

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-63-05

(UNFAIR LABOR PRACTICE)

MILWAUKIE POLICE	)	
EMPLOYEES ASSOCIATION,	)	
	)	
Complainant,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW
	)	AND ORDER
CITY OF MILWAUKIE,	)	
	)	
Respondent	)	
_____	)	

On May 30, 2007, this Board heard oral argument on Respondent's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Vickie Cowan on February 22, 2007, following a hearing on April 7 and 10, 2006 in Milwaukie, Oregon. The record closed on May 11, 2006 upon receipt of the parties' post-hearing briefs.

Daryl Garrettson, Attorney at Law, Garrettson, Goldberg, Fenrich & Makler, 5530 S.W. Kelly Avenue, Portland, Oregon 97201, represented Complainant at oral argument. Jaime B. Goldberg, Attorney at Law from the same firm, represented Complainant at hearing.

Martin C. Dolan, Attorney at Law, Dolan & Griggs, 1130 S.W. Morrison, Suite 630, Portland, Oregon 97205, represented Respondent.

On November 14, 2005, the Milwaukie Police Employees Association (Association) filed this unfair labor practice complaint. It alleges that the City of Milwaukie (City) violated ORS 243.672(1)(a) and (e) by announcing it would unilaterally remove bargaining unit members Floyd Marl and Luke Strait from their

detective positions and reassign them to lower paid police officer positions. The City filed a timely answer which denied any wrongdoing.

The issues are:

1. Does the City's decision to remove a bargaining unit member from the detective position concern a mandatory subject of bargaining? If so, did the City remove bargaining unit members Floyd Marl and Luke Strait from their detective positions without first bargaining to completion, in violation of ORS 243.672(1)(e)?

2. Did the City's announcement that it decided to remove Floyd Marl and Luke Strait from their detective positions interfere with, restrain, or coerce Marl and Strait in or because of their exercise of Public Employee Collective Bargaining Act (PECBA) rights, in violation of ORS 243.672(1)(a)?

### RULINGS

1. The City made a motion *in limine* to exclude all evidence relating to past practice. It asserted that past practice was irrelevant because the contract was clear on its face. The Association argued that the parties' past practice is relevant because the contract was not clear on its face. The ALJ deferred ruling on the motion.

The parties offered different but plausible interpretations of the contract. In order to determine which interpretation is correct, this Board may consider the parties' past practice regarding how the contract was administered. *See Oregon School Employees Association v. Lincoln County School District*, Case No. UP-10-92, 14 PECBR 503, 508 (1993) (past practice is the "most reliable aid" in construing ambiguous contract language). We also examine the parties' past practice to identify the *status quo* when determining whether an employer is obligated to bargain before it can change a working condition. *E.g., Riddle Association of Classified Employees v. Riddle School District #70*, Case No. UP-114-91, 13 PECBR 654, 662 (1992). The past practice evidence is admitted.

2. The ALJ's remaining rulings were reviewed and are correct.

### FINDINGS OF FACT

1. The Association is the exclusive representative of a bargaining unit of police department personnel employed by the City, a public employer.

2. The Association and the City are parties to a collective bargaining agreement effective July 1, 2004 through June 30, 2007. The agreement recognizes the Association as the exclusive representative for all regular employees who work 20 hours or more in the classifications of police recruit, police officer, police sergeant, and police technician.

3. Article 3 - **Management Rights** provides, in relevant part:

***"A. Responsibilities***

"The parties agree that the CITY retains all the customary, usual and exclusive rights, decision-making, prerogatives, functions, and authority connected with or in any way incident to its responsibility to manage the affairs of the CITY or any part of it. Rights of employees in the bargaining unit and the ASSOCIATION are limited to those set forth in the Agreement or provided by Oregon Constitution and Charter of the City of Milwaukie and the CITY retains all prerogatives, functions and rights not subject to the terms of this Agreement.

***"1. Rights***

"It is recognized that the CITY has and will continue to retain the exclusive right and responsibility to operate and manage the Police Department, its facilities, properties and the activities of its employees, insofar as this right does not conflict with terms of this Agreement. Without limiting the generality of the foregoing, it is expressly recognized that the CITY's operational and managerial responsibility includes:

"\* \* \* \* \*

"c) The determination of the management, supervisory and administrative organization of the Department and the selection of employees for promotion to supervisory, management or administrative positions;

“\* \* \* \* \*

- “g) The determination of the size of the working force, the allocation and assignment of work to employees and the determination of policies affecting the selection of employees;

“\* \* \* \* \*

- “i) The direction of all working forces in the system, including the right to hire, suspend, discharge or discipline, or transfer employees.”

4. Article 4 - **Employee Rights** provides, in relevant part:

***“B. Maintenance of standards/existing conditions***

“Subject to available funds, all mandatory subjects of bargaining relating to wages, hours and working conditions not specifically mentioned in this Agreement shall be maintained at not less than the level in effect at the time of the signing of this Agreement.”

