

[12-13-02] Coos County Board of Commissioners and AFSCME Local 2936, Complainants v. Coos County District Attorney and State of Oregon, Respondents / Case No. UP-32-01

Oral argument before the Board on August 13, 2002, on objections filed by Respondents to a recommended decision issued by Administrative Law Judge (ALJ) William Greer on April 17, 2002, following a hearing on December 14, 2001, in Portland, Oregon. The hearing closed on January 24, 2002, upon receipt of the parties' post-hearing briefs.

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Josephine Hawthorne, Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondents Coos County District Attorney and State of Oregon.

On August 16, 2001, Coos County Board of Commissioners (County) and AFSCME Local 2936 (AFSCME), filed this complaint alleging that County District Attorney Paul Burgett (DA) and the State of Oregon (State) had refused to abide by a grievance decision, in violation of ORS 243.672(1)(a) and (g).

The DA terminated a support staff employee (KV) from employment in his office, and AFSCME grieved. During the County's review of the grievance, under a contractual grievance procedure, it ordered KV reinstated to the DA's office. The DA refused to abide by the County's order. AFSCME and the County allege that the DA's refusal violated ORS 243.672(1)(a) and (g). Complainants contend that the DA is a public employer and subject to the terms of the County-AFSCME collective bargaining agreement. The DA asserts that he is not KV's "public employer."

After investigation, the ALJ set the complaint for hearing. Respondents filed their answer on November 28, admitting and denying certain allegations and asserting six affirmative defenses. At hearing, Complainants amended their allegation that a civil penalty is appropriate. The issues are:

1. Was the DA a "public employer" of KV at material times?
2. Is the DA subject to the terms of the 1998-2002 County-AFSCME collective bargaining agreement?
3. Did the DA refuse to abide by the terms of a grievance decision rendered by the County, reinstating KV as an employee in the DA's office, in violation of ORS 243.672(1)(a) and (g)?
4. Did the DA violate ORS 243.672(1)(a) or (1)(g) by returning KV to a position in the DA's office, other than that specified in the County's order? Did the DA's September 2001 reinstatement of KV render this complaint moot?
5. Is a civil penalty order appropriate?
6. Is a filing fee reimbursement order appropriate?

The ALJ concluded that the DA is one of KV's public employers; the DA is subject to the terms of the County-AFSCME collective bargaining agreement; and his refusal to abide by the County's decision in the grievance procedure violated ORS 243.672(1)(a) and (g). We agree and adopt the recommended decision as modified below.

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

RULINGS

1. The DA and State as "public employers" subject to the County-AFSCME collective bargaining agreement. In Respondents' answer, the DA and the State assert several challenges to this Board's jurisdiction, based on Respondents' argument that neither the DA nor the State is a "public employer" for purposes of this dispute. We reject those arguments, as more fully explained in the Conclusions of Law.

2. State as Respondent. In Respondents' answer, it admits that the State is a public employer but denies that the State is a proper respondent in this case. On December 6, 2001, the State filed a motion for an order dismissing it as a respondent, asserting that Complainants' sole allegation against the State related to a legal opinion provided to the DA by an assistant attorney general.

Complainants allege that the DA's allegedly unlawful actions "* * * [1] were in the course and scope of his office and his employment as an elected officer of the State, and [2] were made with the express approval of his Employer, the State of Oregon, by and through its attorney, Lori Kraut, an assistant Attorney General.* * *" Complainants clearly allege that the DA is an elected State officer who acted on behalf of the State. We deny the motion to dismiss the State as a respondent.

3. County as Complainant. Respondents argue that the County is not an "injured party," under ORS 243.672(3), and therefore is not a proper complainant. The County alleges that it paid sums to KV that were owed by the DA. Under the circumstances, we rule that the County is an injured party that was entitled to file this complaint and seek reimbursement from the DA.⁽¹⁾

4. At hearing, counsel for the County marked as Exhibit C-46 and offered into evidence a February 5, 1997 letter from Assistant Attorney General Rudolph Westerband to Tillamook County District Attorney William Porter. In the letter, Westerband discussed district attorneys' collective bargaining rights and obligations regarding deputy district attorneys who are represented by a labor organization.

Respondents objected to receipt of the exhibit, arguing that it was irrelevant, not exchanged in advance of hearing (as required by the ALJ's pre-hearing order), and involved a privileged attorney-client communication. The ALJ correctly ruled that the exhibit was irrelevant. It relates to district attorneys' employment relationship with *deputy district attorneys* (see ORS 8.780), not district attorneys' employment relationship with *support staff*, such as KV (see ORS 8.850).⁽²⁾

4. After the hearing, the ALJ properly took notice of this Board's March 12, 1974 certification of AFSCME as exclusive representative of the bargaining unit; *Local 502-A, Coos County Courthouse Employees, AFSCME v. Coos County*, Case No. C-147. He also properly took notice of this Board's May 7, 1985 amendment of that certification, reflecting a change in the local number and stating the bargaining unit description, as agreed by the parties; *AFSCME Local 2936 v. Coos County*, Case No. UC-28-85. Finally, he properly took notice of the 1974 version of this Board's rules. All three

documents were marked as Board exhibits and made part of the record.

