EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-04-12

(UNIT CLARIFICATION)

COALITION OF GRADUATE EMPLOYEES, LOCAL 6069, AFT, Petitioner, v. OREGON UNIVERSITY SYSTEM, OREGON STATE UNIVERSITY, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On October 22, 2012, the Board heard oral arguments on Petitioner's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on August 27, 2012, after a hearing was held on May 31 and June 5, 2012, in Salem, Oregon. The record closed on June 29, 2012, with the receipt of the parties' post-hearing briefs.

Eben L. Pullman, Field Coordinator, and Richard H. Schwarz, Executive Director, AFT-Oregon, Tigard, Oregon, represented Petitioner.

Jeffrey P. Chicoine, Attorney at Law, Miller Nash LLP, Portland, Oregon, represented Respondent.

On March 9, 2012, the Coalition of Graduate Employees, Local 6069, AFT (Union) filed a petition under which it sought to add approximately 767 unrepresented graduate assistant positions[1] to its current bargaining unit of approximately 951 graduate assistants at Oregon State University (OSU) through either a certification without an election process under

[1]The term graduate assistants, as used in this order, is intended to apply to students with either graduate teaching assistant (GTA) or graduate research assistant (GRA) appointments.

ORS 243.682(2)(a) and OAR 115−025-0000(1)(c) or through the unit clarification process under OAR 115-025-0005(4). This Board bifurcated the petition into two separate cases: one addressing the certification without an election portion of the petition (Case No. CC-05-12); and the case before us addressing the unit clarification petition (Case No. UC-04-12).[2]

On March 20, 2012, the Union filed an amended unit clarification petition in Case No. UC-04-12. OSU filed timely objections to the amended petition on the basis that the petitioned-for positions are not public employees within the meaning of ORS 243.650(19) and do not share sufficient community of interest with the current bargaining unit positions.

The issues in this case are:

1. Are the petitioned-for individuals public employees within the meaning of ORS 243.650(19)?

2. Is the proposed unit of all graduate students with GTA or GRA appointments, or a combination of GTA and GRA appointments, employed by OSU with a minimum appointment of 0.15 FTE, excluding supervisory, confidential, and managerial employees, an appropriate bargaining unit under ORS 243.682(1)(a)?

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The Union is a labor organization and the exclusive representative of a bargaining unit of employees at OSU, a public employer.

2. In 1999, the Union filed a petition seeking to represent graduate assistants at OSU. OSU objected because the petitioned-for unit included graduate assistants engaged in teaching or research primarily to fulfill advanced degree requirements, who it asserted were not public employees under *University of Oregon Graduate Teaching Fellows Federation v. University of Oregon (GTFF v. U of O)*, Case No. C-207-75, 2 PECBR 1039 (1977). The parties subsequently entered into a consent election agreement excluding graduate assistants who were teaching or performing research primarily to fulfill a degree requirement. The consent election agreement was signed by Associate Vice Chancellor Joe Sicotte, on behalf of the Oregon University System (OUS). In November 1999, this Board certified the Union as the exclusive bargaining representative of a bargaining unit which was essentially the same as the current bargaining unit.[3]

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[2]The Board subsequently dismissed the petition for certification without an election. *Coalition of Graduate Employees, Local 6069, AFT v. Oregon University System, Oregon State University*, Case No. CC-005-12, 25 PECBR 42 (2012).

[3]*Coalition of Graduate Employees, AFT, AFL-CIO v. Oregon University System*, Case No. RC-14-99 (1999).

3. The Union and OSU are parties to a collective bargaining agreement (Agreement) effective from July 1, 2008 through June 30, 2012. Under that Agreement, the current bargaining unit includes all OSU graduate students with graduate teaching assistant (GTA) or graduate research assistant (GRA) appointments working a minimum 0.15 full-time equivalent (FTE) appointment in a given academic term,

> "provided that at least 0.10 FTE is devoted to service to OSU as an employee, *excluding* (a) supervisory employees; (b) confidential employees; (c) managerial employees; and (d) graduate students with GTA or GRA appointments in their capacity as students who are teaching or performing research primarily to fulfill an advanced degree requirement." (Emphasis in original.)

OSU currently treats graduate assistants with combined GTA and/or GRA appointments as bargaining unit members even though only one of their appointments falls within the bargaining unit definition.

Background Regarding GTFF/University of Oregon Bargaining Unit

4. In 1977, this Board issued an order in which it concluded that University of Oregon (U of O) graduate teaching fellows (GTFs), who were engaged in teaching or research to fulfill an advanced degree requirement, were not eligible to be included in a bargaining unit of GTFs represented by the Graduate Teaching Fellows Federation Local 3455, AFT, AFL-CIO (GTFF) because they were students and not public employees within the meaning of ORS 243.650(17).[4] *U of O*, 2 PECBR at 1039 (1977).

5. In March 1998, pursuant to a consent election agreement, this Board certified the GTFF bargaining unit at the U of O to include GTFs "with service awards who are teaching or performing research to fulfill a requirement for an advanced degree" in the existing bargaining unit.[5] The consent election agreement was signed by Associate Vice Chancellor Sicotte, on behalf of what is now called the Oregon State Board of Higher Education (OSBHE).

6. The current GTFF bargaining unit at the U of O includes "[a]ll graduate students with GTF appointments (service awards) employed by the University of Oregon, excluding supervisors and confidential employees." At the time of the hearing in this matter, there were approximately 1,480 U of O graduate students with GTF appointments, consisting of 75 percent teaching assistants, 16 percent research assistants, and 9 percent administrative assistants. Eighty-five percent of the funding for GTFs at the U of O is through general/operating funds.

[4]At the time of this decision, the definition of public employee in the Public Employee Collective Bargaining Act (PECBA) was found under ORS 243.650(17). The current definition is in ORS 243.650(19).

[5]*Graduate Teaching Fellows Federation, Local 3455, AFT, AFL-CIO v. University of Oregon*, Case No. UC-56-97 (1997).

Oregon State Board of Higher Education and Oregon University System

7. OSBHE is the governing board for the seven public universities, including OSU. OSBHE advocates for higher education in the political and budgetary process and hires and fires university presidents. OSBHE has generally delegated to the institutions matters related to budgets, personnel hiring, labor relations, and collective bargaining.

8. OUS is the coordinating entity for the higher education system. OUS enacts broad oversight polices and ensures that the institutions coordinate their academic program offerings to complement, rather than compete with, each other.

9. OSU, U of O, Eastern Oregon University (EOU), Western Oregon University (WOU), and Portland State University (PSU) are OUS institutions. OUS Vice Chancellor of Finance and Administration Jay Kenton and OUS Human Resources Division Director of Labor Relations Rick Hampton signed the parties' 2008-2012 Agreement. Kenton also signed the GTFF/U of O 2010-2012 Collective Bargaining Agreement on behalf of OSBHE. OUS representatives have been part of the employer's bargaining team at EOU, WOU, and PSU.

OSU Academic Structure

10. The three elements of OSU's mission include the education of students and the preparation of the next generation of professionals; knowledge generation and application through research, by examining, addressing, and helping to provide solutions to society's problems; and outreach and engagement, with a focus on understanding the needs and issues of the external environment and translating research back to the broader community for its use. OSU accomplishes its mission through undergraduate education, graduate education and research, and community outreach and engagement.

11. OSU offers approximately 200 undergraduate and 80 graduate degree programs. For the Spring 2012 quarter, OSU enrolled 19,245 undergraduate students; 575 professional students; and 3,445 graduate students, including 1,545 master's degree candidates, 1,249 doctorate (Ph.D.) candidates, and 651 non-degree students.

12. The purposes of OSU's undergraduate education are to prepare professionals to become members of the broader community and to educate students holistically to become productive citizens. Undergraduate education is typically instruction driven, with one-third of the program based on general education requirements and two-thirds on a specific discipline. Undergraduate education goals are driven by the institution and generally funded through tuition and state general funds.

13. OSU's professional degree programs include the School of Pharmacy, School of Veterinary Medicine, doctorate of education, master's in business administration, master's in fine arts, master's in engineering, and master's in agriculture. These programs, which are almost exclusively funded through student tuition, are designed to provide students with expertise and in-depth knowledge in a particular area through course-work instruction and specialized training, and hands-on experience in a clinical setting.

14. OSU's graduate student education involves research-based programs, through which students earn a master's degree or a Ph.D.[6] These graduate programs are largely a function of OSU's research enterprise and are driven by the research grants faculty members secure for projects from external sources. Most of the problems faculty address through their research projects, such as climate change or genetics, cannot be solved by one generation of scientists. As a result, research-based graduate education, especially at the Ph.D. level, is primarily focused on developing the next generation of scientists, researchers, and university educators and recruiting students to continue faculty research projects in the future.

15. Graduate students are recruited for or accepted into a graduate program with the expectation of advancing research on a particular faculty member's project. As part of their degree requirement, graduate students are expected to spend approximately 75 to 80 percent of their time in research with a faculty member. Two critical dimensions of a graduate student's research experience are learning to be an independent researcher and obtaining an integrative experience allowing them to see their problem in the broader context. A graduate student applies to both the OSU Graduate School and their program of interest. While the application is pending, the student talks with the program's faculty members. A condition of a student being admitted to a graduate program is that a faculty member agrees to serve as the student's faculty advisor and the student agrees to work under that faculty advisor. This is usually a mutual decision. Since part of the faculty member's research project is designed for student work, often times a student's general thesis area is determined at the time the student is admitted to a specific graduate program.

16. Faculty members generally accept a student into a graduate program with the expectation that the student will have the education, skills, background, and interest to work on the faculty member's project. The student's faculty advisor is responsible for developing and delivering the student's graduate degree program, pursuing research funding needed to recruit graduate students, recruiting students, providing the expertise that allows the student to learn about research methodology and the research itself, overseeing the student's research work, and ensuring that the student is advancing toward his/her degree. A faculty advisor could decide not to renew a graduate student if they determined the student was not a good fit for the program or not performing adequately. A student's researched-based graduate education is also overseen by a graduate committee comprised generally of faculty members, who can provide the student with the broader context.

17. OSU master's and Ph.D. degree programs are administered through the Graduate School. The Graduate School sets the policies regarding the general requirements for these programs. Under these policies, all master's degree students are required to complete a minimum of 45 graduate credit hours, including a thesis or research in lieu of thesis, conduct research or produce creative work, demonstrate subject matter mastery, and be able to ethically conduct scholarly or professional activities. Specific programs may have other requirements.

[6]Although some of the professional programs are for students earning a master's degree, witnesses generally used the term "graduate program" only in regard to the research-based graduate programs, which is how the term is used in this Order.

Graduate Assistantships

18. OSU graduate programs compete with other research-based universities to recruit the highest quality graduate students. As a result, some programs offer students financial support through graduate assistant appointments, which may be very influential in a student's decision to attend OSU. Departments attempt to fit the right funding to the right student based on the mix of skills and funding available. OSU considers the stipends paid to graduate assistants to be financial aid. Students in research-based graduate programs would be required to perform the research as part of their degree requirement even if they were not given a graduate assistant appointment.

19. Programs pay graduate assistant stipends out of a faculty member's research grant, gift, or contract funds. These funds also pay for the materials and equipment needed for the research project, and approximately 30 to 50 percent of the funds are used for OSU administrative costs. The amount of a graduate assistant stipend is intended to be competitive to allow the program to recruit students. The amount of the stipend is not intended to directly reflect the number of hours required for the research. The Graduate School has graduate assistant stipend guidelines that establish a minimum recommended stipend based on FTE for graduate assistants. Departments must follow the minimum stipend requirements but may offer higher stipends.

20. The Graduate School provides on-line information on financing a graduate education, which states that "[t]he most common form of student support, graduate assistantships are employment-based appointments where students, in exchange for their service, receive a stipend, tuition remission, and an institutional contribution toward the health insurance program available only to graduate assistants." The website contains further information on graduate assistantships, stating that:

> "There are many reasons to become a graduate assistant, not the least of which is financial support for your education. In exchange for service, an assistantship provides a monthly salary, tuition remission, and an institutional contribution toward the graduate assistant-only health insurance premium. Teaching assistantships (TAs) may include leading a discussion, delivering lectures, grading papers, or supervising a laboratory. Research assistantships (RAs) typically assist faculty in conducting research projects. As OSU is a teaching and research institution, it follows that the work of our graduate assistants is essential to fulfilling the university's mission.
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> "Assistantship appointments range from 0.20 FTE to 0.49 FTE (FTE meaning full-time employment). An assistant on a 0.30 FTE appointment, for example, is expected to provide 156 hours of service during a 13-week academic term. When a student is offered an assistantship, the administering academic department provides the details of the appointment (e.g. contract dates, FTE, monthly stipend, expectations of position).* * *.

"**All graduate assistants are required:**

"• To perform the full duties of service as determined by their departments,

"• To be **enrolled in a minimum of 12 credit hours** each term of their appointment during the academic year (9 credits during the summer), and

"• To be making satisfactory progress toward an advanced degree."

21. In reference to graduate assistantships, OSU Fiscal Operations Policy and Procedures Manual provides that "[s]tudents can receive financial support from the University as an OSU employee. * * * The compensation for the work completed is in the form of salary and benefits, as well as, tuition remission."

22. Graduate students with GTA appointments generally teach lower division undergraduate courses or provide instructional assistance to faculty with upper division or graduate courses. GTA duties could include delivering lectures, supervising labs or recitation sections, grading papers, preparing materials, or performing other similar instruction-related activities. GTAs are usually designated as bargaining unit members. Bargaining unit or represented GTAs come from either a professional graduate degree program or a research-based graduate program. Represented GTAs may provide assistance in programs other than the one in which they are enrolled. Unrepresented GTAs provide services in their degree program for compensation and to fulfill a degree requirement that a student teach a certain number of terms. These GTA appointments are intended to help students master the course content, challenge their ability to communicate ideas, and provide them training in teaching, lesson planning, and the classroom culture. Graduate programs which require teaching experience in addition to research experience include crop and soil sciences, molecular and cellular biology, food science and technology, fisheries and wildlife, and botany and plant pathology.

23. Graduate students with GRA appointments generally provide assistance with program-based field, laboratory, or research work. Represented GRAs are appointed to a specific job that may benefit a degree program, but the research is not a requirement of their degree. This could include taking care of plants in a greenhouse for a large research program, maintaining an animal collection, being responsible for certain specialized equipment, collecting data, or analyzing data. Unrepresented GRAs provide services in their degree program on a research project which is related to their degree, typically by performing an independent part of the project. These GRAs receive compensation for their work and get hands-on experience in their field of interest. The subject or source of a graduate student's thesis is usually related to the area of their faculty advisor's research project or the work that the student is assigned as part of the assistantship. Students also may be able to tailor their work on the research project to provide data or other information related to the development or completion of their thesis.

24. OSU uses the same "Appointment Letter" template for all graduate assistants, regardless of whether they are represented or not. On the template, the person issuing the letter checks boxes indicating the graduate assistant's bargaining unit status. The template states that a graduate assistant is not included in the bargaining unit when their appointment requires them "to perform duties primarily to fulfill an advanced degree requirement * * *." All graduate assistants are assigned an FTE level in their appointment letter and informed of the expected duration of their appointment. Graduate assistants also receive a position description which sets out the basic

duties of the appointment. Many position descriptions contain the number of hours assistants are expected to work based upon their FTE status.[7] The appointment letter states that "[a]lthough the number of hours you are expected to work may fluctuate slightly during your appointment period, you may not work more than 255 working hours per term, which is a maximum of .49 FTE, in all jobs or appointments you may have within the Oregon University System."

25. OSU's Office of Human Resources has designed guidelines to help departments and programs determine whether a graduate assistant will be performing service work, which is bargaining unit work, or academic-oriented work, which is not bargaining unit work. The guidelines' examples of service appointments include a teaching appointment that is not part of a student's degree requirement, an appointment for a student who has completed the use of specialized equipment for his own research and is assisting other graduate assistants in using the equipment for their research, and an appointment to care for and feed animals to be used in research which is not the student's. The examples of academic appointments include a student teaching a class for the purpose of gaining teaching experience as part of the student's degree requirement, a student conducting research to be used in the student's thesis, and a student who is caring for and feeding animals to be used in the student's research.

26. All graduate assistants receive tuition remissions, the same health insurance plan, employer payment of 85 percent of the employee-only health insurance premium, a monthly stipend, and a $300 per term lump sum differential. OSU deducts state and federal income taxes and worker's compensation from all graduate assistants' pay checks, processes their stipends through the same payroll system used for OSU employees, and issues W-2 Wage and Tax Statements reflecting the amount of stipend paid. Since the bargaining unit was created, OSU has withheld taxes from represented and unrepresented graduate assistant stipends pursuant to the Tax Reform Act of 1986. Graduate assistants' W-2 forms name the Oregon University System-OUS as the employer.[8]

27. Tuition remissions are an enrollment tool used by OSU to recruit and retain the highest quality graduate students and researchers. In the Fall of 2000, OSU implemented the OSU Graduate Tuition Remission Allocation Model, Tuition Remission Policies, and Accounting and Management Procedures. Under the policies, graduate tuition remission is provided to students with 0.20 FTE or greater. The policies also state:

> "At OSU, graduate research and teaching assistantships are awarded to graduate students with superior records in their graduate and/or undergraduate work. All

[7]The form sets the following as the approximate number of hours to be worked per term: .20 FTE, 104 hours; .25 FTE; 130 hours; .30 FTE, 156 hours; 35 FTE, 182 hours; .40 FTE, 208 hours; .45 FTE, 234 hours; .49 FTE, 255 hours.

[8]Prior to the Tax Reform Act of 1986, grant or fellowship amounts payable to degree candidates for teaching and research were not treated as income if all such degree candidates had to perform these services. The Tax Reform Act of 1986 limited this exclusion from income for degree candidates and other students to apply only to grant funds specifically targeted to educational expenses, such as tuition, fees, and books. Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1986 (H.R. 3838, 99th Congress; Public Law 99-514)*, 38-45 (May 4, 1987).

> graduate assistants are required to perform some duties as part of their appointments. Duties of teaching assistants are related to the University's instructional program and duties of research assistants are related to the research function of the University. Graduate assistants providing duties related to fulfilling their educational requirements are paid stipends, while graduate assistants that provide service to the Institution are paid wages."[9]

28. In addition to graduate assistants, OSU has graduate fellowships.[10] Graduate fellowships are a form of financial assistance under which students are awarded tuition, scholarships, or stipends for which specific duties or work is not required. Graduate fellowship stipends are not administered through the payroll system and OSU does not withhold taxes from payments received by graduate fellows or include such payments in a W-2 Tax Statement. The fellowship payments and tuition remission are included on federal tax Tuition Statement Form 1098-T.

29. OSU has a policy addressing employees' obligations regarding conflicts of interest involving research. The current policy does not specifically state that the policy applies to graduate assistants. OSU's prior conflict of interest policy applied to all academic staff members, which as defined, specifically included graduate assistants.

30. OUS rules require all institution employees to assign to OSBHE any invention or technology improvement conceived or developed using institution facilities, personnel, information, or other resources; and educational and professional materials resulting from the institution's instruction, research, or public service activities. The rule applies to graduate assistants, graduate teaching fellows, and student employees. Under its policies, OSBHE reserves ownership rights over all institution work-related inventions and educational and professional materials developed by any employees or persons using institutional facilities, personnel, or resources, including patents and copyrighted resources. The policy does not apply to scholarly works, such as books or works of art.

31. OSU's Intellectual Property Guidelines for Students require all undergraduate students, graduate students, graduate assistants, and graduate fellows who receive monetary support from OSU to assign to OSU their intellectual property rights specifically related to the projects for which they receive financial support.

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[9]We find credible the testimony of Human Resources Director Jacquelyn Randolph that the OUS Financial Administration Standard Operating Manual (FASOM) Section 5.02: Grants and Contracts Graduate Fee Remissions is an outdated policy, which is no longer in effect. However, this finding does not significantly impact our decision.

[10]The Union is not seeking to include the graduate fellows in the bargaining unit under this petition.

32. In May 2012, there were approximately 1,613 graduate students with graduate assistant appointments.[11] The number of graduate assistant appointments (represented and unrepresented) was 1,774 due to the fact that some students held more than one appointment.

33. In May 2012, approximately 933 graduate assistants were designated as in the bargaining unit. This included 744 GTAs, 105 GRAs, and 84 graduate assistants with combined GTA and/or GRA appointments. Represented appointments are funded primarily from general funds. Some represented GTAs are students in professional programs, who provide teaching assistance unrelated to their degree requirements. Others may be first or second year research graduate students, who have not yet been assigned to a research project. Represented GRAs usually work on a large research project or maintain specific equipment or a collection in an area not directly related to their degree requirement.

34. In May 2012, approximately 680 graduate assistants were designated as unrepresented. This included 647 GRAs, 29 GTAs, and 4 graduate assistants with multiple appointments. The unrepresented GTAs were primarily students serving as teaching assistants to meet their degree programs' teaching experience requirements. The unrepresented GRAs were primarily research graduate students assigned to a research project.

35. During 2011 and 2012, an average of 5.3 percent of the total graduate assistants were moved into or out of the bargaining unit from one term to the next.

36. Graduate assistants have offices, which may be shared with other graduate assistants, faculty researchers, or graduate students. They have keys to their offices and access after normal business hours.

37. The parties' Agreement provides for a minimum FTE monthly salary for represented graduate assistants and allows the departments to set a higher monthly salary. Under the Agreement, a represented graduate assistant's salary is determined by multiplying the salary rate by the assigned FTE. FTE is based on hours worked during an academic term, with a range from 0.10 FTE, defined as 52 hours per term, to 0.49 FTE, defined as 255 hours per term.

38. The parties' Agreement includes a grievance procedure. Faculty advisors are not part of this procedure. The grievance procedure provides that disputes over whether a graduate assistant is included in the bargaining unit are to be resolved through an expedited grievance process on unit eligibility issues. There have been no unit eligibility grievances filed under this process.

39. OSU has passed along benefits achieved by the Union through collective bargaining to non-bargaining unit graduate assistants, including employer-paid health insurance contributions and other benefits. During bargaining, OSU frequently includes the cost of

[11]Although the parties' stipulated that there were 1,713 graduate assistants, the total of number of GTAs and GRAs reflected in three of the exhibits is 1,613. In addition, due to the number of multiple appointments, there is difference in the parties' numbers of represented and unrepresented GTAs and GRAs. To the extent possible, our numbers are based on actual students.

providing economic benefits for non-bargaining unit graduate assistants in its estimates of economic proposals. Faculty members do not serve on OSU's bargaining team.

Facts Regarding Some Specific Programs and Graduate Assistants

40. As of May 2012, the Food Science and Technology Department (FST) had 16 unrepresented graduate assistant appointments. The FST Graduate Handbook provides that GTAs are expected to fulfill the specified work hours commensurate with their assigned FTE and perform duties as determined by the department and faculty advisor.

41. As of May 2012, the Crop and Sciences Department (CSD) had 13 represented and 24 unrepresented graduate assistant appointments. The CSD Graduate Student Handbook provides that

> "[g]raduate students on assistantship appointments (GRA) are employees, and have obligations for work on Departmental projects. Work schedules will be decided by the major professor. It is recognized that thesis research may contribute to Experiment Station projects; consequently, there may be little distinction between project work obligations and thesis work.
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> "It is important to recognize that Graduate School is a unique opportunity for educational, professional, scientific, and personal growth. As such, to fully benefit from this experience, the assistantship should not be viewed as a typical job. Rather, the greater the effort, the greater the long-term benefit for the student."

42. As of May 2012, the Environmental and Molecular Toxicology (EMT) Department had 24 unrepresented graduate assistant appointments. The Department's Graduate Student Handbook provides that a 0.49 FTE GRA appointment is considered full-time and students pursuing a thesis degree are expected to be in residence at EMT during normal working hours and any additional time required for their research and classroom activities. The Handbook instructs students that: students receiving financial aid are not permitted to hold outside employment because they are expected to devote their time to their studies and research projects; lack of progress, research productivity, or poor grades in course work could result in dismissal from the program; and all graduate study research data and laboratory notebooks are the property of OSU, the faculty advisor, and/or the funding agency. The Handbook also states that:

> "the most critical measure of success as a graduate student is adequate progress in reaching research and programmatic goals. The time and effort required for maintaining adequate progress will differ among individual students. Students should maintain good lines of communication with their major professor and Thesis/Dissertation Committee to ensure realistic goals are set and adequate progress can be maintained."

43. All EMT students are expected to engage in research during each term they are enrolled. This includes laboratory rotations for first-year students, which expose them to diverse research fields and techniques, provide breadth to their research training, and help them identify their area of research interest and select a faculty advisor. Other research includes that which leads to a master's degree or Ph.D. student's thesis or research in lieu of thesis for non-thesis master's degree students. The amount and type of research depends on a student's course of study, typically requires after hours and weekend work under schedules dictated by the research project, and "includes the goal setting and planning required to successfully perform experiments, the specific experimental manipulations, as well as consistent literature review to keep abreast of research developments and discoveries in Toxicology and the basic sciences."

44. Joshua Robinson has a 0.49 FTE unrepresented GRA appointment in the EMT Department, where he works in the Harper toxicology lab. Robinson primarily performs research to support the needs of the laboratory. He also provides reasonable lab support, such as making requests for chemical pickups, producing lab protocols concerning chemical safety, and assisting with the use of the lab spectrometer. Robinson reports to the lab research coordinator and his faculty advisor. He is currently working on developing a test for certain materials to rapidly categorize their level of hazard, which is part of his faculty advisor's main grant. The work he performs was previously performed by a faculty research assistant. The distinction between his work and the faculty research assistant's work is the capacity to perform research and the specific research needs. Robinson was a guest lecturer in his faculty advisor's class and has shown individuals around the lab when his advisor was absent. Teaching is not a requirement for his degree program.

Robinson works as many hours as it takes to get the work done, which is more than the minimum 40-hour work week he is expected to be present in the lab. Robinson works with his faculty advisor, faculty research assistants, undergraduate student workers, the lab research coordinator, and other graduate students. Robinson believes he would not spend the amount of time in the lab that he currently does if he did not have a GRA appointment and, although he would still have a research project, it would be more targeted at his scholarship requirements. The bulk of the data Robinson collects goes to meet the needs of his faculty advisor. Robinson is currently a master's degree candidate pursuing a non-thesis project degree plan and believes that his research work has educational value and is intertwined with his educational program. He has already completed his project requirements, but continues to take research credits because he is required to maintain his status as a graduate student until he successfully defends his degree. His current research is related to the needs of the lab and any publications in which he can contribute or participate. Robinson hopes to continue his research work in the Harper toxicology lab while pursuing a Ph.D. and transition to a new project.

45. As of May 2012, the Biological and Ecological Engineering Department had 11 unrepresented graduate assistant appointments. The Department's Graduate Student Handbook requires all GRAs to provide service to justify their stipend. Graduate assistants with a 0.49 FTE appointment are expected to provide an average of 20 hours of service per week, which may be in addition to their thesis research, and GRAs with lower appointment levels are to provide a proportionate amount of service.

46. As of May 2012, the Department of Fisheries and Wildlife (DFW) had 29 represented and 29 unrepresented graduate assistant appointments. The DFW Graduate Student Handbook provides that most faculty will not accept students into the program unless financial support is available and that graduate assistantships are awarded to students with superior undergraduate and/or graduate work. Under the Handbook, a GTA is expected to provide approximately 15 hours service per week, such as reading papers and handling laboratory and quiz sections. DFW considers teaching experience as a significant adjunct to a student's education. Appendix D to the Handbook, entitled "EMPLOYMENT OF GRADUATE RESEARCH ASSISTANTS," states that GRAs "are employed as assistants to a faculty member. Usually the research conducted by the GRA will be used for a thesis, but the GRA has no right to withhold data collected while receiving money for the work. The GRA may be permitted to use the research results of a thesis, but all data collected are the property of the University."

47. Peter Kappes is a DFW Ph.D. student. Kappes submitted an application to be admitted to DFW after seeing an opening for a research position on a professional website that posts jobs for master's and Ph.D. candidates. He went through a review process and his current faculty advisor offered him a position. Kappes holds a 0.49 FTE graduate assistant appointment, which rotates between a GTA and GRA. As a GTA, Kappes is designated as part of the bargaining unit because teaching is not a component of his degree program. As a GRA, he is designated as unrepresented because he performs duties primarily to fulfill his degree. His research involves spending approximately 40 hours per week assisting his faculty advisor on a long-term project funded by National Science Foundation (NSF) on Adelie penguin demography. His faculty advisor included funding for a Ph.D. student in the NSF grant to address several questions regarding the huge data set that has accumulated over the 20 years of the project. Kappes analyzes, cleans ups, and proofs the data. He also developed the work he was assigned into his own questions to be answered. Kappes will use the research in his thesis. His faculty advisor's goal is to publish a paper. Any papers Kappes writes will include his faculty advisor's name. Kappes also takes classes.

48. As of May 2012, the Department of Rangeland and Ecology had one represented and two unrepresented graduate assistant appointments. The Department's Graduate Student Handbook states that graduate assistantships are provided to qualified candidates based on academic proficiency, background training, and interest for research in specific areas; appointments are limited to 0.49 FTE; a student must make satisfactory progress on their degree to maintain an assistantship; must participate in the mandatory employee health insurance plan, and that "[i]n recognition of their employment status, tuition for graduate assistants is usually paid from the research project."

49. Mindy Crandall is currently a Ph.D. graduate student in Applied Economics, which is an interdisciplinary program administered through the Graduate School. Crandall's career goal is to teach and she does not plan on doing research. Crandall worked as a GRA during her time as an OSU master's degree student and during the first two years of her Ph.D. program. In 2009, she began her Ph.D. program and held an unrepresented GRA appointment, in what was previously called the Department of Agricultural and Resource Economics (AREc). As part of their degree requirements, AREc students were expected to conduct a combination of research and service and obtain teaching experience as a primary instructor or a teaching

assistant in up to two academic courses. AREc GRAs who were appointed to tasks that were primarily in support of projects distinct to the academic work necessary for their degree were included in the bargaining unit. Crandall's work on her faculty advisor's research project was not directly related to her thesis.

50. In May 2012, the Department of Forest Engineering, Resources and Management (FERM) had 4 represented and 21 unrepresented graduate assistant appointments. FERM students are expected to teach one term to gain experience. GRAs are supervised by a faculty advisor and associated with a faculty research project, which normally serves as a basis for the student's thesis.

51. From January through June 2010, Crandall was assigned to an unrepresented FERM GRA appointment. Crandall worked on an Integrated Landscape Analysis Project, during which she developed community level data for a large Forest Service grant. The research project was not relevant to her thesis work. From July 2010 through June 2011, Crandall was in a GRA position, which included 23 percent teaching duties designated as service work. The Department placed Crandall's appointment into the bargaining unit after she pointed out that a portion of her appointment had been designated as service work. In May 2011, Crandall received her annual evaluation from her faculty advisor, which was based partly on her GRA teaching and research duties. In June 2011, FERM renewed Crandall's GRA appointment without teaching duties and designated the appointment as not included in the bargaining unit. Crandall currently has a graduate fellowship.

52. Daniel Ritter is a graduate student in Applied Economics and has a 0.49 FTE unrepresented GRA appointment in the Department of Agricultural and Resource Economics. Ritter applied to and was accepted at OSU and two other schools, and decided to go to OSU because OSU offered him an assistantship and was more in line with both his research interests and where he wanted to live. Ritter's work has varied every quarter and has included data collection, determining county distribution, and conducting some elementary analysis on his faculty advisor's research project on endangered species. In addition, Ritter sometimes helps his current faculty advisor grade papers and is expected to help in some teaching capacity every third term. Ritter took a grant-writing course and wrote a grant for his department directed toward graduate student funding. He meets with his faculty advisor every week. The data Ritter has collected in the research project is not related to his thesis. He expects to do original research for the thesis, which will likely deal with the impact of Oregon agriculture on endangered species. His thesis work will require data collection similar to that performed in his current research project, which has helped Ritter identify potential sources of data. He is expected to work approximately 20 hours per week, but the actual time varies due to project-based deadlines. His starting and ending times are flexible, although his faculty advisor has required him to be available at certain times on certain projects.

53. As of May 2012, the Department of Forest Ecosystems and Society (FES) had 30 represented and 24 unrepresented graduate assistant appointments.

54. Stacey Frederick is a FES graduate student in a master's degree program. As an undergraduate research assistant, Frederick had previously worked in the same lab and on the same project with her current faculty advisor. Frederick sought admission to and was accepted into the master's degree program after her current faculty advisor recruited her to work on the research project as a graduate student. Frederick has a 0.49 FTE unrepresented GRA appointment and is currently working on a general population survey as part of a research project funded through the Joint Fire Science Program, examining public knowledge of and perceptions about smoke management and agency communications. Frederick is interested in the human side of natural resource problems and hopes to work for a federal agency. Frederick will use some of the work from the current survey, but not the majority of it, for her thesis. Frederick also took an area from her advisor's research project to develop a tag-on survey for her thesis, for which she sought and received funding. Frederick's faculty advisor will use the work on the current project to obtain another project. Frederick meets regularly with her OSU faculty advisor and corresponds by e-mail with a co-advisor from Ohio State University. Because Frederick's hours are based on project deadlines, they vary. She has not been directed to work any specific number of hours, but averages around 20 hours per week, to a maximum of 60 hours.

55. The Entomology Program Graduate Student Handbook states that GRAs are expected to work an amount of time commensurate with their FTE, so that a 0.49 FTE GRA "is expected to spend 20 hours per week throughout the year, on an approved project(s). If the thesis topic is related to the project, the time spent on the thesis research can be applied to this schedule."[12]

56. In May 2012, the Department of Nuclear Engineering and Radiation Health Physics had 7 represented and 38 unrepresented graduate assistant appointments. The Department's Graduate Student Handbook provides that graduate assistants are required to carry out duties assigned by their faculty advisor to justify their stipend and expected to provide a level of service proportional to their FTE, which may be in addition to time required for their thesis research.

57. In May 2012, the College of Earth, Oceanic, and Atmospheric Sciences (CEOAS) had 8 represented and 51 unrepresented graduate assistant appointments. Pursuant to the CEOAS Graduate Handbook, 0.49 FTE GRAs "work on research duties assigned by their faculty research supervisors an average of 20 hours per week, or at least 15 hours per week during the regular academic year and full-time during the summer. * * * Advanced students usually pursue their thesis research full-time as fulfillment of their assistantship duties." In addition, renewal of a GRA appointment is dependent on satisfactory performance and funding. The Handbook provides that GTA appointments are for students interested in teaching or lecturing experience.

58. John Osborne is a CEOAS Ph.D. student and holds an unrepresented 0.49 FTE GRA appointment. Osborne's research project is related to his faculty advisor's interest in the dynamics of the coastal ocean and the application of the method of data assimilation to understand those dynamics. Osborne studies how wind-driven and tide-driven circulation

[12]The record does not include the number of Entomology Program graduate assistants or their bargaining unit status.

influence each other in the coastal ocean, which involves analyzing and processing observational data and preparing, running, and analyzing ocean and atmospheric models. Osborne's GRA appointment is primarily related to fulfilling his degree requirement and he will probably use research he collected during the project in his dissertation. His advisor has also asked Osborne to provide him with unrelated information to help him seek other grants and to share information or data analysis with other individuals. He sees his faculty advisor frequently because his office is across the hall. He is expected to work professional hours on his current project, which equates to approximately 40 hours per week. During some of this time, he works on his thesis. In the fall of 2011, Osborne worked on a different research project in the Indian Ocean, which was unrelated to his dissertation, because he and his advisor thought it would be a good opportunity to learn the work of his ocean-going colleagues. Osborne was previously a Union officer and served as a bargaining team member. He believes his current designation as an unrepresented GRA is consistent with the bargaining unit definition.

59. As of May 2012, the Geosciences Department had 57 represented graduate assistants. In 2008, Geosciences Department Chair Aaron Wolf decided that all department GRAs should be included in the bargaining unit because none of them were involved in research that was solely or primarily for their dissertation or thesis. Wolf did not consult with the OSU Human Resources Department before making this decision.

60. Matthew Loewen is a graduate student in the Geosciences Department, which is now part of CEOAS. He holds both a GTA and GRA appointment, which are both represented, for a total of 0.49 FTE. As a GTA, Loewen works in the plasma lab, where he assists outside and internal users in the operation of, and provides general maintenance for, a laser ablation system connected to a mass spectrometer. As a GRA, Loewen's primary research group is Volcanology, Igneous, Petrology, and Economic Resource Group (VIPER), which studies magma in the earth. This group includes both represented and unrepresented GRAs. VIPER participants read and discuss similar background papers that are relevant to their thesis topics and help each other learn different lab instruments. Loewen has the same faculty advisor for both appointments. Loewen typically works from 8:30 a.m. to 6:00 p.m., but his hours may vary.

61. In May 2012, the Department of Botany and Plant Pathology (BPP) had 29 represented and 26 unrepresented graduate assistant appointments. The BPP Graduate Student Handbook lists the criteria for the acceptance of graduate assistants; these include the applicant's merit, available faculty in the applicant's area of interest who are willing to serve as an advisor, facilities and resources to support the applicant's thesis research, and compatibility between the applicant's academic training and area of interest and BPP staffing needs. Under the Handbook, graduate assistants appointed to a 0.455 FTE are expected to spend 16 to 18 hour per week on their appointment and the faculty advisor, who determines the nature of the graduate assistant's research activities, "is encouraged to expect the student to spend some portion of this time on research or activities unrelated to the thesis work."

62. Joanna (Caity) Smyth is a BPP graduate student. She has a 0.1 FTE GRA appointment through BPP and a 0.39 GTA appointment in the Biology Department, which are both designated as unrepresented. Smyth's GRA appointment involves performing work related

to her faculty advisor's maize gametophyte (pollen) research project. Smyth's responsibilities include handling everyday tasks in the lab, such as seed counting, screening for genotypes, planting, DNA preps, and data collection. Her research responsibilities are related to work she needs to learn for her degree, and includes working with both the lab's corn and her own. Some of the work may relate to the research for her thesis topic, but the majority of her work is for the lab. Smyth has leeway in determining her hours except when her faculty advisor establishes a specific time for tasks such as seed planting. Smyth works with undergraduate students, a faculty research assistant, and her supervisor.

Smyth's GTA appointment includes work as a teaching assistant in an upper class undergraduate lab for Biology majors and working as an assistant in another lab. Smyth is responsible for developing an introductory lecture, designing quizzes, and grading and proctoring exams. In her GTA appointment, she works approximately 22 to 25 hours per week, which she is required to record on a time sheet. Her GTA appointment is related to the requirement that she teach two quarters under her Ph.D. program and is intended to prepare her for her career goals, which likely will include teaching. Smyth had a GTA appointment the prior year, which was not part of her degree requirement, and she believes she was included in the bargaining unit during that time. Smyth takes 16 hours of research class credits, which she uses to work on her thesis.

63. Kevin Weitemier is a BPP graduate student and has two GRA appointments for a combination of 0.40 FTE. In his 0.30 FTE appointment, which is not considered to be part of the bargaining unit, Weitemier works in his faculty advisor's lab on two principle projects related to strawberries and milkweed. He is currently working on sequencing the genome of milkweed. Weitemier's thesis is also about milkweed, but he is looking at a different species than that in his faculty advisor's research project. The data collected in this research project will not be used in his thesis, but the research and training from his faculty advisor will assist him in developing his own tools for his thesis project. His experience in the lab is also relevant to his degree. Weitemier's 0.10 GRA appointment, which is considered part of the bargaining unit, involves working in the Herbarium, where he preserves, stores, catalogues, and prepares plant specimens. He works under a different supervisor in the Herbarium. Weitemier's hours are flexible and are to be split between the two appointments. Weitemier's thesis work is done outside this time. He was recently required to make up time he took off from the Herbarium to travel through Nevada collecting plant samples for his thesis.

64. The Electrical Engineering and Computer Sciences Department (EECS) has 57 represented and 109 unrepresented graduate assistant appointments.

65. Sean McGregor is an EECS graduate student, who originally met his faculty advisor during an undergraduate research project. When McGregor applied to OSU, he communicated with his current faculty advisor about the different research projects that were available. He was accepted into three Ph.D. programs and decided to go to OSU, in part because it offered him a one-year assistantship. McGregor's faculty advisor allowed him to select the research project he would work on, which he did based on his interests. He has a 0.49 FTE unrepresented GRA appointment.

McGregor is currently working on the development of software for a wildfire simulator to do reinforcement learning. The work is related to his faculty advisor's research project and the advisor is required to provide progress reports to the funding organization. McGregor's research work may be potentially related to his thesis, but he has not been in the program long enough to identify a topic. McGrego's faculty advisor assigns him work by identifying development goals he is expected to achieve. His faculty advisor annually evaluates his performance as a graduate student based on a variety of factors, including research and scholarly activities performed during the review period; journal, conference, or workshop papers/posters; GTA/GRA duties; other progress; service, such as on committees; and career goals and desired skills. McGregor works between 5 and 60 hours per week, for an average of 20 hours per week. McGregor also developed an independent research project with other graduate students, which was unrelated to his faculty advisor's research project and outside of his faculty advisor's expertise. To maintain ownership of the independent project, McGregor and the other graduate students worked on the project during their free time and did not use OSU resources.

66. Sean Smith is a graduate student in a Ph.D. program in Materials Science, which is an interdisciplinary program involving EECS; Forestry; the Chemistry Department; and the Mechanical, Industrial, and Engineering Department. When Smith applied to OSU, he was offered programs by several faculty members. Smith selected his current advisor's program because he was interested in the research being conducted and his advisor promised to support him financially throughout his studies. Smith has a 0.49 FTE unrepresented GRA appointment in the Chemistry Department. Smith's research work is related to his faculty advisor's current grant project or is preliminary work on potential future projects. Smith works on several projects, including preparing and analyzing samples, reading papers, thinking of new experiments, and preparing presentations and posters. He also works on a project which he is hoping to use in his thesis related to a novel solution-based method of depositing thin films for electronic applications. Smith has group and individual meetings with his faculty advisor on a weekly basis. On the projects more closely related to his thesis area, Smith and his faculty advisor mutually determine how to proceed by making suggestions and talking about similar working papers they have read. Sometimes his faculty advisor will ask Smith to help with another student's project, train students on the use of tools, and help another student grade papers. Smith created a poster that his advisor will present at a conference and was asked to mentor other graduate students to help with the research work. Smith has not identified his thesis title, but the research work he is doing is in his thesis area, will help him identify a topic, and is part of his educational experience. He works an average of 45 hours per week.

67. Robin Hess is a Ph.D. graduate student in EECS and has a 0.49 FTE unrepresented GRA appointment. Hess is working on a project to develop a system to understand and interpret American football game video for the purpose of advancing knowledge of computer vision research. When Hess began graduate school, he approached his current faculty advisor and asked to work on the football project after he became aware that his advisor had funding for the project. Hess' GRA appointment has always focused on the same project, but at one point in the past, the project funding source changed. At that time, Hess was required to produce benchmarks for the funding agency, so he asked his advisor to put him in the bargaining unit, which his advisor did. Since Hess has completed his classroom work, all of his current degree work is research oriented. The research work Hess conducts for his faculty advisor and

for his thesis are essentially the same. Hess was required to sign an agreement assigning rights related to his research work to OSU. At one point, a company contacted Hess about using his work on the research project. Hess put the company in touch with his advisor, who negotiated an agreement to use the work. Hess will not receive any royalties under the agreement. His work has helped his advisor build a narrative that will allow him to keep doing research. Hess' advisor meets with him once a week and suggests methods for Hess to investigate. Hess is expected to work at least 20 hours per week, but often works more.

CONCLUSIONS OF LAW

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

2. The petitioned for employees are "public employees" under ORS 243.650(19).

3. The proposed unit of all graduate students with Graduate Teaching Assistant or Graduate Research Assistant appointments, or a combination of GRA and GTA appointments, employed by Oregon State University with a minimum 0.15 FTE appointment, excluding supervisory, confidential, and managerial employees, is an appropriate bargaining unit.

DISCUSSION

The Union currently represents an existing bargaining unit of graduate students with GTA and GRA appointments. This bargaining unit, which was the result of a consent election agreement, excludes "graduate students with GTA or GRA appointments in their capacity as students who are teaching or performing research primarily to fulfill an advanced degree requirement." Through this petition, the Union now seeks to add this excluded category of graduate assistants into its bargaining unit.

OSU objects to the proposed expansion of the existing bargaining unit. OSU's primary argument is that the petitioned-for graduate assistants are not employees within the meaning of ORS 243.650(19) because they are teaching or performing research primarily to fulfill their advanced degree requirements. OSU also argues that because the petitioned-for graduate assistants perform their research or teaching duties for different reasons than the graduate assistants in the existing unit, the two groups do not share a sufficient community of interests.

Public Employee Status

We first determine whether the petitioned for individuals are public employees under the Public Employee Collective Bargaining Act (PECBA). This question presents an issue of statutory interpretation concerning the meaning of the term "employee" as used in ORS 243.650(19). Our goal in interpreting and applying statutes is to determine and give effect to the legislature's intent. ORS 174.020(1)(a); *Marion County Law Enforcement Association v. Marion County*, Case No. UP-24-08, 23 PECBR 671, 687 (2010). We use the methodology explained in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), that was

subsequently modified by amendments to ORS 174.020[13] and *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). We first examine the text and context of the statutes and then consider any relevant legislative history the parties offer. If we are unable to determine the legislature's intent after examining the statute's text, context, and legislative history, we then apply maxims of statutory construction. *Bureau of Labor and Industries*, 317 Or at 612.

ORS 243.650(19) defines a public employee as "an employee of a public employer but does not include elected officials, persons appointed to serve on boards or commissions, incarcerated persons working under section 41, Article I of the Oregon Constitution, or persons who are confidential employees, supervisory employees or managerial employees." The parties have stipulated that OSU is a public employer, and OSU does not assert that the petitioned-for individuals fit into any of the enumerated exceptions to the definition of public employee listed in the statute. Thus, the sole remaining issue is whether the petitioned-for graduate assistants are "employees" of OSU or, as the Respondent asserts, they are students.

OSU contends that we conclusively determined the legislature's intent regarding the meaning of the term "employee" as used in ORS 243.650(19) when we decided *University of Oregon Graduate Teaching Fellows Federation v. University of Oregon*, Case No. C-207-75, 2 PECBR 1039 (1977) (*U of O*). In *U of O*, we first concluded that University of Oregon graduate assistants teaching or performing research "which is not a requirement for an advanced degree are employed by the University to perform a service for a fee. As such, they are employes." *Id*. at 1049. With little explanation, we then held that:

> "A traditional employer-employe relationship does not exist when an individual is teaching or performing research to fulfill a degree requirement, even though the individual is being reimbursed for such service. Income for such service is not taxable income. Such an individual is a student and not a public employe." *Id*.

OSU argues that our decision in *U of O* is controlling. After careful consideration, we disagree. First, we note that the 1977 order contains little explanation of the reasons for the decision to exclude graduate assistants who were performing their duties as part of a degree requirement. In fact, the only specifically listed basis for the decision was that the income

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[13]The relevant portions of ORS 174.020 provide that:

> "(1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.
>
> "(b) To assist a court in its construction of a statute, a party may offer the legislative history of the statute.
>
> "* * * * *
>
> "(3) A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate."

received by the students was not considered taxable income by the IRS. Given the absence of other factors cited in the decision, we presume that the tax treatment of the income was a primary factor. However, the tax treatment of the stipends paid to the petitioned-for employees changed after the Tax Reform Act of 1986. The stipends paid for teaching and research are now required to be treated as taxable income regardless of whether an individual's research and teaching duties are performed as a requirement for receipt of an advanced degree.[14]

This change alone is sufficient to revisit our conclusion in *U of O* and to consider the employee status of the petitioned-for employees independently. However, even absent this change, we would still refuse to apply our holding in *U of O* for a second reason. Whether an employee-employer relationship exists is necessarily a fact specific inquiry which must be decided based upon the totality of the circumstances. The prior case involved a different labor organization at a separate university, and thirty-five years have passed since the case was decided. These differences, coupled with the lack of explanation for the results in the *U of O* decision, necessitate an independent decision based upon a careful review of the merits of the petition and the facts in the record.[15]

Further confirmation of the changed circumstances between now and 1977 can be found at the University of Oregon, where the GTFF bargaining unit has been expanded to include the graduate assistants that we previously deemed to be non-employees in *U of O*. This change occurred when, twenty years after the *U of O* case was decided, the association and the university entered into a consent election agreement allowing the previously excluded graduate assistants an opportunity to vote to determine whether they would be represented. The eligible employees voted in favor of representation, and on March 9, 1998, this Board certified the GTFF as the

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[14]This change is reflected in the Internal Revenue Code (IRC) Section 117. 26 USC § 117, Section 117(a) allows taxpayers to exclude "qualified scholarships" from their taxable income, but Section 117(c) excludes GTA and GRA stipends from the definition of "qualified scholarships," stating that subsection (a):

> "shall not apply to that portion of any amount received which represents *payment for teaching, research, or other services* by the student required as a condition for receiving the qualified scholarship." IRC § 117(c)(1). (Emphasis added.)

For the purposes of determining taxable income, "the Oregon legislature intended to make Oregon personal income tax law identical to the Internal Revenue Code * * * subject only to modifications specified in Oregon law." *Ormsby v. Dept. of Rev.*, 18 OTR 146, 151 (citing ORS 316.007). No such exceptions apply to the graduate assistants at issue in this case, and as a result, the income is taxable under both federal and Oregon law.

[15]In addition to the tax treatment of graduate student stipends, the nature of the academic world's reliance upon GRA and GTAs has also changed. Universities, both public and private, are leaning more and more on graduate students to provide teaching and research services which they might not otherwise be able to afford to engage in. The dissent written by members Liebman and Walsh in *Brown University and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America., UAW, AFL-CIO,* Case No. 1-RC-21368, 342 NLRB 483, 175 LRRM 1089 (2004), contains a detailed summary of several recent scholarly works that discuss and summarize these changing trends. See *Brown University,* 342 NLRB at 493, fn 1, and 497-500.

representative of the entire GTFF unit for collective bargaining purposes, regardless of whether the duties were performed primarily in pursuit of their degrees or for other purposes. *Graduate Teaching Fellows Federation, Local 3455, AFT, AFL-CIO v. University of Oregon*, Case No. UC-56-97 (1997).

Having concluded that our holding in *U of O* is not controlling, we next look to the text and context of ORS 243.650(19), the provision that defines a "public employee." In interpreting statutes, we give words of common usage their plain, natural, and ordinary meaning. *PGE*, 317 Or at 611. The PECBA's definition of a "public employee" as "an employee" of a public employer is extremely broad, and subject only to the specific limitations inserted into the statute by the legislature. We find that the term is unambiguous and should be given its ordinary meaning, under which the primary indicia of employee status are that an individual performs work or services for an employer in exchange for wages or salary. This common sense, straight forward approach is the one we took in a similar situation in *International Association of Fire Fighters v. LaPine Rural Fire Protection District*, UC-38-91, 13 PECBR 403 (1992). In that case, we concluded that:

> "Roberts' Dictionary of Industrial Relations (BNA, 1971), in defining 'employee' at p. 117, states that '[i]n general usage the term 'employee' covers all those *who work for a wage or salary* and perform services for an employer.' (Emphasis added.) We simply find no reason to conclude that the 1973 legislature, when it enacted the Public Employee Collective Bargaining Act (PECBA), intended the term 'employee,' as used in subsection (14) and elsewhere in the Act, to have other than that general meaning." 13 PECBR at 408.

We see no reason to deviate from this definition in the present matter, but we would modify it to also incorporate the right to control test we have utilized when determining whether individuals are employees of a public employer or independent contractors. *Hillcrest-MacLaren Education Association v. Hillcrest and MacLaren Schools*, Case No. UC-39-89, 12 PECBR 19, 27 (1990) (citing *Great American Ins. v. General Ins.*, 257 Or 62, 66–67, 475 P2d 415 (1970)); *see also IBEW v. City of Siletz*, Case No. RC-12-11, 19 PECBR 178 (2001). The right to control is an essential element in an employment relationship, and should be considered alongside the indicia listed in *International Association of Fire Fighters v. LaPine Rural Fire Protection District*, Case No. UC-38-91, 13 PECBR 403, 408 (1992).[16]

OSU argues that the legislature intended to follow the National Labor Relations Board's (NLRB) definition of employee under the private sector National Labor Relations Act (NLRA), and we should defer to cases decided under that statute. They contend that, under *Elvin v.*

[16]While the right to control test is appropriate for use in cases specifically involving the question of independent contractor status, it is not by itself an appropriate standard to define who is an employee under the statute in this dispute. Further, because OSU has not asserted that the graduate assistants are independent contractors, we need not address the issue in significant detail in this order. However, we do find that it was the legislature's intent that under the PECBA the employer must have the right to control an employee before an employer-employee relationship is created.

OPEU, 313 Or 165, 832 P2d 36 (1992),[17] we are bound by the NLRB's decision in *Adelphi University and Adelphi University Chapter, American Association of University Professors,* Case No. 29-RC-1640, 195 NLRB 639, 79 LRRM 1545 (1972). We disagree. While the PECBA was modeled after the NLRA, the statutes are not identical and there are significant differences that have often led us to follow a different path than the ones taken by the NLRB. As we noted in *International Union of Operating Engineers, Local 701 v. Klamath Irrigation District,* C-65-76, 2 PECBR 894 (1976),

> "[t]he essence of Respondent's argument is that since the NLRA excludes agricultural laborers from its coverage, and the NLRB has stated irrigation workers are agricultural laborers, and since some Oregon laws exclude such workers from their coverage, this Board must assume that the Oregon legislature intended to exclude irrigation workers from the coverage of the Public Employes' Collective Bargaining Act. However, in choosing its definition of a public employe set forth in ORS 243.650(17), the legislature considered federal and Oregon laws. The resulting statute differs substantially from federal labor law and from state law relating to private employes. Rules of statutory construction cannot be used to create an excluded category of employes where there is no evidence of legislative action of intent to exclude such employes." 2 PECBR at 898.

We do not find that the legislature intended for us to strictly follow NLRB precedent in defining the term employee as used in ORS 243.650(19). The record is devoid of any evidence of legislative intent to exclude the employees at issue. Rather, as we discussed above, the 1973 legislature intended the word employee to have a general and inclusive meaning.

In addition, we disagree that the case cited by OSU, *Adelphi University,* is applicable even if we accepted the argument that NLRB's cases are binding on us in this matter. *Adelphi University* dealt only with an assertion by the employer that the appropriate bargaining unit for regular faculty members of the university should include graduate assistants who engaged in teaching and research and received stipends for their service. The NLRB disagreed, noting that the graduate assistants at issue were "primarily students" and had no community of interest with the regular faculty members. *Id.* at 640. The case did not, however, determine that the graduate assistants were not employees under the NLRA.

One year after *Adelphi University* was decided, and after the PECBA was enacted, the NLRB concluded that research assistants who performed research duties primarily for academic reasons were not employees under the NLRA. *The Leland Stanford Junior University and The Stanford Union of Research Physicists,* Case No. 20-RC-11813, 214 NLRB 621, 87 LRRM 1519 (1974). Like the *U of O* case discussed above, the NLRB in *Leland Stanford* focused in part on the tax treatment of the stipends paid to the research assistants, stating that, "[s]ignificantly, the payments to the RA's are tax exempt income." *Id.* at 622. They then concluded that the research

[17]In *Elvin v. OPEU*, the Oregon Supreme Court noted that the PECBA is modeled after the NLRA and similar in structure, language and purpose. 313 Or at 175 n 7. Accordingly, the Court instructed us to interpret the PECBA by looking to decisions issued under the NLRA prior to the enactment of PECBA in 1973. *Id.* at 177-79.

assistants were primarily students and not employees subject to the Act, citing to *Adelphi University* in support of this position. *Id.* at 623.

We do not find *Leland Stanford* persuasive authority. It was decided after PECBA was enacted by the legislature and prior to the 1986 changes to the tax code which made the petitioned-for Oregon graduate assistants' income taxable. Further, *Leland Stanford* was overruled by the NLRB in 2000 by *New York University and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO,* Case No. 2-RC-22082, 332 NLRB 1205, 165 LRRM 1241 (2000). In that case, the NLRB rejected the distinction between employee and student, stating:

> "Stripped to its essence**,** the argument of the Employer and others is that graduate assistants who work for a college or university are not entitled to the protections of the Act because they are students. The Board's broad and historic interpretation of the Act rejects such a narrow reading of the statute. Accordingly, we will not deprive workers who are compensated by, and under the control of, a statutory employer of their fundamental statutory rights to organize and bargain with their employer, simply because they also are students." *Id.* at 1209.

A mere four years later, the NLRB again reversed direction and overturned the *New York University* decision in *Brown University and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW AFL-CIO.* Case No. 1-RC-21368, 342 NLRB 483, 175 LRRM 1089 (2004). It now appears that the NLRB may be ready to once again change its approach, as they recently granted reconsideration and invited briefs in two cases to address the issue of whether *Brown University* should be modified or reversed. *New York University*, Case No. 02-RC-023481 (June 22, 2012) and *Polytechnic Institute of New York University*, Case 29-RC-012054 (June 22, 2012).

Given the inconsistencies in the NLRB's approach to the treatment of graduate assistants as employees or non-employees, we will not adopt its reasoning. The NRLB's approach would essentially create an exception to the definition of public employee where the legislature did not see fit to incorporate one into the statute.[18] We are unwilling and unable to do so. We are also troubled by the NLRB's approach because it unnecessarily requires this Board to delve into the subjective motivations of the parties to determine whether the relationship between GRAs and GTAs and OSU is primarily economic or primarily educational. While we are obligated under certain provisions of the PECBA to review the motives of the parties for their actions or decisions, we need not and should not engage in such speculation in reviewing whether an individual is an employee. Rather, we should focus on the objective factors contained in *LaPine RFPD.*

[18]Under ORS 174.010, the our role is "simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." Adopting the NLRB's approach is inconsistent with this rule.

The alternative approach taken by the NLRB would require us to create a false dichotomy: that one must either be a student or an employee. We reject this notion and find that it is possible to be both a student and an employee. Nothing in the statute suggests that the two are incompatible, and we are not inclined to create such a distinction or carve out an exception where the legislature has not done so.

In summary, we conclude that the legislature intended the term employee, as used in ORS 243.650(19), to mean an individual who: (1) performs services for another person or entity, (2) in return for wages or salary, (3) under the control or right to control of the employer.[19]

We apply this definition to the facts in this case. In doing so, we conclude with little difficulty that the petitioned for individuals are employees of OSU and are "public employees" under ORS 243.650(19). It is undisputed that the petitioned for GRAs and GTAs perform research and teaching services for OSU. OSU's primary purposes are teaching and research, the same areas in which the petitioned-for individuals provide their service. Clearly, the graduate assistants provide a significant benefit to the university through their labor. The services they perform are largely the same as the services performed by members of the current bargaining unit represented by the Union who are considered employees. As a result, the petitioned-for employees clearly meet the requirement that they perform services or work for OSU.

It is further undisputed that the petitioned for graduate assistants receive payment in the form of monthly stipends and lump sum payments. The stipends and lump sums are taxable wages, and OSU-OSBHE is listed as the employer on the graduate assistants' W-2 forms. The level of stipend is based upon the amount of time the graduate assistant is expected to work under their appointment, as determined by OSU. Graduate assistants also receive benefits from OSU, including tuition remission and employer contributions to health insurance premiums. Accordingly, we conclude that the graduate assistants receive salary or wages in exchange for their services to OSU.

Finally, while not an issue raised by the employer, we find that OSU does maintain the right to control the graduate assistants in their work. OSU controls the fruits of the labor of its GRAs and GTAs through its intellectual property rules. OSU selects graduate assistants through a competitive process and sets the minimum standards for students to maintain those appointments. OSU also pays the graduate students directly through its payroll system, withholds income taxes from the stipends, pays workers compensation insurance for the students, sets the FTE rate for the appointments, and determines the expected number of hours to be worked by each GRA and GTA as well as the maximum number of hours employees can work.

The petitioned-for graduate assistants perform services for OSU in return for wages or salary, and OSU maintains the right to control the graduate assistants. As a result, we conclude

[19]This approach is nearly identical to the approach taken by the United States Supreme Court in defining who is an "employee" subject to the NLRA. In *NLRB v. Town & Country, Inc.*, 516 U.S. 85, 91-92 (1995), the Court held that an employee-employer relationship exists when a servant performs services for another, under the other's control or right of control, and in return for payment. *Id.* at 90–91, 93–95.

that the petitioned-for individuals are employees of OSU, and as a result, are "public employees" under ORS 243.650(19).[20]

Community of Interests

OSU also objects to the petition on the grounds that the petitioned-for employees lack a sufficient community of interest with the existing unit. In determining whether a proposed unit is appropriate, we consider the community of interest, wages, hours, and other working conditions of the employees involved, as well as the history of collective bargaining and the desires of the employees. ORS 243.682(1)(a). Community of interest factors include similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, and common supervision. OAR 115-025-0050(2).

This Board has discretion to determine how much weight to give each factor. *OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251 (2001). We also consider the policies and preferences developed by this Board in determining the more appropriate bargaining unit. *Oregon Workers Union v. State of Oregon, Department of Transportation, and Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. RC-26-05, 21 PECBR 873, 883 (2007).

OSU's primary concern is that, because of the different reasons for the individuals performing services as GRAs or GTAs, the petitioned-for individuals and the existing bargaining unit members have distinct community of interests. Having already concluded that an individual's primary reason for accepting appointment as a GRA or GTA is not determinative of employee status, and having analyzed each of the statutory community of interest factors, we find that the two groups share a sufficient community of interest to form an appropriate bargaining unit.

The wages, including stipends and the $300 lump sum differential, are the same for both groups based upon the FTE status of the graduate assistants as determined by OSU. The two groups also receive the same benefits, including tuition remission, employee health insurance, and employer paid workers' compensation insurance. OSU pays 85 percent of the employee-only premiums for members of both groups.

The petitioned-for employees and the existing unit are all on the same FTE scale, with appointments ranging from .15 FTE to .49 FTE. The hours expected of each employee are

[20]OSU also raises the argument that collective bargaining between the university and the petitioned-for graduate assistants would be difficult or impossible due to the academic reasons for the research and teaching performed by the assistants. This concern is mirrored in the NLRB's decision in the *Brown University* case. However, as noted above, pursuant to a consent election agreement entered into by OSBHE and the GTFF, the University of Oregon currently collectively bargains with graduate assistants regardless of the reasons for their teaching and research activities. OSBHE would be a signatory to any collective bargaining agreement between Petitioner and Respondent, and there is nothing in the record to indicate that what is working at the University of Oregon would not work at OSU. Collective bargaining is a dynamic process that is suitable to a wide range of work environments. We have no reason to believe that OSU and the Union could not adopt a process that works for both parties.

determined by the FTE status of their appointment, and all employees are required to work no more than .49 FTE or a total of 255 hours. The working conditions of the groups are similar as well, with both groups performing the same types of services in the same general environment within the university. All graduate assistants are supervised by faculty members and all are subject to many of the same policies of OSU, including the policies on intellectual property and conflicts of interest discussed above.

The showing of interest submitted by the Union is sufficient to establish that the employees desire representation. And while there has been no history of collective bargaining with the unrepresented employees, OSU has traditionally passed on all negotiated benefits to the unrepresented employees. Further, there are a number of employees who have received appointments to positions within the bargaining unit, as well as appointments that were excluded from the unit. Many graduate assistants have moved in and out of the bargaining unit during their time at OSU.

In summary, while there may be some legitimate differences between the two groups of employees, there are more similarities than differences. Any existing differences are insufficient to render the proposed unit inappropriate for collective bargaining. As a result, we find that the petition proposes a unit appropriate for collective bargaining.

ORDER

1. An appropriate bargaining unit is: all individuals with Graduate Teaching Assistant or Graduate Research Assistant appointments, or a combination of GRA and GTA appointments, employed by Oregon State University with minimum 0.15 FTE appointment, excluding supervisory, confidential, and managerial employees.

2. The Elections Coordinator shall conduct a secret ballot election amongst the unrepresented employees in the above bargaining unit for eligible employees to determine whether they wish to be represented by the Union for the purposes of collective bargaining. Eligible voters are unrepresented GRA and GTAs with a minimum 0.15 FTE appointment at OSU who are employed at the date of this Order and are still employed at the close of the election. The choices on the ballot shall be: Coalition of Graduate Employees Local 6069, AFT and No Representation.

DATED this 4 day of January, 2013.

Susan Rossiter, Chair

*Kathryn A. Logan, Member

Jason Weyand, Member

This Order may be appealed pursuant to ORS 183.482.

*Member Logan Dissenting

The majority holds that the petitioned-for graduate students are public employees within the meaning of ORS 243.650(19). They are not. Rather, they are students who are fulfilling degree requirements to complete their course of education.

We previously addressed this issue in *University of Oregon Graduate Teaching Fellows Federation v. University of Oregon*, Case No. C-207-75, 2 PECBR 1039 (1977), where we concluded that graduate students who teach or perform research as a degree requirement are not public employees because a "traditional employer-employee relationship does not exist * * *." *Id.* at 1049. We based our decision on Oregon past practice and law, both of which have remained unchanged since our decision.

The majority holds that our prior opinion is no longer good law because it contains little explanation, the statute does not specifically exclude students as public employees, and the statement that the students' "[i]ncome for service is not taxable income" is no longer correct. Neither lack of an explanation in a Board order, nor lack of a specific statutory exclusion is a sufficient basis for discounting a prior decision. The majority also does not claim that a previous Board erred when it made its decision. *See American Federation of State, County and Municipal Employees, Council 75, Local 189 v. City of Portland*, Case No. UP-46-08, 24 PECBR 1008 (2012) (the Board erred when it failed to apply a prior Board decision holding that a subject for bargaining was permissive rather than mandatory). Nor does the majority hold that a change in Oregon law requires a different result. Rather, the majority opinion presumes that the prior Board's primary rationale for excluding graduate students from the bargaining unit who are fulfilling degree requirements was the non-taxable status of any monies or benefits provided to such graduate students by the university. Based on that presumption, the majority essentially holds that a change in the federal tax code transforms graduate students into employees. As the presumption is inaccurate, the resulting conclusion is not correct.

I also disagree that the facts have changed in any significant manner since we issued our 1977 decision so as to cause us to ignore our precedent. Further, to assert "changed circumstances" based on a consent election with another university and another bargaining unit is not what this Board has considered in the past as proper grounds for reconsidering and discarding precedent.

The requisite legal analysis is properly described by the majority. We first must review the statutory text and context, consider any legislative history, and if necessary, apply any applicable rules of statutory construction. In interpreting and applying the statute, this Board is to determine and give effect to the legislature's intent. ORS 174.020(1)(a).

The legislature's intent is initially found in ORS 243.656, the policy statement for the Public Employee Collective Bargaining Act (PECBA). This statement is built upon recognizing "harmonious and cooperative relationships between government and its employees;" acknowledging that "unresolved disputes * * * are injurious to the public, the governmental agencies, and public employees;" collectively safeguarding the public and employees "from injury, impairment and interruptions of necessary services;" and obligating the state to "protect the public by attempting to assure the orderly and uninterrupted operations and functions of government." *Id.* Under this language, it is apparent the legislature focused on a "traditional

employer-employee relationship." Such a relationship does not exist between the petitioned-for graduate students and the University.

This focus continues in ORS 243.650(19), the definition of a public employee:

> "'Public employee' means an employee of a public employer but does not include elected officials, persons appointed to serve on boards or commissions, incarcerated persons working under section 41, Article I of the Oregon Constitution, or persons who are confidential employees, supervisory employees or managerial employees."

The issue is whether the petitioned-for graduate students are employees of, and employed by, OSU. An employee is "one employed by another usu. in a position below the executive level and usu. for wages." *Webster's Third New Int'l Dictionary* 743 (unabridged ed 2002). A "wage" is "a pledge or payment of usu. monetary remuneration by an employer esp. for labor or services usu. according to contract and on an hourly, daily, or piecework basis * * *." *Id.* at 2568. To "employ" is "to provide with a job that pays wages or a salary or with a means of earning a living." *Id.* at 743. All of these definitions are contingent upon a traditional employer-employee relationship.

Graduate students completing degree requirements are not "employed" as that term is commonly used. The focus is not on any labor or service or on "earning a living." Rather, the focus in on their education.

The graduate students applied and were selected by the university to a degree program. The university offered stipends, tuition remission, and other benefits that might entice the graduate students to attend. If the graduate students accept the offer, the university then provides the students with an education tailored to meet the degree requirement, which must be met before the students can graduate. Simply receiving remuneration as part of the entire package for their education does not transform the students into employees.

The majority adopts a test to determine whether an individual is an employee. An employee is "an individual who: (1) performs services for another person or entity, (2) in return for wages or salary, (3) under the control or right of control of the employer." Order at 25. This test is extremely broad, and according to the majority, incorporates the petitioned-for employees as public employees. The graduate students do not perform services as traditional employees and do not receive a wage or salary as we typically envision. The "control" that exists is simply dependent upon the degree requirements of a graduate student's program. What the majority fails to consider is that the relationship between graduate assistants and their faculty advisors is not an employer-employee relationship but rather that of a teacher-student relationship.

This matter was correctly decided by the Administrative Law Judge. The petition should be dismissed. Therefore, I respectfully dissent.

Kathryn A. Logan

Kathryn A. Logan, Member

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-42-10

(UNFAIR LABOR PRACTICE)

AMALGAMATED TRANSIT UNION, DIVISION 757, Complainant, v. TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Both parties waived oral argument on Complainant's objections to a Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on June 25, 2012, after a hearing was held on November 9 and 10, 2011, in Portland, Oregon. The record closed on January 9, 2012, following receipt of the parties' post-hearing briefs.

Susan L. Stoner, General Counsel, Amalgamated Transit Union, Division 757, Portland, Oregon, represented Complainant.

Shelley Devine, Senior Deputy General Counsel, Tri-County Metropolitan Transportation District, Portland, Oregon, represented Respondent.

On August 24, 2010, Complainant Amalgamated Transit Union, Division 757 (ATU) filed this unfair labor practice complaint against Tri-County Metropolitan Transportation District (TriMet).[1]

[1]This case was originally scheduled for hearing in April 2011, following briefing and decision over whether the original complaint stated a claim for relief. That hearing was postponed while the parties attempted to reach a stipulation of facts. The parties ultimately filed cross motions related to the need for certain evidence to decide the matter. Those motions were denied leaving disputes of fact between the parties, necessitating a hearing.

TriMet filed a timely answer to the complaint.

The issues presented for hearing, based on the amended complaint and amended answer, are:

1. Did TriMet violate the terms of signed agreements with ATU regarding Fare Inspectors in June 2010 by removing three Fare Inspectors from their Fare Inspector positions, and later placing two of them on more onerous schedules? If so, did TriMet violate ORS 243.672(1)(g)?

2. If ATU prevails, should TriMet be required to pay ATU a civil penalty?[2]

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. TriMet is a public employer as defined by ORS 243.650(20). ATU is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a bargaining unit of approximately 2,000[3] TriMet employees.

2. ATU and TriMet have been parties to a series of collective bargaining agreements beginning in the 1980s through the agreement in effect at the time of hearing. The latter agreement covered the period December 1, 2003 through November 30, 2009, and remains as the *status quo* governing the events at issue in this case.[4]

3. The TriMet classification of Fare Inspector has been in the ATU bargaining unit since 1982. The primary duty of the position is fare enforcement on the TriMet system, which involves contact with passengers and issuing citations if the passengers fail to produce evidence of fare payment. Until recently, they were the only TriMet employees who did this form of fare enforcement. In 2008, there were 15 employees doing this work, 11 Fare Inspectors, and four Lead Fare Inspectors. The most senior Fare Inspectors had approximately 10 years of seniority within that

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[2] In its amended answer, TriMet raised defenses that (1) ATU waived its right to challenge the layoff through the collective bargaining agreement; and (2) ATU failed to exhaust the grievance procedures in the collective bargaining agreement, or this matter should be deferred pending resolution of the grievance process. TriMet did not present argument on these issues in its post-hearing brief and the ALJ did not consider those affirmative defenses. TriMet did not object to the Recommended Order so we also decline to consider these affirmative defenses.

[3] *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-62-05, 22 PECBR 911 (2009), *aff'd on petition and cross-petition*, 250 Or App 681, 282 P3d 2 (2012).

[4] At the time of hearing, the parties' bargaining process was wending its way through the Public Employee Collective Bargaining Act (PECBA) interest arbitration procedures. *See Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-016-11, 24 PECBR 412, *recons*, 24 PECBR 488 (2011).

classification and more than eight additional years of seniority in their previous classifications with TriMet. The previous classification of the employees at issue was Bus Operator.

4. In 2007, Steve Banta became TriMet Executive Director of Operations. After reviewing the TriMet Operations Division organization of work, Banta decided to eliminate the Fare Inspector classification and move those employees and their duties into the Road and Rail Supervisor classifications, which were also in the ATU bargaining unit. Road and Rail Supervisors already performed a variety of duties in the field, including assisting at accident and incident scenes. Combining the functions would increase the number of employees available to perform fare inspection and road/rail supervision.

5. In the spring of 2008, Banta met with the Fare Inspectors in person and told them of his plans, and ATU and TriMet agreed to bargain over the impact of the changes.

The August 2008 Fare Inspector Agreement (FIA)

6. As described in more detail below, the parties bargained over the impact of the transfer of the Fare Inspectors during the summer of 2008. There were two issues concerning the language of the final agreement relevant to this unfair labor practice proceeding: position security for the remaining Fare Inspectors and premium shifts for the transferred employees.

7. On July 16, 2008, representatives of ATU and TriMet first met to bargain the impact. TriMet was represented by Peggy Hanson, TriMet Manager of Operations. ATU was represented by Jon Hunt, ATU President; Sam Schwarz, ATU Vice President; and Jim Fowler, an ATU Executive Board officer representing the bargaining unit work group which included the Fare Inspectors.

8. After the July 16 meeting, Hanson created a draft agreement dated July 18.[5] The draft divided the Fare Inspectors into two groups. The members of one group, with less than 18 years of service at TriMet, were to become Road/Rail Supervisors. The members of the second group, with 18 or more years of service at TriMet, were to remain in the Fare Inspector position. ATU officials believed that this structure reflected an assumption by the parties that the Fare Inspector position would disappear through attrition. The draft did not contain position security or premium shift provisions.[6]

9. On July 30 and 31, the parties met for further bargaining. ATU representatives believed that the parties were in agreement that the remaining Fare Inspectors would not have to work "bad" shifts. The parties had difficulty, however, defining a premium shift because a shift desired by one employee might not be considered desirable by another employee.

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[5]Hanson created three draft agreements, dated July 18, August 7, and August 14. Hanson also created the final agreement on August 18.

[6]The parties had agreed to provide position security for other positions in the past. The collective bargaining agreement provides that TriMet will retain 14 Facilities Maintenance positions and three Shelter Maintenance positions. Past side agreements protected other positions.

10. After the July 31 meeting, Hanson wrote a memo to Hunt describing the proposals made and agreements reached during these meetings. Hanson never sent this memo to Hunt, however. In her memo, Hanson stated:

> "The purpose of this Memo is to list ATU's proposed changes and address each of them specifically, as per our conversation this morning:
>
> "* * * * *
>
> "ATU Proposed Change: All current Fare Inspectors with 18 or more years TriMet seniority (i.e. hire date) who wish to remain as Fare Inspectors must declare in writing their intent to remain as Fare Inspectors. *Premium shifts for those who stay at Fare.* Sign up will be approved by TriMet and ATU. *Premium shift is a shift that reflects the Fare Inspector's choice that they enjoy*. These Fare Inspectors still have the right to move over to Supervisor before October 1, 2008. All Fare Inspectors will have the opportunity to work holidays. [Emphasis added.]
>
> "TriMet Response: Agreed. All current Fare Inspectors with 18 or more years TriMet seniority will be incorporated into the revised agreement."[7]

11. On August 7, Banta, Hanson, and Hunt met. Later that same day, Hanson wrote a second draft agreement and sent it to ATU. This draft did not contain position security or premium shift provisions. ATU did not object to these omissions.

12. On August 11, Hanson sent Hunt a letter stating that the August 7 draft agreement had to be signed by ATU no later than August 14. Hanson and Hunt understood that TriMet would unilaterally merge the Fare Inspectors into the Road/Rail Supervisor Department if ATU did not meet the deadline. Later that day, Hanson wrote Hunt memorializing a telephone conversation. Hanson wrote, "you and I agreed that the ATU will have until Thursday, August 14, 2008 at 5:00pm PDT to sign and return the agreement to me for authorization. The 8/7/08 agreement identifies all terms and conditions of the agreement in its entirety, and is agreed to only on a non-precedent setting basis."

13. On the morning of August 14, 2008, notwithstanding the agreement's silence regarding position security and premium shifts, ATU President Hunt met with the Fare Inspectors to discuss Hanson's August 7 draft. In addition to Hunt, Executive Board member Fowler and 14 of the 15 Fare Inspectors attended the meeting.

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[7] ATU argues that this language in Hanson's unsent memo is evidence of TriMet's agreement regarding premium shifts. We conclude that the memo is insufficient to support such a finding. Hanson's next draft agreement did not contain this language and ATU did not object to the omission or contend that it failed to reflect their agreements.

14. During the meeting, the Fare Inspectors expressed concerns about position security, stating that they feared TriMet would sign the agreement and then abolish their positions anyway.[8] They also raised the issue of premium shifts. Hunt then had the Fare Inspectors vote on the agreement with the understanding that the modifications that they requested would be included. The Fare Inspectors approved the agreement contingent upon the final draft's inclusion of position security and protection for premium shifts.

15. After the meeting, Hunt called Hanson to inform her of the Fare Inspectors' response. Hunt specifically asked Hanson to add language to ease some Fare Inspectors' concerns that TriMet would sign the agreement and then eliminate the Department anyway.

16. Hanson asked Evelyn Minor-Lawrence, TriMet Director of Labor Relations, for language that would address ATU's concerns about eliminating the remaining Fare Inspector positions. Minor-Lawrence gave Hanson language that Hanson believed meant the Fare Inspectors would continue in their positions until they resigned, retired, or involuntarily left TriMet. Hanson placed this language in a revised draft, creating a new paragraph which read as follows:

> "All current Fare Inspectors with 18 or more years TriMet seniority (i.e., hire date) who declare in writing their desire to remain as Fare Inspectors by the above-mentioned deadline may choose to remain in that position until they resign, retire or involuntarily leave the District."

17. Hanson believed that this language did not, in fact, reduce TriMet's ability to terminate the Department at will and transfer the Fare Inspectors to other classifications. Hanson did not share this belief with Hunt. Hunt and Hanson never specifically discussed layoffs or workforce reductions during any of their discussions, except as noted above, and did not specifically discuss the meaning of the phrase "resign, retire or involuntarily leave the District."

18. In response to the Fare Inspector's concerns about premium shifts, Hanson also included the following new paragraph in her revised draft:

> "The District will maintain or improve the current Fare Inspector work shifts comparable with the actual workforce that exists."

19. On August 14, 2008, at approximately 5:00 p.m., Hanson sent Hunt a third draft agreement which included the new provisions described above. Hanson included a demand that the agreement be signed that day. Hunt responded that ATU could not sign this draft because it needed some additional, but minor, changes. On August 15, Hunt telephoned Hanson with the corrections. Hanson agreed to all but one.

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[8] It does not appear that the parties contemplated that any Fare Inspectors would be subject to layoff from employment with TriMet. Not only did all of them have significant seniority as Bus Operators or other positions, but TriMet had not laid off any ATU bargaining unit members since the 1980s.

20. On Monday, August 18, Hanson sent the fourth and final draft to Hunt. The agreement, in letter form, bore a subject line stating "Settlement Agreement — Fare Inspectors" (FIA). Attached were lists of the Fare Inspectors and Road and Rail Supervisors and their TriMet and classification seniority dates. The parties signed the agreement that day.

21. Pursuant to the FIA, the Fare Inspectors with less than 18 years seniority at TriMet had the option to become Road or Rail Supervisors or, if they failed to do so, return to the position they held prior to becoming Fare Inspectors. Seven Fare Inspectors became Road or Rail Supervisors.

22. Because they had less than 18 years of service, Fare Inspectors Coryell and Thake were not entitled to remain Fare Inspectors under the FIA, and they complained to Hunt and filed grievances on the issue.[9] By letter dated September 10, Hunt told Coryell and Thake that ATU's options in impact bargaining had been limited, and that he had "received [Hanson's] assurance that the intent is that those remaining in the department will determine what hours will be worked by the fare inspectors."

The January 2009 Coryell/Thake Agreement (Coryell/Thake Agreement)

23. In October 2008, Coryell and Thake transferred to the Road Supervision Department, as required by the FIA. Both men continued to object to their transfer and sought to return to their Fare Inspector positions. Hunt asked TriMet to consider their return to fare inspection. On November 18, 2008, Hanson wrote Hunt, stating that:

> "I believe the work that you and I achieved with the Agreement signed on August 18, 2008 is sound and based upon strong care and principles. To that end, I will not not consider a modification of our Agreement and will not return Mr. Coryell or Mr. Thake to their former positions."

24. In January 2009, Hunt asked Hanson if TriMet would meet with the former Fare Inspectors. TriMet agreed, and on January 28, 2009, Banta and Hanson met with the group as a whole. Banta and Hanson then met with Coryell and Thake. At this meeting, Coryell and Thake stated that they wanted to return to fare inspection. Banta and Hanson tried to convince Coryell and Thake that returning was not in their best interests. Banta and Hanson repeatedly referred to the Fare Inspection Department as "a dying department" where "you would be at the bottom of the seniority forever" even though they had 20 to 25 years left in their careers. (Coryell Testimony, Tr. 36-7.) Hanson told them that if they chose to go back to fare inspection, they would not be permitted to transfer or bump out of that position back into a Road Supervisor, but would be bumped or transferred to their last full time position, *e.g.,* bus driver or rail operator. Coryell and Thake remained adamant about returning.

[9] ATU rejected the grievances as inconsistent with the August agreement.

Banta and Hanson agreed to place Coryell and Thake in Fare Inspector positions, and also agreed to give them the protections of the 2008 FIA.[10]

Hanson talked briefly with Coryell a few days after the meeting and Coryell reiterated his desire to return.

25. On January 30, 2009, the parties signed an agreement in letter form entitled "Fare Inspector Settlement Modification."(Coryell/Thake Agreement.) The agreement was drafted by TriMet officials, and states:

> "This modification of the August 18, 2008 Fare Inspector Settlement Agreement will allow John Coryell and James Thake to return to their prior positions of Fare Inspector, effective Sunday, February 1, 2009. * * * They will return with the seniority and status previously held as Fare Inspectors. They forfeit any seniority they held in the Road and Rail Supervisor position. In the future, should any of these individuals wish to become a Road or Rail Supervisor, they will be required to apply when there is an open position, go through the competitive recruitment process, complete the required training and establish seniority in their new classification based on their new appointment date. This agreement identifies all the terms and conditions of the settlement in its entirety, and is agreed to only on a non-precedent setting basis."

26. Coryell and Thake returned to Fare Inspector positions in February 2009.

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[10]We base this Finding of Fact on the unrebutted testimony of Coryell and Thake regarding matters discussed during their meeting with Banta and Hanson. Coryell and Thake testified that although Banta and Hanson initially tried to dissuade them from returning to Fare Inspector positions, they eventually agreed to allow them to do so, and also agreed that Coryell and Thake would have the protections provided by the FIA. (Coryell Testimony, Tr. 37; Thake Testimony, Tr. 93.)

Banta provided no detailed testimony regarding the content of the discussion at the January 2009 meeting. (Banta Testimony, Tr. 365.) Hanson, however, corroborated Coryell and Thake's understanding that TriMet modified the provisions of the FIA to cover Thake and Coryell. She testified as follows regarding the January meeting and her subsequent discussions with Hunt about Thake and Coryell's positions:

> "So that was the subsequent, and the whole time Jon and I are still talking back and forth at the end of this ongoing dialogue, it was my position that we had executed in good faith the settlement agreement described here, and to not revert back or make an exception in the case of Mr. Thake and Mr. Coryell. But at the end of the day we did; Steve decided that we would modify it a their request and at Jon's request, and we did so." (Hanson Testimony, Tr. 388.)

The August 2010 Workforce Reduction

27. In January 2010, Banta left TriMet to become Chief Operating Officer of Phoenix's Metrorail. Shelly Lomax, a 23-year TriMet employee with 14 years of work as a manager in the Operations Department, replaced Banta as TriMet's Executive Director of Operations.

28. In the spring of 2010, TriMet faced a $27 million budget shortfall and began several cost-cutting measures, including reducing bus and rail service, placing some managers on furloughs, and freezing unrepresented employee wages. TriMet eliminated 18 positions in the Operations Division's Field Operations Department, which includes Road and Rail Supervisors and Fare Inspectors.

29. Lomax and ATU officials had several discussions about TriMet's cuts, including the impact on Fare Inspectors. They discussed the FIA's phrase "resign, retire or involuntarily leave the district." ATU officials told Lomax that "involuntarily leave the district" did not include reductions in force. Lomax disagreed, noting that a reduction in force was involuntary for the employees. The parties agreed to disagree.

30. The Field Operations Department position reductions were proportionate to the number of employees in each workgroup. However, because TriMet also had a shortage of Bus Operators, the number of employees who would "bump-back" to Bus Operator was also a factor in TriMet's decisionmaking.[11] TriMet eliminated seven Road Supervisor positions, seven Rail Supervisor positions, and three Fare Inspector positions. The selection of specific employee positions for elimination was based on seniority. The three Fare Inspectors with the the least amount of seniority were Coryell, Sandy Raney, and Thake.

31. On June 21, 2010, TriMet issued Coryell, Raney, and Thake written notice that TriMet was eliminating their Fare Inspector positions effective August 29, 2010.

32. The content of the notice, which was in letter form provided a box at the top of the letter with the following information:

> "Current Position: Fare Inspector
> Bump-back Position: Bus Operator
> Previous Position Seniority Date: 9/6/92."

The body of the letter stated, in part:

> "As you know, TriMet has had to implement service reductions over the past two years due to the ongoing recession and revenue shortfall. In order to avoid deeper service cuts, TriMet also took steps to reduce non-union and union positions that indirectly support service.

[11] Lomax and Field Operations Manager Jay Jackson believed that TriMet could not have eliminated any additional Road or Rail Supervisors without significantly affecting service to TriMet customers.

"I regret to inform you that due to a reduction in Fare Inspector positions in TriMet's 2010-2011 budget, *you will be returned to your previous seniority class of Bus Operator* effective Sunday, August 29, 2010. [Emphasis added.]

"You will be added to the signup queue for Bus Operators with a seniority date of 9/6/92, for Fall Service effective 9/5/10. The Fall service signup for Bus Operators begins 7/12/10 * * *.

"If you believe your previous position seniority class or date information is incorrect, or if you do not intend to sign in the Bus Operator seniority class for Fall service, you must notify Executive Administrator Allison Horn * * * no later than 5:00pm on June 30, 2010.

"As of May 29, 2010, our records indicate you have * * * hours of vacation. You are eligible to hold back up to two weeks of vacation for the remainder of the 2010-2011 vacation year. Please complete and return the enclosed Vacation Request Form for the remainder of the 2010-2011 vacation year to Lora Francis * * * by July 9, 2010. You will be advised whether your vacation weeks have been approved based on your Bus Operator seniority.

"In addition, our records indicate that you have been away from performing safety-sensitive duties in excess of 30-days, so you are required to take a drug test prior to returning to duty operating a District vehicle. Please see me or Assistant Manager Dan Stokes no later than July 30, 2010 to arrange for the test.

"You are to report to the Bus Operator Training department (Holgate Plaza) at 8:00am on Monday, August 30, 2010 for 4 weeks of Bus Operator training. You must have a valid CDL or CDL instruction permit and DOT medical card by Sunday, August 29, 2010 * * *.

"At the end of your shift on the last day of your work as a Fare Inspector prior to Sunday, August 29, 2010, please return your Fare Inspector radio, safety vest and any other TriMet-issued equipment to me, Assistant Manager Dan Stokes or to a Lead Supervisor.

"Please contact me * * * if you have any questions about your bump-back. I will notify you if any change occurs in your bump-back situation.

"An employee's return to the work group bumped from, is governed by Article I, Section 14, Paragraph 1 of the [collective bargaining agreement]:

> "'Employees' department seniority shall govern in laying off and reemployment of employees. Employees . . . shall be returned in the inverse order in which they were laid off, as the need for their classification, or classification of work, permits.' [Emphasis omitted.]

"A voluntary informational meeting to answer your questions will be held on Friday, June 25, 2010 * * *.

"I wish you the very best *in your continued work at TriMet*." (Emphasis added.)

The letter was signed by TriMet Manager of Field Operations Jay Jackson.

33. The three Fare Inspectors chose to return to their former Bus Operator positions because each of them knew that failing to "bump-back" would result in their layoff.

Raney's return to Bus Operator

34. Lomax was aware that Raney's bump-back was a hardship for her. On June 30, 2010, Lomax asked Hunt if ATU would agree to allow TriMet to laterally transfer Raney to a Road Supervisor position. This would allow Raney to earn the same wages she did as a Fare Inspector.[12] Hunt stated he would think about it, but did not raise the issue afterwards. On July 29, 2010, Raney met with Lomax. Raney told Lomax that returning to a Bus Operator would be a financial hardship for her. Lomax told Raney that it would be possible for her to make a lateral transfer to a Road Supervisor position if ATU agreed. Raney believed that applying her seniority outside the Fare Inspector classification conflicted with longstanding ATU/TriMet seniority rules (under which she had zero seniority as a Road Supervisor) and would be unethical. Raney knew that accepting the offer would disadvantage the seniority of approximately 30 Road Supervisors. Raney told Lomax that she was not interested in that option. On August 30, 2010, Lomax wrote to Hunt regarding her meeting with Raney and the possibility of a transfer. Lomax asked Hunt to contact her if he was interested in discussing it further, but Hunt did not do so.

35. Raney had not worked as a Bus Operator since leaving the position for Fare Inspector 12 years before. She found the work extremely difficult, and experienced a series of anxiety attacks and related physical issues while driving, and stress-related absences from work. As a result, Raney's physician recommended that she leave the position in the interests of her health and the safety of her passengers. On March 18, 2011, Raney accepted that recommendation and retired from TriMet.

Coryell and Thake's return to Fare Inspection

36. In the spring of 2011, TriMet determined that it had sufficient funds to restore some Operations Department positions, including two Fare Inspector positions. The collective bargaining agreement provided that employees would be returned to their previous positions by seniority. Because Raney had retired, the two employees to be restored were Coryell and Thake. During June, TriMet Manager of Field Operations Jackson contacted both employees and offered them Fare Inspection positions, and they both expressed interest in returning.

[12]Hanson determined that this process would not work for Coryell and Thake, because even if their level of seniority as Fare Inspectors was transferred, they would still have less seniority than employees already bumped out of Road Supervisor positions.

37. However, on July 1, 2011, Thake objected to the Fare Inspector shift and location sign-up posted on July 1, 2011.[13] Thake told Assistant Operations Manager Dan Stokes that under the proposed signup, he would not return to Field Operations as a Fare Inspector. He said that he was willing to return to work only if he was given work on the eastside. He also stated that he preferred daytime work, Monday through Friday, but would accept evening work.

Thake also told Stokes that the proposed signup was retaliation for filing an unfair labor practice complaint, and that if the signup was not changed he would file a grievance and complaint with the Bureau of Labor and Industries (BOLI).

38. Stokes asked Thake to state his position in writing, which Thake did in an e-mail to Stokes on July 5, 2011. That email states in part:

> "This communication will not affect any grievances pending or future. Also, any unfair labor practice suits or Bureau of Labor and Industries inquiries.
>
> "* * * In Aug. of 2010 I was told I would be demoted and given a pay cut due to budget constraints. At that time I was working am shifts with weekends off and able to sign out of my preferred garage, Ruby Junction. Prior to that I was able to hold weekend am shifts and able to sign out of Ruby Junction. In June of 2011 I was told I could return to fare inspection and a sign up would be posted on June 30th. After looking at the sign up and spoken [*sic*] to all of the inspectors I will have no other option but to sign pm shifts, sun. mon. days off and will have to sign out of Elmonica garage. **Being that this effectively does away with all the privileges that I had acquired in approx. 13 years of seniority in the department I am given no choice but to refuse my reinstatement to fare inspection status and will remain a bus driver.** If however a delay in the sign up can be granted and a new sign up posted I ask only that I be allowed to work out of Ruby Junction, a garage that I have, for a number of years and sign ups, shown that I prefer." (Emphasis added.)

39. Granting Thake's request would, among other issues, have delayed the signup by one week, although such delays had occurred in the past for other reasons.

40. On July 6, 2011, Field Operations Manager Jackson mailed a letter to Thake which states, in part:

> "While I understand Ruby Junction to be your preferred garage as an Inspector, sign-ups are designed with a business need in mind. Further, the days off of Sunday and Monday are the same days off held by a Fare Inspector who holds higher

[13] Proposed schedules for Fare Inspectors are posted for about a week, and employees sign up for shifts, based on seniority.

seniority than you would have held had you returned to your Fare Inspector position.[14]

"I have accepted your resignation as Field Operations Fare Inspector. In accepting your resignation you are reminded that you have forfeited your seniority in that position moving forward."

41. On July 7, 2011, ATU filed a "Request for a Step 1 Pre-Filing Conference," a necessary step in the grievance procedure under the parties' collective bargaining agreement, on behalf of Fare Inspectors Gary Radford and Coryell. In its request, ATU alleged that the current Fare Inspector signup violated the FIA because it offered an insufficient amount of day shifts and weekends off to the Fare Inspectors.

42. On July 8, 2011, after consulting with ATU officials, Thake left a message on Jackson's voicemail accepting a return to Fare Inspector, and the next day wrote an e-mail to Jackson stating, "I have decided to accept my reinstatement to Fare Inspector." On July 12, Jackson wrote Thake that TriMet had not agreed to Thake's conditions for reinstatement, had accepted Thake's resignation from that reinstatement, and had accordingly held the sign-up as scheduled without his participation. Later in July, Thake wrote an e-mail to another individual stating in part, "I didn't want to come back as I told both stokes and jackson" and "[ATU President] Hunt said I needed to go back to fare inspecting on the screwed up sign up because I was hurting myself. I told him I didn't care and would fight it the way I wanted to." Thake stated that Hunt had persuaded him to rescind his resignation, Jackson had refused it, and Hunt had asked him to file a grievance over that refusal. Thake told Hunt that he was no longer interested in helping anyone and that he would fight Jackson "my way. Today I filed it so we will see what kind of wasp nest I kicked." Thake was apparently referring to a grievance he filed, which was ultimately denied.

43. On July 21, 2011, TriMet issued a "Pre-Filing Conference Meeting Determination Letter" in response to the ATU's July 7 request for a Step 1 Pre-filing Conference. TriMet denied the grievance on the grounds that the current Fare Inspector signup process was consistent with the signup process in effect on the date the FIA was executed. TriMet noted that the August 17, 2008 Fare Inspector signup offered the following shifts and days off: 41 percent day shifts, 58 percent night shifts, and 29 percent schedules with Saturdays and Sundays off. TriMet also noted that the July 10, 2011 Fare Inspector signup offered the following shifts and days off: 60 percent day shifts, 40 percent night shifts, and 60 percent schedules with Saturdays and Sundays off.

CONCLUSIONS OF LAW

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

[14]Had he returned, Thake would have been the Fare Inspector with the least seniority.

2. TriMet violated the terms of signed agreements with ATU regarding Fare Inspectors by removing Fare Inspectors Raney, Coryell, and Thake from their Fare Inspector positions, in violation of ORS 243.672(1)(g).

ATU alleges that by removing Raney, Coryell, and Thake from their Fare Inspector positions, TriMet violated ORS 243.672(1)(g)[15] by violating the terms of the signed agreements. At issue is that portion of the FIA that provides:

> "All current Fare Inspectors with 18 or more years TriMet seniority (i.e., hire date) who declare in writing their desire to remain as Fare Inspectors by the above-mentioned deadline may choose to remain in that position until they resign, retire or involuntarily leave the District." (Finding of Fact 16.)

ATU argues that the phrase "resign, retire or involuntarily leave the District" means that the Fare Inspectors were guaranteed positions as Fare Inspectors until they resigned, retired, or were involuntarily separated from their employment with TriMet. ATU contends that TriMet's actions—eliminating Fare Inspector positions and requiring Coryell, Thake, and Raney to "bump-back" to previously held positions—did not constitute an involuntary separation from TriMet employment and was, therefore, not permitted under the terms of the FIA. TriMet, however, asserts that by eliminating the Fare Inspector positions it involuntarily separated the employees at issue from their jobs in accordance with the provisions of the FIA. Thus, we begin our consideration of ATU's claims by analyzing the applicable provisions of the written agreements.

Our goal in a contract interpretation case is to discern the parties' intent. To determine that intent, we apply the three-part analysis described in *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005) (citing *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997)). We first examine the text of the disputed contract language in the context of the document as a whole, and if the provision is clear, the analysis ends. Unambiguous contracts must be enforced according to their terms. *Portland Fire Fighters' Assn. v. City of Portland,* 181 Or App 85 at 91, 45 P3d 162, *rev den*, 334 Or 491 (2002). Contract language is ambiguous if it can be given more than one plausible interpretation. 181 Or App at 91. If the provision is ambiguous, we proceed to the second step and examine extrinsic evidence of the parties' intent. "[W]e will examine the parties' prior actions or practice as an aid to contract interpretation *only if* the contract language is ambiguous." *Oregon AFSCME Council 75, Local 2831 v. Lane County*, 23 PECBR 416, 425 (2010) (emphasis in original). Finally, if the provision remains ambiguous after applying the second step, we proceed to the third step and apply appropriate maxims of contract construction. *Yogman*, 325 Or at 364.

We first look to the job security clause in the context of the FIA to determine the meaning of this provision as applied to the facts at issue. As a general rule, parties are strictly bound to agreements they have signed, and this Board will not rewrite or reconstitute the language of those

[15]ORS 243.672(1)(g) makes it an unfair labor practice for a public employer to "violate the terms of any written agreement with respect to employment relations * * *."

agreements. *Gresham Grade Teachers Association v. Gresham Grade School District No. 4 and Larson*, Case No. C-184-78, 5 PECBR 2889, 2895 (1980), *remanded for further proceedings on other matters*, 52 Or App 881, 630 P2d 1304 (1981), *order on remand*, 6 PECBR 4953 (1981).

Here, the key phrase is the one that provides that Fare Inspectors "may choose to remain in that position until they * * * involuntarily leave the District." The parties agree that "the District" means TriMet, not the Fare Inspection Department. We find the phrase clear and unambiguous; it guarantees Fare Inspectors the right to remain in their positions until they are separated, against their wishes, from employment with TriMet. On June 21, 2010, TriMet did not involuntarily remove the three Fare Inspectors from *the District*; instead, it involuntarily removed them from their former Department or work group. These actions violated the terms of the Coryell/Thake and FIA Agreements, resulting in a violation of subsection (1)(g).

TriMet argues, however, that Coryell and Thake had no position security under the FIA because that agreement did not apply to them. TriMet contends that Coryell and Thake returned to Fare Inspection under the Coryell/Thake Agreement, which states that it "identifies all terms and conditions of the settlement in its entirety" and does not include any guarantees regarding position security. ATU, however, argues that the Coryell/Thake Agreement simply added Coryell and Thake to the FIA and therefore provides the two employees with all protections in the earlier agreement. In support of its position, ATU points to the statement in the January agreement that it is a "modification" of the FIA.

We first review the language in the Coryell/Thake Agreement in context to determine whether it is clear and unambiguous. As noted above, an agreement is ambiguous if it is capable of more than one plausible interpretation. *City of Portland,* 181 Or App at 91. We conclude that the Coryell/Thake Agreement is ambiguous, as both TriMet and ATU advance plausible interpretations of the relevant language. Accordingly, we proceed to the second step of our analytical process: reviewing extrinsic evidence concerning the parties' intent.

The evidence shows that the parties intended for Coryell and Thake to be subject to the FIA. Coryell and Thake provided unrebutted testimony that the parties intended to modify the FIA by specifying that the agreement now applied to them. (Finding of Fact 24 n 10.) Their testimony was supported by Hanson who testified that she and Banta agreed to modify the FIA to make an exception for Thake and Coryell.

Additional extrinsic evidence of the parties' intent in executing the Coryell/Thake Agreement is provided by TriMet's response to the grievances that ATU filed concerning the shifts assigned to Coryell and Thake after they were returned to Fare Inspector positions in July 2011. In their responses to these grievances, TriMet never raised the argument that Coryell and Thake were not subject to the provisions of the FIA and, therefore, not entitled to any of this agreement's provisions concerning priority shift assignments. Instead, TriMet argued that they had, at all times, complied with the provisions of the FIA in assigning shifts to Coryell and Thake.

We do not agree with TriMet that language in the Coryell/Thake Agreement specifying that the agreement "identifies all terms and conditions of the settlement in its entirety" indicates that the

parties never intended for the terms of the FIA to apply to Coryell and Thake. This provision does not exclude the extension of the position security provisions in the FIA to Coryell and Thake. Instead, it merely makes clear that Coryell and Thake were promised no additional benefits or rights other than those provided in the FIA and Coryell/Thake Agreements.

In sum, we conclude that TriMet violated the terms of the FIA and Coryell/Thake Agreements with ATU and ORS 243.672(1)(g) when it removed Raney, Thake, and Coryell from their Fare Inspector positions in 2009.

3. TriMet did not violate the terms of signed agreements with ATU and ORS 243.672(1)(g) when, in July 2011, it assigned Coryell and Thake more onerous schedules.

ATU argues that TriMet violated ORS 243.672(1)(g) when, in July 2011, it required Coryell and Thake to work shifts both employees found unappealing, contrary to the terms of the two Agreements. We disagree.

The relevant provision in the FIA requires TriMet to "maintain or improve the current Fare Inspector work shifts comparable with the actual workforce that exists." (Finding of Fact 18.) Prior to the execution of this agreement, Fare Inspectors were never guaranteed any particular shift; instead, they were given the opportunity to sign up for particular shifts based on seniority. TriMet continued to use this signup system in July 2011, and offered Fare Inspectors more desirable day shifts and weekends off than had been offered in July 2008. (Finding of Fact 43.) Accordingly, TriMet complied with the terms of the FIA by improving the work shifts made available to Fare Inspectors.[16]

Remedy

We conclude that TriMet violated ORS 243.7672(1)(g) by removing Raney, Thake, and Coryell from their positions as Fare Inspectors in violation of the FIA and Coryell/Thake Agreements. We will order TriMet to cease and desist from violating subsection (1)(g) by failing to apply the terms of these Agreements to these employees. We will also order TriMet to offer Raney and Thake reinstatement to positions as Fare Inspectors, and to make all three employees whole for all lost wages and benefits they would have received had they not been removed from their positions as Fare Inspectors.[17] Thake, however, will not receive any lost wages or benefits that accrued from

[16]Thake also objected to the work location to which he was assigned in July 2011. We note, however, that the FIA does not guarantee assignment to any particular work location. The agreement refers only to "work shifts"; *Roberts Dictionary of Industrial Relations* 713 (Fourth Edition 1994) defines a "shift" as "[a] regularly scheduled period of work during the 24-hour day for a plant." Thus, the plain meaning of the relevant provision in the FIA provides some guarantee regarding the hours assigned to Fare Inspectors, but contains no guarantees regarding their assigned work location.

[17]TriMet argues that, by failing to accept TriMet's offer to transfer Raney to a Road Supervisor position, Raney and ATU failed to mitigate her damages. We conclude that failing to negotiate an exception (continued...)

the date he refused to return to a Fare Inspector position in July 2011 and the date of his reinstatement under this order, should he accept an offer of reinstatement. Although Thake disagreed with certain aspects of TriMet's offer to reinstate him to a Fare Inspector position, he should have mitigated his damages by "working now" and "grieving later."[18]

ATU also asks that this Board require TriMet to pay a civil penalty. This Board may assess a civil penalty of up to $1,000 against a party that committed an unfair labor practice if (1) a party acted repetitively with knowledge its actions were unlawful, or (2) the party's conduct was "egregious." ORS 243.676(4)(a); *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04, 21 PECBR 206, 221 (2005). "Egregious" is defined as "conspicuously bad" and is synonymous with "flagrant." *East County Bargaining Council (David Douglas Education Association) v. David Douglas School District,* Case No. UP-84-86, 9 PECBR 9184, 9194 (1986), *supplemental order*, 9 PECBR 9354 (1987).

ATU does not claim that the actions at issue were repetitive. It argues that "the admitted actions of Hanson in deliberately misrepresenting the meaning of the contested language during negotiations, as well as subsequent actions by TriMet in violating the clear intent of the parties' agreement" were egregious. (ATU post-hearing brief at 38.) TriMet implemented the FIA in a manner consistent with its interpretation; there is no evidence in the record to demonstrate that the interpretation of the FIA was made in bad faith. ATU does not argue that TriMet's actions struck at core rights protected by the Public Employee Collective Bargaining Act (PECBA) or that TriMet knew that the conduct at issue violated the PECBA. *See Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College,* 21 PECBR 673, 783 (2007), and *Coos County Board of Commissioners and AFSCME Local 2936 v. Coos County District Attorney and State of Oregon,* Case No. UP-32-01, 20 PECBR 87, 104 (2002).

We conclude that TriMet's conduct was not egregious, and we will not award ATU a civil penalty.

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[17](...continued)
to longstanding ATU and TriMet seniority rules, to the disadvantage of approximately 30 employees, is not the type of step ATU or Raney was required to take to mitigate the consequences of TriMet's breach of an agreement.

[18]This Board and the courts have long recognized the "work now, grieve later" rule. The Oregon Supreme Court describes this principle as a "well recognized 'common law' rule of labor relations." *Whitney v. Employment Division,* 280 Or 35, 42 n 1, 569 P2d 1078 (1977). *See also Central Education Association and Vilches v. Central School District 13J,* Case No. UP-74-95, 17 PECBR 54, 68 (1996), *recons,* 17 PECBR 93 (1997). This rule is subject to certain exceptions, none of which are applicable here.

ORDER

1. TriMet shall cease and desist from violating ORS 243.672(1)(g).

2. TriMet shall offer Raney and Thake reinstatement to positions as Fare Inspectors, and make Raney, Thake, and Coryell whole for all lost wages and benefits they would have received had they not been unlawfully removed from these positions. Back pay shall be paid with interest at nine percent per annum and shall be offset by any interim earnings. The back pay award to Thake shall be paid from the date he was unlawfully removed from his position as a Fare Inspector until the date he refused TriMet's offer of reinstatement to a Fare Inspector position in July 2011.

3. The remainder of the Complaint is dismissed.

DATED this 15 day of January 2013.

Kathryn A. Logan, Board Chair

Jason M. Weyand, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. AR-002-11

(PETITION FOR REVIEW OF ARBITRATION AWARD)

IN THE MATTER OF AN ARBITRATION DISPUTE BETWEEN THE STATE OF OF OREGON, DEPARTMENT OF ADMINISTRATIVE SERVICES, Petitioner, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503, OREGON PUBLIC EMPLOYEES UNION, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On August 31, 2012, this Board heard oral argument on this matter. The record closed on March 5, 2012.

Stephen D. Krohn, Senior Assistant Attorney General, Oregon Department of Justice, Salem, Oregon, represented Petitioner.

Marc A. Stefan, Supervising Attorney, SEIU Local 503, Salem, Oregon, represented Respondent.

On October 31, 2011, the State of Oregon, Department of Administrative Services (State) filed a Petition for Review of an Arbitration Decision alleging that the arbitrator exceeded his powers in issuing an arbitration award involving the State and the Service Employees International Union, Local 503 (Union). Respondent filed a timely answer on November 9, 2011. The parties submitted a stipulated factual record and briefs to Administrative Law Judge Peter A. Rader on March 5, 2012. The matter was transferred to the Board in July 2012. Oral argument was heard by the Board on August 31, 2012.

The issue is:

> Did the arbitrator exceed his powers in issuing an arbitration award on October 18, 2011, that involved the State and Union in violation of ORS 240.086(2)(d)?

RULINGS

1. The parties submitted seven proposed exhibits with their briefs, stipulating to the admission of the arbitration award as Exhibit J-1, the Letter of Agreement (LOA) at issue as Exhibit J-2, and the collective bargaining agreement as Exhibit J-7. Exhibits J-1, J-2, and J-7 are received.

2. The State sought to admit Exhibits J-3 and J-4, purporting to be the bargaining history concerning the LOA at issue. The Union objects to these exhibits as irrelevant. The Union sought to admit Exhibits J-5 and J-6, which are the parties' post-hearing briefs submitted to the arbitrator. The State objects to these exhibits as irrelevant.

We previously have held that the only evidence relevant in an action challenging or seeking enforcement of an arbitration award is the parties' contract, the arbitration award, and if a party asserts that an award violates the public policy exception, documents relating to that argument.[1] *Portland Association of Teachers and Hanna v. Portland School District 1J*, Case No. UP-64-99, 18 PECBR 816, 836-37 (2000), *ruling on motion to stay*, 19 PECBR 25 (2001), *AWOP*, 178 Or App 634, 39 P3d 292, 293, *rev den*, 334 Or 121, 47 P3d 484 (2002). We recently reaffirmed our prior holding in *In the Matter of the Arbitration of a Dispute Between State of Oregon, Department of Human Services, Oregon State Hospital v. American Federation of State, County and Municipal Employees, Local 3295*, Case No. AR-01-08, 23 PECBR 712 (2010), *AWOP*, 244 Or App 137, 257 P3d 1021 (2011), *rev den*, 351 Or 649 (2012). As Exhibits J-3, J-4, J-5, and J-6 are outside the purview of what we consider to be relevant evidence, they are not admitted.

FINDINGS OF FACT

The Parties

1. The State is a public employer and the Union is a labor organization.

2. The State and the Union were parties to a collective bargaining agreement that expired June 30, 2011.

Relevant Contract Language and the Letter of Agreement

3. Article 21 of the contract contains the grievance and arbitration procedure. In relevant part, this Article provides:

[1]The public policy exception is not at issue in this case.

"Section 1. Grievances are defined as acts, omissions, applications, or interpretations alleged to be violations of the terms or conditions of this Agreement.

"* * * * *

"All grievances shall be processed in accordance with this Article and it shall be the sole and exclusive method of resolving grievances, except for the following Articles:

"• Article 2--Recognition

"• Article 5--Complete Agreement/Past Practices

"• Article 56--Sick Leave (FMLA/OFLA)

"• Article 22--No Discrimination

"• Article 81--Reclassification Upward, Reclassification Downward, and Reallocation

"* * * * *

"Section 5.

"* * * * *

"Step 4. Grievances which are not satisfactorily resolved at Step 3 may be appealed to arbitration.

"6. Arbitration Selection and Authority.

"* * * * *

"(f) The Parties agree that the decision or award of the arbitrator shall be final and binding on each of the Parties. The arbitrator shall issue his/her decision or award within thirty (30) calendar days of the closing of the hearing record. The arbitrator shall have no authority to rule contrary to, to amend, add to, subtract from, change or eliminate any of the terms of this Agreement. The arbitration will be handled in accordance with the rules of the American Arbitration Association."

4. Appendix A to the contract contains various letters of agreement between the parties that are incorporated into the contract. The LOA at issue reads as follows:

"LETTER OF AGREEMENT 27.00-09-190

"**Article 27- - Salary Increase**

"**Salary Eligibility Date–Step Advancement Freeze**
"**Includes Article 29-Salary Administration/Article 81-Reclass Up/Down**

"This Letter of Agreement is entered into by the State of Oregon, acting through its Department of Administrative Services, Labor Relations Unit (Employer), and the SEIU Local 503, OPEU (Union).

"This Agreement supersedes all provisions in the Collective Bargaining Agreement pertaining to step advancement upon the affected employees' Salary Eligibility Date (SED).

"This Agreement suspends the Letter of Agreement dated December 13, 2007, (Letter of Agreement 27.00-09-170) to add and drop steps for each salary range in all job classifications in the bargaining units from September 1, 2009, through August 31, 2010.

"Upon implementation of this Letter of Agreement, the following applies:

"1. Employees who advance to the new top step of their classification on or after July 1, 2009, through August 31, 2009, as a result of the December 13, 2007 Letter of Agreement, will have their pay reduced to the prior top step. Employees advancing to a higher first step by virtue of the first step being dropped shall not have their pay reduced.

"2. Employees who advance on the pay scale within their classifications' salary range on or after July 1, 2009, through August 31, 2009, will be restored to their former step in effect as of June 30, 2009.

"3. Employees shall not receive any step increases between September 1, 2009, through August 31, 2010, during the freeze period except for initial increases upon promotion and reclassification.

"4. Employees will continue to receive the initial increase upon promotion and reclassification upward during the freeze period. However, promotions or reclassifications to the new top step shall be subject to #1 above.

"Employees who promote during the freeze will receive an additional step either six (6) months after their promotion or September 1, 2010, whichever is later. Their SED will be adjusted pursuant to Article 29.

"5. The step freeze will continue for twelve (12) months through August 31, 2010.

"6. When the step freeze is lifted:

"(a) An employee who received a step or advanced to the new top step in July or August of 2009, will have that step restored on September 1, 2010 to the higher rate that was in effect through August 31, 2009.

"(b) For initial appointments in state service occurring between July 1 and September 1, 2009, employees shall receive a one (1) step increase on September 1, 2010 and on their SED thereafter pursuant to Article 29.

"(c) All other employees will commence receiving step increases on their SED, effective September 1, 2010.

"This Agreement is effective September 1, 2009."

The Grievance and Arbitration Hearing

5. On September 21, 2010, the Union filed a grievance on behalf of a group of employees who were promoted during the six-month period prior to the effective date of the LOA. The matter proceeded to arbitration, where the parties agreed that it was properly before the arbitrator. The parties further agreed the arbitrator should frame the issue, which he stated as follows:

> "Were the employees who received promotions during the six-month period prior to the start of the salary freeze on September 1, 2009, properly paid following the end of the freeze on August 31, 2010? If not, what is the appropriate remedy?"

6. On October 18, 2011, the arbitrator issued his opinion and award. Findings of Fact 7 through 13 are a summary of the arbitrator's facts, analysis, and conclusion.

7. During negotiations for the 2009-2011 Collective Bargaining Agreement, the State and Union agreed to freeze step (salary) increases from September 1, 2009 through August 31, 2010. They executed the LOA at issue memorializing their agreement.

8. Prior to the salary freeze, two salary increases were involved upon an employee's promotion: an immediate increase upon promotion and a promotional increase granted six months later. This promotional increase, based upon successful work performance, occurred on the employee's Salary Eligibility Date (SED).

9. After implementation of the LOA, employees were treated differently based upon when they promoted: 1) employees who promoted during the six months prior to the September 1, 2009 freeze did not receive a promotional salary increase (the grievants in the arbitration); 2) employees who promoted during the first six months of the freeze received a promotional salary increase on September 1, 2010; and 3) employees who promoted during the

second six months of the freeze received a promotional salary increase on their SED after the freeze ended.

10. In the award, the arbitrator recited "Pertinent Contract Provisions," including Article 21, Section 6(f) and the text of the LOA.

11. The arbitrator determined that:

> "Employees in Group 1 received no promotional salary increase during or after the freeze. There is no evidence that the parties identified these employees as a discrete group, or discussed the impact of the freeze on payment of the promotional salary increase for these employees. Absent evidence to the contrary, the Arbitrator presumes that when the parties negotiated the LOA, they unintentionally omitted addressing promotional salary increases for Group 1. While the parties accommodated Group 2 employees in Section 4 of the LOA, there is no evidence that the parties knowingly chose not to accommodate Group 1 employees. This was an inadvertent omission."

12. Having determined that the parties inadvertently omitted the employees in Group 1 from the LOA, the arbitrator then analyzed his authority under the contract to determine the matter. He concluded:

> "Filling the gap: determining the date for Group 1 promotional salary increases
>
> "The Arbitrator must discern the critical difference between, (a) completing a process undertaken by the parties, that is, filling a gap, and (b) acknowledging that silence on a matter was the intention of the parties. In this matter, the evidence shows the intent of the parties was to accommodate employees who did not receive a promotional salary increase during the freeze. The parties created Section 4 of the LOA for employees promoted during the first half of the freeze, Group 2. The parties did not identify nor address the adverse impact of the freeze on similarly situated employees, those persons promoted during the six months prior to the freeze, Group 1. This silence was not intentional. Rather, the silence reflects a complex bargaining process not taken to a reasonable, logical conclusion: that if the parties worked to moderate the adverse impact of the freeze for one group of employees, they would also have done so for a group of similarly situated employees.
>
> "* * * * *
>
> "The primary goal of a 'rights' arbitrator is to determine and carry out the mutual intent of the parties. It is widely recognized that if a provision of a contract is clear and unambiguous, it must be applied in accordance with its terms despite whatever equity or inequity may be present on either side. However, as here, where the parties unintentionally failed to address the adverse impact of the freeze for one group, while addressing the adverse impact for a similarly situated group,

the Arbitrator is compelled to provide relief. The LOA is ambiguous because it does not specifically address employees promoted in the six months before the freeze.

"* * * * *

"A function of 'rights' arbitration is to complete a process started by the parties. By filling the gap in this matter, the Arbitrator is not exceeding the authority granted to the Arbitrator in Article 21, Section 6(f).

"In filling the gap, the task for the Arbitrator is to deduce from the evidence what the parties would have done had they addressed the circumstance of Group 1 employees, as well as Group 2 employees. The purpose of the accommodation for Group 2 employees, found in Section 4 of the LOA, was to lessen the adverse impact of the freeze by proving [*sic*] for receipt of a promotional salary increase. Had the parties addressed the matter, the Arbitrator presumes that the parties would have considered Group 1 employees no less deserving of consideration than Group 2 employees. In the absence of evidence to the contrary, it is reasonable to infer that the parties would have applied the provision 'will receive an additional step either six (6) months after their promotion or September 1, 2010, whichever is later' (Section 4 of the LOA) to Group 1 as well as Group 2."

13. The arbitrator issued the following order in his award:

"The grievance is sustained. Employees who received promotions during the six-month period prior to the start of the salary freeze on September 1, 2009, shall be paid a promotional step retroactive to September 1, 2010. By agreement of the parties, the Arbitrator retains jurisdiction in this matter to hear and decide issues pertaining to implementation of the Award."

CONCLUSIONS OF LAW

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

2. The October 18, 2011 arbitration award does not violate ORS 240.086(2)(d).

DISCUSSION

ORS 240.086(2) authorizes this Board to:

"(2) Review and enforce arbitration awards involving employees in certified or recognized appropriate collective bargaining units. The awards shall be enforced unless the party against whom the award is made files written exceptions thereto for any of the following causes:

"* * * * *

"(d) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

We apply the same standard of review to arbitration awards under ORS 240.086(2) that we apply in reviewing arbitration awards under ORS 243.672(1)(g) and (2)(d). *In the Matter of the Arbitration Between the State of Oregon, Department of Transportation v. Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. AR-1-06, 21 PECBR 838, 842 (2007), citing *Executive Department, State of Oregon v. Federation of Oregon Parole and Probation Officers*, Case No. AR-1-85, 9 PECBR 8497 (1986). As long as the arbitrator's award is based on his or her interpretation of the contract language, the parties are bound by that decision. *Clatsop Community College Faculty Association v. Clatsop Community College*, Case No. UP-139-85, 9 PECBR 8746, 8761-62 (1986). We do not review the decision to determine whether it is right or wrong, and we enforce decisions even if we believe they were erroneous. *Portland School District 1J*, 18 PECBR at 836-37. "Neither a mistake of fact or law vitiates an [arbitration] award." *Brewer v. Allstate Insurance Co.*, 248 Or 558, 562, 436 P2d 547 (1968).

With this limited scope of review in mind, we turn to the case at hand. The State asserts that the award is unenforceable under ORS 240.086(2)(d) because the arbitrator exceeded the contractual authority granted to him when he applied the provisions of Section 4 of the LOA to the employees in Group 1 who were promoted prior to the step freeze. Specifically, the State objects to the arbitrator using "gap-filling" to decide the case, characterizing his decision as "adding to" the contract in violation of Article 21, Section 6(f).

Gap-filling is a process used by arbitrators when they must resolve disputes and give meaning to contract provisions that are unclear, or when they are faced with situations not specifically foreseen by the negotiators. Elkouri & Elkouri, *How Arbitration Works*, (6th ed), at 445, citing *Superior Prods. Co.*, 42 LA 517, 523 (Smith, 1964). Gap-filling is distinct from devising new contract terms. "However, arbitrators may refuse to fill gaps if convinced that to do so 'would constitute contract-making' rather than contract interpretation or application." *Id.* at 445, citing *Labor Standards Ass'n*, 50 LA 1009, 1012 (Kates, 1968).

The concept of gap-filling has been used before with approval in the collective bargaining context. *Harrisburg Ed. Assn. v. Harrisburg Sch. Dist. #7*, 186 Or App 335, 63 P3d 1176 (2003) presented a similar situation to the one before the arbitrator in the present case. In *Harrisburg*, the parties agreed on a concept for an early retirement incentive which would be funded through savings realized by replacing retiring higher-paid full time teachers with newer lower-paid full time teachers. They did not consider the possibility that part-time teachers, either current or new to the district, would be used to replace the retiring teacher. Thus, the specific language agreed to by the parties did not directly cover the issue: what salary levels were to be applied to the equation given the absence of contract language.

The Court, relying upon the *Restatement (Second) of Contracts* section 204 (1981),[2] held that it was appropriate to fill in the gap left in the collective bargaining agreement by the parties. The court stated:

> "The *Restatement's* approach * * * is identical to the one that Oregon courts have adopted in a closely analogous context−that of supplying a reasonable term to fill a contractual gap when the equitable remedy of specific performance is sought. For specific performance to be available a court will not go beyond the agreement struck by the parties or make a new contract for them; the contract therefore must be sufficiently defined to serve as the foundation for a specific judgment." *Id.* at 346. (Citations omitted.)

In footnote 3 of the decision, the Court specifically notes that gap-filling is particularly appropriate in the collective bargaining context, citing to case law noting the differences between a collective bargaining agreement and a commercial contract:

> "The problem that confronts us in this case−that of a contract sufficiently definite to be enforced, but the terms of which do not address the factual circumstance presented−is particularly common in the area of collective bargaining. Unlike a commercial contract, which is designed to be a comprehensive distillation of the parties' bargain, a collective bargaining agreement is a skeletal, interstitial document. *See generally Steelworkers v. Warrior & Gulf Co.*, 363 US 574, 578, 580-81, 80 S Ct 1347, 4 L Ed 2d 1409 (1960). A collective bargaining agreement is akin to a generalized code designed to cover a whole employment relationship and myriad circumstances that no drafter can fully anticipate. *See generally Swanson v. Van Duyn Choc. Shops*, 282 Or 491, 495-97, 579 [P2d] 239 (1978). Arbitration serves to fill gaps in collective bargaining agreements and arbitrators permissibly may resort to sources other than legal principles (*i.e.*, the 'common law of the shop' and the arbitrator's personal judgment) to supply terms that the parties have omitted from the contract. *Id.* Courts, on the other hand, are limited to general principles of contract law in performing the same gap-filling function. *Id.* at 497. For that reason, it is particularly appropriate to follow the 'courageous common sense' principle and *Restatement* section 204 in the area of collective bargaining contracts." *Id.* at 347 n 3.

In this matter, the arbitrator determined that the parties never intended to eliminate promotional salary increases for the employees in Group 1 who promoted prior to the freeze. Rather, he held that the parties "inadvertently omitted" providing increases to those employees, stating that, "[i]n this matter, the evidence shows the intent of the parties was to accommodate

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[2]This section provides:

> "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court."

employees who did not receive a promotional salary increase during the freeze." Arbitration Award at 10. As promotional increases had been given to all other affected employees, the arbitrator decided to fill the gap by granting promotional increases to the employees in Group 1.

As we have often noted, when parties agree to utilize binding arbitration as the means of resolving disputes, they consent to a speedy, nontechnical, equity oriented, and analytically flexible approach to contract dispute resolution. *American Federation of State, County and Municipal Employees, Local 2067 v. City of Salem*, Case No. C-96-82, 6 PECBR 5532, 5539 (1982), *AWOP*, 64 Or App 855, 669 P2d 843 (1983), *rev den*, 296 Or 350 (1984). Gap-filling under the specific circumstances at issue in this case is a recognized practice consistent with the nature of labor arbitration. As a result, we conclude that the arbitrator, by engaging in gap-filling in this decision, did not exceed his authority under the contract, and we will dismiss the petition.

ORDER

The petition is dismissed.

DATED this 15 day of February, 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-001-13

(UNIT CLARIFICATION)

OREGON STATE POLICE OFFICERS' ASSOCIATION, Petitioner, v. STATE OF OREGON, DEPARTMENT OF STATE POLICE, Respondent.	)	ORDER CLARIFYING BARGAINING UNIT

On January 24, 2013, Oregon State Police Officers' Association (Petitioner) filed a unit clarification petition which as amended on January 25, 2013, sought a unit clarification under OAR 115-025-0005(2). Petitioner stated that it is the exclusive representative of a bargaining unit of employees employed by State of Oregon, Department of State Police (Department). The unit is described as:

> "All employees in the bargaining unit as defined by the Employment Relations Board or by mutual agreement between the parties as provided by statute, excluding managerial, supervisory, or confidential employees."

The petition seeks a determination of the public employee status of all employees of the Department holding the rank of Sergeant.

On January 25, 2013, the petition was served on Respondent. Respondent certified, on a certificate of posting signed February 1, 2013, that notices of the pending unit clarification petition were posted. The due date for filing objections was February 15, 2013. No objections were filed.

When a labor organization proposes a facially appropriate unit clarification petition and the employer does not file an objection, the petition is generally granted.[1]

Because there are no objections to the petition, a hearing is not necessary. We shall grant the requested clarification.

ORDER

The bargaining unit is clarified to include all employees of the Department holding the rank of Sergeant.

DATED this 26 day of February, 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

This Order may be appealed pursuant to ORS 183.482.

[1] *Cf. Teamsters Local Union No. 223 v. City of Gold Hill*, Case No. RC-75-92, 14 PECBR 290 (1993) (election ordered where no valid objections filed); *Teamsters Local 57 v. City of Bandon*, Case No. UC-47-91, 13 PECBR 225 (1991) (subject to results of self-determination election, clarification ordered where employer's objections were untimely).

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-25-11

(REDESIGNATION PETITION)

JACKSON COUNTY, Petitioner, v. JACKSON COUNTY SHERIFF'S EMPLOYEES' ASSOCIATION, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This Board heard oral argument on December 17, 2012, on Petitioner's objections to a Recommended Order issued on October 9, 2012, by Administrative Law Judge (ALJ) Peter A. Rader, following a hearing held on January 5 and 6 and May 2, 2012, in Salem, Oregon. The record closed on June 4, 2012, upon receipt of the parties' post-hearing briefs.

Joel C. Benton, Senior Assistant County Counsel, Jackson County, Medford, Oregon, represented Petitioner.

Rhonda J. Fenrich, Fenrich & Gallagher, P.C., Eugene, Oregon, represented Respondent at the hearing. Seth Davis and Ms. Fenrich represented the Respondent at oral argument.[1]

On September 22, 2011, Jackson County (County) filed this redesignation petition under OAR 115-025-0000(1)(e) seeking to remove strike-permitted positions from an existing mixed bargaining unit of Sheriff's Department employees represented by the Jackson County Sheriff's Employees' Association (Association). The Association filed timely objections on the grounds that the petition did not assert a substantial change in circumstances sufficient to support a petition to redesignate, and that it did not meet the statutory requirements set forth in ORS 243.682(1) and OAR 115-025-0000(1)(e).

[1]Mr. Davis, a law clerk, represented the Respondent under the supervision of Ms. Fenrich.

The issue is:

> Should the current mixed unit of strike-prohibited and strike-permitted employees described as "all employees within the Jackson County Sheriff's Department, excluding supervisory, confidential, extra help or irregular part-time (on-call) employees" be redesignated to exclude the strike-permitted employees, including records clerks and other administrative staff, pursuant to OAR 115-025-0000(1)(e)?

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The Association is a labor organization and the exclusive representative of a wall-to-wall bargaining unit of employees in the Sheriff's Department of the County. The County is a public employer.

2. The County's employees are represented by three unions: Service Employees International Union (SEIU) represents approximately 493 strike-permitted employees; the Federation of Oregon Parole and Probation Officers (FOPPO) represents approximately 21 strike-prohibited officers; and the Association represents a mixed unit of approximately 90 strike-prohibited and 45 strike-permitted employees.[2] Each of the unions has unique contracts with the County.

Bargaining Unit History

3. In 1982, the County voluntarily recognized Teamsters Local 223 as the exclusive representative of bargaining unit employees in the Sheriff's Department. Following a 1986 consent agreement, the Board certified the Association as the successor and exclusive representative of a bargaining unit including "Records Clerk, Corrections Cook, Property/Evidence Clerk, Corrections Officers, Criminal Deputy, and Investigator; excluding supervisory, confidential, temporary, and part-time employees who work less than 1,040 hours per year."[3]

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[2]The County alleged for the first time in its closing brief that the ratio of strike-prohibited to strike-permitted employees in the bargaining unit was 106/43.5. Association president Ben Fazio testified that it was 100/45. We credit the testimony of Human Resources employee Sasha Grafenstein who testified that it was 90/45, which the Association cited in its closing brief.

[3]*AFSCME, Council 75 v. Jackson County Sheriff's Department and Jackson County Sheriff*, Case No. RC-30-86 (1986).

4. The bargaining unit's strike-prohibited job classifications include criminal, civil, corrections, and transportation deputies. The strike-permitted job classifications include community service officer, corrections specialist, criminal data technician, property evidence clerk, records clerk, search and rescue assistant, and court security officer.

5. Since its certification, the bargaining unit has been comprised of both strike-permitted and strike-prohibited employees. Under the parties' collective bargaining agreement (Agreement), effective July 1, 2008 through June 30, 2011, the bargaining unit is defined as all "employees within the department, excluding supervisory, confidential, extra help or irregular part-time (on-call) employees."

6. There is no history of labor unrest associated with this mixed unit and no evidence that any statutorily strike-permitted bargaining unit members desire to be in a separate unit.

Sheriff's Department Command Structure

7. The Sheriff's Department maintains a multi-level command structure, beginning with the elected Sheriff, Michael Winters. Reporting directly to Winters is Undersheriff Rodney Countryman. Winters and Countryman oversee the Department's two primary divisions, operations and support services.

8. The operations division is supervised by Captain Terry Larson and includes the criminal and field services divisions. The criminal services division is divided into traffic and patrol, which provides services to White City and Shady Cove under contract. The patrol division in White City is located in a secured facility. The field services division includes search and rescue and marine services.

9. The support services division is supervised by Captain Monty Holloway and includes corrections, special operations, and special projects. The corrections division is divided into sections for the County jail, corrections records, and transport. The special operations division is divided into sections for the Southern Oregon Multi-agency Marijuana Eradication team, two investigation units, and the medical examiner. Special projects is divided into civil, court services, and criminal records. Captain Holloway also supervises training, finance, and administration/personnel support.

10. Bargaining unit members are supervised exclusively by managers/officers within the Sheriff's Department. The chain of command for both strike-prohibited and strike-permitted members initially includes a sergeant or a civilian records supervisor, but all positions ultimately report up the chain of command to a lieutenant, a captain, the undersheriff, and sheriff. All members undergo between twelve and eighteen months of trial service.

11. If they are not working in the field, bargaining unit members report to, and work in, secured facilities that are not accessible by other County employees without permission. They are required to wear Sheriff's Department identification badges and uniforms particular to their job classification. The deputies, security officers, and community service officers all wear similar uniforms which are distinguished by badges identifying their job title and authorization to carry a firearm.

Job Classifications in the Bargaining Unit

12. Criminal Deputies. The primary function of the sworn criminal deputies is the deterrence of crime, which includes patrolling highways and County waterways, apprehending criminal suspects, investigations, issuing and enforcing citations, serving warrants, and general law enforcement. Deputies work primarily in the field or secured facilities and require specialized training and certification from the Department of Public Safety Standards and Training (DPSST). Criminal deputies carry Glock .45 caliber pistols, bean bag shotguns, pepper ball guns, and tasers, and wear distinctive uniforms that include a metal badge, khaki pants with a green stripe, and shirt patches with their rank. They drive marked vehicles. The Sheriff's Department operates 365 days a year, and criminal deputies work one of three shifts per day, seven days a week under the supervision of a shift sergeant.

Criminal deputies are required to have a high school diploma or general education degree (GED); one to three months of related experience or training, or an equivalent combination of experience and training; an Oregon driver's license; and good decision-making, reasoning, communication, and basic math skills. They also must pass a psychological evaluation, physical agility test, and medical exam. Upon being hired, patrol deputies must attend a 10-week DPSST academy and obtain a basic deputy certification within a year of hire.

13. Corrections Deputies. Corrections deputies hold sworn positions and are responsible for supervising inmates at the County jail. Their duties include running a control room to control jail access, forcibly restraining inmates using trained techniques and tools, performing searches of persons and property for concealed contraband, gathering information related to criminal activity, and processing legal warrants and civil documents. They also inventory inmate property, obtain medical information, process mail, and escort inmates when they leave the facility.

Like criminal deputies, they must undergo extensive training and DPSST certification, including training at an academy which focuses on law enforcement, firearms, and the physical aspects of the job. They must possess excellent vision, hearing, and speech, and be physically fit. Their uniforms are similar to those worn by patrol deputies, and include green pants, tan shirts, badges, and logo patches signifying their position, except that the logos are embroidered instead of metal. For safety reasons, they are not permitted to carry firearms in the jail, but may carry tasers or pepper spray. The jail operates 365 days a year, and corrections deputies work one of three shifts per day, seven days a week under the supervision of a corrections sergeant.

14. Transportation Deputies. The transportation deputies hold sworn positions and provide backup to criminal and corrections deputies. Their duties include transporting inmates, supervising and maintaining inmate order and discipline, serving arrest warrants and other civil documents, processing the lodging and release of inmates, conducting searches of people and property for concealed contraband, gathering evidence, and writing reports. The transportation deputies are required to have DPSST certification and they must possess good vision, hearing, and speech and be physically fit. They wear identifying uniforms that are similar to the other deputies and report to a sergeant. They carry firearms as well as nonlethal means of force. They work one of three shifts per day, seven days a week.

15. Community Services Officer. There are currently three non-sworn community service officers in the Sheriff's Department who perform most of the same duties as criminal deputies, except that they cannot make arrests or carry lethal weapons, although they may carry batons, pepper spray, or tasers. They report to a patrol sergeant, work in the same secured environment or in the field, are dispatched in the same way as deputies, wear a uniform and utility belt that is similar to criminal and corrections deputies, drive marked vehicles, file similar reports, undergo the same background checks, and are LEDS-certified.[4] Unlike criminal deputies, they are not required to be certified by DPSST, but may have other training in defensive tactics, CPR, and data entry in criminal databases. These officers take the same oath as deputies, sign the criminal code of ethics, and sign a confidentiality agreement. They occasionally testify in court. They typically work Monday through Friday from 8:00 a.m. to 5:00 p.m.

Captain Larson oversees these positions and described the duties as more expansive than indicated in the position description.[5] The position's duties also include investigating cold cases and burglaries, acting as evidence technicians, writing reports, and performing the essential duties of a deputy except they do not make probable cause arrests or contact suspects. The community service officer position has always been part of this unit. The position receives less pay than a deputy but all other contractual benefits are the same.

The County compared this position to a Developmentally Disabled Investigator, which investigates allegations of abuse involving disabled persons, acts as a liaison to investigative agencies, and provides education and advocacy on behalf of clients. That position does not provide backup to deputies and, unlike community service officers, it relinquishes control over a case once a determination of criminal wrongdoing has been made. That position is also paid less than a community services officer.

[4]LEDS stands for Law Enforcement Data System and is a criminal justice database which includes information about criminal histories, warrants, stolen property, court orders, and weapons. Certification is required to access the system and an employee must complete 20 to 25 hours of training to obtain a LEDS certification, but proficiency can take up to 60 hours. Recertification must occur every two years.

[5]A number of position descriptions in the bargaining unit have not been updated for many years and do not accurately reflect the current scope of duties or the training required to perform them. Testimony from employees holding these positions and their supervisors more accurately reflects their job duties.

Criminal Data Technician. There are currently three criminal data technicians (CDT) in the Sheriff's Department assigned to investigations, traffic, and the interagency drug task force. They are responsible for performing technical and statistical research and analysis from a wide variety of sources, including law enforcement databases, social networking sites, and electronic data mapping software. They use that information to locate people, develop leads to support criminal investigations, clarify jurisdictional boundaries on maps, and link crime information to match perpetrators or identify missing property. The research requires familiarity with law enforcement practices and criminal conduct. They receive a five percent pay differential due to the specialized skills needed for the job. They are an integral part of the investigation team.

The criminal data technicians wear a logo polo shirt, slacks, an identification lanyard, and an identification tag that states "crime analyst" as a job title. The position requires the same level of background investigation as the sworn deputies.

CDT Jennifer Albrecht is stationed in the patrol division and manages the hand-held ticketing program, traffic accidents, and criminal reporting for the traffic team, which includes maintenance, programming, updates, and downloading information. She also manages the patrol car video systems in the Sheriff's Department's fleet, including preserving evidence, managing the chain of custody, and providing proper storage. Albrecht and other criminal data technicians prepare photo line-ups for use by the deputies or investigators, and may assist the district attorney's office in gathering information. The technicians support the work of criminal investigators and sworn deputies on a daily basis by providing independent information from a variety of electronic databases to be used in criminal cases. Technicians work Monday through Friday from 8:00 a.m. to 5:00 p.m.

The County compared this position to the non-represented IT programmers outside the Sheriff's Department, including an office assistant III position with the County's community justice program, which deals with adult and juvenile parole and probation workers. The office assistant III position performs substantial data entry and retrieval into the juvenile justice information system (JJIS), which is a statewide database involving victim data, police reports, crime locations, and conditions of parole. There are similarities between the two job classifications, but the criminal data technicians require specialized training and experience to sift through, identify, and manipulate data relative to criminal investigations, which is one reason why LEDS certification is required for the job. Due to the confidential nature of the work, the criminal data technicians are located in the secured offices of the Sheriff's Department with easy access to the investigators and deputies. The rate of pay is less than other IT positions, but the benefits are superior.

17. Property/Evidence Clerk. The primary function of this job is to receive, maintain, categorize, store, and control all property and evidence either found or obtained as a result of law enforcement duties. Upon receipt, the evidence is bar-coded and preserved by the clerk until needed at trial or released to the owner. Anne Greene has been the property evidence clerk for twenty-nine of her forty years of employment with the County. She has been called upon to transport evidence between the storage facility and court. The clerk is occasionally called out to crime scenes to assist deputies with the retrieval of evidence and to train recruits and deputies in

the requirements for handling, packaging, tagging, and storing evidence. The clerk also testifies in court regarding the preservation of evidence, as well as the chain of custody. When the property/evidence clerk is unavailable, the commanding sergeant may perform the position's duties.

Greene has received specialized training in evidence handling methods at one of the International Association of Property and Evidence Clerk Schools, which takes two years to complete. This training develops specialized skills in the handling of materials such as blood, illegal street drugs, hazardous waste materials, and body parts, as well as applicable state statutes and Departmental rules. Greene is also trained in the proper disposal methods for narcotics and paraphernalia at industrial sites or sanitary disposal service facilities. Ensuring the proper chain of custody for evidence used in criminal prosecutions is an essential aspect of her duties.

The chain of command for this position is exclusively within the Sheriff's Department and Greene reports directly to a sergeant. The property/evidence clerk is required to undergo a background investigation similar to other Sheriff's Department employees, has access to and certification in LEDS, must wear a uniform, and works in a secured location adjacent to the Sheriff's Office and the courthouse that is not accessible to the public or other non-departmental employees. The property/evidence clerk works from 8:00 a.m to 5:00 p.m., Monday through Friday.

The County's comparison of the property/evidence clerk to the storekeeper position in Public Works indicates several differences. The evidence stored by the criminal property/evidence clerk involves retrieval, handling, and storage for criminal investigations rather than operating parts/supply warehouses. The property/evidence clerk works closely within law enforcement protocols, has a chain of command solely within the Sheriff's Department, and the legal requirements of the position link it intrinsically to the law enforcement function. In comparison, the storekeeper position uses an inventory control system but has no chain of custody requirement; is not called out to crime scenes or to testify in court; is not subject to the same specialized training or statutory standards for storage, preservation, or handling of evidence; and the storekeeper position does not require LEDS certification. The equipment shop is open twenty hours per day and mechanics are free to check out parts on their own. If equipment or materials go missing, a report is filed but, other than the monetary loss, the operations of that department are not materially affected.

18. Corrections Specialist. The corrections specialist is assigned to the corrections division and performs duties that are similar to the corrections deputies, but does not carry firearms, restrain inmates, or perform searches. The position is primarily responsible for the assessment and classification of inmates to ensure their proper lodging and to protect other inmates, jail personnel, and the public. The specialist interviews inmates to identify their medical conditions, family connections, disabilities, educational needs, and explains rules and regulations. They generate a criminal history report which is analyzed using a matrix to prepare release recommendations to the court, district attorney, or defense counsel, which may include an assessment of eligibility for a court-appointed attorney, and any special conditions of release and bail amount. The specialist may also attend in-custody court proceedings. The specialist reports to

a sergeant, works in the same secured facility as corrections deputies, and acts as back-up to transportation and corrections deputies.

The position requires a high school diploma, two years of college level courses with an emphasis in criminology or social sciences, plus one year of clerical experience. The specialist undergoes an in-depth background investigation and drug screen, and must be DPSST-certified within one year of employment. The typical hours are from 8:00 a.m. to 5:00 p.m., Monday through Friday.

19. Records Clerks. The County employs civil, criminal, and corrections records clerks, who have similar skill sets but specialized functions. They are often the public's first point of non-emergency contact with the Sheriff's Office. Civil records clerks are supervised by civilian employee Denise Bottoms, or the on-duty sergeant if Bottoms is not present. Criminal records clerks are supervised by Walter Haussner, but ultimate authority for all records clerks comes from the sheriff. Haussner cannot suspend employees and a sergeant signs the employee evaluations. No employees outside the Department give direction to the records clerks. All are required to have a high school diploma and three years of secretarial experience. They all receive a $100 uniform allowance that includes polo shirts with embroidered logo badges, khaki or dark blue slacks, and Sheriff's Department identification badges. All work in secured areas of the Sheriff's Department.

Civil Records Clerks. The civil records clerks process criminal subpoenas for all law enforcement agencies in the County, prepare restraining orders and civil documents, conduct web-based searches and background checks on people about to be served in order to alert deputies of any potential safety risks, fingerprint members of the public, process handgun permits, prepare Sheriff's Department property sales, serve as a liaison to the court staff, and enter and retrieve data from the LEDS database. They are also responsible for analyzing and entering data into the Amber Alert system.