5. Police officers are compensated based on a six-step pay scale ranging from \$3,490 to \$4,454 per month. Officers start at the first step, move to the second step after six months, and move up an additional step each year thereafter.

The contract also includes a provision for special assignment pay. Article 9 provides, in relevant part:

***“A. Assignment***

“Compensation for special assignment and working out of class shall be documented through a Personnel Action Form signed by the Police Chief or designee, except for Acting Watch Commander (AWC) or Acting Sergeant which for actual hours worked, shall be documented on the time sheet. No employee shall receive additional compensation for more

than one special assignment pay (sap). Refer to Personnel and Administrative Policies and Procedures for additional specialty pay assignments not covered below. The grievance procedures in this agreement do not apply to the Personnel and Administrative Policies and Procedures. Compensation shall be as follows:

"Assignment	Compensation	Criteria
"Public Information Officer (PIO) or other specialty on-call position	Five percent (5%) of base police officer pay (sap)	For stand-by and special assignment, personnel assigned minimum of 7 consecutive days per month of stand-by duty and greater than a majority of work days during any given month for special assignment to receive pay for all hours worked during the month.
"Motorcycle	Same as above	For special assignment, if assignment is for greater than a majority of work days during any given month to receive pay for all hours worked during the month.
"Detective	Seven and one-half percent (7.5%) of base police officer pay (sap)	For stand-by and special assignment, same as PIO above
"Dog Handler	Two (2) hours per week at straight time rate (sap)	For each week's work caring for dog.
"Coach	Five percent (5%) of base pay  Pay for coaching a Reserve Officer 2%	Sergeants are excluded. Employees will receive additional coaches pay for days assigned as a coach.  Officer coaching reserves shall receive pay only for hours worked with a reserve.

<p>“Working out of Class (WOC)</p>	<p>Same as above</p>	<p>Assignment to temporarily work above employee’s designated classification, to an assignment with a pay range above the employee’s current classification pay range. Assignment must be for greater than a majority of work days during any given month to receive pay for all hours worked during the month.</p>
<p>“Acting Watch Commander (AWC - a form of WOC)</p>	<p>AWC - Seven and one-half percent (7.5%) of base police officer pay</p>	<p>AWC and Acting Sergeant positions will be assigned by the Chief or his designee. Employee will receive pay for only actual hours worked as AWC or Acting Sergeant.”</p>
<p>“Acting Sergeant (a form of WOC)</p>	<p>Acting Sergeant - ten percent (10%) of base police officer pay</p>	

(Footnote omitted.)

6. Larry Kanzler is the City’s Police Chief and has served in that position since October 1999. Prior to Kanzler, Brent Collier served as Police Chief from 1994 to 1999

7. Floyd Marl is the Association’s president and Luke Strait is the Association’s treasurer. Marl has worked for the City as a police officer since December of 1994; Strait has worked for the City as a police officer for more than 10 years. Since June 2001, both Marl and Strait have been assigned as detectives. At any given time, the City generally has three or four detectives.

8. Before Marl and Strait became detectives, they went through an application process, including an oral board. The applicants were graded by the interview board and the board’s recommendation was then forwarded to the Chief. Officers chosen to be detectives participate in a swearing-in ceremony in front of coworkers, family, and friends where they are presented with their detective badges.

9. In February 2005, Chief Kanzler notified bargaining unit member Monte Sterling that Sterling was being removed from his position as the Public Information Officer (PIO). As a result, Sterling would lose his 5 percent special assignment pay. Sterling told Marl that he was not concerned about leaving the position but thought the Association may have an issue with his involuntary removal from an incentive pay position.

10. After conferring with legal counsel and other Association executive board members, Marl and Strait invited Chief Kanzler to a nearby coffee shop to discuss the Sterling matter.

11. Marl and Strait informed Kanzler that the City had never before unilaterally removed anyone from a long-term incentive pay position unless it was for poor performance or to address a shortage of patrol officers.<sup>1</sup> Kanzler did not want to address Sterling's performance. He responded that he could "raise the bar" on the PIO position so that Sterling could not meet the requirements. As the meeting became more intense, Kanzler told Strait and Marl that they could challenge his decision to move Sterling out of the PIO position, but he was confident he would prevail. Chief Kanzler then stated that he could also remove Marl and Strait from their detective positions if he wished.

12. On February 22, 2005, shortly after the coffee shop meeting, Kanzler e-mailed the entire police department, stating in relevant part:

"It has been the policy of this department to assign personnel to specialty positions and then rotate interested personnel through these positions on 'as needed' [*sic*] basis. Recently, there has been some confusion as to the policy of this department when dealing with special assignment positions, so to clarify the policy I am providing official notice of the policy with regard to special assignment positions.

