

The following issues are presented:

1. Did the County contract out County mental health services in retaliation for the AFSCME strike and other activities protected under the Public Employee Collective Bargaining Act (PECBA)? If so, did this conduct violate ORS 243.672(1)(a), (b), or (c)?
2. Did County managers tell Daniel Burdis and Michael Thor that the County contracted out mental health services because of AFSCME's strike? If so, did this conduct violate ORS 243.672(1)(a)?
3. Should the County be required to pay a civil penalty?

RULINGS

1. Prior to the hearing, the County objected to the ALJ's statement of the issues. The County proposed replacing all references to contracting out in the statement of the first two issues with references to discontinuing mental health services. The County contended that its alternative phrasing more accurately described the events that occurred. The County's objection regarding the statement of the issues is dealt with in the Conclusions of Law.

2. In its November 22, 2006 answer to the complaint, the County asserted, as an affirmative defense, that AFSCME was estopped from claiming that the County acted unlawfully when it contracted out mental health services. Specifically, the County alleged that AFSCME was estopped because it bargained in bad faith in violation of ORS 243.672(2)(b). According to the County, AFSCME failed to raise any issues regarding the County's unlawful conduct during negotiations about the impacts of the County's decision to transfer mental health services.

On January 24, 2007, AFSCME moved to strike the County's estoppel defense. The ALJ granted the motion.

For purposes of a motion to dismiss, we assume the facts alleged in the complaint are true. *SEIU Local 503 v. State of Oregon, Judicial Department*, Case No. UP-6-04, 20 PECBR 677, 678 (2004). This Board must decide whether the facts alleged, if proven, would establish the allegations asserted. *See Duley v. Gresham Police Officers Association*, Case No. UP-127-91, 13 PECBR 397 (1992) (dismissal of an unfair labor practice complaint warranted where the complaint did not allege facts which, if true, would establish a violation of the law).

Assuming *arguendo* that the County could prove its allegations that AFSCME violated ORS 243.672(2)(b) by bargaining in bad faith over the impacts of transferring mental health services, AFSCME's conduct would not constitute a defense against any allegedly unlawful actions by the County. The fact that one party has committed an unfair labor practice does not constitute a defense against another party's unlawful conduct. See *Portland Association of Teachers v. Portland School District*, Case Nos. UP-35/36-94, 15 PECBR 692, 725 (1995). The ALJ correctly granted AFSCME's motion to strike the County's affirmative defense of estoppel.

3. At the hearing, AFSCME offered Exhibits C-81 through C-87 as part of its rebuttal case. The County objected to the admission of these exhibits on the grounds that the exhibits were not provided to the County in advance of the hearing as ordered by the ALJ in his November 9, 2006 letter. The County contended that the exhibits should not be received under OAR 115-010-0068, which provides that this Board has discretion to reject exhibits offered by a party who fails to comply with an ALJ's prehearing requirements regarding exhibits. This Board typically rejects exhibits when the party offering them gives no explanation for its failure to comply with a prehearing order to exchange exhibits. *General Teamsters Local Union No. 324 v. Evergreen-Doe Humane Society*, Case No. PR-1-94, 15 PECBR 746, 747 (1995); and *Central Linn Education Association v. Central Linn School District*, Case No. UP-7-96, 17 PECBR 194, 195 (1997). This Board frequently excuses non-compliance and accepts exhibits when the party seeking to offer the exhibits demonstrates good cause. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-53-00, 19 PECBR 656, 658 (2002), *aff'd* 187 Or App 92, 67 P3d 951 (2003); and *Hillsboro Education Association v. Hillsboro School District*, Case No. UP-7-02, 20 PECBR 124, 127 (2002), *AWOP* 192 Or App 672, 89 P3d 688 (2004).

We have stated that the purposes of OAR 115-010-0068 are to streamline proceedings, eliminate undue surprise, and facilitate discussion of a possible settlement. *Morgan-Tran v. AFSCME Local 88 and Multnomah County*, Case No. UP-67-03, 20 PECBR 948, 950 (2005) (quoting *Cascade Bargaining Council v. Crook County School District*, Case No. UP-83-94, 16 PECBR 231, 233 (1995)). Evidence may be excluded if the party seeking to offer it did not comply with the ALJ's prehearing order. *Morgan-Tran*, 20 PECBR at 950, citing *Oregon Public Employees Union, SEIU, Local 503 v. State of Oregon, Oregon State Hospital*, Case No. UC-37-96, 17 PECBR 434 (1997)). We will consider each of the exhibits offered under these standards. The County objects to a number of exhibits concerning the timing of the County's decision to privatize mental health services: Exhibits C-81 and C-82, statements made by County Commissioners Jim Riddle and Dwight Ellis during their campaigns; Exhibit C-84, handwritten notes made by AFSCME official Daniel Burdis regarding a conversation he had with County Human

Resources Officer Kent Granat about privatization of County mental health services; and Exhibit C-85, a copy of minutes taken at a February 14, 2005 meeting of County managers. During its case-in-chief, the County presented a significant amount of evidence and testimony to show that privatization of mental health services was a long-standing and well-publicized goal of County managers and elected officials. AFSCME may reasonably have been unaware of the need for these exhibits until the County presented its case-in-chief at the hearing. Under these circumstances, we find good cause to accept these exhibits. We also note that the County never alleged that it was unfairly surprised by these exhibits. It is unlikely that the County would be surprised by three of these documents, Exhibits C-81, C-82, and C-85, since they consist of statements made by County managers and elected officials. For these reasons, Exhibits C-81, C-82, C-84, and C-85 will be admitted into evidence.

AFSCME failed to present any explanation of the relevance of Exhibit C-83, a copy of notes taken by an AFSCME representative during a May 25, 2006 bargaining session about the impacts of the County's decision to privatize mental health services, or Exhibit C-86, a January 12, 2006 newspaper article concerning the AFSCME strike. The relevance of these exhibits is not readily discernible and Exhibits C-83 and C-86 will not be admitted into evidence.

Exhibit C-87 is a transcript of a portion of a January 31, 2006 radio show in which County Commissioner Riddle commented about privatization of County mental health services. AFSCME provided the County with a copy of Exhibit C-87 at the hearing, as well as a copy of the audiotape from which the transcript was made. The County does not dispute that AFSCME complied with all procedural requirements needed to offer a transcript of an audiotape as an exhibit to this Board—the transcriptionist signed a notarized statement that the transcript was a verbatim transcript of the identified tape, and AFSCME provided the County with a copy of the transcript and the full audiotape from which the transcript was made. However, the County objects to Exhibit C-87 on the grounds that it did not have sufficient time to review these materials in advance of the hearing. *See Van Dyke v. State of Oregon, Department of Fish and Wildlife*, Case No. MA-6-01 (November 2002); and *Fairbank v. State of Oregon, Eastern Oregon Training Center*, Case No. MA-3-98 (March 2000). Because Exhibit C-87 involves both an audiotape and a transcript, it requires more time for a meaningful review than most other types of exhibits. Nonetheless, we find that Exhibit C-87 was properly offered by AFSCME to rebut evidence presented by the County during its case-in-chief concerning the timing of the County's decision to privatize mental health services. The County never demonstrated that it was placed at a disadvantage or surprised by Exhibit C-87. It is unlikely that the County would be surprised by this exhibit, since it consists of public statements made by County

Commissioner Riddle, who was a County witness. Accordingly, Exhibit C-87 is admitted into evidence.

4. In its brief, the County asks that we take official notice of the fact that no law has been enacted to replace the money provided to the County from federal Oregon and California (O & C) funds. O & C funds are a significant source of revenue for the County budget. In support of its request that this Board take official notice of the end of O & C funding, the County submitted a newspaper article dated May 15, 2007 with its brief.

Agencies “may take notice of judicially cognizable facts, and may take official notice of general, technical or scientific facts within the specialized knowledge of the hearing officer or agency. * * *” ORS 183 450(4). The existence (or non-existence) of a federal law is a fact of which it is appropriate to take official notice. We will take official notice of the fact that no legislation has been enacted that would replace funds the County lost because the O & C program ended. *See Arlington Education Association v. Arlington School District No. 3*, 177 Or App 658, 34 P3d 1197 (2001), *rev den* 333 Or 399, 42 P3d 1243, 1244 (2002). We will not, however, take official notice or otherwise accept into evidence the newspaper article the County submitted with its brief.

5. In its brief, the County submitted a copy of a November 21, 2005 proposal made by AFSCME in contract bargaining, and asks that the record be reopened and the proposal admitted into evidence. AFSCME’s bargaining proposal would modify a “me too” clause to state: “contracted/privatized’ jobs/employees will continue to be under the provisions of the ‘me too’ agreement until final adjudication or settlement of the court case is resolved for the statutory contract continuance period.” The County offered this document to impeach the credibility of AFSCME witness Burdis. According to the County, Burdis testified at the hearing that he was ignorant of the County’s plans to privatize prior to the strike. The County contends that AFSCME’s November 21, 2005 proposal indicates that AFSCME was well aware of County plans to privatize at the time the proposal was made. The County asserts that it did not offer this evidence at the hearing because the County could not reasonably foresee what Burdis would testify about at the hearing.

As a general rule, this Board will not grant a motion to reopen a record for submission of additional evidence unless the evidence offered is material to the issues and was unavailable at the time of the hearing, or there is some other “good and substantial reason” why the evidence was not presented at the hearing. *Cascade Bargaining Council v. Bend-LaPine School District*, Case No. UP-33-97, 17 PECBR 609, 610 (1998) (cites omitted.) Our standard is high for granting a post-hearing motion to

reopen a record for submission of additional evidence. We have granted this type of motion in cases where the evidence was not in existence at the time of the hearing. *Polk County Deputy Sheriff's Association v. Polk County Sheriff's Department*, Case No. UC-61-94, 15 PECBR 845, 846 (1995), citing *AFSCME Local 88 v. Multnomah County*, Case No. UP-89-85, 9 PECBR 8782, 8784 (1986), *reversed and remanded on other grounds* 85 Or App 565, 737 P2d 652 (1987), *order on remand* 10 PECBR 364 (1987), *order on petition for stay and reconsider* 10 PECBR 454 (1988), *ruling and supplemented order on remand* 10 PECBR 614 (1988).