The civil records clerks have daily contact with community justice officers, probation officers, and court personnel. They also interact with inmates who are being transported, and obtain a judge's signature when fugitive charges are filed. They answer incoming telephone calls from the public and inquiries at the front desk. They process the 500-600 documents that are pending at any given time.

Criminal Records Clerks. The criminal records clerks work with the patrol and investigations divisions. They are responsible for entering data into the LEDS database, entering reports and maintaining reports in the ARS system, entering citations, running criminal histories for the deputies, entering reports of stolen property and missing people into the LEDS database, entering warrants for fourteen agencies, coordinating extradition of inmates, preparing stalking orders, registering sex offenders, releasing impounded vehicles, and answering inquiries from the public. They work very closely with the Sheriff's Department traffic team and use the Crystal Reporting System, which requires a thorough understanding of crimes, the methods used by perpetrators, and how crime analysis is performed in order to fashion appropriate search queries.

Notwithstanding the 25-hour LEDS certification training course, it takes up to a year to become proficient with LEDS. A level of trust is required to have access to the LEDS program because unauthorized LEDS searches could lead to warnings from the FBI, which monitors its usage. Other than supervisors, no County personnel outside the bargaining unit are trained to perform these duties. The criminal records clerks work on a 24/7 schedule. The position reports to a civilian supervisor or a sergeant in the command ladder. They all sign a confidentiality agreement and undergo background checks.

One of the criminal records clerks is also assigned duties as a classification clerk. This clerk shares duties with the corrections specialist and interacts daily with corrections deputies. The classification clerk classifies inmates, maintains the jail matrix for determining release dates, provides release assistance, tracks the movement of inmates from the correctional facility to the work release center, and performs the duties of the corrections specialist when that person is not on duty. These duties relate to the safety of inmates and deputies in the corrections facility. The classification clerk works the same hours as the corrections specialist and in the same secure location. The classification clerk is supervised by a sergeant or a civilian supervisor, who report up the same chain of command.

Corrections Records Clerks. The corrections records clerks work with and provide support to the corrections deputies at the County jail. They assist with the lodging of inmates, review lodging sheets to ensure accuracy, confirm identities, enter appropriate information into the Corrections Management System (CMS), validate warrants, and review probable cause affidavits. They also confirm release dates, ensure no additional warrants are outstanding, inform inmates of their reporting requirements to the parole and probation officer as required, and process bail. In some cases, the clerks handle "process onlys," which occur when they process the District Attorney's order that a person be booked without being arrested and requires them to confirm the correct charges and enter the information into the CMS. The clerks also review, track, and enter criminal charges into the Oregon Judicial Information Network (OJIN), and enter inmates release calculations into the Tiburon database. Most corrections deputies do not access the LEDS or Tiburon systems and rely on the corrections clerks to ensure the proper lodging, tracking, and release of inmates. The clerks also process "no contact orders" and interview inmates to obtain basic data.

The County's comparison of the records clerks to the general office assistant classification shows significant differences. Apart from data entry, the office assistants do not have LEDS or Tiburon certification, they do not share the same law enforcement expertise or training, they have a different chain of command, and they do not have the same degree of responsibility or confidentiality obligations related to public safety.

The corrections clerks earn less than deputies, but the contractual benefits are the same. They work in the secured transport office at the correctional facility. There is no automatic right to transfer into other departments. The positions work regular, eight-hour shifts, Monday through Friday.

23. Search and Rescue Assistant. The primary function of this position is to provide support to search and rescue deputies and to the more than 100 volunteers who assist in the recovery of lost, missing, or injured persons. There are three different programs under search and rescue, including canine, rope training, and diving. The position manages the daily operations of this section, which may include initiating a call for volunteers for a mission and providing backup at the incident command center.

Sandi Copeland has been the search and rescue assistant for eleven of her eighteen years at the Sheriff's Department. She previously worked as a criminal and civil records clerk. Copeland tracks hours spent on search and rescue operations, maintains training files and equipment inventory, and prepares budgeting and statutorily-required reports. She conducts background checks for the search and rescue volunteers and the part-time marine deputies. She is certified in LEDS. She also tracks federal grant money used to purchase equipment, tracks worker's compensation claims, and is versed in the Oregon Emergency Management System.

The position reports to a sergeant and works in the same location as the strike-prohibited members of the unit. The search and rescue assistant does not wear a uniform but wears a Sheriff's identification badge similar to those worn by other Sheriff's Department employees. Copeland works five days a week, but is subject to call-out at any time for a search and rescue mission. She reports directly to Lieutenant Patrick Rowland. The position requires a high school diploma.

The County compared this position to the general office assistant position in the County. The two classifications share the same office skills, but the skills needed for search and rescue are fairly specialized and require familiarity with state statutes and Marine Board rules and procedures, budgeting skills, and LEDS-certification.

24. Court Security Officers. There are currently seven security officers in the County whose primary function is maintaining security at the courthouse. Their duties include searching the building, screening all entrants to the courthouse and conducting appropriate searches, seizing contraband or other property, conducting video and audio surveillance, conducting evacuations, providing courtroom security upon request, controlling disorderly individuals, responding to medical alerts in the building, and writing reports. They operate the metal detectors and x-ray machines at the building's entrance. These officers do not carry firearms, but they wear duty belts, bullet-proof vests, a pouch for gloves, a key fob, handcuffs, a radio, and some carry pepper spray. Their uniforms are similar to the corrections deputies. They work daily shifts that coincide with the court's hours of operation.

The County compared this position to the strike-permitted airport enforcement officer position. While both have security functions, the airport enforcement officers do not screen passengers, which is performed by TSA officers. Airport law enforcement, such as handling disorderly persons and apprehending or arresting suspects, is the responsibility of the Medford Police Department. The airport security officers manage traffic and issue citations, check the fence perimeter for holes, troubleshoot the baggage system, and regulate access to restricted areas. They do not carry weapons or have responsibilities outside the airport. The court

security officers support deputies and make arrests in the courthouse as well as earn more than airport security officers.

Transfer and Hiring of Employees Within the Sheriff's Office

25. A County employee from another agency cannot transfer automatically into a Sherrif's Department position. They must first apply, and then undergo a background check, a motor vehicle check, and possibly a credit check. They would have to be eligible for LEDS certification.

26. Sworn deputies may transfer fairly easily to other deputy positions within the Sheriff's Department, and a number of deputies have been promoted to sergeant, lieutenant, or captain. Detective Sergeant Colin Fagin was a corrections deputy before promoting to detective and then detective sergeant.

27. The property/evidence clerk position requires significant training to meet statutory standards for handling hazardous materials, chemicals, narcotics, body parts, and other crime-related evidence. It is one of the highest-paid, non-sworn positions in the bargaining unit, and a person would most likely promote from within, rather than from outside, the Sheriff's Department.

28. Strike-permitted employees in the Sheriff's Department have transferred into other strike-permitted positions within the office.

Wages, Benefits, and Other Working Conditions

29. The wage schedule and wage increases for bargaining unit members are provided for in the parties' Agreement. Salaries for deputies, the corrections specialist, and the property/evidence clerk are at the highest grades. The court security officer, criminal data technician, records clerks, search and rescue assistant, criminal data technician, and community service officer are at the lowest salary grades.

30. Under the Agreement, all bargaining unit employees are entitled to a 30-minute on-duty paid meal period during an eight-hour work day, and have similar accrual rates for holiday leave, on-call pay, vacation leave, and sick leave. Other types of leave available to all unit members include jury duty, voting time, military, bereavement leave, family medical leave, and workers' compensation. Most positions work a forty-hour week, and some positions earn a differential for working nighttime shifts. Overtime is paid to all employees at time and a half.

31. The Association purchases medical insurance for its members based on financial contributions from the County. The premiums for the Association's members are higher than the premiums for SEIU or FOPPO members and therefore the amount of the County's contributions to the Association are correspondingly higher. The medical, dental, and vision benefits received by the Association's members are better than the benefits available to other union members and they have lower deductibles.

32. Association members undergo pre-employment checks commensurate with their duties, which can exceed the typical background checks for other County employees. This may include a criminal history check, a credit history check, and a driving record report from the Department of Motor Vehicles.

33. Association members are administered an oath to uphold the U.S. and Oregon constitutions. They are required to abide by the criminal justice code of ethics, and they sign confidentiality agreements.

34. Under the parties' Agreement, four sets of uniforms are furnished for each deputy and security officer, and an allowance is provided to maintain them. Criminal and corrections deputies, security officers, and community service officers receive an annual $250 allowance for footwear. Clerical employees receive four polo-style shirts which are purchased by the County and embroidered with a logo. The County also provides a $100 annual allowance for clerical employees to purchase trousers and shoes. Trousers must be docker-style, in black, navy, or khaki. Shoes must have closed toes.

35. Sheriff Department employees interact with other County employees but the interaction is connected to their law enforcement duties. They interact with Public Works employees who maintain the vehicle fleet, courthouse employees, human resources employees, IT employees who provide technical assistance, and other County agencies requiring background checks or criminal history information as part of their mission.

36. Human Resources employee Grafenstein acknowledged that a redesignation petition could result in a new bargaining unit to be administered, but did not believe an additional bargaining unit was unmanageable.

CONCLUSIONS OF LAW

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

2. The petition for redesignation is dismissed.

DISCUSSION

Legal Standards

The County seeks to remove the strike-permitted positions from a mixed bargaining unit of Sheriff's Department employees. An employer may file a petition for redesignation pursuant to OAR 115-025-0000(1)(e) "contending that the existing bargaining unit includes an employee or employees who *should not be included* in such bargaining unit under the criteria set forth in ORS 243.682(1)(a)." (Emphasis added.) ORS 243.682(1)(a) requires that we consider such factors as the "community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees." We have specifically defined community of interest factors to include similarity of duties, skills, benefits,

interchange or transfer of employees, promotional ladders, and common supervision. OAR 115-025-0050(2).

We previously determined that the "should not be included" language in OAR 115-025-0000(1)(e) "requires us to find that employees have a clearly distinct community of interest to justify their redesignation out of the unit." *Executive Department, State of Oregon v. Oregon Public Employees Union*, Case No. UC-7-89, 12 PECBR 59, 69 (1990). We later stated that "to prevail in such a case the petitioning employer must show that the unit is not *an* appropriate unit. Put another way, the employer must prove that certain included employees have a community of interest that is *clearly distinct* from the other unit employees." *State of Oregon, Executive Department v. AFSCME Local 2623* and *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections and AFSCME Local 2623*, Case Nos. UC-84/85-91/RC-31-92, 14 PECBR 35, 45-46 (1992) (emphasis in original).

In *State of Oregon, Oregon State Penitentiary v. American Federation of State, County, and Municipal Employees* and *State of Oregon, Oregon Women's Correctional Center v. American Federation of State, County, and Municipal Employees*, Case Nos. UC-19/20-87, 10 PECBR 144, 153 (1987), we identified six factors which affect our decision regarding redesignation petitions:

> "our decision in a mixed unit case is affected by whether: (1) all of the employes are organized with some common supervision and compensation patterns; (2) the community of interest among the employes is a stronger factor than the loss of the strike-permitted employes' right to strike; (3) fragmentation is avoided; (4) strike-prohibited employes constitute the larger percentage of persons in the unit; (5) the unit has historically been mixed; (6) regarding a consent unit, the employer shows a significant change in circumstances."

We now apply the six factors to determine if the strike-permitted employees subject to the petition have a clearly distinct community of interest from the strike-prohibited bargaining unit employees.

(1) Supervision and Compensation Patterns

The strike-permitted and strike-prohibited employees in the Association bargaining unit work under common supervision. There are both civilian managers and sergeants who supervise the records clerks, but ultimately they all report up the same command ladder to lieutenants, captains, the undersheriff, and sheriff.

Bargaining unit employees also have some common compensation patterns. Wages under the parties' Agreement are established by classification based on a salary schedule. While deputy and detective salaries are generally higher, the property/evidence clerk is at one of the highest salary levels, which is a reflection of the demands and expertise required of the job. There are also certain wage differentials based on shift work, training, and overtime, which are uniformly applied to all qualifying members of the bargaining unit. The medical benefits are the same for all

bargaining unit members, which are distinct from the benefits available to other County employees. The requirement that employees wear identifying uniforms, and are supplied an allowance for that purpose, is an additional distinguishing characteristic.

(2) Community of Interest Factor v. Loss of Right to Strike

The community of interest of the employees in this bargaining unit is distinctive and shared across the board. They are all employed in the same County department with the same chain of command, they work and interact collaboratively on a daily basis, they share the same law enforcement mission, they share secured work locations, many undergo similar types of training and background checks, and they wear uniforms that distinguish them from other County employees.

Some other County employees perform work in the same buildings, but the areas where bargaining unit members work are always secured and not accessible by the public or other County employees without permission. These bargaining unit employees may interact with other County departments in a support capacity, but it is not consistent daily contact.

The County is correct that the strike-permitted employees subject to this petition do not perform core law enforcement duties in the same way as sworn deputies, but without the support, expertise, and training of these employees, the deputies could not do their jobs with the same degree of safety or competency. The community service officers provide critical support to, and undergo similar training as, the sworn deputies in the field and perform many of the same duties. The corrections specialist backs up the corrections deputies, interacts with inmates at the jail, and applies accepted law enforcement standards for assessing inmate safety, medical needs, family contacts, and conditions of release.

The criminal data technicians perform complex statistical analysis, including the use of several law enforcement databases and other electronic sources, and are trained to apply that information to help locate persons of interest or missing property, or to use mapping technology. Training in LEDS or other DPSST certification is a requirement of the job. The property evidence clerk plays a vital role in the proper preservation of criminal evidence, and is one of the highest paid employees in the unit because of the training and responsibility required of the position.

The records clerks are often the Sheriff's Department first line of contact with the public and perform a variety of law enforcement-related duties. These include more than just routine data entry and retrieval, as argued by the County, but involve entering warrants for fourteen agencies, fingerprinting, registering sexual offenders, entering citations, running criminal history checks, coordinating extradition of inmates, processing no-contact orders, releasing impounded vehicles, and performing a myriad of other tasks that require constant interaction with deputies and specialized training.

The search and rescue assistant coordinates the emergency functions of that section, including background checks for the volunteers; monitoring equipment, training, and hours;

working at the incident command center when necessary; budgeting; and complying with statutory reporting requirements.

The security officers perform public safety functions for the courthouse that include screening the public who enter the building, conducting searches and evacuations, making court-ordered arrests, maintaining control in the courtroom, and operating video and screening equipment. They wear uniforms and utility belts with a variety of non-lethal law enforcement tools.

The hours of the strike-permitted and strike-prohibited employees are generally different. The strike-prohibited employees, including the criminal records clerks, work shifts covering a 24/7 schedule. The other strike-permitted employees generally work regular day shifts, Monday through Friday. Some of the strike-permitted employees, such as the property/evidence clerk and the search and rescue assistant, are subject to call-out in the event of an emergency.

The County correctly points out that there is no common promotional ladder between the strike-permitted and strike-prohibited positions. However, an individual's employment in a strike-permitted position is considered favorably in an application for a strike-prohibited position due to their training and familiarity with law enforcement operations.

In considering all of these factors, we conclude that the community of interest among the bargaining unit employees is stronger than the County's concerns about the strike-permitted employees' loss of the right to strike. The approximately 45 strike-permitted members of the bargaining unit subject to the petition are prohibited from striking because of their inclusion in the current bargaining unit. However, this is not a situation in which employees stand to lose the right to strike, since they have not had the right to strike throughout the bargaining unit's 26 years of existence. In addition, the desires of the strike-permitted employees to remain in the current bargaining unit override our concern that these employees will be deprived of their right to strike. *Oregon State Penitentiary*, 10 PECBR at 155.

(3) Avoiding Fragmentation

This Board has a policy against the fragmentation of a public employer's workforce into a plethora of splinter bargaining units. *Association of Public Employes v. Oregon State System of Higher Education and Oregon Public Employees Union, Local 503, SEIU*, Case No. RC-113-87, 10 PECBR 883, 888 (1988). A major purpose of our non-fragmentation policy is to assist employers. *Division of State Lands Employes Association v. Division of State Lands, State of Oregon, and Oregon Public Employes Union*, Case No C-72-83, 7 PECBR 6118, 6129 (1983). We have found that designating larger units addresses concerns about the undue burden on public employers caused by the time and resources needed to bargain with multiple bargaining units and the potential 'whipsaw' effect of having different unions competing for bigger and better contracts. *Id*. Notwithstanding this policy, the County argues that the addition of one more bargaining unit would not be a burden, or at least one that it is prepared to accept.

But this Board's policy against fragmentation and preference for larger bargaining units reflects policies set forth under the PECBA that address concerns of both employers and labor organizations. Among those policies is establishing "greater equality of bargaining power between public employers and employees." ORS 243.656(3). Larger units tend to better equalize bargaining power. Fragmentation into multiple units serves to destroy rather than preserve parity of bargaining power. *Oregon Public Employees Union*, 10 PECBR at 889. Another purpose of the policy is to protect the public from impairment or interruption of necessary public services. ORS 243.656(3). An increase in the number of bargaining units increases the number of potential labor disputes and work stoppages. Public employers benefit by having workplace stability and avoiding the undue burden of having to engage in bargaining sessions for the many splinter groups on a round-robin basis. *Id*.

One of the six factors we consider in redesignation petitions involving a mixed bargaining unit is whether fragmentation will be avoided. *Oregon State Penitentiary*, 10 PECBR at 153. Granting the petition for redesignation in this case would create a bargaining unit of 45 employees. The unit would be one of two units within the Sheriff's Department, which does not meet the criterion of avoiding fragmentation. While the County's current leadership is willing to accept the additional work involved in having another bargaining unit, this is not our only consideration. If the strike-permitted employees were in a separate bargaining unit, in the event of labor unrest, there would be potential disruption to the public safety functions of the County

(4) Percentage of Strike-Prohibited Employees

The percentage of strike-prohibited employees in the bargaining unit is larger than that of strike-permitted employees. Based on the 45 strike-permitted employees out of a bargaining unit of 135, the strike-permitted employees constitute 33.3 percent. Typically, in cases where we have granted redesignation petitions of mixed units, the number of strike permitted employees has greatly exceeded the number of strike prohibited positions. This is not the case here.

(5) History of Collective Bargaining

The current Association bargaining unit has existed in essentially the same form since 1986 and, prior to that, was represented by a different labor organization. For all of that time, it has been a wall-to-wall mixed unit. There is no history of labor instability, and several longtime employees testified that there has never been talk of splitting the unit or wanting to strike.

(6) Significant Change in Circumstances

The County has not asserted that there has been a significant change in circumstances since it consented to the current bargaining unit structure in 1986.

Conclusion

After considering and weighing each of the factors, we find that the strike-permitted employees subject to the redesignation petition do not have a clearly distinct community of interest from the strike-prohibited bargaining unit employees. The six factors favor retention of the mixed unit. Therefore, we will dismiss the petition.

ORDER

The petition for redesignation is dismissed.

DATED this 27 day of February, 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-039-10

(UNFAIR LABOR PRACTICE)

AMALGAMATED TRANSIT UNION, DIVISION 757, Complainant, v. TRI-COUNTY METROPOLITAN TRANSIT DISTRICT OF OREGON, Respondent.	)	RULING ON MOTION TO STAY

On December 28, 2012, this Board issued an Order holding that the Tri-County Metropolitan Transit District of Oregon (TriMet) violated ORS 243.672(1)(a) by interfering with, restraining and coercing employees in and because of the exercise of protected rights, violated ORS 243.672(1)(b) by interfering with the administration of the Amalgamated Transit Union, Division 757 (ATU), and violated ORS 243.672(1)(e) by refusing to bargain in good faith. 25 PECBR 325 (2012). We ordered TriMet to: (1) cease and desist from acting unlawfully; (2) make employees whole for lost wages and benefits that occurred due to TriMet's unlawful conduct; and (3) post a notice for 30 days and send an electronic copy of the notice to each bargaining unit member's work e-mail account.

On January 28, 2013, TriMet filed a motion to stay enforcement of a portion of our Order, asking that it not be required to: (1) reimburse bargaining unit employees for insurance premium contributions and medical expenses they paid as a result of TriMet's unlawful conduct; and (2) post a notice of the violations to employees. On February 4, 2013, ATU submitted its response in opposition to the motion. On February 26, 2013, TriMet filed its petition for judicial review of the Order with the Court of Appeals.[1] For the reasons discussed below, we deny TriMet's motion.

[1]Until such time as Tri-Met filed a petition for review, the matter was not ripe for consideration.

This Board may stay enforcement of its order on appeal only "upon a showing of: (A) Irreparable injury to the petitioner; and (B) A colorable claim of error in the order." ORS 183.482(3)(a). When the petitioner makes the requisite showing, we must grant the stay unless we determine that "substantial public harm will result if the order is stayed." ORS 183.482(3)(b).

The burden to demonstrate a "colorable claim of error" is not particularly onerous. "A colorable claim is established unless the petitioner's arguments are 'frivolous or clearly without support in the law.'" *Portland Fire Fighters' Association, Local 43, IAFF, v. City of Portland,* Case No. UP-13-10, 24 PECBR 809, 810 (2012), citing *Chemeketa Community College Education Association v. Chemeketa Community College and Chemeketa Community College Classified Employees Association,* Case No. UC-9-99, 18 PECBR 718, 719 (2000). Here, TriMet asserts that we erred by concluding that TriMet acted with unlawful motives when it froze wages and insurance premium contributions and that, even assuming TriMet had acted in part with unlawful motives, we erred in our application of our mixed motives analysis when we concluded that it would not have taken the actions absent the unlawful motives. While we disagree with TriMet's contentions, we cannot say they are frivolous or clearly lacking support in the law. Accordingly, TriMet has met the minimal requirements to demonstrate a "colorable claim of error."

We next determine whether TriMet will suffer irreparable injury if we do not stay our Order. Although the term "irreparable injury" is not defined in statute, it has a well established definition, as determined by the court in a similar matter. An injury is irreparable if a party "cannot receive reasonable redress in a court of law." *Arlington Sch. Dist. No. 3 v. Arlington Ed. Assoc.*, 184 Or App 97, 101 55 P3d 546 (2002). "Whether or not an injury is irreparable depends not upon the magnitude of the injury, but upon the completeness of a remedy in law." *Id.* at 102, citing *Winslow v. Fleischner, et al.*, 110 Or 554, 563, 223 P 922 (1924).

It is incumbent upon the party requesting the stay to show that irreparable injury is probable if the stay is not granted. Irreparable injury cannot be established by speculative claims or allegations of possible harm. *Portland Fire Fighters*, 24 PECBR at 810, citing *Central Education Association and Vilches v. Central School District 13J,* Case No. UP-74-95, 17 PECBR 250, 252 (1997) (Ruling on Petition for Enforcement and Motion to Stay).

TriMet seeks a stay of two portions of our Order: the portion that requires it to post a notice of the violation and the portion requiring that it provide make-whole payments to bargaining unit members for insurance premiums and medical payments. We address each request separately.

In its motion, TriMet does not address what irreparable harm could occur by posting a notice of the violations. The burden is on TriMet to identify the irreparable harm; it has failed to do so. As a result, we deny that portion of the motion without further discussion.

With regard to the make-whole remedy regarding insurance premiums and medical payments, TriMet argues that it will sustain irreparable financial harm if a stay is not granted, claiming that the full cost of compliance with our Order would amount to a $3.6 million unbudgeted expense. According to TriMet, payment of this expense could significantly harm the public by reducing transit service. TriMet further asserts that the likelihood of recovering the full $3.6 million from its employees if it prevails upon appeal is "remote."

ATU objects to TriMet's motion on several grounds, asserting that: (1) any alleged harm to TriMet is speculative and not irreparable; (2) TriMet has not offered sufficient evidence to support its claim of a $3.6 million cost, and even assuming the $3.6 million figure is correct, TriMet has not alleged or provided evidence that it cannot afford to pay the amount; and (3) that under prior Board cases, an assertion that it may be difficult or unlikely for a party to recover back pay or other financial remedies if they prevail upon appeal is insufficient to establish irreparable harm. We agree that TriMet has failed to establish a sufficient showing of irreparable injury and we will deny the motion to stay the Order.

First, TriMet failed to provide sufficient supporting information to substantiate its claims with regard to the cost of complying with the Order. Rather, it relies solely upon broad assertions to establish irreparable injury, stating in summary fashion that the cost to comply with the Order will be $3.6 million. TriMet neither offers or points to any evidence in the record demonstrating how it arrived at that number, nor does it state outright that it cannot afford to implement the Order or what specific impacts compliance would have on its operations. In *Arlington School District*, the Court of Appeals held that to meet the required "showing" of irreparable harm, the party seeking the stay must provide some proof or evidence that demonstrates that an irreparable injury probably would result if the stay is denied. 184 Or App at 102. TriMet has not met this burden.

Next, TriMet asserts that the likelihood of recovering the 3.6 million should it prevail is "remote," because ATU has instructed its members not to comply with attempts by TriMet to recoup health insurance costs from employees pursuant to TriMet's understanding of the interest arbitration award between the parties.[2] TriMet's assertion, however, does not support an argument that it cannot receive "reasonable redress in a court of law." To the extent that our Order might be overturned by an appellate court, this Board has the authority on remand to order an appropriate remedy.

[2]Both parties have filed unfair labor practice complaints that concern this issue. *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757*, Case No. UP-001-13; *Amalgamated Transit Union, Division 757 v, Tri-County Metropolitan Transportation District of Oregon,* Case No. UP-042-12. Both matters are currently pending.

Any potential harm to TriMet is speculative, not irreparable, and can be adequately addressed in damages or other legal remedies should TriMet prevail. This ruling is consistent with our prior decisions where we have generally held that an employer's obligation to provide make-whole relief does not constitute irreparable harm. *See State Teachers Education Association/OEA/NEA et al and Hurlbert et al v. Willamette Education Service District et al,* 19 PECBR 339 (2001), *AWOP,* 188 Or App 112, 70 P3d 903 (2003); *Central School District 13J,* 17 PECBR at 252. Accordingly, we will deny the motion for stay.

RULING

TriMet's motion for a stay is denied.

DATED this 14 day of March 2013.

Kathryn A. Logan, Board Chair

Jason M. Weyand, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-045-10

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75, LOCAL 1329, Complainant, v. CROOK COUNTY ROAD DEPARTMENT, Respondent.	)	RULING ON MOTION TO STAY

On October 3, 2012, this Board issued an Order holding that the Crook County Road Department (County) violated ORS 243.672(1)(a), (1)(c), and (1)(g) when it terminated Jennifer Beatty, a steward for Oregon AFSCME Council 75, Local 1329 (AFSCME). 25 PECBR 121 (2012). We ordered the County to: (1) cease and desist from acting unlawfully; (2) offer Ms. Beatty reinstatement, with the ability for the County to issue an oral and written reprimand for two of the allegations included in the termination notice; (3) make Ms. Beatty whole for all lost wages and benefits she would have received but for the unlawful termination, less interim earnings and plus interest; and (4) pay a civil penalty of $1,000 to AFSCME.

On November 29, 2012, the County filed its petition for judicial review of the Order with the Court of Appeals. AFSCME filed a Motion to Compel Enforcement of the Order on February 15, 2013.[1] On March 6, 2013, the County submitted its response to that motion and also filed a motion for a stay of enforcement of our Order. On March 12, 2013, AFSCME submitted its response in opposition to the motion for a stay. For the reasons discussed below, we deny the County's motion to stay.

[1]We will address AFSCME's Motion to Compel Enforcement as a separate matter.

ORS 183.482(3) sets the requirements for a party to obtain a stay of an agency order pending judicial review. It states, in relevant part, that:

> "(a) The filing of the petition shall not stay enforcement of the agency order, but the agency may do so upon a showing of:
>
> "(A) Irreparable injury to the petitioner; and
>
> "(B) A colorable claim of error in the order.
>
> "(b) When a petitioner makes the showing required by paragraph (a) of this subsection, the agency shall grant the stay unless the agency determines that substantial public harm will result if the order is stayed. If the agency denies the stay, the denial shall be in writing and shall specifically state the substantial public harm that would result from the granting of the stay."

Because it is dispositive, we address only whether the motion establishes "irreparable injury" to the petitioner. The term "irreparable injury" is not defined in statute, but the court has held that an injury is irreparable if the party cannot receive reasonable or complete redress in a court of law. *Arlington Sch. Dist. No. 3 v. Arlington Educ. Ass'n.*, 184 Or App 97, 101-102, 55 P3d 546 (2002), citing *Winslow v. Fleischner, et al.*, 110 Or 554, 563, 223 P 922 (1924); *accord Bergerson v. Salem-Keizer School District*, 185 Or App 649, 660, 60 P3d 1126 (2003). Thus, the determination of whether an injury is irreparable "depends not upon the magnitude of the injury, but upon the completeness of the remedy in law." *Arlington Educ. Ass'n.*, 184 Or App at 102. Moreover, a "showing" of irreparable injury requires "proof" in the form of "evidence that satisfies a burden of production or persuasion placed upon the proponent of a fact"; "[p]roof must not leave the existence of the fact at issue to speculation." *Id.* Therefore, as pertinent here, a "'showing' must at least demonstrate that irreparable injury *probably* would result if a stay is denied." *Id.* (emphasis in original); *see also Portland Fire Fighters' Association, Local 43, IAFF v. City of Portland*, Case No. UP-13-10, 24 PECBR 809, 810 (2012), citing *Central Education Association and Vilches v. Central School District 13J*, Case No. UP-74-95, 17 PECBR 250, 252 (1997) (Ruling on Petition for Enforcement and Motion to Stay) (speculative claims or allegations of possible harm are not sufficient to make a showing of irreparable injury).

The County is seeking a stay of enforcement of three portions of the Order: (1) the reinstatement of Ms. Beatty to her former position; (2) the requirement that the County provide a "make-whole" remedy, including back pay to Ms. Beatty; and (3) the payment of the civil penalty to AFSCME. Although the County seeks a stay of the portion of our Order requiring that it pay the civil penalty to AFSCME, it does not identify or adequately explain the irreparable injury that would result if we do not stay that portion of the Order. As a result, we will deny that portion of the County's request without further discussion.

With regard to the remaining portions of the Order, the County claims that it will suffer irreparable injury if the stay is not granted in three primary ways. First, it asserts that if Ms. Beatty is reinstated to her position as a truck driver in the Road Department, she would pose a potential risk to the safety of her coworkers and County residents and subject the County to

possible liability. Second, the County argues that the amount of back pay could "potentially impair the County's ability to fund all of its needed services to the County, including road work." Third, it argues that it would be without any real means of recovering the back pay and benefits portion of the award in any timely manner once paid out to Ms. Beatty.

We first address the County's assertion that Ms. Beatty's reinstatement would "present a real potential for harm to the citizens of the County and liability to the County." In support of this assertion, the County contends that our Order "recognized * * * a number of instances where [Ms. Beatty's] operation of County vehicles ended with accidents or damage to those vehicles or unsafe situations * * *." According to the County, Ms. Beatty's "potential involvement" in a future accident "in which [people] are injured or killed" constitutes an irreparable injury.

The County's assertions regarding *potential* future safety risks of reinstating Ms. Beatty during the pendency of its appeal are not sufficient to meet the requirements of a *showing* of irreparable injury. As set forth in our Order, in most cases, the County chose not to discipline Ms. Beatty at the time of the prior incidents. Further, in holding that the County did not have just cause to terminate Ms. Beatty, we noted that these incidents occurred over the course of more than two and a half years and were reasonably consistent with the number and type of incidents in which other Road Department employees were involved. We held that the County's arguments that Ms. Beatty engaged in gross misconduct to be neither credible nor well taken. As a result, there is insufficient evidence in the record to establish that the County's concerns about "potential involvement" amount to more than speculation. *See Arlington Educ. Ass'n.,* 184 Or App at 102. ("Proof must not leave the existence of the fact at issue to speculation.") Consequently, we find that the County has not "demonstrate[d] that irreparable injury *probably* would result." *Id.* (emphasis in original); *see also Bergerson*, 185 Or App at 664 ("ORS 183.482(3) requires a showing that, in the absence of a stay, irreparable injury is *probable.*") (emphasis in original).

We now turn to the County's assertion that it will suffer irreparable injury if we do not stay the make-whole portion of the remedy. We have consistently rejected this argument in prior cases, holding that providing "make-whole" relief pending appeal does not constitute "irreparable injury" as required by ORS 183.482(3)(a)(A). *State Teachers Education Association/OEA/NEA, et al., and Hurlbert v. Willamette Education Service District, et al.,* 19 PECBR 339, 341-42 (2001), *AWOP*, 188 Or App 112 (2003); *Central School District 13J*, 17 PECBR at 252. We set forth our reasoning for this conclusion in an unpublished, but often cited, ruling in *Payne v. Department of Commerce, Building Codes Division,* Case No. 1294 (1982) (unpublished ruling). There, we stated:

> "We are not convinced that the payment of back wages under the circumstances of this case constitutes an 'irreparable injury.' If Respondents ultimately prevail in this case it may or may not be necessary to expend time and money in an effort to recover the back pay. Balanced against the possibility that Appellant would be wrongfully deprived of a significant amount of back pay during a lengthy appeal process, we do not view Respondent's speculation about possible difficulties in recovering the funds to be a sufficient showing of irreparable injury."

The reasoning in *Payne* applies equally in the present dispute. The County's concern about the length of time it might take to recover the make-whole remedy from Ms. Beatty, should it prevail, does not mean that the County would be unable to receive reasonable or complete redress in a court of law. *See Arlington Educ. Ass'n.*, 184 Or App at 101-102 (an injury is irreparable if the party cannot receive reasonable or complete redress in a court of law); *Bergerson*, 185 Or App at 660 (same).

Finally, the County argues that if it is required to pay Ms. Beatty the back pay required by our Order, it could "potentially impair" the ability of the County to fund the services it provides, including road work. Again, the County's asserted injury is speculative and unsupported by sufficient evidence. The County offers nothing sufficiently specific to establish that it cannot afford to pay the back pay, or how paying the amount would specifically affect services. Accordingly, the County has not made a sufficient showing that irreparable injury would probably occur should the Order not be stayed. *Cf. Von Weidlein/N.W. Bottling v. OLCC*, 16 Or App 81, 88, 514 P2d 560 (1973) (petitioners established irreparable injury where an unrebutted affidavit accompanying the motion to stay showed that petitioners had existing and ongoing contracts, such that petitioners would go bankrupt unless the Order was stayed).

For the reasons set forth above, we find that the County has not shown that it will suffer irreparable injury in the absence of a stay of our Order. Therefore, we deny the motion to stay.

RULING

The County's motion to stay is denied.

DATED this _22_ day of March 2013.

Kathryn A. Logan, Board Chair

*Jason M. Weyand, Board Member

Adam Rhynard, Board Member

*Member Weyand did not participate in the decision in this case.

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-007-10

(UNFAIR LABOR PRACTICE)

KIMBERY DAWN OVERMAN, Complainant, v. SEIU LOCAL 503, OPEU, and STATE OF OREGON, DEPARTMENT OF HUMAN SERVICES, Respondents.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Neither party objected to a Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on February 22, 2013, following a hearing held on July 19, 2012, in Salem, Oregon. The record closed on October 10, 2012, following receipt of the parties' post-hearing briefs.

Glenn Solomon, Attorney at Law, Portland, Oregon, represented Complainant Overman.

Christy Te, Staff Attorney, SEIU Local 503, OPEU, Salem, Oregon, represented Respondent SEIU Local 503.

Gary Cordy, Senior Assistant Attorney General, Labor and Employment Section, Salem, Oregon, represented Respondent State of Oregon, Department of Human Services.

On December 9, 2010, Overman filed this action against SEIU Local 503, OPEU (SEIU or Union) and the State of Oregon, Department of Human Services (Department). Overman alleged that the Union breached its duty of fair representation in processing her grievance over a November 2009 written reprimand. Overman also alleged that the Union breached that duty by not adequately responding to a June 14, 2010, e-mail that: (1) indicated that she was considering whether she should resign from the Department; (2) asked what the Union could do to help her before she made a decision to resign; and (3) asked whether the Union would provide some assistance, such as filing a grievance, in the event that she ultimately decided to resign.

After issuing a letter asking Overman to show cause why the matter should not be dismissed on the grounds of timeliness and failure to state a claim, and after reviewing the parties' responses, the ALJ concluded that Overman's claims were untimely and recommended that the Board dismiss the Complaint. However, before the issuance of a final order, the authority upon which the ALJ relied for the timeliness analysis was overruled by *Rogue River Education Ass'n v. Rogue River School*, 244 Or App 181, 260 P3d 619 (2011). Therefore, the Board remanded the case to the ALJ for further proceedings.

The issues are:

1. Did the Union's response to Overman's June 14, 2010 e-mail violate its duty of fair representation under ORS 243.672(2)(a)?

2. Did Overman timely file a claim that the Union violated its duty of fair representation by inadvertently not submitting the Step-3 grievance document regarding the November 2009 written reprimand within the time period required by the collective bargaining agreement? If so, did the Union's inadvertence violate its duty of fair representation?

3. Did the Union unlawfully discriminate against Overman when it failed to timely submit that same Step-3 grievance document on her behalf, even though the Union timely processed a grievance for a similarly-situated employee?

RULINGS

The ALJ's rulings were reviewed and are correct, with the exception that we do not adopt the ALJ's prehearing ruling dismissing Overman's claim concerning the Union's alleged failure to adequately respond to Overman's June 14, 2010 e-mail. For the reasons set forth below, we agree that the claim should be dismissed, but we reach this conclusion based on the fully-developed record submitted at the hearing, rather than dismissing the claim based solely on the pleadings.

FINDINGS OF FACT

1. The Department is a public employer as defined by ORS 243.650(20). SEIU is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a bargaining unit of Department employees.

2. The Department and SEIU have been parties to a series of collective bargaining agreements. At the time that Overman notified the Department of her separation from employment, the agreement that expired June 30, 2011, was in effect. The agreement included a multi-step dispute resolution process that began with a grievance and ended with binding arbitration.

3. Overman began working for the Department in September 2004. During the time relevant to this Complaint, she was employed as a Social Service Specialist 1 in the Department's Beaverton office performing child abuse and neglect investigations. Overman's position was in the Union bargaining unit.

Sometime after September 2009, at the suggestion of a Union representative, Overman wrote the Department stating that she was working in a hostile environment. She also requested accommodations under the Americans with Disabilities Act (ADA). The Department did not respond to her request.

4. On November 3, 2009, Overman received a written reprimand for failing to complete overdue Child Protective Service abuse or neglect assessments. On November 20, 2009, Union Steward Rena Chapel filed two grievances over the reprimand under the collective bargaining agreement. One alleged a violation of just cause and the other alleged a violation of family-leave provisions. On December 11, 2009, the Department denied the grievances at Step 2. During the same time period, the Union filed similar grievances on behalf of another bargaining unit employee.

5. The collective bargaining agreement provided that documents moving a grievance to Step 3 must be filed by the Union and received by the Department within 15 calendar days after the Department's Step-2 response is due or received.

6. Union Steward Rena Chapel incorrectly believed that she had 30 days to file the Union's Step-3 grievance documents. On January 6, 2010, Overman ate lunch with Chapel and Union Stewards Bruce Smith and Rebecca Monteblanco. During that lunch, Smith told Chapel that Step-3 filings were due within 15 days. Chapel stated that this meant that her filings for Overman were past the deadline. The stewards informed Overman that her grievances regarding the written reprimand for the overdue assessments were "null and void" and would not proceed.

7. The Union timely filed a Step-3 grievance for the other employee. As a result, the Union eventually resolved the grievance in favor of the other employee, but not for Overman. There is no evidence in the record that the difference in treatment was based on any

discriminatory or other wrongful motive, or was intentional. The difference in treatment was due solely to Steward Chapel's incorrect belief regarding the Step-3 grievance process time limit.

8. Overman did not receive any performance-related discipline after the November 2009 written reprimand.

9. During January 2010, Overman was under the care of a physician. The physician would not release her to work more than full time (overtime work) for an indefinite period of time. As a result, Overman contended that she was disabled for purposes of the ADA and Oregon's disability law, ORS 659.400 *et seq*., during this time period. Employees in Overman's position normally worked 32 to 40 overtime hours per month. Department officials told Overman that if she could not work overtime, she would be terminated. As a result of this warning, Overman lost Department approval to use flex time. Overman did not inform Union officials of these events.

10. On January 26, 2010, Overman filed a complaint with the Bureau of Labor and Industries and the Equal Employment Opportunity Commission alleging unlawful employment discrimination.

11. On April 27, 2010, Overman played a prank on a coworker who was responsible for dispatching state vehicles. Overman telephoned the coworker and told her that one of the dispatched state vehicles was leaking gasoline and had been stolen. That report triggered the coworker's duty to call the police and fire departments.[1]

12. On May 13, 2010, Department officials held a fact-finding meeting with Overman regarding possible discipline for the prank. Union Steward Melissa Uglesich was present at the meeting.

13. On Monday, June 14, 2010, at 12:30 a.m, Overman sent an e-mail to Union President Linda Burgin, an otherwise unidentified individual named Stearns, and Union attorney Joel Rosenblit. The e-mail's subject line stated, "please respond." In her e-mail, Overman:

(1) Asked the Union to hold Steward Chapel accountable for failing to file Overman's Step-3 grievance documents;[2]

(2) Stated that the previously-imposed discipline had prevented her from receiving two promotions, and that a supervisor told her entire work unit that he did not want to hire an employee with personal issues; and

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[1]The parties dispute whether the coworker actually called the police and fire departments before learning of the prank, and how much work time or overtime the prank cost the employer and coworker. This dispute is not material to our disposition of this case, and we do not resolve it.

[2]The record does not reveal what Overman meant by seeking to hold Steward Chapel accountable. Chapel was apparently a member of Overman's bargaining unit.

(3) Stated that the Department had informed her, in January 2010, that unless she was released to work with no medical restrictions, she would be terminated. The medical restrictions at issue were the inability to work more than 40 hours per week.

14. Overman's June 14 e-mail also stated:

> "Now it is June and I again am pending the decision on another disciplinary hearing.[3] I was told I would hear back by now, with no resolve [*sic*]. It is unfortunate that the job in itself is not difficult, but the management, or lack of [thereof] is impossible. My doctor[s] are telling me to quit, it is not worth the stress. On Friday, I nearly did after another worker yelled at me for not submitting a form in on their schedule which the schedule was un-[beknownst] to me.
>
> "Back in Sept of 2009 my union rep[resentative] told me to write a letter outlining that I was working in a hostile environment because of things like that that have gone on. I also took it upon myself to ask for ADA accommodations, knowing full well I would qualify. There has been no resolve [*sic*] to either request. I feel that that was stirring up a hornets' nest and [I] placed my trust in the rep[resentative].
>
> " * * * * *
>
> "I am at the point [at] which I am ready to quit. Before I do however, I want to know what the union can do to help me other than offer free pizza once a month and a tax break on the dues I have paid.
>
> "Now I am at a point where I feel pressed for time because I will walk away from this job and everything I have invested in the past 5 ½ years, if there is nothing the Union is capable of doing to amend this situation and the hardship it has caused.
>
> "* * * * *
>
> "I * * * have never had an issue with manager[s], supervisors, educators[,] [etc.] until last fall when I stood up to management and said they could no longer deny my request for medical leave. I stated I would not get my work done timely and was told I would have consequences. The consequences have not let up unfortunately.

[3]Overman's June 14 e-mail did not disclose what part of the discipline process she was going through, whether she had received the assistance of a Union representative in that process, what misconduct she was accused of, or what the possible or likely sanction would be. In fact, Overman was referring to the discipline process regarding the prank.

> "In closing, if I resign, assuming that is the course I choose [to] take, will the union aid in any further actions such as filing a grievance on my behalf for the latest disciplinary act that I am receiving? And finally, I ask again if this can be fixed? Thank you for your time, and your feedback. It is greatly appreciated."

15. On the same day that Overman sent the e-mail (June 14), President Burgin forwarded Overman's e-mail to Roxy Barnstead in the Union Member Resource Center for response.

16. On June 15, Barnstead e-mailed Overman stating that Burgin had directed her to follow up on Overman's e-mail, asking Overman to "[p]lease call me * * * as soon as you can."

17. On June 16, 2010, Overman and Barnstead spoke by telephone. Based on Overman's statements during the call, Barnstead concluded that Overman's primary concern was that the Department had scheduled a second fact-finding meeting related to the prank incident, and that Overman might be terminated for the prank. Barnstead told Overman that it was possible that the Department would impose discipline for the prank. Barnstead also stated that Overman had the option of resigning in exchange for having the discipline removed from her personnel file. Overman told Barnstead that she would send Barnstead additional documents related to the prank incident so that Barnstead could further assess the situation. However, Overman did not provide those documents or contact Barnstead again.

18. On Thursday, June 17, 2010, Overman submitted to Department managers a voluntary letter of resignation, effective July 16, 2010. In her letter, Overman stated that she decided to resign "to pursue other endeavors." There is no evidence that Overman sent the Union a copy of this letter.

19. After Overman's June 16 conversation with Barnstead, Overman did not communicate with any Union official before her June 17 submission of her resignation. She also did not communicate with any Union official after that date. Overman did not tell the Union that she believed that she had been forced out of her job and did not ask any Union official to investigate or file any additional grievance for her after she submitted her resignation.

20. The Department issued a written reprimand regarding the prank to Overman on July 16, 2010. She did not ask the Union to file a grievance over that reprimand.

21. Overman's actual last day of employment was July 19, 2010.

22. In August 2010, Overman learned that the other November 2009 grievant, whose Step-3 filing was timely, had prevailed in that grievance.

23. Overman filed this Complaint in December 2010; the Amended Complaint was filed November 17, 2011.

24. On July 18, 2012, the day before the hearing, Overman entered into a settlement agreement with the Department, in which Overman released the Department from "all claims arising under or asserting any alleged violation of * * * any Collective Bargaining Agreement."[4]

CONCLUSIONS OF LAW

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

2. The Union's response to Overman's June 14, 2010 e-mail did not violate its duty of fair representation.

3. Overman's claim that the Union violated its duty of fair representation by arbitrarily not submitting a Step-3 grievance document regarding a November 2009 written reprimand within the time period required by the collective bargaining agreement is untimely.

4. The Union did not unlawfully discriminate against Overman when it failed to timely submit that same Step-3 grievance document on her behalf, even though the Union timely processed a grievance for a similarly-situated employee.

ORS 243.672(2)(a) makes it an unfair labor practice for a labor organization to "[i]nterfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS 243.650 to ORS 243.782." Under this statute, a labor organization is required to fairly represent all employees in a bargaining unit for which it is the exclusive representative. *Putvinskas v. Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO, and Southwestern Oregon Community College*, Case No. UP-71-99, 18 PECBR 882, 894 (2000). A union's handling of a grievance violates its duty of fair representation only where its actions are "arbitrary, discriminatory, or in bad faith." *Coan et al v. City of Portland / Coan et al v. Laborers International Union of North America*, Case Nos. UP-23/24/25/26-86, 10 PECBR 342, 351, *recons*, 10 PECBR 433 (1987), *AWOP*, 93 Or App 780, 764 P2d 625 (1988).

There is no dispute that Overman was in the Union bargaining unit, and that the Union had a duty to fairly represent her. Overman contends that the Union violated that duty by failing to adequately respond to her June 14, 2010 e-mail.

Contrary to that allegation, however, Overman acknowledged that *within hours* of her e-mail being sent, Union President Burgin forwarded the e-mail to a specific Union staff person (Barnstead). The next day, Barnstead e-mailed Overman, stating that the President had directed

[4]Respondent Union sought to introduce this document into evidence; Complainant objected on grounds the settlement was confidential. The parties agreed that the above language was contained in the document. That language is the critical part of the document for this case, and the ALJ properly acted within his discretion in declining to receive the rest of the document because it lacked relevance to the legal issues addressed in this Order.

her to follow up on Overman's e-mail, and further asked Overman to "[p]lease call me * * * as soon as you can."

On June 16, 2010, Overman and Barnstead spoke by telephone and Barnstead concluded that Overman's primary concern was that the Department had scheduled a second fact-finding meeting related to the prank incident. As set forth in more detail above, Barnstead counseled Overman on potential disciplinary outcomes and options available to Overman in response to that potential discipline. Overman committed to sending Barnstead additional documents related to the prank incident, so that Barnstead could further assess the situation. Overman, however, did not provide those documents or contact Barnstead again. Moreover, the record does not establish that Overman provided Barnstead or the Union with a copy of her subsequent June 17, 2010 resignation letter.

Finally, after Overman's June 16 conversation with Barnstead, Overman did not communicate with any Union official before her June 17 submission of her resignation or thereafter. Overman also did not tell the Union that she believed that she had been forced out of her job and did not ask any Union official to investigate or file any additional grievance for her after she submitted her resignation.

Under these circumstances, we find that the Union promptly and ably responded to Overman's June 14 e-mail. Specifically, President Burgin forwarded Overman's e-mail to Barnstead, without delay. Barnstead promptly contacted Overman and counseled her on possible options. Thereafter, Overman stated that she would provide Barnstead with additional documents; Overman, however, did not ultimately do so. Moreover, Overman could have, but did not, contact Barnstead to update her on her situation, particularly her intention to resign that very week. The record does not establish that, once Overman resigned, she contacted Union officials, either to inform them that she had resigned or that she believed that her resignation was a constructive discharge that she wished to grieve. Moreover, the record does not establish that any of the Union's actions undertaken in response to the June 14, 2010 e-mail were arbitrary, discriminatory, or in bad faith.

Consequently, we find that the Union's actions surrounding Overman's June 14, 2010 e-mail and her subsequent resignation did not violate its duty of fair representation under ORS 243.672(2)(a). We will dismiss this portion of the Complaint.

We next turn to Overman's allegation that the Union violated its duty of fair representation by arbitrarily not submitting Step-3 grievance documents within the time constraints required by the collective bargaining agreement. A good-faith decision not to pursue a meritorious grievance, even if mistaken, does not violate a union's duty of fair representation. *Chan v. Leach and Stubblefield, Clackamas Community College; and McKeever and Brown, Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-05, 21 PECBR 563, 575, *recons den*, 21 PECBR 597 (2007). However, a union's unintentional acts or omissions may violate its duty of fair representation under certain circumstances. *Ralphs v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO and State of Oregon, Executive Department*, Case Nos. UP-68/69-91, 14 PECBR 409, 423-24 (1993).

Specifically, a union's unintentional acts or omissions may be actionably arbitrary if three conditions are met: (1) the act or omission reflects a reckless disregard for the rights of the individual employee; (2) the act or omission seriously prejudices the injured employee; and (3) the policies underlying the duty of fair representation would not be served by shielding the union from liability in the circumstances of the particular case. *Id.* Here, we need not decide whether the Union's failure to timely submit the Step-3 grievance documents is actionably arbitrary because, as explained below, Overman's claim in that regard is untimely.

Unfair labor practice complaints are subject to a 180-day statute of limitations. ORS 243.672(3). In *Rogue River*, 244 Or App at 189, the court held "that ORS 243.672(3) incorporates a discovery rule, which means that the limitation period begins to run when a public employee * * * knows or reasonably should know that an unfair labor practice has occurred."

Overman concedes that she was informed by the Union in January 2010 that the aforementioned grievance documents had not been timely submitted, and that, as a result, her grievance regarding her November 2009 written reprimand was "null and void." Thus, in January 2010, Overman knew or reasonably should have known that the alleged arbitrary action of not timely submitting Step-3 grievance documents had occurred. *See Rogue River*, 244 Or App at 189. Overman did not, however, file her unfair labor practice complaint concerning the alleged arbitrary grievance processing until December 2010, more than 180 days after she knew or reasonably should have known that the alleged unfair labor practice had occurred.

Consequently, the Amended Complaint (which we relate back to the original pleading) was untimely regarding the allegation that the Union arbitrarily processed claimant's grievance over the November 2009 written reprimand, and we will dismiss this portion of the Complaint.[5]

Finally, we turn to Overman's allegation that the Union's grievance processing regarding the November 2009 written reprimand was discriminatory. A union's actions are discriminatory if there is "substantial evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives." *Howard v. Western Oregon State College Federation of Teachers, Local 2278, OFT*, Case Nos. UP-80/93-90, 13 PECBR 328, 354 (1991).

Overman's assertion of "discriminatory" Union conduct is premised on a comparison between the Union's untimely submission of Step-3 grievance documents on her behalf and a timely submission of such documents on behalf of a similarly-situated employee.[6] *See Strickland*

[5]The Union argues that this case should also be dismissed because the Department, having reached a settlement with Complainant, is no longer a Respondent. The Union argues that the Department must be a party to the case as an element of Complainant's cause of action and as a party essential for Complainant's relief. Because of our disposition of this case, we need not reach that issue.

[6]Because Overman did not find out about the Union's grievance processing for the similarly-situated employee until August 2010, we find her December 2010 complaint alleging discriminatory grievance processing to be within 180 days from when she knew or reasonably should have known about the alleged discriminatory conduct; her complaint alleging that the Union breached its duty of fair representation by discriminating against her, therefore, is timely. *See* ORS 243.672(3); *Rogue River*, 244 Or App at 189.

v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO, CLC, Case No. UP-134-90, 13 PECBR 113, 124 n 6 (1991) ("discrimination" refers to treatment different from that afforded to others who are similarly situated). A union's decision is in "bad faith" if it intentionally acts against a member's interest and does so for an improper reason. *Stein v. Oregon State Police Officers' Association and Oregon State Department of State Police*, Case No. UP-41-92, 14 PECBR 73, 80 (1992).

Overman's only specific evidence of different treatment is that the Union failed to advance her grievance to Step 3 in late December 2009, while advancing the grievance of the other employee. We have determined that this difference in treatment was not due to any intentional discrimination or improper motive of the Union. The difference was due solely to the Union steward's *unintentional* error regarding the Step-3 grievance deadline. The Union's conduct was not based on any factor related to Overman, such as her disability, union activity, or reputation, or part of an attempt to inappropriately favor the other employee. As the error was unintentional, there is no "evidence of discrimination that [was] intentional, severe and unrelated to legitimate union objectives." *Howard*, 13 PECBR at 354. Therefore, Overman has not proved the necessary elements to establish that the Union's handling of her grievance violated ORS 243.672(2)(a). Accordingly, we will also dismiss this portion of the Complaint.

ORDER

The complaint is dismissed.

DATED this 1 day of April 2013.

_____

*Kathryn A. Logan, Board Chair

_____

Jason M. Weyand, Board Member

_____

Adam Rhynard, Board Member

*Chair Logan did not participate in the decision in this case.

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-023-11

(UNFAIR LABOR PRACTICE)

JACKSON COUNTY SHERIFF'S EMPLOYEES' ASSOCIATION, Complainant, v. JACKSON COUNTY SHERIFF'S DEPARTMENT, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A hearing was held before Administrative Law Judge (ALJ) Peter A. Rader on September 27, 2011, in Salem, Oregon. The record closed on October 28, 2011, following receipt of the parties' post-hearing briefs. The ALJ issued his Recommended Order on August 29, 2012. On December 10, 2012, the Board heard oral argument on Complainant's objections to the Recommended Order.

Aila Hoss and Rhonda J. Fenrich, Fenrich and Gallagher, PC, Eugene, Oregon, represented Complainant at the hearing. Seth Davis and Ms. Fenrich represented the Complainant at oral argument.[1]

Joel C. Benton, Jackson County Senior Assistant County Counsel, Medford, Oregon, represented Respondent.

On April 26, 2011, the Jackson County Sheriff's Employees' Association (Association) filed this unfair labor practice complaint alleging that the Jackson County Sheriff's Department

[1]Ms. Hoss, a certified law student, and Mr. Davis, a law clerk, represented the Complainant under the supervision of Attorney Fenrich.

(County) violated ORS 243.672(1)(e) when it unilaterally reduced the number of corrections deputies eligible to take vacation on the same shift and refused to bargain over the assignment of new duties to the records clerks.

The issues presented are:

1. Did the County unilaterally change a past practice (the *status quo*) by limiting the number of corrections deputies eligible to take the same vacation shift? If so, did this violate ORS 243.672(1)(e)?

2. Did the County refuse to bargain over adding new duties to the position of records clerk? If so, did this violate ORS 243.672(1)(e)?

3. If the County violated ORS 243.672(1)(e), what is the appropriate remedy?

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The Association is a labor organization and the exclusive representative of a bargaining unit of corrections deputies, criminal deputies, court security officers, corrections records clerks, criminal records clerks, civil clerks, and criminal data technicians employed by the County in its Sheriff's Department. The County is a public employer.

2. The County Sheriff is Michael Winters. At the time, Anthony (Tony) Keller was the County's interim managing director whose duties included labor relations. The Association's president was Corrections Deputy Christopher Zornes.

3. The Association's bargaining unit has approximately 131 members, approximately 42 of whom are corrections deputies. Corrections deputies are responsible for the inmates at the County jail, including their safety, movement, feeding, court appearances, and medical issues. The unit's criminal, corrections, and civil records clerks process and maintain records related to the public safety functions of the Sheriff's Department.

The Parties' 2008 - 2011 Agreement

4. The Association and the County were parties to a collective bargaining agreement (Agreement) effective July 1, 2008 through June 30, 2011.

5. Article 2 of the Agreement, which has remained largely unchanged over the years, addresses management rights. It states:

"It is recognized that an area of responsibility must be reserved to the employer if the County is to effectively serve the public. Except as specifically abridged in this Agreement or in accordance with the County's bargaining duties and responsibilities under the [Public Employee Collective Bargaining Act] PECBA, it is recognized that the responsibilities of management are exclusively functions to be exercised by the County and are not subject to negotiation. By way of illustration and not of limitation, the following are listed as such management functions:

"A. The determination of the services to be rendered to the citizens served by the County.

"B. The determination of the employer's financial, budgetary, accounting and organization policies and procedures.

"C. The continuous overseeing of personnel policies, procedures and programs promulgated under any ordinance or administrative order of the County establishing personnel rules and regulations not inconsistent with any other term of this Agreement.

"D. The management and direction of the work force including, but not limited to, the right to determine the methods, processes and manner of performing work; the determination of the duties and qualifications of job classifications; the right to hire, promote, train, transfer and retain employees; the right to discipline or discharge for just cause; the right to lay off for lack of work or funds; the right to abolish positions or reorganize the departments or divisions; the right to determine schedules of work; the right to purchase, dispose and assign equipment or supplies; and the right to contract or subcontract any work."

6. The County jail operates twenty-four hours a day, seven days a week, which requires three shifts of deputies to staff. Article 3.7(a) of the Agreement permits the deputies to bid for work and vacation shifts based on seniority, as follows:

"3.7(a) Shift bidding generally. Employees shall bid shifts and days off based on seniority without regard for gender. Should the county determine that, upon conclusion of the shift bidding process, the operational needs of the department are not being met,

> the County has the right and the responsibility to reassign bargaining unit members to meet its needs. Such reassignments shall take place before the beginning of the designated quarter * * *."

Article 3.7(c) further clarifies the process:

> "3.7(c) Shift bidding for corrections deputies. Corrections deputies shall bid shifts and days off based on seniority. Deputies may elect to remain on a single shift for the full fiscal year or choose any variety of shift changes for the four quarters of the year.
>
> "* * * * *
>
> "If an employee is reassigned by the County under Section 3.7(a) and that new assignment conflicts with a more senior employee's scheduled vacation, the reassigned employee shall retain one-half (1/2) of the employee's scheduled vacation."

7. Article 5 of the contract contains the vacation leave provisions, including accrual rates, accumulation limits, and how and when vacation accruals can be used by bargaining unit members. Article 5.2 states in relevant part:

> "5.2(d) Use of Vacation and Seniority. Employees shall be allowed to take vacation at a time of their choosing, *subject to departmental requirements*. [Emphasis added.]
>
> "Corrections deputies and corrections records clerks may exercise seniority vacation preferences as defined in Article 3, Section 7(c), provided no employee will be permitted to exercise this preference more than once each fiscal year. If an employee is forced by the County to cancel a scheduled vacation, that employee may exercise bumping rights provided that the employee provides at least thirty (30) days written notice to the senior employee's supervisor before he/she can exercise his/her right to bump.
>
> "5.2(e) Vacation Credit if Prevented From Taking Vacation. If an employee is prevented, by the department's personnel requirements, from taking vacation during the normal vacation period, he shall not lose vacation credit."

8. Article 15.15 permits the Sheriff to make job assignments within the records clerk job classification. It provides:

> "The Association agrees that the Sheriff has the authority to make job assignments within the Records Clerk job classification in order to operate the department productively. The Sheriff agrees to assign duties fairly and objectively.
>
> "Some responsibilities that are normally assigned to only one clerk include, but are not limited to, warrants and concealed weapons permits, civil processes, and returns to the court. These assignments may be performed by one or more clerks depending on the Sheriff's assessment of the operating requirements of the department."

The Parties' History Regarding Vacation Bidding

9. The Agreement is silent as to how many corrections deputies may take the same vacation shift. From at least 1999, the procedure followed by the Department has been to issue a memorandum, called a cover letter, before the start of the fiscal year, announcing the shift bidding practice for the following year. The Association never demanded to bargain the practice because it was always agreed to and the County did not believe that it was required to bargain.

10. In 1999, when there were 61 deputies, and in 2001, when there were 64 deputies, only one deputy was permitted to take a particular work or vacation shift. The cover letter to corrections deputies in 1999 states in part:

> "***1 & 2.** At the conclusion of bidding should the County feel that the needs of the Division are not being met as bid, the county will invoke the following provision of the contract:
>
> "*3.7(a). Shift bidding generally. Employees shall bid shifts and days off based on seniority without regard for gender. Should the county determine that, upon conclusion of the shift bidding process, the operational needs of the corrections facility are not being met, the county has the right and the responsibility to reassign bargaining unit members to meet its needs.*
>
> "***3**. Vacation
>
> "Due to overtime concerns, only one person per shift (not location) will be allowed off at a time. To accommodate for differing days off, you can overlap other vacation/s by no more than a total of two working days." (Emphasis in original.)

11. From 2004 through 2011, two corrections deputies were permitted to take the same vacation shift. During that period, the number of deputies working in the Department

ranged from 38 to 55. Except for the number of deputies eligible to take time off, the language in the annual cover letter remained the same:

> "**Vacation bidding**; A maximum of two (2) weeks (80 hours) may be taken in a single two week period or broken up into **two** one week (or less) periods, not to exceed eighty (80) hours. To limit the need for overtime to cover vacations, a **maximum** of two (2) deputies will be allowed off from each shift at the same time. There will be no overlapping of vacation days to exceed the **maximum** of two deputies off at the same time restriction.
>
> "* * * * *
>
> "Should the County determine that, upon conclusion of the shift bidding process, the operational needs of the corrections facilities are not being met, the County has the right and the responsibility to reassign bargaining unit members to meet its needs." (Emphasis in original.)

12. On December 17, 2010, having learned the County intended to reduce from two to one the number of corrections deputies who could take the same vacation shift, Association counsel Rhonda Fenrich sent a letter to Sheriff Winters demanding to bargain over that intended reduction.

13. On December 29, 2010, interim managing director Keller responded to Fenrich's letter stating that the County was permitted to make the vacation reduction without bargaining.

14. On December 30, 2010, corrections supervisor Lieutenant Christine Dismukes informed the corrections deputies through a cover letter that to limit the need for overtime, a maximum of one deputy will be allowed off from each shift at any given time. Her letter stated, in part:

> "To limit the need for overtime to cover vacations, a **maximum** of one (1) deputy will be allowed off from each shift at any given time. There will be no overlapping of vacation days to exceed the **maximum** of one deputy off at the same time restriction. At the conclusion of the bidding, and acceptance and posting of the schedules, additional personal leave requests will be accepted for consideration starting on a designated date and time." (Emphasis in original.)

15. The Association's demand to bargain was repeated in letters or e-mails to the County dated January 13, February 16, and March 10, 2011, but each one was denied.

The Assignment of New Duties to the Records Clerks

16. The County's records clerks are responsible for processing prisoner paperwork, which includes obtaining information from prisoners, photographing, fingerprinting, inventorying personal property, tracking and preparing paperwork for court appearances, running criminal history checks, handling bail transactions, registering sex offenders, processing transfers to other institutions, and completing other miscellaneous tasks.

17. The County's court duties, which include processing video arraignments and calculating prisoner release dates, were traditionally performed by supervisors. Video arraignment duties include attending court when a prisoner is charged and processing inmate paperwork based on indictment, sentencing, and other court actions.

18. Calculating a prisoner's release date can be straightforward or complicated, depending on the circumstances. Data that must be factored into the calculation include such things as the date of surrender, the sentence for each offense if there are multiple convictions, credits for time served, credits for time worked in the facility, trustee time off, time off for good behavior, court sentencing instructions, and probation violations. If the calculations are incorrect, it can result in a prisoner being released before or after their official release date.

19. The County uses a software program called Tiburon to assist with the release date calculations. The practice in the County has been to have someone check complicated calculations because mistakes are frequent.

20. In 2010, the supervisor who performed the court duties retired and the work was assigned to Records Clerks Supervisor Denise Bottoms. Bottoms found the work to be time-consuming and she incurred overtime to complete these tasks. While on vacation for two weeks in 2010, Bottoms temporarily reassigned the court duties to the records clerks, but the Association did not agree to the permanent reassignment of these duties.

21. On December 27, 2010, the jail's commander, Lieutenant Robert Sergi, issued a memorandum stating that, effective immediately, the video arraignment duties were being reassigned from the supervisors to the records clerks. Lt. Sergi's memorandum listed the documents that needed to be tracked and distributed to inmates upon completion of their video appearance. These included charging documents such as the district attorney's information, district attorney's indictment, motion to show cause, letters to the public defender or alternate attorney group letter if appointed by the judge, plea petitions for DUII diversions, a short form plea petition, waiver of presentment of indictment for felony pleas, and sex offender registration form after conviction. It was understood that the calculation of prisoner release dates was being transferred to the records clerks as well.

22. On December 28, 2010, Fenrich sent a letter to Sheriff Winters demanding to bargain the impact of these workload reassignments. The demand to bargain was repeated in letters or e-mails dated January 13, February 16, and March 10, 2011.

23. On January 3, 2011, Keller denied Fenrich's demand to bargain the reassignment of the new duties on the grounds that the work was non-supervisory and the management rights clause in Article 2 authorized the County to make the "determination of the duties and qualifications of job classifications." Keller also cited Article 15.15, which addresses the "Sheriff's authority to make job assignments within the Records Clerk job classification in order to operate the department productively."

24. On January 26, 2011, Keller again denied the Association's demand to bargain by alleging the work was clerical and quoting the language of ORS 243.650(7)(d), which states that "'[e]mployee relations' does not include subjects that have an insubstantial or de minimus effect on public employee wages, hours, and other terms and conditions of employment."

25. On February 14, 2011, Lt. Dismukes wrote to records clerk Alisha Bridges and attached a copy of the new Records Clerk job description, which included the recently-transferred court duties. Dismukes advised Bridges that failure "to perform the assigned duties may result in disciplinary action against you as an employee and/or legal action against the union for failure to follow the terms and conditions of the collective bargaining agreement." Dismukes also wrote that it was management's prerogative to assign these duties under Articles 2 and 15.15 of the Agreement.

26. On March 3, 2011, Keller again denied the Association's demand to bargain and stated in his letter that there was no "effect on the workload of the records clerks due to the change" or that if there was an effect, it was insubstantial. Keller wrote that the new duties were not subject to the definition of "employee relations" under ORS 243.650(7)(g), and that the impact, if any, on the records clerks' duties was minimal because they were using the same software and skills as their existing duties.

27. Five months after the court duties were transferred, the records clerks were regularly incurring overtime arising solely from their court duties. From May 1 through September 15, 2011, the records clerks incurred a combined total of approximately twenty hours of overtime.

CONCLUSIONS OF LAW

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

2. The County did not violate ORS 243.672(1)(e) when it unilaterally reduced the number of corrections deputies eligible to take the same vacation shift.

3. The County violated ORS 243.672(1)(e) when it refused to bargain the impact of adding new duties to the records clerks.

DISCUSSION

The Association alleges that the County violated ORS 243.672(1)(e) by refusing to bargain over unilaterally 1) reducing the number of corrections deputies permitted to take vacation during the same shift, and 2) assigning new duties to the records clerks that were previously performed by supervisors. The County argues that it was not required to bargain under the PECBA and therefore did not violate ORS 243.672(1)(e).

Legal Standards

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer or its designated representative to "[r]efuse to bargain collectively in good faith with the exclusive representative." In general, a public employer violates its duty to bargain in good faith under subsection (1)(e) if it makes a unilateral change in the *status quo* concerning a subject that is mandatory for bargaining. An employer must generally bargain about its decision to change a mandatory subject of bargaining before making the decision. Although an employer is not required to bargain about a decision to change a permissive subject, it is obligated to bargain regarding the impact of that decision on mandatory subjects, before implementing the change. *Three Rivers Ed. Assn. v. Three Rivers Sch. Dist.*, 254 Or App 570, 575 (2013) (citations omitted).

When reviewing an allegation of an unlawful unilateral change, we consider (1) whether an employer made a change to the *status quo*; (2) whether the change concerned a mandatory subject of bargaining; and (3) whether the employer exhausted its duty to bargain. *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177 (2013) (*AOCE*), citing to *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03, 20 PECBR 890, 897 (2005).[2] We need not apply our analysis in a mechanical manner, however, and may proceed to a particular step if that step will be dispositive of the issue. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-24-09, 24 PECBR 730, 761-62 (2012).

Unilateral Change in the Number of Deputies Permitted to Take the Same Vacation Shift

We begin with the "preliminary step in any unilateral change claim—whether there has been a change in the status quo." *AOCE*, 353 Or at 184. To make that determination, we consider "[w]hether the parties have, by their words or actions, defined their rights and responsibilities with regard to a given employment condition." *Id.* (quoting *Coos Bay Police Officers' Association v. City of Coos Bay and Coos Bay Police Department*, 14 PECBR 229, 233 (1993)). In doing so, we look "to a variety of sources, including not only the terms of a current or an

[2]When asserted, we also consider an employer's affirmative defense of waiver: namely, that a party may waive its right to bargain by (1) "clear and unmistakable" contract language, (2) a bargaining history that shows the party consciously yielded its right to bargain, or (3) the party's action or inaction. *AOCE*, 353 Or at 177 (citing 20 PECBR at 896). Here, as the County did not plead an affirmative defense of "waiver," we do not consider it.

expired collective bargaining agreement, but work rules, policies, and an employer's 'pattern of behavior.'" *AOCE*, 353 Or at 184 (quoting *Coos Bay*, 14 PECBR at 233).

Here, the parties' contract contains specific provisions regarding vacation use and bidding in Articles 3.7 and 5, which grant the County the right to modify the number of deputies who may take vacation at the same time. Specifically, Articles 3.7 and 5.2 permit corrections deputies to bid on shifts and vacations. Those same provisions, however, state that the granting of such bids is "subject to departmental requirements" and is contingent on the County's determination that "the operational needs of the department are * * * being met." The agreement further recognizes that "an employee may be forced by the County to cancel a scheduled vacation" (Article 5.2(d)), and that "the department's personnel requirements" may prevent an employee "from taking vacation during the normal vacation period" (Article 5.2(e)).

Likewise, the County's annual bid cover letters repeatedly indicated that the County had the authority to change (for operational reasons) the number of employees who could take vacation at the same time. Moreover, the County exercised that authority in 1999 by limiting vacation time to only one person per shift.

After considering the parties' agreement, work rules, policies, and the County's "pattern of behavior," we find the *status quo* to be that the County retained (and exercised) the right to determine (for operational needs) the number of corrections deputies who could take vacation at the same time. As a result, there was no change in the *status quo* in December 2010, when the County again exercised that right.

We reached a similar conclusion in *International Association of Firefighters, Local 3564 v. City of Grants Pass*, Case No. UP-23-94, 15 PECBR 390 (1994). In *City of Grants Pass*, a hiatus-period case, the parties' agreement allowed for two employees to schedule vacation at the same time, but also contained language stating that vacation scheduling was contingent on the "head of the department's judgment as to the needs of the efficient operations and the availability of vacation relief." *Id.* at 391. During the hiatus-period, the employer reduced the number of employees who could take vacation from two to one in order to maintain a minimum staffing level of three employees per shift.

We held that the employer's action did not violate ORS 243.672(1)(e). We reasoned that the employer's decision was consistent with both the language of the agreement and the parties' past practice in applying that language. *Id.* at 395-96. Consequently, we found that the employer "did not alter the status quo reflected in the expired terms of the agreement." *Id.* at 396. We find the instant facts analogous.

In sum, for the foregoing reasons, we hold that the County did not violate ORS 243.672(1)(e) by allowing only one corrections deputy to take vacation at any one time. Therefore, we will dismiss this claim.

New Duties Assigned to the Records Clerks

The ALJ determined that the County violated ORS 243.672(1)(e) by not bargaining over the mandatory impact of transferring new duties to the records clerks. Neither party objected to this portion of the recommended order, and we consider any objections to that issue waived. Therefore, we adopt the ALJ's conclusions on that claim, and we will order the County to bargain with the Association over the mandatory impact of the transfer of duties to the records clerks.

Remedy

As in most cases involving a unilateral change to a mandatory subject of bargaining, we will order the County to rescind the change and restore the *status quo* with regard to the records clerks' workload until the required bargaining is complete. However, due to the nature of the change and the amount of time that has passed since the change occurred, we will give the County 30 days from the date of this order to effectuate the return to the *status quo*. Of course, the parties are free to implement any other resolution that they jointly agree on before then.

ORDER

1. The County did not violate ORS 243.672(1)(e) when it unilaterally reduced the number of corrections deputies who could take the same vacation shift. This claim is dismissed.

2. The County violated ORS 243.672(1)(e) when it transferred duties previously performed by a supervisor to the Sheriff's Department records clerks without bargaining the impact of its decision with the Association. The County will cease and desist from transferring these duties without bargaining the impact of the decision on the job classification.

3. Within 30 days from the date of this order, the County shall restore the *status quo* that existed before the unilateral reassignment of the work to the records clerks, until such time as the parties complete the required interim bargaining.

DATED this 11 day of April, 2013.

_____
Kathryn A. Logan, Chair

_____
Jason M. Weyand, Member

_____
Adam Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-030-11

(UNFAIR LABOR PRACTICE)

SEAN P. RAREY, Complainant, v. JOSEPHINE COUNTY, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Sean P. Rarey, appeared *pro se.*

Steven Schuback, Attorney at Law, Local Government Personnel Institute, Salem, Oregon, represented Respondent.

On May 23, 2011, Sean P. Rarey filed this unfair labor practice complaint alleging he was denied union representation for a disciplinary interview in violation of ORS 243.672(1)(a). He further alleged that Josephine County (County) violated ORS 243.672(1)(e) by unilaterally changing its policy regarding discipline when it transferred him from a patrol deputy position to a corrections deputy position, and by refusing to provide requested documents.

The complaint was assigned to Administrative Law Judge (ALJ) Peter A. Rader. By letter dated May 26, 2012, ALJ Rader informed Rarey that the ORS 243.672(1)(e) claims were subject to dismissal as the "exclusive representative" was not a party to the proceeding.[1] As the investigation continued, ALJ Rader learned that an identical unfair labor practice complaint (UP-001-11) had been filed and withdrawn earlier in the year, based on the parties agreeing that the issues involved were going to be heard by an arbitrator. This matter was then held in abeyance pending the resolution of arbitration proceedings.

[1]The exclusive representative of all budgeted full-time employees and some part-time employees who work in the County's Sheriff's Office is the Josephine County Sheriffs' Association (Association). Rarey was a member of that bargaining unit when this complaint was filed.

On November 16, 2012, Arbitrator Howell Lankford issued his award, a copy of which was provided to ALJ Rader. On December 7, ALJ Rader informed Rarey that the arbitration award appeared to address Rarey's claims regarding the denial of union representation and involuntary transfer and therefore this complaint was subject to dismissal under the Board's policy regarding deferral to arbitration awards. ALJ Rader reiterated that the ORS 243.672(1)(e) claims were subject to dismissal as Rarey lacked standing to raise them because he was not the "exclusive representative." Rarey was given until December 20, 2012, to show cause why the complaint should not be dismissed. Rarey did not respond.[2] Thereafter, ALJ Rader transferred the case to the Board with a recommendation that the appeal be dismissed.

For purposes of this Order, we assume the allegations in the complaint are true. We also rely on undisputed facts discovered during our investigation. *Upton v. Oregon Education Association/Uniserv*, Case No. UP-58-06, 21 PECBR 867 (2007).

ORS 243.672(1)(e) claims

ORS 243.672 (1)(e) provides that it is an unfair labor practice for a public employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." "'Exclusive representative' means the labor organization that * * * has the right to be the collective bargaining agent of all employees in an appropriate bargaining unit." ORS 243.650(8). The exclusive representative is the Association, not Rarey. The Association is not, and has not been, a party to this proceeding. Rarey does not have standing to raise these claims. *See On'gele and Oregon Association of Corrections Employees v. Department of Corrections, Oregon State Penitentiary*, Case No. UP-42-93, 14 PECBR 825 (1993) (a union alone, not an individual employee, has the right to file a complaint alleging a subsection (1)(e) violation). These two claims will be dismissed.

ORS 243.672(1)(a) claim

Rarey also filed a claim under subsection (1)(a),[3] asserting that he was denied union representation at a disciplinary interview conducted by Undersheriff Donald Fasching. What this Board must determine is whether we return the case to the ALJ for hearing or defer to the arbitrator's award and dismiss the complaint.

The standard for deferral to an arbitrator's award is set out in *Greater Albany Education Association v. Greater Albany School District No. 8J (Greater Albany*), Case No. C-6-80, 5 PECBR 4158, 4160-61(1980). We defer to an arbitrator's award in unfair labor practice cases

[2]The Board could dismiss this complaint solely on the basis of Rarey's failure to respond. *Oregon AFSCME Council 75 v. City of Eugene*, Case No. UP-29-09, 23 PECBR 442 (2009), *recons*, 23 PECBR 580 (2010) (failure of complainant to respond to ALJ's correspondence resulted in dismissal of the complaint for failure to prosecute).

[3]Under ORS 243.672(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 ORS 243.662."

that allege violations of subsections of ORS 243.672 other than (1)(g) and (2)(d) where the award meets the following four-part test:

> "(1) the arbitration proceedings were fair and regular; (2) the parties agreed to be bound thereby; (3) the arbitrator's decision was not repugnant to the [Public Employee Collective Bargaining Act] PECBA; and (4) the issue involved must have been clearly and fully decided by the arbitrator and the question must have been within the arbitrator's competence." *Greater Albany* at 4160-61.

We review each element in turn. First, we find that the proceedings were fair and regular. The matter went to arbitration as settlement of an unfair labor practice complaint (UP-001-11). According to the arbitrator,

> "[t]he hearing was orderly. Each party had the opportunity to present evidence, to call and to cross[-]examine witnesses, and to argue the case. Both parties filed timely post-hearing briefs." Award at 1.

The parties stipulated to the issue to be heard by the arbitrator. Neither party appealed the arbitrator's decision to this Board. This supports our finding that the parties agreed to be bound by the arbitrator's decision.

The arbitrator determined that the County imposed discipline when it transferred Rarey. The arbitrator also found that Rarey had a "reasonable basis for the belief that he was undergoing an investigatory interview associated with possible substantial discipline" when he was interviewed by Fasching. Award at 9. The arbitrator then held that the County violated the collective bargaining agreement by not giving notice of the investigatory interview.[4] As a remedy, he ordered that Rarey be returned to the patrol unit, Rarey's patrol seniority be recalculated as if there had been no interruption in his assignment, and any reference to the disciplinary assignment to the jail be removed from Rarey's personnel file. These findings and conclusions made by Arbitrator Lankford establish that his decision was not repugnant to the PECBA and that the issue involved with the subsection (1)(a) claim was fully decided by the arbitrator and was within his authority and competence.

We conclude that all four elements of the *Greater Albany* deferral test were met by the arbitrator's award. We therefore defer to the arbitrator's award and will dismiss the subsection (1)(a) allegation in the complaint.

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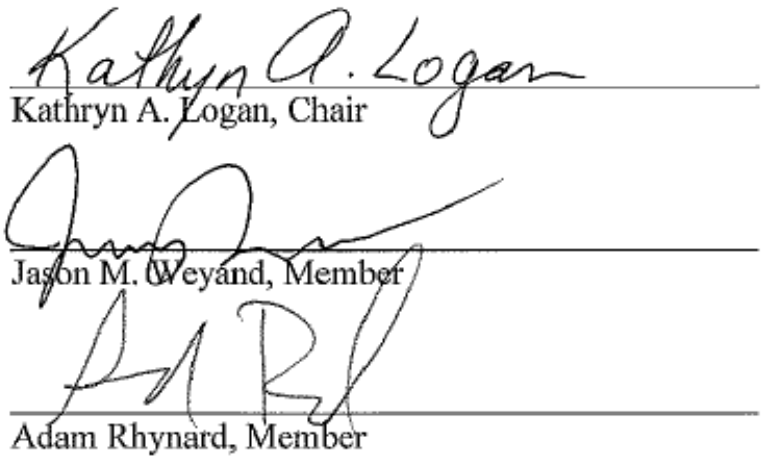
[4]The contract provides that upon notification of an investigatory interview, the involved employee has the right to be represented by a representative of his or her choice.

ORDER

The complaint is dismissed.

DATED this 17 day of April, 2013.



Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-004-13

(AMENDMENT OF RECOGNITION)

SOUTHERN OREGON BARGAINING COUNCIL and MEDFORD EDUCATION ASSOCIATION, Petitioners, v. MEDFORD SCHOOL DISTRICT NO. 549C, Respondent.	)	ORDER AMENDING RECOGNITION OF EXCLUSIVE BARGAINING UNIT

On March 15, 2013, Southern Oregon Bargaining Council (SOBC) and Medford Education Association (Association) filed a petition under OAR 115-025-0008 seeking to amend the employer's recognition of the Association to reflect its affiliation with SOBC.

Ms. Olney, Counsel for the Association, presented declarations and exhibits establishing the following:

Currently, the Association is designated as the exclusive bargaining representative for certified and professional staff of the Medford School District (District). The District recognizes the Association as the sole and exclusive bargaining representative for all bargaining unit members employed or to be employed by the District, excluding substitute teachers, substitute nurses, confidential and supervisory personnel, and personnel less than half time.

In 2001, the Association voted to affiliate with SOBC, and thereafter has participated in council activities. The Association became a full voting member of SOBC on April 8, 2008, when the Association amended its bylaws to add SOBC as an affiliate. Although the Association has been associated with SOBC for years, a Petition to Amend Affiliation had not been filed with ERB. Accordingly, the District declined to recognize SOBC during bargaining.

The Association's governing council discussed the affiliation with SOBC at meetings held in September and November, 2012, and then submitted the question to its members for a

vote. The election procedures it followed are the same as those used for other internal elections, including those to elect officers and to ratify contracts. Building representatives took the question back to colleagues for discussion, posted the ballot in their building for five days, and distributed and collected individually-cast secret ballots. The result of the election was approval to affiliate with SOBC by a majority of votes cast by bargaining unit members.

The District filed no objections to this petition.

We conclude that the affiliation vote was conducted in compliance with at least minimal due process requirements and that a majority of votes cast by the bargaining unit members were for affiliation with SOBC.

Based on the foregoing, this Board issues the following order:

ORDER

The District's recognition of the Medford Education Association as exclusive representative of a bargaining unit of District personnel is amended to reflect the Association's affiliation with Southern Oregon Bargaining Council.

DATED this 25 day of April, 2013.

_____
Kathryn A. Logan, Chair

_____
Jason M. Weyand, Member

_____
Adam Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. CC-008-12

(REPRESENTATION PETITION)

OREGON AFSCME COUNCIL 75, Petitioner, v. WASHINGTON COUNTY, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Board heard oral argument on April 1, 2013, on Petitioner's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Peter A. Rader on February 22, 2013, following a hearing on August 6, 2012, in Salem, Oregon. The record closed on August 27, 2012, following receipt of the parties' post-hearing briefs.

Jennifer K. Chapman, Legal Counsel, Oregon AFSCME, Council 75, Salem, Oregon, represented Petitioner.

Adam S. Collier, Attorney at Law, Bullard, Smith, Jernstedt & Wilson, Portland, Oregon, represented Respondent.

On May 30, 2012, Oregon AFSCME Council 75 (Petitioner or Union) filed this petition seeking to certify a bargaining unit without an election under ORS 243.682(2) and OAR 115-025-0000(1)(c). The petition proposed the formation of a new bargaining unit comprised of

"[a]ll positions requiring a state appraiser certification within Washington County as a condition of employment, including, but not limited to, Appraiser I, Appraiser II, Sr. [Senior] Appraiser, and NATS PDT."[1]

Washington County (County) filed timely objections to the petition, asserting that (1) the new unit would unnecessarily fragment the County's workforce and create a small bargaining unit that shares a community of interest with other County employees who are not included in the petition; and (2) the senior appraisers are supervisory employees and should be excluded from representation.

The issues presented for hearing are:

1. Is the proposed unit appropriate under ORS 243.682 and OAR 115-025-0050(2)?

2. If the proposed unit is appropriate, are the senior property appraisers excluded from representation in the unit as supervisory employees under ORS 243.650(23)?

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The County is a public employer governed by an elected Board of Commissioners. The County has designated five "service areas" to inform the general public regarding the services that it provides: 1) General Government; 2) Public Safety; 3) Land Use, Housing & Transportation; 4) Health & Human Services; and 5) Culture, Education & Recreation. Within those five service areas, the County has 20 departments. The County employs approximately 1,900 regular and part-time employees, of which around 580 are represented by five labor organizations.

2. The Petitioner is a labor organization and the designated representative of a bargaining unit of approximately 55 County employees, who work in the Department of Community Corrections in the Public Safety service area (regular and on-call residential services monitors and residential counselors). Its petition seeks to form a new bargaining unit, without an election, of appraisers, who work in the Assessment & Taxation Department in the County's General Government service area. The employees in the proposed unit are required to have State appraiser certification as a condition of employment.

[1]Before the hearing, the parties clarified and agreed that the NATS PDT position in the original Petition applied to the Appraisal Data Analyst position. We include the Appraisal Data Analyst position in our references to "appraisers" in this order.

3. The other four bargaining units in the County are represented by: the Oregon Nurses Association (ONA), with approximately 22 bargaining unit members (nurses) in the Department of Health & Human Services; the Federation of Oregon Parole and Probation Officers (FOPPO), with approximately 35 members (parole and probation officers) in the Department of Community Corrections; the Teamsters, Local 223, with approximately 120 members (maintenance and technical employees) in the Department of Land Use & Transportation; and the Washington County Police Officers Association, with approximately 350 strike-prohibited members (police and correctional officers) in the Department of the Sheriff in the County's Public Safety service area.

Appraiser Position Descriptions, Duties, and Wages

4. The proposed bargaining unit would include 29 currently unrepresented appraisers working in four classifications: 25 Appraisers I and II, 3 Senior Appraisers, and 1 Appraisal Data Analyst.

5. All of the appraisers work in the Appraisal Division (Division) of the Department of Assessment & Taxation (Department). The Division has approximately 44 employees and is responsible for the appraisal of real property and mobile homes; preparation of ratio studies; explanation and defense of appraisals; annexation petitions; maintenance of personal property records and values; controlling exemptions; and a cyclical reappraisal program.

6. The appraisers work in an office setting in the same area on the same floor of a County building, unless they are assigned to a special project elsewhere.[2] They spend approximately 35 to 50 percent of their time working in the field visiting appraisal sites, to which they drive their own cars and receive reimbursement. A current State of Oregon driver's license is a requirement of the job.

7. Appraisers receive the same medical, retirement, sick leave, insurance, and vacation benefits as all other unrepresented employees, and they are subject to the same personnel rules as those other unrepresented employees. They come in contact with the public and have a casual business dress code similar to other County employees. They occasionally interact with County cartographers, geographical information systems (GIS) analysts, and other Department personnel. On special projects, appraisers may work closely with other Department employees as part of a team.

8. Appraisers have three blackout periods throughout the year during which they may not take vacation leave due to the workload. No appraiser has transferred out of the Department into another County position.

[2]Adrienne Wilkes ordinarily works as an appraisal data analyst, but has temporarily taken on a special assignment in the Department. Her replacement in the position of appraisal data analyst works in the same area as the other appraisers.

9. Real property appraisals in the State must be signed by a certified property appraiser, and all of the classifications in the proposed unit carry the same State appraiser certification requirement. To maintain their certification, appraisers are required to have 30 hours of continuing education every two years.[3]

Appraisal Division Manager

10. There are two levels of management in the Division, which is consistent with other divisions and departments. The Division Manager's duties primarily include managing, directing, and coordinating the activities of the Division. The position exercises direct supervision over professional, technical, and administrative support staff and is also required to have State certification as a property appraiser. The monthly salary range is between $7,382.99 and $8,971.76.

Supervisor Appraisers

11. There are three Property Appraisal Supervisors who report to the Division Manager. They have direct supervision over staff and have the added responsibility of planning, organizing, and managing the day-to-day residential, commercial, industrial, personal property, and farm appraisal functions of the Division. They sign off on appraisals. Their monthly salary range is between $5,727.20 and $6,836.56.

Senior Appraiser

12. The Senior Property Appraiser is a lead worker on assigned appraisal projects and overall operations, and exercises functional and technical supervision over assigned professional, technical, and administrative support staff, but has no direct supervisory authority over employees, which distinguishes it from the supervisor appraiser position. The Senior Appraiser acts in an advisory capacity on project priorities, assignments, and training; recommends the filling of vacant positions; and provides input on hiring decisions and performance evaluations. The senior appraiser is not the ultimate decision-maker in any of those areas. Employee performance evaluations are signed by the supervisor appraiser. Senior appraisers attend management meetings, but are sometimes excluded from all or part of those meetings. The hourly compensation is between $27.98 and $34.01.

13. On occasion, Senior Appraisers perform some limited functions of supervisory appraisers, including signing permission slips for medical appointments, attending the same training as supervisors, and receiving absence request forms from employees.

[3]Other unrepresented County employees also have certification/licensure and continuing education requirements as conditions of employment.

Appraisal Data Analyst

14. The Appraisal Data Analyst's primary duties are to compile, edit, and analyze property sales and all other market-based variables affecting property appraisal and valuation methods; prepare annual sales ratio studies; and prepare appraisal reports as needed. The Analyst also prepares presentations for the Board of Equalization, the Department of Revenue, and the Tax Court. The position has no supervisory authority and receives general supervision from the Division manager. The hourly compensation is between $27.98 and $34.01.

Property Appraiser II

15. The Appraiser II position is the journey level class within the property appraiser series. It has lead responsibility over the Appraiser I position and other non-supervisory staff. The position's primary responsibilities include appraising residential, farm, commercial, industrial, machinery and equipment, and personal property for tax assessments. An Appraiser II also inspects land, buildings, residences, and miscellaneous improvements for appraisal; collects and analyzes real estate market information to establish market value appraisals; analyzes zoning regulations; reviews applications when qualifying property for special assessments; appraises manufactured homes; prepares reports for the Board of Property Tax Appeals; and answers inquiries from the public concerning appraisals, assessments, and procedures. It requires State certification as a property appraiser as a condition of employment. The position is supervised by the appraisal supervisor, and the hourly compensation is between $25.36 and $30.83.

Property Appraiser I

16. The Appraiser I is an entry-level position with similar duties to those of an Appraiser II, except at a lower level of expertise. The Appraiser I is not expected to exercise the same kind of independence or judgment as an Appraiser II. The position is primarily responsible for appraising and determining value of real or personal property, classifying properties, preparing estimates of property values for assessment of *ad valorem* taxes, compiling market information, preparing appraisal reports, and answering owner inquiries. The hourly compensation range is between $21.87 and $26.58.

Other Management Position Descriptions, Duties, and Wages

17. The GIS Supervisor is primarily responsible for planning, organizing, and supervising GIS operations and personnel and performs a variety of technical tasks. No professional certification is required of the position, which exercises direct supervision over assigned technical and administrative support staff. The monthly wage is between $5,098.30 and $6,194.25.

18. The Tax Collections Supervisor is primarily responsible for planning, organizing, and supervising the personnel, and activities involved in the collection of real and personal property. The position has full supervisory responsibilities. The monthly salary range is $5,355.01 to $6,507.67.

19. The Archivist and Records Supervisor is primarily responsible for planning, organizing, and supervising the records management functions of the County, and ensuring records compliance with Federal, State, and local statutes, regulations, and rules. The position exercises direct supervision over assigned administrative support staff. The monthly salary is $5,098.30 to $6,194.25.

20. The Cartography and Records Manager is primarily responsible for managing, directing, and coordinating the activities of the Cartography Division. No specialized certification is required of the position, which exercises direct supervision over technical and administrative support staff. The monthly salary range is between $6,524.17 and $7,927.36.

21. The Senior Administrative Specialist position is primarily responsible for providing a variety of administrative support of considerable complexity requiring thorough knowledge of the organization. It exercises direct supervision over assigned administrative support staff. The hourly wage is between $20.13 and $24.47.

22. The Data Control Coordinator position is primarily responsible for coordinating information for processing activities, including the compilation of input and retrieval of data. The position has direct supervisory authority over employees operating on-line computer terminal equipment, facilitates the training of employees in the section, researches program modifications, and prioritizes projects to meet data processing needs. The hourly compensation is between $26.64 and $32.38.

Other Division Non-Management Positions

23. The GIS Analyst position is primarily responsible for providing professional-level support to end users of the GIS, including analyzing statistics and spatial data to create diagrams, preparing illustrations and maps, developing applications using GIS technology, and recommending programs based on the results of the data analysis. It is a lead position that provides consultative advice on GIS methods, but it does not have supervisory authority and requires no specialized certification. The hourly wage is between $30.89 and $37.55.

24. The Administrative Specialist II position is a generic position in the County and may be assigned to any department. The position provides administrative support of moderate complexity, requiring knowledge of the work unit's procedures and operating details; performs skilled word processing; prepares correspondence using independent judgment in content and style; and has considerable public contact. This position may be supervised by a senior administrative specialist. The hourly wage is between $18.23 and $22.16.

25. The Personal Property Tax Auditor position performs site inspections, collects data, and analyzes financial statements and accounting records of businesses to assure compliance with personal property assessment. The position may exercise functional and technical supervision over assigned technical support staff, but does not include any direct supervisory duties. The hourly compensation is between $25.36 and $30.83.

Other Counties

26. Appraisers employed by Multnomah County are members of a bargaining unit of approximately 2,800 employees. Multnomah County has approximately nine different bargaining units. Appraisers employed by Clackamas County are members of a bargaining unit of approximately 760 employees. Clackamas County has approximately eight different bargaining units. In both counties, other employees are in the bargaining units with the Appraisers.

History of Organizing Efforts in the County

27. As set forth above, the County currently recognizes five bargaining units with five different labor organizations (one of which is the Petitioner).

28. There have been five petitions previously presented to this Board.

a. In 1987, this Board dismissed the Union's petition to represent clerical employees in the Department of Safety. *Oregon AFSCME Council 75 v. Washington County Department of Public Safety (Sheriff's Office)*, Case No. RC-27-87, 10 PECBR 172 (1987).

b. In 1992, this Board dismissed the Union's petition for a department-wide unit in the County's Department of Housing Services. *Oregon AFSCME Council 75 v. Washington County*, Case No. RC–57-92, 14 PECBR 271 (1993).

c. In 1993, this Board dismissed a petition filed by another union that sought to represent a bargaining unit composed solely of employees in the County's Land Development Services Division, Building Services Section. *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, Local Union No. 290 v. Washington County*, Case No. RC-20-93, 14 PECBR 679 (1993).

d. In 2004, this Board certified a unit of 22 residential counselors and residential services monitors at the County's Community Corrections Center. *Oregon AFSCME Council 75 v. Washington County*, Case No. RC-30-03, 20 PECBR 745 (2004).

e. In 2011, the Union filed a clarification petition seeking to add on-call residential services monitors to the existing unit of residential counselors and residential services monitors. *Oregon AFSCME Council 75 v. Washington County*, Case No. UC-21-11. The parties entered into a unit clarification consent election agreement and the on-call employees were added to the existing unit.

29. Appraisers have never previously attempted to form their own bargaining unit.

CONCLUSIONS OF LAW

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

2. The proposed bargaining unit is not appropriate.

DISCUSSION

The Petitioner seeks to form a new bargaining unit without an election consisting of approximately 29 unrepresented appraisers working in four job classifications. It argues that the appraisers' community of interest, wages, hours, and working conditions, as well as the desires of the employees and the history of collective bargaining, warrant finding the proposed unit appropriate. The County argues that the proposed unit: (1) is inconsistent with this Board's longstanding preference for the largest possible appropriate bargaining unit, particularly as that preference relates to the County; (2) conflicts with the history of collective bargaining between the County and the various labor organizations that currently represent some of the County's employees; (3) does not have a sufficiently distinct community of interest from other unrepresented employees; and (4) would unduly fragment the workforce.[4] We agree with the County that the proposed unit is inappropriate, reasoning as follows.

Standards for Decision

Under ORS 243.682(2)(a), when a labor organization, acting on behalf of the employees, files a petition alleging that a majority in a unit appropriate for the purpose of collective bargaining wishes to be represented by a labor organization, the Board shall investigate the petition. If this Board finds that the unit is appropriate for representation, we may certify the labor organization as the exclusive representative without an election.

In deciding whether a proposed bargaining unit is appropriate, this Board "consider[s] such factors as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees." ORS 243.682(1)(a); *see also Klamath Community College Faculty Association, OEA/NEA v. Klamath Community College*, Case No. CC-03-09, 23 PECBR 484, 496 (2010). The list of statutory factors is not exclusive, and we have, along with the listed factors, weighed our preference for certifying the largest possible appropriate unit. *Klamath Community College*, 23 PECBR at 497; *OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251 (2001); *U of O Chapter, AFT v. U of O*, 92 Or App 614, 618-19, 759 P2d 1112 (1988). In determining what constitutes an appropriate bargaining unit, we have discretion to decide how much weight to give each relevant factor in any particular case. *OPEU*, 173 Or App at 436 (2001); *U of O*,

[4]The County also argues that the senior property appraiser is a supervisory employee and ineligible for representation under the Public Employee Collective Bargaining Act (PECBA). Because we find the proposed unit inappropriate, we do not address that argument.

92 Or App at 617-18. Finally, we may determine a unit to be appropriate, even though some other unit might also be appropriate. ORS 243.682(1)(a); *OPEU*, 173 Or App at 436; *Klamath Community College*, 23 PECBR at 497. With those principles in mind, we turn to the appropriateness of the proposed unit.

Community of Interest

The term "community of interest" includes such factors as "similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, [and] common supervisor * * *." OAR 115-025-0050(2). There is no doubt that the petitioned-for appraisers share a strong community of interest among themselves. Specifically, the appraisers perform work in a narrow field within the Department. The appraisers also share licensure and continuing education requirements, as well as similar job duties, promotional opportunities, and common supervision.

The appraisers also, however, share a community of interest (albeit not as strong) with other unrepresented County employees, including other non-clerical employees in the Department. Although the appraisers' interaction with those employees is somewhat limited, the interaction is necessary in meeting the appraisers' job duties. Specifically, the appraisers incorporate the work of other Department employees, and vice-versa. Moreover, the record establishes that other unrepresented County employees also have licensure and continuing education requirements.

We note, however, that the unrepresented non-appraisers do not share common supervisors with the appraisers, and the promotional ladders available to appraisers and other employees are distinct. Moreover, the record does not establish interchange or transfers between the appraisers and other unrepresented employees.

Wages, Hours, and other Working Conditions

Appraisers in the proposed bargaining unit are compensated hourly, which is typical of similar unrepresented classifications in the County. Entry-level appraisers' salaries range from $21.87 per hour to $26.58 per hour, and the Appraiser II salaries range from $25.36 per hour to $30.83 per hour. The salary range of Senior Appraisers and the Appraisal Data Analyst is $27.98 to $34.01. Employees in the proposed unit receive the same benefits, including medical, dental, insurance, retirement, vacation, and sick leave, as all other unrepresented employees in the County, and they are, with limited exceptions noted herein, subject to the same personnel rules and policies.

The Department has its own dress code and travel policy, which applies to appraisers and other unrepresented Department employees. Appraisers work in the same office, except when they are assigned to special projects and temporarily relocate. Appraisers also work on the same floor as Department employees in the Cartography Division, and they work in the same building as other Department employees.

Appraisers spend approximately 35 to 50 percent of their time working independently in the field, to which they drive their own vehicles. The record does not establish that other unrepresented Department or County employees spend comparable amounts of time in the field.

Appraisers are not permitted to flex their time, but that is not typically permitted by the County. Appraisers have a unique restriction on vacation leave, which includes three blackout periods during the year, during which they cannot take vacation leave.

History of Collective Bargaining

The appraisers have never been represented, but, as set forth above, the County has a history of collective bargaining with four different labor organizations (including the Union) representing five different bargaining units.

Desires of Employees

The Petitioner has presented a sufficient showing of interest to demonstrate that the proposed unit of employees wish to form a new bargaining unit consisting only of appraisers.

The Largest Possible Appropriate Unit/Undue Fragmentation

As set forth above, in determining whether a proposed unit is appropriate, this Board has long weighed a preference for certifying the largest possible appropriate unit. *Klamath Community College*, 23 PECBR at 497. Thus, we avoid splitting an employer's workforce into a number of smaller bargaining units because such an action is contrary to many of the policies underlying the PECBA. *Federation of Oregon Parole and Probation Officers v. Clatsop County and AFSCME Local 2746*, Case No. RC-009-12, 25 PECBR 174, 183 (2012). Specifically, smaller bargaining units contravene the PECBA policy of creating "greater equality of bargaining power between public employers and public employees." *Id.* (quoting ORS 243.656(3)). Additionally, more bargaining units increases the potential for labor disputes that could result in work stoppages and the disruption of public services. *Id.* Finally, unduly fragmenting the workforce into excessive bargaining units overly burdens employers if they have to engage in bargaining sessions for the many splinter groups on a round-robin basis. *Id.*

Here, the Union does not contend that the proposed unit is the largest possible appropriate unit. It asserts, however, that our preference for larger bargaining units should not be applied too rigidly.

We agree with the Union that our preference for certifying the largest possible appropriate unit should not be blindly applied. Rather, it is one factor, along with the other designated statutory factors, that we weigh in determining the appropriateness of a proposed unit.[5] Here, however, the

[5]That preference is given even stronger weight in the context of a petition that seeks to "carve out" a group of employees from an existing larger unit. *See, e.g., Oregon Workers Union v. State of Oregon, Department of Transportation and Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. RC-26-05, 21 PECBR 873, 885 (2007) (a labor organization may "carve out" only a portion of an existing bargaining unit where (1) the proposed unit has a community of interest that is "clearly distinct" from the existing unit, *or* (2) "compelling reasons" warrant creation of a "splinter bargaining unit"). As the Union correctly notes, our concerns regarding undue fragmentation are particularly heightened in that context.

Union has proposed a particularly small unit that excludes even other similarly-situated non-clerical employees who work in the Department on the same floor. Moreover, the work of those other non-clerical Department employees overlaps in meaningful ways with the work of the appraisers.[6] When weighing the "largest possible appropriate unit" factor along with 1) the shared community of interest between appraisers and other professional (*i.e.*, non-clerical) employees in the Department (as well as some other professional County employees), and 2) the wages, hours, and working conditions of the appraisers when compared to other Department and County employees, we conclude that the proposed unit is not appropriate.

In reaching this conclusion, we recognize, as we have previously, that in exercising our discretion as to the appropriateness of a proposed unit, "we sometimes must strike a balance between * * * employee free choice against the need to establish and maintain stable labor relations and to equalize bargaining power." *Oregon Workers Union*, 21 PECBR at 889. This case represents a situation where that balance tilts, albeit slightly, against certifying the proposed unit.

Additionally, we distinguish three cases relied on by the Union in arguing that the proposed unit should be certified: *Laborers International Union of North America, Local 320 v. City of Keizer*, Case No. RC-37-99, 18 PECBR 476, 484 (2000); *Clatsop County*, 25 PECBR at 174; and *Washington County*, 20 PECBR at 745.

In *City of Keizer*, this Board certified a bargaining unit of eight utility workers, even though the employer employed 21 unrepresented employees. In doing so, we reasoned that the utility workers all performed work outside, whereas the other unrepresented employees worked inside. 18 PECBR at 484. We further reasoned that the utility workers' department was "physically separated and operate[d] independently from" other departments. *Id.* Moreover, we explained that our analysis of undue fragmentation considers "the size of the potential units and the occupational groupings that would result." *Id.* Applying that consideration in *City of Keizer*, we reasoned that certifying the proposed unit would not unduly fragment the workforce because the employer would only be required to bargain with two bargaining units and, in the future, *at most*, three bargaining units. *Id.* at 484-85.

Here, in contrast to *City of Keizer*, the work of the appraisers is not physically separate from the other unrepresented employees in the Department. Moreover, the proposed unit does not provide us with a meaningful way of excluding other non-clerical Department employees, who also share a notable community of interest with the appraisers. Additionally, this case does not present a situation where we could have some confidence that, if we certified the proposed unit, potential future units would be relatively limited. Therefore, we distinguish *City of Keizer*.

We turn to *Clatsop County*, where we agreed that it was appropriate to "carve out" a unit of five Adult Parole and Probation Officers (PPOs) from an existing unit of 26 employees in that county's Community Corrections-Sheriff's Department. In reaching that decision, we found that

[6]For its part, in oral argument, the County acknowledged that it was a "good question" as to whether a department-wide unit, excluding "Countywide" clerical employees, would be an appropriate unit. The County further agreed that such a Department unit would be "more appropriate" than the proposed unit.

the PPOs *lacked* a community of interest with other Sheriff's Department employees, in part because the primary duty of the PPOs was to rehabilitate released offenders, whereas the primary duty of the Sheriff's Department Deputies was to arrest suspects and maintain custody of convicted individuals. 25 PECBR at 184. That determination was consistent with this Board's reasoning in *Federation of Oregon Parole and Probation Officers v. Polk County Community Corrections*, Case No. RC-71-88, 11 PECBR 667 (1989).

Moreover, in *Clatsop County*, we further found other compelling reasons to certify the proposed small unit of PPOs. Specifically, we found that this Board had historically considered PPOs to be a small group of professional employees who constituted a "craft" for collective bargaining purposes. 25 PECBR at 185 (citing *Federation of Oregon Parole and Probation Officers v. Lane County and AFSCME Local 2831*, Case No. RC-10-05, 21 PECBR 235, 241 (2006); *Polk County*, 11 PECBR at 690).

Here, unlike *Clatsop County*, the appraisers do not *lack* a community of interest with other non-clerical Department employees or even some other professional County employees outside the Department. Moreover, this Board has not historically considered appraisers to be a traditional "craft" unit for purposes of collective bargaining. Consequently, we consider *Clatsop County* inapposite.

Finally, in *Washington County*, which notably involves the same employer as this matter, we found that a proposed unit of all regular employees in the County's Community Corrections Residential Services was not appropriate. Specifically, based on prior orders, we concluded that including clerical employees ("administrative specialists") in a departmental unit would inappropriately fragment those County-wide clerical employees. 20 PECBR at 756.

That conclusion, however, did not end our inquiry. Because this Board has the authority, after concluding that a proposed unit is inappropriate, to then determine whether a unit contained within a petition is appropriate, we next considered whether the remainder of the proposed departmental unit (*i.e.*, all Community Corrections Center (CCC) employees except the clericals) would be appropriate. *Id.* The County contended that an appropriate unit must also include certain employees from a different department (the Juvenile Department). We disagreed with the County's contention, reasoning that the CCC employees worked exclusively with adult offenders, whereas the Juvenile Department employees worked exclusively with juveniles. *Id.* Moreover, the CCC employees and Juvenile Department employees worked at different facilities and did not interact on the job; the employees were also administratively divided under separate departments. *Id.* at 756-57. Under those circumstances, we found that a distinctive community of interest existed in a CCC unit (excluding clerical employees), and that certifying that unit was "consistent with the County's history of functional organizing [because] it include[d] all strike-permitted personnel working with adult offenders." *Id.* at 757.[7]

[7]We noted that we had previously determined that CCC residential services monitors should be excluded from a strike-prohibited unit. *Id.* at 757 n 7.

Here, the proposed unit excludes clerical employees, an exclusion that is consistent with our prior decisions regarding this employer. *Id.* at 753-56. However, unlike the more recent determination concerning the County's CCC employees, this proposed unit is not a departmental unit that excludes only the clerical employees. Rather, this proposed unit is a fragment of a non-clerical departmental unit that also excludes other Department employees who share a community of interest with the appraisers.

Moreover, in our *Washington County* "CCC" case, this Board determined that there was a distinctive community of interest shared by only the CCC employees. Here, in contrast, we do not find that the appraisers share a similarly distinctive community of interest, particularly as relative to other non-clerical employees in the Department. Unlike our "CCC" case, the appraisers here do not work in a separate building away from other non-clerical Department employees. Additionally, the appraisers and other non-clerical Department employees interact with each other in meaningful ways necessary to fulfill their respective job duties; such interaction was lacking in the "CCC" case. Consequently, we do not agree that our *Washington County* "CCC" case requires a conclusion that this proposed unit is appropriate.

Consequently, for the foregoing reasons, we conclude that the proposed bargaining unit is inappropriate, and we will dismiss the petition.

ORDER

The petition is dismissed.

DATED this 26 day of April, 2013.

_____
Kathryn A. Logan, Chair

_____
Jason M. Weyand, Member

_____
Adam Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-24-11

(UNFAIR LABOR PRACTICE)

JACKSON COUNTY, Complainant, v. JACKSON COUNTY SHERIFF'S EMPLOYEES ASSOCIATION, Respondent.	)	FINDINGS AND ORDER ON RESPONDENT'S PETITION FOR REPRESENTATION COSTS

On April 28, 2011, Jackson County (County) filed an unfair labor practice complaint against the Jackson County Sheriff's Association (Association), alleging that the Association violated ORS 243.672(2)(b). On November 5, 2012, this Board issued an Order dismissing the County's complaint. 25 PECBR 209 (2012). On November 21, 2012, the Association submitted its petition for representation costs. On December 11, 2012, the County filed its objection to the amount of the costs sought by the Association.

Pursuant to ORS 243.676(2)(d) and OAR 115-035-0055, this Board finds:

1. The Association filed a timely petition for representation costs and the County filed timely objections to the petition.

2. The Association is the prevailing party. We dismissed the County's complaint, holding that it had not met its burden of proof that the Association violated ORS 243.672(2)(b).

3. The hearing lasted one day. Attorneys for the Association submitted affidavits showing that 35.8 hours of legal work were performed at $225 per hour, for a total cost of $8,055. The Association's petition requests payment of $3,500 in representation costs, which is the maximum amount that this Board customarily awards in the absence of a civil penalty. *Benton County Deputy Sheriff's Association v. Benton County*, Case No. UP-24-06, 22 PECBR 46, 47 (2007) (Rep. Cost Order); OAR 115-035-0055.

4. The requested hourly rate is higher than average. The average hourly rate for representation costs is between $165 and $170 per hour. *Clackamas County Employees Association v. Clackamas County/Clackamas County District Attorney*, Case No. UP-07-08, 24 PECBR 769, 771 (2012) (Rep. Cost Order). However, the number of hours claimed is below average. Cases generally require an average of 45 to 50 hours per day of hearing. *See AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 24 PECBR 720, 723 (2012) (Rep. Cost Order). We will adjust our award accordingly.

5. The County objected to a number of hours claimed by the Association attorneys, arguing that some of the time claimed might have been related to a separate unfair labor practice that the Association filed against the County. The County requested that we reduce the award accordingly, as it was not clear whether some communications with the ALJ, Board staff and County Counsel were solely related to this case. The County offers no specific proof that the hours are not properly claimed in this matter, and we do not find the County's argument sufficiently convincing to reduce the hours claimed in this matter. Further, as noted above, the number of hours claimed is significantly below average when including the contested hours.

6. An average award is generally one-third of the reasonable representation costs of the prevailing party, subject to the $3,500 cap contained in OAR-115-035-0055(1)(a). Having considered the purposes and policies of the Public Employee Collective Bargaining Act, our awards in prior cases, and the reasonable cost of services rendered, this Board awards the Association representation costs in the amount of $2,029.

ORDER

The County will remit $2,029 to the Association within 30 days of the date of this Order.

DATED this 30 day of April 2013.

Kathryn A. Logan

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-25/26/27-11

(UNFAIR LABOR PRACTICE)

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

On February 25, 2013, the Board heard oral argument on Complainant's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald, by way of a stipulation of facts on September 25, 2012. The record closed on September 26, 2012, following receipt of the parties' briefs.

Anil S. Karia, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented Complainant.

Stephanie Harper, Deputy City Attorney, City of Portland, Portland, Oregon, represented Respondent.

On May 2, 2011, the Portland Police Association (Association or PPA) filed three unfair labor practice complaints against the City of Portland (City). The complaints allege that the City imposed unpaid suspensions on Sergeant John Birkinbine (Case No. UP-25-11), Officer Ryan Lewton (Case No. UP-26-11), and Sergeant Liani Reyna (Case No. UP-27-11), contrary to Article 20.1 and 20.2 of the parties' collective bargaining agreement in violation of ORS 243.672(1)(g). Grievances over these disciplinary actions were also submitted to Arbitrator Janet Gaunt. The processing of these complaints was held in abeyance pending the completion of the parties' grievance procedure.

On May 31, 2012, after the arbitrator held that the grievances were not procedurally arbitrable, the Association filed amended complaints in these three cases and requested that this Board proceed with the processing of the complaints.

The ALJ consolidated the three complaints for hearing. She then bifurcated the "procedural" issue concerning the effect of the arbitrator's decision on the Association's subsection (1)(g) claim from the "merits" of the alleged contract violations. The City filed a timely answer to the complaints.

The issue presented is:

Should these complaints, alleging that the City's decision to suspend Sergeant John Birkinbine, Officer Ryan Lewton, and Sergeant Liani Reyna violated ORS 243.672(1)(g), be dismissed as a result of Arbitrator Gaunt's Opinion and Award holding that the grievances were not procedurally arbitrable?

RULINGS

1. A footnote in the parties' Fact Stipulation stated that the City was offering a copy of an arbitration award issued by Arbitrator William Greer into the record, the Association was objecting to that offer, and the parties would address the relevance of the award in their briefs. A copy of Arbitrator Greer's award was attached to the Stipulation as Employer's Exhibit 1. Because the parties agreed to waive hearing and submit these matters through stipulation, only matters that the parties have agreed on as part of the record will be considered. We also note that the City failed to address the relevance of this award in its brief. Therefore, the ALJ's ruling that Employer's Exhibit 1 is not received as part of the record in this proceeding was appropriate.

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

FINDINGS OF FACT

1. The City of Portland is a public employer under ORS 243.650(20).

2. The Association is a labor organization under ORS 243.650(13).

3. The relevant collective bargaining agreement (Agreement) between the Association and the City is effective July 1, 2010 through June 30, 2013. Articles in that Agreement applicable to this matter include: 1) Article 20.1, which provides that "[d]isciplinary action shall be for just cause * * *"; 2) Article 20.2, which provides that discipline "shall be done in a manner that is least likely to embarrass the officer before other officers or the public"; 3) Article 22.2, which provides that an officer or the Association may grieve a breach of the Agreement; and 4) Article 22, which provides for a four-step grievance and arbitration process (including an obligation that the Association timely notify the City of an intent to arbitrate), culminating in binding arbitration, with "[t]he arbitrator's decision [being] final and binding * * *."

4. John Birkinbine is employed by the City as a police sergeant and is a member of the Association bargaining unit. The City issued a disciplinary letter dated November 8, 2010, notifying Birkinbine that he would be suspended without pay for 80 hours for an incident that occurred on January 29, 2010. Birkinbine received this letter in person on November 15, 2010.

5. Ryan Lewton is employed by the City as a police officer and is a member of the Association bargaining unit. The City issued a disciplinary letter dated November 8, 2010, notifying Lewton that he would be suspended without pay for 80 hours for an incident that occurred on January 29, 2010. Lewton received this letter in person on November 16, 2010.

6. Liani Reyna is employed by the City as a police sergeant and is a member of the Association bargaining unit. The City issued a disciplinary letter dated November 8, 2010, notifying Reyna that she would be suspended without pay for 80 hours for an incident that occurred on January 29, 2010. Reyna received this letter in person on November 16, 2010.

7. On November 30, 2010, the Association filed grievances for Birkinbine, Lewton, and Reyna (Grievants), asserting that the City's suspensions violated Article 20.1 and 20.2 of the parties' Agreement. The Association stated in the grievances that "[t]he discipline was not for just cause, is disproportionate to any offense committed by Grievant, is out of keeping with the standards of discipline in the Bureau, fails to take into account mitigating circumstances, and violates the principles of progressive discipline." The Association requested that the suspensions be rescinded, references to the suspensions be removed from the Grievants' personnel files, and the Grievants be made whole for lost wages and benefits.

8. By letter dated April 8, 2011, the City notified the Association that the grievances were not procedurally arbitrable because the Association failed to notify the City of its intent to arbitrate the grievances in a timely manner.

9. The parties agreed to consolidate the grievances, bifurcate the proceedings, and proceed to hearing solely for the purpose of deciding the procedural arbitrability issue. On February 10, 2012, Arbitrator Gaunt held an arbitration hearing and heard evidence regarding only the procedural arbitrability issue. During the hearing, the Association acknowledged that it should have provided the City with written notice of intent to arbitrate under Article 22.4 by March 2, 2011. The arbitrator found that the City did not receive the notice until March 31, 2011. The parties did not submit to the arbitrator the issue of whether the City had just cause to discipline the Grievants, and the arbitrator did not hear evidence regarding that issue at the hearing. Had Arbitrator Gaunt ruled that the grievances were procedurally arbitrable, the parties would have submitted the just cause issue and evidence for each Grievant at a second arbitration proceeding.

10. On May 14, 2012, Arbitrator Gaunt issued her opinion and award. Based on her interpretation of the grievance and arbitration provision in the parties' agreement and a prior arbitration award interpreting that same provision, which she decided to treat as controlling precedent, Arbitrator Gaunt concluded that the grievances were not procedurally arbitrable.

CONCLUSIONS OF LAW

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

2. The complaints alleging that the Grievants' suspensions violated ORS 243.672(1)(g) are dismissed, as a result of Arbitrator Gaunt's Opinion and Award holding that the grievances were not procedurally arbitrable.

DISCUSSION

This matter comes before us as a result of claims filed by the Association alleging that the City disciplined three employees without just cause contrary to Article 20.1 and 20.2 of the parties' Agreement and in violation of ORS 243.672(1)(g). The Association had previously filed grievances contesting the employees' suspensions under the grievance and arbitration procedure in Article 22 of the parties' Agreement. The arbitrator denied the grievances on the basis that they were not procedurally arbitrable because they were untimely filed. The arbitrator did not address the "just cause" claims because the parties had agreed that this would only occur if the arbitrator found the grievances procedurally arbitrable. The question before us is whether the Association may bring its subsection (1)(g) "just cause" contract claims to us, notwithstanding the arbitration award that the Association's grievances regarding those same claims were not procedurally arbitrable. For the following reasons, we dismiss the Association's subsection (1)(g) claims.

ORS 243.672(1)(g) makes it an unfair labor practice for a public employer to"[v]iolate the provisions of any written contract with respect to employment relations including an agreement to arbitrate or to accept the terms of an arbitration award, where the parties have agreed to accept arbitration awards as final and binding upon them." The Association argues that because it has filed contract violation claims under subsection (1)(g) and is not seeking to enforce an arbitration award, this Board should apply its "deferral" standards in evaluating the effect of the arbitration award on the claims at issue here. The City argues that this Board should apply its "enforcement" standards in cases such as this—*i.e.*, where a party files a contract violation claim under subsections (1)(g) or (2)(d) after an arbitrator has ruled on a grievance concerning that claim. To do otherwise, the City argues, would be the equivalent of giving the Association "two bites of the apple," effectively invalidating certain contract provisions and the finality of the arbitration process.

Enforcement of Arbitration Decisions Under Subsection (1)(g) and (2)(d) Claims

The question of the effect of the arbitration decision on the Association's subsection (1)(g) contract claims arises in the context of this Board's requirement that parties must exhaust their contractual dispute resolution process before a complainant can litigate a contract claim as an unfair labor practice violation under subsection (1)(g) or (2)(d). *West Linn Education Association v. West Linn School District No. 3JT (West Linn),* Case No. C-151-77,

3 PECBR 1864 (1978).[1] In *West Linn*, this Board relied on the U.S. Supreme Court's adoption of an exhaustion of administrative remedies doctrine in private sector labor relations cases under Section 301 of the Labor Management Relations Act (LMRA), 29 U. S. C. § 185, in *Republic Steel Corp. v. Maddox*, 379 US 650, 85 S Ct 614, 13 L Ed2d 580 (1965). Section 301, which provides that suits for the enforcement of private sector collective bargaining agreements between an employer and a labor organization may be brought in any district court of the United States, is analogous to a contract violation claim under ORS 243.672(1)(g) and (2)(d). *West Linn*, 3 PECBR at 1870.

In adopting the exhaustion requirement, we explained that,

> "[f]or this Board to hear a complaint alleging contract violation as an unfair labor practice without first requiring the complainant to utilize the dispute resolution procedures agreed to in the collective bargaining agreement would undermine the collective bargaining process. This Board concludes that the legislative purpose of the [Public Employee Collective Bargaining Act] PECBA can best be effectuated by adopting the exhaustion of contract remedies doctrine. This doctrine insures the integrity of the collective bargaining process by insuring that parties to collective bargaining agreements follow the procedures they have negotiated for the resolution of contract disputes. It also encourages the parties to negotiate grievance procedures to resolve contract disputes. This Board believes this to be sound labor relations policy. Labor relations stability depends on the parties working together to resolve disputes which directly affect them. The purpose of grievance procedures is to resolve those disputes at the lowest level of the organization, in the least expensive and most expeditious manner. The unfair labor practice action does not meet these purposes. Unfair labor practice actions are more time consuming and are more expensive than the grievance process. In addition, the unfair labor practice, unlike the grievance process, does not bring the parties together and develop the full range of opportunities for the parties to settle, compromise, and otherwise improve their ongoing relationship." *Id.* at 1869-70.

After the adoption of the *West Linn* exhaustion requirement, we addressed the question of what type of review should be applied to an arbitration award that a party was attempting to enforce under ORS 243.672(1)(g). This Board originally determined that it would review arbitration awards in enforcement proceedings under the deferral standards adopted in

[1]The three exceptions to the exhaustion requirement are: (1) the employer repudiates the grievance process; (2) the grievant is precluded from pursuing the grievance in a timely fashion because the exclusive representative did not fairly represent him; and (3) the ultimate decision maker in the grievance process lacks authority to remedy the grievance. *West Linn*, 3 PECBR at 1870. We take official notice of this Board's records, which show that the three employees, on whose behalf the Association is pursuing the complaints in this matter, filed unfair labor practice complaints against the Association and the City in regard to the suspensions at issue here on October 29, 2012. *Birkinbine v. Portland Police Association and City of Portland*, Case No. FR-5-12; *Reyna v. Portland Police Association and City of Portland*, Case No. FR-6-12; and *Lewton v. Portland Police Association and City of Portland*, Case No. FR-7-12. The Association has not argued that any of the exceptions to the exhaustion requirement have been met.

Siegel v. Gresham Grade Teachers Assn. (Siegel), Case No. C-112-76, 3 PECBR 1390 (1977), *aff'd*, 32 Or App 541, 574 P2d 692 (1978). *See also Eugene Education Association v. Eugene School District 4J (Eugene)*, Case No. C-141-78, 4 PECBR 2598 (1980). Under the *Siegel* deferral standards, the Board enforced an arbitration award if the proceedings were fair and regular, the parties had agreed to be bound thereby, and the decision of the arbitrator was not palpably wrong and, therefore, not repugnant to the PECBA. *Eugene*, 4 PECBR at 2604.

In *Willamina Education Association 30J and Luciano v. Willamina School District No. 30-44-63J (Willamina)*, Case No. C-253-79, 5 PECBR 4086 (1980), however, this Board decided that in the context of enforcement proceedings under subsections (1)(g) and (2)(d), reviewing the merits of an arbitration decision under the third element of the *Siegel* deferral standards was contrary to the state policy favoring binding arbitration of collective bargaining disputes. We also recognized that the *Siegel* deferral standards were substantially different from the arbitration review standards applied by the Oregon appellate courts and the U.S. Supreme Court under Section 301 of the LMRA. We concluded that "that the policies of the PECBA will be better effectuated if [the Board] restricts its review of arbitration awards in (1)(g) and (2)(d) complaints to the stricter standards generally followed by federal and Oregon courts." 5 PECBR at 4097-98.

Consequently, this Board held that in subsection (1)(g) and (2)(d) complaints it will enforce arbitration awards unless it is clearly shown that either:

> "(1) The parties did not, in a written contract, agree to accept such an award as final and binding upon them (for example, an arbitrator finds no violation of the agreement, but upholds a grievance as constituting an unfair labor practice; an arbitrator exceeds a limitation on his authority expressly provided in the collective bargaining agreement); or,
>
> "(2) Enforcement of the award would be contrary to public policy (for example, the award requires the commission of an unlawful act; the arbitration proceedings were not fair and regular and, thus, did not conform to normal due process requirements)." *Id.* at 4099-4100.

We further clarified that "[t]he *Siegel* tests will be applied in ULP cases *charging other than a (1)(g) or (2)(d) violation*," and then specifically stated that the new *Willamina* "enforcement" test would be used

> "*in any case where a party charges only a violation of a contract under ORS 243.672(1)(g) or (2)(d) after an arbitrator has ruled on the issue*. Thus, where a party carries a grievance through arbitration and loses, and then files an unfair labor practice complaint under (1)(g) or (2)(d), this Board will dismiss the complaint so long as the arbitrator's award meets the 'enforcement' tests. The *'deferral' tests will not be applied in such cases*." *Id.* at 4106 n 2 and 4 (emphases added).

The Court of Appeals has affirmed our use of the *Willamina* standard, rather than the *Siegel* standard, in reviewing arbitration awards in subsection (1)(g) enforcement proceedings. *Willamina Sch. Dist. 30J v. Willamina Ed. Assn.*, 60 Or App 629, 635, 655 P2d 189 (1982).

Review of Arbitration Decisions in Claims Other Than Subsections (1)(g) and (2)(d)

Conversely, when a union alleges a violation of *non-contractual statutory rights* under subsections of ORS 243.672 *other than (1)(g) and (2)(d)*, this Board does not require parties to exhaust their grievance process. *Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO v. Southwestern Oregon Community College*, Case No. UP-135-92, 14 PECBR 657, 663 (1993); *AFSCME Council 75, Local 1246 v. State of Oregon, Fairview Training Center*, Case No. UP-103-92, 14 PECBR 610, 611 (1993). However, where parties have filed an unfair labor practice complaint alleging such claims and are simultaneously processing a grievance under their contract grievance and arbitration procedure, we generally follow a practice of holding the unfair labor practice complaint in abeyance pending the resolution of the grievance process.[2] *City of La Grande v. La Grande Police Association, Teamster Local 670*, Case Nos. C-40/45-81, 6 PECBR 4808, 4814 (1981) (it is our policy to postpone processing a subsection (1)(a) complaint while the parties are processing a pending grievance that addresses the issues raised in a complaint); *Oregon School Employees Association v. Astoria School District 1*, Case No. UP-52-91, 13 PECBR 474, 478-80 (1992) (it is this Board's practice to postpone processing a subsection (1)(e) unilateral change claim pending completion of a simultaneous grievance process).

In the previously mentioned *Siegel* decision, 3 PECBR 1390, this Board addressed the effect to be given to a prior arbitration award in cases alleging statutory unfair labor practice violations and we decided to review such arbitration decisions under the "deferral" standards adopted by the National Labor Relations Board (NLRB) in *Spielberg Manufacturing Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955), and *International Harvester Co.*, 138 NLRB 923, 51 LRRM 1155 (1962).[3] In *Spielberg*, the NLRB held that it was "not bound, as a matter of law, by an arbitration award." 112 NLRB at 1081. However, it stated it would defer to an arbitration award covering the charges in a complaint alleging violations of the National Labor Relations Act (NLRA) if

[2]This Board and parties sometimes refer to holding a matter in abeyance pending completion of arbitration as "deferring" to the arbitration process. The use of the term "deferral" in this context must be distinguished from its use in our policy of "deferring" to the arbitration award itself, under which we accept the decision of the arbitrator as dispositive (with limited exceptions) of the unfair labor practice claims.

[3]The PECBA, which was adopted by the Oregon legislature in 1973, was modeled on the National Labor Relations Act (NLRA). The courts have directed this Board to look to cases decided by the NLRB in determining the legislature's intent, especially those cases decided before the adoption of the PECBA. *Elvin v OPEU*, 313 Or 165, 176 n 7, 177-78, 832 P2d 36 (1992).

> "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators' award." *Id*. at 1082.[4]

It is important to note that there is no direct analog to ORS 243.672 (1)(g) and (2)(d) under the NLRA. As a result, although the NLRB has authority to interpret collective bargaining agreements in the context of deciding an unfair labor practice complaint, it "is neither the sole nor the primary source of authority in such matters." *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 202, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991). As the U.S. Supreme Court explained:

> "in some circumstances the authority of the Board and the law of the contract are overlapping, concurrent regimes, neither pre-empting the other. *NLRB v. C & C Plywood Corp*., 385 U.S. 421 (1967); *Carey v. Westinghouse Electric Corp*., 375 U.S. 261, 268 (1964); *Smith v. Evening News Assn*., 371 U.S. 195, 197-198 (1962); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 101, n. 9 (1962). Arbitrators and courts are still the principal sources of contract interpretation, but the Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts. *Smith v. Evening News Assn*., 371 U.S. 195, 197-198 (1962). It may also, if necessary to adjudicate an unfair labor practice, interpret and give effect to the terms of a collective bargaining contract. *NLRB v. C & C Plywood Corp*., 385 U.S. 421 (1967)." *NLRB v. Strong Roofing & Insulating Co*., 393 US 357, 360, 89 S. Ct. 541, 21 L. Ed. 2d 546, (1969).

In addition, the unfair labor practice complaints in *Siegel* and *Spielberg* also did not deal with contract claims filed by a union or an employer. The complaint in *Siegel* was filed by three employees alleging that the union had caused the employer to improperly withhold payments in lieu of dues in violation of ORS 243.672(2)(c) and (2)(d), and that the employer had improperly withheld such payments in violation of ORS 243.672(1)(f) and (g). The issue of the effect of an arbitration decision arose because the union asserted that this Board should dismiss the complaint based on a prior arbitration award, which held that the employer's refusal to withhold the dues from the three employees was a violation of the parties' collective bargaining agreement. *Spielberg* raised the issue of the effect of an arbitration award on a subsequent claim filed by four employees alleging that the employer violated sections 8(a)(1) and (3) of the

[4]In certain types of unfair labor practice complaints, the NLRB defers its jurisdiction over pending unfair labor practice charges to a binding arbitration process. *Collyer Insulated Wire, a Gulf & Western Systems Co*., 192 NLRB 837, 77 LRRM 1931 (1971). In addition, the NLRB will hold in abeyance certain charges when the dispute is scheduled for, or pending before, a binding arbitration process. *Dubo Mfg. Corp.*, 142 NLRB 431, 53 LRRM 1070 (1963).

NLRA.[5] The award, which was raised by the employer as a defense to the complaint, came out of a strike settlement under which the employer and the union had agreed to arbitrate the question of whether the employees should be reinstated.

This Board later reviewed the *Siegel* deferral standards in *Greater Albany Education Association v. Greater Albany School District No. 8J (Greater Albany*), Case No. C-6-80, 5 PECBR 4158, 4160-61(1980). In that case, the union alleged that the employer had violated ORS 243.672(1)(a), (e), and (f).[6] The employer moved to dismiss the subsection (1)(e) and (f) charges on the basis that this Board should defer to a prior arbitration award. We first explained:

> "Because this Board recently enunciated new standards of review of arbitration awards in proceedings charging violations of ORS 243.672(1)(g) and (2)(d) ([citing *Willamina*]), it is appropriate to clarify the standards that will be applied before the Board will defer to an arbitrator's award in unfair labor practice (ULP) cases charging violations of *other sections* of ORS 243.672." 5 PECBR at 4159 (emphasis added).

After reviewing the basis for our post-arbitral deferral standards in cases alleging violations of subsections *other than (1)(g) or (2)(d),* we noted that federal cases subsequent to *Spielberg* had added the requirement that the issue on which deferral was sought had been clearly presented to and decided by the arbitrator, and that the question was within the arbitrator's competence. *Banyard v. NLRB*, 505 F. 2d 342 (DC Cir 1974). We concluded that because this Board had "original jurisdiction of, and therefore the primary interest in, unfair labor practices, it would be sound policy and would best effectuate the purposes of the" PECBA to adopt the fourth element identified in *Banyard* as part of our "deferral" test. Therefore, we summarized that:

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[5]Sections 8(a)(1) and (3) of the NLRA, which are analogous to subsections (1)(a) and (c) of the PECBA, make it an unfair labor practice for an employer

> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];
>
> "* * * * *
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *."

[6]The union in *Greater Albany* had originally filed a subsection (1)(g) claim, but withdrew that claim at the hearing. 5 PECBR at 4158.

> "The four elements that must be present for deferral in ULP cases (other than in enforcement proceedings brought under (1)(g) or (2)(d)), then, are: (1) the arbitration proceedings were fair and regular; (2) the parties agreed to be bound thereby; (3) the arbitrator's decision was not repugnant to the PECBA; and (4) the issue involved must have been clearly and fully decided by the arbitrator and the question must have been within the arbitrator's competence." *Greater Albany*, 5 PECBR at 4160-61.

Application of the Standards of Review to This Case

We conclude that it is appropriate to apply the *Willamina* enforcement standards to determine the effect of a prior arbitration award on contract violation claims filed under ORS 243.672(1)(g) and (2)(d). Unlike the private sector, this Board is authorized under the PECBA to exercise two roles. On one hand, similar to the NLRB, we have authority under subsections of ORS 243.672 other than (1)(g) and (2)(d) to enforce *non-contractual statutory rights*. In such cases, when we consider whether we should defer to an arbitration award interpreting contract rights, we are deciding whether we should accept that award as dispositive of the *non-contractual statutory* issue. For this reason, we apply the *Greater Albany* elements to determine, in part, whether the statutory issue was fully decided by the arbitrator and within the arbitrator's competence.

On the other hand, similar to the courts under Section 301 of the LMRA, our authority under ORS 243.672(1)(g) and (2)(d) is directed *solely at enforcing the parties' contractual rights*. Although we exercise this authority pursuant to subsections (1)(g) and (2)(d), our only charge in such cases is to interpret the parties' contract to determine their intent regarding the contract terms and whether those terms have been violated. In these cases—where the parties have agreed to enforce their contractual rights through a binding dispute resolution process—the issues raised in the grievance before the arbitrator and in the subsection (1)(g) or (2)(d) unfair labor practice claim are identical because they are based on alleged violations of the same contract terms.

As noted above, the court has recognized a distinction in our authority to 1) enforce what are *purely contractual* rights under subsections (1)(g) and (2)(d), and 2) to address complaints raising *non-contractual statutory rights* in which "the underlying conduct itself constitutes an unfair labor practice independent of the fact that it is also a violation of the contract." *See Willamina*, 60 Or App at 632-33. Based on this distinction, the court allowed for our continued use of the *Siegel* deferral standards when we are reviewing arbitration awards in cases in which a complaint raises non-contractual statutory rights, and the court approved the use of the *Willamina* standards when we exercise our authority to enforce contract rights.

The cases applying the *Willamina* standards before *Greater Albany* addressed the "enforcement" of an arbitration award. However, the rationale for applying the *Willamina* standards in contract-violation cases (under subsections (1)(g) and (2)(d)) beyond the enforcement of such an award is the same. Indeed, we recognized as much in *Willamina* by expressly holding that the *Siegel* "deferral" test would not be applied in cases where a party carries a grievance through arbitration and loses and then files an unfair labor practice complaint under subsection (1)(g) or (2)(d). 5 PECBR at 4099-4100, 4106 n 4.

The Association contends, however, that *Greater Albany* overruled *Willamina*. The basis of that assertion rests on the following passage in *Greater Albany*:

> "The four elements that must be present for deferral in ULP cases *(other than in enforcement proceedings* brought under (1)(g) or (2)(d)), then, are: (1) the arbitration proceedings were fair and regular; (2) the parties agreed to be bound thereby; (3) the arbitrator's decision was not repugnant to the PECBA; and (4) the issue involved must have been clearly and fully decided by the arbitrator and the question must have been within the arbitrator's competence." *Greater Albany*, 5 PECBR at 4160-61 (emphasis added).

The Association argues that the above parenthetical in *Greater Albany* overruled *Willamina*'s express holding that the "enforcement" test applied to *all* subsection (1)(g) contract violation claims brought after a party carried a grievance through the arbitration process and lost. According to the Association, *Greater Albany* limited the *Willamina* test to *only* subsection (1)(g) "enforcement proceedings." Thus, the Association argues that because its subsection (1)(g) claim is not an "enforcement proceeding," but only a contract violation claim, the *Greater Albany* "deferral" test, and not the *Willamina* test, applies.

We disagree with the Association's reading of *Greater Albany*. Specifically, we disagree that the mere insertion of the words "enforcement proceedings" was intended to overrule *Willamina*'s holding that the "enforcement" test would extend beyond "enforcement" proceedings and apply "*in any*" subsection (1)(g) and (2)(d) contract-violation claim, where that violation was submitted to arbitration pursuant to a collective bargaining agreement. *See Willamina*, 5 PECBR at 4106 n 4. Given that most post-arbitration subsection (1)(g) and (2)(d) claims would arise in the context of a party seeking to "enforce" an arbitration award, too much should not be read into the parenthetical reference to "enforcement proceedings" in *Greater Albany*. Rather, we find that the phrase "enforcement proceedings" in *Greater Albany* merely represents "loose language" and was not intended to overrule *Willamina*; had *Greater Albany* intended to overrule *Willamina*, as the Association argues, we find it likely that it would have done so explicitly.

Moreover, after *Greater Albany* was issued, we applied the *Willamina* standards in *Clackamas County Employees Association v. Clackamas County*, Case No. UP-4-08, 22 PECBR 404 (2008), *AWOP*, 228 Or App 368, 208 P3d 1057, *rev den*, 347 Or 258, 218 P3d 540 (2009). In that case, the union filed a subsection (1)(g) complaint alleging that the employer had violated the parties' collective bargaining agreement by refusing to reimburse the union for the arbitration fees and expenses that it had paid pursuant to an arbitration decision requiring each party to pay an equal share of the arbitration fees and expenses. The union relied on the language in the parties' collective bargaining agreement that required arbitration fees and expenses to be paid by the losing party and argued that the arbitrator had exceeded her authority when she required the union to pay an equal share. Applying the *Willamina* test, this Board dismissed the complaint, concluding that the arbitrator had not exceeded her authority, the parties had agreed to accept the award as final and binding, and no issue had been raised that the enforcement of the award would be contrary to public policy.

In sum, for the foregoing reasons, we disagree with the Association's argument that *Greater Albany* overruled *Willamina*, and we will continue to apply the *Willamina* "enforcement" test "in any case where a party charges only a violation of a contract under ORS 243.672(1)(g) or (2)(d) after an arbitrator has ruled on the issue." *Willamina*, 5 PECBR at 4106 n 4.

We now turn to the Association's argument that, even under the *Willamina* enforcement standards, we should not dismiss the Association's subsection (1)(g) contract claims because the City failed to allege such an affirmative defense. Although the City did not include an affirmative defense labeled "Enforcement," it clearly raised the substance of such a defense in its answers. Under its affirmative defense labeled "Exhaustion," the City alleged the existence of a binding arbitration procedure in the parties' contract and that the Gaunt arbitration decision is enforceable.[7] The City also stated that it "should not be required to defend itself on a claim that it violated ORS 243.672(1)(g) before [this] Board when it has arbitrated the grievance to an enforceable conclusion before Arbitrator Gaunt." Under its affirmative defense labeled "Deferral," the City stated that this Board "should accept and defer to Arbitrator Gaunt's authority, award and conclusion that the grievance is procedurally not arbitrable and bar Complainant from pursuing its ORS 243.672(1)(g) claim." We find the City's answers and defenses to be sufficiently pled to raise the defense before this Board.

Finally, we disagree with the Association's argument that it should nevertheless be allowed to proceed on its subsection (1)(g) contract claims because the arbitrator determined that the grievances were not "procedurally arbitrable." There is no dispute that the just cause contract violations alleged in the grievances before the arbitrator and in the subsection (1)(g) claims before us are identical. The parties submitted the just cause grievances to the arbitrator under their contractual arbitration process, which provides that "[t]he arbitrator's decision shall be final and binding * * *." The arbitrator concluded that the grievances were not "procedurally arbitrable," reasoning that the circumstances surrounding the Association's untimely processing of the grievances did not provide a "sufficient justification to excuse" the Association's breach of its obligations to timely notify the City of its intent to arbitrate the grievances under the Agreement. The arbitrator's determination and ultimate remedy denying the grievances as not "procedurally arbitrable" do not change the binding nature of the arbitrator's decision on the issues raised in the grievances as a whole. The PECBA policies of encouraging the parties to resolve their disputes through a mutually-agreed-on arbitration process and in favoring binding arbitration would be undermined if this Board allowed the Association to proceed in this matter, after it was unsuccessful in pursuing grievances raising the exact same claims under the parties' grievance process.

[7]Because we conclude that these complaints should be dismissed based on the *Willamina* standards, we do not address the City's argument that the Association is precluded from pursuing a subsection (1)(g) claim because it failed to exhaust the grievance process based on the arbitrator's decision dismissing the grievance as untimely filed.

In conclusion, the parties agreed in their contract to accept the arbitrator's award as final and binding and there is no argument that enforcement of that award would be contrary to public policy. Accordingly, we will dismiss the complaints.

Request for Civil Penalty

The City requests that a civil penalty be ordered under ORS 243.676(4)(b) on the basis that the complaints are frivolous because the law is clear that the Association cannot pursue a subsection (1)(g) claim after failing "to do what is required in order to present the merits of the grievance to an arbitrator." ORS 243.676(4) provides for a civil penalty of up to $1,000 if the complaint was dismissed and the "complaint was frivolously filed, or filed with the intent to harass the other person, or both."

We deny the City's request for a civil penalty. A pleading is frivolous only if every argument presented

> "'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.'" *SEIU Local 503, OPEU v. State of Oregon, Department of Transportation,* Case No. UP-11-09, 23 PECBR 939, 960 (2010) (quoting *AFSCME Council No. 75 v. City of Forest Grove,* Case Nos. UP-5/25-93, 14 PECBR 796, 797 (1993)).

