

(UNFAIR LABOR PRACTICE)

LANE COUNTY PUBLIC WORKS)	
ASSOCIATION, LOCAL 626)	
AND THEODORE BUSHEK,)	
)	
Complainants,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW
)	AND ORDER
LANE COUNTY,)	
)	
Respondent.)	

Oral argument before this Board on May 14, 1991, upon objections from both parties to a Proposed Order issued by Board Agent Jeffrey P. Chicoine, on March 25, 1991, following a hearing on February 6 and 7, 1991, in Eugene, Oregon.

Gary K. Jensen, Attorney at Law, 91 Madison Street, Eugene, Oregon 97402, represented Complainant.

David B. Williams, Assistant County Counsel, Lane County, 125 E. 8th Avenue, Eugene, Oregon 97401, represented Respondent.

Lane County Public Works Association, Local 626 and Theodore Bushek (Association) filed a complaint against Lane County (County) on April 27, 1990. The complaint alleged that the County violated ORS 243.672(1)(a), (c), (d) and (e) by disciplining and by denying a transfer or promotion to Bushek, who was an officer of the Association, and by refusing to provide information requested by the Association. The processing of the complaint was suspended for a time while a related grievance was arbitrated. Because the arbitration award did not resolve the issues underlying the complaint, the case was set for hearing.

At the hearing, the parties waived recitation of procedural rights under the Administrative Procedure Act and presented evidence through the examination of witnesses and submission of documents. Post-hearing briefs were submitted in a timely manner and considered in preparing this Order.

The parties presented to this Board the following issues:

(1) Whether the County's denial to Theodore Bushek of a transfer or promotion to the senior parks maintenance position violated ORS 243.672(1)(a), (c) or (d).

(2) Whether the County's refusal to produce information requested by the Association violated ORS 243.672(1)(e).

(3) Whether the County's discipline of Bushek, which was set aside by the arbitrator, violated ORS 243.672(1)(a), (c) or (d).

Having the full record before it, this Board makes the following:

RULINGS

All rulings of the Board Agent were reviewed and are correct.

FINDINGS OF FACT

1. The County is a public employer. The County is organized into various departments, one of which is the Department of Public Works (Department). The Department is responsible for the construction and maintenance of all County lands, buildings and roads and has approximately 350 to 400 employees.

2. The Department is composed of six divisions, one of which is the engineering division. Within the engineering division, there are five units: (1) road maintenance, (2) field engineering, (3) design engineering, (4) traffic planning and (5) engineering and real property.

The Association and Its Officers

3. The Association is a labor organization and the exclusive representative of 176 employees of the Department. The Association's president from 1982 to 1988 was Theodore Bushek. As president, Bushek was responsible for all internal union administration, negotiations, grievance handling, arbitrations and pursuit of claims before this Board.

4. In 1988, the Association reassigned the responsibility for grievance handling and arbitration to the newly created position of steward-at-large. The other responsibilities remained with the president. At that time, Bushek became steward-at-large. The steward-at-large position was subsequently redesignated as the chief steward position. Bushek served in one of the two steward positions from 1988 to the hearing date. As Association president and steward, Bushek has regularly

represented the Association in meetings with managers and supervisors of the Department.

5. In 1988, Bushek was succeeded as president by John Morris. Morris has remained president through the date of the hearing.

Bushek's Employment

6. Bushek was hired by the County in 1978. Since 1982, Bushek has been employed in the Department's engineering division in the road maintenance unit in the classifications of road maintenance 2 and road maintenance 3.¹ From 1982 to 1984, Bushek maintained the grounds around the Department's headquarters building and central maintenance yard. While in the grounds maintenance function, Bushek received three evaluations. The first two rated his work as competent and the third as above average.² Later, the grounds maintenance work was reassigned to the position of senior parks maintenance.

7. Since 1984, Bushek has worked in the road maintenance unit operating construction and road repair equipment. Bushek has reported to Zone Supervisor Steve Puett throughout his employment in the Department.