5. The ALJ's other rulings were reviewed and are correct.

FINDINGS OF FACT

1. AFSCME, a labor organization, is the exclusive representative of a bargaining unit of certain personnel employed by the County, including the support staff employed in the DA's office.

2. The County is a public employer.⁽³⁾

3. The DA is a public employer.

Office of the DA

4. The DA is a State officer.⁽⁴⁾

5. Burgett was appointed DA effective October 20, 1980. He was elected to office effective 1981. He has been re-elected and served continuously as DA to the hearing date.

6. The County assigns personnel to the DA's office, which is located in the County courthouse. Those employees perform duties as, or in the areas of, legal secretary, child support enforcement, crime victims assistance, medical examiner, and child advocacy. The DA's office includes six secretaries and three support enforcement agents.

County collective bargaining agreements

7. From 1976 to 1983, AFSCME, elected County officials, and the DA entered collective bargaining agreements. In the preamble of those contracts, the parties agreed:

"* * * It is recognized that there is a statutory division of responsibility between the Board of Commissioners and certain elected officials with respect to administration of departments affected by this Agreement, and that the statutes shall control in the event of conflict with any provision of this Agreement."

All of the elected County officials and the DA executed the County-AFSCME collective bargaining agreements that were signed in November 1976, February 1978, and December 1978. After 1978, the DA has not signed any of the contracts.

8. Burgett's predecessor signed a collective bargaining agreement entered into by the County and AFSCME, with a term of July 1, 1978, through June 30, 1980. That agreement applied to the DA's support staff and expired several months before Burgett was appointed DA. Another County-AFSCME collective bargaining agreement, by its terms applicable to employees in the DA's office, became effective on July 1, 1981.

9. After he became DA, Burgett was aware that AFSCME's County bargaining unit included the support staff in the DA's office.

10. In the early 1980s, a dispute arose about the ability of the County to bind certain elected officials to the terms of a collective bargaining agreement with AFSCME. The DA knew of that dispute, when it occurred. As a result of the dispute, the County met with elected County officials and the DA to discuss the County's authority to bargain on behalf of them.

11. In May 1983, at the outset of bargaining for a successor contract, AFSCME wrote the County: "To further clarify the question of authority to bargain. I understand that [a judge] has notified you that you do not represent him at the table. Will you please state specifically whether or not you are authorized bargain on behalf of all other elected officials of the County?" The County negotiator told AFSCME that he was authorized to bargain on behalf of all the elected officials, "with some reservations."

12. In 1983, the County proposed eliminating from the labor contract's preamble the language describing the division of responsibility between the commissioners and elected officials. AFSCME agreed, and they amended the preamble of the 1984-1985 collective bargaining agreement to refer to only the County as the employer. In that agreement, the County recognized AFSCME as the exclusive representative "for all public employees of Coos County" (with certain immaterial exclusions), including those employed in the DA's office.

The County signed the contract on behalf of the employers subject to the agreement. The County and AFSCME repeated that approach in their subsequent contracts.

13. County Personnel Officer Janis Falcon was the County spokesperson in negotiations for the 1998-2002 County-AFSCME collective bargaining agreement. Throughout negotiations, she gave the DA and elected County officials the opportunity to provide input into the County's bargaining positions, and she informed them of progress in negotiations. The DA never disputed Falcon's authority to bargain on his behalf.

14. In the 1998-2002 County-AFSCME collective bargaining agreement, the parties provide that the bargaining unit includes "all public employees of Coos County" (with certain immaterial exclusions), and specifically excludes deputy district attorneys.

15. The contract includes several relevant provisions: (1) the County will not discharge any bargaining unit employee without just cause; (2) the County will layoff employees in accordance with a contractual procedure; and (3) a grievance procedure for resolution of disputes about the meaning, interpretation, or application of its terms, in which AFSCME can process a contract dispute through several levels of decision-makers: the employee's immediate supervisor; the employee's department head; the County commissioners; and a grievance arbitrator.

Employment of KV

16. In mid-1990, the DA employed KV as an extra help employee, excluded from the AFSCME bargaining unit, with funds provided by the County. The DA recognized at that time that "there are some restrictions as to the use of that money if our intended use conflicts with the union contract."

