EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-064-12

(UNFAIR LABOR PRACTICE)

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| OREGON AFSCME COUNCIL 75, LOCAL #3997, Complainant, | ) | |
| v. | ) | RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |
| DESCHUTES COUNTY, Respondent. | ) | |

Giles Gibson, Legal Counsel, AFSCME Council 75, Portland, Oregon, represented Complainant.

Christopher D. Bell, Legal Counsel, Deschutes County, Bend, Oregon, represented Respondent.

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On December 18, 2013, Administrative Law Judge B. Carlton Grew issued a recommended order in this matter. The parties had 14 days from the date of service in which to file written objections. *See* OAR 115-010-0090; OAR 115-035-0050(2). Neither party filed objections.

When neither party objects to a recommended order, we generally adopt the recommended order as our final order, and we consider any objections to that order unpreserved and waived. *International Brotherhood of Electrical Workers, Local Union No. 659 v. Eugene Water & Electric Board,* Case No. UP-008-13 (January 2014). The final order is binding on, and has precedential value for, the named parties only. We do not publish the recommended order because it would not be of benefit to anyone other than the named parties.

ORDER

1. The Board adopts the recommended order as the final order in this matter.

2. The complaint is dismissed.

DATED this 28 day of January 2014.

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.

I agree with the ALJ's recommended order holding that the complainant failed to meet its burden of proof that the County committed an unfair labor practice as alleged in the complaint. As a result, I concur with the majority's decision to dismiss the complaint. However, for the reasons set forth in *International Brotherhood of Electrical Workers, Local Union No. 659 v. Eugene Water & Electric Board,* Case No. UP-008-13 (January 2014), I continue to believe that this Board should not adopt recommended orders on a non-precedential basis merely because neither party filed objections.[1]

Jason M. Weyand, Member

[1]This is the last concurrence I will write on this procedural topic, as I am in the minority on the issue and there is nothing to be gained by continuing to tilt at this particular windmill. However, in cases where the recommended order being adopted is inconsistent with the Public Employees Collective Bargaining Act, I will continue to dissent from the majority opinion on the merits of the underlying dispute.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-008-13

(UNFAIR LABOR PRACTICE)

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| INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 659, | ) | |
| Complainant, | ) | |
| v. | ) | RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |
| EUGENE WATER & ELECTRIC BOARD, | ) | |
| Respondent. | ) | |

Paul C. Hays, Attorney at Law, Portland, Oregon, represented Complainant.

Jeffery J. Matthews, Attorney at Law, Eugene, Oregon, represented Respondent.

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On December 3, 2013, Administrative Law Judge (ALJ) Larry L. Witherell issued a recommended order in this matter. The parties had 14 days from the date of service in which to file written objections. *See* OAR 115-010-0090; OAR 115-035-0050(2). Neither party filed objections.

When parties do not file objections, they fail to preserve challenges to a recommended order and lose the opportunity to present argument to the Board. *See* OAR 115-010-0090; OAR 115-035-0050(2) and (3)(a)*; International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-049-12, 25 PECBR 871, 880 (2013) (exercising our discretion to adopt the ALJ's conclusions where no objections regarding those conclusions were preserved); *Jackson County Sheriff's Employees' Association v. Jackson County Sheriff's Department,* Case No. UP-023-11, 25 PECBR 449, 459 (2013) (as neither party objected to a portion of the ALJ's conclusions, we considered any objections to that portion of the conclusion waived). Although the Board must issue a final order, we need not draft a completely new order. Thus, where, as here, parties do not file timely written objections to a recommended order, we will exercise our discretion to deem any objections waived and unpreserved, and we will

generally adopt the recommended order as our final order. *See Klamath County Fire District #1*, 25 PECBR at 880-81; *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 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).[1] Our caveat in situations such as this is that the final order is only binding on the named parties, and we will not consider such orders precedential in cases involving other parties.

Despite the lack of any objections to the ALJ's recommended order, which concluded that no unfair labor practice was established, our dissenting colleague disapproves of our approach requiring parties to comply with our longstanding rules concerning objections to a recommended order. *See* OAR 115-010-0090; OAR 115-035-0050(2).[2] Rather, the dissent would have members of this Board act as if objections had been filed whenever a particular member takes issue with a recommended order to which neither party has objected. Presumably, even where a party did file objections, the dissent would have this Board expand those objections as we see fit. For the following reasons, we do not believe the dissent's approach to be a wise one.

To begin, our approach honors our longstanding rule that parties have 14 days to file specific written objections to a recommended order. Under the dissent's approach, that rule is rendered meaningless because everything is preserved for our review, regardless of whether any objections, timely or untimely, are filed. We see little purpose in requiring parties to object to a recommended order (as our rules require), and then essentially telling the parties that there is no need to file any objections because everything is purportedly "fair game" on Board review. Indeed, such an approach undermines a fundamental principle of a preservation requirement, which is to promote fairness to both parties in making and responding to arguments.

The dissent proposes to cure this lack of fairness by "providing the parties with notice of the Board's concerns" whenever the Board is contemplating a possible reversal of an

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[1]In *Fred Meyer Stores*, the "preservation" rule at issue was announced in an adjudication of a workers' compensation claim, rather than through the formal rulemaking process. "Agencies generally may express their interpretation of the laws they are charged with administering either by adjudication or by rulemaking, or both." *Trebesch v. Employment Division*, 300 Or 264, 273, 710 P2d 136 (1985). *Accord Centennial School Dist. No. 28J v. BOLI*, 169 Or App 489, 508, 10 P3d 945 (2000). As we explained in *Klamath County Fire District #1*, we long ago adopted rules requiring that objections to a recommended order be filed and served on other parties within 14 days. As also explained in that case, we have authority under ORS 243.766(3) to "[c]onduct proceedings on complaints of unfair labor practices * * * and take such actions with respect thereto as [we] deem[] necessary and proper." Consistent with our rules and the discretion afforded to us by statute, we generally (in the absence of good cause shown) will require a party to file timely objections to a recommended order in accordance with our rules in order to preserve any challenges to such an order.

[2]Our dissenting colleague notes that he is unaware, with exceptions noted, of this Board taking the approach in this case. We are similarly unaware of any prior Board taking the position advocated by the dissent—namely, reversing the conclusions of a recommended order despite no party filing any objections to that order.

unobjected-to recommended order. We would then, according to the new process advanced by the dissent, entertain "additional briefing and oral argument on the issues" that no party has objected to. Although acknowledging that "this approach would certainly add time to the process," that consequence is of little concern to the dissent because we will be "providing the parties with the opportunity to be heard on the issues [before] a decision."[3]

The dissent overlooks that the parties already have been provided "with the opportunity to be heard" on any and all issues contained in a recommended order. The parties have elected to forego any further opportunity by not filing any objections. The dissent, however, would have this Board express its dissatisfaction when litigants choose not to file objections to a recommended order by effectively having this Board act as if objections had been filed on behalf of one (or conceivably even both) of the parties. We do not believe this to be a proper role for this Board.

Moreover, this Board exists to resolve disputes. Where, as here, both parties in a contested case have elected not to file any objections to a recommended order, they have effectively indicated that they are satisfied with the resolution of their particular dispute. In our view, the dispute is resolved. It is not the role of this Board to continue "resolving" a dispute where the parties have indicated that one no longer exists.[4]

Additionally, we are not, as the dissent characterizes it, merely "reticent to disturb a recommended order's outcome when neither party objects." Rather, finding no objection to the order of the ALJ, we are adopting that order, with the understanding that neither party has preserved any challenge to that order. As previously described, we believe that we have the authority to establish our own rules regarding preservation of issues, so long as the standards do not exceed the grant of authority from the legislature to the agency. *See Fred Meyer Stores*, 218

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[3]Although the dissent suggests that we should "at a minimum, engag[e] in a formal rulemaking process" before following our already existing rule requiring parties to timely object to a recommended order, the dissent's unprecedented approach presumably requires no such "formal rulemaking process."

[4]The dissent's approach (which advocates effectively reversing an uncontested recommended order) presents additional problems. To begin, a party who prevailed in a recommended order is not aggrieved and therefore would not be objecting to that order. Under our current rules, if the nonprevailing party also does not file objections, there will be no oral argument and no opportunity (or reason) for the prevailing party to advocate why the recommended order should be adopted. Under the dissent's approach, it is entirely proper for this Board to then switch the prevailing and nonprevailing parties. As a matter of fairness, we do not agree with this approach, nor do we believe that the dissent's purported "answer" to this issue is compelling.

Additionally, this Board routinely tells parties at oral argument that we will not consider any issues that have not been objected to. We believe that it is inconsistent to hold parties who have complied with our rules (by filing timely objections) to a stricter standard than those who have expressly decided not to file any objections. Under the dissent's approach, a party who files timely objections is foreclosed from raising any non-objected-to issue before this Board, yet a party who has chosen not to object at all effectively preserves any potential issue for our review. We fail to see the wisdom of such an approach.

Or App at 504; *see also* ORS 243.766(3). Indeed, it is not uncommon for agencies to establish such rules (*see Fred Meyer Stores*) or for appellate courts to do so (*see* ORAP 5.45). To the extent that the dissent is suggesting that those administrative and judicial bodies are eschewing their obligations merely by requiring parties to identify any objections or exceptions to an underlying order, we disagree.

The dissent has also identified "several practical concerns" about our approach. First, with respect to these parties, the dissent contends that this order has not provided the parties with a resolution to the question presented. To the contrary, we have issued a final order adopting the recommended order as our own and dismissing the complaint in the absence of any objections to that order. The dissent asserts that although "the legal case may be over, the underlying dispute may not be resolved conclusively." This assertion identifies a fundamental misconception about what this Board does. The "legal case" *is* the "dispute" that we are asked to resolve. Thus, when the "legal case" is over, so is the "dispute," as far as this Board is concerned. [5]

We also take issue with the dissent's broad swipe that by requiring parties to follow our rules concerning objections, we are doing "little to promote labor peace." We are puzzled as to how our approach somehow disturbs "labor peace," as we are unaware of any labor unrest resulting from our approach.

The final point of the dissent merits little discussion. Respectfully, we disagree that the majority's approach is going to result in "decreased agency efficiency." To the contrary, we submit that the efficiency of the agency will be increased.

In sum, we believe that the approach we have taken provides optimum fairness to both parties, effectively uses our administrative resources, and honors our longstanding rules. We disagree with the dissent's contrary belief.

ORDER

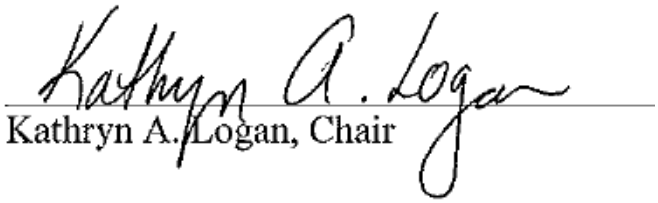
1. The Board adopts the recommended order as the final order in this matter.[6]

[5]We have limited the precedential effect of this order to the parties in this proceeding. The dissent believes that, by proceeding in this fashion, we are foregoing a teaching moment for other potential litigants. We see little problem with certain cases being limited to the parties involved in a dispute—not every case needs to provide "precedent" for other parties; we have plenty of cases that do precisely that.

[6]Because this case will be afforded no precedential value beyond these parties, we do not believe that publication of the recommended order would benefit the bar or the public.

2. The amended complaint is dismissed.

DATED this 14 day of January 2014.



Kathryn A. Logan, Chair

*Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

*Member Weyand Dissenting

I respectfully disagree with my colleagues that the complaint should be dismissed. To the contrary, I would conclude that the Respondent violated ORS 243.672(1)(e) by refusing to bargain with the Complainant. However, due to the procedural approach taken by the majority, and the clear declaration that this order has no precedential value outside of the parties, I will forego an extended discussion of the underlying merits as it would serve little purpose. Instead, I write to address my concerns about the procedure by which the majority reached their decision.