8. Association President Morris was also employed as a road maintenance worker reporting to Zone Supervisor Puett. Puett reports to the road maintenance manager, Carlos Van Elsberg. Van Elsberg reports to the engineering division manager, Ollie Snowden. Snowden reports to the Department director, John Goodson.

Filling the Vacancy in the Senior Parks Maintenance Position

9. In August 1989, the senior parks maintenance (parks) position became vacant. The person employed in that position reported to Zone Supervisor Puett.

10. There are no written guidelines in the Department governing the filling of vacant positions. In the past, vacancies have been filled by lateral transfers and postings, but there are no rules about when one or the other should be utilized. A lateral transfer is simply the reassignment, upon request, from another similarly rated position, with the agreement of the

¹Within the road maintenance unit, there are eight crews. Each crew is assigned a specific area of responsibility and is under the direction of a zone supervisor.

²The evaluation forms contained an overall evaluation rating that offered the choice of five ratings, in descending order of competency, of outstanding, above average, competent, needs improvement and unsatisfactory.

requesting employee's current supervisor and the supervisor of the vacant position. Although the supervisor of the vacant position usually decides whether to fill the position by intra-division transfer, that decision is subject to review and approval by the supervisor's manager.

11. Both Bushek and Morris applied for a transfer to the parks position by delivering a transfer request form to Puett. Puett informed Carlos Van Elsberg, road maintenance manager, that he preferred to fill the position with someone from his crew and therefore wanted to grant the intra-division transfer to either Bushek or Morris.

12. In a departure from his normal practice, Van Elsberg interviewed both transfer candidates. After the interviews, Van Elsberg decided not to fill the position by transfer. Van Elsberg told Puett that he wanted it filled by "posting." Van Elsberg stated that he wanted to make the position widely available so that the Department would have a large number of applicants. Van Elsberg was particularly interested in the parks position because of the close contact that he had with the employee in that position.³ At a later date, Van Elsberg explained to Morris that he decided not to fill the position through lateral transfer because he needed to work closely with the person in the parks position and he felt that he could not work closely with Bushek.

13. Under the posting procedure, the job notice is posted for individual application by employees within the bargaining unit. If there are fewer than three qualified applicants, the job is then opened to the public.

14. Before the parks position was posted, Van Elsberg approached Sid Davis and asked him to consider applying for the parks position. Van Elsberg made no commitments to Davis about obtaining the promotion to the parks position.

15. Davis had previously worked in the Department's parks division under the supervision of Van Elsberg. While with the parks division, Davis had performed grounds maintenance work. When the position became open, Davis was working in the sign shop of the traffic planning and engineering unit of the engineering division. The sign shop was located at the headquarters and central yard facility.

³Although directly supervised by Puett, the parks employee usually worked by himself around the headquarters and yard grounds. The supervisor was typically on the road during the day with the crew. As a result, if immediate approval was required, the parks maintenance employee would have to seek approval from Van Elsberg. The parks employee contacted Van Elsberg about once per week.

16. On September 5, 1989, the County posted the senior parks maintenance position, opening it to application by any member of the bargaining unit.

17. On September 6, 1989, Davis met with the employee who was leaving the parks position to review the position's duties.

18. Also, on September 6, 1989, Bushek discussed the selection procedures regarding the parks position with the Department director, John Goodson. Bushek told Goodson that it was his understanding that the position was already guaranteed to Davis and that he (Bushek) was denied the position because of his union activities. Goodson denied both of Bushek's statements and said that the County merely wanted to obtain the largest possible number of applicants.

19. Three members of the bargaining unit applied for the position: Bushek, Davis and George Ries. The applications were submitted to the County's Personnel Department. The Personnel Department conducted an initial review of the applications. Van Elsberg discussed Bushek's eligibility for the position with Cheryl McCawley, a personnel analyst. McCawley determined that Bushek was not eligible to apply for the position under a posting. She observed that Bushek would receive less than a five percent increase if awarded the parks position. She therefore concluded that Bushek's transfer to the parks position would not constitute a promotion, that job postings were available as a vehicle for promotions only, and that, as a result, he was not eligible to apply for the posted position.