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<sup>1</sup>Periodically, the City has temporarily reassigned officers to cover special circumstances, but it informed the officers before their transfer that the assignment was temporary. In addition, the City occasionally removed an employee from a detective position at the employee's request. The Association established that with one exception, no one had been removed from a long-term detective or PIO position involuntarily except for poor performance or to address a shortage of patrol officers.

“Effective August 1, 2005, specialty assignment positions are non-promotion positions that may or may not receive additional pay for carrying out additional duties in the furtherance of the mission, duties, and responsibilities of the Milwaukie Police Department. These additional duties include, but are not limited to:

- “\* Police Detective
- “\* Detective Sergeant
- “\* \* \* \* \*
- “\* Public Information Officer
- “\* \* \* \* \*
- “\* Police Lieutenant
- “\* Police Captain
- “\* Police Deputy Chief

“Personnel in specialty assignments will ‘routinely’ be evaluated annually for continuance in these assignments. However, the goal of specialty assignments is to provide job skill enhancement and job mobility throughout the department. It would be unfair to the rest of the department to assign someone to a position for the duration of their employment and would encourage nonperformance.”

13. By letter dated February 23, 2005, the Association took issue with Kanzler’s e-mail. It asserted that removing incumbents from an incentive pay position violated the contract, and it demanded to bargain over any changes to the incentive pay positions.

14. On February 25, 2005, Kanzler raised the expectations for the PIO position held by Sterling.

15. On March 3, Sterling resigned from the PIO position effective March 17, 2005.

16. On March 4, the Chief replied to the Association’s February 23 demand-to-bargain letter. In his letter, the Chief stated that specialty assignment positions do not involve a mandatory subject of bargaining and the contract gives the Chief the discretion to assign employees as he sees fit. The Chief acknowledged the Association’s right to file a grievance or an unfair labor practice complaint. He further

stated his intent to make specialty pay assignments for two years. "At the end of two years I would review the assignment with the individual and make a determination as to continuing the assignment or reassigning the duties."

17. In June 2005, the Department began investigating the conduct of bargaining unit member J. R. Oleyar. The Chief subsequently suspended Oleyar in late September

18. On October 3, the Association filed a step 2 grievance on behalf of Oleyar.

19. In a conversation with Sergeant John Hipes, the Chief was irritated and stated that the Association should not defend members such as Oleyar.

20. Sometime between October 3 and October 18, Hipes told Marl that the Chief was "pissed" because the Association was "sticking up for J. R. [Oleyar]."

21. On October 18, 2005, the Chief e-mailed Marl and Strait that he was going to rotate them out of their detective positions, one in June 2006 and the other in December. He asked which one wanted to rotate out first. The Chief met almost daily with Captain James Colt to discuss management and personnel issues. They spoke frequently about the general idea of rotating detectives, but the rotation of Marl and Strait was never raised or discussed.

22. In the past decade, officers have been assigned as detectives for varying lengths of time. Some were assigned on a case basis, others for a few months, and others remained in the position for up to five years. No one has remained in the position for more than five years. Detectives either "burned out" and requested a transfer, or the Chief reassigned them to cover shortages in patrol or for performance reasons. One detective was reassigned to patrol after he announced he would be leaving the force for a position with the Portland Police Department.

21. Neither the City nor the Association has bargained or attempted to bargain language concerning the length of assignments. The current language regarding special assignments is approximately the same as in several prior contracts, except for the percentage of the incentive pay.

22. Employees in special assignments, such as detectives, are paid special assignment pay (SAP) in addition to their regular officer rates. When they are removed

from the assignment, either voluntarily or involuntarily, they no longer receive the extra pay.

25. A police officer who is promoted to sergeant is subject to a six-month probationary period in the new position. When an officer becomes a detective, there is no probationary period.

### CONCLUSIONS OF LAW

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

This complaint arises from the City's decision to involuntarily transfer two Association officers from their detective positions to patrol positions, resulting in their loss of premium pay. The Association alleges that the transfers violate both ORS 243.672(1)(e) and (1)(a). First, it asserts that an assignment to the detective position is a promotion. As such, removal from the position concerns a mandatory subject of bargaining and the City violated subsection (1)(e) when it decided to make the transfer without first negotiating with the Association. The City responds that assignment as a detective is just that—an assignment and thus a permissive subject of bargaining. Second, the Association alleges that the City's decision to transfer the detectives violated subsection (1)(a) because the action restrained, interfered with, or coerced employees in or because of their exercise of protected rights.<sup>2</sup> The City argues that it had the contractual right to transfer the detectives and did so for legitimate business reasons. We first consider the Association claim that the decision to transfer Marl and Strait violated subsection (1)(e).