Although we dismissed the complaints, they raised issues of law that had not directly been addressed by this Board in prior cases. Accordingly, we deny the request for a civil penalty.

ORDER

The complaints are dismissed.

DATED this 3 day of May, 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-01-12

(UNFAIR LABOR PRACTICE)

THOMAS SLAYTER, Complainant, v. SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, and STATE OF OREGON, DEPARTMENT OF FISH AND WILDLIFE, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A hearing was held before Administrative Law Judge (ALJ) Peter A. Rader on September 19, 2012, in Salem, Oregon. The record closed on October 12, 2012, upon receipt of the parties' post-hearing briefs. Neither party objected to the ALJ's Recommended Order issued on March 20, 2013.

Michael W. Franell, Attorney at Law, Medford, Oregon, represented Complainant.

Christy Te, Staff Attorney, Service Employees International Union Local 503, Salem, Oregon, represented Respondent Service Employees International Union Local 503.

Gary M. Cordy, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent State of Oregon, Department of Fish and Wildlife.

On January 3, 2012, complainant Thomas Slayter filed this unfair labor practice complaint, which was amended on April 12, 2012. The Amended Complaint alleged that Service Employees International Union Local 503 (SEIU or Union) breached its duty of fair representation to Slayter by failing to file a grievance on his behalf in violation of ORS 243.672(2)(a), and that the State of Oregon, Department of Fish and Wildlife (Department) disciplined him without just cause in violation of ORS 243.672(1)(g). The respondents filed timely answers.

Slayter can maintain an action against the Department for a violation of the collective bargaining agreement only after proving that SEIU breached its duty to fairly represent him. *Dennis v. SEIU Local 503, OPEU and State of Oregon, Oregon State Hospital*, Case No. UP-26-05, 21 PECBR 578, 591 (2007). Accordingly, the claims were bifurcated to address the allegations against the Union first. *Mengucci v. Fairview Training Center and Teamsters Local 223*, Case Nos. C-187/188-83, 8 PECBR 6722 (1984).

The issue presented is:

Did SEIU violate ORS 243.672(2)(a) by breaching its duty of fair representation to Slayter in connection with discipline imposed by the Department on or about June 1, 2011?

For the reasons stated below, we conclude that the Union did not breach its duty of fair representation under ORS 243.672(2)(a). Accordingly, we will dismiss the complaints against both respondents.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The Department, a public employer, is charged with the protection and enhancement of fish and wildlife and their habitats in Oregon. As part of its mission, it operates more than thirty fish hatcheries around the state.

2. SEIU is a labor organization and the designated representative of a bargaining unit of employees who work for the Department at various facilities around the state.

3. Slayter, a member of the SEIU bargaining unit, has worked for the Department in various seasonal or permanent positions since 1975. From 1987 on, he worked at the Cole Rivers Fish Hatchery, where he was a Fish Hatchery Technician II.

The Parties' Agreement

4. SEIU and the Department, through the Department of Administrative Services (DAS), have been parties to a series of collective bargaining agreements, including contracts effective July 1, 2009 through June 30, 2011, and July 1, 2011 through June 30, 2013. Both agreements (collectively known as the Agreement) have identical language regarding grievances and discipline.

5. The Agreement contains a four-step grievance process that culminates in binding arbitration. At Step 1, either the Union or the employee may file a grievance, but only the Union can advance a grievance beyond Step 1. After Step 1, the Union has sole discretion to determine whether a grievance should be pursued to Steps 2 through 4.

6. Article 20 of the Agreement provides that the principles of progressive discipline shall be used when appropriate. The levels of discipline that may be imposed include written reprimand, denial of annual performance pay, demotion, suspension without pay, and dismissal.

7. Article 21 of the Agreement sets out the grievance process:

> "**GRIEVANCE AND ARBITRATION PROCEDURE**
>
> "**Section 1.** Grievances are defined as acts, omissions, applications, or interpretations alleged to be violations of the terms or conditions of this Agreement.
>
> "* * * * *
>
> "**Section 5.** Grievances shall be processed as follows:
>
> "* * * * *
>
> "Step 1. The grievant(s), with or without Union representation, shall, within thirty (30) calendar days, file the grievance except as otherwise noted to his/her management/executive service supervisor.
>
> "* * * * *
>
> "Step 2. When the response at Step 1 does not resolve the grievance, the grievance must be filed by the Union within fifteen (15) calendar days after the Step 1 response is due or received."

Department Policies

8. The Department has a Code of Conduct, which Slayter signed in 2004, that sets out certain expectations of behavior. Section II of HR Policy 410_02 provides in relevant part:

"In addition to an employee's specific job duties, it is important to understand what is expected of every employee in terms of personal and professional work behavior. Employee's conduct which does not comply with this policy may result in disciplinary action, up to and including dismissal. Off-duty conduct which does not comply with this policy may result in disciplinary action when such conduct has a nexus with the Department.

"* * * * *

"**1. Professionalism**

"Employees are to model professional behavior. This includes honesty, integrity, and caring. * * * * *

"The importance of employees presenting a professional image to the public is critical to our effectiveness and the success of the Department. * * * * *

"**2. Laws, Rules, and Policies**

"Adherence to federal and state laws, rules, regulations and policies is important. Violations that adversely affect [the Department], its credibility or its image, cannot be overlooked. New employees or current employees must report to their supervisor any convictions (including pleas of no contest), traffic/driving violation which could affect driving privileges and/or violate [the Department's] acceptable driving records guidelines, or pending legal issues for violations of laws no later than five calendar days after the event. * * *

"You must promptly report to your immediate supervisor any illegal acts or violations of department rules, policies, or regulations that occur in the workplace.

"**3. Attendance/Backup**

"* * * * *

"Do not use while at work, nor come to work under the influence of drugs or alcohol that might affect your judgment, behavior or the safety of yourself and others. [The Department] has zero tolerance for drugs or alcohol in the workplace."

9. The Department also has a Drug and Alcohol Free Workplace policy, which provides for zero tolerance for alcohol use during work hours or in the workplace. HR policy 450_02 provides:

"**III. POLICY**

"A. To promote employee safety, health and efficiency, the department prohibits during work hours or in the work place any activity involving alcohol, illegal drugs, and prescription and/or non-prescription drugs that

impair performance. Such activities include, but are not limited to the use, sale, transport, possession, transfer and consumption of alcohol and/or illegal drugs; use and abuse of alcohol, prescription and/or nonprescription drugs that impair performance.

"B. Operation of state-owned, leased or privately owned vehicle in an official capacity while under the influence of alcohol, other intoxicants or depressants is prohibited.

"C. Upon determining or having reasonable suspicion, under subsection III, C, of this policy, that an employee has not complied with this policy, the Human Resources Administrator, in conjunction with the appropriate deputy director, shall take appropriate personnel action with regard to the employee, which may include:

"1. Transfer,

"2. Granting of leave with or without pay,
"3. Discipline up to and including dismissal, and/or

"4. Requiring satisfactory participation by the employee in an approved drug abuse assistance or rehabilitation program."

10. On April 26, 2010, Cole Rivers Hatchery Manager Devan Garlock sent an e-mail to all hatchery staff entitled "Sick Leave Use and On Call Duties." The e-mail addressed an employee's mental and physical ability to perform work, and states

"I would like to remind everyone that while you are on call you are required to maintain yourself physically and mentally ready to respond to any situation that may present itself. This means if you would not drink alcoholic beverages before coming to work at 7:30 then you should not do it while on call."

11. The operation of fish hatcheries requires personnel to be available 24 hours per day, seven days per week to respond to mechanical equipment breakdowns and water system maintenance emergencies. If the incubators fail, the fish may die, resulting in a significant financial loss to the Department.

12. To ensure that adequate personnel are available, the Department's technicians may live in rental housing on hatchery property and work rotating shifts. Approximately three or four times per month, a technician may be on-call for six hours after his or her regular shift ends. Technicians are paid one hour of regular salary for every six hours of on-call status.

13. Slayter's last performance evaluation, in June 2009, indicates that he received an overall rating of "successful." Slayter operates machinery and mechanical equipment as part of his job. In 2010, he was counseled by Garlock about drinking beer while operating hatchery equipment.

Facts Giving Rise to Slayter's June 1 Discipline

14. On March 13, 2011, Slayter was scheduled for fish feed duty from 7:30 a.m. to 4:00 p.m., and following his shift, was scheduled for on-call hatchery duty beginning at 4:30 p.m.[1] He did not take a lunch break, so he actually ended his shift at 3:00 p.m. that day. Slayter went home after his shift and consumed a beer, which was his regular habit.

15. At approximately 3:25 p.m., the first in a series of hatchery alarms went off to which Slayter and other employees responded. At approximately 4:30 p.m., Slayter was observed in the hatchery office by four coworkers holding what was described as a can of Busch beer in a Coolie beverage holder.

16. During this same time frame, Slayter had a telephone conversation about the alarms with his supervisor, David Pease, during which Slayter told Pease he was drinking a beer while talking to him.

17. Slayter's drinking at the hatchery office while working on-call was reported to Department management, and the Department conducted an investigation. On March 28, an investigatory interview was held with hatchery manager Garlock, HR analyst Brenda Frank, Slayter, and his Union representative. Slayter was asked about the events of March 13, especially his consumption of alcohol on hatchery grounds. The Department summarized several key questions and Slayter's response in the disciplinary notice that was ultimately issued to Slayter. The relevant portion of the notice stated as follows:

> "a. Had a beer with you when you reported to the hatchery office for the alarm? You said, 'I could have';
>
> "b. Consumed any of the beer while on hatchery grounds? You said 'probably';
>
> "c. Had consumed beer on the hatchery grounds before or if this is something you might normally do? You said, 'yes';
>
> "d. Had made the comment to Mr. Pease that you were working on a beer while talking to him? You said, 'I could have'."

18. Also on March 28, Slayter had a conversation with Pease in which Slayter stated the next day was his birthday and he planned to get "hammered." Slayter was scheduled for on-call duty the next day, but when Pease offered to find someone to cover for him, Slayter declined, stating that he just hoped there would be no alarms.[2]

---

[1]Unless noted otherwise, all remaining dates occurred in 2011.

[2]Slayter later argued that his comment was "facetious" or made in fun, but his refusal to accept Pease's offer to find a replacement for him, and his further statement to Pease that he hoped no alarms would go off, lead us to agree with the Department's findings that he said it and that it was neither facetious nor made in jest.

19. On May 16, a second investigatory meeting was held with Pease and HR analyst Alida McNew, during which Slayter acknowledged drinking a beer after his shift but denied drinking while at the hatchery office.[3] They discussed a previous incident in which he and a relative toured the hatchery in a motorized cart while drinking beer, which led to Slayter being advised not to operate hatchery equipment while drinking.

20. On June 1, the Department issued Slayter a one-step pay reduction for three months. The notice of discipline listed the Department's Code of Conduct and the Drug and Alcohol Free Workplace policies as grounds for the discipline. It also cited Garlock's April 2010 e-mail to hatchery employees reminding employees that if they were on call, drinking alcohol was prohibited. The notice of discipline also cited Slayter's conversation with Pease on March 28 in which Slayter stated that he planned to get "hammered" the next day, even though he was scheduled for on-call duty.

21. The notice of discipline listed a number of essential duties in Slayter's position description that could be impaired by alcohol consumption, including being available to respond to water systems maintenance emergencies; possessing decision-making skills when confronted with an emergency while working alone; and being mindful that safety of self or others, and safety and life support systems for fish, may be at risk without appropriate action or decision. The notice concluded by stating that the agency had lost confidence in his judgment and professionalism and that future misconduct would result in further disciplinary action, up to and including dismissal from state service.

22. Slayter's written response to the notice of discipline stated that after drinking a beer following his shift on March 13, he switched to Pepsi. He pointed to inconsistencies in the witnesses' statements regarding the color, size, and brand of beer they saw and alleged that at least one of them was also drinking. He took issue with the finding that he might have been impaired because he was congratulated by his manager for his work that day. He attributed the complaint about his drinking beer to a disgruntled employee whom Slayter had criticized 12 days earlier for being lazy.

23. Slayter decided to file a grievance over the discipline and was put in touch with Union Steward Joe Sheahan, who worked for the Department for over 20 years and is familiar with hatchery operations. At the time, the parties' Agreement had expired and Sheahan, who works in Salem, was preoccupied with contract negotiations. He was uncertain if the grievance procedures remained intact due to the expired contract. He asked Slayter to send him any written materials.

24. On June 28, the Department granted an extension to July 8 to file the grievance.

[3]Slayter stated he was drinking Pepsi, not beer, at the hatchery office, and did not know how anyone could identify what he was drinking because the can was in a Coolie. When asked why he did not volunteer this information at the March 28 interview, Slayter replied that he was perturbed by the questioning and did not offer more information than was specifically asked. We do not find this explanation credible, and we agree with the Department's findings on this issue.

25. Sheahan reviewed the materials Slayter provided, as well as a transcript of the March 28 investigatory meeting. Based on Slayter's evasive answers to questions about his drinking on March 13, and his failure to deny that he was drinking a beer while talking on the telephone to his supervisor, Sheahan determined that the chances of reversing the Department's discipline were slim. He discussed the case with at least one other steward and decided not to go forward with the grievance.

26. The Union typically takes grievances to arbitration if there is some likelihood of winning. An arbitration screening panel, made up of stewards, decides which cases are arbitrated. If a steward does not think the employee will prevail at arbitration, the case is not brought to the grievance review panel for approval. Although an employee may file their own grievance at Step 1, after that, the steward typically determines whether to pursue it.

27. When Slayter telephoned Sheahan to ask the status of his grievance, Sheahan initially gave an equivocal answer, in part because he believed Slayter to be confrontational. Slayter was left with the impression that it would be filed. In three subsequent telephone conversations with Slayter, Sheahan either assured Slayter that he was working on the grievance, or told him that the grievance had been was filed. The grievance, however, had not been filed, and no grievance was ever filed.

28. In August, Slayter learned that the grievance had not been filed.

Events Giving Rise to Slayter's Dismissal

29. On September 8, while on authorized leave, Slayter was pulled over in the hatchery's parking lot and subsequently charged with Driving Under the Influence of Intoxicants (DUII). Under HR Policy 450_17, Slayter was required to inform the Department of his arrest within five days, but did not do so.

30. On September 28, Slayter pled guilty to the DUII charge and entered a diversion program. On October 18, his DUII conviction was published in the local newspaper. On October 20, he participated in a hearing before the Office of Administrative Hearings to determine whether his license should be suspended.

31. On October 28, for the first time, Slayter provided copies of the citation and other relevant documents to his supervisor, which was six weeks after his arrest. On November 7, he learned that his driver's license was suspended for 90 days, from October 30, 2011 to January 28, 2012.

31. On November 8, Slayter was issued a notice of pre-dismissal and was dismissed from state service effective November 25. The decision was based on his DUII arrest in September, his failure to inform his employer of the arrest for six weeks, his inability to perform his job as a result of his license suspension, and that it was his second alcohol-related incident in less than a year. The notice pointed out the admonition in the June 1 notice of discipline that stated future misconduct will result in further discipline, up to and including dismissal from state service.

32. Slayter filed a grievance on his own behalf at Step 1. He asked for a steward other than Sheahan, but the Union, after reviewing the circumstances and documents related to the dismissal decision, decided not to advance the grievance to Step 2. The Union informed him of its reasons for not doing so, which included Slayter's second alcohol-related discipline in the past year, and his evasive and less than truthful answers to the evidence presented by the Department.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this complaint.

2. The Union did not breach its duty of fair representation in violation of ORS 243.672(2)(a).

DISCUSSION

Slayter alleges that the Union violated its duty of fair representation under ORS 243.672(2)(a) by failing to file a grievance on his behalf as a result of the discipline imposed on June 1, 2011. He argues that the Union arbitrarily decided not to file a grievance, and did not disclose its failure to file until after the deadline had passed. He further contends that if he had prevailed in that grievance, he would not likely have been dismissed from state service as a result of his September DUII arrest.

The Union argues that, after reviewing the evidence and following its regular evaluation process, it made a rational decision not to file a grievance. Slayter's admission that he drank beer after his shift on March 13, his evasive answers to questions about his drinking, and his statement to his supervisor about drinking a beer while they were talking on the telephone, led the Union to conclude that the chances of reversing the Department's decision were slim. It contends that its failure to disclose the results of the evaluation is irrelevant because even if a grievance had been filed, the Union would not have advanced the grievance to the next step.

Legal Standards

Under ORS 243.672(2)(a), it is an unfair labor practice for a labor organization to "[i]nterfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS 243.650 to 243.782." Under the statute, a labor organization is required to fairly represent all employees in a bargaining unit for which it is the exclusive representative. *Putvinskas v. Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO, and Southwestern Oregon Community College*, Case No. UP-71-99, 18 PECBR 882, 894 (2000). A union may breach its duty of fair representation by refusing to file a grievance if its refusal to process or pursue a grievance is "arbitrary, discriminatory or in bad faith." *Coan and Goar v. City of Portland, Bureau of Parks* and *LIUNA Municipal Employees Local 483*, Case Nos. UP-23/24/25/26-86, 10 PECBR 342, 351 (1987), *AWOP*, 93 Or App 780, 764 P2d 625 (1988), citing *Vaca v. Sipes*, 386 US 171, 190, 87 S Ct. 903, 17 L Ed 2d 842 (1967). However, in reviewing duty of fair representation claims, this Board recognizes that labor organizations have substantial discretion in deciding whether to arbitrate or even file a grievance. *Conger v. Jackson County and OPEU*, Case No. UP-22-98, 18 PECBR 79, 88 (1999). A union abuses its discretion, and its conduct may be actionably arbitrary, when its decision lacks a rational basis or its processing of a

grievance is so perfunctory that a reasoned decision is not made. *Ralphs v. OPEU, Local 503, SEIU, AFL-CIO and State of Oregon, Executive Department,* Case Nos. UP-68/69-91, 14 PECBR 409, 422 (1993).

Slayter does not allege that the Union discriminated against him, and did not argue in his closing brief that the Union acted in bad faith. Our focus, therefore, is on determining whether the Union's conduct was actionably arbitrary. This Board has discussed when a union's decision not to take a grievance forward is actionably arbitrary, explaining that

> "[a] union's good-faith decision not to pursue a potentially meritorious grievance, even if mistaken, is not a breach of its duty of fair representation. *Chan*, 21 PECBR at 576 (citing cases) [*Chan v. Clackamas Community College and Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-05, 21 PECBR 563 (2006), *recons den,* 21 PECBR 597 (2007)]. In addition, '[t]he duty of fair representation does not require a union to represent a bargaining unit member in the same manner as an attorney represents a client.' [*Putvinskas,* 18 PECBR at 898]. This discretion extends to how the union investigates a potential grievance, so long as some reasonable good-faith investigation is undertaken. *Randolph v. International Alliance of Theatrical Stage Employees, Local B-20, and Metropolitan Exposition Recreation Commission*, Case Nos. UP-15/16-92, 15 PECBR 85, 106 (1994), *AWOP*, 134 Or App 414, 894 P2d 1267 (1995).
>
> "* * * * *
>
> "Generally, we do not substitute our judgment for that of a union that rationally decided not to process a grievance. Instead, we determine whether a union conducted a proper investigation and used a rational method of decision-making in reaching its conclusion. *Putvinskas,* 18 PECBR at 895." *Dennis v. SEIU Local 503, OPEU and State of Oregon, Oregon State Hospital,* Case No. UP-26-05, 21 PECBR 578, 592-93 (2007).

The Union's Decision Not to File a Grievance

The Union's determination that Slayter's grievance lacked merit was not arbitrary. After reviewing the evidence provided, including a transcript of the March 28 interview in which Slayter gave evasive answers about his alcohol consumption on March 13, Sheahan determined that the likelihood of reversing the Department's decision was slim. An extension to file the grievance was granted in order for Sheahan to review the materials, and although he discussed it with at least one other steward, his opinion did not change.

The Department's Code of Conduct and its policies regarding zero tolerance for alcohol in the workplace were circulated and signed by Slayter in 2004. In 2010, hatchery manager Garlock sent an e-mail to all employees reminding them of that policy and informing them that employees who were in "on-call status" were considered the same as employees reporting for regular duty, and that consuming alcohol before either type of shift was prohibited. Slayter's statement to Pease on March 13 that Slayter was drinking a beer while he was speaking to Pease on the telephone at the hatchery, and Slayter's statement to Pease on March 28 that Slayter planned to get "hammered"

on his birthday the following day, even though he was scheduled for on-call duty, were additional reasons for Sheahan's decision. Slayter's allegation that other employees were drinking on March 13 was not substantiated, but even if it was, under the Department's policy of zero tolerance for alcohol in the workplace, his conduct would not be excused. Similarly, Slayter's allegation that the source of the complaint about his drinking came from a coworker whom he had recently accused of being lazy, and who was retaliating against him, does not excuse his violation of Department policies.

Slayter did not provide evidence that the Union failed to follow its internal practices for evaluating the grievance and provided no evidence that the Union had any reason to change its decision. This Board's role is not to decide whether a grievance has merit, only whether the Union undertook a good-faith evaluation of the grievance before deciding not to take it forward under the contractual dispute resolution procedures. *Chan*, 21 PECBR at 575. The Union's decision was within the broad range of discretion permitted by law and there was a rational basis for its determination that Slayter was unlikely to prevail in his grievance. Based on the foregoing, we conclude that the Union did not act arbitrarily when it decided to forego filing a grievance on Slayter's behalf.

The Union's Failure to Notify Slayter of Its Decision

Slayter also argues that the Union violated its duty of fair representation by failing to inform him of its decision not to file a grievance on his behalf regarding the June incident. Slayter reasons that his rights have been prejudiced because he could have filed a grievance on his own behalf at Step 1 if he had been told the Union was unwilling to do so. Even if he had filed a grievance, however, the parties' Agreement allows only the Union to determine whether to advance it to the next step. Slayter offered no evidence to suggest that the Union would change its mind about filing or advancing a grievance on his behalf. To the contrary, the record establishes that, following an evaluative process, the Union made a rational decision to not file such a grievance.

In addition, even if Slayter had been informed by the Union of its decision not to file a grievance regarding the June incident, and even if he had prevailed in his own grievance arising from the June 1 discipline, the Department would have dismissed him from state service for his subsequent misconduct in September and October. In that regard, the dismissal notice dated November 23, 2011, listed a number of reasons for the Department's decision, including his DUII arrest while on hatchery property, his failure to disclose his arrest for six weeks to his employer, his inability to perform the essential functions of his job for 90 days as a result of his driver's license suspension, and his violation of multiple Department policies. Thus, the dismissal notice focused primarily on Slayter's September and October misconduct, rather than his June misconduct, on which this complaint is based. Consequently, we do not find serious prejudice to Slayter's employment rights as a result of the Union's failure to notify him of its decision not to file a grievance regarding the June incident.

For these reasons, we conclude that the Union did not breach its duty of fair representation to Slayter, and we will dismiss the claim under ORS 243.672(2)(a).

ORS 243.672(1)(g) Claim Against the Department

Where no violation against a labor organization is found in a duty of fair representation case, the claim against the public employer will automatically be dismissed. *Mengucci*, 8 PECBR at 6734; *Tancredi*, 20 PECBR at 975, 977. Therefore, we will dismiss the claim against the Department.

ORDER

The complaint is dismissed.

DATED this 10 day of May 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-77-11

(UNFAIR LABOR PRACTICE)

OREGON SCHOOL EMPLOYEES ASSOCIATION, Complainant, v. MEDFORD SCHOOL DISTRICT #549C, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On April 18, 2013, the Board heard oral argument on Respondent's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Peter A. Rader on January 24, 2013, after a hearing held on May 14, 2012, in Salem, Oregon. The record closed on July 3, 2012, following receipt of the parties' post-hearing briefs.

Sarah K. Drescher, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented Complainant.

Lisa M. Freiley, Designated Representative, Oregon School Boards Association, Salem, Oregon, represented Respondent Medford School District #549C at oral argument. Jessica N. Knieling, Designated Representative, Oregon School Boards Association, Salem, Oregon, represented Respondent at hearing.

On November 21, 2011, the Oregon School Employees Association (OSEA) filed this unfair labor practice complaint alleging that the Medford School District #549C (District) violated ORS 243.672(1)(b) and (e) during bargaining for a funding reopener in 2011. On March 19, 2012, OSEA filed an amended complaint and the District timely answered.

The issues are:

1. During bargaining for a funding reopener provision pursuant to ORS 243.698 and the parties' collective bargaining agreement, did the District *per se* violate its duty to bargain in good faith pursuant to ORS 243.672(1)(e)?

2. During bargaining for a funding reopener provision pursuant to ORS 243.698 and the parties' collective bargaining agreement, did the totality of the District's conduct amount to "surface bargaining" in violation of ORS 243.672(1)(e)?

3. During bargaining for a funding reopener provision pursuant to ORS 243.698 and the parties' collective bargaining agreement, did the District violate ORS 243.672(1)(b) or (e) when it sent an e-mail directly to OSEA bargaining unit members on or about October 26, 2011, regarding bargaining issues and employment relations?

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

For the reasons set forth below, we conclude that the District did not violate ORS 243.672(1)(b) or (e), as alleged by OSEA.

RULINGS

OSEA filed a motion to strike certain portions of the District's Memorandum in Aid of Oral Argument, asserting that the memorandum included "objections" to the Recommended Order that were not included in the District's initial objections. Thereafter, the District filed its own motion to strike, contending that OSEA's Memorandum in Aid of Oral Argument had effectively "objected" to portions of the Recommended Order, even though no official "objections" had been timely filed in accordance with OAR 115-010-0090. At oral argument, OSEA represented that it was not objecting to any portion of the Recommended Order.

We declined to strike any portion of either party's memorandum, but also explained that we would only hear arguments on the objections set forth in the District's timely-filed objections.

Additionally, on April 16, 2013, the District submitted a document that was not introduced during the hearing. At oral argument, we explained that this document was not properly admitted as evidence in the hearing and that we would not consider it.

We incorporate these oral argument rulings into this order. The other rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. OSEA is a labor organization and the exclusive representative of a unit of approximately 460 classified employees who work for the District, a public employer.

2. The District is overseen by a board of directors. The District's Superintendent is Dr. Philip Long and its Human Resources (HR) Director is Dr. Todd Bloomquist, both of whom were designated representatives for the District.

3. OSEA's local president is Lyndy Overacker, and the OSEA's field representative and chief negotiator is Cindy Drought. Drought is a former president and union steward for the local.

4. The District's classified employees hold job classifications in 21 categories, which fall into one of six areas: clerical, operations, technical, instructional, safety, or facilities. Based on their positions, classified employees work between 169 and 261 days per year. Some classified employees work only when students are in school, while others work year-round. The District maintains between 40 and 50 calendars to track each position's work schedule.

The Parties' Agreement

5. The District and OSEA are parties to a collective bargaining agreement (Agreement), effective July 1, 2009 through June 30, 2012.

6. Article I, 1.3 b. of the Agreement contains a funding reopener provision, which states:

> "In the event of a budget deficit from the prior year, legislative action, or initiative affecting any portion of this agreement, the wage and related economic items agreed to herein shall not be reduced without negotiations between the Association and the District. A budget deficit shall be defined as the inability of the District to finance staffing and programs through the general fund operating budget at the previous year's level. The District or Association shall give notice of its need to renegotiate the contract during the term of the agreement and the parties shall utilize the provisions of ORS 243.698 except that the period of negotiations shall be 150 calendar days."

7. Article IV, 4.3 provides that the District will participate in PERS and contribute six percent of each employee's wage for the duration of the Agreement.

The Parties' Bargaining

8. On or about May 31, 2011, HR Director Bloomquist notified local OSEA President Overacker in writing that reduced State revenues would result in a budget shortfall for the District of approximately $11 million, and that the District was reopening the Agreement to discuss ways to deal with the deficit.[1] The District had already negotiated concessions from teachers and administration personnel, and was seeking $1.7 million in further cuts from its classified employees, which represented a potential wage cut to those classified employees of eight percent.

[1]Unless noted otherwise, all events occurred in 2011.

9. On June 1, the parties met for the first of eight meetings that extended into October. At the outset, Bloomquist told OSEA's representatives that he was open to their suggestions for cost-saving ideas, as long as they totaled the targeted amount. The goal was to avoid layoffs or school closures.

10. OSEA favored furloughs, which are unpaid days in the school calendar, as a way to fill the deficit. The teachers had agreed to furloughs on non-student contact days, when students are not in school. The District did not immediately reject the idea of furloughs and agreed to continue talking.

11. On July 7, OSEA proposed that full-time employees who worked 261 days per year would take ten furlough days, and employees who worked 181 days per year would take seven furlough days. For employees who worked less than 181 days, OSEA proposed no furloughs because those employees had recently incurred wage cuts of 12 to 24 percent due to District restructuring.

12. The District was initially sympathetic to the idea of exempting employees who had recently undergone wage reductions from further cuts, but opposed the furlough option. It countered with the idea of employees contributing six percent of their salaries to PERS, called a "pickup," which Bloomquist suggested could be presented as a wage reduction to make it more acceptable to the employees.

13. On August 2, Bloomquist e-mailed Drought and Overacker stating that he had received numbers from the District's business office indicating that even with the six-percent PERS pickup, the shortfall would be in the $500,000 to $600,000 range. He requested a meeting with them to discuss the situation.[2]

14. On August 9, the parties reached a tentative agreement (TA), which included the six-percent PERS pickup and no furlough days. The pickup period would be in effect for the 2011-12 fiscal year, ending on June 30, 2012. The TA exempted from the pickup any employees who did not earn enough to participate in PERS and who had recently undergone wage reductions. The TA also included changes to the employee insurance plan.[3] The District further agreed to cover "any amount remaining of the classified portion of the deficit" from its reserve funds. After taking into account the tentatively-agreed-on PERS pickup and insurance changes, that remaining deficit was estimated to be $500,000. The estimated savings to the District would be around the eight percent target amount, but the net cost to employees would be around six and one-half percent, due to tax savings from their PERS contributions.

[2]The District applied an additional $425,000 to the shortfall arising from savings associated with retirements, unfilled vacancies, reductions, or eliminations of classified hours or positions.

[3]The District is one of a handful of school districts that is self-insured, giving it some flexibility to make cost-saving changes.

15. Before submitting the TA to a membership ratification vote, OSEA asked the District to consider adding more employees who would be exempt from the PERS pickup−namely, employees who had experienced a loss in pay as a result of being "bumped" into a lower classification due to a reduction in force (RIF). The District informed OSEA that it did not agree to the additional exemptions.

16. OSEA drafted a Memorandum of Agreement (MOA) reflecting the TA, and submitted it to the membership for ratification. On August 29, OSEA's ratification vote failed by a narrow margin.

17. On August 31, the parties met to discuss the failed ratification vote. OSEA proposed separating the health insurance portion of the TA and submitting that issue to the membership for ratification. The District indicated agreement with that approach.

18. On September 7, Drought sent two MOAs to Bloomquist. The first one included the health insurance package, which would save the District $312,500 and expire with the Agreement on June 30, 2012. This amounted to approximately two percent of the targeted eight percent in reductions. The District agreed to the health insurance MOA, and on September 13, OSEA's members ratified that MOA.

19. The second MOA proposed furloughs based on the number of days per year an employee worked. Exempted from furloughs were those employees who had undergone a wage reduction through restructuring or a RIF. The second MOA did not include any PERS pickup by the employees.

20. At a September 8 meeting, OSEA modified their furlough proposal so that full-time employees working 261 days per year would take ten furlough days, those working between 203 to 224 days would take eight furlough days, those working between 193 to 199 days would take seven furlough days, and employees working less than 181 days would have no furlough days. The District indicated an opposition to furlough days, and further stated that its reserve-funds contribution was contingent on an employee PERS pickup. The District also estimated that exempting so many employees from furloughs would not achieve the necessary deficit reduction.

21. In a telephone conversation with Overacker, Superintendent Long stated that the District might still be willing to contribute to the deficit from its reserves.

22. At a September 28 meeting, OSEA again proposed furloughs for certain employees on non-student contact days, but Bloomquist responded that this would not spread the cuts equally and suggested that if the PERS pickup was not on the table, the District would not contribute any money from its reserve funds. The District also informed OSEA that its Board of Directors (Board) was opposed to furlough days.

23. On October 11, the District notified OSEA's representatives that the Board had rejected its latest proposal because it exempted approximately 45 percent of OSEA's members from any cuts. Under that proposal, the District estimated that it would have to contribute $751,000 to make up the deficit amount. Bloomquist reiterated that the Board would not contribute from reserve funds unless the six-percent PERS pickup was on the table. He suggested some wage reduction ideas, including prorating insurance contributions or reducing wages by eight-percent for one year, but expressly stated those suggestions were not "proposals." OSEA offered a new proposal that included five furlough days on non-student contact days and a six-percent PERS pickup from January 1, 2012 through June 30, 2012. OSEA's proposal maintained the same exemptions for employees who had recently experienced a wage reduction due to restructuring or a RIF.

24. On October 17, the District rejected these ideas and stated that it would not accept exemptions, on equitable grounds, even for employees who had suffered wage cuts in 2011. The District's position was that wage cuts, in whatever form, needed to be applied equally to all employees, and that tracking furloughs for 40 to 50 work schedules would be problematic.

25. On October 18, 11 days before the end of the 150-day bargaining period, the parties met for another bargaining session, at which the District submitted a proposal that called for an employee-paid six-percent PERS pickup to start on January 1, 2012, and continue until a successor agreement was reached. There were no exemptions for OSEA members who had recently undergone wage cuts. The proposal also included a three-percent wage reduction to all employees, effective July 1, 2011 through June 30, 2012, to make up for the loss of six months in PERS contributions. The District also agreed to cover any remaining deficit amount, which was estimated to be in excess of $500,000, from its reserve funds.

26. OSEA was concerned about the open-ended PERS pickup, and felt that it put pressure on the successor bargaining team. OSEA was also concerned about the straight wage reduction without any exemptions. The "most glaring thing that [OSEA] was concerned about" was the lack of of exemptions.

27. OSEA responded by asking whether the District would be willing to consider "cut hours" as opposed to "cut days" (furloughs). After a caucus, the District reiterated that there would not be exemptions, but indicated that "cut hours" might work, and would take that suggestion to the Board.

28. On October 26, the parties met for a final time. OSEA proposed an MOA that included a PERS pickup, effective January 1, 2012 through June 30, 2012 for some employees, and effective February 1, 2012 through June 30, 2012 for other employees, and a three-percent wage cut effective July 1, 2011 through June 30, 2012, which could be converted into furlough hours for employees who worked on non-student contact days. OSEA's proposal also anticipated a contribution from the District in excess of $500,000. OSEA's proposal maintained the same employee exemptions from both the PERS pickup and the three-percent wage reduction. The District told OSEA that it would take this proposal to the Board.

29. On October 26, at around 2:17 p.m., Bloomquist sent an e-mail to all District employees, which summarized the bargaining for all employee groups up to that time. The District regularly sent e-mails to all employees updating them on events, policies, or other relevant information. Bloomquist's communication addressed a number of topics, but as it pertained to the classified employees, it stated:

"**Working Together with Medford's Employees During the Budget Crisis**

"As of October 26, 2011, the only employee group that has yet to agree to compensation adjustments to meet the overall reduction is the Oregon School Employees Association (OSEA) classified group. Even so, the district and OSEA leadership continue to work on solutions.

"**Working with OSEA**

"The total amount that was OSEA's portion of the deficit was approximately $1.5 million. After cost saving measures and staff reductions in the spring of 2011, the remaining $1.25 million was the target amount to resolve through negotiations.
"The Medford School Board made it clear that any solutions with employee groups needed to be equitable amongst the employees with as little negative impact of service to students. The initial classified talks centered on employees contributing toward their retirement through the Public Employee Retirement System (PERS). This is what is known as a PERS pickup and is six percent of an employee's salary. Because the OSEA bargaining team supported the PERS pickup, the school board agreed to cover nearly $500,000 of OSEA's remaining portion of the deficit. With the insurance program change and the PERS pickup, the total savings to the district would be about eight percent; however, the actual impact to a typical OSEA employee may only be about 6.5% because of tax breaks when employees pay their own PERS pickup. Despite the August 9 tentative agreement, the OSEA members voted to reject the agreement on August 29.

"**Further OSEA Problem-Solving**

"Other than a massive layoff of classified staff, there is no other way to achieve such large employee cost reductions. After analyzing the impact of such a layoff, the school district determined that further layoffs were a last resort option and that to do so would have a significantly negative impact on classrooms.
"OSEA's counter offers since the August rejection have been centered on a cut-day approach and exemptions for certain employees. This concept is problematic since there are so many varying days and hours that classified employees work. Cutting days means that each employee group loses different amounts. That translates into inequitable reductions to staff. Additionally, many of the employees only work when students are in school; to reduce those services would be inappropriate. OSEA insisted that if employees are to lose wages due to a state budget deficit that the employee should not have to come to work. However, a cut-day approach does not provide an equitable solution and clearly disadvantages some employees.

"On September 8, OSEA submitted a new proposal for the district. The district analysis of the offer found that only 55% of all classified staff would be impacted by the agreement, leaving 45% not having to contribute to the reductions. This proposal constituted about $158,000 in savings, leaving the district to cover the remaining $1.09 million.

"On October 3, the school board bargaining team rejected MOA #2 because it did not adequately address the budget deficit and because it was not equitable to employees. OSEA drafted a new proposal after a bargaining session on October 11, when the district shared out what it would take to make up the budget deficit. Based on that discussion, OSEA's proposal included 45% of OSEA employees exempted from any cuts; five non-instructional cut days; a six percent PERS pickup beginning January 1, 2012 and ending June 30, 2012; and the district filling in the remaining $781,000 of the deficit. This proposal was again rejected by the school board bargaining team since it exempted certain employees and did not address enough of the deficit.

"On October 18, the district presented a proposal that eliminated the exemptions OSEA had previously proposed for certain employees so that wage reductions were equitable. The proposal included a six percent PERS pickup beginning January 1, 2012, a three percent across the board wage reduction effective July 1, 2011 to make up for the loss of six months of PERS pickup, and the district covering $500,000 of the OSEA portion of the deficit. The impact to OSEA staff would be an effective 7.25% since half of the year's PERS pickup would yield a smaller tax break for OSEA employees.

"The school board made it very clear that it would not be able to provide $500,000 of reserves to help the OSEA deficit if OSEA did not agree to a PERS pickup. Without a PERS pickup, the agreement could be an 8% (or higher) wage reduction. That, along with the insurance program changes, would get OSEA closer to the needed amount. This, of course, would have a more significant impact to each employee's take-home pay, especially when the district's original proposal only impacted employee earnings by about 6.5%. Talks between the association and the district continue as the end of the 150-day bargaining period comes to a close. You can click here to see a timeline of the expedited bargaining process."

30. Later that day, Bloomquist sent a letter via e-mail to Drought and Overacker rejecting OSEA's proposal. In rejecting the proposal, the District cited the limited number of PERS pickup months, the exemptions for certain employees, and the use of furloughs in lieu of wage reductions. The District reiterated its position that "including exemptions for some employees creates an inequitable condition for OSEA members, placing additional burdens on some employees who have to compensate for others." The District offered to meet with the OSEA representatives and welcomed any other proposals that more closely aligned with the Board's direction and met OSEA's portion of the deficit. The District also informed OSEA that it would implement its October 18 offer, unless the parties reached agreement before October 29. The District further stated that its bargaining team was available through the evening of October 29 to meet with OSEA.

31. On October 28, Drought sent a letter to Bloomquist responding to the District's rejection of OSEA's October 26 proposal. In that letter, OSEA "acknowledge[d] the Board's generosity in [its] willingness to contribute dollars from the District's reserves to assist in covering classified's portion of the deficit." However, OSEA also felt that it was not appropriate to tie successor bargaining issues into discussions regarding the deficit, which OSEA believed the District had done with its last offer involving the PERS pickup. OSEA also felt that its most recent proposal "addressed the issue of equity to the greatest extent possible," considering the complexity of the bargaining unit. OSEA acknowledged the District's willingness to meet through October 29, but stated that continued discussions were unlikely to result in a TA that would be ratified by both parties. Finally, OSEA took exception to the District's October 26 e-mail, which OSEA felt contained erroneous and misleading information and undermined the bargaining process. The letter concluded by stating that OSEA would file an unfair labor practice complaint against the District.

32. OSEA sent a memorandum to its members disputing a number of statements in Bloomquist's October 26 e-mail. OSEA told the members that the e-mail misrepresented the negotiations by omitting any mention of the cost savings measures that had been agreed to, including the health insurance adjustments worth $312,500 and reductions in the classified workforce worth $450,000. According to OSEA, rather than the $781,000 amount cited by Bloomquist needed to make up the deficit, the accurate number was approximately $500,000. The memorandum also pointed out that Bloomquist's e-mail failed to mention that the District initially represented that OSEA could design cost-saving measures anyway it wished, which led to OSEA spending a great deal of bargaining time crafting proposals around non-student-contact-day furloughs, all of which were rejected. The memorandum also stated that the August TA exempted from furloughs those members who had recently incurred wage cuts, but that the District later rescinded that position by calling the exemption inequitable. The memorandum further told members that the District did not unequivocally reject the furlough option until September 7, which was late in the process. Finally, OSEA pointed out that the TA reached in August ended the PERS pickup on June 30, 2012, but that the District's October 18 proposal potentially extended the pickup period beyond that date if no new agreement was reached.

33. On November 1, the District implemented its October 18 proposal.

CONCLUSIONS OF LAW

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

2. During 2011 bargaining of a funding reopener provision, the District did not *per se* violate its duty to bargain in good faith in violation of ORS 243.672(1)(e).

3. During 2011 bargaining of a funding reopener provision, the totality of the District's conduct did not constitute bad-faith bargaining in violation of ORS 243.672(1)(e).

4. During 2011 bargaining of a funding reopener provision, the District did not violate ORS 243.672(1)(b) and/or (e) as a result of an e-mail sent directly to OSEA members on or about October 26, 2011, regarding bargaining issues and employment relations.[4]

DISCUSSION

After reaching agreements with teachers and administration personnel to reduce an $11 million budget shortfall in 2011, the District sought $1.7 million in concessions from its classified employees. OSEA alleges that the District's conduct during mid-term bargaining to address the shortfall amounted to both a *per se* violation of its duty to bargain in good faith under ORS 243.672(1)(e) and a violation based on the totality of the District's bargaining conduct. OSEA also alleges that the District violated ORS 243.672(1)(b) and/or (e) when its HR director sent an e-mail regarding bargaining to all employees. OSEA contends that this e-mail was an attempt to directly deal with employees by bypassing the union, and that as a result, the District interfered with its administration. We disagree with each of OSEA's allegations, reasoning as follows.

Bad-Faith-Bargaining Claim

It is an unfair labor practice for a public employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." ORS 243.672(1)(e). Here, OSEA alleges that: (1) the District's implementation of an offer that was "worse for" OSEA's members than the TA that those members previously rejected constitutes a *per se* violation of ORS 243.672(1)(e); and (2) that the totality of the District's conduct amounted to "surface bargaining." We address each allegation, in turn.[5]

We first address the alleged *per se* violation. We have recognized that some bargaining conduct is so inimical to the bargaining process that it amounts to a *per se* violation of the obligation to bargain in good faith, even without a showing of subjective bad faith. *International Association of Firefighters Local #1431 v. City of Medford*, Case Nos. UP-32/35-06, 22 PECBR 198, 206-07 (2007). For example, we have found the following to constitute *per se* violations of ORS 243.672(1)(e): (1) unilaterally implementing a change in a mandatory subject of bargaining; (2) submitting a new proposal in mediation, which had not been subjected to bargaining; and (3) submitting a new proposal in a final offer, which had not been subjected to bargaining. *Dallas Police Employees Association v. City of Dallas*, Case No. UP-33-08, 23 PECBR 365, 378 n 7 (2009). OSEA does not contend that the District's conduct falls within

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[4]OSEA alleged a "direct-dealing" violation under ORS 243.672(1)(e), but did not argue or otherwise address that argument in its post-hearing brief. Accordingly, we will dismiss that claim. *Gresham Police Officers Association v. City of Gresham,* Case Nos. UP-06/18-09, 24 PECBR 55 (2010).

[5]Because the Recommended Order found a violation of subsection (1)(e) under a totality-of-conduct analysis, the order did not reach the issue of the *per se* violation. As set forth below, we find that the totality of the District's conduct did not violate subsection (1)(e). Therefore, we also address OSEA's assertion of a *per se* violation.

one of those previously recognized categories, but rather asserts that if a labor organization's membership rejects a tentative agreement, an employer may not ultimately implement a "worse" offer than that rejected by the membership without violating ORS 243.672(1)(e).[6]

We decline to conclude that a final offer implemented by an employer must always be equal to or better than a tentative agreement rejected by a union's membership. Simply put, such an implementation is not so inimical to the bargaining process that it necessarily amounts to *per se* bad-faith bargaining. Moreover, such an implementation does not rise to the level of the limited categories of *per se* violations that this Board has previously recognized.

Specifically, an employer's unilateral change in a mandatory subject of bargaining fundamentally undermines and destabilizes the relationship between an employer and the exclusive bargaining representative. Additionally, submitting new proposals (either in a final offer or in mediation) that have not been subjected to bargaining effectively bypasses the entire collective bargaining process, a core element of the Public Employee Collective Bargaining Act (PECBA).

The same cannot necessarily be said for an employer's implementation of a final offer, which has components that are less favorable to some or all bargaining unit members than a proposal that the parties tentatively agreed to but that the union membership rejected. This is particularly true where, as here, the parties engaged in bargaining for some two months after the union membership rejected the TA. In such circumstances, an employer's implementation of a "worse" offer does not *per se* fundamentally undermine the exclusive bargaining representative, nor does it completely bypass the bargaining process. In fact, here, as set forth in more detail above and below, after the OSEA membership rejected the TA, the parties met numerous times over the next two months about how to reach an agreement to address the District's deficit. Although those bargaining sessions did not ultimately yield a collectively-bargained agreement, it does not follow that the employer *per se* bargained in bad faith by implementing a final offer that was less favorable to some bargaining unit members than the rejected TA.

Therefore, we conclude that the employer's implementation of its October 18, 2011 proposal does not constitute a *per se* violation of ORS 243.672(1)(e). Consequently, we will dismiss this claim.

We now turn to OSEA's allegation that the District engaged in "surface bargaining," meaning that the District merely went through the motions of bargaining without any intention of reaching agreement. *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No.

[6]In addition to the reasons set forth below, OSEA's proposition is problematic in at least one other respect—namely, the difficulty in determining whether one offer might be objectively "worse" than another. For example, some proposals may include an increased monetary benefit to employees but a decreased non-monetary benefit, or vice-versa. Additionally, proposals may affect certain bargaining unit members differently. Here, for example, a member of OSEA's negotiating team testified as to her subjective belief that the proposal implemented by the District was "worse" than the TA. Yet, a chart submitted by OSEA to compare the effects of the TA and the implemented proposals on three different employees was more equivocal. To be sure, according to the chart, two employees fared worse under the implemented proposal; however, one employee fared the same. Thus, on this record, whether the District's final offer was objectively "worse" for *all* bargaining unit members is not clear.

UP-14-85, 8 PECBR 8160, 8196 (1985). In surface bargaining cases, there is no direct evidence that an employer is unwilling to negotiate in good faith. *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 777 (2007). Instead, we examine the totality of the bargaining conduct to determine whether the employer demonstrated a willingness to reach an agreement that is the result of good-faith negotiations. *Hood River Employees Local Union No. 2503-2/AFSCME Council 75/AFL-CIO v. Hood River County*, Case No. UP-92-94, 16 PECBR 433, 451-52, *compliance order*, 16 PECBR 696 (1996), *AWOP*, 146 Or App 777, 932 P2d 1216 (1997).

In applying the totality-of-conduct standard to allegations of surface bargaining, we examine multiple factors, including: (1) whether dilatory tactics were used; (2) contents of the proposals; (3) behavior of the party's negotiator; (4) nature and number of concessions made; (5) failure to explain a bargaining position; and (6) the course of negotiations. *City of Dallas*, 23 PECBR at 378; *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 584, *recons*, 16 PECBR 707 (1996). We also consider other factors that might be relevant in any given case. *See, e.g., Rogue Valley Transportation District*, 16 PECBR at 587.[7] After considering the totality of the District's bargaining conduct regarding the funding reopener, we do not conclude that the District "merely went through the motions of bargaining without any intention of reaching an agreement." *See McKenzie School District #68*, 8 PECBR at 8196. We reason as follows.

1. *Dilatory Tactics.* Dilatory tactics that tend to unreasonably delay or impede negotiations indicate bad-faith bargaining. *Id.* at 8197. OSEA argues that by waiting until the end of the school year to reopen the contract, by which time most of the classified employees were about to start summer break, the District made communications and feedback problematic for the bargaining team. OSEA, however, was on notice well before May 31 that there was a funding shortfall and that layoffs were possible. OSEA was also aware that the District wished to complete negotiations with its teachers and administration personnel before bargaining with classified employees. OSEA did not object to this arrangement or demand that mid-term bargaining begin sooner, and we do not find that the District's formal notification to OSEA in May was dilatory.

OSEA also argues that the District unreasonably delayed submitting its proposal to extend the PERS pickup period, such that OSEA had inadequate time to respond to that proposal. According to OSEA, the District had previously signaled that the pickup period would end on June 30, 2012, as was agreed to in the TA, rather than extend until a successor agreement was reached.

[7]For example, we have considered whether a party: (1) committed other unfair labor practices during negotiations; (2) gave inaccurate reasons for a claim asserted in negotiations; and (3) engaged in conditional bargaining. *Rogue River Valley Transportation District*, 16 PECBR at 587. As noted, however, each case presents its own set of circumstances, and we may consider any factor that contributes to the totality of a party's bargaining conduct.

Although the District's October 18 proposal included a change to the end date of the PERS pickup, that proposal also pushed back the start date for that pickup. Specifically, rather than starting the PERS pickup period at the beginning of the 2011-12 fiscal year as proposed in the TA, the District's October 18 proposal started the pickup period on January 1, 2012. Moreover, in an attempt to try different ways of filling the classified employees' portion of the deficit, the parties engaged in numerous bargaining sessions after the OSEA membership rejected the TA. In other words, this is not a situation where there was no bargaining after OSEA members rejected the TA, with the District springing a last-second proposal that radically departed from the framework of the rejected TA.

Additionally, the record shows that the primary sticking point between the parties was not the end date of the PERS pickup, which would in any event ultimately be determined by a successor agreement. Rather, the more significant disagreement concerned whether there would be any exemptions for certain employees and whether cut days/hours could be used instead of a straight wage reduction.

Finally, when the District made its proposal, the parties still had some time (11 days) before the 150-day period expired, and the record shows that OSEA made a meaningful counterproposal several days before that period expired. After the District rejected that counterproposal, it informed OSEA that it was still willing to bargain up to the deadline.

Consequently, on these facts, we do not find that the District's October 18 proposal to extend the PERS pickup until a successor agreement was reached unreasonably delayed or impeded the overall negotiations on how to fill the classified employees' portion of the budget shortfall.

2. *Content of the District's Proposals.* OSEA argues the District acted in bad faith by: (1) allegedly conditioning bargaining on acceptance of the PERS pickup; (2) conditioning a reserve-funds contribution on the PERS pickup; (3) not exempting certain employees from wage cuts and the PERS pickup in the District's only written proposal; and (4) extending the PERS pickup period beyond the Agreement's expiration. OSEA further contends that because its membership had already rejected the six-percent PERS pickup in the TA, OSEA's bargaining team could not bring that same proposal back to them a second time.

A party may not condition its participation in bargaining on the other party making concessions. *See Clackamas County Peace Officer's Association v. Clackamas County and Clackamas County Sheriff's Department*, Case No. UP-41-86, 9 PECBR 9174, 9177-78 (1986). Here, however, although the PERS pickup was a signature piece of the District's proposal on filling the budget shortfall, the District did not condition its participation in bargaining on OSEA agreeing to the pickup. To the contrary, the parties regularly met and exchanged varying ideas about ways to cover the deficit. Although the District held to its position that the PERS pickup was the most desirable way to achieve that goal, it did not condition bargaining on OSEA's acceptance of that proposal.

We also disagree that the District violated its duty to bargain in good faith by merely conditioning its contribution from reserves on OSEA's acceptance of the PERS pickup. Throughout the negotiations, and even after it appeared that those negotiations would not result in an agreement, OSEA acknowledged the District's "generosity" to contribute approximately $500,000 from its reserves, a contribution that was not made to other bargaining units. We do not agree that conditioning that contribution on the PERS pickup indicates that the District was unwilling to reach a negotiated agreement.

We next address the District's proposal that no employees be exempted from the PERS pickup and wage reduction. The District explained why it believed that OSEA's proposal exempting so many employees from those "cuts" was "inequitable." The District further explained that those proposals fell short of filling the deficit. The District also told OSEA that a PERS pickup and a straight wage reduction were the most practical and efficient means of filling that deficit, and that those "cuts" should be applied across-the-board to all employees.

OSEA countered that the District's definition of "equitable" failed to consider that the proposed exempted employees had recently endured significant wage cuts. Thus, asking those employees to take additional cuts was, from OSEA's perspective, "inequitable."

The question concerning the most equitable way to fill the budget shortfall was subjected to considerable disagreement and debate. The question is also one of significant complexity. Indeed, as OSEA informed its members at the conclusion of bargaining, "'equity' is a difficult thing to achieve for a classified bargaining unit" with such a diverse group of employees. Although the parties had different ideas about what would be most "equitable" and practical, that difference in perspective does not mean that the District was unwilling to reach an agreement.

Finally, we consider the District's proposal extending the PERS pickup period indefinitely until a successor agreement was reached. OSEA contends that this proposal indicates bad faith because it was regressive, and made 139 days after bargaining had begun. OSEA further contends that because the proposal was made just 11 days before the 150-day bargaining period expired, it had little time to adequately respond to or bargain over the issue.

We agree with OSEA that the timing and content of the District's proposal extending the time period of the PERS pickup was not good bargaining practice. *See McKenzie School District #68*, 8 PECBA at 8198 n 18 (observing that certain employer actions were not necessarily "good bargaining practice," but also were not indicative of "bad faith"). We further note that a new proposal made in the late stages of bargaining may indicate bad-faith bargaining, particularly when that proposal is regressive. However, the District's proposal, along with its timing, does not amount to a *per se* violation of the duty to bargain in good faith. Moreover, although made in the later stages of negotiating, the parties still had time to conduct meaningful negotiations before the bargaining period expired. Nevertheless, we agree with OSEA that it would have been preferable if the District had proposed (and explained) the PERS pickup extension earlier in the process. Therefore, we consider the timing and content of the District's October 18 proposal as one factor in our analysis of the totality of the District's conduct, and conclude that, together, the timing and content of the proposal are suggestive of bad-faith bargaining.

3. *Behavior of the District's Negotiator*. In examining the conduct of the party's negotiator, we focus on the effect that the negotiator's conduct had on the bargaining process. Where, for instance, a representative makes no proposals, offers no counterproposals, has no apparent authority to negotiate, is non-responsive to inquiries from the other party, and tinkers with contract language away from the bargaining table, such conduct indicates an intention not to bargain or reach agreement. *Hood River County*, 16 PECBR at 454.

OSEA argues that neither Bloomquist nor Superintendent Long had any real authority to reach a tentative agreement, and contends that they misled OSEA's bargaining team into believing certain reductions were acceptable when they were not. The evidence does not show an intent to mislead.

It is correct that Bloomquist had limited authority to enter into a tentative agreement without ultimate board approval, but there is no persuasive evidence that he lacked authority to advance proposals or accept others. Neither side had unrestricted authority to enter into a binding agreement without the approval of its constituency. This does not mean the representatives acted in bad faith. Accordingly, we do not find that Bloomquist or Long lacked meaningful authority to bargain.

We also do not conclude that Bloomquist's or Long's behavior negatively affected the bargaining process. Bloomquist and Long were cordial throughout the negotiations; they promptly exchanged telephone calls and e-mails from OSEA's representatives; Bloomquist attended the bargaining sessions, responded to proposals and offered cost-saving ideas, and explained the District's position, even when OSEA's representatives did not accept it.

Therefore, we do not find Bloomquist's or Long's behavior indicative of bad-faith bargaining.

4. *Nature and Number of Concessions Made.* The obligation to meet and negotiate does not compel either party to agree to a proposal or require the making of a concession. ORS 243.650(4). Thus, this Board "cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position * * *." *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-37-08, 23 PECBR 895, 916 (2010). However, "the employer is obliged to make <u>some</u> reasonable effort in <u>some</u> direction to compose [its] differences with the union * * *." *Id.* at 916-17, quoting *McKenzie School District*, 8 PECBR at 8198 (emphasis in original).

OSEA contends that the District engaged in surface bargaining because it made no concessions and only one counterproposal shortly before the bargaining period ended. We disagree. The negotiations show that the District was willing to apply savings from retirements and unfilled vacancies to the classified employees' deficit; it agreed to additional savings from the health insurance package; it offered a financial contribution from its reserves; and it reached a TA in August. Although, as noted above, the District made a later-stage bargaining proposal that extended the end date of the PERS pickup, we do not find that the District was unwilling to consider or propose other cost-saving measures. Overall, we find that this factor does not indicate that the District was merely going through the motions without any intention of reaching an agreement on the budget shortfall. *See McKenzie School District #68*, 8 PECBR at 8196.

5. *Failure to Explain Bargaining Position.* Good-faith bargaining requires that a party explain its proposals so that the other side may respond in an intelligent manner. *Id.* at 8199. OSEA argues that the District had no reasonable explanation for making a proposal in October that was worse than what was tentatively agreed to in August. OSEA further contends that the District also failed to explain why it insisted on certain conditions and failed to pursue other solutions.

We conclude that the District adequately and repeatedly conveyed its objections to furloughs and to exempting certain employees from the PERS pickup. OSEA did not accept the District's explanation about the most "equitable" way to implement wage cuts, but that does not make the District's explanation false or misleading.

We are less persuaded, however, that the District adequately explained why it changed its position regarding the end date of the PERS pickup period. Although the District may have done so in light of its proposal to start the pickup date six months later, it did not sufficiently identify that as the reason. Additionally, the District's explanation that the PERS pickup period would extend as the "*status quo*" until a new successor agreement was reached did not adequately convey how that proposition related to the budget shortfall. Thus, we find the District's explanation on this particular proposal to be inadequate and a factor weighing in favor of OSEA's complaint.

6. *Course of Negotiations.* Evidence that a party never intended to reach a settlement but had planned to implement its proposals from the beginning indicates bad-faith bargaining. *School Employees Local Union 140, SEIU, AFL-CIO, CLE v. School District No. 1, Multnomah County*, Case No. UP-44-02, 20 PECBR 420, 433 (2003). Likewise, an employer who rushes through the negotiation process may demonstrate a lack of serious intention to reach agreement. *Id.*

Here, the parties met approximately eight times over a five-month period and their representatives maintained regular communications and exchanged ideas, information, and options. Moreover, the parties agreed to a TA relatively early in the bargaining process. Although OSEA's membership narrowly rejected the TA, the parties established a serious intention to reach an agreement.

After the TA was rejected, the parties continued to bargain, and indeed reached a separate agreement on health insurance. Although the parties disagreed on the best way to fill the balance of the budget shortfall, particularly in a way that would be ratified by both parties, they discussed and exchanged proposals on that issue. The District also continued to offer $500,000 from its reserves. Although that contribution was contingent on the PERS pickup, it was nonetheless a good-faith offer to reduce the classified bargaining group's contribution amount, and was not an offer that had been extended to other bargaining groups. Therefore, we find that the course of negotiations indicates that the District was willing to reach a negotiated agreement.

7. *Other Factors*. In addition to the foregoing, we give weight to the parties' ability to reach a TA on the entire budget shortfall. We also give weight to the parties' ability to reach an agreement on health insurance, even after the OSEA membership rejected the overall TA. Moreover, even after the District rejected OSEA's final proposal, the District indicated a willingness to continue bargaining until the end of the bargaining period; OSEA, however, declined to continue bargaining. Collectively, these factors significantly weigh against concluding

that the District "merely went through the motions of bargaining without any intention of reaching an agreement." *See McKenzie School District #68*, 8 PECBR at 8196.

After weighing the totality of the District's conduct, we do not find that the District engaged in surface bargaining, as alleged by OSEA. Although, as set forth above, we agree that certain conduct concerning the District's late-stage proposal on the end date of the PERS pickup could indicate bad-faith bargaining, the totality of the District's conduct does not establish that the District lacked serious intention to reach a negotiated agreement. Accordingly, we find that the District did not violate its duty to bargain in good faith under subsection (1)(e), and we will dismiss this complaint.

The District Did Not Violate ORS 243.672(1)(b)

OSEA alleges the District violated ORS 243.672(1)(b) when Bloomquist sent an e-mail to all employees on October 26, which it contends materially misrepresented the bargaining that had occurred, undermined the designated representatives by portraying them in a negative light, and attempted to bypass the designated representatives and deal directly with bargaining unit members. Specifically, OSEA contends that the timing of Bloomquist's communication, coming just before the District rejected OSEA's latest proposal, made OSEA's bargaining team appear unreasonable because it was the only employee group not to reach agreement. OSEA also argues that this was a subtle attempt to bargain directly with OSEA members.

A public employer violates ORS 243.672(1)(b) when it dominates, interferes with, or assists in the formation, existence, or administration of a labor organization. *Oregon AFSCME Council 75, Local 2936 v. Coos County*, Case No. UP-15-04, 21 PECBR 360, 385 (2006). In order to prevail on a subsection (1)(b) claim, a complainant must show interference that directly affects the labor organization. We have explained that

> "[t]o establish a subsection (1)(b) violation, 'a complainant must prove that an employer took actions [that] impede or impair a labor organization in the performance of its statutory responsibilities. In establishing this violation[,] a complaining labor organization must provide evidence to support the conclusion that *some actual interference* with its existence or administration occurred as a result of the employer's actions.'" *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 22 PECBR 752, 794 (2008) (emphasis in original) (quoting *Junction City Police Association v. Junction City*, Case No. UP-18-89, 11 PECBR 780, 789 (1989)).

Additionally, an employer dealing directly with employees on contract issues can violate subsection (1)(b) because "[b]argaining unit members who see the employer dealing directly with other unit members about contractual issues will inevitably lose confidence in the exclusive representative's capability to represent their interests in dealing with the employer." *AFSCME, Local 2909 v. City of Albany*, Case No. UP-26-98, 18 PECBR 26, 39 (1999). *See also 911 Professional Communications Employees Association v. City of Salem*, Case No. UP-62-00, 19 PECBR 871 (2002).

Here, Bloomquist's e-mail correctly pointed out that OSEA was the only employee group that had not reached agreement with the District, but the e-mail did not: (1) criticize OSEA's bargaining team or its proposals; (2) contain a proposal that differed significantly from proposals previously made to OSEA; (3) invite a response from, or propose to meet with, bargaining unit members; (4) allege that the OSEA bargaining team had failed to convey a proposal; (5) state anything that was not already known to OSEA's bargaining team; or (6) indicate that the District would change its positions based on member feedback. The e-mail omitted references to the cost-saving measures already agreed to, and to the District's initial offer to consider OSEA's cost-saving measures (including furloughs and exemptions), but these omissions did not misrepresent the negotiations.

The only material omission was any reference to the District's proposal to extend the PERS pickup period beyond the Agreement's expiration. Although significant, there is no persuasive evidence that bargaining unit members had lost confidence in, or called for the removal of, their bargaining representatives as a result of the omission. Accordingly, OSEA did not establish that Bloomquist's e-mail interfered with or undermined its administration, and we will dismiss this subsection (1)(b) claim.

ORDER

The complaint is dismissed.

DATED this 23 day of May, 2012

Kathryn A. Logan, Chair

*Jason M. Weyand, Member

Adam L. Rhynard, Member

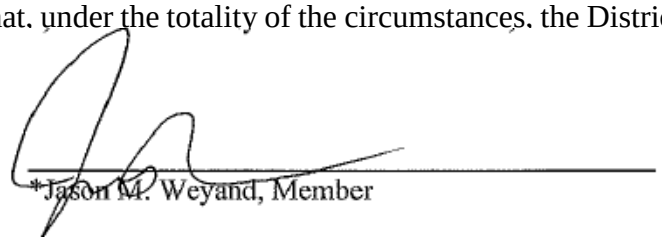
This Order may be appealed pursuant to ORS 183.482.

*Member Weyand, Concurring In Part, Dissenting In Part:

I concur with my colleagues in holding that the District did not engage in a *per se* violation of ORS 243.672(1)(e), and that the District did not violate ORS 243.672(1)(b). However, I respectfully disagree with their conclusion that the District did not engage in bad faith bargaining under the totality of the circumstances.

The District's conduct before the failure of the ratification vote on the original TA was certainly consistent with the standards of good faith bargaining, but its conduct after the Association members voted the TA down was not. The District's bargaining position became increasingly hard line, culminating in its proposing and implementing a regressive proposal regarding the elimination of the employees' PERS pickup. While a regressive proposal in and of itself may not establish bad faith bargaining, there are situations where it can under the appropriate surrounding circumstances. This is one of those cases.

The parties were engaged in interim bargaining as a result of a contractually mandated re-opener provision solely on economic issues to address a budget shortfall for fiscal year 2011-12. The PERS pickup became a central focus of the negotiations, as demonstrated by the failure of the ratification vote and the subsequent decision by the District to condition its contribution of reserve funds on employees accepting the elimination of the PERS pickup. A regressive proposal on a key financial issue so late in the bargaining process (especially one that extended beyond the period of time in which budget savings were intended to be realized), coupled with the surrounding facts and the marked change in the District's bargaining approach, is in my opinion sufficient to establish a violation. I agree with the ALJ that, under the totality of the circumstances, the District violated ORS 243.672(1)(e).



*Jason M. Weyand, Member

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-043-11

(UNFAIR LABOR PRACTICE)

ASSOCIATION OF ENGINEERING EMPLOYEES OF OREGON, Complainant, v. STATE OF OREGON, DEPARTMENT OF ADMINISTRATIVE SERVICES, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter was submitted directly to the Board after the parties agreed to waive a hearing and agreed to stipulated facts and joint exhibits. The record closed on December 17, 2012, following receipt of the parties' briefs.

Julie Falender, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented Complainant.

Tessa M. Sugahara, Attorney-in-Charge, Labor and Employment Section, Oregon Department of Justice, Salem, Oregon, represented Respondent.

On July 19, 2011, the Association of Engineering Employees of Oregon (Association) filed this unfair labor practice complaint alleging that the State of Oregon, Department of Administrative Services (State) violated ORS 243.672(1)(a), (b) and (c) as a result of certain actions taken by the State during negotiations for a successor collective bargaining agreement. The Association later amended its complaint, adding allegations that the State violated ORS 243.672(1)(e) and withdrawing certain allegations. On March 1, 2013, the parties were notified that the matter was being held in abeyance until a third Board member was appointed, confirmed, and had time to review the matter. On May 30, the Board notified the parties that an Order would be issued by mid-June.

The issues presented are:

1. Did the State violate ORS 243.672(1)(e) when it unilaterally changed the *status quo* with regard to the use of the State's e-mail system during the hiatus period? [1]

2. Did the State's directives prohibiting the use of the State e-mail system for Association-related communications during the hiatus period violate ORS 243.672(1)(a) and (1)(c)?

3. Did the State violate ORS 243.672(1)(b) or (1)(e) when, during the hiatus period, it decided to cease providing the Association with copies of disciplinary documents issued to bargaining unit members?

4. Did the State violate ORS 243.672(1)(e) when it ceased granting Association leave during the hiatus period?

5. If the State violated ORS 243.672(1)(a), (b), (c) or (e), what is the appropriate remedy?

For the reasons set forth below, we conclude that the State violated ORS 243.672(1)(e) when during the hiatus period it decided to: (1) prohibit the use of the State e-mail system for Association-related communications as previously allowed under Article 71 of the expired contract; (2) prohibit managers from providing copies of disciplinary documents to the Association as required by Article 24, Section 1 of the expired contract; and (3) prohibit managers from granting or extending Association leave under Article 9, Section 6 of the expired contract. In addition, the State violated ORS 243.672(1)(a) when it prohibited the use of its e-mail system for any Association-related communications. Finally, the State's decision to cease providing copies of disciplinary documents to the Association did not violate ORS 243.672(1)(b). Because of our disposition of these claims, we do not address whether the State violated ORS 243.672(1)(c).

RULINGS

On December 17, 2012, the State submitted its 40-page closing brief, in violation of OAR 115-010-0077(3). ("Briefs shall not exceed 30 pages, unless expressly permitted by the Board or its agent.") On December 18, the Association objected to the length of the brief and asked the Board to disregard it. The State subsequently submitted a Post-Filing Motion to Request Brief in Excess of 30 Pages. We granted the Association's objection in part by striking pages 31 through 40 of the State's brief, and denied the State's Motion in its entirety. The stricken pages were not considered in reaching our decision, although they remain part of the record.

[1]The "hiatus period" refers to the time after the expiration of the parties' collective bargaining agreement and before the completion of the parties' bargaining obligation for a new agreement under the PECBA. *Teamsters Local 223 v. City of Medford*, Case No. UP-053-10, 24 PECBR 169 (2011), *recons*, 24 PECBR 225 (2011).

FINDINGS OF FACT

We adopt the following findings of fact from the parties' stipulation of facts and joint exhibits:

1. The Association is a labor organization that represents certain employees of the State who work in three agencies: the Oregon Department of Transportation, the Oregon Department of Forestry, and the Oregon Parks and Recreation Department (Agencies).

2. The State of Oregon, Department of Administrative Services (DAS) is the exclusive bargaining representative for the State, which is a public employer.

3. The Association and the State were parties to a collective bargaining agreement that was effective from July 1, 2009, through June 30, 2011.

4. The parties were in negotiations for a successor agreement when the contract expired on June 30, 2011, but did not reach an agreement before expiration.

5. In the past, the parties had agreed to extend the existing collective bargaining agreement after the expiration date provided for in the contract.

DAS Guidelines

6. On June 29, 2011, DAS Director Michael Jordan sent a memorandum to all agency directors, human resource directors and human resource managers regarding the upcoming expiration of the collective bargaining agreements between the State and various unions, including the Association. This memorandum stated that:

> "Labor contract negotiations continue to move forward with all parties engaged at the bargaining tables. Representatives for the State and AFSCME and SEIU are currently in mediation which is the second phase of the negotiations process in the [PECBA]. The parties have been engaged in mediation with the Employment Relations Board's State Conciliator for multiple sessions and are continuing to meet to reach resolution.
>
> "The attached guidelines address one immediate issue that State Government must address, which is the expiration of the current collective bargaining agreements and the fact they are not being extended. Importantly, the State, as the employer, is required to maintain in effect the same wages, hours and mandatory terms and conditions of employment for represented bargaining unit employees that existed at the time the contract expired until the entire bargaining process is concluded. That process will not conclude until at least the end of July."

7. Attached to the memorandum was a document entitled "General Guidelines for Employer Representatives when a Collective Bargaining Agreement Expires." (DAS Guidelines). The DAS Guidelines specifically enumerated certain subjects that would not be

continued once the agreements expired because DAS believed them to be permissive for bargaining. The DAS Guidelines stated in relevant part that:

> "Current situation: As already reported by the news media, the State has advised the multiple unions representing State employees that when the current collective bargaining agreements expire, they will not be extended. While that means the agreements are no longer in force it also triggers a legal doctrine commonly referred to 'as the status quo period.' The legal effect of this doctrine is that the State must maintain certain conditions of employment for a period of time that runs until the dispute resolution process is at a point where the State would implement the terms of a Final Offer or, in the case of non-strike units, an arbitrator made an award.
>
> "Status quo obligations: During the status quo period, an employer is required to maintain in effect certain terms of employment (e.g. wages, hours of work) and other terms and conditions of employment that are called 'mandatory subjects' in the context of bargaining. The status quo is generally going to be what the expired contract provided for regarding that mandatory subject.
>
> "If a subject is not mandatory it is legally described as 'permissive' and the State is not required to maintain these terms even though they may be found in an expired collective bargaining agreement.
>
> "This is a challenging and complex area of labor law that is subject to interpretation and application of various tests. For purposes of general guidance some examples are listed below. It is important to review both sections. Mandatory areas will remain while those under the permissive section - even if found in an expired contract - will not be continued after the agreements expire.
>
> "* * * * *
>
> "Permissive subjects: These are some of the items that will *not be* continued once the agreements expire on June 30, 2011. Set out below are specific provisions in some or all of the current agreements that will not continue during the status quo period of time. [Emphasis in original.]
>
> "(1) Access to state email systems – There would be no use of the State's email system by union staff or state employees holding positions in the union. If examples are found they need to be reported to the agency HR unit.
>
> "* * * * *
>
> "(3) Notice to the unions of Corrective Action, Discipline and Dismissal - Personnel decisions will continue to be made but the notice to the unions, where required by an expired contract, is discontinued.

"(4) Leaves of Absence for Union Business - - Those employees already on leave will be allowed to continue under continuing terms and conditions of employment for employees, but no new leaves or extensions will be granted during the status quo period." (Emphases in original.)

8. On June 30, 2011, DAS Labor Relations Manager Glenn West sent a letter advising Association Co-Executive Director Dawn Nicholson that the expired agreement would not be extended by the State. The letter also discussed the State's *status quo* obligations, and included a copy of the DAS Guidelines.

Use of the State E-Mail System

9. Article 71 of the expired agreement allowed the Association and its represented employees to utilize the State e-mail system, subject to certain conditions. Article 71 provided that:

"E-Mail Messaging System. Association representatives and AEE-represented employees may use an Agency's e-mail messaging system to communicate about Association business provided that all of the following conditions are followed:

"1. Use shall not contain false, unlawful, offensive or derogatory statements against any person, organization or group of persons. Statements shall not contain profanity, vulgarity, sexual content, character slurs, threats or threats of violence. The content of the e-mail shall not contain rude or hostile references to race, marital status, age, gender, sexual orientation, religious or political beliefs, national origin, health or disability.

"2. Except as modified by this Article, Agency shall have the right to control its e-mail system, its uses or information.

"3. The Agency reserves the right to trace, review, audit, access, intercept, recover or monitor use of its e-mail system without notice.

"4. Use of the e-mail system will not adversely affect the use of or hinder the performance of an Agency's computer system for Agency business.

"5. E-mail messages sent simultaneously to more than five (5) people shall be no more than approximately one (1) page and in plain or rich text format. Such group e-mails shall not include attachments or contain graphics (except for the Association logo). Recipients of such group e-mails shall not use the 'Reply All' function.

"6. E-mail usage shall comply with Agency policies applicable to all users such as protection of confidential information and security of equipment.

"7. The Agency will not incur any additional costs for e-mail usage including printing.

"8. The Union will hold the Employer and Agency harmless against any lawsuits, claims, complaints or other legal or administrative actions where action is taken against the Union or its agents (including Association staff, Association officers and Key Members) regarding any communications or effect [*sic*] any communications that are a direct result of the use of e-mail under this Agreement.

"9. Such e-mail communications shall only be between AEE-represented employees and/or managers, within their respective Agency, and the Association. However, for purposes of negotiations, bargaining team members may communicate across agencies. Additionally, DAS[-] recognized joint multi-agency labor/management committee members and the Association Board of Directors may communicate across agencies. The Association shall provide the names of its Board of Directors to DAS.

"10. Use of Agency's e-mail system shall be on employee's non-paid time.

"11. E-mail communications may include links to the Association website, which may be accessed on non-paid time.

"12. Nothing shall prohibit an employee from forwarding an e-mail message to his/her home computer.

"13. E-mail shall not be used to lobby, solicit, recruit, persuade for or against any political candidate, ballot measure, legislative bill or law, or to initiate or coordinate strikes, walkouts, work stoppages, or activities that violate the Contract.

"14. Should the Employer believe that the Association's staff has violated this Letter of Agreement, the Employer will notify the Association's Executive Director, in writing, within thirty (30) calendar days from the date of the alleged misuse of an Agency's e-mail system. The Executive Director shall respond, in writing, within thirty (30) days and include the action that will be taken to enforce the Letter of Agreement. If, despite these actions, the violation continues, the Employer will notify the Association, in writing, within thirty (30) calendar days that the alleged misuse may be arbitrated."

10. On July 7, 2011, Parks and Recreation Department Director Tim Wood sent out a memorandum to all employees of his agency concerning the use of e-mail for union business during the *status quo* period. The messages stated that:

"As the collective bargaining process continues there is a change concerning use of agency's e-mail systems. I want to provide clear direction to all parties on the use of agency e-mail systems for union business. **At this time, and until further notice, union business is not to be conducted through the state's e-mail systems.** [Emphasis in original.]

"This means no messages will be sent by or on behalf of the union through the agency's e-mail system, whether the communication is from union staff or agency staff holding union positions. Any agency staff receiving a message inadvertently sent concerning union business must advise your immediate supervisor of the communication without responding to it.

"The use of the agency's e-mail system by staff for non-work related purposes remains in place. That means your internet access (whether for various acceptable sites or to a private email account) is subject to existing agency policy. If you have any questions concerning the scope of such permitted use it is important to contact Human Resources Manager, Tasha Petersen, to get clarification before you use the system. Our goal is to have the policy followed and avoid any personnel issues concerning such use.

"Thank you for your attention to this important matter."

11. On July 8, 2011, Department of Transportation Deputy Director Clyde Saiki sent out an identical memorandum, except that it did not contain a specific Human Resources contact in the message. Deputy State Forester Paul Bell also sent out an e-mail that same day containing the same information to all staff in the Department of Forestry. The use limitations applied to all employees, including the Association bargaining unit members and bargaining unit employees represented by other unions.

12. Each agency with Association-represented employees has a written policy allowing "limited, incidental personal use" of the State's e-mail and internet system. Use for union activities is allowed per the applicable contract. All exceptions for non-State business allowed under these policies continued during the hiatus period, other than the "union-business" exception.

13. In previous years, the Association has sent bargaining updates to members via their State e-mail addresses.

14. The Association posted updates on bargaining for the 2011-13 contract on the Association website that was accessible to its members who had voluntarily registered for a username and password on the "Members portion" of its public website, including during the hiatus period. In July 2011, approximately half of the Association members had registered a username and password on this website.

15. The Association's membership application requests an employee's work and personal e-mail address. Although voluntary, approximately half of the Association's members provided a personal e-mail address. The Association is able to obtain the work e-mail addresses of all bargaining unit employees through the State address book, and the Association maintains a database of personal and work e-mail addresses of its members.

16. During the period of time following the contract's expiration, the State did not impose any limitations or restrictions on communications between employees and the Association through telephones or other media (*e.g*. telephone, inter or intra-campus or agency mail). Only use of the State e-mail system was suspended.

Notice of Corrective Actions, Disciplinary Actions and Dismissals

17. Article 24, Section 1 of the expired contract states:

> "The Employer and the Association agree that the conduct of employees must reflect the best interest of the public. Conduct shall be measured by the employee's performance, safety record and attitude. Disciplinary action shall follow the principles of progressive discipline when appropriate.
>
> "Regular status FLSA non-exempt employees reprimanded in writing, reduced in pay, demoted, suspended without pay or terminated and regular status FLSA exempt employees reprimanded in writing, suspended without pay in full week increments, demoted or terminated will be for just cause.
>
> "Every letter of reprimand, suspension, demotion, reduction in pay or dismissal for disciplinary reasons given to any employee shall have attached or shall include a statement that the employee has fifteen (15) calendar days from the effective date of the action in which to exercise the right of appeal. Such letters and statements will be hand delivered and/or sent by certified return-receipt mail to the employee, except letters of reprimand, and a copy sent to the Association."

18. From July 1, 2011 through July 28, 2011, the time in which the State was operating under the DAS Guidelines, the State did not issue any notices of suspension, demotion, reduction in pay or dismissal to Association members.

Leaves of Absence for Association Business

19. Article 9, Section 6 of the expired contract provides for leave to the Association President and 1st Vice President for Association business. This section provides that:

> "The Employer recognizes the right of the Association to conduct its own affairs and that the Association's President and 1st Vice President may desire to be easily accessible to the Employer, the Agency and the employees alike. To maintain this accessibility, the Association's President and 1st Vice President shall be allowed up to one hundred (100) hours a year (each) of vacation, compensatory time, or leave without pay to conduct this business, when requested by the individual employee. When assistance is requested by the Employer, time required for such assistance will not be considered to be leave."

20. On June 13, 2011, Association 1st Vice President Jody Frasier notified his supervisor of leave to travel and participate in collective bargaining for the dates of July 18, 19, 27 and 28, 2011. This leave request was not denied or subsequently rescinded by the State. Mr. Frasier's timesheet for July 2011, which he and his supervisor signed, allocated 28 hours of leave on those dates under payroll code "UBB," which is code for paid leave for participating in collective bargaining sessions.

21. Association President Jordon Orser was also credited with 24 hours of union leave for participating in Association business on July 19, 22 and 28, 2011. Those hours were allocated under payroll code "UBB," and the timesheets were signed by Mr. Orser and his supervisor.

22. Under Article 9, Section 6, the President and 1st Vice President of the Association are not required to provide management with notice of the need to take leave for Association activities. However, Association officers often provided management with such notice as a courtesy. Under the terms of the expired agreement, agency management could not deny Association leave.

Tentative Agreement

23. The parties signed a tentative agreement (TA) for a successor collective bargaining agreement on July 28, 2011. Contemporaneously, the State agreed to extend the provisions of the expired agreement until Association members had the opportunity to vote on the TA. By extending the agreement, the State effectively ceased enforcement of the DAS Guidelines.

CONCLUSIONS OF LAW

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

ORS 243.672(1)(e) Allegations

We first address the Association's claims that the State violated ORS 243.672(1)(e) when, during the hiatus period, it unilaterally ceased complying with the *status quo* established by three articles in the expired contract between the parties: (1) Article 71, which allowed the Association and its members to utilize the State's e-mail system to communicate about Association business, subject to certain agreed upon limitations; (2) Article 24, Section 1, which in relevant part required the State to provide the Association with copies of disciplinary documents for bargaining unit members; and (3) Article 9, Section 6, which allowed the Association President and 1st Vice President to utilize vacation leave, compensatory time, or leave without pay to attend to Association business. The Association contends that because these three articles concern mandatory subjects for bargaining, the State's unilateral decision to change the *status quo* before the completion of bargaining violated its duty to bargain in good faith with the Association under subsection (1)(e). The State responds that these three articles concern permissive subjects of bargaining and therefore, its unilateral actions were lawful.

Standards for Decision: ORS 243.672(1)(e)

ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer or its designated representative to "[r]efuse to bargain collectively in good faith with the exclusive representative" of its employees. In turn, collective bargaining is defined as

> "the performance of the mutual obligation of a public employer and the representative of its employees to meet at reasonable times and confer in good faith with respect to employment relations for the purpose of negotiations concerning mandatory subjects of bargaining, to meet and confer in good faith in accordance with law with respect to any dispute concerning the interpretation or application of a collective bargaining agreement, and to execute written contracts incorporating agreements that have been reached on behalf of the public employer and the employees in the bargaining unit covered by such negotiations." ORS 243.650(4).

This Board has long recognized that an employer commits a *per se* violation of ORS 243.672(1)(e) if it makes a unilateral change in the *status quo* concerning a mandatory subject of bargaining without first completing its bargaining obligation under the PECBA. *See Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177, 295 P3d 38 (2013) (*AOCE*), citing to *Wasco County v. AFSCME*, 46 Or App 859, 613 P2d 1067 (1980) (upholding the Board's authority to adopt the *per se* analysis in unilateral change cases). Thus, when the parties' collective bargaining agreement expires and a new agreement has not been reached, an employer is obligated to maintain the *status quo* with regard to mandatory subjects of bargaining. This requirement is often referred to as the "*status quo* doctrine." In *Oregon School Employees Association, Chapter 7 v. Salem School District 24J,* Case No. C-273-79, 6 PECBR 5036, 5046 (1982), we explained that this general rule "is grounded on the theory that a unilateral change frustrates the objectives of the [PECBA] much as does a flat refusal to bargain."[2]

An employer must generally bargain over its decision to change a mandatory subject of bargaining before making its decision. An employer is not required to bargain over a decision to change a permissive subjective of bargaining, but it is required to bargain over the impacts of the decision on mandatory subjects of bargaining before implementing the change. *Three Rivers Ed. Assn. v. Three Rivers Sch. Dist.*, 254 Or App 570, 575, 294 P3d 574 (2013).

In *AOCE,* the Oregon Supreme Court summarized our methodology for analyzing unilateral change allegations as follows:

> "When reviewing an allegation of unlawful unilateral change, ERB considers (1) whether an employer made a change to an "established practice," often referred to as the "status quo"; [Footnote omitted.] (2) whether the change concerned a mandatory subject of bargaining; and (3) whether the employer exhausted its duty

[2]We cited with approval the Supreme Court's decision in *NLRB v. Katz,* 369 US 736, 747, 82 S Ct 1107 (1962), where the Court found that unilateral changes to mandatory subjects of bargaining were *per se* violations of Section 8(a)(5) of the National Labor Relations Act. *Salem School District 24J,* 6 PECBR at 5047.

to bargain. *Ass'n of Oregon Corr. Employees*, 20 PECBR 890, 897." *AOCE,* 353 Or at 177.

If, upon completion of this analysis, we conclude that the employer was required to bargain a change but failed to do so, we then consider any affirmative defenses raised by the employer. *Lebanon Education Association/OEA v. Lebanon Community School District,* Case No. UP-4-06, 22 PECBR 323, 360 (2008). However, we need not apply our analysis in a mechanical manner and we may proceed to a particular step if that step will be dispositive of the issue. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District,* Case No. UP-24-09, 24 PECBR 730, 762 (2012).

To determine the *status quo,* we review the record to find "[w]hether the parties have, by their words or actions, defined their rights and responsibilities with regard to a given employment condition." *Coos Bay Police Officers' Association v. City of Coos Bay and Coos Bay Police Department*, Case No. UP-61-92, 14 PECBR 229, 233 (1993). The *status quo* may be established by various sources, including the terms of a current or expired collective bargaining agreement, work rules, policies, or an employer's pattern of behavior. *AOCE,* 353 Or at 184. It may also be established by statute. *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757,* Case No. UP-55-05, 22 PECBR 506, 552 (2008).

When determining whether a subject is mandatory for bargaining, we follow a two-step process. First, we identify the subject of the proposal. Second, we examine whether that subject is mandatory for bargaining. To answer the second question, we first determine whether the subject is specifically designated as mandatory or permissive under the statute, or whether we have addressed the status of the subject in a previous Board decision. *Springfield Police Association v. City of Springfield*, Case No. UP-28-96, 16 PECBR 712, 721 (1996). If the subject in dispute is specifically included in the definition of "employment relations" under ORS 243.650(7)(a), then the subject is mandatory for bargaining. *Portland Fire Fighters Assoc. v. City of Portland,* 305 Or 275, 282-83, 751 P2d 770 (1988). Under ORS 243.650 (7)(a), employment relations "includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment."

If the subject does not fall into one of these categories, we next determine whether it is specifically excluded from the definition of employment relations under ORS 243.650(7)(g) (or in the case of school district bargaining, subsection (7)(e)). Subsection (7)(g) excludes:

> "staffing levels and safety issues[3] (except those staffing levels and safety issues that have a direct and substantial effect on the on-the-job safety of public employees), scheduling of services provided to the public, determination of the minimum qualifications necessary for any position, criteria for evaluation or

[3]As is often the case, there is an exception to the exception. For employees who are strike-prohibited under ORS 243.736, employment relations does include "safety issues that have an impact on the on-the-job safety of the employees or staffing levels that have a significant impact on the on-the-job safety of the employees." ORS 243.650(7)(f).

> performance appraisal, assignment of duties, workload when the effect on duties is insubstantial, reasonable dress, grooming, and at-work personal conduct requirements respecting smoking, gum chewing, and similar matters of personal conduct at work, and any other subject proposed that is permissive under paragraphs (b), (c) and (d) of this subsection."

If the subject is not one of the enumerated permissive subjects in subsection (7)(g), we then review whether paragraphs (b) or (d) apply. Under ORS 243.650(7)(b), subjects determined to be permissive by this Board before June 6, 1995 continue to be permissive. Subsection (7)(d) provides that subjects that have an insubstantial or *de minimis* effect on public employee wages, hours, and other conditions of employment are permissive.

If the proposal does not fall within any of these categories, we review our prior cases to determine if we have previously decided whether the subject was a mandatory, permissive or prohibited subject for bargaining.[4] Finally, if none of the foregoing steps are dispositive, we apply the balancing test in ORS 243.650(7)(c). *City of Springfield,* 16 PECBR at 721-22; *AFSCME Local 88 v. Multnomah County,* Case No. UP-18-06, 22 PECBR 279, *recons*, 22 PECBR 444 (2008). Under this balancing test, a subject is permissive if we determine that it has "a greater impact on management's prerogative than on employee wages, hours, or other terms and conditions of employment." ORS 243.650 (7)(c).

Use of the State E-Mail System for Association Business

2. The State's unilateral decision to prohibit the use of its e-mail system for Association-related communications during the hiatus period violated ORS 243.672(1)(e).

The Association has raised a unilateral change claim under subsection (1)(e). We begin our analysis of this claim by noting what is not in dispute between the parties. Importantly, there is no dispute as to: (1) what the *status quo* was (Article 71 allowed employees, employees holding Association positions, and Association staff to use the State e-mail to communicate regarding Association business); and (2) that the *status quo* was changed unilaterally when the State decided that Article 71 was permissive and began prohibiting communications that were formerly allowed under that article. Thus, the only disputed issue is whether the subject or subjects contained in Article 71 are mandatory or permissive for bargaining, and if mandatory, whether Article 71's provisions are included within a limited group of exceptions to the *status quo* doctrine that this Board has recognized.

To resolve this dispute, we first identify the subject or subjects at issue in the discontinued provisions of Article 71. Article 71 contains an agreement between the parties that Association representatives and Association members may utilize the State e-mail system to communicate regarding Association business. It provides 13 restrictions and rules regulating such use, including the requirement that e-mails comply with various employer policies on the

[4]Unlike the review we conduct under ORS 243.650(7)(b), where we only look at cases decided before June 6, 1995, our analysis of prior cases at this step of the process includes a review of all previous Board decisions that have not been modified or overturned by subsequent decisions of the Board, the courts or statutory revisions.

content, size and format of the messages; that the e-mails be sent and read on non-work time; and that they not interfere with the operations of the Agencies. Finally, Article 71 contains a provision that creates a process for the State to bring complaints about the use of the State e-mail system for Association communications. This process can culminate in binding arbitration of the State's complaint.

Based on these provisions, we find that the subject of Article 71 is the allowance of, and limitations on, the use of the State's e-mail system by its employees and their certified representative to communicate about union business.

Having determined the subject of Article 71, we next review whether this subject falls within one of the enumerated categories of subjects that the legislature has designated as mandatory or permissive. We find that this subject does not fall within one of those categories as it does not concern direct or indirect monetary benefits, hours, vacations, sick leave, or grievance procedures that are mandatory for bargaining under ORS 243.650(7)(a). Nor does the Article fall within the subjects specifically designated as permissive under ORS 243.650(7)(g).

We next review our case law to determine if we decided before June 6, 1995, that the allowance of, and limitations on, the use of an employer's e-mail system by its employees and their certified representative to communicate regarding union matters is permissive. If so, that subject remains permissive. *See* ORS 243.650(7)(b). Both parties assert that we have conclusively decided the mandatory/permissive nature of Article 71's provisions. Although we find several of the cases cited by the parties compelling, we do not find them to be directly controlling.

We begin by addressing the State's argument that we decided the at-issue subject to be permissive in *Oregon State Police Officers Association v. State of Oregon, Department of State Police*, Case No. UP-109-85, 9 PECBR 8794 (1986). In that case, the Board held that the "State violated ORS 243.672(1)(e) by implementing a change in its practice concerning the use of state vehicles by officers on standby status because the State refused to bargain over the impact of the change * * * before it was implemented." *Id.* at 8806. In reaching that decision, this Board reasoned that, "[o]n balance, the decision to discontinue the off-duty use of State vehicles [was] permissive," but that the "impact of this decision, however, falls within the definition of 'employment relations'" under ORS 243.650(7) because the "officers affected by the decision had been receiving an indirect monetary benefit under the prior policy, including avoiding of wear and tear on their personal vehicles and saving the fuel consumed in driving to and from work."[5] *Id.* at 8806-07.

For this decision to be binding under ORS 243.650(7)(b), we must find the subject at issue in *Department of State Police* to be the same as the subject at issue in this matter. However, the nature of the subject of "the off-duty use of State vehicles by officers on standby status" is clearly not the same as the nature of the allowance of, and limitations on, the use of an employer's e-mail system by its employees and their certified representative to communicate

[5]Under ORS 243.650(7), "employment relations" includes "indirect monetary benefits."

regarding union matters. Therefore, we disagree with the State's assertion that *Department of State Police* decided that the subject of Article 71 is a permissive, non-mandatory subject of bargaining.

The State, however, cites the following language in *Department of State Police*, in support of its contention:

> "The determination by an employer of the use of its equipment is an inherent management right essential to that employer's ability to determine its level of services, assignment of duties, and the general operation of the employer's enterprise." *Id.* at 8806.

This statement should not be read as applying to *all* employer equipment in *all* situations. Such a broad application would be unworkable and would render permissive various subjects that we have determined to be mandatory in previous decisions. Indeed, other cases have reached different conclusions on the mandatory/permissive nature of subjects that involve the use of employer equipment and other employer-owned property. *See City of Portland v. Portland Police Commanding Officers Association*, Case No. UP-19/26-9, 12 PECBR 424 (1990), *recons*, 12 PECBR 646 (1991) (proposal requiring the employer to provide take-home vehicles and raid gear for officers involved a mandatory subject of bargaining as it impacted direct or indirect monetary benefits and safety); *International Association of Fire Fighters, Local #2752 v. City of Hermiston*, Case No. UP-51-86, 9 PECBR 8964 (1986) (proposal requiring that firefighters have exclusive use of dormitory and living areas at the worksite concerned a mandatory subject of bargaining); *Springfield Education Association v. Springfield School District No. 19*, Case No. C-278, 1 PECBR 347 (1975), *aff'd after remand on other grounds*, 290 Or 217, 621 P2d 547 (1980) (proposals allowing the union to utilize the employer's school rooms for after-hours meetings at no cost, allowing the union to post union materials on bulletin boards in the faculty and work rooms on the employer's property, and granting the union the right to use "school facilities and equipment, including typewriters, mimeographing machines, other duplicating equipment, calculating machines, and all types of audio-visual equipment at reasonable times, when such equipment is not in use are all mandatory for bargaining); *South Lane Education Association v. South Lane School District*, Case No. C-280, 1 PECBR 459 (1975), *aff'd after remand on other grounds*, 290 Or 217, 621 P2d 547 (1980) (proposals nearly identical to those at issue in *Springfield School District* regarding the use of employer facilities and equipment are mandatory for bargaining); *Eugene Education Association v. Eugene School District 4J*, Case No. C-279, 1 PECBR 446 (1974) (proposals (1) allowing union to use school rooms and space for union meetings, (2) allowing the union to use inter-school mail for communications with members, (3) requiring that the district provide sufficient faculty rooms and furnishings, and (4) requiring classrooms to be properly maintained are all mandatory for bargaining).[6]

[6]Some of these cases involve not only the use of employer equipment, but also employer facilities, or a combination of the two. We find these two subjects to be similar in nature as both involve a property right held by the employer. As a result of this similarity, we find that these cases are relevant (but not controlling) to our analysis in this case.

As demonstrated by these cases, we analyze scope-of-bargaining disputes over subjects that involve the use of an employer's equipment or property on a subject-by-subject basis, and the results of our analysis will be driven by the nature of the employer equipment or facilities, the particular use involved, and the application of the analytical framework described above. In other words, the mere fact that a subject involves the use of an employer's equipment or property does not automatically render that subject permissive (or mandatory).

The off-duty use of employer-owned vehicles by police officers, the subject involved in *Department of State Police,* requires a much different level and type of use of "employer equipment" than does the use of the State's e-mail system by Association-represented employees to communicate with each other and their Association representatives regarding union business. Although the transmittal of e-mails inherently requires some utilization of the State's equipment, it is a significantly different type of equipment use than providing vehicles for employees to utilize on off-duty time. For example, because the State and its employees already regularly utilize e-mail for work related communications, the infrastructure and equipment necessary to transmit an Association-related e-mail are already in place. A proposal requiring the State to provide take-home vehicles, however, may require the State to purchase equipment it does not already have and provide significant additional capital outlays for maintenance, fuel and other costs associated with vehicle use. Further, vehicles, unlike e-mail, are not a type of employer equipment that can be utilized for communications regarding workplace matters. Therefore, we do not find the above-quoted language in *Department of State Police* dispositive or particularly probative concerning the question before us. For these reasons, we find *Department of State Police* inapposite; therefore, ORS 243.650(7)(b) does not apply.

In support of its position, the Association cites to a trio of cases, beginning with *Springfield School District.* In *Springfield School District,* we reviewed a labor organization's proposals allowing the union to utilize the employer's school rooms for after-hours meetings at no cost, allowing the union to post union materials on bulletin boards in the faculty and work rooms on the employer's property, and granting the union the right to use "school facilities and equipment, including typewriters, mimeographing machines, other duplicating equipment, calculating machines, and all types of audio-visual equipment at reasonable times, when such equipment is not otherwise in use." 1 PECBR at 355. We found these proposals, along with a proposal that the parties agree to print and distribute copies of the contract to employees, to be mandatory for bargaining. We reasoned that "[p]rovisions [that] require cooperation of the public employer with the exclusive representative in the discharge of the duty of fair representation under the Act are clearly for the benefit of both the public employer and his employes, and cannot be found improper assistance." *Id.* at 350. We also found union proposals requiring that the district provide teachers with a reference library, desks, closet and storage spaces, and other supplies mandatory for bargaining. *Id.* at 359. In *South Lane School District,* we held for a second time that the same types of proposals were mandatory because they "assist the incumbent labor organization in its duty of fair representation." *Id.* at 474.

Finally, the Association points to language in *Oregon University System v. Oregon Public Employees Union, Local 503,* Case No. UP-61-98, 19 PECBR 205 (2001), *recons,* 19 PECBR 431 (2001), *rev'd on other grounds,* 185 Or App 506, 60 P3d 567 (2002), where we briefly discussed the obligation to bargain over access to an employer's equipment for union

communications, even though that issue was not specifically before us.[7] Specifically, we observed:

> "the general rule in the private sector is that a union and its members do not have a statutory right to use the employer's equipment to communicate. [Footnote omitted] In both the private sector and under the [PECBA], the subject of access to the employer's equipment for union communications is typically mandatory for bargaining. * * * Thus, if a right to use equipment exists, it must be found in the collective bargaining agreement." *OUS,* 19 PECBR at 434 (Order on Reconsideration) (citing *NLRB v. Proof Co.,* 242 F2d 560, 562 (7th Cir.), *cert denied,* 355 US 831 (1957); *Springfield School District,* 1 PECBR at 355).

The validity of this statement appears to have been accepted without the need for further discussion by this Board, and we quoted this statement with approval in our decision in *SEIU Local 503 v. State of Oregon, Oregon Judicial Department,* Case Nos. UP-52/62-03, 21 PECBR 98, 113-14 (2005), *aff'd,* 209 Or App 497, 149 P 3d 235 (2006) (*OJD III*). This previous recognition that the subject of access to an employer's equipment for union communications is typically mandatory for bargaining provides strong support for our conclusion here—that the subject of the allowance of, and limitations on, the use of the State's e-mail system by its employees and their certified representative to communicate about union business is mandatory for bargaining. However, because that precise question was not necessary to the outcome of those prior cases, we do not find those cases controlling here. Moreover, the evolution of e-mail and its use in workplace communications is an important topic that requires us to conduct a careful and comprehensive review of its bargaining status. Therefore, we will continue with our analysis.

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[7] *OUS* involved a claim by the employer that the union violated ORS 243.672(2)(d) by using the employer's e-mail system for union communications without employer permission, and by refusing to comply with the terms of two arbitration awards that concluded that the contract did not expressly allow for this type of use. We originally dismissed the complaint, finding that the complaint was in part untimely, and finding that the union had not refused to comply with the second arbitration award. We noted that the second arbitrator only found that the employer had not violated the contract by preventing the union from using its e-mail system for union communications. There was no finding by the arbitrator that the use of the e-mail system by the union violated the contract, and as a result, the award did not direct the union to cease utilizing the e-mail system; it merely dismissed the union's grievance. Finally, we concluded that the union did not violate any specific provision of the contract by continuing to use the e-mail system after the arbitration awards. 19 PECBR at 215-18.

However, on reconsideration, we held that the union had violated the implied covenant of good faith and fair dealing as applied to the contract by continuing to use the e-mail system when the contract did not allow for such use. We concluded that this continuing conduct violated ORS 243.672(2)(d). 19 PECBR at 433-35. The Court of Appeals affirmed the portion of our order finding that the union did not violate ORS 243.672(2)(d) by breaching the contract or refusing to comply with the arbitrator's award, but reversed our finding that the union had committed an unfair labor practice by breaching the implied duty of good faith and fair dealing. 185 Or App at 520. Although this case dealt with the use of an employer's e-mail system for union communications, we were not called upon to decide the mandatory or permissive status of that subject.

Accordingly, we next turn to the State's assertion that the impact on employees of the prohibition on the use of e-mail for conducting Association business is insubstantial, rendering the subject permissive under ORS 243.650(7)(d). The State argues that the Association was obligated to provide evidence of incidents or patterns of employees being impacted by the decision, but failed to do so. This argument mischaracterizes our analysis of unilateral change allegations that occur during the hiatus period. When we determine whether a subject is permissive under ORS 243.650(7)(d) in this context, our focus is on the possible impact to the bargaining unit of the *subject* of the proposal, not on whether the Association has submitted evidence of specific past or present impacts of the proposal. *City of Springfield*, 16 PECBR at 720. The fact that only a short period of time passed between the change in the *status quo* and the settlement of the contract does not excuse the State's conduct if the subject is ultimately found to be mandatory.

With the proper focus in mind, we conclude that the subject of Article 71 (the use of, and limitations on the use of the State's e-mail system to communicate about Association business) has more than an insubstantial impact on the bargaining unit. Use of the State's e-mail system for Association-related messages allows for a convenient, fast, and effective method of communication between the Association and represented employees. A labor organization cannot operate effectively without communicating with its membership. Nor can an individual employee or group of employees obtain the full benefit of representation if they cannot freely communicate with their coworkers or their exclusive representative.

Numerous times, this Board has discussed the importance of free and open communications between union members and their representatives under the PECBA. *See generally AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 22 PECBR 752, 797 (2008) (conversations between union members and union representatives are confidential, because confidentiality "furthers the purposes and policies of PECBA by ensuring that employees have unfettered access to their union representatives"); *Sandy Education Association and Davey v. Sandy Union High School District No. 2 and Heaton*, Case No. 42-87, 10 PECBR 389, 397, *amended*, 10 PECBR 437 (1988) (prohibiting an employee from discussing workplace incidents with other bargaining unit members, including union officials, violated ORS 243.672(1)(a)). Of course, certain limitations on such communications are not necessarily unlawful. *See Polk County Deputy Sheriff's Association v. Polk County*, Case No. UP-107-94, 16 PECBR 64, 84-85 (1995) (employer's prohibition of union officer from speaking with non-bargaining unit witness during work time was a lawful restriction of protected activity). However, the mere fact that some limitations are lawful does not mean that the impact on a bargaining unit of those limitations is insubstantial.

If we held that the subject of access to and restrictions on the use of the State's e-mail system had an insubstantial impact on bargaining unit members, we would undermine the policies and purposes of the PECBA. Those policies and purposes are best served by robust communications between employees and their exclusive representative. The record is clear that the Association and its members have historically used the State e-mail system to exchange communications regarding contract negotiations. These communications directly touch on a wide variety of mandatory subjects including wages, hours and working conditions. Limiting the availability of this important communication tool would necessarily impact, at least indirectly, each of those subjects as well. As a result, we conclude that the allowance of, and limitations on,

the use of the employer's e-mail system has a significant impact on the bargaining unit members' conditions of employment. Therefore, that subject is not permissive under ORS 243.650(7)(d).

Because the foregoing analysis does not conclusively resolve whether the subject of Article 71 is mandatory or permissive, we turn to the final step in our analysis: the balancing test under ORS 243.650(7)(c). In order to determine if the subject of access to and limitation on the use of the State's e-mail system to communicate about Association business has a greater impact on management's prerogative than on employee wages, hours, or other terms and conditions of employment, we must first identify the interests of both parties.

The State has an interest in controlling the access to and use of its communications systems and its equipment. This interest includes, among other things, the ability to protect against improper use of that system that might subject the State to liability, and the ability to ensure that employees are performing work for the employer while on paid time, rather than utilizing the e-mail system excessively for non-work purposes. There is also presumably at least some cost to the State to allow such use, though the record contains no evidence concerning the amount of that cost. To be sure, these are significant interests that weigh in favor of a finding that the subject is permissive under subsection (7)(c).

However, on this record, these concerns are largely generalized and speculative. Moreover, such concerns were addressed in the expired Article 71, which contained provisions that prevented additional costs to the State, required that e-mails comply with applicable policies regarding content, indemnified the State for disputes arising out of Association related e-mails, and limited the use of the e-mail system to non-work time. As these provisions demonstrate, collective bargaining is a dynamic process capable of addressing such significant concerns.

We turn to the subject's impact on employee wages, hours, or other terms and conditions of employment. As discussed above, the employees have an interest in being able to communicate with each other and with representatives of the Association about the wide range of issues that occur in the workplace and other Association issues. E-mail has become an essential part of today's workplace, surpassing yesterday's bulletin board, water cooler and mail room. Employers and employees rely on this means of communication more and more each year to conduct business and communicate about a wide variety of matters, particularly in bargaining units such as the Association's where employees are spread across multiple agencies and worksites. The ability of employees to communicate about matters of common concern is one of the lynchpins of collective bargaining, and fundamentally impacts employees' ability to collectively bargain over all aspects of wages, hours, and working conditions.

When we balance these competing interests, we find that the subject of access to and limitations on the use of the State's e-mail system has a greater impact on the employees' wages, hours and working conditions than it does on management's prerogatives.[8] Accordingly, we find

[8]Our conclusion is consistent with the results reached in the previous cases cited by the Association, as the subject at issue also requires the State to assist the Association in the discharge of its obligation to fairly represent all members of the bargaining unit. As we noted above in our discussion of *South Lane School District* and *Springfield School District*, proposals requiring such assistance are generally mandatory for bargaining. *South Lane School District*, 1 PECBR at 473-74; *Springfield School District*, 1 PECBR at 355.

that Article 71's language allowing and placing limits on the use of the State's e-mail system for Association related communications is mandatory for bargaining.[9]

Our dissenting colleague disagrees with our balancing of these interests, noting that other methods of communication remain available for the Association and its members. We disagree with this reasoning. First, the dissent's balancing of the subject minimizes the importance and unique nature of e-mail communication in the modern workplace. E-mail has become ubiquitous, largely supplanting many traditional forms of communication. This is particularly important given the nature of the Association bargaining unit, which has employees in three separate State agencies at multiple office locations. Moreover, the importance of e-mail is magnified given the changing nature of the workplace, including the increasing number of State employees who may be permitted or required to telecommute to perform their jobs. *See* ORS 240.855(2) ("It is the policy of the State of Oregon to encourage state agencies to allow employees to telecommute when there are opportunities for improved employee performance, reduced commuting miles or agency savings.").

The dissent also concludes that "the impact on the Association in losing this one avenue of communication [access to the state e-mail system] is minimal." The dissent reasons that the Association could have still communicated with its members through the State's bulletin boards, telephone system, or the mail.

Our disagreement with this reasoning is twofold. First, as we have explained above, given the vital role that e-mail plays in shaping the terms and conditions of employment for today's State employees, we do not agree that removing that avenue of communication has only a "minimal" impact regarding such terms and conditions of employment.

Additionally, the mere existence of lesser communication alternatives to the use of the State's e-mail system does not, in our view, mean that access to the State's e-mail system is a permissive subject of bargaining, particularly given that our case precedent indicates that those other alternatives are also mandatory subjects of bargaining. *See Springfield School District*, 1 PECBR at 355, 360 (subjects of "telephone facilities exclusively for teacher use," union use of "inter-school mail service and teacher mail boxes for communications" with members, and union use of employer bulletin board all mandatory subjects of bargaining). Nearly any type of proposal on any subject has alternatives that an employer or a labor organization may find more

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[9]This result is also consistent with a recent ruling from the National Labor Relations Board, which concluded that employer changes to e-mail policies that limited "personal use" by bargaining unit members were mandatory for bargaining. *See ANG Newspapers*, 350 NLRB 1175 (2007). Because the PECBA was adopted to model the National Labor Relations Act, we may look to cases decided under the federal law to assist us in interpreting the PECBA. Particularly helpful are cases decided before 1973, the year the PECBA was enacted. *Portland Association of Teachers v. Multnomah School District No. 1*, 171 Or App 616, 631 n 6, 16 P3d 1189 (2000) (citing *Elvin v. OPEU*, 313 Or 165, 177, 832 P2d 36 (1992)); *accord Southern Oregon Bargaining Council/Rogue River Education Association/OEA/NEA v. Rogue River School District 35*, Case No. UP-62-09, 23 PECBR 767, 790 n 21, *recons*, 23 PECBR 878 (2010). We have not been presented with a sufficient justification for creating a conflict between the PECBA and the NLRA regarding the mandatory/permissive nature of the State's e-mail policy.

or less acceptable than the proposal offered by the other party during negotiations. The existence of such alternatives does not change the mandatory/permissive nature of the subject itself and render a subject permissive when it is otherwise mandatory.

Finally, we address the dissent's concern regarding the breadth of our opinion. As we understand the dissent's concern, our opinion "equates the use of the e-mail system to the mandatory subject of [the] use of [employer] bulletin boards." According to the dissent, we should not treat all communication-related employer systems the same. We agree with that premise. Our recitation to case precedent regarding bulletin boards, telephones, and other communication-related equipment demonstrates how this Board has treated similar, albeit not identical, communication-related equipment. Our inquiry, however, does not stop there. In other words, we do not merely equate access to the State's e-mail system to access to a bulletin board. To the contrary, we have attempted to explain the unique characteristics of e-mail and its transformative role in today's workplace, which, we have determined have an even *greater* impact on employee terms and conditions of employment than other historical communication-related equipment. Furthermore, we have considered the State's "significant interests," specifically as it relates to its e-mail system. Therefore, we do not agree with the dissent that we have failed to "look at the type and usage of" the State's e-mail system and merely "equate[d] bulletin boards and e-mail systems as 'forms of communication.'"

Having concluded that the subject of the discontinued provisions of Article 71 is mandatory for bargaining, we next turn to the State's argument that this subject falls within an exception to the *status quo* doctrine because the rights contained in Article 71 are "purely contractual rights." Although this Board has utilized the phrase "purely contractual rights" when referencing a group of subjects that fall within an established exception to the general rule we refer to as the *status quo* doctrine, this label is somewhat misleading. In order to clarify the proper scope of these limited exceptions, a review of their historical development is necessary.

Blue Mountain Community College Faculty Association v. Blue Mountain Community College, Case No. C-179-77, 3 PECBR 2025 (1978) (*Blue Mountain*) was the first Board case that recognized exceptions to the general rule that mandatory subjects of bargaining must be maintained during the hiatus period. In *Blue Mountain*, we held that the college was not required to maintain the *status quo* during the hiatus period when it came to granting sabbatical leaves for bargaining unit members. We discussed case law from the private sector and other public sector jurisdictions that recognized certain exceptions to the *status quo* doctrine. We then concluded that requiring the college to continue to grant sabbatical leave would "grant a bargaining advantage to the labor organization and reduce the flexibility of the parties in their effort to reach agreement." In order to maintain the balance of power through bargaining, we held that the college was not obligated to continue providing sabbatical leave during the hiatus period and had not violated ORS 243.672(1)(e) by discontinuing the applicable provisions of the expired contract. *Id.* at 2031-32.[10]

[10]In 1986, we abandoned the "balance of power" exception to the *status quo* doctrine, finding the exception too broad and difficult to apply with any predictability. *In the Matter of the Petition for Declaratory Ruling filed by Portland Community College*, Case No. DR-6-86, 9 PECBR 9018, 9023-24 (1986).

We addressed in more detail the types of limited exceptions to the *status quo* doctrine in *Salem School District 24J,* stating:

> "There are, in addition, certain purely contractual rights that expire along with the contract itself. These are rights or conditions that neither could nor would be binding without being included in the collective bargaining agreement. An employer does not make an unlawful unilateral change when it no longer affords such rights to the employes or their exclusive representative after the term of the contract. Such purely contractual rights include:
>
> "1. Provisions governing permissive subjects of bargaining. Because the employer was under no obligation to negotiate about and agree to such provisions in the first place, the employer is not obligated to continue such provisions in effect when the contract expires.
>
> "2. The procedure to adjudicate contract violations. A grievance procedure that provides the mechanism for appealing alleged contract violations does not have to be continued in force by the employer after the collective bargaining agreement expires except for grievances that matured during the contract period. In other words, an employer may have to continue to give its employes a paid holiday on Labor Day, but its failure to do so-when the collective bargaining agreement expired June 30—is not grievable under the contractual grievance procedure. [Footnote omitted.]
>
> "3. Certain provisions concerning the rights of the exclusive representative. As an example, the right to receive fair share payments from nonmembers is entirely contractual. (See ORS 292.055(5).) An employer may cease making such deductions when the collective bargaining agreement expires." *Salem School District 24J,* 6 PECBR at 5047-48.

In subsequent cases, we have referred to the three categories of subjects listed in *Salem School District 24J* as "purely contractual rights." *See AFSCME Council 75, Local 2067 v. City of Salem,* Case No. UP-71-88, 11 PECBR 422, 426-28 (1989); *Oregon Nurses Association and Vaile v. Eastern Oregon Psychiatric Center,* Case No. UP-15-86, 9 PECBR 9236, 9251 (1986). However, despite the term's recurrent use, we recognize that the vast majority of mandatory subjects of bargaining that are commonly included in collective bargaining agreements are "purely contractual," in that employers are not required to continue providing these benefits or rights by law (the PECBA notwithstanding), but solely by virtue of the collective bargaining agreement. In the abstract, these subjects could all be considered "purely contractual rights," but they are nevertheless not all excluded from the *status quo* doctrine. For the exception to apply, the subjects must be permissive or fall within the few specific exceptions to the general rule that we have previously recognized. Thus, the label "purely contractual rights" for this narrow group of exceptions is inapt, and should not be read literally.

With this limited view of the exceptions established, we next turn to the question of whether the right to use the State e-mail system for Association business under Article 71 fits within our three recognized exceptions set forth above. It does not. As discussed above, we have

determined that the provisions are mandatory for bargaining, not permissive. Further, Article 71 does not involve a procedure to adjudicate contract violations or the payment of fair share fees by bargaining unit members. We decline to further expand our limited exceptions to the *status quo* doctrine.

For the foregoing reasons, we conclude that the State violated ORS 243.672(1)(e) when it unilaterally changed the *status quo* established by Article 71 during the hiatus period.

Provision of Disciplinary Documents to the Association

3. The State violated ORS 243.672(1)(e) when it unilaterally ceased providing notice to the Association of disciplinary actions during the hiatus period.

Article 24, Section 1 of the expired contract requires the State to provide the Association with copies of disciplinary documents issued to bargaining unit members. This expired provision establishes the *status quo* for the Association's second unilateral change claim under subsection (1)(e). Again, it is undisputed that the State unilaterally changed the *status quo.* The issue before us is whether the discontinued provisions are mandatory or permissive for bargaining.

We begin our analysis by examining the language at issue to identify the specific subject in dispute. Article 24 contains the discipline and discharge provisions of the expired agreement. Section 1 contains language providing that the employer must have "just cause" to take the listed categories of disciplinary actions, and requiring that progressive discipline principles be followed when appropriate. Section 1 also contains the specific discontinued language at issue in this claim, which is the requirement that the State provide the Association with a copy of any disciplinary documents.

We have generally held that proposals regarding just cause standards for discipline are mandatory for bargaining. *See Multnomah County Corrections Officers' Association v. Multnomah County,* Case No. UP-21-86, 9 PECBR 9529, 9557-58 (1987). This includes not only the substantive standard of just cause, but also the procedures and guidelines for discipline. In *Portland Fire Fighters Association, Local 43, IAFF v. City of Portland*, Case No. UP-99-94, 16 PECBR 245, 252 (1995), *AWOP*, 142 Or App 206, 920 P2d 181 (1996), we explained our reasons for this holding, stating:

> "We do not agree that disciplinary 'process' and the type and severity of discipline are conceptually separable from the principle of just cause and its grounding in fairness and due process. Disciplinary criteria, guidelines and procedures are fundamentally related to wages, hours, job security, just cause and progressive discipline, matters in which employees have a substantial interest and in which employers have little or no countervailing interests."

As we did in *City of Portland,* we find that the requirement that the State provide copies of disciplinary documents to the Association indistinguishable from the remainder of Article 24's provisions incorporating the standard of just cause for discipline.

There are a number of situations where an individual employee who is disciplined may be too intimidated, embarrassed, or unaware of their rights to challenge or respond to a disciplinary action in a manner consistent with the agreed upon disciplinary standards. As a result, they may not know that they can or should take a copy of their disciplinary action to a union representative for assistance. Requiring the employer to provide a copy of disciplinary documents to the Association ensures that employees are adequately represented and fully aware of their rights on matters that relate to their continued employment, due process, and possibly their wages (in the event of a monetary sanction).

Moreover, the disciplinary process does not necessarily end with the issuance of a disciplinary action. The ability of employees to challenge a disciplinary action can be a key component to a fair disciplinary process, and providing copies of disciplinary documents both to employees and the Association ensures that all impacted parties are informed of the possibility that such a challenge is needed. Further, the requirement to provide a copy of disciplinary documents to the Association ensures that the Association has all of the information that it needs to fulfill its statutory duty of fair representation to its bargaining unit members by monitoring disciplinary actions to ensure that they are in compliance with the just cause standards and other provisions of the contract. Accordingly, we conclude that Article 24, Section 1's requirement that the State provide copies of disciplinary documents to the Association relates to standards for discipline, disciplinary process and procedures, and minimum fairness. As a result, the subject is mandatory for bargaining.

The State characterizes this benefit as a right that solely benefits the Association; and one that is rendered irrelevant during the hiatus period because the grievance arbitration procedure is no longer available to the Association or its members. We disagree. Although the State is correct that the arbitration provisions are no longer available during the hiatus period, the Association may still contest disciplinary actions that it believes are taken without just cause as changes to the *status quo* in violation of ORS 243.672(1)(e). *See Oregon Education Association v. Willamette Education Service District*, Case No. UP-08-07, 22 PECBR 585, 607 (2008) (employer violated ORS 243.672(1)(e) by terminating a teacher in violation of the *status quo*, as established by the expired just cause and discipline provisions of the contract); *Wy'East Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05, 22 PECBR 108 (2007) (school district violated ORS 243.672(1)(e) by disciplining a teacher without just cause, contrary to the *status quo* established by the expired collective bargaining agreement). The enforcement mechanism is different, but the Association's obligation to represent the bargaining unit in such matters is not.

In fact, the change in enforcement mechanism makes the requirement that the Association receive copies of the disciplinary documents during the hiatus period even more important. In *On'Gele and Oregon Association of Corrections Employees v. Department of Corrections, Oregon State Penitentiary*, Case No. UP-42-93, 14 PECBR 825 (1993), we held that an individual employee did not have standing to bring a subsection (1)(e) complaint against the employer challenging their discipline during the hiatus period. We noted that because subsection (1)(e) makes it an unfair labor practice for a public employer to refuse to bargain in good faith *with the exclusive representative* of employees, the union, not the individual employee, is the "injured party" as defined under ORS 243.672(4). *Id.* at 429-30.

Without the requirement that the Association receive copies of each disciplinary document, its ability to enforce the *status quo* for employees will be compromised. When provided with copies of disciplinary documents, Association representatives are in a better position to understand whether a disciplinary action is in fact consistent with just cause and progressive discipline principles, whether an employer has complied with any required due process steps, or whether the discipline is proportionate to other similar disciplinary actions taken against employees in the unit. Finally, Association representatives will presumably have a greater understanding of the process to challenge disciplinary actions that may not comport with the *status quo.*[11]

Accordingly, we conclude that the expired provisions of Article 24, Section 1, which contain the requirement to provide the Association with copies of disciplinary documents, are mandatory for bargaining.

Having concluded that the contested provisions of Article 24, Section 1 are mandatory for bargaining, we next address the State's affirmative defenses. The State asserts that because it did not issue any disciplinary actions to bargaining unit members that would have triggered the obligation to provide the Association with copies of the disciplinary documents, it did not violate subsection (1)(e).

We considered and rejected a similar argument in *Gresham Police Officers Association v. City of Gresham*, Case Nos. UP-6/18-09, 24 PECBR 55 (2010). In *City of Gresham,* the employer announced that it was changing its policies on a wide variety of subjects, including the effective date of salary advancements for bargaining unit members (and other City employees) and the use of sick leave. The City refused to bargain with the union, and the union filed a complaint alleging that the City's actions amounted to unilateral changes in violation of subsection (1)(e). The City defended its actions in part by asserting that it did not apply the newly amended policy to members of the bargaining unit. We held that:

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[11]We have held somewhat related proposals to be mandatory for bargaining. For example, in *Eastern Oregon Psychiatric Center*, 9 PECBR 9236, we were confronted with a situation where the employer sought to limit the union's access to documents in an employee's personnel file in a manner consistent with the terms of an expired contract that required employee approval before the union could access the contents of a personnel file. We held that the language limiting access to the personnel files by the union was a mandatory subject that survived after the contract expired. It stands to reason that if contract language *limiting* union access to personnel documents for bargaining unit members is a mandatory subject of bargaining, then contract language providing an affirmative right to a copy of employee disciplinary documents is likewise a mandatory subject of bargaining. We have also held that a proposal regarding limitations on how long certain documents can be kept in an employee's personnel files was mandatory for bargaining, as it involved the subjects of "disciplinary standards and procedures" and "minimum fairness" relating to personnel files. *City of Springfield,* 16 PECBR at 721. *See also Springfield Police Association v. City of Springfield,* Case No. UP-37-94, 15 PECBR 325 (1994), *aff'd in part, rev'd in part,* 134 Or App 26, 894 P2d 546, *on remand*, 16 PECBR 139 (1995) (we generally view proposals that relate to employee or union access to personnel files as mandatory and those that attempt to prescribe the contents as permissive).

> "The fact that the City never implemented the change in salary-schedule advancement for GPOA bargaining unit members does not relieve the City of the need to bargain its decision to make the change. The subsection (1)(e) violation occurred when the City decided to change [the policy on salary advancement for employees]. The City had an obligation to bargain before it made the decision, and that obligation is not somehow retroactively dissolved because the City later decided not to implement the change. The lack of implementation may affect the remedy, but it does not change the fact that the City acted in bad faith." *Id.* 24 PECBR at 70.

Similarly, in this case, the State unilaterally made the decision to cease complying with Article 24's provisions during the hiatus period and announced that change through the DAS Guidelines and corresponding messages from top agency managers, all of which were sent to the Association and the employees. As noted above, if a subject is mandatory for bargaining, an employer must to complete the required bargaining *before* making a decision to change a mandatory subject of bargaining. *Three Rivers Sch. Dist.*, 254 Or App at 575. That the State took no disciplinary actions during the time in which it was operating under the DAS Guidelines does not change the fact that the State unilaterally changed a mandatory subject of bargaining in violation of subsection (1)(e). As we noted in *City of Gresham,* it is the decision that triggers the bargaining obligation, and the lack of specific harm resulting from the change merely alters the potential remedy for the violation.

Finally, we address the State's argument that the provisions of Article 24 requiring the State to provide the Association with copies of disciplinary documents are "purely contractual rights" that need not be maintained during the hiatus period. This subject clearly does not fall within the recognized type of subjects that we have in the past excluded from the general rule of the *status quo* doctrine, and we again decline to expand those limited exceptions. Thus, the *status quo* established by Article 24, Section 1 must be maintained beyond the expiration of the contract.

In summary, we conclude that the requirement to provide the Association with copies of disciplinary documents concerns just cause standards and procedures for discipline, as well as the fundamental fairness of the disciplinary process, and that these subjects do not expire with the contract. *See Eastern Oregon Psychiatric Center,* 9 PECBR at 9250 (holding that expired just cause provisions of a contract "would survive the contract as part of the status quo concerning working conditions.") For these reasons, we conclude that the State violated ORS 243.672(1)(e) when it decided to change the *status quo* established by the expired portion of Article 24, Section 1, requiring it to provide the Association with copies of disciplinary documents for bargaining unit members.

Discontinuation of Association Leave

4. The State violated ORS 243.672(1)(e) when it decided to cease providing leaves of absence for employees attending to Association business during the hiatus period, as required by Article 9, Section 6 of the expired contract.

The *status quo* regarding Association leave is established by Article 9, Section 6 of the expired contract, which requires the employer to allow the Association President and Vice President as much as 100 hours of vacation, compensatory time, or leave without pay to conduct Association business. Moreover, under Article 9, Section 6, if the Association officer's assistance is requested by the State, the time spent providing such assistance must be considered regular paid working time, not leave.

These provisions specifically affect several of the enumerated categories of employment relations contained in ORS 243.650(7)(a), including direct monetary benefits, hours, and vacation. As a result, the subject is mandatory for bargaining. We have held numerous times that such provisions were mandatory for bargaining. For example, in *AFSCME Local 173 v. Polk County*, Case No. UP-100-88, 11 PECBR 536 (1989), we held that the employer violated ORS 243.672(1)(e) when, after the contract expired during successor negotiations, it stopped paying union bargaining team members for time spent in negotiations during regular work hours as required by the expired contract. We noted that the payment of union negotiators concerned "monetary benefits" to the individuals involved in negotiations, and was thus a mandatory subject of bargaining. *Id.* at 541.

We reached a similar result in *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-91-93, 14 PECBR 832 (1993), where the union proposed that its President and Vice President be provided with paid leave time to conduct various types of union business, including time to attend grievance hearings, represent employees in investigatory meetings, attend meetings where the employer had requested a union representative be present, investigate potential grievances or unfair labor practices, attend arbitration or ERB hearings involving the association, and conduct union meetings. The employer only contested the last portion of the proposal, asserting that paid leave to conduct union meetings was either permissive for bargaining or prohibited as unlawful assistance to the union. *Id.* at 835-36.

We first held that the proposal to provide paid leave to attend union meetings did not constitute unlawful assistance, as the attendance at those meetings was "in whole or in substantial part, directly related to the parties' collective bargaining relationship." *Id.* at 861. We then held that the proposal was mandatory for bargaining, finding the subject "akin to that of 'vacations' and 'sick leave,' two subjects enumerated in ORS 243.650(7)." *Id.* at 862. *See also Eugene Education Association v. Eugene School District 4J and Miller,* Case No. C-93-79, 5 PECBR 3004 (1980) (holding that a proposal for unpaid leave for an employee to serve as an officer of a local union and be returned to substantially the same position upon return is mandatory); *Oregon School Employees Association v. School District No. 9 of Jackson County,* Case No. C-204-78, 4 PECBR 2352 (1979) (paid time for union members to attend grievance or negotiation sessions is mandatory for bargaining).

Consistent with these decisions, we conclude that the Association leave provisions of Article 9, section 6 involve the mandatory subjects of direct monetary benefits and vacation, and are mandatory for bargaining.

The State again asserts that the Association-leave provisions of Article 9 fall within the "purely contractual rights" exception to the *status quo* doctrine. This is not the first time this Board has been presented with this issue. In *Polk County*, we rejected an employer's assertion that expired provisions allowing bargaining unit members paid time to bargain a successor agreement were "purely contractual rights" that expired with the old contract. We reasoned that the paid leave provisions, while providing a benefit to the union, were more fundamentally related to employee leave and pay, subjects that are mandatory for bargaining. *Polk County*, 11 PECBR at 540-42.

Although the contract language at issue is somewhat different from the language involved in *Polk County*, this language still provides for paid or unpaid leave for two employees who serve as Association officers to engage in activities that are directly related to the collective bargaining relationship. For example, as noted in Finding of Fact 20, paid Association leave under this article was used by Local 1st Vice President Frasier to participate in contract negotiations in July. This clearly provided a monetary benefit to Frasier. The fact that the Association also received a benefit from this paid leave does not allow us to place a clearly mandatory subject of bargaining into the limited group of exceptions that we have recognized to the *status quo* doctrine. Consequently, we find the *Polk County* holding to be applicable, and we will not expand the limited category of exceptions to the *status quo* doctrine to include leave for association officers when the leave provisions are mandatory for bargaining.

For the foregoing reasons, we conclude that the State's unilateral decision to cease complying with the Association leave provisions of the expired contract during the hiatus period violated ORS 243.672(1)(e).

ORS 243.672(1)(a) Allegations

Standards for Decision: ORS 243.672 (1)(a) Claim

We now turn to the Association's claim that the directives prohibiting the use of the State's e-mail system for Association-related communications violated ORS 243.672(1)(a). Under subsection (1)(a), it is 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 public employees with 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." There are two different types of (1)(a) violations. First, an employer violates the statute if it takes actions that interfere with, restrain or coerce employees "because of" their exercise of PECBA-protected rights. Second, an employer violates this section if it takes actions that interfere with, restrain or coerce employees "in the exercise" of their protected rights. *Portland Assn. of Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000).

The focus of our inquiry is different under each of the two "prongs" of ORS 243.672(1)(a). To decide if an employer violated the "because of" prong of the statute, we analyze the reasons for the employer's conduct. An employer commits a violation if it takes action because of an employee's exercise of rights protected by PECBA. We do not require that the complainant prove that the employer acted with actual anti-union animus or the subjective

intent to restrain or interfere with protected rights. Instead, a complainant must show "a direct causal nexus between the protected activity and the employer's action." *Id.* For claims brought under the "in the exercise" prong of (1)(a), we focus on the likely consequences of the employer's actions. If the natural and probable effect of the employer action is to deter employees from exercising a protected right, then the action interferes with, restrains or coerces employees in the exercise of protected rights in violation of ORS 243.672(1)(a). *Id.*

An employer may violate the "in the exercise" prong in two different ways. First, this Board has recognized that a derivative "in the exercise" violation occurs when an employer violates the "because of" prong of the statute. When an employer takes an unlawful action because of an employee's PECBA protected rights, the natural and probable effect of that action will be to chill the employee's willingness to engage in further protected activities. *State Teachers Education Association/OEA/NEA et al and Hurlbert et al. v. Willamette Education Service District et al.*, Case No. UP-14-99, 19 PECBR 228, 249 (2001), *AWOP*, 188 Or App 112, 70 P3d 903 (2003).

Second, an employer may commit an independent or stand-alone violation of the "in the exercise" prong of subsection (1)(a). When deciding whether an employer committed a stand-alone (1)(a) violation, we determine whether the natural and probable effect of the employer's conduct, viewed under the totality of the circumstances, would be to interfere with employees' exercise of protected rights. *Polk County Deputy Sheriff's Association v. Polk County*, Case No. UP-107-94, 16 PECBR 64, 77 (1995); *Oregon Public Employes Union and Termine v. Malheur County, Commissioner Cox, Commissioner Hammack and Sheriff Mallea*, Case No. UP-47-87, 10 PECBR 514, 521 (1988). We apply an objective standard. *Tigard Police Officers Association v. City of Tigard*, Case No. C-70-84, 8 PECBR 7989, 7999 (1985). Neither the subjective impression of employees nor the employer's motive is relevant. Rather, we are concerned solely with the probable consequences of the employer's actions. *Spray Education Association and Short v. Spray School District No. 1*, Case No. UP-91-87, 11 PECBR 201, 219-20 (1989).

Independent "in the exercise" violations often occur when an employer makes threatening or coercive statements regarding union activity. Violations can, however, also occur in the absence of direct threats or coercion and may be based on an employer's implied coercion or threat of reprisal. *Hood River Education Association v. Hood River County School District*, Case No. UP-38-93, 14 PECBR 495, 499 (1993). An employer can violate the "in the exercise" prong of subsection (1)(a) by presenting an entirely lawful act in a way that leads other employees to believe the act was unlawfully based on protected activity. *Eugene Charter School Professionals, AFT, AFL-CIO v. Ridgeline Montessori Public Charter School*, Case No. UP-34-08, 23 PECBR 316, 331 n 13 (2009).

5. The State's directive, prohibiting the use of the State e-mail system for Association-related communications during the hiatus period, violated ORS 243.672(1)(a) by interfering with, restraining, or coercing Association members "because of" and "in the exercise of" rights guaranteed by ORS 243.662.

"Because of" Claim

We begin by considering the Association's claim that the State's decision to prohibit the use of its e-mail system for Association business violates the "because of" prong of subsection (1)(a). As a preliminary matter, we must determine whether the State took an action sufficient to establish a claim under ORS 243.672(1)(a). We conclude that it did.

The State made a concrete decision to stop complying with the expired provisions of Article 71 that specifically allowed for the use of its e-mail system for Association-related communications. DAS representatives issued general guidelines asserting that contract provisions relating to use of the State e-mail system were permissive and that such use would be discontinued during the hiatus period. Shortly thereafter, top-level managers from the Agencies sent a directive to the Association and bargaining unit members stating,

> "As the collective bargaining process continues there is a change concerning use of agency's e-mail systems. I want to provide clear direction to all parties on the use of agency e-mail systems for union business. **At this time, and until further notice, union business is not to be conducted through the state's e-mail systems.** [Emphasis in original.]
>
> "This means no messages will be sent by or on behalf of the union through the agency's e-mail system, whether the communication is from union staff or agency staff holding union positions. Any agency staff receiving a message inadvertently sent concerning union business must advise your immediate supervisor of the communication without responding to it."

These directives explicitly singled out Association-related communications, prohibiting any and all such communications on the State's e-mail system while continuing to allow other personal use of the e-mail system. These directives appear to be even more broadly worded than the original DAS Guidelines. The decision and subsequent implementation of the decision to prohibit the use of the e-mail system for Association-related communications are sufficient, discrete actions to meet the requirement that the Association establish an "employer action" under subsection (1)(a).

We next turn to the question of whether members of the bargaining unit were engaged in protected activity at the time of the employer's action. We conclude with little difficulty that they were. At the time that the directives were issued, the State and the Association were engaged in contract negotiations. The employees, through the Association, continued to bargain beyond the expiration of the contract. Additionally, Association members who were serving on the bargaining team were utilizing the e-mail system to communicate about the status of negotiations, as they had in years past. These activities are protected under ORS 243.662.

Finally, we determine whether there was a causal connection between the protected activity and the State's action. The directives specifically targeted only Association-related e-mails, and barred all "use of the State's email system by union staff or state employees holding positions in the union." Moreover, the DAS Guidelines and Agency e-mails also did not single out any other type of communication as being prohibited—only Association-related

communications. Further, the directives specifically linked the prohibition to the failure of the parties to reach a settlement during the life of the expired agreement, and once a TA was reached, the State rescinded the directives and began complying with the *status quo* established by the expired contract.

This prohibition was not based on any legitimate, lawful motives. As we concluded above, the State violated ORS 243.672(1)(e) by unilaterally changing the *status quo* established by the expired Article 71. The State's mistaken opinion that the article was permissive and that it was not obligated to continue abiding by the terms of the expired contract at issue here does not render an unlawful action lawful, although it may impact the remedy that we order. We do not require a complainant to demonstrate that an employer acted with actual anti-union animus or the subjective intent to restrain or interfere with protected activities. We only require a causal connection between the employer's conduct and some protected activity. Here, that standard is met. As a result, we conclude that the State's action was directly in response to protected activities of Association members.

Application of the *OJD* Cases

In its argument, the State relies heavily on its assertion that its decision to prohibit the use of its e-mail system for Association business does not violate ORS 243.672(1)(a) under our prior decision in *OJD III*. *OJD III* was part of a trio of cases concerning an employer's limitation on union-related communications between the Oregon Judicial Department and SEIU that also included *Service Employees International Union, Local 503, Oregon Public Employees Union v. State of Oregon, Judicial Department,* Case No. UP-03-04, 20 PECBR 864, (2005) (*OJD I*); and *SEIU Local 503, OPEU v. State of Oregon, Judicial Department,* Case No. UP-11-04, 21 PECBR 37, 46 (2005) (*OJD II*).[12] These cases are instructive, but for the following reasons, we conclude that the cases support, rather than contradict, our conclusion that the State violated ORS 243.672(1)(a).

In *OJD I*, we determined that the employer violated ORS 243.672(1)(a) when managers (1) directed a potential bargaining unit employee not to discuss union issues in conversations "in the office," when those conversations routinely included nonwork and personal subjects; and (2) directed the employee not to have planned, systematic conversations with other employees on union issues on work time when other work-time conversations routinely included nonwork and personal subjects. 20 PECBR at 875-76. In reaching that conclusion, we explained that "[w]hen a public employer seeks to place limits on employee communication about a union or labor relations issues, the rules must be narrowly tailored and must not unduly infringe on employees' protected rights to participate in union activities." *Id.* at 872 (citing *Oregon Public Employees Union v. Jefferson County,* Case No. UP-22-99, 18 PECBR 146, 152 (1999)). We further explained that:

> "A rule prohibiting union-related speech or distribution of union-related materials in nonwork areas or on nonwork time is presumptively invalid. This presumption may be rebutted where, for example, special circumstances make the rule necessary to maintain production or discipline and where the employer's interest

[12]All three cases arose in the context of a union organizing campaign.

> in light of the special circumstances outweighs the employees' interest in engaging in union-related speech. [Citations omitted.]
>
> "A rule prohibiting union-related speech and distribution of materials in working areas or during work time is presumptively valid. This presumption can be rebutted by showing that the rule was discriminatorily promulgated or enforced. An employer may prohibit its employees from discussing nonwork-related or personal matters on work time, but it cannot permit discussions on those matters while prohibiting discussion of union matters." *Id.* at 872-73.

In concluding that the employer violated ORS 243.672(1)(a) when a supervisor told an employee that he could not talk about union matters in the office, we reasoned that:

> "On its face, this directive applies to both work time and nonwork time in the office. As to nonwork time, the directive is presumptively invalid, and the employer has not identified any special circumstances to overcome the presumption of invalidity. As to work time, the directive is presumptively valid. [The union] overcame this presumption by establishing that the directive was selectively applied to discussions about Union matters, but not to other personal, nonwork-related discussions among employees." *Id.* at 875.

Our conclusion and reasoning in *OJD I* does not support the State's assertion that its guidelines and directives singling out only union-related e-mails and the use of the e-mail system by state employees holding positions in the union were lawful. To the contrary, we find our conclusion in *OJD I* consistent with our finding that the State's actions violated ORS 243.672(1)(a). In the present case, the DAS Guidelines stated that "[t]here would be no use of the State's email system by union staff or state employees holding positions in the union." Such a prohibition goes beyond even the content-based directive that we found unlawful in *OJD I*, and singles out "state employees holding positions in the union." Moreover, the various directives issued by multiple top-level State managers barred all Association-related use of the State's e-mail system, regardless of when and where that usage occurred. As in *OJD I*, the directives, as applied to nonwork time and nonwork areas, were presumptively invalid, and the State has not identified any special circumstances to overcome that presumption.

We acknowledge, however, the difficulty in directly correlating our rules regarding employee communications in "working/nonworking areas" to the context of using the State's e-mail system.[13] But we need not resolve the somewhat metaphysical question of when or whether an employee's use of an employer's e-mail system (even when accessed from a "nonwork" location), can be considered to take place in a "nonwork" area. Even assuming, without deciding, that the State's "no-Association-related-e-mail" directives were presumptively valid, the directives were selectively issued regarding discussions about union matters, but not to other personal, nonwork-related e-mails. Indeed, the directives made that distinction explicit. Under such circumstances, we find that, like *OJD I*, the Association has overcome any presumptively valid rule.

[13]We note, however, as discussed below, that *OJD II* held that policies barring the use of an employer's e-mail system for union communications on nonwork time are presumptively invalid.

We now turn to *OJD II*, where we applied these same principles in reviewing whether it was unlawful for an employer to prevent union supporters from using the "reply all" function on the e-mail system to respond to communications that supporters viewed as negative towards the union. We first acknowledged precedent that employees do not have a statutory right to use the employer's e-mail system, but noted that if the employer had a rule regulating e-mail usage, it cannot be applied in a discriminatory fashion. *OJD II*, 21 PECBR at 46. We concluded that the "reply-all" prohibition did not violate subsection (1)(a), providing the following reasoning:

> "The policy is presumptively valid to the extent it regulates employee activities during work time, and SEIU has not overcome the presumption. OJD management regularly uses e-mail to disseminate business information to all OJD employees throughout the state. For 15 years, the 'reply all' function has been disabled. There is no evidence that * * * managers ever used the 'reply all' function. Nor is there evidence that OJD ever intended to allow its employees to use the 'reply all' function.
>
> "Based on the evidence in the record, we conclude that OJD's 'reply all' policy is valid. The policy was not promulgated in response to actual or anticipated union activities, and it was not discriminatorily enforced.
>
> "The policy is presumptively invalid to the extent it controls union activities during nonwork time. The State has overcome the presumption. When the 'reply all' function is used to respond to an agency-wide e-mail, it sends the response to 1800 employees. The evidence indicates that regular use of the 'reply all' function in these circumstances would result in a volume of mail that could create congestion in the system and hamper legitimate and necessary business uses. Further, the fact that judges and other staff receive these e-mails while they are in the courtroom constitutes an interruption of critical work that the State can legitimately control." *Id.* at 46-47.

OJD II is notably distinguishable from this case. Most significantly, the *OJD II* policy barring use of the "reply all" function was facially neutral and applied to all e-mail communications, not just union-related communications. Here, as discussed above, the State's guidelines and directives *singled out* union-related e-mails and the use of the e-mail system by state employees holding positions in the union. Additionally, the *OJD II* policy "was not promulgated in response to actual or anticipated union activities." *Id.* at 46. Here, the record establishes that the State's directive *was promulgated* in response to such actual or anticipated activities. Thus, even assuming the presumptive validity of the State's directives, the Association has overcome that presumption.

Finally, under *OJD II*, the State's directives are presumptively invalid with respect to e-mails sent on nonwork time.[14] Unlike *OJD II*, however, the State here has not established that

[14]Again, we note the difficulty of applying a "nonwork area" presumption to the use of an e-mail system.

continuing to permit Association-related communications would "create congestion in the system and hamper legitimate and necessary business uses."[15] *Id.* 47. Likewise, the State has not submitted sufficient evidence that there was a compelling business need to ban such communications. Further, the directives prohibiting Association-related communications were not narrowly tailored as required under *Jefferson County*; they were overly broad and encompassed all Association- related communications. Consequently, we do not find that *OJD II* compels a conclusion that the State's prohibition on Association-related communications is lawful.