Here, the County failed to assert that the proposal was unavailable or demonstrate any other valid reason why the proposal could not have been introduced at the hearing.¹ Accordingly, we will not reopen the record to admit AFSCME's November 21, 2005 proposal concerning contracting out.

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

FINDINGS OF FACT

1. AFSCME is a labor organization and the County a is public employer. Prior to July 1, 2006, AFSCME represented a bargaining unit of approximately 325 County workers that included employees in the County Mental Health Department.

2. The O & C program began in the early 1900s, when the Oregon and California railroad ceased operations and land given to the railroad reverted to the federal government. Josephine County was 1 of 16 Oregon counties that lost a substantial portion of taxable property in this process. To compensate for this loss of revenue, the federal government enacted legislation that divided revenues from timber harvesting equally between the federal government and each of the 16 counties affected by cessation of the Oregon and California railroad.

Beginning in the 1980s, timber harvests in the County began to steadily decrease; they virtually ended by the start of the 1992-93 fiscal year. The federal government then created a formula that gradually reduced the amount of O & C funds that counties received. The federal government stopped using this formula in 2000, and enacted the Federal Secure Rural Schools and Community Self-Determination Act of

¹We note that Burdis testified as a witness during AFSCME's presentation of its case-in-chief on the first day of the hearing, and that the hearing was conducted over a seven-day period, from March 8 through March 15, 2007.

2000, Public Law 106-393 (the Act). The Act abolished O & C funding on June 30, 2006, but provided that from 2001 through 2006, counties would receive O & C payments that were based on an average of the three highest years of past payments.

3. The County is governed by a three-member, elected Board of Commissioners (BCC) that oversees the work of the County's various departments. Prior to June 2006, mental health services was the largest of these departments. The County provided mental health programs in the following areas: alcohol and drug, developmental disabilities, early intervention, mental and emotional disabilities, secure residential treatment, and college scholarships.

4. The County general fund is the County's chief operating fund. Prior to June 30, 2006, general fund revenue came from O & C money, property taxes, motor fuel taxes, fees, and federal and state grants. Historically, O & C funds constituted the largest source of revenue for the County's general fund. For the 2005-06 fiscal year, O & C money provided 39.4 percent of the County's general fund revenues.

County mental health services were funded almost entirely by grants from the state and federal government. In 2005-06, the County budgeted approximately \$26,202,269 for mental health services. County general fund revenues accounted for \$118,626 of this total amount, less than one-half of 1 percent of the mental health services budget.² The County planned to allocate no general fund revenues to the Mental Health Division budget for the 2006-07 fiscal year.

Federal and state funding for County mental health services was calculated using a formula based on the number of clients served. In past years, reduced client loads resulted in some decreases in funding and staff layoffs. Mental health staff did not feel that these cuts affected the quality of services, however, because there were fewer clients to serve.

Each County department pays a specified annual amount to a County indirect service fund (ISF). Money in the ISF is allocated to County departments that provide services to all other County departments, including finance, legal, information systems, personnel, BCC, and general government.

²Revenues for the following programs in the 2005-06 budget were used to calculate these figures: general fund-mental health, Jennifer Patton Memorial Fund, mental health fund 250, developmentally disabled services fund 251, ESCE early intervention fund 252, alcohol and drug fund 253, secured treatment facility fund 270, regional hospital fund 290, Zelzie Reed Early Intervention Trust fund 726, and College Dreams fund 727

5. In July 1995, Robert Beckett, then the director of the County Mental Health Department, developed a plan to privatize County mental health services. Under Beckett's plan, the County would contract with Options of Southern Oregon (Options), a private nonprofit agency, to offer mental health services formerly provided by the County. Beckett proposed that the County retain "mental health authority" which would allow the County to keep ultimate administrative authority over delivery of mental health services.³ Under Beckett's plan, County employees would continue in their same positions but transfer to the new nonprofit agency, with no loss in pay or benefits as a result of this change. Beckett also proposed that employees continue to be represented by AFSCME.

6. By letter dated July 26, 1995, AFSCME Representative Ken Spray wrote County Personnel Officer David Dickman about Beckett's plan to privatize mental health services. The letter stated, in pertinent part:

"I have heard from members at Mental Health that there is a move to go to a private, non-profit entity and then contract with Josephine County to provide Mental Health Services.

"* * * * *

"At this stage the union cannot agree to this transition. We may be able to, but first we need to hold a meeting with appropriate County officials and discuss impacts, etc.

"In closing, we request a copy of the written plan upon receipt of this letter in order to give the Executive Board an opportunity to review the proposal. Also we demand to meet and bargain the impact of this contracting out proposal."

7. Beckett presented his plan for privatization of mental health services to the BCC and department heads, but they were uninterested in pursuing his proposal. Consequently, the County never bargained with AFSCME about the plan.

³ORS 430.630(10)(a)(A) defines a "local mental health authority" as a "board of county commissioners of one or more counties that establishes or operates a community mental health and developmental disabilities program." Under ORS 430.620(1), a board of county commissioners may choose to contract with a public agency or private corporation for mental health and developmental disabilities services.

8. In 2003, County managers and commissioners again discussed the possibility of privatizing mental health services. By letter dated April 28, 2003, AFSCME Representative Lon Holston demanded to bargain over the privatization of County mental health services. Kent Granat, County human resources officer, responded to Holston's letter. Granat told Holston that AFSCME's demand was premature and that privatization was unlikely to occur because it would negatively affect the County budget.

The County prepared an analysis of the financial impact of privatization that showed that if mental health services were privatized, the County would lose \$854,000, the net contribution made by the Mental Health Department to the ISF.⁴

9. In November 2004, AFSCME began negotiations for a collective bargaining agreement to succeed the contract with the County that expired on June 30, 2005.

10. The County has transferred services other than mental health to a private entity, but did so only after completing a comprehensive study and determining that such an action would save the County money. In 2004, the County's Community Action Program (CAP), a program that provided housing, energy, transportation, and other forms of assistance to low-income County residents, began operating at a deficit due to mismanagement of funds. CAP's budget for the 2004-05 fiscal year was \$3,248,847, and the program employed 29 people. The State of Oregon commissioned a study of CAP, which was undertaken by the Mid-Iowa Community Action Program and completed on January 13, 2005. The study recommended that the County transfer the programs offered by CAP to a non-governmental entity—either Umpqua Community Action Network (UCAN) or ACCESS. The study noted that such a transfer would reduce CAP administration costs, make CAP eligible for new funding sources as part of a non-governmental organization, and save the County \$400,000 in administrative costs.

On September 29, 2005, the County transferred its food bank program from CAP to UCAN as part of its implementation of the study recommendations.

11. On January 1, 2005, Jim Riddle and Dwight Ellis began their terms of office as County commissioners. Because Riddle had experience working in the health

⁴This amount was calculated by subtracting \$133,000 (the amount allocated from the County general fund to the Mental Health Department) from \$987,000 (the amount the Mental Health Department contributed to the ISF in 2003.)

care field, he was designated BCC liaison to the County Health and Human Services Departments.

12. In February 2005, Joe Adair, then the interim director of the County Human Services Department, began investigating the possibility of privatizing the College Dreams program. College Dreams was a County mental health program that provided college scholarships to at-risk youth, and was operating at a deficit when Adair began his investigation. For 2005-06, College Dreams had a budget of \$302,020, and three employees.

13. In March 2005, Adair began investigating the possibility of privatizing County human services programs other than College Dreams. Adair considered two options: (1) creating a County non-profit corporation that would contract with the County to offer services previously provided by the County or (2) contracting with existing non-profit entities that would then provide services previously offered by the County. Adair believed that privatization would benefit the County because non-governmental organizations could administer the programs at a lower cost than could the County and could also access new funding sources.

14. On May 3, 2005, Adair spoke to the Board members of Options about his desire to contract with a non-governmental organization to provide mental health services to County residents.

15. By letter dated June 15, 2005, Adair notified AFSCME Representative Holston that funding for the College Dreams program had been greatly reduced and that the County planned "to transfer the program to the YMCA, with current staff, within the allocated funding to Prevention services. Moving the program out will maintain the three staff positions." Adair noted that the College Dreams staff had been notified about the changes that would be occurring.

16. Effective July 1, 2005, the County consolidated its 24 departments into 4 major departments. Mental health became a division of the new Health and Human Services Department; Leslee O'Brien was named director of this department and Adair was appointed head of the Mental Health Division.

Some time after she was hired, O'Brien was directed to create a plan for privatizing programs offered by the Health and Human Services Department. O'Brien told the mental health advisory board, a citizen group that advised the County on

mental health issues, that she anticipated that the process would take two to three years.⁵

17. Negotiations for the new AFSCME contract were contentious and difficult. The County sought a number of major changes in the contract. Changes sought included: eliminating the County contribution to each employee's deferred compensation plan; reducing the size of the step increases on the salary schedule and increasing the number of steps on the schedule; abolishing a program that allowed employees to "sell" leave to the County and receive payments for unused leave days; and reducing and restricting the amount and type of leave employees were allowed to accrue.

18. On October 21, 2005, Commissioner Riddle and Health and Human Services Director O'Brien met with the Options executive director. Riddle explained to the Options director that he was conducting an "in depth audit to look at the actual internal services fund loss to the county" if the County contracted with Options to offer mental health services.⁶

⁵The record contains no evidence regarding who directed O'Brien to develop a plan for privatization, and no evidence that O'Brien ever developed such a plan.

⁶The record contains no evidence that Riddle ever completed this audit. In fact, Riddle testified that his decision to privatize mental health services was not made on the basis of financial considerations, as demonstrated by his response to the following question by counsel for AFSCME:

"Q. From the point of view of county revenue, was the situation such that you had to privatize mental health because of the dire financial straits of the county at that point in time?

"A. In my opinion, no. * * *" (Transcript at 409.)

Riddle testified that he wanted to privatize mental health programs because he thought they would "continue to survive and actually thrive outside of the county umbrella" (Transcript at 408.)