17. In October 1990, the DA hired KV as a legal secretary. In 1993, the DA made the decision to promote her to a position as support enforcement agent. From 1991 through 1996, KV's supervisor and the DA rated KV's performance as satisfactory or better. Throughout her employment as a regular employee, the DA and the County applied the terms of the County-AFSCME collective bargaining agreement to KV.

18. In August 2000, KV was involved in an off-duty incident. Due to her alleged misconduct, the DA suspended KV with pay. On August 29, Falcon provided to the DA a copy of a County document entitled "Supervisor's Guide to the Disciplinary Process." On September 6, the DA met with KV and her AFSCME representative.

By letter dated September 13, the DA wrote KV: "I regret to inform you that I must terminate you from employment with the [DA's] office. That decision was effective September 15. The DA and the County processed that decision as a termination of KV's employment.

19. AFSCME grieved that action through the contractual grievance procedure. After considering the grievance, on January 9, 2001, the County reduced the DA's action to a one-month suspension; offered KV a legal secretary II position in the DA's office; and stated that "* * * [a]ll other back pay will be paid to [KV]."

20. The DA informed the County on January 22 that he had conferred with counsel from the Oregon Department of Justice and that he was not required to reinstate KV to a position in his office. He also stated that ORS 8.850 requires the County to provide the DA with "stenographic assistance"; that he had not signed the collective bargaining agreement; and that the County could reassign KV to a different County department.⁽⁵⁾

21. The County considered the dispute further and on May 9, ordered KV reinstated on May 14 to her former position as support enforcement agent in the DA's office.

22. The DA, on May 14, told KV that he would not accept her back into his office. KV reported to the County, which at that time directed her to go home.

23. On June 4, the County reaffirmed its earlier decision. Its order of that date provided that KV's employment was not terminated; that she was to be suspended without pay for 30 calendar days; that she was to report for work on May 14;⁽⁶⁾ and that she was to receive back pay from September 13, 2000 through May 11, 2001, "* * * minus the 30 day unpaid suspension and minus the unemployment benefits [KV] received between September 2000 and May 2001."

24. Effective June 6, due to the DA's refusal to permit KV to work in his office, the County reduced the workforce in the DA's office by eliminating KV's position and placing her on layoff status.

25. On August 9, 2001, the DA consented to KV's return to his office. He specified that she would have somewhat different duties and be supervised by the chief deputy district attorney.

26. On August 23, the County recalled KV to work, effective September 4, as a support enforcement agent in the DA's office.

27. When the County recalled KV to work, it paid her an amount (\$32,016.59) that it calculated was owing under the terms of its grievance decision.

DA's role regarding AFSCME personnel employed in the DA's office

28. Throughout his tenure in office, the DA has timely received copies of the County-AFSCME collective bargaining agreement. The County has always invited his input in preparation for bargaining with AFSCME. Until receiving the County's grievance procedure order to reinstate KV, he had consistently applied the terms of those contracts to the County employees assigned to work in his office.

29. The DA has effectively recommended the hiring of personnel who work in his office, including KV. The County has never rejected any of his hiring decisions. He also effectively recommended the promotions of KV and other employees.

30. When considering the termination of an employee, the DA always has consulted with the County personnel department. The DA effectively terminated an individual who was employed in the DA's office as assistant crime victim coordinator. That employee's position was funded by a grant and excluded from the AFSCME bargaining unit. Aside from this case involving KV, the County has given effect to the DA's termination recommendations.

31. DA office employees submit resignation and retirement letters to the DA. When accepting a resignation or retirement letter, the DA signs a form that states the effective date of the termination; the reason for the termination; and the employee's hours of leave accrued, taken, and to be paid upon termination. He transmits that form and a form entitled "Payroll Termination Voucher" to the County personnel office; the voucher details the amount of money owing to the employee upon termination. After review by the personnel office, the voucher is submitted to the County for approval.

32. The DA sought and obtained from the County the reclassification of an employee in his office from office specialist to legal secretary.

33. As the department head, the DA prepares and signs forms for the employees in his office, including County forms to document the results of new-hire recruitments and promotions; performance evaluations (including recommendations for merit pay increases); and applications for family, medical, or maternity leave. On worker compensation claim forms, the DA signs as the "employer representative," after specifying that the County is the employer.

34. The County has adopted a personnel policies and procedures manual that, by its terms, applies to all individuals employed by the County, including those assigned to work for elected officials. The record contains no separate policy and procedure manual that may have been adopted by the DA.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The DA is a "public employer" of the support staff in his office.
3. The DA is subject to the terms of the 1998-2002 County-AFSCME collective bargaining agreement.
4. From January 9, 2001, to August 9, 2001, the DA refused to reinstate KV, in violation of the County's grievance procedure decision order and ORS 243.672(1)(g).
5. The DA's refusal to reinstate KV violated ORS 243.672(1)(a).
6. The DA's reinstatement of KV to a position in his office, effective September 4, 2001, was not contrary to the terms of the County's grievance procedure decision; did not violate ORS 243.672(1)(a) or (g); and did not render this complaint moot.
7. The DA's violations of ORS 243.672(1)(a) and (g) warrant the payment of a civil penalty.