Finally, in *OJD III*, we found that the employer did not violate subsection (1)(a) when one manager interpreted the employer's facially-neutral policy on the acceptable use of its e-mail system as prohibiting union-related communications. Specifically, the policy at issue prohibited the use of the Department's e-mail system for "personal lobbying, soliciting, recruiting, selling or persuading, for or against, commercial ventures, products, religions, or political causes or organizations." 21 PECBR at 103. In dismissing the complaint, we found that the manager's one-time prohibition was presumptively valid, and that the union had not overcome that presumption. In doing so, we emphasized that:

> "We are not confronted with any issues unique to e-mail because the Department has chosen to treat the use of e-mail in the same fashion as the telephone. In addition * * * we are not concerned with a wide-ranging dispute covering thousands of employees at various campuses * * *. Nor do we rule on the Department's rules as promulgated statewide, but only as interpreted by [one] administrator, on one occasion in 2003." *Id.* at 114.

With those caveats in mind, we determined that the Department's general rules on e-mail usage were presumptively valid. We then determined that the union had not overcome the presumption because it had "not introduced sufficient evidence of 'personal use' to overcome the presumption." *Id.* at 116. Significantly, in reaching that conclusion, we reasoned that:

> "[t]he Department's policies do not discriminate against union-related messages. *They do not prohibit only union communications*. * * * The Department has acted to stop e-mail solicitations such as an employee's solicitation for other employees to take her yoga class, a dog groomer seeking clients, and solicitations to attend a Pampered Chef cookware sale/party. The Department has also stopped employees from having lunchtime prayer services in a vacant courtroom." *Id.* at 116 (emphasis added).

[15]Indeed, as noted above, the parties here have negotiated numerous restraints on Association-related e-mail usage, such that the State cannot legitimately advance the same arguments that we found sufficient in *OJD II* to overcome the presumptive invalidity of the policy's application on nonwork time.

We acknowledged that the Department had permitted e-mail solicitations concerning Governor and Department-approved charity drives, as well as e-mails involving "team-building" activities. *Id.* We observed, however, that such e-mails were treated as "work related" under the Department's policy, and we agreed with those characterizations. Based on the record presented in *OJD III*, we dismissed the complaint. *Id.*

The Court of Appeals affirmed our decision, observing that this Board's order

> "proceeded from the legal premise that, notwithstanding that OJD had opened its system to limited nonbusiness or personal uses, the 'anti-solicitation' prohibition remained enforceable unless OJD managers, as a matter of practice, expressly allowed or knowingly acquiesced in violations of that prohibition." *OJD III*, 209 Or App at 515.

Concluding that we "correctly framed the legal analysis," the court found the reasoning of our order, which it labeled the "nonabsolutist approach," compelling. *Id.* The court then explained that its review was reduced to whether our order had properly applied that nonabsolutist "construct" to that dispute. *Id.* at 516. In answering that question in the affirmative, the court first observed that the union did not challenge the portion of our order that determined that the disputed e-mail "fell within a broader, categorical restriction against uses of the employer's property *that was not limited to union-related communications*." *Id.* at 516 (emphasis added). Rather, the union asserted that "OJD ha[d] failed to enforce that prohibition against other sorts of solicitations and, thus, preclusion of union-related messages [was] impermissibly discriminatory." *Id.*

The court reasoned that the union's "position founder[ed] on the allocation of the burden of proof and on the content of [that] record." *Id.* Explaining that the union bore the burden of proof, the court determined that the union failed to make the necessary showing "that OJD had, as a matter of practice, either explicitly approved or knowingly acquiesced in the use of its e-mail systems for nonbusiness-related solicitations prohibited under its policy." *Id.* The court acknowledged, as had our order, that OJD had "routinely and explicitly approve[d] communications soliciting participation in 'Department-approved charity drives, such as the Governor's charitable fund drive, Governor's food drive, and Governor's toy drive, and funds for the Oregon Food Bank and a needy family program.'" *Id.* at 517. The court approved of our conclusion, which the union did not dispute, that, "given the context, *viz.*, that the charitable drives were an intramural activity, communications regarding those drives were properly characterized as 'business-related'" under OJD's policy. *Id.* "Consequently, OJD's approval—indeed, sponsorship—of those solicitations was not indicative of discrimination but, instead, constituted explicitly permitted use of OJD's system for 'business purposes.'" *Id.*

Ultimately, the court summarized its decision as follows:

> "ERB did not err in concluding, on this record, that SEIU had failed to prove discriminatory enforcement in violation of ORS 243.672(1)(a). The disputed e-mail violated OJD's general prohibition against use of its equipment for non-business-related solicitations, and SEIU failed to establish that OJD's enforcement

> of that prohibition in this instance deviated from its routine practice with respect to other, non-union-related communications." *Id.*

We find that our conclusion (and the court's) in *OJD III* is distinguishable from this case in numerous respects. Most importantly, *OJD III* did not concern a facially-discriminatory e-mail policy—*i.e.*, a policy that expressly singled out union-related e-mails as an exception to the State's allowance of other "nonbusiness" e-mails. Here, in contrast, the State's prohibition specifically targeted (and barred) Association-related e-mails and kept in place existing policies that permitted other personal or "nonbusiness" uses of the State's e-mail system. That fundamental distinction alone is significant to distinguish *OJD III*, which was premised on a conclusion that the policy did not, on its face, "discriminate against union-related messages" and did not "*prohibit only union communications*." *See* 21 PECBR at 116 (emphasis added); *see also* 209 Or App at 516 (restriction "not limited to union-related communication"). We decline to hold that the State may target for exclusion only union-related e-mails, while broadly permitting copious other "personal" or "nonbusiness" e-mails, or that the State may single out "state employees holding positions in the union." Moreover, we find no support for such a sweeping proposition in *OJD III*, our prior case law, or federal precedent under the NLRA.[16]

Additionally, both our order and the court's in *OJD III* were expressly limited to the policy and record developed in that case. We reached our conclusion in *OJD III* with the caveats that: (1) the dispute did not concern "any issues unique to e-mail because the Department ha[d] chosen to treat the use of e-mail in the same fashion as the telephone"; (2) we were "not concerned with a wide-ranging dispute covering thousands of employees"; and (3) we were not addressing a "statewide" policy, but rather only a single interpretation by one administrator on one occasion. *See* 21 PECBR at 114. Those concerns, which were absent in *OJD III*, are present here.

Likewise, after agreeing with our framework for analyzing the dispute, the court reduced its review to whether we had properly applied that framework to that dispute. 209 Or App at 516. Here, as detailed above, both the policy at issue here and the facts regarding the State's selective application of that policy are materially different from *OJD III*.

In sum, in *OJD III*, the court affirmed our determination that the union had failed to prove discriminatory enforcement of a facially-neutral e-mail policy. *See* 209 Or App at 517. Simply put, the e-mail directives at issue here are not facially-neutral, but rather are facially discriminatory, in that they expressly singled out Association-related communications (and use by state employees holding union positions) in violation of ORS 243.672(1)(a). On a related note, unlike *OJD III*, the State's e-mail prohibitions concerning Association-related communications did not involve a "general prohibition against use of [the State's] equipment

[16]We again note that the directives issued by Agency managers here prohibited Association-related e-mail communications even on non-work hours, and that, under *OJD II*, such directives are presumptively invalid.

for non-business-related soliciatations" but rather a *specific* prohibition against only Association-related communications. *See id.* Therefore, we distinguish *OJD III*.[17]

For these reasons, we find that the State's prohibition of the use of its e-mail system interfered with, restrained, and coerced employees because of their exercise of protected rights under ORS 243.662. Accordingly, the State violated ORS 243672(1)(a).

"In the Exercise of" Claim

We now turn to the Association's claim that the State's directive prohibiting the use of its e-mail system for Association-related business violated the "in the exercise of" prong of ORS 243.672(1)(a). We conclude that it did. As discussed above, we found that the State violated the "because of" prong of ORS 243.672(1)(a) when it issued the DAS Directives in response to the protected activities of the Association and its members. The natural and probable consequence of that action is to chill Association members in the exercise of protected rights going forward. As a result, the State has committed a derivative "in the exercise of" violation under subsection (1)(a).

ORS 243.672(1)(c) Allegation

6. In light of our decision above, we do not decide the Association's claim that the State's directive prohibiting the use of the its e-mail system for Association-related communications violated ORS 243.672(1)(c) because doing so would add nothing to our remedy.

ORS 243.672(1)(b) Allegation

7. The State did not violate ORS 243.672(1)(b) when it ceased providing notice to the Association of disciplinary actions during the hiatus period.

[17]We also note that *OJD II* and *III* arose in the very different context of an ongoing organizing drive by a labor organization that was not certified as the exclusive representative of the affected employees. When a union is seeking to represent employees in a possible bargaining unit, it is at least arguably "soliciting" support from those employees, making the comparison to an employer's generalized "anti-solicitation" rules somewhat more analogous. However, during an organizing campaign, the legal obligations of an employer are largely negative: they must refrain from certain activities that are coercive or that unlawfully assist a labor organization. Once a labor organization is certified or recognized as the exclusive representative of a group of employees, the obligations of the employer expand to include additional affirmative obligations, including but certainly not limited to the duty to bargain in good faith, the obligation to provide notice of changes to the exclusive representative, the duty to provide information relevant to possible contract violations or for use in developing bargaining proposals, and the obligation to withhold dues. As a result, comparing the State's "no-Association-related-e-mail" directives to the type of general non-solicitation policies at issue in *OJD II* an *OJD III* is not particularly apt.

Legal Standards: ORS 243.672(1)(b)

A public employer commits an unfair labor practice under ORS 243.672(1)(b) if it dominates, interferes with, or assists in the formation, existence or administration of a labor organization. Where a labor organization alleges that the employer dominated or interfered with the administration of the union, we generally require that a complainant prove that an employer took actions that impeded or impaired the labor organization in the performance of its statutory responsibilities. The proffered evidence must establish that the employer's actions resulted in actual interference with the labor organization. *AFSCME Local 189 v. City of Portland,* Case No. UP-7-07, 22 PECBR 752, 794 (2008). However, as we held in *Santiam Correctional Institution,* some actions by an employer are "so inimical to the core values of the PECBA that they violate subsection (1)(b), even if there is no proof that these statements directly affected any union activity." 22 PECBR at 398; *see also AFSCME, Local 2909 v. City of Albany,* Case No. UP-26-98, 18 PECBR 26, 39 (1999) (employer bypassing the union and presenting new bargaining proposals directly to employees violated (1)(b) even without an adverse impact to the union); *Oregon Public Employees Union v. Jefferson County,* Case No. UP-20-99, 18 PECBR 310, 318 (1999) (County commissioner's statement to local union president that he wanted the bargaining unit to be represented by a different labor organization and that he would not negotiate with certain representatives of the labor organization violated (1)(b) even without a showing of actual interference).

Analysis: ORS 243.672(1)(b)

The stipulated facts demonstrate that no disciplinary actions were taken by the State during the period in which the State was operating under the DAS Guidelines. Thus, the State would not have been obligated to provide the Association with any notices of corrective action during that period, even if it had continued to comply with the requirements of Article 24, Section 1. As a result, the Association has not established any actual domination or interference with the administration of the Association.

Nor do we consider the State's actions of such a nature as to obviate the need for some evidence of an actual adverse impact on the Association. In the cases where we have found no need for evidence of actual interference, the alleged violations have generally been of the type that on their face would have the likely impact of negatively affecting a labor organization. Further, these situations were often ones in which establishing evidence of a particular concrete impact would be difficult. Here, the State's action was not sufficiently egregious to meet this standard. Nor do we find that actual impact would be difficult to establish had there been any. Accordingly, we will dismiss this claim.[18]

[18]We do not address the issue of whether we would have found a violation if the record contained evidence that the State had taken disciplinary actions during the time in which it operated under the DAS Guidelines.

Remedy

The Association requests that we order the State to cease and desist its unlawful actions, comply with the terms of the expired agreement, post a notice of the violations on all union billboards and distribute the notice electronically to all bargaining unit members, and make all employees affected by the violations whole. We will order the State to cease and desist from any further violations, but we need not order the State to comply with the terms of the expired agreement, as a successor has been reached since the complaint was filed and the parties are operating under that agreement.

We order employers to post a notice of violations if we determine that 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 employes; (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 (1983).

Not all of these criteria must be satisfied to justify a posting. *Blue Mountain Community College*, 21 PECBR at 782. After applying these factors to the present case, we conclude that it would not be appropriate to require the State to post a notice of the violations.

ORDER

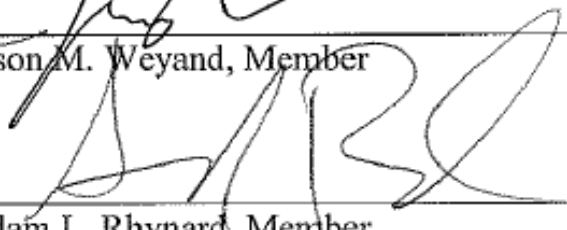
1. The State shall cease and desist from violating ORS 243.672(1)(a) and (1)(e) as described above.

2. The remainder of the Complaint is dismissed.

DATED this 17 day of June 2013.

*Kathryn A. Logan, Chair

Jason M. Weyand, Member



Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

*Chair Logan, Concurring In Part, Dissenting In Part:

The majority opinion concludes that the State violated ORS 243.672(1)(e) when it unilaterally prohibited the use of the State's e-mail system for Association-related communications. As I disagree with the majority's decision, I respectfully dissent from this portion of the Order.

The subject at issue is whether access to and use of the State's e-mail system is mandatory or permissive for bargaining. Although the parties argue that the subject has already been decided by this Board, they each reach a different result. Due to the lack of clarity on the matter, I agree with the majority that the subject should be balanced.

The State's interest in its computer equipment and e-mail system is set forth in the State's Acceptable Use of State Information Assets Policy. This Policy states that the computers and e-mail are provided for business purposes of the State, and are made available to users to "optimize the business process" of the State. The information systems must be appropriately secured "to properly protect state information systems." Further, the Policy reflects the State's concerns regarding security of confidential information, data protection, and operational efficiency of its systems. As for e-mail, it may be used for union business "per the contract." The Association acknowledges the State's right to control this system in the expired collective bargaining agreement: "[e]xcept as modified by this Article, Agency shall have the right to control its e-mail system, its uses or information." These interests are critically important to the State and its operations.

The employees', as well as the Associations', interest in the system is that it provides an easy way to communicate. While not allowing use of that system may make communicating with and among bargaining unit members a bit more complicated, the ability to communicate remains intact through many other means of communication that existed long before e-mail. The bulletin boards still existed, the mail system was available, telephones remained accessible, and personal e-mail addresses could be used by the employees and Association. The only limitation was on use of the State's email system. The impact on the employees' wages, hours and working conditions due to that limitation was minimal.

In balancing the interests, I find that the subject of access to and use of the State's equipment and e-mail system has a greater impact on management's prerogative than it does on employee wages, hours and other conditions of employment. Therefore, pursuant to the terms of ORS 243.650(7)(c), the subject is permissive.

Finally, I have some concerns about what I foresee as the scope of the majority opinion. The majority equates the use of the e-mail system to the mandatory subject of use of union bulletin boards. The arguable impact of the majority opinion is, however, that once a piece of employer equipment may be used for communication, bargaining over that use is mandatory. Not all manners and forms of communication, however, are the same. Bulletin boards are not computer systems. Bulletin boards are nailed to a wall in the breakroom with items physically attached to it with push pins. Computers, however, sit on many employees' desks, and the e-mail system allows for dynamic conversations and instant communication. I see little similarity between the types of usage that may occur with a bulletin board and a computer.

This Board, rather than equate bulletin boards and e-mails systems as "forms of communication," should look at the type and usage of a communication system.

As the use of the e-mail system by Association representatives was a permissive subject of bargaining, the State did not violate ORS 243.672(1)(e). I respectfully dissent.

Kathryn A. Logan

*Kathryn A. Logan, Chair

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-012-12

(PETITION FOR UNIT CLARIFICATION)

TUALATIN EMPLOYEES' ASSOCIATION,	)	
Petitioner,	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
v.	)	
CITY OF TUALATIN,	)	
Respondent.	)	

A hearing was held before Administrative Law Judge (ALJ) B. Carlton Grew on August 14, 2012, in Salem, Oregon. The record closed on September 17, 2012, following receipt of the parties' post hearing briefs. The ALJ issued his Recommended Order on February 8, 2013. On May 8, 2013, the Board heard oral argument on the Respondent's objections to the Recommended Order.

Daryl S. Garrettson, Attorney at Law, Lafayette, Oregon, represented Petitioner.

Daniel Rowan, Attorney at Law, Local Government Personnel Institute, Salem, Oregon, represented Respondent at the hearing. Ashley Boyle, Labor Relations Attorney, Local Government Personnel Institute, Salem, Oregon, represented Respondent at oral argument.

On April 23, 2012, Petitioner filed this Petition for Unit Clarification seeking to clarify certain employees into the existing bargaining unit under OAR 115-025-0005(2). The City objected on the following grounds: the Petition was improperly filed under subsection (2); the parties' longstanding practice has been that these employees are not included in the bargaining unit; the employees at issue had an administrative affinity with management and no opportunity to choose their bargaining unit status; and two of the employees were confidential employees. On August 6, 2012, pursuant to direction from the ALJ and without objection from the City, the Association filed a Second Amended Petition removing some positions and adding the authority of OAR 115-025-0005(3).

The issue in this case is, pursuant to OAR 115-25-0005(3), should the bargaining unit of "all regular full-time, and part-time employees of the City of Tualatin, excluding casual, temporary and seasonal employees, employees represented by the Tualatin Police Officers Association, or employees defined as supervisory or confidential by state statute" be clarified to include the following positions: Management Analyst II - Community Development; Deputy City Recorder - Administration; Program Coordinator - Community Development; Program Coordinator - Community Services; Program Coordinator - Finance; Program Coordinator - Operations; Program Coordinator - Police; Paralegal - City Attorney's Office; Network Administrator; Information Technology Technician; and Information Technology Coordinator?[1]

For the following reasons we conclude that the bargaining unit should be so clarified.

RULINGS

On April 27, 2012, a notice was posted informing employees that the Association's petition had been filed, and that objections to the petition must be filed within 14 calendar days from the date of the notice. Timely objections to that petition were filed by seven employees. Six of those employees also testified at the August 14 hearing.

On February 8, 2013, the ALJ issued his Recommended Order. Thereafter, six of the employees who filed objections filed a request to intervene. Two other employees, who had not filed objections to the petition, also requested to intervene.

On March 27, 2013, we denied the request to intervene. With respect to the two employees who did not object to the petition, we found that their requests were too late under OAR 115-025-0030 and OAR 115-025-0035.

As to the other six employees, we explained that they were "interested persons" to the proceedings, but not "parties." We further observed that those six employees testified at the hearing, which gave them the opportunity to present information relevant to the case, and that we would consider that testimony in our review.

We incorporate our March 27 ruling into this order. The other rulings of the ALJ were reviewed and are correct.

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[1] In response to the Association's OAR 115-025-0005(2) petition, the City initially contended that the Deputy City Recorder and Network Administrator positions qualified as "[c]onfidential employee[s]" within the meaning of ORS 243.650(6). Thereafter, however, the City abandoned that position, and at oral argument conceded that none of the disputed positions were "confidential," "managerial," or "supervisory." Consequently, we limit our discussion to the Association's OAR 115-025-0005(3) petition.

The City also argues that this Board should order an election for these employees. This Board does not order elections in subsection (3) cases, as the issue is whether the positions at issue are currently members of the bargaining unit based on the contract language, not whether the employees want to become members of the bargaining unit.

FINDINGS OF FACT[2]

1. The City is a public employer as defined by ORS 243.650(20). The Association is a labor organization as defined by ORS 243.650(13), and the exclusive representative of a bargaining unit of approximately 70 City employees.

2. The bargaining unit was originally certified by a consent election in 1984 to be represented by the then Oregon Public Employees Union (OPEU).[3] The Association replaced OPEU as the bargaining representative for this unit in 2003 following a consent election.

3. The City has two bargaining units: the Association and the Tualatin Police Officers Association.

4. The most recent City-Association collective bargaining agreement contains the following recognition clause in its Preamble:[4]

> "The City of Tualatin (City) recognizes the Tualatin Employees' Association (Association) as the sole and exclusive bargaining agent for all regular full-time, and part-time employees of the City of Tualatin, excluding casual, temporary and seasonal employees, employees represented by the Tualatin Police Officers Association, or employees defined as supervisory or confidential by state statute."

The unit description has not changed since its 1984 inception in any manner relevant to this Petition.

5. The collective bargaining agreement also includes a provision regarding the interpretation of titles in the agreement:

> "The use of article titles, sections or paragraph headings throughout this Agreement are [*sic*] intended for easy reference only and shall not be interpreted and/or implied

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[2] Because the Association initially filed its petition under OAR 115-025-0005(2), and because the City likewise indicated that some of the disputed positions were "confidential," managerial," or "supervisory," the hearing record included considerable evidence regarding the precise job duties of those disputed positions, and the ALJ's Recommended Order properly included detailed factual findings regarding those job duties. In light of the City's concession, however, that none of the disputed positions are "confidential," "managerial," or "supervisory," many of those facts are no longer probative concerning the Association's subsection (3) petition. Therefore, we modify the "Findings of Fact" in the Recommended Order to exclude those findings that are no longer pertinent to our analysis.

[3] OPEU has since changed its name to SEIU Local 503, OPEU.

[4] The collective bargaining agreement in evidence expired June 30, 2012. At the time of hearing, the parties were bargaining for a successor agreement to cover the period July 1, 2012 through June 30, 2015. The record contains no evidence that the relevant language in the new agreement will differ from the agreement in evidence.

so as to eliminate or substantially reduce, increase, or in any way modify the terms and conditions thereof."

6. The collective bargaining agreement also includes a provision regarding the means for adding positions to the bargaining unit:

> "If a new classification is added to the bargaining unit by the City, the Association shall be provided with the City's proposed rate of pay and a copy of the job description. That rate shall become permanent unless the Association files written notice of its desire to negotiate the permanent rate within ten (10) calendar days from the date it receives its notification of the classification. If a request for negotiations is filed by the Association, the parties shall begin negotiations within fifteen (15) calendar days. If there is disagreement between the parties as to the exclusion of a new position from the bargaining unit, such issue will be subject to the procedures of the Employment Relations Board. "

7. The collective bargaining agreement also includes several "Exhibits," one of which is entitled "EXHIBIT A - ASSOCIATION CLASSIFICATIONS." Exhibit A contains only a list of positions. The bargaining unit positions at issue in this Petition are not included on that list. "EXHIBIT B - SALARY SCHEDULE" contains a list of positions and their various hourly and monthly salary steps. Exhibit A's list of positions has varied from contract to contract, but such an Exhibit has been attached to every collective bargaining agreement since at least the 1990s.[5]

8. The Second Amended Petition covers 11 employees: five Program Coordinators; three Information Technology (IT) employees; and one employee each for the positions of Paralegal, Deputy City Recorder, and Management Analyst II. None of the positions are exempt from overtime.

9. Throughout the years, the City has undergone numerous organizational changes, which has resulted in adding new positions/titles and changing job responsibilities for existing positions/titles. Those reorganizations and changes are detailed more below.

10. From the time that the bargaining unit was first certified in 1984, the City has notified all employees, including Association representatives, when the City created a new position, changed a job title, or filled a vacant position. Since at least the 2003 Association consent election, the City has informed prospective employees applying for the positions named in the Petition that the positions were outside the bargaining unit. Before the events giving rise to the Petition, the Association or OPEU did not assert that the positions at issue were included in its bargaining unit.

Program Coordinators

11. The five Program Coordinators at issue work in the Departments of Operations, Finance, Community Services, Community Development, and Police.

[5]Both parties agreed that there is no evidence in the record regarding the origins of Exhibits A or B.

12. The City created the Program Coordinator classification in 1992, replacing its Administrative Assistant classification. There is no evidence that OPEU sought to bargain over the bargaining unit status of the Administrative Assistant classification or its change to Program Coordinator. In 1992, the City had five Program Coordinator positions, one in each of the following City work sections: Administration; Economic Development; Engineering & Building; Operations; and Parks & Recreation. At the time of hearing, only the Program Coordinators in Administration and Operations retained their original job titles.

13. During the 2003 change of representative from OPEU to the Association, none of the existing Program Coordinator positions were included on the "*Excelsior* list"[6] and none of those employees voted in the Association's certification election.

14. In 2004, the City created the Police Program Coordinator position. In 2009, the City created the Finance Program Coordinator position. The City identified these positions as non-represented in its job postings, and the Association did not, at that time, raise the issue of whether these positions were included in its bargaining unit.

15. In 2010, the City merged its Economic Development and Engineering and Building Departments, each of which had a Program Coordinator. These two Program Coordinator positions were combined into one position, Program Coordinator in Community Development. At some point before this Petition, the City merged the Parks and Recreation Department and the Library Department, and the Parks and Recreation Program Coordinator became the Community Services Program Coordinator.

Information Technology Technician

16. The City created the Information Technology Technician (IT Technician) position in December 2007.

17. The IT Technician performs activities necessary for the efficient, reliable operation of the City's computer systems, networks, and computers, and coordinates or provides maintenance on City computer hardware and related hardware, including cell phones.

Information Technology Coordinator

18. The City created the IT Coordinator position in November 2005 as a "non-exempt management" position, outside of the bargaining unit. According to the position description, the IT Coordinator is to develop, organize, and manage the City web site; design its Geographic

[6] This term refers to the National Labor Relations Board's decision in *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966), which requires employers involved in pending representation elections before the Board to submit a list containing the names and addresses of all employees eligible to vote, which the Board then makes available to the organizing unions.

Information System (GIS); and perform a variety of related technical tasks. The IT Coordinator also represents the City on various regional governmental GIS entities.

Management Analyst II

19. Before 2006, the City created a Management Analyst I position, which was never added to the bargaining unit. In November 2011, after the Analyst I position had been vacant for several years, the City created the Management Analyst II position. Ben Bryant, who held the Management Analyst II position at the time of hearing, accepted the job believing that the position was unrepresented. Bryant believed that the unrepresented status would allow him to gain administrative experience that could lead to promotion. There is no evidence that the Association sought to bargain over the bargaining unit status of the Management Analyst II when that position was created.

Paralegal

20. Since at least 1996, the City has employed a legal assistant for the City Attorney. For some time before 2006, the position was called Legal Services Assistant. The Legal Services Assistant was never considered part of the bargaining unit, was not included on the 2003 *Excelsior* list, and did not vote in the 2003 Consent Election. In 2006, the City changed the job title to Paralegal. There is no evidence that the Association sought to bargain over the bargaining unit status of the Legal Services Assistant classification or its change to Paralegal.

Deputy City Recorder

21. This position has existed in some form since 1995, and performed supervisory duties for much of that time. In March 2012, the City changed the title of this position (originally called Secretary to the City Manager) from Executive Assistant to Deputy City Recorder and removed its supervisory duties.

Network Administrator

22. In January 2012, the City combined its Information Services (IS) and Geographic Information Systems (GIS) functions into one department. As part of this reorganization, the City contracted for an interim IS Director, and created the position of Network Administrator. The City hired a permanent IS Director six months later. The Network Administrator, IT Coordinator, IT Technician, and GIS Technician all report to the IS Director.

23. Before the 2012 reorganization, the Network Administrator position was called the IS Manager and supervised the IS Technician position. That supervisory role ended with the creation of the Network Administrator position, which has no supervisory duties. This change prompted the Association's interest in whether the disputed positions were properly excluded from the bargaining unit, and led to this Petition.

CONCLUSIONS OF LAW

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

2. The Management Analyst II - Community Development; Deputy City Recorder - Administration; Program Coordinator - Community Development; Program Coordinator - Community Services; Program Coordinator - Finance; Program Coordinator - Operations; Program Coordinator - Police; Paralegal - City Attorney's Office; Network Administrator; Information Technology Technician; and Information Technology Coordinator are included in the existing City of Tualatin/Tualatin Employees' Association bargaining unit of "all regular full-time, and part-time employees of the City of Tualatin, excluding casual, temporary and seasonal employees, employees represented by the Tualatin Police Officers Association, or employees defined as supervisory or confidential by state statute."

Discussion

The Association's petition seeks a determination that, under OAR 115-025-0005(3), the disputed positions are included in the Association's bargaining unit pursuant to the existing bargaining unit description contained in the Association-City collective bargaining agreement. The City argues that the parties never intended this result, as reflected by Exhibit A to the contract.

OAR 115-025-0005(3) provides:

> "When the issue raised by the clarification petition is whether certain positions are or are not included in a bargaining unit under the express terms of a certification description or collective bargaining agreement, a petition may be filed at any time; except that the petitioning party shall be required to exhaust any grievance in process that may resolve the issue before such a petition shall be deemed timely by the Board."

Under OAR 115-025-0005(3), the issue is not whether the employees *should be added* to the bargaining unit; we decide only whether the employees are *already in the unit* based on the language of the certification or the collective bargaining agreement. *Marion County v. Marion County Employees Association Local 294, SEIU Local 503*, Case No. UC-12-02, 19 PECBR 781, 782 (2002). In evaluating a petition under subsection (3),

> "[t]his Board generally will look only to the express language of the certification description or of the collective bargaining agreement in deciding whether the disputed positions are included or excluded. The express terms of the certification or agreement clearly must not include the disputed positions for this Board to find that they are excluded from the unit. Doubts will be resolved in favor of inclusion in the unit." *Salem Education Association v. Salem School District 24J*, Case Nos. C-262-79, C-2-80, and C-73-80, 6 PECBR 4557, 4572-73 (1981). *See also Marion*

County Law Enforcement Association v. Marion County, Case No. UC-37-02, 20 PECBR 398, 402 (2003).

The parties' dispute requires us to interpret the collective bargaining agreement to determine if the disputed positions are included in the Association's bargaining unit. We follow well-established rules when interpreting collective bargaining agreements. *Portland Police Assoc. v. City of Portland*, 248 Or App. 109, 113, 273 P3d 192 (2012).

> "As with other contracts, the general rule applicable to the construction of an unambiguous collective bargaining agreement is that it must be enforced according to its terms. A contract is ambiguous if it can reasonably be given more than one plausible interpretation. 'If a contract is ambiguous, the trier of fact will ascertain the intent of the parties and construe the contract consistent with' that intent. Specifically, if a term of the contract is ambiguous, the court will 'examine extrinsic evidence of the contracting parties' intent,' if such evidence is available. 'If the ambiguity persists, we resolve it by resorting to appropriate maxims of contractual construction.'" *Id.*, quoting *Arlington Ed. Assn. v. Arlington Sch. Dist. No. 3*, 196 Or App 586, 595, 103 P3d 1138 (2004).

We first determine whether the collective bargaining agreement is ambiguous regarding whether the disputed positions are included in the bargaining unit. "[T]o determine whether a contract is ambiguous, we analyze whether 'it is susceptible to more than one plausible interpretation,' considering 'the context of the contract as a whole, including the circumstances in which the agreement was made.'" *Id.* at 116-17, quoting *Cassidy v. Pavlonnis*, 227 Or App 259, 264, 205 P3d 58 (2009). With those principles in mind, we turn to the relevant provisions of the collective bargaining agreement.

The collective bargaining agreement recognizes the Association as the bargaining representative for the following described unit:

> "[A]ll regular full-time, and part-time employees of the City of Tualatin, excluding casual, temporary and seasonal employees, employees represented by the Tualatin Police Officers Association, or employees defined as supervisory or confidential by state statute."

Standing on its own, this clause is unambiguous as to the issue at hand. However, the City argues that, taken as a whole, the agreement is ambiguous regarding the unit description because the agreement includes two exhibits: "EXHIBIT A - ASSOCIATION CLASSIFICATIONS," and "EXHIBIT B – SALARY SCHEDULE." Exhibit A [7] provides a list of positions and does not

[7]The agreement states that its titles, such as "Association Classifications" are "intended for easy reference only and shall not be interpreted and/or implied so as to eliminate or substantially reduce, increase, or in any way modify the terms and conditions thereof." Therefore, it is arguable that the agreement itself minimizes the significance of the list.

include the positions at issue here. Exhibit B provides the same list of positions divided into different salary steps. The representation clause does not, however, refer to or incorporate Exhibit A or B.[8] Indeed, Exhibit A is not referenced in any other part of the collective bargaining agreement. At oral argument, the parties agreed that the record does not contain evidence regarding the origin of Exhibit A.

We agree with the City that Exhibit A, which provides a list of "Association Classifications" that does not include the disputed positions, supports a "plausible interpretation" that the disputed positions are not part of the bargaining unit. *See City of Portland*, 248 Or App at 116-17 (a contract is ambiguous if it is "susceptible to more than one plausible interpretation"). However, although Exhibit A may make the agreement "susceptible" to such a plausible interpretation, we do not find it sufficient to overcome the more express and probative language of the recognition clause. As set forth above, the recognition clause identifies the bargaining unit as "*all* regular full-time, and part-time employees of the City of Tualatin" (emphasis added), with certain exceptions that do not apply to the disputed positions. The recognition clause, which is the most probative language concerning the designated bargaining unit, makes no reference to Exhibit A, and does not otherwise indicate that Exhibit A was intended to limit the sweeping language of the recognition clause.

Moreover, we resolve any remaining ambiguity by "resorting to appropriate maxims of contractual construction." *Id.* at 113. Pertinent to evaluating petitions brought under OAR 115-025-0005(3), we have employed the following maxim in construing a collective bargaining agreement:

> "The express terms of the certification or agreement clearly must not include the disputed positions for this Board to find that they are excluded from the unit. Doubts will be resolved in favor of inclusion in the unit." *Marion County*, 20 PECBR at 402 (citing *Salem School District 24J*, 6 PECBR at 4572-73). *See also City of Portland*, 248 Or App at 117 (recognizing the maxim of construction that, when a collective bargaining agreement is ambiguous with respect to whether a particular issue is arbitrable, we resolve that ambiguity in favor of arbitrability).

Employing this statutory maxim for interpreting collective bargaining agreements in a subsection (3) petition further supports our conclusion that the disputed positions should be included in the unit.

The City also argues that these employees should not be included in the bargaining unit because they have an administrative affinity with City management. As the City acknowledges, administrative affinity is one of the criteria this Board uses to determine whether a proposed bargaining unit has a community of interest and the appropriate scope of a bargaining unit. It is not a criterion under OAR 115-025-0005(3), where the issue is "whether certain positions are or are not included in a bargaining unit under the express terms of a certification description or collective

[8] Because the City's argument relies primarily on Exhibit A (and that exhibit provides the strongest support for the City's position), we focus our analysis primarily on that exhibit.

bargaining agreement * * *." *See also Clackamas County Employees' Association v. Clackamas County*, Case No. UC-23-87, 10 PECBR 481, 482 (1988) (consideration of "community-of-interest" factors not appropriate in the context of an OAR 115-025-0005(3) petition).

Finally, we address the City's "waiver" argument. Specifically, the City argues that the Association effectively "waived" its right to file a subsection (3) petition because the disputed positions have been tacitly excluded from the unit throughout the parties' lengthy collective bargaining relationship.[9]

We disagree with the City's contention. As set forth above, the express language of the applicable rule provides that such a "petition may be filed *at any time*." OAR 115-025-0005(3) (emphasis added).[10] Thus, the language of our rule forecloses a finding that the Association has "waived" its right to file a "unit clarification" petition under that subsection, and the City acknowledges that this Board has not previously held that either an employer or a union has "waived" its right to file a such a petition merely because a group of employees had been included or excluded from a bargaining unit before the petition was filed. Indeed, the very nature of such a "unit clarification" petition is for this Board to make a determination as to whether contested employees are effectively already in or out of an existing unit based on the language of the certification or the collective bargaining agreement. *See Marion County*, 19 PECBR at 782. Consequently, we decline to hold that the Association "waived" its right to file this petition because it had not filed such a petition at some earlier point.

Moreover, putting aside the express language of the rule itself (and the lack of any precedential support), injecting a "waiver" element into a subsection (3) petition would be problematic in many respects. As the instant matter demonstrates, an employer's organizational structure is fluid. Over time, new departments may be added, existing departments may be merged, and others may be dropped or eliminated entirely. Likewise, within any given department or division of an employer, new positions may be created, or the job duties of existing positions may be changed. When such organizational restructuring occurs, either an employer or a union may seek clarification as to whether "certain positions are or are not included in a bargaining unit under the express terms of a certification description or collective bargaining agreement." *See* OAR 115-025-0005(3).

With respect to a labor organization, it may discover that certain positions have not been considered to be part of a bargaining unit, even though the express terms of the parties' agreement

[9]The City also asserts that the Association should be estopped from its claims over these employees, without providing any analysis or argument. We do not consider that contention.

[10] The rule contains one exception to the "at-any-time" allowance: that "the petitioning party shall be required to exhaust any grievance in process that may resolve the issue before such a petition shall be deemed timely by the Board." Neither party contends that this exhaustion exception applies to the Association's petition.

say otherwise. Such confusion is more likely where, as here, an employer has restructured itself many times over, including consolidating departments, changing job titles and duties for existing positions, and creating new positions (or eliminating previous ones).[11]

Likewise, an employer may "discover" that its restructuring excludes a position that was previously considered to be a part of the unit under the express terms of the parties' agreement. That realization may occur immediately or years down the road. In either event, the employer has the right to seek clarification of that position "at any time." *Id.* Inserting a "waiver" analysis into a subsection (3) petition would be to ignore the dynamic nature of an employer's operation, and would likely be unworkable or overly confusing.[12]

Finally, a "waiver" analysis could result in this Board effectively "rewriting" the parties' contract. Under a subsection (3) petition, we determine "whether certain positions are or are not included in a bargaining unit *under the express terms of a certification description or collective bargaining agreement*." OAR 115-025-0005(3) (emphasis added). If we were to employ a "waiver" analysis, as the City requests, we could be presented with a situation where we include or exclude a position from a bargaining unit, even though the express terms of the parties' agreement *requires* otherwise. We do not believe that to be a proper function of this Board.

For the aforementioned reasons, we conclude that the express terms of the parties' contract include the positions at issue.

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[11] Indeed, this record supports that the City's most recent 2012 restructuring triggered the Association's scrutiny regarding the disputed positions, and led to the filing of this petition. The record further supports that the City has represented (and believed) in past years that the disputed positions were excluded from the unit per the terms of the parties' collective bargaining agreement because the positions were "confidential" or "supervisory." As part of its organizational restructuring throughout the years, the City has added new positions, changed job-position titles, and changed the job responsibilities for the disputed positions, such that the City now concedes that none of the disputed positions qualify as "confidential" or "supervisory." The City's previous representations (and the Association's acceptance of such) are the most likely source of the historical exclusion of the disputed positions from the bargaining unit. Such circumstances present a typical case for filing a subsection (3) petition.

[12] The City has not proposed a workable "waiver" analysis, and, as indicated above, we question whether one is available in the context of a subsection (3) petition.

ORDER

The City employees working in the positions of Management Analyst II - Community Development; Deputy City Recorder - Administration; Program Coordinator - Community Development; Program Coordinator - Community Services; Program Coordinator - Finance; Program Coordinator - Operations; Program Coordinator - Police; Paralegal - City Attorney's Office; Network Administrator; Information Technology Technician; and Information Technology Coordinator are included in the existing City-Association bargaining unit.

DATED this 21 day of June 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-17-08

(UNFAIR LABOR PRACTICE)

ROGUE RIVER EDUCATION ASSOCIATION/SOUTHERN OREGON BARGAINING COUNCIL/OEA/NEA,	)	
Complainant,	)	
v.	)	FINDINGS AND ORDER ON COMPLAINANT'S PETITION FOR ATTORNEY FEES ON APPEAL
ROGUE RIVER SCHOOL DISTRICT NO. 35,	)	
Respondent.	)	

On May 6, 2008, the Rogue River Education Association/Southern Oregon Bargaining Council/OEA/NEA (Association) filed an unfair labor practice complaint against the Rogue River School District No. 35 (District) alleging that the District violated ORS 243.672(1)(g). The Board initially dismissed the complaint as untimely. 22 PECBR 577 (2008). The Association then filed a petition for review with the Court of Appeals, and on October 11, 2011, the Court of Appeals reversed our order and remanded the matter to us for reconsideration. 244 Or App 181, 260 P3d 619 (2011). The appellate judgment was entered on October 11, 2011. On November 13, 2012, we issued our Order on Remand, 25 PECBR 230 (2012), finding that the District had violated ORS 243.672(1)(g). The Association submitted its petition for attorney fees on October 25, 2011. On October 27, 2011, the District filed its objection to the Association's petition.[1]

Pursuant to ORS 243.676(2)(e) and OAR 115-035-0057, this Board finds:

1. The Association filed a timely petition for attorney fees and the District filed timely objections to the petition.

2. The appellate judgment names the Association as the prevailing party.

[1]The Association submitted a separate petition for representation costs. That petition will be addressed in a separate order on this date.

3. Counsel for the Association submitted affidavits showing that 48.8 hours were spent on the case, with 40.5 hours of work billed at $145 per hour and 8.3 hours of work billed at $150 per hour. The total amount of fees billed was $6,967.50.

4. The requested hourly rate is below average. The average rate for attorney fees is between $165 and $170 per hour. *Portland Police Association v. City of Portland*, Case No. UP-05-08, 25 PECBR 116 (2012) (Attorney Fees Order). The number of hours claimed is above average. Cases generally require an average of 35 hours on appeal. *Id.* at 117.

5. The District objected to the petition in its entirety, arguing that it was untimely. The District further argued that the Board had initially ruled that the complaint was untimely, and that our case law was unclear about whether a discovery rule or an occurrence rule applied when judging the timeliness of complaints.

6. OAR 115-035-0057(1) requires a party to file a petition for attorney fees within 21 days of the entry of the appellate judgment. The appellate judgment was entered October 11, 2011. The Association filed its petition 14 days later. As a result, the petition was timely.

7. Under OAR 115-035-0057(3), we may consider whether a significant modification was made on remand when issuing attorney fee awards. In this matter, the Board initially dismissed the matter as untimely. On remand, after the Court of Appeals clarified that a discovery rule was applicable, we held that the District violated ORS 243.672(1)(g). This is a significant modification. As a result, we will award a lower-than-average award in this matter.

8. Having considered the purposes and policies of the Public Employee Collective Bargaining Act, our awards in prior cases, and the reasonable cost of services rendered, this Board awards the Association attorney fees in the amount of $1,312.

ORDER

The District will remit $1,312 to the Association within 30 days of the date of this Order.

DATED this 21 day of June 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-17-08

(UNFAIR LABOR PRACTICE)

ROGUE RIVER EDUCATION ASSOCIATION/SOUTHERN OREGON BARGAINING COUNCIL/OEA/NEA,	)	
Complainant,	)	
v.	)	FINDINGS AND ORDER ON COMPLAINANT'S PETITION FOR REPRESENTATION COSTS
ROGUE RIVER SCHOOL DISTRICT NO. 35,	)	
Respondent.	)	

On May 6, 2008, the Rogue River Education Association/Southern Oregon Bargaining Council/OEA/NEA (Association) filed an unfair labor practice complaint against the Rogue River School District No. 35 (District) alleging that the District violated ORS 243.672(1)(g). The Board initially dismissed the complaint as untimely. 22 PECBR 577 (2008). The Association then filed a petition for review with the Court of Appeals, and on October 11, 2011, the Court of Appeals reversed our order and remanded the matter to us for reconsideration. 244 Or App 181, 260 P3d 619 (2011). On November 13, 2012, we issued our Order on Remand, 25 PECBR 230 (2012), finding that the District had violated ORS 243.672(1)(g). The Association submitted its petition for representation costs on December 3, 2012. On December 5, 2012, the County filed its objection to the Association's petition.[1]

Pursuant to ORS 243.676(2)(d) and OAR 115-035-0055, this Board finds:

1. The Association filed a timely petition for representation costs and the District filed timely objections to the petition.

2. The Association is the prevailing party. We concluded that the District violated ORS 243.672(1)(g), the sole claim at issue in the complaint.

3. A single day hearing was held on February 16, 2012, before ALJ Peter Rader. Counsel for the Association submitted affidavits showing that 43.3 hours were spent on the case,

[1]The Association submitted a separate petition for attorney fees on appeal. That petition will be addressed in a separate order on this date.

with 41.3 hours being legal work billed at $150 per hour and 2 hours being travel time billed at $75 per hour. The total amount of fees billed was $6,345.00. The Association's petition requests payment of $3,500 in representation costs, which is the maximum amount that this Board awards in the absence of a civil penalty. *American Federation of State, County and Municipal Employees Council 75, Local 88 v. Multnomah* County, Case No. UP-22-10, 22 PECBR 150, 151 (2012) (Rep. Cost Order); OAR 115-035-0055.

4. The requested hourly rate is below average. The average rate for representation costs is between $165 and $170 per hour. *Clackamas County Employees' Association v. Clackamas County/Clackamas County District Attorney*, Case No. UP-7-08, 24 PECBR 769, 771 (2012) (Rep. Cost Order). The number of hours claimed is also slightly below average. Cases generally require an average of 45 to 50 hours per day of hearing. *See AFSCME Council 75, Local 3964 v. Josephine County*, Case No. UP-26-06, 24 PECBR 720, 723 (2012) (Rep. Cost Order).

5. The District objected to the petition in its entirety, noting that the Board had initially ruled that the complaint was untimely and that our case law was unclear about whether a discovery rule or an occurrence rule applied when judging the timeliness of complaints. In cases involving novel legal issues such as this, this Board typically issues lower than average representation cost awards. *Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections*, Case No. UP-5-06, 22 PECBR 479, 480 (2008) (Rep. Cost Order). In recognition that our case law was unclear before the Court of Appeals' decision, we will adjust the award downwards.

6. An average award is generally one-third of the reasonable representation costs of the prevailing party, subject to the $3,500 cap contained in OAR 115-035-0055(1)(a). Having considered the purposes and policies of the Public Employee Collective Bargaining Act, our awards in prior cases, and the reasonable cost of services rendered, this Board awards the Association representation costs in the amount of $1,586.

ORDER

The District will remit $1,586 to the Association within 30 days of the date of this Order.

DATED this 21 day of June 2013.

Kathryn A. Logan

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD
OF THE
STATE OF OREGON

METROPOLITAN EXPOSITION RECREATION COMMISSION, Complainant, v. ILWU LOCAL 28, Respondent.	)	Case No. UP-57-12 CONSENT ORDER

On January 11, 2012, Metropolitan Exposition Recreation Commission, ("MERC"), filed an unfair labor practice against Respondent International Longshore Workers Union, Local 28 ("Union"), alleging violations of ORS 243.672(2)(b) when the bargaining team allegedly failed to recommend ratification of the tentatively agreed to successor contract between the parties, failed to negotiate in good faith, and failed to provide information.

The parties have agreed to settle this matter by entry of this consent order, subject to Board approval. They also agree to waive all further proceedings in this matter, including a hearing before the Board and judicial review of the consent order. Finally, the signatories warrant they are authorized by their respective principals to sign the stipulation, waive reading of the Administrative Procedure Act rights (ORS 183.413), and represent that the statements in the stipulation of fact are accurate and constitute all of the evidence that either party wishes to present to the Board.

II. STIPULATED FACTS

1. ILWU Local 28 is a labor organization as defined by ORS 243.650(13).

2. MERC is a public employer as defined by ORS 243.650(20).

3. The Bargaining Committee of the Union failed to recommend to the membership ratification of the tentatively agreed upon collective bargaining agreement.

III. STIPULATED CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and this subject matter.

2. The Union violated ORS 243.672(2)(b) when its bargaining committee did not recommend to the membership ratification of the tentatively agreed upon collective bargaining agreement.

IV. STIPULATED ORDER

1. The Union shall cease and desist from conduct in violation of ORS 243.672(2)(b) and shall recommend ratification of the tentatively agreed to contract.
2. All remaining claims are dismissed.
3. Neither party shall be awarded representation costs and no civil penalty shall be awarded.

Nathan A. S. Sykes, OSB No. 954347
Attorney For Complainant
Date: 6/20/13

6/20/2013
Thomas K. Doyle, OSB No. 972511
Attorney for Respondent

Date: _____

This Consent Order is hereby approved this 25 day of June, 2013

FOR THE EMPLOYMENT RELATIONS BOARD

Kathryn A. Logan

Kathryn A. Logan, Chair

Date: 6/25/13

Jason M. Weyand, Board Member

Date: 6/25/13

Adam L. Rhynard, Board Member

Date: 6/25/13

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-074-11

(UNFAIR LABOR PRACTICE)

BROOKINGS-HARBOR EDUCATION ASSOCIATION/OEA, Complainant, v. BROOKINGS-HARBOR SCHOOL DISTRICT 17C, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

No objections were filed to a recommended order issued on April 29, 2013 by Administrative Law Judge (ALJ) B. Carlton Grew, after hearings on September 26 and 27, 2012.[1] The record closed on November 9, 2012, following receipt of the parties' post-hearing briefs.

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

Bruce A. Zagar, Attorney at Law, Garrett Hemann Robertson, P.C., Salem, Oregon, represented Respondent.

On November 4, 2011, Brookings-Harbor Education Association/OEA (Association) filed this Complaint alleging that Brookings-Harbor School District 17C (District) had violated ORS 243.672(1)(g) by failing to fully implement an arbitration award. The District filed a timely answer. On April 5, 2012, five days before the originally scheduled hearing, the Association filed a motion to amend the Complaint to add claims under ORS 243.672(1)(a) and (c). The ALJ granted the motion over the District's objection, and the Amended Complaint and Answer to the Amended Complaint were filed. The District alleged that the award required it to act unlawfully.

[1]On May 9, 2013, we granted the parties' joint request to extend the time to file objections until June 13, 2013. On June 7, 2013, we were informed that the parties would not be filing objections, and that both parties were waiving oral argument.

The issues are:[2]

1. Did the District fail to comply with the Kucharski grievance Arbitration Award? If so, did the arbitrator exceed her authority or violate public policy, or did the District violate ORS 243.672(1)(g)?

2. Are the Association's claims under ORS 243.672(1)(a) and (c) untimely?

3. If the Association prevails, what is the appropriate remedy?

We conclude that the District violated ORS 243.672(1)(g) and that the remaining claims are untimely. As a remedy, the District shall cease and desist from refusing to implement the arbitration award and make Kucharski whole for any loss or injury that he suffered due to the District's failure to promptly implement the award. The District shall also sign and post copies of a notice, as set forth below.

RULINGS

The rulings of the Administrative Law Judge were reviewed and are correct.[3]

FINDINGS OF FACT

1. The Association is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a bargaining unit of approximately 200 classified and unclassified employees employed by the District, a public employer as defined by ORS 243.650(20).

Background[4]

2. During the relevant time period, the parties were subject to a 2008-2011 collective bargaining agreement. That agreement includes dispute resolution provisions beginning with a grievance and ending with binding arbitration. The agreement also includes a layoff provision, which provides in part: "If the Board determines a layoff is necessary, then ORS 342.934 will determine the teachers to be retained." ORS 342.934 governs layoffs of licensed teachers from Oregon public schools. ORS 342.934(3) requires that teachers who are retained after a layoff must "hold proper licenses at the time of layoff to fill the remaining positions."

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[2]The Association also sought a civil penalty, but its Amended Complaint fails to comply with the pleading requirements for such a claim set forth in OAR 115-035-0075(2). The District also sought a civil penalty, but because of our disposition of the parties' claims and defenses, we do not award a civil penalty to the District.

[3]The District objected to the filing of the Amended Complaint, but did not raise the issue in its post-hearing brief, and therefore we do not address this ruling separately.

[4]Findings of fact 2-9 are a slightly edited version of relevant sections of the Arbitrator's Analysis and Award.

3. ORS 342.934(7) describes the authority of an arbitrator hearing appeals from layoffs of licensed teachers:

> "(7) An appeal from a decision on reduction in staff or recall under this section shall be by arbitration under the rules of the Employment Relations Board or by a procedure mutually agreed upon by the employee representatives and the employer. The results of the procedure shall be final and binding on the parties. Appeals from multiple reductions may be considered in a single arbitration. The arbitrator is authorized to reverse the staff reduction decision or the recall decision made by the district only if the district:
>
> "(a) Exceeded its jurisdiction;
>
> "(b) Failed to follow the procedure applicable to the matter before it;
>
> "(c) Made a finding or order not supported by substantial evidence in the whole record; or
>
> "(d) Improperly construed the applicable law."

4. District teacher Kucharski had taught robotics in Advanced Industrial Engineering and Introduction to Technology courses. He had also taught several other classes involving architecture using 3-D computer modeling and computer-assisted drawing. Kucharski had been actively involved in the evolution of the District's traditional industrial arts or shop programs to technology education.

5. Before the 2009-2010 school year, Kucharski taught technology and industrial arts courses at the District high school. The District eliminated those courses at the end of the 2008-2009 school year.

6. In the 2009-2010 school year, Kucharski taught wood shop and two technology classes in the District middle school.

7. In early 2010, the District, for financial reasons, decided to eliminate the middle school wood shop courses. On March 15, 2010, the District informed Kucharski that he would be laid off at the end of the school year. His layoff notice stated, "[t]his layoff does not preclude you from taking advantage of your seniority to bump into another position." Kucharski was the only teacher laid off at this time.

8. Kucharski sought to bump two teachers with less seniority, including less senior District high school teacher Alan Chirinian, but the District did not permit this, contending that Kucharski was not licensed to teach either teacher's courses.

9. The Association filed a grievance claiming that Kucharski should have been allowed to bump Chirinian. The District denied the grievance, and the Association requested arbitration. Arbitrator Jean Savage held the hearing on February 2 and 3, 2011, and then permitted

the submission of additional evidence and briefing after the hearing. The Arbitration Award was issued on June 27, 2011. The Arbitrator defined the issue before her as: "The arbitrator finds that the issues are: Whether the grievance [was timely]?[5] Whether the District violated Article 20, Layoff and Recall, when it retained a teacher less senior than the Grievant to teach certain technology courses. If so, what is the appropriate remedy?"

Teacher Licensing and Subject Matter Coding for Courses[6]

10. The Association argued in arbitration that Kucharski was licensed and qualified to teach the courses assigned to Chirinian in the 2010-2011 school year. Those courses included: Introduction to Computer Applications and Programming, No. 10152; 3-D Rapid Prototyping, No. 21010; and Advanced Robotic Sciences, No. 21009. The District contended that Kucharski was not licensed to teach these courses because they had elements of science curriculum embedded within them.

11. The number codes attached to each course were National Center for Education Statistics (NCES) codes related to the academic subjects of the courses, and defined the type and amount of academic credit students would obtain by passing the courses. The codes also determined the academic licensure and qualifications required of teachers for those courses.

12. The course codes were ultimately chosen by District administrative staff, who had a variety of State and other resources available to assist them in selecting the appropriate codes.

13. ORS 342.934(3) requires that when a school district reduces its staff, "the school district shall * * * [d]etermine whether teachers to be retained hold proper licenses at the time of layoff to fill the remaining positions." Teachers in Oregon are required to be licensed. In addition to a Standard Teaching License, a teacher may have one or more endorsements needed to teach certain subjects. An endorsement is "[t]he subject matter or specialty education field in which the individual is licensed to teach." OAR 584-005-0005(16).

14. Kucharski is licensed to teach in the area of Manufacturing Technology and has an endorsement in Standard Technology Education. Chirinian is licensed to teach in the area of Standard Biology and has an endorsement in Standard Integrated Science.

15. The Teacher Standards and Practices Commission (TSPC), an independent licensing agency within the purview of the state, aligns a teacher's endorsement with every course being taught. The Oregon Department of Education (ODE) has generic titles for each subject and within that subject there are specific NCES codes. School districts are required to assign NCES codes to every course and assign teachers with the proper endorsement area for a course as coded.

[5]The District contended that the date of Kucharski's layoff notice controlled the grievance filing deadline; the Association argued that the date of the denial of bumping rights determined the appropriate deadline. The Arbitrator ruled in favor of the Association on this point, and this ruling is not disputed in this proceeding.

[6]The finding of facts in this section were made based on the Arbitrator's Analysis and Award and from the evidence presented at the hearing in this case.

Each year, districts report the courses being taught and the teachers who are teaching those courses to ODE in compliance with ODE requirements.

16. The Association also argued that Kucharski was licensed to teach Introduction to Robotic Science, No. 21009; Intermediate Robotic Science, No. 21009M; Emerging Technologies Projects, No. 21053; and Digital Manufacturing Science, No. 21010M. The District did not deny that Kucharski was qualified to teach these courses.

17. The TSPC relies upon the District-chosen NCES codes and TSPC's records of teacher qualifications to determine that a teacher has the subject matter expertise to teach a course.

Arbitration Award: Framework and Scope of Decision

18. The Arbitrator defined the "Framework and Scope of Decision" of her Award as follows:

> "This case arises under Article 20 of the parties' collective bargaining agreement[,] which incorporates Oregon's statutory requirements in ORS 342.934, the procedure for reduction of teacher staff due to funding or administrative decision.
>
> "The District argues that it has complied with ORS 342.934(7). The arbitrator has examined the language of Section 7 and finds that it is not applicable. Section (7) states that '[t]he arbitrator is authorized to reverse the staff reduction decision or the recall decision made by a district only if the district failed to comply with one of four requirements.' [Emphasis in original.] In this case, it is not the District's decision to reduce its staff by one position that is at issue. It is undisputed that the District had the authority to make this decision. The decision that the Association disputes is the District's decision not to allow the Grievant to bump into the position occupied by Teacher C. [Chirinian] at the high school. The issue is whether the District violated the collective bargaining agreement when it retained a less senior teacher than the Grievant to teach certain technology courses and not whether the District could reduce its teaching staff.
>
> "Further, the arbitrator finds that ORS 342.934(4) is inapplicable. That section provides that a district can retain a teacher with less seniority if the district determines that the teacher 'being retained has more competence or merit than the teacher with more seniority who is being released.' In its brief, the District does not argue that Teacher C., who has less seniority than the Grievant, has greater competence or merit (although the Superintendent made that argument in his grievance response). Rather, the District's argument is that certain technology courses have embedded science standards that require a teacher with an Integrated Science endorsement and that the Grievant does not have the proper endorsement to teach these technology courses."

19. The Arbitrator then addressed whether Kucharski is licensed to teach technology courses embedded with a science curriculum:

"The District's position is that the Grievant, who has an endorsement in Standard Technology Education, is not licensed to teach certain technology courses that include an embedded science curriculum and are offered for science credit. Those courses, and the NCES codes that the District assigned to them, are:

"Introduction to Computer Applications and Programming, 10152;
"3-D Rapid Prototyping, 21010; and
"Advanced Robotic Sciences, 21009.

"The Association does not dispute the District's right to add a science component to these courses nor does it dispute that the District did so.[12] The Association's position is that the NCES codes that the District assigned show that the courses are technology courses that the Grievant is licensed to teach and that science credit is available for these courses if the Grievant teaches them.

"The District assigned Teacher C. to teach the three courses listed above in the 2010-2011 school year as well as Intermediate Robotic Science, 21009, and Introduction to Robotic Sciences, 21009. There is no dispute that the Grievant has more seniority than Teacher C; however the District retained Teacher C. rather than the Grievant because Teacher C has an Integrated Science endorsement.

"The issue is whether the District's addition of a science component into certain technology courses, without changing the NCES codes, required that a teacher with an Integrated Science endorsement teach those courses for students to obtain science credit. This issue arises under Article 20, Layoff and Recall, which provides that when a teacher is to be laid off, 'ORS 342.934 will determine the teachers to be retained.'

"[12]Additional courses with embedded science standards that were not being taught in the first semester in 2010-2011 were Emerging Technologies Projects, 21053, and Digital Manufacturing Science, 21010M." (Internal citations omitted.)

20. The Arbitrator determined the following regarding the District's decision to embed technology courses with science standards:

"The District Superintendent testified that in the future Oregon students will be required to have three credits in science rather than the current two credits. As a result, the District decided to embed science standards in some of its technology courses. Ms. Pratt states in her affidavit that the change takes effect in 2012 and that '[a]pplied and integrated courses aligned to the science content standards may meet this requirement.'

"According to the Principal's testimony, Teacher C., who did not testify, did the actual work of embedding science standards in some of the technology courses in 2008 to 2009. In the record, the standards are referenced by number in the curriculum mappers (a month by month review of what is being taught) for three courses--Introduction to Robotics, Advanced Robotics, and 3-D Rapid Prototyping.

Association Exh. No. A-11 provides a description of the numbers. For example, A-7 is '[u]nderstanding about scientific inquiry.' Although the District's course catalog lists all the technology courses under 'Science,' District witnesses testified that Introduction to Robotic Science[14] and Intermediate Robotic Science do not have embedded science standards.

"Although District witnesses repeatedly asserted that ODE has been awarding science credit for Advanced Robotics, 3-D Rapid Prototyping, Emerging Technologies Projects, and Digital Manufacturing Science for several years, there is nothing in the record to establish that fact. To the contrary, Ms. Ferrer submitted a copy of the 'most recent public record, which is from 2009-2010' of the District's annual report on Highly Qualified Teachers. That report shows 'one academic core science class being taught by [Teacher C.]' That class is listed as physical science.

"In her affidavit, Ms. Pratt explains that the appropriate course code for Advanced Robotics and 3-D Rapid Prototyping is in the science category using codes beginning with No. O3XXX. Specifically, she finds that the appropriate code is No. 03212, Scientific Research and Design, because 'the description specifically addresses the use of scientific inquiry, which is required to award science credit.'[15] However, the course descriptions for Advanced Robotics and 3-D Rapid Prototyping did not change in the course catalog the District provides to students. Also, there is nothing in Ms. Pratt's affidavit that shows how she determined that science credit is being awarded, Ms. Pratt states 'the appropriate course code for both courses must be in the Science category since Science credit is being awarded[.]'

"Ms. Pratt notes the District's testimony that the NCES code numbers had not been updated but she does not address the effect of the District's failure to update the numbers. More importantly, Ms. Pratt's affidavit does not support a conclusion that science credit is unavailable for courses using non-science codes. While Ms. Pratt's affidavit states that Advanced Robotics and 3-D Rapid Prototyping should have been titled and coded as science courses, there is nothing in her affidavit to support the argument that science credit cannot be awarded for these courses as they are presently coded.

"The District admits that it has the responsibility to establish accurate NCES codes for courses taught in the high school. The Principal testified that the District is working to align its course codes with those of the state, that currently the numbers have no meaning, and that they are 'a work in progress.' The Principal also testified that a secretary at the District office inputs the NCES codes. Overall, the Principal's testimony revealed a lack of understanding of TSPC's function, the NCES codes, and how the codes are used. Despite approving the addition of science standards to some of the technology courses, the Principal did not research the appropriate codes. At first the Principal testified that he consulted only with the Superintendent; later he stated that he telephoned TSPC, but he could not identify the person with whom he spoke.

"Introduction to Computer Applications and Programming is the third course that the District assigned Teacher C. to teach the first semester of the 2010-2011 school year. The Principal testified that there is no science credit for that course. The Association argues that computer science classes do not require 'any particular endorsement. ...The District made no assertion that the Grievant would be barred by any agency from teaching a computer class at the high school.' However, the District asserted in its brief that the course requires an integrated science endorsement and restated in its supplemental brief that the course also had embedded science standards."

"[14]There is a conflict in the record concerning Introduction to Robotics. Association Exhibit No. 13 shows that national science standards are included in the course. However, the Principal testified that no science credit is awarded for that course.

"[15]Ms. Pratt states that for science credit courses must be 'inquiry-based,' that is they must 'provide students the opportunity to apply scientific reasoning and critical thinking to support conclusions or explanations with evidence from their investigations.'"

21. After reviewing the evidence before her, the Arbitrator reached the following conclusions:

"At the heart of this dispute are the NCES codes. They are a critical aspect of the Oregon state teacher licensing system which relies on the codes furnished by school districts. The codes, when matched with teachers' licenses, enable TSPC, the licensing agency, to ensure that qualified teachers are teaching Oregon's students. Correct NCES codes enable TSPC to fulfill its function. In addition, teachers and the Association must be able to rely on the submitted codes. Not only must teachers be licensed, but they must obtain particular endorsements to teach certain subjects and obtaining an endorsement can be critical to a teacher's employment. Obtaining the appropriate endorsement is not a trivial matter; it can easily involve years of education. Knowing which endorsements are necessary depends on districts accurately coding courses.

"Although it is the District's responsibility to submit correct NCES codes to TSPC, the record shows that the District took this responsibility lightly. While there are resources at the District's disposal--individuals at ODE and documents providing guidance—to assist in this work, it appears that the District did not utilize them. The District's lack of attention is particularly striking in the circumstances. At some point in time, the District must have become aware that it might be necessary to eliminate the middle school courses that the Grievant was teaching. That possibility would have led to a review of the Grievant's endorsements and experience in teaching technology courses that were currently taught in the high school. In view of the potential for a teacher layoff, such a situation should naturally have resulted in a careful examination of all the possible ramifications, including course descriptions and NCES codes.

"Using the NCES codes that the District furnished and information on TSPC's website, the documents show that the Grievant's endorsement permits him to teach Computer Integrated Manufacturing, 21010; Emerging Technologies, 21053; and Robotics, 21009. Also, 3-D Rapid Prototyping and Digital Manufacturing Science are coded 21010 and, accordingly, the Grievant could teach those courses.[16] The arbitrator also finds that Teacher C. is endorsed to teach the robotics courses; however, his endorsement does not permit him to teach 3-D Rapid Prototyping, 21010; Emerging Technologies Projects, 21053; or Digital Manufacturing Science, 21010M. There is no record that the District applied for a conditional teaching permit with regard to any of the technology courses at issue.

"[16]The Principal testified that Computer Integrated Manufacturing includes 3-D Rapid Prototyping.

"The course titled Introduction to Computer Programming and Applications, 10152, can be taught by any licensed teacher, according to the information in the record. OAR 584-036-0083 provides that any standard teaching license is valid for 'areas in which the Commission has no licensure endorsements, including but not limited to: (a) Computer education;...' The NCES code for this course remained 10152 and, as such, a Standard Teaching License is sufficient to teach this course. Consequently, the arbitrator finds that either the Grievant or Teacher C. can teach the course.

"The fact that the District embedded science standards into some of the technology courses does not change this result. The ODE document, 'Guidelines, Scenarios, and Resources for Offering Credit in Applied Academics,' clarifies this issue. That document states that the Oregon State Board of Education endorsed the concept of meeting core math and science requirements by integrating math and science standards in applied courses. The ODE guidelines state that

> "'credit for core academic subjects...must be awarded by a highly qualified teacher....However, in many cases, applied academic courses can be taught by teachers who are not licensed in the core content areas. A teacher licensed to teach agriculture can teach an agriculture science class that meets graduation requirements for science.'

"The ODE guidelines also state that '[m]ost teachers with a CTE (Technology) license are qualified to teach courses that include academic content related to their endorsement.' As the arbitrator understands this guideline, the Grievant is qualified to teach the technology courses that the District embedded with science standards.

"In summary, according to the NCES codes that the District submitted and based on the record, the arbitrator finds that the Grievant holds the technology endorsement necessary to teach all the courses which the District coded as

technology courses. Specifically, the Grievant holds the correct endorsement to teach the courses assigned to Teacher C. in the 2010-2011 school year:

"Introduction to Computer Applications and Programming, 10152;
"3-D Rapid Prototyping, 21010;
"Introduction to Robotic Science, 21009;
"Intermediate Robotic Science, 21009M; and
"Advanced Robotic Sciences, 21009V.

"In addition, the Grievant is endorsed to teach the two courses that the District did not offer the first semester of 2010-2011--Emerging Technologies Projects, 21053, and Digital Manufacturing Science, 21010M.

"In reaching this decision, the arbitrator also finds that as required in ORS 342.934(2)(a), the District did not 'make every reasonable effort to: (a) Transfer teachers of courses scheduled for discontinuation to other teaching positions for which they are licensed and qualified.' Further, the District did not '[d]etermine whether teachers to be retained hold proper licenses at the time of layoff to fill the remaining positions' as required in ORS 342.934(3)(a)."

22. The Arbitrator's Award stated:

"Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the grievance met the filing requirements in Article 13 of the parties' collective bargaining agreement and that the District violated Article 20, Layoff and Recall, when it retained a teacher less senior than the Grievant to teach certain technology courses. Therefore, as required in ORS 342.934(2)(a), the District did not 'make every reasonable effort to: (a) Transfer teachers of courses scheduled for discontinuation to other teaching positions for which they are licensed and qualified' nor did the District correctly '[d]etermine whether teachers to be retained hold proper licenses at the time of layoff to fill the remaining positions,' as required in ORS 342.934(3)(a).

"The grievance is sustained."

23.The Arbitrator's Remedy was as follows:

"The District is ordered to reinstate the Grievant to a teaching position in the Brookings-Harbor School District 17C and make him whole. Specifically, the District must pay the Grievant full back pay and benefits.

"The arbitrator retains jurisdiction for 60 days solely to resolve any disputes that may arise in connection with implementation of the remedy."

24. The Award was issued June 27, 2011.

Arbitrator's Clarification of Remedy

25. On June 30, 2011, counsel for the District, Bruce Zagar, e-mailed counsel for the Association, Barbara Diamond, and stated:

> "I have met with the Brookings-Harbor School Board and I need to inform you that the Board is giving serious consideration to refusing to implement the arbitrator's award. Not to argue the point, but to clarify the basis for this consideration, the District would cite you to the fact that the arbitrator exceeded her jurisdiction by ruling [that] ORS 342.934(4) is not applicable to this case. Furthermore, her award violates public policy regarding the placement of a teacher into a position for which he is not properly licensed or endorsed.
>
> "I also want to point out to you that the District has changed all the applicable NCES numbers for the science embedded technology courses. They are all now starting with the first two digits of '03---.' Both you and the arbitrator agree that if the NCES number was correctly in the science area ('03'), then Mr. Kucharski is not licensed. That is the case now.
>
> "Kucharski * * * does not have the seniority or the licensure to teach in any of the remaining positions."

26. On July 14, 2011, Diamond sent a document request to the District regarding the changed NCES numbers, ODE filings, and course catalog. On July 20, Zagar faxed Diamond the 2011-2012 Curriculum Planning Guide, which included course descriptions for the technology courses 3-D Rapid Prototyping, Emerging Technologies Projects Science, Introduction to Robotics, Intermediate Robotics, and Advanced Robotics. Each course was coded 03.

27. Also on July 20, the School Board met and, as reported by Zagar, (1) "voted to reinstate Mr. Kucharski and to make him whole in accordance with the decision of the arbitrator," and (2) voted to "place Stephen Kucharski on layoff for the 2011-2012 school year as a result of his lack of licensure to teach remaining courses and/or because of his lack of seniority to displace any teacher."

28. On July 22, Diamond e-mailed Arbitrator Savage.[7] Diamond stated,

> "I am enclosing the letter which shows that the District is refusing to place Kucharski into a teaching position with the District. I have in my possession the school catalog for the District which shows that robotics and other technology classes are being offered. Mr. Chirinian is apparently going to be continuing in the position he was in last year. I therefore believe we have a dispute about your order."

[7]In her Clarification of Remedy, the Arbitrator noted that the parties had agreed that she would retain jurisdiction over the matter for 90 days, notwithstanding the 60-day reference in the Award.

29. On August 19, the Association filed a formal motion to clarify the Award.[8] The Association asked the Arbitrator "to clarify whether, in awarding Grievant reinstatement, she intended to permit the District to place Grievant in an actual teaching position or whether the duty to reinstate could be satisfied by placing Grievant on layoff." The Association also stated that the District had recoded the technology courses as "IB physics courses." In support of the motion, the Association submitted the records the District had submitted to ODE for 2011, which indicated that the District had not reported any of the robotics or technology courses in dispute to ODE as qualifying for NCES science credit. This was contrary to the District's contentions during the arbitration.

30. On August 26, the District filed a formal response to the motion. The District submitted a Course Schedule dated August 23. In that document, the recoded IB Physics course numbers had been recoded again, this time to 03 numbers for 3D Rapid Prototyping, Emerging Technologies Projects, and Intermediate and Advanced Robotics. Introduction to Robotics was no longer in the catalog. On September 2, the Association filed a reply brief.

31. On September 13, 2011, the arbitrator issued a "Clarification of Remedy." In that decision, the Arbitrator summarized the Association's position as follows:

> "The Association seeks a clarification that 'reinstatement means placing the Grievant in position he would have had if the District had given him [Teacher C.'s] position.'
>
> "The Association argues that the District's conduct was 'arbitrary, capricious, and discriminatory when it intentionally reclassified the robotics position to avoid reinstating the Grievant.' Although the District recoded the technology courses after the award was issued, the Association argues that this action could have been taken earlier. In these circumstances, the Association asserts that the arbitrator 'has the power to determine that when a party fails to raise a defense regarding the remedy that was available at the time of arbitration, it should not be entitled to deny the right to reinstatement after the hearing is complete and the award issued.' The Association also asserts that 'every contract contains an implied covenant of good faith and fair dealing.' Citing several cases, the Association adds that 'Oregon arbitration awards and ERB cases demonstrate that employers may not exercise their discretion so as to deprive employees of their vested contract rights.'
>
> "In addition the Association argues that the District's conduct in this case has been 'misleading and unreasonable.' The Association asserts that initially the District changed codes for the technology courses to a category appropriate for IB (International Baccalaureate) Physics, NCES course code 03157. These courses, the Association asserts, 'could not rationally be viewed as lB Physics classes.' Further, the Association points out that the District does not have an IB Physics program and even if it did exist, such classes would require a certified physics

[8]There is no dispute that the District complied with the retrospective/make whole portion of the Arbitration Award.

teacher---not a license held by Teacher C. Although the Association requested course codes for the 2011-12 school year, the Association asserts that District sent codes for the prior year, the same codes at issue in the arbitration. The Association also argues that there is no evidence that new codes for technology courses which were 'developed during the pendency of this motion' were submitted to the Oregon Department of Education (ODE) or that any of 'the robotics or technology classes had been submitted to ODE as qualifying for NCLB (No Child Left Behind) science credit.' Finally, the Association asserts that the District could have used the same codes used in the 2010-11 school year because 'there are overlapping credentials which allow teachers with technology licenses to teach classes for science credit.'

"The Association argues that the arbitrator 'should order the District to actually reinstate Grievant to the position he would have had if the District had followed the contract and acted in good faith.'"

32. The Arbitrator summarized the District's position as follows:

"The District argues that the District reinstated the Grievant as the award required. Further, the District asserts that the Award did not give the Grievant 'any protected status, or classification, after reinstatement and being made whole, so the District could lay off the Grievant.' The District asserts that the Grievant is 'not licensed to teach the courses he formerly taught because of the embedding of the science curriculum and, now, because they are properly coded with the correct NCES number.' According to the District, '[m]isassigning a teacher outside of the teacher's area of licensure does violate state law and subjects the District to economic penalties.'

"In addition, the District argues that the new layoff of the Grievant is 'clearly an issue that was not before the arbitrator in the original case.' Citing various cases, the District asserts that the arbitrator has no jurisdiction over this new issue.

"The District also asserts that the arbitrator's determination that ORS 342.934(7) is limited to the District's reduction in force decision and not to the layoff or recall decisions 'is wrong as a matter of law' and therefore the arbitrator exceeded her jurisdiction. In support, the District cites Cascade Bargaining Council v. Bend-Lapine School District No, 1, 17 PECBR 558 (1998). The District also argues that under Willamina Education Association 30J and Barbara Crowell Lucanio v. Willamina School District No. 30-44-63J, 5 PECBR 4086 (1980), the Award 'violates established public policy by either ordering a school board to assign an improperly licensed teacher to teach adopted science curriculum or which forces a duly elected school board to reverse a policy decision to embed certain technology courses with science curriculum.'" (Emphasis in original.)

33. The Arbitrator then set out her reasoning as follows:

"With the parties' agreement, the arbitrator retained jurisdiction in this dispute 'solely to resolve any disputes that may arise in connection with implementation of the remedy.' As a remedy for the District's contract violation, the arbitrator ordered the District 'to reinstate the Grievant to a teaching position in the Brookings-Harbor School District 17C and make him whole.' The dispute raised in the Association's Motion is whether the District's layoff of the Grievant for the 2011-12 school year is consistent with the Remedy.

"This issue arises directly from the remedy---instead of reinstating the Grievant to a teaching position as the Award requires, the District placed the Grievant on layoff. Moreover, the 'lay off' for the 2011-12 school year is based on essentially the same action that the arbitrator found was inconsistent with the parties' agreement and the requirements of ORS 342.934(2)(a), which is incorporated into the agreement. Furthermore, an email in the record plainly states the District's intent to reject the arbitration Award. In that email, the District's counsel writes

> "'I have met with the Brookings-Harbor School Board and I need to inform you that the Board is giving serious consideration to refusing to implement the arbitrator's award. … I am willing to recommend to the District, in the alternative, that the District (sic) back pay [the Grievant] minus any appropriate offsets for income earned in the interim, but place him back on layoff again, for up to 27 months.'

"The parties specifically agreed in Article 13 of their agreement that arbitration awards shall be final and binding. That article states '[t]he decision of the arbitrator shall be submitted to the Board and the Association and shall be final and binding upon the parties.'

"The arbitrator's Decision and Award is that the Grievant be placed in 'a teaching position in the Brookings-Harbor School District 17C.' The arbitrator did not further define 'a teaching position' because there was no evidence in the record as to specific classes that would be offered in the 2011-12 school year. Further, the arbitrator did not award the grievant a teaching position to include all the courses taught by Teacher C. in the 2010-11 school year because the evidence did not show that those courses would be repeated in the 2011-12 school year. In addition, it is possible that the District would add courses, redesign courses, and/or reassign courses in the process of assigning the Grievant to a teaching position. Furthermore, to the extent that embedded science requirements are relevant, the Decision and Award found that one, or possibly two of the technology courses, did not even include embedded science. Further, the award found that 'Computer Programming and Applications, 10152, can be taught by any licensed teacher.' Taking all these factors into consideration, the arbitrator designed a Remedy to give the District maximum flexibility in returning the Grievant to 'a teaching position,' a position to be determined by the District. Finally, nothing in the Remedy requires an illegal

action by the District, including an action not in compliance with state teacher licensing requirements.

"The arbitrator has reviewed the District's arguments that the arbitrator's determination concerning ORS 342.934(7) is wrong as a matter of law and that her award violates public policy and finds that a response would not be within her limited jurisdiction." (Internal citations omitted.)

34. The Arbitrator's decision on the motion was:

"The Association's Motion asked the arbitrator 'to clarify whether, in awarding Grievant reinstatement, she intended to permit the District to place Grievant in an actual teaching position or whether the duty to reinstate could be satisfied by placing Grievant on layoff.' The arbitrator finds that placing the Grievant on layoff does not satisfy the Award which specifically ordered that the Grievant be placed 'in a teaching position in the Brookings-Harbor School District l7C.'" (Citations omitted.)

Related and Subsequent Events

35. As of July 22, 2011, the Association did not have a copy of the master teaching schedule for the upcoming 2011-2012 school year, but was aware that the District course catalog listed all of the previously discussed technology courses.

36. During August 2011, Kucharski documented the following:

"ARBITRATION AWARD TO REHIRE INTO A TEACHING POSITION:

"The district plan is to hire me then PROMPTLY lay me off! This seems like fraud and a violation of the award since:

"As of this late date:
The district does not have me on a schedule
Does not have a class scheduled for me to teach
Does not have students scheduled to a class
Does not have a physical room for me to return to a teaching position.

"I believe I should either receive compensation for this arbitrated award or the window for reinstatement should be 12-13 school year giving the district time to address this award with in [*sic*] offering an actual contract. I would prefer some compensation. I am under contract."

37. Before the start of the 2011-2012 school year, the District made additional staff reductions, including the layoff of a science teacher from the high school. The District also changed Chirinian's assigned courses to an equal number of physics and technology classes. The technology classes were 3D Rapid Prototyping/Emerging Technologies Projects, Intermediate

Robotics, and Advanced Robotics. In addition, as he had the previous school year, Chirinian was awarded a $4,801 extra duty contract for serving as the high school robotics coach.

38. The Association assumed, in the absence of any notice from the District, that the courses assigned to Chirinian would not be changed. The District did not inform the Association directly of any changes in Chirinian's courses up to and including the final arbitration clarification submission on August 26.

39. On September 19, Diamond e-mailed Zagar regarding "Calculations in Kucharski." Diamond asked, "I would like to know the status of this. We have limited jurisdiction for the arbitrator to resolve disputes. Please let's wrap this up. Also, is the District going to offer Steve a position or not? It would be helpful if you would communicate the status of compliance on both issues." Zagar responded, "I expect to have an answer on the back pay issues today or tomorrow from the District. I am meeting with the Board tonight re: the Clarified decision. I should have an answer on the second issue tomorrow."

40. On September 21, 2011, the District Board responded to the Arbitrator's clarification order. The Board decided that it would "not change any decisions or actions we have taken in the case of reinstatement and lay off of the teacher." The Board's decision was based on its view that Kucharski could not teach technology courses for science credit, and the District would not create new courses for Kucharski or have him teach technology courses without science credit.

Courses Taught by Chirinian

41. At the time of the September 2012 hearing in this case, the 2012-2013 school year had begun. Chirinian had returned to a schedule of six technology courses: Digital Manufacturing, two Introduction to Robotics classes, Emerging Technology Projects, 3-D Rapid Prototyping, and Advanced Robotics.

42. Over the course of this unfair labor practice litigation, the District provided the Association with documents regarding the assignment of NCES numbers to courses taught by Chirinian and curriculum maps for 3-D Rapid Prototyping, Emerging Technologies Projects, and all three robotics courses. The course syllabi for Intermediate Robotics, Advanced Robotics Science, 3D Rapid Prototyping/Digital Manufacturing, and the six-week curriculum document for Introduction to Robotics did not list science standards.

CONCLUSIONS OF LAW

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

2. In issuing the Kucharski grievance Arbitration Award**,** the Arbitrator did not exceed her authority or violate public policy, and the District violated ORS 243.672(1)(g) by refusing to accept that Award.

The Association alleges that the District failed to comply with the Arbitrator's Award and subsequent Clarification, in violation of ORS 243.672(1)(g). The District contends that it complied with the Arbitrator's orders to the extent permitted by law.

Standards for Decision

ORS 243.672(1)(g) provides that it is an unfair labor practice for a public employer or its designated representative to "[v]iolate the provisions of any written contract with respect to employment relations including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept arbitration awards as final and binding upon them."

Under the Public Employee Collective Bargaining Act (PECBA), arbitration is favored as a means for labor organizations and public employers to resolve their disputes. In this case, the Association alleges that the District violated ORS 243.672(1)(g) by refusing to accept and implement the terms of a grievance arbitration award. The District concedes that it refused to accept part of the award but contends its refusal is justified because the arbitrator exceeded her authority under the collective bargaining agreement and the statute it incorporated, ORS 342.934(7).

In evaluating a refusal to accept or implement an arbitration award, this Board applies the standard explained in *Willamina Education Association 3J and Lucanio v. Willamina School District* No 30-44-633, Case No. C-253-79, 5 PECBR 4086 (1980) (*"Willamina II"*) and approved by the Court of Appeals in *Willamina Ed. Assoc. v. Willamina Sch. Dist.*, 50 Or App 195, 623 P2d 658 (1981), *rem'd*, 4 PECBR 2571 (1980) (*"Willamina I"*). Under that standard, arbitration awards will be enforced unless it is clearly shown that either: "(1) The parties did not, in a written contract, agree to accept such an award as final and binding upon them * * *; or, (2) Enforcement of the award would be contrary to public policy * * *." 5 PECBR at 4100. *See also Cascade Bargaining Council v. Bend-Lapine School District No. 1*, Case No. UP-33-97, 17 PECBR 558 (1998), *recons*, 17 PECBR 609 (1998).

In this case, both the contract and ORS 342.934(7) provide that arbitration will be final and binding. Nevertheless, the District argues that the award is not one that it agreed to accept as final and binding because the arbitrator exceeded the contractual limits on her authority imposed by: (1) the collective bargaining agreement, which states, "[i]f the Board determines a layoff is necessary, then ORS 342.934 will determine the teachers to be retained;" and (2) the incorporated provision of ORS 342.934(7), which provides in part that an arbitrator is authorized to reverse a staff reduction decision only if the district "(a) [e]xceeded its jurisdiction; (b) [f]ailed to follow the procedure applicable to the matter before it; (c) [m]ade a finding or order not supported by substantial evidence in the whole record; or (d) [i]mproperly construed the applicable law." (Finding of Fact 3.)

Arbitrator's Reasoning

The District argues that, in ruling that ORS 342.934(7) was inapplicable to the issue before her, the Arbitrator was "wrong as a matter of law" and exceeded her jurisdiction. (Respondent's post-hearing brief at 4, 8.) As this Board stated in *Bend-Lapine,*

> "The crux of the District's argument is that the arbitrator determined that the District 'improperly construed the applicable law,' as prohibited by ORS 342.934(7)(d), by incorrectly interpreting and applying 'competence.' In the District's view, the arbitrator's 'interpretation of ORS 342.934(8)(a) is clearly wrong,' and that his faulty interpretation of 'competence' was the basis for his entire decision. In short, the District contends that it did not misconstrue the law and that therefore the arbitrator exceeded the contractual and statutory limitations on his jurisdiction by concluding that it did. Said another way, what the District is contending is that, because its interpretation of competence is 'right' and the arbitrator's interpretation is 'wrong,' the award is not enforceable.
>
> "In essence, the District is asking this Board to review the merits of the grievance. In adopting the *Willamina II* standard of review, we stated that 'the policies of the PECBA will be better effectuated' if review of arbitration awards was restricted to the standards used by courts. The concept of limited review of arbitration awards by this Board was approved by the Court of Appeals in *Willamina I*, stating that '[w]hether the arbitrator correctly interpreted the contract is the very question that neither ERB nor this court can[]consider on review.' *Willamina School District v. Willamina Education Association,* 60 Or App 629, 636, 655 P2d 189 (1982).
>
> "Consistent with that limited review, this Board has consistently refused to engage in a right/wrong review of arbitration awards. In *Chenowith Education Association v. Chenowith School District*, Case No. UP-104-94, 16 PECBR 26, 40 (1995), *aff'd,* 141 Or App 422, 918 P2d 854 (1996), we described our review process:
>
> > "'We have not and will not act as an appellate body to remedy arbitrators' wrong interpretations of collective bargaining agreements. When parties bargain for arbitration of their contract disputes, and agree to be bound thereby, they must abide both 'right' and 'wrong' decisions made within the arbitrator's jurisdiction and the rule of *Willamina*.'
>
> "As applied in this case, our standard of review leads us to conclude that the award must be enforced. The contract provides that arbitration will be final and binding. By reference, the agreement incorporates certain express limitations, listed in ORS 342.934(7), on an arbitrator's authority to reverse layoff and recall decisions. One of those limitations is that a layoff/recall decision can be reversed if the arbitrator finds that a district failed to follow the applicable procedures. Here the arbitrator found that the District did not follow the procedures set out in Article IX because it failed to transfer the grievants to available positions for which they were

> certified and subsequently failed to recall them to vacancies for which they were certified. In reaching his conclusion, the arbitrator relied on his interpretations of various provisions of the parties' contract. The conclusion he reached—that the District failed to follow the required procedures—was one which authorized him to reverse the layoff and recall decision. He thus did not exceed any limitation on his authority." 17 PECBR at 567-9 (footnotes omitted).

Although the District argues that the Arbitrator in this case held that subsection (7) of ORS 342.934 did not apply, it does not attempt to argue that the arbitrator *actually violated that statute*, or that any portion of the Award is *inconsistent with the statute*. The District simply argues that, because the Arbitrator denied the applicability of subsection (7), her Award by definition exceeded her authority. We conclude that the Arbitrator's statement about the applicable standards is not sufficient to support a conclusion that the Arbitrator violated the applicable standards, even if such an examination were not subject to the prohibition against a "right/wrong" review. Put another way, the record does not reveal that the Arbitrator "exceeded any express limitations on [her] authority—in this case, the limitations set out in ORS 342.934(7)." *Id.* at 569.

The District also argues that the Arbitrator had no jurisdiction to issue the Clarification of Award. However, there is no dispute that the Arbitrator retained jurisdiction over the matter during the relevant time period, and that the Grievant made a timely request that the Arbitrator clarify her Award in light of the District's response. Responding to the Grievant, the District presented the Arbitrator with its objections to both the original Award and the request for clarification. The District now argues that the Arbitrator was wrong as a matter of law regarding her jurisdiction to clarify the Award. However, the prohibition of a "right/wrong" review applies equally to this arbitral decision, and we do not substitute our judgment for that of the Arbitrator.

The District argues that, by issuing the Clarification, the Arbitrator violated the common law rule of *functus officio* (office performed). That rule provides that "an arbitrator's jurisdiction ends when a final award is issued." *Elkouri & Elkouri: How Arbitration Works, Seventh Edition*, at 7-37. However, an attempt to clarify the ambiguity of an arbitral remedy during a period of retained arbitral jurisdiction is an established exception to that rule. In this case, even if the Award were not ambiguous upon issuance, its application to the subsequent school year and revised course coding rendered it so. The circumstances of this case are, in fact, an example of the reason for the practice of arbitral retention of jurisdiction. *See How Arbitration Works, Seventh Edition*, at 7-46 to 7-51. Finally, it would defeat the purposes and policies of the PECBA and the labor arbitration process it supports to require a new dispute resolution process to begin simply because the losing party in the arbitration implements its intransigence in the guise of a new decision.

Arbitrator's Remedy

Finally, the District also argues that the Award and its Clarification require the District to either violate the law or public policy. This Board has held that the "public policy" exception is "exceedingly narrow." *In the Matter of the Arbitration Between State of Oregon, Department of Corrections v. AFSCME Council 75, Local 2623*, Case No. AR-1-92, 13 PECBR 846, 855 (1992). In order to prevail, the District must "clearly show" that the award requires it to commit an unlawful act.F (*Willamina I and II*.) We do not consider the general public policies that the statute may express. *Department of Corrections*, 13 PECBR at 855. *See also Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04, 21 PECBR 206, 218 (2005).

The District states,

> "[t]hus, the arbitrator's initial award would require the District to violate the law by assigning a teacher to teach courses for which he is not licensed. However, in the alternative, the District could have assigned Mr. Kucharski to teach the Technology courses, but it would have had to strip those courses of the Science curriculum because he could not teach it, nor could credit be given for it because he is not licensed to teach Science. That would violate public policy * * *.
>
> "* * * * *
>
> "The arbitrator's second "Clarification' Award would again force the District to either place Mr. Kucharski into teaching positions for which he was not licensed or it would force the District to discontinue awarding Science credit for the Technology/Robotics courses. Thus, it would either require the District to violate the law by improperly assigning an unlicensed teacher or it would violate public policy by forcing a school district to change its adopted curriculum." (Respondent's post-hearing brief at 9, 12) (emphasis in original).

We note first that the District's argument rests on disputed factual determinations of what types of classes were within the scope of Kucharski's license and endorsement, what licenses were required to teach the courses at issue, and how and why the District assigned codes to the courses at issue. There is ample evidence in the record to support the conclusion that Kucharski could teach these classes and that the students could still receive Science credit for them. In fact, the District concedes as much, but contends that the procedures for doing so were cumbersome and not generally used by the District. These were all matters decided by the Arbitrator, which are not subject to a "right/wrong" review.

Second, and most importantly, despite litigating this matter in two separate forums, the District has yet to point to a specific statutory provision or any clearly defined public policy that the Arbitration Award and Clarification require it to violate. We conclude that the District has failed to establish that the Arbitrator's Award and Clarification violate law or public policy.

We conclude review of this issue, as we did in *Portland Police Association v. City of Portland* (*Frashour*), Case No. UP-023-12, 25 PECBR 94, 112 (2012), with a discussion of the purpose of the arbitration process.

> "The United States Supreme Court has explained why the courts have such a limited role in reviewing labor arbitration awards under federal law:
>
> > "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than a judge, it is the arbitrator's view of the facts and the meaning of the contract they have agreed to accept. * * * To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the

> contract. * * * [T]he parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground the arbitrator misread the contract." *United Paperworkers Int'l Union v. Misco, Inc*., 484 US 29, 37-38, 108 S. Ct. 364, 98 L.Ed. 2d 286, (1987) (citing *United Steelworkers v. Enterprise Wheel & Car Corp*., 363 US 593, 599 (1960))."

In this matter, the District and Association agreed, through collective bargaining, that layoff decisions could be processed through the contractual grievance procedure, which culminates in arbitration. They also agreed that the arbitrator's decision shall be "final and binding." *Clackamas County Employees Association v. Clackamas County*, Case No. UP-4-08, 22 PECBR 404, 410 (2008), *AWOP*, 228 Or App 368, 208 P3d 1057 (2009) (when parties agree to grievance arbitration, they have agreed to accept the arbitrator's interpretation of their contract). We have been told by the courts not to engage in a "right-wrong" analysis, but rather to ensure that the parties got what they bargained for—a binding decision by an arbitrator. *Clatsop Community College Faculty Association v. Clatsop Community College*, Case No. UP-139-85, 9 PECBR 8746, 8761-62 (1986).

In this case, the arbitrator determined that the District improperly laid Kucharski off and ordered the District to restore him to a teaching position. The District does not have a lawful reason for refusing to implement the Award. Therefore, the District's failure to implement it violates ORS 243.672(1)(g).

3. The Association's Claims Under ORS 243.672(a) and (c) Are Untimely

Unfair labor practice complaints are subject to a 180-day statute of limitations. ORS 243.672(3) provides that "[a]n injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice." The Court of Appeals has held that the statute "incorporates a discovery rule, which means that the limitation period begins to run when a public employee, labor organization, or public employer knows or reasonably should know that an unfair labor practice has occurred." *Rogue River Education Assoc. v. Rogue River School*, 244 Or App 181, 189, 260 P3d 619 (2011). The request for leave to file an Amended Complaint in this case was filed on April 5, 2012. Therefore, the additional claims are timely only if the Association did not know, or reasonably should not have known, the facts underlying the relevant causes of action until October 8, 2011.

In its Amended Complaint, the Association alleges that the "District's actions in changing the technology position to a technology/science position in order to disqualify Grievant constitute restraint, interference and coercion in violation of [ORS 243.672](1)(a)." (Amended Complaint at 8.) We conclude that the Association knew, or reasonably should have known, that the District had changed codes for the relevant classes no later than the start of the 2011-2012 school year in September 2011. The District informed Association counsel of changes to science codes on June 30, 2011. In addition, in August 2011, Kucharski documented that there were no classes on the schedule for him to teach. Whether the Association and Kucharski knew of all the coding changes by the start of the limitations period, they were in possession of the critical facts to the cause of action (that the District would not reinstate him to a teaching position because it deemed him unqualified to teach those classes) before October 8, 2011. Therefore, this claim is untimely and we will dismiss it.

In its Amended Complaint, Complainant alleges that the "District's actions in purporting to lay off Grievant on several occasions after he was reinstated by the Arbitrator constitute discrimination in violation of ORS 243.672(1)(c)." (Amended Complaint at 8.) We conclude that the Association knew, or reasonably should have known, of the District's two decisions to layoff, or retain Kucharski on layoff status, on the dates those decisions were communicated to the Association's counsel, namely July 21, 2011 and September 22, 2011. These were the critical facts to the cause of action. Therefore, this claim is untimely and we will dismiss it.

4. The appropriate remedy is that the District cease and desist from refusing to implement the Arbitrator's Award and its Clarification and post a notice of its wrongdoing.

We will order the District to cease and desist from refusing to implement the Arbitrator's Award dated June 27, 2011, and its Clarification dated September 13, 2011, and make Kucharski whole for any loss or injury he suffered due to the District's failure to promptly implement the Arbitration Award and its Clarification.

Posting a Notice

We will order the District to post notices of its violation. We order such a posting if we determine a party's violation of the PECBA was:

> "(1) 'calculated or flagrant'; (2) part of a 'continuing course of illegal conduct'; (3) committed by a significant number of the [violating party's] personnel; (4) affected a significant number of bargaining unit members; (5) significantly (or potentially) impacted the designated bargaining representative's functioning; or (6) involved a strike, lockout, or discharge." *Amalgamated Transit Union, Division 757 v. TriCounty Metropolitan Transportation District of Oregon*, Case No. UP-016-11, 24 PECBR 412, 452 (2011), citing *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), *rev den*, 296 Or 536, 678 P2d 738 (1984).

Not all of these criteria need be satisfied to warrant posting a notice. *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, 19 PECBR 684, 685 (2002). In this case, the District's actions were calculated and repetitive. The District's action also affected the Association's ability to function as a bargaining representative, because a refusal to implement an arbitrator's award frustrates enforcement of the collective bargaining agreement. *Frashour,* 25 PECBR at 113-114.

ORDER

1. The City shall cease and desist from refusing to implement the Arbitrator's Award dated June 27, 2011, and its Clarification dated September 13, 2011, and make Kucharski whole for any loss or injury he suffered due to the District's failure to promptly implement the Arbitration Award and its Clarification.

2. Within 30 days of the date of the final Order, the City shall sign and post copies of the attached notice in prominent places in the District work places and administrative offices. The notice shall remain posted for at least 30 days. The District Superintendent shall sign the notice.

DATED this 26 day of June 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, 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-074-11, Brookings-Harbor Education Association/OEA v. Brookings-Harbor School District 17C, 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 the Brookings-Harbor School District 17C violated the PECBA by refusing to implement an arbitration award in violation of ORS 243.672(1)(g). The violation occurred when the District refused to reinstate Stephen Kucharski and make him whole as ordered by the arbitrator.

To remedy this violation, the Employment Relations Board ordered the District to:

1. Cease and desist from violating ORS 243.672(1)(g).

2. Cease and desist from refusing to implement the Arbitrator's Award dated June 27, 2011, and its Clarification dated September 13, 2011, and make Mr. Kucharski whole for any loss or injury he suffered due to the District's failure to promptly implement the Arbitration Award.

3. Post this notice in prominent places in the District.

EMPLOYER

Dated_____, 2013 By _____
District Superintendent

_____
Title

****

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

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

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-17-11

(UNFAIR LABOR PRACTICE)

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 75, LOCAL 132, Complainant, v. OREGON EMPLOYMENT DEPARTMENT, CHILD CARE DIVISION, Respondent.	)	FINDINGS AND ORDER ON RESPONDENT'S PETITION FOR REPRESENTATION COSTS

On April 4, 2011, the American Federation of State, County and Municipal Employees, Council 75, Local 132 (AFSCME) filed an unfair labor practice complaint against the Oregon Employment Department, Child Care Division (CCD), alleging that the CCD violated ORS 243.672(1)(e). On November 6, 2012, this Board issued an Order dismissing AFSCME's complaint. 25 PECBR 216 (2012). On November 26, 2012, the CCD submitted its petition for representation costs. On December 14, 2012, AFSCME filed its objection to the amount of the costs sought by the CCD.

Pursuant to ORS 243.676(2)(d) and OAR 115-035-0055, this Board finds:

1. The CCD filed a timely petition for representation costs and AFSCME filed timely objections to the petition.

2. The CCD is the prevailing party. We dismissed AFSCME's complaint, holding that the complaint and grievance procedures for child care providers, and their impact on providers' registration or certification status, are prohibited subjects for bargaining.

3. Counsel for CCD submitted an affidavit and exhibits showing that 103.4 hours of legal work was performed at $143 per hour, and 6.50 hours of legal work was performed at $137 per hour. The CCD's petition requests payment in the amount of $14,786. The maximum amount this Board awards in the absence of a civil penalty is $3,500. *American Federation of State, County and Municipal Employees Council 75, Local 88 v. Multnomah* County, Case No. UP-22-10, 25 PECBR 150, 151 (2012) (Rep. Cost Order); OAR 115-035-0055.

4. The requested hourly rate is lower than average. The average rate for representation costs is between $165 and $170 per hour. *Clackamas County Employees' Association v. Clackamas County/Clackamas County District Attorney,* Case No. UP-7-08, 24 PECBR 769, 771 (2012) (Rep. Cost Order). The number of hours claimed is above average for a single day of hearing. Cases generally require an average of 45 to 50 hours per day of hearing. *See AFSCME Council 75, Local 3964 v. Josephine County,* Case No. UP-26-06, 24 PECBR 720, 723 (2012) (Rep. Cost Order). We will adjust our award accordingly.

5. AFSCME raised two objections: 1) the amount of attorney fees requested, and 2) failure of the petition to include a statement as to how the amount of the award would be consistent with the policies and purposes of the Public Employee Collective Bargaining Act (PECBA). *See* OAR 115-035-0055(2)(c). AFSCME asserts that the claim should be rejected in its entirety for failing to comply with the rule.

While neither the petition nor the affidavit specifically quotes the language of OAR 115-035-0055(2)(c), the information provided in both documents minimally supports our determination that an award of representation costs is consistent with the policies and purposes of the PECBA. However, AFSCME is correct that the amount of attorney fees would be capped at $3,500.

6. An average award is generally one-third of the reasonable representation costs of the prevailing party, subject to the $3,500 cap contained in OAR-115-035-0055(1)(a). Having considered the purposes and policies of the PECBA, our awards in prior cases, the novel issues raised and the reasonable cost of services rendered, this Board awards representation costs to CCD in the amount of $2,383.

ORDER

AFSCME will remit $2,383 to the CCD within 30 days of the date of this Order.

DATED this 28 day of June 2013.

Kathryn A. Logan, Chair

*Jason M. Weyand, Member

Adam L. Rhynard, Member

*Member Weyand did not participate in the decision in this case.

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-35-10

(UNFAIR LABOR PRACTICE)

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 28, Complainant, v. PORT OF PORTLAND, Respondent.	)	FINDINGS AND ORDER ON COMPLAINANT'S PETITION FOR REPRESENTATION COSTS

On July 12, 2010, the International Longshore and Warehouse Union, Local 28 (Union) filed an unfair labor practice complaint against the Port of Portland (Port), alleging that the Port violated ORS 243.672(1)(a), (b) and (c). On December 19, 2012, we issued our order finding that the Port violated ORS 243.672(1)(a) by denying union representation for the Union President at an investigatory meeting, and that the Port violated ORS 243.672(1)(a) and (1)(b) when it disciplined the Union President in response to his protected union activities. We dismissed the Union's claim that the Port had violated ORS 243.672(1)(a), (b) and (c) by issuing disparate disciplinary actions to other employees based on their protected union activity. 25 PECBR 285 (2012). The Union submitted its petition for representation costs on January 9, 2013.

Pursuant to ORS 243.676(2)(d) and OAR 115-035-0055, this Board finds:

1. The Union filed a timely petition for representation costs.

2. The Union is the prevailing party. We concluded that the Port violated ORS 243.672(1)(a), (b) and (c), in two separate situations involving the Union President.

3. Counsel for the Union submitted affidavits showing that 96.4 hours of time was spent on the case, with 90.4 hours billed at $150 per hour, and 6 hours billed at $105 per hour. The total amount of fees billed on the matter was $14,190. The Union's petition requests payment of $3,500 in representation costs, which is the maximum amount this Board awards in the absence of a civil penalty. *American Federation of State, County and Municipal Employees Council 75, Local 88 v. Multnomah* County, Case No. UP-22-10, 25 PECBR 150, 151 (2012) (Rep. Cost Order); OAR 115-035-0055.

4. The requested hourly rate is below average. The average rate for representation costs is between $165 and $170 per hour. *Clackamas County Employees' Association v. Clackamas County/Clackamas County District Attorney,* Case No. UP-7-08, 24 PECBR 769, 771 (2012) (Rep. Cost Order). The number of hours claimed is average for a two day hearing. Cases generally require an average of 45 to 50 hours per day of hearing. *See AFSCME Council 75, Local 3964 v. Josephine County,* Case No. UP-26-06, 24 PECBR 720, 723 (2012) (Rep. Cost Order). We will consider these factors in issuing our award.

5. In cases involving interference with protected union activities, we generally issue greater than average representation cost awards. *Clackamas County/Clackamas County District Attorney* at 771. An average award is generally one-third of the reasonable representation costs of the prevailing party, subject to the $3,500 cap contained in OAR 115-035-0055(1)(a). Here, even an average award would greatly exceed our cap. As a result, having considered the purposes and policies of the Public Employee Collective Bargaining Act, our awards in prior cases, and the reasonable costs of services rendered, this Board awards the Union representation costs in the amount of $3,500.

ORDER

The Port will remit $3,500 to the Union within 30 days of the date of this Order.

DATED this 28 day of June 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-52-12

(UNFAIR LABOR PRACTICE)

FEDERATION OF OREGON PAROLE AND PROBATION OFFICERS, Complainant, v. LANE COUNTY, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A hearing was held before Administrative Law Judge (ALJ) Wendy L. Greenwald on January 22, 2013, in Salem, Oregon. The record closed on February 26, 2013, following receipt of the parties' post-hearing briefs. Neither party objected to the Recommended Order issued by the ALJ on May 28, 2013.

Becky Gallagher, Attorney at Law, Fenrich & Gallagher, Eugene, Oregon, represented Complainant.

Mark P. Amberg, Attorney at Law, Harrang Long Gary Rudnick P.C., Eugene, Oregon, represented Respondent.

On October 1, 2012, the Federation of Oregon Parole and Probation Officers (FOPPO) filed this unfair labor practice complaint against Lane County (County) alleging that the County violated ORS 243.672(1)(a) and (b) when Lieutenant (Lt.) Larry Brown refused to allow FOPPO President Linda Hamilton to serve as an employee's union representative in a meeting and subsequently served her with an investigation notice because she filed four grievances against the County. The County filed a timely answer to the complaint denying that the County violated ORS 243.672(1)(a) or (b). As an affirmative defense, the County asserted that because the meeting Hamilton was excluded from was non-disciplinary, the employee was not entitled to union representation and no violation could have occurred.

The issues presented are:

1. Did the County violate ORS 243.672(1)(a) when Brown refused to allow Hamilton to attend a meeting with a union member as FOPPO's representative on September 18, 2012, and/or when he served Hamilton with a notice of investigation on September 24, 2012?

2. Did the County interfere with the administration of FOPPO in violation of ORS 243.672(1)(b) when Brown refused to allow Hamilton to attend a meeting with a union member as FOPPO's representative on September 18, 2012, and/or when he served Hamilton with a notice of investigation on September 24, 2012?

3. If the County violated ORS 243.672(1)(a) or (b), what is the appropriate remedy?

For the reasons discussed below, this Board concludes that the County violated ORS 243.672(1)(a) and (b) when Brown refused to allow Hamilton to serve as a union representative in the employee meeting because she engaged in protected activity. However, we conclude that the County did not violate ORS 243.672(1)(a) and (b) when Brown presented Hamilton with a notice of investigation and we dismiss those allegations in the complaint.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. FOPPO is a labor organization and the exclusive representative of a bargaining unit of parole and probation officers (POs) employed by the County, a public employer. The POs work in the Parole and Probation Unit (PPU), which was under the administration of the County Sheriff's Office until January 2013.

2. FOPPO and the County were parties to a collective bargaining agreement (Agreement) that expired on June 30, 2012.

3. Brown was the designated manager of the PPU from June 2012 until January 2013. On August 2, 2012, Brown sent an e-mail to all PPU staff regarding the procedure for notifying supervisors about requests for assistance from other law enforcement agencies (Assistance Procedure).[1] Brown explained that the POs should either (1) seek approval from their supervisor in advance when assistance was requested for a planned event, or (2) advise their supervisor at the earliest convenience after an incident when immediate assistance was requested due to an arrest in progress. Brown believed he was clarifying a procedure outlined by the prior PPU manager in February 2012.

[1]All subsequent events occurred in 2012.

4. In response to the e-mail, FOPPO Vice President Rick Pokorny asked Brown a question about the Assistance Procedure. No other POs asked questions and FOPPO did not raise any concerns about the Assistance Procedure.

5. On September 6, PO Cody Mace drove past a Eugene police officer who was talking with a citizen about individuals she had seen shooting heroin down by the Willamette River. The police officer radioed Mace and requested assistance with one of the individuals the officer believed was under PPU supervision. Mace then requested that PO Tim Shreve provide assistance because Shreve was in the area and Mace believed that Shreve supervised one of the individuals. Subsequently, Mace, Shreve, PO Ken Border and PO Mark Dugan assisted the police officer at the river. This incident resulted in the apprehension of several individuals.

6. After the incident at the Willamette River (River Incident), Border notified his supervisor, Andrea Schlesinger, about the assistance that the four POs had provided to the police officer. Schlesinger told Border that under the Assistance Procedure, he should have sought her approval before providing assistance. Border disagreed and asked to meet with Brown about the Assistance Procedure. After Schlesinger told Brown about her conversation with Border, Brown decided to meet with the four POs to debrief the River Incident and clarify his expectations under the Assistance Procedure.

7. On September 9, Brown and Supervisors Aaron Rauschert and Schlesinger met with Border to discuss the River Incident. Border was offered the opportunity to have a FOPPO representative present, but declined. During the meeting, Brown told Border that because there had been time to notify his supervisor before engaging in the River Incident, the incident was a planned event under the Assistance Procedure and Border should have requested prior supervisor approval.

8. On September 10, Supervisor Schlesinger, an employee from the County Human Resources (HR) Department, Captain Fox, and Hamilton, who was FOPPO's President, met to discuss Hamilton's return to Schlesinger's work unit. Hamilton had been placed in Supervisor Rauschert's work unit temporarily while a complaint that Hamilton had filed against Schlesinger was investigated. The meeting was scheduled at Hamilton's request.

9. On September 11, Supervisor Rauschert told Shreve that Brown wanted to meet with him to debrief the River Incident and clarify management's expectations under the Assistance Procedure. Rauschert told Shreve that the meeting would not be disciplinary, but Shreve could have a FOPPO representative present. Because Border had told Shreve what had occurred during his River Incident meeting, Shreve asked Hamilton to attend the meeting with him.

10. That day, Shreve, Hamilton, Brown, and Rauschert met in Brown's office. Hamilton was present as Shreve's union representative. At the outset, Brown stated that the meeting was not disciplinary and the purpose was to debrief the River Incident and clarify management's expectations under the Assistance Procedure. As Brown began to discuss the Assistance Procedure with Shreve, Hamilton interrupted and objected to the Assistance Procedure's validity. Hamilton asserted that Brown could not change a policy under the parties' Agreement until the County provided FOPPO with notice and an opportunity to respond to any new policy. She indicated that his e-mail did not accomplish that purpose.

11. Brown responded that they were not there to debate the validity of the Assistance Procedure, but to debrief the River Incident and talk about the Assistance Procedure's requirements. After Hamilton continued to argue about the validity of the Assistance Procedure, Brown told Hamilton that if she wanted to meet with him after Shreve's meeting, they could discuss her issue. Brown then proceeded to discuss the Assistance Procedure and River Incident with Shreve. At some point, Hamilton again raised the issue of whether the Assistance Procedure was legitimate and could be enforced. Brown again responded that they were not there to talk about the Assistance Procedure's validity. After Hamilton continued to assert her concerns, Brown stated that if she did not want to meet to talk about her issues after the meeting, she could file a grievance. Hamilton replied that she might do this. At this point, both Brown's and Hamilton's voices were raised.[2]

12. Shreve and Brown again proceeded to discuss the Assistance Procedure. At one point, Shreve stated that although some positive things had happened in the PPU recently, the Assistance Procedure made the POs feel that the supervisors did not trust them. Brown responded that the requirement for POs to contact their supervisors was an issue of accountability. He explained that, under the Assistance Procedure, if the Sheriff asked why four POs were assisting police officers along the river, either he or the supervisors would be able to respond. When Hamilton sarcastically commented that the command staff had nothing better to do than sit and listen to the radio, Brown stated the meeting was again getting off point.

13. After some additional discussion about the Assistance Procedure, Shreve left the meeting. Hamilton then told Rauschert and Brown that accountability goes both ways. When Brown tried to address the situation he thought she was referring to, Hamilton stood and objected in a raised voice that she was talking about another situation. Hamilton stated her concerns about a situation in which she felt that Rauschert had not responded to a late night call about an offender from the Department of Corrections (DOC). Rauschert and Hamilton proceeded to disagree about whether DOC had called Rauschert, during which Hamilton spoke loudly and became angry and agitated and Rauschert became upset because he felt Hamilton was saying that he was lying.[3] Brown told Hamilton that she did not have to yell and she was being disrespectful. He asked her to lower her voice. Hamilton told Brown that she was not yelling or being disrespectful and left.

[2]The witnesses disagree about whether Hamilton or Brown raised their voices at this point. Resolving this conflict is not critical to our decision. However, it is credible that they both raised their voices because Hamilton had to interrupt Brown's discussion with Shreve to express her frustration over what she saw was an invalid policy, and Brown was attempting to stop Hamilton's interruptions and redirect the discussion back to the River Incident and Assistance Procedure.

[3]Hamilton testified that she was neither yelling nor angry, but was calm during this portion of the meeting. However, Brown's and Rauschert's testimony that Hamilton was angry, agitated, and yelling is more believable because Brown raised a concern about Hamilton yelling at the time the conversation occurred and Hamilton was upset by the incident they were discussing.

14. After the Shreve meeting, Brown notified his supervisor, Captain Greg Fox, about the conflict between himself and Hamilton during Shreve's meeting and indicated that Hamilton was likely to file a grievance. Hamilton sent an e-mail to Deputy Chief Doug Hooley stating that Brown had been heavy-handed during the Shreve meeting. Hooley then spoke with Fox, who explained what Brown had told him about the meeting. Hooley was concerned that Hamilton and Brown were accusing each other of being disrespectful.

15. On September 13, Hamilton filed four grievances against Brown. Three of the grievances alleged violations of different provisions in the parties' Agreement arising out the issuance of the Assistance Procedure. One grievance alleged a violation of the Agreement based on Brown's conduct during the Shreve meeting, stating:

> "Lt. Brown on 09-11-2012, failed to maintain a working relationship with the union that is reflective of bilateral respect. He accused me of yelling and being disrespectful when attempting to convey that accountability goes both way[s] for management and employees. I attempted to provide examples where accountability is not being held at [the] same standards for management as is for employees. I also attempted to suggest notice to employees on policy being revised or changed and he said 'you don't like file [*sic*] grievance.' Making changes in work rules and not notifying the union along with refusing to engage in dialogue as required by contract is not fostering an environment of mutual trust, not business like manner and does not encourage management and bargaining unit members to maintain a working relationship that reflect[s] bilateral respect."

16. After the grievances were filed, Brown contacted Fox to determine if he should hold the River Incident meetings with POs Mace and Dugan and, if so, who should attend those meetings. Fox and Deputy Chief Hooley decided that Brown should continue with the meetings, but that Hamilton would not be allowed to attend because of the grievances. Fox and Hooley also wanted to avoid repeating the conflict that had developed between Hamilton and Brown in the Shreve meeting. They did not discuss excluding Hamilton from any other meetings or taking any other action against Hamilton.

17. On September 18, Supervisor Rauschert told Mace that Brown wanted to meet with him to debrief the River Incident and go over management's expectations under the Assistance Procedure. Rauschert told Mace the meeting was not disciplinary, but that Mace could have a FOPPO representative present. Mace wanted Hamilton to be his union representative because she had been Shreve's representative and was familiar with the issues. Rauschert told Mace that Hamilton could not be his union representative.

18. When Hamilton learned she could not attend Mace's meeting, she sent an e-mail to Brown, Captain Fox, Deputy Chief Hooley, and Sheriff Tom Turner, asking why she was not allowed to attend. Brown responded to Hamilton:

> "I was advised by Captain Fox to have the debrief meeting with PO Mace and PO Dugan and to make sure they understand the supervisor expectation for requested assistance with law enforcement agencies. Even though this is not disciplinary in nature in any way - if they wanted to have a Union Rep present to monitor the conversation, they were most welcome to do so. However, due to your complaint / grievances against me, Captain Fox told me to have another Union Rep sit in instead of you to avoid any conflict of interest.
>
> "Therefore, please arrange to have another Rep sit in on these two particular meetings if they are requested."

19. On September 18, Rauschert and Brown met with Mace about the River Incident and Assistance Procedure. Hamilton was available and willing, but was not allowed to attend the meeting as Mace's union representative. Mace was represented by FOPPO Vice President Pokorny, who is an experienced union representative. Before the meeting, Pokorny was told what had occurred during the River Incident and in the meetings with Border and Shreve, and felt well-versed on the issues.

20. On September 21, Supervisor Schlesinger filed a complaint against Hamilton for discrimination and disrespectful conduct. In the complaint, Schlesinger set out her concerns about Hamilton's behavior at the September 10 meeting and a comment Hamilton had made at a meeting on September 18 with Supervisor Rauschert.

21. Complaints are processed through the Office of Professional Standards, which is administered by Deputy Chief Hooley. Under the Sheriff's Office policy, complaint investigation notices are required to be served in a timely manner. The service of such a notice is a procedural matter. Although the policy provides for the supervisor assigned to conduct the investigation to serve the investigation notice, this does not always occur. Sergeant French, who works in the Office of Professional Standards, has conducted certain investigations and delivered investigation notices in the past. Fox and Hooley have also served investigation notices. In the past, Hamilton was served investigation notices by French or her unit supervisor.

22. After consulting with the HR Department, Hooley assigned the investigation of Schlesinger's complaint to an outside investigator. The outside investigator was not available to prepare the investigation notice, so Hooley assigned this responsibility to French. Because the outside investigator also was not available to serve the investigation notice and it needed to be served in a timely manner, Hooley told Fox to either have Brown serve it or have Brown delegate this responsibility. After Fox told Brown to serve the investigation notice, Brown asked Hooley whether he should serve the notice in light of Hamilton's grievances. Hooley told Brown that serving the notice was a routine matter and there should not be a problem.

23. On September 24, Brown served Hamilton with the investigation notice by delivering the notice to her and reading the listed allegations. When Brown delivered the notice, Hamilton believed that he was smiling and retaliating against her for filing the grievances. Rauschert, who was Hamilton's supervisor, was working that day.

24. The County has not excluded Hamilton from attending any meetings other than the meeting with Mace and a subsequent meeting with Dugan. The County has not prohibited Hamilton from otherwise participating as a FOPPO representative.

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) and (b) by refusing to allow Hamilton to serve as a union representative at the September 18, 2012 meeting because of her protected activity.

3. The County did not violate ORS 243.672(1)(a) or (b) when Brown served Hamilton with an investigation notice on September 24, 2012.

DISCUSSION

FOPPO alleges that the County violated ORS 243.672(1)(a) and (b) when Brown refused to allow Hamilton to attend Mace's meeting as his union representative on September 18, 2012, and when Brown delivered an investigation notice to Hamilton on September 24, 2012. We begin by analyzing FOPPO's claims under subsection (1)(a).

Subsection (1)(a) Allegations

Under ORS 243.672(1)(a), it is unlawful for a public employer to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." In turn, ORS 243.662 provides public employees with 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." ORS 243.672(1)(a) includes two distinct prohibitions: (1) restraint, interference, or coercion "because of" the exercise of rights guaranteed by ORS 243.662; and (2) restraint, interference, or coercion "in the exercise" of rights guaranteed by ORS 243.662. *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000). FOPPO alleges a violation of both prongs of subsection (1)(a).

To determine if an employer violated the "because of" prong of subsection (1)(a), we examine the employer's reasons for the disputed action. If the employer acted because of an employee's exercise of rights protected by the Public Employee Collective Bargaining Act (PECBA), the employer's actions are unlawful. *Id.* It is not necessary for a complainant to demonstrate that an employer acted with hostility or anti-union animus, nor must a complainant prove that the employer was subjectively motivated by an intent to restrain or interfere with protected rights. A complainant need only show that there is a causal nexus between the employer's action and the protected activity. *Id* at 623-24.

When we analyze an employer's actions under the "in" prong of subsection (1)(a), we focus on the effect of the employer's actions on the employees. If the employer's conduct, when viewed objectively, has the natural and probable effect of deterring employees from engaging in PECBA-protected activity, the employer commits an "in" violation. *Portland Assn. Teachers*, 171 Or App at 623-24. A violation of the "in" prong may be derivative, since it is presumed that an employer who violates the "because of" prong of subsection (1)(a) also violates the "in" portion of the statute. *Oregon Public Employes Union and Termine v. Malheur County, Commissioner Cox, Commissioner Hammack and Sheriff Mallea*, Case No. UP-47-87, 10 PECBR 514, 521 (1988). An employer's actions may also independently violate the "in" prong, which typically occurs when the employer makes threats that are directed at protected activity. *Clackamas County Employees' Assn. v. Clackamas County*, 243 Or App 34, 42, 259 P3d 932 (2011). However, violations may also occur as a result of an employer's implied coercion or threat of reprisal. *Hood River Education Association v. Hood River County School District*, Case No. UP-38-93, 14 PECBR 495, 499 (1993).

1. Hamilton's Exclusion From Mace's Meeting

We first decide whether the County committed a "because of" violation when it prohibited Hamilton from serving as Mace's union representative on September 18. We begin by determining the reason the County took this action. FOPPO contends that the County excluded Hamilton from Mace's meeting because she filed grievances against the County after Shreve's meeting. The County admits it prohibited Hamilton from attending the meeting as Mace's union representative, in part, because of the four grievances. The County also asserts that it did not intend to interfere with Hamilton's protected activity, but decided to exclude Hamilton from the meetings so Brown could meet with Mace to clarify the expectations under the Assistance Procedure while avoiding the conflicts caused by Hamilton's disruptive behavior.

This Board concludes that the reason the County prohibited Hamilton from serving as Mace's union representative was because of the four grievances she filed against the County. Brown, in an e-mail responding to Hamilton's questions regarding the reason for the prohibition, stated:

> "However, due to your complaint / grievances against me, Captain Fox told me to have another Union Rep sit in instead of you to avoid any conflict of interest. Therefore, please arrange to have another Rep sit in on these two particular meetings if they are requested."

Brown told Hamilton that she was prohibited from attending Mace's meeting due to the grievances she filed. Brown's statement to Hamilton, which occurred right after the County made its decision, is the best evidence of the reason the County decided to exclude Hamilton from the meetings. In addition, the County representatives were aware of Hamilton's behavior at Shreve's meeting before Hamilton filed the grievances, but took no action. When Brown informed his superiors about Hamilton's behavior he neither asked, nor did they raise, whether Hamilton should attend the subsequent River Incident meetings. It was only after the grievances were filed that a decision was made to exclude Hamilton from those meetings. So, even if the County considered Hamilton's disruptive behavior in making its decision, we conclude that it prohibited Hamilton from attending Mace's meeting because of the grievances that she filed.

The next question is whether the filing of the grievances constitutes protected activity under ORS 243.662. This Board has the "authority to determine the range of activities that are protected under ORS 243.662." *Central School Dist. 13J v. Central Education Assoc.*, 155 Or App 92, 94, 962 P2d 763 (1998). We have long held that filing a contract grievance is protected activity. *Portland Association of Teachers and Bailey v. Multnomah County School District #1*, Case No. C-68-84, 9 PECBR 8635, 8651 (1986). Therefore, FOPPO proved that the County prohibited Hamilton from attending Mace's meeting as a union representative because she engaged in protected activity.

The County asserts, however, that because Mace had no PECBA-protected right to have a union representative at the meeting, prohibiting Hamilton or any union representative from attending the meeting could not violate ORS 243.672(1)(a).[4] This argument is not persuasive for a number of reasons. First, Mace may not have had a *Weingarten* right to have a union representative at the meeting. However, once Brown told Mace that a union representative could be present, he could not prohibit Hamilton from being that union representative because of her protected activity.

Second, the complaint does not allege that the County violated Mace's subsection (1)(a) rights by denying him the union representative of his choice. Instead, the complaint alleges that the County interfered with Hamilton's subsection (1)(a) rights by excluding her from Mace's meeting because of the grievances she filed. Therefore, the issue of Mace's entitlement to a union representative is not before us.

Finally, the issue under a "because of" claim is not whether an employee had a PECBA-protected entitlement related to the employer's action. The question is whether the reason the employer took the action was because the employee engaged in PECBA-protected activity. For example, in *Grants Pass Association of Classified Employees/OEA/NEA and Bullington v. Grants Pass School District No. 7*, Case No. UP-05-07, 22 PECBR 806 (2008), this Board concluded that the employer violated ORS 243.672(1)(a) when it took certain actions, including moving the employee out of her private office and prohibiting the employee from participating in an interview committee, because the employee had asserted rights under the collective bargaining agreement. This Board did not consider, and it is unlikely we would have found, that the employee had a PECBA-protected entitlement to work in a private office or participate in the interview committee. The only consideration in that case, and the one before us, is whether the employer's actions were taken because of the employee's exercise of protected activity.

[4] Under ORS 243.672(1)(a), an employee has the right to request union representation at investigatory interviews that the employee reasonably believes may result in disciplinary action. *AFSCME, Local 328, v. Oregon Health Sciences University*, Case No. UP-119-87, 10 PECBR 922, 926-27 (1988) (adopting the federal law *Weingarten* rights approved in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S Ct 959, 43 L Ed2d 171 (1975)). This right does not apply to meetings called by the employer solely to issue discipline or conversations in which a manager is only giving instruction, training, or needed work-technique corrections. 10 PECBR at 929. The right "arises only when an employee reasonably believes that a purpose of an interview is to obtain information from the employee that could provide a basis for imposing discipline upon the employee or for justifying already-determined discipline." *Washington County Police Officers Association v. Washington County*, Case No. UP-15-90, 12 PECBR 693, 701 (1991).

The matter before us includes circumstances similar to those that existed in *Teamsters Local 57 v. City of Bandon*, Case No. UP-129-91, 13 PECBR 568 (1992). In that case, we found that the employer violated ORS 243.672(1)(a) by excluding a union steward from attending a bargaining session because the steward engaged in protected activity by filing an unfair labor practice complaint. Here, the County prohibited Hamilton from serving as Mace's union representative because she filed grievances. Therefore, consistent with our reasoning in *City of Bandon*, we conclude that the County interfered with, restrained, or coerced Hamilton because of her exercise of rights guaranteed in ORS 243.662 in violation of ORS 243.672(1)(a).

Having concluded that the County committed a "because of" violation when it prohibited Hamilton from serving as Mace's union representative, it follows that this conduct also constitutes a derivative "in" violation of subsection (1)(a). As previously explained, when an employer takes an action against an employee because of that employee's protected union activity, as occurred here, the inevitable effect is to interfere with, restrain, or coerce the employee in the exercise of their PECBA-protected rights. *Malheur County*, 10 PECBR at 521. Because we find a derivative violation in regard to this allegation, we need not consider whether these actions also constitute an independent "in" violation.

2. Service of the Investigation Notice

FOPPO also alleges that the County violated the "in" prong of subsection (1)(a) by having Brown serve Hamilton the notice of investigation.[5] FOPPO asserts that because Brown was the subject of the grievances, which is why Hamilton was denied the right to act as a union representative, Brown's actions in serving the notice so soon after the grievances were filed would naturally chill her and other employees from engaging in protected activity. In addition, FOPPO asserts that Brown acted in a harassing and intimidating manner by smiling at Hamilton as he handed her the investigation notice and read the charges.

We review the record to determine whether there is sufficient evidence that, when objectively viewed, the County's actions would chill Hamilton or other union members in their exercise of protected rights. *Portland Assn. Teachers*, 171 Or App at 624. This Board has explained that because "finding an 'in' violation under ORS 243.672(1)(a) is generally based on an employer's threat or implied threat of interference with employees' exercise of protected rights, '[i]n order for a reasonable employee to be chilled in the exercise of protected activity, that employee must see some relationship between the protected activity and the employer's actions or statements.' *Teamsters Local 223 v. Tillamook County Emergency Communications District*, Case No. UP-46-95, 16 PECBR 397, 404 (1996)." *Tigard Police Officers' Association v. City of Tigard*, Case No. UP-59-10, 24 PECBR 927, 937 (2012). In analyzing "in" violations, the Court of Appeals also has distinguished "between employer threats that are directed at protected activity and generic expressions of anger that may be made in the heat of a collective bargaining dispute." *Clackamas County*, 243 Or App at 42.

[5]Although it appears that FOPPO alleged both a "because of" and "in" the exercise of violation under this claim, it limited its argument in its post-hearing brief to the "in" claim. Therefore, we do not address the "because of" claim in our decision.

FOPPO points to the timing of the delivery of the investigation notice as evidence that the County violated subsection (1)(a), noting that Brown served the investigation notice only seven days after Hamilton filed her grievances. FOPPO argues that this close proximity in time between Hamilton's protected activity and the service of the notice raises an inference of a relationship between the two that would have the natural and probable effect of deterring employees from pursuing their PECBA-protected rights. In its post-hearing brief, FOPPO also implied a connection between the timing of Hamilton's grievances and the filing of Schlesinger's complaint.

Although timing can raise an inference of a causal connection between an employee's protected activity and the employer's action, the timing for the service of the investigation notice here occurred for legitimate reasons that mitigate against such an inference. First, it was undisputed that under Sherriff's Office policies, investigation notices were required to be served in a timely manner. Consistent with that requirement, the investigation notice was served three days after Schlesinger filed her complaint. There is not sufficient evidence to cause a reasonable employee to link Schlesinger's decision to file her complaint on September 21 with Hamilton's grievances. And, although the meeting that was the basis of Schlesinger's complaint occurred on September 10, her complaint was also based on a September 18 conversation with Supervisor Rauschert, which occurred just three days before Schlesinger filed her complaint.

Finally, Brown's service of the investigation notice, when viewed objectively, was not inherently intimidating or coercive. Hooley, not Brown, made the decision for Brown to serve the investigation notice solely as a matter of expedience without consideration of Hamilton's protected activity. Although the policy provided for such notices to be delivered by the assigned supervisor, the investigator was not available to serve the notice in this matter and this had not always been the practice. In addition, Brown was the manager of the unit in which Hamilton worked. As a result, as long as Brown was in that position, Hamilton and other employees understood that he was responsible for dealing with employees on various employment issues. Hamilton's exercise of protected activity did not change this. And, even if Brown smiled when he delivered the notice, a smile alone is insufficient evidence of a threat to Hamilton's protected rights. Therefore, the natural and probable consequences of the County's lawful service of the notice of investigation on an unrelated matter, when viewed objectively, would not tend to interfere with, restrain, or coerce employees in the exercise of their protected rights.

Subsection (1)(b) Allegation

Under ORS 243.672(1)(b), it is an unfair labor practice for a public employer to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization." Although the purpose of subsection (1)(a) is to protect the rights of individual employees, subsection (1)(b) is concerned with the rights of the union itself. *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 22 PECBR 752, 794 (2008). To establish a violation of subsection (1)(b),

> "a complainant must prove that an employer took actions which impede or impair a labor organization in the performance of its statutory responsibilities. In establishing this violation a complaining labor organization must provide evidence to support the conclusion that *some actual interference* with its existence or administration occurred as a result of the employer's actions." *Junction City Police*

Association v. Junction City, Case No. UP-18-89, 11 PECBR 780, 789 (1989) (emphasis added).

Hamilton, who was the FOPPO president, was prohibited by the County from serving as a union representative. Hamilton was the FOPPO representative most familiar with the issues in the meeting and was the representative requested by the employee. As a result, FOPPO was unlawfully deprived of a union official "capable of performing the full range of her duties on behalf of the [union] and its members." *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 355 (2008). *See also City of Portland*, 22 PECBR at 794. Therefore, the County's decision prohibiting Hamilton from serving as Mace's union representative impeded, impaired, and interfered with FOPPO in performing its duties as exclusive bargaining representative and thus violated ORS 243.672(1)(b).

However, for the reasons previously discussed in the subsection (1)(a) complaint, the County's decision to have Brown serve the investigation notice on Hamilton did not violate subsection (1)(b).

ORDER

1. The County violated ORS 243.672(1)(a) and (b) by refusing to allow Hamilton to serve as a union representative in Mace's meeting because of her exercise of protected activity.

2. The County shall cease and desist from violating ORS 243.672(1)(a) and (b).The remaining claims are dismissed.

DATED this 28 day of June 2013.

Kathryn A. Logan

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-032-12

(UNFAIR LABOR PRACTICE)

FEDERATION OF OREGON PAROLE AND PROBATION OFFICERS, MULTNOMAH COUNTY CHAPTER, Complainant, v. MULTNOMAH COUNTY, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On June 10, 2013, the Board heard oral argument on Respondent's objections to a Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on April 11, 2013, after a hearing held in Portland, Oregon, on September 21, 2012. The record closed on November 2, 2012, following receipt of the parties' post-hearing briefs.

Daryl S. Garrettson, Attorney at Law, Lafayette, Oregon, represented Complainant.

Kathryn A. Short, Senior Assistant County Attorney, Portland, Oregon, represented Respondent.

On June 25, 2012, the Federation of Oregon Parole and Probation Officers, Multnomah County Chapter (FOPPO or Federation) filed this unfair labor practice complaint against Multnomah County (County). The Federation alleged that the County had unlawfully filed a Last Best Offer (LBO) that was less favorable than its Final Offer. The County filed a timely answer to the complaint, alleging that the Federation had waived its right to file this complaint, and added a counterclaim alleging that the Federation unlawfully failed to comply with the arbitration award by refusing to sign the resulting collective bargaining agreement.

The issues are:

1. Did the County's LBO violate ORS 243.672(1)(e)? If so, what is the appropriate remedy?

2. Did the Federation waive its right to bring an unfair labor practice complaint by allegedly seeking enforcement of the collective bargaining agreement awarded by Arbitrator Whalen?

3. Did the Federation violate ORS 243.672(2)(c) or (e) by not signing the collective bargaining agreement awarded by Arbitrator Whalen? If so, what is the appropriate remedy?

We conclude that: (1) the County violated ORS 243.672(1)(e); (2) the Federation did not waive its right to bring its unfair labor practice complaint; (3) the Federation did not violate ORS 243.672(2)(c) or (e); and (4) the appropriate remedy for the County's subsection (1)(e) violation is to remand the matter to Arbitrator Whalen as detailed below.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The Federation is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a strike-prohibited bargaining unit of parole and probation officers employed by the County, a public employer as defined by ORS 243.650(20).

2. The parties have had a series of collective bargaining agreements. The last agreement expired on June 30, 2011. The parties participated in at least ten bargaining sessions for a successor agreement. Before the events at issue, the parties tentatively agreed to 21 collective bargaining agreement articles and three addenda, leaving seven articles and two addenda in dispute.

3. On July 21, 2011, the County submitted a package proposal, with the caveat that the County could withdraw the proposal at any time. The Federation did not accept the proposal.

4. On November 1, 2011, the Federation declared impasse and filed its Final Offer. The County filed its Final Offer on November 9, 2011.

5. On March 8, 2012, the County filed its LBO. The LBO made several changes to its Final Offer. The changes that the Federation attacks are set out below.

6. The County's Final Offer *deleted* the following language from the preceding collective bargaining agreement:

> "Management may require HCP [Health Care Professional] verification of absence due to non-FMLA and non-OFLA covered illness or injury under the following conditions: 1. the employee has been absent for more than three (3) days; or 2. the employee has exhausted all sick leave; or 3. management reasonably believes that the absence may not be bona fide."

The County's LBO *restored* that language.

7. The County's Final Offer *deleted* the following language from the preceding collective bargaining agreement:

> "Saved Holiday Bonus days must be used in the fiscal year they are awarded."

The effect of the deletion would have been to allow unit employees to carry unused Holiday Bonus days into the next fiscal year instead of losing them. The County's LBO *restored* this language.

8. The County's Final Offer extended workers' compensation supplemental benefits to *12* months. The County's LBO reverted to the prior collective bargaining agreement terms, which provided those supplemental benefits for *three* months. Supplemental benefits bridge the gap between workers' compensation benefits and the unit employees' take home pay without drawing from other employee paid leave.

9. The County's LBO withdrew changes in its Final Offer to lead worker assignment and pay provisions contained in Addendum B, and reverted to the language of the prior collective bargaining agreement.

10. On March 9, 2012, Federation attorney Daryl Garrettson e-mailed Ann Boss, County Labor Relations Manager, asking why the County had withdrawn its proposal for Addendum B and reverted to current contract language. Garrettson stated that the County's actions could constitute "retrograde negotiations." In response, the County submitted a revised LBO that restored the Final Offer's Addendum B language. The Federation did not raise any other issues regarding the County's LBO.

11. On March 22 and 23, 2012, the parties held an interest arbitration hearing before Arbitrator Kathryn Whalen pursuant to ORS 243.742. At that hearing, the Federation stated, for the first time, that other provisions of the LBO were not the same as the Final Offer.

12. On May 11, 2012, Arbitrator Whalen issued her opinion awarding the County's LBO. The pertinent part of the arbitrator's award follows:

> "The Federation has submitted proposals that would change existing contract articles concerning Workers Compensation, (Article 12), Holiday Bonus Carry-over (Article 8) and Retiree Medical Insurance (Article 22). The County's LBO proposes the status quo; that is, that current language should remain

unchanged. Of these proposed changes, it is the Federation's proposals about Workers Compensation that are the most significant.

"The Federation proposes that an employee absent from work due to an on-the-job injury may select the option of submitting his/her Workers Compensation payment in return for a regular paycheck paid by the County.

"The County argues that this proposal for continuation pay without a cap is unprecedented. The County contends that although MCDSA and MCCDA contracts provide for continuation pay, these contracts differ from the Federation's proposal in significant ways. First, these other contracts provide that employees are not eligible for continuation pay until they have ten years seniority with the County. Second, the employee is entitled to choose continuation pay only once in his or her career with the County.

"According to the County, the Federation's proposal without limitations creates an uncapped, ongoing liability for the County that cannot reasonably be predicted or properly budgeted. As a result, the public interest is not well served by this uncapped liability that no other jurisdiction offers.

"The Federation contends its intent is that the above language is limited by the earlier paragraph in Article 12 in which the Federation has proposed a limit on supplemental benefits of 12 months. The Federation asserts that this time limitation was communicated repeatedly at the bargaining table and reinforced in its Post Hearing Brief.

"I have reviewed the continuation pay language of the MCDSA and MCCDA contracts. The County is correct that these agreements provide for continuation pay in lieu of supplemental benefits only to employees with 10 or more years seniority and are an option only once in an employee's career. These other contract provisions provide detailed procedures and specifications in connection with the receipt of continuation pay. The Federation's proposal does not mirror these contract provisions.

"At hearing, Mitchell acknowledged that the Federation's proposals are different from that of the other contracts. He said he was not sure why but believed the language of the other agreements was complex; and the Federation felt the need to provide different language that did not have the 10-year seniority and once in a life-time restrictions.

"As the proponent of new language, the Federation bears the burden of convincing me that the status quo should be changed. I find the evidence is insufficient to justify the Federation's proposed continuation pay language and the County has raised legitimate concerns about it.

"The Federation also proposed that throughout the period an employee receives Workers Compensation benefits, the County will continue full retirement contributions as though the employee was still working their full or part-time work schedule.

"At hearing, the County asserted that this proposal is illegal. According to the County, it would be unlawful for it to do so because the definition of "salary" in the PERS statute excludes Workers Compensation benefits; that is such benefits are non-subject salary. In support of this argument, the County relies upon a decision by the PERS Board in which Workers Compensation benefits were not considered in calculating the final average salary of a fire fighter.

"The Federation responds to the County's illegality claim with a number of arguments: (1) The case cited by the County concerns calculating average salary; it does not state that it would be illegal for an employer to make a full retirement contribution to PERS while an employee is on time loss; (2) the County's illegality argument is untimely as it was not raised at any time in bargaining and such behavior should not be rewarded—especially when the County is wrong about its assertions; (3) if the Federation's proposal is unlawful, then so is the current contract language which provides for retirement contributions for an appropriate amount on supplemental benefits; and (4) in other County agreements, namely those with MCDSA and MCCDA, the County has agreed to the same language the Federation is proposing.

"While I have considered all of the above arguments, arbitration is not the authoritative forum to decide an issue concerning the legality of a proposal. Regardless of what I may think, my opinion is not a final or binding determination of this matter.

"Further, and more importantly, it is not necessary for me to make a legal conclusion about this issue. As explained above, I have other concerns with the Federation's Workers Compensation proposal as drafted. It is on these grounds that I find the County's proposal better serves the interest and welfare of the public.

"Although the Federation's other proposed language changes are in dispute, the evidence and arguments indicate that these are not significant when compared to the Workers Compensation issue addressed in detail above." (Internal citations omitted.)

13. The arbitrator concluded,

"This case is a close call. Neither wage proposal was significantly favored by secondary criteria. The Federation's Workers Compensation proposal gives the

County's LBO the edge. I conclude the County's LBO is more consistent with the interest and welfare of the public."

14. Also on May 11, 2012, the Federation filed a grievance alleging that the County violated a Memorandum of Agreement - Temporary Employees. The record does not reveal whether the Federation had received Arbitrator Whalen's award before filing the grievance. Although almost all of the text of the memorandum had previously been agreed to in 2008, the grievance alleged a violation of a managerial signature requirement for certain actions by temporary employees agreed to on April 18, 2011, the same date as the parties agreed to Article 1 of the collective bargaining agreement. That agreed version of Article 1 stated in part: "[e]ffective the date of this agreement, the parties agree to the April 18, 2011 memorandum of agreement relating to the usage of temporary employees as set forth in that memorandum and incorporated herein." On May 24, 2012, the County sustained the grievance in part and denied it in part, despite acknowledging that the grievance was untimely and filed at the wrong step.

15. On June 22, 2012, Jeff Heinrich, County Labor Relations Manager, sent the Federation a draft collective bargaining agreement consistent with the arbitrator's award for review and signature.

16. On July 13, 2012, Garrettson notified Heinrich that the Federation would not sign the contract because the County had committed an unfair labor practice.

17. On June 25, 2012, the Federation filed this action.

CONCLUSIONS OF LAW

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

2. The County submitted an LBO that included three regressive proposals when compared to its Final Offer, in violation of ORS 243.672(1)(e).

3. The Federation did not waive its right to bring this unfair labor practice complaint.

4. The Federation did not violate ORS 243.672(2)(c) or (e).

Standards for Decision

The steps of the bargaining process for strike-prohibited bargaining units are set out in ORS 243.712 and ORS 243.736 through 243.756. Unless changed by agreement of the parties, they must table bargain for 150 days, and, if necessary, proceed through mediation, impasse, and the submission of Final Offers to the mediator and LBOs to the interest arbitrator. The Federation alleges that the County's LBO, which contained three regressive proposals that had not been bargained over, represented bad-faith bargaining prohibited by ORS 243.672(1)(e).

ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer or its designated representative to "[r]efuse to bargain collectively in good faith with the exclusive representative." Although we generally analyze claims of bad-faith-bargaining by looking at the totality of a party's bargaining conduct, we have recognized that some bargaining conduct is so inimical to the bargaining process that it amounts to a *per se* violation of the obligation to bargain in good faith, even without a showing of subjective bad faith.[1] *International Association of Firefighters Local #1431 v. City of Medford*, Case Nos. UP-32/35-06, 22 PECBR 198, 206-7 (2007). Here, we find that the County's inclusion of three regressive proposals in its LBO constitutes a *per se* violation of its good-faith-bargaining obligation. We reason as follows.