In their order above, my colleagues chose to adopt the recommended order's dismissal of the amended complaint without expressly agreeing with or incorporating the ALJ's analysis. Instead, they summarily adopt the recommended order because they deem any objections to that outcome waived or unpreserved.[7] The majority also announced that the final order would have

[7]In two recent cases, *Jackson County Sheriff's Employees' Association v. Jackson County Sheriff's Department,* Case No. UP-023-11, 25 PECBR 449, 459 (2013), and *International Association of Firefighters, Local 890 v. Klamath County Fire District #1,* Case No. UP-049-12, 25 PECBR 871 (2013), we adopted only a portion of the ALJ's underlying legal conclusions without incorporating or approving of the analysis itself based on the parties' failure to object to those conclusions. Despite my reservations about taking this approach, I joined in the opinions because the ultimate conclusions of law in those cases were in my opinion correct. My concerns were reflected in footnote 7 of *Klamath County Fire District #1,* which noted that I would have incorporated an analysis expressly finding that the subjects at issue were mandatory for bargaining rather than applying the preservation standard to reach our decision. *Id.* at 880. These two decisions are now being cited in support of the process from which I am dissenting. If it were possible to take a mulligan on those decisions, I would certainly do so and instead of joining the majority in this aspect of the decisions, I would write a concurrence noting my concerns.

no precedential value outside of the parties to the case. To my knowledge, other than the two cases cited above, this approach has never been taken by the Board in a contested case proceeding. For a variety of reasons, I do not believe that this practice is one in which this Board should engage absent a legislative change or, at a minimum, engaging in the formal rulemaking process.[8]

As an initial matter, I agree that, consistent with our rules, we may conclude that a party has waived its ability to raise arguments challenging the recommended order's conclusions if it fails to file timely objections. Should a party file untimely objections, we can clearly refuse to consider those objections. Where I part ways with the majority is in our view of what the Board's role should be if neither party objects to a recommended order, particularly in cases where there are questions about the validity of the legal conclusions contained in the recommended order. The majority believes it appropriate to adopt recommended orders on a non-precedential basis as set forth above, at least in certain cases. In cases where a recommended order is free from clear legal errors, I agree that we should adopt it as our final order if neither party objects. However, in those cases, I would continue to adhere to our historical practice of adopting the recommended order in its entirety and have that final order serve as future precedent.

Unlike the majority, however, I believe that we can and should modify clear legal errors in a recommended order even if no objections are filed. This approach could result in this Board making small modifications to a recommended order's legal analysis that do not disturb the ultimate outcome of the case, as is the current practice, or it could result in the Board reversing an ALJ's ultimate conclusions if the legal error is significant. My colleagues are understandably reticent to disturb a recommended order's outcome when neither party objects. But it is the three members of this Board who sign the final orders, and who are vested with the ultimate responsibility to ensure that cases are decided in a manner consistent with the Public Employee Collective Bargaining Act (PECBA). We are an agency of the State of Oregon and a quasi-judicial body. As such, I believe that we have an obligation to take every reasonable step we can to ensure that final orders we issue apply the PECBA correctly, regardless of whether a party files an objection to a recommended order.

If a recommended order were issued tomorrow that erroneously determined that a prohibited subject of bargaining was mandatory, then held that a public employer or labor organization violated the PECBA by refusing to bargain over that subject, I believe it would be incumbent on this Board to correct that legal error, even if, for whatever reason, neither party filed objections. Likewise, if a recommended order were issued dismissing a complaint after erroneously holding that a clearly mandatory proposal was permissive, I believe we would be obligated to correct the legal error when issuing our final order. Given the quality of our ALJs and most parties' willingness to file objections to conclusions of law with which they do not agree, this type of situation is unlikely to occur with any frequency. However, I personally cannot embrace a process that would result in Board members signing their names to final orders

[8]While we may have the legal authority to make this type of change via the contested case process, I do not believe that we should. Utilizing the formal rulemaking process would provide this Board the opportunity to hear from the public and the parties that appear before us on the pros and cons of such a change, as well as the opportunity to discuss alternative processes, including the process I have suggested below to deal with non-objector cases that may contain clear legal errors.

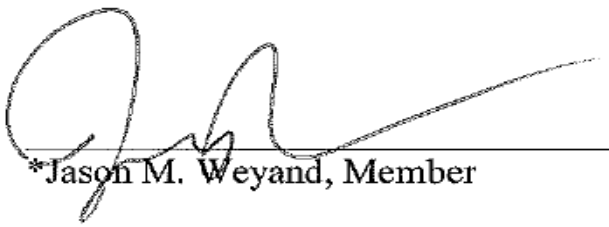
adopting recommended orders that they believe to be inconsistent with the PECBA. I believe that the Board has the authority to correct legal errors even absent objections from the parties, and should exercise that authority in cases such as the one before us today.

In cases where such a reversal is a possibility, I would provide the parties with notice of the Board's concerns and afford them an opportunity to submit additional briefing and offer oral argument on the issues. Although this approach would certainly add time to the process, it would ensure that the Board's final orders apply the PECBA correctly while still providing the parties with the opportunity to be heard on the issues prior to a decision.

I also have several practical concerns about the overall utility of the final order in this case. First, this order does not provide the parties with a resolution to the question of whether the Respondent was obligated to bargain over the subject at issue in the complaint. While the legal case may be over, the underlying dispute may not be resolved conclusively because the case was ultimately decided on a matter of procedure rather than on the merits. In my opinion, such a procedural victory for one party does little to promote labor peace. Also, this non-precedent setting case is by definition incapable of providing other parties that might be on the verge of a similar dispute with guidance that might help them avoid litigation. Nor does it inform the ALJs whether the Board found the recommended order's analysis correct or whether we disagreed with it. Should they be faced with the same issue a second time, instead of having clear precedent to follow, they will instead need to reinvent the wheel, resulting in decreased agency efficiency. I believe our traditional final orders that fully set forth the basis for our decision and the applicable legal analysis are better suited to the needs of the parties, the ALJs, and by extension, the public.

My colleagues disagree, characterizing their chosen approach as merely requiring adherence to our rules setting timelines for filing objections. They further claim that under my approach these rules would be "rendered meaningless," and parties would have no reason to file objections. I disagree. I do not believe that my approach or the majority's approach is inconsistent with the rules or renders them meaningless. The rules cited simply require the parties to file objections within 14 days of the recommended order's issuance. If no objections are filed within that time, the Board *may* disregard any late filed objections in making our final determination on the case. Nothing in these rules prohibit the Board from considering legal errors not raised in the objections of the parties. The only limitations set forth under our rules on the scope of our review of a recommended order are contained in OAR 115-010-0095(3) and OAR 115-035-0050(3)(c), which state that we may only consider information contained within the record.

For these reasons, I do not see any compelling reason to adopt the process put forward by the majority. Therefore, I cannot join my colleagues in the decision above, and I respectfully dissent from the order.



*Jason M. Weyand, Member

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-004-11

(UNFAIR LABOR PRACTICE)

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|---|---|---|
| MAUREEN WRIGHT,<br><br>Complainant,<br><br>v.<br><br>LOCAL 2277, PORTLAND COMMUNITY COLLEGE FEDERATION OF FACULTY AND ACADEMIC PROFESSIONALS, AFT, AFL-CIO,<br><br>and<br><br>PORTLAND COMMUNITY COLLEGE,<br><br>Respondents. | ) | RULINGS,<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND ORDER |

On December 1, 2011, Maureen Wright filed unfair labor practice complaints against Local 2277, Portland Community College Federation of Faculty and Academic Professionals, AFT, AFL-CIO (Federation) and Portland Community College (College). A hearing was held before Administrative Law Judge Peter A. Rader on November 7 and 8, 2012, and January 23, 2013, in Salem, Oregon. The record closed on February 15, 2013, following receipt of the parties' post-hearing briefs. The ALJ issued his Recommended Order on June 27, 2013. On November 7, 2013, the Board heard oral argument on Complainant's and Respondent Federation's objections to the Recommended Order.

Maureen Wright, Portland, Oregon, appeared *pro se.*

Richard H. Schwarz, Executive Director, AFT-Oregon, Portland, Oregon, represented Respondent, Local 2277, Portland Community College Federation of Faculty and Academic Professionals, AFT, AFL-CIO.

Michael J. Porter, Attorney at Law, Miller Nash, Portland, Oregon, represented Respondent Portland Community College.

On December 1, 2011, Wright filed an unfair labor practice complaint alleging that the Federation violated its duty of fair representation under ORS 243.672(2)(a) and that the College breached the parties' collective bargaining agreement in violation of ORS 243.672(1)(g). Wright filed an amended complaint on May 2, 2012, and the Federation and College filed timely answers.[1]

Where a complainant alleges both a duty of fair representation claim against the union and a breach of contract claim against the employer, the complainant must establish a breach of the duty of fair representation by the union before proceeding with the contract claim against the employer. *Stotler v. Teamsters Local 223 and City of Medford,* Case No. FR-03-12, 25 PECBR 70, 73 (2012). Accordingly, this case was bifurcated so that the claims against the Federation could be heard first. *Mengucci v. Fairview Training Center and Teamsters Local 223,* Case Nos. C-187/188-83, 8 PECBR 6722 (1984). If we do not determine that the Federation violated its duty of fair representation, then the claims against the employer will be automatically dismissed. *Id.* at 6734.

The issue is:

Did the Federation violate ORS 243.672(2)(a) by breaching its duty of fair representation in connection with its processing of Wright's grievances filed on February 28 and March 11, 2011?[2]

For the reasons stated below, we conclude that the Federation did not violate its duty of fair representation under ORS 243.672(2)(a). Accordingly we will dismiss the complaint against both respondents.

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[1]On May 2, 2012, Wright filed a 58-page amended complaint that included a wide-ranging list of factual allegations against both respondents. The purpose of the hearing, however, was to address the Federation's processing of her 2011 grievances. To the extent that her amended complaint addresses other issues, it is dismissed. Any findings of fact related to issues beyond the 2011 grievances are solely considered as background information.

Additionally, Wright filed timely objections to the Recommended Order and timely submitted a memorandum in aid of oral argument. Thereafter, she submitted additional filings. At oral argument, this Board explained that it would consider those additional filings only to the extent that they addressed issues raised in the initial objections. Any new issues or objections raised by the subsequent filings will not be considered.

[2]Although the Federation initially asserted an affirmative defense that Wright's complaint was untimely, it did not object to that portion of the Recommended Order concluding otherwise. Therefore, we do not address any timeliness defense.

## RULINGS

The ALJ's rulings have been reviewed and are correct.

## FINDINGS OF FACT

1. The College, a public employer, operates three post-secondary education facilities at the Cascade, Rock Creek, and Sylvania Campuses in Portland.

2. The Federation is a labor organization and the exclusive representative of a bargaining unit of faculty and academic employees.

3. Maureen Wright has been employed by the College for 17 years and is a member of the Federation's bargaining unit for faculty and academic employees. She is a full-time instructor assigned to the Rock Creek Campus, teaching computer classes in the Department of Business Administration (BA). She has a continuous appointment (the equivalent of academic tenure) in BA, which is generally awarded after a three-year probationary period. She also has a continuous appointment in the Department of Computer Information Systems (CIS), but she is primarily assigned to teach BA courses, and typically teaches only one course per semester in the CIS Department.[3]

### The Parties' Agreement

4. The Federation and College have been parties to a series of collective bargaining agreements (collectively, Agreement) the most recent of which have effective dates of September 1, 2009 through August 31, 2011, and September 1, 2011 through August 31, 2015.[4]

5. Article 1.14 defines the Federation membership to include full and part-time employees. Article 2.3 excludes casual, management staff, confidential, and supervisory employees from the bargaining unit.

6. Article 2.7 provides that "[m]anagement will attempt to meet the instructional, counseling and librarian needs of the College through the employment of full-time Faculty, when warranted by program needs and when economically feasible."

7. Article 8 allows for assignment overloads, which are assignments exceeding the workweek, work year, and workload definitions, but are a permissible way for an instructor to earn additional compensation. The assignment of overloads is a management prerogative.

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[3]In 2007, it was called the Department of Computer Instructional Science, but the acronym remains the same.

[4]The operative articles in both Agreements contain similar language, but because most of the events arose in 2010 and 2011, we use the numbering in the September 1, 2009 through August 31, 2011 Agreement.

8. Article 10.2 addresses the process for faculty transfers. Article 10.212 provides:

> "Normally, Faculty will be assigned to work locations for a full appointment year. However, employees may be reassigned to other work locations during the year to meet program needs due to emergencies or unforeseen events. Management will first seek qualified volunteers for the assignment. If no qualified employee volunteers, Management may assign an employee to the work location. When possible, decisions to reassign employees will also take into consideration the needs of the employees."