8. An order directing the DA to reimburse Complainants' complaint filing fees is not appropriate.

DISCUSSION

This case illustrates the conflict that may arise between elected officials in a county and the county itself concerning which entity is the public employer of those public employees working for the elected official. AFSCME and the County assert that the DA is a joint employer of the County employees who work in his office. The State and DA assert that neither is a public employer of any County employees other than deputy district attorneys for the purposes of the Public Employee Collective Bargaining Act (PECBA), and thus the DA's actions in refusing to reinstate KV cannot have violated the PECBA. We hold that the DA is a public employer of the County employees in his office for PECBA purposes, and that his conduct was unlawful.

"Public employer" status of the DA

ORS 243.650(20) defines "public employer" as: "the State of Oregon, and the following political subdivisions: Cities, counties, community colleges, school districts, special districts, mass transit districts, metropolitan service districts, public service corporations or municipal corporations and public and quasi-public corporations." ORS 243.650(21) defines "public employer representative" as including "any individual or individuals specifically designated by the public employer to act in its interests in all matters dealing with employee representation, collective bargaining and related issues."

This Board and the appellate courts have determined that various individuals are "public employers" and subject to this Board's jurisdiction: juvenile court judges;⁽⁷⁾ the judicial department of the State;⁽⁸⁾ and a county sheriff.⁽⁹⁾ The DA concedes that he is a "public employer" of the deputy district attorneys whom he employs.

At issue here, however, is whether the DA is a "public employer" for the support staff who work in his office. The DA argues that the County is the sole employer of those employees, and that he is not a "public employer" of KV and the other support personnel who work there. AFSCME and the County assert that since 1974, the DA and his predecessors have acted with the County as joint public employers of those employees. We must determine whether the DA is a public employer of his support staff.

The legislature has directed counties to provide support for district attorneys. ORS 8.850 states: "Each county shall provide the district attorney and any deputies for such county with such office space, facilities, supplies and *stenographic assistances* as is necessary to perform efficiently the duties of such office." (Emphasis added.)

To resolve the issue of the DA's status as a public employer of his office staff, we apply the "joint employer" standard that we have discussed in other cases. See *IBEW Local 932 v. City of Siletz*, Case No. RC-12-00, 19 PECBR 178, 183-86 (2001); and *COPPEA v. City of Portland*, Case No. UC-58-95, 16 PECBR 879, 885 (1996), *AWOP* 148 Or App 635, 939 P2d 678, 679 (1997). As we said in *City of Portland*, "[t]he basic test of joint employer status is whether each of the two employers has a significant role in determining the essential terms and conditions of employment of the employees in question." 16 PECBR at 887. See also *Boire v. Greyhound Corp.*, 376 US 473, 481, 55 LRRM 2694 (1964).

In this case, the County exercises significant control over the employment of support staff assigned to

the DA's office. The County reviews personnel recommendations; authorizes hiring and other personnel decisions; has negotiated collective bargaining agreements that apply to those employees; and can resolve grievances in the grievance procedure. The County is the appointing authority for the support staff who work in the DA's office.

The DA also exercises significant day-to-day control over such employees. He effectively recommends that the County hire and promote the employees assigned to his office; assigns work to them; evaluates their performance; administers the disciplinary process; and has taken steps that resulted in the termination of employees. In this case, he decided to terminate KV, issued the termination letter to her, and even temporarily blocked the County's attempt to assign her to work again in his office. Aside from this case involving KV's employment, the record contains no evidence that the County has refused to give effect to any of the DA's personnel recommendations or decisions.

Despite this evidence tending to show that he is an employer, the DA insists that he can have no employer status except that expressly authorized by statute. We do not agree. A public official such as the DA can be an employer, at least for PECBA purposes, by exercising significant control over employment relations matters over public employees.⁽¹⁰⁾

Joint employer disputes are not common in public employment. Such issues arise much more frequently in the private sector, often in circumstances in which one employer contracts with another for the second employer to provide workers to perform some duties for the first. Whether the two employers constitute joint employers, however, is not dependent on their contractual relationship. *NLRB v. Western Temporary Services*, 821 F.2d 1258, 125 LRRM 2787 (7th Cir 1987). Instead, the question is whether both employers "exert significant control over the same employees." *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 111 LRRM 2748, 2753 (3rd Cir 1982). Factors considered by the federal courts and the National Labor Relations Board include "the supervision of the employees' day-to-day activities, authority to hire or fire employees, promulgation of work rules and conditions of employment, work assignments, and issuance of operating instructions." *W.W. Grainger Inc. v. NLRB*, 860 F.2d 244, 129 LRRM 2718, 2721 (7th Cir 1988).