> "The [Public Employee Collective Bargaining Act] PECBA bargaining process is a series of carefully structured steps designed to help the parties identify and narrow their disputes. It begins with table bargaining and then moves to mediation, final offers, cooling off, and [for strike-permitted employees,] self help." *Blue Mountain Faculty Association v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 754 (2007).

For strike-prohibited employees, the PECBA bargaining process includes a final step of binding interest arbitration, rather than self help.[2] ORS 243.742. Interest arbitration is initiated by filing a petition with this Board, and is accompanied by a final offer filed with the mediator. ORS 243.742(2). After the selection of an arbitrator and the establishment of a hearing date, the parties must exchange their LBOs "on all unresolved mandatory subjects" not less than 14 days before the date of the hearing. ORS 243.746(3). The statute also contemplates, however, that a party might "change its position within 24 hours of the 14-day deadline," in which case, "the other party will be allowed an additional 24 hours to modify its position." *Id*. Other than that proviso, "neither party may change" its LBO package, unless the parties stipulate to do so. *Id*.; *see also* OAR 115-040-0015(7)(g).

Thus, the statutory scheme anticipates (and allows) that a party's Final Offer and LBO may differ. However, any such change is not unfettered. As described above, the PECBA bargaining process is "designed to help the parties identify and narrow their disputes." *Blue Mountain Community College*, 21 PECBR at 754. Consequently, we have disapproved of

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[1]For example, we have found the following to constitute *per* se violations of ORS 243.672(1)(e): (1) unilaterally implementing a change in a mandatory subject of bargaining; (2) submitting a new proposal in mediation, which had not been subjected to bargaining; (3) including a "first-time" proposal in a final offer without bargaining over (or at least offering to bargain over) that proposal. *See Hood River County v. Oregon AFSCME Council 75, Local 1082*, Case No. UP-09-08, 23 PECBR 583, 605-6 (2010); *Dallas Police Employees Association v. City of Dallas*, Case No. UP-33-08, 23 PECBR 365, 378 n 7 (2009).

[2]Although the final dispute resolution procedures of the PECBA bargaining process are different for strike-permitted and strike-prohibited employees, both procedures share the same goal, which is the signing of a collective bargaining agreement negotiated in good faith between public employers and the exclusive representatives of their employees.

conduct that "expands rather than narrows the scope of the parties' bargaining dispute, thereby making agreement less likely." *Id.* This is particularly true "late in the bargaining process" and even more so at the points of Final Offer/mediation and LBO/interest arbitration. We have held that several actions in the late stages of bargaining constitute *per se* violations of the obligation to bargain in good faith. *See id.* at 755-56 (injecting new issues in mediation, a final offer or implementation *per se* violates the duty to bargain in good faith); *see also Hood River County*, 23 PECBR at 605-6 (union violated ORS 243.672(2)(b) by including a first-time proposal in a final offer without bargaining over, or at least offering to bargain over, that proposal).[3]

As previously indicated, the rationale behind these holdings is similar—those actions frustrate the bargaining process and expand, rather than narrow, the scope of the parties' dispute, regardless of any subjective bad faith. *See Blue Mountain Community College*, 21 PECBR at 754. Thus, those types of actions contravene the principles of the PECBA, including: (1) the development of harmonious and cooperative relationships between public employers and their employees; (2) full acceptance of the principles and procedures of collective negotiation to alleviate various forms of strife and unrest; (3) discouraging unresolved disputes because they are injurious to the public, the governmental agencies, and public employees; (4) encouraging practices fundamental to the peaceful adjustment of labor disputes; and (5) obligating public employers, public employees and their representatives to enter into collective negotiations with willingness to resolve grievances and disputes relating to employment relations and to enter into written and signed contracts evidencing agreements resulting from such negotiations. *See* ORS 243.656.

Likewise, we hold that a regressive proposal on a mandatory subject of bargaining (without any countervailing concessions) occurring between a Final Offer and an LBO is so inimical to the PECBA and its carefully-structured bargaining process that it amounts to a *per se* violation of the obligation to bargain in good faith, even without a showing of subjective bad faith. Simply put, at this stage of the bargaining process, the requisite statutory process has effectively ended, and the parties are putting their differences into the hands of an arbitrator. By regressing on a mandatory subject of bargaining between the submission of the Final Offer and the LBO (when the requisite bargaining has ceased),[4] a party undermines the previous collective efforts of the parties to narrow their disputes and effectively negates previous good-faith bargaining. Moreover, permitting such conduct would engender less confidence in the PECBA bargaining process because both parties would be wary of the other submitting regressive proposals just weeks before the interest arbitration. Such wariness could taint the entire bargaining process and encourage parties to attempt to strategically "game" the process in violation of the policies of the PECBA. Therefore, although the statute envisions that there might

[3]*Cf. Southern Oregon Bargaining Council/Rogue River Education Association/OEA/NEA v. Rogue River School District 35*, Case No.UP-62-09, 23 PECBR 767, 791-93, *recons*, 23 PECBR 878 (2010) (declining to find that the employer engaged in *per se* bad-faith bargaining by allegedly making regressive proposals in mediation because, as a factual matter, the allegedly regressive proposals were not made in mediation).

[4]Although statutorily-required bargaining has ceased, the parties may continue to bargain.

be some changes in a party's Final Offer and LBO, such changes must narrow, rather than expand, the scope of the parties' dispute. Consequently, a party that makes regressive proposals on mandatory subjects of bargaining during this period commits a *per se* violation of the obligation to bargain in good faith under subsection (1)(e) or (2)(b).[5]

Applying those principles here, we find that the County committed a *per se* violation of ORS 243.672(1)(e) by making three regressive proposals on mandatory subjects of bargaining in its LBO by reverting to prior contract language in: (1) requiring health care professional verification of absence under certain circumstances; (2) requiring that saved Holiday Bonus days be used in the fiscal year in which they are awarded; and (3) limiting workers' compensation supplemental benefits to three months. With respect to each of these proposals, the County withdrew proposals that had been in its Final Offer that were more favorable to bargaining unit members, and reverted in its LBO to the less favorable language of the prior collective bargaining agreement. The County does not dispute that those three proposals were regressive, and does not contend that it made other changes to its Final Offer that were more favorable to bargaining unit members. Consequently, we find that the County violated ORS 243.672(1)(e).

Because the County's unlawful action changed the terms of the offer before the interest arbitrator, we conclude that the Federation had no duty to sign or implement the contractual result of the interest arbitration, and we will dismiss the County's counterclaim.

Waiver

The County also contends that the Federation waived its statutory right to bring its subsection (1)(e) complaint because it purportedly "relied on" the County's LBO as awarded by Arbitrator Whalen when it filed a grievance under a Memorandum of Agreement amended during the bargaining process. "Under Oregon law, a waiver is the intentional relinquishment of a known right." *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 183, 295 P3d 38 (2013) (*AOCE*) (internal quotations omitted). We generally consider a "waiver" argument concerning a subsection (1)(e) charge to be an affirmative defense. *Id.*; *see also Jackson County Sheriff's Employees' Association v. Jackson County Sheriff's Department*, Case No. UP-023-11, 25 PECBR 449, 457 n 2 (2013); *Multnomah County Correction Deputies Association v. Multnomah County*, Case No. UP-58-05, 22 PECBR 422, 439 n 4, *recons*, 22 PECBR 571 (2008). As the Respondent on the subsection (1)(e) claim, the County has the burden of proving that affirmative defense. OAR 115-035-0042(6); *Portland Firefighters' Association, Local 43, IAFF v. City Of Portland*, Case No. UP-14-07, 23 PECBR 165, 167 (2009) (Order on Reconsideration).

[5]We do not decide whether a regressive proposal on a mandatory subject of bargaining would *per se* violate the duty to bargain in good faith if it was accompanied by a significant concession on another issue. However, we would likely review that question in light of the well-established understanding that the purposes and policies of the PECBA are enhanced by actions that move the parties toward an agreement and narrow, rather than expand, the scope of the parties' dispute.

The County argues that "[b]y grieving the MOA, the Federation tacitly accepted the enforceability of the successor collective bargaining agreement awarded by Arbitrator Whalen." We do not agree that the Federation's filing of a grievance (and therefore preserving any claims as part of its duty to represent its members) constitutes "tacit acceptance" of the County's LBO, as awarded by Arbitrator Whalen. In any event, the Federation's actions do not amount to the "intentional relinquishment" of the Federation's statutory right to file a subsection (1)(e) complaint. Indeed, such a conclusion would be hard to square with the Federation's refusal to sign the collective bargaining agreement that was consistent with the County's LBO, as awarded by Arbitrator Whalen.

We further note that the basis of the Federation's grievance concerned a provision that was agreed to during the bargaining process, *before* the *unresolved* matters were submitted to interest arbitration. This further supports our conclusion that the Federation did not clearly evince an intent to ratify the agreement issued by the arbitrator.

The County also argues that the Federation waived its claims because it objected to one, but not all, of the regressive changes in the County's LBO, thus "lying in the weeds" to bring this action. The Federation did, however, raise the issue during the arbitration, and there is no evidence that the County lacked the opportunity to cure these defects before submission of the arbitral record for decision.

Remedy

We turn to the remedy. FOPPO asks us to award its LBO. Alternatively, it asks us to vacate Arbitrator Whalen's award, which awarded the County's LBO, and direct the parties to resubmit LBOs consistent with their Final Offers to Arbitrator Whalen, or another mutually-agreed-on arbitrator.

The County contends that FOPPO's proposed remedies are excessive, and, at most, we should strike the County's three regressive LBO proposals and incorporate its three Final Offer proposals, which were more favorable to FOPPO's members.[6] The County reasons that, to do otherwise, would unduly destabilize finality of interest arbitration awards. The County further argues that nothing in Arbitrator Whalen's award indicates that the three regressive proposals played a role in her awarding the County's LBO.

We are reluctant to determine what Arbitrator Whalen would or would not have done had the County not submitted an invalid LBO. However, we also are disinclined to send the parties back to "square one," when the record before us does not indicate whether the three regressive proposals were material to Arbitrator Whalen's award. Therefore, we remand the matter to Arbitrator Whalen to determine whether the three proposals would change her award. Specifically, the County's LBO is modified by rescinding the three regressive LBO proposals and replacing those proposals with the language used in its Final Offer. FOPPO's LBO shall remain the same. Arbitrator Whalen may then determine whether to adhere to her prior award,

[6]There is nothing prohibiting the parties from agreeing to this change.

award FOPPO's LBO, or order a new hearing (or allow additional evidence or submissions by the parties). In the event that Arbitrator Whalen adheres to her determination to award the County's LBO (as modified by this order) or decides to award FOPPO's LBO, such a determination shall be made within 60 days from the date of this order. If Arbitrator Whalen determines that further proceedings are necessary, she shall set dates and places for hearing pursuant to ORS 243.746(3) and proceed in a manner consistent with ORS 243.746(4), (5), and (6).[7]

ORDER

The County will cease and desist from bad-faith bargaining by submitting regressive proposals in its LBO. The County will retract those regressive proposals from its LBO and replace them with the corresponding proposals in its Final Offer.

In the absence of an agreement between the parties within 30 days from the date of our order, the parties will resubmit their LBOs to Arbitrator Whalen, consistent with this order. Arbitrator Whalen will then determine whether to adhere to her prior award, award FOPPO's LBO, or order a new hearing (or allow additional evidence or submissions by the parties). Arbitrator Whalen's costs, if any, will borne equally by the parties.

DATED this 3 day of July 2013.

Kathryn A. Logan
Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

[7]Although our order sets forth the LBOs to be submitted to Arbitrator Whalen, our order should not be construed as restricting the parties from attempting to resolve their dispute or to further narrow the scope of their dispute. To that extent, the parties would still be able to submit LBOs not less than 14 calendar days before the date of hearing set by Arbitrator Whalen. *See* ORS 243.746(3). However, any such LBO modification must be consistent with this order.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-42-10

(UNFAIR LABOR PRACTICE)

AMALGAMATED TRANSIT UNION, DIVISION 757, Complainant, v. TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT, Respondent.	)	SUPPLEMENTAL ORDER

On January 15, 2013, this Board issued an order holding that the Tri-County Metropolitan Transportation District (TriMet) violated ORS 243.672(1)(g) when it violated the provisions of two written agreements with the Amalgamated Transit Union, Division 757 (ATU). 25 PECBR 385 (2013). Specifically, we concluded that TriMet violated the terms of the written agreements by involuntarily removing ATU represented employees Coryell, Thake, and Raney from their positions as Fare Inspectors and transferring them into the lower paid classification of Bus Operator.

As part of our remedy for these violations, we ordered:

> "TriMet shall offer Raney and Thake reinstatement to positions as Fare Inspectors, and make Raney, Thake, and Coryell whole for all lost wages and benefits they would have received had they not been unlawfully removed from these positions. Back pay shall be paid with interest at nine percent per annum and shall be offset by any interim earnings. The back pay award to Thake shall be paid from the date he was unlawfully removed from his position as a Fare Inspector until the date he refused TriMet's offer of reinstatement to a Fare Inspector position in July 2011." *Id.* at 401.

By letter dated February 7, 2013, ATU notified the Board that the parties were unable to reach an agreement on the back pay amounts owed to Thake and Coryell, and requested clarification of the order on two issues: (1) whether the back pay award should be offset by the value of overtime worked by the employees in the lower paid classification of Bus Operator; and (2) the appropriate treatment of vacation leave taken by Thake, which was paid at the Bus Operator rate but earned while he was a Fare Inspector. On February 14, 2013, ATU filed a motion to compel compliance with the Order. TriMet submitted a timely response.

On April 3, 2013, the Board sent a letter requesting additional information pertaining to these issues. On May 3, the parties submitted a joint stipulation and some additional documents that responded to the Board's letter. We rely upon the uncontested information in these stipulations and documents in reaching our decision below.

The issues are:

1. How should the back pay award to Thake and Coryell be calculated?

2. Should TriMet be required to pay Thake the difference between the value of vacation hours that he earned as a Fare Inspector but took while working as a Bus Operator?

FINDINGS OF FACT

The following findings of fact are undisputed and are taken from our prior order, the stipulations of the parties, and joint exhibits submitted to the Board:

1. Coryell and Thake's Fare Inspector positions were eliminated effective August 29, 2010. They were transferred to the lower paid classification of Bus Operators.

2. In the spring of 2011, TriMet determined that it had sufficient funds to restore some Operations Department positions, including two Fare Inspector positions. Coryell and Thake were both offered the opportunity to return to their Fare Inspector positions.

3. Effective July 9, 2011, Coryell returned to the position of Fare Inspector. However, Thake objected to the Fare Inspector shift and location sign-up posted on July 1, 2011. He did not accept the offer of reinstatement.

4. As of August 28, 2010, Thake's straight-time hourly wage as a Fare Inspector was $31.72 per hour.[1]

[1]It appears that TriMet employees received at least two wage increases during the period when Coryell and Thake were working as Bus Operators rather than Fare Inspectors. Any wage increases that Coryell and Thake would have received had they not been removed from their positions as Fare Inspectors must be included in calculating the final back pay award pursuant to this Order.

5. As of August 28, 2010, Coryell's hourly straight-time hourly wage as a Fare Inspector was $32.02 per hour.

6. After Thake's transfer to Bus Operator on September 1, 2010, his straight-time hourly wage was $25.13 per hour for the period between August 29, 2010 and November 30, 2010. From December 1, 2010 through January 21, 2011, his straight-time hourly wage was $25.26 per hour. From January 22, 2011 through May 31, 2011, his straight-time hourly wage was $25.56 per hour. From June 1, 2011 through July 8, 2011, his straight-time hourly wage was $26.19 per hour.

7. After Coryell's transfer to Bus Operator on September 1, 2010, his straight-time hourly wage was $25.43 per hour for the period between August 29, 2010 and November 30, 2010. From December 1, 2010 through May 31, 2011, his straight-time hourly wage was $25.56 per hour. From June 1, 2011, until he was reinstated to Fare Inspector (July 9, 2011), his straight-time hourly wage was $26.19 per hour.

8. Thake and Coryell worked varying amounts of overtime as both Fare Inspectors and Bus Operators, and the amount of overtime worked in both positions fluctuated greatly in different months. For example, in the ten-month period from September 1, 2009 through June 30, 2010, Thake's monthly overtime hours as a Fare Inspector ranged from zero hours to 20.5 hours. During that same period, Coryell's monthly overtime hours as a Fare Inspector ranged from four hours to 20.33 hours.

After their transfer to the lower paid classification of Bus Operator, Thake and Coryell worked significantly more hours of overtime than they did as Fare Inspectors. Thake worked an average of 42.367 hours of overtime as a Bus Operator, while Coryell worked an average of 90.672 hours of overtime.[2] However, the monthly overtime hours significantly fluctuated. Specifically, Thake worked as little as 8.35 overtime hours in one month, and as many as 61.23 overtime hours in another month. Likewise, Coryell worked a low of 32.76 overtime hours in one month, and a high of 121.28 overtime hours in another month.

9. The amount of overtime worked by other Fare Inspectors during the relevant time periods varied greatly, with some employees working very little overtime and some employees working substantial amounts of overtime. Overtime for Fare Inspectors was driven by a number of factors, including the number of citations issued by individual employees and the number of citations that were challenged by recipients.

10. Because of the amount of overtime worked after they were transferred to Bus Operators, Thake and Coryell earned more money as Bus Operators than they did during the same time period the previous year as Fare Inspectors.

[2]The monthly overtime averages were calculated using only the full calendar months in which Coryell and Thake worked in the respective classifications. We excluded the partial months of August and July, where the employees only worked a fraction of the calendar month, because those months only involved a small number of work days and were not representative of a regular month.

11. Thake took 80 hours of vacation leave between August 30, 2010 and December 25, 2010. He was compensated for these hours at the straight-time Bus Operator rate of $25.13 per hour for the 40 hours of vacation he took between August 30 and September 3, and $25.26 per hour for the 40 hours of vacation he took in December 2010. This leave was accrued while Thake was working as a Fare Inspector.

DISCUSSION

In our January 15, 2013 order, this Board ordered TriMet to make Thake and Coryell whole for all lost wages they would have received had they not been unlawfully removed from their Fare Inspector positions. 25 PECBR at 401. We further directed that back pay be offset by any interim earnings. *Id.*

The parties disagree whether overtime worked by Thake and Coryell as Bus Operators between August 29, 2010 and July 9, 2011 constitute "interim earnings" that should be deducted from our back pay award. According to ATU, the overtime is akin to secondary employment ("moonlighting") that should not be considered "interim earnings." TriMet disagrees, arguing that, for offset purposes, Coryell and Thake's interim earnings should include pay for both the straight time hours and all overtime hours worked by the employees as Bus Operators between August 29, 2010 and July 9, 2011. Thus, according to TriMet, no back pay is owed.[3]

Given the unusual circumstances of this case, we determine that the back pay award should be calculated only on the basis of Thake's and Coryell's straight-time pay, both as Fare Inspectors and Bus Operators.[4] We make this determination based on several atypical factors present in this case. First, as set forth above, the number of overtime hours that Thake and Coryell worked as *both* Fare Inspectors *and* Bus Operators varied greatly from month to month. Moreover, the number of hours that each employee worked or would have worked in both positions was controlled by numerous variables that severely compromise our ability to make an accurate measure of back pay when including overtime. Furthermore, during their time as Bus Operators, Thake and Coryell significantly increased the hours of overtime they worked compared to the overtime that they worked as Fare Inspectors; the record does not show whether overtime worked as either Fare Inspectors or Bus Operators was compulsory, elective, or a combination of both. Finally, unlike most back pay disputes that we have ruled on, this case presents a less common scenario where the unlawful conduct of the employer did not result in a loss of employment, but rather a transfer to a lower-paid classification.

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[3]TriMet's method of calculation computes the loss of pay and interim earnings based on the entire period that Thake and Coryell were employed as Bus Operators. That method ignores our holdings in *Lebanon Association of Classified Employees v. Lebanon Community School District*, Case No. UP-33-04, 21 PECBR 533, 536-37 (2006) (Supplemental Order) and *Oregon School Employees Association v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832, 8853 n 28 (1986), that, when calculating back pay, we generally compute the loss of pay on the basis of each separate month, or portion of a month, during the period from the date of the violation to the date of a proper offer of reinstatement.

[4]Therefore, we do not reach the overtime pay/interim earning issue.

In sum, because the foregoing factors inject too much uncertainty into a back pay calculation that would consider Thake and Coryell's overtime, we will order that TriMet calculate the back pay owed by excluding overtime from both lost wages and interim earnings. Thus, the calculation shall be done solely on the straight-time hours that each employee worked, and the back pay owed should reflect the difference in straight-time hourly wages that Thake and Coryell would have earned had they remained as Fare Inspectors rather than Bus Operators from August 29, 2010 to July 9, 2011. The calculation should be done on a monthly basis and take into account any wage increases that Thake and Coryell would have received had they remained as Fare Inspectors.

We turn to the issue regarding the vacation leave taken by Thake. Vacation time utilized by Thake was paid at the straight-time rate that he earned as a Bus Operator. It should have been paid, however, at the straight-time rate of Fare Inspector. Consequently, for the 80 hours of vacation leave that Thake took between August 30, 2010 and December 25, 2010, we will order TriMet to pay him the difference between the Bus Operator rate and the Fare Inspector rate, at the times that he took the two vacations.[5]

ORDER

Within 30 days of the date of this Order, TriMet will pay Thake and Coryell back pay and any corresponding benefits owed, utilizing the back pay calculation set forth above. In addition, for Thake's 80 hours of vacation leave, TriMet will pay him the difference between the rate that he was compensated originally (as a Bus Operator) and the rate at which he would have been compensated as a Fare Inspector. TriMet will pay interest at 9 percent per annum on any such payments from the date each payment was due until it is paid.

DATED this 3 day of July 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

[5]Although our calculation of back pay necessarily contains this conclusion, we set it out separately in our Order to make certain there is no misunderstanding of our award.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-42/50-12

(UNFAIR LABOR PRACTICE)

AMALGAMATED TRANSIT UNION, DIVISION 757, Complainant, v. TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON, Complainant, v. AMALGAMATED TRANSIT UNION, DIVISION 757, Respondent.	)	

A hearing was held before Administrative Law Judge (ALJ) Wendy L. Greenwald on January 8 and 9, 2013, in Salem, Oregon. The record closed on February 26, 2013, following receipt of the parties' post-hearing briefs. On March 25, 2013, this matter was transferred to the Board for decision.

Michael J. Tedesco and Julie Falender, Attorneys at Law, Tedesco Law Group, Portland, Oregon, represented Amalgamated Transit Union, Local 757.

Adam S. Collier, Attorney At Law, Bullard Smith Jernstedt Wilson, Portland, Oregon, represented Tri-County Metropolitan Transportation District of Oregon.

On August 9, 2012, the Amalgamated Transit Union, Division 757, (ATU or Union) filed an unfair labor practice complaint (ULP) (UP-042-12) against the Tri-County Metropolitan Transportation District of Oregon (TriMet or District). The complaint, as amended on August 30, 2012, alleges that TriMet violated ORS 243.672(1)(a), (g), and (e), as stated in the issues below. TriMet filed a timely answer on November 5, 2012.

On September 26, 2012, TriMet filed an unfair labor practice complaint against ATU (UP-050-12). The complaint, as amended on November 15, 2012, alleges that ATU violated ORS 243.672(2)(b), (c), and (d) by refusing to cooperate with TriMet's implementation of the interest arbitration award. ATU filed a timely answer on December 27, 2012.

With the consent of the parties, these complaints were consolidated for hearing and decision. The parties agreed that the issues presented in Case No. UP-42-12 are:

1. Did TriMet act contrary to ORS 243.746(3) in violation of ORS 243.672(1)(e) by amending its last best offer (LBO) health insurance proposal at the interest arbitration hearing or after the interest arbitration award was issued, or by failing to communicate its collection methodology for the implementation of its retroactive health insurance proposal?

2. Did TriMet violate ORS 243.672(1)(e) by substantially changing its LBO pension proposal at the interest arbitration hearing?

3. Did TriMet act contrary to ORS 731.036(6)(d), 743.874, or 743.876 in violation of ORS 243.672(1)(e) by informing employees that they would have to pay the difference between the cost of premiums, co-pays, deductibles, and out-of-pocket expenses under the prior health insurance plans and the cost of the LBO insurance plans?

4. Did TriMet interfere with, restrain, or coerce ATU members in or because of their rights guaranteed under ORS 243.662 in violation of ORS 243.672(1)(a) by making an LBO proposal that discontinued paying union stewards to represent employees in grievance step meetings?

5. Did TriMet breach the language in the 2003-2009 collective bargaining agreement, which guaranteed retirees an annual Consumer Price Index (CPI)-based cost-of-living adjustment (COLA) between three percent and five percent in violation of ORS 243.672(1)(g), by proposing in its LBO that retirees receive an annual CPI-based COLA with a minimum of zero percent and a maximum of seven percent?

6. Was TriMet's implementation of its LBO retroactive health insurance proposal pursuant to the interest arbitration award illegal and unenforceable in violation of ORS 243.672(1)(e)?

7. On approximately August 1, 2012, did TriMet unilaterally alter the *status quo* by notifying ATU that it was discontinuing its payment to the Recreation Trust Fund (RTF), pursuant to its implementation of its LBO awarded in interest arbitration, in violation of ORS 243.672(1)(e)?

8. On approximately August 1, 2012, did TriMet unilaterally alter the *status quo* by notifying ATU it was discontinuing its payment to the Employee Assistance Program (EAP), pursuant to its implementation of its LBO awarded in interest arbitration, in violation of ORS 243.672(1)(e)?

9. Did TriMet mislead ATU and the interest arbitrator about the impact of its proposal regarding the calculation of COLA increases for retiree pensions in violation of ORS 243.672(1)(e)?

10. If TriMet violated ORS 243.672(1)(a), (e) or (g), what is the appropriate remedy?

The parties agreed that the issues presented in Case No. UP-50-12 are:

1. Did ATU fail to bargain in good faith in violation of ORS 243.672(2)(b) by not requesting information about or asserting objections before interest arbitration that TriMet's LBO proposals on health insurance, a defined contribution plan, or the calculation of the COLA increases for retirees were too vague to be implemented, or that TriMet had failed to provide information regarding a proposed methodology for implementation of these proposals?

2. Did ATU fail to bargain in good faith in violation of ORS 243.672(2)(b) by not requesting information about or asserting objections before interest arbitration that TriMet's LBO proposals on health insurance, discontinuing pay for grievance procedure work, calculating retiree COLA increases, or the retirement formula were illegal and/or prohibited subjects of bargaining?

3. On approximately July 16 and September 19, 2012, did ATU, in violation of ORS 243.672(2)(b), (c), or (d), instruct bargaining unit members not to sign a form authorizing TriMet to deduct past health insurance premium costs from their wages or not to respond to TriMet's letter requesting repayment of health insurance premiums contrary to Article 1, Section 9, paragraph 1, of TriMet's LBO, as awarded by the arbitrator?

4. On approximately July 16 and September 19, 2012, did ATU instruct bargaining unit members not to comply with TriMet's attempt to recoup health insurance premium costs retroactive to December 1, 2009, in accordance with the interest arbitration award, contrary to ORS 243.752 and in violation of ORS 243.672(2)(c)?

5. If ATU violated ORS 243.672(2)(b), (c), or (d), what is the appropriate remedy?

For the reasons set forth below, we conclude that TriMet: (1) committed a *per se* violation of ORS 243.672(1)(e) when it amended its LBO regarding health insurance benefits; and (2) violated ORS 243.672(1)(e) by deciding, before bargaining, to unilaterally stop payments to the RTF and EAP. We dismiss ATU's remaining allegations, as well as TriMet's allegations.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. ATU is a labor organization and the exclusive bargaining representative of a strike-prohibited bargaining unit of employees at TriMet, a public employer.

2. During times relevant to these complaints, Jon Hunt was the ATU President until July 1, 2012, when Bruce Hansen ("ATU's Hansen") became the ATU President. Hansen had previously served as an ATU Executive Board member and bargaining team member.

3. During times relevant to these complaints, Fred Hansen ("TriMet's Hansen") was TriMet's General Manager until July 2010, when Neil McFarlane became General Manager. On November 14, 2011, Randy Stedman became TriMet's Executive Director of Labor Relations and Human Resources.

Background

4. ATU and TriMet were parties to a collective bargaining agreement effective December 1, 2003 through November 30, 2009 (2003-09 Agreement). The parties began negotiations for a successor agreement in October 2009.

5. During their bargaining session on November 20, 2009, TriMet's spokesperson, Executive Director of Operations Steve Banta, suggested that the parties simultaneously exchange their proposals; caucus separately to review the other team's proposal; and reconvene to discuss, ask questions about, and seek clarification of the other team's proposal. When ATU President Hunt objected to this process, the teams agreed to exchange proposals and have Banta read TriMet's proposal aloud and answer any questions. After Banta read through TriMet's proposal, Hunt expressed the union's understanding of each section of the initial proposal, and, after stating his disappointment with TriMet's proposal, stated that the union understood the proposal.

6. The parties agreed to meet in another bargaining session on December 3, 2009. Hunt later cancelled the December 3 session, notified TriMet that he was not available to meet until mid-January, and requested information related to health care benefits and premiums. On December 1, Banta notified Hunt that TriMet would provide him with the requested information, asked Hunt to meet as arranged on December 3, and stated that TriMet wanted to schedule a series of bargaining sessions and have an opportunity to more fully explain its proposals. On December 2, Hunt responded to Banta that he did not "think anyone has confusion about TriMet's proposals. They are clearly and simply stated takeaways."

7. On December 3, 2009, TriMet's Hansen encouraged Hunt to schedule another bargaining session. Hunt indicated he was not available to meet until mid-January, was unwilling to schedule another session, and believed they should meet with ATU Executive International Vice President Ron Heintzman to discuss the bargaining issues. Heintzman had been the ATU's president and bargaining spokesperson from 1988 through July 2002. TriMet's Hansen asked to have small bargaining groups meet on non-health care benefit issues in the interim, but Hunt refused.

8. On January 14, 2010, TriMet's Hansen, Hunt, and Heintzman met to discuss the bargaining issues. Between February 11 and March 22, 2010, Hansen and Heintzman exchanged e-mails in which they continued their discussions and presented bargaining proposals primarily related to health insurance. It is Heintzman's practice during bargaining not to ask an employer questions or request information about a proposal he does not like. In his experience, the employer usually drops those proposals. Heintzman believed he understood TriMet's proposals, so he did not ask TriMet's Hansen to explain them. Heintzman requested information related to certain health care costs and premiums and the level of benefits available to employees under the defined benefit retirement plan. The parties never held another face-to-face bargaining session.

9. During June and July 2010, the parties participated in several mediation sessions. On approximately July 14, 2010, TriMet filed a declaration of impasse under ORS 243.712(2)(a). On approximately July 21, 2010, the parties petitioned for interest arbitration and submitted their respective final offers and cost summaries.

10. In August 2010, ATU filed a ULP complaint (Case No. UP-016-11) alleging that TriMet engaged in bad-faith bargaining in violation of ORS 243.672(1)(e) by including new issues in its July 21 final offer. On September 12, 2011, the Board issued a decision in which it held that some of TriMet's final offer proposals were unlawful and ordered TriMet to submit a revised final offer excluding those proposals.[1] On February 16, 20l2, after ATU objected that TriMet had not complied with the Board's order, the Board ordered TriMet to submit a second revised final offer.[2] On March 5, 2012, TriMet submitted its second revised final offer, which provided that the parties' successor agreement would be effective from December 1, 2009 through November 30, 2012.

11. On approximately April 29, 2012, the parties exchanged their LBOs in accordance with ORS 243.746(3). Both parties' LBOs proposed that the successor Agreement be effective December 1, 2009 through November 30, 2012.

12. On May 14 through 17, 2012, the parties proceeded to interest arbitration before Arbitrator David Gaba.

13. On July 13, 2012, Arbitrator Gaba awarded TriMet's LBO.

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[1]*Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon (ATU v. TriMet),* Case No. UP-016-11, 24 PECBR 412, *recons,* 24 PECBR 488 (2011).

[2]*ATU v. TriMet*, Case No. UP-016-11, 24 PECBR 602 (2012) (Compliance Order).

14. After the arbitration award was issued, TriMet implemented all of the provisions in its LBO, but it did not recoup amounts that it believed employees owed under its retroactive health insurance proposals.

15. The collective bargaining agreement, based on the LBO awarded by the arbitrator, expired on November 30, 2012.

Health Insurance

16. TriMet does not act as a self-insurer by providing health insurance to its employees. TriMet provides employees health insurance benefits through a fully-insured contracts with Regence Blue Cross Blue Shield of Oregon (Regence) and Kaiser insurance companies.

17. TriMet's second revised final offer proposal on health and welfare benefits provided, in relevant part:

> "The District shall pay one hundred percent (100%) of a composite rate for the medical, hospital and prescription drug, dental, convalescence and optical benefits for full-time employees, dependents of employees, and retirees not eligible for Medicare. During the term of this Agreement, ~~The~~ the benefits and specific coverage of these plans ~~shall be the same as currently provided~~ will be as set forth in the Active Employee Health Benefits Summary and incorporated herein. * * *." (Emphases and markings in original.)

18. Attached to TriMet's second revised final offer was a Regence medical plan summary dated January 1, 2011, and a Kaiser medical plan summary, effective January 1 through December 31, 2010. In that final offer, TriMet did not state the method by which it would retroactively recoup the difference between the premiums for the plans proposed in its final offer and the premiums that it had paid for benefits since December 1, 2009.

19. TriMet's LBO included the same health and welfare benefit proposal as had been included in its second revised final offer, except that TriMet included additional Kaiser medical plan summaries. TriMet did not state in its LBO the method it would use to retroactively recoup the difference between the premiums for the plans proposed in its final offer and the premiums that it had paid for benefits since December 1, 2009.

20. ATU's LBO proposed to maintain the *status quo* existing in the 2003-09 Agreement, except for Section 9, paragraph 1. Under that section, ATU proposed that TriMet would pay 98.5 percent of the composite rate for current employees effective January 1, 2011, and 97 percent of the composite rate for current employees effective January 1, 2012, based on the health insurance plans in effect on December 31, 2010. ATU did not include in its proposal the method under which TriMet would retroactively recoup amounts equal to the 1.5 percent and 3 percent of premium costs that ATU proposed employees pay in 2011 and 2012.

21. On approximately May 8, 2012, ATU Attorney Michael Tedesco asked TriMet Attorney Adam Collier about the effective date of TriMet's LBO health insurance proposal. Collier notified Tedesco that the proposal was effective December 1, 2009.

22. During the interest arbitration hearing, Attorney Tedesco objected that TriMet's LBO did not state how TriMet intended to recoup any amounts owed by employees under its health and welfare proposal and raised a number of questions about the legality of the various methods by which TriMet might attempt to recoup these amounts.

23. General Manager McFarlane testified at the interest arbitration hearing that TriMet did not plan to recoup the retroactive health insurance premiums through payroll deductions.

24. Kari Johnson, TriMet's Mercer health insurance benefit consultant, testified at the interest arbitration hearing that she had met with Executive Director Stedman in February 2012 to discuss the retroactive application of TriMet's LBO health insurance proposal and methodologies for determining what each ATU member would owe. She testified that if TriMet's LBO was awarded, TriMet would recoup from employees the difference between the premiums paid on their behalf since December 1, 2009, and the premiums that TriMet would have paid during that period if the plans proposed by TriMet had been in effect. Johnson also testified that she thought that TriMet was considering deducting the amounts owed by the ATU members from the retroactive wage increases the ATU members would receive pursuant to this Board's order, but that she was not employed by TriMet and could not speak for TriMet regarding that issue.

25. Tedesco objected to Johnson's testimony on the basis that TriMet was unlawfully correcting and clarifying its LBO at the arbitration hearing.

26. In his interest arbitration award, Arbitrator Gaba indicated that TriMet's LBO lacked specificity regarding how TriMet intended to retroactively implement its health insurance proposal and stated "a proposal of this nature raises serious legal concerns and may well violate Oregon law depending on how it is implemented."

27. From December 1, 2009 through the date on which it implemented its LBO, TriMet paid premiums for employee health insurance coverage that cost more than the premiums it would have paid if the health insurance plans in its LBO proposal had been in place during this time.

Pension Benefits - Defined Contribution Plan

28. The 2003-09 Agreement provided for a defined benefit retirement plan for employees who retired after February 1, 1992. A retiree's defined benefit was determined by multiplying a benefit multiplier, established in the 2003-09 Agreement, by an employee's number of years of employment.[3]

[3]The benefit multiplier is also referred to as the retirement base rate.

29. At the parties' November 20, 2009 bargaining session, TriMet proposed that all employees hired on or after January 1, 2010 would be eligible for the "TriMet Defined Contribution Plan for Union Employees."

30. On December 31, 2009, Heintzman asked TriMet's Hansen to provide him with calculations comparing the monthly pensions available to ATU-represented employees under the defined benefit plan in the 2003-09 Agreement and similar employees under the Public Employees Retirement System.

31. On March 22, 2010, TriMet's Hansen provided Heintzman with an outline of TriMet's framework for an agreement. He stated, in part, that "[a]s is the case with management employees, all new union employees, hired after a certain date, to be agreed upon, will be eligible for a TriMet Defined Contribution Plan. The current Defined Benefit plan for union employees would be closed, as is the Defined Benefit Plan to management employees." TriMet's Hansen did not provide Heintzman with a copy of the proposed defined contribution plan or explain the plan to Heintzman. Heintzman understood TriMet's proposals and chose not to ask questions about or seek information regarding TriMet's defined contribution proposal because he disagreed with it.

32. In its second revised final offer, TriMet proposed that "[a]ctive employees who are hired by TriMet on or after April 1, 2012, shall be eligible for and become a participant in a Defined Contribution Plan, which shall have the same elements as that offered to all TriMet employees."

33. In its LBO, TriMet proposed:

> "Active employees who are hired by TriMet on or after the first day of the month following the date of the Arbitrator's decision, shall be eligible for and become a participant in a Defined Contribution Plan, which shall have the same elements as that offered to all TriMet non-union employees."

34. TriMet's defined contribution pension plan summary for non-union employees is posted on TriMet's internal website and is accessible to all employees and ATU representatives.

35. At the interest arbitration hearing, TriMet introduced the non-union defined contribution plan summary as an exhibit. This summary had not previously been provided to ATU. During the interest arbitration proceeding, in response to questions from ATU Attorney Tedesco, TriMet's Chief Financial Officer Beth deHamel, testified:

> "Q * * * And the proposal in the last best offer talks about elements of the defined contribution plan. What elements in this document are not referred to?
>
> "A My understanding, the intent was that this document as is was the proposal to the ATU.
>
> "Q Then can you explain why the proposal doesn't say 'identical to' rather than 'elements of'?

"A No, I can't explain why. We would have to change some wording to -- you know, this talks about management employees. But the intent was that management and non -- Union and non-Union would have the same plan administered by the same company.

"Q To your knowledge, was that intent ever expressed, what you just told me?

"A I'm not sure."

36. After the interest arbitration award was issued, TriMet notified employees about the pension changes under the LBO for employees hired on or after August 1, 2012, stating that "[n]ew employees will participate in a Defined Contribution Plan that is substantially identical to the Management Defined Contribution Plan * * *."

37. On August 13, 2012, McFarland sent ATU's Hansen a draft of a defined contribution retirement plan document for ATU-represented employees hired after August 1, 2012. TriMet developed the plan after the arbitrator's award was issued based on the same elements existing in the defined contribution plan for non-union employees. Stedman requested to meet with ATU to confer about the draft and other aspects of the interest arbitration award.

38. On August 31, 2012, ATU's Hansen notified Stedman that ATU did not believe that the defined contribution pension plan could be implemented because it arose out of an illegal proposal at interest arbitration and, because the plan concerned mandatory subjects of bargaining, ATU was issuing a demand to bargain.

39. On September 5, 2012, Stedman responded that McFarland had signed the defined contribution plan document on August 20 and that the plan was implemented effective August 1, pursuant to the arbitrator's award. Stedman also told ATU's Hansen that TriMet had no obligation to bargain over the plan since it had been implemented pursuant to the interest arbitration award. Stedman asked ATU's Hansen "[i]f you believe there is any substantive difference between the plan elements of the non-union and union-represented defined contribution plans, please articulate them." ATU never identified any differences between the two defined contribution plans.

Union Steward Pay

40. Under the 2003-09 Agreement, Tri-Met was responsible for paying the salary of one union representative to participate in Steps I through III of the grievance process. At the November 20, 2009 bargaining session, TriMet proposed that ATU become responsible for paying for union representatives to attend all steps of the grievance process. TriMet included this proposal in its original final offer, with minor modifications.

41. In *ATU v. TriMet*, Case No. UP-016-11, this Board held that TriMet's union steward pay proposal was appropriately included in TriMet's final offer.[4] TriMet included this proposal in its second revised final offer.

42. In its LBO, TriMet proposed that "[e]ffective upon the first day of the month following the date of the Arbitrator's decision, the Union shall be responsible for paying its representative in any step of the grievance process."

43. During the interest arbitration hearing, TriMet presented a significant amount of evidence regarding its critical financial situation and its need to reduce costs. TriMet also presented evidence regarding the number of grievances ATU filed and the related cost to TriMet of paying for union representatives to attend the grievance meetings. TriMet's evidence showed that from 2006 to 2011, ATU had filed 1448 grievances, which resulted in TriMet paying approximately $148,000 for union stewards to represent employees in the grievance meetings. TriMet also showed that ATU had requested arbitration in 254 of the 1448 grievances, ATU had advanced 34 of those 254 grievances to either expedited or full arbitration, and TriMet had been successful in 27 of the 34 grievances.

44. During the arbitration hearing, McFarlane and Director of Workforce Development Evelyn Minor-Lawrence testified about TriMet's union steward pay proposal. When McFarlane was asked why TriMet was making this proposal, he testified that

> "Again there's a cost issue associated with this. The cost of paying for these hours has, is, and I suspect we have experts that will testify on the exact cost, but it is an element of our proposal from a cost standpoint.
>
> "The other point here is that this is a very grievance-rich environment. My numbers that stick in my brain are over 1,400 grievances over the last five years. And it has become clear that there needs to be some seriousness placed on this process, and pricing that is one step in that direction."

45. On cross examination, McFarlane testified that he was not aware if the rationale that he had testified to had been provided to ATU during bargaining.

46. Minor-Lawrence testified that under the 2003-09 Agreement, TriMet was paying the union stewards who attended the grievance meetings to do union business, not TriMet business; that these meetings had not been mutually beneficial in most cases; and that TriMet was "getting too many grievances or that the process is not being effective."

Pension Plan - Retiree COLA Increases

47. The parties' 2003-09 Agreement provided that retirement pay for existing retirees was to be increased by the general wage increases for employees during the life of the

[4] *ATU v. TriMet*, 24 PECBR at 442-43.

Agreement. The Agreement also provided that any general wage increase for employees was based on COLAs, with a minimum of 3 percent and a maximum of 7 percent.

48. In its LBO, TriMet proposed that, effective on the issuance of the arbitrator's award, retirement pay for existing retirees would be increased by the U. S. Urban Wage Earners and Clerical Workers Consumer Price Index (CPI-U) for the previous year, with a minimum of 0 percent and a maximum of 7 percent per year. TriMet also proposed that the retirement pay for employees retiring after the arbitration award was issued would be increased each May 1 by 90 percent of the increase in the CPI-U for the previous year, with a minimum of 0 percent and a maximum of 7 percent per year.

49. During the arbitration hearing, ATU argued that TriMet's LBO proposal to eliminate the 3 percent floor for retirement increases was illegal because it took away vested or accrued benefits of existing retirees and current employees.

50. In his arbitration award, Arbitrator Gaba recognized that awarding TriMet's LBO for existing retirees and employees would likely result in litigation, but expressed his opinion that TriMet would likely prevail in such litigation.

Employee Assistance Program (EAP) and Recreation Trust Fund (RTF)

51. Article 1, Section 9, paragraph 3, of the 2003-09 Agreement included a provision on an EAP, which provided, in relevant part:

> "**Par. 3.** [EAP]
>
> "a. The [EAP] shall be separately operated and administered by the Union.
>
> "b. Effective December 1, 2003, the District shall pay $55,000 to the Association to operate and administer the [EAP]. This amount shall increase to:
>
> $57,000 on 12/01/04
> $59,000 on 12/01/05
> $61,000 on 12/01/06
> $63,000 on 12/01/07
> $65,000 on 12/01/08."

52. Article 1, Section 19, paragraph 4, of the 2003-09 Agreement provided for contributions to an RTF, as follows:

> "**Par. 4.** Upon ratification of this agreement, the District will continue to deposit into [an RTF]. This amount shall increase from the December 1, 2002 amount of $43,000 to:

$45,000 on 12/01/03
$47,000 on 12/01/04
$49,000 on 12/01/05
$51,000 on 12/01/06
$53,000 on 12/01/07
$55, 000 on 12/01/08."

53. Under TriMet's November 20, 2009 proposal, TriMet did not specifically address the EAP or RTF payments.

54. Based on its belief that it was required to maintain the *status quo* during bargaining, TriMet made annual deposits of $55,000 into the RTF and $65,000 into the EAP in 2009, 2010, and 2011.

55. In its original final offer, TriMet proposed to delete the language in the 2003-09 Agreement establishing the increased payments for the EAP and the RTF and include language under which it would annually pay $65,000 into the EAP and $55,000 into the RTF on December 1, 2009, December 1, 2010, and December 1, 2011. In *ATU v. TriMet*, Case No. UP-016-11, this Board found that these proposals were unlawful and ordered them deleted from TriMet's final offer.[5]

56. In its second revised final offer, TriMet included the language from the 2003-09 Agreement in Article 1, Section 9, paragraph 3, and Section 19, paragraph 4, as its proposal on the EAP and RTF. TriMet's cost summary for its second revised final offer did not include calculations related to the EAP or RTF.

57. In its LBO, TriMet included the same language on the EAP and RTF that had been included in its second revised final offer.

58. Before the interest arbitration hearing, ATU Attorney Tedesco and TriMet Attorney Collier attempted to stipulate to the costs related to the parties' LBOs. To assist with these discussions, on Saturday, May 12, 2012, Collier provided Tedesco with TriMet's cost summary of its LBO. That cost summary included annual payments of $55,000 for the RTF and $65,000 for the EAP in 2009, 2010, and 2011, but stated:

> "TriMet has not proposed to continue funding the [EAP] or the [RTF] in 2009, 2010, or 2011, and proposed to discontinue its funding of the Transit Exchange program altogether. Although this normally would show up as a cost savings to TriMet for the three programs in the amounts of $65,000 per year, $55,000 per year, and $18,000 per year respectively (i.e. the amount TriMet contributed to fund the three programs in 2008), TriMet continued to make payments in 2009, 2010 and 2011 in order to maintain the status quo."

[5] *ATU v. TriMet*, 24 PECBR at 450-451.

59. Until he read TriMet's cost summary on May 13, 2012, which was the day before the interest arbitration hearing, Tedesco did not know that TriMet was proposing to stop future payments to the EAP and RTF. Before this time, ATU International Vice President Heintzman had believed that TriMet was proposing to make annual payments to the EAP and RTF of $65,000 and $55,000 respectively, as set out in the 2003-09 Agreement.

60. In his interest arbitration award, Arbitrator Gaba did not address the EAP or the RTF.

61. On August 1, 2012, Executive Director Stedman notified ATU President Hansen that TriMet would not make further payments to the EAP or RTF based on the interest arbitration award. TriMet did not request that ATU return the funds that TriMet had deposited in the EAP or RTF in 2009, 2010, and 2011.

Pension Plan - Retiree Benefit Multiplier

62. The 2003-09 Agreement provided that retirement benefits for employees who retired after February 1, 1992, would be calculated using a $42.00 per month benefit multiplier. The $42.00 benefit multiplier was then adjusted each September 1 by the amount of the general employee wage increase during the prior year. An employee's initial retirement benefit was determined by multiplying the benefit multiplier in effect at the time of the employee's retirement by their years of service. As of September 1, 2009, the existing benefit multiplier was $72.96.

63. On September 1, 2010, pursuant to the *status quo* established by the 2003-09 Agreement, TriMet increased the $72.96 benefit multiplier by 3.0 percent to $75.15. The increase was based on the total of general wage increases for employees of 0 percent on December 1, 2009 and 3.0 percent on June 1, 2010.

64. The parties' 2003-09 Agreement also provided for existing retirees' benefits to be increased by any general wage increases for employees. As a result, in February 2011, TriMet increased existing retirees' pension benefits by a COLA of 3.0 percent.

65. TriMet did not increase the benefit multiplier in September 2011 or apply a COLA to retirement benefits in February 2012.

66. In its second revised final offer, TriMet proposed that retirement pay for active employees hired before April 1, 2012, would be based on $42.00 per month for each full year of service. TriMet deleted the language that provided for the $42.00 benefit multiplier to be adjusted each year on September 1 by the amount of any employee general wage increase.

67. On April 16, 2012, ATU notified bargaining unit members that TriMet had proposed to reduce the current benefit multiplier of $75.15 per month to $42.00 per month.

68. On April 18, 2012, Executive Director Stedman sent a letter to ATU President Hunt, which stated, in part, "ATU well knows that the base rate is adjusted annually and that the current rate is $75.15. The $42 base amount is the figure stated in the expired contract. TriMet

neither proposed to change the base amount nor did it propose to reduce the currently applicable amount of $75.15."

69. Sometime after April 18, 2012, ATU Attorney Julie Falender and TriMet Attorney Collier had several communications about TriMet's retirement proposal. Falender asked if TriMet was proposing that the benefit multiplier continue at its current rate for each year of service or revert back to $42.00 per month for each year of service. Collier responded that TriMet was proposing to continue the benefit multiplier at its current rate for each year of service. When Falender asked Collier to provide written confirmation, Collier gave her a copy of Stedman's April 18 letter to Hunt.

70. On April 20, 2012, General Manager McFarland notified employees that "[t]he pension for vested union employees is calculated at $75.15 per year of service. This has not changed and TriMet has not proposed to change or reduce it."

71. In its LBO, TriMet proposed that the benefit multiplier for "retirement pay will be adjusted based upon the amount of any specified general wage increase (whether actual or percentage) on February 1, 1992, and each February 1 thereafter, during the life of this Agreement."

72. During the arbitration hearing, TriMet did not present any evidence indicating that the retroactive implementation of its LBO applying the general wage increases to the benefit multiplier on February 1, rather than September 1, would decrease the existing $75.15 benefit multiplier or affect current retirees' benefits.

73. After the interest arbitration award was issued, TriMet recalculated the benefit multipliers in order to retroactively determine the retirement benefits for employees who retired between November 2009 and the issuance of the arbitration award. TriMet increased the $72.96 benefit multiplier that was effective on September 1, 2009 by the general wage increases of 0 percent effective February 1, 2010; 3.51 percent effective February 1, 2011; and 4.57 percent effective February 1, 2012.[6] This changed the benefit multiplier for employees retiring during the periods specified below, as follows:

a) from September 2010 through January 2011 - decreased from $75.15 to $72.96;
b) from February 2011 through August 2011 - increased from $75.15 to $75.52;
c) from September 2011 through January 2012 - decreased from $77.40 to $75.52; and
d) from February 2012 through August 2012 - increased from $77.40 to $78.97.

74. The following table shows how TriMet calculated the benefit multipliers used to determine the benefit multiplier before and after the interest arbitration award was issued:

[6]Although the COLA for the 2009 included a 0.73 percent in June 2009 and a 0 percent in December 2009, TriMet only applied the 0 percent COLA to the $72.96 benefit multiplier to calculate the February 1, 2010 rate because it had previously applied the 0.73 percent COLA on September 1, 2009 to calculate the $72.96 rate.

Date	General Wage Increases	Pre-Award Change to Benefit Multiplier	Pre-Award Benefit Multiplier	Post-Award Change to Benefit Multiplier	Post-Award Benefit Multiplier
12/1/08	2.27%				
6/1/09	0.73%				
9/1/09		3.0%	$72.96		$72.96
12/1/09	0.00%				
2/1/10				0.00%	$72.96
6/1/10	3.00%				
9/1/10		3.00%	$75.15		
12/1/10	0.51%				
2/1/11				3.51%	$75.52
6/1/11	2.49%				
9/1/10		3.00%	$77.40		
12/1/11	2.08%				
2/1/12				4.57%	$78.97
6/1/12	1.23%				
9/1/12		3.33%	$79.96		

75. On August 27, 2012, TriMet notified the retirees who had retired on February 1, 2010 (or who had started collecting retirement benefits on or after that date) about the retroactive effect on their benefits, based on changes to the benefit multiplier and the COLA adjustments to their pension payments in the amounts of 3.51 percent effective February 1, 2011, and 4.57 percent effective February 1, 2012.

76. Between 40 to 45 employees retired between September 1, 2009 and February 1, 2011. Patricia Butler was an ATU bargaining unit member who retired on November 26, 2010. When she retired, TriMet calculated Butler's retirement benefit using a benefit multiplier of $75.15, which resulted in a monthly joint annuity benefit of $1,795.86. In February 2011, TriMet increased Butler's monthly benefit by a 3.0 percent COLA and began paying her $1,849.74 per month.

77. After the arbitration award was issued, TriMet revised Butler's benefit calculation based on a benefit multiplier of $72.96, which resulted in an initial monthly joint annuity benefit of $1,745.53. TriMet then increased Butler's monthly benefit in February 2011 by a 3.51 percent COLA, for a monthly benefit of $1806.80, and again increased the monthly benefit in February 2012 by a 4.57 percent COLA, for a monthly benefit of $1,889.37. TriMet calculated that Butler had been paid $386.55 more in retirement benefits than she would have been entitled to under TriMet's LBO and subsequent arbitration award, but it did not seek to recoup the overpayment.

78. If TriMet had not reduced Butler's benefit multiplier and had applied the retroactive COLA increases of 3.51 percent in February 2011 and 4.57 percent in February 2012 to Butler's original retirement benefit of $1,795.86, she would have been entitled to a monthly

benefit of $1,795.86 from November 2010 through January 2011, $1,858.89 from February 2011 through January 2012, and $1,943.87 from February 2012 through January 2013.

Communications on Recoupment of Insurance Retroactive Premium Costs

79. On July 13, 2012, Executive Director Stedman contacted ATU's Hansen to seek agreement on how to implement whichever LBO was awarded in a manner that offered the best tax advantage to employees. Stedman explained that under either TriMet's or ATU's LBO, TriMet owed employees for retroactive wage increases and employees owed TriMet for retroactive insurance costs. Stedman proposed that TriMet deduct the amounts that employees owed TriMet from amounts that TriMet owed employees. Stedman also provided Hansen with a proposed Memorandum of Agreement setting out this arrangement.

80. On July 13, 2012, ATU's Hansen responded to Stedman that he did not believe that employees owed TriMet anything under its LBO insurance proposal and further stated that neither ATU nor the employees would authorize TriMet to deduct anything from the retroactive wages that TriMet owed employees.

81. On approximately July 16, 2012, after Arbitrator Gaba awarded TriMet's LBO, ATU's Hansen notified bargaining unit employees that ATU intended to pursue legal action regarding the arbitration award. He further stated:

> "It is very likely that TriMet will attempt to get you to sign an authorization for them to deduct past health insurance premium costs from the wage increases TriMet owes you. DO NOT, UNDER ANY CIRCUMSTANCES, SIGN SUCH AN AUTHORIZATION.
>
> "* * * * *
>
> "TriMet management is likely to threaten you with legal action should you refuse to sign the authorization. TriMet would have to sue every single union member individually. It would have a hard time winning such a case when the arbitrator has said, so many times, that such a deduction is likely illegal." (Emphasis in original.)

On July 23, 2012, McFarlane notified employees that the arbitration award

> "calls for employees who were in the Regence Plan at any time from December 1, 2009 to now to move to what is called a 90/10 plan. Because the move is retroactive, those employees also will owe money to TriMet for the value of out-of-pocket expenses they should have been paying under the Regence 90/10 plan. It will take some time to calculate the 'true up,' especially for employees who participated in multiple medical plans since December 2009."

82. On July 26, 2012, ATU filed a Second Motion to Compel Compliance in Case No. UP-016-11, alleging that TriMet illegally intended to deduct retroactive health insurance

premium costs from employees' retroactive wage payments. On August 27, 2012, after this Board notified ATU of its intent to dismiss the Motion, ATU withdrew the Motion.

83. On September 19, 2012, Stedman sent ATU's Hansen sample letters that TriMet had prepared to send employees and retirees regarding the retroactive implementation of TriMet's health insurance proposal. In the sample letters, TriMet provided employees with an accounting of the difference in premium costs between the medical plan(s) they had worked under since December 2009 and the plan that had been awarded in interest arbitration. Some letters notified employees of how much they owed TriMet and the employee's option to deduct this amount from their wages or pay the amount by personal check. In addition, the sample letter stated, "[i]f you do not write a personal check or sign the payroll deduction authorization form, TriMet will treat this as a failure to pay a legal debt. TriMet will exercise its right to collect the money owed through legal process and retains its right to impose appropriate discipline." The letters showed that employees owed TriMet various amounts between $20.00 and $7,080.59. TriMet never sent these letters to the employees.

84. Also on September 19, 2012, ATU notified employees and retirees that TriMet would be contacting them to demand repayment of prior premiums costs. ATU also indicated that it intended to take legal action against TriMet. ATU stated "[i]n the meantime, we ask that you cooperate with and support our actions on your behalf by NOT responding to TriMet's letter." ATU also requested that employees "stand together in solidarity and refuse to respond to TriMet's payment demand until such time as we obtain a judicial decision on this latest installment of TriMet gone crazy."

CONCLUSIONS OF LAW

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

2. TriMet violated ORS 243.672(1)(e) by amending its last best offer (LBO) health insurance proposal at the interest arbitration hearing.

3. TriMet violated ORS 243.672(1)(e) by unilaterally changing the *status quo* when it decided to discontinue payments to the RTF and EAP.

4. TriMet did not otherwise violate the Public Employee Collective Bargaining Act (PECBA), as alleged by ATU.

5. ATU did not violate ORS 243.672(2)(b), (c), or (d), as alleged by TriMet.

DISCUSSION

Health Insurance and Pension Benefits (Defined Contribution Plan)

ATU first contends that TriMet committed *per se* violations[7] of subsection (1)(e) by amending its LBO at the interest arbitration hearing with respect to: (1) its health insurance proposal; and (2) its pension proposal.[8] TriMet responds that its LBO was not amended in either respect. We agree with ATU regarding the health insurance proposal, but with TriMet concerning the pension proposal.

Under ORS 243.746(3) and OAR 115-040-0015(7)(g), parties are required to exchange their LBOs at least 14 days before the date of an interest arbitration hearing, and, with exceptions not relevant here, may not thereafter change their LBOs. ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer or its designated representative to "[r]efuse to bargain collectively in good faith with the exclusive representative." Although we generally analyze claims of bad-faith-bargaining by looking at the totality of a party's bargaining conduct, we have recognized that some bargaining conduct is so inimical to the bargaining process that it amounts to a *per se* violation of the obligation to bargain in good faith.[9] *International Association of Firefighters Local #1431 v. City of Medford*, Case Nos. UP-32/35-06, 22 PECBR 198, 206-07 (2007). For example, we have found the following to constitute *per se* violations of ORS 243.672(1)(e): (1) unilaterally implementing a change in a mandatory subject of bargaining; (2) submitting a new proposal in mediation, which had not been subjected to bargaining; and (3) submitting a new proposal in a final offer, without subjecting that proposal to bargaining. *Dallas Police Employees Association v. City of Dallas*, Case No. UP-33-08, 23 PECBR 365, 378 n 7 (2009); *see also City of Portland v. Portland Police Commanding Officers Association*, Case Nos. UP-19/26-90, 12 PECBR 424, 464-65 (1990).

Today, we hold that a party that changes its previously-submitted LBO in violation of ORS 243.746(3) and OAR 115-040-0015(7)(g) commits a *per se* violation of the obligation to bargain in good faith under ORS 243.672(1)(e) or (2)(b). This holding is consistent with our precedent in which we found *per se* violations for including a new issue in a final offer, implementation, or mediation (*Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamamin v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 755-56 (2007)) and for including a new issue in an LBO submitted for interest arbitration (*International Association of Firefighters, Local 2285 v. Douglas County Fire District #2*, Case No. UP-3-03, 20 PECBR 235, 241 (2003); *Marion County Law Enforcement*

[7]We limit our discussion to specific *per se* violations, as alleged by ATU in the agreed-upon statement of the issues.

[8]ATU also contends that TriMet violated subsection (1)(e) by not "fully explaining" its health insurance proposal before the hearing. We have not held that a party *per se* violates the duty to bargain in good faith by failing to "fully explain" a particular proposal, and we do not do so here.

[9]As noted above, we limit our discussion to the specific *per se* violations alleged by ATU in the agreed-upon statement of the issues.

Association v. Marion County and Marion County Sheriff's Office, Case No. UP-65-92, 14 PECBR 25, 29-31 (1992)).[10] The rationale behind that precedent is that:

> "The PECBA bargaining process is a series of carefully structured steps designed to help the parties identify and narrow their disputes. It begins with table bargaining and then moves to mediation, final offers, cooling off, and [for strike-permitted employees,] self help." *Blue Mountain Community College*, 21 PECBR at 754.

For strike-prohibited employees, as here, the PECBA bargaining process includes a final step of binding interest arbitration, rather than self help. ORS 243.742. Although the final dispute resolution procedures of the PECBA bargaining process are different for strike-permitted and strike-prohibited employees, both procedures share the same goal, which is the signing of a collective bargaining agreement negotiated in good faith between public employers and the exclusive representatives of their employees.

Likewise, changing an LBO runs counter to the statutorily-defined PECBA bargaining process for strike-prohibited employees. Under that process, once the mediation process fails to produce an agreement, binding interest arbitration is initiated. ORS 243.742. After selection of an arbitrator and the establishment of a hearing date, the parties must exchange their LBOs "on all unresolved mandatory subjects" not less than 14 days before the date of the hearing. ORS 243.746(3). The statute also contemplates, however, that a party might change "its position within 24 hours of the 14-day deadline," in which case, "the other party will be allowed an additional 24 hours to modify its position." *Id.* Other than that proviso, "neither party may change" its LBO package, unless the parties stipulate to do so. *Id.*; *see also* OAR 115-040-0015(7)(g).

Permitting a party to change its LBO in violation of ORS 243.746(3) and OAR 115-040-0015(7)(g) would render that statute and rule largely nugatory. Moreover, given that the arbitrator must award "only one of the last best offer packages submitted by the parties" (ORS 243.746(5)) and may not rewrite or modify any LBO, permitting a party to change its LBO past the permitted statutory period severely undermines the integrity of the interest arbitration. Consequently, like other similar late-stage changes in bargaining positions, such a change is so inimical to the bargaining process that it amounts to a *per se* violation of the obligation to bargain in good faith, even without a showing of subjective bad faith. *See City of Medford*, 22 PECBR at 206-7.

Therefore, we turn to whether TriMet changed its LBO package, specifically in reference to its health insurance proposal. ATU contends that TriMet effectively amended its LBO proposal on health insurance by adding a retroactivity provision, as well as terms that would permit TriMet to recoup money from bargaining unit members, going back to December 1, 2009. ATU argues that such amendments violate subsection (1)(e). According to TriMet, there was no

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[10]In this line of cases, we have described a "new issue" as one that is not "reasonably comprehended within" prior discussions or bargaining positions, or that does not "logically evolve" from such discussions or positions. *Blue Mountain Community College*, 21 PECBR at 757-58.

official "amendment" of its LBO; rather, TriMet just provided more details about how it intended to implement its proposal. We agree with ATU.

TriMet's LBO proposed effective dates of December 1, 2009 through November 30, 2012. Some of the specific LBO proposals, however, stated that the terms of that proposal would be effective on "the first day of the month" after Arbitrator Gaba's award or would be effective as of the "issuance" of that award. With respect to health insurance, TriMet's LBO did not contain a specific effective date of the proposal. The proposal itself, however, stated that the "benefits and specific coverage" of the proposed health plans would be "as set forth in the Active Employee Health Benefits Summary * * *." The referenced summary identified a Regence plan and a Kaiser plan, and incorporated those plans into the proposed LBO. The Regence Plan listed an effective date of January 1, 2011. The Kaiser plan included a summary of medical benefits effective January 1, 2011 through December 31, 2011, and a summary of medical benefits effective January 1, 2012 through June 30, 2012.

On May 8, 2012, six days before the scheduled May 14 interest arbitration, ATU counsel inquired about the effective date of TriMet's LBO health insurance proposal. On May 9, TriMet counsel left a voicemail for ATU's counsel, stating that the proposal was effective December 1, 2009.

At the interest arbitration hearing, TriMet submitted extensive evidence in the form of documents and witness testimony in support of its LBO health insurance proposal. That evidence demonstrates that TriMet's proposal was retroactive to December 1, 2009. For example, under its proposal, TriMet presented evidence that it intended to recoup money from bargaining unit members to pay for increased health insurance premiums. ATU protested, claiming that TriMet's LBO health insurance proposal did not state that it was retroactive or that, under that proposal, TriMet would be able to recoup money from bargaining unit members. ATU further argued that TriMet had not specified how it intended to implement the retroactive proposal or recoup money from bargaining unit members under its LBO health insurance proposal.

TriMet's LBO on health insurance is vague regarding the effective date. Although the LBO proposal itself includes an effective date of December 1, 2009, various other proposals in that document contained different effective dates. Moreover, the plan summaries indicate varying effective dates of January 1, 2011 and January 1, 2012. No plan summaries were attached to the proposal with an effective date of December 1, 2009. Even more problematic, however, is the absence of a recoupment provision in TriMet's LBO; that additional contractual provision was not announced until after TriMet submitted its LBO, and the methodology by which TriMet would capture that money was not explained until the third day of the interest arbitration hearing.

We find that TriMet substantively changed its LBO regarding health insurance to include both retroactivity and recoupment provisions. We disagree with TriMet's assertion that those provisions merely provided more "detail" regarding its health insurance proposal and did not amount to a "change." Although TriMet is correct that a party in an interest arbitration proceeding may provide additional evidence or explanation as to why its LBO should be implemented, that is not an accurate characterization of what TriMet did in this matter. TriMet's LBO failed to contain sufficient language relative to what it advanced at the interest arbitration

hearing (namely, provisions stating that its proposal was retroactive and that it would be entitled to recoup the differences in premiums paid with what "should have" been paid in the event that its LBO was implemented).

TriMet also argues that it attempted to "reach out" to ATU after the arbitration hearing in an attempt "to reach an agreement regarding how to recoup employee health insurance contributions and to minimize the tax impact on [employees]." TriMet asserts that ATU rebuffed those efforts. The difficulty with TriMet's argument rests with when it first attempted to "reach out" to ATU to discuss this issue—namely, *after* it had submitted its LBO and *after* the arbitration proceeding. Although we acknowledge that TriMet belatedly attempted to collectively bargain this issue, it does not cure TriMet's actions in bypassing the collective bargaining process and not subjecting that proposal "to the crucible of the PECBA's dispute resolution process." *See Blue Mountain Community,* 21 PECBR at 758; *see also Roseburg Education Association v. Roseburg School District No. 4*, Case No. UP-26-85, 8 PECBR 7938, 7956-57 (1985).

Therefore, for the foregoing reasons, we find that TriMet committed a *per se* violation of ORS 243.672(1)(e) when it amended its LBO regarding health insurance at the interest arbitration.

We turn to the pension proposal. TriMet's LBO included a proposal that active employees "hired by TriMet on or after first day of the month following the date of the Arbitrator's decision, shall only be eligible for and become a participant in a Defined Contribution Plan, which shall have the same elements as that currently offered to all TriMet non-union employees."

ATU alleges that TriMet substantively amended the pension proposal at the interest arbitration hearing by introducing never-before-heard details about that proposal. Specifically, ATU argues that TriMet provided testimony at hearing specifying: (1) that the union and non-union plan would be "the same"; (2) who the plan manager would be; and (3) that employees would have the ability to self-direct investments.[11]

We disagree that these details constituted substantive changes to the LBO pension proposal. ATU's first argument is dependent on our finding that the phrase "the same elements," as used in the LBO, is different from "the same." We decline to split that semantic hair. Rather, we find that the phrase "the same elements" adequately conveyed to ATU that the LBO pension proposal for union employees would be "the same" as "that currently offered to all TriMet non-union employees."

We also disagree with ATU's contention that additional details submitted at the interest arbitration regarding the pension plan (*e.g.*, the identity of the plan manager and that employees could self-direct investments) constituted a substantive change in the proposal itself. Unlike the health insurance proposal discussed above, the evidence submitted at the interest arbitration

[11]ATU also contends that TriMet did not "fully explain" its LBO proposal. As noted above regarding the health insurance proposal, we do not find that such an allegation, even if true, constitutes a *per se* violation of subsection (1)(e).

hearing regarding the pension proposal is better characterized as explanatory in nature, designed to assist the arbitrator in making an informed assessment about the proposal. The added details about the plan did not substantively change the terms of that plan. Finally, we note that the specifics of the "non-union plan" as identified in the LBO was available to all employees and union officers on TriMet's website.

In sum, we find that TriMet did not substantively change its LBO pension proposal after it was exchanged with ATU. Therefore, we will dismiss this claim.

Insurance Code/Prohibited Subjects of Bargaining

We next turn to ATU's allegation that TriMet violated ORS 243.672(1)(e) by including prohibited subjects of bargaining in its LBO and then submitting those prohibited subjects to interest arbitration. ATU specifically alleges that TriMet's LBO violated certain statutes (discussed below) "by informing employees that they would have to pay the difference between the costs of premiums, co-pays, deductibles, and out-of-pocket expenses under the prior health insurance plans and the cost of the [LBO] insurance plans."

A proposal that is prohibited by law is considered a prohibited subject of bargaining. *Service Employees Int'l Union Local 503 v. DAS*, 183 Or App 594, 598, 54 P3d 1043 (2002). Thus, proposals that necessarily violate statutes are prohibited, and insisting on an illegal, and therefore prohibited, subject of bargaining (even short of impasse) constitutes bad-faith bargaining.

Here, ATU contends that TriMet's LBO violated ORS 731.036(6)(d), ORS 743.874, and ORS 743.876. We address each contention, in turn.

ORS 731.036 provides a list of "[p]ersons completely exempt from application of Insurance Code." As relevant to ATU's assertion that TriMet's LBO on health insurance violates subsection (6)(d), that provision exempts

> "[c]ities, counties, school districts, community college districts, community college service districts or districts, as defined in ORS 198.010 and 198.180, that either individually or jointly insure for health insurance coverage, excluding disability insurance, their employees or retired employees, or their dependents, or students engaged in school activities, or combination of employees and dependents, with or without employee or student contributions, if all of the following conditions are met:
>
> "(d) Enrollees must be provided copies of summary plan descriptions."

By its terms, ORS 731.036(6)(d) exempts certain entities from the Insurance Code, so long as certain provisions are met. The statute does not create any substantive rights. Thus, we do not see how TriMet's LBO on health insurance violates that provision. Ostensibly, ATU is arguing that TriMet was required by ORS 731.036(6)(d) to provide all bargaining unit members with a summary plan description as part of its LBO health insurance proposal, and that TriMet's

failure to do so rendered that proposal "illegal." Simply put, that is not what ORS 731.036(6)(d) says; rather, that subsection sets forth what certain entities must provide to be exempt from the Insurance Code. Therefore, ORS 731.036(6)(d) is inapposite, and we we will dismiss ATU's allegation that TriMet violated ORS 243.672(1)(e) by submitting a proposal at interest arbitration purportedly in violation of ORS 731.036(6)(d).

We discuss ORS 743.874 and ORS 743.876 in tandem because ATU's reliance on these provisions for its bad-faith bargaining charge under ORS 243.672(1)(e) is defective for the same reasons. ORS 743.874 governs insurer estimates of costs for *in-network procedures* or services, and provides that an

> "insurer offering a health benefit plan as defined in ORS 743.730 must establish a procedure for providing to an enrollee in the plan a reasonable estimate of an enrollee's costs for an in-network procedure or service covered by the enrollee's health benefit plan, in advance of the procedure or service, when an enrollee or an enrollee's authorized representative provides the following information to the insurer:
>
> > "(a) [t]he type of procedure or service;
> > "(b) [t]he name of the provider;
> > "(c) [t]he enrollee's member number or policy number; and
> > "(d) [i]f requested by the insurer, the site where the procedure or service will be performed." ORS 743.874(1).

Other subsections of ORS 743.874 set forth what must be included in a cost estimate, the procedures that must be covered, certain disclosures, and how the information in the section must be made available.

ORS 743.876 is a related statute that governs estimates of costs that insurers must provide for *out-of-network* procedures or services. It contains similar requirements as ORS 743.874, with the caveat that the requirements concern "out-of-network" (rather than "in-network") procedures or services.

Both ORS 743.874 and ORS 743.876 concern an insurer's obligations to establish a procedure for providing enrollees with reasonable advance cost estimates for certain procedures, once an enrollee provides notice of a future procedure. We fail to see (and ATU has not established) the relationship between the Insurance Code provisions and the alleged violation of ORS 243.672(1)(e), which requires TriMet to bargain in good faith with ATU. To begin, the cited provisions apply to the entities that provide health insurance to ATU's members, *i.e.*, Regence and Kaiser, and not to TriMet itself. Even assuming that these provisions could be interpreted as applying to TriMet, ATU has not submitted evidence establishing that TriMet's LBO on health insurance violates either statute. That proposal does not contain a provision permitting TriMet (or its insurers) to act in violation of ORS 743.874 or ORS 743.876. Therefore, we will dismiss ATU's claim alleging that TriMet violated ORS 243.672(1)(e) by submitting an allegedly "illegal" proposal at interest arbitration concerning ORS 743.874 and ORS 743.876.

We also will dismiss ATU's complaint that TriMet violated ORS 243.672(1)(e) by "implementing an unenforceable collective bargaining agreement." That assertion is contingent on finding that TriMet's LBO proposal, which was awarded by Arbitrator Gaba, violated the Insurance Code. As set forth above, we have concluded that ATU has not established that TriMet's LBO proposal violated that Code. Therefore, we will dismiss this allegation.

Pension Plan - Retiree Benefit Multiplier

We next address ATU's argument that TriMet bargained in bad faith in violation of ORS 243.672(1)(e) by allegedly "misleading ATU and the arbitrator as to the true impact of its proposal regarding the retiree pension base rate." According to ATU, after Arbitrator Gaba issued his award, "TriMet learned that there were unintended consequences associated with retroactively changing retirees' monthly pension rates," but TriMet nevertheless retroactively implemented such a change "to the detriment of ATU retirees." We disagree with ATU's assertions.

We assume, without deciding, the correctness of the premise of ATU's argument—namely, that misleading a party or an interest arbitrator regarding a proposal or LBO is inconsistent with the requirement to bargain in good faith. This record, however, does not establish that TriMet misled either ATU or the arbitrator regarding the retiree pension base rate. To the contrary, the record shows that TriMet's LBO proposed changing the date of the pension benefit multiplier from September 1 to February 1 for each year of the agreement. The record further shows that TriMet did not present evidence at the interest arbitration on the effect (if any) of changing the multiplier date. Indeed, as even ATU recognizes, it was not until after Arbitrator Gaba issued his award that TriMet first realized that changing the multiplier date from September to February would affect monthly pension rates. Thus, we fail to see, as ATU alleges, how TriMet deceived ATU or Arbitrator Gaba regarding an "unintended consequence" of changing the benefit multiplier date.[12]

RTF and EAP

ATU next alleges that TriMet violated ORS 243.672(1)(e) by unilaterally altering the *status quo* when it discontinued payments to the RTF and EAP after Arbitrator Gaba issued his award. For the following reasons, we agree with ATU that TriMet's actions regarding the RTF and EAP violated subsection (1)(e).

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer or its designated representative to "[r]efuse to bargain collectively in good faith with the exclusive representative." In general, a public employer violates its duty to bargain in good faith under subsection (1)(e) if it makes a unilateral change in the *status quo* concerning a subject that is mandatory for bargaining. An employer must generally bargain about its decision to change a

[12]We further note that TriMet's LBO included the benefit multiplier date change, and that neither party presented evidence or argument on the effect of that date change in the interest arbitration proceeding. Thus, the record is devoid of evidence that either party believed that merely changing the date of the benefit multiplier would have an effect, much less a significant effect, on the monthly pension benefits ultimately received.

mandatory subject of bargaining before making the decision. Although an employer is not required to bargain about a decision to change a permissive subject, it is obligated to bargain regarding the impact of that decision on mandatory subjects before implementing the change. *Three Rivers Ed. Assn. v. Three Rivers Sch. Dist.*, 254 Or App 570, 575 (2013).

When reviewing an allegation of an unlawful unilateral change, we consider: (1) whether an employer made a change to the *status quo*; (2) whether the change concerned a mandatory subject of bargaining; and (3) whether the employer exhausted its duty to bargain. *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177 (2013) (*AOCE*) (citing *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03, 20 PECBR 890, 897 (2005)); *see also Jackson County Sheriff's Employees' Association v. Jackson County Sheriff's Department*, Case No. UP-023-11, 25 PECBR 449, 457 (2013). We need not apply our analysis in a mechanical manner, however, and may proceed to a particular step if that step will be dispositive of the issue. *Jackson County*, 25 PECBR at 457; *see also Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-24-09, 24 PECBR 730, 761-62 (2012).

We begin with the "preliminary step in any unilateral change claim—whether there has been a change in the status quo." *AOCE*, 353 Or at 184. To make that determination, we consider "[w]hether the parties have, by their words or actions, defined their rights and responsibilities with regard to a given employment condition." *Id.* (quoting *Coos Bay Police Officers' Association v. City of Coos Bay and Coos Bay Police Department*, 14 PECBR 229, 233 (1993)). In doing so, we look "to a variety of sources, including not only the terms of a current or an expired collective bargaining agreement, but work rules, policies, and an employer's 'pattern of behavior."' *AOCE*, 353 Or at 184 (quoting *Coos Bay*, 14 PECBR at 233); *Jackson County*, 25 PECBR at 457-58.

Here, the parties dispute the *status quo* regarding TriMet's payments to the RTF and EAP. In our prior order, we determined that TriMet's final offer proposals regarding the RTF and EAP violated ORS 243.672(1)(e) because those proposals impermissibly introduced "new issues" into the bargaining process at a late stage. *ATU v. TriMet*, Case No. UP-016-11, 24 PECBR 412, 449-51 (2011). In doing so, we concluded that the expired 2003-2009 agreement required TriMet to "annually increase its payments" to those funds by $2,000 each year. *Id.* As of 2008, TriMet was obligated to pay $55,000 to the RTF and $65,000 to the EAP.[13] We further concluded that by proposing in its final offer "to eliminate annual increases" in those payments, TriMet's final offer proposals impermissibly "capped" those payments at those 2008 amounts. *Id.* Consequently, we ordered TriMet to cease and desist from including new issues in its final offer, and to submit a revised final offer that did not include proposals that introduced "new issues." *Id.* at 451-53. We further ordered TriMet to eliminate its proposal to cap the contribution amounts to the RTF and EAP at the 2008 level. *Id.* at 453.

[13]Because the payments were required to be paid each December and the agreement expired November 30, 2009, December 2008 reflects the last payments owed by TriMet under that agreement.

Consistent with our prior order, TriMet then submitted a revised final offer that retained the current contract language regarding the RTF and EAP. As we previously stated in our prior final order, that language required TriMet to eliminate capping contributions to the RTF and EAP at the 2008 level and restore the annual $2,000 increases. As such, consistent with our prior order, we interpret TriMet's revised final offer and LBO proposals to continue those annual $2,000 increases to the RTF and EAP.[14] Thus, when Arbitrator Gaba awarded TriMet's LBO, TriMet was obligated to continue payments to the RTF and EAP consistent with those increases.

Instead, in August 2012, TriMet announced that it was *ceasing* payments altogether, purportedly because of Arbitrator Gaba's award.[15] Specifically, TriMet contends that its termination of the payments to the RTF and EAP was lawful because its LBO, which was awarded by Arbitrator Gaba, eliminated those payments altogether. Thus, according to TriMet, Arbitrator Gaba's award set a new *status quo* with respect to such payments—*i.e.*, that no payments were required.

We disagree with TriMet's contentions, as doing so would necessitate finding that TriMet's revised final offer and LBO proposed *ceasing* all payments to the RTF and EAP. Such a finding, however, would be incompatible with our prior order, which barred TriMet from even capping those amounts in its revised final offer, much less eliminating them entirely. Therefore, consistent with our prior order, we interpret TriMet's revised final offer and LBO as continuing to propose annual $2,000 increases to the RTF and EAP. Thus, when Arbitrator Gaba awarded TriMet's LBO, TriMet was required to pay those annual increases. Consequently, when TriMet unilaterally decided to stop payments to the RTF and EAP in August 2012, it unlawfully changed the *status quo* and violated subsection (1)(e).

Our determination that TriMet made unlawful unilateral changes regarding the RTF and EAP payments is further supported by TriMet's conduct in drafting and presenting its LBO. Specifically, TriMet's LBO proposed "current contract language except" certain specified "changes." The LBO also stated that all changes were "set forth in the attached pages in 'track-changes' format," followed by a list of identified specific changes. None of those specifically-identified "changes," however, concerned the RTF or EAP. Moreover, when TriMet made changes to the contract language in the previous agreement, it indicated as much in its LBO with "track changes" markers, such as striking out proposed deletions and underlining proposed additions. In TriMet's LBO, the provisions regarding the RTF and EAP were left untouched. As noted above, the "current contract language" (as determined by our prior final order) required TriMet to continue payments to the RTF and EAP with annual $2,000 increases. Finally, Arbitrator Gaba's award made no mention of TriMet purportedly changing its obligation to pay $2,000 annual increases to the RTF and EAP. Thus, we conclude that TriMet's LBO

[14]TriMet does not assert that it made a change in its revised final offer and its LBO regarding payments to the RTF and EAP.

[15]We note that, during the hiatus period, TriMet continued to pay only the *2008* contribution amounts (*i.e.*, $55,000 to the RTF and $65,000 to the EAP) in 2009, 2010, and 2011. ATU did not allege that TriMet violated subsection (1)(e) by unilaterally changing the *status quo* in 2009, 2010, and 2011 by not paying the annual $2,000 increases in December of each year. Therefore, we limit our discussion to the August 2012 unilateral change of stopping the payments entirely.

proposal of "current contract language" (except as otherwise identified), continued those annual $2,000 increases.

In sum, consistent with our prior order, when Arbitrator Gaba awarded TriMet's LBO, that LBO included continued payments to the RTF and EAP, with annual $2000 increases. Consequently, in August 2012, when Arbitrator Gaba awarded TriMet's LBO, the *status quo* was that TriMet would pay $63,000 to the RTF and $73,000 to the EAP in December 2012. There is no dispute that TriMet changed that *status quo* by deciding in August 2012 not to make those payments. Moreover, TriMet does not dispute, and we find, that the change concerned a mandatory subject of bargaining, and that TriMet did not exhaust its duty to bargain. *See AOCE* 353 Or at 177. Therefore, we hold that TriMet violated ORS 243.672(1)(e) by deciding, *before bargaining*, to unilaterally stop payments to the RTF and EAP. *See Three Rivers*, 254 Or App at 575 (an "employer must bargain about its decision to change a mandatory subject for bargaining *before* making the decision") (emphasis in original).[16]

Pension Plan - Retiree COLA Increases

We now turn to ATU's argument that TriMet violated ORS 243.672(1)(g) by proposing an "LBO that breached the 2003-2009 collective bargaining agreement." ORS 243.672(1)(g) makes it an unfair labor practice for an employer to "[v]iolate the provisions of any written contract with respect to employment relations * * *." We disagree with the premise of ATU's claim—namely, that an LBO *proposal* can, in and of itself, violate a provision of a prior collective bargaining agreement.[17] Simply put, an LBO *proposal to change* a prior contract

[16]We reject TriMet's argument that we lack the authority to decide the subsection (1)(e) unilateral change claim because ATU was purportedly required to exhaust the grievance process under a now-expired agreement. Where, as here, "a union alleges a violation of *non-contractual statutory rights* under subsections of ORS 243.672 *other than (1)(g) and (2)(d)*, this Board does not require parties to exhaust their grievance process." *Portland Police Association v. City Of Portland*, Case Nos. UP-25/26/27-11, 25 PECBR 481, 487 (2013) (emphases in original); *see also Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO v. Southwestern Oregon Community College*, Case No. UP-135-92, 14 PECBR 657, 663 (1993). Although we generally follow a practice of holding an unfair labor practice complaint in abeyance pending the resolution of a simultaneous grievance process, there is no such simultaneous grievance process pending in this matter that would cause us to hold this proceeding in abeyance. *See City of La Grande v. La Grande Police Association, Teamster Local 670*, Case Nos. C-40/45-81, 6 PECBR 4808, 4814 (1981) (it is our policy to postpone processing a subsection (1)(a) complaint while the parties are processing a pending grievance that addresses the issues raised in a complaint); *Oregon School Employees Association v. Astoria School District 1*, Case No. UP-52-91, 13 PECBR 474, 479 (1992) (it is this Board's practice to postpone processing a subsection (1)(e) unilateral change claim pending completion of a simultaneous grievance process). As ATU was not required to file a grievance regarding this claim, TriMet's assertion is without merit.

[17] There is a theoretical exception—an agreement could contain a provision prohibiting one party or the other from *proposing* a change to that provision (even after the contract expires). In that theoretical example, a proposal violating that contractual provision could violate subsection (1)(g).

provision does not *actually change* that provision—it merely proposes to do so; consequently, Therefore, we will dismiss this claim.[18]

Union Steward Pay

We next turn to ATU's allegation that TriMet "interfered with, restrained, or coerced ATU members in and because of the exercise of rights guaranteed in ORS 243.662, in violation of ORS 243.672(1)(a)."[19] ATU claims that TriMet violated subsection (1)(a) by "offering an LBO proposal that retaliates against ATU members for filing grievances"; that LBO proposed discontinuing the practice of TriMet paying union stewards to represent employees in grievance meetings.

ORS 243.672(1)(a) makes it unlawful for a public employer to interfere with, restrain, or coerce employees "in" or "because of" the exercise of rights guaranteed in ORS 243.662. ORS 243.662 guarantees public employees "the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations."

To determine if an employer violated the "because of" portion of subsection (1)(a), we examine the employer's reason for the disputed action. If the employer acted "because of" an employee's exercise of rights protected by the PECBA, the employer's actions are unlawful. *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000). In order to show a violation of the "because of" prong of subsection (1)(a), it is not necessary to demonstrate that an employer acted with hostility or anti-union animus. Nor must a complainant prove that the employer was motivated by an intent to restrain or interfere with protected rights. A complainant need only show that the employer took the disputed action because an employee exercised a protected right. *Portland Association of Teachers and Bailey v. Multnomah County School District #1*, Case No. C-68-84, 9 PECBR 8635, 8646 n 10 (1986).

When we analyze an employer's actions under the "in" the exercise portion of subsection (1)(a), the employer's motive is irrelevant. We focus only on the effect of the employer's actions on the employees. If the employer's conduct, when viewed objectively, has the natural and probable effect of deterring employees from engaging in PECBA-protected activity, the employer violates the "in" the exercise prong of subsection (1)(a). *Portland Assn. Teachers*, 171 Or App at 623-24. An "in" violation may be either derivative or independent. An employer who commits a "because of" violation also generally commits an "in" violation because the natural and probable effect of the employer's unlawful action is to chill the exercise of protected rights. An employer's actions may also independently violate the "in" the exercise prong. *Clackamas County Employees' Assn. v. Clackamas County*, 243 Or App 34, 40, 259 P3d 932 (2011).

[18] Consequently, we express no opinion on whether TriMet's ultimate implementation of its LBO proposal, pursuant to Arbitrator Gaba's award, violated ORS 243.672(1)(g).

[19] We assume, without deciding, that a (1)(a) violation can arise via a bargaining proposal.

We first consider whether TriMet decided to propose to stop paying union stewards to attend grievance meetings "because of" employees' exercise of protected rights. We begin our analysis by examining the record to determine the reason TriMet acted. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 741 (2004). This is a fact determination. *Portland Assn. Teachers*, 171 Or App at 626-27.

We then decide if TriMet's reasons were lawful or unlawful. If the reasons were lawful, we will dismiss the allegation. If the reasons are unlawful, or if a lawful reason is a pretext for unlawful conduct, we will find a violation of the "because of" prong of subsection (1)(a). If we find that the employer acted for both lawful and unlawful reasons, we apply a mixed motive analysis. Under that analysis, we determine whether TriMet's "unlawful motivation—as one of two or more coinciding reasons for the employment action—was a sufficient factor to attribute the decision to it." *Portland Assn. Teachers*, 171 Or App at 639. In other words, we determine "whether the employer would not have taken the disputed action but for the unlawful motive." *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06, 22 PECBR 212, 221 (2007).

Here, ATU contends that TriMet proposed to stop paying union stewards to attend grievance meetings because ATU filed "so many" grievances. According to ATU, filing grievances constitutes the exercise of "protected rights," and, therefore, any proposal issued "because of" the number of grievances filed necessarily violates subsection (1)(a).

TriMet contends that it made the proposal "to both reduce [its] costs and to make the grievance process more effective." According to TriMet, it "received little or no benefit from paying union stewards to represent employees in grievance step meetings * * *." Given TriMet's financial situation, TriMet contends that not paying union stewards to attend grievance meetings was a logical way to save money without affecting services provided to the public.

On this record, we agree with TriMet. The record shows that paying stewards to attend grievance meetings cost TriMet approximately $150,000 over a six-year period, not including lost production time. TriMet's representatives (McFarlan and Minor-Lawrence) testified that the proposal was made as part of a broader attempt to cut costs. Although those representatives also referenced the large number of grievances filed by ATU, the cost to TriMet for paying stewards to attend grievance meetings is interlinked with the number of grievances—*i.e.*, the more grievance meetings, the larger the cost to TriMet. After considering the record as a whole, we find that TriMet's proposal to no longer pay union stewards to attend grievance meetings was not "because of" employees exercising protected rights of filing grievances; rather, we find that the proposal was made "because of" the cost to TriMet and its conclusion that such payments yielded it little to no benefit. Therefore, we will dismiss this complaint.[20]

[20]Even if we concluded that TriMet made the proposal for "mixed motives," we would nevertheless dismiss the complaint. Specifically, we would determine that the overriding reason for the proposal was the cost savings, coupled with TriMet's belief that it realized no benefit from paying stewards to attend grievance meetings. That reason is lawful, and we would conclude that TriMet would have made the same proposal, regardless of any alleged unlawful motive (retaliation for ATU filing grievances on behalf of its members). *See Cove School District #15*, 22 PECBR at 221.

We next determine whether TriMet's proposal to discontinue the practice of paying union stewards to represent employees in grievance meetings violated the "in" the exercise of prong of subsection (1)(a). Having already dismissed the "because of" claim above, we do not find a derivative "in" the exercise of violation.

We must now decide whether ATU has established an independent "in" the exercise of claim under ORS 243.672(1)(a). As previously stated, in analyzing such a claim, we apply an objective standard to determine whether the natural and probable consequence of TriMet's proposal would be to chill employees in their willingness to engage in protected activities; neither motive nor the extent to which employees actually were coerced is controlling. *Clackamas County*, 243 Or App at 40; *Portland Assn. Teachers*, 171 Or App at 624.

We do not believe that the mere *proposal* to stop paying union stewards to represent employees in grievance meetings would have such natural and probable "chilling" consequences. Collective bargaining is a dynamic process. It is not uncommon for a party to engage in "hard bargaining" or to make proposals that the other party finds objectionable, inequitable, or harsh. "Bluff, bluster, and posturing, while not encouraged, are common." *Blue Mountain Community College*, 21 PECBR at 751. Both parties and the affected employees are generally aware of such bargaining tactics, particularly, where, as here, the parties are not strangers to the back-and-forth of bargaining.

Moreover, when bargaining for a new contract, both parties typically review terms and conditions in the existing or expiring contract and evaluate which terms they wish to retain, modify, or eliminate. Both parties often also consider adding new terms. A party likewise generally expects that the other will have its own position as to what the new collective bargaining agreement will look like. Although the existing or expiring agreement codifies current contractual rights, the parties are aware that the expiration of that agreement brings an end to those rights, unless retained by the successor agreement.

Thus, in most instances, it is unlikely that a mere bargaining proposal would have the natural and probable consequence of chilling employees in their willingness to engage in protected activities. Likewise, we find nothing exceptional regarding TriMet's proposal to discontinue the practice of paying union stewards to represent employees in grievance meetings, a practice that was contractually agreed to under the old, expired agreement. As set forth above, TriMet believed that it derived little to no benefit from that contractual obligation, and, consequently, proposed eliminating it from the successor agreement.

In asserting otherwise, ATU advances the following series of propositions that purportedly flow from TriMet's proposal: (1) ATU representatives had to spend additional time at TriMet facilities to accommodate grievance meetings and were "forced to use unpaid time to attend" those meetings; (2) because scheduling the grievance meetings is "more challenging," some ATU members are going into grievance meetings "without representation"; (3) because it is "more challenging to have representation at grievance meetings * * *, it is more challenging for bargaining unit members to exercise their PECBA-protected rights"; and (4) as a result, employees will be more reluctant in the future to exercise their protected rights. "In other words," according to ATU, "members would learn from this experience that, in the future, it will be more challenging for them to engage in certain protected activities."

We are not persuaded by ATU's contentions for multiple reasons. To begin, ATU's arguments are premised on the *implementation* of the LBO proposal that was awarded by Arbitrator Gaba; the stipulated issue, however, is whether the *proposal* violated subsection (1)(a). In any event, although the chain of events put forth by ATU is *possible*, we do not conclude that it is the *natural and probable consequence* of ATU's proposal. *See Oregon School Employees Association v. Central Point School District*, Case No. UP-1-88, 10 PECBR 532, 538 (1988) (employer's lawful promotion of a bargaining unit member did not violate subsection (1)(e) because, although it may have had the possible effect of chilling protected activity, it did not have the natural and probable effect of doing so). To hold otherwise would mean that employees would be naturally chilled in exercising their protected rights whenever an employer does not pay for a union steward to represent them in a grievance meeting. We do not believe that such a proposition is borne out in practice. In other words, we disagree with ATU that employees are naturally and probably chilled in the exercise of their protected rights when an employer does not pay for a union steward to attend a grievance meeting.

Consequently, because we conclude that, when objectively viewed, TriMet's proposal to discontinue paying union stewards for their participation in grievance meetings would not have the natural and probable consequence of chilling "union members generally in their exercise of protected rights," we will dismiss this claim. *See Portland Assn. Teachers*, 171 Or App at 624.

Finally, we address our dissenting colleague's assertion that we have "narrowly construed ATU's complaint and failed to consider all of the issues that were properly before us." According to the dissent, we should "have considered the issues raised by ATU in a more comprehensive manner" and "found additional violations of ORS 243.672(1)(e) and (1)(g)." This assertion, however, begs the question—what were the issues raised by ATU?

The record establishes that, after ATU filed its complaint, a veteran ALJ reviewed that complaint and identified the issues precisely as set forth in our order. The ALJ then informed the parties that she had so identified the issues and provided the parties with the opportunity to object to or modify those issues. Neither party elected to do so. Moreover, at the hearing, the ALJ again identified the issues as set forth above in our order, and *both parties agreed that those were the issues to be decided*. Finally, neither party requested before the hearing, during the hearing, after the hearing, or in submissions to this Board, to modify or expand the list of issues to include those addressed by the dissent. In that regard, the dissent stands alone.

To the extent that the dissent suggests that the parties' agreed-on identification of the issues is not the best source for determining the issues before us, we respectfully disagree. Moreover, even if we were to agree with the dissent to look elsewhere to find "the issues raised by ATU," we would begin by looking at the issues identified by the parties in their post-hearing briefs. ATU's post-hearing brief identifies, in the same numerical order, the 10 issues that we have identified as before us. Thus, although the dissent asserts that we have "ignored" issues "raised by ATU," we submit that we have identified each (and only) every issue that the parties have put before us.

The dissent's reliance on prior cases also misses the mark. In each case cited by the dissent, this Board addressed an alternate legal theory regarding an issue that was undisputedly before the Board. Here, the dissent has not just proposed an alternative legal theory, but rather has identified and addressed new issues that neither party agreed were before us.[21] Moreover, none of the cases cited by the dissent concerned a situation where, as here, after the filing of a complaint, an ALJ identified the issues to be decided, and *both parties agreed with those issues in their entirety*.

In sum, the dissent does not dispute that we have identified and decided the issues exactly as identified by the ALJ and as agreed to by both parties. Rather, the dissent nevertheless faults the majority for not reformulating the issues to address conduct that *could be* considered unfair labor practices if the parties had asked us to decide those issues.[22] In this matter, an ALJ and seasoned practitioners representing the parties have all identified and agreed in specific details to each issue that should be addressed. In such circumstances, we should not tell the parties what the issues could or should have been. We believe that the best practice of this Board is to decide the contested issues that the parties have asked us to decide. Therefore, we decline to join the dissent in expanding the issues before us.[23]

TriMet's Claims (UP-50-12)

We turn now to TriMet's allegations that ATU committed unfair labor practices. TriMet first contends that ATU violated ORS 243.672(2)(b), (c), and (d) and ORS 243.752 by instructing its members not to cooperate with TriMet's attempts to enforce Arbitrator Gaba's award. In relevant parts, ORS 243.672 makes it an unfair labor practice for a labor organization to: (1) refuse to bargain collectively in good faith with the employer (subsection (b)); (2) refuse or fail to comply with any provision of ORS 243.650 to 243.782 (subsection (c)); and (3) violate the provisions of any written contract with respect to employment relations, including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept arbitration awards as final and binding upon them (subsection (d)).

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[21]There is a distinction. For example, the dissent cites *Oregon Public Employees Union, SEIU Local 503 v. Wallowa County*, Case No. UP-77-96, 17 PECBR 451, 465-66 (1998), for the proposition that we considered the union's argument that the employer breached a settlement agreement in a manner not asserted in its complaint for purposes of a (1)(g) breach-of-contract claim. What the dissent has done here, however, is markedly different. To put this in the context of *Wallowa County*, the dissent's position would have us decide any breach of any settlement agreement (or presumably any agreement), merely because the union alleged a (1)(g) claim. In other words, the dissent confuses the issue to be determined with the legal theory by which that issue is resolved.

[22]Although the dissent asserts that the disputed issues are "clear," the dissent's own analysis belies such an assertion. Specifically, the dissent also characterizes ATU's claims as "somewhat difficult to parse," and "not artfully pled," characterizations that we do not associate with "clear." What is "clear," we would submit, is the agreed-on issues.

[23]As we decline to address issues not before us, we take no position on the dissent's determination of those issues.

[23]As we decline to address issues not before us, we take no position on the dissent's determination of those issues.

According to TriMet, ATU violated each of these provisions by instructing its members to not cooperate with TriMet's attempts to recoup retroactive health insurance payments. For the following reasons, we disagree with TriMet that ATU's communications with its members were unlawful.

TriMet's claims are based on two letters ATU sent to its members. First, on July 16, 2012, a few days after Arbitrator Gaba issued his July 13 award, ATU posted on its website a letter to members stating:

> "It is very likely that TriMet will attempt to get you to sign an authorization for them to deduct past health insurance premium costs from the wage increases TriMet owes you. DO NOT, UNDER ANY CIRCUMSTANCES, SIGN SUCH AN AUTHORIZATION.
>
> "* * * * *
>
> "TriMet management is likely to threaten you with legal action should you refuse to sign the authorization. TriMet would have to sue every single union member individually. It would have a hard time winning such a case when the arbitrator has said, so many times, that such a deduction is likely illegal." (Emphasis in original.)

Second, after TriMet sent ATU "sample letter statements" regarding what ATU members would owe in retroactive health insurance payments, ATU sent a letter to its members on September 19, 2012, letting them know that TriMet would soon be mailing members a letter regarding the recoupment of health insurance payments. ATU told the members that it intended to take legal action against TriMet. ATU further stated:

> "[i]n the meantime, we ask that you cooperate with and support our actions on your behalf by NOT responding to TriMet's letter." (Emphasis in original.)

Finally, ATU asked the employees to "stand together in solidarity and refuse to respond to TriMet's payment demand until such time as we obtain a judicial decision on this latest installment of TriMet gone crazy."

We first address TriMet's contention that these two letters constitute a refusal to bargain in good faith. Because TriMet has not identified any of the totality-of-conduct factors that we traditionally use in assessing such bad-faith-bargaining claims, and has instead asserted that specific acts in and of themselves establish bad-faith bargaining, we interpret TriMet's claims as alleging *per se* bad-faith bargaining. As set forth above, we find that some conduct is so inimical to the bargaining process that it amounts to a *per se* violation of the obligation to bargain in good faith, even without a showing of subjective bad faith. *City of Medford*, 22 PECBR at 206-07. We have limited *per se* bad-faith-bargaining determinations to conduct that falls so far outside the range of reasonable bargaining behavior that no further analysis of a party's good or bad faith is necessary.

Here, we do not find that ATU's communications with its own members regarding its

perceptions on the legality of TriMet compelling employees to authorize wage deductions indicates bad-faith bargaining, much less constitutes a *per se* violation of the duty to bargain in good faith. Likewise, informing members that it intended to bring a future legal action in the event that TriMet attempted to recoup money from members also does not, on its own, indicate that ATU was bargaining in bad faith. Therefore, we will dismiss this claim.

We next address TriMet's subsection (c) and (d) claims together because they are premised on the same legal theory: namely, that ATU's letters constituted a refusal or failure to comply with the final and binding award of Arbitrator Gaba. The difficulty with TriMet's theory is twofold. First, nothing in Arbitrator Gaba's award expressly authorized TriMet to compel recoupment. Indeed, Arbitrator Gaba's award indicated skepticism regarding the legality of any such collection scheme. Moreover, Arbitrator Gaba's award did not speak to, much less bar, ATU from communicating with its members on that issue.

Second, TriMet acknowledged that it has not taken any steps to retroactively implement its health insurance LBO, or to recoup payments from employees. Indeed, TriMet did not send the "sample letter statements" to employees that triggered ATU's September 19 letter to its members. Thus, we do not find that ATU failed or refused to comply with provisions purportedly in Arbitrator Gaba's award, which TriMet itself has never even sought to implement.

Consequently, for these reasons, we do not find that ATU's July 16 and September 19, 2012 communications with its members constituted a refusal or failure to comply with Arbitrator Gaba's award in violation of ORS 243.672(2)(c) or (d). Therefore, we will dismiss these claims.

Finally, we address TriMet's allegations that ATU violated ORS 243.672(2)(b) by not requesting information about or asserting objections before the interest arbitration hearing began that: (1) TriMet's LBO proposals on health insurance, a defined contribution plan, or the calculation of the COLA increases for retirees were too vague to be implemented or that TriMet had failed to provide information regarding a proposed methodology for implementation of these proposals; and (2) TriMet's LBO proposals on health insurance, discontinuing pay for grievance procedure work, calculating retiree COLA increases, or the retirement formula were illegal and/or prohibited subjects of bargaining. In short, TriMet asserts that ATU *per se* violated subsection (2)(b) by not requesting sufficient information about the specific aforementioned TriMet proposals or by failing to assert objections to those proposals before the interest arbitration hearing commenced.

We have not held that a party's failure to request additional information regarding specific proposals or to "object" to such proposals before an interest arbitration hearing begins is so inimical to the bargaining process that it amounts to a *per se* violation of the obligation to bargain in good faith, even without a showing of subjective bad faith. *See City of Medford*, 22 PECBR at 206-7. We decline to extend our limited categories of *per se* bad-faith-bargaining violations to include inadequate requests for "additional information" or purportedly not "objecting" to a party's proposals before an interest arbitration hearing commences. Although such failures might be considered as part of analyzing the totality of a party's bargaining conduct (or as part of a defense to another party's bad-faith-bargaining claim), they are not so hostile to the bargaining process, such that a party violates the PECBA without any showing of subjective

bad faith. Therefore, we will dismiss these complaints.

Conclusion

In sum, we find that TriMet has not established any of the alleged violations set forth in its complaint. With respect to ATU's allegation, we conclude that TriMet: (1) committed a *per se* violation of ORS 243.672(1)(e) when it amended its LBO regarding health insurance benefits; and (2) violated ORS 243.672(1)(e) by deciding, *before bargaining*, to unilaterally stop payments to the RTF and EAP. We dismiss ATU's remaining allegations.

Remedy

We have found that TriMet violated ORS 243.672(1)(e) by amending its LBO regarding health insurance benefits and by deciding, before bargaining, to unilaterally stop payments to the RTF and EAP. As a remedy for those violations, we will order TriMet to cease and desist from violating ORS 243.672(1)(e). ORS 243.676(2)(b).

We will also order affirmative relief "necessary to effectuate the purposes of [the PECBA]." ORS 243.676(2)(c). The usual remedy for a unilateral change violation, besides a cease-and-desist order, is requiring the employer to restore the *status quo* that existed before the unlawful change. *Lebanon Association of Classified Employees v. Lebanon Community School District*, Case No. UP-33-04, 21 PECBR 71, 80 (2005). Thus, with respect to the payments to the RTF and EAP, we will award the "usual remedy," and will order TriMet to restore the *status quo ante*, which requires TriMet to pay $63,000 to the RTF and $73,000 to the EAP, both of which should have been paid in December 2012. We will further order TriMet to maintain the *status quo* regarding payments to the RTF and EAP, until such time as the parties have reached agreement or have exhausted their bargaining obligations under the PECBA.[24]

We will also order that TriMet is prohibited from recouping any past health insurance premiums purportedly owed by ATU-represented employees related to TriMet's LBO, which was awarded by Arbitrator Gaba. We decline to vacate Arbitrator Gaba's award and remand the matter to him to conduct another interest arbitration hearing, as requested by ATU. Although we would generally order such a remedy in a typical case where a party changes its LBO in violation of ORS 243.746(3) and OAR 115-040-0015(7)(g), this is not a typical case. We find that such a remedy could further aggravate, rather than improve, the parties' contentious relationship, which has already resulted in multiple unfair labor practice proceedings arising out of the bargaining over the 2009-2012 collective bargaining agreement. Additionally, ordering such a remedy could further complicate and frustrate the parties' ongoing bargaining for a future successor contract. Under these circumstances, we conclude that remanding the matter to Arbitrator Gaba is not necessary to effectuate the purposes of the PECBA. *See* ORS 243.676(2)(c).

[24]As set forth above, the *status quo* consists of annual $2,000 increases to both the RTF and EAP.

ORDER

1. TriMet shall cease and desist from violating ORS 243.672(1)(e).

2. Within 30 days of the date of this order, TriMet shall restore the *status quo* regarding payments to the RTF and EAP, including, but not limited to, paying $63,000 to the RTF and $73,000 to the EAP.

3. TriMet shall maintain the *status quo* regarding payments to the RTF and EAP, including annual $2,000 increases consistent with this order, until such time as the parties have reached agreement or have exhausted their statutory bargaining obligations.

4. TriMet shall not attempt to recoup any past health insurance premiums purportedly owed by ATU-represented employees concerning TriMet's LBO.

DATED this 19 of July, 2013.

Kathryn A. Logan

Kathryn A. Logan, Chair

*Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

*Member Weyand, Concurring in Part and Dissenting in Part.

I concur with my colleagues in the majority of the conclusions set forth above, including the holdings that: (1) TriMet violated ORS 243.672(1)(e) by amending its LBO regarding health insurance benefits; (2) TriMet violated ORS 243.672(1)(e) by discontinuing payments to the RTF and EAP; (3) TriMet did not violate subsection (1)(e) by changing its LBO proposal establishing a defined contribution plan for new hires; (4) TriMet did not violate ORS 243.672(1)(a) by proposing to discontinue the practice of paying union stewards for their time spent representing employees in grievance meetings; (5) ATU did not meet its burden of proof on its claim that TriMet's health insurance LBO violated the cited insurance code provisions; and (6) ATU did not violate its duty to bargain in good faith as alleged in TriMet's complaint.

I respectfully dissent from the remainder of the order. The majority narrowly construed ATU's complaint and failed to consider all of the issues that were properly before us. I would have considered the issues raised by ATU in a more comprehensive manner, and in doing so, I would have found additional violations of ORS 243.672(1)(e) and (1)(g).

I.
The Majority Erred by Construing the Issues Too Narrowly

We ordinarily consider a claim or affirmative defense raised by a party if the pleadings or subsequent proceedings are sufficient to put the opposing party on notice of the claim and a reasonable opportunity to respond to the claim has been provided. We give parties some latitude when construing their arguments, and on several occasions, this Board has considered arguments advanced by a party even if they were not originally asserted with the level of clarity that we would normally expect. For example, in *Oregon Public Employees Union, SEIU Local 503 v. Wallowa County*, Case No. UP-77-96, 17 PECBR 451, 465-66, *recons*, 17 PECBR 536 (1998), we considered two claims raised by the union that were not clearly pled. First, we considered the union's (1)(a) claim under both the "in" and "because of" prongs of ORS 243.672(1)(a), even though the complaint only alleged a violation of the "because of" prong. Second, in an allegation that the employer violated ORS 243.672(1)(g), we considered the union's argument that the employer breached a settlement agreement in a manner not asserted in its complaint. *Id*.

The employer sought reconsideration of our order, arguing that we should not have considered the union's alternate (1)(g) theory because it did not have adequate notice to respond to that claim. On reconsideration, we acknowledged that the union's complaint did not allege the specific interpretation of the settlement agreement that we adopted. But we ultimately concluded that, based on the pleadings and the contested case process, the employer had adequate notice of the issue to present a defense to the claim. We also stated that "this Board is not confined to an interpretation of the agreement that is urged by either party." *Wallowa County*,17 PECBR 536, 538 (1998) (Order on reconsideration); *See also McMinnville Education Association and Mid-Valley Bargaining Council v. McMinnville School Distric #40t*, Case No. UP-4-97, 17 PECBR 539, 540 (1998) (we considered a second (1)(g) claim that was not plead in the initial complaint over employer's objections, concluding that in light of specific paragraphs of the complaint and one of the stipulated facts, the employer had sufficient notice of the claim to be able to respond); *Lincoln City Police Employees' Association v. City of Lincoln City*, Case No. UP-43-98, 18 PECBR 323, 344 (1999) (considering an employer's affirmative defense of exhaustion in a (1)(e) case even though they did not plead it as an affirmative defense as required by our rules because the union had sufficient notice and opportunity to respond to the affirmative defense because it was raised in the hearing.)

The record before us makes it clear that the primary issues raised by ATU are assertions that: (1) TriMet's retroactive reduction of health insurance benefits is illegal and prohibited for bargaining; and (2) TriMet's modification of the pension benefits promised to employees in the previous collective bargaining agreement was unlawful under ORS 243.672(1)(g) and (1)(e). The majority opinion addresses these issues not in the broad sense they were raised, but in the narrowest sense allowed by the agreed upon issue statements. I believe the narrow construction of these important issues was erroneous, and in fact ignores rather than resolves the primary disputes between the parties.

I begin by addressing ATU's contention that TriMet's retroactive health insurance reductions were unlawful and prohibited for bargaining. At different times, ATU asserts that the proposals are illegal under the Oregon Insurance Code, the PECBA, Oregon wage and hour laws limiting the reasons an employer may make deductions to an employee's paycheck, and general

contract law theories. ATU most clearly advanced the assertion that the retroactive application of the insurance proposals violates the Oregon Insurance Code. The majority decision, in which I concur, focuses on this assertion only. And while I agree with the conclusion we reached, I believe that our analysis should have continued and considered the legality of TriMet's proposals more broadly. Such a broad construction would be consistent with ATU's complaint, brief, and the conduct of the contested case proceedings.

Despite the multiple theories raised by ATU, at its heart, its claim boils down to a simple scope-of-bargaining question: is TriMet's proposal retroactively reducing insurance benefits prohibited for bargaining? This is the issue before us.

And when we review the bargaining status of a proposal, our choices are not constrained to accepting one party or the other's legal characterization of that subject (nor in a case requiring us to interpret a contract are we bound to accept either party's interpretation of that agreement if it is incorrect). To the contrary, we are bound to consider the subject under our well established analytical framework to determine whether it is mandatory, permissive or prohibited for bargaining. By way of example, consider a hypothetical situation where the parties disagree over the bargaining status of a subject, with the labor organization asserting the subject was mandatory because it involved indirect monetary benefits, and the employer claiming the proposal was permissive for bargaining under ORS 243.650(7)(b) (subjects determined to be permissive by the Board prior to 1995 continue to be permissive). If either assertion was legally correct, we would certainly adopt that position in our conclusions. But if neither party asserted the correct legal conclusion, we would continue our analysis and determine independently whether the proposal was permissive, mandatory or even prohibited for reasons not asserted by the parties. This is the approach we should follow in this matter, as neither party correctly analyzed the status of TriMet's retroactive reductions in health insurance benefits.

Based on the record, TriMet had sufficient notice of the breadth of ATU's claims to respond to this more broadly viewed claim, and in fact did so. TriMet offered extensive legal argument specifically rebutting the assertion that its retroactive health insurance proposals violated Oregon insurance law. However, it also asserted more general arguments concerning the legality of proposals that retroactively reduce insurance benefits. TriMet cited to two cases in defense of its position, arguing:

> "Finally, it should be noted that the Oregon Supreme Court has held that there is nothing unlawful about retroactive proposals. *See Springer v. Powder Power Tool Corporation*, 220 Or 102 (1960) ('We believe this [retroactive] language is clear and free from ambiguity. Since the parties have agreed that the contract should be effective as of April 1 1953, we are bound to construe it as if it were made on that date.') Similarly ERB has held that an employer does not commit a ULP by implementing a retroactive health insurance proposal. *See Oregon AFSCME Council 75, Local 2936 v. Coos County*, [Case No. UP-15-04] 21 PECBR 360, 387-92 (2006).
>
> "Thus, TriMet's LBO health insurance proposal clearly is not illegal and does not violate any provisions of Oregon law." (TriMet's Post-Hearing Brief at 23-24).

The inclusion of this argument demonstrates that TriMet had sufficient notice and opportunity to make arguments about the legality of its proposals. As a result, the issue, as broadly formulated, was properly before us and should have been considered.

The majority also erred by narrowly framing the issues regarding the pension multiplier and retiree COLA changes in TriMet's LBO. The majority summarily dismissed the claim, reasoning that merely making a proposal cannot violate ORS 243.672(1)(g) under these circumstances. But a common sense reading of the record demonstrates that ATU was not asserting that TriMet violated subsections (1)(e) and (1)(g) by merely "proposing" the pension changes in its LBO. To the contrary, ATU was clearly arguing that TriMet violated the terms of the prior collective bargaining agreement by submitting and subsequently implementing new contract terms that reduced benefits promised to employees in the prior contract. The majority's erroneous construction of the claim ignored this issue, and I believe that we should have considered the claim on its merits instead.

Finally, TriMet's change to the COLAs and pension multipliers for retirees was made retroactive and negatively impacted a significant number of employees who retired prior to the interest arbitration award. This aspect of the implementation of TriMet's LBO raises unique legal concerns that the majority does not address. Those issues are too important to ignore and must be resolved, even though they were not artfully pled.

II.
TriMet's Retroactive Reductions in Health Insurance Benefits Violated ORS 243.672(1)(e).

ATU contends that the retroactive reduction of health insurance benefits under TriMet's LBO was illegal and prohibited for bargaining. As a preliminary matter, I note that proposals for the retroactive application of collective bargaining agreements are commonplace in labor relations. In most cases, there is nothing inherently unlawful about such proposals. In fact, making agreements retroactive can assist parties in reaching a mutually agreeable contract in many situations.

But TriMet's retroactive proposals on health insurance are unusual. TriMet seeks to turn back the clock three years by creating the legal fiction that the reduced health insurance benefit levels it proposed in its LBO were in place for the three years prior to the interest arbitrator's award. Standing alone, this legal fiction might not render the proposal prohibited for bargaining, but TriMet takes the legal fiction a step further, stating its intent to recoup moneys it believes it is owed by its employees by virtue of the retroactive health insurance proposals. For some employees, this "debt" may be as much as $7,000, depending on the employee's benefit choices. It is this purported debt owed by employees for benefits already received that renders the LBO unlawful and prohibited for bargaining.[25]

[25]Our remedy in this case, which includes an order prohibiting TriMet from recouping moneys it claims are owed by its employees under its insurance LBO, arguably renders my concerns about the retroactivity of the insurance proposals moot. However, I am concerned that our decision could be read to suggest that TriMet's proposals were otherwise lawful, and would have been enforced had TriMet not violated ORS 243.672(1)(e) by modifying its LBO proposal. Our order should not be construed in such a manner, but the issue is simply too important not to address directly.

TriMet's retroactive reduction in health insurance benefits is inconsistent with the obligation to bargain in good faith under ORS 243.672(1)(e). We have long held that an employer violates subsection (1)(e) if it unilaterally changes mandatory subjects of bargaining during the hiatus period.[26] As a result, PECBA requires that employers maintain the *status quo* in effect at the expiration of a contract (on mandatory subjects of bargaining) until a new contract is agreed to or the PECBA dispute resolution procedures are exhausted. This requirement is known as the *status quo* doctrine.

The *status quo* doctrine serves many important functions in labor relations and is integral to achieving PECBA's lofty goals. It provides individual employees, labor organizations, and employers with some level of certainty on important issues, both economic and non-economic, during the course of negotiations. The doctrine also helps balance the scales during negotiations and provides an incentive to the parties to reach an agreement in a reasonable time frame. Both of these functions are consistent with PECBA's stated purposes of avoiding labor strife and establishing greater equality of bargaining power between public employers and public employees. *See generally* ORS 243.656(3).

This Board is obligated to make decisions that promote, rather than contradict, these goals. Allowing an employer to submit an LBO (or implement a final offer in strike-permitted units) that retroactively reduces benefits or wages would eviscerate the utility of the *status quo* doctrine. If an employer can retroactively reduce or take away benefits, wages, or other rights of employees, then the employer can unwind the *status quo* after the fact, and the doctrine becomes nothing but a temporary roadblock that can be easily circumnavigated.

Such an approach would be incompatible with ORS 243.756, which in the context of a strike-prohibited group like ATU's bargaining unit, codifies the *status quo* for wages and health insurance. ORS 243.756 requires that:

> "During the pendency of arbitration proceedings that occur after the expiration of a previous collective bargaining agreement, all wages and benefits shall remain frozen at the level last in effect before the agreement expired, except that no public employer shall be required to increase contributions for insurance premiums unless the expiring collective bargaining agreement provides otherwise. Merit step and longevity step pay increases shall be part of the status quo unless the expiring collective bargaining agreement expressly provides otherwise."

Allowing the retroactive reduction in benefits and wages is contrary to the requirements of this statute, as well as to the *status quo* doctrine developed under ORS 243.672(1)(e). As a result, TriMet's retroactive reduction in health insurancebenefits is unlawful and prohibited for bargaining.

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[26]The hiatus period is the common term for the period of time between the expiration of an existing collective bargaining agreement and either the signing of a new contract, or the conclusion of the PECBA required bargaining procedures.

While at first glance it may appear inequitable to prohibit the retroactive reduction of wages and benefits while permitting the negotiation of retroactive increases in these areas, the differentiation is supported by by the law and equitable notions of fundamental fairness. PECBA itself implicitly recognizes that retroactive improvements in the *status quo* are different than retroactive impairments of the same. The act *does* contain a provision that specifically authorizes arbitrators to award retroactive *increases* in wages and benefits. ORS 243.752(2) states that

> "[t]he arbitration panel may award increases retroactively to the first day after the expiration of the immediately preceding collective bargaining agreement. At any time the parties, by stipulation, may amend or modify an award of arbitration."

Notably, there is no corresponding language authorizing the award of a retroactive decrease. This absence demonstrates legislative approval of retroactive changes that benefit employees, and by inference, supports a conclusion that retroactive reductions were not authorized by the legislature or, at a minimum, were meant to be treated differently.

In addition, Oregon contract law recognizes that prospective changes in employee wages and benefits are generally allowed, while retroactive changes are generally not. This rule stems from the courts' determination that an employer's promises of pay and benefits to an employee in exchange for the employee's services is a unilateral offer of an employment contract. The employee may accept that offer by subsequently performing the required work, and an enforceable contract is created. *See Taylor v. Mult. Dep. Sher. Ret. Bd.*, 265 Or 445, 453-54, 510 P2d 339 (1973). For at-will employees, this employment contract may be modified unilaterally in many situations, but not in all. In *Olson v. F & D Publishing Co., Inc.*, 160 Or App 582, 982 P2d 556 (1999), the court acknowledged that an employment contract may be unilaterally modified, but only prospectively. The court stated that:

> "[Defendants] base their argument on the principle that an employer may unilaterally modify an at-will employee's contract and that the employee impliedly accepts the modification by continuing to work after learning of it. [Footnote omitted.] *See Fish v. Trans-Box Systems, Inc.*, 140 Or App 255, 914 P2d 1107 (1996); *Albrant v. Sterling Furniture Co.*, 85 Or App. 272, 736 P2d 201, *rev den*, 304 Or 55, 742 P2d 1186 (1987). Defendants acknowledge that the legal principle they invoke only applies prospectively. As they correctly admit, "[a]n employer cannot inform an [at-will] employee that wages have been retroactively reduced * * *. Wages for past work within the employment relationship are 'earned' and 'vested.'" 160 Or App at 588.

The courts have consistently resolved similar disputes over an employer's reduction or elimination of employment benefits by reviewing whether the pay or benefits at issue are earned or vested before or after the change is made. Various types of benefits have been found to be included in the "earned" and "vested" category of compensation that may not be reduced once the employee completes the necessary service to vest in the particular benefit. Several of these cases will be discussed below in the section analyzing pension issues.

The decisions under Oregon contract law reflect notions of equity as applied to the employment relationship, and the general principle that employees should be able to count on an employer's promises if they perform their part of the bargain. TriMet's employees earned and vested in their health insurance benefits by performing the work required by the employer at the time the insurance benefits were paid. This is a classic example of consideration paid for work already performed, and both parties to the agreement have adequately performed their obligation under the employment contract. TriMet may not retroactively and unilaterally unwind its performance of its obligations to its employees, even through the award of its LBO through interest arbitration, and then demand repayment for the benefits the employees earned and vested in during the *status quo* period. Employees cannot through any corresponding legal fiction retroactively dissolve their performance under the employment contract. That is to say that employees cannot retroactively quit their jobs as a result of the decreased compensation, or retroactively accept alternate employment that might have provided greater compensation. The employees' only options are prospective.

Allowing the collective bargaining process to be unfold in this fashion would trample the rights of individual employees while undermining the effectiveness of the system of collective bargaining set forth under PECBA. This would severely compromise, not promote, the purposes of the PECBA. Thus, standing alone, TriMet's proposals on health insurance violate the PECBA and are prohibited for bargaining. But TriMet's retroactive reduction in health insurance benefits and corresponding efforts to recoup the value of past benefits provided to employees also requires, or at least allows, TriMet to breach the employment contracts it has made with its employees. A proposal that requires a public employer to breach such contracts is contrary to public policy, unlawful, and prohibited for bargaining.[27]

TriMet points to our decision in *Oregon AFSCME Council 75, Local 2936 v. Coos County*, Case No. UP-15-04, 21 PECBR 360 (2006), to support its claim that the retroactive insurance proposal was lawful. In that case, we rejected the union's allegation that the emloyer's health insurance proposals amounted to a *per se* violation of subsection (1)(e) because they retroactively changed the *status quo*. However, our decision in that case is easily distinguished from the present matter. In *Coos County*, the employer's proposal was not retroactive in the same sense that TriMet's proposal is. The County proposed that it would contribute a fixed amount of

[27]TriMet's proposal may also be prohibited under other statutes as well, depending on what actions it intended to take to recoup the moneys it believes it is owed from its employees by virtue of the retroactive application of its LBO proposal. Under ORS 652.610(3) an employer may not "withhold, deduct or divert any portion of an employees wages" unless the deduction falls within one of the enumerated exceptions in the statute. The only exception that arguably would apply is contained in subsection (d), which allows for payroll deductions authorized by a collective bargaining agreement. However, as noted above, TriMet did not propose any specific method of collection, let alone a contract proposal that included an agreement to deduct money from employee paychecks to satisfy the "debt" allegedly owed as a result of retroactively reduced health insurance benefits. Thus, it does not appear that TriMet could lawfully seek to recoup the moneys through payroll deductions. Because TriMet has not consistently committed to any particular collection methodology, this concern is speculative and need not be addressed in detail. In addition, our order prohibiting the recoupment of these "debts" conclusively renders this concern moot.

money annually to pay for employee insurance premiums. The proposed contribution was limited to the ongoing plan year that was only partially concluded, and the employer prospectively reduced its monthly insurance premium contributions to achieve the needed cost savings (achieved through averaging the needed savings over the entire year). *Id.* at 387-92. The County did not create a legal fiction that it retroactively reduced the monthly premiums it had already paid, then claim that employees owed the county moneys as a result of overpayments. Nor did the county make any effort to recoup the value of benefits paid during the *status quo* period.

We found that the County had consistently proposed this approach throughout bargaining, with the numbers shifting based upon when an agreement was reached. As a result, there was no conduct so inimical to the PECBA that a *per se* violation of subsection (1)(e) occurred. Further, in footnote 19, we correctly inferred that the County's approach did not in fact retroactively change the *status quo*, and the implementation of the County's insurance proposal would not have changed even if the effective date of the proposal had been changed to a future or present date. *Id.* at 388-90.

Had TriMet followed the same approach taken by the employer in *Coos County*, it would not have violated (1)(e). But TriMet elected to take the legal fiction of retroactivity several steps further than Coos County, and truly sought to retroactively modify the *status quo.* As a result, TriMet's proposal was unlawful and prohibited for bargaining. By submitting this proposal to interest arbitration and subsequently implementing the LBO, TriMet violated ORS 243.672(1)(e).

III.
TriMet's Retroactive Reductions in Pension Benefits Violated ORS 243.672(1)(g).

ATU asserts that TriMet violated the 2003-2009 collective bargaining agreement, and by extension ORS 243.672(1)(g), when it proposed and implemented its LBO modifying pension benefits. This is an unusual (1)(g) claim, as it involves a claim based upon a collective bargaining agreement that has by its terms expired. However, certain terms contained in a collective bargaining agreement survive the expiration of the agreement. *Executive Department v. FOPPO*, 92 Or App 331, 758 P2d 410 (1988). In three separate cases involving the same parties, we held that an employer's elimination or modification of retiree benefits under expired collective bargaining agreements violated the expired contracts and subsection (1)(g). *See McMinnville Education Association and Mid-Valley Bargaining Council v. McMinnville School District #40*, Case No. UP-78-94, 16 PECBR 107, 124-25 (1995) (employer violated subsection (1)(g) by changing the health insurance plan for retired teachers in a manner contrary to the terms of expired collective bargaining agreements); *McMinnville Education Association and Mid-Valley Bargaining Council v. McMinnville School District #40*, Case No. UP-71-95, 16 PECBR 481, 486-89 (1996) (employer violated subsection (1)(g) by refusing to pay the health insurance premiums for retired teachers as required by the terms of expired collective bargaining agreements); *McMinnville Education Association and Mid-Valley Bargaining Council v. McMinnville School District #40*, Case No. UP-4-97, 17 PECBR 539, 545-47 (1998) (employer violated subsection (1)(g) by refusing to provide retirees the open enrollment period it provided to current employees and by failing to offer some retirees the indemnity plan, as required by the terms of expired collective bargaining agreements).

We have also held that once an employee vests in a benefit earned under a prior collective bargaining agreement, the employee's benefit cannot be subsequently reduced or eliminated, even by successor collective bargaining agreements. In *Enterprise Education Association v. Enterprise School District No. 21,* Case No. UP-16-04, 21 PECBR 49, 60-62 (2005) (Chair Gamson concurring in part, dissenting in part), we concluded that an employer violated the provisions of an expired collective bargaining agreement, and ORS 243.672(1)(g) when it reduced retiree health benefits even though the successor contract agreed to by the union authorized the change. The majority explained that, while the union could permissibly agree to eliminate future benefits employees who have not yet retired, benefits for employees who have already vested could not be changed. *Id*.

The complainant sought reconsideration of portions of our order, including the majority's dismissal of a (1)(g) claim brought on behalf of teachers who had not yet retired, but had already begun receiving a pre-retirement stipend during the hiatus period. On reconsideration, we adopted the rationale in Chair Gamson's dissent to the original order, and held that because the teachers had completed the required service to receive the pre-retirement stipend before the new collective bargaining agreement was signed, they had vested in their right to the stipend and it could not be taken away. *Enterprise Education Association v. Enterprise School District No. 21,* Case No. UP-16-04, 21 PECBR 202, 203 (2005) (*Order on recons*).

ATU asserts that the LBO proposal removing the 3 percent COLA floor for retirees violates the prior collective bargaining agreement. I am not convinced that ATU met its burden of proof on this matter as it applies generally to retirees. However, after the interest arbitration award was issued, TriMet announced that it was modifying the pension multiplier by retroactively applying its LBO terms. The net result was that employees who retired between September 2010 and January 2011 had their multiplier rate decreased from $75.15 to $72.96, decreasing the retirees' monthly benefits by $2.19 per month for each year of service. Similarly, employees who retired between September 2011 and January 2012 had their multiplier rate decreased from $77.40 to $75.52, reducing their monthly benefit by $1.88 per year of service. Other employees who retired during the *status quo* period, based upon their specific retirement dates, actually saw their benefit increase by virtue of the retroactive application of the COLA changes.

The impact of TriMet's retroactive change is exemplified by ATU bargaining unit member Patricia Butler, who retired on November 26, 2010, which was during the *status quo* period. When she retired, TriMet calculated Butler's retirement benefit using a benefit multiplier of $75.15, and due to her years of service, she began receiving a monthly benefit of $1,795.86. Also during the hiatus period, TriMet increased Butler's monthly benefit by 3 percent in February of 2011, raising her benefit to $1,849.74 per month. After the arbitration award, TriMet retroactively reduced Butler's base benefit multiplier from $75.15 to $72.96, reducing her original base monthly benefit to $1,745.53. TriMet then increased Butler's monthly benefits by the COLA amounts set forth in its LBO, resulting in a monthly benefit of $1,889.37.[28]

[28]TriMet calculated that Butler had been overpaid during the *status quo* period, but as of the hearing it had not sought to recoup the overpayment.

The impact of TriMet's retroactive change in Butler's benefit multiplier will continue for the entire time she receives pension benefits from TriMet. Every future COLA she receives will be reduced by virtue of this change, compounding the financial impact of the benefit multiplier reduction each and every month. As noted in the findings of fact, if TriMet had not reduced Butler's benefit multiplier and had applied the retroactive COLA increases only, she would be currently entitled to a monthly benefit of $1,943.87, rather than $1,889.37. That is a difference in excess of $50 per month, a sum that is certainly substantial, and the number will only grow with time.

Oregon law recognizes that the adoption of a pension plan or other benefit plan is an offer for a unilateral contract, and the tender of part performance by an employee can accept the employer's offer. *See Crawford v. Teachers' Ret. Fund Ass'n*, 164 Or 77, 99 P2d 729 (1940) (a teacher who had completed the prerequisite duty entitling him to a pension had a vested contractual right that could not be substantially impaired); *Taylor v. Mult. Dep. Sher. Ret. Bd.*, 265 Or. 445, 453, 510 P2d 339 (1973). Once the offer is accepted by the employee and part performance is tendered sufficient to meet the applicable vesting requirements, the employer cannot unilaterally reduce or eliminate the benefit.

In *Harryman v. Roseburg Fire Dist.*, 244 Or 631, 420 P2d 51 (1966), the Oregon Supreme Court held that an employee was entitled to be paid for unused sick leave at the termination of his employment when the payment was authorized at the time he was employed. The court reached this conclusion even though, subsequent to the employee's hire and during his employment, the District enacted a change discontinuing the payout of unused sick leave. The court held that the employee had accepted employment upon the assumption that the payout for unused sick leave was part of the compensation for his work, and that provision was a part of his contract of employment and could not later be taken away by the employer. *Id.* at 634-35.

The Supreme Court considered a similar issue in the collective bargaining environment in *McHorse v. Portland General Electric Company*, where it considered the contractual nature of a disability plan. The employer ceased paying benefits to an employee who had been previously found to be disabled. The employer claimed that the employee was not actually disabled or, in the alternative, if he was disabled, that it could terminate the plan at will. The court held that:

> "The courts have viewed plans such as these differently, depending on whether or not the plan calls for a contribution by the employee to the plan; however, it would seem that in the situation where the employee has satisfied all conditions precedent to becoming eligible for benefits under a plan, the better reasoned view is that the employee has a vested right to the benefits. This view sees the employer's plan as an offer to the employee which can be accepted by the employee's continued employment, and such employment constitutes the underlying consideration for the promise. *Taylor v. Mult. Dep. Sher. Ret. Bd.*, 265 Or. 445, 510 P.2d 339 (1973); *Ball v. Victor Adding Machine Company*, 236 F2d 170 (5th Cir 1956); *Jacoby v. Grays Harbor Chair & Mfg. Company*, 77 Wash 2d 911, 468 P2d 666 (1970). This approach seems particularly appropriate to the instant case, as here the plan was the result of a negotiated labor

> contract. See *Vallejo v. American R. Co. of Porto Rico*, 188 F2d 513 (1st Cir. 1951). Therefore, we view this plan not as a gratuity but as a contract which forms part of the consideration flowing between the employer and his employees." 268 Or 323, 331, 521 P2d 315 (1974)

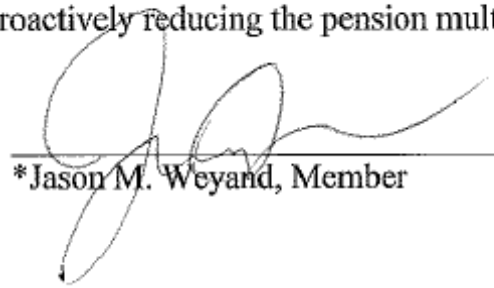
Here, TriMet made certain promises to Ms. Butler and other similarly situated employees who retired during the hiatus period. The promises were that they would receive, for their lifetime, pension benefits based upon the multiplier that was in effect when they retired. After the interest arbitration award, TriMet retroactively recalculated these benefits and broke those promises, causing a reduction in pension benefits that will continue and even expand based upon the compounding effect of the change to the multiplier. This broken promise violates the prior collective bargaining agreements that the employees retired under, and as a result, TriMet violated ORS 243.672(1)(g).

IV.
TriMet's Retroactive Reductions in Pension Benefits Violated ORS 243.672(1)(e).

TriMet also violated ORS 243.672(1)(e) when it retroactively changed the pension multiplier rates. ATU raised concerns prior to the interest arbitration that TriMet was proposing to reduce the pension multiplier, albeit in a more severe manner than what ultimately ended up occurring. In response, TriMet representatives stated in writing on multiple occasions that it was not proposing a reduction in the current multiplier. These statements were not ambiguous. TriMet Executive Director Stedman wrote that "TriMet neither proposed to change the base amount nor did it propose to reduce the currently applicable amount of $75.15." In keeping with these representations, TriMet produced no testimony or evidence during the arbitration that it was going to retroactively apply its LBO proposals on the multiplier rate. ATU, and presumably the arbitrator, reasonably did not believe that such a retroactive application was part of TriMet's LBO. In fact, TriMet representatives testified that at the time of the interest arbitration, it too was unaware that its own proposal would be implemented retroactively.

These facts support two possible conclusions: (1) TriMet deliberately mislead ATU and the interest arbitrator regarding the retroactive impact of the pension multiplier rate changes; or (2) TriMet was truly unaware that the LBO would be implemented on a retroactive basis, but chose to proceed with the implementation even though it was inconsistent with its representations to ATU and the interest arbitrator. ATU focused the majority of its argument on the allegation that TriMet deliberately mislead it and the arbitrator, but also argued the alternative assertion in its brief. The majority only reviewed whether TriMet deliberately misrepresented its position at the arbitration hearing. I agree with the majority that TriMet did not deliberately misrepresent its LBO proposal at the arbitration, but it seems apparent that it implemented the arbitrator's award in a manner that was inconsistent with its own understanding of its LBO proposal. A party that implements an LBO inconsistently with its original proposal violates ORS 243.672(1)(e). *See Roseburg Education Association v. Roseburg School District No. 4*, Case No. UP-26-85, 8 PECBR 7938, 7956-57 (1985). TriMet could have implemented its pension changes prospectively, consistent its representations before and during the interest

arbitration hearing. It chose instead to implement the LBO retroactively. Accordingly, I conclude that TriMet violated subsection (1)(e) by retroactively reducing the pension multiplier and COLAs for existing retirees.



*Jason M. Weyand, Member

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-006-13

(CERTIFICATION OF REPRESENTATIVE)

ASSOCIATION OF OREGON CORRECTIONS EMPLOYEES, Petitioner, v. STATE OF OREGON, DEPARTMENT OF CORRECTIONS, Respondent, and OREGON AFSCME COUNCIL 75, Incumbent.	)	DISMISSAL OF OBJECTIONS TO CONDUCT OF ELECTION

Becky Gallagher, Attorney at Law, Eugene, Oregon, represented Petitioner.

Craig Cowan, Senior Labor Relations Manager, Department of Administrative Services, Salem, Oregon, represented Respondent.

Jennifer K. Chapman, Legal Counsel, Oregon AFSCME Council 75, represented Incumbent.

On April 2, 2013,[1] the Association of Oregon Corrections Employees (AOCE) filed a petition, which was amended April 3, seeking to represent a group of employees of the State of Oregon, Department of Corrections (DOC) that were represented by incumbent Oregon AFSCME Council 75 (AFSCME). On May 1, the Elections Coordinator approved a consent election agreement between AOCE, AFSCME, and DOC. The results of that election were tabulated on June 14, with 553 votes for AFSCME, 532 votes for AOCE, and two votes for "no representation."

[1]All dates are 2013 unless otherwise specified.

On June 21, AOCE timely filed objections to the conduct of that election and conduct affecting the results of that election. *See* OAR 115-025-0060(9). Thereafter, AFSCME filed a response to AOCE's objections, contending that the objections lacked merit. The matter was assigned to Administrative Law Judge (ALJ) Grew, who conducted an investigation into the objections. *See* OAR 115-025-0060(11).

Based on ALJ Grew's investigation, he informed the parties in a July 24 letter that he would be submitting the matter to this Board, with the recommendation that the objections be dismissed without a hearing. In that letter, ALJ Grew set forth specific facts that resulted from his investigation, as well as relevant Board authority, which he believed warranted dismissal of the objections. ALJ Grew gave the parties until August 2 to present any factual or legal argument showing why he should not do so.

On July 26, AOCE counsel informed the ALJ that AOCE did not intend to present any further argument on its objections, and that the matter could be submitted to the Board. For the following reasons, we dismiss the objections.

For purposes of this dismissal order, we rely on the facts uncovered during our investigation, which were set forth in ALJ Grew's July 24 letter and which were not disputed by the parties. On May 30, the Elections Coordinator mailed 1,761 ballots through the State mailing service. Those ballots were mailed to the names and addresses on the final April 30 *Excelsior*[2] list, which was provided by the employer in the form of an electronic document and peel-off mailing labels. The ERB staff, under the supervision of the Elections Coordinator, peeled the labels off of their backing and applied them to envelopes with enclosed ballots. The envelopes were then submitted to the State mailing service for postage and mailing. State mailing service records confirm that it applied postage to 1,761 pieces of mail for ERB on May 30.

When the United States Postal Service (USPS) delivered completed or non-deliverable ballots to ERB, the Elections Coordinator recorded each event on an electronic spreadsheet derived from the final *Excelsior* list. This list is called the "voter list." The voter list also included totals of the ballots received each day. The Elections Coordinator sent an electronic copy of the voter list, as updated with the recorded events, to the parties on June 3, 4, 5, 6, 7, 11, and 12.

When an individual contacted ERB during the voting period and stated that a ballot had not been received, the Elections Coordinator immediately sent out a new ballot to the address provided by that individual. Those events were also recorded on the voter list.

As a matter of protocol, ERB staff does not return unopened ballots to senders during the elections period, and the Elections Coordinator is not aware of any such action taking place in this election.

[2]This term refers to the National Labor Relations Board's decision in *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966), which requires employers involved in pending representation elections before the Board to submit a list containing the names and addresses of all employees eligible to vote, which the Board then makes available to the organizing unions.

ERB received 1,088 ballots by the June 13 5:00 p.m. deadline. The results of the tally were 532 votes for AOCE and 553 votes for AFSCME, a difference of 21 votes.[3] ERB also received 49 ballots after the deadline; six of the ballots were from individuals that AOCE claimed had returned completed ballots (discussed below). There were also 38 ballots returned by the USPS as undeliverable, only nine of which had forwarding addresses. For those nine, the Elections Coordinator mailed new ballots to the newly provided addresses.

AOCE timely filed objections, claiming that: (1) 25-named individuals reported that they returned ballots "as required by the Election Notice," but those votes were not accounted for in the June 14 tally;[4] (2) one individual (Emilio Carbajal) asserted that he did not vote, yet he was recorded as having voted; (3) 12 eligible voters never received ballots; (4) three individuals "did not receive ballots in time to vote"; (5) one completed, unopened ballot was returned to the house of the voter by the USPS; and (6) the June 14 ballot count was "confusing."

In considering objections to a representation election, this Board has observed that "[e]lections should not be set aside lightly, because to do so interferes with the orderly processes of labor relations." *Employees of State of Oregon Motor Vehicles Division v. Oregon State Employes Association*, Case No. C-29-80, 5 PECBR 3069, 3073 (1980). We will, however, set an election aside "[i]f it may reasonably be said that proscribed conduct at an election had an impact or reasonably could have been expected to have an impact on the outcome of the election." *Id.*; *see also Don and Employees of the City of St. Helens v. Oregon AFSCME Council 75, and the City of St. Helens*, Case No. DC-39-03, 20 PECBR 547, 550 (2004). For the following reasons, we conclude that none of AOCE's objections warrant setting aside the election.

Under OAR 115-025-0060(4), "[i]n a mail ballot election, a ballot that is not delivered through the U.S. mail or in person by the voter is void." We have explained that our

> "mail ballot election procedures are clear with regard to voting deadlines; by whatever means delivered, ballots must be received in the Board offices before the voting deadline or they will not be counted." *Teamsters Local 58 v. City of Rainier*, 13 PECBR 169, 170 (1991).

Here, with respect to objections 1, 3, 4, and 5, the undisputed facts show that the ballots were not delivered to ERB through the U.S. mail or in person by the voter before the voting

[3]As previously noted, ERB also received two votes for "no representation." There was also one voided ballot.