9. Article 10.22 provides that a continuous appointment employee who wants to be considered for transfer to another campus or administrative unit must submit a request in writing to the Human Resources Department by December 1 of the year preceding the transfer.

10. Article 10.23 addresses requests by faculty employees for a transfer, and states that a

> "[c]ontinuous appointment employee may also request transfer in order to fill an announced job opening in the same discipline or job classification at another campus or administrative unit. The employee's request will be taken into consideration before the location of the new employee's assignment is established. Such requests must be submitted prior to the closing date specified in the job announcement."

11. Article 11 addresses employee personnel files, and requires that documents relating to assessment or discipline be signed or initialed by the employee before placement in the employee file. Other management-initiated documents directed to be placed in the employee file will either be addressed or copied to the employee so that the employee is aware of what material is being filed.

12. Article 21 addresses discrimination claims based on an employee's status, which may include a person's "race, color, religion, ethnicity, use of native language, national origin, sex, marital status, height/weight ratio, disability, veteran status, age, or sexual orientation," as well as all civil rights laws of the City of Portland and the State of Oregon. Discrimination complaints are processed under a multi-step formula similar to grievances.

13. Article 21.23 provides that if the employee files a complaint of discrimination with any external public agency or with a State of Federal Court, the discrimination complaint procedure or the grievance shall automatically terminate.

14. Article 22 addresses discipline, which may only be imposed for just cause and is defined as written warnings, disciplinary probation, suspensions without pay, and dismissals.

15. Article 22.9 provides that notices of discipline must be provided to the employee, who shall acknowledge receipt before placement in the employee's personnel file. Article 22.22 states that, subject to a 12-to-24-month waiting period, an employee may request that certain kinds of discipline be removed from that file. Discipline may be challenged in accordance with the grievance procedures in Article 25.

16. Article 24 addresses reductions in force (RIF), which are defined as the layoff of full-time employees when employees' positions are eliminated due to a reduction or termination in funding for a special contract program; a discontinuance or reduction of programs due to enrollment decline or other financial reasons; or a Board-declared college-wide financial shortage.

17. Article 24.324 states that the Federation shall be responsible for maintaining seniority records for bargaining unit employees based on data provided by the Human Resources Department.

18. Article 25 sets out the grievance procedures for two types of grievances, individual and group, which are defined as allegations that a "specific and identifiable section of this Agreement has been violated." Article 25.17 requires that a grievance shall include the factual details of the violation and any requested remedy, and shall be signed by the grievant and a representative of the Federation, except in the case of a "Federation" (group) grievance, in which case a Federation signature is sufficient.

19. Article 25.19 requires individual grievances to be filed by the grievant or the Federation within 22 business days of the event that prompted the grievance, or within 22 business days of the grievant's knowledge of the event.

20. Article 25.2 sets out a five-step process for individual grievances, which begins at Step 1 with a meeting between the grievant and the administrative supervisor. Step 2 requires a written grievance to be filed with the administrative supervisor within 22 days. At Step 3, the written complaint must be submitted to the Campus Dean of Instruction, the Dean of Student Development, or the Director. At Step 4, the grievance is submitted to the Executive level, which could mean either the Campus President or an appropriate Executive with administrative responsibility. At Step 5, a grievant has 15 days to file for binding arbitration.

21. Article 25.3 sets out a four-step process for group grievances, which are filed by the Federation on behalf of a group of bargaining unit members who share the same grievance. Step 1 requires a meeting with the Director of Human Resources (HR) or designee. Step 2 requires a written grievance to be filed with the HR Director or designee. Step 3 is directed to the next Administrative level, and Step 4 goes to binding arbitration. An individual cannot file a group grievance, which requires the signature of a Federation official before the College will process it.

Background

22. In July 2006, Rock Creek Campus President Katherine Persson and HR Director Jerry Donnelly advised Wright that her pattern of sending lengthy, repetitive, and voluminous document requests directed to multiple College employees was consuming a great deal of time and resources because they lacked clarity, and were based on statements taken out of context. Donnelly

directed staff not to spend further time on her inquiries. He advised Wright to work with the Federation on her requests and told her that her continued refusal to follow normal labor/management processes could subject her to discipline for insubordination.

23. In 2006, the CIS department faced a funding shortage due to low enrollment. Consequently, the College invoked the RIF provision in Article 24 to reduce certain faculty positions and eliminate others. As part of the RIF, the College wished to eliminate dual appointments, which was a practice that allowed faculty members to hold simultaneous, continuous appointments in two different departments.

24. On March 8, 2007, the Federation filed grievances on behalf of Wright and another instructor, Delyse Totten, based on the potential loss of their dual appointments. Wright also sought to eliminate what she perceived as preferential CIS teaching assignments being given to unqualified instructors. The grievances were ultimately settled, but a separate agreement was negotiated that recognized Wright's and Totten's "continuous appointment status" in BA and CIS, but that also stated that Wright and Totten would now be assigned to teach full-time in BA. The agreement further stated that although their primary assignments were in BA, they would have a reasonable expectation of being assigned at least one CIS course per semester, subject to availability and approval by the Division Dean.

25. On May 30, 2007, HR representative Cheryl Belt sent an e-mail to Wright summarizing the April 12, 2007 grievance settlement regarding her teaching assignments. Belt wrote:

> "Maureen, on behalf of Reine Thomas and Katherine Persson, I am forwarding this response to follow-up on our meeting held on May 10th, 2007. While we cannot agree to other requests you made during that meeting, based on your request that day, we do offer in good faith the following statement which modifies paragraph 7 of the April 12, 2007 Grievance Response from Lisa Bledsoe:
>
> "We cannot agree to restore BA/CIS positions. However, in recognition of the fact that Delyse and Maureen have continuous appointment status in BA/CIS and that, although they are now and will continue to be assigned to BA positions and to teach BA courses, they may continue to have an expectation of receiving assignments in both disciplines, management is willing to assign them at least one CIS course as part of their regular teaching load effective fall term, 2007. Although assignment to at least one CIS course will be typical if conditions make it possible for them to teach in both disciplines, there is no guarantee that they will be assigned courses in both disciplines**.** The final decision regarding course assignments will be made by the appropriate Division Dean(s), according to Article 6.232. In addition, Dean Cheryl Scott has agreed to continue the practice of working with Maureen during Spring term of each year, in consultation with CIS Dean John McKee, to establish an annual projected schedule for the following academic year, as was done during Spring term 2006 for 06-07." (Emphasis omitted.)

26. Since 2007, Wright has asked the Federation numerous times to re-open the 2007 grievance settlement because she believed that she was being unfairly treated in her CIS teaching assignments. Based on the 2007 settlement agreement, it was the consensus of Federation officials and College personnel that, although Wright had achieved "continuous appointment status" in BA and CIS, the 2007 settlement agreement established the terms by which Wright might receive current and future course assignments in CIS.

27. In 2009-2010, Wright took a leave of absence under the Oregon Family Leave Act (OFLA) and the Federal Family Medical Leave Act (FMLA), which was later converted into a claim for accommodation under the Americans with Disabilities Act (ADA). The result is that Wright now teaches classes from her home. The College assigned Affirmative Action/Equity Director Claire Oliveros to manage Wright's working conditions for the 2011-2012 academic years.

28. On or about February 3, 2010, Wright filed a grievance against the College alleging that: (1) part-time faculty were being given CIS teaching assignments that should have been offered to her for the fall 2009 term; (2) she had been singled out for unfair treatment in her assignments; (3) she was denied the protections of the 2007 grievance settlement; and (4) she should be reimbursed for sick leave taken in 2009-2010. Although the 2010 grievance was untimely, the College met with her for a Step-2 meeting, to which she was accompanied by Federation Grievance Officer Frank Goulard. On March 18, 2010, Wright was notified that her grievance was denied as untimely, but she advanced it to Step 3 anyway, where it was denied again for the same reason and advanced no further.

29. HR Representative Cheryl Belt responded to Wright's grievance and found no record of discipline or threats of discipline in Wright's personnel file.

30. In February of 2010, Wright filed a gender-based discrimination complaint with the Bureau of Labor and Industries (BOLI). The complaint alleged that males were over-represented in the CIS department, which resulted in Wright being denied teaching assignments and employment opportunities. Among other things, Wright believed that she was unfairly passed over in her bid for the BA faculty chair position. BOLI's investigative report quotes Cheryl Scott, the Dean of the Business and Humanities at Rock Creek, as stating that Wright did not possess the qualities necessary to be department chair. BOLI dismissed the complaint.

31. In 2010, Wright filed a complaint with the Multnomah County District Attorney's Office alleging that the College had violated the public records law by failing to produce documents that she requested. Wright has since spent thousands of dollars of her own money for document requests.

32. On March 11, 2010, Donnelly reminded Wright of his previous admonition about sending excessive document requests and inquiries to multiple personnel that lacked clarity, were repetitious, were based on statements taken out of context, and were directed to College personnel who had no authority to respond to her requests. He repeated his advice to work with the Federation regarding future document requests and said that if she persisted in taking actions outside the appropriate labor/management processes, she could be subject to discipline for insubordination. He directed her to address all future inquiries to the Rock Creek BA Dean Scott.

33. During the 2011-2012 academic year, managers and supervisors were allowed to teach certain classes at the College. Dean Scott, and managers Corbett Gottfried, Samantha Hopf, Stephen Hopf, and Linda Monahan, taught lower division collegiate courses from 2010-2012, but were exempt from paying fair share dues.

34. Department chairs are members of the academic faculty bargaining unit to which Wright belongs. They do not process, or possess decision-making authority over, grievances filed by faculty members.

Facts Giving Rise to the Complaint

35. On January 27, 2011, Wright reported to the Federation that she had been threatened with discipline and unfairly denied CIS teaching assignments in violation of the 2007 grievance settlement agreement.[5] She requested that the Federation file a "series of grievances" and an unfair labor practice complaint (ULP) on her behalf, and attached a 19-page memorandum containing a topics index labeled "Overview, Cross References, Triggering Incident, Comparable: Precedents & Practices, Consequences of Triggering Incident, Conclusion - Follow-Up Requested, Applicable Excerpts from Collective Bargaining Agreement, and Excerpts from Unfair Labor Practices (ULP)."

36. Wright's complaint of threatened discipline was based on HR Director Donnelly's 2006 and 2010 communications regarding her excessive and repetitive inquiries and requests for documents from various College personnel, which she construed as an attempt to prevent her from filing grievances.

37. Federation Grievance Officer and biology instructor DeGrauw was assigned to assist Wright with her complaint. Although relatively new to the grievance officer position, DeGrauw investigated the alleged threats, but found no evidence of any discipline, or threats of discipline, in Wright's personnel file. He understood Donnelly's 2006 and 2010 e-mails to Wright as an effort to get her to follow the grievance process in the Agreement, not as a threat to prevent her from filing grievances or as discipline for engaging in protected activity.

38. Wright's complaint of unfair treatment was based in part on the CIS Department's decision to recruit nationally for two instructors, rather than to offer her one of the positions. She believed that her continuous appointment status in CIS entitled her to be considered for the job and that she had been unfairly denied the opportunity. Wright informed DeGrauw of this, but despite repeated requests from him to provide specific dates, names, and actions taken to support her allegation, she did not do so in a way that persuaded DeGrauw that a contract violation occurred.

[5]Unless indicated otherwise, all remaining events occurred in 2011.

39. On January 28, DeGrauw sent an e-mail to Wright asking for factual support for her allegations.[6] DeGrauw spoke to the Federation's Labor Relations Specialist Michael Cannarella and the former Grievance Officer Frank Goulard to find out what had happened in the 2007 grievances and concluded that Wright's current complaints were an attempt to re-open those matters, but that she lacked legitimate grounds for doing so. She had been assigned to teach one CIS course per semester, which was consistent with the 2007 grievance settlement. Nevertheless, DeGrauw offered to examine her claims if she could provide documentation of wrongdoing.

40. On January 29, DeGrauw suggested that if Wright wanted to obtain a full-time CIS position she should apply for a transfer through normal channels. He wrote:

> "I wanted to stress to you the importance of applying for the transfer through normal channels if what you want is a full-time position in CIS. Doing so and not getting the transfer will at least require a concrete action on the part of the college. If you request it they must give a reason why you did not get it. But you must do it in normal channels and in a timely manner or the contract can not even enforce [*sic*] you getting a response from the college. I can't remember what the deadline was but it is Monday or Tuesday I think, so if it is what you want put in for the transfer ASAP."