Other states that have considered similar disputes in the public sector have applied variations of the tests used in the private sector. For example, in *AFSCME v. Meharg*, 96 LRRM 3047 (1977), the Michigan Court of Appeals concluded that a county board of commissioners and a county sheriff were joint employers of deputy sheriffs. In that case, the contract was between the county and the union. When the sheriff fired a deputy, the union grieved under the contract. The sheriff maintained he had not signed the contract and was therefore not bound by it. In holding that the sheriff was a joint employer bound by the agreement, the court said that "[w]hile the board of commissioners may be the employer to the extent that it controls the economic factors involved in the employment contract, there is no question but that the sheriff is the employer who has control over the day to day operation of the sheriff's department." 96 LRRM at 3048. See also *Ulster County v. CSEA*, 79 LRRM 2265 (1971); *Costigan v. Local 696*, 90 LRRM 2328 (1975); *Kane County v. ILRB*, 128 LRRM 2922 (1988).

On the record before us, we conclude that the DA has exercised the authority of an employer with respect to the employees in his office. He has hired or effectively recommended the hiring of employees, including KV. Although he may not have the ultimate authority to terminate employees, he has effectively recommended discharges before this instance. He has disciplined employees. His role in the establishment of wage rates for employees in his office is not clear, but he has sought and received reclassifications for employees. He is largely, if not completely, responsible for the day-to-day supervision of his office staff. He has established work rules and operating instructions for his staff. He determines their assignments within his office. Though he has not chosen to participate directly in

negotiations, the County has invited his input and has advised him of the status of bargaining. In sum, the DA has amply demonstrated sufficient authority to be found a joint employer of his office staff.

We conclude that the County and the DA function as joint employers of the employees who work in the DA's office. Each plays a meaningful role in establishing the employment conditions for these employees. They share or co-determine those matters governing essential terms and conditions of employment. The DA is a "public employer" under the PECBA for his office staff.

Application of County-AFSCME contract to the DA

The DA did not sign the most recent County-AFSCME contract. However, the law from other jurisdictions that have considered the question is clear that a joint employer need not sign a collective bargaining agreement to be subject to its terms. A party becomes a joint employer by taking actions consistent with employer status. As discussed above, the DA did so here, including operating his office in conformity with the terms of the County-AFSCME contract. What binds the DA to that contract is his conduct.⁽¹¹⁾

ORS 243.672(1)(g) contract violation claim

The DA and the County, each public employers, are joint employers under the PECBA, with respect to the office staff in the DA's office. The County, as one of the employers of the DA's office employees, entered into a collective bargaining agreement with AFSCME that was in effect at all material times in this case. That contract contains a grievance procedure, under which the County has the authority to resolve grievances. After the DA dismissed KV, AFSCME grieved and the County, pursuant to its contractual authority, resolved the grievance by ordering KV reinstated to her position in the DA's office. The DA, the other employer of KV, refused to abide by that decision.

ORS 243.672(1)(g) provides that it is an unfair labor practice for a public employer to violate the provisions of a collective bargaining agreement. As an employer of KV, the DA was obliged--as was the County--to comply with the provisions of the County-AFSCME contract. The contract's grievance procedure gives the County the authority to resolve grievances, which the County attempted to do by ordering KV's reinstatement. The DA was constrained to abide by that decision, and his failure to do so was contrary to the terms of the contract.

ORS 243.672(1)(a) discrimination claim

Complainants also allege that the DA's refusal to abide by the County's reinstatement order violated ORS 243.672(1)(a).⁽¹²⁾ Subsection (1)(a) provides that 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 ORS 243.662." ORS 243.662 states that public employees have the right to participate in the activities of labor organizations for the purpose of representation and collective bargaining.

Based on the allegations of the complaint, we analyze this charge as a (1)(a) violation. When deciding a subsection (1)(a) complaint asserting that the employer interfered with, restrained, or coerced an employee "in the exercise of" protected rights, we determine whether the natural and probable consequence of the employer's action would tend to interfere with, restrain, or coerce employees in exercising those rights. *ATU v. Tri-Met*, Case No. UP-48-97, 17 PECBR 780, 789 (1998).⁽¹³⁾

We have held that a public employer violated both the "because of" and "in the exercise of" prongs of ORS 243.672(1)(a) when it denied an assignment change request submitted by an employee because the

employee had used a contractual grievance procedure to challenge an earlier employer decision. *Portland Association of Teachers and Bailey v. Multnomah County School District*, Case No. C-68-84, 9 PECBR 8635, 8646-8651 (1986).

