

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-61-09

(UNFAIR LABOR PRACTICE)

EAGLE POINT EDUCATION)	
ASSOCIATION/OEA/NEA,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
JACKSON COUNTY SCHOOL)	AND ORDER
DISTRICT NO. 9,)	
)	
Respondent.)	
_____)	

On September 21, 2011, the Board heard oral argument on Complainant's objections to a Recommended Order issued on May 17, 2011, by Administrative Law Judge (ALJ) Wendy L. Greenwald, after a hearing held on June 16 and 17, 2010, in Salem, Oregon. The record closed on September 2, 2010, following receipt of the parties' post-hearing briefs.

Barbara Diamond, Attorney at Law, Diamond Law, Portland, Oregon, represented Complainant.

Nancy Hungerford, Attorney at Law, The Hungerford Law Firm, Oregon City, Oregon, represented Respondent.

On November 23, 2009, the Eagle Point Education Association/OEA/NEA (Association) filed an unfair labor practice complaint against the Jackson County School District No. 9 (District) alleging that the District's creation of the Collaborative System Initiative (CSI) violated ORS 243.672(1)(a) and (b). At the hearing, the Association was allowed to amend its complaint to include an allegation that the District's creation of the CSI also constituted a unilateral change in violation of ORS 243.672(1)(e).

The District filed a timely answer. The issues in this case are:

1) Did the District's creation or administration of the CSI restrain or interfere with employees in or because of their exercise of protected activity in violation of ORS 243.672(1)(a)?

2) Did the District's creation or administration of the CSI result in the domination of, interference with, or assistance in the formation, existence, or administration of an employee organization in violation of ORS 243.672(1)(b)?

3) Did the District make a unilateral change by replacing the Labor-Management Committee with the CSI in violation of ORS 243.672(1)(e)?

4) If the District violated ORS 243.672(1)(a), (b), or (e), what is the appropriate remedy?

5) Should the Association be awarded a civil penalty under ORS 243.676(4)?

RULINGS

1. The District filed a Motion that sought to bar Complainant's witnesses and exhibits because the Association's witness list, exhibit list, and exhibits had not been provided to the District seven days prior to the hearing in compliance with the ALJ's pre-hearing directive. The ALJ had directed that "[b]y seven days prior to the hearing date," the parties should "mail or deliver to each other" a witness list, exhibit list, and the exhibits to be presented in each party's case-in-chief. The District argues that the evidence presented by the Association should be excluded because: (1) e-mailing the lists and exhibits did not satisfy the pre-hearing directive; and (2) it was unable to adequately prepare for the hearing due to its surprise at, and late receipt of, this information. The District further asserted that this Board should require the Association to show good cause for failing to comply with the pre-hearing requirements, a standard that is consistent with what this Board applies when a respondent fails to file an answer.

OAR 115-010-0068(4) states that a party who does not comply with the ALJ's pre-hearing directives regarding the exchange of evidence, "may be denied the right to offer such evidence." (Emphasis added.) This wording allows the ALJ to exercise discretion regarding the matters to be presented at hearing.¹ We have stated that "[t]he purpose of OAR 115-10-[0]068 is to streamline proceedings and eliminate undue surprise" and to "facilitate discussion toward possible settlement of the issues." *Cascade Bargaining Council v. Crook County School District*, Case No. UP-83-94, 16 PECBR 231, 233 and n 4 (1995). These are the appropriate considerations here.

In this case, the Association e-mailed, and the District received, the exhibit and witness lists seven days prior to the hearing. Due to a clerical error, the Association did not mail these lists or the exhibits to the District that day. The next day, after discovering that the information

¹By contrast, the ALJ's discretion is very limited under OAR 115-035-0035(3), which provides that a respondent who fails to file its answer 14 days after service of the complaint, "absent a showing of good cause," will not be allowed to present evidence at the hearing.

had not been mailed, the Association e-mailed the exhibits to the District and mailed the District the witness list, exhibit list, and exhibits. The District was unable to open the e-mailed exhibits, and did not receive the mailed lists and exhibits until five days prior to the hearing.

The ALJ did not abuse her discretion in denying the District's Motion. First, the Association did comply with the ALJ's directive by delivering the exhibit and witness lists to the District seven days prior to the hearing. While it is true that this Board's rules do not currently allow parties to file motions or pleadings by e-mail, neither our rules nor the ALJ's pre-hearing directive dictated the form of communication between the parties. Since there is no dispute that the e-mailed lists were in fact delivered seven days prior to the hearing, the Association complied with the ALJ's pre-hearing directive regarding these lists.

Second, the ALJ appropriately concluded that it would be inconsistent with the purposes of OAR 115-010-0068(4) to exclude the exhibits. While the District did not receive the exhibits until five days prior to the hearing, the ALJ had only directed that the exhibits be delivered or mailed seven days prior to the hearing, not that they be received by that time. Had the Association mailed the exhibits seven days prior to the hearing, at best they would have been received one day earlier. In addition, based on the exhibit list, which the District received seven days prior to the hearing, the District was aware of the exhibits the Association intended to present as most of the exhibits were either created by the District or consisted of communications between the Association and the District. The District also did not ask to continue the hearing to eliminate any prejudice due to its late receipt of the exhibits. The ALJ correctly concluded that the late receipt of the exhibits did not prejudice the District's case.

2. At the hearing, the Association moved to file an amended complaint. The original complaint provided that "[t]he CSI has met on or about May 27, August 31, October 14, and November 4, 2009 and is continuing to meet as of the date of the filing of this unfair labor practice complaint." (Complaint at 4.) The Association moved to add the language that

"CSI has discussed staff absence reporting, secretarial workload issues, trimester vs semester schedules, budget status and the question of cutting days, student safety and violence threats, custodial support, the district handbook, building closures, work schedules, ee [sic] rewards [and] award banquets." (Amended Complaint at 4.)

Additionally, the Association moved to add an ORS 243.672(1)(e) allegation, stating that "[t]he replacement of Labor Management Committees with CSI also violated the status quo in violation of 1(e)." The District objected to both proposed amendments.

Under OAR 115-035-0010(2), after a complaint has been served, a complainant may only amend a complaint with the approval of the ALJ. In the recommended order, the ALJ granted the Association's Motion to amend the complaint, based on our discussion in *Wy'East Education Association/East County Bargaining Council/Oregon Education Association v. Oregon Trail School District No. 46*, Case No. UP-16-06, 22 PECBR 668, 669-72 (2008), *rev'd and remanded*, 244 Or App 194, 260 P3d 626 (2011). In *Wy'East*, this Board outlined the criteria an ALJ should consider in deciding whether to approve a late amendment. The criteria include the

nature of the amendment, whether the respondent has objected, whether any surprise or prejudice to the respondent can be cured by additional days of hearing or allowing the amendment of the answer, whether the purpose of the amendment is a litigation tactic, and the impact of the amendment on the orderly presentation of evidence or other practical concerns.

We usually uphold an ALJ's decision on motions to amend a complaint after a respondent has filed its answer. *Id.* at 670. We grant the presiding ALJ a great deal of discretion in deciding whether to grant or deny such motions. In this matter, although we are concerned about the lateness and content of the proposed amendments, we do not see that the ALJ abused her discretion in granting these amendments. The ALJ properly granted the Motion to Amend the Complaint.

3. The other rulings of the ALJ were reviewed and are correct.

4. The Association, in its objections to the Recommended Order, took exception with "Conclusion of Law no. [*sic*] 2 and the discussion, as well as the Order dismissing the complaint." This Conclusion, which dismissed the ORS 243.672(1)(a) allegation, was the only conclusion to which the Association objected. In its Memorandum in Aid of Oral Argument, the Association also argued that the ALJ erred in her conclusions regarding subsections (1)(b) and (1)(e).

In its Memorandum in Aid of Oral Argument, the District asserted that the Association should not be permitted to present argument regarding any other Conclusion of Law. We agree.

OAR 115-010-0090 requires a party to file specific written objections with the Board. OAR 115-035-0050(3)(a) states, in pertinent part, "if objections are filed to the Recommended Order, parties will be given an opportunity to present oral argument to the Board." Both rules require specific objections to preserve a party's ability to argue to this Board. If specific objections are filed on some Conclusions, but not others, this Board will only review the Conclusions of Law to which objections were filed. Therefore, this Board will not consider arguments concerning subsections (1)(b) and (1)(e) because they were not raised in the objections.²

FINDINGS OF FACT

1. The Association is a labor organization and the exclusive representative of a wall-to-wall bargaining unit of approximately 390 licensed teachers and classified employees at the District, a public employer. The Association's administrative structure includes approximately 16 elected building representatives, an eight-member executive committee, and officers. A representative from the Oregon Education Association (OEA), referred to as a UniServ consultant, is also assigned to assist the Association.

²The Association made numerous objections to the Findings of Fact. Based on our ruling, we will not address factual objections that related to the ORS 243.672(1)(b) or (e) allegations.

2. During the times relevant to this complaint, representatives of the Association included OEA UniServ Consultant Jane Bilodeau and Janean Nodine, who initially served as an Association Co-President with Lori Evans, and then served as Association President.

3. During the times relevant to this complaint, District administrators included Superintendent Cynda Rickert and Human Resources (HR) Director Michael Remick. The District is governed by a school board and its administrative structure includes a cabinet, which is made up of Superintendent Rickert, HR Director Remick, the Special Education Director, the Director of School Improvement, the Business Manager, and Superintendent/School Board Secretary Kathy Ascuena.

Background

4. The parties' previous collective bargaining agreements did not include a provision for a labor-management committee (LMC). Before Rickert became superintendent, prior superintendents and Association representatives participated in various types of LMC processes. Former Superintendent Ted Adams usually met only with former UniServ Consultant Steve Straughan. Former Superintendent Bill Jones usually met with the Association President only when issues occurred, but did not meet on an ongoing basis. Former Superintendent Bill Feusahrens sometimes met with former UniServ Consultant Susan Crumpton, and sometimes with Crumpton and the Association President. Some of these meetings were held during the school day, while others were not.