20. Bushek informally appealed the determination regarding his ineligibility to the Department's management. After a delay of three or four weeks, the Personnel Department told Bushek that he would be considered eligible for the position.

The Promotion Interview

21. Van Elsberg was responsible for selecting and recommending one of the three applicants for the parks position. He formed an interview panel consisting of Puett; another road maintenance zone supervisor, Doug Putschler; and himself. Van Elsberg prepared 19 questions for use in the interview, which were typed and distributed to the other panel members. He received from the Personnel Department an interview ratings guide that used letters, not numbers, for scoring responses to

interview questions. He also received an interview rating form for summarizing scores.⁴

22. The panel met with each applicant for approximately one hour on the same afternoon in October 1989. At the interview, each applicant was asked the same 19 questions. Each of the panel members took notes of the applicants' responses on the paper containing the questions. Letter grades were assigned to each applicant's responses to each question, except that Van Elsberg failed to assign a letter grade to Bushek's response to one question and Putschler failed to assign letter grades to Bushek's responses to three questions.

The Award of the Parks Position to Davis

23. A few days after the interview, the panel reconvened and recommended that the position be awarded to Davis Puett preferred Bushek. Puett's preference was based on (1) Bushek's superior performance in the interview; (2) Bushek's specific, written proposal on projects he wanted to accomplish around the grounds; and (3) Puett's personal desire to transfer someone from within his crew to that position.

24. Bushek and Davis had comparable levels of prior experience in grounds maintenance. Davis had worked several years in grounds maintenance for the parks division. Bushek had worked for three years in grounds maintenance at the headquarters and central yard facility.

25. Van Elsberg favored Davis, and Putschler found Davis and Bushek about equal.⁵ Because Putschler understood that Van Elsberg would have to work closely with the selected

⁴There is no evidence that it was contrary to a written policy or practice for a manager to draft his own questions for an interview. A rating system based on letters, as opposed to numbers, had been used only once before the interview for the parks position, but has been used continuously since then. The County switched to the letter system to prevent routine totaling of number scores and the award of the position based on total scores. By blindly totaling scores, the interviewer is prevented from giving extra weight to the more important questions.

⁵After the interview, Putschler told two other employees that Bushek, but not Davis, had done well in the interview. Putschler's statement does not necessarily mean that Putschler found Bushek to be a more qualified or more suited candidate for the position than Davis. The parks position is not one requiring primarily verbal skills that can be measured solely through an interview. Putschler's recommendation relied on factors other than Bushek's and Davis's relative performances in the interview.

employee, he decided to "submit" to Van Elsberg's preference. Putschler and Van Elsberg had the following concerns:

(a) They were both concerned about Bushek's attitude and motivation. They viewed Bushek's statement that he deserved the job as exhibiting an improper attitude.⁶

(b) They also questioned his motivation in seeking the job. Bushek had previously inquired about whether he could arrange a flex-time schedule if he obtained the job because he wanted to take graduate coursework at the University of Oregon. They concluded that Davis wanted the position because he enjoyed that type of work, which he had done almost exclusively since employed by the County.

(c) Van Elsberg had, in the past, worked with the parks employee and would continue to do so. Hence, he wanted to find someone with whom he would be comfortable working. Because Van Elsberg was not comfortable working with Bushek, he did not find Bushek as the most suitable candidate.⁷

26. Van Elsberg's prior experiences in dealing with Bushek were almost solely in the union-management forum where Bushek was representing the union, including contract negotiations, grievance processing and the filing of an unfair labor practice charge against Van Elsberg that was later withdrawn.

27. Bushek was subsequently notified that Davis was selected for the parks position as the "most suitable" candidate. Bushek appealed the selection to Engineering Division Manager Ollie Snowden and Director John Goodson, but his appeal was denied. At a later date, Snowden explained that he upheld Van Elsberg's selection because of his experience in a conversation with Bushek in early 1988 over the County's denial of funds for him to take a word processing course. The conversation expanded into a general discussion on the County's approach to training.⁸

⁶Bushek explained that he deserved the job because of his greater seniority.