Commissioner Ellis also testified that his primary motive for supporting privatization was not a concern about the County's difficult financial situation. When questioned about his reasons for supporting privatization, Ellis responded:

"* * * And where I was coming from was, when I learned that mental health was paying over a million dollars for ISF funds to the county, and then we were cutting them back to zero basically the next year, that's money that could be

19. The County and AFSCME were unable to reach an agreement after table bargaining and mediation, and submitted their final offers to the State Conciliator on October 17 and 18, 2005.

20. At an October 31, 2005 meeting of County commissioners and managers, O'Brien discussed plans for contracting out the CAP program to UCAN or ACCESS by July of 2006. O'Brien also spoke about the possibility of contracting out mental health programs by July 2006, and explained that some cost savings could be achieved by doing so.

21. AFSCME became frustrated by the lack of progress in negotiations. From October through December 2005, AFSCME engaged in a number of activities designed to encourage bargaining unit members to support the union's negotiating position, gain public support for AFSCME's efforts to achieve a contract, and place pressure on the County to settle the bargaining dispute. These activities included a public rally held in front of the courthouse on October 7, 2005, weekly informational picketing at the County courthouse during the lunch hour, an ad in the local paper asking community members to contact the County commissioners to urge a resolution of the negotiations dispute, and a guest editorial in the local paper by AFSCME Bargaining Chair and President Burdis.

22. In November or December 2005, the County commissioners appeared on a local radio show and discussed privatization of some County programs. AFSCME believed that this discussion related to a possible County plan to form a new library district.

23. On December 5, 2005, the County prepared an analysis showing the potential impact that a loss of the ISF funds contributed by the Mental Health Division would have on the County budget. These calculations demonstrated that based on

going to provide services

"I didn't think that it was right. And I thought they could survive better out in the nonprofit type arena, rather than come under the umbrella of the county" (Transcript at 434.)

Neither Riddle nor Ellis testified about the specific reasons why they believed that mental health programs would flourish if offered by organizations other than the County.

2005-06 budget figures, the County ISF would lose approximately \$469,257 if mental health services were transferred to other organizations.⁷

24. At a December 6, 2005 meeting of County managers, Adair explained that he was continuing to work on plans to privatize mental health services with the Options director and Riddle.

25. On December 12, 2005, County commissioners and managers met to consider changes in the County budget that might be necessitated by a loss of O & C funding in June 2006. O'Brien presented information regarding the impact of cuts in O & C funding on a number of programs, but explained that she had prepared nothing about the effect of a loss of O & C funds on human services programs because plans were being made for "outsourcing" these services.

26. By letter dated December 22, 2005, AFSCME Representative Holston asked the County for information about the County departments that were being considered for privatization. Among the materials Holston requested were the names of employees who would be affected by privatization, the "timetable for privatization for each of the groups of county employees" being considered, and the taxing districts being proposed.

The County responded to Holston's letter by scheduling a meeting to discuss privatization on January 9, 2006.

27. AFSCME and the County were unsuccessful in resolving their contract dispute. On December 29, 2005, AFSCME notified the County that it would strike unless the parties reached an agreement by January 9, 2007.

28. On January 1, 2006, the County implemented its final offer.

29. On January 9, 2006, the AFSCME bargaining unit went on strike, a strike that was lawful under ORS 243.726. Employees from the County's Mental Health Division strongly supported the strike. Approximately 80 percent of the workers in the Mental Health Division went on strike, as compared with approximately 40 percent in the Public Works Department and 60 percent in the Juvenile Department. A number of strike leaders worked in the Mental Health Division, including three of the

⁷This amount was calculated by subtracting the amount of the 2005-06 general fund contribution to the Mental Health Division—\$118,626—from the amount the Mental Health Division contributed to the ISF in 2005-06—\$587,883.

five bargaining team members, the local AFSCME president, and the chair of the activity committee.

30. The strike ended on January 12, 2006, when AFSCME and the County reached a tentative agreement. Commissioner Raffenburg opposed the tentative agreement and refused to support it. The other two commissioners supported the tentative agreement because they believed it saved the County money. County staff calculated that the settlement resulted in an annual reduction of \$468,681 in County payroll costs for AFSCME bargaining unit members, with additional long-term savings of approximately \$500,000 per year.

31. At a January 19, 2006 meeting of the mental health advisory board, Riddle told the group that the BCC was seriously considering privatization of mental health services and would be meeting with one of the local mental health providers to discuss this topic within the next few weeks.

32. On January 31, 2006, the County commissioners appeared on a local radio show. In response to a question by the show's host about current issues of concern to the BCC, Commissioner Riddle answered that the BCC was working on transferring the CAP to UCAN on July 1, and also mentioned that "there's been some discussion, just very preliminary stages, but what parts of the mental health program could also be * * * better served * * * by being in the private sector."

33. In late January or early February 2006, Riddle met with a state facilitator to discuss privatizing County mental health programs.

34. Human Resources Officer Granat and local AFSCME President and Negotiating Chair Burdis met in February 2006 to finalize language for the new contract. At one of their meetings, Burdis questioned Granat about rumors that the County was planning to privatize some of its programs. Granat responded that he would deny their conversation if ever asked about it, and then told Burdis that the BCC was supporting privatization, and that if it were not for the strike, there would have been no discussion of privatization. He explained that due to financial considerations, it was unlikely that privatization would occur.⁸

⁸Granat testified that he did not recall this conversation with Burdis. (Transcript at 353-54.) We note that the testimony of a witness that he or she does not remember a particular event does not deny that the event occurred; it simply means that the witness cannot remember what happened. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 737, n. 3 (2004). Burdis's testimony regarding his conversation with

35. At a February 14, 2006 meeting of County managers that Mental Health Division Director Adair attended, County Human Services Department Director O'Brien announced that the BCC decision to privatize was "official." County managers met with staff to explain privatization, but turnout at the meeting was low.

36. AFSCME bargaining unit members and the BCC both voted to ratify the tentative agreement. The BCC vote on February 15 was two to one in favor, with Raffenburg voting against the agreement. The ratified agreement was in effect through June 30, 2007

37. At a February 27, 2006 meeting of County commissioners and managers, Riddle told those present that he was scheduled to meet with representatives from the state to discuss privatization of mental health services. He explained that the County would no longer be in the mental health business after July 1, 2006.

38. On March 1, 2006, Riddle, Adair, and O'Brien met with a representative of the State Department of Health and Human Services to discuss the County's plan to privatize mental health services.

39. At its March 10, 2006 meeting, the BCC voted unanimously to direct staff to take the following actions: prepare "letters of notice and termination to various Mental Health agencies effective July 1, 2006;" draft a letter of intent regarding an agreement between Options and the County; work on the financial aspects of privatization; and notify AFSCME of the 90-day limitation on expedited bargaining under ORS 243.698(1).

40. On March 13, 2006, O'Brien, Adair, and the BCC prepared and issued a press release that stated, in pertinent part:

"The Josephine County Board of Commissioners have determined that effective July 1, 2006, Josephine County will no longer provide or administer the following Health and Human Services programs:

- "- Direct mental health services
- "- Addiction services

Granat was clear, detailed, and consistent with the evidence presented. In addition, Burdis recorded the conversation in contemporaneous notes. Because Burdis's recollection of his conversation with Granat is more exact than Granat's, we find it more likely than not that Granat made the statements attributed to him.

- “- Developmental disability services
- “- Early intervention services

“The County will maintain the Local Mental Health Authority for mental health and addiction services, but will contract with local service providers to administer these services. By retaining the local mental health authority, the County will monitor the services provided by the contracting agency, to assure the quality of those services in the future.

“Josephine County is currently involved in discussions with the non-profit service provider ‘Options for Southern Oregon’, in an attempt enter [*sic*] into a contract where Options would assume the administration of these programs.

“Developmental disability case management and crisis service will be returned to the State of Oregon. The majority of developmental disability services will continue uninterrupted with current providers SPARC/Stepping Stones, Green Leaf and Goodwill. Gilbert Creek Early intervention services at [*sic*] will be returned to the Douglas County Educational Service District.

“* * * * *

“These changes will help to assure the continued success of the affected programs, allowing for the continued delivery of services to the public, in an increasingly difficult fiscal environment, due in part to the continued rising County costs and due to an uncertain future regarding County revenues from Federal and State of Oregon sources.”

41. By letter dated March 13, 2006, Granat notified AFSCME that effective July 1, 2006, the County intended to contract with other entities to offer direct mental health, addiction, developmental disability, and early intervention services that were currently provided by the County. The letter provided the same reasons for the County’s decision and the same information regarding the arrangements for transferring programs as were given in the County’s press release.

42. Also on March 13, 2006, the BCC met with employees affected by the County's decision to transfer mental health programs to explain the changes proposed and answer questions.

43. On March 15, 2006, the BCC passed a resolution that stated in relevant part:

“WHEREAS the expected loss of O&C revenues in Josephine County and rising costs of County expenses has created an uncertain financial future for the County;

“WHEREAS it is in the best interest of the County to downsize its workforce and outsource services;

“WHEREAS the Department of Human Services of the State of Oregon is willing and able to administer and accept the transfer of the Developmental Disability Programs;

“WHEREAS Options for Southern Oregon, Inc. is willing and able to administer and accept the transfer of the Community Mental Health Programs and the Addiction Services Programs, including gambling prevention and treatment services;

“WHEREAS Douglas Education Service District is willing and able to administer and accept the transfer of Early Intervention and Early Childhood Special Education Services’

“NOW, THEREFORE, IT IS HEREBY RESOLVED that effective July 1, 2006, the following programs shall be transferred to the following entities:

- “1. The Community Mental Health Programs provided by the County under state contract number 113003 shall be transferred to Options for Southern Oregon, Inc

- “2. The Developmental Disability Programs provided by the County under state contract 113003 shall be transferred to the State of Oregon Department of Human Services.
- “3. The Addiction Services Programs, including gambling prevention and treatment services, provided by the County under state contract number 113003 shall be transferred to Options for Southern Oregon, Inc.
- “4. The Early Intervention and Early Childhood Special Education Services provided by the County under the contract with Douglas Education Service District shall be transferred to Douglas Education Service District.”

The resolution was passed without discussion as part of a consent agenda.