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<sup>2</sup>ORS 243.672(1)(a) identifies two separate and independent violations, a "because of" violation and an "in the exercise" violation. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 739 (2004). There is some confusion here about which violations are at issue. The ALJ concluded that only the "in the exercise" prong is at issue; the City argues that only the "because of" prong is at issue; and the Association asserts that both prongs are at issue. Based on a fair and non-technical reading of the complaint, as well as our review of the evidence adduced at hearing, we conclude that both prongs of subsection (1)(a) are at issue. Considering both prongs should not surprise or prejudice the City. The ALJ alerted the parties that the "in the exercise" prong was at issue, and the City litigated and argued the case under the "because of" prong.

2. The City did not violate ORS 243.672(1)(e) when it decided to transfer Marl and Strait out of their detective assignments without first bargaining with the Association.

ORS 243.672(1)(e) requires the City to bargain in good faith with the Association. The obligation to bargain in good faith includes the duty to bargain to completion before changing the *status quo* regarding a mandatory subject of bargaining that is not addressed in the parties' contract. *Oregon AFSCME Council 75 v. State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-56-99, 19 PECBR 76, 89 (2001). The City is entitled to change permissive subjects without bargaining, although in some instances it may be required to bargain over the impacts of the change. *FOPPO v. Corrections Division*, Case No. C-57-82, 7 PECBR 5649, 5654-55 (1983). When presented with a claim of an unlawful unilateral change, we must determine (1) whether the employer changed the *status quo* and (2) whether the change concerns a mandatory subject for bargaining. *OSEA v. Bandon School District*, Case No. UP-26/44-00, 19 PECBR 609, 619 (2002).

The parties' contract is silent on the length of special assignments. We therefore look to the parties' past practice to define the *status quo*. See *East County Bargaining Council v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184, 9192 n. 11 (1986) (the parties' past practice can create the *status quo*). The City has never involuntarily removed an employee from a long-term detective position except for poor performance or to address the need for additional patrol officers. The City did not decide to remove Marl and Strait from their detective assignments because of their performance or the need for more patrol officers. The City's actions in regard to Marl and Strait thus constituted an unbargained change in the *status quo*.

The crux of this dispute is whether the change in the *status quo*—the City's decision to remove two police officers from their special assignments as detective, and the attendant loss of premium pay—concerns a mandatory subject for bargaining. If it concerns a mandatory subject, the City has made an unlawful unilateral change as alleged. If not, the City can lawfully make the change without bargaining and we will dismiss the complaint.

The parties characterize the City's actions differently. The Association argues that an assignment to a detective position is a promotion and therefore concerns a mandatory subject of bargaining. See *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-91-93, 14 PECBR 832, 868-69 (1993), *AWOP 133 Or App 602, 892 P2d 1030, rev den 321 Or 268, 895 P2d 1362 (1995)* (a proposal that allows bargaining unit members to take advantage of promotional

opportunities created by management is mandatory). A promotion is a raise in position or rank. *Springfield Police Association v. City of Springfield*, Case No. UP-37-94, 15 PECBR 325, 334 (1994), *rev'd and remanded in part, aff'd in part* 134 Or App 26, 894 P2d 546, *order on remand* 16 PECBR 139 (1995). The Association also observes that the detective position includes an additional 7.5 percent SAP and that wages are a *per se* mandatory subject of bargaining under ORS 243.650(7)(a).

The City argues that assignment to detectives is just that—an assignment and thus a permissive subject for bargaining. ORS 243.650(7)(f) (assignment of duties is permissive); and *Lane County v. Lane County Peace Officers Association*, Case Nos. UP-102/105/109-93, 15 PECBR 53 (1994) (same). The City further notes that the 7.5 percent special assignment pay is covered by the collective bargaining agreement and argues that the Association has thus waived its right to further bargaining over pay issues.

The parties do not dispute the general proposition that promotion is mandatory for bargaining and assignment is permissive. Nor do they seriously dispute that the City was required to bargain if the detective position concerns a mandatory promotion but not if it concerns a permissive assignment. The dispositive issue, then, is whether appointment to, and removal from, a detective position concerns promotion or whether it concerns assignment.<sup>3</sup>

To properly characterize the City's actions, we balance the actual effect of the actions to determine if they have a greater impact on assignment or on promotion. *International Association of Firefighters, Local 314 v. City of Salem*, Case No. C-61-83, 7 PECBR 5819, 5824-27 (1983), *aff'd* 68 Or App 793, 684 P2d 605, *rev den* 298 Or 150 (1984); and *Springfield Education Association v. Springfield School District No. 19*, Case Nos

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<sup>3</sup>The City also argues that it acted lawfully when it removed Marl and Strait from their detective positions because the collective bargaining agreement gives the City the right to assign its employees. This argument begs the question of whether the City's conduct is properly characterized as an assignment.