⁷The foregoing explanation is derived from Putschler's testimony and the interview rating forms signed by Putschler and Van Elsberg. Van Elsberg never did explain the basis by which he determined that Davis was more suitable for the position than Bushek.

⁸The Association failed to prove that Bushek undertook this conversation as a representative of the Association and in his role as the head of the Association's training committee. The role of the Association or the training committee was never brought up in the course of that conversation in either Snowden's or Bushek's version.

In that conversation, Snowden found Bushek a difficult person with whom to work.⁹

Bushek's Alleged Intimidation of Davis

28. After learning of the selection, Bushek approached Davis to discuss the selection decision. Davis had not yet heard about the decision, and Bushek informed Davis that he was awarded the job. Bushek then stated that he (Bushek) was better qualified for the position than Davis and that Davis should turn down the position. Davis and Bushek also discussed whether the crew and Puett would look unfavorably on Davis's appointment. Bushek told Davis that if he accepted the job he should explain to the entire crew that there was not a scam to deny Bushek the job and that he should describe his qualifications. The discussion lasted 10 to 15 minutes, was carried out in normal tones of voice, and was neither threatening nor coercive.

29. During the Bushek-Davis conversation, various other employees approached and briefly entered the conversation. One such person was George Ries, the other rejected applicant. When Ries approached, Bushek turned to him and asked whether Ries wanted Bushek to pursue a grievance on behalf of Ries regarding the selection of Davis to the parks position.

30. Following the Bushek-Davis discussion, the County held an investigatory meeting to determine whether the facts supported discipline of Bushek. As a result of the interview, the County issued a written reprimand of Bushek for violating a County work rule prohibiting intimidation, coercion or threatening of other employees.

The Association's Information Request

31. The Association grieved the reprimand through the parties' contractual grievance procedure, contending that the County lacked just cause for discipline. During the grievance processing, the Association requested various documents from the County. Although some information was provided, the County refused to provide the following information:

"Since the Union maintains that the discipline is a cover-up for Carlos Van Elsberg's illegitimate actions, and to help the Union to determine if any other rules, regulations or procedures have been violated, I am also requesting:

⁹Although Snowden had prior dealings with Bushek in his role as union steward and president in various union-management meetings, Snowden never exhibited any animosity toward Bushek as a result of or in any of these meetings.

1. The personnel file of Sid Davis, the successful candidate for the Senior Park Maintenance position (Posting # 89-104) that gave rise to this dispute.
2. His complete application for the position.
3. All copies of interview notes and/or any documents used in evaluating the applicants for the above noted posting.
4. Information regarding any changes in interview/evaluation criteria that has occurred [sic] in the last three years.
5. Information as to where, in any Lane County document the term 'more suited' can be found and/or defined, as in 'more suited for a position.' "

32. The County refused to produce this information, stating:

"You indicated the * * * information requested was to aid in the filing of a ULP for failure to bargain in good faith. We would respond as follows:

- " 1) The procedure by which you would have access to Sid Davis' personnel file is the same as stated in #2 above [requiring authorization by the employee].
- " 3) [sic] Interview notes and documents utilized in the selection process have been considered as privileged documents as part of management's right to select candidates for employment.
- " 4) Criteria for selection for this position was not changed as this is a new position so there is no past criteria. In any event, it is management's prerogative [sic] to determine what selection procedure and criteria will be used.
- " 5) I am not aware whether there is or is not a Lane County definition of 'more suited'. A more specific response would have to be researched. "

The Association never offered any waiver from employees regarding documents from their personnel files. In addition, the parties took no further steps to narrow their differences.

The Arbitration Award

33. After exhausting the preliminary steps in which the grievance was denied, the Association took the grievance to arbitration. Arbitrator Arno Denecke concluded that Bushek had not violated the County work rule and set aside the discipline imposed upon him.