44. By letter dated March 21, 2006, Granat notified AFSCME that effective July 1, 2006, the County intended to contract out the services provided by CAP to UCAN. In his letter, Granat explained that all CAP employees would be transferred to and become employees of UCAN.

45. By letter dated March 28, 2006, AFSCME demanded expedited bargaining under ORS 243.698 about the impact of the County’s decision “to contract out or transfer” mental health services and CAP. Michael Thor, who worked in the County Mental Health Department and had been a member of the AFSCME bargaining team for contract negotiations, was appointed chair of the AFSCME impact bargaining team.

46. In April 2006, Thor was scheduled to attend a meeting of the benefits committee. Thor was unable to find the meeting he was supposed to attend, but did find a group of Options board members who were meeting with Riddle, Ellis, Granat, and other County managers. Thor decided to stay and listen to this group, since they were negotiating the financial arrangements for the contract between Options and the County.

At one point during the meeting, Adair laughed at what he believed to be the County's unwillingness to talk frankly about the amount of money that could be made available to Options.

After the meeting, Thor stopped to talk with Francine Gentile, a member of the Options board with whom he was acquainted. Adair approached them and said that he thought he had lost his composure at the meeting. Thor and Gentile assured Adair that they believed he acted appropriately by insisting that the County be honest about funds it had available. Gentile then left.

Thor and Adair continued their conversation; Thor said that perhaps Adair understood how frustrated AFSCME was by the County's "obfuscation" during bargaining for the AFSCME contract. (Adair had been a member of the County's bargaining team during contract negotiations.) Adair then told Thor that the contract with Options would not have been made if AFSCME had not gone on strike.⁹

⁹At the hearing, Adair denied telling Thor that the County would not have transferred mental health programs had there not been a strike. Based on the following considerations, we find Thor's testimony regarding his conversation with Adair to be more credible.

Adair was an ardent supporter of privatizing County mental health services. He testified that he had urged privatization for years so that the Mental Health Division would not have to contribute to the County ISF and could instead use this money for services and programs. Adair testified that after he became interim director of the Mental Health Department in 2004, he began "to push on the commissioners about privatization. I just started to--I'll use the term--nag on them about privatization and about letting the agency go. And I used the term almost every time I met with them. I would almost pound on the table, 'let my people go.'" (Transcript at 240.)

Although Adair characterized himself as an impassioned supporter of privatization, he was surprisingly unsure about when the BCC decided to privatize and whether he was present when that decision was made. When asked on direct examination whether he was present when the BCC made the decision to privatize, Adair responded: "I can't answer definitively yes or no. I probably was." (Transcript at 275.) When asked again on cross-examination if he was present when the BCC decided to privatize, Adair answered that he was not. (Transcript at 296.)

Adair also testified that he first learned that the BCC supported privatization when the County commissioners voted to take this action at their March meetings. (Transcript at 302 and 323.) The record shows, however, that Adair was present at a February 14, 2006 meeting of County managers at which O'Brien announced that the BCC's decision to privatize mental health services was "official."

47. On April 11, 2006, AFSCME bargaining unit members voted to slow or stop the County plan to privatize mental health services. Bargaining unit members believed that the process was moving too quickly and that they were not given accurate information about the effects of privatization on their conditions of employment.

48. On the advice of the County's legal counsel, Granat prepared a written statement to AFSCME to explain why the County wished to privatize mental health services. Granat's statement provided, in relevant part:

"II. County Financial Summary

"a - The County faces an uncertain future regarding County discretionary general fund revenues from Federal sources. The County is in the last year of the O&C federal timber subsidy program and program renewal is in grave doubt

"b - During the current six (6) year O&C federal timber subsidy program, these discretionary general fund revenues increased annually at a rate of fifty percent (50%) of the annual cost-of-living. At the same time County expenses increased at a much greater percentage.

"c - County compensation expenses have increased over the past five years as follows:

"- The annual cost-of-living increase has averaged 2.4%;

We find Adair's testimony to be internally inconsistent and inconsistent with other documentary evidence. We also find it highly unlikely that Adair, who described himself as a fervent advocate of privatization who had been urging the BCC to take this action for two years, would have difficulty remembering when the BCC made its decision to privatize and whether he (Adair) was present during these deliberations. We also find it improbable that Adair would forget about a meeting where it was announced that the BCCs had made an "official" decision to privatize. Because we conclude that Adair's testimony regarding his knowledge of the BCC's decision to privatize is not credible due to its inherent implausibility, we give little credence to his testimony regarding his conversation with Thor. *See Ralphs v. OPEU and State of Oregon, Executive Department*, Case Nos. UP-68/69-91, 15 PECBR 115, 130 (1994) (complainant's lack of truthfulness in testifying about one matter renders his testimony on another matter not credible.) Consequently, we also find that his testimony concerning his April conversation with Thor is not credible. By contrast, we find Thor's testimony straightforward, consistent, and therefore credible.

“- Wages have increased an additional 2.4% because of guaranteed ‘wage steps’;

“- Health insurance costs have risen \$300/month (\$3600/year/employee) despite plan design modifications to reduce benefit coverage;

“- PERS costs have risen more than 7% of payroll.

“d - County administrative overhead costs (legal, finance, IT, HR, commissioners), operations and maintenance (O&M) expenses, and general liability/risk management insurance charges have risen to be a larger and larger percentage of each departments [*sic*] and offices [*sic*] annual budget. This is primarily because of the rising compensation expenses covered in #c above.

“e - As a result of #b, #c and #d above, the County has experienced recurring layoffs across the County. Over the past five (5) years, there have been just under 100 employees laid off (99 employees).

“III. Effect of County Finances on Mental Health

“a - The Health and Human Service (HHS) programs face an uncertain future regarding revenues from State and Federal sources. These programs have received declining discretionary general fund dollars. HHS has gone from \$545,000 in the 2002-2003 fiscal year budget (3.4% of the discretionary general fund dollars) to \$135,000 (less than 1% of the discretionary general fund dollars) in the 05-06 fiscal year budget. And, revenue from discretionary general fund dollars for HHS programs would have gone to zero in the 2006-2007 fiscal year budget.

“b - State revenues have decreased twenty-five percent (25%) in the last five year period totaling \$2,015,000 while the operation costs have continued to escalate. In the 2005-2006 fiscal budget year, revenue from the state decreased almost \$500,000.

“c - HHS services have directly experienced the effect of rising county compensation cost over the past five years. These have included the earlier mentioned 2.4% average cola [sic] increase, the 2.4% average increase in wages from step increases, the 7% rise in PERS costs and the \$3600/year increase in medical costs.

“d - The HHS budget includes a total of \$1,200,000 to cover administrative overhead costs (finance, legal, IT, HR, commissioners), O&M charges, and general liability - risk management - insurance costs.

“e - The ongoing cycle of expenses rising at a faster rate than revenues has resulted in:

“- 40 layoffs in the HHS programs over the past five years with 80% of these layoffs coming in the past three years;

“- Community Action having a \$50,000 deficit requiring a County 'bail-out';

“- A curtailment of guardianan [sic], lifespan respite and food share programs; and

“- Scheduled closure weeks for some Early Intervention programs.

“f - The Human Services programs are scattered out into seven (7) different buildings with most of the staff (approximately 40 employees) working in a building located at 741 NE 'A' Street. This building is approximately 100 years old and is no longer a functional place to do business and offer services. There are, and have been, insufficient county or Human Service funds to move this number of employees and programs into another facility.

“IV. Conclusion

“This information on Josephine County and the Human Services Department has led the Board of County Commissioners to conclude that, in order for the human services programs to survive in Josephine County, and have

a chance to grow, this contracting out decision had to be made.

“The State of Oregon participated in the contracting-out decision and found a ‘willing partner’, Options, to take over the bulk of the human service programs, services and employees. The County will maintain the Local Mental Health Authority for mental health and addiction services to monitor the services provided by the contracting agency, to assure the quality of those services in the future.

“The subcontracting out of HHS programs will greatly reduce the overhead expenses and help assure the continued success of the affected programs, allowing for the continued delivery of services to the public in an increasingly difficult fiscal environment, due in part to the continued rising County costs and due to an uncertain future regarding County revenues from Federal and State of Oregon sources.”

49. AFSCME and the County bargained about the impacts of the County’s decision to transfer mental health services to other organizations. On June 15, 2006, they reached agreement on a memorandum of understanding regarding “the privatization of Community Services, County Developmental Disability Services, Early Intervention, Mental Health, and Region V Developmental Disability Crisis Diversion Services, which is scheduled to take effect July 1, 2006.” The memorandum addressed a number of matters, including layoff and recall rights for transferred employees, transfer of leave balances, and payments for accrued leave.

50. At its June 28, 2006 meeting, the BCC approved a “Transfer Agreement” which provided, in pertinent part:

“This Agreement is made by and between JOSEPHINE COUNTY, a political subdivision of the State of Oregon, (‘County’), and OPTIONS FOR SOUTHERN OREGON, INC., an Oregon non-profit corporation (Options).

“WHEREAS Josephine County, by and through the Mental Health Program of its Health and Human Services Department, is engaged in providing mental health services pursuant to ORS 430.610 et seq.;

“WHEREAS the Mental Health Program has provided community mental health and addiction services for the citizens of Josephine County in accordance with Intergovernmental Agreement number 113003 with the State of Oregon Department of Human Services;

“* * * * *

“WHEREAS the County seeks to ensure the continued provision of mental health services for County citizens;

“WHEREAS it is in the best interest of the County to downsize its workforce and outsource services;

“WHEREAS, [*sic*] Options desires to receive from County, and County desires to transfer to Options, duties and responsibilities of providing mental health services to Josephine County citizens in accordance with the terms and conditions contained in this Agreement;

“WHEREAS Options for Southern Oregon, Inc is willing and able to provide mental health and addiction services to the citizens of Josephine County, and is willing and able to administer and accept the transfer of the Community Mental Health Programs and the Addiction Services Programs, including gambling prevention and treatment services;

“NOW, THEREFORE, in consideration of the agreements and covenants contained herein the parties hereby agree as follows:

“* * * * *

“2. TRANSFER AND RECEIPT

“2.1 **Closing.** The Closing of the transfer contemplated hereby shall take place at 11:59 p.m. on June 30, 2006.