41. The CIS department was requiring Wright to submit her résumé and a form listing her qualifications, which she believed was unnecessary because she already held a full-time, continuous appointment in that department. She believed that the department had altered the rules to prevent her from getting the position and had refused to timely provide the necessary form.

42. On January 30, Wright sent a memorandum to HR Director Donnelly stating why she believed that she was entitled to the position and suggested that he arrange it to avoid a complaint. Later that day, she asked DeGrauw to prepare a grievance based on the denial of her request to be placed in the full-time CIS position.

43. On February 9, Wright and DeGrauw exchanged e-mails about the status of his investigation, which included a list of questions and instructions from Wright for DeGrauw to pursue with the College, most of which related to her belief that she was being denied a full-time CIS position. Some of the questions/directions involved another instructor's qualifications to teach CIS coursework, including a request for DeGrauw to obtain the job announcement, the instructor's application, interview notes, College expenditures for professional development, and copies of any and all release time or pay, or professional development that the instructor received. DeGrauw responded with a series of questions related to the events surrounding Wright's application.

44. On February 10, DeGrauw sent an e-mail to Wright explaining the transfer procedure based on his past experience, including the interview and supporting documentation process. Wright responded:

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[6]Because Wright is assigned to work from home, almost all communications between her and Federation personnel are via e-mail.

"I am glad to help you narrow the focus and avoid digressions to save you time. Thanks for letting me know that you are being distracted by your preparations for up-coming contract negotiations.

"To narrow the digressions, please abandon hypothetical speculations and false comparisons. Your experience with a transfer request is a false comparison.

"The narrow facts for my grievance are associated with the distribution of my full-time workload within the Computer Technology Division where I already have worked continuously in the CIS program.

"To clarify, I already have continuous status in the instructor classification and CIS discipline. My full-time regular workload has been continuous in the CIS Program from 1998 to the present. I requested a redistribution of my full-time workload. That is not a transfer. I already work within the CIS Program, a centrally administered District program. I am qualified."

45. On February 11, DeGrauw sent an e-mail to Wright informing her that he was still investigating her claim.

46. On February 17, Wright wrote to DeGrauw asking about his investigation and research regarding her allegation that Donnelly's communications were an attempt to prevent her from exercising her grievance rights.

47. On February 18, DeGrauw wrote to Wright stating that he did not believe that Donnelly had committed a ULP, but even if he had, the last operative event took place on March 11, 2010. DeGrauw wrote that because Wright did not communicate with him about Donnelly's statements until September 23 and did not provide the requested evidence until October 2010, the complaint was outside the filing period for filing grievances (22 days), or a ULP (180 days). After quoting from Donnelly's March 2010 e-mail, DeGrauw informed Wright that he did not believe Donnelly intended to prevent her from filing grievances, but was merely trying to get her to follow the contractual grievance process. DeGrauw's e-mail concluded:

"As for my discussions with an attorney, it was done over a break at an AFT training meeting dealing with exingency [*sic*] and arbitration law in October and the person I spoke with was the attorney that AFT had brought in to teach part of the course. I am sorry I do not remember her name, but I am sure I could find it. As your request for grievances were not timely my discussions were more for future knowledge and something that I was passing on to you.

"As for not following up or taking the matter seriously, to the contrary, I have spent a great deal of time and energy on an issue where there can be no filing done either of a ULP or a contract grievance because they were not brought forward in a timely manner.

"There will be no grievance or ULP filed at this time regarding this outdated material."

48. Later on February 18, DeGrauw sent an e-mail to Donnelly, which was copied to Wright, that was intended to clear up any misunderstanding. The e-mail asked Donnelly:

"[D]o you have any intent to deny Maureen Wright the ability to file an individual grievance, using the properly outlined procedures as defined in article 25.2 of the current PCCFFAP contract?

"* * * * *

"Do you have any intent on disciplining Maureen Wright for exercising her rights to file an individual grievance using the properly outlined procedures as defined in article 25.2 of the current PCCFFAP contract?"

49. DeGrauw followed up with a separate e-mail to Wright on February 18 stating that after speaking with the Division Dean and Human Resources, his understanding of the transfer protocols was only applicable to instructors already holding appointments in a department and, because she no longer held a continuous appointment in CIS, her application was denied. He also cited the language in language in Article 10 which states:

"'A continuous appointment employee may also request transfer in order to fill an announced job opening in the **same discipline** or job classification at another campus or administrative unit. The employee's request will be taken into consideration before the location of the new employee's assignment is established. Such requests must be submitted prior to the closing date specified in the job announcement." (Emphasis in original.)

DeGrauw's e-mail continues:

"As your request was from a different discipline (BA) I was surprised the transfer request was even considered. When I learned that a request for transfer was given to an employee in CAS, I thought there may have been some unfair treatment, but upon further investigation with the appropriate Division Dean and Human Resources, I have learned that there were three transfer applicants for the two positions in CIS (two males and one female). None of the three applicants were from CIS, but all the transfer requests were considered because all three applicants had, at one time, had continuous appointment assignments within CIS. The three applicants for transfer were treated equally in the evaluation process. Of the transfer requests made only one was approved, the two applicants whose requests were denied were given notice by the campus president, Linda Gerber as to the reasons for the denial in accordance with article 10.231 of the PCCFFAP current contract.

"I realize from your previous emails that you feel we are employees of the district and that therefore continuous appointment status makes us eligible to work anywhere in the college, but the truth of the matter is you used to have a split appointment in BA/CIS,[7] but that this was given up. I realize you may view your past decision as a mistake and may wish to rescind it, but the matter was revisited and grieved and settled several years ago and is over. It will not be revisited through the grievance process. While it is true you are continuous appointment your assignment/appointment is in BA, with the expectation of being able to teach at least one course in CIS per term. Your movement from BA to CIS would not just be a reassignment of teaching responsibilities within a department but a move from one discipline to another from your current assignment/appointment.

"There is no article within the contract that guarantees that an employee request for transfer will be guaranteed. The management retains the right to make instructional assignments in article 6.232 of the current PCCFFAP contract, which states;

"'Instructional assignments will be made based on student and program needs, the size of the available classrooms, the qualifications of the Instructor and, insofar as possible, the interests of the Instructor. The individual Instructor's preference shall be taken under advisement in making teaching assignments, provided the Instructor's timely requests are made in writing to the Division Dean.'

"This clause in the contract allows management to determine teaching assignments of individual instructors, and just because you request a reassignment of teaching assignments there is no guarantee that you will get it and this is true for all instructors at the college.

"Your quoting of sections of article 10.212 and the way you are presenting them is not an accurate interpretation of the contract. The sentence you quote most frequently is 'Management will first seek qualified volunteers for the assignment.'"

After referencing the context of the "whole article," DeGrauw continued:

"'Normally, Faculty will be assigned to work locations for a full appointment year. However, employees may be reassigned to work in other locations during the year to meet programs needs due to emergencies or unforeseen events. Management will first seek qualified volunteers for the assignment.'

"The transfer opportunities for which you applied were 'anticipated openings' and not 'emergencies or unforeseen events' so it rules out the necessity of asking for volunteers.

[7]As can be seen in this e-mail, the parties (and their representatives) often used varying terms to describe Wright's unusual situation. Although the terms that the parties used were, at times, confusing, it is clear that, under the terms of the 2007 agreement, Wright had continuing appointment status in both BA and CIS, but only a full-time assignment in BA, with the expectation of being offered at least one CIS course per semester.

"The purpose of the article is to protect members of the bargaining unit from being placed in an appointment that may disrupt their lives from what the assignment was they had originally received, without seeking others who are willing to make the move.

"There is no evidence that the college was in violation of the contract in a manner that was detrimental to any members of the bargaining unit regarding your recent request for a transfer from BA to the CIS department and there is no evidence that the college treated you in a manner different from other members of the bargaining unit regarding this transfer request.

"Without evidence to the contrary, I will not be filing a Federation grievance and will consider the matter closed."

50. On February 22, Donnelly responded to DeGrauw's questions regarding his statements to Wright about her grievances and potential discipline. Donnelly wrote:

"Thanks for your message. I apologize for not responding yesterday, but I wanted to take the time to review the March 11, 2010 letter to Ms. Wright to see if I could understand how she reached those conclusions as they certainly were not my intent.

"I have reviewed the letter this afternoon and can unequivocally respond to your questions. I did not then, and do not now, have any intent to deny Maureen Wright the ability to file an individual grievances, using the properly outlined procedures as defined in article 25.2 of the current PCCFFAP contract; and, I did not then, and do not now, have any intent on disciplining Maureen Wright for exercising her rights to file an individual grievance using the properly outlined procedures as defined in article 25.2 of the current PCCFFAP contract."

51. On February 28, DeGrauw sent Wright an e-mail in which he restated why he, Cannarella, and former Grievance Officer Goulard, were all of the opinion that Donnelly did not commit a ULP in his communications to her in 2006 and 2010. DeGrauw wrote:

"I am writing to let you know that the Federation is very interested in helping you to pursue any timely grievances or Unfair Labor Practice (ULPs). One of the things that we have to keep in mind is that the contract works both ways, we can use it to force management to abide by the rules of the contract, but management can also force us to abide by the contract.

"* * * * *

"You have not been denied your right to participate in grievances as the procedure has been outlined in the Federation contract. You were not threatened with discipline for abiding by the contract, but due to excessive emails to individuals who were outside the procedures established by the contract in article 25. As I said at this point (five years and one year later, respectively) I can only assume this was the case as you provided me with no documentation to the contrary, you did not grieve them at the time, nor did you file an ULP in a timely manner.

"* * * * *

"You have been told the matters you recently brought forward are outside the timelines for filing so I will consider these matters closed; please do not bring them forward again."

52. Approximately one hour after DeGrauw sent Wright that e-mail, Wright filed an unsigned, 18-page grievance with the College (2/28 grievance) with the heading "Don't Ask, Don't Tell, Exclude, Step 1 Article 25.3 Group Grievance; Step 1 Article 25.2 Individual Grievance Procedure; Step 1 Article 21 Nondiscrimination" that listed a number of Articles from the parties' Agreement and a narrative of alleged wrongdoing and discrimination by the College.

53. She listed Donnelly, Oliveros, Scott, Charmagne Ehrenhaus (Dean of Computer Information Systems), and Scott Quinn (CIS Department Chair) as respondents. Copies were sent to the President of the Faculty Federation, Michael Morrow, and to DeGrauw and Cannarella.

54. Before filing the grievance, Wright had not shown the grievance to anyone at the Federation, had not asked for their input, and had not informed them that she was filing it. In addition, she labeled it as a group grievance even though she was the only identified grievant.

55. Her grievance alleged that the College had discriminated against her in violation of the Agreement by preventing her from applying for professional development funds; denying her teaching opportunities; giving preferential teaching assignments to managers over faculty; and by denying her access to information necessary to compete for open teaching positions, the latter being a violation of Oregon's public records and open meetings law. She objected to having to re-qualify to teach CIS courses.

56. Wright's requested remedies included re-opening the 2007 and 2010 grievances; ensuring her access to equal job opportunities and assignments; receiving dollars and time for her professional development; receiving public meeting notices, agendas, and minutes of various groups; memorializing these remedies using measurable behavioral performance in a written agreement; and protecting her from future retaliation.

57. Approximately 30 minutes later, DeGrauw wrote to Wright informing her that the grievance did not follow the correct process because the Agreement required her to begin with an informal meeting with the appropriate administrative supervisor. He pointed out that because she alleged discrimination under Article 21, she should have directed the grievance to Affirmative Action Director Oliveros, and not to all of the named respondents.