CONCLUSIONS OF LAW

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

2. The County violated ORS 243.672(1)(a) by failing to transfer or promote Bushek to the senior park maintenance position.

The Association charges that the County failed to transfer or promote Bushek to the senior parks maintenance position "because of" his union activity.¹⁰ A complainant making a "because of" charge must first establish a *prima facie* case.

"* * * In most cases, a *prima facie* case is established by showing the exercise of protected activity, adverse employer action and some connection between the two sufficient to support an *inference* of a causal relationship. If Complainant's proof is sufficient only to raise such an inference, the employer can defeat the consequent presumption of unlawful discrimination by presenting credible evidence to show that it acted for reasons

¹⁰ORS 243.672(1)(a) makes it an unfair labor practice for an employer to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662."

ORS 243.662 provides that "[p]ublic employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations."

See *OPEU and Termine v. Malheur County*, Case No. UP-47-87, 10 PECBR 514, 520 (1988), for a discussion of the "in" and the "because of" prongs of subsection (1)(a).

unrelated to the protected activity (e.g., legitimate "business" reasons). In such cases, Complainant then bears the burden of persuading this Board that, more probably than not, the employer's proffered legitimate reasons are either false or otherwise pretextual and that, but for Complainant's protected activity, the employer's adverse action would not have occurred.

"In contrast, if Complainant's *prima facie* case establishes that the employer's action was in fact motivated, at least in part, by protected activity, the burden shifts to the employer to persuade this Board that although protected activity was a motivating factor in its conduct, it also acted for lawful reasons, and would have done so even absent the protected activity." *Lucas v. Coos County Sheriff's Office*, Case No. UP-119-90, _____ PECBR _____ (June 6, 1991), slip op. at p. 6, emphasis in original.

Bushek is a long-time leader of the Association. His status as a union official continued through the events at issue in this case and is expected to continue into the future. Van Elsberg had many contacts with Bushek regarding union business. Bushek and Morris each requested a transfer to a position that was about to open. Ordinarily, intra-division transfer requests have been approved or denied by agreement of the transferring and receiving foremen (in this instance, the same man, Puett). Van Elsberg decided to interview the employees in this case, however. He further decided not to grant a transfer and then had the personnel department "post" the position. Bushek, Davis and Ries applied for the "promotion." Bushek originally was declared ineligible for consideration for the promotion. He informally appealed that decision to Goodson, the department director, who interceded on his behalf so that his application was considered. After candidate interviews, two members (Van Elsberg and Putschler) of the interview panel recommended that Davis be hired. The third panel member, Puett, refused to join in the recommendation because he favored Bushek for the job. Bushek was at least as qualified as Davis to fill the position. The recommendation of Davis was accepted by the managers of the department and he was given the job.

The Association established a *prima facie* case. It showed extensive union activity by Bushek, adverse employer action (the refusal of the transfer request and later denial of the promotion), a proximity in time between the union activity and the adverse action, and "attending circumstances which suggest something other than a lawful, business-related, reason for the coincidence."¹¹ The attending circumstances consist of

¹¹ *OPEU and Termine v. Malheur County*, *supra*, 10 PECBR at 520.

Van Elsberg's decision to interview the transfer candidates rather than leave the matter to the foreman, his denial of a transfer and his decision to post the position, his discussion with McCawley in personnel regarding Bushek's eligibility for a promotion which preceded Bushek initially being declared ineligible for the position, his solicitation of Davis to apply for the job, and his selection¹² of Davis over the wishes of foreman Puett, who strongly preferred Bushek.

The Association further proved that Bushek's union activity played a role in Van Elsberg's decision not to grant his transfer request. Van Elsberg intervened in the transfer situation because he wanted to work closely with the senior parks maintenance employee. He did not feel he could work closely with Bushek.¹³ Van Elsberg's knowledge of Bushek was gained almost solely from their contacts incident to Bushek's duties as a union official. We infer that Van Elsberg's belief that he could not work closely with Bushek was based on his impressions of Bushek's personality and characteristics that were formed during and as a direct result of Bushek's activities on behalf of the union.