“2.2 **Acquired Assets.** At Closing, County shall assign, transfer, convey and deliver to Options, and Options shall acquire, accept, and receive all the assets, properties, rights, contracts, operations, businesses, services, and employees of the Division, as they existed on and as they have been adjusted as the result of the normal operations of the Division through, to and including the Closing Date, including the following:

“A. **Client Records.** * * *

“B. **Furniture, Computers, and Equipment.** * * *

“C. **Warranties and Guarantees.** * * *

“D. **Books and Materials.** * * *

“E. **Computer Software.** * * *

“F. **Contracts.** * * *

“G. **Employment Records.** * * *

“* * * * *

“2.4 **Consideration.** In consideration of the transfer to Options of the Acquired Assets, at Closing, County shall pay to Options the following:

“A. County shall pay to Options a sum equal to the number of hours of accrued vacation leave retained by each Transferred Employee times the Transferred Employee’s hourly rate of pay as of the Closing Date.

“2.5 **County’s Liabilities.** County will assume and pay, perform or discharge any Liabilities relating to events, occurrences, or Services provided on or before the Closing Date, including any workers’ compensation claims, if the date of the accident or occurrence that is the subject of such claim is on or before the Closing Date. County shall assume and pay and be responsible for all Accounts Payable incurred in the performance of Services by the Division on or before the Closing Date

“2.6 **Options’ Liabilities.** Unless otherwise agreed in writing, Options will assume and pay, perform or discharge any Liabilities, relating to events, occurrences, or Services provided after the Closing Date, including any workers’ compensation claims, if the date of the accident or occurrence that is the subject of such claim is after the Closing Date. Options shall assume and pay and be responsible for all Accounts Payable incurred in the performance of Services on or after July 1, 2006.

“2.7 **Leasehold Interests.** County shall transfer to Options its leasehold interests in the real estate and leases listed in Schedule 6 at such date as may be agreed upon in writing.^[10]

“2.8 **Real Property.** County shall transfer to Options good and marketable title to the real property described in Schedule 7 at such date as may be agreed upon in writing.

“* * * * *

¹⁰The record does not include any of the “Schedules” referred to in the Transfer Agreement.

“3.8 **Litigation.** Except as set forth in Schedule 9, County has no knowledge of any action, lawsuit, claim, proceeding, or investigation in any court, board, bureau, agency, arbitrator, or mediator, either pending or threatened, which, if decided adversely against County, could have a material adverse effect upon a material part of the Division, the Business, or the Services provided, and County knows of no reasonable basis for any such action, lawsuit claim, proceeding or investigation.

“* * * * *

“3.11 **Employee Plans and Contracts.**

“A. **Labor Contracts and Employment Matters.** County is not a party to any collective bargaining or other labor union contract applicable to persons employed by County in the business or operations of the Division other than those listed in Schedule 10. County has not breached or otherwise failed to comply with any provision of any such agreement or contract. There are no pending material grievances, labor or employee relations problems concerning the Division.

“* * * * *

“10. **EMPLOYEE RELATIONS AND BENEFITS**

“10.1 **Employee Transfer.** As of the day after Closing, all employees listed in Schedule 1 who are employees of the County on the Closing Date shall be considered Transferred Employees of Options.

“10.2 **Salary.** Transferred Employees shall not have their salary reduced as a result of the transfer during the first twelve (12) months of employment with Options. After the first twelve (12) months of employment with Options, Transferred Employees shall be placed at the closest salary for the position as designated under Options’ salary schedule.

“10.3 **Accrued Compensatory Time.** County shall liquidate accrued compensatory time at the time of transfer, consistent with any applicable statutes or collective bargaining agreement.

“10.4 **Sick and Vacation Leave.** After the Closing Date, Options shall grant Transferred Employees any leaves according to its rules or any applicable bargaining agreement.

“10.5 **Health Insurance Waiting Periods.** In the event that any Transferred Employee is subject to a waiting period for coverage of preexisting conditions under Options’ health insurance plan, Options shall arrange for a waiver of such waiting period with its health insurer. The County shall reimburse Options for the additional premium costs, if any, resulting from such waiver, for a period of not to exceed 12 months.

“* * * * *

“10.7 **Status of Transferred Employees.** Options shall place all Transferred Employees on its employee roster, subject to the following:

“A. If the Transferred Employee was serving a probationary period with the County at the time of transfer, the past service of the Transferred Employee on probation

shall be applied toward the regular probation requirements of Options.

“B. If the Transferred Employee meets the qualifications therefor, the Transferred Employee may elect to participate in the retirement system available to employees of Options.

“C. Transferred Employees shall retain all seniority accrued under employment with the County, but no regular employee of Options shall be demoted or laid off by reason of that seniority at the time of transfer. After the Closing Date, the Transferred Employees’ seniority from the County shall be regarded as seniority acquired under Options.

“D. Subject to the provisions of ORS 236.605 et seq., Transferred Employees shall enjoy the same privileges, including benefits, hours and conditions of employment, and be subject to the same regulations, as other employees of Options.

“10.8 **Authority of Options.** Options shall place Transferred Employees in a position comparable to the position the Transferred Employee enjoyed with the County on the Closing Date, subject to the following:

“A. Options, in determining a comparable position, shall consider the Transferred Employee’s educational and physical qualifications, experience, and the salary, duties and responsibilities of prior employment with the County.

- “B. If Options finds that no comparable position exists under subsection (A) above, Options shall offer the Transferred Employee a lesser position, if such position is available, according to the qualifications of the Transferred Employee.
- “C. If Options finds that no comparable position exists, the Transferred Employee shall be listed as a regular laid-off employee with Options, and shall have priority to appointment over other persons eligible for any position for which the employee is qualified, subject to any applicable collective bargaining agreement.
- “D. The finding and action of Options under subsection (B) and (C) above shall be subject to a hearing upon the Transferred Employee’s request, and shall be subject to review under ORS 34.010 to 34.100.”

51. By letter dated June 28, 2006, AFSCME President Burdis protested the BCC’s consideration of the Transfer Agreement as part of its consent agenda and without public comment at its June 28 meeting. In his letter, Burdis noted that AFSCME opposed privatization of mental health services because “experience shows it will drive up costs, reduce the quality of services, and harm the consumers these agencies serve.” Burdis also strongly objected to the language in Section 3.8, calling the assertions made in this section “patently **false**.” Burdis listed the “numerous legal actions” pending against the County: “an unfair labor practice in front of the state Employment Relations Board, a lawsuit filed by the Non-Union Personnel Group, and numerous grievances filed by AFSCME Local 3694.”

52. On June 30, 2007, the Transfer Agreement was executed by the County and Options. Because the Options attorney did not have sufficient opportunity to review the Transfer Agreement before it was executed, the parties attached an Addendum to the Transfer Agreement. The Addendum provided that Options would

have a 31-day period “to conduct such legal and due diligence review of the rights, liabilities and obligations arising under the Transfer Agreement.” If Options was dissatisfied with the Transfer Agreement after completing its review, the organization would have until July 31, 2006 to notify the County that it wished to rescind the Transfer Agreement. If Options rescinded the agreement, then all employees, property, and other rights acquired by Options under the Transfer Agreement would be returned to the County. In the event of a rescission, the County agreed to “indemnify and hold Options harmless from all claim, liability, obligation or cost (including all costs, including attorneys’ fees at trial or appeal) arising out of” any matters related to the provisions of the Transfer Agreement.

53. In the summer of 2006, the County implemented its planned transfer of mental health programs and employees. On July 1, 2006, addiction services and community mental health programs, and employees were transferred to Options under the terms of the Transfer Agreement. Early intervention programs and employees were transferred to Douglas County. Douglas County then transferred these programs and employees to the Southern Oregon Educational Service District. Most developmental disability programs and employees were transferred to the State of Oregon. The state then contracted with a newly formed nonprofit organization, Community Living Case Management Services, to offer these programs, and former County employees were transferred to this organization. Employees who had formerly worked for the County in region five developmental disability services were initially transferred to Jackson County. Jackson County then contracted with a private organization, Jefferson Behavioral Health, to offer these services, and former County employees began working for Jefferson Behavioral Health. CAP employees transferred to UCAN.

With the exception of one part-time employee in early intervention services, all bargaining unit members who were formerly employed in County community mental health, addiction, early intervention, and developmental disability (including region five) programs transferred to positions in the organizations with which the County contracted.

54. AFSCME bargaining unit members who transferred from positions with the County to positions with other organizations were guaranteed the same salaries they had received from the County through June 30, 2007. These employees no longer participate in the state Public Employee Retirement System as they did with the County

AFSCME initially lost 125 bargaining unit members when the County transferred mental health programs, since it represented none of the employees in the

organizations to which the County workers transferred. Eventually, the seven employees who worked for Community Living Case Management Services requested that the employer voluntarily recognize AFSCME as their exclusive representative, and the employer granted their request.

55. The reduction in the number of bargaining unit members due to the County's transfer of mental health programs caused AFSCME to lose approximately \$4,000 per month in dues and fair share fee payments.

CONCLUSIONS OF LAW

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

2. The County violated ORS 243.672(1)(a) when it transferred community mental health, developmental disability (including region five), addiction, and early intervention programs out of the AFSCME bargaining unit.

At its core, AFSCME's allegations are simple. It asserts that the County transferred its mental health programs out of the AFSCME bargaining unit in retaliation for AFSCME's strike. AFSCME alleges that these County actions violate ORS 243.672(1)(a).

Under subsection(1)(a), it is 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" the PECBA. Subsection (1)(a) states two separate violations. It prohibits employer actions that interfere with, restrain, or coerce employees "because of" their exercise of protected rights. It also prohibits employer actions that interfere with, restrain, or coerce employees "in" their exercise of protected rights. *Blue Mountain Faculty Association v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 775 (2007). AFSCME alleges that the County violated both the "because of" and the "in" provisions of subsection (1)(a).

In analyzing whether an employer violated the "because of" portion of subsection (1)(a), we look to the reasons for the employer's conduct. If the employer acted "because of" the employees' exercise of PECBA-protected rights, we will find these actions to be unlawful. *OPEU and Termine v. Malheur County*, Case No. UP-47-87, 10 PECBR 514, 520 (1988). To prove a violation of the "because of" subsection (1)(a), a complainant need not show that the employer acted with hostility or for reasons of anti-union animus. Instead, a complainant must demonstrate 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).