We also note that the parties' contract contains a maintenance of standards clause that requires the City to maintain all mandatory subjects at not less than the level that existed when the parties signed the agreement. If the City's conduct is properly characterized as a promotion/demotion issue, it may be subject to this provision. But again, this begs the question of whether the City's actions are properly characterized as a promotion/demotion issue.

C-144/161-83, 7 PECBR 6357, 6385-88 (1984).<sup>4</sup> Based on the facts in this case, we conclude that on balance, the detective position has a greater impact on assignment than on promotion.

The parties' collective bargaining agreement provides insight into how the parties themselves treated the detective position. The recognition clause of the agreement makes the Association the exclusive representative of the following classifications: police recruit, police officer, police sergeant, and police technician. There is thus a natural ladder of progression from recruit to police officer to sergeant. We find it significant that there is no separate detective classification, and thus no ladder of progression from patrol officer to detective. Nor are there any of the normal prerequisites for promotion such as a written examination or a waiting list. And unlike other promotions in the police department, the change from police officer to detective does not include a probationary period in the new position.

In addition, the parties' agreement specifically calls the extra pay for detectives special "*assignment*" pay. The employees understand that they receive the additional pay only while they perform this special assignment. When they are relieved of that assignment, they no longer receive the pay. Further, the special assignment pay is based on a percentage of the member's regular pay. There is no separate salary schedule for detectives. The foregoing factors all indicate the matter concerns assignment.

On the other side of the scale, the parties recognized that special assignments such as detective may carry additional duties, and they therefore negotiated

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<sup>4</sup>Our cases identify two distinct "scope of bargaining" issues that we resolve by using a balancing test. The first is the "generic" question of whether a general subject is mandatory or permissive for bargaining. We sometimes use a balancing test to make this decision. ORS 243 650(7)(c) (subjects are permissive if they have "a greater impact on management's prerogative than on employee wages, hours, or other terms and conditions of employment"). There is no need to apply this balance here. As described in the text, the "generic" scope issue is not in dispute. The parties agree that promotion is mandatory and assignment is permissive.

The issue here involves the second type of scope issue. The dispute is which of two generic subjects—promotion or assignment—best characterizes the particular actions of the City. Again we use a balancing test. We weigh the impact of the City's actions on a condition of employment against the impact on a management right. Here, we weigh the impact of the City's actions on promotion against the impacts on assignment.

extra pay to cover those duties.<sup>5</sup> Promotions typically include extra pay. The fact that extra pay is attached to the detective position is one indication that it constitutes a promotion.

In *Springfield Police Association v. City of Springfield*, Case No. UP-37-94, 15 PECBR 325 (1994), *rev'd and remanded in part, aff'd in part* 134 Or App 26, 894 P2d 546, *order on remand* 16 PECBR 139 (1995), the union argued that additional pay made a detective position a promotion from patrol duty. We specifically noted that the amount of money involved was slight and was based primarily on considerations of on-the-job clothing. We concluded that such a small amount of money was not sufficient to make the position a promotion. 15 PECBR at 334. The additional pay here is more substantial, in excess of \$300 per month for police officers at the higher steps of the pay scale. Extra pay alone, however, does not make the detective position—or other premium pay positions such as motorcycle patrol, dog handler, or coach—a promotion from police officer. We also note that detectives here must undergo training for the position, so unlike *Springfield Police*, the employees cannot be “interchangeably assigned” between patrol and detectives.

Although it is a reasonably close call, we conclude that on balance, based on the totality of the evidence in this record, the detective position is an assignment. It is thus permissive for bargaining and the City was entitled to change the assignment without bargaining. We will dismiss the Association’s subsection (1)(e) claim

3. The City violated ORS 243.672(1)(a) when it notified Marl and Strait that they were to be removed from the detective position.

ORS 243.672(1)(a) makes it an unfair labor practice 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 public employees the right to “form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations.”

Subsection (1)(a) contains two separate prohibitions. First, it prohibits employer actions that interfere with, restrain, or coerce employees “because of” their

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<sup>5</sup>We reject the Association’s argument that the City was required to bargain the economics of the removal from a detective position. The parties already bargained over the additional compensation for detective work and neither party is obligated to bargain the matter again during the life of the contract.

exercise of protected rights; and second, it prohibits employer actions that interfere with, restrain, or coerce employees “in the exercise” of protected rights. *Lane County Public Works Association v. Lane County*, Case No. UP-15-03, 20 PECBR 596, 603 (2004). The Association alleges the City violated both portions of subsection (1)(a) when it decided to remove Marl and Strait from their detective positions and place them back on patrol.