When it is proven that an employee's protected activity played a role in an employer's action adverse to the employee, the burden of persuasion shifts to the employer. See *Monroe Elementary Educ. Assn. v. Monroe Sch. Dist. No. 25J*, Case Nos. UP-49-90 and UP-56-90, _____ PEGBR _____ (May 30, 1991). Ordinarily, an employer carries its burden by showing it had legitimate reasons for taking the action and by convincing this Board that, more probably than not, it would have made the same decision without consideration of the employee's protected activity. This case presents a somewhat different question because the "good" and the "bad" reasons for the denial of Bushek's transfer cannot be clearly separated and balanced against each other.¹⁴ A supervisor's belief that he could not work closely with an employee generally could constitute a legitimate reason for denying the employee a new job. Van Elsberg's opinion of Bushek, though, was predicated on Bushek's performance of union duties. It follows, therefore, that but for Bushek's protected activity

¹²It is clear that Putschler concurred in the selection of Davis primarily because Van Elsberg wanted Davis.

¹³We base this finding on Morris's un rebutted testimony. See Finding of Fact No. 12. Van Elsberg, who testified after Morris, did not specifically explain why he chose not to allow Bushek's transfer. He confirmed that he was concerned about the position because he worked closely with that employee, which is why he fully involved himself in the transfer request.

¹⁴This would not be so, of course, if the County had shown some additional reason for the denial of the transfer and, subsequently, the "promotion"--for example, that Bushek was not qualified for the position.

Van Elsberg would not have held that opinion at the time of the transfer request. The County's evidence does not persuade us that, even absent Van Elsberg's feelings about Bushek, the transfer or promotion would have been denied.

In the usual case, our analysis would be complete at this point. The Association proved that Bushek's union activity played a role in the County's decision; and the County failed to prove it would have made the same decision regardless of consideration of the employee's protected activity. We believe further explanation is necessary, however. Otherwise, our discussion might be interpreted as holding that an employer can never legitimately consider, in making personnel decisions, information about an employee that it gained as a result of the employee's performance of union business. We do not intend to indicate that any reliance on such information is, in effect, a *per se* violation of subsection (1)(a).¹⁵ At the same time, in order to accord employees the full protection provided by (1)(a), we believe an employer's reliance on such information must be scrutinized.

In the present case, Van Elsberg's opinion about not getting along with Bushek was based on Bushek's conduct during normal union activities. There is no evidence that the manner in which Bushek exercised protected rights was so unusual that any reasonable person would have formed the same opinion. Under such circumstances, we do not find that Van Elsberg's belief constitutes a legitimate business reason for denying Bushek's transfer or promotion. To hold otherwise would put at risk of discrimination every union activist who properly performs his or her duties.

Because Bushek was denied a transfer or promotion because of his protected activities, the County violated ORS 243.672(1)(a). The Association need not prove the existence of anti-union *animus* on Van Elsberg's part. See, e.g., *Portland Assn. of Teachers and Bailey v. Multnomah County Sch. Dist. No. 1*, Case No. C-68-84, 9 PECBR 8635 (1986). Without such proof, however, we do not infer that the County's action also violated ORS 243.672(1)(c).¹⁶ Compare, e.g., *Monroe Elementary Educ. Assn. v. Monroe Sch. Dist.*, *supra*.

¹⁵For example, an employer might legitimately consider an employee's lack of math skills--even if that knowledge was gained by observing the employee at the bargaining table--if that person requested a job that required such skills.

¹⁶ORS 243.672(1)(c) makes it an unfair labor practice for an employer to "[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization."

We also do not find a subsection (1)(d) violation.¹⁷ Although there is evidence that Bushek filed unfair practice complaints and that Van Elsberg was vaguely aware of that activity, the evidence is not sufficient for us to conclude that the activity played a significant role in the formation of Van Elsberg's negative opinion of Bushek.