5. In late 2003, former Superintendent Feusahrens and former UniServ Consultant Crumpton met in LMC meetings on October 9, October 29, November 25, and December 17. During these meetings, they discussed a variety of issues, such as a lack of nutritional items in candy machines, bereavement leave, a flea infestation, a board member complaint about a bargaining unit member, association leave, selection of volunteer coaches, the number of employees on long-term disability, reinstatement of the retire/rehire language, administrative evaluations, the need for principal support, rumors about a reduction in work days, and computerization of report cards. While District representatives found Crumpton to be a vigorous advocate, the relationship between Crumpton and District representatives, including HR Director Remick, was collaborative and respectful.

6. Since 2000, Oregon School Boards Association's (OSBA) Consultant Lisa Freiley has represented the District during collective bargaining negotiations. During these negotiations, Freiley worked under Superintendents Jones and Feusahrens, and negotiated with OEA UniServ Consultants Straughan and Crumpton. These past negotiations had all been lengthy and somewhat contentious, only settling after months of bargaining and several mediation sessions. In addition, during these negotiations, the Association bargaining unit members had been very forceful in presenting their opinions and had engaged in a number of support activities, including informational picketing, attendance at school board meetings, buttons, and direct communications with school board members.

2007-2008 School Year

7. Rickert became the District's superintendent in July 2007. Rickert brought with her an approach based on a body of research, entitled the *Four Characteristics of Improved School Districts*, which covered effective leadership, quality teaching and learning, system-wide improvement, and clear and collaborative relationships. After Rickert became superintendent, she focused on aligning the District's activities and groups under the concepts in the *Four Characteristics of School Improvement* for the purpose of improving student success. An initial project Rickert focused on was implementing school-wide student-management systems.

8. During the 2007-2008 school year, Rickert also implemented the concepts included in the *Four Characteristics of Improved School Districts* by building a District-wide leadership team of approximately 20 administrators. Rickert had found that many District administrators were site-based managers, who sometimes competed with each other over resources. Rickert believed that site-based management was inconsistent with the *Four Characteristics of Improved School Districts*.

9. Students were Rickert's most important focus at the District and she believed that teachers were the primary factor in student success. Soon after becoming superintendent, Rickert began a practice of visiting teachers in their classrooms and other employees at their work sites on Thursdays. During the 2007-2008 school year, Rickert worked through building administrators to arrange classroom visits with teachers in advance. After the 2007-2008 school year, Rickert received feedback that establishing prior arrangements for the classroom visits were no longer necessary. She continued to visit employees, but did not pre-arrange her visits.³

10. Prior to and during the time Rickert was superintendent, a number of committees operated at the District in which employees, including Association bargaining unit members, participated. These employees were either assigned to a committee by their administrator, volunteered for a committee, or participated based on the subject matter or their job responsibilities. Among others, the committees included a Special Education Committee, which was District-wide and reported to the Special Education Director; the Climate Committee, the purpose of which was to build relationships and support among staff members; the Positive Behavior Support Team (PBS), which addressed student management issues; Curriculum Committees, in which all teachers in a department reviewed and made recommendations for classroom materials; the Response to Intervention Committee (RTI), which Rickert created to address academic and District-wide student management issues; the Technology Committee, which included representatives from each building; the Grading Committee, which was responsible for designing a new report card; a Transportation Committee, which focused on

³The Association's assertion that "Rickert's practice was to visit any rank-and-file dissenters unannounced at their workplace and to criticize the person for making any negative statements about her or the District" is not supported by the evidence. (Complainant's Post-Hearing Brief at 6.) There is no evidence regarding which teachers Rickert visited. Also, no employees testified that this was their experience. In addition, although Association witness Rebecca Konefal testified that employees had told her this had occurred, she neither recalled the names of the employees, what had been said, or when such visits occurred.

interactions with students on buses; Info Links, which was made up of clerical support and secretaries who focused on solving problems; and an Attendance Committee.

11. The District's weekly schedule provided for early student release on Wednesdays. This early release time was used by staff to concentrate on school improvement. Some of the District committees met during this time.

12. OEA UniServ Consultant Jane Bilodeau was assigned to the Association in November 2007. Sometime after this, Association President Nodine introduced her to the District administrative office staff, including HR Director Remick and HR Specialist Christine Richmond. When Richmond was introduced to Bilodeau as an HR Specialist, Bilodeau replied, "You must be special." Richmond was embarrassed by Bilodeau's remark and felt Bilodeau was being rude. Remick was surprised at the interaction and found Bilodeau to be far from friendly.

13. During the 2007-2008 school year, the District and the Association participated in LMC meetings. Initially, Superintendent Rickert and HR Director Remick met monthly with Co-Presidents Nodine and Evans. After Bilodeau was assigned to the Association, she attended the LMC meetings.

14. The parties held LMC meetings on December 3, 2007, and January 14, 2008. The participants in these meetings included Superintendent Rickert, HR Director Remick, teacher Mason Marshall, Association President Nodine, and UniServ Consultant Bilodeau. During these meetings, the parties talked about a variety of issues, such as teacher credits, a grievance over members monitoring members, a custodian's hostile work environment, expedited bargaining, a custodial manager's roughness, smoking in District vehicles, a supervisor's disrespectful treatment of an employee, a hostile work environment, use of profanity, instructional assistant hours, transportation call in, sick leave in relation to privacy and the Family Medical Leave Act, job sharing, and child abuse reporting. At the January 14 meeting, while the parties were reviewing the LMC process norms, Bilodeau stated that she felt there was a "need to review the process in more depth since it did not feel like a real LMC to her." Later during the meeting, Bilodeau again objected to the format and process that the LMC used for resolving issues.

15. During one of the first grievance meetings Bilodeau attended, she objected to how formally Remick proceeded. Bilodeau told Remick how things had been done in Montana, where she previously had worked. Remick tried to explain the parties' contract requirements, but Bilodeau objected to this. She also mentioned the fact that Remick had been an Association president in the past and told him to "pass the torch and get over it." HR Specialist Richmond, who was present at the meeting, believed Bilodeau was very abrasive, and observed that Bilodeau sometimes pointed her finger in Remick's face.

16. During other meetings with Remick, Bilodeau sometimes called Remick "Mikey." In a meeting with Remick and Superintendent Rickert, Bilodeau called Remick "sweetie." This meeting occurred not long after Bilodeau had raised an issue with Remick about a supervisor who had allegedly sexually harassed an employee. When Remick asked Bilodeau whether she considered her use of the term "sweetie" to be sexual harassment, she responded that it was a lot better than what she could have called him.

17. Shortly after Bilodeau began working with the Association, some principals raised concerns with Remick about Bilodeau's attendance at building-level discussions with the Association held prior to the filing of a grievance. In the past, only the Association building site representatives had attended these meetings. The principals told Remick they were unsure if they were sufficiently experienced to address some of the issues raised by Bilodeau.

18. In March 2008, the parties began bargaining over a successor agreement. The primary issues during the bargaining process were financial. OSBA Consultant Freiley represented the District during the successor negotiations and teacher Debbie Brudevold was the Association's bargaining chair.

19. After negotiations began, members of the District's bargaining team developed concerns about UniServ Consultant Bilodeau's tone because they felt she was being disrespectful. For example, when Bilodeau was introduced to the HR staff at a bargaining session, she asked how many staff it took to get the job done. Freiley later told Bilodeau that the HR staff had not understood her humor and felt diminished by her comments. During bargaining, Bilodeau also rolled her eyes and shrugged her shoulders in a manner that led the District bargaining team members to believe she was not listening to them. Freiley told Bilodeau that she understood her frustration with the process but that actions like this were creating an environment where the District did not want to listen to her. Bilodeau also told Freiley when the District's actions or manners upset the Association bargaining team and asked Freiley to communicate her frustrations to the District's team, which Freiley did.

2008-2009 School Year

20. During the District's inservice meeting in August 2008, Association Bargaining Chair Brudevold spoke about the status of the bargaining process. She told employees that bargaining was not going well and that employees needed to be cautious about their spending in the future because it was unclear how and when things would be resolved. Brudevold's presentation was made in front of the District's teachers and some administrators.

21. On August 26, 2008, Superintendent Rickert and HR Director Remick met with Association Co-Presidents Evans and Nodine. Rickert explained that she had felt that Brudevold's description of the bargaining status during the District inservice was unfair and untrue because it did not include any of the options the District had presented to the Association. Rickert requested that Evans and Nodine accompany her to talk with Brudevold about this. Evans told Rickert that she was unwilling to do this and that, since Brudevold was the bargaining chair, Rickert should discuss any bargaining issues directly with Brudevold.

Next, Rickert informed Evans and Nodine that an employee had told other employees in his building that Rickert "will shake your hand and smile in your face, but it is insincere. You may look at her [Rickert] and think F you, but don't say it."⁴ Rickert explained she felt hurt by

⁴Bilodeau testified that she later found out that the employee's statement had been made during an Association meeting. There is no evidence in the record that Superintendent Rickert was aware of when the employee made this statement, however.

these remarks and asked Nodine and Evans to accompany her while she talked with the employee. Nodine and Evans refused to go with Rickert and told her to drop it. Rickert agreed not to pursue the issue, but stated that personal attacks would not be tolerated. Nodine and Evans agreed that personal attacks should not be tolerated.

22. Sometime after meeting with Evans, Rickert asked Brudevold to meet with her. Brudevold told Rickert that she would only meet if Bilodeau was present. The meeting was never held.

23. When the LMC meetings began in the fall of 2008, Nodine informed Rickert that Bilodeau would not be attending. During the fall of 2008, Bilodeau did not attend the LMC meetings.

24. During the 2008-2009 school year, the parties' bargaining process was contentious due to the disagreements over the bargaining issues. This contentious bargaining situation also created a negative labor-management relationship outside of bargaining. The Association bargaining unit members were very active during the negotiations, and were angry and frustrated by the bargaining process. They frequently engaged in informational picketing, attended District school board meetings, made phone calls, and appeared on the news. Rickert believed that the picketing sometimes created an uncomfortable, restless, and somewhat negative environment at the District.

25. Beginning in September 2008, the parties' negotiations occurred in mediation. At a mediation session on September 9, the Association proposed for the first time that an LMC process be included in the parties' contract. The Association proposal provided for five members chosen by the Association, five members chosen by the District, quarterly meetings held during the school day, and release time to be provided by the District. The District told the Association that it objected to the LMC proposal because, although it wanted to continue the LMC relationship, it also wanted to allow for the process to be flexible and fluid, did not want to impact students by taking staff out of classrooms, and did not want to increase the District's costs by having to pay for substitute teachers.