58. On March 2, DeGrauw again wrote to Wright regarding her individual grievance and explained the appropriate process under the Agreement, including that her claim under Article 21 should have been directed to Oliveros. DeGrauw wrote:

> "[M]y comment that it needed to be signed did not mean that it needed to be signed by a representative of the Federation, just that it needed to be signed by you. However once it is signed, you will not be able to make changes to it and it will be the document that proceeds through each step of the process. Without the details and the facts of what happened to demonstrate that 'management excluded Maureen Wright from the ability to meet the deadline for Professional and Staff Development proposals for Spring 2011' there will be nowhere for the grievance to go and there will be no reason not to deny it. As you will not be able to change the document between steps (article 25.18), you will likely end with the same result at each step.
>
> "The proper procedure for this is to begin with a call or visit to Claire Oliveros to see if the grievance of unequal treatment can be resolved informally (article 21.21) and then to move to step 2. But you will need to include the details and facts that support your contention of unequal treatment and that 'management excluded Maureen Wright from the ability to meet the deadline for Professional and Staff Development proposals for Spring 2011.'
>
> "Could you please let me know what happened that prevented you from getting the approval to apply for the professional and staff development funding? You will also want to include these details in your formal grievance statement"

59. On March 3, Wright did not respond to his queries, but wrote to DeGrauw, Morrow, and Goulard asking them for a signature to advance her grievance to Step 2 as required under Article 25.17. In a separate e-mail to DeGrauw and Cannarella, she wrote that her purpose in combining a group, individual, and discrimination claim in one document was "to be efficient and to attempt to resolve my employee concerns informally and as quickly as possible." DeGrauw responded that the specific information that he requested was not contained in her grievance. He sent her four questions intended to elicit the specific facts to support her contention that she was prevented from getting approval to apply for staff development funds. He also asked Wright whether she had contacted Oliveros about her discrimination claim.

60. On March 4, Wright renewed her request for a Federation signature so that she could advance her grievance to Step 2 and attached a blank signature page. Wright exchanged multiple e-mails that day with various Federation officials in their attempt to substantiate her allegations. At 8:15 p.m., DeGrauw replied with questions, asking her to provide facts indicating that February 4, 2011, was the triggering incident for her claims, including who said what, whether there were e-mails to document what was said, exactly how she was prevented from getting a signature by the deadline for applying, and whether she had contacted Oliveros. Her responses referred him back to sections of her grievance.

61. On March 5, Wright repeated her request for a Federation signature, and wrote "[t]here's no contractual obligation for you to look over my individual grievance. Please relax. You're not on the hook to do anything except sign the Fed Rep courtesy signature form that I provided you. Mine is only an individual grievance." DeGrauw did not refuse to sign it, but replied that he did not have a scanner and could not readily send a signed copy of the signature page.

62. On March 7 at 5:47 p.m. and March 8 at 7:20 p.m., DeGrauw attempted to fax the grievance signature page to Wright. On March 9, he was successful in transmitting a signed facsimile of the grievance to Scott's office, the number for which was appended to Wright's latest e-mail. DeGrauw had struck out the "Group Grievance" line on the first page of Wright's grievance, so that it was labeled only as an individual grievance.

63. On March 8, Wright amended her February 28 grievance, which she labeled "Step 2 (3/8/2010) Written Grievance; Step 2 Amended to Supersede Step 1."

64. On March 9, HR Director Bledsoe wrote to DeGrauw acknowledging receipt of an unsigned grievance filed the day before and asking whether the Federation had signed it. DeGrauw replied that he had sent it to Scott because she was the only person who was supposed to receive it at Step 2.

65. On March 11, Wright filed a second grievance (March 11 grievance) with the heading "Unequal & Unfair Treatment in Assignments & Opportunities; Barriers to Entry Targeted Harmful to Protected Class Member." This was also labeled as a group grievance under Article 25.3, even though she was the only named grievant, and it was an individual grievance under Article 21.2. She listed HR Director Donnelly and Oliveros as respondents.

66. The March 11 grievance renewed many of her allegations from the February 28 grievance and her BOLI complaint of discrimination in employment opportunities, which included the BA department chair position, and denial of professional development funds. Her grievance included allegations that the 2007 grievance settlements had been breached and should be re-opened; that unqualified male faculty had been hired since 2006 to the detriment of female faculty; that from 2010, seniority lists had not been maintained as required by the Agreement; that there was a flawed selection process in the assignment of CIS courses; that the CIS department improperly required Wright to qualify for CIS teaching assignments even though it hired ineligible applicants or faculty members for those positions; that Donnelly's discipline and alleged threats of discipline from 2006 and 2010 were renewed in his response to DeGrauw's inquiries in March; and that the College failed to respond to her February 28 grievance at Step 1.

67. Among the remedies she sought were demands to re-open the 2007 and 2010 grievances; to reimburse her for sick leave taken in 2009-10;[8] to implement a practice of allowing

[8] Although Wright provided neither an explanation nor documentation for this demand in the grievance, in an October 28 e-mail to the Federation, she sought restoration of 675 hours of sick leave or reimbursement of $43,449 in wages connected to her OFLA/FMLA leave and subsequent ADA claim in 2009-10. In an e-mail to Executive Council member Peter Seaman on November 2, Wright requested wage reimbursement in the amount of $48,449.

her the first right of refusal for teaching assignments and positions such as faculty department chair and interim dean; to purge her personnel file of any threats of disciplinary actions; to correct the 2011 seniority lists and to perpetuate future seniority lists to show that Wright has continuous status as an instructor in BA and CIS; and to delete faculty members Bill Bruno, Diana Ellis, and Taylor Hanna's names from the seniority lists because they lacked instructor-classification status.

68. The Federation's Goulard reviewed the grievance and reminded Wright that DeGrauw was her contact person and requested that she respond to DeGrauw's questions from March 3, 4, and 11.[9]

69. On March 12, Wright responded to Goulard regarding her request that the Federation sign her March 11 grievance. She wrote:

> "The courtesy signature request is unrelated to the union's questions. The contract does not require that the individual grievant receive permission from a Fed Rep for a courtesy signature. The union's courtesy signature is only a courtesy notice requirement. The grievance is my individual grievance, and it is not co-sponsored by the union. On 3/11/2011, the union agreed to provide a courtesy signature. Please follow through now. Keep your agreement.
>
> "I welcome the union's questions. There are 180 days for an Unfair Labor Practice (ULP) Complaint. There are only two business days for the courtesy signature deadline.
>
> "Ed's questions that you forwarded have been previously answered, and his questions are the results of his oversights, incorrect assumptions that lead him to digress into speculative questions. I enjoy when Ed engages in devil's advocacy and when he role plays Jerry Donnelly. Today, there are more urgent matters."

70. On March 13, DeGrauw wrote to Wright stating that if he wandered off into speculation, it was because she did not provide enough detail for anyone to know what happened. He went on to explain:

> "[t]he intent of having the grievance signed by a representative of the Federation is so the Federation can help the individual draft the grievance and advise them on the merits of their grievance and to increase their chances for success. I am trying to point out to you that your filings are confusing and based on broad statements and lack adequate details for them to have any chance of success."

71. On March 14, DeGrauw signed Wright's March 11 grievance. Although the grievance was late, the College accepted it and processed it as an individual grievance under Article 21.2.

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[9]Goulard was a former grievance officer. At the time of the hearing, he was the Federation's President.

72. On March 15, Wright wrote to Donnelly and Oliveros advancing her March 11 grievance to Step 2.

73. On March 15, Director Bledsoe wrote to DeGrauw letting him know that Wright had contacted Scott, Donnelly, and Erenhaus to set up meetings at Step 2, and asking him to confirm that the Federation's signature was only intended for her February 28 grievance.

74. On March 17, Donnelly wrote to Wright stating that her February 28 grievance had caused confusion because it was labeled as a group and individual grievance, even though she was the only named grievant, and because she had sent it to so many people that it was unclear who should respond. Donnelly wrote that the College had concerns because her grievances did not provide factual details to explain how the contract provisions she cited were violated, and that its length (18 pages with a directory), was so large and unclear that the College required additional time to respond. The e-mail, which Wright construed as bullying, and was part of the basis for her subsequent complaint against Donnelly, concludes:

> "Please note that we will consider any matters that occurred before February 4, 2011 as untimely, so you should not expect a response to them. In addition, we will not be responding to matters that do not involve alleged violations of the provisions of the Faculty/Academic Professional Agreement, e.g. allegations of violation of public records laws, 'unfair labor practice definitions,' etc. We also will not be responding further to any grievance allegations that involve allegations that you previously raised in your complaint with the Bureau of Labor and Industries (BOLI). The college already responded to those allegations and BOLI has dismissed your complaint.
>
> "While we are undertaking a review of your grievances we expect that you will refrain from sending the recipients additional messages requesting a meeting. If you continue to send such messages, please be advised that you should not expect a response. We will respond to your grievances once we've had an adequate opportunity to review them."

75. On March 18, DeGrauw wrote to Wright that she had sent him a file containing her grievances, but that the file would not accept changes and therefore he could not send his comments to her.

76. On March 27, DeGrauw wrote to Wright explaining that her group grievances were improperly filed, but that Bledsoe acknowledged that her individual grievance was properly before the College. He renewed his offer to help her with her individual grievance.

77. On March 30, Wright sent an e-mail to Donnelly and Oliveros, among others, advancing her February 28 grievance to Step 3. She sent separate notices to Dean Scott, Sylvania Campus Dean of Instruction Jeff Triplet, CIS Dean Ehrenhaus, Rock Creek Campus Dean of Instruction Brigitte Ryslinge, and CIS Faculty Department Chair Quinn, stating that they did not meet with her about the February 28 grievance on the dates and times that she had scheduled.

78. On March 30, Wright sent an e-mail to Dean Ryslinge setting a meeting time for the following day to discuss her grievance. Ryslinge replied that she was not available to meet the following day and that she would consult with Human Resources to determine whether a meeting was appropriate. Triplett replied that he was unavailable to meet at the time that Wright scheduled.

79. On March 30, Wright filed a 21-page memorandum that was labeled a response to Donnelly's reply to her March 11 grievance. The memorandum also included a complaint for workplace bullying against Donnelly for allegedly threatening her with discipline for exercising her grievance rights. She alleged that Donnelly had made these threats in front of unnamed people, which was a violation of the Agreement's confidentiality requirements regarding discipline. Donnelly replied that because he was the subject of the complaint under the Standards for Professional Behavior for PCC employees, he had forwarded the complaint to his immediate supervisor, Vice-President of Administrative Services Wing-Kit Chung.

80. On March 31, Wright declined DeGrauw's suggestion that she agree to the College's request for an extension to reply to her grievances and asked who the Federation's attorney was. DeGrauw responded that he did not believe that Donnelly had violated either the Agreement or committed a ULP, and that he would identify a union attorney to assist her if the need arose.

81. On April 4, Wright wrote to DeGrauw asking if staff members were labor attorneys and expressing her disappointment at the Federation's unwillingness to enforce the contract or the CIS grievance remedies from 2007. The Federation declined Wright's request to pay for an attorney to attend her meetings with the College regarding her individual grievances.

82. On April 5, DeGrauw wrote to Wright stating why he believed that Donnelly's e-mails did not threaten discipline but was a direction to her to follow the process set out in the Agreement. He reminded her that she had not yet provided factual details to support her claims, and again recommended that she grant an extension to the College to respond.

83. On April 5, Chung wrote to Wright stating that the College had decided to consolidate her two grievances and her complaint against Donnelly because they appeared to share related facts. He had asked Affirmative Action Director Oliveros to review the complaints, but because she was unfamiliar with the issues, it would take her and the College's legal counsel some time to undertake that task. Chung's letter implied that he was requesting an extension to respond. By copy of his letter to DeGrauw, he asked the Federation to consent to this exception to the standard grievance procedures. The next day, Oliveros confirmed with Wright that it would take her some time to review the information, but that she would schedule a meeting in the near future.

84. On April 6, DeGrauw wrote to Wright recommending that she allow the College additional time to sort through her grievances and asking if she wanted him to begin the grievance process for violations to Articles 25.20 and 25.222 for failing to timely respond to her grievances at Steps 1 and 2. He also asked her if she intended to file claims based on violations of Article 11 of the Agreement regarding her employee files, about which she had also complained. Wright had expressed concern about the removal of any discipline or threats of discipline from her personnel file, even though none were found.

85. On April 7, Wright agreed to the extension and sent DeGrauw suggested language in which the College was to admit that it violated the Agreement by not timely responding to her grievances, and that it would agree to reactivate her 2010 grievance and Step 3 ADA appeal, which had been closed. DeGrauw advised Wright that her discrimination grievances could not be revived because Article 21.3 states that "[i]f the employee files a complaint with any external public agency or with a State or Federal Court, the discrimination complaint procedure or the grievance shall automatically terminate."