“Because of” Claim

The “because of” portion of ORS 243.672(1)(a) prohibits a public employer from basing its actions on an employee’s protected union activity. A complainant does not need to show that the employer acted with hostility or anti-union animus. *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 22 PECBR 61, 92 (2007). A complainant needs to show only that “the employer was motivated *by the protected right* to take the disputed action.” *Amalgamated Transit Union v. Tri-County Metropolitan Transit District*, Case No. UP-48-97, 17 PECBR 780, 788 n. 8 (1998) (emphasis in original). The emphasis is on the reason for the employer’s action. *Portland Association of Teachers and Poole v. Multnomah School District No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000).<sup>6</sup> Accordingly, we begin our analysis by examining the record to determine the reason the employer acted. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 741 (2004); see *Portland Association of Teachers and Poole*, 171 Or App at 626 (this Board acts as a “trier of fact” in determining whether the employer was motivated to act by an employee’s exercise of protected activity).

Here, the Association and the City offer different reasons for the City’s decision to remove Marl and Strait from their detective positions. The Association asserts the City acted because of Marl and Strait’s protected union activities; the City asserts it acted for legitimate, non-discriminatory reasons. In cases such as this, there is rarely direct evidence of the employer’s motive; we instead must rely on circumstantial evidence to infer the motive. *Portland Association of Teachers and Poole*, 171 Or App at 624. We will therefore examine the circumstances surrounding the City’s decision in order to determine why it acted.

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<sup>6</sup>The City argues that we should not examine the reasons for its actions because the parties’ collective bargaining agreement permits it to assign and remove employees from detective positions. We disagree. Although the agreement gives the City the power to assign employees, the City cannot exercise that power for an unlawful reason.

The first pertinent event took place in February 2005.<sup>7</sup> Chief Kanzler decided to remove a bargaining unit member from his position as Public Information Officer (PIO). As a result, the employee would lose his 5 percent special assignment pay. Marl and Strait, in their capacities as union officials, met with Chief Kanzler to discuss the matter. Kanzler took the position that he had the authority to remove the PIO whenever he wanted; Marl and Strait argued that doing so would change the historical practice. As the meeting became more intense, Kanzler stated that he could also remove Marl and Strait from their positions as detectives.

In these circumstances, we understand the Chief's comment about removing Marl and Strait to be a threat. Marl and Strait were acting as Association representatives, and they were challenging the Chief's personnel decision. In essence, the Chief was telling Marl and Strait he could take away their 7.5 percent special assignment pay, and he said it during an intense disagreement over a matter in which Marl and Strait were acting as union representatives for a bargaining unit member. In this context, we view the Chief's statement that he could remove Marl and Strait from their detective assignments as a threat based on their protected union activity.

When an employer threatens to act based on protected activity, we will infer that a subsequent act that fulfills the threat has the same unlawful motive. *Tigard Police Officers Association v. City of Tigard*, Case No. C-70-84, 8 PECBR 7989, 8000-8001 (1985). In October 2005, the Chief announced his decision to remove Marl and Strait from their detective positions. This was precisely what he had threatened to do, so we infer that his decision was similarly based on Marl and Strait's protected activity.

The timing of the Chief's announcement is also a factor. He announced his decision to transfer Marl and Strait on October 18, 2005, just 15 days after the Association filed a grievance challenging the Chief's decision to suspend bargaining unit member Oleyar. The Chief was irritated and told a sergeant that the Association should not defend Oleyar. The sergeant passed the Chief's comments along to Marl.

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<sup>7</sup>This event occurred outside the 180-day statute of limitations in ORS 243.672(3). For this reason, we may not conclude that the incident itself constitutes an unfair labor practice. *Blue Mountain Faculty Association v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 751 n. 38 (2007). We may, however, consider the evidence to provide context and explain the significance of events that occurred within the 180 days. *Oregon School Employees Association v. Port Orford-Langlois School District 2J*, Case No. UP-54-92, 13 PECBR 822, 823 (1992).

When an employer's action closely follows protected activity, we will infer a causal connection unless circumstances indicate a legitimate reason for the timing. *AFSCME Council 75, Local 3694 v. Josephine County*, 22 PECBR at 95. At oral argument, the City suggested that the timing was legitimate because another detective was leaving and it was cost-effective to train all of the new detectives at once. The record does not indicate the Chief ever considered this rationale or that there would be any cost savings. All the Chief testified to in hearing is that another detective was leaving and he was going to rotate the positions occupied by Marl and Strait. He did not mention convenience or cost. In fact, there is little evidence that the Chief engaged in any deliberative process at all before deciding on the transfers.<sup>8</sup> The Chief did not, for example, ever mention the Marl and Strait rotations to Captain Colt, even though the Chief and Colt met almost daily to discuss management and personnel issues.

The City has identified no legitimate reason to transfer Marl and Strait when it did. Based on the timing, we infer that the transfers were in response to the filing of the Oleyar grievance. This inference is bolstered by the fact that the Chief openly expressed his displeasure with the grievance.