26. In a November 2008 mediation session, the Association made a new proposal for joint interest-based bargaining (IBB) training to occur prior to negotiations for the next collective bargaining agreement. The proposal provided for training of up to 12 days for up to five Association members and release time to be provided by the District. The Association told the District that the purpose of this proposal was to assist the parties in building and fostering a better relationship.

27. During the middle of the bargaining process, Association Bargaining Chair Brudevold and bargaining team member Mike Curtis met a few times with Superintendent Rickert and School Board Chair Jonathan Bilden. The purpose of these meetings was to try to get the bargaining process moving. At some point during these meetings, Rickert stated that she had a difficult time working with Bilodeau because Bilodeau was abrasive and this was causing problems. Brudevold stated that she hoped Rickert would work with Bilodeau because Bilodeau was part of the Association bargaining team.

28. Without prior notice to Rickert, Bilodeau attended the December 2008 LMC meeting. On December 24, 2008, Rickert sent Nodine an e-mail stating:

“In addition to changing our January meeting, I would like to clarify who attends our meetings. Michael and I recall that this fall we agreed to meet with you and any other employee you would like to bring. We were both surprised when Jane showed up to our meeting last time. I believe it’s fair to say that when Jane is in the meetings, they take on a different feel. I would liken it to when we have Lisa Freiley in our meetings, there’s a difference.

“Please let me know what you’re thinking about that and we’ll figure it out together.”

29. On January 7, 2009, Nodine responded by e-mail, stating:

“I appreciate your offer to ‘figure it out together.’ You were correct in remembering that in the Fall I informed you that Jane would not be attending the LMC meetings. I informed you of this because she could not attend since she was on strike. I never intended to have the lack of her attendance to be permanent and apologize for any confusion.

“Jane is our UniServ representative and an integral part of labor relations here in Eagle Point. It makes no sense to me to exclude her; I think that would only cause dysfunction and I am not interested in created [*sic*] any more of that.

“An important part of LMC is to build relations and I do not see how that can happen without all the necessary people in the room.

“That said, if you want to spend the money and time to have Lisa present, I have no issue with that. I understand that she is very adept at labor-management relations. Please let me know.”

30. During the 2008-2009 school year, Remick was present at several meetings held between principals and Bilodeau. After one of these meetings, Principal Allen Barber told Remick he felt attacked by Bilodeau. In another meeting, Remick and Principal Johnson thought they were just going to have a discussion, but Bilodeau told them the meeting was about a grievance. Remick was also present at a non-renewal hearing, after which Principal Johnson told Remick that he felt that Bilodeau had threatened him when she told him “well that’s two” and “there better not be a third.” Some principals told Remick that they did not want to meet with Bilodeau without support from the administrative office. As a result of these concerns, the District adopted a policy under which, if Bilodeau or another UniServ consultant attended a meeting unannounced, the principal would reschedule the meeting so they could request someone from HR or the District office to attend. In approximately February 2009, Remick notified Bilodeau about this policy.

31. During the parties' negotiations, Association Executive Council member Rebecca Konefal was chairperson of communications on the bargaining support team and the primary author of a weekly newsletter for its bargaining unit members. In early 2009, Konefal wrote an article in the newsletter about intimidation tactics being used by the administration, which notified members that they did not have to tolerate such tactics, that the Association wanted to track such incidents, and encouraged members to talk to the Association.⁵

32. The parties held several mediation sessions in January and February 2009. In a January mediation session, the District proposed to include the Association's joint IBB training proposal in the parties' successor agreement.

33. In February 2009, the District began discussions with twelve-month bargaining unit employees about changing their workweek to four ten-hour days during the summer as a cost-saving measure. Article 5 of the parties' collective bargaining agreement provided that the normal workweek for a classified employee was five consecutive eight-hour days, but that "[t]he supervisor and an employee may agree to modify the work schedule to allow for four (4) ten (10) hour days."

34. In its February 26, 2009 final offer, the Association did not include either its joint IBB training or LMC proposals and did not pursue its LMC proposal in bargaining after this point. During March 2009, the District continued to propose packages which included the Association's joint IBB training proposal. On March 20 or 21, 2009, the Association made a bargaining proposal for joint training on dispute resolution skills and processes "for the purpose of Interest-based Bargaining, Labor Management and Contract Maintenance * * *." Sometime during March 2009, the Association scheduled a strike vote for March 31.

35. In March 2009, Rickert and Remick met with Nodine and Bilodeau to provide them information about staff layoffs which were scheduled for the end of the school year. Rickert and Remick explained the process they had used in identifying the employees to be laid off and presented the names of the employees. They also explained the process they had developed that would allow them to notify all of the affected employees at the same time so miscommunications were minimized and employees would be better able to understand what was occurring. When Rickert and Remick asked Nodine and Bilodeau to keep the employees' names confidential until the notification process had occurred, Bilodeau was unwilling to agree to their request. Rickert and Remick became very concerned about the potential for miscommunications should the notifications not all occur at the same time. They continued to raise their concerns and again asked Bilodeau to keep the information confidential. After further discussion, Bilodeau agreed to maintain confidentiality for all but one employee.

⁵While there is no dispute that the article was published, there is insufficient evidence to support a finding that either Superintendent Rickert or other administrators engaged in the alleged intimidation tactics. Although Konefal testified that she wrote the article based on at least ten complaints, the gist of which were that people were afraid if they voiced their opinion they would receive a visit from the superintendent, she could not recall any specifics regarding the basis of these complaints, including who had complained, what had been said, or when the visits had even occurred.

36. The parties began their final mediation session on March 31, 2009, at approximately 4:00 p.m. During the evening, the parties recessed negotiations so the Association bargaining team members could attend the strike vote. The bargaining unit employees voted for a strike and the District became aware of this result when it was reported on the news that evening. After the strike vote was taken, negotiations resumed. The parties subsequently reached a tentative agreement at 6:30 a.m. on April 1, 2009. The tentative agreement stated, in part, that the parties “agree to training for Labor-Management and contract administration.” Rickert felt that having a strike vote created an uncomfortable situation and was possibly disruptive for the students and the learning environment.

37. After the negotiations were resolved, Rickert felt it was very important to try to restore a positive environment at the District. In addition, because of her involvement in the contract negotiations, Rickert had been unable to focus on further implementation of the *Four Characteristics of Improved School Districts*. As a result, Rickert designed a committee called the Collaborative Solutions Initiative (CSI), whose purpose was to focus on expanding communication across the District by building a team of employees that acted as a Superintendent advisory committee. Rickert’s goal in developing the CSI was to create positive communications and better relationships in the District. Rickert decided that building principals and an employee from each building would participate in the CSI committee process, which would be held during Wednesday early release time.

38. In a weekly cabinet meeting soon after negotiations concluded, Rickert expressed her opinion that Bilodeau had been unprofessional during the negotiations, had not served the best interests of the employees, and that she did not want to participate in an LMC process that included Bilodeau. At that meeting or a subsequent cabinet meeting, Rickert also explained that she was developing a District-wide committee of employees and building administrators, referred to as the CSI, which would provide advice on day-to-day operational issues at the District.⁶

39. Rickert directed principals to invite employees to participate in the CSI. Rickert did not tell the principals which employees to select, but specified the CSI would include one employee per building, plus two from the high school and one each from facilities, technology, and transportation. She provided the principals with an invitation to use in soliciting volunteers

⁶We do not find credible the testimony of prior business manager Randy Struckmeier that Rickert told the cabinet she created the CSI because she did not want to have an LMC process that included Bilodeau. Rickert was a credible witness, who admitted to many facts against her interest, including that she did not want to work with Bilodeau in the LMC process and that she had told others, including Association representatives, about her difficulty in working with Bilodeau. She also testified credibly regarding the reason for the creation of the CSI in relation to her long-term commitment to implementing the *Four Characteristics of Improved School Districts* and her desire to create a more positive atmosphere at the District. On the other hand, although Struckmeier testified he heard many discussions about the CSI, he could not recall specifics about how it was to operate. He further testified that he understood the Superintendent had to approve employee participants, which was not true. In addition, the fact he was terminated from the District in May 2010 could have further impacted his recollection, which was not clear.

for the CSI. In indicating who was invited to join the committee, the invitation stated "YOU!," and under the reason for the meeting, the invitation stated "To seek solutions!"

40. Association Bargaining Chair Brudevold volunteered to be on the CSI in her building. When she volunteered, her principal told her he already had two other volunteers, so he was appointing the first person who volunteered, which was not her.

41. Prior to May 22, 2009, Rickert thought that the Association and employees had agreed to the District's proposed summer schedule of four ten-hour days per week. On May 22, after the Association notified Rickert that it did not support the schedule, Rickert sent an e-mail to District administrators, with a copy to Nodine and Co-President Evans, stating:

"We ran the summer hours issue by the Association co-presidents. While our fact finding indicated that we had unanimous support, the union informed us today of classified employees who are not in agreement.

"Therefore, confidential employees and administrators will work (4) four (10) ten hour days as planned. The district office will be closed on Friday through Sunday beginning June 22, 2009 and ending August 21, 2009. The district office will be open to the public from 7:30 a.m. to 4:00 p.m., Monday through Thursday.

"Classified summer schedules are yet to be determined."

42. Sometime between May 22 and May 27, 2009, District High School Principal Allen Barber forwarded Rickert's e-mail to high school employees, and stated:

"The 'four ten hour days' is apparently off the table. The union will not allow it because they say that their members do not support the idea.

"The administrators and confidential employees at the district office are going to do four tens, as well as the high school principals.

"Do you guys want to do 10 hour days this summer? If so, we can close the building every Friday.

"If this is something you want, I can see if the district will allow our school to operate four ten hour days.

"I believe it would have to be all of you....

"Let me know and I will ask if that is what you want...."

43. On May 27, 2009, Nodine sent Rickert an e-mail, which stated:

"For the past two years it has been the desire of the Association to work in a collegial manner with the District Administrators. In years past, the Association

has played an active role in discussions held which would effect [sic] our members. Recently it was discussed by the administration without input by the Association regarding going to 4/10 hr. work days. I believe that this proposal would have been an easy sell to the members if there had been an initial buy in by the Association. Would it not have been better to survey the members who would be effected [sic] to see what they wanted (so that there might be some ownership) in the final decision?

“I think that if we truly are attempting to be a team that we need to work together and have input from both sides. I think that putting bot [sic] sides together can only help build unity and strength to the entire organization.