In determining whether an employer violated the “in” provisions of subsection (1)(a), the employer’s motive is irrelevant. Instead, we examine the consequences of the employer’s actions. If these actions, viewed objectively, have the natural and probable effect of deterring employees from exercising their protected rights, we will find a violation of the “in” prong. Subsection (1)(a). *Portland Association Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 624, 16 P3d 1189 (2000). A violation of the “in” portion of subsection (1)(a) may be either derivative or independent. An employer who violates the “because of” portion of subsection (1)(a) also commits a derivative violation of the “in” prong. An employer may also independently violate the “in” provisions of (1)(a). *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).

We turn first to the “because of” allegations. We begin our analysis by examining the reasons for the employer’s action. This is a fact determination based on the record as a whole. Our analysis then continues:

“Once we have determined the reason or reasons for the employer’s actions, we must then decide if those reasons are lawful. If all of the reasons are lawful, we will dismiss the complaint. If all of the reasons are unlawful, or if the employer’s purportedly lawful reasons are merely a pretext for its unlawful conduct, then complainant will prevail. If we conclude that the employer acted for a combination of lawful and unlawful reasons, then we apply a mixed-motive analysis.” *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 741 (2004).

Accordingly, we begin by examining the reasons why the County chose to transfer mental health services when it did. Not surprisingly, the parties have different views of the reasons for the transfer. AFSCME asserts the County made the transfer because of the AFSCME strike, while the County maintains it had legitimate, non-discriminatory reasons for its actions. Our first task is to determine the real reasons why the County transferred mental health programs out of the AFSCME bargaining unit.

Typically, in disputes of this type, evidence concerning the reasons for an employer's actions is largely circumstantial. In *Portland Association Teachers v. Mult. Sch. Dist.*, 171 Or App at 624, the court noted that motive in cases alleging a violation of subsection (1)(a) "rarely is susceptible to proof by direct evidence." This is one of those rare cases. The statements of Granat and Adair provide direct evidence regarding the real reason the County transferred mental health programs out of the AFSCME bargaining unit: because of the AFSCME strike. In February 2006, County Human Resources Officer Granat told AFSCME Local President and Bargaining Chair Burdis that the County commissioners were in favor of privatization, and that they would not be talking about this action except for the AFSCME strike. Similarly, in April 2006, Adair, director of the County Mental Health Division, told AFSCME Bargaining Chair Thor that the County would not have transferred mental health services to the nonprofit organization Options if AFSCME had not gone on strike. Both Granat and Adair were actively involved with the County commissioners and County managers in developing plans to transfer mental health programs out of the AFSCME bargaining unit. Because of the positions these two County managers held, they were privy to the reasons the County acted. Their statements are highly persuasive evidence of the actual reason the County decided to transfer mental health programs.

The direct evidence that the County transferred mental health programs because of the AFSCME strike is bolstered by circumstantial evidence in the record. On this record, it appears that the transfer was contrary to the County's financial interest. Mental health programs were almost entirely supported by state and federal grants. The services required little or no money from the general fund. To the contrary, they actually contributed hundreds of thousand of dollars to the general fund through the ISF. The County anticipated that the general fund would be decimated by the projected loss of O & C money, which accounted for almost 40 percent of the general fund revenue. The County's decision to transfer mental health services and thereby lose even more general fund money is suspicious. It is undisputed that the County twice before considered privatizing mental health programs. In 1995 and again in 2003, County managers developed and discussed proposals for privatizing mental health programs but rejected the idea, primarily because they recognized that such a transfer would cost the County a significant amount of money. The County has not explained why it now considers that loss of money acceptable.

The speed with which the County went from consideration to implementation of its decision to transfer mental health programs is also suspicious. In 2005, County managers again began examining the feasibility and desirability of transferring mental health programs to other organizations. Except for College Dreams and the food bank, two small programs that were struggling financially and were

transferred to other agencies in 2005, County managers anticipated no rapid privatization of mental health services. Soon after the County hired O'Brien to head the County's Health and Human Services Department in July 2005, she was directed to begin planning for privatization. O'Brien expected the process would take two to three years. By December 6, 2005, privatization was a plan on which Adair and other County managers were continuing to work. The nature and pace of the County's privatization plans changed dramatically and without explanation after the AFSCME strike was settled on January 12, 2006. The record contains no evidence of any significant change in the County's financial situation or other pertinent circumstances between December 2005 and February 2006. Nor is there evidence of any deliberations by County managers or commissioners regarding the benefits of privatization. The record contains minutes of numerous meetings of County managers and elected officials held between December 2005 and February 2006. At none of these meetings, however, did the participants engage in any substantive discussion about the reasons for privatizing mental health programs. Nonetheless, in the space of two months, privatizing mental health services changed from a two- to three-year plan on which County managers were working in December 2005 to an action that the BCC had officially decided to take on February 14, 2006.

Another circumstance we consider is timing. The timing of the County's decision to transfer mental health programs is suspicious, since it was made "official" a month after the strike occurred and the day before the County commissioners ratified the tentative contract agreement with AFSCME. We will infer a causal connection when an employer's action is close in time to the employees' protected activity, "coupled with attending circumstances that suggest something other than legitimate reasons for the temporal tie." *Amalgamated Transit Union v. Tri-County Metropolitan Transit District*, 17 PECBR at 787; and *Amalgamated Transit Union, Division 757 v. Basin Transit Service*, Case No. UP-36-85, 8 PECBR 8305, 8314, *amended* 8 PECBR 8318 (1985). *See also OSEA v. West Linn School District*, Case No. UP-53-90, 12 PECBR 732, 741 (1991) ("[t]he likelihood that there is a connection between protected activity and adverse employer action gets progressively smaller (the inference becomes weaker) as time goes by.") Here, the decision occurred shortly after the strike and the circumstances of the decision do not suggest any legitimate reason for the timing. The County offers no answer to the question: "Why now?" In December 2005, the County had not yet decided to privatize. It anticipated that privatizing would cause a loss of \$469,257 to the general fund and it expected a plan would take two to three years to implement. By February 2006, the County had made a final decision to privatize and planned to complete the process in four months. The only change in circumstances was the AFSCME strike. Mental health workers supported the strike in greater numbers than did employees in other County departments. Many of the strike leaders worked in the

Mental Health Division. The timing of the County's decision to privatize, considered with other direct and circumstantial evidence, suggests that the County decided to transfer the mental health positions because AFSCME employees went on strike.

We also note that the process used by the County managers and elected officials in choosing to transfer mental health programs contrasts sharply with the County's procedure in privatizing CAP. The CAP transfer and the Mental Health Division transfer occurred at approximately the same time. With CAP, however, County managers considered and agreed with a January 2005 study that recommended transferring CAP services to a non-governmental organization. The study noted that such an action would save the County \$400,000, would reduce CAP administrative costs, and would make CAP eligible for new funding sources. The decision to privatize mental health services, by contrast, was made without advance study or analysis, resulted in a loss of revenue to the general fund, and offered no demonstrable benefits to the County.

The County commissioners offered several reasons to justify their decision to privatize. We find these reasons neither clear nor consistent. We begin with financial considerations. Certainly, the outlook for the County's general fund was bleak, given the threatened loss of O & C money which provided almost 40 percent of the County's general fund revenue in 2005-06. Yet mental health programs were unaffected by this problem, since the programs were funded almost entirely by state and federal grants. For the 2005-06 fiscal year, County general fund revenues provided less than 1 percent of the total Mental Health Division budget. For the 2006-07 fiscal year, the County planned to provide *no* general fund support for the Mental Health Division budget. The County's Mental Health Division actually contributed to the general fund through the ISF which helped fund other County departments. According to the County's own calculations, the transfer of mental health programs could result in a loss of \$469,257 to the ISF. The County has not explained why the transfer makes economic sense, especially in light of the County's asserted financial crisis due to the anticipated loss of O & C funds. At the hearing, Commissioners Riddle and Ellis both testified that their support for privatization was not based on the financial considerations, but was motivated by their belief that County mental health programs would "survive" and "thrive" if offered by organizations other than the County.

The County commissioners gave AFSCME and the public a quite different explanation of their decision to transfer mental health programs. Contrary to their testimony at hearing that they did not rely on financial considerations, the commissioners explained the transfers to AFSCME and the public almost entirely on the basis of the "increasingly difficult fiscal environment," "the expected loss of O&C revenues," and the "uncertain future regarding County" "discretionary general fund

dollars.” Because the County’s reasons are shifting and inconsistent, we give them little credence.

The record contains evidence of some valid reasons why the County might choose to transfer mental health services. These reasons include the poor condition of the aging building that housed many of the mental health programs, the possibility of reduced administrative costs if services were offered by a nonprofit organization, and a potential for greater availability of funding sources. There is no indication on the record, however, that the BCC analyzed, discussed at any length, relied on, or seriously considered any of these reasons *before* it voted to privatize on March 15, 2006. Our task is to determine why the County acted. Reasons that *might* have been legitimate had the County seriously considered them have no place in our analysis or discussion.

In conclusion, the employer’s purportedly lawful reasons for transferring mental health programs—to save the County money and to allow these programs to “survive” and “thrive”—are simply not supported by a preponderance of the evidence. The County lost income as a result of the transfer of mental health programs. The record provides no factual basis for the County commissioners’ assertion that mental health programs would flourish as a result of the transfer. In addition, there is no evidence to show that the County actually relied upon any valid, lawful reasons in making its decision to contract out mental health programs.

Accordingly, we conclude that the reasons offered by the County for its action were pretextual. When an employer’s reasons for its actions are found to be pretextual, it is reasonable to infer that the employer has some other unlawful motive which it wishes to conceal. *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995) (citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)). We infer that the County had an unlawful motive for its action: the AFSCME strike.