In this case, the DA--acting as one of the employers of his support staff--fired KV, and she filed a grievance. In its grievance procedure decision, the County ordered KV reinstated to the DA's office. The DA initially refused to reinstate KV, thereby repudiating the contractual grievance procedure. The natural and probable result of the DA's refusal to comply with the County's grievance order was interference with and restraint of employees in their use of the grievance procedure: when an employer repudiates a grievance resolution, a reasonable employee would tend to be inhibited from filing grievances. *Compare ATU v. Tri-Met*, 17 PECBR at 789 (employer's conversion of suspension to termination, during review of employee's grievance, violated subsection (1)(a)). The DA's conduct violated the "in the exercise of" prong of ORS 243.672(1)(a).

Reinstatement and mootness

After his initial refusal to reinstate KV, and shortly after the filing of this complaint, the DA did accept her as an employee in his office. The DA argues that his decision to allow KV to return to work in his office moots this complaint. This Board has consistently refused to apply a mootness rule to complaints alleging violations of (1)(a). Such violations impact core PECBA rights, and merely ceasing the unlawful conduct may not be sufficient to undo the harm caused. The DA's reinstatement of KV, following his seven-month refusal to permit her to return to work, did not render this case moot.

Remedy

ORS 243.676(2)(c) provides that upon concluding that a public employer has engaged in an unfair labor practice, this Board shall issue a cease and desist order and "[t]ake such affirmative action * * * as necessary to effectuate the purposes of" the PECBA.

This case presents unique circumstances. AFSCME and the County filed the complaint jointly against the DA. In addition to a cease and desist order, the complaint sought the following relief: (1) an order that KV be reinstated to her former position in the DA's office, with the DA and the State required to pay all the back pay and benefits due to KV; (2) an order that the DA post a notice; (3) an order that the DA and the State pay the complainants' representation costs; and (4) an order that the DA and the State pay a civil penalty and reimburse Complainants' filing fees. These are not unusual requests in a complaint alleging violations of (1)(a) and (1)(g). What makes the request atypical is that the County, one of the two joint employers, is seeking this relief from the DA, the other joint employer.

ORS 243.676(2)(c) requires this Board to issue a cease and desist order if we find a violation. We concluded above that the DA violated (1)(a) and (1)(g) by his refusal to reinstate KV. We will order the DA to cease and desist from such conduct.

In the hearing, it was established that KV has been reinstated, and questions about the terms of that reinstatement are being litigated in another forum. We turn then to the issue of back pay and benefits.

It was also established at hearing that the County paid KV \$32,016.59 under the terms of its decision resolving the grievance. So far as the record before us shows, KV has received all the back pay and benefits to which she was entitled under the County's grievance resolution decision. The County seeks to have the DA (and/or the State) reimburse it for that expenditure.

Such an order would not be appropriate, however. Had the DA complied immediately with the County's grievance resolution, the County would have paid KV's back pay and benefits. Had the County not resolved the grievance and had it been later resolved in AFSCME's favor at arbitration, the County would have had to pay any back pay awarded by an arbitrator. Had the DA not fired KV in the first place, the County would have paid KV's salary and benefits. In other words, the County, as one of KV's employers, was and is responsible for KV's compensation. To order the DA to reimburse the County for KV's pay and benefits that the County would have been responsible for paying in any event goes beyond make-whole relief. Therefore, we will not order such reimbursement.

Posting of notice

Complainants request this Board to order the DA to post a notice regarding his violation of the PECBA.

This Board generally directs respondents to post a notice in situations in which the violation:

"* * * (1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was perpetrated by a significant number of a 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. * * *" *OSEA v. Fern Ridge School District*, Case No. C-19-82, 6 PECBR 5590, 5601 (1983), *AWOP 65 Or App 568, 671 P2d 1210 (1983), rev den 296 Or 536 (1984)*.

The DA's refusal to abide by the County's grievance order involved a flagrant disregard of the applicable contract and flagrantly violated ORS 243.672(1)(a). In addition, the DA's violation affected the ongoing employment rights of a bargaining unit employee. We shall order the DA to post the attached notice.

Civil penalty

OAR 115-35-075(1)(a) provides that we may award a civil penalty of up to \$1,000 to the prevailing party in an unfair labor practice case if "[t]he Board finds [1] that the party committing an unfair labor practice did so repetitively, knowing that the action taken was an unfair labor practice and took such action disregarding that knowledge; or [2] that the action constituting an unfair practice was egregious * * * "(14)

This Board has established strict requirements for the extraordinary sanction of a civil penalty: "The request [for a civil penalty] must include a statement as to why a civil penalty is appropriate in the case under these rules, with a clear and concise statement of the facts alleged in support of the statement." OAR 115-35-075(2).