Another factor is that the Chief failed to follow his own policy regarding assignments. In his February 22, 2005 e-mail to the entire department, he said that employees in "specialty assignments" would be evaluated annually for continuance in those positions. Then, on March 4, 2005, in a letter to the Association, the Chief said he intended to make all specialty assignments for two years, and after two years he would "review the assignment with the individual and make a determination as to continuing the assignment or reassigning the duties." The Chief did not follow either policy. There is no evidence in this record that he made an annual evaluation of Marl and Strait or that he met with them to review their assignments.

We also find it suspicious that the only employees rotated at this time were Marl and Strait, two Association officials. In fact, besides Marl and Strait, the Chief has not involuntarily removed another similarly situated employee from a detective position since his tenure began in 1999.

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<sup>8</sup>In regards to the timing of the transfers, we also note that detective work requires additional skills and training, and there are only three or four detectives in the Department at any time. When one experienced detective announced he was leaving, it made little sense for the Chief to also rotate out two other experienced detectives within a six-month period and bring in all new people who lack the necessary skills and experience.

All of this evidence taken together strongly suggests the City removed Marl and Strait from their detective positions because of their union activities.

The City alleges it had several legitimate reasons for the transfer. The Chief had been considering the idea of rotation for some time. The Chief and Captain Colt discussed rotating specialty assignments as early as 2000. According to the City, “the Chief desired to use the assignments to cross-train multiple employees, heightening the overall skill and responsiveness of the department, to provide opportunities for special assignment to more employees to increase officer retention, and to utilize his discretion to keep officers from becoming burned out and unproductive in their duties.” (Respondent’s Post-Hearing Brief at 29-30 )

These are all legitimate, non-discriminatory reasons for a rotation policy. There is, however, little evidence that the Chief actually considered or applied these reasons in his decision to rotate Marl and Strait out of their detective positions. *See AFSCME Council 75, Local 3694 v. Josephine County*, 22 PECBR at 97 (legitimate reasons that were not actually considered have no place in the Board’s subsection (1)(a) analysis). For example, the Chief never mentioned to Captain Colt that he planned to rotate Marl and Strait, even though the Chief met with Colt almost daily to discuss management and personnel issues. Further, although these reasons may explain why a rotation policy is legitimate as a general matter, they do not explain why the rotations had to occur when they did, or why the only ones rotated were Association officials Marl and Strait. After weighing the evidence, we find that the City’s asserted reasons are pretext and that the real reason it rotated Marl and Strait out of their detective positions was because they were union officials who represented bargaining unit members in disputes with the Chief.

Once we determine the reason the City acted, we must next decide if the reason is lawful. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, 20 PECBR at 741. Marl and Strait engaged in protected activity when they represented bargaining unit members in disputes with the City. An underlying purpose of the PECBA is to encourage “practices fundamental to the peaceful adjustment of disputes arising out of differences as to wages, hours, terms and other working conditions \* \* \*” ORS 243.656(3). That purpose is attained only if employees and their representatives are free to present their workplace disputes to the employer. *E.g., Portland Association of Teachers and Bailey v. Multnomah County School District #1*, Case No. C-68-84, 9 PECBR 8635 (1986) (right to file and pursue grievances is protected activity). We conclude without difficulty that it was unlawful for the City to remove Marl and Strait from their detective positions, with the attendant loss of 7.5 percent of their pay, because of their

protected activity. The City's actions violate the "because of" portion of ORS 243.672(1)(a).

"In the Exercise" Claim

We turn next to the "in the exercise" portion of ORS 243.672(1)(a). Under this provision, the City's motive is irrelevant. Instead, we examine the consequences of the employer's actions. If these actions, viewed objectively, would have the natural and probable effect of deterring a reasonable employee from engaging in protected activity, the employer violates the "in the exercise" portion of subsection (1)(a). *Portland Association of Teachers and Poole*, 171 Or App at 624. There are two types of "in the exercise" violations, derivative and independent. An employer that violates the "because of" portion of subsection (1)(a) also commits a derivative violation; an employer may also independently violate the "in the exercise" portion, typically by coercive or threatening statements. *State Teachers Education Association v. Willamette Education Service District*, Case No. UP-14-99, 19 PECBR 228, 249 (2001), AWOP 188 Or App 112, 70 P3d 903 (2003).

The City argues that it did not commit an "in the exercise" violation because the Association failed to prove that its activities actually chilled any bargaining unit member in the exercise of protected rights. The Association does not need to prove any actual interference, restraint, or coercion. *Teamsters Local 206 v. City of Coquille*, Case No. UP-66-03, 20 PECBR 767, 776 (2004) (citing cases). It must show only that a chill in the exercise of protected rights is the natural and probable consequence of the disputed activity.