We shall order that Bushek be placed in the senior parks maintenance position and be made whole.

3. The County did not violate ORS 243.672(1)(a), (c) or (d) by reprimanding Bushek.

The County reprimanded Bushek for attempting to coerce and intimidate a fellow employee in violation of a County work rule. The reprimand arose out of Bushek's conversation with Davis following Davis's selection for the parks position. The reprimand was taken to arbitration, where it was set aside for lack of just cause.

We reject the Association's argument that (1) Bushek was investigating a grievance in his conversation with Davis; (2) because he was investigating a grievance he was engaged in protected union activity; and (3) this protected activity was the reason the County reprimanded Bushek. The evidence regarding the Bushek-Davis conversation established that Bushek was not investigating a grievance, but was pursuing a personal matter. Bushek directly stated that he (Bushek) and not Davis should have the job and that Davis should turn down the job. Such statements do not have the resonance of a grievance investigation. The Association's contention that he was pursuing a grievance was an after-the-fact rationalization.

The only indication that arguably suggests that Bushek was pursuing a grievance in this conversation with Davis was his question to George Ries, who was the other rejected applicant for the parks position. When Ries just happened into the conversation, Bushek asked Ries if he wanted to file a grievance over the County's denying him the position. That comment was insufficient to establish that Bushek was investigating a grievance in his conversation with Davis.

An individual does not engage in protected activity when pursuing a personal matter outside of the framework of the collective bargaining or grievance resolution process. See *McGrew v. Marion County Fire District No. 1*, Case No. C-103-77, 3 PECBR

¹⁷ORS 243.672(1)(d) makes it an unfair labor practice for an employer to "[d]ischarge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony under ORS 243.650 to 243.782."

1747, 1751 (1978); *Morris v. City of Lincoln City*, Case No. C-282, 1 PECBR 177, 183 (1977).

Because Bushek was not engaged in protected activities when talking with Davis, the Association did not establish a *prima facie* violation of the "because of" prong of section (1)(a). We likewise conclude that there was no violation of the "in" prong. As we held in *Polk County Deputy Sheriffs' Association v. Polk County*, Case No. UP-48-90, 12 PECBR 503, 512 (1990):

"We have found that the County did not reprimand [the employee] because of his protected activities. As a result, the 'natural and probable' effect of this lawful Department action cannot have been to chill employee exercise of * * * PECBA rights. The Association has thus failed to show a violation of the in prong of section (1)(a)." (footnote omitted).

Furthermore, there is no basis for establishing a violation of subsections (1)(c) or (1)(d). As in *Polk County*, "[b]ecause we have found no actual causal connection between [the] exercise of protected activity and the written reprimand he received, we find no violation of either ORS 243.672(1)(c) or (1)(d)."

4. The County did not violate ORS 243.672(1)(e) by failing to produce information requested by the Association.

Although the County did not produce the information sought by the Association, we do not find a violation under the circumstances.

Concerning Davis's file and application, the County responded that it would release that information to the Association if it received a waiver from Davis as required by County policies. The parties had been operating under that policy. The County's response was appropriate under the parties' practice, therefore.¹⁸ The Association did not produce a waiver or further assert its right to the information. Considering these facts, we do not find that the County's response to these requests was unlawful under the PECBA.

The Association's third request at issue sought "copies of interview notes and/or any documents used in evaluating the applicants" for the senior parks maintenance position. We have held before that an employer has no obligation to produce subjective or confidential information such as notes made during negotiations or grievance investigations. *OSEA Chapter 68 v. Colton Sch. Dist. 53*, Case No. C-124-81, 6 PECBR 5027, 5032

¹⁸The Association did not contend that the policy was unlawful or otherwise invalid or inapplicable.

(1982). The Colton rationale and holding is equally applicable to notes and personal observations made during promotional or hiring interviews.

The County adequately responded to the Association's other requests.