[4]AOCE asserted that there were 26 individuals, but only provided the names of 25 individuals. Therefore, we consider the number of alleged unaccounted-for ballots to be 25. In any event, even if the number were 26, our result would be the same.

deadline; therefore, under our rules and case precedent, those alleged ballots are void and will not be counted. *See* OAR 115-025-0060(4); *City of Rainer*, 13 PECBR at 170.[5]

We turn to objection 2, which claims that an eligible voter (Emilio Carbajal) did not vote, yet had a ballot counted as though he did. The undisputed facts discovered during our investigation show that ballots were sent to two individuals with the last name Carbajal, Emilio and Bobby, both of whom appeared on the *Excelsior* list. Both individuals were recorded during the tally as having submitted timely ballots. Aside from those facts, neither the Elections Coordinator nor this Board has any additional information about this issue. Under these circumstances, we do not conclude that the disputed ballot should be treated as void. In any event, even if we agreed to void that ballot, doing so would not affect the outcome of the election.

We turn to the final objection (number 6), which alleges that the June 14 ballot count was "confusing." Specifically, AOCE alleges that, during the count, ballots were not placed in designated "AOCE" and "AFSCME" boxes, but were instead "piled on the table and/or one common box." At the conclusion of the tally process, however, AOCE's observers/representatives "certif[ied] that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above." Moreover, AOCE does not allege that any ballot was lost or miscounted during the tally. Under such circumstances, we find no merit to this objection.

Accordingly, for the foregoing reasons, we will dismiss AOCE's objections.

ORDER

The objections to the conduct of the election and conduct affecting the outcome of the election are dismissed. The Elections Coordinator shall certify the election results as soon as practicable.

DATED this 2 day of August, 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

[5]Neither the allegations nor the undisputed facts discovered during our investigation show any extraordinary circumstances (*e.g.*, natural disaster or postal service strike) that would warrant an exception to our general rule. Likewise, the record does not establish any irregularities when the ballots were received by ERB and recorded on the voter list.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-31-12

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503, Complainant, v. STATE OF OREGON, DEPARTMENT OF REVENUE, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On May 15, 2012, the Service Employees International Union, Local 503 (Union) filed this unfair labor practice complaint against the State of Oregon, Department of Revenue (Department). The complaint, as amended on August 30 and September 4, 2012, alleges that the Department violated ORS 243.672(1)(g) by failing to comply with the terms of the September 1, 2011 Settlement Agreement ("Settlement Agreement") between the parties. The Department filed a timely answer to the complaint.

A hearing was held before Administrative Law Judge (ALJ) Wendy L. Greenwald on October 26, 2012, in Salem, Oregon. The record closed on December 24, 2012, following receipt of the parties' post-hearing briefs. The ALJ issued a recommended order on March 4, 2013, and on June 11, 2013, the Board heard oral arguments on Complainant's objections to the recommended order.

Michael J. Tedesco and Nicole L. McMillan, Attorneys at Law, Tedesco Law Group, Portland, Oregon, represented Complainant at hearing. Christy Te, Attorney at Law, SEIU Local 503 OPEU, Salem, Oregon, represented Complainant at oral argument.

Lisa M. Umscheid, Senior Assistant Attorney General, Department of Justice, Salem, Oregon, represented Respondent.

ISSUES

The issues are:

1. Did the Department violate the Settlement Agreement and ORS 243.672(1)(g) by:

a. failing to compensate employee Charles "Sonny" West at 0.5 times his regular rate of pay for hours travelled on Sunday, March 22, 2009;

b. failing to compensate Corporation and Cigarette Tax Auditors employed by the Department (Grievants) for meal periods during overnight travel between January 2009 and September 1, 2011, and thereafter;

c. failing to compensate former employees Paul Kraft, Scott Schlag, Ben Blanco, Penny Rath, and Will Traub for meal periods during overnight travel between January 2009 and September 1, 2011; or

d. requiring Grievants to flex their work schedules before going on overnight travel after September 1, 2011?

2. If the Department violated ORS 243.672(1)(g), what is the appropriate remedy?

SUMMARY OF THE DECISION

For the reasons discussed below, this Board concludes that the Department breached the Settlement Agreement in violation of ORS 243.672(1)(g) by: (1) failing to compensate employee West at 0.5 times his regular rate of pay for 10.5 hours of time he worked on Sunday, March 22, 2009; (2) failing to compensate Grievants for meal periods during overnight travel for the time period between January 2009 and September 1, 2011 and thereafter; and (3) failing to compensate former employees for meal periods during overnight travel that they worked before leaving the Department. We also conclude that the Department did not require employees to flex their work schedules in violation of the Settlement Agreement and ORS 243.672(1)(g).

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The Union is a labor organization as defined by ORS 243.650(13) and the exclusive bargaining representative of a group of State employees, including those working in the Department. The Department is a public employer as defined by ORS 243.650(20).

Relevant Collective Bargaining Agreement Language

2. The Department and the Union were parties to a series of collective bargaining agreements (CBAs) effective July 1, 2007 through June 30, 2009; July 1, 2009 through June 30, 2011; and July 1, 2011 through June 30, 2013.

3. Article 90.5, Section 4 of the parties' CBAs provided for employees to be granted an unpaid meal period of at least 30 minutes normally scheduled in the middle of their shift. In addition, it required that the Department count an employee's entire shift as time worked if the Department required the employee to work a full shift without a lunch period.

4. Under Article 32 of the CBAs, which is entitled "OVERTIME," employees are entitled to overtime pay at the rate of one-and-one-half time for "time worked" in excess of eight hours per day or 40 hours per week. "Time worked" is defined as "[a]ll time for which an employee is compensated at the regular straight time rate of pay, except on-call time and penalty payment(s) * * * but including holiday time off, compensatory time off, and other paid leave * * *." At times relevant to this complaint, the Department compensated employees for overtime by crediting them with compensatory time at the overtime rate rather than the payment of wages.

5. Article 21 of the parties' 2011-2013 CBA establishes a multi-step dispute resolution process that begins with a grievance and terminates in binding arbitration. A grievance under that process is defined as "acts, omissions, applications, or interpretations alleged to be violations of the terms or conditions of this Agreement."

6. The Department employs corporate tax auditors (auditors) who are represented by the Union. During some corporate audits, the auditors travel to a corporation's out-of-state headquarters to interview necessary managers and review documents. The auditors work directly with the corporation to schedule the time the out-of-state audit will be conducted based on the availability of the necessary corporation staff and the auditors' schedules and travel preferences. Auditors may combine an out-of-state audit trip with a personal trip. Auditors must seek approval from their supervisors regarding their travel arrangements before taking the out-of-state trip.

7. Auditors record their hours worked on monthly time sheets. A time sheet reflects the number of hours an auditor records as worked each day, but does not show whether the auditor included or deducted meal break time from the hours recorded for out-of-state travel days.

8. Joe DiNicola has been employed by the Department in an auditor position since 1991. From 1991 through 2004, DiNicola included meal break time as hours worked on his time sheet for the days he traveled for an out-of-state audit. From 2004 through 2008, DiNicola took a leave of absence from the Department to serve as the Union's state-wide president.

9. On October 24, 2005, Corporate Audit Program Manager Janielle Lipscomb responded to a question from an auditor regarding whether auditors were required to deduct meal break time from their out-of-state travel time. The auditor had indicated that some auditors were doing this and some were not. In her e-mail response to the entire audit staff, Lipscomb provided

a citation to Bureau of Labor and Industries (BOLI) Administrative Rule OAR 839-020-0050[1] and notified staff members that Department Human Resources Manager Kimberley Dettwyler had stated "any time we pay someone's salary, they are considered to be 'working.' As such, when someone works 6 or more hours in a day, we MUST give them a lunch period. Under law, we are not allowed to give them permission to skip their lunch period." (Emphasis in the original.) Because DiNicola was not an audit staff member at this time, he did not receive this e-mail.

10. After DiNicola returned to the Department in 2008, he followed his prior practice of including meal break time as hours worked on his time sheet for the days he traveled to an out-of-state audit.

11. Before March 3, 2009, auditors normally worked their regular 40-hour schedule during the week before an out-of-state audit, traveled on Sunday to the audit location, conducted the audit Monday through Thursday, and traveled back to Oregon on Friday.[2] Auditors received overtime compensation for their Sunday travel time. Under the CBA, auditors could request to work fewer hours the week before they traveled to adjust for the overtime hours during the Sunday travel.

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[1]OAR 839-020-0050 provides, in relevant part:

> "(2)(a) Except as otherwise provided in this rule, every employer shall provide to each employee, for each work period of not less than six or more than eight hours, a meal period of not less than 30 continuous minutes during which the employee is relieved of all duties.
>
> "(b) Except as otherwise provided in this rule, if an employee is not relieved of all duties for 30 continuous minutes during the meal period, the employer must pay the employee for the entire 30-minute meal period.
>
> "(c) An employer is not required to provide a meal period to an employee for a work period of less than six hours. When an employee's work period is more than eight hours, the employer shall provide the employee the number of meal periods listed in Appendix A of this rule.
>
> "(d) Timing of the meal period: If the work period is seven hours or less, the meal period is to be taken between the second and fifth hour worked. If the work period is more than seven hours, the meal period is to be taken between the third and sixth hour worked.
>
> "* * * * *
>
> "(7) The provisions of this rule regarding meal periods and rest periods may be modified by the terms of a collective bargaining agreement if the provisions of the collective bargaining agreement entered into by the employees specifically prescribe rules concerning meal periods and rest periods."

[2]Although the parties distinguished between employees who normally worked a regular schedule (8 hours per day, 5 days per week) and those who normally worked an alternate schedule (such as 10 hours per day, 4 days per week), we use the term regular schedule in this order to include any weekly schedule the employee normally worked.

12. On March 3, 2009, the Department began requiring auditors that were traveling on a Sunday to reduce their prior week's regularly scheduled hours by an amount necessary to avoid overtime compensation for the Sunday travel.

13. On March 9, 2009, DiNicola filed a grievance alleging that the Department violated numerous articles in the parties' CBA by requiring him to limit his work schedule in the week before his Sunday travel to an out-of-state audit. DiNicola did not allege a violation of Article 90.5, Section 4, which addressed meal breaks, or refer specifically to meal break time in the grievance.

14. Before March 12, 2009, the Department compensated auditors for all overnight travel time, except for meal break time, even when the travel time exceeded their normal 8-hour or 10-hour work day. On March 12, the Department began directing auditors to only record on their time sheets the hours on out-of-state travel days that "cut across" their scheduled work day, pursuant to BOLI Administrative Rule OAR 839-020-0045(5).[3] Under the "cut across" rule, if an employee works a regular schedule of eight hours per day, the employee can only record up to eight hours of work on a travel day even if the employee traveled for more than eight hours. After the implementation of the "cut across" rule, DiNicola no longer included meal break time during overnight travel as hours worked on his time sheet.

15. In April 2009, the Union demanded to bargain over the Department's implementation of the "cut across" rule.

16. From May 28, 2009 through November 25, 2009, the Union filed seven group grievances alleging that the Department had violated the CBA by only compensating Grievants for time that "cut across" their normal work hours, rather than for all hours worked while in overnight travel status, and requiring Grievants to alter their 40-hour work schedules during the week before overnight travel. The grievances alleged a violation of Article 90.5 Work Schedules, Sections 2 and 3, as well as numerous other articles in the CBA. The grievances did not specifically allege a violation of Article 90.5, Section 4, which addresses meal breaks, or specifically directly refer to meal break time.

17. DiNicola was the Union representative responsible for processing the eight grievances. At Step 2 of the grievance process, Department Director Elizabeth Harchenko asked

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[3]BOLI Administrative Rule OAR 839-020-0045(5) provides:

> "(5) Travel away from the home community: Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is work time when it cuts across the employee's workday. The employee is substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on non-working days. Time that is spent in travel away from home outside of regular work hours as a passenger on an airplane, train, boat, bus, or automobile is not considered work time."

DiNicola what practices the Union was alleging the Department had changed. DiNicola explained that employees were no longer being compensated for travel hours that did not "cut across" the work schedule, including meal break time. Harchenko acknowledged the Department's practice had been altered and that it was not longer compensating for all hours of travel.

18. On September 4, 2009, the Union filed an unfair labor practice complaint (the Cut Across ULP) against the Department alleging that the "cut across" rule constituted an unlawful unilateral change in violation of ORS 243.672(1)(e). After the Cut Across ULP was filed, the Department and Union engaged in midterm bargaining, but failed to reach agreement. During bargaining, the Department's representative was Tom Perry, State Labor Relations Manager with the Department of Administrative Services (DAS). During the negotiations, Perry told the Union team, which included DiNicola, that he wanted to resolve all issues related to the Cut Across ULP and the grievances during bargaining. Meal breaks were discussed several times during the bargaining meetings.

19. In October 2009, DiNicola notified Department employees that the Union had proposed that the Department "should continue its past practice of compensating employees for all travel hours, with one exception. We proposed that while in travel status to a temporary work location, employees would be required to deduct an unpaid meal break - - whether or not the employees actually had an opportunity to take such a break."

20. At the conclusion of bargaining, the Department implemented its last proposal, under which the "cut across" rule would apply to all out-of-state audit travel effective January 8, 2010. Auditors were retroactively compensated for all out-of-state travel hours, except meal break time, from March 2009 through January 7, 2010. In January 2010, the Department retroactively compensated Auditor West for four hours worked on March 22, 2009, at the 1.5 overtime rate, for a total credit of six hours compensatory time.

21. On March 5, 2010, the Union withdrew the Cut Across ULP complaint because the Department had implemented the remedy that it had requested.

22. On May 10, 2010, Union Attorney Joel Rosenblit, HR Manager Dettwyler, and Labor Relations Manager Perry signed a document setting out the key provisions in the settlement of the eight grievances. One provision required the Department to retroactively compensate auditors for all hours in travel status from January 8, 2010, until the compensatory time was reinstated. For reasons not relevant here, the Union subsequently refused to sign a final settlement document incorporating the key provisions and demanded to arbitrate the grievances. The Department, which believed a settlement agreement had been reached, implemented the key settlement provisions and refused to go to arbitration. The Union then filed a ULP alleging a refusal to arbitrate, which the parties subsequently resolved by agreeing to submit the eight grievances to arbitration.

23. On November 5, 2010, Lipscomb sent the tax auditors who reported to her a reminder that during travel days they needed "to take into account a 30 minute unpaid meal period for any time worked over 6 hours."

24. Before the September 1, 2011 grievance arbitration hearing, the Department's attorney, Sylvia Van Dyke, discussed the grievances with Marc Stefan or Michael Tedesco, who were attorneys representing the Union. Van Dyke told either Stefan or Tedesco that one option the Department was considering was to not alter the schedules the week before travel, but to impose a process under which the Department would compare the overtime travel cost with the per diem travel cost and require the employee to stay over the weekend if the per diem cost was less. Tedesco or Stefan told Van Dyke that DiNicola did not think it was likely that the Department would take this approach.[4]

September 1, 2011 Arbitration and Settlement

25. On August 30, 2011, Van Dyke and the Union's attorney, Naomi Loo, exchanged, but were unable to agree on, the arbitration issue statements. Although using different wording, both Loo's and Van Dyke's arbitration issues addressed whether the Department could (1) require auditors to alter their schedules the week before travel without an employee's consent, and (2) compensate employees for travel time only for hours that "cut across" an employee's normal work hours.

26. On September 1, 2011, Arbitrator Sylvia Skratek convened the arbitration hearing on the eight grievances. The Union was represented by attorneys Tedesco and Loo. DiNicola was also present. The Department was represented by Van Dyke. Neither Tedesco nor Van Dyke specifically mentioned meal break time in their opening statements. After the parties concluded their opening statements, at the arbitrator's suggestion, they recessed the hearing and engaged in settlement discussions.

27. Van Dyke initially met separately with Tedesco and asked whether the Union would entertain a settlement in which the Department agreed to rescind its "cut across" rule and recognize all hours auditors actually spent traveling, as long as any settlement was non-precedent setting and was limited to the issues raised in the eight grievances. After consulting with DiNicola, Tedesco told Van Dyke that the Union was agreeable to the concept she had outlined and asked her to provide the Union a draft settlement agreement. The draft provided, in part, as follows:

> "1. Employer will not require Grievants who are on alternate or regular work schedules to adjust their alternate or regular work schedules for travel time, but the state may require Grievants to adjust their schedules during audit weeks.
>
> "2. The Employer will recognize all hours Grievants are scheduled to be traveling on overnight travel as compensable work time."

[4]Because DiNicola did not recall this conversation occurring during the September 1 settlement negotiations and Van Dyke testified that this conversation occurred either before September 1 or during the September 1 negotiations, we conclude the discussion likely occurred before September 1.

28. The parties continued to negotiate over the language of the settlement agreement. Van Dyke met with Tedesco alone and, at times, with Tedesco, Loo, and DiNicola to talk about changes to the wording in the proposed language. The parties did not specifically talk about meal breaks.

29. On September 1, 2011, the parties executed the Settlement Agreement, the stated purpose of which was to resolve and settle the eight grievances. The Settlement Agreement provides, in relevant part, as follows:

"RECITALS

"2. On March 9, 2009, DiNicola and SEIU filed a grievance claiming the State violated the CBA by requiring him to modify his work schedule during weeks when DiNicola was in travel status (the 'individual grievance').

"3. On May 28, June 30, July 29, August 28, September 29, October 30, and November 25, 2009, Grievants and SEIU filed grievances which (a) claimed the State violated the CBA by requiring Grievants to modify their work schedules during weeks when they were in overnight travel status, and (b) claimed the State violated the CBA by changing the manner in which travel time was calculated so that employees were no longer paid for all time spent in overnight travel status, but only for time that cut across normal work hours (plus time spent driving or working) (collectively, the 'group grievances').

"* * * * *

"AGREEMENT

"NOW, THEREFORE, the parties agree as follows:

"1. The Employer will not require Grievants who are on alternate or regular work schedules to adjust their alternate or regular work schedules for travel time. However, the Grievants agree to work 8-hour days, Monday through Friday, while conducting an audit at an out-of-state-location. Grievants are not waiving their right to overtime compensation for hours worked in excess of 8 per day or 40 per week, pursuant to the CBA.

"2. The Employer will recognize all hours traveling during overnight travel as compensable work time.

"3. From January 2009 through September 1, 2011, the Employer will compensate Grievants for .5 times their regular rate of pay for travel time that took place on weekends which has not already been compensated at the rate of 1.5.

"* * * * *

"7. This Agreement shall in all respects be interpreted, enforced, and governed under the laws of the State of Oregon. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against either party.

"* * * * *

"9. This Agreement is the sole and entire agreement between the parties relating to the Grievances. No change or modification of this Agreement is valid unless it is in writing and signed by all of the parties to this Agreement. All signatories below acknowledge this is the complete Settlement Agreement and no part of the grievances remains unresolved. This Agreement becomes effective on the date of the final signature below."

Events Subsequent to the Settlement Agreement

30. In October 2011, the Department compensated the Grievants for the compensatory time or pay due for overnight travel time during the period between January 2009 and September 1, 2011, excluding meal break time. The Department credited Grievant West with 1.25 hours of compensatory time for hours worked on March 22, 2009.

31. In November 2011, DiNicola notified HR Manager Dettwyler by e-mail that he believed West was due 5.25 compensatory time hours for March 22, 2009. DiNicola also notified the Department that the deduction of meal break time from the retroactive compensatory time credited to the Grievants was not consistent with the Settlement Agreement because the meal break deduction was instituted as part of the "cut across" rule in March 2009.

32. After the Settlement Agreement, the Department instituted a "least-cost method" for analyzing auditors' proposed overnight travel. Under this method, an auditor is required to compare the cost of traveling on a normal work day and staying in the audit city during the weekend preceding the audit, such as a trip from Friday through Friday or Monday through Monday, with the cost of overtime incurred by traveling on a day not part of the auditor's normal workweek schedule, such as a trip from Sunday through Friday or Monday through Saturday. The costs of staying over the weekend include the hotel room, meals, hotel parking, other hotel fees, and airport parking expenses. Auditors are not compensated for their time during the weekend. The overtime cost is based on the number of hours the auditor is in travel status on a Saturday or Sunday multiplied by their overtime rate, which includes other payroll expenses such as social security, insurance, and workers' compensation. Auditors are required to select the least cost option for out-of-state travel. If the least-cost option results in the auditor staying in the audit city over the weekend and the auditor does not want to do this, the auditor can chose to travel on a Saturday or Sunday and flex his or her regular schedule in the prior week to offset the overtime cost.

33. From September 2011 through August 2012, auditors took 99 out-of-state audit trips. In 16 of the trips, auditors flexed their hours in the week before their out-of-state travel. In three of these 16 trips, it was less expensive for the auditor to stay the weekend in the audit city under the least-cost method. Some employees voluntarily flex their hours in the week before travel based on personal preference. Some employees dislike having to complete the least-cost-comparison worksheet.

34. Auditor Teresa Pullen normally works a ten-hour-per-day, four-day-per-week schedule. In early May 2012, Pullen submitted a travel request and least-cost-analysis worksheet to her supervisor, Kathryn Lolley, for an overnight trip to Pittsburgh. The estimated cost of staying over the weekend was $413.66. Pullen provided two options under the overtime cost analysis. One estimate included an overnight flight, which cost $510.00, and resulted in 26.5 hours of overtime for a cost of $1,540.90.[5] The second estimate included an overnight flight, which cost $609.00, and resulted in 17.5 overtime hours for a cost of $1,017.45. The estimated overtime costs were much higher than those submitted by other employees. Lolley denied Pullen's travel request due to several errors on the spreadsheet and expressed concern about the amount of compensatory time.

35. Because the overtime costs for travel on a weekend were substantially higher than the cost of staying over a weekend, Pullen intended to submit a request for a Monday through Monday trip. However, she mistakenly prepared a request that included travel to the audit city on a Monday and returning on Saturday. Lolley declined the request and directed Pullen to change the dates to reflect a Monday to Monday trip and correct errors in the related costs. The Department does not require auditors to take overnight flights, so Lolley also suggested that Pullen use a different non-stop airline flight, which cost $685.00.

36. A Monday to Monday trip meant Pullen would have to spend the weekend in Pittsburgh away from her family. Lolley suggested to Pullen that if she did not want to stay over the weekend, she could flex her work hours the week before she traveled to reduce the amount of overtime that would be incurred. At some point previously, Pullen had mentioned to Lolley that she wanted to flex her regular work schedule so she could spend time preparing for her daughter's wedding in September. To do this, Pullen was required to submit a travel request for a Sunday through Friday trip and state that she wanted to voluntarily flex her normal work schedule the week before the travel. Pullen did not like either choice, but decided to flex her hours. Lolley approved Pullen's third travel request, which included the $685 airline flight. This trip resulted in two hours of overtime compensation at a cost of $116.29.

CONCLUSIONS OF LAW

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

[5]Pullen testified that she incorrectly entered the number 26.5 into the spreadsheet, which is Exhibit C-22 at page 1, rather than the correct number 25.5. Because the amount is not determinative here, we use the 26.5 hours that was on the spreadsheet she submitted.

2. The Department breached the Settlement Agreement and violated ORS 243.672(1)(g) by failing to compensate employee West at 0.5 times his regular rate of pay for hours he worked on Sunday, March 22, 2009.

3. The Department breached the Settlement Agreement and violated ORS 243.672(1)(g) by failing to compensate Grievants for meal periods during overnight travel from January 2009 through September 1, 2011, and thereafter.

4. The Department breached the Settlement Agreement and violated ORS 243.672(1)(g) by failing to compensate former employees Paul Kraft, Scott Schlag, Ben Blanco, Penny Rath, and Will Traub for meal periods during overnight travel from January 2009 through September 1, 2011, and thereafter.

5. The Department did not breach paragraph 1 of the Settlement Agreement by implementing the least-cost method after September 1, 2011.

DISCUSSION

At issue here is whether the Department breached the parties' Settlement Agreement in violation of ORS 243.672(1)(g). Subsection (1)(g) makes it an unfair labor practice for a public employer or its designated representative to "[v]iolate the provisions of any written contract with respect to employment relations * * *." A written grievance settlement is a "contract with respect to employment relations," within the meaning of subsection (1)(g). *Oregon Public Employees Union, SEIU Local 503 v. Wallowa County* (*SEIU v. Wallowa County*), Case No. UP-77-96, 17 PECBR 451, 462 (1997), *adhered to on recons*, 17 PECBR 536 (1998). Therefore, a breach of a settlement agreement constitutes a violation of subsection (1)(g). *Oregon AFSCME Council 75, Local 3336 v. State of Oregon Department of Environmental Quality* (*AFSCME v. DEQ*), Case No. UP-47-06, 22 PECBR 18, 28 (2007).

The key facts in this case are not in dispute, but the Department and the Union disagree about how the relevant provisions of the Settlement Agreement apply given those facts. Accordingly, in order to determine whether the Settlement Agreement was breached, we must interpret the language contained in the writing to determine the parties' intent. Settlement agreements are interpreted in the same manner as collective bargaining agreements, by following the rules of contract construction as applied by the courts. *SEIU v. Wallowa County*, 17 PECBR at 462-63, citing *OSEA v. Rainier School District No. 13*, 311 Or 188, 194, 808 P2d 83 (1991). Those rules require this Board to first examine the text of the disputed contract language in the context of the document as a whole to determine whether the language is ambiguous. "A contract is ambiguous if it can reasonably be given more than one plausible interpretation." *Portland Police Assoc. v. City of Portland*, 248 Or App 109, 113, 273 P3d 192 (2012), citing *Arlington Ed. Assn. v. Arlington Sch. Dist. No. 3*, 196 Or App 586, 595, 103 P3d 1138 (2004). If the contract is unambiguous, it must be enforced according to its terms. *Rainier School Dist. No. 13*, 311 Or at 194. If the provision is ambiguous, we proceed to the second step and examine extrinsic evidence to ascertain the parties' intent. Finally, if the provision remains ambiguous after applying the second step, we proceed to the third step and rely on appropriate maxims of contract construction.

Lincoln County Education Association v. Lincoln County School District, Case No. UP-14-04, 21 PECBR 20, 29 (2005), citing *Yogman v. Parrott*, 325 Or 358, 361-65, 937 P2d 1019 (1997).

Sonny West Compensatory Time Credit

The parties' dispute over the amount of compensatory time owed to West under the Settlement Agreement arises out of the language in paragraph 2, which provides that the affected auditors are to be compensated for ".5 times their regular rate of pay for travel time that took place on weekends which has not already been compensated at the rate of 1.5." The Union argues that under this language, the Department was required to compensate West for 5.25 hours. The Department argues that West was only entitled to 1.25 hours of compensation for that day under the Settlement Agreement. For the reasons discussed below, the Department breached the Settlement Agreement in violation of ORS 243.672(1)(g) by failing to credit West with a total of 5.25 hours of compensatory time for March 22, 2009.

Each party's positions can best be understood by looking at the different manners in which they calculate the amount owed to West for the time worked on March 22. The parties agree that West worked 14.5 hours on March 22, for which he was paid 14.5 hours at the straight-time rate in March 2009. They also agree he was later credited with 6 hours of compensatory time for March 22 based on 4 hours of work at the 1.5 overtime rate. The Department calculated that it owed West 1.25 additional hours under the Settlement Agreement as follows:

Total hours worked:	14.50 hours
Multiplied by 1.5 overtime rate:	x 1.50
Total hours compensation due:	21.75 hours
Minus 14.5 hours compensation at straight time rate:	-14.50 hours
Minus 4 hours compensation at 1.5 overtime rate:	- 6.00 hours
Total compensation due:	1.25 hours

The Union calculates the Department owes West 5.25 hours as follows:

Total hours worked on March 22:	14.5 hours
Minus hours worked compensated at 1.5 rate in January 2010:	- 4.0 hours
Total hours not compensated at 1.5 rate:	10.5 hours
Multiplied by .5 rate	x .5
Total compensation due:	5.25 hours

The Union's calculations are based on the language in the Settlement Agreement, which sets out the method the Department is to use to calculate the amount of compensation due employees. We find that language unambiguous. Under that language, West is entitled to be compensated at the .5 rate for 10.5 hours of work because he had not previously been compensated for those hours at the 1.5 rate.

The Department nevertheless contends that this results in West being compensated for a total of 25.75 hours for March 22 (14.5 hours + 6 hours + 5.25 hours), when he only would have

been entitled to 21.75 hours of compensation if the Department had paid him for 14.5 hours at the 1.5 overtime rate in March 2009. This 4 hours of difference in the amount of total compensation due West occurs because the Department credited West for 4 hours of compensatory time in January 2010 at a 1.5 overtime rate rather than the .5 rate, even though it had already paid him for those 4 hours at the straight-time rate in March 2009.

The Department asserts that paying West a total of 25.75 hours for the time worked on March 22 is inconsistent with the parties' intent under the Settlement Agreement. Yet the language in that agreement setting out the method for calculating the amount due is both specific and clear. The Settlement Agreement also includes no provision for adjusting the amount due based on the Department's prior duplicate payment of the 4 hours of straight-time compensation or the total compensation that would have been due in a day if paid at the 1.5 overtime rate. The Department also did not rely on any other language in the Settlement Agreement in support of its position. Although the Department claims that the application of the language in the Settlement Agreement to West's situation is unfair, we are bound to enforce the language agreed to by the parties within the context of the Settlement Agreement as a whole, which is the best evidence of the parties' intent. *See Rainier School Dist. No. 13*, 311 Or at 194 (if the contract is unambiguous, it must be enforced according to its terms).

Meal Periods

The Union alleges that the Department violated the Settlement Agreement (and therefore ORS 243.672(1)(g)) in two distinct ways: first, by failing to retroactively compensate the Grievants for their meal periods during overnight travel between January 2009 and September 2011; and second, by requiring auditors to continue to deduct meal periods from their travel hours after the Settlement Agreement was executed.[6] The Union relies on the language in paragraphs 2 and 3 of the Settlement Agreement. The disputed language states as follows:

> "2. The Employer will recognize all hours traveling during overnight travel as compensable work time.
>
> "3. From January 2009 through September 1, 2011, the Employer will compensate Grievants for .5 times their regular rate of pay for travel time that took place on weekends which has not already been compensated at the rate of 1.5."

The Union asserts that these two provisions, read in conjunction with one another, require the Department to provide employees on overnight travel with paid meal periods going forward and retroactive to January 2009. The Department views the language differently; arguing that the compensable travel hours only includes time worked and not unpaid meal periods. It points out

[6]The Union also argues that this Board should order the Department to pay the Grievants, who are no longer employed by the Department, penalty wages under ORS 652.150(1). However, the Union did not allege such a violation in the complaint and, even if it did, we do not have jurisdiction over such claims. The enforcement of ORS 652.150(1) resides within the authority of the Oregon Bureau of Labor and Industries and the courts. ORS Chapter 652.165 and 652.310 - 652.414.

that paid meal periods are not expressly included in the paragraphs above, rendering the language ambiguous. The Department further argues that extrinsic evidence supports its assertion that unpaid meal periods were not intended to be included as compensable time, either prospectively or retroactively to January 2009.

We begin our analysis by determining whether the Settlement Agreement is ambiguous—that is, whether the language is susceptible to more than one plausible interpretation when considering the context of the contract as a whole, including the circumstances in which the Settlement Agreement was made. *Portland Police Assoc.*, 248 Or App at 116-17; *Tualatin Employees' Association v. City of Tualatin*, Case No., UC-012-12, 25 PECBR 565, 572 (2013). We conclude that the disputed language is not ambiguous, and that the Union's interpretation of the Settlement Agreement is consistent with the intent of the parties embodied in the writing.

When we interpret agreements, we give words their plain and customary meaning. *Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections*, Case No. UP-05-06, 22 PECBR 224, 232 (2008). Paragraph 2 states in no uncertain terms that "all hours traveling during overnight travel" are considered as compensable time. The parties agreed to use extraordinarily broad language to define what "overnight travel" should be compensable—"all." *Webster's Third New International Dictionary*, 54 (unabridged ed 2002) defines "all" as "**1a:** that is the whole amount or quantity of" or "**1b:** as much as possible **:** the greatest possible* * * * *." It is difficult to conceive of a way to more broadly define what would be treated as compensable time. Had the parties intended a more narrow definition of this term, they would not have used this term, and accepting the Department's argument would require us to read into this plain language an unwritten exception for meal periods, something we are not willing to do. *See* ORS 42.230 (in interpreting agreements, the court's role "is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all.").

Indeed, as we understand the Department's argument, it acknowledges that, standing alone, paragraph 2 would unambiguously support the Union's interpretation. The Department argues, however, that paragraph 3 modifies or limits the expansive definition of compensable time, thereby rendering the Settlement Agreement as a whole ambiguous. Specifically, the Department asserts that using the phrase "travel time" in paragraph 3, instead of "all hours traveling" in paragraph 2, changes the meaning of the Settlement Agreement. We do not assign such import to the slight difference in wording in paragraphs 2 and 3. We see no persuasive argument that merely changing the phrase "all hours traveling" to "travel time" materially altered the agreement between the parties, much less redefined or narrowed the sweeping phrase "all hours traveling." Had the Department intended to qualify "all hours traveling" to exclude meal breaks (or any other time), we believe that it would have done so expressly, rather than just use the phrase "travel time" in a subsequent paragraph.

Even if we were to agree with the Department that the language is at least susceptible to more than one plausible interpretation, our result would not change if we resorted to extrinsic evidence of the parties' intent. The language strongly supports the Union's interpretation, and the language itself is the best evidence of the parties' intent. For us to interpret the Settlement

Agreement in a different manner, the Department would have to produce compelling extrinsic evidence in support of its alternative interpretation. Here, both parties offered extrinsic evidence concerning the grievances that led to the arbitration hearing and the signing of the Settlement Agreement after opening statements were made at the arbitration hearing. The Department's primary evidence in support of its interpretation of the language included the grievance documents, the statement of the issues offered by the parties at the hearing, and the testimony of Van Dyke, that meal times were not discussed specifically as part of the settlement negotiations. The Union also offered the related grievance documents to support its interpretation, as well as the testimony of DiNicola about communications that occurred during the initial steps of the grievance procedure and the Union's understanding of the intent of the Settlement Agreement.

Taken as a whole, the extrinsic evidence provides some context to the Settlement Agreement, but does not support the Department's interpretation of the disputed language. Viewed in the light most positive to the Department, the extrinsic evidence demonstrates at best that the Union did not address with great specificity the breadth of its concerns about unpaid meal breaks. We find, however, that the Union did raise the issue of unpaid meal breaks as part of the settlement-related grievances. Specifically, at a Step-2 grievance meeting, when Harchenko asked DiNicola about the reasons for the grievance, DiNicola expressly identified meal break time as one period in which employees were no longer being compensated for travel hours. Although subsequent discussions on the issue of meal periods were not extensive or specific, the parties ultimately settled on the following language: "[t]he Employer will recognize all hours traveling during overnight travel as compensable work time." Thus, any lack of specificity regarding "meal periods" is not sufficient to overcome the best evidence of the parties' intent: the highly persuasive and probative nature of the terms contained in the Settlement Agreement itself.

Moreover, the grievance documents do contain broad language alleging that the Department violated the contract by "failing to compensate grievants for all hours worked" and having supervisors instruct "business division tax auditors to not report all hours worked on Revenue timesheets." Thus, the grievances can reasonably be construed as incorporating the Union's concerns about unpaid meal periods, even though these concerns were not explicitly incorporated into the grievance form. This is consistent with Mr. DiNicola's un-rebutted testimony that he spoke with Department Director Harchenko about the Union's meal period concerns during the initial steps of the grievance process. Thus, the extrinsic evidence provides some additional support for the Union's interpretation of the Settlement Agreement.

In sum, even assuming for the sake of argument that the provisions of the Settlement Agreement were ambiguous, the extrinsic evidence presented by the parties does not dictate a result other than the one we reached above. For the foregoing reasons, we conclude that the Department violated the terms of the Settlement Agreement and ORS 243.672(1)(g) when it failed to compensate Grievants for meal periods during overnight travel.[7]

[7] The Settlement Agreement defines the term "Grievants" in a manner that includes former employees Kraft, Schlag, Blanco, Rath, and Traub. The failure to compensate these former employees also violated the Settlement Agreement for the same reasons set forth in our analysis above.

We next address the Department's affirmative defense that the Union's allegations regarding meal break time should be dismissed for failure to exhaust the grievance process contained in the collective bargaining agreement. *See West Linn Education Association v. West Linn School District No 3JT*, Case No. C-151-77, 3 PECBR 1864, 1868-71 (1978). The Department has the burden of proving this affirmative defense. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case Nos. UP-58/112-88, 11 PECBR 370, 380 (1989); OAR 115-035-0035(1). A party is only required to resolve its dispute through a grievance process before proceeding with a subsection (1)(g) claim when it has agreed to do so. *AFSCME v. DEQ*, 22 PECBR at 29. Here, the Union alleges a violation of the Settlement Agreement, not the CBA. The Settlement Agreement neither includes its own grievance process nor incorporates the grievance process in the parties' CBA. In addition, the CBA grievance process only covers violations of the CBA, and as a result, is not applicable here. Therefore, the Department failed to carry its burden of proof on this affirmative defense.

Least-Cost Method

The Union also alleges that the Department's implementation of the least-cost method violates the Settlement Agreement. The Union argues that the purpose of the Settlement Agreement was to stop supervisors from requiring auditors to reduce their hours during their workweek before traveling to offset overtime accrued during weekend travel. It asserts that it understood that the Settlement Agreement meant that the Department would revert back to the previous system of allowing auditors to work their regular 40-hour work schedule the week before their Sunday travel day and be credited compensatory time at the overtime rate for the weekend travel. Instead, the Union argues, the Department is using the least-cost method to pressure, manipulate, and even coerce auditors into reducing their regular schedules in violation of the Settlement Agreement. The Union also asserts that the Department has manipulated the least cost comparison analysis to make the cost of compensatory time appear more expensive by including other payroll costs and has not implemented the model in a manner to consistently minimize travel costs and expenses, which is supposed to be the model's purpose.

The Department argues that it is not requiring auditors to adjust their schedules the week before they travel in violation of the Settlement Agreement. Instead, it is requiring auditors to stay over the weekend when doing so is less expensive than the overtime cost, which the Settlement Agreement does not prohibit. In addition, it is allowing auditors to voluntarily adjust their prior week's schedule in lieu of complying with this requirement. The Department asserts that it explained during the discussions leading up to the Settlement Agreement that it believed it had the right to implement a least-cost method that could result in employees being required to stay over the weekend, and the Union did not object.

The language in the Settlement Agreement at issue here is in paragraph 1, which states in relevant part that the Department "will not require Grievants who are on alternate or regular work schedules to adjust their alternate or regular work schedules for travel time." The parties' Settlement Agreement on this language was in response to the claims in DiNicola's grievance and the seven group grievances that the Department had required the auditors "to modify their work schedules during weeks when they were in overnight travel status." Because the parties did not define the word "require" in the Settlement Agreement, we refer to the dictionary to determine the

ordinary meaning of that word. *Yogman v. Parrott*, 325 Or at 362. Relevant here, "require" means "**5:** to impose a compulsion or command upon (as a person) to do something **:** demand of (one) that something be done or some action taken **:** enjoin, command, or authoritatively insist (that someone do something)." *Webster's* at 1929. "[C]ompulsion" is based on the act of or agency to compel. *Id*. at 468. Among other definitions, "compel" means to "**c:** force by authority, code, or custom[;] **2a:** to force or cause irresistibly **:** call upon, require, or command without possibility of withholding or denying[;] **3a:** to domineer over so as to force compliance or submission: demand consideration or attention." *Id*. at 463.

There is no dispute that the Department requires the auditors to stay over the weekend within the meaning of that word, if that is the least cost alternative. However, on its face, the Settlement Agreement does not prohibit such a requirement. The Union also does not assert that this requirement in itself violates the Settlement Agreement. It argues, however, that by requiring auditors to stay over the weekend and then allowing them to agree to flex their schedules to avoid staying over the weekend, the Department is, in effect, requiring the auditors to flex their prior week's schedules.

Because the Department would apparently not violate the Settlement Agreement if it required the auditors to stay over the weekend without allowing them the option of flexing their schedule the week before travel, it is difficult to understand how allowing them this option does violate the Settlement Agreement. The Department has presented the auditors with an option, which they may choose to exercise or not. This does not come within the definition of the word "require" under the Settlement Agreement. Although we agree with the Union that the auditor may be faced with making an "unpalatable decision" between staying over the weekend and flexing their schedules, we do not agree that making an unpalatable decision in itself constitutes a compulsion or a demand. The auditor still makes the choice.

There is also no evidence that the supervisors used duress, coercion, or unethical tactics in pressuring employees into flexing their schedules. The Union's argument that the mere fact the supervisor presented the information directly to an employee in itself constitutes coercion or manipulation is unpersuasive. A supervisor notifying employees that they are required to stay over the weekend and suggesting that they could voluntarily adjust their schedule if they did not want to stay over the weekend, without some evidence of coercive or manipulative actions, does not constitute coercion.

Auditor Pullen's testimony is also insufficient to prove that the Department required the auditors to adjust their schedules in violation of the Settlement Agreement. Pullen testified that she felt intimidated by the least-cost-analysis process because she did not like filling out the paperwork; her supervisor denied her initial requests; and she was faced with two options, neither of which were good. Although the least-cost-analysis paperwork certainly requires an expenditure of time, it is not coercive in itself. In addition, Pullen's requests were primarily denied because of the errors that she made on the requests. And, although Pullen did not feel that either of the choices she faced were good options, she was not compelled or commanded to adjust her schedule. She was told she was required to stay the weekend based on the cost analysis, but that she could agree to adjust her schedule the prior week to avoid this result, which she chose to do.

Finally, we address the Union's argument that the Department's least-cost method is not valid because: (1) it does not require auditors to take the least expensive airline flight; and (2) it has inflated the cost of compensatory time so that the cost of overtime is generally the more expensive option. We disagree with this contention. The evidence shows that, at most, the least-cost method resulted in auditors flexing their schedules rather than staying over the weekend in three out of 99 trips between September 2011 and August 2012. Therefore, if the Department's intent was to inflate expenses and costs so that the cost of overtime is generally the more expensive option, it has done a very poor job. In addition, although the auditors receive no wages at the time the compensatory time is credited, they certainly receive wages when the compensatory time is taken. And, although it is true that the Department did not require employees to take red-eye airline flights, this factor does not affect the least-cost analysis.

ORDER

1. The Department shall cease and desist from violating ORS 243.672(1)(g) by failing to credit Sonny West with a total of 5.25 hours of compensatory time for the 10.5 hours he worked on March 22, 2009. Within 10 days of the date of the Board's final order, the Department shall credit West with 4.00 hours of compensatory time.

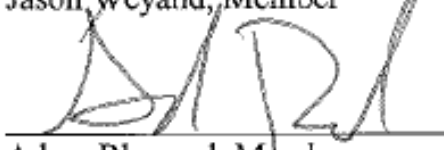
2. The Department shall cease and desist from violating ORS 243.672(1)(g) by failing to recognize meal periods taken during overnight travel as compensable time. Within 30 days of this Order, the Department shall make all Grievants and former employees whole for meal periods that have not been recognized as compensable time from January 2009, until the Order is fully implemented.

3. The other claims are dismissed.

DATED this 5 day of August, 2013.

*Kathryn A. Logan, Chair

Jason Weyand, Member



Adam Rhynard, Member

*Chair Logan did not participate in the deliberations or decision in this matter.

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-16-08

(UNFAIR LABOR PRACTICE)

THREE RIVERS EDUCATION ASSOCIATION, SOBC/OEA/NEA,	)	
Complainant,	)	
v.	)	ORDER ON REMAND
THREE RIVERS SCHOOL DISTRICT,	)	
Respondent.	)	

This matter is before the Board on remand from the Court of Appeals. *Three Rivers Ed. Assn. v. Three Rivers Sch. Dist.*, 254 Or App 570, 294 P3d 547 (2013). The court reversed and remanded the Board's prior order dismissing the unfair labor practice complaint filed by the Three Rivers Education Association, SOBC/OEA/NEA (Association). 23 PECBR 638 (2010). Because no members of the current Board were involved in that prior order, the parties requested that we allow supplemental briefing and oral argument on remand. We agreed to that request and heard oral argument on June 25, 2013.

In its complaint, the Association alleged that the Three Rivers School District (District) violated ORS 243.672(1)(e) and (1)(f) when it unilaterally decided to change the *status quo* with respect to student contact time/teaching workload.[1] The Board initially held that the District changed that *status quo*, and that the subject of student contact time was a mandatory subject of bargaining. Nevertheless, the Board dismissed the complaint after determining that the District's adoption of the trimester schedule concerned a *permissive* subject of bargaining. The Board further determined that, "at most," the decisions regarding the permissive subject (the educational calendar) and the decision regarding the mandatory subject (student contact time) occurred "simultaneously." 23 PECBR at 660. Reasoning that prior Board cases had "consistently held" that a change in student contact time should be treated as an "impact" of a decision to change the

[1]Although "student contact time" and "teaching workload" may be distinct in certain situations, the Association's arguments before the court and this Board focused almost exclusively on student contact time, and the Association used "teacher workload" synonymously with "student contact time." Thus, for the remainder of our order, we refer to the contested change as concerning "student contact time."

educational calendar, even when these changes occurred at the same time, the Board concluded that "the District was not required to bargain about its decision to change the school calendar before it decided to do so." *Id.* at 661. The Board added, however, that the District was "obligated to bargain about the mandatory impacts of that decision before it implemented the new trimester system." *Id.* The Board ultimately determined that the District satisfied its statutory obligation to bargain before it implemented the trimester system. *Id.* at 662.

Former Chair Gamson dissented, asserting that the decision to increase student contact time was *separate from* the decision to adopt a trimester schedule. *Id.* at 668 (Gamson dissenting). He further observed that "the majority apparently agree[d] with [him] on this point" because "[i]t expressly finds no 'inextricable link' between implementing a trimester system and increasing student contact time for teachers." *Id.* He concluded:

> "Given that my colleagues determined that the increase in student contact time was due to a separate decision by the school board, and was not a necessary result of a trimester schedule, I cannot discern how they could then conclude that the increase was not a decision at all, but merely an impact. I know of no sense, semantic or otherwise, in which a decision is not a decision." *Id.*

The Association appealed and, as set forth above, the court reversed and remanded the matter to us. In doing so, the court quoted the above passage from the dissent and stated:

> "We agree with the dissent: We cannot discern the ERB majority's reasoning from its opinion. The majority first found that there was no causal relationship between the two decisions. Then it held that, despite that lack of any causal relationship, one decision was an 'impact' of the other. Without more explanation, those two items appear incompatible because the concept of 'impact' includes causation. That is, if there was no causal connection between the decisions—if they were independent, but simultaneous decisions—then we do not understand how one can be considered an 'impact' of the other. Consequently, the order fails our review for substantial reason. * * *
>
> "Thus, the majority's emphasis on the simultaneity of the two decisions is unavailing in light of its finding that there was no link between them. In all of the cases that the majority cites in support of its holding, there was a causal link between the decision and its 'impact.' * * *
>
> "In sum, the majority's opinion lacks substantial reasoning because it finds no causal connection between the decision to change the school schedule and the decision to increase student-contact time and workload, but then concludes that the latter was an impact of the former. Accordingly, we remand for the board to clearly address whether there was a causal connection between the two decisions and, if so, why the connection was such that it obviated the need for the predecision bargaining that would otherwise be required with regard to student-contact and workload decisions." 254 Or App at 580-81.

The issue on remand is:

Did the District violate ORS 243.672(1)(e) by deciding to unilaterally change the *status quo* regarding a mandatory subject of bargaining?[2]

FINDINGS OF FACT

Neither party disputes the Findings of Fact from the Board's prior order, and we continue to adopt those findings as part of our Order on Remand, as supplemented herein.[3] We summarize the undisputed facts most pertinent to our resolution of the issue on remand.

In September 2007, the Oregon Department of Education (ODE) notified the District that it was increasing student graduation requirements from 22 credits to 24 credits, with additional requirements in math, science, and vocational preparation. ODE required the District to implement this credit change for freshman by the fall of 2008. As a result, the District's Leadership Team (Team), which recommends to the school board how to best serve the needs of the students and the District, was concerned that students who failed only one class would not graduate. The 2007-2008 Team consisted of the superintendent, the human resources director and labor-relations spokesperson (Debbie Bruckner), the fiscal services director, and the director of curriculum and business services.

In the spring and summer of 2007, the Team had collected and reviewed data regarding the District's declining enrollment, budget issues, student state assessment scores, class failure rates, and graduation rates. The Team looked at options for addressing the budget shortfall at the high schools, including eliminating teaching positions. The Team was also concerned about high class failure rates. A significant number of high school students obtained a Graduate Equivalent Development (GED) certificate, rather than graduating from a District high school.

After being informed by ODE of the new graduation requirements, the Team and other high school administrators explored options on how best to serve the needs of the students, despite a $1.2 million budget shortfall. They discussed scheduling options, such as a six-period schedule and a trimester schedule. The group was familiar with a six-period schedule because Grants Pass School District used such a schedule. The Team had never before considered a trimester schedule.

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[2]The Association's complaint also alleged that the District violated ORS 243.672(1)(f) by failing to send the Association notice of anticipated changes that imposed a duty to bargain under ORS 243.698. In our prior order, we dismissed that claim, as well as the subsection (1)(e) claim. As noted, the Association appealed that decision to the court of appeals. However, the Association only assigned as error our determination regarding the subsection (1(e) claim, and the Association's submissions to the court did not reference the subsection (1)(f) claim. Likewise, on remand, the Association has not referenced the subsection (1)(f) claim. Consequently, we conclude that the Association only appealed that portion of our order concerning the subsection (1)(e) claim or that the Association has abandoned that claim; therefore, we will not address any subsection (1)(f) claim.

[3]A full accounting of those facts is set forth in the Board's prior order. *See* 23 PECBR at 639-58.

In early October, the high school principals and Dan Huber-Kantola[4] visited several Oregon school districts that utilized trimester schedules. These trimester schedules consisted of five daily periods, including a preparation period. After the site visits, the administrators concluded that the trimester schedule offered possibilities that the Team should explore with the school board.

By memorandum dated October 18, 2007, the Team told the school board that it recommended that the District adopt a common preparation period at the high schools and a trimester schedule that increased student contact time. The Team projected that such a change could reduce between eight to 13 high school teaching positions, with a savings of approximately $570,000 to $890,000. The Team explained that a common prep period allowed a school to teach the same number of students with fewer staff because the teachers taught every period instead of one-seventh of them being away from students on a prep period. The Team looked at implementing the common preparation period in the current schedule, but did not see it as a good option because it would reduce the number of elective classes a student could take. With the new state requirement of 24 credits to graduate, there would be no "wiggle room" if a student failed a class—something that often occurred with freshman and sophomore students. The Team felt the trimester schedule would best meet the needs of high school students, but was willing to look at other options that also met those needs.

The Team developed a PowerPoint presentation, which included information regarding the District's enrollment decline, financial situation, assessment scores, failure and graduation rates, the Team's recommendation for a common prep period, an overview of the four schedules the Team had considered, and the Team's recommendation for the trimester schedule, which also included an increase in student contact time. On October 29, 2007, Human Resources Director Breckner reviewed the PowerPoint presentation with Association President Chuck Robertson. The Team presented the PowerPoint at a joint meeting of District site councils on October 30 and at a school board work session on November 5.

At a November 19, 2007 school board meeting, the board voted to adopt the process recommended by the Team; that process involved changing three District high schools to a trimester schedule, with a common prep period and increased student contact time.

On November 26, 2007, Breckner hand-delivered a letter to Robertson and Oregon Education Association (OEA) UniServe Representative Jane Bilodeau, which notified the Association of the changes made by the District (as approved by the board), including: (1) moving from a 7-period semester schedule to a 5-period trimester schedule; (2) moving to a common prep period; and (3) increasing a teacher's average student contact time from 312 minutes a day, 6 periods a day, to 340 minutes a day, 5 periods a day.

On December 12, 2007, Bilodeau e-mailed Breckner and Superintendent Fritts, informing the District that the Association considered certain aspects of the District's changes to be mandatory for bargaining. The Association demanded to bargain over those mandatory subjects,

[4]As set forth in the Board's prior order, Huber-Kantola worked for the District as the special education director until he became the director of fiscal services, and then replaced Jerry Fritts in February 2008 as the superintendent-clerk.

but also questioned whether legitimate bargaining could occur because the board had already made its decision.

Thereafter, Breckner provided the Association with bargaining dates and informed the Association that the District believed that its decision involved only a permissive subject, and that, therefore, the District had no obligation to engage in predecision bargaining.

The parties subsequently engaged in impact bargaining regarding the District's November 2007 changes. The Association filed a complaint alleging, among other things, that the District violated ORS 243.672(1)(e) by unilaterally deciding to increase student contact time, without first bargaining over that decision.

CONCLUSIONS OF LAW

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

2. The District violated ORS 243.672(1)(e) by refusing to bargain its decision to increase student contact time.

DISCUSSION

We quote the Board's prior order as to the applicable law, which neither party disputes:

> "When, as here, a labor organization alleges that an employer made a unilateral change in the *status quo*, we apply the analysis as set out in *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008). First, we must identify the *status quo* and then determine whether the employer changed it. If the employer changed the *status quo*, we then determine whether the change concerns a mandatory subject for bargaining. If so, we examine the record to determine whether the employer completed its bargaining obligation before it decided to make the change. An employer must bargain about its decision to change a mandatory subject for bargaining *before* making the decision."[5] 23 PECBR at 658-59.

The Board's prior order treated the dispute as one involving whether the District was required to engage in predecision bargaining regarding the increase in student contact time. However, at oral argument before the Court of Appeals, as well as at oral argument before this Board on remand, the District did not dispute that it was required to engage in predecision bargaining with respect to student contact time. Rather, the District contended that it had engaged in such predecision bargaining because it did not make any "student-contact-time" decision in November 2007, but only in April 2008, *after* bargaining with the Association.

[5]If the employer did not complete its bargaining obligation, we would then consider any affirmative defenses raised by the employer (*e.g.*, waiver, emergency, or failure to exhaust contract remedies). Here, however, no affirmative defenses have been raised.

Thus, although the Board's prior order suggests otherwise, the parties generally agree on the appropriate legal framework governing this dispute. Specifically, the Association agrees that if the District made only a decision in November 2007 concerning the permissive subject of the trimester schedule, the District was not obligated to bargain that decision under the Public Employee Collective Bargaining Act (PECBA). For its part, the District agrees that if it made *separate* decisions in November 2007, one concerning the trimester schedule and a second concerning the mandatory subject of student contact time, it was required to bargain about the latter before deciding on any changes.[6] Thus, as clarified at oral argument before the court and on remand before this Board, the dispositive issue is quite narrow and relatively straightforward—specifically, we must determine, as a factual matter, whether the District made a decision in November 2007 to increase student contact time. If so, the District violated subsection (1)(e) because no bargaining took place on that subject before such a decision was made. If not, the District did not violate subsection (1)(e) because it only made a decision concerning the permissive subject of the educational calendar.

In the Board's prior order, all three former members agreed that the District made *two* "prebargaining" decisions in November 2007, one concerning the permissive subject of the trimester schedule and one concerning the mandatory subject of student contact time. *See* 23 PECBR at 660-61 (majority opinion), 668 (dissenting opinion); *see also* 254 Or App at 576-77. That fact was also apparently accepted by the Court of Appeals, which characterized the facts as "undisputed," and noted on multiple occasions (including its remand instructions) that the District made "two decisions" in November 2007. *See* 254 Or App at 571, 577, 578, and 580.

Thus, to agree with the District that it only made *one* prebargaining decision in November 2007 (concerning *just* the permissive subject of the educational calendar), we would need to make a factual determination contrary to that set forth in the Board's prior order (by both the majority and the dissent), and that was understood by the court to be undisputed. We decline to do so. To begin, we are not inclined to revisit and reverse a factual finding made in a prior order that the District did not cross-assign as error with the court (*see* ORAP 5.57), and that was at least implicitly accepted by the court. In other words, we conclude that the District did not properly preserve a challenge to the Board's previous finding that the District made *two* decisions in November 2007, one concerning the permissive subject of the school calendar, and the second to the mandatory subject of student contact time.[7] Consequently, we adhere to the Board's prior

[6]There is no dispute that the subject of the educational calendar is permissive for bargaining, and that the subject of student contact time is mandatory for bargaining. *See Three Rivers Ed. Assn.*, 254 Or App at 575.

[7]The significance in the District not cross-assigning as error the prior finding regarding the two decisions should not be underestimated. By not doing so, the court engaged in a substantial analysis of whether the District was required to engage in "impact bargaining" or "decision bargaining" regarding the mandatory subject of student contact time. That analysis (as well as the analysis in the Board's prior order) was predicated on a determination that the District made two prebargaining decisions in November 2007. If the District had cross-assigned as error the finding that it made two decisions in November 2007, the court could have addressed that finding at that time.

factual determination (which was unanimous) that the District decided in November 2007 to change both the educational calendar and student contact time.

In any event, even if we were to entertain the District's challenge to that prior factual finding, this Board would still conclude that the District made two prebargaining decisions in November 2007. On November 19, 2007, the school board adopted the process recommended by the Team; that recommended process included *both* changing to a trimester system and increasing student contact time. Consistent with that action, on November 26, 2007, Breckner, the District's HR Director and spokesperson in labor-relations matters, hand-delivered a letter to the Association stating that the District had: (1) approved a change from a 7-period semester schedule to a 5-period trimester schedule; (2) approved a change to move to a common prep period; and (3) approved a change in student contact time. With respect to the latter, Breckner's letter was unequivocal, stating that, although the average District teacher currently taught 312 minutes a day, 6 periods a day, under the change approved by the board, "a high school teacher *will teach approximately 340 minutes, 5 periods a day*." (Emphasis added.)

Based on the foregoing, even if the District preserved the issue, we would nevertheless continue to adhere to the Board's prior determination that the District made two decisions in November 2007 to: (1) change to a trimester schedule (a permissive subject of bargaining); and (2) increase student contact time from 312 minutes per day to 340 minutes per day (a mandatory subject of bargaining).

In arguing for a different result, the District contends that it cannot be bound by Breckner's letter because only a formal resolution by the District's board could constitute a District "decision." We disagree.

Breckner was the District's HR director and labor-relations spokesperson. She was also the authority that informed the Association of the District's decision. Moreover, when the Association demanded to bargain and indicated that the District's prebargaining decision regarding mandatory subjects already violated the PECBA, Breckner was the District representative who informed the Association of the District's position regarding that assertion. Breckner also provided the Association with bargaining dates and asked the Association to come prepared to identify the mandatory impacts of the decision to change to a trimester system and to present its proposals. Breckner further accepted, on behalf of the District, the Association's demand to bargain, and she informed the Association of the District's willingness to engage in "impact" bargaining.[8] Additionally, Breckner acted as the District's primary bargaining representative in the subsequent "impact" negotiations.

[8]The record does not show that the District's board formally voted on a resolution regarding that position.

Consequently, we find with little difficulty that Breckner was authorized to speak on behalf of the District regarding the decision that the board had made.[9]

In any event, we do not find Breckner's November 2007 letter informing the Association of the District's decisions regarding the trimester schedule and the increased student contact time to be inconsistent with the board's vote to approve the Team's recommendations regarding those matters. Specifically, Breckner's letter setting forth the District's decision was consistent with the board's vote to adopt the Team's recommendations, as both the letter and the board's vote reflected that the District had decided to both change to a trimester system and to increase student contact time. Under such circumstances, we disagree with the District's contention that Breckner's letter was insufficient to demonstrate that the District made a decision in November 2007 to change student contact time.

As set forth above, the District concedes that if we find that it made a decision in November 2007 to change student contact time, then it violated subsection (1)(e) because it did not bargain with the Association before making that decision. Therefore, because we have made such a finding, we conclude that the District violated ORS 243.672(1)(e). [10]

We turn to the remedy. Because the District violated ORS 243.672(1)(e) by deciding to change student contact time without first bargaining with the Association, we will order the District to cease and desist from engaging in that conduct. ORS 243.676(2)(b).

Normally, in a case involving an unlawful unilateral change such as this one, we also order restoration of the *status quo*. However, given the significant passage of time since the District's unlawful unilateral change (and the nature of the change), the Association requests that we instead direct the parties to bargain in good faith over the appropriate remedy. We agree with the Association that such a remedy is appropriate here and will so order. The parties will have 60 days from the date of this order in which to bargain in good faith for a remedy. If the parties have not

[9]Additionally, even if Breckner had acted on her own, such action would likely be imputed to the District. Under ORS 243.672(1), an unfair labor practice is committed by "a public employer or its designated representative." Although there is no statutory definition of "designated representative," for purposes of ORS 243.650 to 243.782, a "public employer representative" includes "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." ORS 243.650(21); *see also Service Employees Int'l Union Local 503 v. DAS*, 202 Or App 469, 476, 123 P.3d 300 (2005). As set forth above, there can be little dispute that Breckner was designated to act in the District's interests for purposes of collective bargaining and related issues and would qualify as a "designated representative" of the District within the meaning of the PECBA.

[10]Because we have not adhered to the Board's prior analysis and the issues on remand have been treated more narrowly, the court's remand instruction (to provide a substantially-reasoned order regarding that analysis) does not appear to be applicable. In any event, as we have explained, we conclude that the District made two separate decision in November 2007—(1) a change in student contact time, and (2) a change to the educational calendar—and that the decision to change student contact time was not caused by the decision to change the educational calendar.

reached an agreement on a remedy at the end of the 60-day period, each party is to submit to the Board the last proposal that was submitted to the other party, and we will determine a remedy that effectuates the policies of the PECBA.[11] *See* ORS 243.676(2)(c).

The Association also requests that we order the District to post a notice of its subsection (1)(e) violation. We order employers to post a notice of violations if we determine that 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. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601 (1983). Not all of these criteria must be satisfied to justify a posting. *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 782 (2007). The Association has not identified which, if any, of these factors necessitate the requested posting remedy, and after applying these factors to the present case, we do not conclude that a posting is warranted.

ORDER

1. The District violated ORS 243.672(1)(e) when it decided to change student contact time without first bargaining with the Association. The District will cease and desist from engaging in such conduct.

2. The District and Association shall bargain in good faith over the appropriate remedy. The parties have 60 days from the date of this order to bargain over a remedy. If the parties have not reached an agreement on a remedy at the end of the 60-day period, each party is to submit to the Board the last proposal that was submitted to the other party.

DATED this 8 day of August, 2013.

Kathryn A. Logan
Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

[11] Our potential remedy may involve selecting the Association's proposed remedy, the District's proposed remedy, or a remedy of our own.

EMPLOYMENT RELATIONS BOARD

OF THE STATE OF OREGON

OREGON AFSCME COUNCIL 75, LOCAL 350-2, Complainant, v. THE CITY OF OREGON CITY, Respondent.	Case No. UP-18-13 CONSENT ORDER

I. STATEMENT OF THE CASE

On April 8, 2013, Complainant Oregon AFSCME Local 350-2 ("AFSCME") filed an unfair labor practice complaint against Respondent, The City of Oregon City ("City"), alleging violations of ORS 243.672(1)(a), (b), and (c).

The parties have agreed to settle this matter by entry of this consent order, subject to Board approval. They also agree to waive all further proceedings in this matter, including a hearing before the Board and judicial review of the consent order. Finally, the signatories warrant they are authorized by their respective principals to sign the stipulation, waive reading of the Administrative Procedure Act rights (ORS 183.413), and represent that the statements in the stipulation of fact are accurate and constitute all of the evidence that either party wishes to present to the Board.

II. STIPULATED FACTS

1. Oregon AFSCME Local 350-2 is a labor organization as defined by ORS 243.650(13).
2. The City of Oregon City is a public employer as defined by ORS 243.650(20).
3. On or about April 5, 2013, through a letter written on the City's behalf by the City's labor representative and lawyer, the City disputed a position that AFSCME had taken with respect to the discipline of employee, Samantha Vandagriff. The letter restated arguments previously stated by City management and threatened to rescind the demotion and terminate her employment

unless AFSCME withdrew its argument that the labor agreement did not permit demotion as a form of discipline.

4. City officials were aware of the letter before it was sent and inquired specifically about concerns expressed by AFSCME at that time. Promptly upon learning of the filing of an unfair labor practice complaint, the City consulted a different lawyer and, on April 10, 2013, rescinded and repudiated written statements stated in the letter by email communication to AFSCME.

III. STIPULATED CONCLUSIONS OF LAW

1. The Board has jurisdiction over these parties and this subject matter.
2. The City violated ORS 243.672(1)(a) and (b).

IV. STIPULATED ORDER

1. The City shall cease and desist from interfering with, restraining, or coercing bargaining unit members and AFSCME in or because of the exercise of rights protected under ORS 243.662 in violation of ORS 243.672(1)(a).
2. The City shall cease and desist from interfering with the administration of the union in violation of ORS 243.672(1)(b).
3. All remaining claims are dismissed.
4. Neither party shall be awarded representation costs and no civil penalty shall be awarded.

FOR THE UNION

Jennifer K. Chapman
Legal Counsel
Oregon AFSCME Council 75
Date: 8/1/13

FOR THE EMPLOYER

Adam Collier
Attorney for the City of Oregon City
Date: 8/6/13

This Consent Order is hereby approved and adopted this 8 day of August, 2013.

FOR THE EMPOLOYMENT RELATIONS BOARD

Kathryn A. Logan

Kathryn A. Logan, Chair
Date: _____

Jason M. Weyand, Board Member
Date: _____

Adam L. Rhynard, Board Member
Date: _____

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-23-11

(UNFAIR LABOR PRACTICE)

JACKSON COUNTY SHERIFF'S, EMPLOYEES' ASSOCIATION, Complainant, v. JACKSON COUNTY SHERIFF'S DEPARTMENT, Respondent.	)	FINDINGS AND ORDER ON PETITIONS FOR REPRESENTATION COSTS

On April 26, 2011, the Jackson County Sheriff's Association (Association) filed an unfair labor practice complaint against Jackson County Sheriff's Department (County), alleging that the County violated ORS 243.672(1)(e) by unilaterally changing the *status quo* concerning the number of deputies allowed to select the same vacation shift and by increasing the workload of records clerks without first bargaining over the impacts of the additional workload. On April 11, 2013, this Board issued an Order concluding that the County violated ORS 243.672(1)(e) when it increased the workload of the records clerks without bargaining the impacts. We dismissed the Association's claim concerning the change in vacation shifts for deputies. 25 PECBR 449 (2013). Both parties seek representation costs. On April 24, 2013, the Association submitted its petition for representation costs. On April 29, 2013, the County filed its petition for representation costs. On May 13, 2013, the County filed objections to the amount of the costs sought by the Association.

Pursuant to ORS 243.676(2)(d) and OAR 115-035-0055, this Board finds that:

1. The County and the Association filed timely petitions for representation costs. The County filed timely objections to the Association's petition.

2. This case involved one day of hearing. According to the Association's affidavit, representatives for the Association spent 29.7 hours working on this matter at rates of $250 per hour for attorney time and $50 per hour for law clerk time, for a total of $4,440. According to the

affidavit of counsel for the County, he spent 106.6 hours working on this matter at the rate of $165 per hour, for a total cost of $17,889.

3. Both the County and the Association are prevailing parties.

Only a "prevailing party" in an unfair labor practice is entitled to representation costs. ORS 243.676(2), (3); OAR 115-035-0055(1). Both parties assert that they are the prevailing party. Under our rules, if one or more "separate charges" are upheld and one or more dismissed, each party may be considered as "prevailing" for the purposes of representation costs. Charges are "separate" if (1) they are based on "clearly distinct and independent operative facts; *i.e.*, the charges could have been plead and litigated without material reliance on the allegations of the other," and (2) they concern "enforcement of rights independent of the other." *Arlington Education Association v. Arlington School District No. 3*, Case No. UP-65-99, 21 PECBR 192, 194 (2005) (Rep. Cost Order); OAR 115-035-0055(1)(b)(A).

We conclude that each (1)(e) charge is separate, as each charge alleged a different *status quo* change for different employee groups. We held that the County violated ORS 243.672(1)(e) by adding new duties to the records clerks without first bargaining over the impacts with the Association. The Association is the prevailing party on this claim. We dismissed the Association's second claim under (1)(e), finding that the County was not obligated to bargain over the change in the number of deputies allowed to take vacation during a shift. The County was the prevailing party on this charge. As a result, the Association and the County are both prevailing parties for the purpose of representation costs.

4. Neither party prevailed to a greater extent than the other.

When considering representation costs in cases where both parties prevail on separate charges, the Board determines the percentage of the case that each party prevailed on, and then subtracts those percentages. If one party prevails to a greater extent, we then apply that percentage to the adjusted representation costs claimed by the party to determine the amount of costs we will award. *See East County Bargaining Council v. Centennial School District No. 28JT,* Case No. C-185-82, 8 PECBR 8359 (1986) (Rep. Cost Order) (determining that respondent prevailed on 53 percent of the case, and complainant on 47 percent, resulting in a six percent award to the respondent). To determine the percentages of the case that each party prevailed on, we examine the number of issues involved, the significance of the issues, and the amount of time that a party reasonably devoted to each issue. *Arlington School District No. 3*, 21 PECBR at 195, *citing to Mid-Valley Bargaining Council and Clausing-Lee v. Corvallis School District*, Case No. UP-69-95 (Unpublished Rep. Cost Order, February 1997).

This case involved two separate charges that the County violated ORS 243.672(1)(e) by making unilateral changes without first bargaining with the Association. The charges were of equal significance in the case, and would reasonably require the same or a substantially similar amount of time to litigate. As a result, we find that each party prevailed on 50 percent of the case. When neither party prevails to a greater extent than the other, we offset the representation costs and do not award costs to either party. *City of Madras v. Madras Police Employees'*

Association, Case No. UP-63-02 (Unpublished Rep. Cost Order, October 2003). As a result, we will dismiss both petitions.

ORDER

The petitions for representation costs are dismissed.

DATED this 8 day of August 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-24-12

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75, LOCAL 2376, Complainant, v. STATE OF OREGON, DEPARTMENT OF CORRECTIONS, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Neither party objected to a Recommended Order issued by Administrative Law Judge (ALJ) Peter A. Rader on June 11, 2013, after hearings on December 11 and 12, 2012, in Salem, Oregon.[1] The record closed on January 15, 2013, following receipt of the parties' post-hearing briefs.

Jennifer K. Chapman, Legal Counsel, Oregon AFSCME Council 75, Local 2376, Salem, Oregon, represented Complainant.

Stephen D. Krohn, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

On April 25, 2012, Oregon AFSCME Council 75, Local 2376 (Union) filed this unfair labor practice complaint against the State of Oregon, Department of Corrections (Department), alleging the Department violated ORS 243.672(1)(a) and (c) following bargaining unit member

[1]Respondent initially filed objections to the Recommended Order on June 25, 2013, but subsequently withdrew those objections.

Robert Hillmick's reinstatement. At the ALJ's request, an amended complaint was filed on June 28, 2012, and the Department timely answered on August 15, 2012, raising the affirmative defense of timeliness as to certain claims and requesting a civil penalty and reimbursement of filing fees.[2]

RULINGS

The rulings of the ALJ have been reviewed and are correct.

ISSUES

The issues are:

1. Did the Department's treatment of Robert Hillmick, following his reinstatement in 2012, interfere with, restrain, or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662 in violation of ORS 243.672(1)(a)?

2. Did the Department's treatment of Robert Hillmick, following his reinstatement in 2012, have the natural and probable effect of dissuading other union employees from engaging in protected rights under ORS 243.662? If so, did the Department violate ORS 243.672(1)(c)?

3. If the Department violated ORS 243.672(1)(a) or (c), should a civil penalty be imposed? If the claims against the Department are dismissed, should a civil penalty be imposed on the Union?

For the reasons stated below, we conclude that the Department did not violate ORS 243.672(1)(a) or (c), and dismiss the complaint. We also deny the Department's requests for a civil penalty and reimbursement of its filing fee.[3]

FINDINGS OF FACT

1. The Union is a labor organization and the exclusive representative of employees who work at correctional facilities operated by the Department, a public employer.

[2]In the event that we award a civil penalty, the Department also requests representation costs in excess of $3,500. Representation costs are not part of this order. *See* OAR 115-035-0055.

[3]Two Board members have been involved with Mr. Hillmick in their prior employment. Although no direct conflict of interest exists, both Board members have previously recused themselves from cases in which they had been involved. However, if we followed this process for this matter, there would not be a quorum of Board members to issue this Order. Therefore, Chair Logan and Member Weyand invoke the rule of necessity so that this matter can be completed.

2. The Union and the Department, through the Department of Administrative Services, have been parties to a series of collective bargaining agreements, the most recent of which was effective July 2011 through June 2013.

3. The Eastern Oregon Correctional Facility (EOCI) is located in Pendleton, and the Two Rivers Correctional Facility (TRCI) is located in Umatilla, Oregon.

4. Robert Hillmick is a bargaining unit member who has worked for the Department at various correctional facilities for more than 21 years. In 2000, he was promoted to correctional sergeant at TRCI and later that year, to correctional lieutenant/security threat group manager. In 2005, he was promoted to correctional counselor at EOCI, where he assisted inmates transitioning to post-prison life. He was a union steward and, as of 2008, president of Local 2376-4, which includes employees in the Security Plus unit at EOCI. In his capacity as Local President, Hillmick developed a reputation as an aggressive advocate for its members.

5. On December 29, 2010, Hillmick received a notice of dismissal from state service for multiple violations of the Department's policy regarding use of its electronic systems (telephone, e-mail, and internet). The Union filed a grievance on his behalf and ultimately requested binding arbitration pursuant to the parties' Collective Bargaining Agreement (Agreement).

6. On June 3, 2011, the Union filed an unfair labor practice complaint with this Board alleging the Department violated ORS 243.672(1)(a) as a result of Hillmick's protected union activities.[4]

7. In June of 2011, Hillmick contacted former coworker John Myrick, who was at that time the acting superintendent of corrections counselors at TRCI, and asked him whether he (Hillmick) would be welcomed at TRCI if a settlement was reached in his arbitration. The two men had known each other for years and Myrick replied affirmatively.

8. In August of 2011, Hillmick's supervisor at EOCI, correctional rehabilitation manager Greg Clark, was disciplined for excessive personal internet use as a result of an inquiry generated by Hillmick in his capacity as president of the local bargaining unit.

9. At the October 27 and 28, 2011 arbitration, the Department of Justice attorney representing the Department decided whom to call as witnesses. One witness was EOCI corrections counselor Ward King, with whom Hillmick had a fractious relationship. King brought an issue to Hillmick's attention regarding Superintendent Rick Coursey, and incorrectly believed that Hillmick had brought the matter to Coursey's attention when, in fact, it was discovered through the Department's search of Hillmick's e-mails to other Union officials.

[4] *Oregon AFSCME Council 75, Local 2376 v. DOC, EOCI*, Case No. UP-32-11, 24 PECBR 599 (2012). On February 2, 2012, the parties entered into a consent order in which the Department admitted to violating ORS 243.672(1)(a).

Nevertheless, the incident soured their relationship and the two men did not trust each other. King made comments that were critical of Hillmick in the latter's Bureau of Labor and Industries (BOLI) proceeding and at the arbitration. Also testifying at the arbitration was Hillmick's supervisor, Greg Clark, and EOCI's assistant superintendent of correctional rehabilitation Brigitte Amsberry. All three provided negative testimony regarding Hillmick.

10. On or about December 6, 2011, Clark moved his office to the fourth floor of F Building Appendage, the same building where Hillmick previously worked, as did corrections counselor Alice DeJongh. Clark's administrative assistant, Yesenia Rangel, moved from the fourth to the third floor.

11. On December 18, 2011, Arbitrator Edward M. Clay issued his award, ordering Hillmick reinstated to his old position with back pay and expungement of the termination from his personnel records. Legal counsel for the Department and Union negotiated Hillmick's return date for January 9, 2012, which, after factoring in weekends, holidays, vacations, and furloughs, was approximately nine working days after receipt of the award.

12. On December 21, EOCI's Director of Human Resources, Martin Imhoff, called a meeting of Department managers and HR personnel to discuss implementation of the arbitration award.

13. On January 5 and 6, 2012, Imhoff and Amsberry exchanged e-mails with Union counsel and various HR and Internet Technology Services section managers to reactivate Hillmick's telephone number, e-mail account, payroll, security access, badge, orientation information, scheduling, back pay, and miscellaneous paperwork, but not all of the arrangements were completed by Hillmick's return.[5]

14. On January 6, Union counsel contacted the Department of Justice attorney regarding the public posting of Hillmick's arbitration award on the Department's internal server, called the U-drive. The Department's employee and labor relations section in Salem typically distributes and posts all labor arbitration awards on the internal server, which is available to managers and HR personnel, but there was a link to the folder accessible to anyone in the Department who knew where to look. Some Department employees accessed the U-drive folder, read the award, and mentioned it to Hillmick. When Union counsel brought this to the Department's attention, Imhoff promptly restricted access to authorized managers only.

15. On January 6, an e-mail was sent to all employees in the section notifying them of Hillmick's return date. That e-mail included EOCI's internal notification form with a checklist for letters, photos, photo identification, and Department procedures necessary to make that happen.

[5]Unless indicated otherwise, all remaining dates occurred in 2012.

The Events of January 9

16. At 7:48 a.m., Imhoff sent an e-mail to Amsberry and other managers regarding his meeting that morning with the Union's local president, Annette Skillman, in which they discussed Hillmick's return. The e-mail provided a 13-point summary of topics discussed that included arrangements already completed and those needing further action.

17. At 7:58 a.m., Skillman sent an e-mail to Imhoff that mentioned paperwork ready for Hillmick's signature and return to Amsberry, including three key chits (identifying the user and allowing access to the facility), the code of ethics, and forms for user authorization, family relationship, emergency contact information, race/ethnicity, criminal history, and DMV records.

18. At 8:00 a.m., Hillmick reported to Amsberry's office, at which Clark was present. The atmosphere was strained and Hillmick declined to sit down. Amsberry and Clark proceeded to brief Hillmick on some new procedures, refresher courses, caseload, and other assignments, during which time Clark ate a banana.[6] The meeting lasted approximately 15 minutes.

19. At 9:38 a.m., Imhoff sent an e-mail to Kim Brockamp, assistant director of HR, and Daryl Borello, the Department's chief employee relations administrator. The e-mail raised the possibility of easing tension and enhancing Hillmick's successful return to work by transferring Clark and Amsberry to TRCI and having two managers at that facility, David Pedro and John Myrick, transfer to EOCI. The idea was later dropped when it was learned that the two TRCI employees were acting managers and did not share the same rank as Clark and Amsberry.

20. Hillmick's new office was on the fourth floor of the building in which he previously worked. The office was comparable to his former one, but his new office did not have the odd configuration and support beam running through the middle of it, which meant he had more usable space. His former office was on the third floor, but during his year-long absence, it had been converted into a storage/break room with built-in cupboards, appliances, a copier, and other office equipment, and was no longer available. Clark had hired three new counselors while Hillmick was gone, and the remaining third floor offices were all occupied.

21. When Hillmick found his new office, he learned the keys he had been authorized by Clark to check out did not fit the lock. He contacted the tool and key sergeant, Levi Patterson, who made a new set. Patterson explained in an e-mail to Hillmick in August that Rangel had occupied Hillmick's former office, that he was given her set of keys, one of which opened Clark's office, and that he had been instructed to re-key Hillmick's and the other counselor's key rings to prevent access to Clark's office due to the confidential files kept there.

[6]Hillmick testified that Clark ate four bananas during the meeting, making it difficult to understand him, which he construed as a hostile act. We credit the testimony of Clark and Amsberry that Clark did not consume four bananas during the meeting and that Hillmick did not complain about being unable to understand Clark's comments. Nevertheless, after that meeting Hillmick concluded that his return to EOCI would be unsuccessful.

22. Hillmick's office had a window and two desks (metal and wood), but no chairs. The telephone and computer were not activated, the computer monitor was smaller than the other counselors' monitors, and there were no employee manuals or office supplies. There was a near-dead potted plant in the office.[7]

23. Hillmick contacted Amsberry about his lack of telephone and internet connections. At 10:38 a.m., IT manager Stacey Ledbetter sent an e-mail to Hillmick and his managers stating that a new telephone number had to be assigned to his office and that she was still working on the cabling connections. The telephone was operational by 2:00 p.m., and internet access was available by 4:00 p.m. that afternoon.

24. Rangel had wiped down the desks and removed some items stored in Hillmick's office before his return. She informed him that he could select either desk and have the other one removed. He was advised that training manuals were available in hard copy or online if he needed immediate access. When he inquired about a time sheet, counselor DeJongh informed him that they now recorded their time online. Hillmick found a bookcase and arranged to have an inmate work crew bring it up to his office.

25. At 4:36 p.m., Hillmick sent an e-mail to counselor Bob Martinez at TRCI asking if he was interested in switching jobs and coming to EOCI. Martinez declined.

The Events of January 10

26. At 7:44 a.m., Hillmick sent an e-mail to Clark and Amsberry requesting a larger computer monitor, office supplies, and permission to bring in a small radio. Amsberry put in a request for a 22-inch monitor and confirmed with Hillmick two days later that it had been ordered. Clark directed Rangel to provide Hillmick with whatever he needed in the way of office supplies, which she provided within two days. The request for a radio had to be approved by the security captain David Heehn, who approved the request two days later.

27. At 8:33 a.m., Hillmick sent an e-mail to corrections counselor Dave Shotts at TRCI asking if Shotts was interested in switching jobs and coming to EOCI. Shotts declined, replying that he was happy at TRCI. Hillmick did not notify HR that he had contacted TRCI counselors about switching positions, but word of his efforts to transfer got out.

28. Case assignments at EOCI are based on a number of factors, which may include a counselor's experience, the inmate's release date, and the type of counseling required. At the time, counselor DeJongh carried a caseload of 500 inmates with a Low Automated Criminal Risk Score (ACRS), who require less counseling than inmates with Moderate or High ACRS.

[7]Plants are watered and maintained by inmate orderlies, and the plant was removed to the facility's nursery. Although the Department produced a healthy-looking potted plant at hearing, claiming that it was the same, rejuvenated plant, it was not admitted into evidence.

29. Hillmick's caseload consisted of approximately 109 Moderate/High ACRS inmates with more than 48 months left on their sentence. He sent an e-mail to Clark and Amsberry inquiring about the size of his caseload, which was larger than he previously managed and larger than the caseload of some other counselors. It was explained that his assigned inmates typically required less counseling than those about to be released, and once inmates were 48 months from their release date, he was to transfer them to another counselor.

30. On January 11 at 2:38 p.m., Hillmick sent an e-mail to Clark and Amsberry inquiring about a counselor meeting to which he had not been invited. The next day, Clark responded that he was not excluded but was being given time to become familiar with his caseload, and that he would be added to the distribution list. Rangel testified that it was her oversight not to have added him to the distribution list on the day he returned.

31. On January 19, Hillmick informed Union counsel and Brockamp that he believed he was being retaliated against. Borello sent an e-mail to Brockamp and east side administrator Sharon Blackletter addressing the issue of Hillmick's new office, which was discussed with Superintendent Coursey and Imhoff three or four days before Hillmick's return. The e-mail states in part:

> "Rick and Marty called me and stated that due to Hillmick being gone so long, they had another employee using his office (Hillmick's memo states it is being used for storage). I know they told me another employee was assigned that office because Rick expressed concern at uprooting that employee just to give Hillmick back his old office. Rick asked me what his options were and stated he had Clark an [*sic*] some vacant office space in a close but different location. With Clark supervising counselors, I interpreted that as it was another counselor area within the institution. I expressed that Rick could move the counselor in Hillmick's old office out, as an option, but that he wasn't required to do so.
>
> "I expressed concern with assigning only Hillmick to an area where he was ONLY with Clark as it would clearly be singling Hillmick out. I did mention that it might be beneficial to have Hillmick in close proximity to Clark's office to answer questions, training and yes, to make sure Hillmick did not start stirring the pot and dividing management and staff due to his history of discipl[in]e by management and success in arbitration. Clark could keep an eye on the situation which we have predicted would/could be fairly tense. It was at that point, Rick stated he understood and actually was aware of another counselor that was willing to also move offices into this area. We spoke of that being an appropriate option as the counselors would have two primary areas of offices and Hillmick would not be singled out.
>
> "We then went into a conversation of having that office ready for Hillmick's return. I brought up the [TG] arbitration because I had firsthand knowledge of that case. I explained that prior to [TG] returning to work we made sure her entire

office was set up and ready for her and had a phone and computer equipment completely ready. Rick mentioned that would be completed prior to Hillmick's return and mentioned they (EOCI) had received a lot (I think he said dozens) of computers recently and that the office would be complete prior to Hillmick's return.

"When I hung up the telephone with Rick and Marty I was under the impression that Hillmick's old office was being used by an EMPLOYEE and that Hillmick would return to a complete and prepared office, in another location but in an area with Clark and at least one other counselor. I did not see this arrangement as retaliatory or singling Hillmick out in any way. It prevented expense and time loss in moving other employees only because Hillmick was returning and it would not negatively affect morale by moving employee offices just because Hillmick was coming back. Doing so, I thought might cause Hillmick more complications due to animosity amongst the counselors affected. I did not agree to displacing him if his old office was being used as storage (that was never mentioned). I advised against giving him an office where he was singled out and my advice was to have whatever office they were assigning to him prepared and ready for his return. I did advise Rick that he was not obligated to place Hillmick back in his old office if that was not operationally feasible." (Emphasis in original.)

32. On January 20, in response to Hillmick's complaint of retaliation, HR managers approached Hillmick about the possibility of transferring to TRCI. At that point, it was clear to everyone that Hillmick's return to work was not going well and it was thought this might be an appropriate solution. Hillmick was receptive, and negotiations began between the Union and Department.

33. On January 20, Hillmick was leaving his office for the day when he encountered King walking through the facility's compound. The two men had a heated exchange, which Hillmick immediately reported to Imhoff and later filed a complaint against King addressed to Brockamp, Union counsel, and other managers. It states in part:

"Mr. King approached me and was trying to start a conversation with me like we were old friends. I ignored him to begin with and just looked away, then he started walking with me and I politely told him that we had nothing to say to each other. At that point Mr. King pretty much lost his cool and got very agitated and hostile, leaning his face toward mine saying, that's fine, you want to be that way, I can be that way too, and things to that [e]ffect as I continued walking toward the door home. While he was leaning into me, putting his shoulder against mine, I just kept walking and then he got in front of me and in a very hostile manner, said, 'Any time, any time!' He was challenging me to a fist fight. I just kept walking and watching to make sure that he was not going to make a physical move toward me as he left. I was trying to mind my own business and just go home when all this occurred, but was not allowed to do that."

34. Imhoff immediately reported the incident to Amsberry and suggested they review the surveillance video of the area the two men were walking in. Imhoff wrote up the incident in his own report, which states in part:

> "Ward King turned so that the two of them were facing while walking. Mr. King was off the front of Mr. Hillmick's left shoulder and said 'I was trying to offer you an olive branch, but you want to be that way, fine, I can be that way too.' Mr. King said this more than once, or similar words, as he kept walking very closely, in Mr. Hillmick's physical space such that Mr. Hillmick thought he might be physically confronted. Mr. King said 'Any time, any time,' as if challenging Mr. Hillmick to a fight."

35. Immediately after the incident, King went to Amsberry's office. His January 23 report of the incident states that he asked Hillmick how it felt to be back, and that Hillmick responded with an expletive. King also wrote that he walked in front of Hillmick and turned, and when he did so, his lunch box hit Hillmick on his side. The report goes on to state:

> "I am aware that my reply could have been taken as threatening, as I was very frustrated at Mr. Hillmick's continued negative attitude towards me and others.
>
> "I have learned that in the future, I will only speak to Mr. Hillmick in a professional tone, and only converse in the event that our duties as correctional counselors warrant communication."

King received a letter of correction as a result of Hillmick's complaint.

36. Imhoff and Amsberry reviewed the security video of the two men walking, but determined that it was inconclusive as to whether King behaved aggressively towards Hillmick.

37. On February 9, the alarm on Clark's new office radio went off while he was out and another counselor let Hillmick in to turn it off. Hillmick brought the incident to Clark's attention, but the radio alarm went off the next day for 45 minutes because Hillmick did not have a key to that office. Clark is available via cell phone, but Hillmick did not contact him. Hillmick reported the incidents to Coursey, who replied that Clark would no longer use the radio, that no counselors were supposed to have keys to Clark's office, and that those keys would be removed immediately.

38. On February 17, the parties signed an agreement for Hillmick to transfer to TRCI at the same pay and classification, and for counselor Shotts to transfer to EOCI. There were no agreements about providing a state car or paying for Hillmick's commuting costs or expenses. The agreement, which was signed by Hillmick, AFSCME's business agent Tim Woolery, and Brockamp, states:

"AGREEMENT

"Rob Hillmick voluntarily accepts a transfer from his current counselor position at Eastern Oregon Correctional Institution (EOCI) to a counselor position at Two Rivers Correctional Institution (TRCI).

"Rob Hillmick's compensation will remain at $5,772, Step 8, of the Correctional Counselor classification and will not be impacted by his voluntary transfer to TRCI. Future step increases or COLA's will be issued according to the AFSCME Security Plus Collective Bargaining Agreement. DOC will not pay any additional compensation to Mr. Hillmick as a result of his transfer.

"Upon the last signature of this agreement, DOC will make arrangements with Mr. Hillmick as to when he should report to his TRCI Counselor Position."

39. In March of 2012, Hillmick and Shotts traded positions. Shotts assumed Hillmick's caseload of Moderate/High ACRS inmates at EOCI, but carried an additional caseload comprised of inmates categorized as Security Threat Management, which can include gang members, and between 60-70 high-alert-status inmates known for violence.

CONCLUSIONS OF LAW

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

2. The Department did not violate the "because of" or the "in" the exercise of prongs of ORS 243.672(1)(a) in its dealings with Hillmick upon his reinstatement to EOCI in 2012.

3. The Department did not violate ORS 243.672(1)(c) in its dealings with Hillmick upon his reinstatement to EOCI in 2012.

4. The Department's requests for a civil penalty and reimbursement of its filing fee are denied.

DISCUSSION

The Union alleges the Department violated both the "because of" and the "in" prongs of ORS 243.672(1)(a), as well as subsection (1)(c), after Hillmick's return to work at EOCI on January 9, 2012. It contends that a series of minor incidents, when viewed together, demonstrates a pattern of hostile behavior intended to punish Hillmick for engaging in protected union activities. In addition to reimbursement of filing fees, it seeks a civil penalty and an order that the Department compensate Hillmick for the additional time and gas expenses he has incurred as a result of his transfer to TRCI.

The Department argues that a team of employees had approximately nine working days from the date of the arbitration award to prepare for Hillmick's return, including arrangements

for new telephone and internet connections, back pay, payroll, calculation of furloughs, benefits, miscellaneous forms, security identification, clearances, keys, office space, assignments, and office supplies. It points out that many of the arrangements were completed before he arrived and that the matters he complained about were resolved within a day or two of his return to work. It also argues Hillmick initiated his transfer, both before and after his return to work, by contacting three employees at TRCI about the possibility of his transferring to that facility, which undercuts his argument that he was forced to do so. Finally, it argues that the transfer agreement specifically states that the Department would not pay any additional compensation to Hillmick as a result of his voluntary move to TRCI. The Department seeks reimbursement of its filing fee and the assessment of a civil penalty.

Legal Standards: ORS 243.672(1)(a) Claim

Under ORS 243.672(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 ORS 243.662." Protected rights under ORS 243.662 include the right to "form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations."

Subsection (1)(a) prohibits two types of employer actions: (1) those that interfere with, restrain, or coerce employees "because of" their exercise of protected rights under ORS 243.662; and (2) those that interfere with, restrain, or coerce employees "in" the exercise of those protected rights. *Tigard Police Officers' Association v. City of Tigard*, Case No. UP-59-10, 24 PECBR 927, 936 (2012).

To determine if an employer violated the "because of" portion of subsection (1)(a), we examine the employer's reasons for the disputed conduct. If the employer acted "because of" an employee's exercise of rights protected by the Public Employee Collective Bargaining Act (PECBA), the employer's actions are unlawful. *International Longshore and Warehouse Union, Local 28 v. Port of Portland*, Case No. UP-35-10, 25 PECBR 285, 295 (2012). We do not require that the complainant prove that the employer acted with actual anti-union animus or the subjective intent to restrain or interfere with protected rights. Instead, a complainant must show "a direct causal nexus between the protected activity and the employer's action." *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 624, n 3, 16 P3d 1189 (2000).

The focus of our analysis under the "in" prong of (1)(a) is not on the employer's motive or reasons for acting, but on the likely consequences of the employer's actions. If the natural and probable effect of the employer's action is to deter employees from exercising a protected right, then the action interferes with, restrains, or coerces employees in the exercise of protected rights in violation of ORS 243.672(1)(a). *Milwaukee Police Employees Association v. City of Milwaukie*, Case No. UP-52-11, 25 PECBR 263, 275-76 (2012).

An employer may violate the "in" prong in two different ways. A derivative violation occurs when an employer violates the "because of" prong of the statute. If an employer takes

unlawful action because of an employee's PECBA-protected activities, the natural and probable effect of the employer's conduct will be to chill the employee's willingness to engage in further protected activities. *Id*. An independent violation occurs when the natural and probable effect of the employer's conduct, viewed under the totality of the circumstances, would tend to interfere with employees' exercise of protected rights. These violations typically arise when an employer makes threatening or coercive statements regarding union activity. *Id*. The complainant has the burden of proof. OAR 115-10-0070(5)(b).

Analysis: ORS 243.672(1)(a) Claim

To determine if an employer violated the "because of" portion of subsection (1)(a), we first examine the employer's conduct and any reasons for the disputed action. We address each of the allegations to determine whether there was a pattern of retaliatory conduct.

Hillmick was not engaged in union-related activities when he returned to EOCI on January 9, 2012. He had been gone from the Department for a year and was no longer the local president or a steward. The protected activity giving rise to the complaint allegedly occurred as a result of exercising his grievance rights under the contract, which resulted in his reinstatement.

As a preliminary matter, we note that several of the actions complained of were taken, or not taken, by bargaining unit members rather than Department supervisors or managers. Rangel testified that Clark instructed her to set up Hillmick's office and to order whatever supplies he needed. She waited until Hillmick arrived before letting him decide which of the two desks he wanted to keep, she did not order office supplies until he told her what he needed, and admitted that she forgot to add him to the distribution list for the weekly counselors' meeting on the day he returned. All of those matters were taken care of by Rangel within a day or two of Hillmick's return to work and, in the absence of any evidence that she was directed to delay taking these actions by the Department, we do not conclude that they were retaliatory.

Similarly, the incident with corrections counselor and fellow bargaining unit member King appeared to be based on personal animosity rather than any Department-sanctioned conduct. King believed that Hillmick had disclosed confidential information. King also had provided negative testimony against Hillmick in a BOLI proceeding and grievance arbitration. The two men did not like each other, but we find no persuasive evidence that their altercation in the EOCI compound on January 20 was instigated by the Department or directly motivated by Hillmick's union-related activities. In fact, King received a letter of correction from the Department as result of the incident.

Likewise, the telephone and internet connection work performed in Hillmick's office was done by bargaining unit personnel. The e-mails generated on January 5 and 6, as well as meetings with various managers before Hillmick's return, all indicate that a team of people were deployed to perform the telephone and internet work. On the day he returned, Hillmick complained that neither his telephone nor computer were connected. By 10:30 a.m. that morning, the IT employee charged with making those connections reported to him that his office required a new telephone number and that she was still working on the cabling connections. Hillmick's

telephone was working by 2:00 p.m. and his internet connection was operational by 4:00 p.m. that afternoon.

As we have found, the Department had approximately nine working days, including weekends, holiday, furloughs, and vacations, to prepare for Hillmick's return. The paperwork and preparatory services were ordered and assigned to various staff, and we find these short delays in finalizing arrangements were neither unreasonable nor retaliatory. The same is true of Hillmick's complaint regarding the size of his office monitor, which was smaller than other counselors' monitors. The IT section was responsible for putting the monitor in his office from available supplies, but when Hillmick requested a larger one, Amsberry placed an order for a 22-inch monitor within two days of his return to work. Based on the relatively short period of time the Department had to prepare, we do not conclude that there was a causal connection between these minor delays in completing arrangements and Hillmick's protected activities. In fact, all of Hillmick's requests were delivered, resolved, or ordered within two days of his return to work.

Hillmick was not provided a time sheet upon his return because in his absence the practice had changed, and counselor DeJongh informed him that their time was now recorded online. Likewise, the training manuals were available online and most counselors accessed them in that manner, but Hillmick was told that he could find hard copies in one of the offices if he needed them immediately. Arguably, Clark or Rangel should have explained both of those things to him when he arrived, but Clark did not instruct Rangel to withhold that information from Hillmick, and we do not conclude that the failure to inform Hillmick of those changes on his first day back amounted to a form of retaliation.

The Union argues that proof of retaliatory conduct occurred when the Department posted Hillmick's arbitration award on its internal server, where it was viewed by several employees who were aware of the link. The award contained unflattering facts about Hillmick and the Union argues that it was posted to embarrass him, but cited no policy or confidentiality agreement that prohibited the Department from posting it. The Department's longstanding practice was to post all labor arbitration awards on its internal server so that managers and HR personnel could access them. EOCI's HR director Imhoff credibly testified that he was unaware Department employees could access the server without permission, but once he learned they could, he promptly restricted their access. We find no credible evidence that the Department deviated from its standard practice when it posted the arbitration award on its internal server or intended to embarrass Hillmick by doing so. In fact, inasmuch as the award concluded that his dismissal was without just cause, it was arguably more embarrassing for the Department than Hillmick.

As a result of an inquiry from Hillmick, his supervisor, Clark, received a week's suspension for violating the Department's acceptable use policy regarding internet access, and Clark provided negative testimony about Hillmick at the latter's arbitration. They did not like each other, as indicated by Hillmick's refusal to sit down when he saw Clark in Amsberry's office on the day he returned. Hillmick's allegation that Clark ate four bananas during their initial meeting, thereby making him difficult to understand, was credibly contradicted by both

Clark and Amsberry. His allegation that Clark intentionally provided the wrong key set for his office was also not proven. In a subsequent e-mail to Hillmick from Patterson, the tool and key sergeant, it was explained that Hillmick had been given Rangel's old office and key set, which included a key to Clark's office. They were immediately changed when the mistake was discovered. All of the other counselors who had keys to Clark's office had them removed due to the confidential files stored there.

The level of tension between Hillmick and Clark was anticipated and apparently discussed by managers even before Hillmick returned. Clark and Amsberry both considered transferring to TRCI shortly after their initial meeting with Hillmick. The Union argues that Clark's rare interactions with Hillmick prove that Clark was ignoring him, but credible evidence from Clark, DeJongh, and Shotts indicate that Clark's duties frequently kept him out of the office, he was not chatty with his employees, he left them alone to do their work, and he did not interact with them unless it was necessary. Clark's aloofness, at least as it pertained to Hillmick, was both consistent with his personality and management style and typical of his treatment of all employees.

Hillmick's complaint of Clark's radio alarm going off twice while Clark was out of the office is not evidence of Department wrongdoing. Clark had the radio for two days before it went off the first time and there was no evidence he was aware the alarm had been set. When Hillmick was dissatisfied with Clark's response to his complaint, he contacted Superintendent Coursey about the matter. Coursey acted promptly and informed Hillmick that Clark would no longer use the radio in his office, and that no counselors would have keys to Clark's office.

Hillmick questioned his caseload of 109 Moderate/High ACRS inmates because he believed that it was larger than the caseload of some other counselors. Caseloads are determined by a number of factors, including the inmate status, their release date, and the amount of counseling required. Counselor DeJongh carried a caseload of 500 inmates because they were Low ACRS and therefore required less counseling. Hillmick's caseload consisted of inmates with more than 48 months remaining on their sentence, which meant that they generally required less counseling than inmates who were preparing for release. Hillmick was instructed to turn over his inmates to another counselor once they were 48 months from their release dates, which limited his counseling obligations. We also note that his replacement at EOCI, Shotts, inherited Hillmick's caseload without difficulty, as well as an additional number of inmates categorized as Security Threat Management, which can include gang members, and between 60-70 high-alert-status inmates known for violence. Based on these findings, the Union did not prove that Hillmick's caseload was unreasonable or more burdensome than any other counselor at EOCI.

The Union further alleges that placing Hillmick's new office on the fourth floor, rather than returning him to his former third-floor office, is additional proof of retaliatory conduct. It cites HR administrator Borello's January 19 e-mail as evidence that the Department wished to curtail Hillmick's union-related activities. That memo states in part:

> "I expressed concern with assigning only Hillmick to an area where he was ONLY with Clark as it would clearly be singling Hillmick out. I did mention that it might be beneficial to have Hillmick in close proximity to Clark's office to answer questions, training and yes, to make sure Hillmick did not start stirring the pot and dividing management and staff due to his history of discipl[in]e by management and success in arbitration. Clark could keep an eye on the situation which we have predicted would/could be fairly tense. It was at that point, Rick stated he understood and actually was aware of another counselor that was willing to also move offices into this area. We spoke of that being an appropriate option as the counselors would have two primary areas of offices and Hillmick would not be singled out." (Emphasis in original.)

The Union argues that Borello's reference to Hillmick's "stirring the pot and dividing management and staff due to his history of discipline by management and success in arbitration" concerned Hillmick's former union-related activities, and was intended to either suppress Hillmick's future union activities or discourage others from engaging in similar activity. Borello's acknowledgment of Hillmick's past activities, and that Hillman's reinstatement could result in a "fairly tense" work environment, however, does not establish that the Department's placement of Hillmick on the fourth floor interfered with, restrained, or coerced employees "because of" Hillmick's exercise of protected rights. Rather, as previously mentioned, the third-floor office lacked space to accommodate Hillmick. Clark had hired three new counselors in the past year, and all of the third-floor offices were occupied. The Union provided no regulation or authority in the arbitration award requiring the Department to return a reinstated employee to his or her former office, especially if it had been re-purposed.

Moreover, the Union also provided no evidence that walking one floor up was tangibly different or created any hardship to Hillmick. His new office was comparable in size, had a window, and was arguably more practical than his former office because it had more useable floor space. We do not conclude that providing Hillmick with such a space would interfere with, restrain, or coerce employees.

Furthermore, Borello's memo expressed justified concern that if Clark and Hillmick were the only employees on the fourth floor, it could give rise to a complaint that he was being "singled out." In fact, counselor DeJongh moved to the fourth floor in part because they did not want Hillmick to feel he was being placed there alone with Clark. Borello also cited benefits in having Hillmick in close proximity to Clark for purposes of training and answering questions. In considering all of these factors, the decision to assign Hillmick a new office did not violate the "because of" prong of subsection (1)(a).

Hillmick was understandably anxious about his return to EOCI after a long absence and under these circumstances, as demonstrated by his outreach to three TRCI employees about transferring to TRCI either before or immediately after he came back to work. The fact that not all of the preparations were completed by the time Hillmick returned to work, however, does not establish retaliatory conduct. The e-mails sent and meetings held before Hillmick's return show that personnel from the IT and HR departments, as well as several employees within the

counseling section, were involved in preparations. Hillmick's questions or requests related to office supplies, time sheets, training materials, his computer monitor, telephone and internet connections, keys, his caseload, the distribution lists, and a radio were answered, provided, or authorized within two days of his return.

As demonstrated by the December 2011 arbitration award and the February 2012 consent order, the Department had engaged in retaliatory conduct related to Hillmick's prior union-related activities. The circumstances following his return were markedly different. Of the two employees cited for retaliatory conduct, King was a fellow bargaining unit member with personal reasons for disliking Hillmick, and Clark was suspended for a week as a result of an inquiry generated by Hillmick. Personal animosity, whether valid or not, does not rise to the level of retaliation without some causal connection to protected union activities. The Department's communications and actions, both before and after his return, indicate a desire to have Hillmick succeed, and to the extent it could accommodate him, it did so. When it learned that Hillmick had contacted counselors at TRCI to explore their interest in changing jobs with him, it eventually pursued that option on his behalf and arranged for a transfer.

The Union also argues that, but for Hillmick's treatment upon his return, he would not have transferred to TRCI, which entitles him to damages in the form of travel costs totaling $300 per month plus 1.5 hours of daily commuting time. As set forth above, however, *Hillmick*, not the Department, first inquired about transferring to TRCI, and he did so even before being reinstated at EOCI. Moreover, the parties and Hillmick signed a *voluntary* agreement regarding his transfer to TRCI, which specifically stated that "DOC will not pay any additional compensation to Mr. Hillmick as a result of his transfer." The Union's legal counsel was involved in the negotiations for the transfer, and its agent, Woolery, signed the agreement. Hillmick had assistance with negotiations regarding the terms and conditions for the transfer, and there was no evidence that the Union sought travel costs or compensation for extra commuting time.

For the foregoing reasons, we conclude that the Union did not meet its burden of proving that the Department violated the "because of" prong of subsection (1)(a) and we will dismiss this claim.

Because we have concluded that the Department's actions did not violate the "because of" portion of subsection (1)(a), we find no derivative "in" violation under the statute. To determine whether an employer's actions independently violated the "in" prong, we must decide if the natural and probable effect of an employer's actions, when considered objectively, would chill employees in the exercise of their PECBA-protected rights. *Portland Assn. Teachers*, 171 Or App at 623-24. Neither the employer's motive nor the employees' subjective beliefs are relevant. *Teamsters Local 206 v. City of Coquille*, Case No. UP-66-03, 20 PECBR 767, 776 (2004).

Hillmick's return was not mistake-free, but the evidence shows that the reasons are more attributable to the brief preparation time, his perceptions of retaliatory behavior, and pre-existing personal animosity with certain employees, rather than an orchestrated effort to retaliate against

him. Borello's e-mail acknowledged the potential for tension, but cited his previous experience with a reinstated employee as proof that it could be successful.

The totality of the circumstances indicate that both parties knew there was a problem with Hillmick's return before he ever complained of retaliatory conduct. Hillmick approached Myrick in June of 2011 to see if he would be welcomed at TRCI if a settlement was reached in his arbitration. The idea of transferring Clark and Amsberry to TRCI was proposed on Hillmick's first day back at work. On that day and the next, Hillmick contacted counselors at TRCI to see if they were interested in changing positions with him, all of which occurred before Hillmick's complaints of retaliation. Borello's e-mail discussed placing Hillmick on the fourth floor with Clark and DeJongh in part so that Clark could keep an eye on him, but equally significant was that they did not want to appear to single Hillmick out by isolating him. In addition, when it became known that Hillmick wished to transfer, the Department acted swiftly to accommodate his wishes. A violation occurs under the "in" prong of subsection (1)(a) only where such a chilling effect would be the natural and probable consequence of the employer's actions or statements. *City of Milwaukie*, 25 PECBR at 277. Under the totality of these circumstances, we do not conclude that employees would be chilled in the exercise of PECBA-protected activity by the Department's efforts to accommodate Hillmick's return to work.

Based on the foregoing, the Union did not meet its burden of proving that the Department interfered with, restrained, or coerced Union employees because of, or in the exercise of, rights guaranteed by ORS 243.662 in its dealings with Hillmick at the time of his reinstatement and we will dismiss this claim.

Legal Standards: ORS 243.672(1)(c) Claim

Under ORS 243.672(1)(c), it is an unfair labor practice for a public 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 have said that, generally, "[o]ur test for determining a violation of subsection (1)(c) is similar to the one we use in determining a violation of the 'because of' prong of subsection (1)(a)." *Oregon AFSCME Council 75, Local #3943 v. State of Oregon, Department of Corrections, Santiam Correctional Institution*, Case No. UP-51-05, 22 PECBR 372, 396 (2008).

Analysis: ORS 243.672(1)(c) Claim

Although there was some lingering resentment against Hillmick, we do not conclude that the resentment carried over to how he was treated following his return in January 2012. Clark, Amsberry, Imhoff, and King all provided negative testimony about Hillmick at his arbitration, so it appears that their perception of Hillmick was unchanged, but the evidence demonstrates that the Department intended to implement the award and have Hillmick succeed in his return to work.

On this record, we do not conclude that the Department discouraged or otherwise chilled Hillmick or other bargaining unit members from engaging in union activities, or that the

Department acted in a manner that was inherently destructive of protected rights under ORS 243.662. Accordingly, we will dismiss the subsection (1)(c) claim.

The Department's Request for a Civil Penalty and Reimbursement of Filing Fee

This Board may assess a civil penalty of up to $1,000 "as a result of an unfair labor practice complaint hearing." ORS 243.676(4). As relevant here, we may do so if: (1) "[t]he complaint has been dismissed" after "find[ing] that the person named in the complaint has not engaged in or is not engaging in an unfair labor practice"; *and* (2) "the complaint was frivolously filed, or filed with the intent to harass the other person, or both." ORS 243.676(3), (4)(a), (b); *see also* OAR 115-035-0075. Although we dismiss the Union's complaint, we do not conclude that the complaint was frivolously filed or filed with the intent to harass the Department. We also do not conclude that the Union's complaint was "filed in bad faith," such that the Department is entitled to reimbursement of its filing fee. *See* OAR 115-35-0075(3) (the Board may order reimbursement of the filing fee to the prevailing party "in any case in which the complaint or answer is found to have been frivolous or filed in bad faith"). Accordingly, we will deny the Department's request for a civil penalty and reimbursement of its filing fee.

ORDER

1. The complaint is dismissed.

2. The Department's request for reimbursement of its filing fee and the imposition of a civil penalty are denied.

DATED this 8 of August, 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-25/26/27-11

(UNFAIR LABOR PRACTICE)

PORTLAND POLICE ASSOCIATION, Complainant, v. CITY OF PORTLAND, Respondent.	)	FINDINGS AND ORDER ON RESPONDENT'S PETITION FOR REPRESENTATION COSTS

On May 2, 2011, the Portland Police Association (Association) filed three unfair labor practice complaints against the City of Portland (City), alleging that the City violated ORS 243.672(1)(g) by disciplining three bargaining unit members in violation of the collective bargaining agreement between the parties. These cases were placed in abeyance pending the outcome of related arbitration proceedings. After the arbitrator issued an award dismissing the grievances as untimely, the Association amended its complaints and requested that the Board proceed with the cases. The ALJ consolidated the three claims for processing, and then bifurcated the matters to consider the effect of the arbitration award on the (1)(g) complaints. The parties submitted the matter to the Board on stipulated facts. On May 3, 2013, this Board issued an Order dismissing the Association's complaints. 25 PECBR 481 (2013). On May 28, 2013, the City submitted its petition for representation costs. On June 17, 2013, the Association filed its objection to the City's petition.

Pursuant to ORS 243.676(2)(d) and OAR 115-035-0055, this Board finds:

1. The City filed a timely petition for representation costs and the Association filed timely objections to the petition.[1]

2. The City is the prevailing party. We dismissed the Association's complaints under ORS 243.672(1)(g) as a result of the arbitrator's award, which concluded that the original grievances were not procedurally arbitrable.

[1]OAR 115-035-0055(2) requires petitions for representation costs to be filed within 21 days of the date of the issuance of the Order. The City's petition was filed on May 28, 2013, more than 21 days after the Order was issued. However, the Board's offices were closed Friday, May 24, for a furlough day, and Monday, May 27, for a holiday. Accordingly, under OAR 115-010-0012 and OAR 115-035-0055(2), the petition was timely filed.

3. The City's petition requests $3,500 in representation costs, the maximum amount that this Board awards in the absence of a civil penalty. *American Federation of State, County and Municipal Employees Council 75, Local 88 v. Multnomah County*, Case No. UP-22-10, 25 PECBR 150, 151 (2012) (Rep. Cost Order): OAR-115-035-0055(1). In support of this request, the City submitted two affidavits. The City asserts that these affidavits support its claim that at least 25 hours of legal work were performed at the rate of $165 per hour, for a total cost of $4,125.

4. The requested hourly rate is average. The average rate for representation costs is between $165 and $170 per hour. *Clackamas County Employees' Association v. Clackamas County/Clackamas County District Attorney*, Case No. UP-7-08, 24 PECBR 769 (2012) (Rep. Cost Order). The number of hours claimed is at the high end of the average for a case involving stipulated facts, which generally requires an average of 16 to 25 hours of work. *See Oregon AFSCME Council 75, Local #2502 v. Hood River County*, Case No. UP-26-06, 25 PECBR 75 (2012) (Rep. Cost Order). The City, however, was unable to accurately estimate the amount of time that was spent defending the case, and instead provided information outlining the work that was performed (but without a summary of the time spent performing that work). Because we cannot accurately determine the amount of time spent on the case, we will only award the City the representation costs for 16 hours, the lowest end of the average number of hours required for a case involving stipulated facts.

5. An average award is generally one-third of the reasonable representation costs of the prevailing party, subject to the $3,500 cap. Having considered the purposes and policies of the PECBA, our awards in prior cases, and the reasonable cost of services rendered, this Board awards representation costs to the City in the amount of $880.

ORDER

The Association will remit $880 to the City within 30 days of the date of this Order.

DATED this 8 day of August 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-077-11

(UNFAIR LABOR PRACTICE)

OREGON SCHOOL EMPLOYEES ASSOCIATION, Complainant, v. MEDFORD SCHOOL DISTRICT #549C, Respondent.	)	FINDINGS AND ORDER ON RESPONDENT'S PETITION FOR REPRESENTATION COSTS

On November 21, 2011, the Oregon School Employees Association (Association) filed an unfair labor practice complaint alleging that the Medford School District #549C (District) violated ORS 243.672(1)(b) and (e). On May 23, 2013, we dismissed the complaint. 25 PECBR 506 (2013). The District submitted its petition for representation costs on June 12, 2013. On July 1, 2013, the Association filed its objection to the District's petition.

Pursuant to ORS 243.676(2)(d) and OAR 115-035-0055, this Board finds:

1. The District filed a timely petition for representation costs and the Association filed timely objections to the petition.

2. The District is the prevailing party, as the Board dismissed the complaint.

3. A single day of hearing was held on May 14, 2012. The District submitted an affidavit showing that 71.5 hours were spent on the case, with 62 hours billed at $135 per hour and 9.5 hours billed at $160 per hour. The total amount of representation costs was $9,905. The District's petition requests payment of $3,500 in representation costs, which is the maximum amount that this Board awards in the absence of a civil penalty. *American Federation of State, County and Municipal Employees Council 75, Local 88 v. Multnomah* County, Case No. UP-22-10, 25 PECBR 150, 151 (2012) (Rep. Cost Order); OAR 115-035-0055.

4. The requested hourly rate is below average. The average rate for representation costs is between $165 and $170 per hour. *Clackamas County Employees' Association v. Clackamas County/Clackamas County District Attorney,* Case No. UP-7-08, 24 PECBR 769, 771

(2012) (Rep. Cost Order). The number of hours claimed is above average. Cases generally require an average of 45 to 50 hours per day of hearing. *See AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 24 PECBR 720, 723 (2012) (Rep. Cost Order).

5. The Association objected to the petition in its entirety, claiming that a representation cost award would not further the policies of the Public Employee Collective Bargaining Act (PECBA). The Association further asserted that if some award was reasonable, the hours claimed by the District were excessive. Finally, the Association stated that if the Board issued an award, it should be no more than 25 percent of the District's reasonable costs because, as asserted by the Association, this case involved a matter of first impression.

It is appropriate to award representation costs. Although we may agree that the facts in this matter had some unique qualities, this was neither a case of first impression (OAR 115-035-0055(4)(a)(A)) nor one involving novel legal issues that would cause us to reduce the award. *Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections*, Case No. UP-5-06, 22 PECBR 479, 480 (2008) (Rep. Cost Order). However, we will take into account that the number of hours claimed was above average.

6. An average award is generally one-third of the reasonable representation costs of the prevailing party, subject to the $3,500 cap contained in OAR 115-035-0055(1)(a). *Oregon AFSCME Council 75*, 22 PECBR at 480. Having considered the purposes and policies of the PECBA, our awards in prior cases, and the reasonable cost of services rendered, this Board awards representation costs to the District in the amount of $2,250.

ORDER

The Association will remit $2,250 to the District within 30 days of the date of this Order.

DATED this 23 day of August 2013.

Kathryn A. Logan

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-26-12

(UNFAIR LABOR PRACTICE)

JACKSON COUNTY SCHOOL DISTRICT #9, Complainant, v. EAGLE POINT EDUCATION ASSOCIATION/OEA/NEA, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On August 15, 2013, the Board heard oral argument on Complainant's objections to a recommended order issued by Administrative Law Judge Peter A. Rader, after a hearing held on November 21, 2012, in Salem, Oregon. The record closed on December 13, 2012, following receipt of the parties' post-hearing briefs.

Jackie Marks and Lisa Freiley, Designated Representatives, Oregon School Boards Association, Salem, Oregon, represented Complainant at hearing and oral argument, respectively.

Thomas Doyle, Attorney at Law, Bennett, Hartman, Morris & Kaplan, LLP, Portland, Oregon, represented Respondent.

On May 4, 2012, Complainant Jackson County School District #9 (District) filed this unfair labor practice complaint alleging that Respondent Eagle Point Education Association/OEA/NEA (Association) violated ORS 243.672(2)(d) during negotiations for a new contract in 2012. The Association filed a timely answer.

The issues are:

1. Did the Association violate the parties' Agreement and ORS 243.672(2)(d) by using the District's e-mail system to communicate with its members to initiate or coordinate a strike against the District, once the parties had entered into the 30-day cooling off period?

2. If the Association violated ORS 243.672(2)(d), what is the appropriate remedy?

For the reasons stated below, we find that the Association did not violate the parties' Agreement and ORS 243.672(2)(d) because the Agreement was no longer in effect when the Association used the District's e-mail system.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The District, a public employer, operates ten schools in Jackson County. The Association is a labor organization and the exclusive representative of a group of certified and classified employees employed by the District.[1]

2. The District and the Association have been parties to a series of collective bargaining agreements, including the 2008-2011 Agreement at issue here. Article 1 of the Agreement, titled "DURATION OF AGREEMENT," stated that "the agreement shall be effective upon ratification and shall terminate on June 30, 2011."

3. Article 17 of the parties' Agreement states in relevant part:

"C. **USE OF SCHOOL EQUIPMENT**

"* * * * *

> "The Council and the local Association may use the District's e-mail system to communicate with its members regarding Union business within the following conditions:
>
> "1. The Council and the local Association agree to abide by the District's policy and administrative regulations (those in effect as of 3/31/2009) regarding the use of District e-mail facilities.

[1]The parties' Agreement lists the Southern Oregon Bargaining Council/Eagle Point Education Certified and Classified Employees, OEA/NEA as the exclusive representative, but these groups are affiliated and treated as one entity for the purposes of this complaint.

> "2. The Council and the local Association will not use the District's e-mail system to lobby, solicit, recruit, persuade for or against any political candidate, ballot measure, legislative bill or law, or to initiate or coordinate strikes once the parties have entered into the thirty (30) day cooling off period, walkouts, work stoppages or activities that violate the Contract."

4. On March 28, 2012, following unsuccessful bargaining and mediation for a successor Agreement, the Association declared impasse with final offers due on April 4.[2] The parties entered a 30-day cooling off period pursuant to ORS 243.712, which was in effect from April 5 through May 5.

5. Dave Carrell was the Association's acting president during the negotiations, and David Sours was chair of the bargaining support team.

6. Beginning in March and continuing through the 30-day cooling off period, Carrell and Sours sent approximately nine e-mails to bargaining unit members using the District's e-mail system. Sours occasionally attached union-related newsletters to his e-mail communications. The subject line of Sours' e-mails all contained phrases such as "Read Off Duty" or "Off Duty."

7. The subjects of the e-mails to or from Carrell and Sours during the cooling off period included topics such as encouraging members to wear red as a sign of support, scheduling weekly question and answer meetings to address issues related to bargaining and a possible strike, engaging members in one-on-one interviews about their support for a strike, encouraging members to attend a pre-strike assessment meeting, and scheduling a strike vote.

8. Human Resources (HR) specialist and District bargaining team member Christine Richmond construed some or all of these e-mail communications to be coordinating or initiating a strike in violation of Article 17 and brought them to the attention of the District's HR director.

CONCLUSIONS OF LAW

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

2. The Association did not violate ORS 243.672(2)(d) when it sent e-mails to bargaining unit members in April 2012, during the 30-day cooling off period.

DISCUSSION

The District alleges that the Association violated ORS 243.672(2)(d) when its members used the District's e-mail system to initiate or coordinate a strike during the parties' 30-day cooling off period because such conduct was expressly prohibited by the parties' expired Agreement. The Association responds that because the Agreement had expired, there was no contract in effect during

[2]Unless indicated otherwise, all remaining events occurred in 2012.

the relevant period and there can be no violation of ORS 243.672(2)(d). Alternatively, the Association contends that the disputed e-mails sent through the District's e-mail system in April 2012 did not "initiate" or "coordinate" a strike. We agree with the Association that its actions in April 2012 did not violate the terms of the 2008-2011 Agreement because the Agreement had expired.[3] We reason as follows.

It is an unfair labor practice under ORS 243.672(2)(d) for a labor organization to violate the provisions of any written contract with respect to employment relations. ORS 243.672(2)(d) is an analogue to subsection (1)(g). Under both statutes, we interpret the agreement to determine whether it has been violated. *Oregon University System (OUS) v. Oregon Public Employees Union, Local 503,* Case No. UP-61-98, 19 PECBR 205, 217 (2001), *recons,* 19 PECBR 431 (2001), *rev'd on other grounds,* 185 Or App 506, 60 P3d 567 (2002), *dismissed on remand,* 20 PECBR 233 (2003).

The parties' dispute requires us to interpret the Agreement. We follow well-established rules when interpreting collective bargaining agreements:

> "As with other contracts, the general rule applicable to the construction of an unambiguous collective bargaining agreement is that it must be enforced according to its terms. A contract is ambiguous if it can reasonably be given more than one plausible interpretation. 'If a contract is ambiguous, the trier of fact will ascertain the intent of the parties and construe the contract consistent with' that intent. Specifically, if a term of the contract is ambiguous, the court will 'examine extrinsic evidence of the contracting parties' intent,' if such evidence is available. 'If the ambiguity persists, we resolve it by resorting to appropriate maxims of contractual construction."' *Portland Police Assoc. v. City of Portland,* 248 Or App 109, 113, 273 P3d 192 (2012) (quoting *Arlington Ed. Assn. v. Arlington Sch. Dist. No. 3,* 196 Or App 586, 595, 103 P3d 1138 (2004)).

The parties do not dispute that Article 1, titled "Duration of Agreement," explicitly states that the Agreement terminates on June 30, 2011. Rather, the District asserts that notwithstanding the "Duration of Agreement" clause, Article 17 extended beyond the Agreement's expiration (June 30, 2011) through the time of the disputed action (April 2012). In other words, even though the Agreement did not contain an evergreen clause, the District contends that Article 17 contained its own evergreen clause because the time period involved, the "cooling off period," would more likely than not occur after the expiration of the agreement. We disagree.

Neither Article 1 nor Article 17 is ambiguous. Neither article contains language that indicates they are "susceptible to more than one plausible interpretation" when considering "the contract as a whole, including the circumstances in which the contract was made." *City of Portland,* 248 Or App at 116-17 (quoting *Cassidy v. Pavlonnis,* 227 Or App 259, 264, 205 P3d 58 (2009)); *accord Tualatin Employees' Association v. City of Tualatin,* Case No. UC-012-12, 25 PECBR 565(2013).

[3]Therefore, we do not address whether the disputed e-mails initiated or coordinated a strike within the meaning of the Agreement.

The Agreement is unambiguous in that all of its provisions, including Article 17, expired on June 30, 2011. Article 1 states that "[t]his agreement shall be effective upon ratification and *shall terminate on June 30, 2011*." (Emphasis added.) There are no exceptions to that termination date in that article or elsewhere in the Agreement. Moreover, the Agreement does not contain an express "evergreen clause," which we have described as "a contract provision that specifies that the provisions of a collective bargaining agreement will remain in effect during negotiations for a successor agreement." *Association of Oregon Corrections Employees and Oregon State Police Officers' Association v. State of Oregon, Department of Corrections, Department of State Police*, Case Nos. UP-25/35-04, 21 PECBR 139 (2005), *aff'd*, 213 Or App 648, 164 P3d 291, *rev den*, 343 Or 363, 169 P3d 1268 (2007). Finally, Article 17 does not contain a provision that extends its terms beyond June 30, 2011. Under these circumstances, we conclude that the Agreement, including the terms of Article 17, terminated on June 30, 2011. Consequently, the Association's actions in April 2012 did not violate Article 17 of the Agreement.[4]

ORDER

The complaint is dismissed.

DATED this 9 day of September 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

[4]Even if we were to find the Agreement ambiguous regarding the termination date of Article 17, we would reach the same conclusion. As discussed above, the language of the Agreement strongly supports the Association's position, and the District has not presented extrinsic evidence to overcome the clear language of the Agreement.

BEFORE THE STATE OF OREGON

EMPLOYMENT RELATIONS BOARD

PORTLAND POLICE COMMANDING OFFICERS ASSOCIATION, Complainant, v. CITY OF PORTLAND, Respondent.	Case No. UP-017-10 CONSENT ORDER

I. STATEMENT OF THE CASE

In April, 2010, complainant Portland Police Commanding Officers Association ("PPCOA" or "Association") filed an unfair labor practice complaint against respondent City of Portland ("City") alleging violations of ORS 243.672(1)(g). The parties have agreed to settle this matter by entry of this consent order, subject to Board approval. The parties agree to waive all further proceedings in this matter, including the filing of an answer, a hearing before the Board, and judicial review of this consent order. The signatories warrant that they are authorized by their respective principals to sign the stipulation and waive reading of the Administrative Procedure Act rights (ORS 183.413). The parties further represent that the statements in this stipulation of fact are accurate and constitute all of the evidence that either party wished to present to the Board.

II. STIPULATED FACTS

1. The PPCOA is a labor organization as defined by ORS 243.650(13).

2. The City of Portland is a public employer as defined by ORS 243.650(20).

3. The allegations arose out of a grievance filed by the Association alleging that on or about August 28, 2009, the City had changed its longstanding past practice in the payment of

certain retirement benefits under the Fire and Police Disability and Retirement Fund Charter (Chapter 5 of the Portland City Charter), and that such change violates of Article 3 of the PPCOA Agreement.

4. On or about February 10, 2010 the City refused to process the grievance, taking the position that the grievance was not arbitrable because the acts of the FPDR Board are not the City's acts for purposes of the Public Employee Collective Bargaining Act, and because there is no duty to bargain over unlawful subjects.

5. The parties' disagreement over whether the City's change in payment of retirement benefits to FPDR members violates Article 3 of the collective bargaining agreement is subject to arbitration under Article 31 of the PPCOA agreement and the City has subjected this dispute to arbitration under Article 31.

III. STIPULATED CONCLUSIONS OF LAW

1. The Board has jurisdiction over these parties and the subject matter.

2. The City of Portland violated ORS 243.672(1)(g) by its refusal to arbitrate over the change in the alternate payee rule for FPDR retirees.

IV. STIPULATED ORDER

1. The City violated ORS 243.672(1)(g) by its initial refusal to process the grievance.

2. The parties will pay their own representation costs.

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3. The City will reimburse the Association's filing fee.

4. A copy of this order shall be posted in prominent places in the Police Bureau and other places where bargaining unit members are located.

PORTLAND POLICE COMMANDING OFFICERS ASSOCIATION

By: Henry J. Kaplan

Henry J. Kaplan
Attorney for Complainants
Bennett, Hartman, Morris & Kaplan, LLP
210 S.W. Morrison Street, Suite 500
Portland, OR 97204

Date: September 5, 2013

CITY OF PORTLAND

By: Ian M. Leitheiser

Ian Leitheiser
Deputy City Attorney
1221 SW 4th Ave Ste 430
Portland OR 97204

Date: September 4, 2013

This consent order is hereby approved and adopted this 10 day of September, 2013.

FOR THE EMPLOYMENT RELATIONS BOARD

Kathryn A. Logan, Chair

Jason M. Weyand, Board Member

Adam L. Rhynard, Board Member

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-042-11

(UNFAIR LABOR PRACTICE)

SEIU LOCAL 503, OPEU, Complainant, v. STATE OF OREGON, ACTING THROUGH THE DEPARTMENT OF ADMINISTRATIVE SERVICES, OREGON UNIVERSITY SYSTEM, OREGON STATE UNIVERSITY, AND WESTERN OREGON UNIVERSITY, Respondents.	)	RULINGS, FINDINGS OF FACT CONCLUSIONS OF LAW, AND ORDER

This matter was submitted directly to the Board after Complainant, SEIU Local 503, OPEU (SEIU), and Respondent, State of Oregon, Department of Administrative Services (State or DAS), and Respondents Oregon University System (OUS), Oregon State University (OSU), and Western Oregon University (WOU) (collectively, OUS or the Universities), agreed to waive a hearing and agreed to stipulated facts, exhibits, and issues. The record closed on December 17, 2012, following receipt of the parties' briefs.

Marc Stefan, Supervising Attorney, SEIU Local 503, OPEU, Salem, Oregon, represented Complainant.

Tessa Sugahara, Attorney-in-Charge, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent DAS.

Jeffrey Chicoine, Attorney at Law, Miller Nash, LLP, Portland, Oregon, represented Respondent OUS.

SEIU filed this unfair labor practice complaint alleging that DAS and the Universities violated ORS 243.671(1)(a) and (e) as a result of certain actions taken by DAS and the Universities during negotiations for successor bargaining agreements. DAS and the Universities timely answered the complaint.

As described below, after the parties submitted briefs in this matter, we issued a decision in a companion case concerning essentially the same disputed issues. *Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11, 25 PECBR 525 (2013) (*AEE*). We subsequently granted the respondent's (DAS's) request for reconsideration and oral argument in *AEE*. On July 15, 2013, we afforded the parties in this matter the opportunity to submit additional briefing and provide oral argument regarding the application of our initial decision in *AEE* to this case. All of the parties declined to submit additional briefing or participate in oral argument.[1]

The stipulated issues are:

1. Did DAS's and OUS's June 29, 2011 directive/guidelines concerning use of the employers' e-mail systems after the expiration of the contract constitute a unilateral change to "employment relations" within the meaning of ORS 243.650(7), *i.e.*, a mandatory subject of bargaining? If so, did they violate the duty to bargain in good faith in violation of ORS 243.672(1)(e)?

2. Effective July 1, 2011, did DAS issue a directive applied by state agencies covered by the DAS-SEIU agreement or applied by universities covered by the OUS-SEIU agreement, regarding the use of employer e-mail systems, that interfered with, restrained, or coerced employees in the exercise of rights guaranteed in ORS 243.662, in violation of ORS 243.672(1)(a)?

3. If DAS or OUS violated ORS 243.672(1)(a) or (e), what is the appropriate remedy?

For the reasons set forth below, and those set forth in the companion *AEE* case, we conclude that: (1) DAS and OUS violated ORS 243.672(1)(e) by unilaterally deciding to change the use of their e-mail systems by prohibiting employees and SEIU representatives from using the e-mail system to communicate about union business; and (2) DAS violated ORS 243.672(1)(a) when it issued a directive prohibiting the use of employer e-mail systems for union-related communications, which was then applied by the state agencies covered by the DAS-SEIU agreement and by universities covered by the OUS-SEIU agreement. As a remedy, DAS and OUS are ordered to cease and desist from engaging in that unlawful conduct.

[1]We issue our reconsideration decision in *AEE* this same day (*Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11, __ PECBR __ (Order on Reconsideration) (September 19, 2013)).

FINDINGS OF FACT

We adopt the following findings of fact from the parties' stipulated facts and exhibits.

1. SEIU is a labor organization as defined in ORS 243.650(13) and represents certain state employees in various agencies of the State, including OUS, OSU, and WOU.

2. DAS is the exclusive bargaining representative for the State agencies other than OUS and its constituent universities. The State, OUS, and OUS's constituent universities, including OSU and WOU, are each public employers as defined by ORS 243.650(20).

SEIU and DAS

3. SEIU and DAS were parties to a collective bargaining agreement effective through June 30, 2011.

4. Although engaged in bargaining, SEIU and DAS did not reach agreement on a successor contract by June 30, 2011, when the existing agreement expired.

5. During bargaining with SEIU on June 1, 2011, the DAS chief spokesperson Gail Parnell advised SEIU Executive Director Heather Conroy that the State was not going to extend the contract beyond its expiration date.

6. On June 29, 2011, DAS sent a memorandum to all agency directors, human resource directors, and human resource managers, including OUS, regarding the expiration of the collective bargaining agreements between the State agencies and various unions, and the fact that the agreements would not be extended beyond their expiration dates. There was an attachment addressing guidelines for the "*status quo period*" (DAS Guidelines). The DAS Guidelines specifically enumerated what was characterized as certain "permissive subjects" that would "not be continued once the agreements expire."

7. By letter dated June 29, 2011, Parnell advised Conroy that the expired agreement would not be extended by the State. The letter also discussed *status quo* obligations and attached a copy of the DAS Guidelines.

8. Under what it terms as "permissive subjects," the DAS Guidelines list "[a]ccess to state e[-]mail system." The expired agreement with SEIU addressed the use of the State Agencies' e-mail systems by union representatives in Article 10.

9. The parties reached a tentative agreement (TA) for a successor collective bargaining agreement on July 22, 2011. Contemporaneous with the TA, the State agreed to restore e-mail access.

10. The contract between SEIU and DAS first addressed the union use of e-mail in a letter agreement to the parties' 2001-2003 contract.

11. The parties first negotiated the question of e-mail use during bargaining for the 1995-1997 agreement. As a result of a disagreement over the interpretation, the parties arbitrated the question of union access under the language as it then appeared in the contract and relevant bargaining history. The relevant provisions are outlined in the arbitration decision.

12. In the 2003-2005 SEIU-DAS agreement, the parties replaced the Letter of Agreement concerning "Union Use of E-Mail" with Article 10, section (5)(b), which detailed the purpose, restrictions, and limitations on the use of the e-mail system. Specifically, Article 10, section (5)(b) states that, with certain enumerated restrictions, "Union representatives and SEIU-represented employees may use an Agency's e-mail messaging system to communicate about Union business."

13. In the intervening period, although there have been some modifications to the language in subsections (5) and (9) of Article 10, section 5(b) of the SEIU-DAS agreement, the provision otherwise reads the same as in the 2003-2005 agreement.

14. "DAS Statewide Policy—Acceptable Use of State Information Assets" outlines the boundaries for use of the state e-mail system.

SEIU and OUS

15. SEIU and OUS were parties to a collective bargaining agreement effective through June 30, 2011.

16. The SEIU-OUS agreement applies to a bargaining unit consisting of classified employees of OUS and its constituent universities.

17. Although engaged in bargaining, SEIU and OUS did not reach agreement on a successor contract by June 30, 2011, when the existing agreement expired.

18. Jay Kenton, OUS Vice-Chancellor for Finance and Administration, served as chief spokesperson for OUS throughout the bargaining with SEIU.

19. Rich Peppers, Assistant Executive Director for SEIU, served as chief spokesperson for SEIU throughout its bargaining with OUS.

20. By letter dated July 6, 2011, Kenton sent Peppers a letter attaching the DAS Guidelines. In adopting and implementing the DAS Guidelines, OUS relied on the directives, reasoning, and advice of DAS.

21. OUS gave individual universities discretion as to how and whether to implement the provisions of the DAS Guidelines related to e-mail use for union business.

22. WOU is part of OUS and issued an undated memorandum on the subject of "Status Quo Period and Appropriate Use of E-Mail."

23. OSU is also part of OUS and issued a memorandum dated June 30, 2011, from Jacquelyn Rudolph (OSU Director of Human Resources) to "Senior Executive Administrators, Dean, Directors and Department Chairs" on the subject of "Expiration of Collective Bargaining Agreement for Classified Employees."

24. By an e-mail dated August 11, 2011, and sent to OSU manager Amy Flint, Notocha Coe, in her capacity as SEIU steward, asserted rights on behalf of SEIU-represented employees to use accrued leave time to cover time off for attending classes under Article 63 of the expired SEIU-OUS agreement. Coe was instructed that, pursuant to OSU policy, she was not to use the university e-mail system to conduct union business.

25. On September 14, 2011, SEIU and OUS signed a comprehensive TA for a successor agreement, at which time OUS and its constituent universities ceased restrictions on union use of the universities' e-mail systems.

26. The SEIU-OUS agreement first included provisions on union e-mail use in the 2003-2005 agreement. Those provisions permit SEIU representatives and SEIU-represented employees to "use the University's [e-mail] system for union business," subject to certain specified restrictions.

Other Stipulated Facts

27. OSU has a policy, effective 2006 to date, titled "Acceptable Use of University Computing Resources."

28. The State's Acceptable Use of State and Information Assets policy governs e-mail usage by state agencies. OUS and its constituent universities apply portions of this policy that do not contradict their own missions and that are not addressed by their own policies, including the provision on solicitations (on page 4 of the State's policy).

29. SEIU maintains a "Membership Data Base" (MDB). The MDB contains various forms of information secured from the State and OUS, pursuant to contractual and other reporting obligations and information shared by members with SEIU. That information includes, among many other things, personal and work e-mail addresses for employees that SEIU represents.

30. During the period up to and following contract expiration, SEIU actively sought to increase the number of private e-mail addresses in its MDB by asking individuals to visit its website and enter their personal e-mail addresses via a web-based form. Further, SEIU sought to expand those opportunities by urging employees that it represents to provide it with alternative contact information—efforts above and beyond its regular practice of urging employees to keep their contact information up to date with the union.

31. During negotiations with DAS and OUS for respective successor agreements to the 2009-2011 collective bargaining agreements, SEIU made substantial efforts, as it has in past contract negotiations, to communicate with its members regarding matters that it believed relevant to the ongoing negotiations. SEIU also made such efforts to receive information from its represented employees that those employees deemed relevant to the ongoing negotiations. Those efforts to communicate included e-mails sent by SEIU to members (and vice-versa) on the State and/or OUS e-mail systems, as well as personal e-mail accounts maintained by SEIU-represented employees. These communications by SEIU to its members (and from members to SEIU) using the State and/or OUS e-mail systems continued following expiration of the contract.

32. During the period following expiration of the contract, SEIU continued in its efforts to maintain communications between itself and represented workers on matters deemed relevant by each. It did so by continued efforts to use the State and OUS e-mail systems and by seeking and attempting to utilize alternative means of communications, including the SEIU website, Facebook, Twitter, and other social media. Nonetheless, SEIU communications to and from workers became more difficult and less successful due to the employers' actions at issue in this matter.

33. During the period following contract expiration, DAS did not impose any limitations or restrictions on communications between employees and SEIU through telephone or other media (*e.g.*, telephone, inter or intra-campus or agency mail), other than the State and OUS e-mail systems.

34. The DAS Guidelines did not address employees' use of State or university e-mail systems for personal or non-work-related e-mail. Such use was subject to compliance with existing policies of DAS or particular DAS Agencies or universities of the OUS system.

CONCLUSIONS OF LAW

In the companion *AEE* case (which also includes the order on reconsideration issued this same day), we concluded that DAS violated ORS 243.672(1)(a) and (e) for conduct nearly identical to what is at issue in this matter. After we issued our initial order in *AEE*, we granted DAS's motion for reconsideration and oral argument, and afforded the parties in this case the opportunity to submit any additional briefing as to why our conclusion in *AEE* should not control the outcome here. We have also considered DAS's arguments on reconsideration in *AEE* as part of our determination in this matter. For the following reasons, we find no meaningful distinction between *AEE* and this dispute that would warrant a different outcome.

ORS 243.672(1)(e) Violation

In *AEE*, we concluded that DAS violated ORS 243.672(1)(e) because it decided to unilaterally change a mandatory subject of bargaining (use of the State's e-mail system to conduct union-related business) during the hiatus period. Dispositive in both *AEE* and this case is whether the use of the employers' e-mail systems after the expiration of the contract constitutes a unilateral change to "employment relations" within the meaning of ORS 243.650(7), *i.e.*, a mandatory subject of bargaining.

In *AEE*, we identified the subject at issue as "the allowance of, and limitations on, the use of the State's e-mail system by its employees and their certified representative to communicate about union business." 25 PECBR at 537. Likewise, here the subject of the discontinued article concerns use of the employers' e-mail systems by SEIU representatives and SEIU-represented employees to communicate about union-related business. Specifically, the discontinued SEIU-DAS article concerns the "use of an Agency's e-mail messaging system to communicate about Union business" by SEIU representatives and SEIU-represented employees. Likewise, the discontinued SEIU-OUS article concerned "the use of the University's [e-mail] system for union business" by SEIU representatives and SEIU-represented employees. Finally, the parties have not argued that the subject at issue here is different from that identified in *AEE*.

In *AEE*, we then determined that this subject did not fall within one of the specifically-enumerated statutory designations of mandatory or permissive. *Id.* at 537-42. Included in that determination was our conclusion that the subject had not been previously designated as permissive before June 6, 1995. *See id.* at 537-40; *see also* ORS 243.650(7)(b). We also disagreed with DAS's assertion that that the subject had "an insubstantial or *de minimis* effect on public employee wages, hours, and other terms and conditions of employment." *See* ORS 243.650(7)(d); *see also* 25 PECBR at 541-42.

Thus, the outcome in *AEE* ultimately was determined by the balancing test under ORS 243.650(7)(c). We explained in *AEE* that this test required us to determine if access to and use of the State's e-mail system by the union and its represented employees to communicate about union business had a greater impact on management's prerogative than on employee wages, hours, or other terms and conditions of employment. 25 PECBR at 542-44. We determined that the subject had a significant impact on management's prerogatives, including: the right to control access to and use of the State's communications systems and its equipment; the right to protect against improper use of that system that might subject the State to liability; and the right to ensure that employees are performing work for the employer while on paid time, rather than utilizing the e-mail system excessively for non-work purposes. We also noted that there was presumably at least some cost to the State to allow such use, although the record contained no evidence concerning the amount of that cost. *Id.* at 542.

We then turned to the impact on employee wages, hours, or other terms and conditions of employment. We explained that use of the State's e-mail system allows employees to communicate with each other and with representatives of the Association about wages, hours,

and other terms and conditions of employment. We further observed that e-mail has become an essential part of today's workplace, surpassing yesterday's bulletin board, water cooler, and mail room, and that employees rely on this means of communication more and more each year to communicate with each other and their designated representative about a wide variety of employment matters, particularly in bargaining units where employees are spread across multiple agencies and worksites. *Id.* We added that the ability of employees to communicate with each other and their bargaining representative about matters of common concern is one of the lynchpins of collective bargaining, and fundamentally impacts employees' ability to collectively bargain over all aspects of wages, hours, and other terms and conditions of employment.[2]

Finally, when we balanced the competing interests, we concluded that the subject of access to and limitations on the use of the State's e-mail system had a greater impact on the employees' wages, hours, and other terms and conditions of employment than on management's prerogatives. *Id.* at 542-44. Accordingly, we found the subject mandatory for bargaining.[3] *Id.*[4]

The arguments by both parties in this dispute largely mirror those addressed in *AEE*; indeed arguments advanced in that case have been incorporated in those made here. We see no need to repeat our analysis in *AEE* regarding those arguments.