“The Association is NOT asking to run the district, we are just asking to be included in the input which will help render a viable working arrangement for the members which will hopefully ultimately save the district money.

“I would like to encourage the Administration to step back and include the Association in their ‘open’ communication to better serve the students and members of the D-9 school family. I think that if we are apart [sic] of the solution then we can work harder to make sure the end results benefit the entire district.

“On that note, in the above message Allen stated that it was the Union that would not allow this decision to be made-- this was and is not the case. When you contacted me regarding this issue, I had not had time to investigate what our members wanted. I asked that this be placed on the back burner until this week when I could talk with our members.

“Since then, I did talk with Mike and I believe we had a very good discussion and I am hopeful that he shared with you what we discussed. I appreciate the openness and honesty and I feel that we came to a good understanding with this issue and others.

“Most members are willing to do the 4/10 hr. work days but there were a few that this change really ‘affected’ their lives. I worried about them. Anyway, I wanted to let you know that I did take time to investigate this issue and I hope that a decision can be made by all very shortly.”

44. On May 27, 2009, Superintendent Rickert held the first CSI meeting. The meeting was attended by 23 District staff members, approximately half of whom were administrators. The committee included one current Association representative, Association Treasurer/Executive Committee Member Mike Hyland. McKael Ziegler, who was part of a group of Association members who received an award from the OEA for “voting to go on strike in the midst of an economic crisis,” was also appointed as a member of the CSI.

45. During the May 27 CSI meeting, Rickert used a power point presentation to introduce the CSI process. Under the title “WHO?,” the power point read:

“Superintendent, Secretary, Principals, Supervisors, Representative from each building/support area

“Volunteers who participate in a building leadership team/role (i.e. site council, climate committee, etc.)

“Positive, student focused, problem solver, leadership role with staff, creative, respectful.”

Under the title “What’s my role?,” the power point provided:

- “1. Solutions seeker
- “2. Liaison/leader with the staff
- “3. Advisor to superintendent.”

In response to the question “Why CSI - D9?,” the power point read “[t]o serve as an advisory team to the superintendent to identify daily operations and procedures that get in the way of achieving the D9 mission and work together to find creative solutions.” The minutes of the meeting, which were taken by Superintendent/Board Secretary Ascuna, reflect that Rickert explained “[t]he plan is for this group to find a better way to do our daily work by building relationships and solving issues together so that when we do have bigger issues, we will be able to solve them in a better way.” The power point reflected that the committee would do their work “[u]sing *Four Characteristics of Improved School Districts*, contracts, handbooks, statutes, policies, etc.,” the CSI meetings would be held monthly; the process would be advisory; and the participants would use a situational leadership model to work toward building consensus on issues. (Emphasis in original.) Under the situational leadership model, the committee looked at an issue in terms of the advantages, challenges, what it would take to overcome the challenges, and the process to be used if the recommendation was to proceed.

46. During the May 27 meeting, after the group worked on creating “norms,” Rickert explained that

“We will be using situational leadership protocols to solve issues that are brought to the team. We will be sending email reminders prior to meetings and asking for situational leadership topics to bring to the meetings. We need these issues ahead of time so that we can have a focused agenda as well as gather resources that we may need.

“We have a current situation that we brought to the group as an example. There was a proposal for the district to go to (4) four (10) hour days for the summer. We broke into small groups to discuss pros and cons and work to solve the issue.”

47. After the small groups shared the results of their discussions about the summer schedule example, Rickert reported to the group that

“* * * we asked for all supervisors and administrators to talk to their employees to discuss any issues and see if people were in agreement. Through this process many questions were answered and issues were solved. Before we put it into place we sent it to the association co-presidents to get their feedback. They talked to some members and found some additional issues that we are now trying to resolve.”

At the end of the meeting, Rickert provided team members with a copy of a book entitled *The Five Dysfunctions of a Team* to read during the summer. The minutes reflected that the group agreed to “identify daily operations and procedures that get in the way of achieving the D9 mission and work together to find creative solutions,” meet monthly beginning on August 31, “use situational leadership to solve problems brought by team members,” be “an advisory team to the superintendent regarding daily operations and procedures,” and be “positive problem solvers.”

48. During a school board meeting the evening of May 27, Rickert told the board that the first CSI meeting had been held that afternoon and

“This group is being formed to work to problem solve basic operations and procedure issues that get in the way of staff doing their work for kids. The members were chosen by the supervisors and administrators. They are all focused, problem solving individuals. The motivation for his [*sic*] group is to make sure we don’t have another year like we had this year through negotiations. Kudos to principals and supervisors for picking people who are positive and want to work to make positive changes in our district.”

49. On June 4, 2009, the Association notified the District that employees were willing to work four ten-hour days per week during the summer. As a result, the District notified the affected bargaining unit employees about the modified summer hours.

50. On July 22, 2009, Superintendent/Board Secretary Ascuna sent Nodine an e-mail asking for the names of the Association executive council members and officers, and indicated that Rickert “wanted to know what you thought of just you and her in the labor management meetings this year. Please let us know what you think of the idea and also what day of the month would work best for you. Tuesdays and Thursdays are not good days for Cynda [Rickert] due to regularly scheduled meetings.”

51. By e-mail dated July 23, 2009, Nodine sent Ascuna the list of executive board members and stated:

“I would love to meet with Cynda for Labor Management meetings. Her schedule will be more extensive than mine so focus on what works for her. Monday’s seem to be OK * * * Maybe a Wednesday morning. Think about it and let me know what works.

“Also, could you give me some information about the CSI Committee? I know this group met once last year and I was not able to attend but I would like to get a little more information about this committee and what it’s [*sic*] main purpose will be.”

52. On July 30, 2009, Ascuna responded by e-mail that they were looking at Monday or Thursday mornings for the LMC meetings, but would wait to schedule the meeting until the Association officers were elected. Ascuna also provided Nodine the power point presentation

and minutes from the May 27 CSI meeting and stated that the District would wait to see who was elected Association president and then invite him/her to the CSI meetings.

2009-2010 School Year

53. The second CSI meeting was held on August 31, 2009. Rickert reviewed the meeting norms, the resource binders, and the May 27 power point. The minutes of the meeting reflect that Rickert then explained that

“The situational leadership issue we talked about in May was the 12 month employees moving to 4 10-hour days for the summer months. The data received from employee surveys was reviewed. We need to compare the electric bills from this summer to last summer to determine the cost savings if any.

“The CSI:D9 team members will take this data back to share with building and department staff to get more feedback. We will continue to review the data to make plans for next summer. Ken [Gruenwald] recommended that we also look at safety data to see if there was any change.”

Rickert also notified the group that Association President Nodine had been invited to the CSI, was unable to attend that day, but would attend future meetings. The group then agreed that meetings would be held the first Wednesday of the month at various locations, Ascuena would send a reminder prior to a meeting to allow committee members the opportunity to propose meeting agenda topics, and Ascuena would notify members of the proposed agenda topics prior to the meeting to allow them to solicit feedback and information from building staff before the meeting. The group reviewed the *Four Characteristics of Improved School Districts* research, which was to be the foundation for the committee’s work, and debriefed the summer reading book, *The Five Dysfunctions of a Team*. Finally, the minutes reflect that the committee decided that the building/department partners would decide how the information from the committee would be shared in their building.

54. On September 3, 2009, Ascuena sent Nodine an e-mail asking if she wanted to schedule the LMC meetings for Monday or Thursday mornings. On September 23, 2009, Ascuena again e-mailed Nodine asking which date worked for the LMC meeting.

55. Sometime prior to September 23, 2009, District High School Administrator Tim Rupp requested that teacher Jane Doe meet with him and bring a representative.⁷ The meeting was held on September 23 and was attended by Doe, Nodine, OEA UniServ Consultant Robert Young, Rupp, and employee Mary Franz. After Rupp realized that Young was a UniServ consultant, he became tense and explained that the meeting would need to be rescheduled because Young was present. Nodine suggested, and Rupp agreed, that the meeting could continue if Young did not attend the meeting, but remained available nearby for Nodine and Doe to consult with, if necessary.

⁷“Jane Doe” is a pseudonym.

Nodine then became aware that Franz, who was a classified bargaining unit member, was present to take notes. Nodine informed Rupp that Franz could not take notes about a meeting regarding another bargaining unit member under the collective bargaining agreement and asked Rupp why a confidential employee was not being used.⁸ Rupp became frustrated and informed Nodine that there were no confidential employees available and Franz would take the notes. Nodine restated her position that under the parties' Agreement, Rupp had to use a confidential employee, and that since he had scheduled the meeting, he should have made such arrangements. Nodine then left the meeting to consult with Young and, upon her return, asked Rupp about the purpose of the meeting. After Rupp explained that it was a pre-investigation into student and parent complaints, Nodine brought Young back into the meeting. Rupp then stopped the meeting and explained that building administrators had been directed to reschedule meetings if an OEA representative attended without prior notice so arrangements could be made for HR Director Remick to be present at the meeting.

56. The meeting to investigate the complaints against Doe was rescheduled for September 29. Doe, Nodine, Young, Rupp, Remick, and Administrative Assistant Beverly Vait attended the meeting. When Nodine arrived she perceived that Remick appeared to be agitated. Nodine jokingly asked if Vait, who was a bargaining unit member, had become a confidential employee. Remick told Nodine that she knew Vait had not changed positions and was "being ridiculous for asking." Nodine objected to Vait taking notes. She said that because Rupp had rescheduled the meeting, he should have been better prepared and arranged for a confidential secretary. Remick "glared at" Nodine and informed her that under the collective bargaining agreement, if all of the confidential secretaries were busy, which they were, the District was entitled to use a classified employee. Nodine then stated that the administration should have made arrangements for a confidential employee to be present and suggested that Remick take the notes. Remick became very angry at Nodine's suggestion and her persistence regarding the issue. In a rude manner, Remick told Nodine that it was not his job to take notes, that Vait would remain and take the notes, and that Nodine should drop the issue because they were not going to talk about it again. Nodine was shocked by Remick's rudeness. The group then discussed the complaints that had been brought against Doe, although Nodine limited her participation due to Remick's remarks.