86. On April 14, Chung responded by stating that the College would not resurrect Wright's 2010 grievance and Step 3 ADA appeal, and that he had decided to consolidate her February 28 and March 11 grievances with the March 30 complaint against Donnelly. The College's outside counsel was retained because the allegations concerned ADA claims, violations of the Agreement, ethics violations, and violations of the public records law.

87. On May 5, following expiration of the extension period, Wright moved her grievance to Step 4, and sent her grievance to Oliveras, Donnelly, David Rule, and Linda Gerber, with copies to DeGrauw and Cannarella. The College did not respond within the 15-day period required by the Agreement, at which point Wright asked the Federation to advance the grievance to arbitration.

88. On May 5 and 7, DeGrauw and Cannarella wrote to Wright that either of them would be available to accompany her to her grievance meeting with the College. Wright asked the Federation's President, Morrow, to provide a union attorney for those meetings, but Morrow declined and referred her to DeGrauw or Cannarella because they were more informed than he about her situation. She declined DeGrauw and Cannarella's offer to accompany her to the meetings and ultimately attended the meeting with her own attorney.

89. On May 12, Wright wrote to Chung stating that the College had not met the May 5 deadline to respond and that she was moving her grievance to the next step and setting two possible dates on which to meet with him.

90. On May 13, Wright and her attorney met with Oliveros to discuss her complaint against Donnelly. The Federation was not informed of the meeting nor asked to attend.

91. On June 7, Wright sent an e-mail to Morrow, DeGrauw, Cannarella, and Goulard asking the Federation to file for arbitration and a ULP against the College.

92. On June 8, DeGrauw wrote to Wright confirming that her grievances had been consolidated, that they had been advanced to Step 4 before District Vice-President Chung, and that they were being investigated under affirmative-action guidelines.

93. On June 11, Wright wrote to DeGrauw asking when the Federation's next executive council meeting was scheduled.

94. On June 25, DeGrauw wrote to Wright stating that the Federation had determined that her complaints were not contract violations and that there was no ULP violation based on the evidence that she provided. His e-mail went on to state that he was there to help, but that it was

his perception that if she did not receive the answer that she wanted, then she would contact other Federation employees.

95. On or about July 27, Wright was transferred to Special Projects, which she construed as a form of discipline.

96. On August 5, Wright wrote a memo to DeGrauw regarding what she considered to be new violations of the Agreement based on the 2007 grievance settlement. The transmittal also included Scott's annual assessment of Wright dated July 7, and referenced an e-mail from Scott dated July 17 that she believed amounted to a ULP.

97. On August 11, DeGrauw received a copy of an e-mail from ADA Coordinator Maria Mendez to Wright stating that her assignments for the 2011-2012 year included three BA courses and one CIS course.

98. On August 12, DeGrauw wrote to Wright asking how Scott's comments and Quinn's e-mail were ULPs and asking her specific questions about her allegations. He informed her that he had spoken with Schwarz, Goulard, Cannarella, Bartholomew, and Pullman in March and April, and that they all agreed that her grievances did not state grounds for a ULP, and that they considered the matter closed.

99. Oliveros requested additional supporting documentation from Wright but did not receive credible or verifiable evidence in support of her claims. After numerous unsuccessful attempts to get Wright to provide evidence of a contract violation, Oliveros concluded that the grievances lacked merit.

100. On September 13, Wright received a nine-page response from Chung dismissing both of her grievances and her complaint against Donnelly.[10]

101. On October 7, Wright wrote a memorandum to Morrow that was critical of DeGrauw's handling of her grievances and asking that he be removed. Morrow declined.

102. On October 27, Wright wrote a memorandum to the Federation's executive council and its staff requesting agenda time at its next council meeting, and attached copies of her previous memoranda. She requested that the council fund a ULP claim against the College and alleged that the Federation had failed in its duty of fair representation. Her memorandum included entirely new allegations, including false student complaints against her, false statements by College personnel, and an allegation that the Federation was controlled by management. She requested reimbursement of her legal fees; that the Federation pay her "public-records" costs; that the Federation agree to provide an attorney for any bargaining unit member who is asked to meet with the College's legal counsel; and that she have pre-approved funding for her professional development in the areas of contract, grievance, arbitration, and employment issues. Although she requested that the Federation fund a ULP, she did not, at that time, ask it to file for arbitration.

[10]Wright did not provide Chung's letter at the hearing and because the Federation was not a party to her individual grievances, it never saw Chung's response.

103. On November 4, Wright attended the executive council's meeting accompanied by Mike Talbert, another faculty member. When her agenda item came up, the council went into executive session, from which Wright and Talbert were excluded. When the council reconvened an hour later, it announced its decision to deny her requests and not file a ULP on her behalf. DeGrauw was present and explained the council's reasoning to Wright after the meeting.

104. Although the executive council denied Wright's requests for legal representation and reimbursement of expenses, there is no evidence that it held any ill feelings towards her.

105. On November 6, DeGrauw e-mailed Wright and requested that she send him pertinent information so that he could determine whether she had valid grievances or an unfair labor practice claim against the College. DeGrauw also offered to meet with Wright in person to discuss the matter.

106. On November 11, Heather Dittmore, the Federation's Secretary (an elected officer position), submitted minutes of the November 4 meeting for posting on its website. The minutes reflect that the council voted unanimously in executive session, without elaboration, "to decline to act on the member's requests (of October 27, 2011 and November 4, 2011), and affirms established procedures for handling grievances; MSP (Goulard, Angell, U) with friendly amendment."

107. Between September 23, 2010 and December 9, 2011, Wright exchanged approximately 200 e-mails with Federation personnel concerning her 2011 grievances, and approximately 40 additional e-mails concerning other contract grievances or complaints.

## CONCLUSIONS OF LAW

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

2. The Federation did not violate its duty of fair representation under ORS 243.672(2)(a).

## DISCUSSION

Wright alleges that the Federation's processing of her February 28 and March 11, 2011 grievances was arbitrary, discriminatory, or in bad faith and violated ORS 243.672(2)(a). The Federation argues that Wright's grievances were untimely, she failed to follow the Agreement's grievance process, and despite multiple offers to assist her, she failed to provide sufficient support for her allegations.

### Legal Standard Under ORS 243.672(2)(a)

It is an unfair labor practice under ORS 243.672(2)(a) for a labor organization to interfere with, restrain or coerce an employee in or because of the exercise of any right guaranteed under the Public Employee Collective Bargaining Act (PECBA). This Board has recognized that ORS 243.672(2)(a) requires a union to fairly represent all employees for whom it is the exclusive

representative. *Chan v. Leach and Stubblefield, Clackamas Community College; McKeever and Brown, Clackamas Community College Association of Classified Employees/OEA/NEA,* Case No. UP-13-05, 21 PECBR 563, 574 (2006).

A union's conduct may breach its duty of fair representation when its refusal to process or pursue a grievance is arbitrary, discriminatory, or in bad faith. *Id.* at 574. A decision is discriminatory if there is substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. *Id.* at 575. A union's decision is arbitrary if it lacks a rational basis. *Howard v. Western Oregon State College Federation of Teachers, Local 2278, OFT,* Case Nos. UP-80/93-90, 13 PECBR 328, 354 (1991). A union's decision is in bad faith if it intentionally acts against a member's interest, and does so for an improper reason. *Chan*, 21 PECBR at 575. The complainant bears the burden of proof. OAR 115-035-0042(6).

This Board accords a union substantial discretion in deciding whether to arbitrate, or even file, a grievance. *Conger v. Jackson County and Oregon Public Employees Union*, 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). An employee does not have an absolute right to have a union take a grievance to arbitration. *Chan*, 21 PECBR at 575, citing *Vaca v. Sipes*, 386 US 171, 191 (1967). A union's rational and good faith decision not to pursue a meritorious grievance, even if mistaken, does not violate its duty of fair representation. *Tancredi v. Jackson County Sheriff's Employee Association and Jackson County Sheriff's Office*, Case No. UP-31-04, 20 PECBR 967, 974 (2005). "What is important is the process by which the [union] determined not to pursue the grievance, not whether the grievance was filed." *Id*. at 976.

This Board has described a union's duty of fair representation by explaining:

> "[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) * * *. 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 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, 898 (2000).] 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)." *Slayter v. Service Employees International Union Local 503 and State of Oregon, Department of Fish and Wildlife,* Case No. FR-01-12, 25 PECBR 494, 503 (2013).

The duty of fair representation is one form of the checks and balances that apply to the self-governance of labor organizations. When we are asked to review a union's decision regarding a grievance, we give deference to that decision, unless it lacks a rational basis or the processing of the grievance was so perfunctory that a reasoned decision was not made. *Putvinskas*, 18 PECBR at 894; *Ralphs*, 14 PECBR at 422. Thus, this Board generally does not substitute its judgment for that of a union that rationally decides to not process a grievance. Instead, this Board primarily determines whether the union conducted a proper investigation and has employed some rational decision-making process in reaching its decision. Therefore, without violating its duty of fair representation, a union may rationally decide not to pursue a grievance, even though the union likely would win in arbitration. *Putvinskas*, 18 PECBR at 895.

Dating from the 2007 grievance settlement, Wright has been dissatisfied with her teaching assignments and employment opportunities. Through a series of grievances, a BOLI complaint, and a public records violation complaint against the College, she has attempted to correct what she perceived as unfair or discriminatory treatment. Most of these complaints were either dismissed or denied.

From the outset, DeGrauw raised questions about the timeliness of Wright's claims that appeared to him to be permutations of earlier, dismissed grievances or complaints, and repeatedly asked her to document the contract violations with names, dates, statements, or supporting documents. Under Article 25.19, grievances can only be filed within 22 days of the occurrence, or knowledge of the occurrence, giving rise to the complaint. Wright appeared unable, or unwilling, to respond in a way that made sense to DeGrauw. She became frustrated with his repeated requests for supporting facts, and either ignored them, directed him to her grievances, or issued directions to him.

DeGrauw believed, as did other Federation and College employees, including Cannarella who assisted Wright with the 2007 grievance, that Wright had given up her right to teach full time in CIS, per the terms of the 2007 settlement agreement. The position of the Federation (and College) is consistent with the 2007 settlement agreement, which indicated that Wright was not *entitled* to a CIS assignment, but may have a reasonable expectation of being offered at least one CIS course per term, subject to the approval of the Division Dean. The settlement agreement does not state that Wright is entitled to teach full-time in the CIS department. Moreover, Wright has been assigned CIS courses since 2007, which is consistent with the settlement agreement, and which DeGrauw relied on to conclude that the College had complied with that agreement. We do not conclude that DeGrauw's (and by extension, the Federation's) processing of this grievance demonstrated: (1) a lack of a rational basis; (2) intentional and severe discrimination unrelated to legitimate union objectives; or (3) an intentional act against Wright's interest for an improper reason.

DeGrauw also reasonably concluded that Wright's grievance claim that HR Director Donnelly had disciplined, or threatened to discipline her, by preventing her from filing grievances was untimely and unsubstantiated. The claim stems from Donnelly's direction to Wright in 2006 and 2010 that she stop submitting lengthy and repetitive requests for documents and information to multiple College personnel, most of whom had no authority to address her complaints. Donnelly's e-mails directed Wright to seek guidance from the Federation in future requests, and stated that failure to comply with the process for grievance resolution could lead to discipline for insubordination. Donnelly did not state that Wright was prevented from filing grievances or requesting information; rather, Donnelly asked Wright to comply with the appropriate procedures when doing so. Under these circumstances, and having found no evidence of discipline in Wright's personnel file, DeGrauw informed Wright that this claim was untimely and that the grievance was not likely to be successful. We do not conclude that DeGrauw's determination was arbitrary, discriminatory, or made in bad faith.

Wright's claims that unqualified instructors, who were part-time or managerial, were being assigned courses also appeared to be similar to her 2010 grievance and echoed complaints from the 2007 grievance. When DeGrauw requested recent documentation, Wright did not provide evidence in a way that DeGrauw could determine that a timely contract violation had occurred. On this record, we conclude that DeGrauw treated Wright's complaints seriously and made a meaningful attempt to understand the complaint and obtain evidence that would substantiate Wright's grievance. Thus, Wright has not established that DeGrauw's actions violated the Federation's duty of fair representation.