Moreover, we offered DAS and OUS an opportunity to provide supplemental briefing on why our analysis in *AEE* should not apply here, but they declined to submit supplemental briefing.[5] After considering our analysis in *AEE*, the arguments advanced in this case, as well as the stipulated issues, facts, and exhibits in this case, we conclude that *AEE* controls the outcome here. In both cases, the subject at issue concerns the use of the State's e-mail system by represented employees and their representatives to communicate about union business. Moreover, DAS was a party in both proceedings. Additionally, both cases involve the same decision by DAS to unilaterally change the *status quo* regarding the subject issue. Finally, neither DAS nor OUS advanced arguments as to why the two matters are distinguishable. Under such circumstances, we conclude that there is no material difference in this matter and *AEE*, such

[2]In our order on reconsideration in *AEE*, also issued today, we further explain the subject's impact on public employee wages, hours, and other terms and conditions of employment, as well as the subject's impact on management's prerogatives.

[3]We further observed that our conclusion was consistent with federal law under the National Labor Relations Act, after which the PECBA was modeled. 25 PECBR at 543 n 9.

[4]We addressed (and rejected) one additional argument by the State—namely, that the subject should not be mandatory under the so-called "purely-contractual-rights" exception. We explained that the exception had been limited to three categories of subjects (none of which applied), and we declined to further expand the exception. *Id.* at 544-46. That same reasoning applies to this matter.

[5]We also afforded SEIU the opportunity to submit supplemental briefing addressing the applicability of AEE to this case. SEIU also did not submit supplemental briefing, but did state that there was no meaningful distinction between the two cases.

that a different outcome is warranted here.[6] Accordingly, we will find that DAS and OUS violated subsection (1)(e), as alleged.

ORS 243.672(1)(a) Violation

In *AEE*, we concluded that DAS violated subsection (1)(a) by issuing a directive and guidelines that prohibited the use of the State e-mail system by state employees holding union positions and for union-related communications. 25 PECBR at 551-61. In reaching that conclusion, we explained that the directive and guidelines were facially discriminatory, in that they expressly singled out union-related communications (and use by state employees holding union positions) in violation of ORS 243.672(1)(a). *Id.*

Here, the same directive and guidelines are at issue. We have not been presented with any persuasive arguments why *AEE* should not control the outcome here.[7] Consequently, consistent with our decision in *AEE*, we will find that DAS and OUS violated ORS 243.672(1)(a).[8]

Remedy

We turn to the remedy. Where, as here, we find that an employer violates the Public Employee Collective Bargaining Act (PECBA), we order the employer to cease and desist from engaging in such conduct. *See* ORS 243.676(2)(b).[9] We may also "[t]ake such affirmative action * * * as necessary to effectuate the purposes of [the PECBA]." ORS 243.676(2)(c). Here, SEIU asks that we order the employers to post a notice of their violations. We order such a remedy if we determine that 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. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590,

[6]As previously noted, we incorporate our *AEE* reconsideration order as part of our analysis in this case.

[7]We reiterate that we provided DAS and OUS the opportunity to submit supplemental briefing on why our analysis in *AEE* should not apply here, and that DAS and OUS declined to submit such briefing.

[8]We provided additional discussion in our *AEE* reconsideration order, in response to the arguments advanced by DAS in its request for reconsideration. We incorporate that discussion as part of our conclusion in this case.

[9]Although the State contends that a "cease-and-desist" order should not be issued because it has already rescinded its unlawful conduct, a "cease-and-desist" order is *mandatory* once we "find[] that any person named in the complaint has engaged in or is engaging in any unfair labor practice charged in the complaint." ORS 243.676(2) and 2(b).

5601 (1983). Not all of these criteria must be satisfied to justify a posting. *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 782 (2007). As in *AEE*, after applying these factors to the present case, we do not conclude that a posting is warranted.

ORDER

1. DAS and OUS shall cease and desist from violating ORS 243.672(1)(a) and (e) as described above.

DATED this 19 day of September, 2013.

*Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

*Chair Logan, Concurring in Part, Dissenting in Part:

In *AEE*, I dissented to the majority's conclusion that the State violated ORS 243.672(1)(e) when it unilaterally prohibited the use of the State's e-mail system for Association-related communications. For the reasons stated in that order, I respectfully dissent to the majority's holding in this matter.

Kathryn A. Logan, Chair

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-043-11

(UNFAIR LABOR PRACTICE)

ASSOCIATION OF ENGINEERING EMPLOYEES OF OREGON, Complainant, v. STATE OF OREGON, DEPARTMENT OF ADMINISTRATIVE SERVICES, Respondent.	)	ORDER ON RECONSIDERATION

On June 17, 2013, this Board issued an order concluding that the State of Oregon, Department of Administrative Services (State) violated ORS 243.672(1)(e) and (1)(a) when it unilaterally changed the *status quo* established by three different articles in its expired collective bargaining agreement with the Association of Engineering Employees of Oregon (Association). 25 PECBR 525 (2013). On July 1, 2013, the State filed a petition seeking reconsideration of portions of our order. The Board granted the State's motion for reconsideration and heard oral arguments on the State's petition on August 14, 2013.[1]

The State also requested that the Board grant it the opportunity for "rehearing" so that it could submit additional evidence regarding the evolution of the use of e-mail as a workplace communication tool and the impacts and costs to the employer of allowing Association-related messages to be sent and received on its e-mail system. We only reopen the record at the request of a party when: (1) the evidence is material to the issues in dispute; and (2) the evidence was either unavailable at the time of the hearing or there was a "good and substantial" reason the evidence was not offered at the hearing. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon,* Case No. UP-16-11, 24 PECBR 488 (2011) (Ruling on Reconsideration). We apply this standard in cases where the parties have submitted the

[1]As this case was submitted directly to the Board on stipulated facts, no recommended order was issued. In such cases, we generally grant reconsideration upon the request of a party. *Oregon AFSCME Council 75, Local 3336 v. State of Oregon, Department of Environmental Quality,* Case No. UP-47-06, 22 PECBR 54, 54-55 (2007).

issues to the Board based on stipulated facts as well as to cases where hearings have been held. *Teamsters Local 223 v. City of Medford*, Case No. UP-53-10, 24 PECBR 225, 226-27 (2011) (Ruling on Reconsideration).

The State has not asserted that any potential evidence was unavailable at the time the stipulated facts and joint exhibits were submitted to the Board or provided any explanation as to why the evidence was not submitted before the close of the record. Nor has the State offered any compelling reasons why we should reopen the record to accept any new evidence. Accordingly, the request does not meet the standards we apply to requests of this type. Therefore, the request for rehearing and to reopen the record is denied.

Issues on Reconsideration

The State requests that we reconsider the portions of our order holding that it violated ORS 243.672(1)(e) and (1)(a) when, during the hiatus period, it unilaterally prohibited employees and Association representatives from using the State's e-mail system for Association-related communications. The State alleged that we erred in our analysis of the (1)(e) allegation by: (1) improperly applying the requirements of ORS 243.650(7)(b); (2) improperly applying the provisions of ORS 243.650(7)(d); (3) improperly applying the balancing test under ORS 243.650(7)(c); and (4) narrowly applying the "purely contractual rights" exception to the *status quo* doctrine. Finally, the State alleges that because it prohibited the sending or receiving of Association-related messages on the State e-mail system for lawful reasons, we incorrectly concluded that the State violated ORS 243.672(1)(a). We will address each of the assertions separately.

Application of ORS 243.650(7)(b)

We begin with the State's claim that we improperly applied ORS 243.650(7)(b), which excludes from the definition of "employment relations" any "subjects determined to be permissive, nonmandatory subjects of bargaining by the Employment Relations Board prior to June 6, 1995." The State reasserts its argument that in *Oregon State Police Officers Association v. State of Oregon Department of State Police*, Case No. UP-109-85, 9 PECBR 8794 (1986), we decided the subject at issue to be a permissive, nonmandatory subject of bargaining. As previously explained, the subject at issue in *Department of State Police* was "the off-duty use of State vehicles." 9 PECBR at 8806.[2] The subject here is the use of the State's e-mail system by the Association and Association-represented employees to communicate about union business. Simply put, these cases

[2]The observation in *Department of State Police* that the "determination by an employer of the use of its equipment is an inherent management right essential to that employer's ability to determine its level of services, assignment of duties, and the general operation of the employer's enterprise," (*id.*) was *dicta*. As we previously explained, the State's interpretation of *Department of State Police—i.e.*, that it held that any use of any employer equipment constitutes a permissive subject of bargaining—cannot be reconciled with the numerous cases both before and after *Department of State Police* holding that all sorts of equipment (including vehicles and communication systems) are mandatory for bargaining. Consequently, we do not address the State's argument that any subject determined to be permissive before June 6, 1995, is permissive under ORS 243.650(7)(b), even if that determination was overruled before June 6, 1995. We are skeptical, however, of that argument.

involved two different subjects. Consequently, we adhere to our determination that this Board did not determine before June 6, 1995, that the use of an employer's e-mail system by a union and its represented employees to communicate about union business was a permissive, nonmandatory subject of bargaining.[3] Therefore, this subject is not permissive under ORS 243.650(7)(b).

Application of ORS 243.650(7)(c)

We now turn to the State's contention that we improperly balanced the subject at issue under ORS 243.650(7)(c).[4] Under that subsection, we balance the impact on management's prerogative regarding the subject against the impact on employee wages, hours, or other terms and conditions of employment. On reconsideration, the State contends that our order did not sufficiently identify the effect on public employee wages, hours, and other terms and conditions of employment, with respect to the use of the State's e-mail system by the Association and Association-represented employees to communicate about union business. We adhere to our determination, with the following supplementation.

The Association is the certified exclusive representative of the employees in the bargaining unit for "purposes of collective bargaining with respect to employment relations." ORS 243.666(1). Because of this exclusive status, this Board has long held that union/association rights pertaining to the use of employer facilities and communication systems constitute "employment relations"—*i.e.*, are mandatory for bargaining. *See Springfield Education Association v. Springfield School District No. 19*, Case No. C-278, 1 PECBR 347, 355 (1975); *Eugene Education Association v. Eugene School District No. 4J*, Case No. C-279, 1 PECBR 446, 456 (1975); *South Lane Education Association v. South Lane School District No. 45J*, Case No. C-280, 1 PECBR 459, 473-74 (1975), *aff'd*, 42 Or App 93, 600 P2d 425 (1979); *aff'd as modified*,

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[3]The State also asserts that once we concluded that the subject at issue in *Department of State Police* was different from the subject at issue in this case, there was no need for further discussion comparing and contrasting the equipment at issue in *Department of State Police* with the equipment at issue in this case. *See* 25 PECBR at 540. We agree with the State and we do not incorporate that additional discussion as part of our resolution of this case.

[4]The State also contests our conclusion that the subject at issue has more than an "insubstantial or de minimis effect on public employee wages, hours, and other terms and conditions of employment." *See* ORS 243.650(7)(d). As set forth in our prior order and explained below in our balancing test, we adhere to our conclusion that the impact on public employee wages, hours, and other terms and conditions of employment is significant and outweighs the impact on management prerogatives, which is also substantial. It necessarily follows that the subject has more than an insubstantial or de minimis effect on public employee wages, hours, and other terms and conditions of employment, and is not, therefore, permissive under subsection (7)(d).

In addition, the State asserts that our prior order mischaracterized the holding of *Springfield Police Association v. City of Springfield*, Case No. UP-28-96, 16 PECBR 712, 720 (1996). To clarify, we cited that case for the proposition that the focus of our analysis in a scope-of-bargaining case is subject based, not proposal based. 25 PECBR at 542. We adhere to that proposition and citation.

Springfield Education Assn. v. School Dist., 290 Or 217, 621 P2d 547 (1980).[5] Inherent in those holdings is the recognition that union access to employer communication systems has a significant effect on public employee wages, hours, and other terms and conditions of employment that generally outweighs the impact on management's prerogatives regarding the employer's communication systems.[6] This is so in part because, as the exclusive bargaining representative of public employees, the union negotiates the wages, hours, and other terms and conditions of employment for its represented employees.

Moreover, the certified labor organization commonly plays a vital role in presenting grievances on behalf of its employees, and bears the statutory obligation to fully and fairly represent those employees. *See* ORS 243.672(2)(a). We have recognized that the duty of fair representation significantly impacts the represented employees' wages, hours, and other terms and conditions of employment, and also provides a benefit to the employer. *See Springfield School District No. 19*, 1 PECBR at 350. Thus, we have long held that provisions that "assist the incumbent labor organization in its duty of fair representation are within the scope of mandatory bargaining." *South Lane School District No. 45J*, 1 PECBR at 474. As noted above, we have specifically determined that provisions concerning union access to an employer's communication systems for purposes of union-related communications assist the union in its duty of fair representation and are, therefore, mandatory for bargaining.

We do not find that the employer's communication system at issue here—e-mail—warrants a different result from our longstanding practice regarding other employer-owned communication systems. Rather, consistent with our previous holdings concerning union access to other employer communication systems, we continue to find that the use of the State's e-mail system by the Association and its represented employees to communicate about union business has a greater impact on public employee wages, hours, and other terms and conditions of employment than on management's prerogatives.

As discussed in our prior order, e-mail has become commonplace in today's workplace and has achieved a relevance surpassing other communication systems (bulletin boards, inter-office mail) that this Board previously determined to be mandatory for bargaining. This is particularly true in a bargaining unit like the Association's, where employees are spread across three separate agencies. The ability of employees and Association representatives to access the State's e-mail system greatly assists the Association in its duty of fair representation, which necessarily involves: (1) negotiating for public employee wages, hours, and other terms and conditions of enforcement; (2) monitoring employer compliance with contractual provisions on wages, hours, and other terms and conditions of employment; and 3) enforcing and grieving those same contractual provisions.

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[5]The three cited cases were consolidated for purposes of appeal before the Court of Appeals and the Supreme Court.

[6]Although *Springfield* was decided before the 1995 amendments that, *inter alia*, added subsections (7)(c) and (d), the courts have recognized that subsection (7)(c) codified the balancing test that this Board used in *Springfield et al.* to determine whether a subject that is not expressly listed in subsection 7(a) is a condition of employment. *See Eugene Police Employees' Association v. City of Eugene*, 157 Or App 341, 354, 972 P2d 1191 (1998), *rev den*, 328 Or 418, 987 P2d 511 (1999). Therefore, even though these cases were decided before the statutory exception of (7)(c) was added, they are still instructive.

Like union access to older employer communication systems, Association access to the State's e-mail system facilitates communication between the Association and its represented employees so that the Association can fully and fairly represent those employees, which significantly impacts the employees' wages, hours, and other terms and conditions of employment.

Access to the State's e-mail system by the Association and its represented employees to communicate about union business has other significant impacts on public employee wages, hours, and other terms and conditions of employment, beyond assisting the Association in its duty of fair representation. Specifically, such access provides an efficient and reliable method for the Association and its represented employees to: (1) send and receive communications before contract negotiations to identify what issues employees would like to have addressed through negotiations, including wages, hours, and other terms and conditions of employment, such as benefits, "just-cause" provisions, and layoff procedures; (2) communicate about potential bargaining proposals, draft proposals, or counterproposals; (3) send notices of meetings or other opportunities to discuss bargaining issues; (4) update employees about proposals made by the Association and the State, and solicit and receive feedback on those proposals; (5) plan or discuss concerted activities to support the contract campaign; (6) announce the terms of a tentative agreement and prepare for and conduct the ratification process; (7) discuss potential grievances under the contract; (8) discuss changes in the workplace that might trigger the obligation of the State to engage in interim bargaining; (9) provide for Association representation in disciplinary investigations; (10) send employee grievances to representatives of the employer and the Association; and (11) solicit and receive information in support of grievances, interim bargaining efforts, unfair labor practices or other contract administration matters. This list is by no means exhaustive, but it demonstrates that the use of the State's e-mail system by the Association and its represented employees has direct and substantial effects on employees' wages, hours, and other terms and conditions of employment.

We recognize, as the State argues, that the State's e-mail system is not the only communication method available to the Association and its represented employees. To be sure, there are other ways in which the Association and its represented employees could communicate about public employee wages, hours, and other terms and conditions of employment, including use of the bulletin boards, the postal service, intra-office mail, personal e-mail systems, the Association's own e-mail system, or home visitation. The existence of such alternatives does not mean, however, that access to the State's e-mail system does not have a substantial impact on public employee wages, hours, and other terms and conditions of employment. This is particularly true because the State's e-mail system provides a more efficient and effective communication system than older, traditional systems whose use has long been considered mandatory for bargaining. Of the options currently afforded to the Association and its represented employees, the e-mail system is the communication system that likely has the most significant, direct effect on employees' wages, hours, and other terms and conditions of employment.

The State further contends that we should not look at its e-mail system "in a vacuum," but rather in the context of a larger "technological revolution." Specifically, the State argues that the proliferation of computers, internet access, "smart phones," and social-media sites lessens the impact of the subject on public employee wages, hours, and other terms and conditions of employment. We agree with the State to a point. The increasing availability of other instantaneous and two-way communication technologies shifts the balance slightly towards a finding that the use of the State's e-mail system by the Association and its represented employees to communicate about union business should be permissive under our balancing test. However, as set forth above and in our prior order, the impact on employee wages, hours, and other terms and conditions of employment remains significant, as the State's e-mail system provides public employees and their exclusive bargaining representative with the more reliable, accessible, and relevant communication system with respect to employment relations.

We next turn to the State's argument that we gave "short shrift" to the impact on management's prerogatives. Specifically, the State argues that we failed to grasp the importance of its property rights, the concerns about employees spending work time to communicate about union business, and the potential harm that might arise from the use of its e-mail system for Association-related communications. We acknowledged these impacts in our original order and reiterate here that those impacts are significant. But this does not end the inquiry. We must still balance the overall impact of the subject on management's prerogatives against the impact on employee wages, hours, and other terms and conditions of employment.

After doing so again on reconsideration, we continue to conclude that the impact on management's prerogatives does not outweigh the impact on employee wages, hours, and other terms and conditions of employment. In adhering to our conclusion, we note that some of the impacts on management's prerogatives identified by the State (including primarily the financial costs of providing, maintaining, and upgrading its e-mail system; the costs of internet security; and the potential difficulties in ensuring that employees are performing work rather than spending time on non-work e-mails) apply not only to the use of its e-mail system for Association-related communications, but also more broadly to the entire State e-mail system. These costs and concerns are implicated more by the question of whether the State should establish and maintain an e-mail system for its employees at all. The question before us is solely whether the State is obligated to bargain over the use of its *existing e-mail system* for Association-related communications.

Additionally, the impacts on management's prerogatives here are also limited by the contractual agreement reached by the parties. Specifically, the agreement retains and reinforces many of the prerogatives that the State contends we have minimized, including: (1) the overall right to control the e-mail system; (2) the right to trace, review, audit, and intercept use of its e-mail system without notice; and (3) limits on the contents, length, and recipients of e-mails. Additionally, usage of the State's e-mail system by the Association and its represented employees to communicate about union business: (1) must occur on non-working time; (2) may not result in any additional costs to the State; and (3) may not adversely affect the use of or hinder the performance of an Agency's computer system for Agency business. Finally, the State is held harmless against any actions taken against the Association or its agents that are a direct result of the use of e-mail under the parties' agreement.

In sum, we have carefully reconsidered our balancing of the subject at issue. Having done so, as modified above, we adhere to our original order and conclude that the subject of the use of the State's e-mail system for Association-related communications has a greater impact on employee wages, hours, and other terms and conditions of employment than it does on management's prerogatives. As a result, the subject is mandatory for bargaining.

"Purely contractual rights" exception to the *status quo* doctrine

The State objects to our application of the "purely contractual rights" exception to the *status quo* doctrine described in *Oregon School Employees Association, Chapter 7 v. Salem School District 24J,* Case No. C-273-79, 6 PECBR 5036, 5046 (1982). The State points to language from *Oregon University System v. Oregon Public Employees Union, Local 503,* Case No. UP-61-98, 19 PECBR 205 (2001), *recons,* 19 PECBR 431 (2001), *rev'd on other grounds,* 185 Or App 506, 60 P3d 567 (2002), to support its assertion that the use of an employer's e-mail system is a purely contractual right that should not survive the expiration of a collective bargaining agreement. In *OUS,* we noted that:

> "the general rule in the private sector is that a union and its members do not have a statutory right to use the employer's equipment to communicate. [Footnote omitted.] In both the private sector and under the Public Employee Collective Bargaining Act [PECBA], the subject of access to the employer's equipment for union communications is typically mandatory for bargaining. * * * Thus, if a right to use equipment exists, it must be found in the collective bargaining agreement." *OUS,* 19 PECBR at 434 (Order on Reconsideration) (citing *NLRB v. Proof Co.,* 242 F2d 560, 562 (7th Cir.), *cert den,* 355 US 831 (1957); *Springfield School District,* 1 PECBR at 355).

The State posits that since we previously held that the right to use the employer's e-mail system must be found in a collective bargaining agreement, it must be a "purely contractual" right under the *Salem School District 24J* case.

We disagree. The cited language only stands for the proposition that the PECBA does not specifically require that a public employer allow a labor organization to utilize its equipment for union communications. It does not address whether the subject should be included in the exceptions to the *status quo* doctrine, but it does demonstrate why we described the term "purely contractual rights" as inapt. If we applied the term "purely contractual right" literally, as urged by the State, we would effectively eliminate the *status quo* doctrine because a significant portion of every collective bargaining agreement consists of rights conferred solely by that contract. For the reasons set forth in our original order, we continue to hold that a narrow reading of these exceptions is the correct approach.

ORS 243.672(1)(a)

We concluded in our original order that the State violated both the "because of" and "in" prongs of ORS 243.672(1)(a) when it prohibited employees and Association representatives from utilizing its e-mail system for union-related communications. In doing so, we found that the

prohibition was not based on any legitimate or lawful motives, but rather that the State's actions were taken "because of" protected activities of bargaining unit members. The State contends that we erred in this conclusion. It asserts that the prohibition was based on a single lawful reason: its purported belief that use of e-mail for Association-related communications under Article 71 involved a permissive subject of bargaining.

We do not agree, however, that the State acted for the reason that it asserts. Immediately after the contract expired, the State issued directives prohibiting *only* Association-related communications over its e-mail system. It did so while specifically noting that other personal use of the e-mail system was still allowed per the applicable agency policies. As previously explained, this prohibition was facially discriminatory and demonstrated that the State prohibited employees and Association representatives from using the State's e-mail system "because of" protected activities. Therefore, we find the State's purported reason for its conduct—that it merely barred Association-related communication because it believed the subject to be permissive for bargaining—to be a pretext for its unlawful conduct. Consequently, the State violated subsection (1)(a). *See Wy'east Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05, 22 PECBR 108, 146 (2007) (if all of an employer's reasons for its conduct are unlawful under subsection (1)(a), or if the employer's supposedly lawful reasons are only a pretext for its unlawful conduct, the complainant will prevail); *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 741 (2004) (same).

However, even if we accepted the State's assertion that it was at least in part motivated by the mistaken belief that it was allowed to change the *status quo* upon expiration of the contract, our conclusion would be the same. In situations where we find that an employer acts for both lawful and unlawful reasons, we determine whether the employer's unlawful motive "was a sufficient factor to attribute the decision to it." *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 639, 16 P3d 1189 (2000). Alternately stated, we determine "whether the employer would not have taken the disputed action but for the unlawful motive." *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06, 22 PECBR 212, 221 (2007).

As noted above, at the same time that the State informed employees and Association representatives that no Association-related communications were allowed on the State e-mail system, it clarified that any other personal use allowed for under existing policies was still allowed. These directives, which were e-mailed to all employees in the bargaining unit, establish that the primary, if not the only, motivating factor for the prohibition was that the State's e-mail system was being used to engage in protected activity—namely, to communicate regarding Association matters. Thus, even under a mixed motive analysis, we would find that the State would not have discontinued the use of its e-mail system for Association-related communications "but for" its unlawful motive, in violation of subsection (1)(a).

As a result, we adhere to our original order and continue to hold that the State violated ORS 243.672(1)(a) when it prohibited Association-related messages from being sent on its e-mail system.

ORDER

1. The State's request for reconsideration is granted.

2. We adhere to our order as explained and clarified above.

3. The State's request for a rehearing and to reopen the record is denied.

DATED this19 day of September 2013.

*Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

*Chair Logan, Concurring in Part, Dissenting in Part:

I respectfully dissent from the portion of this reconsideration order that holds that the State violated ORS 243.672(1)(e). As I stated in the initial order, when the balancing test is applied, there is a "greater impact on management's prerogative than on employee wages, hours and other terms and conditions of employment," rendering this subject to be permissive.

Kathryn A. Logan, Chair

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-042-11

(UNFAIR LABOR PRACTICE)

SEIU LOCAL 503, OPEU, Complainant, v. STATE OF OREGON, ACTING THROUGH THE DEPARTMENT OF ADMINISTRATIVE SERVICES, OREGON UNIVERSITY SYSTEM, OREGON STATE UNIVERSITY, AND WESTERN OREGON UNIVERSITY, Respondents.	)	WITHDRAWAL OF ORDER AND REISSUANCE OF RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On September 19, 2013, this Board issued an order in the above-captioned case, which inadvertently omitted a citation of the statute under which the order may be appealed. To correct that omission, we withdraw our September 19, 2013 order and reissue it below. The parties' rights of appeal shall begin to run from the date of this order.

This matter was submitted directly to the Board after Complainant, SEIU Local 503, OPEU (SEIU), and Respondent, State of Oregon, Department of Administrative Services (State or DAS), and Respondents Oregon University System (OUS), Oregon State University (OSU), and Western Oregon University (WOU) (collectively, OUS or the Universities), agreed to waive a hearing and agreed to stipulated facts, exhibits, and issues. The record closed on December 17, 2012, following receipt of the parties' briefs.

Marc Stefan, Supervising Attorney, SEIU Local 503, OPEU, Salem, Oregon, represented Complainant.

Tessa Sugahara, Attorney-in-Charge, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent DAS.

Jeffrey Chicoine, Attorney at Law, Miller Nash, LLP, Portland, Oregon, represented Respondent OUS.

SEIU filed this unfair labor practice complaint alleging that DAS and the Universities violated ORS 243.671(1)(a) and (e) as a result of certain actions taken by DAS and the Universities during negotiations for successor bargaining agreements. DAS and the Universities timely answered the complaint.

As described below, after the parties submitted briefs in this matter, we issued a decision in a companion case concerning essentially the same disputed issues. *Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services,* Case No. UP-043-11, 25 PECBR 525 (2013) (*AEE*). We subsequently granted the respondent's (DAS's) request for reconsideration and oral argument in *AEE*. On July 15, 2013, we afforded the parties in this matter the opportunity to submit additional briefing and provide oral argument regarding the application of our initial decision in *AEE* to this case. All of the parties declined to submit additional briefing or participate in oral argument.[1]

The stipulated issues are:

1. Did DAS's and OUS's June 29, 2011 directive/guidelines concerning use of the employers' e-mail systems after the expiration of the contract constitute a unilateral change to "employment relations" within the meaning of ORS 243.650(7), *i.e.*, a mandatory subject of bargaining? If so, did they violate the duty to bargain in good faith in violation of ORS 243.672(1)(e)?

2. Effective July 1, 2011, did DAS issue a directive applied by state agencies covered by the DAS-SEIU agreement or applied by universities covered by the OUS-SEIU agreement, regarding the use of employer e-mail systems, that interfered with, restrained, or coerced employees in the exercise of rights guaranteed in ORS 243.662, in violation of ORS 243.672(1)(a)?

3. If DAS or OUS violated ORS 243.672(1)(a) or (e), what is the appropriate remedy?

For the reasons set forth below, and those set forth in the companion *AEE* case, we conclude that: (1) DAS and OUS violated ORS 243.672(1)(e) by unilaterally deciding to change the use of their e-mail systems by prohibiting employees and SEIU representatives from using the e-mail system to communicate about union business; and (2) DAS violated ORS 243.672(1)(a) when it issued a directive prohibiting the use of employer e-mail systems for union-related communications, which was then applied by the state agencies covered by the

[1]We issue our reconsideration decision in *AEE* this same day (*Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11, __ PECBR __ (Order on Reconsideration) (September 19, 2013)).

DAS-SEIU agreement and by universities covered by the OUS-SEIU agreement. As a remedy, DAS and OUS are ordered to cease and desist from engaging in that unlawful conduct.

FINDINGS OF FACT

We adopt the following findings of fact from the parties' stipulated facts and exhibits.

1. SEIU is a labor organization as defined in ORS 243.650(13) and represents certain state employees in various agencies of the State, including OUS, OSU, and WOU.

2. DAS is the exclusive bargaining representative for the State agencies other than OUS and its constituent universities. The State, OUS, and OUS's constituent universities, including OSU and WOU, are each public employers as defined by ORS 243.650(20).

SEIU and DAS

3. SEIU and DAS were parties to a collective bargaining agreement effective through June 30, 2011.

4. Although engaged in bargaining, SEIU and DAS did not reach agreement on a successor contract by June 30, 2011, when the existing agreement expired.

5. During bargaining with SEIU on June 1, 2011, the DAS chief spokesperson Gail Parnell advised SEIU Executive Director Heather Conroy that the State was not going to extend the contract beyond its expiration date.

6. On June 29, 2011, DAS sent a memorandum to all agency directors, human resource directors, and human resource managers, including OUS, regarding the expiration of the collective bargaining agreements between the State agencies and various unions, and the fact that the agreements would not be extended beyond their expiration dates. There was an attachment addressing guidelines for the "*status quo period*" (DAS Guidelines). The DAS Guidelines specifically enumerated what was characterized as certain "permissive subjects" that would "not be continued once the agreements expire."

7. By letter dated June 29, 2011, Parnell advised Conroy that the expired agreement would not be extended by the State. The letter also discussed *status quo* obligations and attached a copy of the DAS Guidelines.

8. Under what it terms as "permissive subjects," the DAS Guidelines list "[a]ccess to state e[-]mail system." The expired agreement with SEIU addressed the use of the State Agencies' e-mail systems by union representatives in Article 10.

9. The parties reached a tentative agreement (TA) for a successor collective bargaining agreement on July 22, 2011. Contemporaneous with the TA, the State agreed to restore e-mail access.

10. The contract between SEIU and DAS first addressed the union use of e-mail in a letter agreement to the parties' 2001-2003 contract.

11. The parties first negotiated the question of e-mail use during bargaining for the 1995-1997 agreement. As a result of a disagreement over the interpretation, the parties arbitrated the question of union access under the language as it then appeared in the contract and relevant bargaining history. The relevant provisions are outlined in the arbitration decision.

12. In the 2003-2005 SEIU-DAS agreement, the parties replaced the Letter of Agreement concerning "Union Use of E-Mail" with Article 10, section (5)(b), which detailed the purpose, restrictions, and limitations on the use of the e-mail system. Specifically, Article 10, section (5)(b) states that, with certain enumerated restrictions, "Union representatives and SEIU-represented employees may use an Agency's e-mail messaging system to communicate about Union business."

13. In the intervening period, although there have been some modifications to the language in subsections (5) and (9) of Article 10, section 5(b) of the SEIU-DAS agreement, the provision otherwise reads the same as in the 2003-2005 agreement.

14. "DAS Statewide Policy—Acceptable Use of State Information Assets" outlines the boundaries for use of the state e-mail system.

SEIU and OUS

15. SEIU and OUS were parties to a collective bargaining agreement effective through June 30, 2011.

16. The SEIU-OUS agreement applies to a bargaining unit consisting of classified employees of OUS and its constituent universities.

17. Although engaged in bargaining, SEIU and OUS did not reach agreement on a successor contract by June 30, 2011, when the existing agreement expired.

18. Jay Kenton, OUS Vice-Chancellor for Finance and Administration, served as chief spokesperson for OUS throughout the bargaining with SEIU.

19. Rich Peppers, Assistant Executive Director for SEIU, served as chief spokesperson for SEIU throughout its bargaining with OUS.

20. By letter dated July 6, 2011, Kenton sent Peppers a letter attaching the DAS Guidelines. In adopting and implementing the DAS Guidelines, OUS relied on the directives, reasoning, and advice of DAS.

21. OUS gave individual universities discretion as to how and whether to implement the provisions of the DAS Guidelines related to e-mail use for union business.

22. WOU is part of OUS and issued an undated memorandum on the subject of "Status Quo Period and Appropriate Use of E-Mail."

23. OSU is also part of OUS and issued a memorandum dated June 30, 2011, from Jacquelyn Rudolph (OSU Director of Human Resources) to "Senior Executive Administrators, Dean, Directors and Department Chairs" on the subject of "Expiration of Collective Bargaining Agreement for Classified Employees."

24. By an e-mail dated August 11, 2011, and sent to OSU manager Amy Flint, Notocha Coe, in her capacity as SEIU steward, asserted rights on behalf of SEIU-represented employees to use accrued leave time to cover time off for attending classes under Article 63 of the expired SEIU-OUS agreement. Coe was instructed that, pursuant to OSU policy, she was not to use the university e-mail system to conduct union business.

25. On September 14, 2011, SEIU and OUS signed a comprehensive TA for a successor agreement, at which time OUS and its constituent universities ceased restrictions on union use of the universities' e-mail systems.

26. The SEIU-OUS agreement first included provisions on union e-mail use in the 2003-2005 agreement. Those provisions permit SEIU representatives and SEIU-represented employees to "use the University's [e-mail] system for union business," subject to certain specified restrictions.

Other Stipulated Facts

27. OSU has a policy, effective 2006 to date, titled "Acceptable Use of University Computing Resources."

28. The State's Acceptable Use of State and Information Assets policy governs e-mail usage by state agencies. OUS and its constituent universities apply portions of this policy that do not contradict their own missions and that are not addressed by their own policies, including the provision on solicitations (on page 4 of the State's policy).

29. SEIU maintains a "Membership Data Base" (MDB). The MDB contains various forms of information secured from the State and OUS, pursuant to contractual and other reporting obligations and information shared by members with SEIU. That information includes, among many other things, personal and work e-mail addresses for employees that SEIU represents.

30. During the period up to and following contract expiration, SEIU actively sought to increase the number of private e-mail addresses in its MDB by asking individuals to visit its website and enter their personal e-mail addresses via a web-based form. Further, SEIU sought to expand those opportunities by urging employees that it represents to provide it with alternative contact information—efforts above and beyond its regular practice of urging employees to keep their contact information up to date with the union.

31. During negotiations with DAS and OUS for respective successor agreements to the 2009-2011 collective bargaining agreements, SEIU made substantial efforts, as it has in past contract negotiations, to communicate with its members regarding matters that it believed relevant to the ongoing negotiations. SEIU also made such efforts to receive information from its represented employees that those employees deemed relevant to the ongoing negotiations. Those efforts to communicate included e-mails sent by SEIU to members (and vice-versa) on the State and/or OUS e-mail systems, as well as personal e-mail accounts maintained by SEIU-represented employees. These communications by SEIU to its members (and from members to SEIU) using the State and/or OUS e-mail systems continued following expiration of the contract.

32. During the period following expiration of the contract, SEIU continued in its efforts to maintain communications between itself and represented workers on matters deemed relevant by each. It did so by continued efforts to use the State and OUS e-mail systems and by seeking and attempting to utilize alternative means of communications, including the SEIU website, Facebook, Twitter, and other social media. Nonetheless, SEIU communications to and from workers became more difficult and less successful due to the employers' actions at issue in this matter.

33. During the period following contract expiration, DAS did not impose any limitations or restrictions on communications between employees and SEIU through telephone or other media (*e.g.*, telephone, inter or intra-campus or agency mail), other than the State and OUS e-mail systems.

34. The DAS Guidelines did not address employees' use of State or university e-mail systems for personal or non-work-related e-mail. Such use was subject to compliance with existing policies of DAS or particular DAS Agencies or universities of the OUS system.

CONCLUSIONS OF LAW

In the companion *AEE* case (which also includes the order on reconsideration issued this same day), we concluded that DAS violated ORS 243.672(1)(a) and (e) for conduct nearly identical to what is at issue in this matter. After we issued our initial order in *AEE*, we granted DAS's motion for reconsideration and oral argument, and afforded the parties in this case the opportunity to submit any additional briefing as to why our conclusion in *AEE* should not control the outcome here. We have also considered DAS's arguments on reconsideration in *AEE* as part of our determination in this matter. For the following reasons, we find no meaningful distinction between *AEE* and this dispute that would warrant a different outcome.

ORS 243.672(1)(e) Violation

In *AEE*, we concluded that DAS violated ORS 243.672(1)(e) because it decided to unilaterally change a mandatory subject of bargaining (use of the State's e-mail system to conduct union-related business) during the hiatus period. Dispositive in both *AEE* and this case is whether the use of the employers' e-mail systems after the expiration of the contract constitutes a unilateral change to "employment relations" within the meaning of ORS 243.650(7), *i.e.*, a mandatory subject of bargaining.

In *AEE*, we identified the subject at issue as "the allowance of, and limitations on, the use of the State's e-mail system by its employees and their certified representative to communicate about union business." 25 PECBR at 537. Likewise, here the subject of the discontinued article concerns use of the employers' e-mail systems by SEIU representatives and SEIU-represented employees to communicate about union-related business. Specifically, the discontinued SEIU-DAS article concerns the "use of an Agency's e-mail messaging system to communicate about Union business" by SEIU representatives and SEIU-represented employees. Likewise, the discontinued SEIU-OUS article concerned "the use of the University's [e-mail] system for union business" by SEIU representatives and SEIU-represented employees. Finally, the parties have not argued that the subject at issue here is different from that identified in *AEE*.

In *AEE*, we then determined that this subject did not fall within one of the specifically-enumerated statutory designations of mandatory or permissive. *Id.* at 537-42. Included in that determination was our conclusion that the subject had not been previously designated as permissive before June 6, 1995. *See id.* at 537-40; *see also* ORS 243.650(7)(b). We also disagreed with DAS's assertion that that the subject had "an insubstantial or *de minimis* effect on public employee wages, hours, and other terms and conditions of employment." *See* ORS 243.650(7)(d); *see also* 25 PECBR at 541-42.

Thus, the outcome in *AEE* ultimately was determined by the balancing test under ORS 243.650(7)(c). We explained in *AEE* that this test required us to determine if access to and use of the State's e-mail system by the union and its represented employees to communicate about union business had a greater impact on management's prerogative than on employee wages, hours, or other terms and conditions of employment. 25 PECBR at 542-44. We determined that the subject had a significant impact on management's prerogatives, including: the right to control access to and use of the State's communications systems and its equipment; the right to protect against improper use of that system that might subject the State to liability; and the right to ensure that employees are performing work for the employer while on paid time, rather than utilizing the e-mail system excessively for non-work purposes. We also noted that there was presumably at least some cost to the State to allow such use, although the record contained no evidence concerning the amount of that cost. *Id.* at 542.

We then turned to the impact on employee wages, hours, or other terms and conditions of employment. We explained that use of the State's e-mail system allows employees to communicate with each other and with representatives of the Association about wages, hours,

and other terms and conditions of employment. We further observed that e-mail has become an essential part of today's workplace, surpassing yesterday's bulletin board, water cooler, and mail room, and that employees rely on this means of communication more and more each year to communicate with each other and their designated representative about a wide variety of employment matters, particularly in bargaining units where employees are spread across multiple agencies and worksites. *Id.* We added that the ability of employees to communicate with each other and their bargaining representative about matters of common concern is one of the lynchpins of collective bargaining, and fundamentally impacts employees' ability to collectively bargain over all aspects of wages, hours, and other terms and conditions of employment.[2]

Finally, when we balanced the competing interests, we concluded that the subject of access to and limitations on the use of the State's e-mail system had a greater impact on the employees' wages, hours, and other terms and conditions of employment than on management's prerogatives. *Id.* at 542-44. Accordingly, we found the subject mandatory for bargaining.[3] *Id.*[4]

The arguments by both parties in this dispute largely mirror those addressed in *AEE*; indeed arguments advanced in that case have been incorporated in those made here. We see no need to repeat our analysis in *AEE* regarding those arguments.

Moreover, we offered DAS and OUS an opportunity to provide supplemental briefing on why our analysis in *AEE* should not apply here, but they declined to submit supplemental briefing.[5] After considering our analysis in *AEE*, the arguments advanced in this case, as well as the stipulated issues, facts, and exhibits in this case, we conclude that *AEE* controls the outcome here. In both cases, the subject at issue concerns the use of the State's e-mail system by represented employees and their representatives to communicate about union business. Moreover, DAS was a party in both proceedings. Additionally, both cases involve the same decision by DAS to unilaterally change the *status quo* regarding the subject issue. Finally, neither DAS nor OUS advanced arguments as to why the two matters are distinguishable. Under such circumstances, we conclude that there is no material difference in this matter and *AEE*, such

[2]In our order on reconsideration in *AEE*, also issued today, we further explain the subject's impact on public employee wages, hours, and other terms and conditions of employment, as well as the subject's impact on management's prerogatives.

[3]We further observed that our conclusion was consistent with federal law under the National Labor Relations Act, after which the PECBA was modeled. 25 PECBR at 543 n 9.

[4]We addressed (and rejected) one additional argument by the State—namely, that the subject should not be mandatory under the so-called "purely-contractual-rights" exception. We explained that the exception had been limited to three categories of subjects (none of which applied), and we declined to further expand the exception. *Id.* at 544-46. That same reasoning applies to this matter.

[5]We also afforded SEIU the opportunity to submit supplemental briefing addressing the applicability of AEE to this case. SEIU also did not submit supplemental briefing, but did state that there was no meaningful distinction between the two cases.

that a different outcome is warranted here.[6] Accordingly, we will find that DAS and OUS violated subsection (1)(e), as alleged.

ORS 243.672(1)(a) Violation

In *AEE*, we concluded that DAS violated subsection (1)(a) by issuing a directive and guidelines that prohibited the use of the State e-mail system by state employees holding union positions and for union-related communications. 25 PECBR at 551-61. In reaching that conclusion, we explained that the directive and guidelines were facially discriminatory, in that they expressly singled out union-related communications (and use by state employees holding union positions) in violation of ORS 243.672(1)(a). *Id.*

Here, the same directive and guidelines are at issue. We have not been presented with any persuasive arguments why *AEE* should not control the outcome here.[7] Consequently, consistent with our decision in *AEE*, we will find that DAS and OUS violated ORS 243.672(1)(a).[8]

Remedy

We turn to the remedy. Where, as here, we find that an employer violates the Public Employee Collective Bargaining Act (PECBA), we order the employer to cease and desist from engaging in such conduct. *See* ORS 243.676(2)(b).[9] We may also "[t]ake such affirmative action * * * as necessary to effectuate the purposes of [the PECBA]." ORS 243.676(2)(c). Here, SEIU asks that we order the employers to post a notice of their violations. We order such a remedy if we determine that 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. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590,

[6]As previously noted, we incorporate our *AEE* reconsideration order as part of our analysis in this case.

[7]We reiterate that we provided DAS and OUS the opportunity to submit supplemental briefing on why our analysis in *AEE* should not apply here, and that DAS and OUS declined to submit such briefing.

[8]We provided additional discussion in our *AEE* reconsideration order, in response to the arguments advanced by DAS in its request for reconsideration. We incorporate that discussion as part of our conclusion in this case.

[9]Although the State contends that a "cease-and-desist" order should not be issued because it has already rescinded its unlawful conduct, a "cease-and-desist" order is *mandatory* once we "find[] that any person named in the complaint has engaged in or is engaging in any unfair labor practice charged in the complaint." ORS 243.676(2) and 2(b).

5601 (1983). Not all of these criteria must be satisfied to justify a posting. *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 782 (2007). As in *AEE*, after applying these factors to the present case, we do not conclude that a posting is warranted.

ORDER

1. DAS and OUS shall cease and desist from violating ORS 243.672(1)(a) and (e) as described above.

DATED this _3__ day of October, 2013.

*Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

*Chair Logan, Concurring in Part, Dissenting in Part:

In *AEE*, I dissented to the majority's conclusion that the State violated ORS 243.672(1)(e) when it unilaterally prohibited the use of the State's e-mail system for Association-related communications. For the reasons stated in that order, I respectfully dissent to the majority's holding in this matter.

Kathryn A. Logan, Chair

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-030-12

(UNFAIR LABOR PRACTICE)

OREGON SCHOOL EMPLOYEES ASSOCIATION, Complainant, v. PARKROSE SCHOOL DISTRICT, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On August 19, 2013, the Board heard oral argument on Complainant's and Respondent's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Peter A. Rader, after a hearing held on October 3, 2012, in Salem, Oregon. The record closed on November 26, 2012, following receipt of the parties' post-hearing briefs.

Sarah K. Drescher, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented Complainant.

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

On May 14, 2012, Oregon School Employees Association (OSEA or Association) filed this unfair labor practice complaint alleging that the Parkrose School District (District) violated ORS 243.672(1)(e) when it unilaterally imposed across-the-board furloughs on all classified employees for the 2011-12 school year. On June 11, 2012, OSEA amended its complaint to allege that the District again violated ORS 243.672(1)(e) when it unilaterally imposed furloughs on classified employees for the 2012-13 school year. The District filed an answer denying the charges and alleging as an affirmative defense that OSEA had waived its right to bargain by failing to file a timely demand to bargain as required under ORS 243.698(3).

The issues are:

1. Did the District violate ORS 243.672(1)(e) by unilaterally imposing furlough days for classified employees for the 2011-12 and 2012-13 school years?

2. If the District violated ORS 243.672(1)(e), what is the appropriate remedy?

For the reasons stated below, we find that the District violated ORS 243.672(1)(e) when it unilaterally imposed a total of 16 across-the-board furlough days for classified employees for the 2011-12 and 2012-13 school years. As a remedy, the District shall cease and desist from violating ORS 243.672(1)(e). The District shall also post a notice of its violation, as set forth below. Additionally, the District shall restore wages and benefits lost by the classified employees as a result of the imposition of furlough days for the 2011-12 and 2012-13 school years. The Association's request for a civil penalty is denied.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. OSEA is the designated representative of a bargaining unit of approximately 200 classified employees who work for the District, a public employer. The District operates two elementary schools, two middle schools, one high school, and one charter school.

2. OSEA and the District have been parties to a series of collective bargaining agreements, the most recent of which is effective from 2011 through 2014.

3. There are five classifications in the bargaining unit, encompassing approximately 68 job positions, including food service; educational assistant; bus driver; custodial/maintenance/ security/technology; and secretary/clerical/child care.

4. In contrast to the District's licensed teachers, classified employees do not work a guaranteed number of days per year. Some classified employees work only during the academic year, while others work year-round. Their monthly wages are averaged based on the total number of days that they work per year.

5. At the start of the school year, the District's human resources department issues and tracks calendars for all classified positions showing the number of days that those employees will likely work in the coming year. At one time, the days worked were consistent for each job classification, but now each employee gets an individual calendar for the upcoming school year.

6. Until approximately three years ago, the District used a site-based management system that allowed principals and managers at each school to make minor adjustments to a classified position's work schedule based on the needs of the building.

7. When Superintendent Karen Gray assumed her position three years ago, the District adopted a centralized system where decisions were uniformly applied District-wide.

Successor Bargaining for the Parties' 2011-14 Agreement

8. In early 2011, the parties began negotiations for a successor contract but did not reach a contract settlement until after the 2009-11 Agreement's June 30, 2011 expiration date. Hal Meyerdierk was OSEA's primary negotiator. The District was primarily represented by David McKay, Director of Human Resources, along with Superintendent Gray.

9. On October 17, 2011, the parties met for a bargaining session, at which the District presented the Association with a Memorandum of Understanding (MOU) that would permit the District to impose 10 furlough days for the 2011-12 work year, with five furlough days to be taken in the first five months of the school year and five additional furlough days to be taken in the last five months of the school year.

10. On October 24, 2011, the District sent a revised MOU regarding furlough days for the 2011-12 school year. Specifically, the revised MOU proposed that the classified employees would only take the same number of furlough days as the District's teachers.

11. Meyerdierk met with OSEA's bargaining team, and based on concerns of the team, sent the District a revised MOU on October 27, specifying that furlough days would not take place on paid, legal holidays.

12. On October 31, 2011, the District's Board met and approved an academic calendar, which removed eight student contact days from the academic calendar. That change did not affect the total number of paid work days for classified employees because those eight days were just "backfilled" as work days in June.

13. On November 4, 2011, McKay sent Meyerdierk an e-mail that asked him to review language of an e-mail that McKay proposed to share with classified employees regarding the District's October 31 vote. The proposed language stated that, at this time, classified employees would be expected to work and be paid for the eight backfilled days in June. Meyerdierk and the Association had no problem with this language because it reflected that there was no change in the number of paid work days for classified employees.

14. On November 8, 2011, McKay sent the above-mentioned e-mail to District staff, stating that the District was still bargaining with both the classified staff and the teachers. The e-mail further stated that no agreement had been reached yet on furloughs, and that the District intended to bargain fairly with both OSEA and the teachers' union.

15. On November 9, 2011, Superintendent Gray sent a letter similar to the e-mail to District parents and guardians informing them that the District had no agreement at that time with OSEA or the teachers' union regarding furlough days.

16. Although no official bargaining sessions were held between October 17, 2011 and a January 9, 2012 mediation session, Meyerdierk had additional conversations with McKay about furlough days. In one of those conversations, McKay asked Meyerdierk if the Association was willing to sign the MOU on furlough days. Meyerdierk responded that the Association would bargain that issue as part of the scheduled mediation sessions.

17. Furlough days were not discussed at the parties' first mediation session, which was held on January 9, 2012.

18. Near the end of the parties' second mediation session, held on February 7, 2012, Association members raised (and the District answered) questions about furlough days, including how many such days the District was proposing for the 2011-12 school year (eight days versus 10 days), and how the calendar would be adjusted depending on the number of furlough days.

19. At the February 7 mediation session, the District also presented a financial package, which was largely acceptable to the classified employees. The Association, however, made some modifications, which were presented to the District. The District indicated that the Association's modifications looked good, but also stated that the District needed to run some more numbers, based on the modifications. The parties, therefore, agreed to a follow-up mediation session on February 14.

20. At the February 14, 2012, mediation session, the District responded that the financial package looked good and presented the Association with a "full package" proposal. The Association caucused to review the District's proposal. In that caucus, the Association's bargaining team discussed the absence of any furlough day MOU or proposal. The Association then returned to the mediation session and informed the District that they were in agreement with the package, but also asked about the absence of any furlough day contract language. At that point, Gray said that the District was not there to talk about furlough days, which was a separate issue, and she physically removed the furlough MOU from the table. Meyerdierk then stated that he understood that furlough days would be a separate issue to be bargained at a later date. The parties then signed off on a tentative agreement of the collective bargaining agreement that did not included any language or agreement regarding across-the-board furlough days or changes in work days for classified employees. The Association considered the lack of language on both of those items to be a success.

21. The parties' 2011-14 agreement was ratified in early March 2012.

22. Although the parties' 2011-14 agreement was ratified without an agreement on furlough days, the ratified contract contains an article (Article 20) that sets forth "guidelines" that "dictate what the work year should be for each group of classified employees." Those guidelines include: (1) classified employees must be available during the period of time that

students are in school; (2) the needs of students of different ages vary, so programs are adjusted accordingly, and the District must "provide staffing on a different basis at various levels"; (3) with the exception of days when licensed personnel are not instructing students or are unavailable for supervisory responsibility, classified employees working directly under the direction of licensed employees should expect to work a similar schedule as the licensed employees; and (4) employees who work fewer than 12 months per year shall be notified of their hours, location, and days of work no later than two weeks before their first workday.

23. Article 20 also provides that, using these guidelines, the work year for each classified employee is shown in Appendix A. Appendix A, in turn, provides a classification list with the job titles, pay range, and approximate number of workdays and holidays for the classified employees. Some of the job titles have a single number of workdays (*e.g.*, 215, 230, 260, etc.), whereas other job titles include a range of workdays (*e.g.*, 166-183, 170-187, 169-191, etc.). The workdays/holidays column is marked with an asterisk, and a corresponding footnote states:

> "***Work Days** - Nothing above shall be construed as a guarantee of employment for a given number of months; or days per year, or hours of employment per day. Calendars for the work schedule will be prepared and issued with the notices sent as per Article 20.1.1.5. These calendars will be construed to be suggestions of days worked and may be altered to suit needs in individual buildings or departments by mutual agreement between supervisors and employees. The total number of days worked will not be affected by these agreements."

24. Some form of Article 20 with Appendix A has existed in the parties' various agreements since at least 2000.[1]

25. After the contract was ratified, the District and the Association met on March 19, 2012, to discuss the possible effect of a teachers' strike on the classified employees. At this time, although the classified employees had settled their contract with the District, the teachers had not. The Association asked the District about the number of furlough days that the District was considering, and Gray responded that the District was still bargaining that issue with the teachers' union. Meyerdierk then asked the District about bargaining the furlough days for the classified employees with the Association. Despite the parties' agreement in February to bargain furlough days as a separate issue, Gray stated that the District would not bargain furlough days with the Association.

26. At an April 5, 2012, meeting with the District and the Association, Gray informed the Association that the District would be unilaterally implementing furlough days for the classified employees, and that a pay reduction would occur in their future paychecks. The Association reiterated that the District needed to bargain that decision, at which point Gray asked if another unfair labor practice complaint would be filed. Meyerdierk responded that such a complaint would be filed if the District refused to bargain over the furlough days.

[1]Before 2006, Appendix A was included in Article 24 of the parties' agreement.

27. In April 2012, the District deducted money from the paychecks of the classified employees based on a projection of 10 furlough days for the 2011-12 school year. Thereafter, the District unilaterally changed the number of furlough days to eight and made further paycheck deductions based on eight furlough days for the 2011-12 school year.

28. For the last three months of the 2011-12 school year, classified employees lost eight days of wages and benefits. Based on several factors, including an employee's hire date, year-round employees had their wages reduced by an average of 3.08 percent, and employees who worked only during the academic year had their wages reduced by 4.44 percent. Systems/Network Administrator, Richard Doyle, who works year-round, had $1,427.13 in wages and benefits deducted from his paycheck during that period.

29. In early June 2012, Meyerdierk learned that the District intended to impose additional furlough days for the following school year (2012-13). Meyerdierk asked the District to bargain over those additional furlough days, but the District refused.

The Parties' History Regarding Furlough Days, Inclement Weather Cut Days, and Work Schedule Adjustments

30. In 2002, following a failed school levy, the District's superintendent notified OSEA that the District needed to cut workdays for all classified staff, and that the District would "bargain on demand over this plan to reduce days, using the expedited bargaining process in ORS 243.698." OSEA demanded to bargain, and the parties reached an MOU to cut six work days for all classified employees for that school year.

31. On December 19, 2009, inclement weather resulted in school closures throughout the District. On May 6, 2010, the District notified all employees that the school board decided to treat December 19 as a "cut day" for all certified, classified, and administrative staff. The District deducted a day's pay from the paychecks for all three employee groups, but spread the deductions over the remaining pay periods to minimize the effect on the employees. OSEA did not grieve or otherwise demand to bargain the cut day.

32. In 2010, the District was faced with a budget deficit and unilaterally implemented 10 furlough days for classified employees for the 2010-11 school year without notifying OSEA or bargaining over the issue. OSEA filed an unfair labor practice complaint that resulted in the parties negotiating a settlement agreement in which neither party acknowledged "any violation of the statute or collective bargaining agreement."[2]

33. Over the past ten years, the District has made adjustments to the work calendars under what is now Article 20 and Appendix A of the parties' agreement (described above).

[2] *OSEA v. Parkrose School District*, Case No. UP-48-10.

CONCLUSIONS OF LAW

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

2. The District violated ORS 243.672(1)(e) by unilaterally imposing furlough days (unpaid days off) on classified employees for the 2011-12 and 2012-13 school years without first bargaining the change with the Association.

DISCUSSION

OSEA alleges the District unilaterally changed the *status quo*, in violation of ORS 243.672(1)(e), when it imposed eight furlough days on its classified employees in each of the 2011-2012 and 2012-2013 school years without fulfilling its bargaining obligation. The District neither disputes that the subject at issue constitutes a mandatory subject of bargaining nor that it refused to bargain to completion on the across-the-board reduction in work days. Rather, the District asserts that it was under no obligation to bargain over the unilaterally imposed furlough days because the parties' agreement permitted it to make such a unilateral change. We agree with OSEA, reasoning as follows.

Legal Standards

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." *Clackamas County Employees' Association v. Clackamas County*, Case No. UP-53-09, 23 PECBR 571, 576 (2010). A public employer commits a *per se* violation of ORS 243.672(1)(e) by issuing a "flat refusal" to bargain over a mandatory subject of bargaining, as well as by making a unilateral change regarding a mandatory subject of bargaining while the employer has a duty to bargain. *See Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11, 25 PECBR 525, 534, *recons*, 25 PECBR 764 (2013) (explaining that *per se* violations of ORS 243.672(1)(e) for a "flat refusal" to bargain over a mandatory subject of bargaining and for a unilateral change regarding a mandatory subject of bargaining are grounded on the same theory that both frustrate the objectives of the Public Employee Collective Bargaining Act (PECBA)); *Oregon School Employees Association, Chapter 7 v. Salem School District 24J*, Case No. C-273-79, 6 PECBR 5036, 5046 (1982) (same).[3]

Here, there is no dispute that the subject of reduced work days with corresponding pay reductions (*i.e.*, furlough days) is mandatory for bargaining. Despite initially bargaining with the

[3]As explained in *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177 n 6, 295 P3d 38 (2013) (*AOCE*), our *per se* bad-faith-bargaining precedent is modeled after analogous longstanding federal precedent under the National Labor Relations Act, which also holds that an employer's "flat refusal" to bargain over a mandatory subject is a *per se* violation of the obligation to bargain in good faith, much like an employer's unilateral change to a mandatory subject of bargaining without first bargaining to completion with the exclusive representative. *See NLRB v. Katz*, 369 U.S. 736, 747, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962). Here, the Association did not plead the violation as a "flat refusal" *per se* violation, but rather as a *per se* "unilateral change" violation. Therefore, we analyze this dispute under our "unilateral change" framework.

Association and exchanging proposals on that subject, however, the District, on March 19, 2012, changed course and flatly refused to further bargain over that subject with respect to the 2011-12 school year. The District reiterated that flat refusal on April 5 and also informed the Association that a pay reduction would be forthcoming in the paychecks of classified employees.[4]

The District changed the *status quo* in April 2012 when it deducted pay from the classified employees' paychecks based on an initial unilateral decision to impose 10 across-the-board furlough days on those employees for the 2011-12 school year, and again in May 2012 when it unilaterally determined to impose eight across-the-board furlough days for the following school year. In short, those employees ultimately went from having zero furlough days for the 2011-12 school year (the *status quo*) to having eight such days (the unilateral change). Those employees also experienced a change in their wages and benefits. Likewise, in June 2012, the District unilaterally made a change when it determined not to pay classified employees for eight scheduled work days during the 2012-13 school year.

The District defends its actions by arguing that it was authorized to make such changes by the parties' most recent collective bargaining agreement, which was ratified by the Association in March 2012. To pursue the affirmative defense of contractual waiver, the employer must first assert that defense in its answer. *See* OAR 115-035-0035(1). Here, the District did not set forth in its answer, as an affirmative defense, that the parties' contract constituted a waiver by the Association of its statutory right to bargain over mandatory subjects of bargaining.[5] Therefore, we do not consider that affirmative defense.

Finally, we disagree with the District's assertion that the *status quo* was one of "variability," such that it did not change the *status quo* when it unilaterally imposed across-the-board furlough days on the classified employees. To begin, this assertion, although framed as defining the *status quo*, is essentially a contractual waiver analysis, which, as set forth above, the District did not properly assert in its answer.

Even assuming, however, the theoretical validity of the District's assertion, we still conclude that the District's unilateral change from zero furlough days in the 2011-12 and 2012-13 school years to eight furlough days in each of those school years (and the resultant loss in wages and benefits) changed the *status quo* in violation of ORS 243.672(1)(e). Here, as set forth above, the parties' contract, which was ratified in March 2012 and establishes the *status quo*, included no furlough days for classified employees, despite the parties' initially bargaining over the days but without coming to agreement on that issue.

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[4]As noted above, had the Association pleaded and argued that the "flat refusal" constituted a *per se* violation of subsection (1)(e), we likely would have agreed with that argument. The same is true with respect to the District's June 2012 "flat refusal" to bargain over additional furloughs for the 2012-13 school year. *See Association of Engineering Employees of Oregon*, 25 PECBR at 534; *Oregon School Employees Association*, 6 PECBR at 5046. However, because the Association has only pursued a "unilateral change" violation, we address only that violation.

[5]The District did properly assert as an affirmative defense in its Answer that the Association waived its right to bargain under ORS 243.698(3). The District, however, did not raise that statutory waiver defense at hearing, in its post-hearing brief, or at oral argument before this Board. Therefore, we do not consider it.

The District nevertheless relies on Appendix A, which provides a classification list with the job titles, pay range, and approximate number of workdays and holidays for the classified employees. The workdays/holidays column is marked with an asterisk, and a corresponding footnote states in relevant part that "[n]othing above shall be construed as a guarantee of employment for a given number of months; or days per year, or hours of employment per day."

The District asserts that these contract terms establish a *status quo* of "variability." In other words, according to the District, these terms and how they have been applied established that the District has always been able to unilaterally change the number of work days for classified employees, such that it could unilaterally impose the total of 16 across-the-board furlough days over the two school years (or any number of such furlough days at any time).[6] As noted above, however, the contract sets forth a negotiated number of workdays for different classified employees, albeit approximate days based on the guidelines set forth in the contract. The contract does not expressly state that the District may unilaterally implement, in the middle of the contract, across-the-board furlough days.

Moreover, the parties' bargaining history belies the District's interpretation of the parties' agreement. Specifically, before this agreement was ratified, the parties had bargained over the number of furlough days that would be permitted under the contract. Indeed, the District had proposed an MOU that would permit it to implement five furlough days in the first five months of the 2011-12 school year, and five furlough days in the last five months of that school year. The Association responded with some amendments to that MOU. Significantly, at the February 14, 2012 mediation session at which the parties ultimately agreed to the terms of the 2011-14 contract, the Association raised the issue of furlough days because the District's proposed "full package" made no mention of those days. Superintendent Gray responded that the District was not there to discuss furlough days at that session, and that furlough days constituted a separate issue. The Association's bargaining representative, Meyerdierk, clarified the understanding that the proposed package would be agreed to, and that the parties would then separately bargain the issue of furlough days.

Thus, we conclude that the parties recognized across-the-board furloughs as an issue separate from the terms of the contract, including Appendix A and Article 20. Likewise, at the time that the parties agreed on the terms of the 2011-14 contract, the issue of furlough days remained a separate issue to be bargained before implementation. Consequently, we disagree with the District's contention that the identified contract terms established a *status quo* whereby it could unilaterally impose across-the-board furloughs on the classified employees. To the contrary, the *status quo* consisted of an *absence of furlough days* for 2011-14, which would have to be bargained in the future before they could be implemented by the District. Thus, when the District changed course in April, May, and June 2012, and unilaterally imposed across-the-board furloughs for the 2011-12 and 2012-13 school years, along with paycheck deductions, it unlawfully changed the *status quo*.

[6]Indeed, at oral argument, the District asserted that it could impose 50, 100, or any number of furlough days without bargaining with the Association. Although the District asserts that, as a practical matter, it would not do that, it maintains that it has the statutory right to do so based on this contractual language.

In sum, we conclude that the District violated ORS 243.672(1)(e) by unilaterally imposing across-the-board furlough days on the classified employees, with a corresponding loss of wages and benefits, for the 2011-12 and 2012-13 school years.

Remedy

We have concluded that the District violated ORS 243.672(1)(e) by refusing to bargain over furlough days for the classified employees and unilaterally imposing a total of 16 furlough days for the 2011-12 and 2012-13 school years. As a remedy, we will order the District to cease and desist from violating ORS 243.672(1)(e). ORS 243.676(2)(b).

We will also order affirmative relief "necessary to effectuate the purposes of [the PECBA]." ORS 243.676(2)(c). The usual remedy for a unilateral change violation, besides a cease-and-desist order, is requiring the employer to restore the *status quo* that existed before the unlawful change. *Lebanon Association of Classified Employees v. Lebanon Community School District*, Case No. UP-33-04, 21 PECBR 71, 80 (2005). We see no compelling reason not to order the "usual remedy" in this case. Accordingly, the District is ordered to restore the wages and benefits lost by classified employees due to the imposition of furlough days for the 2011-12 and 2012-13 school years.

Finally, we will require the District to post a notice. In determining whether a posting is warranted, we consider whether 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. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601 (1983). Not all of these criteria need to be satisfied for us to require a posting. *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 782 (2007). Here, the violation was calculated and all classified employees were affected by the District's decision, such that we find a posting warranted. Accordingly, we will order the District to post notice of its violation in the District's administrative offices and at locations in each school where bargaining unit members are likely to see it.[7]

ORDER

1. The District violated ORS 243.672(1)(e) when it unilaterally imposed across-the-board furloughs on classified employees for the 2011-12 and 2012-13 school years without first fulfilling its bargaining obligation.

[7]The Recommended Order also declined to award a civil penalty, which was initially requested by the Association. The Association did not object to that portion of the Recommended Order, and, therefore, we do not consider the civil penalty request preserved. Therefore, we will not disturb the determination in the Recommended Order that a civil penalty is unwarranted.

2. The District shall cease and desist from imposing across-the-board furloughs on all classified employees without fulfilling its bargaining obligation.

3. Within 60 days of the date of this Order, the District shall restore all wages and benefits lost by classified employees due to the imposition of furlough days for the 2011-12 and 2012-13 school years.

4. Within 15 days of the date of this Order, the District shall post a notice of its violations in its administrative offices and in each school in the District at a location where classified employees are likely to view it. The notice shall remain posted for 30 days. The District Superintendent shall sign the notice.

DATED this 22 day of October 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, 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-030-12, Oregon School Employees Association v. Parkrose School District, 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 held that the Parkrose School District (District) violated the PECBA by unilaterally changing the *status quo* and imposing across-the-board furloughs on classified employees for the 2011-12 and 2012-13 school years without first fulfilling its bargaining obligation in violation of ORS 243.672(1)(e).

To remedy this violation, the Employment Relations Board ordered the District to:

1. Cease and desist from imposing across-the-board furloughs on all classified employees without fulfilling its bargaining obligation;

2. Restore all wages and benefits lost by classified employees due to the imposition of furlough days for the 2011-12 and 2012-13 school years; and

3. Post this notice for 30 days in prominent places in its administrative offices and in each school in the District at a location where classified employees are likely to view it.

Parkrose School District

Dated_____, 2013 By: _____
Employer Representative

_____
Title

****

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

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

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-053-11

(UNFAIR LABOR PRACTICE)

AMALGAMATED TRANSIT UNION, DIVISION 757, Complainant, v. TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On August 26, 2013, the Board heard oral argument on Complainant's objections to a recommended order issued by Administrative Law Judge (ALJ) Peter A. Rader, after a hearing held on July 25, 2012, in Salem, Oregon. The record closed on August 29, 2012, upon receipt of the parties' post-hearing briefs.

Julie Falender, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented Complainant.

Shelley R. Devine, Senior Deputy General Counsel, Tri-County Metropolitan Transportation District, Portland, Oregon, represented Respondent.

On August 5, 2011, the Amalgamated Transit Union, Division 757 (ATU) filed this unfair labor practice complaint alleging that the Tri-County Metropolitan Transportation District of Oregon (TriMet) violated ORS 243.672 (1)(a), (e) and (g). ATU filed an amended complaint on October 5, 2011, and a second amended complaint on December 16, 2011. TriMet filed a timely answer with affirmative defenses and counterclaims alleging that ATU violated ORS 243.672(2)(a), (c), and (d). Before the hearing, the parties reached an agreement that limited

the scope of issues for hearing, and ATU withdrew all of the claims under (1)(a) and one claim under (1)(e). The ALJ also dismissed TriMet's remaining counterclaims before the hearing.

The remaining issues are:

1. Did TriMet unilaterally change a mandatory subject of bargaining, in violation of ORS 243.672(1)(e), by requiring employee T.P.[1] to see and then obtain a release from TriMet's contract physician before returning to work?

2. Did TriMet violate the terms of a written agreement with ATU, in violation of ORS 243.672(1)(g), by requiring T.P. to see and then obtain a release from TriMet's contract physician before returning to work?

3. If TriMet violated ORS 243.672(1)(e) or (g), what is the appropriate remedy?

For the reasons stated below, we conclude that TriMet did not violate either ORS 243.672(1)(e) or (g), and dismiss the complaint.

RULINGS

1. On March 22, 2012, ATU filed a motion to dismiss TriMet's counterclaims. TriMet voluntarily withdrew the ORS 243.672(2)(c) counterclaim. The ALJ then dismissed TriMet's remaining counterclaims alleging violations of ORS 243.672(2)(a) and (d). As TriMet did not file objections to this ruling, we will not consider the claims in our Order.

2. TriMet attached a copy of an arbitration decision to its post-hearing brief that it asserted was relevant to the case. This arbitration decision was discussed during witness testimony at the hearing, but was not offered by either party as an exhibit. This document is not relevant to our decision, and was not considered by the Board.

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

FINDINGS OF FACT[2]

1. ATU is a labor organization as defined in ORS 243.650(13) and is the exclusive representative of certain employees employed by TriMet.

2. TriMet is a public employer as defined by ORS 243.650(20).

[1]The parties agreed to use initials to protect the privacy of the employee.

[2]Findings of Fact 1 through 8 are based upon the stipulated facts submitted by the parties. The remaining Findings of Fact are made based on the exhibits received and the testimony of witnesses.

3. ATU and TriMet are parties to a collective bargaining agreement that expired on November 30, 2009.

4. On April 13, 2011, TriMet employee T.P. was operating a light rail train when he contacted TriMet's Rail Control. He advised Control that he was "currently mentally exacerbated and physically in pain" and that he would be filling out a report of injury.

5. That same day, TriMet placed T.P. on paid administrative leave and informed him that an evaluation with TriMet's contract doctor would be required before T.P. could return to duty.

6. TriMet did not notify ATU of T.P.'s situation on or about April 13, 2011.

7. T.P. went to an evaluation by Dr. Harris, TriMet's contract physician.

8. When Dr. Harris released T.P. to return to work, T.P. returned to the same route that he was on before he was placed on leave.

The Parties' Working Wage Agreement

9. From 1976, the parties have entered into a series of collective bargaining agreements, called working wage agreements (WWAs).

10. Article 1, Section 19, paragraph 6 of the 2004-2009 WWA, which remained in effect at the times relevant to the dispute pertaining to T.P.'s situation, provides that:

> "When the District requires an employee to be examined by the District's consultant physician before returning to work, the appointment will be made as promptly as possible under the circumstances to avoid any potential loss of pay to the employee. Should a situation develop when the opinions of two (2) competent medical doctors conflict and the District will not permit the employee to work, the matter will be immediately investigated including, if necessary, written statements from doctors. If, after investigation and discussion between the two (2) physicians, it is clear that there is a direct medical conflict, the Association and the District shall select a third doctor competent in the medical area involved, and his opinion will be sought. The majority opinion will determine the employee's status."[3]

The 1991 Agreement

11. The parties have signed over two dozen side agreements, letters of understanding, or memoranda that address specific workplace issues or policies not addressed in the WWA. Although subject to change, these have included subjects such as a drug and alcohol policy, hours of service, and employee uniforms.

[3]At the time the complaint was filed, the parties were still in the process of negotiating a successor agreement to the 2004-2009 WWA. As a result, the parties were operating under the *status quo* established by the 2004-2009 WWA during the period of time relevant to this dispute.

12. On May 8, 1990, TriMet's labor relations director sent a letter to ATU's business representative Ron Heintzman that stated:

> "When an employee returns to work with a valid release from his/her personal doctor, he/she immediately returns to the payroll.
>
> "If TriMet is the cause of the delay in having the employee examined by the District's doctor, and the employee is cooperating to the extent that he/she is showing up for scheduled appointments, he/she continues on the payroll.
>
> "If the District's doctor does not concur with the employee's doctor's release, we have reached a medical conflict and we (the Union and the District) agree on a third doctor. As per long standing policy, the employee is <u>not</u> on the payroll during the period between the conflict and the resolution.
>
> "As far as I can determine, what I have outlined above is totally consistent with the contract and long standing past practice." (Emphasis in original.)

13. In November 1991, the parties received an arbitration award applying the terms of Article 1, Section 20, paragraph 7 of the WWA then in effect. Neither party agreed with the arbitrator's interpretation of the WWA, so the parties memorialized their understanding of the appropriate practice in a written policy agreement (the 1991 Agreement), which has been adhered to ever since.[4]

14. The 1991 Agreement states in relevant part that:

> "1. An employee who has been absent due to accident or illness shall be returned to the payroll upon the receipt of a full written release to return to work from the employee's attending physician. Pay shall start as of the date the employee is released to return to his or her regular work; provided, however, that no employee shall receive workers' compensation benefits and pay for the same period.
>
> "2. In the event the District exercises its discretion under Article 1, Section 20, Par. 7 and requires an employee to be examined by the District's consulting physician before returning to work, the employee's pay shall continue through the date the District's consulting physician renders an opinion.

[4]TriMet suggested in its post-hearing brief that the 1991 Agreement may not even be valid because it was never incorporated into the WWA, but at oral argument, TriMet conceded that the policy was binding. In addition, the credible evidence shows that the terms of that agreement have been followed since its adoption.

"3. The District shall, by the end of the next working day, notify the Union that it is exercising its discretion under Article 1, Section 20, Par.7. The Union and District shall select a third doctor competent in the medical area involved from a pre-established list as soon as possible thereafter. The method of selection will be agreement or, if either party elects, alternate striking.

"4. If the District's consulting physician concurs that the employee is fit for duty, the employee shall be returned to work.

"5. If the District's consulting physician advises that the employee is not fit for duty, the employee's pay will cease and the employee shall be immediately notified, with a copy to the Union, of the necessity of a third doctor's opinion.

" * * * * *

"7. In the event the employee fails to keep the scheduled appointment without good cause, the District's back pay obligation, if any, will cease from that day forward.

"8. If the third doctor concurs with the attending physician's opinion that the employee is fit for duty, the employee shall be returned to work as soon as possible and shall receive back pay from the date of the opinion of the District's consulting physician. Provided, however, that the District's back pay obligation hereunder shall not exceed fourteen (14) calendar days unless the District has caused the delay, whereupon it will be obligated to pay for the period covered by its delay.

"9. If the third doctor concurs with the District's consulting physician's opinion that the employee is not fit for duty, the employee shall not be returned to work or be entitled to any back pay and the employee's future status shall be determined by the applicable provision of the collective bargaining agreement.

"* * * * *

"11. It is the intent of the parties that this agreement completely set forth the procedure to implement Article 1, Section 20, Par. 7 of the collective bargaining agreement. However, in the event there is an omission or ambiguity, every attempt will be made to resolve it through negotiation."

The Parties' Practice

15. The parties agree that since 1991, TriMet has been able to direct an employee to see its contract physician after the employee returns to work with a medical release from his or her attending physician. If the two physicians confer and disagree about the employee's ability to return to work, the procedures of the 1991 Agreement are invoked to resolve the dispute.

16. ATU provided numerous examples of injured or ill employees who were released for work by their attending physician, but were then directed to see TriMet's contract physician before being allowed to return to duty. Either the parties reached agreement on the employee's return to work, or the third-doctor-opinion process in the 1991 Agreement was invoked to resolve the dispute.

17. Bargaining unit members who are ill or injured typically, but not always, seek medical releases from their attending physicians before returning to work. During the past 17 years, senior TriMet managers have sent between 75 and 100 employees to see its contract physician for medical examinations.[5] The employees were referred for examinations regardless of whether they had already seen an attending physician. Those referrals were usually based on safety concerns or questions TriMet had about an employee's ability to work. Under these circumstances, TriMet does not notify ATU when it directs employees to see its contract physician. The referral does not interfere with an employee's ability to seek a medical opinion from his or her own attending physician.

TriMet's Human Resources Policies

18. Beginning in 2008, TriMet's HR department posted newly issued policies or rules on the company's intranet website called TriNet. TriMet reminds employees annually that they are required to self-notify and understand these policies, which are accessible through their desktop computers or workstation computers set up at kiosks at major TriMet facilities. The TriNet website lists over 70 HR policies or rules.

19. TriMet's HR policy 332 was adopted in 2002 and posted on its intranet website in 2008. The policy states in part:

> "**FITNESS FOR RETURN TO WORK**
>
> "An employee in a safety-sensitive position may be required to undergo a physical examination to determine fitness for return to work under the following circumstances:
>
> "• The person has been absent from work on a leave of absence 6 months or longer.
>
> "• The person has experienced a health problem that could jeopardize safety, such as heart attack, stroke, seizure, loss of consciousness, or breathing difficulty.

[5] We credit the testimony of TriMet's Transportation Director Hayden Talbot and Executive Director of Operations Shelly Lomax as to the number of employees they, or their managers, have referred to fitness for duty evaluations during this period. ATU's consultant Heintzman and ATU's general counsel Susan Stoner disputed these numbers, but neither is employed by TriMet and the company does not always notify ATU when it orders these evaluations. Presumably that information was available through discovery, but was not produced at hearing.

"• Even if the condition is undiagnosed but the symptoms suggest a health condition that could compromise safety, Tri-Met may require an employee to have a physical examination and doctor's clearance before returning to work.

"Tri-Met's contracted physician performs the examination or may refer the employee to a specialist * * *."[6]

Facts Giving Rise to the Complaint

20. Following T.P.'s return to work a week after obtaining a release from TriMet's contract physician, representatives of ATU and TriMet exchanged letters in which they disagreed about the process to follow when an employee reports a work-related injury. ATU objected to TriMet's requirement that T.P. be examined by its contract physician *before* he had seen his attending physician. TriMet maintained that its actions were consistent with terms of the WWA, the practice of the parties and the 1991 Agreement.

CONCLUSIONS OF LAW

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

2. TriMet did not violate ORS 243.672(1)(e) or (g) when it required employee T.P. to see and obtain a release from TriMet's contract physician before returning to work.

DISCUSSION

ATU alleges that TriMet violated both ORS 243.672(1)(g) and (e) when it required light rail operator T.P. to obtain a release from its contract physician before returning to work. Although ATU pleaded these claims separately, they are based on the same legal theory: that TriMet violated the provisions of the WWA/1991 Agreement in its treatment of T.P. ATU's first assertion is that TriMet violated subsection (1)(e) by unilaterally changing the *status quo* established by the WWA/1991 Agreement.[7] ATU further alleges that TriMet violated subsection (1)(g) by breaching the terms of this written agreement. Because both claims turn on the application and interpretation of the WWA/1991 Agreement, we will consider them jointly.

[6]Although Heintzman and Stoner testified that they were unaware of HR policy 332, the policy has been in use since its adoption in 2002. The policy provides that conflicts between two medical opinions would be resolved by the procedure set forth in the WWA.

[7]In some instances, ATU suggested that the *status quo* in this case was established by the past practice of the parties. However, in its brief and at oral arguments, ATU clarified that the past practice it referenced consisted of the terms of the WWA/1991 Agreement. Accordingly, we limit our discussion to whether TriMet violated the terms of the WWA/1991 Agreement.

Legal Standards: ORS 243.672(1)(g) and (1)(e)

Under ORS 243.672(1)(g), it is an unfair labor practice for a public employer to "[v]iolate the provisions of any written contract with respect to employment relations." When we interpret labor agreements and other contracts with respect to employment relations, we do so in the same way that we interpret other contracts. *Portland Fire Fighters' Assn. v. City of Portland*, 181 Or App 85, 91, 45 P3d 162 (2001), *rev den*, 334 Or 491 (2002). Our goal is to determine the parties' intent. ORS 42.240. We first examine the text of the disputed provision, in the context of the document as a whole. *Portland Fire Fighters' Assn.*, 181 Or App at 91. If the agreement is ambiguous, we examine any extrinsic evidence of the parties' intent contained in the record. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005). If the provision remains ambiguous after examining the extrinsic evidence, we resort to the use of any appropriate maxims of contract construction. *Yogman v. Parrot*, 325 Or 358, 364, 937 P2d 1019 (1997).

ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer or its designated representative to "[r]efuse to bargain collectively in good faith with the exclusive representative" of its employees. An employer commits a *per se* violation of ORS 243.672(1)(e) if it makes a unilateral change in the *status quo* concerning a mandatory subject of bargaining without first completing its bargaining obligation under the Public Employee Collective Bargaining Act (PECBA). *See Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177, 295 P3d 38 (2013) (*AOCE*), citing to *Wasco County v. AFSCME*, 46 Or App 859, 613 P2d 1067 (1980). Because both parties have identified the WWA/1991 Agreement as establishing the *status quo*, and there is no dispute between the parties that the subject concerns a mandatory subject of bargaining, our conclusion regarding the meaning of that agreement is dispositive of this claim. In *AOCE*, the Oregon Supreme Court summarized our methodology for analyzing unilateral change allegations as follows:

> "When reviewing an allegation of unlawful unilateral change, ERB considers (1) whether an employer made a change to an "established practice," often referred to as the "status quo"; [Footnote omitted.] (2) whether the change concerned a mandatory subject of bargaining; and (3) whether the employer exhausted its duty to bargain. *Ass'n of Oregon Corr. Employees*, 20 PECBR 890, 897." *AOCE*, 353 Or at 177.

If the complainant provides the requisite evidence to establish a violation, we then consider any affirmative defenses raised by the employer. *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008).

Analysis

Article 1, Section 19, Paragraph 6 of the most recent WWA includes provisions that establish in general the process the parties have agreed to follow when there are conflicting medical opinions about an employee's ability to return to work. In turn, as noted in paragraph 11 of the 1991 Agreement, the parties negotiated that second policy agreement to "completely set forth the procedure to implement" the WWA's general provisions.[8] The first three paragraphs, of the 1991 Agreement, which are most relevant to our analysis, state that:

> "1. An employee who has been absent due to accident or illness shall be returned to the payroll upon the receipt of a full written release to return to work from the employee's attending physician. Pay shall start as of the date the employee is released to return to his or her regular work; provided, however, that no employee shall receive workers' compensation benefits and pay for the same period.
>
> "2. In the event the District exercises its discretion under Article 1, Section 20, Par. 7 and requires an employee to be examined by the District's consulting physician before returning to work, the employee's pay shall continue through the date the District's consulting physician renders an opinion.
>
> "3. The District shall, by the end of the next working day, notify the Union that it is exercising its discretion under Article 1, Section 20, Par. 7. The Union and District shall select a third doctor competent in the medical area involved from a pre-established list as soon as possible thereafter. The method of selection will be agreement or, if either party elects, alternate striking."

ATU contends that these paragraphs are steps that TriMet must follow sequentially. According to ATU, TriMet may not send T.P. or other members of the ATU bargaining unit to TriMet's contract physician unless it first requests a release from the employee's attending physician under paragraph 1 and also provides ATU notice of its decision. TriMet disagrees, asserting that the WWA/1991 Agreement does not prohibit it from sending employees to see its contract physician before the employee's attending physician is asked to provide a release.

As an initial matter, we conclude that both parties have offered plausible interpretations of the language, and as a result, the language is ambiguous. ATU's argument is supported by the language of paragraph 1 and the structure of the agreement as a whole, which could be read as creating sequential steps that must be followed in order. TriMet's argument is supported by the absence of specific language prohibiting it from requiring employees to see its contract physician before the employee's attending physician is asked to provide a release.

[8]At some point, the parties renumbered the applicable section of the WWA that dealt with medical examinations, but the language was otherwise unchanged.

As the complainant, ATU has the burden of proof and must establish by a preponderance of the evidence that TriMet violated the WWA/1991 Agreement. And although we find the language set forth above to be ambiguous, the two plausible interpretations are not equally supported by the language. ATU asks us to construe the language in its favor by inferring the existence of a specific prohibition on TriMet's discretion in the absence of clear language establishing such a limitation. Under ORS 42.230, when interpreting an agreement, we are required "simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted." The difficulty with ATU's argument is that neither the WWA nor the 1991 Agreement states what ATU asks us to find (*i.e.*, that TriMet was prohibited from directing T.P. to see its contract physician, even though T.P. had not yet obtained a release from his personal physician). In order to agree with ATU's interpretation of the agreement, the extrinsic evidence in the record would need to establish such a prohibition. We now turn to that evidence.

Both parties offered extrinsic evidence in support of their interpretation and application of the WWA/1991 Agreement. ATU offered the testimony of Stoner and Heintzman, who were involved in negotiating the 1991 Agreement, about what they believed the intent behind the language was and the context in which that agreement was negotiated. ATU also offered documents and testimony concerning several examples of situations in which ATU and TriMet had invoked the 1991 Agreement to resolve disputes between an employee's physician and TriMet's contract physician.

In response, TriMet offered the testimony of Ms. Talbott and Ms. Lomax that, over the past 17 years, somewhere between 75 and 100 employees had been sent to TriMet's contract physician before they were allowed to return to work. Lomax and Talbott both testified that TriMet made the decision to send the employees to the contract physician regardless of whether the employee's attending physician had previously provided, or been asked to provide, a letter releasing the employee to work.

We find that the extrinsic evidence offered by ATU does not establish that TriMet was prohibited from sending employees to its contract physician before the employee's attending physician had an opportunity to provide a release. Rather, the evidence offered establishes that the intent of the 1991 Agreement was to ensure that employees would not be placed on unpaid status if TriMet insisted on sending them to its contract physician before allowing the employee to return to work. This intent is demonstrated by the language of the 1991 Agreement, which references employee pay status not only in paragraph 1, but in paragraphs 2, 7, 8 and 9 as well. Stoner and Heintzman acknowledged in their testimony that that the primary concern that led to the original arbitration proceeding and the subsequent negotiation of the 1991 Agreement was ATU's concern about the financial impacts on employees who potentially could have been placed on unpaid status for long periods of time while waiting for TriMet's contract physician to evaluate the employee's fitness for duty.

In summary, we find that the extrinsic evidence offered by ATU did not provide persuasive evidence that supported its assertion that the parties agreed, through the 1991 Agreement, to prevent TriMet from sending employees to its contract physician before the employee's attending physician was given the opportunity to provide a release for the employee. As a result, we conclude that ATU did not establish that TriMet violated the WWA/1991 Agreement or that TriMet changed the *status quo* with regards to those agreements by directing T.P to obtain a release from TriMet's contract physician before seeking a release from T.P.'s attending physician. Accordingly, we will dismiss ATU's complaint in its entirety.

ORDER

The complaint is dismissed.

DATED this 25 day of October 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-024-12

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75, LOCAL 2376,	)	
Complainant,	)	FINDINGS AND ORDER ON RESPONDENT'S PETITION FOR REPRESENTATION COSTS
v.	)	
STATE OF OREGON, DEPARTMENT OF CORRECTIONS,	)	
Respondent.	)	

On April 25, 2012, Oregon AFSCME Council 75, Local 2376 (Union) filed an unfair labor practice complaint alleging that State of Oregon, Department of Corrections (Department) violated ORS 243.672(1)(a) and (c). After an amended complaint was filed on June 28, 2012, the Department filed a timely answer. On August 8, 2013, we dismissed the complaint. 25 PECBR 721 (2013). The Department submitted its petition for representation costs on August 9, 2013. The Union did not submit an objection to the petition.

Pursuant to ORS 243.676(2)(d) and OAR 115-035-0055, this Board[1] finds:

1. The Department filed a timely petition for representation costs and the Union did not file objections to the petition.

2. The Department is the prevailing party, as we dismissed the complaint.

3. Two days of hearing were held on December 11 and 12, 2012, before Administrative Law Judge Peter A. Rader.

[1]As explained in our August 8, 2013 order, two Board members were involved with the employee whose alleged treatment by the Department formed the basis of the Union's complaint. Although no direct conflict exists, both Board members have previously recused themselves from cases in which they had been involved. However, if we followed this process for this matter, there would not be a quorum of Board members to issue this Order. Therefore, Chair Logan and Member Weyand invoke the rule of necessity so that this matter can be completed.

4. Counsel for the Department submitted an affidavit stating that 188.1 hours of legal work were spent on the case, with 184.6 hours billed at a rate of $143 per hour, and 3.5 hours billed at a rate of $39 per hour. Based on that affidavit, the total amount of fees billed in this case was $26,397. The Department's petition requests an award of representation costs in the amount of $3,500, which is the maximum amount that this Board awards in the absence of a civil penalty. *American Federation of State, County and Municipal Employees Council 75, Local 88 v. Multnomah County*, Case No. UP-22-10, 25 PECBR 150, 151 (2012) (Rep. Cost Order); OAR 115-035-0055(1)(a).

5. The Department's requested hourly rate is below the average representation rate of $165 to $170 per hour. *See Clackamas County Employees' Association v. Clackamas County/Clackamas County District Attorney*, Case No. UP-7-08, 24 PECBR 769, 771 (2012) (Rep. Cost Order).

6. Cases generally require an average of 45 to 50 hours per day of hearing. *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 24 PECBR 720, 723 (2012) (Rep. Cost Order). The Department's claimed hours (188.1) are significantly above average. The Department's petition acknowledges as much, but notes that the nature of the allegations in the complaint required, among other things, conducting 26 initial investigatory interviews and preparing 19 witnesses to testify at the hearing.

7. An average award is generally one-third of the reasonable representation costs of the prevailing party, subject to the $3,500 cap contained in OAR 115-035-0055(1)(a). *Oregon School Employees Association v. Medford School District #549C*, Case No. UP-077-11, 25 PECBR 744, 745 (2013) (Rep. Cost Order). Here, regardless of whether we use our average number of hours or the number of hours claimed by the Department, an average award would exceed the $3,500 cap. As a result, having considered the purposes and policies of the Public Employee Collective Bargaining Act, our awards in prior cases, and the reasonable cost of services rendered in this case, we will order representation costs to the Department in the amount of $3,500.

ORDER

The Union will remit $3,500 to the Department within 30 days of the date of this Order.

DATED this 29 day of October 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-032-12

(UNFAIR LABOR PRACTICE)

FEDERATION OF OREGON PAROLE AND PROBATION OFFICERS, MULTNOMAH COUNTY CHAPTER, Complainant, v. MULTNOMAH COUNTY, Respondent.	)	FINDINGS AND ORDER ON COMPLAINANT'S PETITION FOR REPRESENTATION COSTS

On June 25, 2012, the Federation of Oregon Parole and Probation Officers, Multnomah County Chapter (Federation) filed an unfair labor practice complaint alleging that Multnomah County (County) violated ORS 243.672(1)(e). The County filed a timely answer to the complaint and added a counterclaim alleging that the Federation violated ORS 243.672(2)(c) and (e). On July 3, 2013, we issued an order holding that: (1) the County violated ORS 243.672(1)(e); and the Federation did not violate ORS 243.672(c) or (e). 25 PECBR 629 (2013). The Federation submitted its petition for representation costs on July 24, 2013. The County filed objections to that petition on August 13, 2013.

Pursuant to ORS 243.676(2)(d) and OAR 115-035-0055, this Board finds:

1. The Federation filed a timely petition for representation costs and the County filed timely objections to the petition.

2. The Federation is the prevailing party, as our order concluded that the County violated ORS 243.672(1)(e), and that the Federation did not violate ORS 243.672(2)(c) or (e).

3. A single-day hearing was held on September 21, 2012, before Administrative Law Judge B. Carlton Grew.

4. Counsel for the Federation submitted an affidavit stating that 33.5 hours were spent on the case at a rate of $175 per hour. Based on that affidavit, the petition requests representation costs in the amount of $5,862.50.

5. The County objected to the requested amount, arguing that: (1) the representation costs in this case should not exceed $3,500; (2) the average award of one-third of the Federation's reasonable representation costs is $1,898; and (3) no factors warrant adjusting the representation costs above our general "one-third" award.

6. In the absence of a civil penalty, we limit representation costs award to $3,500. *American Federation of State, County and Municipal Employees Council 75, Local 88 v. Multnomah County*, Case No. UP-22-10, 25 PECBR 150, 151 (2012) (Rep. Cost Order); OAR 115-035-0055(1)(a). A civil penalty was not awarded in this case.

7. The Federation's requested hourly rate of $175 per hour is slightly above the average representation rate of $165 to $170 per hour. *See Clackamas County Employees' Association v. Clackamas County/Clackamas County District Attorney*, Case No. UP-7-08, 24 PECBR 769, 771 (2012) (Rep. Cost Order).

8. Cases generally require an average of 45 to 50 hours per day of hearing. *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 24 PECBR 720, 723 (2012) (Rep. Cost Order). The Federation's claimed hours (33.5) are below average.

9. An average award is generally one-third of the reasonable representation costs of the prevailing party, subject to the $3,500 cap contained in OAR 115-035-0055(1)(a). *Oregon School Employees Association v. Medford School District #549C*, Case No. UP-077-11, 25 PECBR 744, 745 (2013) (Rep. Cost Order).

10. Having considered the purposes and policies of the Public Employee Collective Bargaining Act, our awards in prior cases, and the reasonable cost of services rendered in this case, we will order our general award of one-third of the Federation's reasonable representation costs. Therefore, we order representation costs to the Federation in the amount of $1,898.

ORDER

The County will remit $1,898 to the Federation within 30 days of the date of this Order.

DATED this 29 day of October 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-027-12

(UNFAIR LABOR PRACTICE)

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 483, Complainant, v. CITY OF PORTLAND, BUREAU OF HUMAN RESOURCES, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On September 16, 2013, the Board heard oral argument on Complainant's and Respondent's objections to a Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew, after a hearing on December 4 and 5, 2012, in Salem, Oregon. The record closed on January 28, 2013, following receipt of the parties' post-hearing briefs.

Barbara J. Diamond, Diamond Law, Portland, Oregon, represented Complainant.

Lory Kraut, Deputy City Attorney, City of Portland, Oregon, represented Respondent.

On May 9, 2012, Laborers' International Union of North America, Local 483 (Union) filed this Complaint alleging that the City of Portland, Bureau of Human Resources, (City) had violated ORS 243.672(1)(b), (e), and (f) by unilaterally changing the maximum hours of Seasonal Maintenance Workers (SMWs). On July 17, 2012, the Union amended its Complaint to add facts in support of its (1)(b) claim. On December 3, 2012, with leave from the ALJ, the Union filed a Second Amended Complaint adding allegations that the City had also violated ORS 243.672(1)(e) by misrepresenting its intent to increase those hours unilaterally and by

addressing the issue unilaterally after the collective bargaining agreement was ratified.[1] The City filed a timely answer, including affirmative defenses that: (1) the Complaint was untimely; (2) the Union waived its right to to bargain the change in hours, pursuant to ORS 243.698; and (3) the City's actions were authorized by the parties' collective bargaining agreement.

The issues are:

1. Is the Union's complaint alleging that the City unilaterally changed the maximum annual hours of SMWs in violation of ORS 243.672(1)(e) timely?

2. If the Union's unilateral change complaint is timely, did the Union establish such a violation?[2]

3. Did the City make a misrepresentation during bargaining that violated ORS 243.672(1)(e)?

4. Did the City fail to comply with ORS 243.698(2), and therefore violate ORS 243.672(1)(f)?

We conclude that the Union's complaint is timely and that the City violated ORS 243.672(1)(e) by unilaterally increasing the maximum number of annual work hours of SMWs. As a remedy for that violation, we will order the City to cease and desist from that conduct and restore the *status quo ante*. We further conclude that the City did not make the misrepresentation alleged by the Union, and we will dismiss that claim. Finally, because we conclude that the provisions of ORS 243.698 do not apply in these circumstances, we will dismiss the Union's subsection (1)(f) claim.

RULINGS

The rulings of the Administrative Law Judge were reviewed and are correct.

FINDINGS OF FACT

The Parties and the Union's SMW Unit

1. The Union is a labor organization as defined by ORS 243.650(13). The City is a public employer as defined by ORS 243.650(20).

2. The Union is the exclusive representative of three bargaining units of City employees. The Union's bargaining unit at issue here is composed of, depending on the season,

[1]The ALJ granted the City's prehearing motion to dismiss Complainant's (1)(b) claim, which alleged that the unilateral change in SMW hours and hiring of those workers during a hiring freeze dominated or interfered with the existence or administration of the Union. The Union does not challenge this ruling.

[2]Included in this issue is whether the City established any of its affirmative defenses.

approximately 60 to 125 City SMWs. The Union also represents a unit of recreation facility workers and a bargaining unit of City Utility Workers governed by the multiple-union collective bargaining agreement of the District Council of Trade Unions (DCTU).

3. Most SMWs work for the City Parks Bureau (Parks); the rest work for the Water Bureau. SMWs perform "a variety of unskilled manual labor and limited semi-skilled tasks in support of maintenance," including the "more routine and less complex duties assigned to more skilled classifications." Their duties typically include routine cleaning and maintenance tasks such as grounds maintenance. SMWs are "at-will" employees who may be rehired from year to year, and who lack layoff/recall or "just-cause" rights.

4. The City employs thousands of other seasonal workers who are not called SMWs and who are not subject to the City/Union SMW collective bargaining agreement.

5. SMW work is similar to work done by non-seasonal full-time Utility 1 Workers who are subject to the City/Union/DCTU collective bargaining agreement.

6. The Union organized the SMW bargaining unit in 2000, in part to prevent the City from moving work from the Union DCTU Utility Workers to the SMWs, who were then unrepresented, lower paid at-will employees with fewer benefits and no seniority. The Union's approach to bargaining has included offering to increase the maximum hours of SMW work in exchange for increased benefits for SMWs. As a result, bargaining between the Union and City regarding SMWs often included discussions of the maximum hours that SMWs could work per calendar year. All of the parties' collective bargaining agreements have included language referring to that issue.

The City's Human Resources Administrative Rules

7. In 2002, the City first adopted its Human Resources Administrative Rules (HRARs), consolidating and codifying a variety of rules in its multiple Bureaus. The HRARs state that they do not constitute a contract between the City and its employees.

8. The HRARs acknowledge that any collective bargaining agreement controls over any conflicting HRARs.[3]

9. The HRARs also state that labor representatives "may be invited to participate in the development or review" of a rule, but that the City retains the "authority to adopt rules as needed." The rules characterize any labor representative participation in the rulemaking process as "advisory only." The HRARs further state that if "a rule is subject to mandatory collective bargaining, the rule may be implemented but employees under collective bargaining agreements will not be subject to the rule until bargaining obligations are completed."[4]

[3]Even without this internal acknowledgement, that same principle would still apply.

[4]We note that the Public Employee Collective Bargaining Act (PECBA) and the parties' agreement determine the City's statutory and contractual bargaining obligations, not the City's self-authored HRARs.

The 2011-2014 SMW Collective Bargaining Agreement

10. On June 16, 2011, the parties' reached a tentative agreement on their most recent collective bargaining agreement, which is effective July 1, 2011 through June 30, 2014.

11. The parties bargained the current 2011-2014 SMW collective bargaining agreement from February until June 2011. Union Internal Organizer Erica Askin represented the Union, aided by Union Field Representative Lon Holston and two SMW employees. Patrick Ward, a City Labor Relations Coordinator,[5] represented the City, aided by City Parks Bureau Zone Manager Jeff Milkus and Human Resources employee Mary Strayhand.

12. The Union's bargaining goals were to attain just-cause protection, priority in seasonal re-employment according to seniority, and dispute resolution through arbitration. The City's proposals addressed vision and dental health benefits and annual cost-of-living increases. Neither party's *written* proposals sought changes in Article 1.2, the section describing SMW hours.

13. At a bargaining session on June 16, 2011, which occurred after the allowable time period set by the parties' ground rules for submitting new proposals, the Union made a verbal "supposal" that it would agree to an increase in the SMW hours' limitation if the City would accept any of its major proposals or modified proposals for just-cause protection, seniority in re-employment, and access to arbitration.

14. The Union bargaining team members believed that Parks' representative Milkus indicated an interest in the "supposal" through his body language. However, City spokesperson Ward stated that the City had no interest in increasing the hours of work, which was currently at 1200 hours for SMWs. This ended discussions on the "supposal."

15. Ultimately, the parties agreed on the following language in Article 1.2 of the current (2011-2014) SMW collective bargaining agreement:

> "A Seasonal Maintenance Worker may be employed for a limited duration for a maximum number of hours per calendar year as defined by the City's [HRARs]. Currently the maximum number of hours is 1200. The parties recognize the maximum number of hours is limited by City Charter. Should the City Charter change, the parties agree to meet pursuant to ORS 243.698 to bargain over the impact of the change."

16. The parties agree that the agreement's provisions referencing the City Charter are obsolete, in that the referenced City Charter section that used to limit the maximum hours of seasonal employees has not existed since 2007.

[5]Ward reports to the City Director of the Bureau of Human Resources. During 2011, Yvonne Deckard held that position.

17. As indicated in Article 1.2 of the parties' agreement, at the time that the parties agreed to the terms of the 2011-2014 agreement, the City's HRARs provided that all Casual/Casual Other Appointments, including SMWs, were limited to 1200 annual work hours.[6]

18. The HRARs continued to state, however, that those same Casual/Casual Other Appointments were not eligible for health insurance benefits or holiday pay, even though the SMWs were entitled to such benefits under the terms of the 2011-2014 agreement.

The Parties' History Regarding SMW Hours

19. The 1200-hour limitation in Article 1.2 has been in place since the parties' 2007-2011 agreement. Before that agreement, the annual hour limitation in the parties' previous agreement was 860. During the negotiations for the 2007-2011 agreement, the parties agreed to increase the annual hour limit to 1200, in part because doing so made it feasible to obtain a health insurance provider for SMWs, which was a high priority for the Union.

20. Once the limit on maximum hours was raised to 1200, the parties were able to locate a health insurance provider for SMWs, and health insurance for the SMWs was part of subsequent collective bargaining agreements. The City changed its HRARs (3.03) to reflect the new 1200-hour limit, but, as noted above, the City's HRARs continued to state that Seasonal Appointments (and later Casual/Casual Other Appointments) were not eligible for health insurance benefits, even though SMWs were eligible for such benefits under the terms of the collective bargaining agreement.

HRAR Revision Process

21. Anna Kanwit has been the director of the Bureau of Human Resources (BHR) since May 2012. She served as the Assistant Director from 2000 until 2012. Kanwit was primarily responsible for creating the original HRARs, which were adopted by the City Council in 2002. The City considers the HRARs to be "binding City policy," but not a contract. Since their adoption, the HRARs have typically been revised annually. Kanwit oversees these revisions.

22. The 2012 version of HRAR 1.02, "Administrative Rule Development and Issuance," provides in part:

> "Rules shall be approved by the Chief Administrative Officer (CAO) as Council's designee unless otherwise noted in the City Charter. Prior to the adoption, amendment or repeal of any rule, the Director of Human Resources shall give public notice of the proposed action at least fifteen (15) days prior to the effective date by mailing the notice to each council member, all bureau directors and each

[6]Since its inception, HRAR 3.03 has listed all available employee classifications in the City. From 2002 until 2010, casual or seasonal positions, including SMWs, were identified as "Seasonal Appointments" in the HRARs. In October 2010, the City changed the name of this category of employees to "Casual/Casual Other" to accommodate its new financial management software.

> labor organization representing City employees. The CAO must approve changes in the actual rule once adopted."
>
> "* * * * *
>
> "Drafts of new rules will be distributed to the elected officials, Bureau Directors and all employees as well as to the City's labor leaders for review and comment to solicit feedback before the final rule is issued. A memorandum of explanation describing the rationale for any new rule or the need for revisions of an existing rule should accompany the forwarded rule.
>
> "* * * * *
>
> "The [BHR] will make every effort to ensure that key stakeholders are involved during the framing, formulation or review of new or revised rules. Key stakeholders may include Commissioners and staff, Bureau Directors, Human Resources professionals, labor representatives, employees, Risk Management and the City Attorney."

The terms of this provision have been the same at all times relevant to this action.

23. As part of the HRAR revision process, BHR e-mails all City employees, elected officials, designated representatives of the City's labor unions, and other interested parties a statement that the process has begun and invites them to send in suggested changes. Kanwit reviews the suggestions, drafts proposed rule changes, and discusses them with City and union officials.

24. After preparing the text of proposed changes, BHR e-mails each City labor organization information about the proposed changes.[7] The e-mail states that the recipients can view the proposed changes by clicking on an embedded hyperlink. If the number of proposed changes were few in number, that hyperlink sent the viewer to the proposed rules in legislative format identifying the current text and proposed text. When the City was considering a larger number of changes, the link generally sent the viewer to a grid providing a summary description of each proposed revision.

25. Although the e-mailed notices stated that unions had 15 days to comment on the proposed changes, Kanwit often extended the comment period upon a union's request.[8] During

[7]Before 2010, this information was also provided on paper. All City unions received notice that the City would no longer provide hard copies, and there is no evidence that the Union objected to receiving proposed HRAR changes by e-mail.

[8]When drafting the HRAR 1.02 15-day notice-and-comment period, Kanwit intended that it provide an appropriate amount of time for unions to demand to bargain pursuant to ORS 243.698. As explained below, despite Kanwit's intention, ORS 243.698 may or may not apply to mid-term changes, depending on, among other things, whether the proposed change concerns a condition of employment covered by an existing collective bargaining agreement.

every HRAR revision process, at least one City union has contacted Kanwit after receiving the e-mail notice of proposed revisions regarding a potential change. The unions typically seek information about whether a proposed change affects their members, or is in conflict with their collective bargaining agreement, and whether they needed to file a demand to bargain or a grievance.

26. The Union designated Richard Beetle as the individual who was to receive notice of any changes to the HRARs, and he was familiar with the HRAR revision process. He recalled at hearing that BHR had notified him "every year" of HRAR changes and that he reviewed the proposed or final changes, albeit "not meticulously." In 2007, Beetle had trouble opening the HRAR draft rules online and informed the City that the 15 days for the comment period should not begin until he received a hard copy of the changes. There is no evidence that Beetle was unable to open draft HRARs online at any other time.

2011 HRAR Revisions

27. At some point during 2011, Kanwit had a discussion with senior Parks managers Margaret Evans and Mike Abbaté, who requested that the City increase the permissible hours of casual workers. The discussion referred to the City's contract with a vendor providing temporary employees. Kanwit did not recall when this discussion took place. City negotiator Ward did not discuss this issue with Kanwit.

28. In September 2011, Kanwit decided to include a proposal to increase the maximum hours of casual employees to 1400 in HRAR 3.03 as part of the upcoming 2011 HRAR rule revision.

29. Kanwit believed that the change in maximum hours of casual or casual/other employees had a relationship to the Union's contract, although she did not review the 2011-2014 SMW contract that had recently been ratified. Kanwit also believed that, under HRAR 1.02, the change would not apply to Union bargaining unit SMWs until any bargaining was completed. If the Union had demanded to bargain the change during the notice-and-comment period, Kanwit testified that the City would have bargained before implementing any changes to the maximum annual hours of its represented employees.

30. On October 4, 2011, Kanwit's assistant Judy Bishop sent an e-mail to all City employees, elected officials, and union leaders (including Beetle). It stated:

> "This message announces the start of the notice and comment period for proposed revisions to the HR Administrative Rules pursuant to HR Administrative Rule 1.02. In the interest of sustainability, hard copies of the proposed rules will not be distributed. You may view a summary document describing the revisions, the new rules, and each rule with proposed revisions at: [link].
>
> "If you have any comments concerning these changes, please send them to Anna Kanwit no later than October 21, 2011."

31. Clicking on the link in Bishop's October 4 e-mail called up a webpage. That webpage stated in part as follows:

"**Proposed Revisions to the HR Administrative Rules**

Questions & Comments
If you have any questions or comments, please contact our site administrator.

"October 4, 2011 is the start of the 15-day notice and comment period for two new rules and proposed changes to the HR Administrative Rules. Use the following links to view the new rules and each rule with proposed revisions.

"The Summary of Proposed Revisions contains a brief description of the changes.

"**You may submit your comments regarding the proposed revisions to Anna Kanwit no later than October 21, 2011, which is the close of the notice and comment period.**

"**Summary of Proposed Revisions** (PDF Document, 16kb)

"**1.01 Duties & Authority of the Director of Human Resources Mission & Vision of the Bureau of Human Resources** (Word Document, 46kb)

"1.07 Time Review and Approval *NEW RULE* (Word Document, 53kb)

"2.02 Prohibition Against Workplace Harassment and Discrimination (Word Document, 105kb)

"2.03 Bloodborne Pathogen Exposure and the Workplace (Word Document, 54kb)

"2.04 Gender Identity Non-discrimination (Word Document, 38kb)

"3.01 Recruitment Processes (Word Document, 93kb)

"3.02 Eligible Lists (Word Document, 71kb)

"3.03 Types of Appointments (Word Document, 136kb)

"3.04 Temporary Appointments (Word Document, 50kb)

"3.06 Employment of Retirees (Word Document, 61kb)

"3.07 Veterans Preference (Word Document, 42kb)." (Emphasis in original; font changed omitted.)

The text that was boldfaced and underlined was a hyperlink to the identified document. The webpage continued on to list 30 additional revisions in the same format.

32. The hyperlinked document identified as "Summary of Proposed Revisions" near the top of the webpage was a PDF[9] document consisting of a list of affected rules with a very brief summary of changes to each rule in table format. It provided in part:

"**SUMMARY OF PROPOSED REVISIONS TO HR ADMINISTRATIVE RULES, OCTOBER 2011**

"**SECTION - RULE** **CHANGES**

1 – ADMINISTRATION	
1.01 Duties & Authority of the Director of Human Resources Mission & Vision of the Bureau of Human Resources	Non-substantive only, grammatical change.
1.07 Time Review and Approval NEW RULE	Mandates time review and approval by supervisors: ensures accountability for employee pay.
2 - EQUAL EMPLOYMENT	
2.02 Prohibition Against Workplace Harassment, Discrimination and Retaliation	Clarified that inappropriate conduct as defined in the rule may violate the City's rule even if it is not illegal harassment or discrimination under state or federal law. Streamlines rule by eliminating multiple definitions of 'protected status' and eliminated qualifier of 'Vietnam Era' to Veterans' status and a protected status under the rule.
2.03 Bloodborne Pathogen Exposure and the Workplace	Updated the rule.
2.04 Gender identify Non-discrimination	Changed rule to comply with statutory changes concerning use of sex specific facilities and other clarifications.
3 – EMPLOYMENT	
3.01 Recruitment Processes	Clarification that a person can transfer to a vacant position and eliminated reference to the JIF form as it is no longer used.
3.02 Eligible Lists	Made minor changes due to NEOGOV
3.03 Types of Appointments	Increased number of hours for casual/casual other employees from 1200 to 1400 per year.

[9]PDF is an acronym for Portable Document Format, an Adobe file extension.

3.04 Temporary Appointments	Clarified when vacation and sick leave can be used.
3.06 Employment of Retirees	City paid benefits continue for only the first 6 months of employment as retiree, not first 1039 hours (that could be one year if the person is half time).
3.07 Veterans Preference	Changed language to match statute including adding having a 'disability rating' as qualifying for preference. "

(Emphasis in original; font changes omitted.) The grid continued on for 37 additional boxes.

34. Bishop e-mailed the 2011 HRAR revision notice to Beetle, who was designated by the Union as its contact person for HRAR revisions since at least 2004. Although Beetle did not recall receiving the e-mail, the record does not establish that he was unable to open or read this e-mail.

35. The City did not send Union Internal Organizer Askin a copy of Kanwit's e-mail. Some time after these events, Askin attempted to use a link in a forwarded e-mail to view the summary of HRAR changes and was unable to do so. However, Askin believes that Kanwit's e-mail would not have alerted her to changes in SMW maximum hours, in part because the parties had just negotiated those hours and the City had expressed no interest in such an increase. Askin was aware that the City employs approximately 3,000 seasonal workers, the vast majority of whom are not in a Union bargaining unit.

36. In October, City officials reviewed comments submitted regarding the proposed HRAR changes. Kanwit also responded to questions from representatives of City labor organizations International Association of Fire Fighters, International Brotherhood of Electrical Workers, International Union of Operating Engineers Local 701, and the District Council of Trade Unions (DCTU). No labor organization, including Complainant, demanded to bargain over any part of the 2011 revised HRARs during the notice-and-comment period.

37. On November 4, 2011, Jack Graham, the City Chief Administrative Officer, approved the revisions to the HRARs. On November 10, BHR's Bishop e-mailed City employees, managers, and unions notice that the proposed revisions had become effective. The subject line of the e-mail stated, "HR Administrative Rule Revisions." The body of the e-mail stated in part:

> "Two new HR Administrative rules and revisions to the existing rules became effective November 4, 2011.
>
> "View the approval memo, a summary describing the new rules and revisions, and the rules with edits at [link]."

The linked documents in the November 10 e-mail followed the same format and order as the October 4 linked documents.

38. On November 14, 2011, Mary Strayhand, Human Resources Business Partner, sent an e-mail to all Parks managers and supervisors stating in part:

> "As you may be aware, the adoption of the revised [HRARs] includes an increase in seasonal hours from 1200 per calendar year to 1400 per calendar year. That increase in hours under HRAR 3.03 became effective November 4, 2011. Therefore, you may have all seasonal employees including seasonal recreation staff and [SMWs] work up to 1400 hours this calendar year * * *."

39. Also on November 14, Askin received a copy of Strayhand's e-mail. This was the first time that any Union official became aware that the City had raised the maximum hours of SMWs to 1400. After reviewing the e-mail, Askin's first thought was that the City had overlooked or forgotten about Article 1.2 of the parties' collective bargaining agreement.

40. Therefore, on November 14 and 16, 2011, Askin e-mailed Strayhand seeking clarification of Strayhand's e-mail regarding the HRAR changes as applied to SMWs' hours. On November 16, Strayhand replied that the increase in SMW hours was reflected in the HRARs.

41. On November 18, Askin e-mailed City Labor Relations Coordinator Ward demanding to bargain the "impacts of [the City's] application of HR Rule 3.03 to the Seasonal Maintenance Workers' employment of limited duration."

42. On December 1, 2011, Ward refused to bargain on the ground that the demand was not timely under ORS 243.698(3).

43. On December 2, 2011, Askin e-mailed Ward stating that the Union would like to discuss the change and that the Union intended to file an unfair labor practice because the increase in SMW hours constituted "a major change" to the parties' agreement, and the Union needed to be notified that the HRAR revision was going to be applied to the SMWs. Askin reminded Ward of the Union's offer during bargaining to increase the SMWs' hours in exchange for concessions from the City.

44. The City did not enter into such discussions, and the Union filed this action on May 9, 2012. The Union did not file a grievance and did not allege in its Amended Complaint that the City breached the parties' collective bargaining agreement.

45. As of the date of hearing, there was no evidence that any SMWs had actually performed more than 1200 hours of work in the calendar year.

CONCLUSIONS OF LAW

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

2. The Union's May 9, 2012 complaint is timely with respect to the (1)(e) unilateral change claim.

The City contends that the Union's subsection (1)(e) unilateral change claim is untimely.[10] Unfair labor practice complaints are subject to a 180-day statute of limitations. ORS 243.672(3) provides that "[a]n injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice." ORS 243.672(3) incorporates a "discovery rule," meaning that "the limitation period begins to run when a public employee, labor organization, or public employer knows or reasonably should know that an unfair labor practice has occurred." *Rogue River Education Ass'n v. Rogue River School*, 244 Or App 181, 189, 260 P3d 619 (2011). "[T]he determination of whether and when an injured party reasonably should have known of an unfair labor practice presents a factual question that requires case-specific analysis." *Id.* at 190.

To begin our case-specific analysis, we first identify the nature of the alleged unfair labor practice(s) and the date of the filing of the complaint. Here, the claim alleges that the City unilaterally changed the maximum annual hours that SMWs could work without first bargaining with the Union. When, as here, a subject (work hours) is mandatory for bargaining, a public employer must bargain with the exclusive representative, *before* deciding to change the *status quo* concerning that subject. *Three Rivers Ed. Assn. v. Three Rivers Sch. Dist.*, 254 Or App 570, 575, 294 P3d 547 (2013). This claim alleges that the City made a unilateral change to a mandatory subject of bargaining when it decided, without bargaining with the Union, to increase the annual maximum hours for SMWs from 1200 to 1400. The complaint was filed on May 9, 2012.[11] Therefore, we must determine if the Union reasonably should have known before November 11, 2011, that the City had decided to change the maximum number of annual hours for SMWs without first bargaining with the Union. If the answer to that determination is "yes," then the complaint is untimely; likewise, if the answer is "no," then the complaint is timely. For the following reasons, we find the complaint timely with respect to this claim.[12]

According to the City, the change occurred on November 4, 2011, when Jack Graham, the City Chief Administrative Officer, approved revisions to the HRARs, including an annual increase in the number of hours for "casual/casual other employees from 1200 to 1400." The City contends that the Union should reasonably have known of that change on November 10, 2011 when BHR's Bishop e-mailed City employees, managers, and unions (including the Union's designated representative, Richard Beetle) that revisions to the HRARs had become effective. Thus, under the City's argument, the Union's May 9, 2012 complaint is one day too late.

The Union contends that the change did not occur until at least November 14, 2011, which is the date that the Union also contends is the earliest date that it should reasonably have

[10]The City also asserted affirmative defenses that the complaint is untimely with respect to the Union's (1)(e) "misrepresentation" claim, as well as the (1)(f) claim (described below). Because we conclude that those claims should be dismissed on the merits, we assume without deciding that the complaint is timely with respect to those other claims.

[11]The complaint was thereafter amended twice.

[12]The City acknowledges that the Union did not have "actual knowledge" of the unilateral change until at least November 14, 2011, meaning that the complaint is timely unless the Union should reasonably have known of that change before that date.

known that the City decided to apply the revised HRAR annual-hours increase for casual/casual other employees to SMWs without bargaining with the Union. On that date, Mary Strayhand, the City's BHR employee assigned to Parks, sent an e-mail to Parks management and supervisors, specifically stating that the SMWs' annual-hour maximum could be increased pursuant to the HRAR revisions.

We need not resolve the dispute as to when the unfair labor practice "occurred" because we conclude that, regardless of the "occurrence" date, the Union should not reasonably have known that the City decided to increase the maximum annual hours for SMWs, without bargaining with the Union, until at least November 14, 2011, making the complaint timely. We disagree with the City's contrary contention for several reasons.

The City contends that the Union should reasonably have known of the unilateral change on November 10 when the City sent an e-mail to all City employees and labor organizations that it had revised its HRARs.[13] Because one of those HRAR revisions constituted a a change to the maximum annual hours of "casual/casual other" employees, which includes SMWs, the City contends that the Union should reasonably have known on November 10, 2011, of the occurrence of the alleged unfair labor practice.

There is some appeal to the City's argument, particularly given that the 2011-2014 contract states that SMWs may be employed for "a maximum number of hours per calendar year as defined by the [HRARs]." That same contractual provision, however, states the current annual maximum as 1200 hours. Moreover, during the bargaining for that contract, the maximum number of annual hours for SMWs was discussed, with the Union offering to raise that number in exchange for some concessions by the City. The City rejected the offer and, on June 16, 2011, the parties agreed that the annual maximum hours would remain at 1200.

The City then announced on November 10, 2011, by way of a mass e-mail to all City employees and copied to, among others, designated representatives of various labor organizations that represented City employees, that it had made changes to its HRARs. The text of the e-mail did not identify the changes, but merely provided recipients with a link to review a summary describing the new rules and revisions, as well as the rules with edits.

The summary of the HRAR revisions included 41 revisions, one of which was titled "Temporary Appointments." The "Temporary Appointments" changes were described as "[i]ncreased number of hours for casual/casual other employees from 1200 to 1400 per year." The summary of the HRAR revisions did not expressly refer to SMWs.

The HRARs (with edits) included numerous changes, one of which replaced "1200" with "1400" in the following sentence under the category "Casual/Casual Other Appointments": "Casual/Casual Other appointments are limited to 1400 hours per year." Neither this sentence nor the section of the HRARs titled "Casual/Casual Other Appointments" expressly mentions

[13]On October 4, 2011, the City had sent a similar mass e-mail that informed receipients that the City was entering the "notice and comment period for proposed revisions" to its HRARs. The City concedes, however, that no decision had been at that point whether there would be a change to the maximum number of hours for Casual/Casual Other employees or SMWs.

SMWs. The section does, however, define "Casual/Casual Other appointments" as employees who "are not eligible for health benefits." The section also states that part-time "Casual/Casual Other employees are not eligible for holiday pay." Under the terms of the parties' 2011-2014 collective bargaining agreement, however, SMWs are eligible for both health benefits and holiday pay.

Under these circumstances, we disagree with the City that the Union should reasonably have known on November 10, 2011 that the City had committed the alleged unfair labor practice based on material contained in the link that was included in the November 10, 2011 e-mail. As set forth above, the alleged unfair labor practice at issue is the City's decision to increase the maximum annual hours of SMWs without bargaining with the Union. The material contained in the link did not directly mention SMWs, but rather referred to a broader category of workers (Casual/Casual Other Appointments), most of whom are unrepresented.

Moreover, the HRARs continued to define Casual/Casual Other Appointments in a way that is at odds with SMWs in two significant respects: SMWs are contractually eligible for both health benefits and holiday pay, whereas the HRARs define Casual/Casual Other Appointments as employees who lack such eligibility. Additionally, the parties had just completed bargaining over the maximum number of annual hours for SMWs, with the City rejecting the Union's proposal to raise that limit. Furthermore, the extant SMW classification specification stated that SMW appointments were limited to 1200 hours per year. Although the City's Kanwit testified that this was an "oversight," it nevertheless supports our conclusion regarding the date that the Union should reasonably have known that the City intended to unilaterally change the SMWs annual maximum hours by way of the HRAR revisions. Finally, the terms of the HRARs limit a labor organization's involvement in the HRAR revision process as "advisory only," a limitation that is not synonymous with pre-decision collective bargaining.

Thus, as of November 10, 2011, we do not believe that it was reasonable for the Union to have known that the alleged unfair labor practice had occurred. At that date, it was reasonable for the Union to believe that the HRAR changes involving the maximum annual hours were intended for unrepresented Casual/Casual Other Appointments, or that the City would be willing to bargain any such change as it might be applied to SMWs. Circumstances changed, however, on November 14, 2011, when, for the first time, the City expressly stated in an e-mail to the Parks Department managers and supervisors that the HRAR increase in annual maximum hours included SMWs. When the Union became aware of this e-mail, it promptly sought clarification of the City's position and thereafter asserted that the City was obligated to bargain over any such change. The City then responded that it did not believe that it had such an obligation. The Union's complaint was filed within 180 days of November 14, 2011, which we conclude is the earliest date under these circumstances that the Union should reasonably have known that the unfair labor practice (change in the hours of SMWs without first bargaining with the Union) occurred.[14]

[14]Because the complaint is timely using November 14, 2011 as the "discovery" date, we need not decide whether a later date (such as when the City refused to bargain after the Union sought clarification of the City's position regarding the change) is the more appropriate date to start the statute of limitations.

Our conclusion is supported by our determination that the City itself appeared to be at least partly unaware of the consequences of the HRAR annual-hour increase for Casual/Casual Other Appointments.[15] Specifically, Kanwit testified that the increase was prompted by Parks, which was motivated by concerns regarding *recreation* staff, *not SMW*s. Kanwit testified that she specifically discussed the recreation-staff rationale for the hours increase with Parks, but could not recall whether she specifically discussed the hours increase as it might apply to SMWs. Moreover, Kanwit acknowledged that she did not review the 2011-2014 contract covering the SMWs after it was ratified, and that she only had general, but not specific, knowledge regarding the bargaining for the contract. Kanwit also conceded that she did not confer with Patrick Ward, who had represented the City in the bargaining of the 2011-2014 SMW contract, regarding the HRAR increase in maximum hours for "casual" employees, as it might pertain to SMWs.

Finally, although the change was prompted by a concern regarding recreation staff, and the City's November 14, 2011 e-mail stated that the new 1400-hour HRAR maximum applied to "casual" recreation staff (who are unrepresented), the City ultimately rescinded that decision after the Union (which also represents "non-casual" seasonal recreation staff under a separate collective bargaining agreement) protested that decision as a violation of the represented recreational workers' contract. In short, the City's actions and mixed signals regarding the intent and scope of the HRARs supports our conclusion that the Union reasonably should not have known of the intent and scope of the HRARs (*i.e.*, that the HRARs would be used to make a unilateral change in the maximum annual hours of SMWs) regarding the SMWs until at least November 14, 2011, when the City first made that intent express.

We realize that the City likely believes that because the Union's named representative failed to read the City's e-mails about the proposed changes to the HRARs and the adoption of those changes, our discussion above is irrelevant. The key issue for statute-of-limitations purposes, however, is when was it "reasonable" for the Union to know about the alleged *unfair labor practice*. Here, the alleged unfair labor practice concerns the City's unilateral decision to apply the HRAR "casual" hours increase to SMWs. If a reasonable reading of the information sent to the Union representative would fail to inform him that the City had decided to apply the proposed changes to SWMs, then it is not "reasonable" for the Union to know that the City is committing an unfair labor practice.

Thus, under the factual circumstances specific to this case, we conclude that it was reasonable for the Union to believe that the HRAR revisions increasing the annual hours of Casual/Casual Other Appointments was not intended to constitute a unilateral change in the maximum annual hours for represented SMWs until, at the earliest, November 14, 2011, when the City first expressly indicated such an intention. The complaint, therefore, is timely.

3. The City violated ORS 243.672(1)(e) by unilaterally changing the maximum annual hours of SMWs.

We turn to the merits. As set forth above, it is a *per se* violation of ORS 243.672(1)(e) for a public employer to decide, before bargaining with the exclusive representative of employees, to

[15]As noted above, the City also appeared to misunderstand the applicability of ORS 243.698 regarding conditions of employment covered by current collective bargaining agreements.

change the *status quo* regarding a mandatory subject of bargaining. *Three Rivers Ed. Assn.* at 575. Here, there is no dispute that the annual work hours of SMWs constitutes a mandatory subject of bargaining. Moreover, we conclude with little difficulty that the *status quo* limited those hours to 1200, as the parties' 2011-2014 agreement identified 1,200 hours as the current maximum. Finally, the City acknowledges that it did not bargain with the Union before increasing that annual limitation to 1400. Thus, in the absence of a proven affirmative defense, the Union has established a (1)(e) unilateral change violation. *See Assn. of Oregon Correction Emp. v. State of Oregon*, 353 Or 170, 177, 295 P3d 38 (2013) (*AOCE*) (in a unilateral change case, this Board considers,when asserted, an employer's affirmative defense of waiver).

Here, the City has properly pleaded and asserted an affirmative defense of "waiver." Specifically, the City contends that the Union waived its right to bargain about the change in SMWs' hours, pursuant to ORS 243.698(3).[16] We disagree with City's contention.

ORS 243.698 provides for "an expedited process that applies to certain negotiations during the term of an agreement." *In the Matter of the Joint Petition for Declaratory Ruling Filed by Medford School District 549C and Oregon School Employees Association Chapter 15*, Case No. DR-2-04, 20 PECBR 721, 724 (2004). This Board has previously explained that the expedited process applies only in "special circumstances"; notably, as relevant here, the proposed mid-term change must "concern a condition of employment that is a mandatory subject of bargaining not covered by the existing agreement." *Id.* at 727 (quoting *In the Matter of the Petition for Declaratory Ruling Filed by the Sandy Union High School District*, Case No. DR-4-96, 16 PECBR 699, 703 (1996); *see also* OAR 115-040-0000(2)(a). The proposed mid-term change in this matter concerns the maximum annual hours of SMWs, a mandatory subject of bargaining that *is* covered by the existing agreement. Consequently, ORS 243.698 does not apply, and the Union necessarily did not waive its right to bargain under ORS 243.698(3). Therefore, the City has not proved its affirmative defense and we conclude that it violated ORS 243.672(1)(e).[17]

4. The City did not otherwise violate ORS 243.672(1)(e) or (f).

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[16]The City also contended that its unilateral actions were authorized by the express terms of the parties' agreement. Although not pleaded as an affirmative defense of waiver, this Board has held that "[w]hen defending against a unilateral change complaint on the grounds that there is express contract language, and/or that bargaining has been completed, the proper defense is waiver." *Oregon School Employees Association v. Bandon School District #54*, Case Nos. UP-26/44-00, 19 PECBR 609, 624 (2002), In those circumstances, we have also held that such an alleged contractual waiver must be clear and unmistakable. *Id.* In *AOCE*, 353 Or at 182-85, the court concluded that this Board was not required to adopt a different analysis, and that the "waiver analysis" was not legally erroneous. The City has not asked that we revisit our waiver analysis, and we do not do so at this time. The City also has not argued that the contract language satisfies the "clear and unmistakable" waiver set forth in *AOCE*.

[17]We note that Article 1.2 of the parties' agreement references ORS 243.698. It does so, however, in relation to bargaining the impact of a change to the City Charter, not the HRARs. As previously noted, the parties acknowledge that the agreement's provisions referencing the City Charter, which include the reference to ORS 243.698, are obsolete, in that the referenced City Charter section has not existed since 2007.

The Union next alleges that the City violated ORS 243.672(1)(e) by allegedly making misrepresentations during the bargaining for the 2011-14 successor agreement. Specifically, the Union points to a statement by Ward, the City's primary negotiator, that the City was not interested in the Union's proposal to increase the annual maximum hours of SMWs. According to the Union, that statement constituted a bargaining misrepresentation because the City was in fact interested in increasing those hours.

We are not persuaded by the Union's arguments. Ward's statement, in context, reveals nothing more than that the City was not interested in the Union's *quid pro quo* proposal—namely, a concession by the City to include "just cause" and "binding arbitration" provisions in exchange for a concession by the Union to increase the annual maximum hours of SMWs. The City's lack of interest in that *quid pro quo* was not misrepresentative—to the contrary, it accurately reflected the City's position.[18] Therefore, we will dismiss this claim.

(1)(f) Claim

ORS 243.672(1)(f) makes it an unfair labor practice for a public employer to "[r]efuse or fail to comply with any provision of ORS 243.650 to 243.782." We have described this subsection as a catchall provision designed to provide a cause of action for violations not otherwise specified in ORS 243.672(1*). International Brotherhood of Electrical Workers, Local 125 v. City of Forest Grove*, Case No. C-201-75, 4 PECBR 2168, 2172 (1979). Here, the Union contends that the City violated subsection (1)(f) by failing to comply with the "notice" requirements of ORS 243.698. As set forth above, however, the "special circumstances" that trigger ORS 243.698 are not present here. Therefore, we will dismiss this claim.

[18]The Union has not proved that Ward and Kanwit were somehow in cahoots over a plan to unilaterally increase the SMWs' annual work hours after the parties signed the 2011-2014 contract. To the contrary, as explained above, the record indicates a lack of coordination and communication between Kanwit and Ward that likely led to the City violating (1)(e) in the manner that it did. That same lack of communication and coordination, however, supports, that Ward was not misrepresenting the City's position at the bargaining table.

Likewise, we do not agree with the Union's contention that the City "use[d] the expedited bargaining process to override the regular bargaining process." According to the Union, we should infer that someone from the City's bargaining team "funnel[ed] the issue of SMW hours increase into the HRAR process while the contract was being moved * * * to printing." Kanwit then, according to the Union's theory, "decided to put the idea into her HRAR process and wait and see if the [U]nion discovered the needle in the haystack." Therefore, the Union concludes, the City attempted to bypass the regular bargaining process regarding SMW hours and surreptiously sought to use the expedited bargaining process of ORS 243.698 by way of the HRAR revision process. In doing so, the Union asserts that the City aimed to remove the SMW hours as part of bargaining for an overall contract. The Union's theory, however, is premised on the same type of unproven conspiracy/coordination between Kanwit and the City's bargaining team that we have already rejected and that is not established by this record. Therefore, we will dismiss this alternative (1)(e) "misrepresentation" claim.

Remedy

We have concluded that the City violated ORS 243.672(1)(e) by unilaterally increasing the maximum number of annual work hours for SMWs. As a remedy, we will order the City to cease and desist from violating ORS 243.672(1)(e). ORS 243.676(2)(b).

We will also order affirmative relief "necessary to effectuate the purposes of [the PECBA]." ORS 243.676(2)(c). The usual remedy for a unilateral change violation, besides a cease-and-desist order, is requiring the employer to restore the *status quo* that existed before the unlawful change. *Lebanon Association of Classified Employees v. Lebanon Community School District*, Case No. UP-33-04, 21 PECBR 71, 80 (2005). We see no compelling reason not to order the "usual remedy" in this case. Accordingly, we will order the City to rescind the change and restore the *status quo* with regard to the maximum number of annual work hours for SMWs.

ORDER

1. The City violated ORS 243.672(1)(e) when it unilaterally decided to increase the maximum number of annual work hours for SMWs, without first bargaining with the Union.

2. The City shall cease and desist from unilateral increasing the maximum number of annual work hours for SMWs and shall restore the *status quo ante* of 1200 annual work hours for SMWs.

3. The Union's remaining claims are dismissed.

DATED this 5 day of November 2013.

Kathryn A. Logan

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-016-08

(UNFAIR LABOR PRACTICE)

THREE RIVERS EDUCATION ASSOCIATION, SOBC/OEA/NEA, Complainant, v. THREE RIVERS SCHOOL DISTRICT, Respondent.	)	SUPPLEMENTAL ORDER

On August 8, 2013, this Board issued an order (on remand from the Court of Appeals) holding that the Three Rivers School District (District) violated ORS 243.672(1)(e) when it unilaterally decided to increase student contact time for high school teachers represented by the Three Rivers Education Association, SOBC/OEA/NEA (Association). 25 PECBR 712 (2013). As a remedy, we ordered the District to cease and desist from that conduct.[1] We also ordered the parties to bargain over an additional remedy. In the event that the parties were unable to agree on a remedy after bargaining in good faith for 60 days, we directed them to submit their latest remedy proposals to this Board so that we could determine an appropriate remedy.[2] Although the parties bargained in good faith over an appropriate additional remedy, they were unable to ultimately reach an agreement. Consistent with our prior order, both parties submitted their last proposals to this Board.[3] We turn to those proposals.

[1] As recognized by both parties' proposals, the District returned to the *status quo ante* as of October 15, 2013.

[2] At the parties' mutual request, we expanded our initial 60-day timeline in order for the parties to continue bargaining over a remedy.

[3] Although not requested in our order, both parties also filed submissions in support of their respective final proposals. Those submissions engendered a motion by the Association to partially strike the submission of the District on the grounds that some of the information included in the District's submission was improper. We deny the Association's motion to strike, but also note that we have not reopened the record to receive the extraneous submissions by the parties as "evidence," but merely as argument in support of their respective positions.

The District's final proposal offered the following: (1) $1,000 to each high school teacher who was working in the 2008-2009 school year (when the unilateral change took place); and (2) the ability of all high school teachers to work from home on "clerical days" from the current school year through June 2016 (when the parties' current collective bargaining agreement expires). With respect to the $1,000 payment, the District proposed to pay that in two installments: $500 in November 2013 and $500 in November 2014.

The Association's final proposal offered the following: (1) compensate all high school bargaining unit members for student contact time worked in excess of 312 minutes per day; (2) compensate full-time teachers in an amount equal to 10.5 days at a per-diem rate applicable to each teacher for each year that the unilateral change was in effect; (3) compensate part-time employees and employees who worked less than a full year on a pro-rated basis; and (4) pay interest of nine percent on the proposed compensation.[4]

Having considered both parties' proposals, the circumstances of this case, and the policies and purposes of the Public Employee Collective Bargaining Act (PECBA), we conclude that neither proposal provides the type of affirmative action that best effectuates the purposes of the PECBA. *See* ORS 243.676(2)(c); *see also* ORS 243.656 (describing the policies and purposes of the PECBA). Therefore, consistent with our prior order, we will order our own remedy, albeit one that incorporates several features and a general framework taken from the parties' proposals.[5]

As an initial matter, we agree with both parties that some form of economic compensation is warranted due to the increased student contact time. However, the District's proposal of a one-time payment of $1,000 for only high school teachers who worked in the 2008-2009 school year does not sufficiently remedy the severity and longevity of the unilateral change. It also does not sufficiently extend to all high school teachers who were affected by the change.[6]

On the other hand, the Association's proposal overstates the remedy necessary to effectuate the purposes of the PECBA. That proposal is premised on an assumption that the actual working hours of each teacher increased proportionally to the increased student contact time, an assumption not established by the record. Moreover, because the circumstances of this particular type of unilateral change do not comfortably correspond to a traditional "back pay" scenario (*e.g.*, when a discriminatee is terminated on a certain date or when an employee is unlawfully required to work

[4] The Association also presented what it calls a "hybrid proposal" that contained "non-economic concepts." The Association acknowledges that this "hybrid proposal" was never explored, and the Association has not asserted that this "hybrid proposal" constitutes "the last proposal that was submitted to [the District]" under the terms of our order. Therefore, we do not consider that "hybrid proposal."

[5] In our prior order, we expressly reserved the right to fashion a remedy of our own. Therefore, the cases cited by the Association, in which the Board expressly committed to picking only one proposal, are inapposite.

[6] High school teachers who were not employed during that year nevertheless were subjected to the unilateral change of increased student contact time, even though they did not have a direct "before/after" experience.

in a lower-paid classification), we conclude that the type of calculation proposed by the Association is not appropriate in this case.

Consequently, we conclude that a flat annual amount is the best form of compensation to remedy this particular complaint. We further conclude that $1,000 is an appropriate annual amount; however, that amount shall be paid to each high school teacher represented by the Association who worked in each school year that the unilateral change was in effect: 2008-09, 2009-10, 2010-11, 2011-12, and 2012-13.[7] In other words, the number of school years from 2008-2013 that a high school teacher worked will determine the number of $1,000 payments that the teacher is entitled to (*e.g.*, a high school teacher who worked in all five of those school years will receive five payments of $1,000 each, a teacher who worked in four of those years will receive four payments, and so forth).[8] For the current school year through October 15, 2013, the date on which the District took sufficient action to return to the *status quo ante*, the District shall pay $100 to each high school teacher represented by the Association who worked during that period. Except as otherwise set forth in this order, no interest is due on these payments.

We further agree with the District that it is appropriate to make the above-required payments in installments. Consistent with the District's final proposal, it shall pay $500 of any owed amounts in November 2013. Also in November 2013, the District shall make a $100 payment to any high school teacher who is *only* entitled to the $100 payment for work performed this school year before October 15, 2013.[9] In November 2014, the District shall pay one-half of any remaining balance to each affected high school teacher.[10] In November 2015, the District shall pay any remaining balance to each affected high school teacher.[11] If the District fails to timely make these

[7] The Association estimated that its proposal, which also provided that a payment be made for each year in which the unilateral change was in effect, would cost approximately $3,000 per high school teacher per year.

[8] The payments shall be made regardless of how many days a high school teacher worked in any given year. In other words, if a high school teacher worked in a subject school year, that teacher is entitled to $1,000 for that year, even though that teacher may have arrived or left during that year.

[9] In other words, high school teachers who are newly hired as of this school year will receive their $100 payment-in-full in November 2013. All other high school teachers will receive their payments in installments as set forth in this order.

[10] Nothing in this Order prohibits the District from making payments earlier than set forth in this order or from paying off any owed amounts before the dates provided in this order. The dates that we have provided only establish the outside time by which the District must make the required payments.

[11] By way of example, a high school teacher who worked in all five relevant years plus the beginning of the current school year would be entitled to a total of $5,100 ($1,000 for each of the five full school years plus $100 for the current year), to be paid as follows: $500 in November 2013; $2,300 in November 2014; and $2,300 in November 2015.

payments, any unpaid amounts will be subject to nine-percent interest from the date that the payment was due until such payments are made.[12]

ORDER

1. The District shall pay each high school teacher who worked during the 2008-09, 2009-10, 2010-11, 2011-12, or 2012-13 school years $1,000 for each of those school years worked, consistent with this order.

2. The District shall pay each high school teacher who worked through October 15, 2013, during the current school year (2013-14) $100 each, consistent with this order.

3. If the District fails to timely make a payment required by this order, any unpaid amounts will be subject to nine-percent interest from the date that the payment was due until such payment is made.

DATED this 6 day of November, 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

[12] The District's payments will be considered timely so long as they are made by the last day of each month specified in this order.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-031-12

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503, Complainant, v. STATE OF OREGON, DEPARTMENT OF REVENUE, Respondent.	)	FINDINGS AND ORDER ON PETITIONS FOR REPRESENTATION COSTS

On May 15, 2012, the Service Employees International Union, Local 503 (Union) filed an unfair labor practice complaint against the State of Oregon, Department of Revenue (Department). The complaint, as amended on August 30 and September 4, 2012, alleged that the Department violated ORS 243.672(1)(g) by failing to comply with the terms of a September 1, 2011 Settlement Agreement (Settlement Agreement). The Department filed a timely answer to the complaint. On August 5, 2013, we issued an Order holding that the Department violated ORS 243.672(1)(g) by: (1) failing to compensate an employee (West) at 0.5 times his regular rate of pay for 10.5 hours of time; and (2) failing to compensate current and former employees for meal periods during overnight travel. We also dismissed the Union's (1)(g) claim alleging that the Department had required employees to flex their work schedules in violation of the Settlement Agreement. 25 PECBR 691 (2013).

Both parties seek representation costs. On August 23, 2013, the Department submitted its petition for representation costs. The Union filed objections to that petition on September 11, 2013. On August 26, 2013, the Union filed its petition for representation costs, and the Department filed its objections to that petition on September 16, 2013.

Pursuant to ORS 243.676(2)(d) and (3)(b), along with OAR 115-035-0055, this Board finds:

1. The Union and the Department filed timely petitions for representation costs. The Union and the Department filed timely objections to the other party's petition.

2. This case involved a single-day hearing held on October 26, 2012, before Administrative Law Judge Wendy L. Greenwald.

3. Both the Union and the Department are prevailing parties.

Only a "prevailing party" in an unfair labor practice is entitled to representation costs. ORS 243.676(2)(d), (3)(b); OAR 115-035-0055(1). In situations "[w]here one charge (or more) in a complaint is upheld while one charge (or more) in a complaint is dismissed, each party may be regarded as a prevailing party and may file a petition for representation costs for the portion of the case upon which it prevailed, provided that" the separate charges: (1) "are based on clearly distinct and independent operative facts; i.e. the charges could have been plead[ed] and litigated without material reliance on the allegations of the other(s)"; and (2) concern "the enforcement of rights independent of the other(s)." OAR 115-035-0055(1)(b)(A). A charge is separate only if it meets both parts of this test. *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 24 PECBR 720, 721 (2012) (Rep. Cost Order).

We begin by determining whether the charges at issue are separate. The Union alleged that the Department violated ORS 243.672(1)(g) by: (1) failing to compensate employee West at .5 times his regular rate of pay for hours travelled on one particular day; (2) failing to compensate current employees for meal periods during overnight travel between January 2009 and September 1, 2011, and thereafter; (3) failing to compensate *former* employees for those meal periods between January 2009 and September 1, 2011; and (4) requiring employees to flex their work schedules before going on overnight travel after September 1, 2011. For the reasons described below, we conclude that: (1) charge one is separate from all other charges; (2) charges two and three are not separate from each other, but are separate from charges one and four; and (3) charge four is separate from all other charges.