57. After the meeting, Remick asked to talk to Nodine. Nodine requested that Young be present because she did not want to be alone with Remick. Remick told Nodine that her behavior had been unacceptable and that he felt the bad relationship between the Association and the administration was due to the advice given to the Association by the current UniServ consultant. While Remick did not use Bilodeau's name, she was the Association's current UniServ consultant. Remick told Nodine he did not feel the UniServ consultant's advice was in the best interest of the employees, referring to the events during the prior bargaining process and the outcome of an issue over teacher non-renewals. They then talked about Nodine's concerns

⁸Article 25 of the parties' Agreement provides that "[w]hen possible, bargaining unit members will not be used as note takers in meetings involving Programs of Assistance, Discipline Meetings, Investigatory Meetings and Grievances. Only when due to work load related issues, and the district is not able to assign a non-unit member to take notes for these meetings, may an administrator/supervisor elect to use the building level administrative assistant in this capacity."

about having bargaining unit employees take notes and building better communication between the administration and the Association. Remick indicated that administrators felt comfortable working with Nodine, and placed blame for the difficulties in the relationship on an unnamed person. After the meeting, Nodine did not feel comfortable about either herself or other bargaining unit members meeting alone with Remick.

58. On September 29, 2009, Nodine sent Ascuena an e-mail asking “[d]oes October 6th work from 8:00-10:00 for Rebecca, Jane, and I to come and meet with Cynda for labor/mgt. meeting?”

59. On September 30, 2009, Ascuena responded to Nodine by e-mail that

“* * * as our emails from July show [*sic*] below, Cynda was hoping that the labor/management meetings would be just the two of you. Cynda’s preference is not to include Michael and Jane at this time and we are unsure who Rebecca is. Tuesdays are not an option for Cynda, Mondays or Thursdays are best. How about October 12 or 15?”

60. On October 5, 2009, Nodine e-mailed Ascuena wondering whether she had missed seeing an e-mail from the District confirming the LMC meeting for October 6, and indicating that she and Bilodeau were available to meet on Thursday morning.

61. On October 6, 2009, Ascuena sent Nodine a copy of all of the e-mails they had exchanged since July about scheduling the LMC meeting, including Ascuena’s September 30 e-mail, and asked Nodine what she wanted to do.

62. On October 11, 2009, Nodine e-mailed Superintendent Rickert that

“Like you, the Association wants to have a labor-management committee meeting. We have much to discuss such as the contractually required advocacy training. “Our new Executive Council has met several times and we have set our guidelines for how we will operate this year. One guideline is to insure the integrity of the committees, roles, etc that we form. We have assigned three people to our labor management committee: Rebecca (who is our president-elect[]), Jane, our UniServ Consultant and me, the president. I need to honor the Executive Board’s decisions. October 12, 14 and 15 will not work for us. October 19, or 22 are available at this time. Please let me know if these dates will work. I really appreciate your understanding.”

63. The next CSI meeting was held on October 14, 2009. Nodine was present at this meeting. Superintendent/Board Secretary Ascuena created the meeting’s agenda from topics provided by committee members. At the beginning of the meeting, Rickert passed around a meeting location sign-up sheet and then the committee read and discussed an article on team building. Next, under old business, Rickert told participants that the District had saved approximately \$7,000 on electric costs during the summer and that “[w]e will re-visit this issue in early spring before summer 2010 schedules are set.” Under new business, the group discussed

whether elementary teachers needed to continue filling out “cum cards,” which are student information reports kept in a student’s permanent record; ways to improve student enrollment forms and the building registration process; and the District’s handbook, including what some felt was a “condescending, legalistic tone,” the purpose of employees’ signing off on the handbook, and ways of tracking changes in the handbook. Issues that were on the agenda, but not discussed due to lack of time, included bilingual staff at Mountain View Elementary (MVE), report cards, and participation in parent/teacher conferences. Teacher Mary VanWesep had submitted the bilingual staff issue because the MVE bilingual secretary had been laid off.

64. On October 19, 2009, Superintendent Rickert responded by e-mail to Nodine about scheduling the LMC, stating:

“Can you believe we’ve been working on scheduling the labor/management meeting since July? Perhaps that’s because some pieces keep changing. However, one thing that has not changed is my schedule. Mondays and Thursdays are still the days that will work for me. Please feel free to choose one of those days as well as before or after school, whichever works best for you is fine.

“Something that keeps changing is who will participate in the meetings. I was really hoping it would be you and me as we agreed in July. However, now that you have a president elect it makes good sense to include Rebecca [Konefal] too. I extend an open invitation to her and would really look forward to working with her. However, as I shared with you in September, I am still not willing to include the uniserv consultant, Jane Bilideau [*sic*], in our monthly labor/management meetings.

“Also in your most recent email you mentioned the contractually required advocacy training. My understanding is that the issue is already being worked on by Lisa Frielly [*sic*] and Jane.

“I hope to hear from you soon so that you, Rebecca and I can begin meeting and work together to move our District forward so that all D9 students can be more successful.”

65. During the fall of 2009, the District and the Association participated in interim bargaining over a change in classified employees’ hours and days and the contracting out of food service. The parties did not reach agreement on these issues and the District ultimately implemented its proposed changes.

66. In October 2009, Nodine invited Superintendent Rickert, District school board members, and cabinet members to a “getting to know each other’ dinner” with Association representatives. Since the parties were currently in interim bargaining, the District representatives declined the invitation.

67. The next CSI meeting was held on November 4, 2009, in the high school library. Pam Long attended this meeting in Nodine’s absence. At the beginning of the meeting, the committee members discussed the issue of building trust, based on *The Five Dysfunctions of a Team*, and engaged in several team building exercises. The group then addressed the situational leadership agenda items under old business as follows: (1) the group was notified the District

would no longer use cum cards; (2) after some discussion, a subcommittee was created to look at student enrollment forms and electronic registration; (3) Rickert notified the group that the HR Department agreed to highlight future changes to the student handbook and an attorney would be consulted to determine if the tone of the sign-off sheet could be softened; and (4) the group was notified that a subcommittee had been established to look at elementary report cards.

68. Under new business during the November 4 meeting, the participants first discussed the loss of the bilingual staff member at MVE due to the layoff. Rickert referred the committee members to the layoff article in the parties' contract and explained that "[w]e can't keep staff members based on specific building needs, but must follow the contract. A possible solution would be to change the job description to add bi-lingual staff as a separate job description? The district will bring this forward to our next bargaining session. If the union agrees then it will be a very easy change to make in our contract." The minutes reflect, under the closure section of the meeting, that "[a]t next negotiations we will bring bi-lingual job descriptions to the table."

69. The next topic under new business at the November 4 CSI meeting was parent/teacher conferences. The committee discussed a variety of issues, including poor parent participation rates at the secondary level; past flexibility about how and when conferences were held and the lack of current flexibility; the fact staff is paid for three eight-hour days; the need for face-to-face conferences; a principal's ability to designate the conference hours at their building; the impact of conferences being scheduled during Thanksgiving week; a need for elementary groups, who had good participation, to share their experiences; the focus of the conferences; and a need for consistency throughout the District. The committee decided that sub-committees should be formed at the elementary and secondary levels.⁹ The CSI had no set expectations, but would look at all possibilities and the research. The last topic the committee addressed was the availability of principals to building staff. Rickert provided the committee with information about the principals' time commitments and the group discussed such matters as the impact of principals' hours, mandatory training time, required meeting time, and time involved in the RTI process on a principal's availability and ability to address behavior issues at the school. The group then agreed to table the discussion, communicate what they had learned to the employees in their buildings, and bring back ideas from discussions in the buildings.

⁹There is no specific language in the parties' agreement which addresses parent/teacher conference schedules. Article 5, "Working Conditions," provides that a normal work schedule for licensed employees

"* * * shall consist of forty (40) hours inclusive of a daily minimum of 30 minutes duty-free lunch period, preparation time and other required professional obligations. The parties recognize the desirability of flexible scheduling allowing principals and employees to adjust daily and weekly schedules at the work site to meet professional obligations within the required forty (40) hours."

70. On November 8, 2009, Bilodeau sent Rickert an e-mail stating:

“You and I seem to be having difficulty relating and it appears to cause a lot of unnecessary strife. I was wondering if you would be willing to have dinner or just a meeting in your office if you prefer, to allow ourselves to better understand what we are both trying to accomplish and see if there is a common place - one that allows for differences of opinions but allows for coming together at times whenever possible? Thoughts?”

71. On November 18, 2009, Rickert responded:

“After much thought, I would like to propose we do the following. Let’s move forward with labor/management meetings that include you, Janean, Rebecca, (or whoever [*sic*] you choose) Michael, and me. I see that as the venue in which to share and define what we are trying to accomplish for the students in this district.

“Let me share again the times that work for me are Mondays and Thursdays before or after school. I would also like to limit our meetings to an hour knowing that some may have child care or family issues.

“In our first meeting, I would like to set agreements on how our meetings will work like we did two years ago with Lori and Janean.”

72. The parties ultimately held only two or three LMC meetings during the 2009-2010 school year. They initially delayed meeting because they were unable to agree on either a trainer or the date and time for the meetings. At Rickert’s suggestion, the parties agreed to start the LMC process by identifying their core beliefs and creating a mission statement. At the time of the hearing, they had not yet reached agreement on their core beliefs.

73. The February 3, 2010 CSI meeting was held at a middle school media center. The committee first talked about norms for managing conflicts. The committee then broke into subcommittees and provided updates on: (1) the cum card - an electronic form had been identified and a group was preparing to review state requirements and finalize the process; (2) staff absence reporting - the group that had previously worked on the current form was meeting to discuss changes recommended by the CSI; (3) enrollment forms/registration - Principal Barber told the committee that the cost of registration was considerable and, if possible, he wanted to implement an electronic process and proposed a sub-committee be created to do this; (4) elementary report cards/test scores - the subcommittee indicated that since report cards had been revised many times with mixed reactions from teachers, it intended to research best practices, conduct research to share in buildings, and do a staff survey; (5) parent/teacher conferences - it was reported that one school was piloting a student-led conference project, which then “led to the conversation about trimester vs. semester,” during which some participants stated that there would be “a huge push back from staff if we chose to move to trimester,” and the sub-committee then identified the next steps, which included e-mailing input from parents and teachers to CSI members, thinking about their goals, and researching best practices; (6) trimester versus semester - no additional discussion; and (7) the middle school structure – Rickert

“* * * encouraged the middle school people to consider the structure of our middle schools and look at best practice like teaming and schedules. A 7 period day for that level is very disruptive and over-stimulates kids at that age level. This is an easier change than moving to trimester with huge impact for our students.