In their complaint, Complainants assert that they provided the DA with citations to controlling Board and appellate court decisions, and that Respondents "knew or should have known that the DA was obligated to accept the County Commissioners' grievance decision, and they disregarded that knowledge in taking the actions alleged" in the complaint. Complainants allege that Respondents' conduct was egregious, and that a civil penalty award "will help to deter such future unlawful refusals in furtherance of the PECBA."

In their amended complaint, Complainants make two additional points in support of their request for a civil penalty. First, they contend that the DA's assertion that he was not a "public employer" of KV was frivolous because the DA "acted in every manner as a co-employer of [KV]. He hired, evaluated, directed, disciplined, and ultimately fired her. There is no reasonable basis in law or fact for this

defense." Second, they assert that the DA's claim that he was not bound by the collective bargaining agreement "is without any reasonable basis in that the [DA] has historically been so bound. The [DA] historically has acted in similar fashion with respect to other nonattorney employees of his office." Finally, Complainants state that a civil penalty order would "further the policies of the PECBA * * *." We conclude that Complainants' pleading met the civil penalty rule's pleading requirements.

We have previously stated that a definition of "egregious" is "conspicuously bad" and that a synonym is "flagrant." *East County Bargaining Council v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184, 9194 (1986). In that case, we concluded that the employer's unilateral increase in student contact time amounted to a "flagrant and knowing disregard for the duties imposed by the PECBA" and warranted a \$1,000 civil penalty. 9 PECBR at 9196.

In another decision, we determined that an employer committed an "egregious" violation, resulting in a \$1,000 civil penalty, when it violated ORS 243.672(1)(a) by assigning a union activist--whose primary assignment had been vehicle maintenance--to repair an irrigation system, which involved digging ditches in the rain. *OACE v. Douglas School District*, Case No. UP-82-89, 12 PECBR 547, 565 (1990).

In this case, we have concluded that the DA is a party to the County-AFSCME collective bargaining agreement and--for over two decades--has consistently applied it to employees in his office. It was only after he barred KV from his office, and the County ordered him to reinstate her, that he first asserted he was *not* bound by that contract. The DA's refusal to abide by the County's grievance decision was a flagrant violation of the contract and ORS 243.672(1)(g). The natural and probable effect of the DA's refusal to abide by the County's decision was a chilling of employees' use of the grievance procedure to resolve disputes and also a flagrant violation of ORS 243.672(1)(a). The DA's conduct warrants a civil penalty.

Filing fee reimbursement

Complainants also request the Board to order the DA to reimburse their \$250 complaint filing fee. OAR 115-35-075(3) provides: "* * * The Board may order filing fee reimbursement to the prevailing party in any case in which the complaint or answer is found to have been frivolous or filed in bad faith. A request for filing fee reimbursement must comply with the procedure established in subsection (2) of this rule [quoted above]."

This Board has stated that defenses or complaints are frivolous only if:

"* * * 'every argument on appeal is one that [1] a reasonable lawyer would know is not well grounded in fact, or that [2] a reasonable lawyer would know is not warranted either by existing law or by a reasonable argument for the extension, modification, or reversal of existing law.'" *AFSCME Council No. 75 v. City of Forest Grove*, Case Nos. UP-5/25-93, 14 PECBR 796, 797 (1993) representation cost order (emphasis added), quoting *Westfall v. Rust International*, 314 Or 553, 559, 840 P2d 700 (1992).

The complaint and answer presented complicated legal issues. While *some* of Respondents' defenses were questionable or arguably frivolous, we cannot conclude that *every* defense was frivolous. Because not every defense asserted by Respondents was frivolous, we deny Complainants' request for a filing fee reimbursement order.⁽¹⁵⁾

ORDER

1. The DA shall cease and desist from refusing to comply with the County's January 9, 2001 grievance decision, regarding the grievance of KV.
2. The DA shall post the attached notice, in compliance with its terms.
3. The DA shall pay each Complainant a civil penalty of \$500, within 30 days of the date of this Order.
4. Complainants' request for reimbursement of its complaint filing fees is denied.

DATED this 13th day of December 2002.

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-32-01, *Coos County Board of Commissioners and AFSCME Local 2936 v. Coos County District Attorney and State of Oregon*, and in order to effectuate the policies of the Public Employee Collective Bargaining Act, District Attorney Paul Burgett hereby notifies the employees employed in his office that:

District Attorney Burgett terminated a support staff employee from his office. AFSCME Local 2936 challenged the termination by filing a grievance. The County decided to resolve the grievance by ordering the employee reinstated to District Attorney Burgett's office, with back pay. District Attorney Burgett refused to abide by the County's decision, asserting that he was not a "public employer" of the employee and was not subject to the 1998-2002 County-AFSCME collective bargaining agreement.