The charge related to employee West concerned how that particular employee should be compensated on a particular work day based on language in the Settlement Agreement stating that affected auditors were to be compensated for ".5 times their regular rate of pay for travel time that took place on weekends which has not already been compensated at the rate of 1.5." That charge could have been pleaded and litigated without material reliance on any of the other charges. *See* OAR 115-035-0055(1)(b)(A). Moreover, it concerned enforcement of a right under the Settlement Agreement (how that compensation rate should be calculated with respect to employee West for one particular workday) that was independent of the others. Consequently, it is a separate charge for purposes of representation costs.

Charges two and three concern whether employees were entitled under the Settlement Agreement to be compensated for meal periods during overnight travel. The primary distinction between the two charges is that one concerned *current* employees, whereas the other concerned *former* employees. These charges are not based on clearly distinct and independent operative facts. They also do not concern enforcement of rights independent of the other. Therefore, they are not separate from each other. They are, however, separate from charge one (as described above) and from charge four (as described below).

Charge four alleged that the Department breached a particular provision of the Settlement Agreement that is distinct from the other charges—namely, that the Department would not require Grievants to adjust their work schedules for travel time. This charge could have been pleaded and litigated without material reliance on the allegations of the other charges, and concerned the enforcement of a contractual right independent of the others. Therefore, it is a separate charge for purposes of representation costs.

Thus, ultimately, the Union prevailed on two charges and the Department prevailed on one. We must now determine the percentage of the overall case on which each party prevailed, keeping in mind that determining that percentage is not "solely a matter of dividing the number of claims on which a party prevailed by the total number of issues." *Wy'East Education Association/East County Bargaining Council/Oregon Education Association, et al. v. Oregon Trail School District No. 46*, Case No. UP-16-06, 25 PECBR 90, 91 (2012) (Rep. Cost Order). We also consider the relative importance of each issue in the case, and the amount of time devoted to the various issues. *Id.*

Here, approximately 10 percent of the time in this case was devoted to charge one. The remaining time (90 percent) was equally devoted to charges two/three (which we concluded was a single charge for representation cost purposes) and four. This breakdown also approximates the relative importance of each issue in the case. Therefore, after reviewing the record, we conclude that the Union prevailed on 55 percent of the case and the Department prevailed on 45 percent of the case. As is our practice, we subtract the percentages to determine a single prevailing party for purposes of awarding representation costs. *Id.* at 92. Therefore, the Union is a "10-percent" prevailing party. We will adjust the Union's request accordingly, and we will address only the Union's petition for purposes of this award.

4. Counsel for the Union submitted affidavits stating that 228.8 hours of legal work were spent on the case, with 13.65 hours billed at a rate of $140 per hour, 155.65 hours billed at a rate of $125 per hour, and 59.5 hours worked at a "reasonable value" of $125 per hour. *See* OAR 115-035-0055(1)(c)(B). The Union's petition requests an award of representation costs in the amount of $3,500, which is the maximum amount that this Board awards in the absence of a civil penalty. *American Federation of State, County and Municipal Employees Council 75, Local 88 v. Multnomah County*, Case No. UP-22-10, 25 PECBR 150, 151 (2012) (Rep. Cost Order); OAR 115-035-0055.

5. The Union's requested hourly rates ($125 and $140) are significantly below the average representation rate of $165 to $170 per hour. *See Clackamas County Employees' Association v. Clackamas County/Clackamas County District Attorney*, Case No. UP-7-08, 24 PECBR 769, 771 (2012) (Rep. Cost Order). We conclude that those requested rates are reasonable.

6. Cases generally require an average of 45 to 50 hours per day of hearing. *Josephine County*, 24 PECBR at 723. The Union's claimed hours (228.8) are more than 350 percent above the average for a single-day hearing. We note, however, that the affidavit submitted by the Department's counsel stated that 119.6 hours of Department time was spent on this case. The number of hours spent by the Department is relevant to determining the

reasonableness of the Union's request. *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 853, 855 (2007) (Rep. Cost Order). Under these circumstances, we conclude that 120 hours is a reasonable amount of time for the Union to have devoted to the case.

7. We calculate reasonable costs by multiplying the reasonable number of hours spent by the reasonable hourly rate charged. *Blue Mountain Faculty Association*, 21 PECBR at 856. In this case, that calculation results in reasonable representation costs of $15,204. Because the Union is a 10-percent prevailing party, we adjust that amount to $1,520. An average award is generally one-third of the reasonable representation costs of the prevailing party, subject to the $3,500 cap contained in OAR 115-035-0055(1)(a). *Oregon School Employees Association v. Medford School District #549C*, Case No. UP-077-11, 25 PECBR 744, 745 (2013) (Rep. Cost Order). Having considered the purposes and polices of the Public Employee Collective Bargaining Act, our awards in prior cases, and the reasonable costs of services rendered in this case, we will order representation costs to the Union in the amount of $507.

ORDER

The Department shall remit $507 to the Union within 30 days of the date of this Order.

DATED this 19 day of November, 2013.

*Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

*Chair Logan did not participate in the deliberations or decision in this matter.

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. AR-001-13

(PETITION FOR REVIEW OF ARBITRATION AWARD)

IN THE MATTER OF AN ARBITRATION BETWEEN THE STATE OF OREGON, DEPARTMENT OF HUMAN SERVICES,	)	
Petitioner,	)	RULINGS,
v.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503, OPEU,	)	
Respondent.	)	

On March 22, 2013, the State of Oregon, Department of Human Services (DHS), filed a petition for review of a March 11, 2013, grievance arbitration award involving DHS and the Service Employees International Union, Local 503, OPEU (SEIU). SEIU filed a timely answer to the petition. A hearing was conducted by Administrative Law Judge (ALJ) Wendy L. Greenwald on August 6, 2013. The record closed on August 23, 2013 with the submission of the parties' closing briefs. The ALJ drafted the Findings of Fact, and on October 7, 2013, the matter was submitted directly to the Board for decision.

Stephen D. Krohn, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Petitioner.

Christy Te, Legal Counsel, SEIU Local 503, OPEU, Salem, Oregon, represented Respondent.

DHS alleges that the award is unenforceable under ORS 240.086(2)(d) and ORS 243.706(1) because reinstatement of the grievant would violate public policy as established by ORS 419B.010. SEIU disagrees, arguing that the award ordering the grievant's reinstatement does not violate any clearly defined public policy and must be enforced.

The issue is:

Is the March 11, 2013 arbitration award enforceable under ORS 240.086(2)(d) and ORS 243.706(1)?

For the reasons set forth below, we conclude that the arbitration award is enforceable under ORS 240.086(2)(d) and ORS 243.706(1), and we will deny DHS's petition.

RULINGS

1. The parties submitted four joint exhibits, including the collective bargaining agreement (J-1), the disputed arbitration award (J-2), DHS's petition (J-3), and SEIU's answer (J-4). These exhibits are received as evidence.

2. DHS also offered several additional exhibits and witness testimony concerning some of those exhibits. SEIU objected to the admission of Exhibits P-6 through P-13, and the testimony of Stacy Ayers and Karyn Schimmels concerning Exhibits P-6, P-7, P-8 and P-9. SEIU contends that the documents and testimony are irrelevant.[1]

In cases reviewing arbitration awards, the only evidence that is relevant is the parties' contract, the arbitration award, and evidence related to any claimed public policy exception. *In the Matter of the Arbitration of a Dispute Between State of Oregon, Department of Human Services, Oregon State Hospital v. American Federation of State, County and Municipal Employees, Local 3295*, Case No. AR-01-08, 23 PECBR 712 (2010), *AWOP*, 244 Or App 137, 257 P3d 1021 (2011), *rev den*, 351 Or 649 (2012). The only sources of public policy that we may rely on are statutes and judicial decisions, and we may not consider "administrative rules, employment manuals, office policies, or proclamations by administrative officials." *Washington Cty. Police Assn. v Washington Cty.*, 335 Or 198, 205-06, 63 P3d 1167 (2003). In addition, the Court of Appeals has ruled that the testimony of witnesses regarding the public policy implications of reinstating a grievant is "entirely irrelevant" to our inquiry. *Salem-Keizer Assn. v. Salem-Keizer Sch. Dist. 24J*, 186 Or App 19, 28, 61 P3d 970 (2003).

Exhibits P-6 through P-9 consist of excerpts of DHS's training manuals and website concerning the obligation to report child abuse. These administrative materials are not relevant to our analysis. Consequently, Exhibits P-6 through P-9 are not admitted, and we will not consider the testimony of Ayers and Schimmels related to those exhibits.

[1]SEIU did not object to the admission of Exhibit P-5, a copy of the current statutes pertaining to the requirement that certain public and private officials immediately report suspected child abuse to the appropriate authorities (ORS 419B.005 through ORS 419B.050).This exhibit is received.

Exhibits P-10 and P-11 are judicial decisions related to ORS 419B.010, which DHS contends support its public policy argument. As such, the decisions are relevant and are received.[2] Exhibits P-12 and P-13, which include legislative history related to ORS 419B.010, are also received into the record as evidence related to the public policy exception asserted by the State.

FINDINGS OF FACT[3]

1. SEIU, a labor organization, and DHS, a public employer, were parties to a collective bargaining agreement that expired June 30, 2013. The agreement included the following provisions, in relevant part:

> **"ARTICLE 20--INVESTIGATIONS, DISCIPLINE, AND DISCHARGE**
> **"Section 1.** The principles of progressive discipline shall be used when appropriate. Discipline shall include, but not be limited to: written reprimands; denial of an annual performance pay increase; reduction in pay [footnote deleted]; demotion; suspension without pay [footnote deleted]; and dismissal. Discipline shall be imposed only for just cause.
>
> "* * * * *
>
> "**ARTICLE 21--GRIEVANCE AND ARBITRATION PROCEDURE**
> [Described a grievance procedure that culminates in binding arbitration and included the following provisions:]
> **"Section 1.** Grievances are defined as acts, omissions, applications, or interpretations alleged to be violations of the terms or conditions of this Agreement.
>
> "* * * * *
>
> "All grievances shall be processed in accordance with this Article and it shall be the sole and exclusive method of resolving grievances * * *.
>
> "* * * * *
>
> "**Section 6. Arbitration Selection and Authority.**
>
> "* * * * *
>
> "(f) The Parties agree that the decision or award of the arbitrator shall be final and binding on each of the Parties. * * * The arbitrator shall have no authority to rule contrary to, to amend, add to, subtract from, change or eliminate any of the terms of this Agreement."

[2]Judicial decisions are not evidence, and are solely considered as part of the record pertaining to DHS's public policy arguments.

[3]Findings of Fact 2 through 8 are taken from the arbitration award. The remaining Findings of Fact are taken from the joint exhibits submitted by the parties.

2. DHS employed the grievant from January 1, 1986, until her dismissal on September 1, 2011. During 2011, the grievant was employed as a social services specialist in DHS's Child Welfare Program's Resource Unit. Grievant was a member of the SEIU bargaining unit.

3. As a DHS employee, the grievant was required to immediately report suspected child abuse under ORS 419B.010.[4]

4. On September 1, 2011, DHS terminated the grievant's employment for failure to make a timely report of child abuse under ORS 419B.005 and ORS 419B.010.

5. On October 13, 2011, SEIU filed a timely grievance over the grievant's dismissal. On November 19 and 20, 2012, the parties participated in an arbitration hearing. The parties agreed that the issues before the arbitrator were:

"Was [Grievant] terminated for just cause?

"If not, what is the appropriate remedy?"

6. On March 11, 2013, the arbitrator issued her award. The arbitrator concluded that DHS met its burden of establishing that the grievant had engaged in misconduct by failing to make a timely report of suspected child abuse as required by ORS 419B.010. The arbitrator summarized her conclusions as follows:

> "I have found that the Employer established the misconduct as charged and that Grievant failed to immediately report suspected child abuse. I agree with the Employer that this is a serious offense that cannot be excused for the reasons argued by DHS; and I do not excuse Grievant from her misconduct."

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[4]Under ORS 419B.005(4)(e), DHS employees are included in the group of public and private officials who are required to report suspected child abuse. In turn, ORS 419B.010 states in relevant part that:

> "(1) Any public or private official having reasonable cause to believe that any child with whom the official comes in contact has suffered abuse or that any person with whom the official comes in contact has abused a child shall immediately report or cause a report to be made in the manner required in ORS 419B.015. ***
>
> "*****
>
> "(5) A person who violates subsection (1) of this section commits a Class A violation. Prosecution under this subsection shall be commenced at any time within 18 months after commission of the offense."

7. Having concluded that the grievant had engaged in the misconduct alleged, the arbitrator examined whether there were relevant mitigating factors present. The arbitrator noted that grievant had worked for DHS for 25 years with satisfactory work performance and no disciplinary history, had shown remorse for her actions, and had voluntarily undertaken and completed additional training in recognizing and reporting child abuse. After discussing these mitigating factors, the arbitrator concluded that DHS did not have just cause to terminate the grievant, instead finding "the appropriate discipline to be a 60-day unpaid suspension."

8. Consistent with her conclusion, the arbitrator issued an award that required DHS to immediately reinstate the grievant and make her whole for lost back pay and benefits, excluding the 60-day unpaid suspension.

9. DHS refused to reinstate the grievant. On March 22, 2013, DHS filed its petition seeking review of the award.

CONCLUSIONS OF LAW

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

2. The March 11, 2013 arbitration award is enforceable under ORS 240.086(2)(d) and ORS 243.706(1).

DISCUSSION

Under Article 21 of the collective bargaining agreement, DHS and SEIU agreed to resolve disputes arising under that contract by submitting the matter to arbitration, and further agreed that the decision or award issued by the arbitrator would be final and binding on them both. Despite this agreement, DHS now seeks to have this Board declare the arbitration award ordering the grievant's reinstatement unenforceable.

It is by now axiomatic that public policy strongly favors the use of binding arbitration to resolve labor disputes. *See generally, Marion County Law Enforcement Association v. Marion County,* Case No. UP-24-08, 23 PECBR 671, 685-86 (2010) (discussing the public policies served by the use of binding arbitration). When we review arbitration awards under ORS 240.086(2) and ORS 243.672, we may only subject them to "sparing review, in the interests of promoting the efficiency and finality of arbitration as a decision-making process for those who contract to use it." *Fed. of Ore. Parole Officers v. Corrections Div.*, 67 Or App 559, 563, 679 P2d 868, *rev den*, 297 Or 458 (1984). Although the present case involves a challenge to an arbitration award under ORS 240.706(1), we see no reason to treat it any differently. Further, we do not review the arbitrator's decision to determine whether it is right or wrong, and we enforce the decision even if we believe it was erroneous. *Portland Association of Teachers and Hanna v. Portland School District 1J*, Case No. UP-64-99, 18 PECBR 816, 836-37 (2000), *ruling on motion to stay*, 19 PECBR 25 (2001), *AWOP*, 178 Or App 634, 39 P3d 292, *rev den*, 334 Or 121, 47 P3d 484 (2002).

When parties agree to utilize binding arbitration as the sole means of resolving contractual grievances, as DHS and the Union did here, they agree to accept the arbitrator's interpretation of their contract. So long as the arbitrator's award is based on his or her interpretation of the contract language, the parties are bound by that decision unless a statutory exception applies. *Clatsop Community College Faculty Association v. Clatsop Community College*, Case No. UP-139-85, 9 PECBR 8746, 8761-62 (1986).

However, the deference given to arbitration awards is not without limitations. DHS filed its petition under ORS 240.086(2), which grants this Board authority to review arbitration awards issued in disputes between a state agency and the exclusive representative of the agency's employees.[5] Under this statute, we will enforce arbitration awards unless certain enumerated exceptions are established. DHS argues that the award is unenforceable under the exception set forth under ORS 240.086(2)(d), which precludes enforcement of awards where "[t]he arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."[6] Specifically, DHS contends that the award violates public policy and is unenforceable under ORS 243.706(1), which states that:

> "A public employer may enter into a written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in binding arbitration or any other dispute resolution process agreed to by the parties. As a condition of enforceability, any arbitration award that orders the reinstatement of a public employee or otherwise relieves the public employee of responsibility for misconduct shall comply with public policy requirements as clearly defined in statutes or judicial decisions including but not limited to policies respecting sexual harassment or sexual misconduct, unjustified and egregious use of physical or deadly force and serious criminal misconduct, related to work."

When a party alleges that an arbitration award that reinstates an employee is unenforceable under this public policy exception, we review the claim by applying a three-part analysis. First, we determine whether the arbitrator found that the grievant engaged in the misconduct for which discipline was imposed. If so, we then determine if the arbitrator reinstated or otherwise relieved the grievant of responsibility for the misconduct. If both of these tests are met, we then determine

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[5]This Board also reviews arbitration awards in the context of unfair labor practice complaints alleging violations of ORS 243.672(1)(g) and 243.672(2)(d) (refusal to accept the terms of an arbitration award when the parties have agreed to accept the awards as final and binding). We apply the same "sparing review" standard to arbitration awards under ORS 240.086(2) that we apply in reviewing arbitration awards under subsections (1)(g) and (2)(d). *See Fed. of Ore. Parole Officers v. Corrections Div.*, 67 Or App at 563; *In the Matter of the Arbitration Between the State of Oregon, Department of Transportation v. State Employees International Union Local 503, Oregon Public Employees Union*, Case No. AR-1-06, 21 PECBR 838, 842 (2007).

[6]DHS does not assert a "typical" ORS 240.086(2)(d) claim that the arbitrator lacked the authority to decide the grievance as presented or that a final and definite award was not made on the matter. Rather, the sole contention advanced by DHS is that the arbitration award is contrary to public policy and, therefore, is unenforceable under ORS 243.706(1) *and* ORS 240.086(2)(d).

if the award violates a clearly defined public policy expressed in statutes or judicial decisions. *Portland Police Association v. City of Portland*, Case No. UP-023-12, 25 PECBR 94, 111 (2012), *appeal pending*; *see also Deschutes County Sheriff's Association v. Deschutes County and Deschutes County Sheriff's Office,* Case No. UP-55-97, 17 PECBR 845, 860 (1998), *rev'd and rem'd*, 169 Or App 445, 9 P3d 742 (2000), *rev den*, 332 Or 137, 27 P3d 1043 (2001), *order on remand*, 19 PECBR 321 (2001).

The courts have narrowly construed this public policy exception. Specifically, the courts have stated that the statute does not permit this Board to overturn an arbitrator's award because we believe that an employee's conduct violates public policy. Rather, "[t]he proper inquiry * * * is whether the *award itself* complies with the specified kind of public policy requirements." *Washington Cty.*, 335 Or at 205 (emphasis in original). In other words, as applied to this case, does an award ordering reinstatement of an employee who did not make a timely mandatory report under ORS 419B.010 "fail to comply with some public policy requirements that are clearly defined in the statute or judicial decision?" *Id.* For us to answer this question in the affirmative, it is not enough for there to be a statute or judicial decision that clearly defines a public policy requiring an individual to comply with the reporting obligations of ORS 419B.010; rather, a statute or judicial decision must contain a clearly defined public policy against reinstating an employee who was has not complied with those reporting obligations. *See Washington Cty. Police Assn. v. Washington Cty.*, 187 Or App 686, 691-92, 69 P3d 767 (2003). Finally, the courts have explained that, to be "clearly defined," the statute or judicial decision "must outline, characterize, or delimit a public policy in such a way as to leave no serious doubt or question respecting the content or import of that policy." *Washington Cty.*, 335 Or at 205-06.

With this limited scope of review in mind, we now apply these standards to the award at issue here. There is no dispute that the arbitrator found that the grievant had engaged in the misconduct for which DHS terminated her: failing to timely report suspected child abuse. In the award, the arbitrator summarized her conclusions, stating that "I have found that the Employer established the misconduct as charged and that Grievant failed to immediately report suspected child abuse. I agree with the Employer that this is a serious offense that cannot be excused for the reasons argued by DHS; and I do not excuse Grievant from her misconduct." There is also no dispute that the arbitrator ordered that the grievant be reinstated, her misconduct notwithstanding. The arbitrator concluded that DHS did not have just cause to terminate the grievant, instead holding that a 60-day unpaid suspension was the appropriate disciplinary sanction. Thus, the first two of the three tests are satisfied and the outcome of our analysis hinges on whether there is a clearly defined public policy that renders the award unenforceable.

DHS claims that the award violates the public policy embodied in ORS 419B.005, 010, and 015, which require certain public and private officials (including the grievant) to immediately report suspected child abuse or face prosecution for a Class A violation. This mandatory reporting requirement reflects the declaration of public policy found in ORS 419B.007, which states that:

> "The Legislative Assembly finds that for the purpose of facilitating the use of protective social services to prevent further abuse, safeguard and enhance the welfare of abused children, and preserve family life when consistent with the protection of the child by stabilizing the family and improving parental capacity, it is necessary and in the public interest to require mandatory reports and investigations of abuse of children and to encourage voluntary reports."

To be sure, these statutes establish a clearly defined public policy that required the grievant to immediately report suspected abuse. Additionally, there is no dispute that the arbitration award concluded that the grievant's conduct violated this clearly defined public policy.

However, the statutes cited by DHS are not statutes "about employment or reinstatement." *See Washington Cty.*, 335 Or at 206. Moreover, as noted above, the court has told this Board that the "precise question" to be answered "is not whether public policy dictates that" the grievant should have immediately reported the suspected abuse. *See Washington Cty.*, 187 Or App at 691-92; *see also Salem-Keizer Sch. Dist. 24J*, 186 Or App at 25 ("whether the underlying conduct violates public policy is not the relevant inquiry"). Rather, the question before us is whether some statute or judicial opinion outlines, characterizes, or delimits a public policy against reinstating a public or private official (such as the grievant) who has not complied with the reporting requirements of ORS 419B.010. *See Washington Cty.*, 187 Or App at 691-92. Moreover, if there is such a statute or judicial decision, "does the statute or decision articulate that policy in such a way as to leave no serious doubt or question respecting the content or import of that policy"? *Id.*

DHS has not cited (and we have not located) any particular statute or judicial decision that clearly prohibits the reinstatement of a public or private official who fails to comply with the reporting requirements under ORS 419B.010.[7] Therefore, the arbitration award is enforceable. *See Washington Cty.*, 335 Or at 207 (arbitration award is enforceable under ORS 243.706(1), unless a statute or judicial decision "contains a clearly defined public policy that would preclude the employee's reinstatement").

Our determination is consistent with previous decisions by the courts. For example, in its order on remand from the Supreme Court in *Washington Cty.*, the Court of Appeals held that an arbitration award that reinstated a public safety officer who admitted to off-duty marijuana use was enforceable because there was no clear statute or judicial decision that prohibited an arbitration award from reinstating a public safety officer who engaged in such conduct. Consequently, the employer committed an unfair labor practice when it refused to implement that arbitration award.

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[7]DHS submitted two cases in support of its public policy argument. However, these cases do not involve the question of whether there is a public policy that prohibits an arbitration award from reinstating an employee who fails to comply with ORS 419B.010. Rather, they discuss, in general terms, the importance of the policies underlying the mandatory reporting requirements, which is not in dispute. *See State ex rel Juv. Dept. v. Spencer*, 198 Or App 599, 108 P3d 1189 (2005) (discussing abrogation of the privilege for communications between a psychotherapist and a patient when those communications trigger the therapist's mandatory reporting obligations); *Malcolm v. Salem-Keizer School District*, Case No. 06C10016, 2006 WL 5359522 (June 12, 2006) (Trial Court Order).

187 Or App at 690-91. Also, in *Salem-Keizer Sch. Dist. 24J*, the Court of Appeals again held that an arbitration award that reinstated an instructional assistant who admitted to, but had not been convicted of, the crime of second-degree theft was enforceable because there was no statute or judicial decision that clearly prohibited such reinstatement. 186 Or App at 19. Because of the limited review allowable under the statutes and the judicial decisions set forth above, we deny the petition.

ORDER

The petition is denied.

DATED this 21 day of November 2013.

Kathryn A. Logan

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-030-12

(UNFAIR LABOR PRACTICE)

OREGON SCHOOL EMPLOYEES ASSOCIATION, Complainant, v. PARKROSE SCHOOL DISTRICT, Respondent.	)	ORDER ON RECONSIDERATION

On October 22, 2013, this Board issued an order holding that the Parkrose School District (District) violated ORS 243.672(1)(e) when it unilaterally imposed across-the-board furloughs on classified employees represented by Oregon School Employees Association (Association) for the 2011-12 and 2012-13 school years. 25 PECBR __ (2013). As a remedy for that violation, we ordered the District, *inter alia*, to restore all wages and benefits lost by classified employees due to the imposition of those furlough days.

On November 4, 2013, the District filed a motion for reconsideration solely with respect to the portion of our order that required it to restore all lost wages and benefits. On November 12, 2013, the Association filed its objection to the District's motion for reconsideration. Having considered both parties' positions, we grant the District's motion for reconsideration, but nevertheless adhere to our original order, as supplemented herein.

In our prior order, we explained that the "usual remedy for a unilateral change violation, besides a cease-and-desist order, is requiring the employer to restore the *status quo* that existed before the unlawful change." 25 PECBR at __ (October 22, 2013). Finding no compelling reason to depart from our "usual remedy," we ordered the District to restore the wages and benefits lost by classified employees due to the imposition of furlough days.

The District acknowledges that it is appropriate for us to issue a "cease-and-desist" order and to return the parties to the *status quo ante*. The District asserts, however, that rather than order "make-whole" relief to the classified employees who had furlough days unilaterally imposed on them and suffered concomitant payroll reductions, we should order the parties to first bargain over any make-whole relief. In other words, the District contends that a return to the *status quo ante* means only that we should return the parties to bargaining over the furlough days

that have already been implemented. To do otherwise, the District contends, would be "presumptive" and would inappropriately "dictate" the make-whole relief, rather than allowing the parties to bargain over any such relief.

The Association requests that we adhere to our "make-whole" remedy. Such a remedy, the Association argues, is consistent with our "usual remedy" of returning the parties to the *status quo ante* because the classified employees lost discrete and quantifiable wages and benefits as a result of the District's unilateral actions. The Association further argues that such a remedy is consistent with remedies ordered in similar cases. Finally, the Association asserts that the District's requested remedy would not deter the District (or other public employers) from unilaterally changing the *status quo* in similar circumstances because that requested remedy would effectively "reward" the District for its unlawful gambit.

We agree with the Association. To begin, we have broad authority to fashion an appropriate remedy under the circumstances of each particular case to effectuate the purposes of the Public Employee Collective Bargaining Act (PECBA). *See, e.g.*, *Elvin v. OPEU*, 102 Or App 159, 164, 793 P2d 338 (1990), *aff'd*, 313 Or 165, 832 P2d 36 (1992); *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections, Oregon Corrections Enterprises,* Case No. UP-22-00, 19 PECBR 437 (2001); ORS 243.676(2)(c). In general, a return to the *status quo ante* may or may not involve some form of monetary compensation, depending on the nature of the unilateral change. Here, the District's unilateral implementation of 16 total furlough days over two school years resulted in a direct and measurable elimination of a preexisting benefit to the classified employees. In a variety of similar situations involving quantifiable losses, we have routinely awarded make-whole relief as part of the return to the *status quo ante*. *See Gresham Grade Teachers Association v. Gresham Grade School District No. 4 and Larson*, Case No. C-184-78, 6 PECBR 4953 (Order on Remand) (a "true make-whole remedy is possible in cases where the action of an employer deprives employees of a pre-existing and measurable direct or indirect monetary benefit"); *Wy'East Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05, 22 PECBR 108 (2007) (ordering employer to make employee whole for unilateral change regarding college equivalency credit for in-service training courses); *Riddle Association of Classified Employees v. Riddle School District #70*, Case No. UP-114-91, 13 PECBR 654 (1992) (ordering employer to make employees whole for unilateral changes regarding paid lunch break and clothing reimbursement); *International Association of Fire Fighters, Local 2854 v. Tualatin Fire Protection District*, Case No. C-13-82, 6 PECBR 5224 (1982) (ordering employer to make whole employees whose work time was reduced as a result of a unilateral reduction in work hours).

The District nevertheless asks us to first return the parties to the bargaining table before ordering monetary relief, citing to *Three Rivers Education Association, SOBC/OEA/NEA v. Three Rivers School District*, Case No. UP-16-08, 25 PECBR 712 (2013) (on remand), *Salem Education Association v. Salem-Keizer School District 24J*, Case No. UP-132-93, 15 PECBR 302 (1994), *East County Bargaining Council (David Douglas Education Association) v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184 (1986), and *Gresham Grade*, 6 PECBR 4953 (on remand). Each of those cases involved a unilateral change to student contact time. In each case, we directed the parties, in the first instance, to bargain over a remedy.

If the parties were unable to agree on an appropriate remedy, we ordered them to submit their final proposed remedies to the Board for final decision. To be sure, when the unilateral change has concerned increased student contact time, we have often ordered this type of "bargaining-first" remedy.[1] We have done so in part because that particular unilateral change is not as easily reducible to a traditional "make-whole" remedy. An increase of one hour of student contact time does not necessarily result in a corresponding one-hour increase in teaching duties.[2] *See Three Rivers Education Association, SOBC/OEA/NEA v. Three Rivers School District*, Case No. UP-016-08, 25 PECBR __ (November 6, 2013) (Supplemental Order); *David Douglas*, 9 PECBR at 9197-98; *Gresham Grade*, 6 PECBR at 4956. Thus, in student-contact-time cases, the record often does not establish, at least at the initial Board-review stage, the deprivation of a preexisting and measurable direct or indirect economic benefit. *See Three Rivers*, 25 PECBR at __ (November 6, 2013); *Gresham Grade*, 6 PECBR at 4956.

In contrast, the unilateral change here (the imposition of 16 furlough days) resulted in a measurable and direct economic harm to the affected employees. Consequently, we continue to conclude that our usual remedy of returning the parties to the *status quo ante*, including making affected employees whole for the lost wages and benefits as a result of the furlough days, best effectuates the purposes of the PECBA. *See* ORS 243.676(2)(c).

ORDER

1. The District's motion for reconsideration is granted.

2. We adhere to our prior order, as supplemented herein.

DATED this 25 day of November, 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

[1]We have also, however, fashioned a make-whole remedy in the first instance for a unilateral increase in student contact time. *See Greater Albany Education Association v. Greater Albany School District No. 8J*, Case No. C-6-80, 5 PECBR 4158, 4168-69 (1980).

[2]We have also done so in light of a significant passage of time and at the request of the complaining party, neither of which is present in this matter. *See Three Rivers*, 25 PECBR at 719-20.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-037-12

(UNFAIR LABOR PRACTICE)

AMALGAMATED TRANSIT UNION, DIVISION 757, Complainant, v. TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On October 29, 2013, the Board heard oral argument on Complainant's objections to a recommended order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald, after hearings held on February 26, 27, 28, and March 13, 2013, in Salem, Oregon. The record closed on May 20, 2013, following receipt of the parties' post-hearing briefs.

Susan L. Stoner, General Counsel, Amalgamated Transit Union, Division 757, Portland, Oregon, represented the Complainant.

Shelley Devine, Attorney at Law, Tri-County Metropolitan Transportation District of Oregon, Portland, Oregon, represented the Respondent.

On July 25, 2012, the Amalgamated Transit Union, Division 757 (ATU) filed an unfair labor practice complaint against the Tri-County Metropolitan Transportation District of Oregon (TriMet). The complaint alleges that, in March 2012, TriMet unilaterally changed the *status quo* regarding mandatory bargaining subjects in violation of ORS 243.672(1)(e) when it required road/rail supervisors (who are represented by ATU) to: (1) demand to see proof of fares from customers; (2) issue citations; and (3) meet a daily quota on such contacts without providing training on how to perform those duties. TriMet filed a timely answer to the complaint.

The issues are:

1. Did TriMet unilaterally change the *status quo* in March 2012, in violation of ORS 243.672(1)(e), by allegedly requiring all road/rail supervisors to demand to see proof of fares from customers and to meet a daily quota on such contacts without training those supervisors on how to perform those duties safely?

2. If TriMet violated ORS 243.672(1)(e), what is the appropriate remedy?

For the reasons discussed below, we conclude that ATU failed to establish that TriMet unilaterally changed the *status quo* in March 2012 in violation of ORS 243.672(1)(e) as alleged. Rather, at that time, we conclude that TriMet merely reminded 11 of the 55 road/rail supervisors that their job responsibilities included filing code enforcement reports, aiming for 35 passenger contacts per day, performing fare inspections, and issuing citations for fare violations, all of which were consistent with the *status quo*.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. ATU is a labor organization as defined in ORS 243.650(13) and the exclusive representative of certain employees of TriMet, including the employees in the Field Operations Department classifications of operator, fare inspector, road supervisor, rail supervisor, and lead supervisor.

2. TriMet is a public employer as defined in ORS 243.650(20).

3. The TriMet Code (TMC) codifies TriMet's general ordinances. TriMet provides its fare inspectors and road/rail supervisors with a TMC general reference book, which includes TMC Chapters 28, 29, and 30 and the Administrative Rules for exclusions and interdiction commands.[1] TMC Chapter 28 governs conduct on TriMet property related to such activities as smoking; consuming food or beverages; playing radios or other sound-emitting devices; bringing non-assistance animals or pets into vehicles; riding bikes, skateboards, in-line skates, or roller skates in a vehicle or station; engaging in disruptive, intimidating, or threatening behavior; and possessing an open container of an alcoholic beverage. TMC Chapter 29 makes it unlawful for passengers to use TriMet vehicles without paying the applicable fare; failing to carry or exhibit proof of fare payment upon demand; or failing to provide their name, address, and identification. TMC Chapter 30 establishes regulations related to TriMet parking facilities.

[1]Interdiction commands are written notices to vacate TriMet premises for up to four hours.

4. The TMC reference book also includes a general overview of employees' enforcement authority, including information on warnings, citations, exclusions, and arrests. TMC Sections 28.20(C), 29.40(A), and 30.30(E) authorize inspectors, Tri-Met appointed peace officers, and State of Oregon peace officers to issue citations to anyone who violates a provision of TMC Chapters 28, 29, or 30. "Inspectors" are defined as "a person other than a 'peace officer' authorized by the General Manager or by the provisions of TMC Chapters 28, 29, or 30 to demand proof of fare payment and to issue citations as provided hereunder."

5. In 1998, then TriMet General Manager Tom Walsh appointed all road/rail supervisors as "[i]nspectors authorized to demand proof of fare payment and to issue citations for violations of Tri-Met Code Chapters 28, 29 and 30," subject to the completion of appropriate training. At the time, road/rail supervisors understood that they had been given the authority to demand proof of fare payment and issue fare citations, but were not required to exercise this authority. Road/rail supervisors sometimes asked to see a fare when responding to an operator call for assistance and wrote citations for fare violations. They also used the lack of a fare as a reason to request a passenger's identification and run an "R-check" or remove a troublesome person from a vehicle.[2] Road/rail supervisors also participated in fare missions with fare inspectors, checking fares in a specific location or high-volume area. Police officers also participated in some of these fare missions.

6. Historically, the fare inspector classification had been charged with ensuring compliance with TMC Chapter 29, which, as noted above, primarily concerns fare evasion. In late 2002, TriMet developed a plan for fare inspectors and road/rail supervisors to increase the frequency of fare missions. As a result, ATU raised a concern that road/rail supervisors were performing fare inspector work during fare missions. At that time, ATU and TriMet agreed that road/rail supervisors would limit their role in fare missions to "support, visibility and enhanced customer service" and would not engage in or issue fare-evasion citations. TriMet also notified ATU, however, that TriMet would "continue with current and acknowledged practices of [road/rail] supervisors writing citations for non-mission fare evasion when necessary, and at the discretion of the [road/rail] supervisor."

7. In 2007, Steve Banta became TriMet's Executive Director of Operations. In late January 2008, Banta notified ATU President Jonathan Hunt that TriMet intended to expand the authority of individuals working for TriMet's private security contractor, Wackenhut, to issue citations, exclusions, and interdiction commands. At the same time, he confirmed that road/rail supervisors were authorized to demand proof of fare payment and issue citations and notices of exclusion for all TMC Chapter 28, 29, and 30 violations, and notified Hunt that TriMet intended to authorize those supervisors to issue interdiction commands, subject to the completion of appropriate training.

[2]In an R-Check, a fare inspector or supervisor contacts the TriMet command center to check a violator's record of exclusion status and prior offenses.

8. In early 2008, Banta notified Hunt that TriMet intended to eliminate the fare inspector classification, move the current fare inspectors and their duties into road/rail supervisor classifications, and provide the road/rail supervisors with enhanced TMC and fare enforcement responsibilities. Banta explained that combining the classifications would increase the number of employees available to perform fare inspection and supervision work. Hunt understood that TriMet wanted "to have all these [rail/]road supervisors do the same work as fare inspectors" and that TriMet was not legally required to bargain over the redistribution of the fare inspector duties to the rail/road supervisor classifications, but was required to bargain the impact of this change.

9. On June 11, 2008, Transportation Director Peggy Hanson met with Hunt to discuss TriMet's strategy for building a "dynamic, integrated, highly trained and cross-functional" field response team, which included the police, Wackenhut employees, fare inspectors, and road/rail supervisors. Hunt understood that the focus of this meeting was to discuss TriMet's intention of giving broader work to road/rail supervisors and creating a new "hybrid" position that would perform both fare inspector and road/rail supervisor duties.

10. On June 20, 2008, a fare inspector notified Hunt that Banta had said that road/rail supervisors were now "inspectors" who would work on missions and do the job of an inspector while on missions. The fare inspectors complained that TriMet was using road/rail supervisors to fill in work on missions and that none of the road/rail supervisors had gone through the extensive fare inspector training. A few days later, Hunt forwarded the e-mail to Banta and told Banta that they needed to meet and discuss "Wackenhut, leads, work assignments and training."

11. Beginning on July 16, 2008, TriMet and ATU bargained over the consolidation of the fare inspectors into the road/rail supervisor classifications. During this and subsequent bargaining meetings, the parties discussed the impact on employees, how that impact could be mitigated, who would do what jobs, titles for the fare inspector positions, shifts, and other issues. ATU's primary focus during bargaining was the encroachment of Wackenhut on bargaining unit work and the current fare inspectors' seniority.

12. On August 18, 2008, ATU and TriMet signed a document entitled "Settlement Agreement - Fare Inspectors" (Fare Inspector Agreement). Under the Fare Inspector Agreement: fare inspectors with 18 or more years of service remained in the fare inspector classification; a process, including training and seniority provisions, was established for fare inspectors with fewer than 18 years to transfer into the road/rail supervisor classifications; 10 new road/rail supervisor positions would be added at the beginning of 2009; and nine new road/rail supervisor positions would be added with the opening of the Green Line rail service in the fall of 2009.

13. That same day, Hunt provided Hanson with a signed copy of the Fare Inspector Agreement and notified her, "[n]ow that we have this piece done, we next need to address the issue of [the] change's impact, if any, on the bus and rail supervisor job duties. Let me know when we are going to start that discussion."

14. On September 23, 2008, Hunt sent Hanson a "Second Request to Bargain," stating that pursuant to his August 18 letter, ATU was "requesting that the parties bargain over the impact of prospective changes in bus and rail supervisor job duties. I realize that those changes have not yet taken place, but it seems wise to begin bargaining before the supervisors come out of training." Hunt asked Hanson to let him know when they would begin those discussions and indicated that he was not waiving ATU's statutory right to notice of changes in mandatory bargaining subjects.

15. On October 2, 2008, Hanson sent Hunt a letter entitled "ATU Request to Bargain: Impact of Prospective Changes to Bus and Rail Supervisor Duties." Hanson acknowledged Hunt's request "to bargain over the impact of prospective changes, if any, in bus and rail supervisor duties." She then confirmed that they had met on September 29 and talked on the phone on October 1 "regarding this issue" and agreed to continue their dialogue consistent with the requirement in the Fare Inspector Agreement that they discuss the final assignment for the Green Line supervisor positions.[3]

16. Sometime in November 2008, Tri-Met adopted revised road/rail supervisor job descriptions. In the summary description and the list of essential functions, TriMet added language reflecting that the supervisors' duties included "[a]n exclusive focus on inspecting fares and enforcing TriMet code. Perform related duties as required." TriMet did not provide ATU with a copy of the modified job descriptions.

17. On November 13, 2008, Banta sent a memorandum to all TriMet bus and rail operators inviting them to apply for fifteen new road/rail supervisor positions. Banta stated that the new road/rail supervisors would choose their work through a sign-up process for two types of assignments, one focused on the supervision of the daily bus or rail transportation system operations, including customer service, operator support, oversight duties, fare inspection, and code enforcement; and one exclusively focused on inspecting fares and enforcing TMC. On November 14, the positions were posted and a copy of the job postings was e-mailed to ATU President Hunt. The list of essential functions in the road/rail supervisor job postings was changed to include "[a]n exclusive focus on inspecting fares and enforcing TriMet code."

18. After 2008, new road/rail supervisors were provided training in both district supervisor work and TMC enforcement, including fare enforcement. During the training for new supervisors in 2009, Chief Fare Inspector Gary Radford provided on-the-job training in a variety of areas, including TMC Chapter 29 fare violation issues, citations, and TriMet's Standard Operating Procedures (SOPs).

[3]Regardless of the wording in Hanson's letter, both Hunt and Hanson testified that they did not address supervisors performing fare inspection work in their September 29 and October conversations, but limited their discussion to the implementation of the Fare Inspector Agreement.

19. In July 2010, Field Operations Assistant Manager Dan Stokes notified road/rail supervisors and inspectors that some employees had failed to submit their weekly code enforcement activity reports, which were used to summarize code enforcement activities, including warnings, citations, exclusions, and passenger contacts. Stokes directed employees to submit this information on the "Visibility/Code Enforcement Stats" form and reminded them that this requirement was included in their shift sign-up.

20. In August 2010, TriMet eliminated road supervisor foot shifts and 17 supervisors returned to district supervisor work. On September 1, 2010, Operations Manager Jay Jackson sent road/rail supervisors, leads, and managers a memorandum entitled "TriMet Code Enforcement – Daily Activity and Reporting," in which he stated that "[o]ur foot shifts no longer exist but that does not mean we are not responsible for doing fare inspections or enforcing TMC." Jackson directed all road/rail supervisors to complete at least one hour of TMC enforcement per day in their district and complete and submit the weekly "Code Enforcement Stats" form tracking their activity. The form, which was attached, included spaces to enter hours and the number of citations, written warnings, verbal warnings, "jumpers," exclusions, custodies, parking citations, and passengers contacted.

21. Beginning in October 2010, the road/rail supervisor sign-ups specified that all shifts were required to conduct one hour of code enforcement each day and document this activity on a "Field Ops Code Enforcement Stats" form, including their hours, number of passengers contacted, train number, and applicable notes. TriMet moved from using the term "visibility missions and stats" to the term "code enforcement" because the latter was more consistent with its expectation that road/rail supervisors focus on enforcing the TMC and tracking the number of warnings, citations, exclusions, and contacts during their required hour of code enforcement work. After October 2010, no separate reference was made in the sign-ups to fare enforcement.

22. At the time that the one-hour code enforcement requirement was imposed, road/rail supervisors had the discretion to issue citations, exclusions, or warnings for fare evasion. Some supervisors issued fare citations regularly and some never issued fare citations or checked fares. Others checked fares and issued citations for fare evasion on their own, in pairs, or during fare missions. For example, during December 2010, 16 supervisors wrote at least one citation or exclusion for a fare violation and, during January 2011, 25 supervisors wrote at least one citation or exclusion for a fare violation.

23. On November 12, 2010, Assistant Manager Stokes sent letters to approximately 25 road/rail supervisors who had failed to submit any code enforcement reports for October. Stokes notified the employees that he expected them to accomplish and document a minimum of one hour of code enforcement daily and submit their weekly reports. He stated further, "[t]ypically, supervisors have contacted approximately 35 passengers per hour. You should aim for this number of contacts each day during your hour's work." The number of 35 passenger contacts in Stokes' letter was based on an approximate average of the number of district supervisor contacts on the weekly code enforcement reports between February 2010 and October 2010, including reports that reflected no contacts.

24. When road/rail supervisor James Fowler received his November 12, 2010 letter, he told Stokes that he did not understand what TriMet wanted with regard to fare inspection and code enforcement and that he felt that he had insufficient training. He was frustrated with TriMet's decision in September to eliminate the foot shifts, but still push for code enforcement and fare inspection work. A few days later, Stokes arranged for Fowler to meet with Chief Fare Inspector Radford to determine what code enforcement training Fowler needed and suggested to Fowler that this might be an opportunity to identify training that others needed. Fowler told Stokes that he had interviewed 25 other Field Operations members and 95 percent of them felt they had not been properly trained. Fowler was unable to meet with Radford due to a personal emergency, did not reschedule the training, and notified Stokes that he saw no value in being trained on how to write citations and "[l]ike the others I will get in line and muddle along with my own self training. You will get your reports and all will be fine until something goes terribly wrong." Fowler began filing code enforcement reports.

25. Road/rail supervisor Jay Frye also received a November 2010 letter. He subsequently filed reports reflecting his hours of code enforcement, but did not indicate any contacts or information about those contacts.[4] Frye contacted up to 60 passengers in an hour, but did not record this information.

26. Then road/rail supervisor Mohsen Jalalipour also received a November 12, 2010 letter. Before receiving that letter, Jalalipour had been performing one hour of code enforcement per day, but failed to file his reports. After receiving the letter, he filed his reports. Jalalipour understood that he was not required to write citations and did not issue any in December 2010 or January 2011 before becoming the assistant manager in February 2011. Jalalipour did not believe that checking fares during code enforcement impacted his workload because if a bus was full, he could have 35 contacts on one bus. He also had been told that he could do his one hour of code enforcement in increments and that emergencies, accidents, incidents, service blockages, and calls for assistance took precedent over code enforcement work.

27. In the December 2010 foot-mission-statistics report, 43 road/rail supervisors reported 834 hours of code enforcement statistics, resulting in 77 citations, 602 written warnings, 1501 verbal warnings, and 53 expulsions. The citations were issued by 11 road/rail supervisors, five of whom only issued one or two citations. The other 32 road/rail supervisors issued no citations. The statistics did not specify the section of the TMC that had been violated.

28. On March 30, 2011, Operations Manager Jackson sent letters to seven road/rail supervisors who had received the November 12, 2010 letter and were still not submitting the reports, including road/rail supervisor Wheeler. Jackson reminded them of his directive to "accomplish a minimum of one hour of code enforcement daily, and submit a weekly report documenting those efforts." Jackson concluded: "A review of the signups you have participated in have clearly laid this out as part of your daily activities. Additionally, inspecting fares and enforcing TriMet code is also an essential function in your job description."

[4]Frye testified he did not recall the November 2010 letter.

29. On July 19, 2011, TriMet publicly announced its intent to add six new road/rail supervisors to perform fare enforcement and shift the focus of their work from warning and educating riders to issuing citations and exclusions. That day, Assistant Manager Stokes sent e-mails to all supervisors, inspectors, and leads entitled "R-checks and Fare Enforcement," to which he attached a copy of the news advisory announcing the addition of the new road/rail supervisors and the shift in focus from education to enforcement. Stokes asked the supervisors to be patient with delays that they might experience with R-checks responses from the command center during their one-hour of code enforcement.

30. The majority of road/rail supervisors who filed code enforcement reports several months before and after July 2011 showed an increase in the number of citations issued after July 2011. A number of the road/rail supervisors showing such an increase had worked in that position before August 2008. In August 2011, 31 road/rail supervisors wrote at least one citation for fare violations and, in February 2012, 36 road/rail supervisors wrote at least one citation or exclusion for fare violations.

31. Beginning with the July 2011 sign-ups, the specific duties for four new road supervisor shifts and two new rail supervisor shifts required employees to conduct code enforcement work and work with other inspectors or supervisors conducting code enforcement, including to "administer/enforce TriMet code and inspect fares, and address security issues as appropriate." Jackson created these shifts as training opportunities for the road/rail supervisors to learn from the fare inspectors and so that the fare inspectors would be working in pairs for their safety.

32. On July 26, 2011, Assistant Manager Jalalipour met with road/rail supervisor Wheeler about his failure to file weekly code enforcement reports. Wheeler indicated that he did not understand what it meant or how to do fare inspections and that he needed training on how to issue citations and warnings. Lead Fare Inspector Radford provided Wheeler training on July 29, but Wheeler still did not perform fare inspections or file code enforcement reports thereafter.

33. During late July and early August, Jalalipour also met individually with five other road/rail supervisors, including Fowler, and explained the obligation to perform TMC enforcement and file reports.

34. In August 2011, TriMet modified SOP 313, which was under the "Fare Inspector SOPs," to identify the proper responses to fare violations by "Code Enforcement supervisors." The revised SOP 313 provided that: (1) written warnings were to be rarely used and only when compelling reasons required leniency; (2) "clear violations of fare policy require issuance of a citation to ensure overall system compliance"; and (3) exclusions may be issued if temporary removal of the customer from TriMet property is warranted. SOP 313 stated further that "it is expected that the majority of fare violations warrant issuance of a citation."

35. On September 13, 2011, Manager Jackson notified all road/rail supervisors and field operations leads that he was concerned about reports that field operations personnel were chasing and pursuing people. Jackson stated that this was dangerous and reminded them of SOP 306, 307, and 312, which stated that they were not to pursue, detain, prevent departure of, block

the exit of, search, restrain, or use physical force against a person during code or fare enforcement activities.

36. During an unfair labor practice hearing on November 10, 2011, Manager Jackson testified that code enforcement work included fare evasion work.[5] He also testified about the four supervisor shifts created in July 2011 in which supervisors worked directly with fare inspectors and other supervisors performing code enforcement and fare inspection.

37. During the training of new road/rail supervisors in 2011, Chief Fare Inspector Radford provided both classroom and on-the-job training on writing citations, filling out code-enforcement related forms, SOPs 300 to 314, making customer contacts, and asking customers for proof of fare payment.

38. In January through March 2012, TriMet provided a one-day training for all road/rail supervisors and leads on safety and service. The training addressed topics including the role of the road/rail supervisors and safety job expectations, creating a safety management system, tools for effective interactions with customers, engaging operators, and personal safety/code enforcement.

39. In March 2012, there were 55 road/rail supervisors. Around the beginning of March 2012, Assistant Managers Stokes and Jalalipour met individually with 11 supervisors who were not consistently filing code enforcement reports. Nine of these employees had received the November 2010 reminder letter and four had also received the March 2011 reminder letter. Stokes reminded the employees of their code enforcement and reporting responsibilities. Stokes told the employees to aim for a goal of 35 passenger contacts each hour, how this number had been arrived at, how such contacts could be made, and that code enforcement included fare inspection work. Stokes also reminded them of TriMet's July 19 public notice shifting the agency's focus from fare education to fare enforcement and stated that TriMet has moved away from warnings and education to issuing citations and exclusions for riders without a fare. Neither Jalalipour nor Stokes set a quota for the number of citations to be written.[6]

40. On March 5, 2012, Stokes sent the eleven employees a letter regarding their meeting. Stokes indicated that the purpose of the meeting had been to "discuss how we could improve your efforts to enforce TriMet code, submit daily reports, and document your code enforcement efforts in the form of citations or exclusions." The letter summarized what had occurred at the meeting, including the prior notifications that the employees had received, their

[5] *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-42-10, 25 PECBR 385 (2013).

[6] Fowler testified that Stokes set a quota for citations by telling him that 14 percent of the 35 contacts should result in a citation. However, both Stokes and Jalalipour testified that they did not tell the employees that there was a quota for citations during this meeting. The letter Stokes sent to the employees after the meeting confirms this testimony. In addition, although Wheeler recalled them saying that 25 percent of his 35 contacts should result in warnings or citations, he admitted that they also told him there was no quota for citations. Therefore, we find that Stokes and Jalalipour did not set a quota for citations during these meetings.

performance summary, the opportunity to have the code enforcement training provided to new employees, and the offer of additional training to be arranged if the employee felt that it was necessary. At the end of the letter, Stokes notified employees that failure to meet the expectation could result in additional training, corrective action, or discipline. The letter also stated:

> "[i]t is our expectation that from this day forward you will complete a minimum of one hour of code enforcement work per shift. Additionally, during this hour you should attempt to contact approximately 35 passengers per hour, which records indicate is a reasonable contact rate. Of these contacts, it is our expectation that your activities will show you are enforcing TriMet code using the tools we have provided for you; citations and exclusions are expected now for fare violations."

41. Stokes' March 5, 2012 letter to road/rail supervisor William DeSimone also stated, in part:

> "You asked if there was a quota or goal associated with citations, warnings and exclusions. I explained that there was no quota for these, but it was expected that you write citations or exclusions when you [en]countered a fare-evading passenger. I also explained that warnings would be the exception, not the rule, and that warnings were not to be issued for your convenience to avoid your responsibility to write citations or exclusions. I also explained that it was a goal to contact approximately 35 passengers during your one hour of code enforcement each day."

42. On March 16, 2012, then ATU Vice President Samuel Schwarz sent TriMet a letter demanding to bargain over alleged changes to the road/rail supervisors' job duties. On March 21, Executive Director Randy Stedman responded that TriMet refused to bargain on the basis that the demand was not made within 14 days of the addition of code enforcement duties to the supervisors' job responsibilities. On April 2, 2012, ATU's Hunt sent TriMet a second demand to bargain over alleged changes to the road/rail supervisors' job duties. Executive Director Stedman responded on April 4 that TriMet had no duty to bargain because no change had been made to the road/rail supervisors' enforcement duties.

CONCLUSIONS OF LAW

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

2. TriMet did not violate ORS 243.672(1)(e) in March 2012, by reminding 11 road/rail supervisors that they were expected to complete a minimum of one hour of code enforcement work per shift, contact 35 passengers per hour, and enforce the TMC, including issuing citations and exclusions for fare violations.

DISCUSSION

ATU alleges that in March 2012, TriMet made a unilateral change in the *status quo* in violation of ORS 243.672(1)(e) by requiring all road/rail supervisors to demand to see proof of

fares from at least 35 customers per day and issue citations on all fare violations. ATU argues that under the established past practice, road/rail supervisors had the discretion to decide whether to request proof of fare payment and whether to issue a citation in response to a fare violation. ATU alleges that this unilateral change in the past practice impacted the mandatory bargaining subjects of safety and workload.

TriMet alleges that the complaint should be dismissed as untimely under ORS 243.672(3) because the change to the road/rail supervisors' duties occurred in 2008. TriMet also asserts that it did not make a change in the *status quo* in March 2012, but merely met with certain road/rail supervisors to notify them that they were failing to perform their required duties. In addition, TriMet argues that even if a change in the *status quo* occurred in March 2012, it did not impact a mandatory subject of bargaining.[7] As explained below, we agree with TriMet that there was no change to the *status quo* in March 2012 when TriMet counseled 11 (out of 55) road/rail supervisors for not performing and documenting TMC enforcement, including fare inspection.[8]

ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer or its designated representative to "[r]efuse to bargain collectively in good faith with the exclusive representative." An employer commits a *per se* violation of ORS 243.672(1)(e) if it makes a unilateral change regarding a mandatory subject of bargaining while it has a duty to bargain. *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177, 295 P3d 38 (2013) (*AOCE*) (citing *Wasco County v. AFSCME*, 46 Or App 859, 613 P2d 1067 (1980)).

In analyzing a complaint alleging a unilateral change, this Board considers: (1) whether an employer made a change to the *status quo*; (2) whether the change concerned employment relations (*i.e.*, a "mandatory subject of bargaining"); and (3) whether the employer exhausted its duty to bargain. *AOCE*, 353 Or at 177. When asserted, we also consider any affirmative defense. *Id.*; *see also Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008). However, we do not apply these steps mechanically and may proceed to a particular step if it would dispose of the issue. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-24-09, 24 PECBR 730, 761 (2012).

We begin with the "preliminary step in any unilateral change claim—whether there has been a change in the *status quo*." *AOCE*, 353 Or at 184 (italics added). To make that determination, we consider "[w]hether the parties have, by their words or actions, defined their rights and responsibilities with regard to a given employment condition." *Id.* (quoting *Coos Bay Police Officers' Association v. City of Coos Bay and Coos Bay Police Department*,

[7]In light of our conclusion that there was no change in the *status quo* in March 2012, we do not address whether the alleged change concerned a mandatory subject of bargaining.

[8]Because ATU's complaint is based on TriMet's March 2012 actions (and not earlier actions in 2008, 2010, and 2011), we conclude that the July 25, 2012 complaint is timely with respect to the March 2012 actions. *See Rogue River Education Assn. v. Rogue River School*, 244 Or App 181, 189, 260 P3d 619 (2011) (under ORS 243.672(3), an injured party must file a complaint within 180 days of when that party knows or reasonably should know that an unfair labor practice has occurred).

14 PECBR 229, 233 (1993)). In doing so, we look "to a variety of sources, including not only the terms of a current or an expired collective bargaining agreement, but work rules, policies, and an employer's 'pattern of behavior."' *AOCE*, 353 Or at 184 (quoting *Coos Bay*, 14 PECBR at 233); *accord Jackson County Sheriff's Employees' Association v. Jackson County Sheriff's Department*, Case No. UP-023-11, 25 PECBR 449, 457-58 (2013).

We first analyze TriMet's actions in March 2012, which ATU contends changed the *status quo*. Specifically, in March 2012, TriMet managers met with 11 road/rail supervisors to discuss how those supervisors could improve their TMC enforcement responsibilities and their documentation of those responsibilities. Those meetings were memorialized in letters sent by TriMet to the 11 road/rail supervisors, which informed those employees that they were expected to: (1) complete one hour of TMC enforcement per workday; (2) contact approximately 35 TriMet passengers during that hour of TMC enforcement; and (3) demonstrate TMC enforcement, noting that citations and exclusions were expected for fare violations. The letters further informed the employees that additional training or instruction could be arranged if requested.

ATU has not established that these March 2012 counseling sessions and letters changed the *status quo* regarding employment relations. To the contrary, since 2008, the essential functions of the road/rail supervisor included TMC enforcement, which also included fare inspection. As set forth above, in 2008, TriMet merged the fare inspector classification into the road/rail supervisor classifications. When that merger occurred, TriMet's Banta expressed a clear intent to have road/rail supervisors perform a broader range of duties, including fare inspection work. TriMet then acted to implement this intent. Not long after the 2008 Fare Inspector Agreement was negotiated, TriMet included the fare inspection responsibilities in the new road/rail supervisor job descriptions. At the same time, TriMet notified the bus/rail operators, who were potential applicants for new road/rail supervisor positions, that the assignments that they could bid on included fare inspection duties. TriMet also included the fare inspection duties in the road/rail supervisor job posting and provided training on fare inspections and SOPs related to fare inspections to the successful road/rail supervisor job applicants.

Moreover, in September 2010, TriMet informed road/rail supervisors that one hour of TMC enforcement was expected per workday, and that weekly enforcement reports were required. As early as November 2010, Assistant Manager Stokes told road/rail supervisors who were not filing code enforcement reports to aim for contacting 35 passengers during their one hour of code enforcement. This goal was based on the approximate average of the number of contacts per hour made by road/rail supervisors filing code enforcement reports between February and October 2010. Those road/rail supervisors who continued to fail to file code enforcement work were reminded of this goal in March 2011. Therefore, TriMet's March 2012 reminder that road/rail supervisors were expected to contact approximately 35 passengers during their hour of code enforcement work did not change the *status quo*.

Additionally, in July 2011, road/rail supervisors were told that citations and exclusions (as opposed to warnings and education) were expected for riders who lacked proof of a valid fare. Consistent with that July 2011 directive, TriMet modified SOP 313 in August 2011 to identify the proper responses to fare violations by road/rail supervisors. The revised SOP 313 provided that: (1) written warnings were to be rarely used and only when compelling reasons

required leniency; (2) "clear violations of fare policy require issuance of a citation to ensure overall system compliance"; and (3) exclusions may be issued if temporary removal of the customer from TriMet property is warranted. SOP 313 stated further that "it is expected that the majority of fare violations warrant issuance of a citation." Therefore, the March 2012 meetings and letters reminding 11 road/rail supervisors of the citation/exclusion expectation did not change the *status quo*.

In sum, we conclude that TriMet did not change the *status quo* in March 2012. To the contrary, at that time, TriMet was merely reminding 11 road/rail supervisors of *existing* job requirements that had previously been in place. Indeed, nine of the 11 road/rail supervisors who were counseled in March 2012, had received similar counseling letters in November 2010, and four of those 11 had received an additional similar counseling letter in March 2011.[9] Consequently, we hold that TriMet did not change the *status quo* when it met with 11 road/rail supervisors (and sent letters memorializing those meetings) in March 2012 to remind those supervisors of TriMet's expectations of their job responsibilities.[10] Therefore, we will dismiss the complaint.

ORDER

The complaint is dismissed.

DATED this 2 day of December 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

[9]The only meaningful addition in the March 2012 letter was the expectation that citations and exclusions be issued for fare evasion. As explained above, that added expectation arose out of a July 2011 directive.

[10]We also reject ATU's allegation that TriMet changed the *status quo* by establishing a "daily quota" in March 2012 regarding passenger contacts and fare-evasion citations. The record does not establish that any such quotas were imposed.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-054-12

(UNFAIR LABOR PRACTICE)

TUALATIN EMPLOYEES' ASSOCIATION, Complainant, v. CITY OF TUALATIN, Respondent.	)	RULINGS FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

None of the parties objected to a Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on October 21, 2013, after a hearing held on May 30, 2013, in Salem, Oregon. The record closed on June 24, 2013, following receipt of the parties' post-hearing briefs.

Derek R. Budzik, Attorney at Law, Lafayette, Oregon, represented Complainant.

Ashley Boyle, Labor Relations Attorney/Consultant, Local Government Personnel Institute, Salem, Oregon, represented Respondent.

On October 17, 2012, the Tualatin Employees' Association (Association) filed this unfair labor practice complaint against the City of Tualatin (City) alleging that the City violated ORS 243.672(1)(a), (b), and (c) by giving employees who were subject to a pending unit clarification petition a 2.5 percent wage increase. The City filed a timely answer to the complaint.

The issues are:

1. Did the City interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under ORS 243.662, in violation of ORS 243.672(1)(a), by giving the employees who were subject to the Association's unit clarification petition a 2.5 percent salary increase?

2. Did the City dominate or interfere with the formation, existence, or administration of the Association, in violation of ORS 243.672(1)(b), by giving the employees who were subject to the unit clarification petition a 2.5 percent salary increase?

3. Did the City discriminate in regard to the terms and conditions of employment for the purpose of discouraging membership in the Association, in violation of ORS 243.672(1)(c), by giving the employees who were subject to the unit clarification petition a 2.5 percent salary increase?

4. If the City violated ORS 243.672(1)(a), (b), or (c), what is the appropriate remedy?

For the reasons discussed below, we conclude that the City did not violate ORS 243.672(1)(a), (b), or (c).

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT[1]

Parties

1. The Association is a labor organization as defined by ORS 243.650(13) and the exclusive representative of approximately 70 employees at the City. The City is a public employer as defined by ORS 243.650(20).

2. There are approximately 43 unrepresented City employees.

3. The Association and City were parties to a collective bargaining agreement that was effective July 1, 2010 through June 30, 2012. Under that contract, Association bargaining unit employees had the option of selecting medical insurance under either a Blue Cross Plan, V-PPO, or a Kaiser plan.

Bargaining for 2012 - 2015 collective bargaining agreement and unit clarification petition

4. The Association and the City held their first bargaining session for a successor collective bargaining agreement in February 2012. In its initial proposal, the Association

[1]The following Findings of Fact are based upon a stipulation by the parties and the record at hearing.

proposed to add language providing for the City to make contributions to an HRA VEBA Medical Reimbursement plan (Reimbursement Plan)[2] in the amount of one percent of each unit employee's base pay and the cash value of each employee's accrued vacation time in excess of 35 days.

5. On April 24, 2012, the Association filed a unit clarification petition under OAR 115-025-0005(2) with this Board seeking to clarify whether thirteen unrepresented employees in various positions were public employees within the meaning of ORS 243.650(19). *Tualatin Employees' Association v. City of Tualatin*, Case No. UC-012-12, 25 PECBR 565 (2013). The Association subsequently withdrew its petition regarding two of the positions.

6. On May 10, 2012, the City filed timely objections asserting that the petition should have been filed under either OAR 115-025-0005(3), the purpose of which is to clarify whether the positions at issue are included under the express terms of the recognition clause, or OAR 115-025-0005(4), the purpose of which is to determine if it is appropriate to add unrepresented employees to a bargaining unit. The City also asserted that the petitioned-for employees should be allowed to vote on whether they should be placed in the Association bargaining unit. On July 15, 2012, the City again objected to the petition being considered under subsection (2) and asserted that a self-determination election should be held.

7. After the petition was filed, the City initially suspended the parties' negotiations because it was concerned that the bargaining conduct might constitute an undue influence on employees, should a self-determination be ordered under subsection (2), and its desire to know the scope of the positions in the bargaining unit that bargaining would address. After the Association notified the City of its intent to file an unfair labor practice complaint against the City asserting that the City was refusing to bargain under ORS 243.672(1)(e), the City resumed bargaining with the Association.

8. At some point during the bargaining process, the City Council authorized its bargaining team to make proposals increasing the total compensation package up to three percent, and to increase compensation for unrepresented employees by the same amount.

9. During bargaining, the parties discussed allowing the Association bargaining unit employees to vote on replacing Blue Cross Plan V with either Blue Cross Plan 1-B or Blue Cross Co-Pay Plan B, both of which had lower premium costs. Because the City's medical insurance premium contribution was based on a percentage of the Kaiser Plan premium, the amount of the City's contribution remained the same regardless of the plan selected by employees. Leaving Blue Cross Plan V for either Blue Cross Plan 1-B or Co-Pay Plan B would lower employees'

[2]HRA is an acronym for health reimbursement arrangement; VEBA is an acronym for voluntary employees' beneficiary association. However, HRA VEBA is also a shortened form of HRA VEBA Trust, which is "a multiple employer non-profit trust managed by a board of trustees elected by the plan participants. HRA VEBA Trust currently serves over 43,000 participants from more than 400 governmental employers in the Northwest." http://www.hraveba.org/#!about/c20r9, accessed October 17, 2013. The parties' negotiations appear to have concerned participation in the HRA VEBA Trust.

out-of-pocket premium costs. The City also presented a counter proposal for a Reimbursement Plan contribution linked to Association members agreeing to Blue Cross Plan 1-B or Co-Pay Plan B. Based on the parties' bargaining discussions, the City bargaining team believed that the Association bargaining unit members would vote for either Plan 1-B or Co-Pay Plan B.

10. On July 30, 2012, the parties reached a tentative agreement on a total compensation proposal, which included a two percent salary increase each July 1, in 2012, 2013, and 2014; a maximum insurance premium contribution of 90 percent of the Kaiser plan and ODS Dental II with Ortho; an increase in the City's insurance contribution of up to five percent in January 1, 2014 and January 1, 2015; and new Reimbursement Plan language contingent on the Association's selection of either the Blue Cross Co-Pay Plan B or Plan 1-B, including a one-time City contribution of $200.00 for each employee with an established Reimbursement Plan account and contributions based on the cash value of accrued vacation in excess of 260 hours per quarter. The parties also agreed that the Association would select its insurance plan in the collective bargaining agreement ratification vote and that the City would provide a $25.00 monthly payment for full-time employees who opted out of the City insurance plans.

Compensation increase for unrepresented employees

11. On August 6, 2012, Human Resources Manager Janet Newport and Financial Director Donald Hudson reviewed the tentative agreement with City Manager Sherilyn Lombos. Hudson provided Lombos and Newport with his analysis of the cost impact of the tentative agreement. The document reflected that the total increased compensation cost of the tentative agreement was three percent during the three years of the contract, which included a cost of approximately 0.5 percent each year based on the City's contributions to the Reimbursement Plan.

12. At this meeting, for the first time, the managers discussed the structure of a total compensation package for unrepresented employees. In past years, the City had given unrepresented employees the same salary increases as Association bargaining unit employees. Lombos, Newport, and Hudson decided to provide unrepresented employees with an economic package equivalent to the three percent total compensation increase bargained for Association bargaining unit employees. Because the managers decided not to include unrepresented employees in the City's 0.5 percent contribution to the Reimbursement Plan, the managers proposed a 2.5 percent salary increase for unrepresented employees. They also proposed the same City contribution to unrepresented employees' regular health insurance as provided to Association bargaining unit members. During this meeting, the managers did not mention or discuss the pending unit clarification or the status of the 11 employees subject to the petition.

13. After the August 6, 2012 meeting, Newport explained to Association President Bailey that the City provided the additional 0.5 percent wages to unrepresented employees because those employees would not receive City contributions to a Reimbursement Plan account. Soon after their discussion, a leaflet was posted at the City stating that management employees would receive a 2.5 percent increase, but would not have a Reimbursement Plan option. On August 12, 2012, Newport sent an e-mail to all unrepresented employees clarifying that the proposed compensation package for those employees included a 2.5 percent salary increase and an increase in the amount of health insurance contribution based on the 90 percent formula.

14. A hearing on the objections to the unit clarification petition in Case No. UC-012-12 was held on August 14 and 15, 2012. At the time of the hearing, the Association had amended the petition to proceed under OAR 115-025-0005(2) and (3). The City continued to assert that a self-determination election should be held.

15. On August 14, 2012, Association President Bailey notified HR Manager Newport that the Association had ratified the tentative agreement and the bargaining unit employees had voted to retain Blue Cross Plan V. This choice meant that Association unit employees would not receive the 0.5 percent Reimbursement Plan contributions, and that, therefore, the increase in compensation to unit employees was 2.5 percent instead of 3 percent. City officials were surprised by the unit members' choice because much of the parties' bargaining had focused on lowering medical insurance premiums and other medical costs to Association unit members.

16. On August 27, 2012, the City Council adopted resolutions approving the 2.5 percent increase for unrepresented employees (retroactive to July 1, 2012); an adjustment to unrepresented employee medical insurance (retroactive to August 1, 2012); and ratifying the terms of the parties' tentative agreement (retroactive to July 1, 2012).

17. On June 21, 2013, the Employment Relations Board issued its final order in Case No. UC-012-12.[3] The Board concluded that the express terms of the parties' collective bargaining agreement included the 11 positions at issue, and ordered that "they are contained" within the Association bargaining unit. The Board did not order an election.

CONCLUSIONS OF LAW

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

2. The City did not violate ORS 243.672(1)(a) by giving the employees subject to the Association's unit clarification petition a 2.5 percent salary increase.

The Association alleges that the City violated the "in the exercise" prong of subsection (1)(a) by giving a 0.5 percent pay increase to unrepresented employees who were at issue in the Association's unit clarification petition, thereby subjecting them to a 0.5 percent pay cut if they were clarified into the Association. The City contends that the employees at issue were not "public employees" under the Public Employee Collective Bargaining Act (PECBA) at the time of the pay increase, that the City provided all unrepresented employees with the same pay increase, and that the Association was responsible for the difference in pay.

[3]We take judicial notice of this decision. *See 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).

Legal Standards: ORS 243.672(1)(a) Claim

Under ORS 243.672(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 ORS 243.662." Protected rights under ORS 243.662 include the right to "form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations."

Subsection (1)(a) prohibits two types of employer actions: (1) those that interfere with, restrain, or coerce employees "because of" their exercise of protected rights under ORS 243.662; and (2) those that interfere with, restrain, or coerce employees "in the exercise" of those protected rights. *Tigard Police Officers' Association v. City of Tigard*, Case No. UP-59-10, 24 PECBR 927, 936 (2012).

The Association does not allege that the City violated the "because of" portion of subsection (1)(a), but that the City's conduct affected employee rights under the "in the exercise" portion. The focus of our analysis under the "in the exercise" prong of (1)(a) is not on the employer's motive or reasons for acting, but on the likely consequences of the employer's actions. If the natural and probable effect of an employer's action is to "deter employees from exercising a protected right, then the action interferes with, restrains, or coerces employees in the exercise of protected rights in violation of ORS 243.672(1)(a)." *Milwaukee Police Employees Association v. City of Milwaukie*, Case No. UP-52-11, 25 PECBR 263, 275-76 (2012).

More specifically, an employer may violate the "in the exercise" prong when the natural and probable effect of the employer's conduct, viewed under the totality of the circumstances, would tend to interfere with employees' exercise of protected rights.[4] These violations most frequently occur when an employer makes threatening or coercive statements regarding union activity. *Id.* at 276. The complainant has the burden of proof. OAR 115-010-0070(5)(b).

The Association established that the City granted a 2.5 percent salary increase to the employees subject to the OAR 115-025-0005(3) unit clarification petition, as it did with all then-unrepresented employees. To decide whether the City's actions constitute an "in the exercise" violation, we consider the results that would likely flow from its actions. The City's motive is not controlling, nor are the subjective impressions of affected employees. We base our decision on "an objective standard and the totality of the circumstances." *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, 19 PECBR 590, 602 (2002), quoting *Spray Ed. Assoc. and Short v. Spray School District*, Case No. UP-91-87, 11 PECBR 201, 218 (1989).

[4]A derivative violation of the "in the exercise" prong of the statute occurs when an employer violates the "because of" prong of the statute, and is not at issue here.

Analysis: ORS 243.672(1)(a) Claim

The Association contends that the City interfered with or coerced employees in the exercise of their rights to choose union representation by offering employees a financial reward for giving up those rights.[5] The Association argues that the natural and probable effect of implementing the additional 0.5 percent wage increase for the 11 employees would be to induce them to vote against membership in the Association bargaining unit (if an election was required). The Association further argues that this Board should sanction the City because its officials granted the wage increase while believing, and advocating, that a unit composition election should take place.

The difficulty with the Association's claim is that an election is not held in an OAR 115-025-0005(3) unit clarification matter. As this Board has previously stated:

> "A subsection (3) unit clarification petition requires only that we interpret the recognition clause negotiated by the parties and does not involve an election by the employees. Hence, employees have no freedom of choice to exercise, and there is no employee voting subject to any improper influence by the employer through manipulation of the negotiating process." *American Federation of State, County and Municipal Employees v. Metropolitan Services District*, Case No. UP-97-90, 13 PECBR 26, 29 (1991).

In UC-012-12, this Board determined that the employees at issue were members of the unit as described by the collective bargaining agreement and did not order an election. *City of Tualatin*, 25 PECBR at 575-76. The Association's claim, consequently, is without merit because the employees could not be induced to vote against union membership when an election would never occur (regardless of any purported belief by City officials that an election "should" occur).

The Association offers no other rationale to support a conclusion that the City violated the "in the exercise" clause. We will dismiss this claim.[6]

Legal Standards: ORS 243.672(1)(b) Claim

We turn to whether the City violated ORS 243.672(1)(b) through its grant of a 2.5 percent compensation increase to the 11 employees at issue. ORS 243.672(1)(b) provides that it

[5]The Association's arguments focus on the City's advocacy for, and the possibility of, an election to determine whether the 11 employees at issue would join the Association unit. The Association's arguments also focus on the *difference between* the compensation increases of represented and unrepresented employees, rather than the fact that the City *changed* the compensation of the 11 then-unrepresented employees at issue.

[6]Although this Board determines that employees in positions subject to a successful OAR 115-025-0005(3) petition were already members of a bargaining unit pursuant to its unit description, the effective date of actual unit membership is determined by this Board's Order, not the date of the unit description agreement or the creation or modification of the positions at issue.

is an unfair labor practice for an employer or its representative to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization."

To prove a subsection (1)(b) violation, a union must "demonstrate that the employer's actions actually, directly, and adversely affected the labor organization's ability to serve as exclusive representative." *Oregon AFSCME Council 75, Local #3943 v. State of Oregon, Department of Corrections, Santiam Correctional Institution*, Case No. UP-51-05, 22 PECBR 372, 397(2008).

Analysis: ORS 243.672(1)(b) Claim

The Association argues that the City's actions made it less likely that the employees at issue would vote to join the Association bargaining unit and violated its duty of neutrality, citing *Teamsters Local 57 v. Lane County and AFSCME Local 2831*, Case No. C-199-82, 7 PECBR 5763, 5785 n 4 (1983), and *In the Matter of a Petition by Central School District, Polk County*, Case No. DR-5-85, 8 PECBR 8082, 8084 (1985). As explained above, no such election has been or will be held. As a result, the Board precedent cited by the Association is inapposite.

The Association also argues:

> "The City violated ORS 243.672(l)(b) because it tried to have it both ways. If the City wanted an untainted self-determination election in UC-012-12, it should not have bargained and adjusted the salaries of the impacted employees. If the City wanted to adjust the salaries of the impacted employees, then it should not have argued for a self-determination election." Association post-hearing brief at 16.

The Association has failed to demonstrate that the City's actions actually and adversely affected the Association's ability to represent its members. Accordingly, the City's action did not violate subsection (1)(b). We will dismiss this claim.

Legal Standards: ORS 243.672(1)(c) Claim

ORS 243.672(1)(c) provides that it is an unfair labor practice for a public employer or its designated representative 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." This Board has stated that generally, "[o]ur test for determining a violation of subsection (1)(c) is similar to the one we use in determining a violation of the 'because of' prong of subsection (1)(a)."*Oregon AFSCME Council 75, Local 2376 v. State of Oregon, Department of Corrections*, Case No. UP-24-12, 25 PECBR 721, 737 (2013), citing *State of Oregon, Department of Corrections, Santiam Correctional Institution*, 22 PECBR at 396 (2008). A (1)(c) violation is established by the same "but for" causation employed under (1)(a). *AFSCME Council 75, AFL-CIO and Haphey and Bondietti v. Linn County, Linn County Sheriff's Office and Sheriff Martinak*, Case No. UP-115-87, 11 PECBR 631, 650-51 (1989).

Analysis: ORS 243.672(1)(c) Claim

The Association argues that the City violated subsection (1)(c) by giving a "disparate salary increase"—*i.e.*, by raising the wages of the employees at issue 0.5 percent more than the compensation provided to Association employees. The Association is correct that the increase in compensation of unit employees differed from that extended to unrepresented employees, including the 11 employees at issue. However, the difference in treatment was not caused by the City alone. The City provided its unrepresented employees with a compensation increase equal to the higher compensation package it agreed to provide Association unit after bargaining with the Association. The 0.5 percent disparity was created when (1) Association leadership chose to present Association members with an option to retain their previous, lower value compensation package, and (2) a majority of Association members voted for that lower compensation package.

The City managers' decision was made before the Association vote, albeit ratified by the City Council after that vote, and there is no evidence that City officials had any expectation that the Association members would reject the medical Reimbursement Plan that the Association obtained in bargaining.[8] Had the Association members selected the more valuable compensation package, there would be no disparity in the value of the compensation.[9] If the employees-at-issue ultimately received greater compensation than bargaining unit employees, this was due to the democratic choice of the Association unit, not the City. In addition, the compensation granted the employees-at-issue was given to all then-unrepresented employees, a status held by the 11 employees-at-issue until June 21, 2013. Therefore, the difference in compensation for unrepresented and represented employees, or the difference between the employees-at-issue and the represented employees, cannot be ascribed to unlawful discriminatory intent by City officials. We conclude that the Association has failed to prove the causation element necessary to establish a (1)(c) violation.

The Association also failed to prove that the City had an unlawful purpose. It is difficult to accept the Association's argument that the City's actions were intended to create a compensation disparity when, at the time that the City selected the non-bargaining unit employee compensation package, City officials reasonably believed that the Association members would choose the medical insurance option that the parties agreed to in bargaining. There is no evidence that union activities were a factor in the County's decision except to the extent that the County used the Association's benefits package as a benchmark to achieve compensation parity for non-bargaining unit employees. This is a lawful purpose.

[8]There is no evidence that the members of the City Council had any unlawful intent in approving the managers' recommendations or revisited the managers' analysis in light of the Association vote.

[9]Although the Association notes that there was a difference in the *type* of compensation (wages v. medical reimbursement funds) offered to the unrepresented and represented employees, it does not explain how this fact would change the analysis of its claims under the PECBA.

The Association has failed to prove that the City unlawfully discriminated against the Association and its unit members. We will dismiss this claim.

For the reasons set forth above, we conclude that the Association has failed to prove that the City violated ORS 243.672(1)(a),(b), or (c). As a result, we will dismiss the Association's complaint entirely.

ORDER

1. The Amended Complaint is dismissed.

DATED this 12 day of December 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-049-12

(UNFAIR LABOR PRACTICE)

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 890, Complainant, v. KLAMATH COUNTY FIRE DISTRICT #1, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On September 27, 2013, the Board heard oral argument on Complainant's and Respondent's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on July 22, 2013, after a hearing held on February 21, 2013, in Salem, Oregon. The record closed on April 12, 2013, following receipt of the parties' post-hearing briefs.

Michael J. Tedesco and Nicole L. McMillan, Attorneys at Law, Tedesco Law Group, Portland, Oregon, represented Complainant.

Kirk S. Peterson, Attorney at Law, Bullard Law, Portland, Oregon, represented Respondent.

On September 18, 2012, the International Association of Firefighters, Local 890 (Association) filed this unfair labor practice complaint against the Klamath County Fire District #1 (District). The complaint, as amended on November 26, 2012, alleges that the District: (1) violated ORS 243.672(1)(e) by unilaterally implementing changes to meal breaks, overnight rest breaks, and travel expenses during out-of-town medical transports before exhausting its bargaining obligation; (2) violated ORS 243.672(1)(f) by refusing to proceed to interest arbitration on unresolved mandatory subjects of bargaining; and (3) violated ORS 243.672 (1)(a) and (b) by removing bargaining unit employees from the Station Design

Committee as a result of the employees' protected activities.[1] The District filed a timely answer to the complaint, which included a number of affirmative defenses.

The issues are:

1. On approximately May 8, 2012, did the District unilaterally change the *status quo* regarding mandatory subjects of bargaining in violation of ORS 243.672(1)(e)?

2. On approximately July 26, 2012, did the District refuse to proceed to interest arbitration over changes to the Inter-Facility Transports Standard Operating Guideline (SOG), and, if so, did that refusal violate ORS 243.672(1)(f)?

3. Did the District violate ORS 243.672(1)(a) or (b) by removing bargaining unit members from team meetings and communications related to the construction of Station 3?

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

For the reasons discussed below, we conclude that the District violated ORS 243.672(1)(e) by unilaterally implementing changes to mandatory subjects of bargaining before completing the required bargaining process, which included interest arbitration for this strike-prohibited unit. We further conclude that the District did not otherwise violate the Public Employee Collective Bargaining Act (PECBA).

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The Association is a labor organization as defined in ORS 243.650(13) and is the exclusive bargaining representative of employees working in the positions of captain, firefighter, and deputy fire marshal at the District, which is a public employer defined by ORS 243.650(20).

2. The Association and the District were parties to a collective bargaining agreement (Agreement) effective July 1, 2009 through June 30, 2012. By its terms, the Agreement remained in effect pending the negotiation of a new collective bargaining agreement.

Relevant Collective Bargaining Agreement Language

[1]The Association also alleged that the District had unilaterally altered the staffing of transports in violation of ORS 243.672(1)(e). This claim was withdrawn at hearing.

3. Article 5.1 of the parties' Agreement sets out the District's management rights, which include "the authority and right to determine the mission, purposes, objectives and policies of the District; to determine the facilities, methods, means, and number of personnel required for the conduct of District programs, operations and divisions; to direct, deploy and utilize the workforce; * * *." Article 5.2 provides that the enumeration of the rights in Article 5.1 does not exclude other management rights not specifically listed, and that the rights and responsibilities of the District not specifically modified by the parties' Agreement remain the function of the District.

4. Article 40.2 provides that the parties have waived the right to negotiate "any matter raised in negotiations over this Agreement, subject to all other provisions of this Article." Under Article 40.3, the parties recognize the Agreement as the "entire existing Agreement between the parties. This does not, however, waive the right of the [Association] to bargain unilateral changes of mandatory subjects."

Changes to the Inter-Facility Transports Standard Operating Guideline (SOG)

5. Since 2000, the District has provided medical transportation to and from the local hospital and out-of-town medical facilities. The District primarily transports patients to and from hospitals located in Medford and Bend, but occasionally transports are made to Portland, Hermiston, and Sacramento.

6. In June 2005, the parties negotiated a Memo of Understanding (2005 MOU) addressing work hours and meal and rest periods. Under meal periods, the MOU provides that "[t]wenty-four hour shift personnel shall have meal periods of one hour during each work shift. Meal periods shall be scheduled at or about 12:00 and 17:00 daily. Personnel will be required to respond on emergency calls and make up their meal period as soon as feasible."

7. In December 2006, the District adopted the Inter-Facility Transports Standard Operating Guideline (2006 SOG). The 2006 SOG provided for the on-duty battalion chief (BC or supervisor) to notify the duty chief if staffing went below 17. Regarding meals and overnight rest breaks, the 2006 SOG provided that:

> "[a]ll lodging and meal breaks will be coordinated with the on-duty B.C. in accordance with the existing MOU. A breakfast meal break is allowed when the transport itself crosses the breakfast meal time or any of the personnel assigned are working past their scheduled duty time off of 07:00. (More than 24 hours continuous or hold-over overtime). Any expenses will follow applicable SOGs and Policies."

8. Two on-duty employees are generally used for transports. The District often operates below minimum staffing levels during a transport. In the past, the District occasionally called in off-duty employees to work during the transport.

9. Under the 2006 SOG, employees generally did not take overnight rest breaks on trips to Medford, but were allowed to do so on trips to Bend. At times, the supervisor and employee agreed in advance that employees would stay overnight and the supervisor made the lodging arrangements. Other times, employees contacted their supervisor if they did not feel that they could safely drive back to Klamath Falls after a long transport and told their supervisor where they planned to stay. Supervisors generally authorized the rest break as requested, although sometimes the supervisor asked the employees to take their rest break in a different town. There is no evidence that a supervisor ever told employees on a transport that they could not have an overnight rest break.

10. Under the 2006 SOG, employees did not need to call a supervisor for permission to take a meal break around regular lunch and dinner meal times, but could just stop and eat at a restaurant along the route back to Klamath Falls after dropping off the patient. Employees generally called before stopping for meals outside of regular meal times. There is no evidence that a supervisor ever told employees that they could not take a meal break or told them where they had to eat. Employees were allowed to spend $30.00 per day on meals during transport.

11. Under the 2006 SOG, the District provided a credit card to employees on transports for such expenses as meals, lodging, repairs, and other incidentals. Before a transport, employees obtained the credit card from the BC. In late 2011, the District cancelled the card after a firefighter failed to immediately return the District credit card to the BC at the end of a transport, fearing that it was lost. In January 2012, the Association filed a grievance that sought reinstatement of the credit card or, in the alternative, proposed that the District provide employees with cash before all transports at an identified per diem rate.[2]

12. On January 18, District Operations Chief John Spradley notified Association President Shane Malone that the District would reinstate the credit card for use during transports and intended to revise the 2006 SOG to include the per diem meal rates proposed in the grievance. On February 1, Malone demanded to bargain over changes to the 2006 SOG.

13. On February 15, Fire Chief Jim Wenzel provided Malone with the District's proposed changes to the 2006 SOG and agreed that the District would bargain over mandatory changes or impacts pursuant to ORS 243.698. As part of the SOG changes, the District proposed to require employees to obtain express permission for lodging arrangements, overnight stays, and meals on transports to Medford or Bend occurring after the hospital cafeteria had closed; authorize the supervisor to deny a meal break for employees on transports to Medford or Bend if crews were below minimum standards; require employees to seek permission to stop for meals at locations other than the hospital cafeteria; and provide for specific rates and hours for meal reimbursements. The proposed meal reimbursements included breakfast - $7.00 (left station before 7:00 a.m. and returned after 9:00 a.m.); lunch - $11.00 (left station before 12:00 p.m. and returned after 1:00 p.m.); and dinner - $23.00 (left station before 5:00 p.m. and returned after 6:00 p.m.).

[2]Unless otherwise specified, all subsequent events occurred in 2012.

14. The parties held several bargaining sessions, exchanged proposals, and bargained over the District's proposed changes.[3] On April 2, the Association proposed an MOU, which provided for meals to be reimbursed at the federal General Services Administration (GSA) per diem rates for the city in which the employee was eating breakfast (employees leaving duty station before 7:30 a.m. who are off duty before 7:00 a.m.); lunch (employees who have not had their lunch break before transport and will not return to their duty station by 12:30 p.m.); dinner (employees who have not had their dinner break before transport and will not return to their duty station by 5:30 p.m.); and other meals (employees sent on transports after 7:00 p.m.). The proposed MOU also provided that travel to a meal break location should not exceed 20 minutes; such travel should be in the general direction of the return trip; and employees could, but were not required to, eat in the hospital cafeteria.

15. On April 26, the District first proposed a letter of clarification and later an MOU that provided for meal reimbursements to be based on the GSA per diem rates for the city in which the employee was eating and that the meal times would be those established in the new SOG and the 2005 MOU. The District also proposed to modify its original changes to the 2006 SOG by removing the language on meal rates and times and inserting the meal period language from the 2005 MOU. The District made a similar proposal on May 1.

16. By letter dated May 8, Chief Wenzel notified President Malone that the District was implementing its final bargaining proposal pursuant to ORS 243.698(4). The relevant section in the 2012 SOG, which includes the changes implemented by the District, provides:

> "7.1. The inter-facility transport crew will be provided a Fire District No. 1 credit card to cover authorized incidental meal, lodging, or repair expenses. The credit card must be checked out, and on return, checked back in with the BC. Any employee making a purchase on the provided Fire District No. 1 credit card must hand in the associated receipts when the credit card is checked back in.
>
> "7.2. All lodging arrangements and overnight stays will be allowed only with express verbal permission from the BC.
>
> "7.3 Personnel performing inter-facility transports to Medford and Bend are authorized to purchase meals at the receiving hospital's cafeteria. If the cafeteria is not serving food, it is not considered a normal meal time and the meal break must be preauthorized by the Battalion Chief.
>
> "7.3.1. Meals shall be limited up to the GSA per diem rates for the city they are eating in.

[3]The Association does not allege that the District failed to bargain in good faith during the 90-day expedited bargaining period.

"7.3.2. Twenty-four hour shift personnel shall have meal periods of one hour during each work shift. Meal periods shall be scheduled at or about 12:00 and 17:00 daily. Personnel will be required to respond on emergency calls and makeup their meal period as soon as feasible.

"7.4. For trips to Medford and Bend the BC may deny meal break if crews are below minimum staffing levels.

"7.5. Stopping for meals at a location other than the hospital cafeteria will only be allowed after receiving permission from the BC, and in these instances the meal rates above still apply. In these instances a restaurant must be chosen based on convenient location and quick service."

17. On June 13, the Association filed a petition with this Board to initiate binding arbitration over the District's changes to the 2006 SOG. This Board initiated interest arbitration on June 18. On June 21, the District requested that this Board terminate the interest arbitration process on the basis that all of the changes made were to permissive bargaining subjects and the Association's request for interest arbitration was untimely. On July 13, this Board denied the District's request and appointed an interest arbitrator. On July 19, the arbitrator provided the parties with available dates for an interest arbitration hearing, and on July 26, the Association responded with available dates. On that same day, the District suggested to the Association that the parties wait to set an arbitration date until this Board ruled on a Declaratory Ruling request that the District intended to make in the near future. The record contains no further evidence on subsequent communications or actions by the parties in attempting to set up an arbitration date.

Station Design Committee

18. In 2009 or 2010, the District was awarded a federal grant to rebuild Station 3. The District's proposed plan was to demolish Station 1 after rebuilding Station 3 and relocate personnel from Station 1 to Station 3. In September 2010, prior Association President Carl Gurske notified Chief Wenzel that the Association was demanding to bargain over the impending station changes. The Association was concerned that the relocation of personnel would increase response time to an incident, which could impact on-the-job safety. Chief Wenzel responded that the bargaining demand was premature because its operational plan was not final.

19. The District maintained a Station Design Committee to provide input on new or rebuilt fire station designs and locations. The Committee was composed of District management personnel, including Chief Wenzel and Operations Chief Spradley, and three bargaining unit employees, including Firefighter Chad Tramp. The bargaining unit employees volunteered to be on the Committee. At a Committee meeting in early 2012, management personnel mentioned that the District was moving forward with its plan to close Station 1, rebuild Station 3, and move personnel from Station 1 to Station 3. The Committee members were reviewing station design

documents and providing input on the temporary facilities for the relocation of the existing Station 3 crews during the rebuilding.

20. After the Design Committee meeting, Firefighter Tramp told Association President Malone that he had learned that the District intended to proceed with its plan to close Station 1, rebuild Station 3, and relocate employees to Station 3.

21. On February 29, President Malone sent Chief Wenzel a letter demanding to bargain the potential closure of Station 1 and the rebuilding of and relocation to Station 3. Malone also made a broad information request for all notes and minutes from any meetings regarding Station 3. The letter stated, in part:

> "This is due to recent District activities that borderline direct bargaining and the 07 October 2010 letter from the Chief. We believe the District has had ample time to determine the operations and now must sit down and bargain prior to starting the station #3 construction project.
>
> "We must caution the District from talking to bargaining unit personnel about anything that is a mandatory subject of bargaining this will include anything that [a]ffects safety and staffing that [a]ffects safety. The District must also be careful of items currently cover[ed] by the CBA and how changes can have adverse effects on personnel other than those assigned to station #3. Any further communications with any bargaining unit personnel over these matters will be viewed as intentional undermining of the union and will be addressed accordingly without further notice."

22. On March 2, Wenzel notified Malone that the District was willing to bargain over the mandatory effects of relocating the crews from Station 3. Wenzel invited Malone to tour the property that the District intended to use as a temporary facility on March 5. Either during the tour or in a subsequent meeting, Malone verbally warned Wenzel and Operations Chief Spradley about talking with bargaining unit employees about mandatory bargaining subjects related to the station changes.[4]

23. On March 29, Malone sent Wenzel another request for information related to the Association's demand to bargain over the changes to Stations 1 and 3. Malone requested all

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[4]We credit the testimony of Wenzel and Spradley that Malone verbally directed them not to talk with bargaining unit employees about the mandatory aspects of the station changes in a meeting sometime after February 29. Although Malone initially testified that he did not recall this conversation, he later testified that he may have said this during the tour of the temporary building. We also credit the testimony of Wenzel and Malone that Malone did not specify that he was talking about the Design Committee employees during this conversation. Although Spradley recalled Malone referring directly to the Design Committee employees, it is more likely that Spradley just assumed Malone's comment was directed at them because the Design Committee was involved in the discussions about the plans for the temporary building.

Station 3 grant-related information, including internal and external e-mails, application materials, application amendments and changes, and dollars expended.

24. By letter to Malone dated April 19, Wenzel confirmed that the District was willing to bargain the mandatory subjects related to the construction of Station 3, informed Malone about the District's current relocation plans, stated he would not change the deployment model from Station 1 until a third party recommendation was received based on a study of the District's standards of response coverage, and addressed the Association's "voluminous" information request stating: "the District objects to the request as overbroad, unduly burdensome, and unlikely to produce relevant information. If you disagree, please state why you believe the information is relevant and please specifically limit your request to only relevant information."

25. The parties met for bargaining on April 25. The parties' discussions were somewhat contentious. Early on, Wenzel asked Malone to show some respect in the manner he was asking his questions and Malone responded that respect can go both ways. Malone explained the Association's bargaining demand, reasserted the Association's request for information, and asked whether Station 1 would be closed. Wenzel replied that the District wanted to do a study, which it had not yet completed, about the best response locations before closing Station 1. After Malone pointed out that the grant stated that Station 1 would be closed after Station 3 was rebuilt, Wenzel said that it was up to the grant committee to decide if modifications to the original application were allowed. Malone then stated that he knew that Wenzel had said Station 1 was being closed during the Design Committee meeting. After Wenzel responded that he did not remember saying this, Malone stated that the Association had multiple witnesses.

26. During the April 25 meeting, Wenzel became frustrated after he asked Malone several times to identify what mandatory issues were impacted by station changes and Malone failed to do so. At one point, Wenzel asked Association Secretary/Treasurer Gary Denny if he could identify the Association's safety concerns and Malone directed Denny not to answer Wenzel's question. Wenzel and Malone continued with their somewhat contentious discussion. At the end of the meeting, when Malone asked about the Association's request for information, Wenzel responded that the District would get back to him but might have to start charging for the requests and staff time.

27. In a letter to Malone dated April 26, Wenzel expressed frustration that he had asked the Association three times during the April 25 meeting to identify specific mandatory impacts related to either the closure of Station 1 or the rebuilding of Station 3, and the Association had not only failed to respond but had stopped one of its bargaining team members from responding. Wenzel stated that these actions constituted bad faith bargaining and left the District unable to address the Association's concerns. Wenzel also stated that the Association's request for information was overly broad and unduly burdensome and could require weeks of full-time research and copying at a cost of thousands of dollars. Wenzel asked Malone to narrow and more specifically define his request. Wenzel concluded by stating that the District remained willing to bargain over any mandatory subjects identified by the Association.

28. On April 30, Operations Chief Spradley sent an e-mail to the Design Committee members, which stated:

> "Until further notice the Fire District is removing personnel who are also members of Local 890 from our team meetings and communications in relation to the construction of Station #3.
>
> "This is a result of the Demand to Bargain process that Local 890 has engaged Fire District No. 1 with.
>
> "To all who have participated or provided input related to this project we have very much valued and appreciated your input. This restriction is simply being made to ensure Fire District No. 1 does not inadvertently discuss a sensitive matter related to the Demand to Bargain, or put a Local 890 member in a conflicting position.
>
> "Once this matter is resolved; if possible, restriction on participation will be removed."

29. On May 24, 2012, the parties entered into an MOU addressing the closing of Station 1 and rebuilding of Station 3, including the requirements for the Station 3 temporary headquarters.

CONCLUSIONS OF LAW

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

2. The District violated ORS 243.672(1)(e) by implementing changes to mandatory bargaining subjects in the 2006 SOG before completing the bargaining process, which includes binding interest arbitration for this unit of strike-prohibited employees.

ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer or its designated representative to "[r]efuse to bargain collectively in good faith with the exclusive representative." An employer commits a *per se* violation of ORS 243.672(1)(e) if it makes a unilateral change regarding a mandatory subject of bargaining while it has a duty to bargain. *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177, 295 P3d 38 (2013) (*AOCE*) (citing *Wasco County v. AFSCME*, 46 Or App 859, 613 P2d 1067 (1980)).

In analyzing a complaint alleging a unilateral change, this Board considers: (1) whether an employer made a change to the *status quo*; (2) whether the change concerned "employment relations" (*i.e.*, a mandatory subject of bargaining); and (3) whether the employer exhausted its duty to bargain. *AOCE*, 353 Or at 177. When asserted, we also consider any affirmative defense. *Id.*; *see also Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008). However, we do not apply these steps mechanically

and may proceed to a particular step if it would dispose of the issue. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-24-09, 24 PECBR 730, 761 (2012).

The parties do not dispute that the employer changed the *status quo* in May 2012, when the District implemented its final bargaining proposal on the SOG changes. Moreover, although at hearing the parties disputed whether the SOG changes involved mandatory or permissive subjects of bargaining, neither party objected to those portions of the ALJ's Recommended Order concluding that some of the changes involved mandatory subjects of bargaining.[5] Under ORS 243.766(3) and (7), this Board shall conduct proceedings on complaints of unfair labor practices and take such actions "as it deems necessary" regarding those proceedings and shall "[a]dopt rules relative to the exercise of [our] powers and authority and to govern the proceedings before [us] in accordance with ORS chapter 183." Consistent with that statutory mandate, this Board long ago adopted rules stating that parties have "14 days from the date of service of a Recommended Order to file specific written objections with the Board." OAR 115-010-0090; OAR 115-035-0050(2). If a party does not file such specific written objections within the 14-day period, we may, "in the absence of good cause shown, invalidate any such objections as being untimely" and may "disregard" any such objections "in making a final determination in the case." OAR 115-010-0090.[6] Consistent with our rules and the discretion afforded to this Board, we adopt (and will not disturb) the ALJ's conclusions regarding the mandatory/permissive nature of the SOG changes, as no objections regarding those conclusions have been preserved.[7] *See* OAR 115-010-0090; OAR 115-015-035-0050(2); *Jackson County Sheriff's Employees' Association v. Jackson County Sheriff's Department*, Case No. UP-023-11, 25 PECBR 449, 459 (2013) (neither party objected to a portion of the ALJ's conclusions on a subsection (1)(e) claim, and we considered any objections to that issue waived); *see also Fred Meyer Stores v. Godfrey*, 218 Or App 496, 504, 180 P3d 98 (2008) (Under ORS 183.482(8)(b), an agency has the authority to establish its own rules regarding preservation of issues, and the circumstances that suffice to constitute adequate preservation are within the

[5]We note that our rules provide for a procedure "to reduce the time required for a determination of whether a contract proposal is a mandatory, permissive or prohibited subject of bargaining," OAR 115-035-0060(1), as well as a procedure for other unfair labor practice complaints that warrant expedited consideration, OAR 115-035-0068. Neither party invoked those procedures in this matter.

[6]Neither party asserts that the "good-cause" proviso has been satisfied—indeed, neither party has argued that the ALJ's conclusions on the mandatory/permissive nature of the SOG changes are incorrect.

[7]Member Weyand disagrees that the permissive/mandatory status of the subjects at issue in the 2006 SOG should be resolved by the application of a preservation standard based on the parties' failure to object to the relevant portions of the ALJ's Recommended Order. Rather, he would independently conclude that the subjects at issue between the parties were mandatory for bargaining.

province of the agency creating the standards, so long as those standards do not exceed the grant of authority from the legislature to the agency).[8]

With that in mind, we turn to the remaining and dispositive issue—whether the District exhausted its duty to bargain. According to the District, because the disputed bargaining was subject to the expedited process of ORS 243.698, it had exhausted its duty to bargain after bargaining for 90 days.[9] The District further contends that because ORS 243.698 makes no distinction between a strike-*permitted* unit and a strike-*prohibited* unit, it was allowed to implement its proposed changes after bargaining for 90 days, with one caveat. The District concedes that it may not unilaterally implement proposed changes on a strike-prohibited unit if, after bargaining for 90 days pursuant to ORS 243.698, a strike-prohibited unit petitions for binding interest arbitration over unresolved mandatory subjects of bargaining *before* the District implements its proposed changes. Thus, according to the District, in enacting ORS 243.698, the legislature intended to create a "first-to-act" statutory scheme in which the party that acts first (following the 90 days of bargaining) controls the mechanism by which expedited bargaining disputes are resolved.

The Association disagrees, asserting that ORS 243.698 maintains the distinction throughout the PECBA regarding the dispute resolution process for strike-permitted and strike-prohibited employees. That distinction prohibits a public employer from unilaterally implementing its final bargaining proposal with respect to a strike-prohibited unit after the requisite bargaining period, and instead requires the unresolved issues to be submitted to binding interest arbitration at the request of either party. We agree with the Association.

The objective of statutory interpretation is to "pursue the intention of the legislature if possible." *State v. Gaines*, 346 Or 160, 165, 206 P3d 1042 (2009); *see also* ORS 174.020(1)(a) ("[i]n the construction of a statute, a court shall pursue the intention of the legislature if possible."). In interpreting statutes, the first step in determining the legislature's intent is to examine the statutory text and context. *Gaines*, 346 Or at 171. Context includes other provisions of the same and related statutes. *Multnomah County Corrections v. Multnomah County*, 257 Or App 713, 720-21, 308 P3d 230 (2013). Thus, "[w]hen we examine the text of the statute, we always do so in context, which includes, among other things, other provisions of the statute of which the disputed provision is a part." *Hale v. Klemp*, 220 Or App 27, 32, 184 P3d 1185 (2008); *see also Vsetecka v. Safeway Stores, Inc.*, 337 Or 502, 508, 98 P3d 1116 (2004) ("[o]rdinarily, * * * text should not be read in isolation but must be considered in context.")

[8]Likewise, the District did not object to the portion of the Recommended Order finding that the parties' dispute regarding changes to meal reimbursements remained "unresolved" at the time of the District's unilateral change. Consequently, we do not disturb that conclusion. *See* OAR 115-010-0090; OAR 115-035-0050(2).

[9]The Association has not disputed the District's assertion that it engaged in at least 90 days of bargaining as required under ORS 243.698.

(internal quotation marks omitted).[10] We construe statutes to give effect to all relevant provisions and not in a way that would render some provisions surplusage. *English v. Multnomah County*, 229 Or App 15, 32, 209 P3d 831, *adhered to in part on recons*, 230 Or App 125, 213 P3d 1265 (2009); *see also* ORS 174.010.

Before analyzing the text of ORS 243.698, it is useful to understand the context of related statutory provisions, including those governing the "traditional" bargaining process and the distinction between "strike-permitted" and "strike-prohibited" employees. Broadly speaking, the PECBA bargaining process is a series of carefully structured steps designed to help the parties identify and narrow their disputes. It begins with table bargaining and then moves to mediation, final offers, cooling off, and for strike-permitted employees, self help. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District Of Oregon*, Case Nos. UP-42/50-12, 25 PECBR 640, 658 (2013), *appeal pending* (quoting *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamamin v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 754 (2007)). For strike-prohibited employees, the PECBA bargaining process is largely similar, but "includes a final step of binding interest arbitration, rather than self help." *Federation of Oregon Parole And Probation Officers, Multnomah County Chapter v. Multnomah County*, Case No. UP-032-12, 25 PECBR 629, 635 (2013) (citing ORS 243.742).[11] "Although the final dispute resolution procedures of the PECBA bargaining process are different for strike-permitted and strike-prohibited employees, both procedures share the same goal, which is the signing of a collective bargaining agreement negotiated in good faith between public employers and the exclusive representatives of their employees." *Multnomah County*, 25 PECBR at 635 n 2.

ORS 243.698 was added to the PECBA in 1975 by way of SB 750. *See* Or Laws 1995, ch 286, § 13.[12] ORS 243.698 provides for an expedited process that applies to certain

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[10]We may also consider any applicable legislative history proffered by the parties, along with any pertinent legislative history that we independently have examined. *Gaines*, 346 Or at 171-72, 177-78. Here, neither party has proffered any such history, nor have we independently examined any. For a summary of "[t]he process used to achieve consensus" on Senate Bill (SB) 750, see "Henry Drummonds, *A Case Study of the Ex Ante Veto Negotiations Process: The Derfler–Bryant Act and the 1995 Amendments to the Oregon Public Employee Collective Bargaining Law*, 32 Will L Rev 69 (1996)." *Jefferson County v. OPEU*, 174 Or App 12, 24 n 6, 23 P3d 401 (2001).

[11]The steps of the traditional "bargaining process for strike-prohibited bargaining units are set out in ORS 243.712 and ORS 243.736 through 243.756." *Multnomah County*, 25 PECBR at 634. "Unless changed by agreement of the parties, they must table bargain for 150 days, and, if necessary, proceed through mediation, impasse, and the submission of Final Offers to the mediator and LBOs to the interest arbitrator." *Id.*

[12]ORS 243.698 was a small part of a much larger change in the PECBA. For a discussion on the scope of those changes from both management and labor perspectives, *see* Abernathy, John, Henry H. Drummonds, Paul B. Gamson, Nancy J. Hungerford, Andrea L. Hungerford, Howell L. Lankford, Randy Leonard, Lon Mills, Kathryn T. Whalen, and Tim Williams, *After SB 750: Implications of the 1995 Reform of Oregon's Public Employee Collective Bargaining Act*, LERC Monograph Series No. 14 (1996).

negotiations during the term of an agreement. *Laborers' International Union of North America, Local 483 v. City of Portland, Bureau of Human Resources*, Case No. UP-027-12, 25 PECBR 810, 825 (2013) (quoting *In the Matter of the Joint Petition for Declaratory Ruling Filed by Medford School District 549C and Oregon School Employees Association Chapter 15*, Case No. DR-2-04, 20 PECBR 721, 724 (2004)). Specifically, the expedited process of ORS 243.698 applies only in "special circumstances," such as a proposed mid-term change that "concern[s] a condition of employment that is a mandatory subject of bargaining not covered by the existing agreement." *City of Portland*, 25 PECBR at 825; *Medford School District 549C*, 20 PECBR at 727; *accord In the Matter of the Petition for Declaratory Ruling Filed by the Sandy Union High School District*, Case No. DR-4-96, 16 PECBR 699, 703 (1996); *see also* OAR 115-040-0000(2)(a). In all other circumstances, the "traditional" (*i.e.*, not expedited) process set forth in ORS 243.712 through ORS 243. 756 governs bargaining dispute resolution.

With that context in mind, we turn to the text of ORS 243.698, which provides, in relevant parts:

> "(1) When the employer is obligated to bargain over employment relations during the term of a collective bargaining agreement and the exclusive representative demands to bargain, the bargaining may not, without the consent of both parties and provided the parties have negotiated in good faith, continue past 90 calendar days after the date the notification specified in subsection (2) of this section is received.
>
> "* * * * *
>
> "(4) The expedited bargaining process shall cease 90 calendar days after the written notice described in subsection (2) of this section is sent, and the employer may implement the proposed changes without further obligations to bargain. At any time during the 90-day period, the parties jointly may agree to mediation, but that mediation shall not continue past the 90-day period from the date the notification specified in subsection (2) of this section is sent. Neither party may seek binding arbitration during the 90-day period."

In short, ORS 243.698 provides an expedited process for mid-term bargaining and corresponding dispute resolution procedures for the parties should they reach impasse. Specifically, rather than the 150 days of table bargaining required under the traditional bargaining process, the expedited process of ORS 243.698 requires only 90 days of such bargaining. Moreover, ORS 243.698 does not require a mediation period (although parties may jointly request mediation as part of the 90-day bargaining period) or a cooling-off period.

The statute does not expressly reference "strike-prohibited" or "strike-permitted" employees. It does, however, reference both a unilateral employer implementation (the traditional self-help "weapon" for an employer with respect to strike-permitted employees), as

well as binding arbitration (the traditional final stage of a bargaining dispute involving strike-prohibited employees).

The statute also does not expressly state that it intended to provide a different final dispute resolution process for strike-permitted and strike-prohibited employees than that provided elsewhere in the PECBA. The District, however, asks us to conclude exactly that—namely, that the 1995 statutory addition of ORS 243.698 sets forth a different final dispute resolution process for strike-prohibited employees (other than binding arbitration) when the expedited bargaining process applies.[13] As explained above and below, the District asserts that the legislature intended to create a "first-to-act" statutory scheme, in which, after bargaining for 90 days, either party may initiate binding interest arbitration when the dispute concerns a strike-prohibited unit. If it is a labor organization, however, that initiates binding arbitration, it may only invoke that process if the employer has not effectively "beaten it to the punch" by already implementing a final proposal.

In advancing this argument, the District relies on two provisions in ORS 243.698: (1) bargaining may not "continue past 90 calendar days" (in the absence of both parties consenting to continued bargaining); and (2) the expedited bargaining process shall cease after the 90-day bargaining period, with the employer permitted to "implement the proposed changes without further obligations to bargain." The District acknowledges, however, that ORS 243.698(4) also states that "[n]either party may seek binding arbitration during the 90-day period," thus limiting its authority in some circumstances to implement its proposed changes and instead submit the matter to binding arbitration.

The District seeks to reconcile the provisions allowing both employer implementation and binding arbitration with its "first-to-act" theory. Under that theory, an employer may always unilaterally implement its proposed changes after the parties have bargained for 90 days. An employer may also seek binding arbitration at that time. A labor organization may also seek binding arbitration after the parties have bargained for 90 days, but only if the employer has not *first* implemented its proposal. On the other hand, if the labor organization wins the implementation/binding arbitration "race," then the employer may not unilaterally implement its final proposal. In other words, according to the District, ORS 243.698 sets forth a statutory scheme for a unit of strike-prohibited employees in which, once the parties have bargained for 90 days, either party may petition for binding interest arbitration or the employer may implement its

[13]The District does not appear to argue that binding interest arbitration is available for strike-permitted employees if a labor organization seeks such arbitration before an employer implements its final proposal. Yet, that conclusion would appear to be the logical result of the employer's statutory interpretation. Specifically, if the District is correct that, at the end of the 90-day period set forth in ORS 243.698, it may choose to implement its final proposed changes or seek binding arbitration regardless of whether the employees at issue are strike-permitted or strike-prohibited, it would appear that strike-permitted employees would likewise be able to avail themselves of the option to strike or seek binding arbitration at the end of the 90-day period. As set forth below, we do not believe that the legislature intended such a radical restructuring of the PECBA in enacting the expedited bargaining process of ORS 243.698.

proposed changes. The dispositive factor in each case is which happens first. Thus, if the Association here had *first* petitioned for binding interest arbitration, then the District could not have implemented its proposed changes. However, because the District *first* implemented its proposed changes, the Association was prohibited from petitioning for binding interest arbitration.

We disagree with the District's statutory interpretation. ORS 243.698 is one section of a broad statutory scheme concerning collective bargaining rights of public employers, its employees, and labor organizations. *See* ORS 243.650 to ORS 243.782. As set forth above, the PECBA maintains several core provisions throughout, including the distinction between bargaining dispute resolutions for strike-permitted and strike-prohibited employees. The PECBA also expressly states that where, as here, "the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of labor disputes." ORS 243.742(1). "[T]o that end[,] the provisions of * * * ORS 243.650 to 243.782 * * * providing for compulsory arbitration, shall be liberally construed." *Id.* We do not believe that the District's "first-to-act" theory is consistent with that mandate or supported by the text and context of the PECBA as a whole. To the contrary, such an interpretation would undermine the legislative scheme that affords strike-prohibited employees binding arbitration as "an effective and binding procedure for the resolution of [bargaining] disputes." *Id.* Had the legislature intended to create something as unique as the District's statutory interpretation, something that has no other corollary in the PECBA and would be at odds with the PECBA's carefully-designed scheme for bargaining dispute resolution, it could have done so expressly.[14]

Thus, when read in context, we conclude that the legislature intended ORS 243.698 to provide an expedited bargaining process for those certain mid-term changes set forth above, but to retain the fundamental framework for such a process. In other words, after bargaining for 90 calendar days under ORS 243.698, the "expedited bargaining process" ceases and a public employer of a strike-permitted unit "may implement [its] proposed changes without further obligations to bargain." ORS 243.698(4). With respect to a strike-prohibited unit, however, "[n]either party may seek binding arbitration during the 90-day period," but either party may initiate binding arbitration after that period. *Id.* Thus, with a strike-prohibited unit, after the parties have bargained for 90 days, "the expedited bargaining process shall cease," and, at the initiation of either party, the final process of binding arbitration resolves any remaining dispute. Reading the statute in this manner gives effect to all of the language in ORS 243.698, in the context of the remaining provisions of the PECBA. *See* ORS 174.010 (our role in interpreting a statute is "simply to ascertain and declare what is, in terms or in substance, contained therein, not

[14]Additionally, ORS 243.698 includes a "Note" that it was "added to and made a part of 243.650 to 243.782 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation." The Preface to Oregon Revised Statutes explains that such a note "mean[s] that the *placement* of the section was editorial and not by legislative action." (Emphasis added.) This is yet an additional reason not to divorce ORS 243.698 from the rest of the PECBA, as the District's reading of the statute would effectively do.

to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all").

Finally, although we have concluded that the legislature's intent regarding ORS 243.698 is clear based on the text and context of the statute, and that, therefore, there is no need to resort to general maxims of statutory construction, we note that such maxims support our conclusion. *See Gaines*, 346 Or at 172 (if the legislature's intent remains unclear after examining text, context, and legislative history, we may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty). "Among those maxims is the principle that ambiguities in statutory language should be construed in such a way as to avoid 'an absurd result that is inconsistent with the apparent policy of the legislation as a whole.'" *State v. O'Donnell*, 192 Or App 234, 251, 85 P3d 323 (2004) (quoting *State v. Vasquez–Rubio*, 323 Or 275, 283, 917 P2d 494 (1996)). The District's statutory interpretation would produce such a result that is inconsistent with the policies of the PECBA as a whole, which are designed, *inter alia*, to: (1) develop "harmonious and cooperative relationships between government and its employees"; (2) "alleviate various forms of strife and unrest" by public employers recognizing "the right of public employees to organize" and fully accepting "the principle and procedure of collective negotiation between public employers and public employee organizations"; (3) remove certain recognized sources of strife and unrest "by encouraging practices fundamental to the peaceful adjustment of disputes arising out of differences as to wages, hours, terms and other working conditions, and by establishing greater equality of bargaining power between public employers and public employees"; and (4) afford an alternate, expeditious, effective and binding procedure for the resolution of labor disputes "where the right of employees to strike is by law prohibited."[15] *See* ORS 243.656, 243.742. Simply put, a "first-to-act" scheme as proposed by the District frustrates, rather than accomplishes, these policies.

In sum, we conclude that the text and context of ORS 243.698 did not authorize the District to change the *status quo* by unilaterally implementing its final proposal. Rather, because this bargaining dispute concerned strike-prohibited employees, the District was obligated to maintain the *status quo* until the completion of the entire bargaining process (and not just the 90-day expedited bargaining process), which, for these employees, includes binding arbitration. In other words, at the time of the unilateral change, the District had not exhausted its duty to bargain by merely completing the 90 days of table bargaining set forth in ORS 243.698. Rather, as explained above, the District's recourse (after bargaining for 90 calendar days) was to seek binding interest arbitration.[16] Because the District instead changed the *status quo* before exhausting its duty to bargain (*i.e.*, submitting unresolved mandatory subjects to binding arbitration), we will find that it violated ORS 243.672(1)(e).

[15]The District's interpretation also does not set forth how we would determine which party "won the race."

[16]The parties may, of course, jointly agree to continue bargaining in good faith. *See* ORS 243.698(1).

3. The District did not violate ORS 243.672(1)(e) or (f) by allegedly refusing to participate in an interest arbitration proceeding.

The Association next alleges that on approximately July 26, 2012, the District violated ORS 243.672(1)(e) and (f) by "refusing to proceed to interest arbitration." According to the Association, the District's refusal to participate in an interest arbitration proceeding constitutes a failure to bargain in good faith under ORS 243.672(1)(e) and also violates ORS 243.672(1)(f), which makes it an unfair labor practice for an employer to "[r]efuse or fail to comply with any provision of ORS 243.650 to 243.782."

On this record, however, we conclude that the Association has not established that the District "refused" to proceed with interest arbitration, as alleged. Specifically, the record establishes that on July 19, the arbitrator provided the parties with available dates for an interest arbitration hearing. On July 26, the Association responded with available dates. On that same day, the District suggested to the Association that the parties wait to set an arbitration date until this Board ruled on a Declaratory Ruling request that the District intended to make in the near future. The record does not establish that the Association objected to the District's request to delay setting the arbitration date before filing this complaint. The record also does not include subsequent communications or actions by the parties attempting to set, or of the District expressly refusing to set, an arbitration date. Under these circumstances, we conclude that the Association has not established that the District refused (on or about July 26) to proceed to interest arbitration, and we will dismiss this claim.[17]

4. The District did not violate ORS 243.672(1)(a) or (b) by removing the three bargaining unit employees from the Station Design Committee.

The Association also alleges that the District violated ORS 243.672(1)(a) and (b) by removing bargaining unit employees from the Station Design Committee as a result of employees' protected activities. Under ORS 243.672(1)(a), it is unlawful for a public employer to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights

[17]In *AFSCME Local 1246 v. Fairview Training Center, Mental Health Division, State of Oregon*, Case No. C-137/143-84, 8 PECBR 8011, 8015 (1985), *aff'd*, 81 Or App 165, 724 P2d 895 (1986), the Board stated that "[a] refusal to participate fully in the [binding interest] arbitration process is a refusal to comply with provisions of the [PECBA] and therefore is a violation of ORS 243.672(1)(f) or (2)(c)." In light of our conclusion above, we need not address whether *Fairview Training Center* was correctly decided. We leave that decision for another day. We unanimously agree, however, that once this Board initiated the interest arbitration process, the Association needed no further imprimatur from this Board to proceed with the arbitration that we had already initiated. That is because our rules expressly contemplate that a party may elect (albeit at its own peril) not to participate in an interest arbitration proceeding. In such circumstances, the arbitrator is not permitted to make findings of fact or issue an order "solely on the default of a party." OAR 115-040-0015(7)(o). Rather, the "arbitrator shall require the other party to submit such evidence as he/she may require for the making of findings of fact and [an] order." *Id.* Thus, the option to proceed *ex parte* with the interest arbitration that we initiated was and still is an option for the Association under OAR 115-040-0015(7)(o).

guaranteed in ORS 243.662." ORS 243.672(1)(a) includes "two distinct prohibitions: (1) restraint, interference, or coercion 'because of' the exercise of protected rights; and (2) restraint, interference, or coercion 'in' the exercise of protected rights." *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000). The Association alleges a violation of both prongs of subsection (1)(a).

To determine if an employer violated the "because of" prong of subsection (1)(a), we examine the employer's reasons for the disputed action. *Id.* at 623. In order to show a violation of the "because of" prong of subsection (1)(a), it is not necessary to demonstrate that an employer acted with hostility or anti-union animus, nor must a complainant prove that the employer was subjectively motivated by an intent to restrain or interfere with protected rights. A complainant need only show that the employer took the disputed action because an employee exercised a protected right. *Portland Association of Teachers and Bailey v. Multnomah County School District #1,* Case No. C-68-84, 9 PECBR 8635, 8646 n 10 (1986).

When we analyze an employer's actions under the "in" prong of subsection (1)(a), we focus on the effect of the employer's actions on the employees. If the employer's conduct, when viewed objectively, has the natural and probable effect of deterring employees from engaging in PECBA-protected activity, the employer commits an "in" violation. *Portland Assn. Teachers,* 171 Or App at 624. In an "in" claim, "neither motive nor the extent to which employees actually were coerced is controlling." *Id*. A violation of the "in" prong of subsection (1)(a) may be derivative because it is presumed that an employer who violates the subsection (1)(a) "because of" prong also violates the "in" portion of the statute. *Oregon Public Employes Union and Termine v. Malheur County*, Case No. UP-47-87, 10 PECBR 514, 521 (1988). An employer's actions may also independently violate the "in" prong, which typically occurs when the employer makes threats that are directed at protected activity. *Clackamas County Employees' Assn. v. Clackamas County,* 243 Or App 34, 42, 259 P3d 932 (2011).

We begin our analysis of the alleged "because of" violation by examining the record to determine the reason that the District removed the employees from the Station Design Committee. This is a fact determination. *Portland Assn. Teachers*, 171 Or App at 626; *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 741 (2004). Here, the parties put forward different reasons for the District's decision. The Association alleges that the District removed the employees from the Committee because the District found out during the April 25 bargaining session that a Committee member told Association President Malone that the District intended to proceed with the station changes or because of the Association's bargaining activities over the station changes. The District asserts that it removed the employees from the Committee in response to President Malone's threat that the Association would take action against the District if the District had further communications with bargaining unit employees about matters related to the Station 1 and 3 changes.

We conclude that the District removed the employees from the Committee in response to the Association's communications warning the District not to talk with employees about bargaining issues related to the Station 1 and 3 changes. In his February 27 letter, Malone accused the District of being involved in "borderline direct bargaining" activities with employees

regarding the changes to Station 1 and 3. He cautioned the District against talking with employees about anything related to the station changes that could be a mandatory bargaining subject and anything that affected the safety of staff, items currently covered by the parties' agreement, and changes that might adversely impact any bargaining unit employees. Malone also warned the District that the Association would take further action should District communications with employees over such matters continue to occur. In a subsequent verbal conversation with Wenzel and Spradley, Malone affirmed his concerns about discussions that the District was having with bargaining unit employees and again told the District to stop such discussions.

In the face of the Association's broad non-communication directive regarding the station changes, backed up by a warning of potential legal action, the District's assertion that it decided to remove the employees from the Design Committee in response to these communications is not only understandable, but convincing. Although the Association argues that Malone did not specifically reference the Design Committee members in his communications, Malone also neither identified the specific conversations that were the basis of his objections nor exempted the discussions with employees in the Design Committee from his directive. Malone only told Wenzel and Spradley that he objected to conversations that the District was having with employees about issues related to the changes to Station 1 and 3. Malone's demand to bargain was very broad, covering any mandatory topics related to Station 1 and 3 staffing, location, and operations. Because the Design Committee was addressing issues that could fall within this demand, the District reasonably concluded that Malone's February 29 letter and subsequent verbal direction to stop talking with employees about such matters applied to the Committee discussions. Indeed, given the Design Committee's focus, Malone's letter and verbal direction were essentially a demand to remove the bargaining unit employees from that Committee.

The Association asserts that the fact that the District removed the employees from the Design Committee only five days after a somewhat contentious April 25 bargaining session supports a conclusion that the employees were removed due to the protected activity during that meeting. A causal relationship may be "based on proximity in time between the protected activity and the employer's action, coupled with attending circumstances that suggest something other than legitimate reasons for the temporal tie." *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transit District*, Case No. UP-48-97, 17 PECBR 780, 787 (1998). Such attending circumstances are not present in this case.

The April 25 meeting was somewhat contentious and both parties certainly voiced their frustrations throughout the meeting. Yet, there is no evidence that the District's frustrations during the meeting were directed at the protected activity relied on by the Association. The Association's own notes show that Wenzel's frustration at the meeting was directed at the Association's failure to identify the mandatory subjects to be addressed in the bargaining and the voluminous information requests. Those notes show no negative response from the District regarding Malone's comment that the Design Committee members told him that the District was closing Station 1. In addition, because the Association failed to identify the specific issues it was seeking to bargain over during the April 25 meeting, the District's decision to remove the

employees from the Design Committee after that meeting to avoid communicating with them about potential bargaining issues is believable.

We also conclude that the District's reason for removing the employees from the Design Committee was lawful. The District did not act because the parties were bargaining over the station changes, but in direct response to the Association's directive to stop communicating about matters related to its bargaining demand with bargaining unit employees. Therefore, the District did not remove the employees from the Design Committee because of protected activity in violation of the "because of" prong of ORS 243.672(1)(a).

The District also did not violate the "in" prong of subsection (1)(a) in removing the employees from the Design Committee. Because we did not find a violation of the "because of" prong, there can be no derivative violation. In addition, we generally conclude that an employer's lawful conduct, when viewed objectively, would not have the natural and probable effect of chilling employees in the exercise of their protected rights. *See Oregon School Employees Association v. Lebanon School District No. 16C*, Case No. UP-53-91, 13 PECBR 292, 299 (1991), *citing to Oregon School Employees Association v. Morrow School District No. 1*, Case No. UP-39-89, 12 PECBR 398, 407 n 7 (1990). Here, the natural and probable consequences of the District's lawful conduct in removing the employees from the Committee as a result of Malone's direction to stop communicating about the station changes with employees, when viewed objectively, would not tend to interfere with, restrain, or coerce employees in the exercise of their protected rights in violation of ORS 243.672(1)(a). This allegation will be dismissed.

The District also did not interfere with the existence or administration of the Association in violation of ORS 243.672(1)(b) by removing the employees from the Design Committee. Under ORS 243.672(1)(b), it is an unfair labor practice for a public employer to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization." We have explained that subsection (1)(b) is concerned with the rights of the union itself. *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 22 PECBR 752, 794 (2008). We have concluded that the District removed the employees from the Committee in an attempt to comply with the Association President's request. Consequently, we do not conclude that such conduct interfered with the existence or administration of the Association. Therefore, the District did not violate ORS 243.672(1)(b) and we will dismiss this allegation.

Remedy

Because we have determined that the District violated ORS 243.672(1)(e) by implementing proposed changes in employment relations, we are required to enter a cease and desist order. ORS 243.676(2)(b). We will order the District to cease and desist from failing to bargain in good faith under ORS 243.672(1)(e). We will also order affirmative relief "necessary to effectuate the purposes of [the PECBA]." ORS 243.676(2)(c). The usual remedy for a unilateral change violation, besides a cease-and-desist order, is requiring the employer to restore the *status quo* that existed before the unlawful change. *Lebanon Association of Classified Employees v. Lebanon Community School District*, Case No. UP-33-04, 21 PECBR 71, 80

(2005). We see no reason not to order the "usual remedy" in this case. Accordingly, the District is ordered to rescind its unilaterally implemented changes regarding mandatory subjects, consistent with this order.

We will not order the District to post a notice of its wrongdoing. We generally order such a posting if we determine a party's violation of the PECBA was: (1) "calculated or flagrant;" (2) part of a "continuing course of illegal conduct;" (3) committed by a significant number of the respondent's personnel; (4) affected a significant number of bargaining unit employees; (5) significantly (or potentially) impacted the designated bargaining representative's functioning; 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), *rev den,* 296 Or 536, 678 P2d 738 (1984). Not all of these criteria need be satisfied to warrant posting a notice. *Oregon Nurses Association v. Oregon Health & Science University,* Case No. UP-3-02, 19 PECBR 684, 685 (2002). The District's violation of the law does not satisfy the criteria for posting a notice of its wrongdoing.

ORDER

1. The District violated ORS 243.672(1)(e) when it unilaterally changed the *status quo* regarding mandatory subjects of bargaining. The District shall cease and desist from violating ORS 243.672(1)(e) and shall restore the *status quo ante* consistent with this order.

2. The other claims are dismissed.

DATED this 20 day of December 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-027-12

(UNFAIR LABOR PRACTICE)

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 483, Complainant, v. CITY OF PORTLAND, BUREAU OF HUMAN RESOURCES, Respondent.	)	ORDER ON RECONSIDERATION

On November 5, 2013, this Board issued an order holding that the City of Portland, Bureau of Human Resources (City), violated ORS 243.672(1)(e) when it increased the maximum number of annual work hours of Seasonal Maintenance Workers (SMWs) without first bargaining with the SMWs' exclusive representative, Laborers' International Union of North America, Local 483 (Union).[1] In doing so, we concluded that the Union's complaint was timely. 25 PECBR 810 (2013).

On November 19, 2013, the City filed a motion for reconsideration with respect to our conclusions that: (1) the complaint was timely; and (2) the City had violated ORS 243.672(1)(e) when it unilaterally increased the annual hours of SMWs.[2] On December 16, 2013, the Union

[1]We also dismissed numerous other claims made by the Union.

[2]The City's reconsideration motion includes a number of objections regarding "omissions" and "deletions" of factual findings contained in the Recommended Order. Rather than respond point-by-point to each assertion, we address those objections that appear to be most significant to the City and that are relevant to our ultimate conclusions of law. Any objection to a finding of fact that we do not specifically respond to in this order has been considered and rejected.

First, the City contends that we omitted "critical findings of fact" regarding the Union's belief that the HRARs were "irrelevant" with respect to the contractual number of hours that SMWs could work in a calendar year, and that, therefore, the Union did not believe that it needed to strictly monitor revisions

objected to the City's motion and asked us to adhere to our order. We grant the City's motion for reconsideration, but adhere to our prior order, as supplemented herein.

Timeliness

As set forth in more detail in our prior order, a complaint is timely under ORS 243.672(3) so long as it is filed within 180 days of when a complaining party "knows or reasonably should know that an unfair labor practice has occurred." *Rogue River Education Ass'n v. Rogue River School*, 244 Or App 181, 189, 260 P3d 619 (2011). That determination "presents a factual question that requires case-specific analysis." *Id.* at 190.

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to the HRARs. We do not see how the inclusion of these facts (that the Union did not believe that the HRARs gave the City *carte blanche* to increase the maximum annual hours of SMWs) advances the City's position or our decision. Presumably, these facts, and others that the City believes should have been included in our order, show that "the Union's conduct was patently unreasonable." The City's assertion represents a key misunderstanding with respect to our analysis of whether a complaint is timely. Specifically, whether a complaining party's "conduct" is reasonable or unreasonable is not necessarily dispositive of whether a complaining party reasonably should have known on a date certain about the commission of an unfair labor practice. Rather, we determine whether, in light of the unfair labor practice(s) alleged in the complaint, a complainant reasonably should have known of the occurrence of the alleged unfair labor practice(s). There is a difference. For example, the City may well be correct that the "conduct" of Richard Beetle was "unreasonable" when he did not immediately open, read, and seek clarification regarding the City's notices of HRAR revisions, given that Beetle was the Union's designated representative to receive notification of HRAR changes. Such a finding does not necessarily establish, however, when the Union reasonably should have known of the City's unlawful conduct. As we previously explained (and reiterate below), even if Beetle had immediately read the City's November 10, 2011 e-mail, the Union could not be held to reasonably have known that the City had committed the alleged unfair labor practice because that e-mail did not sufficiently convey the City's intention to apply the HRAR revisions to represented SMWs without bargaining with the Union. Thus, the reasonableness (or lack thereof) of Beetle's conduct is not dispositive as to when the Union reasonably should have known that the City had decided to increase the hours of SMWs without first bargaining with the Union.

Second, a large number of the City's assertions in its reconsideration motion reflect the City's position that our order misunderstood the scope and application of the HRARs. As we explained in our prior order, however, our charge is determining whether the City violated ORS 243.672(1)(e), an inquiry that is determined by the PECBA, not the City's self-authored HRARs. The City may obviously view the scope and application of its HRARs in any way that it chooses. The City may also choose to include in its HRARs when the City believes that a collective bargaining agreement "controls" a condition of employment, and when the City believes that its HRARs govern that same condition of employment. Our independent analysis, however, of whether the City's unilateral change violates the PECBA is not tethered to the HRARs or the City's own belief system concerning the scope and application of its HRARs. By way of example, the HRARs could state that the terms of the HRARs always control in the event of a conflict with a collective bargaining agreement, or that the City does not need to bargain over mandatory subjects of bargaining. Such HRAR provisions would not be controlling on this Board in determining the merits of an unfair labor practice complaint.

To agree with the City that the Union's complaint was untimely, we would need to conclude that by November 10, 2011, the Union reasonably should have known that the City had decided to increase the maximum annual hours of SMWs without bargaining with the Union. To reach that conclusion, we would need to find that the Union reasonably should have known that a November 10, 2011 mass e-mail sent by the City to all City employees, which was copied to, among others, designated representatives of various labor organizations that represented City employees (including the Union), informed the Union that the City had decided to increase the maximum annual hours of SMWs, and that the City would not bargain with the Union over the increase of hours. In its reconsideration motion, the City urges that we should reach precisely that conclusion based on the following chain of thought: (1) the parties' collective bargaining agreement permitted the City to unilaterally increase the maximum annual hours of SMWs by way of amendments to its HRARs; (2) the City notified the Union in the November 10, 2011 e-mail that it had made changes to the HRARs; (3) a "reasonably prudent union" would have, therefore, reviewed the HRAR changes that day; (4) upon reviewing the HRAR changes, a reasonably prudent union would have understood that same day that the increase in hours for "casual/casual other employees" was intended to apply to SMWs because SMWs were "casual/casual other employees"; and (5) that the City would not bargain over those changes.

As explained in our prior order and further explained below, we disagree that the parties' collective bargaining agreement authorized the City to unilaterally increase the SMWs' maximum annual hours. Anna Kanwit, the City's Director of the Bureau of Human Resources (BHR),[3] specifically testified that the City would have bargained over the increase had the Union made a "timely" (from her perspective) demand to bargain. That admission reflects that the City itself did not believe that it had the contractual authority to unilaterally increase the hours of SMWs. Moreover, during the bargaining over the parties' most recent contract, the parties agreed that the annual maximum hours would remain at 1,200. The language that the City relies on—that the SMWs would be limited to "a maximum number of hours per calendar year as defined by the [HRARs]"—does not state that the City could unilaterally increase those hours or that the Union was waiving its right to bargain over any such proposed future increase. Thus, we disagree with the fundamental premise of the City's argument, from which its analysis flows.

Moreover, we continue to conclude that the City's November 10, 2011 e-mail did not sufficiently explain that the City intended to apply the HRAR increased hours for "casual/casual other employees" to SMWs. In short, the City could have made the exact same changes to the HRARs with no intent to apply those changes to SMWs, and it was objectively reasonable that the Union did not know of the City's decision to apply those changes to the SMWs until at least November 14, 2011, when the City first made that intention express. Indeed, when the City advised the Union on November 14 that it would be applying the HRAR changes to the SMWs, the City also informed the Union that those same changes would apply to casual employees in the Recreation Department, which happened to be the department that motivated the HRAR changes. Thereafter, however, the City rescinded its announced decision that the HRAR changes

[3]As explained in our earlier order, Kanwit held this position since May 2012 and previously served as the Assistant Director of BHR from 2000 until 2012.

would apply to those Recreation Department employees.[4] This supports our conclusion that the sweep of the HRAR changes, including to what employees those changes would or would not apply, was not objectively clear based on the November 10, 2011 e-mail (or possibly even based on the November 14 e-mail, given the City's subsequent rescission of its announcement that the HRAR changes would apply to certain Recreation employees).[5]

Therefore, as supplemented in this order, we adhere to our previous determination that the Union's complaint is not barred by ORS 243.672(3).

Unilateral Change

Citing footnote 16 of our prior order, the City contends that we "refused to reach the merits of [its] affirmative defense that the contract authorized it" to unilaterally increase the maximum hours for SMWs, "apparently because the City did not denominate this defense specifically as 'waiver.'" The City contends that it was not required to designate its "contract" defense as a "waiver" because at the time that it answered the complaint, this Board "recognized a general contract affirmative defense to a (1)(e) allegation."

The City misunderstands the import of our prior order, which stated that "[w]hen defending against a unilateral change complaint on the grounds that there is express contract language, and/or that bargaining has been completed, the proper defense is waiver." 25 PECBR at 825 (quoting *Oregon School Employees Association v. Bandon School District #54*, Case Nos. UP-26/44-00, 19 PECBR 609, 624 (2002)). We added that under our waiver analysis, "such an alleged contractual waiver must be clear and unmistakable," and that the court in *Assn. of Oregon Correction Emp. v. State of Oregon*, 353 Or 170, 182-85, 295 P3d 38 (2013) (*AOCE*) concluded that our waiver analysis was not legally erroneous. 25 PECBR at 825. We then explained that the City had not (1) argued that the contract language on which it relied satisfied the "clear and unmistakable" standard, or (2) asked us to revisit our waiver analysis. *Id.*

Thus, we did not, as the City appears to believe, refuse to address the City's "contract authorization" defense because it was not pleaded as an affirmative defense. Rather, we addressed the merits of the defense and concluded that the contract language relied on by the City did not satisfy the "clear and unmistakable" standard, and that the City had not argued as such.

On reconsideration, the City urges us to conclude that the contract clearly and unmistakably waived the Union's right to bargain over changes to the SMWs' hours.[6] According

[4]The City asserts that our prior order wrongly concluded that it applied the HRAR changes to Recreation staff. That is not what our prior order concluded; rather, we concluded that the City's November 14, 2011 e-mail stated that the HRAR changes *would* be applied to Recreation staff.

[5]As explained in our prior order, because the complaint is timely using the November 14, 2011 e-mail date, we need not, and do not, decide whether a later date is the more appropriate date by which the Union should reasonably have known of the alleged unfair labor practice.

[6]Although we generally will not consider arguments raised for the first time on reconsideration when those arguments could have been previously raised, we will address the City's argument in this case

to the City, Article 1.2 of the current (2011-2014) SMW collective bargaining agreement[7] establishes such a clear and unmistakable waiver. That article states, in relevant parts: "[a] Seasonal Maintenance Worker may be employed for a limited duration for a maximum number of hours per calendar year as defined by the City's [HRARs]. Currently the maximum number of hours is 1200."[8]

The City contends that the first sentence establishes its right to unilaterally change the maximum hours for SMWs by way of the HRARs, and that the second sentence "merely recognize[s] the maximum hours in the HRARs at the time [that] the parties negotiated the most recent contract." The City argues that, together, these two sentences establish a clear and unmistakable waiver by the Union of its right to bargain over potential changes to the SMWs' hours. We disagree with the City's contention. Specifically, the cited language does not mention changes to the HRARs or bargaining over such changes, much less clearly and unmistakably state that the Union is waiving its right to bargain over any such future changes during the term of the agreement.[9] We conclude that, whatever might be said of the cited language, it falls well

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due to the special circumstances regarding our contract-waiver analysis and the timing of this case. Specifically, at the time that the City filed its answer (December 11, 2012) to the second amended complaint, the Court of Appeals had rejected the Board's contract-waiver analysis, which the Board had adopted in 2002 in *Bandon School District #54*. *See Assn. of Oregon Corrections Emp. v. State of Oregon*, 246 Or App 477, 479, 268 P3d 627, 628 (2011), *rev'd*, 353 Or 170, 295 P3d 38 (2013). Indeed, the City relied heavily on that Court of Appeals opinion in its January 25, 2013 closing brief to the ALJ. Approximately *one week before* the City submitted that brief, however, the Oregon Supreme Court in *AOCE* reversed the Court of Appeals opinion and affirmed the Board's "*Bandon*" approach as set out above and in our earlier opinion (*i.e.*, that waiver is the proper defense when relying on contract language to defend against a unilateral change complaint, and that such a waiver must be clear and unmistakable). Although the Oregon Supreme Court's *AOCE* opinion issued before the City filed its closing brief with the ALJ, the timing was such that we will consider the City's arguments on reconsideration that the contract language here satisfied the "clear and unmistakable" standard.

[7]In its reconsideration motion, the City contends that our order erroneously stated that the parties tentatively agreed to the 2011-2014 agreement on June 16, and that the correct date of that tentative agreement is June 24. The June 16 date was included in the Findings of Fact in the Recommended Order, and no party objected to that finding. The specific date of the tentative agreement is not pertinent to our analysis or ultimate conclusion.

[8]The article also included the following language: "[t]he parties recognize the maximum number of hours is limited by City Charter. Should the City Charter change, the parties agree to meet pursuant to ORS 243.698 to bargain over the impact of the change." As explained in our prior order, the parties agree that this language is obsolete in that it refers to a section of the City Charter that has not existed since 2007. Thus, that language is not pertinent to our analysis, and the City does not rely on that language to establish its defense of contractual waiver.

[9]We note again that the City's argument was contradicted by Kanwit, who testified that the City would have bargained with the Union over changes to SMWs hours had the Union, from her perspective, timely demanded to bargain. Although Kanwit's testimony does not determine the City's bargaining obligation under the agreement, it reflects that the City's contractual-waiver argument was contradicted by that testimony.

short of establishing a "clear and unmistakable" waiver of the right to bargain over changes to the maximum hours of SMWs.[10]

In sum, as supplemented herein, we continue to conclude that the Union's complaint was timely, and that the City violated ORS 243.672(1)(e).

ORDER

1. The City's motion for reconsideration is granted.

2. We adhere to our prior order, as supplemented herein.

DATED this 31 day of December, 2013.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

[10]The City also argues that its position is supported by our prior order. According to the City, that order concluded that the Union's participation in the HRAR process was "advisory only." Thus, by the City's reasoning, we determined that the contract language unambiguously authorized the City to change the SMWs' hours without first bargaining with the Union. The City misunderstands our prior order, which merely recited how *the City's HRARs* "characterize any labor representative participation in the rulemaking process." We did not independently make any such assessment, but rather cited the language in the HRARs, which so characterized a union's participation. As noted elsewhere in this order, our determination of whether the City violated ORS 243.672(1)(e) is not dictated by the HRARs.