“Allocation of resources is an option if we find that this is a barrier. We need to make sure we follow the contract.”

74. During the February 3 CSI meeting, under new business, committee members discussed the process for changes in CSI membership and Rickert requested feedback on her communications within the District. The minutes identified future spring topics that included revisiting the summer work schedule and reviewing the attorney’s recommendations about the tone of the District Handbook.

75. The March 3, 2010 CSI meeting was held in a District media center. At the beginning of the meeting, Principal Barber reported to the committee that rumors about threats of student fights had been investigated and were determined to be unfounded. Other discussion occurred regarding an explosion in a bathroom at another school. Rickert encouraged committee members to keep students calm and stop rumors in these situations. The group then moved into small groups to talk about the topic of achieving commitments under *The Five Dysfunctions of a Team*. Next, under old business, subcommittees provided updates on: (1) cum cards - it was reported an electronic form had been identified and a policy needed to be developed around maintaining the form; (2) staff absence reporting - leave forms had been changed to allow the current verification form to be replaced by printing leave balances on paychecks, so the only form that would require a signature would be the leave request form; (3) enrollment forms - no report; (4) elementary report cards - it was reported that information would be gathered through a survey and that a high school grading committee had met that day; (5) parent/teacher conferences - the District’s 2010-2011 draft master calendar was handed out; and (6) trimester versus semester - no discussion reflected in minutes.

76. Under new business during the March 3 CSI meeting, the committee discussed concerns related to custodial support. A bargaining unit member, whose building shared a custodian with another building, put this issue on the agenda because the teacher did not believe trash was being dumped as often as needed. After administrators shared information about custodians being understaffed throughout the District, the committee brainstormed ways employees could help, including reporting problems to the principal, thanking custodians, dumping their own trash, asking students to assist, limiting classroom parties, and seeing if other buildings were doing something creative. After the CSI meeting, the custodial supervisor addressed the problem directly with his staff.

77. At the CSI meeting on April 7, 2010, the first topic addressed was enrollment forms/electronic registration. Rickert notified the committee that buildings were already beginning the registration process and a computer program had been found that allowed parents to access and revise student information. She then solicited volunteer schools for a pilot project using the program. Under the topic of parent conference options, Rickert indicated that concerns had been raised that the end date for the first quarter in the 2010-2011 school year was too

far from the parent/teacher conference date, and reviewed with the committee two options the cabinet had come up with to address this concern. The minutes then reflect the following discussion:

- “a. Version 2 — If Friday 11/12 is optional day would we be able to close buildings? Cynda [Rickert] reminded that we would keep in with current practice and make sure buildings are kept open all 3 days.
 - “b. It is hard to get parents to come in for conferences Thanksgiving week because many families use those non-school days to travel for the holiday.
 - “c. Work day on 8th is very close to conference days on 9th, 10th & 12th for printing of report cards and verification that grades are in and complete. We could shift the work day of the person responsible for printing the report cards.
 - “d. There may be some concern for teachers to get grades done on time.
 - “e. Another option – Joni [Parsons] shared another option with 3 short weeks.
 - “f. Another option – Heather H [Hohnstein] shared an option that included a day for students to work on student led conference presentations on the 8” (student let [*sic*] conferences are not yet in place)
 - “g. Some principals shared that they would like to check with their secretaries or the person responsible for printing report cards before making a decision.
 - “h. Cynda will revise options and send out Zoomerang Survey to all staff for feedback.
- “The final calendar will go to the board for approval at the April 14 meeting.”

78. Another topic discussed during the April 7 CSI meeting was end-of-year celebrations.¹⁰ Rickert told the committee about a proposal that she had already shared with principals and the board, as follows:

“Buildings have their individual retirement celebrations and recognition and that would continue and district and union leaders would attend and present a gift as we have done in the past. Instead of the breakfast we would put out a brochure/flyer with a picture and short bio for each retiree. We could also recognize years of service and perfect attendance, the things that we value. Another idea is to have each building share an accomplishment from their building. We could also include a list of building retirement dates and times if anyone wants to attend.

“The other proposal is to have an awards banquet hosted by CSI. CSI would be responsible for setting the criteria for the nominations, review and winners of each award. Nomination criteria would be based on data and the Four Characteristics of Improved School Districts.”

¹⁰In its brief, the Association relied on Exhibit C-18 to support its argument regarding the CSI recognition awards. However, the Association withdrew Exhibit C-18 during the hearing, and it is not part of the record.

Rickert made additional suggestions about award categories, the number and process of nominations, and time lines. The committee then provided feedback about Rickert's ideas, developed a to-do list for the awards banquet, and committee members volunteered to help. The last topic at the April 7 CSI meeting was the elementary report card. The subcommittee notified the group it had met to discuss the findings of their survey, which it would share at next CSI meeting.

79. In the past, superintendents had provided for formal employee recognition and awards. For example, former Superintendent Adams was very involved in and solicited nominations for a District-wide recognition award that was presented at a school board meeting. At the high school, the principal presented Eagle Excellence Awards. The District had, on occasion, paid for end-of-year/retirement breakfasts and barbeques, and a breakfast at the beginning of the year for all District staff.

80. Rickert had been regularly communicating with employees about the District's budget situation, in part because the CSI had encouraged her to provide weekly communications. In late May 2010, the State notified the District that there would be a significant cut in its budget. In early June 2010, the District invited the Association officers and executive council members to a meeting with Remick and the District's business manager to review the latest budget information, go over the school funding numbers, and provide feedback or collaborate on cost-cutting ideas. President Konefal was the only Association representative who attended the meeting.

81. Sometime in 2010, the Association presented the school board with a survey it had conducted that it believed showed many District employees were not satisfied with Superintendent Rickert's performance.¹¹

82. The CSI ultimately approved and held an employee awards banquet. Nodine participated in the committee which set the criteria for the awards. Bilodeau was upset that the CSI interfered with what she saw as the traditional retiree breakfast in which the Association had participated and believed that the awards process created unrest in the bargaining unit. The Association held its own dinner for retirees.

83. At some unidentified point, after the District calendar had been approved by the school board, Konefal attended a CSI meeting.¹² During the meeting, one of attendees brought up

¹¹The Association's assertion that "the majority of staff were dissatisfied with how Rickert was running the District" is not supported by the survey. (Complainant's Post Hearing Brief at 5.) Association witness Rebecca Konefal, who presented the testimony about the survey, could not recall either the number, or percentage, of employees who responded to the survey. She also could not recall the response percentage the Association had required before the results of the survey were presented to the school board, when the survey was taken, or when it was presented to the board. Since Konefal testified that all the survey comments contained in Exh. C-26 were written by separate employees, at best the Association showed that 42 employees out of a bargaining unit of 390 responded to the survey. Not all of the comments of these 42 employees reflected dissatisfaction with the Superintendent's performance.

¹²Konefal did not recall whether the District calendar had already been set at the time she attended the CSI meeting or which meeting she attended. However, none of the CSI minutes through the

the issue of the teachers' work week and hours related to the parent-teacher conferences under the school calendar. Committee members, including Konefal, raised concerns about a change of hours at the middle school, where teachers were scheduled to work two 12-hour days before the conferences, but had only worked ten-hour days in the past. The principals agreed that this was a change from prior years. The elementary teachers also expressed concerns that they would be working extra hours conferencing the prior week and did not think they should have to work the same 40-hour schedule the week of conferences. The committee discussed how the middle school was more locked into the conference schedule because it conducted a different type of conferencing. The committee's conversation floated freely into other areas, including explorations of trimester versus semester scenarios and student-led conferencing. At the end of the discussion, Rickert stated that the parent-teacher conference schedule established in the calendar would not change.

84. During her tenure as Association President, Nodine was required to keep a president leave time log, which the District used to bill the Association for actual hours used. Nodine was also warned once not to use her classroom phone to conduct Association business. Nodine did not recall any other actions the District had taken against her related to her exercise of union activity.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The District did not violate ORS 243.672(1)(a) when it created or administered the CSI.

The Association alleges that “[b]y creating the CSI in order to by-pass the Association’s chosen representative,” the District interfered with the right of employees to choose their own representative in violation of ORS 243.672(1)(a). (Amended Complaint at 5.) 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 243.662 guarantees 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.” In subsection (1)(a) cases, we analyze allegations of an employer’s violation of ORS 243.622 rights under both the “because of” and the “in the exercise of” prongs of that statute. *Oregon Public Employes Union and Termine v. Malheur County, Commissioner Cox, Commissioner Hammack and Sheriff Mallea*, Case No. UP-47-87, 10 PECBR 514, 520-21 (1988).

The “because of” prong of ORS 243.672(1)(a) prohibits a public employer from taking actions against an employee because the employee engaged in protected union activities. *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06,

April 2010 meeting reflect that she was present. At the April 2010 meeting, Rickert announced that the calendar would be approved by the Board on April 14. Therefore, Konefal likely attended a meeting after April, at which time the calendar had been approved by the Board.

22 PECBR 323, 351 (2008). In analyzing “because of” claims, we first determine whether the employee engaged in protected activities and then determine whether the employer took adverse or employment-related action against the employee in response to the protected activity. *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 22 PECBR 752, 795 (2008).

In analyzing an alleged violation of the “in the exercise of” portion of ORS 243.672(1)(a), we “determine whether the natural and probable effect of the employer’s conduct would tend to interfere with, restrain and coerce employees in the exercise of their PECBA rights.” *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transit District*, Case No. UP-48-97, 17 PECBR 780, 789 (1998). An “in the exercise of” claim may be derivative of a “because of” violation. An employer may also independently violate the “in the exercise of” prong of subsection (1)(a). An independent or stand alone “in the exercise of” claim usually arises in the context of employer threats “of reprisal for union activity.” *Malheur County*, 10 PECBR at 521. Such threats generally are either directly coercive or threatening statements, or situations where there is nothing directly threatening or coercive, but where the employer’s action, objectively viewed, “would chill union members generally in their exercise of protected rights.” *Portland Assn. of Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 624, 16 P3d 1189 (2000).