In sum, we conclude that the actual reason the County transferred mental health programs out of the AFSCME bargaining unit was because AFSCME went on strike. We base our conclusion on a number of factors. These factors include the direct evidence of statements by County managers, the suspicious timing of the County’s decision-making process, and the equally suspicious speed with which the transfer was implemented. In addition, we have considered the marked difference between the transfer of mental health programs and the transfer of other County programs. We also note that the County never established any legitimate reason for the transfer. To the contrary, the transfer caused the County to lose money in a time of tremendous financial uncertainty due to the projected loss of O & C funds that accounted for almost 40 percent of the County’s general fund revenues. The County’s assertion that mental

health programs would “survive” and “thrive” outside of the County is not supported by the record. Accordingly, the strong preponderance of the evidence demonstrates that the County transferred mental health programs because of the AFSCME strike.

Now that we have determined the actual reason for the County’s actions, we must next decide if this reason is lawful. *AFSCME Council 75 v. Umatilla County*, 20 PECBR at 741. The right of public employees to engage in a lawful strike is guaranteed under the PECBA. ORS 243.726(2). We conclude, without difficulty, that the County’s reason for transferring mental health services out of the AFSCME bargaining unit in response to the AFSCME strike was unlawful.

For all of the foregoing reasons, we find the County’s decision to transfer community mental health, developmental disability (including region five), addiction, and early intervention programs interfered with, restrained, or coerced employees “because of” their exercise of PECBA-protected rights in violation of ORS 243.672(1)(a).¹¹

Next, we must decide whether the County’s decision to transfer mental health programs also interfered with, restrained, or coerced employees “in” their exercise of protected rights in violation of (1)(a). In determining whether an employer’s actions violate the “in” portion of subsection (1)(a), the employer’s motive is irrelevant. Instead, we examine the consequences of the employer’s actions. If these actions, viewed objectively, have the natural and probable effect of deterring employees from exercising their protected rights, we will find a violation of the “in” prong. *Portland Association Teachers v. Mult. Sch. Dist.*, 171 Or App at 624. A violation of the “in” portion of subsection (1)(a) may be either derivative or independent.

Generally, an employer that violates the “because of” portion of subsection (1)(a) commits a derivative violation of the “in” prong. “Employer discrimination which is caused by an employe’s union activity will inevitably have the effect of interfering with the employe’s exercise of protected rights.” *OPEU and Termine v. Malheur County*,

¹¹This conclusion should not be interpreted as one which prohibits the County from ever transferring mental health services (or any other programs). Instead, our finding that the County violated subsection (1)(a) concerns only the decision announced on February 14, 2006 (see Finding of Fact 35.) As noted above, there may well be valid reasons why the County would wish to transfer mental health programs. The record in this case, however, demonstrates that the County’s transfer decision was not made on the basis of legitimate considerations. As long as any future County decisions to transfer programs or services comply with the law and are made for lawful reasons, the County is free to take such actions.

10 PECBR at 521. *See also Amalgamated Transit Union v. Tri-County Metropolitan Transit District*, 17 PECBR at 789; and *Roseburg Education Association v. Douglas County School District*, Case No. UP-16-96, 16 PECBR 868, 876 (1996).

An employer's actions may also independently violate the "in" portion of subsection (1)(a). *Amalgamated Transit Union v. Tri-County Metropolitan Transit District*, 17 PECBR at 789 (an employer's discharge of an employee while the employee was using the grievance procedure did not violate the "because of" portion of subsection (1)(a); it did, however, violate the "in" portion because it had the natural and probable effect of discouraging employees from filing grievances)

Here, we find a derivative violation of subsection (1)(a). The natural and probable effect of the County's unlawful action in transferring mental health programs out of the AFSCME bargaining unit is to deter employees from exercising their protected rights. Any reasonable employee—knowing that the County transferred work out of the AFSCME bargaining unit because of the strike—would hesitate or refrain from engaging in protected strike activity. A County employee would understandably be fearful of exercising PECBA rights in the future after seeing that AFSCME bargaining unit members lost union representation and the protection of a collective bargaining agreement for doing so.

We do not reach the issue of whether the County's transfer of mental health programs was also an independent violation of the "in" portion of subsection (1)(a). As discussed below, we have fashioned a remedy to address two violations of subsection (1)(a). It would add nothing to our remedy were we to find a third, separate violation of subsection (1)(a).

3. This Board does not decide the issue of whether the statements that Granat and Adair made to AFSCME leaders Burdis and Thor violated ORS 243.672(1)(a).

AFSCME alleges that the statements County Managers Granat and Adair made to AFSCME leaders Burdis and Thor violated subsection (1)(a). We do not need to decide this issue. We have already concluded that the County violated both portions of subsection (1)(a). An additional violation would add nothing to the remedy we have ordered. We believe that Granat and Adair's statements are more properly viewed as evidence of the reasons for the County's decision to transfer mental health programs.

4. The County violated ORS 243.672(1)(b) when it transferred community mental health, developmental disability (including region five), addiction, and early intervention programs to organizations outside of the County.

An employer violates section ORS 243.672(1)(b) if it dominates, interferes with, or assists in the formation, existence, or administration of a labor organization. To prove a violation of subsection (1)(b), a labor organization must demonstrate that an employer directly and adversely affected the labor organization's ability to perform its duties as exclusive representative. *Klamath County Peace Officers Association v. Klamath County and Klamath County Sheriff's Office*, Case No. UP-18-97, 17 PECBR 515, 526 (1998).

An employer violates subsection (1)(b) if its actions interfere with union members' representation rights. In *Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections and Association of Oregon Corrections Employees*, Case No. UP-4-01, 19 PECBR 785 (2002), the employer and AOCE, a labor organization, agreed that five transferred employees would remain members of the AOCE bargaining unit. Other employees in the unit to which the employees were transferred were members of another labor organization, AFSCME. We determined that the employer's treatment of the transferred employees violated subsection (1)(b). We concluded that the employer's actions "favored AOCE and disfavored AFSCME," "reduced the bargaining power and stature of the AFSCME bargaining unit, and undermined AFSCME as the exclusive representative of that unit." *AFSCME Council 75 v. State of Oregon, Department of Corrections and AOCE*, 19 PECBR at 799.

Here, the County undermined AFSCME's status and its ability to perform its duties as exclusive representative to a degree far greater than the employer in *AFSCME Council 75 v. State of Oregon, Department of Corrections and AOCE*. The County violated subsection (1)(a) when it transferred mental health programs out of the AFSCME bargaining unit. As a result of the County's unlawful action, AFSCME lost approximately one-third of its bargaining unit, many of its leaders, and \$4,000 in monthly dues and fair share fee payments. These actions seriously diminished AFSCME's bargaining power and stature. Accordingly, we conclude that the County's unlawful actions in transferring mental health programs directly and adversely affected AFSCME's ability to perform its statutory duties as exclusive representative in violation of subsection (1)(b).

5. This Board does not decide whether the County violated ORS 243.672(1)(c) when it transferred community mental health, developmental disability

(including region five), addiction, and early intervention programs to organizations outside of the County.

Because we have found the County's actions in transferring mental health programs violated ORS 243.672(1)(a) and (b), it is not necessary to determine if these same actions also violated ORS 243.672(1)(c). We frequently hold that when an employer's conduct violates subsections (1)(a) and (b), we will not determine whether the same conduct also violates subsection (1)(c). *E.g., FOPPO and Mazikowski v. Washington County Department of Community Corrections*, Case No. UP-97-93, 15 PECBR 260, 274 (1994) (citing *OPEU and Termine v. Malheur County*, Case No. UP-47-87, 10 PECBR 514 (1988)); *State Teachers Education Association v. Willamette ESD*, 19 PECBR at 260 (unnecessary to consider a parallel subsection (1)(c) claim where a (1)(a) violation has been established.) But see *Amalgamated Transit Union v. Basin Transit Service*, 8 PECBR 8305; *OSEA v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832 (1986); and *OSEA v. Medford School District 549C*, Case No. UP-60-86, 10 PECBR 402 (1988), *AWOP 94 Or App 781, 767 P2d 934* (1989) (finding violations of subsections (1)(a), (b), and (c).) Here, an additional determination that the County's transfer decision violated subsection (1)(c) would add nothing to the remedy and we therefore will not decide it.

Remedy

ORS 243.676(2)(b) requires us to enter a cease and desist order when we determine that a party has committed an unfair labor practice. We will do so. The statute also permits us to order affirmative relief, including reinstatement of employees with back pay, when needed to effectuate the purposes and policies of the PECBA. ORS 243.676(2)(c). We find back pay and reinstatement are necessary here.¹² When an

¹²In its brief, the County asserts that it closed its Mental Health Division and completely divested itself of all mental health programs by contracting with other organizations to provide services formerly offered by the County. The County's contention is relevant to the issue of the appropriate remedy in this case. If we conclude that an employer has ended a program, we will not order reinstatement of employees to positions in the program even if the employer's actions in closing the program violated the PECBA. *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337 (2003). We disagree with the County's contention that it went out of the business of providing mental health services, however. We find that the County transferred mental health services to other organizations and did not close the Mental Health Division.

In *Teamsters Local 670 v. City of Vale*, the employer completely disbanded its police department. City police no longer provided services; the city did not pay for any other agency to provide police services and had no future plans for doing so. In addition, the city exercised no

employer discharges an employee in violation of subsection (1)(a), we invariably order the employer to reinstate the employee to the position formerly held and make the employee whole for lost wages and benefits. *E.g.*, *Central Education Association and Vilches v. Central School District*, Case No. UP-74-95, 17 PECBR 54, 72 (1996), *order modified on reconsideration* 17 PECBR 93 (1997), *aff'd* 155 Or App 92, 962 P2d 763 (1998); *Amalgamated Transit Union v. Basin Transit Service*, 8 PECBR at 8316; *OSEA v. Klamath County School District*, 9 PECBR at 8857; *OSEA v. Medford School District*, 10 PECBR at 432; *Oregon State Employees Association v. Lincoln County and Sheriff Hockema*, Case No. C-131-77, 3 PECBR 1650, 1657 (1977), *aff'd* 34 Or App 527, 579 P2d 282 (1978); and *Harrison v. Central Linn School District No. 552-C*, Case No. C-152-76, 3 PECBR 1593, 1601 (1977), *aff'd* 34 Or App 221, 578 P2d 460 (1978). Accordingly, we will order the County to make the employees whole for any lost wages and benefits, minus interim earnings.