Similarly, Wright's request for reimbursement for lost wages or sick leave for time off in 2009-2010 when she took OFLA/FMLA leave was neither documented nor timely. These complaints would also have been subject to dismissal if the Federation had filed a claim with this Board, as Wright had requested. Under ORS 243.672(3), unfair labor practice complaints are subject to a 180-day statute of limitations. The claims that Wright raised occurred in 2010 or before and likely would have been subject to dismissal. We do not conclude that the Federation acted in an arbitrary, discriminatory, or bad-faith manner in concluding that a potential unfair labor practice complaint based on these claims would be dismissed as untimely.

Wright also alleged that the Federation refused to sign her grievances, but DeGrauw did sign them. He struck out the "group grievance caption" in the March 11 grievance because it did not meet the criteria under Article 25.3 and sent it to Dean Scott's office, who was the only appropriate recipient under the Agreement. Moreover, Wright was not harmed by how DeGrauw handled the grievances because the College accepted and processed them.[11]

[11]Wright's allegation that the Federation and College entered into an agreement to consolidate her two grievances and her complaint against Donnelly, and to extend the College's deadline for responding to her grievances, was credibly contradicted by DeGrauw and Vice-President for Administration Chung.

The record in this case reflects over 200 e-mails exchanged between Wright and Federation employees, particularly DeGrauw, regarding her grievances that show her claims were treated seriously. DeGrauw made multiple offers of assistance, undertook an investigation that included contacting at least half a dozen people, and repeatedly asked Wright to provide supporting documentation. Wright rejected his offer to attend her grievance meeting with the College and instead retained her own attorney. DeGrauw reached a good-faith conclusion that her claims were untimely, lacked merit, or were unsubstantiated. Notwithstanding his conclusion regarding the merits of her grievances, DeGrauw continued to offer assistance to Wright after the grievances were filed and following the Federation's executive council rejection of her request to file a ULP. Such actions fall far short of being arbitrary, discriminatory, or undertaken in bad faith.

As to Wright's claim that the College had denied her professional development funds, which she alleged occurred on March 4, 2011, DeGrauw repeatedly asked for documentation concerning the details of when, how and by whom the funds were denied. DeGrauw did not receive that information and he reasonably concluded that no contract violation had been committed. Wright argues that the Federation kept incomplete records about earlier grievances, as well as the minutes of the November 4, 2011 meeting of the executive council. The minutes of the executive council meeting are in evidence, and although they may not contain the level of information she sought, she did not meet her burden that the Federation's record-keeping violated its duty of fair representation.

Finally, we note that in many instances the Federation offered to assist Wright at various stages of the grievance process, but Wright declined the offer. Specifically, on May 5 and 7, 2011, DeGrauw and Cannarella wrote to Wright that either of them would be available to accompany her to her grievance meeting with the College. Wright, however, declined their offers and ultimately attended the meeting with her own attorney. Moreover, when Wright and her attorney met with the College to discuss her complaint against Donnelly, Wright did not inform the Federation of the meeting or ask any Federation representative to attend. Wright also represented to the Federation on multiple occasions that she only wanted a "courtesy signature" from the Federation on her "individual" grievances, and that the Federation was otherwise "not on the hook to do anything" because Wright was opting to individually pursue her grievances.

In sum, we conclude that the Federation undertook meaningful and sincere efforts in an attempt to assist and represent Wright in her multi-faceted grievances against the College. We further conclude that Wright has not proven that the Federation's processing of her February 28 and March 11, 2011 grievances was arbitrary, discriminatory, or done in bad faith. Accordingly, we will dismiss the complaint.[12]

[12]The Federation notes in its closing brief that Wright did not actually request the executive council to advance her grievances to arbitration, only to fund a ULP. In any event, we find that Wright did not establish that the Federation's actions violated its statutory duty of fair representation.

Violation of ORS 243.672(1)(g)

Where, as here, no violation against the union is found, the complaint against the employer is automatically dismissed. *Tancredi,* 20 PECBR at 977. Therefore, we will also dismiss the complaint against the College.

ORDER

The complaints against the Federation and the College are dismissed.

DATED this 11 day of February 2014.

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-026-12

(UNFAIR LABOR PRACTICE)

| | | |
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| JACKSON COUNTY SCHOOL DISTRICT #9,<br><br>Complainant,<br><br>v.<br><br>EAGLE POINT EDUCATION ASSOCIATION/OEA/NEA,<br><br>Respondent. | ) | FINDINGS AND ORDER ON RESPONDENT'S PETITION FOR REPRESENTATION COSTS |

On May 4, 2012, Jackson County School District #9 (District) filed an unfair labor practice complaint alleging that 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. On September 9, 2013, we issued an order holding that the Association did not violate ORS 243.672(2)(d), as alleged in the District's complaint. On September 30, 2013, the Association submitted its petition for representation costs. The District filed objections to that petition on October 30, 2013.

Pursuant to ORS 243.676(3)(b) and OAR 115-035-0055, this Board finds that:

1. The Association filed a timely petition for representation costs.

2. The District did not file timely objections to the petition.

Under OAR 115-035-0055(3), written objections to a petition for representation costs must be filed and served within 21 days from the date of service of the petition. The Association filed its petition on September 30, 2013, giving the District until October 21, 2013 to file its objections. The District's objections were not filed until October 30, 2013. The District did not request, and did not receive, any extension of time to file its objections. Therefore, the District's objections are not timely, and we will not consider them.

3. This case involved a single-day hearing held on November 21, 2012, before Administrative Law Judge Peter A. Rader.

4. The Association is the prevailing party, as our order concluded that the Association did not violate ORS 243.672(2)(d).

5. Counsel for the Association submitted an affidavit stating that 50.7 hours were spent on the case at a rate of $150 per hour, for a total of $7,605 in representation costs. Based on that affidavit, the petition requests a representation costs award of $3,500, which is the maximum award when no civil penalty is appropriate. OAR 115-035-0055(1)(a).

6. The Association's requested hourly rate of $150 per hour is below the average representation rate of $165 to $170 per hour. *See Federation of Oregon Parole and Probation Officers, Multnomah County Chapter v. Multnomah County*, Case No. UP-032-12, 25 PECBR 808, 809 (2013) (Rep. Cost Order).

7. Cases generally require an average of 45 to 50 hours per day of hearing. *Id.* The Association's claimed hours (50.7, rounded down to 50) are average.

8. 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). *Id.*

9. 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 order representation costs to the Association in the amount of $2,500.

ORDER

The District will remit $2,500 to the Association within 30 days of the date of this Order.

DATED this 21 day of February 2014.

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-004-12

(UNFAIR LABOR PRACTICE)

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| STEVEN STOTLER, JR., Complainant, | ) | |
| v. | ) | RULINGS, |
| MEDFORD POLICE OFFICERS' ASSOCIATION | ) | FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |
| and | ) | |
| CITY OF MEDFORD, Respondents. | ) | |

G. Jefferson Campbell, Jr., Attorney at Law, Medford, Oregon, represented Complainant.

Becky Gallagher, Attorney at Law, Fenrich and Gallagher, PC, Eugene, Oregon, represented Respondent Association.

Dian S. Rubanoff, Attorney at Law, Peck, Rubanoff, and Hatfield, Portland, Oregon, represented Respondent City.

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On February 3, 2014, Administrative Law Judge Larry L. Witherell issued a recommended order in this matter. The parties had 14 days from the date of service in which to file written objections. *See* OAR 115-010-0090; OAR 115-035-0050(2).

Complainant submitted written objections, which were received on February 20, 2014, in an envelope postmarked February 18, 2014. It is the date of receipt, not the date of mailing that determines the filing date. *See* OAR 115-010-0010(5). Complainant neither requested an extension of time in advance of filing the objections nor did he submit a request for late filing in

addition to his objections. As the objections are untimely filed, they will not be considered by the Board.

Neither of the respondents filed objections. Therefore, this Board will treat this matter as if no objections were filed.

When parties do not object to a recommended order, we generally adopt the recommended order as our final order, and we consider any objections that could have been made to that order unpreserved and waived. *International Brotherhood of Electrical Workers, Local Union No. 657 v. Eugene Water and Electric Board,* Case No. UP-008-13, 25 PECBR 901 (2014). The final order is binding on, and has precedential value for, the named parties only. We do not publish the recommended order because it would not be of benefit to anyone other than the named parties.

ORDER

1. The Board adopts the recommended order as the final order in this matter.

2. The complaint is dismissed.

DATED this 21 day of February 2014.

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-043-11

(UNFAIR LABOR PRACTICE)

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| ASSOCIATION OF ENGINEERING EMPLOYEES,<br><br>Complainant,<br><br>v.<br><br>STATE OF OREGON, DEPARTMENT OF ADMINISTRATIVE SERVICES,<br><br>Respondent. | ) | FINDINGS AND ORDER ON COMPLAINANT'S PETITION FOR REPRESENTATION COSTS |

On July 19, 2011, the Association of Engineering Employees (Association) filed an unfair labor practice complaint against the State of Oregon, Department of Administrative Services (DAS). The complaint, as amended, alleged that the DAS violated ORS 243.672(1)(a), (b), (c) and (e) by taking certain actions during negotiations for a successor collective bargaining agreement.

The matter was submitted directly to the Board for decision based on stipulated facts and the briefs of the parties. On June 17, 2013, the Board issued an order concluding that DAS violated the "because of" and "in" the exercise of prongs of ORS 243.672(1)(a) by prohibiting the use of its e-mail system for Association-related communications, and violated ORS 243.672(1)(e) by changing the *status quo* established by the expired contract when, during the hiatus period, it: (1) prohibited the use of its e-mail system for Association-related communications; (2) ceased providing the Association with copies of disciplinary documents; and (3) stopped allowing Association representatives to take union leave. In light of our decision under subsection (1)(a), we declined to decide whether DAS also violated subsection (1)(c). Finally, we dismissed the Association's complaint that DAS violated subsection (1)(b) when it ceased providing the Association with copies of disciplinary documents during the hiatus period. 25 PECBR 525 (2013).

On July 1, 2013, DAS filed a petition seeking reconsideration and rehearing on portions of our order. The Association filed a petition for representation costs on July 2, 2013. DAS filed objections to that petition on July 19, 2013.

The Board granted reconsideration and heard oral arguments on DAS's petition for reconsideration on August 14, 2013. On September 19, 2013, the Board issued an order adhering to the original order, as explained and clarified in the order on reconsideration. 25 PECBR 764 (2013).

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

1. The Association filed a timely petition for representation costs. DAS filed timely objections to the Association's petition.

2. This case was submitted directly to the Board on stipulated facts, with no hearing required.

3. The Association is the prevailing party.

Only a "prevailing party" in an unfair labor practice is entitled to representation costs. ORS 243.676(2)(d); OAR 115-035-0055(1). The Association prevailed on the charges under (1)(a) and (1)(e), and we declined to decide the (1)(c) charge due to our resolution of the other charges. However, the Association's complaint under (1)(b) was dismissed. Accordingly, we must begin by determining whether DAS may also be considered as a "prevailing party."

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 (2012) (Rep. Cost Order).

With these standards in mind, we conclude that the Association is the sole prevailing party because the charges at issue were based on the same operative facts. We held that DAS violated ORS 243.672(1)(e) when it ceased providing copies of disciplinary documents to the Association during the hiatus period. We dismissed the Association's complaint under (1)(b) based on these same operative facts. As such, the charges were not separate, and the Association is the sole prevailing party.

4. Counsel for the Association submitted affidavits stating that 64.25 hours of legal work were spent on the case, billed at $125 per hour, with a total cost to the Association of $8,031.25. The Association'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 Association's requested hourly rate of $125 per hour 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). However, the number of hours claimed by the Association is higher than average. The parties submitted this matter on a joint stipulation of facts in lieu of a hearing. The average time spent on a stipulated-fact case of average complexity is 16-25 hours. *Oregon AFSCME Council 75, Local 2503 v. Hood River County,* Case No. UP-11-08, 25 PECBR 75 (2012) (Rep. Cost Order). This case, however, was significantly more complex than an average case, and DAS has not contested the hours claimed by the Association. After conducting our review, we conclude that the Association's claimed number of hours is reasonable.