The District did not violate the “because of” prong of ORS 243.672(1)(a). One element of a *prima facie* case in a “because of” claim is an allegation of “employment related action against the employee by the employer * * *.” *911 Professional Communications Employees Association v. City of Salem*, 19 PECBR 871, 883 n 6. The Association neither alleged nor presented any evidence that an employee or group of employees suffered adverse or other employment-related action in relation to the creation or existence of the CSI. We considered similar circumstances in *City of Salem*, where the employer established and maintained a committee to address shift scheduling. We dismissed the union’s subsection (1)(a) claim because it “failed to establish that any employee suffered employment-related action in or because of his or her objections to the scheduling committee.” 19 PECBR at 891.

The Association fails to identify any adverse or employment-related action taken against employees as a result of union activity. Therefore, we conclude that the District did not violate the “because of” portion of subsection (1)(a).

We next turn to the Association’s “in the exercise of” subsection (1)(a) claim. Here, the Association alleges that the creation of the CSI had the natural and probable effect of tending to interfere with, restrain, or coerce employees in the exercise of their PECBA rights. There is no evidence, however, to support this claim. The District made no direct or implied threats regarding employees’ participation or non-participation in the CSI regarding their objection to or support for the CSI. In fact, several Association leaders, including the Association President and one Executive Council member, actively participated in the committee. Nor is there any evidence that employees felt intimidated or coerced about participating in PECBA-protected activities as a result of the CSI committee. Except for the timing, there is little to distinguish this committee from other ongoing committees in the District. Therefore, the Association did not prove that the creation of the CSI had the natural and probable effect of interfering with the exercise of employees’ PECBA-protected rights in violation of subsection (1)(a).

3. The District did not violate ORS 243.672(1)(b) when it created or administered the CSI.

The Association alleges that the District violated subsection (1)(b) by forming and administering an employer-dominated employee organization - the CSI. Relying on NLRB case law, the Association asserts that because the CSI existed for the purpose of employees "dealing with" the District on matters of employment relations, the CSI was an employer-dominated organization. In support of its claim, the Association asserts that the Superintendent established the CSI soon after the parties' contentious negotiations process to change the negative environment resulting from the negotiations and to avoid working with UniServ Consultant Bilodeau in the LMC process. The Association contends that the District failed to consult with, or seek input from, the Association prior to the creation of the CSI; determined the composition of the CSI membership; selected the employees for the committee based on characteristics which were intended to exclude Union representatives; and scheduled the CSI meetings during paid time. The Association further argues that the District established the CSI employee members as staff liaisons, whose purpose was to solicit information from staff to present to the committee; to communicate information from the committee to the staff; and to engage in problem solving on a variety of issues, including matters of employment relations.

Although the District asserts it did not "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization" within the meaning of ORS 243.672(1)(b) when it created the CSI, the District does not dispute that it created the CSI without input from the Association; determined the structure, function, and purpose of the committee; selected employees as committee members from those that volunteered; and held the committee meetings on its premises during working hours. The District contends, however, that the CSI is similar to many other District committees that meet and make recommendations regarding operational issues, but do not represent employees on matters of "[e]mployment relations" within the meaning of ORS 243.650(7). Instead, it argues that the CSI is merely a District-wide advisory committee established to address day-to-day operational issues.

We begin our analysis of the Association's claims and the District's defenses by analyzing the statute at issue. ORS 243.672(1)(b) makes it an unfair labor practice for a public employer to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization." The statute identifies three separate actions in which a public employer may not engage: domination, interference or assistance. Our decisions have addressed the types of employer actions involving interference and assistance. *See Junction City Police Association v. Junction City*, Case No. UP-18-89, 11 PECBR 732, 780 (1989) (confiscation by City of materials prepared by Union President for unfair labor practice complaint); *City of Portland*, 22 PECBR at 794 (Union deprived of use of union official). We have not directly addressed actions involving employer domination of an employee organization.

The Public Employee Collective Bargaining Act (PECBA) neither defines the term "employee organization" nor what constitutes employer domination under ORS 243.672(1)(b). In *Bates, et al. v. Portland Federation of Teachers and Classified Employees and Portland School District 1J*, Case No. UP-6-87, 11 PECBR 563, *recons*, 11 PECBR 629 (1989), *aff'd*, 106 Or App 221, 807 P2d 306 (1991), we discussed the meaning of employer domination in the

context of a case asserting unlawful employer assistance to an employee organization. After explaining what type of employer conduct constitutes lawful cooperation, we explained that

“[a]t the other end of the continuum is employer intrusion into union affairs that is so pervasive that the employer acquires a substantial voice in the control and direction of the union. In such cases the employer is guilty of unlawful ‘domination’ of a labor organization. For example, an employer unlawfully dominates a labor organization when no union meetings are held apart from those with management, no coherent program or plan of action is developed by the union, and meetings take place only on company premises during working hours and proceed ‘according to an agenda prepared by management.’ [Lawson Co. v. NLRB, 118 LRRM 2505 (6th Cir 1985)] ” 11 PECBR at 573.

The Association argues that, since the PECBA was modeled on the National Labor Relations Act (NLRA), 29 USC §§ 151-169 (1971), we should look to NLRB decisions for guidance in determining what constitutes an employer-dominated employee organization. See *Elvin v. OPEU*, 313 Or 165, 175 and n 7, 832 P2d 36 (1992).

The NLRB uses a two-step process to determine whether an employee organization is unlawfully dominated by an employer: 1) Is the entity at issue a “labor organization” as defined under Section 2(5);¹³ and 2) has the employer dominated or interfered with the formation of the entity or contributed financial or other support to it in violation of Section 8(a)(2)?¹⁴ *Electromation, Inc.*, 309 NLRB 990, 994, 142 LRRM 1001 (1992), *enforced*, 35 F3d 1148, 147 LRRM 2257 (7th Cir. 1994).

An organization is a labor organization if the “(1) employees participate, (2) the organization exists, at least in part, for the purpose of ‘dealing with’ employers, and (3) these dealings concern ‘conditions of work’ or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment.” *Electromation, Inc.*, 309 NLRB at 994. NLRB views “dealing with:”

“as a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in Sec. 2(5), coupled with real or apparent consideration of those proposals by management. A unilateral mechanism, such as

¹³Section 2(5) of the NLRA defines the term “labor organization” as

“[a]ny organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”

¹⁴Similar to subsection (1)(b) under the PECBA, Section 8(a)(2) of the NLRA, 29 USC § 158(a)(2), makes it an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.”

a 'suggestion box,' or 'brainstorming' groups or meetings, or analogous information exchanges, does not constitute 'dealing with.'"¹⁵ *Id.* at 995 n 21.

The NLRB further explained in *E.I. Du Pont de Nemours & Co.*, 311 NLRB 893, 894, 143 LRRM 1121, *corrected*, 143 LRRM 1268 (1993), that

"the concept of 'dealing' does not require that the two sides seek to compromise their differences. It involves only a bilateral mechanism between two parties. That 'bilateral mechanism' ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required. If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pattern or practice, the element of dealing is present. However, if there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing." (Footnote omitted.)

We agree that the first step in addressing a claim alleging the existence of an employer-dominated employee organization within the meaning of ORS 243.672(1)(b) is to determine whether the employee organization is a labor organization. We must, however, use the PECBA definition of the term "labor organization," not the definition under the NLRA. Under the PECBA, a "labor organization" is "any organization that has as one of its purposes representing employees in their employment relations with public employers." ORS 243.650(13). Under ORS 243.650(7)(a), "[e]mployment relations" are defined to include "matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment." The term "[e]mployment relations" specifically does not include subjects this Board has determined to be permissive prior to June 6, 1995; subjects this Board "determines to have a greater impact on management's prerogative than on employee wages, hours, or other terms and conditions of employment" after June 6, 1995; and in relation to school districts, subjects such as class size, the school or educational calendar, standards of performance

¹⁵Other cases in which the NLRB held that employee groups did not "deal with" the employer within the meaning of Section (2)(5) include *EFCO Corporation*, 327 NLRB 372, 376, 160 LRRM 1049 (1998), *enforced*, 215 F3d 1318 (4th Cir 2000) (committee screened employee suggestions prior to forwarding them to management); *Fiber Materials, Inc.*, 228 NLRB 933, 934-35, 95 LRRM 1014 (1977) (an employee group met with the employer twice to raise questions about fringe benefit policies); *Mercy-Memorial Hospital*, 231 NLRB 1108, 1121, 96 LRRM 1239 (1977) (committee decided the validity of employee complaints at the third step, which the employee could accept or appeal to the next step); *General Foods Corp.*, 231 NLRB 1232, 1234-35, 96 LRRM 1204 (1977) (company's employees were divided into four committees, similar to work crews, which performed various jobs, were delegated certain managerial functions, and held team meetings with their supervisor, during which employees sometimes raised concerns about employment issues); *Sears, Roebuck & Co.*, 274 NLRB 230, 243-44, 118 LRRM 1329 (1985) (communications committee which provided a rotating opportunity for employees to give input to help solve management problems, such as availability of parts and training).

or criteria for evaluation of teachers, standards and procedures for student discipline, and school curriculum. ORS 243.650(7)(b)-(e).

The PECBA definition of "labor organization" arguably does not match the breadth and scope of the NLRA definition, but we need not decide that issue here. Under either definition of a "labor organization," we conclude that the CSI is not an employer-dominated employee organization within the meaning of ORS 243.672(1)(b). The prohibition of employer-dominated employee organizations under the PECBA is directed at employee organizations that represent employees with the employer in regard to matters of "employment relations." The CSI, however, was neither created to, nor did it, address matters of employment relations. Rather, it was devised to work on day-to-day operational issues. Consistent with this purpose, many of the issues the CSI addressed had little or no relation to "employment relations matters." These issues dealt with purely administrative processes and forms, such as the cum cards (permanent student record forms); student registration forms; the tracking of changes in the District's student handbook; the principals' availability in the buildings; and the elementary report cards.

The CSI also did not act as a labor organization, within the meaning of ORS 243.650(13), in regard to other CSI topics which were related to matters of "employment relations." The Association asserts that the CSI represented employees regarding the topic of summer work hours. In its initial meeting, the District did use this issue as a model problem for the CSI to practice the situational leadership process. Yet, the District did not use the committee to actually solve the problem. In fact, after the CSI finished its practice exercise on this issue, the Superintendent reported to the committee the actual process the District was using to determine if the summer hours would be modified. The District worked with the Association and the affected employees on the issue even prior to this CSI meeting, and the decision to change the schedule only occurred after the Association notified the District that employees would agree to the modified hours. At a later time, the District asked committee members to share information about the limited savings which had resulted from the adjusted summer schedule with building staff and expressed its intent to revisit the issue the next year. However, the CSI did not act for employees to determine whether a modified summer schedule would be used during the summer of 2009 or in the future.