We will also restore former AFSCME bargaining unit members who were transferred as a result of the County's unlawful action to the bargaining unit positions they held prior to the transfers. Because these programs serve particularly vulnerable County residents, we are mindful of the disruption this remedy may cause. Consequently, implementation of this remedy will be suspended for 30 days to allow the parties to negotiate and otherwise plan for the transition.

The County also violated subsection (1)(b) and adversely affected AFSCME. AFSCME lost dues and fair share fees it otherwise would have collected if the employees had not been unlawfully transferred. We will order the County to make AFSCME whole for that loss.

In *OSEA, Chapter 98 v. Sheridan School District 48J*, Case No. UP-34-85, 8 PECBR 8098 (1985), a school district refused to make payroll deductions for a union

control over law enforcement functions that were sometimes provided by county sheriff's personnel within the city. We did not order reinstatement even though the City failed to bargain in good faith before it acted.

Here, none of these factors are present. Work formerly performed by AFSCME bargaining unit members continues to be done by the same people—the only difference is that these employees now work for organizations other than the County. As a local mental health authority under ORS 430.630(10)(a)(A), the BCC has retained some control over mental health services offered to County residents. For these reasons, we find that the County's actions constitute a transfer of mental health programs and not a closure of these programs.

in violation of ORS 243.672(1)(f). We required the employer to pay the labor organization all sums owed, noting:

“* * * Even though the money to be paid under the requests, if paid at the time requested, would have come out of the employe’s paychecks and not District 48J’s funds, we find a remedy requiring back payments to be made from District 48J’s funds to be appropriate.” *OSEA v. Sheridan School District*, 8 PECBR at 8104.

In another case, we found that a hospital unlawfully refused to deduct fair share fee payments from bargaining unit members’ salaries and remit these payments to a nurses union. We ordered the employer to reimburse the union and refused to allow the employer to take the money from the nurses’ salaries. We noted:

“* * * If we were to allow the District to simply make deductions from the nurses’ pay at this time, we essentially would be placing the burden of the District’s unlawful conduct on the ONA and the individual nurses rather than on the District.” *Oregon Nurses Association v. Bay Area Health District*, Case No. C-48-83, 7 PECBR 5937, 5941, n. 3 (1983).

Consistent with our practice, we will order the County to reimburse AFSCME for the amount of dues and fair share fees, with interest, that the mental health employees would have paid to AFSCME had the County not transferred them. The County may not seek reimbursement from past, current or future bargaining unit employees. *AFSCME Council 75 v. State of Oregon, Department of Corrections and AOCE*, 19 PECBR at 801 (citing *Cascade Unified Education Association v. Cascade School District*, Case No. UP-31-98, 18 PECBR 590, 604, n. 13 (2000)); *OSEA v. Sheridan School District*, 8 PECBR at 8104, n. 4; and *Oregon Nurses Association v. Bay Area Health District*, 7 PECBR at 5941, n. 3.

Civil Penalty

AFSCME asks us to award a civil penalty. Under ORS 243 676(4)(a), we may order a civil penalty if a party committed an unfair labor practice “repetitively, knowing that the action taken was an unfair labor practice and took the action disregarding this knowledge, or that the action constituting the unfair labor practice was egregious.” *See also* OAR 115-035-0075(1)(a). We find no evidence in the record to

demonstrate that the County's unlawful actions were repetitive, or that the County acted with knowledge that its actions were unlawful.

We do, however, find the County's actions egregious. "Egregious" violations are those that tend to undermine the very nature of the collective bargaining process. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-27-02, 20 PECBR 571, 594 (2004). The right of employees to strike is one of the core activities expressly protected by the PECBA. Here, because former AFSCME bargaining unit members went on strike, they lost union representation, benefits, salaries, rights, and protections formerly guaranteed by their collective bargaining agreement.

In addition, the right of the exclusive bargaining representative to be free of employer interference is also a core PECBA right. Because of the County's actions, the AFSCME bargaining unit was reduced by one-third. AFSCME lost bargaining power and a substantial amount of dues. In Oregon, a public employer may not retaliate against employees or their union because of a strike. Under these circumstances, we will order the County to pay AFSCME a \$1,000 civil penalty, the maximum permitted by law.

Reimbursement of Filing Fees

Under ORS 243.672(3), we may order reimbursement of the filing fee to a prevailing party in an unfair labor practice proceeding if "the complaint or answer is found to have been frivolous or filed in bad faith." *See also* OAR 115-035-0075(3). A defense or complaint is frivolous only if every argument asserted is one that a reasonable lawyer would know is not well-grounded in fact or warranted either by existing law, or by a reasonable argument for extending the law. *Coos County Board of Commissioners and AFSCME Local 2696 v. Coos County District Attorney and State of Oregon*, Case No. UP-32-01, 20 PECBR 87, 105 (2002), *on reconsideration* 20 PECBR 185 (2003) (quoting *AFSCME Council No. 75 v. City of Forest Grove*, Case Nos. UP-5/25-93, 14 PECBR 796, 797 (1993); and *Westfall v. Rust International*, 314 Or 553, 559, 840 P2d 700 (1992)).

Although we found against the County, the County's answer was not frivolous or filed in bad faith. All arguments asserted by the County in its answer have at least some reasonable basis in fact and existing law. We will not order the County to reimburse AFSCME's filing fee.

Notice Posting

AFSCME asks this Board to order the County to post a notice of its wrongdoing. We will order an employer to post a notice when an unlawful action

“(1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was perpetrated by a significant number of Respondent’s personnel; (4) affected a significant portion of bargaining unit employees; (5) had a significant potential or actual impact on the functioning of the designated bargaining representative as the representative; or (6) involved a strike, lockout, or discharge.” *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601, *AWOP 65 Or App 568, 671 P2d 1210* (1983). Not all of these criteria need be satisfied to warrant a posting. *Blue Mountain Faculty Association v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 782 (2007) (citing *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, 19 PECBR 684, 685 (2002)).

Here at least four of the above criteria were met. The County’s conduct was so flagrant that we ordered a civil penalty. The County’s unlawful conduct affected a large portion of bargaining unit employees—approximately one-third of the bargaining unit. In addition, the County’s transfer decision significantly and directly affected AFSCME’s ability to serve as exclusive representative. As a result of the County’s unlawful actions, AFSCME’s status and power as exclusive representative was diminished by the loss of dues and a substantial number of its bargaining unit members. The County’s unlawful conduct also involved a strike. We will order the County to post the attached notice.

ORDER

1. The County shall cease and desist from transferring direct mental health, addiction, developmental disability (including region five), and early intervention programs from the County to other organizations.

2. Unless AFSCME and the County agree otherwise, the County shall, within 30 days of the date of this Order, reinstate former AFSCME bargaining unit members who previously worked in County direct mental health, addiction, developmental disability (including region five), and early intervention programs to the positions they held prior to the date on which they were transferred out of the AFSCME bargaining unit.

3. The County will make former AFSCME bargaining unit members who previously worked in County direct mental health, addiction, developmental disability (including region five), and early intervention programs whole for the wages and benefits they would have received if they had continued working for the County, less interim earnings, with interest at 9 percent per annum, for the period beginning on

the date they ceased being members of the AFSCME bargaining unit and ending 30 days from the date on which this Order is issued.

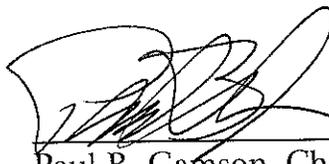
4. The County will make AFSCME whole for any dues and fair share fee payments AFSCME would have received from former AFSCME bargaining unit members who previously worked in County direct mental health, addiction, developmental disability (including region five), and early intervention programs, with interest at 9 percent per annum, for the period beginning on the date the employees ceased being members of the AFSCME bargaining unit and ending 30 days from the date on which this Order is issued. The County may not seek or receive reimbursement for these payments from former, present, or future members of the AFSCME bargaining unit.

5. Within 30 days of the date of this Order, the County will pay AFSCME a civil penalty of \$1,000.

6. The County shall sign and prominently post a copy of the attached notice in each location where current and former AFSCME bargaining unit members work. The notice will be posted within five days of the date on which this Order is issued and will remain posted for 30 consecutive days.

7. The remainder of the complaint is dismissed.

DATED this 30th day of October 2007.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.



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-26-06, *AFSCME Council 75, Local 3694 v. Josephine County*, and in order to effectuate the policies of the Public Employee Collective Bargaining Act (PECBA), we hereby notify our employees that:

The Employment Relations Board has found that Josephine County (County) violated the PECBA by transferring community mental health, developmental disability (including region five), addiction, and early intervention programs (collectively referred to as "mental health programs") from the County to other organizations because the employees engaged in protected strike activity. These actions of the County interfered with, restrained, and coerced AFSCME bargaining unit members in and because of the exercise of rights guaranteed by the PECBA. The County's actions also dominated or interfered with the formation, existence, or administration of AFSCME in violation of the law.

The Employment Relations Board has ordered the County to:

1. Cease and desist from unlawful activities.
2. Unless otherwise agreed to by AFSCME and the County, reinstate former AFSCME bargaining unit members who previously worked in County mental health programs to the positions they held prior the date on which the County transferred them out of the AFSCME bargaining unit. This portion of the remedy will be suspended for 30 days to allow AFSCME and the County to negotiate over the transition.
3. Make former AFSCME bargaining unit members who previously worked in County mental health programs whole for the wages and benefits they would have received, less interim earnings, with interest at 9 percent per annum, for the period beginning on the date they were transferred out of the AFSCME bargaining unit and ending 30 days from the date on which this order is issued.
4. Make AFSCME whole for any dues and fair share fee payments AFSCME would have received from former AFSCME bargaining unit members who previously worked in County mental health programs for the period beginning on the date these employees were transferred out of the AFSCME bargaining unit and ending 30 days from the date on which this order is issued.
5. Pay AFSCME a civil penalty of \$1,000.

JOSEPHINE COUNTY

Dated _____, 2007

By _____
Employer Representative

Title

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This notice must remain posted 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 NE, Suite 400, Salem, Oregon 97301-3807, phone 378-3807.