The City committed a derivative "in the exercise" violation. We have already concluded that the City violated the "because of" portion of subsection (1)(a). As we stated in *Portland Association of Teachers and Bailey v. Multnomah County School District #1*, 9 PECBR at 8650, "[i]t is difficult to envision an instance of 'but for' discrimination that would not, *ipso facto*, restrain or coerce employees in the exercise of ORS 243.662 rights." Here, the consequences Marl and Strait suffered because of their union activities were clear for all to see. The Chief removed them from their preferred position as detectives and thereby reduced their salary by 7.5 percent. Any reasonable bargaining unit member would naturally and probably be deterred from exercising their protected rights in light of such consequences.

We choose not to address the question of whether the City additionally committed an independent violation of the "in the exercise" portion of subsection (1)(a).

We have already found two violations of subsection (1)(a)—one under each prong—and it would add nothing to the remedy to find a third.

### Remedy

Under ORS 243.676(2)(b), we are required to enter a cease and desist order whenever we determine that a party committed an unfair labor practice. We will do so here. In addition, the statute permits affirmative relief, including reinstatement with back pay, when necessary to effectuate the policies of the PECBA. ORS 243.676(2)(c). Reinstatement and back pay are necessary here. When an employee loses pay or a position in violation of ORS 243.672(1)(a), we invariably order the employer to make the employee whole with reinstatement and back pay. *AFSCME Council 75, Local 3694 v. Josephine County*, 22 PECBR at 101-102 (citing cases). Accordingly, we will order the City to restore Marl and Strait to their detective positions and make them whole for any pay and benefits they lost because of the transfer, plus interest, minus interim earnings.<sup>9</sup>

In addition, we will order the City to post the attached notice. *See Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, *AWOP 65 Or App 568, 671 P2d 1210 (1983), rev den 296 Or 536 (1984)*. The City's actions impacted the entire bargaining unit. The natural and probable effect of the actions was to chill all bargaining unit members in the exercise of PECBA-protected rights. The City's actions also made it potentially more difficult for the Association to represent the bargaining unit. Employees would naturally be reluctant to serve as Association officials or to represent employees in disputes with management if they understood they could lose pay and benefits as result. Posting a notice is an appropriate way to assure employees they are free to engage in protected activity without fear of retaliation.

### ORDER

1. The City shall cease and desist from interfering with, restraining, or coercing members of the Association bargaining unit in or because of their exercise of PECBA-protected rights.

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<sup>9</sup>The City asserts that restoring Marl and Strait to their detective positions would mean the City could never reassign anyone who was involved with the Association. Our decision is not nearly so sweeping. The City can exercise its right to reassign employees, including those involved with the Association, so long as it does so for legitimate, non-discriminatory reasons. It cannot reassign them because of their Association activities.

2. The City shall reinstate Floyd Marl and Luke Strait to their detective positions and make them whole for any loss of pay or benefits caused by their reassignments, minus interim earnings, plus interest at 9 percent per annum.

3. The City shall sign and prominently post the attached Notice to Employees in each City building or facility where bargaining unit members work. The Notice shall be posted within 14 days of the date of this Order and shall remain posted for a period of 30 consecutive days.

4. The remaining elements of the complaint are dismissed.

DATED this 26<sup>th</sup> day of November 2007.



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Paul B. Gamson, Chair

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\*Vickie Cowan, Board Member



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Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

\*Board Member Cowan has recused herself.



## NOTICE TO EMPLOYEES

### POSTED BY ORDER OF THE STATE OF OREGON EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-63-05, Milwaukie Police Employees Association v. City of Milwaukie, and in order to effectuate the policies of the Public Employee Collective Bargaining Act, we hereby notify our employees that:

Milwaukie Police Employees Association (Association) filed an unfair labor practice complaint against the City of Milwaukie (City) alleging that the City violated the Public Employee Collective Bargaining Act (PECBA).

ORS 243.672(1)(a) makes it an unfair labor practice 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 provides: “Public employees have 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.”

The Board concluded that the City violated the law by interfering with, restraining, or coercing employees in and because of the exercise of rights under the PECBA when it transferred Officers Marl and Strait and reduced their pay.

The Board ordered the City to cease and desist from violating the statute, to reinstate Marl and Strait to their detective positions with back pay, and to post this notice in a prominent place for 30 days at all City facilities where members of the bargaining unit work.

The City will comply with the Employment Relations Board’s Order.

City of Milwaukie

Dated \_\_\_\_\_, 2007

By: \_\_\_\_\_

Employer Representative

\_\_\_\_\_  
Title

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### **THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED**

*This notice must remain posted in each employer facility in which bargaining unit personnel are employed for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other materials. Any questions concerning this notice or compliance with its provisions may be directed to the Employment Relations Board, 528 Cottage Street N E, Suite 400, Salem, Oregon 97301-3807, phone (503) 378-3807*