The Association also contends that the CSI dealt with matters of "employment relations" when it discussed work schedules in relation to the topic of parent/teacher conferences. This issue was on the agenda due to poor parent participation at certain levels. During the discussion of ways to improve participation, issues were raised about the timing of the conferences on the school calendar. However, the topic of school or educational calendar is specifically excluded from matters of employment relations under ORS 243.650(7)(e). We reach the same conclusion on the very limited discussions about semester versus trimester schedules and middle school work schedules. Although the topic of semester versus trimester was on the committee's agenda for several meetings, the only actual discussion of the topic came up in the context of parent/teacher conferences. In this context, some participants expressed concerns that a trimester schedule change would not be acceptable to staff. However, there is no evidence that the CSI actually worked on or sought solutions on this topic. The same is true regarding the topic of the middle school structure. The issue was raised by Rickert, but she only encouraged the middle

school employees to consider a different schedule or team approach in working with their students. Again, the CSI did not actually do any work on the topic.¹⁶

Finally, the CSI also did not represent employees in the statutory sense regarding other agenda topics. After an employee raised the issue of a lack of bilingual staff, the Superintendent immediately referred the committee to the layoff language in the parties' Agreement and explained that the issue would have to be bargained with the Association. The "safety" issues discussed were limited to a principal's report to the CSI about rumors of student fights and an explosion in a restroom. The District requested that committee members encourage other staff to squelch such rumors in the future, but did not engage the committee to otherwise address the issue. The committee's focus on the "sick leave" issue was not on any mandatory aspects, such as the amount of or right to those benefits, but only on the simplification of administrative forms used to track such benefits. When the employees raised concerns about the tone of the signature page for the District's student handbook, the District did not ask the committee to solve the problem, but sought legal advice to determine if any changes were possible. In regard to the custodial support topic, although the committee brainstormed ideas on how classroom teachers might address the lack of trash pick up, the custodial supervisor addressed these concerns directly with his custodial staff after the CSI meeting. Finally, there was no evidence that the employee awards banquet affected a mandatory topic of bargaining.

The CSI participants were not engaged in a bilateral process in regard to matters of employment relations. There was no pattern or practice of employee proposals from committee members to the District on such matters, which the District accepted or rejected by word or deed. At most, employees raised concerns about matters of employment relations during discussion of permissive bargaining topics. The District then either referred such issues to bargaining with the Association or did not engage in addressing the topic. Therefore, the CSI would not constitute an employer-dominated organization within the meaning of the NLRA.

The Association argues, however, that we should find a violation of ORS 243.672(1)(b) because the District created the CSI to avoid meeting with Bilodeau and the Association in the LMC process. According to the Association, the District disliked Bilodeau's strong advocacy of Association rights and the Association's aggressive bargaining campaign. In support of this argument, the Association asserts that the Superintendent delayed the LMC process and generally engaged in intimidation of employees as a result of their union activities.

The Association did not prove that Superintendent Rickert set up the CSI to avoid meeting in the LMC process. It is not disputed that Rickert was reluctant to meet with Bilodeau in the LMC process. Rickert clearly found Bilodeau difficult to work with, due to what she perceived was Bilodeau's disrespectful and abrasive personality. At the same time, however, the District both initiated and pursued scheduling LMC meetings from July through September 2009. In fact, Nodine initially agreed to participate in LMC meetings which were limited to her and the

¹⁶Such changes to the school schedule are permissive subjects for bargaining. *Three Rivers Education Association, SOBC/OEA/NEA v. Three Rivers School District*, Case No. UP-16-08, 23 PECBR 638, 662 (2010), *appeal pending*. The District would, of course, have to bargain any mandatory impacts of such a decision with the Association.

Superintendent. It was not until September 29 that Nodine first raised Bilodeau's participation, and October 11 that Nodine notified Rickert that the Association wanted Bilodeau at the LMC meetings. Since Rickert ultimately agreed to meet with Bilodeau in the LMC on November 18, any delay due to Rickert's desire to exclude Bilodeau from LMC meeting lasted at most a month and one-half.

There is also no proof that even after Rickert agreed to meet in the LMC with Bilodeau, she continued to delay the LMC process and pressed her own agenda so that little could be accomplished by the parties. Subsequent delays in the LMC process occurred because both parties were unable to agree on either a trainer or a meeting schedule. In addition, the Association agreed with Rickert's suggestion that the LMC initially work on identifying its core beliefs and mission.

The Association also failed to prove its broad accusations that Superintendent Rickert intimidated employees due to their involvement in the Association's bargaining campaign or for voicing their opinion. Except for the strike vote, it was largely undisputed that the bargaining activities which culminated in an agreement in March 2009 were not significantly different than the activities employees had engaged in during prior bargaining campaigns. Nodine also essentially admitted that the District had not discriminated against her as a result of her union activity. In addition, the only factual incident presented to support the allegations of intimidation was Rickert's request for Association Co-Presidents Nodine and Evans to accompany Rickert to talk with an employee whose statements Rickert perceived to be a personal attack, and to talk with the Association bargaining chair about what Rickert believed was an unfair portrayal of the bargaining situation at the District inservice meeting. While Rickert was certainly upset about what had been said, she indicated no intent to take action against these employees and there is no evidence that she did.¹⁷

4. The District did not make a unilateral change in the *status quo* in violation of ORS 243.672(1)(e) when it created the CSI.

The District did not unilaterally replace the parties' LMC with the CSI in violation of ORS 243.672(1)(e). Although the Association added this allegation to its complaint during the hearing, the Association failed to address this claim in its brief. In such cases, it is our practice to dismiss such a claim. *See, Gresham Police Officers Association v. City of Gresham*, UP-6/18-09, 24 PECBR 55, 67 n 4 (2010).

¹⁷The Association limited its argument in its brief to the allegation of unlawful employer domination under subsection (1)(b). Therefore, we do not address whether the District's actions constituted unlawful interference within the meaning of that subsection.

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 concur in the result but not the reasoning. Two particular issues are worth comment. Both concern the proper analysis under ORS 243.672(1)(a).

As my colleagues describe, subsection (1)(a) states two separate and independent violations, the “in” prong and the “because” prong. I begin with the “in” prong. My colleagues dismiss this claim because there is “no evidence that employees felt intimidated about participating in PECBA-protected activities as a result of” the employer’s conduct. This is the wrong standard. To establish an “in” prong violation, the Association does not need to prove that anyone was *actually* restrained, interfered with, or coerced. *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 624, 16 P3d 1189 (2000); *Teamsters Local 206 v. City of Coquille*, Case No. UP-66-03, 20 PECBR 767, 776 (2004) (citing cases); *Milwaukie Police Employees Association v. City of Milwaukie*, Case No. UP-63-05, 22 PECBR 168, 186 (2007), *AWOP*, 229 Or App 358 (2009). The test is whether the natural and probable effect of the employer’s conduct is to deter employees from exercising protected rights. *Portland Assn. Teachers*, 171 Or App at 623. My colleagues err in suggesting otherwise.¹⁸

I believe my colleagues also incorrectly analyze the “because” prong. They dismiss the Association’s “because” claim on grounds that “[t]he Association fails to identify any employment-related action taken against employees as a result of union activity.” In my view, the

¹⁸The converse is also true. That is, proof that one or more employees were in fact intimidated doesn’t prove an “in” violation. The test is whether a reasonable employee would naturally be deterred from participating in protected activity. A hypersensitive employee who overreacts and feels intimidated does not prove a violation any more than an unusually strong employee who is undaunted disproves a violation.

requirement that the employer's coercive actions be "employment-related" is both unnecessary and wrong.

"Employment-related" is certainly not derived from the statute. As pertinent here, subsection (1)(a) makes it an unfair labor practice for a public employer to "[i]nterfere with, restrain or coerce employees * * * because of the exercise of" PECBA-protected rights. Work-related actions—demotion, suspension, or dismissal for example—can certainly be coercive, but not exclusively so. Many non-work related actions can also be coercive. For example, an employee would likely be coerced if the employer said it would shoot his dog if the employee ever attends another union meeting, or if the school District refused to do business with an employee's father because the employee is the union president. These examples are not work-related, but they certainly would dissuade an employee from engaging in protected activities. The work-related requirement is thus under-inclusive; that is, it would condone some of an employer's coercive conduct the statute intends to prohibit. We should therefore disavow the test.¹⁹

Analytical tests are common. They can be both useful and necessary to help interpret the PECBA. But we need to develop tests that are derived from the statute and further the statute's underlying purpose. The "employment-related" test does not. To the contrary, it distracts from the statute's main focus. *See Portland Assn. Teachers*, 171 Or App at 623 (to prove a "because" prong violation, a complainant "must establish that the employer was motivated *by the exercise of the protected right* to take the disputed action." (Emphasis in original)). Viewed from that perspective, it makes no difference whether the employer's coercive conduct is work-related or not. All that matters is that the conduct is coercive.

The "employment-related" test also creates another problem. The precise contours and outer limits of the test are unclear. In some circumstances, it may be difficult to tell whether a particular employer action is employment-related. The Board will then need to formulate a test to determine what is "employment-related," in effect creating a test for how to apply a test. This ultimately distracts from the proper statutory inquiry.

For all of these reasons, I believe my colleagues err in requiring an employer's coercive conduct to additionally be "employment related." Here, I reach the same result without adding this extra layer of analytical tests. I therefore concur in the result but not the reasoning.



*Paul B. Gamson, Board Member

¹⁹My colleagues' requirement that an employer action be "against" an employee is also unnecessarily restrictive. Negative action "against" an employee is not the only type of coercive conduct. An employee can be coerced with a carrot as well as a stick. Paying an employee \$10,000 for agreeing not to attend union meetings is just as effectively coercive as threatening to demote him if he attends union meetings. Stating the test as whether an employer takes action "against" an employee is under-inclusive. It would permit positive coercion the legislature intended to restrict. I therefore disagree with my colleagues' statement requiring employer action "against" an employee.