5. We deny the Association's request for a civil penalty.

Our conclusion that ORS 243.672(1)(a) was violated is based on a novel theory about basing personnel decisions on personal interactions in union-management meetings. We have previously held that civil penalties generally are not appropriate in cases involving issues of first impression. See *OSEA Chapter 148 v. Petersburg School District 14C*, Case No. UP-84-85, 9 PECBR 8612, 8624 (1986). In addition, we do not find the County's PECBA violation to be repetitive or egregious.

ORDER

1. The County shall cease and desist from violating ORS 243.672(1)(a) by continuing to deny Bushek the position of senior parks maintenance.

2. The County shall place Bushek in the senior parks maintenance position within 30 days of this Order. The County shall also make Bushek whole for all financial losses resulting from the denial of the transfer to him in accordance with our ruling in *OSEA v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832, 8853-56 (1986).

3. The remaining claims set forth in the complaint are dismissed.

DATED this 14th day of August 1991.

Allen M. Hein

Allen M. Hein, Board Member

Patrick J. Mosey

Patrick J. Mosey, Board Member

This Order may be appealed pursuant to ORS 183.482.

Chairman Ellis dissenting:

I dissent because I believe there are three major faults in the majority's analysis. First, the majority decision utilizes a mixed-motive analysis in this case which this Board first adopted in *Monroe, supra*, but which is not appropriate in this case. A mixed motive analysis is appropriate only where the Complainant can establish "by a preponderance of the evidence that illegitimate motives played some part in the decision. If the plaintiff cannot present that quality of evidence, then the case must be decided under the old framework * * * following *Burdine*." *Adams v. Frank*, 49 FEP cases 1276, 1278 (E. D. VA 1989) (declining to apply a mixed motive analysis in an employment discrimination case). In *Monroe*, unlike in this case, we found *direct* evidence of the superintendent's anti-union *animus*, which shifted the burden of persuasion. In the majority decision here, there is no direct evidence of anti-union motivation and hence the burden should not shift to the employer.

The second problem with the Order is that it draws an inference that Bushek's union activity played a role in Van Elsberg's determination. To draw the inference, the majority's decision disregards substantial uncontroverted evidence indicating that union activity was not considered in the selection process -- that evidence is the testimony of all three members of the selection panel that Bushek's union activities were never discussed or even mentioned in the interview process.

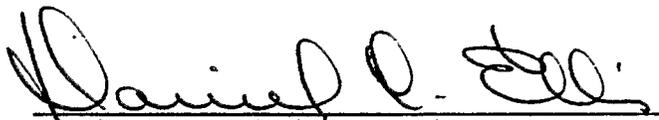
Furthermore, the inference assumes without any supporting evidence or explanation that Van Elsberg's experience in dealing with Bushek created a negative impression of Bushek. There was no direct evidence that Van Elsberg ever expressed any problem or even discomfort with the union or Bushek's representation of the union. Nor was there any evidence of Van Elsberg's personal feelings toward Bushek - much less evidence of any negative feelings.

A third problem is the majority's assumption that Van Elsberg's alleged reliance on the union activity was wrongful. The decision places the burden on the employer to show that Bushek's activity in representing the union was so unusual or obnoxious as to justify Van Elsberg's and the employer's reliance on this activity in making its decision. By so phrasing the question and placing the burden on the employer, the answer is preordained. Because the employer never acknowledged that it relied on his union activity, it would have no reason to show that the activity was so unusual or obnoxious to justify reliance on it.

In any event, the only evidence related to Bushek's behavior at a meeting with management was at a meeting with Ollie Snowden involving a personal dispute. That evidence established that at that meeting Bushek did not behave in a professional manner. But there is no basis for assuming that Bushek behaved

in a similarly unprofessional manner in his dealings with Van
Elsberg.

For the reasons set out above, I believe that the
majority decision reaches too hard and too far in its efforts to
find anti-union motives by the employer in its decision not to
hire Bushek. The inferences drawn by the majority and the
conclusions reached are not supported by the record.


Daniel C. Ellis, Chairman