The Employment Relations Board concluded that: (1) District Attorney Burgett and Coos County are joint public employers of the support staff employed in the District Attorney's office; (2) District Attorney Burgett is subject to the terms of the 1998-2002 County-AFSCME collective bargaining agreement; and (3) District Attorney Burgett's refusal to abide by the County's decision violated the 1998-2002 County-AFSCME collective bargaining agreement and amounted to an unfair labor practice under ORS 243.672(1)(a) and ORS 243.672(1)(g).

The Employment Relations Board ordered District Attorney Burgett to cease and desist from refusing to abide by the County's grievance decision. The Board also ordered District Attorney Burgett to pay a civil penalty of \$1,000 to Complainants.

District Attorney Burgett will comply with the Employment Relations Board's Order and cease and desist from such unlawful conduct.

Dated _____, 2002 Paul Burgett, District Attorney

* * * * *

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 N.E., Suite 400, Salem, Oregon 97301-3807, phone 503-378-3807, ext. 0.

1. As explained in our discussion of the remedy, however, we conclude that the County is not entitled to the reimbursement it seeks.
2. The ALJ also ruled that the exhibit was untimely exchanged contrary to Board rules. That ruling was within his discretion.
3. The following County government positions are elective, under ORS 204.005: assessor, clerk, commissioners, sheriff, surveyor, and treasurer.
4. The Oregon Constitution provides, in part, that: "[t]here shall be elected by districts comprised of one, or more counties, a sufficient number of prosecuting Attorneys, *who shall be the law officers of the State*, and of the counties within their respective districts, and shall perform such duties pertaining to the administration of Law, and general police as the Legislative Assembly may direct." Or. Const. Article 7-Original, Section 17 (emphasis added). The DA is an elected State official; ORS 8.610; *see generally* ORS 8.610-8.852. *See also* 30 OrAGOps 335, 336 (1961), in which the Attorney General stated: "[t]his office has long held that district attorneys are state officers." ORS 180.060(4) provides, in part, that the Attorney General "shall consult with, advise and direct the district attorneys in all criminal causes and matters relating to state affairs in their respective counties." (Emphasis added.)
5. KV worked in a classification entitled "support enforcement agent." The County employs personnel in that classification only in the DA's office.
6. The County apparently intended its June 4 order to be retroactive to May 14.
7. *See Circuit Court [Judge Richard Barron] v. AFSCME*, 295 Or 542, 669 P2d 314 (1983), *affirming* 61 Or App 311, 657 P2d 1237 (1983), *affirming* 6 PECBR 5051 (1982). In our decision, we reviewed the applicable statutes and held that the juvenile judge was the juvenile counselors' *sole* employer, not a joint employer. 6 PECBR at 5062-5063. On the facts, we concluded that the juvenile judge was a member of a multi-employer bargaining unit. 6 PECBR at 5067.
8. *See Lent v. Employment Relations Board and AFSCME Council 75*, 63 Or App 400, 664 P2d 1110, *rev den* 295 Or 617 (1983).
9. *See Hockema v. Oregon State Employees Association*, 34 Or App 527, 579 P2d 282, *rev den* 283 Or 235 (1978), in which the court stated that " * * * a 'public employer'--the state--has designated sheriffs to act in its interests in dealing with deputies." 34 Or App at 529.

10. Even a private sector employer may be a joint employer of public employees for PECBA purposes. *See City of Siletz*, 19 PECBR at 184.

11. The ALJ found that the DA was part of a multi-employer association with the County and was bound to the contract for that reason. In so doing, he relied on this Board's decision in *Barron*. While the application of the multi-employer association principles in that case are correct in the context of that case, we do not find them necessary here. In *Barron*, this Board specifically concluded that the judge and the county were *not* joint employers, and application of multi-employer association principles was necessary to hold the judge to the terms of the contract. Because we conclude that the DA was and is a joint employer of the staff in his office, we need not consider the additional question of whether he was also a member of a multi-employer association with the County.

12. In paragraph 32 of the complaint, Complainants allege that, "[b]y disregarding [KV]'s grievance settlement, the [DA] has interfered with [KV]'s exercise of protected rights, in violation of ORS 243.672 (1)(a)."

13. The Court of Appeals quoted, with approval, this Board's description of the analysis; *PAT and Poole v. Multnomah County School District*, 171 Or App 616, 625-626, 16 P3d 1189 (2000).

14. There is no basis in this case for considering the DA's conduct repetitive. *AOCE v. Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 74 (1999).

15. While it might appear incongruous to award a civil penalty yet deny fee reimbursement, the applicable standards are different. We award a civil penalty where we conclude that conduct has been flagrantly bad. We order fee reimbursement where defenses raised are frivolous. A party may be guilty of egregious misconduct yet raise defenses that are at least arguable. Such was the case here.