6. We calculate reasonable costs by multiplying the reasonable number of hours spent by the reasonable hourly rate charged. In this case, that calculation results in reasonable representation costs of $8031.25. 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). However, in cases such as this involving interference with protected union activities, we typically *increase* representation cost awards. *International Longshore and Warehouse Union, Local 28 v. Port of Portland*, Case No. UP-35-10, 25 PECBR 610, 611 (2013) (Rep. Cost Order). This case also involved a novel issue concerning the mandatory/permissive nature of the Association's access to and use of DAS's e-mail system. In "novel-issue" cases, we generally *decrease* the award to one-fourth of the prevailing party's reasonable costs, so that parties will not be deterred from litigating novel issues. *Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections*, Case No. UP-5-06, 22 PECBR 479, 480-81 (2008) (Rep. Cost Order). Because this case involves factors that typically *increase* and *decrease* our average award, we will adhere to our usual award of one-third of the Association's reasonable representation costs.

7. 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 Association in the amount of $2,677.

ORDER

DAS shall remit $2,677 to the Association within 30 days of the date of this Order.

DATED this 24 day of February, 2014.

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-074-11

(UNFAIR LABOR PRACTICE)

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| BROOKINGS-HARBOR EDUCATION ASSOCIATION/OEA,<br><br>Complainant,<br><br>v.<br><br>BROOKINGS-HARBOR SCHOOL DISTRICT 17C,<br><br>Respondent. | ) | FINDINGS AND ORDER ON PETITIONS FOR REPRESENTATION COSTS |

On November 4, 2011, Brookings-Harbor Education Association/OEA (Association) filed an unfair labor practice complaint against Brookings-Harbor School District 17C (District), alleging that the District violated ORS 243.672(1)(g) by failing to fully implement an arbitration award. The District filed a timely answer to the complaint.

On April 5, 2012, five days before the originally-scheduled hearing, the Association moved to amend its complaint to add claims under ORS 243.672(1)(a) and (c). Administrative Law Judge B. Carlton Grew granted the motion over the District's objection. A hearing was held on September 26 and 27, 2012, and a Recommended Order issued on April 29, 2013.

On June 26, 2013, we issued an Order holding that the District violated ORS 243.672(1)(g) by refusing to implement an arbitration award. We ordered the District to cease and desist from that unlawful conduct and to post a notice. We also dismissed the Association's (1)(a) and (1)(c) claims, holding that those claims were untimely under ORS 243.672(3). 25 PECBR 584 (2013).

Both parties seek representation costs. On July 16, 2013, the District submitted its petition for representation costs, and on July 24, 2013, the Association filed objections to that petition. On July 25, 2013, the Association filed its petition for representation costs, and on July 31, 2013, the District filed its objections to that petition.

Pursuant to ORS 243.676(2)(d) and (3)(b), along with OAR 115-035-0055, this Board finds that:

1. The District filed a timely petition for representation costs.

2. The Association did not file a timely petition for representation costs.

On June 26, 2013, we issued our order in the above-captioned case. Under OAR 115-035-0055(2), a prevailing party must file its petition for representation costs within 21 dates of the date of the issuance of the order. The date of filing is "the date of receipt by the Board." OAR 115-010-0010(5).

Thus, under our rules, the Association's petition for representation costs was initially due on July 17, 2013. On July 17, 2013, however, the Association requested, and received, a seven-day extension to file its petition for representation costs, making the petition due on July 24, 2013.

We did not receive the Association's petition, however, until July 25, 2013. We then provided the Association with an opportunity to show why the petition should not be dismissed as untimely, and, on February 24, 2014, the Association filed a petition for relief for its late filing.[1] The Association explained that the petition for representation costs was mailed on July 22, 2013, and that, in the experience of Association counsel's office, the petition should have been received by the Board by July 24, at the latest.[2]

Although we do not question the past experience of Association counsel's office, under our rules, a petition for representation costs is not filed until it is received by this Board, regardless of when that petition was mailed. *See* OAR 115-010-0010(5). Our rules also state that representation cost "[f]ilings that do not strictly comply with [our] rules will be dismissed." OAR 115-035-0055(5). Moreover, our rules allow for the filing of the petition by facsimile, which provides a petitioner with confirmation of receipt by the Board.[3] *See* OAR 115-010-0115. The Association could also have contacted this Board to ensure that the mailed petition was received by the due date. In sum, we conclude that the Association's petition for representation costs is not timely, and we will dismiss the petition.

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[1]We also granted the District an opportunity to reply to any Association submission, but in light of our dismissal of the petition, no reply from the District is necessary.

[2]The Association also asserts that the District's objections to the petition did not raise a timeliness issue. The District, however, would in all likelihood be unaware of the date that this Board received the Association's petition, which is the relevant date under our rules. Thus, the lack of a timeliness objection to the petition by the District is neither surprising nor dispositive.

[3]Indeed, the Association availed itself of facsimile filing in its objections to the District's petition for representation costs, which the Association faxed (and we received) on July 24, 2013.

3. The District is not a prevailing party.

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).

Here, the Association prevailed on its claim that the District violated ORS 243.672(1)(g) by failing to fully implement an arbitration award. The District, however, was successful in having the Association's (1)(a) and (1)(c) claims dismissed. Nevertheless, the Association's (1)(a) and (1)(c) claims were based on similar facts concerning the District's failure to fully implement the arbitration award. Specifically, although pleaded as three different claims, all three claims were based on the same operative facts as to whether the District had fully complied with the arbitration award. Under these circumstances, we conclude that the dismissed (1)(a) and (1)(c) claims were not "based on clearly distinct and independent operative facts," such that those claims are separate from the (1)(g) claim. Therefore, the District is not a "prevailing party" within the meaning of ORS 243.676(3)(b) and OAR 115-035-0055(1), and we will dismiss the District's petition.

ORDER

The Association's and the District's petitions for representation costs are dismissed.

DATED this 25 day of February, 2014.

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)

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| THREE RIVERS EDUCATION ASSOCIATION, SOBC/OEA/NEA,<br><br>Complainant,<br><br>v.<br><br>THREE RIVERS SCHOOL DISTRICT,<br><br>Respondent. | ) | FINDINGS AND ORDER ON COMPLAINANT'S PETITION FOR REPRESENTATION COSTS |

On April 29, 2008, the Three Rivers Education Association, SOBC/OEA/NEA (Association) filed an unfair labor practice complaint against the Three Rivers School District (District), alleging that the District violated ORS 243.672(1)(e). The Board initially dismissed the complaint. 23 PECBR 638 (2010). The Association then filed a petition for review with the Court of Appeals, and on January 16, 2013, the Court of Appeals reversed the Board's order and remanded the matter to us. *Three Rivers Ed. Assn. v. Three Rivers Sch. Dist.*, 254 Or App 570, 294 P3d 547 (2013). On August 8, 2013, this Board issued an Order on Remand, holding that the District violated ORS 243.672(1)(e), as alleged by the Association.[1] On August 29, 2013, the Association filed its petition for representation costs on remand.[2] The District did not object to the petition.

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

1. The Association filed a timely petition for representation costs on remand, and the District did not object to the petition.

[1]The Association submitted a separate petition for attorney fees on appeal, pursuant to ORS 243.676(2)(e) and OAR 115-035-0057. That petition is addressed in a separate order issued on this date.

[2]The Association only seeks representation costs for services rendered on remand before this Board. Therefore, our award is limited to those costs.

2. The Association is the prevailing party.

3. Counsel for the Association submitted affidavits showing that 21.6 hours were spent on remand, at a rate of $150 per hour, for a total of $3,090 in representation costs on remand.[3]

4. The requested hourly rate is below average. The average rate for attorney fees is between $165 and $170 per hour. *See Federation of Oregon Parole and Probation Officers, Multnomah County Chapter v. Multnomah County*, Case No. UP-032-12, 25 PECBR 808, 809 (2013) (Rep. Cost Order). The District has not objected to the number of hours spent by Association counsel on remand, and we conclude that the number of hours is reasonable.

5. 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 attorney fees in the amount of $1,030.

ORDER

The District will remit $1,030 to the Association within 30 days of the date of this Order.

DATED this 28 day of February 2014.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

[3]The petition recites both "$3,090" and "$3,909" in representation costs; we conclude that the latter is a typographical error because the former accurately reflects the number of hours spent on remand, multiplied by the hourly rate.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-016-08

(UNFAIR LABOR PRACTICE)

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| THREE RIVERS EDUCATION ASSOCIATION, SOBC/OEA/NEA,<br><br>Complainant,<br><br>v.<br><br>THREE RIVERS SCHOOL DISTRICT,<br><br>Respondent. | ) | FINDINGS AND ORDER ON COMPLAINANT'S PETITION FOR ATTORNEY FEES ON APPEAL |

On April 29, 2008, the Three Rivers Education Association, SOBC/OEA/NEA (Association) filed an unfair labor practice complaint against the Three Rivers School District (District), alleging that the District violated ORS 243.672(1)(e). The Board initially dismissed the complaint. 23 PECBR 638 (2010). The Association then filed a petition for review with the Court of Appeals, and on January 16, 2013, the Court of Appeals reversed the initial order and remanded the matter to us. *Three Rivers Ed. Assn. v. Three Rivers Sch. Dist.*, 254 Or App 570, 294 P3d 547 (2013). The appellate judgment was entered on March 19, 2013. On April 9, 2013, the Association filed its petition for attorney fees, pursuant to ORS 243.676(2)(e) and OAR 115-035-0057.[1] The District did not object to the petition. On August 8, 2013, this Board issued an Order on Remand, holding that the District violated ORS 243.672(1)(e), as alleged by the Association.

Pursuant to ORS 243.676(2)(e) and OAR 115-035-0057, this Board finds that:

1. The Association filed a timely petition for attorney fees and the District did not object to the petition.

2. The appellate judgment named the Association as the prevailing party.

[1]The Association submitted a separate petition for representation costs, pursuant to ORS 243.676(2)(d) and OAR 115-035-0055. That petition is addressed in a separate order issued on this date.

3. Counsel for the Association submitted affidavits showing that 72.7 hours were spent on the appeal, at a rate of $150 per hour, and 2.2 hours were billed at a rate of $75 per hour, for a total of $11,070 in attorney fees on appeal.

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 (74.9) is above the average (35) set forth in *City of Portland*. *Id.* at 117. We will consider these factors in determining the reasonableness of the cost of services rendered by the Association.

5. In a unilateral change case, we typically award one-third of the adjusted representation costs. *Beaverton Police Association v. City of Beaverton*, Case No. UP-10-01, 21 PECBR 186, 188 (2005) (Attorney Fees Order). 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 $1,750.

ORDER

The District will remit $1,750 to the Association within 30 days of the date of this Order.

DATED this 28 day of February 2014.

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-004-11

(UNFAIR LABOR PRACTICE)

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| MAUREEN WRIGHT,<br><br>Complainant,<br><br>v.<br><br>LOCAL 2277, PORTLAND COMMUNITY COLLEGE FEDERATION OF FACULTY AND ACADEMIC PROFESSIONALS, AFT, AFL-CIO,<br><br>and<br><br>PORTLAND COMMUNITY COLLEGE,<br><br>Respondents. | ) | ORDER DENYING PETITION FOR REHEARING AND RECONSIDERATION |

On February 11, 2014, this Board issued an order that dismissed Complainant Maureen Wright's unfair labor practice complaints against Local 2277, Portland Community College Federation of Faculty and Academic Professionals, AFT, AFL-CIO and Portland Community College. On February 25, 2014, Complainant filed a petition for reconsideration of our order or for a rehearing. *See* OAR 115-010-0100. We have considered Complainant's petition, but find no issues of fact or law that warrant reconsideration or a rehearing. Therefore, we deny the petition.

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ORDER

Complainant's petition for reconsideration or rehearing is denied.

DATED this 5 day of March 2014.

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. UC-011-13

(UNIT CLARIFICATION PETITION)

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| LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 483, | ) | |
| Petitioner, | ) | RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |
| v. | ) | |
| CITY OF PORTLAND, | ) | |
| Respondent. | ) | |

On January 9, 2014, the Board heard oral argument on Petitioner's and Respondent's objections to a Recommended Order issued on November 20, 2013, by Administrative Law Judge (ALJ) Wendy L. Greenwald after hearings held on May 28 and 29, 2013, in Salem, Oregon. The parties' post-hearing briefs were submitted on June 24, 2013. The record closed on July 8, 2013, with the admission of two additional exhibits.

Erica B. Askin, Staff Representative, Laborers' International Union of North America, Local 483, Portland, Oregon, represented Petitioner.

Matthew V. Farley, Deputy City Attorney, City of Portland, Portland, Oregon, represented Respondent.

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On April 17, 2013, the Laborers' International Union of North America, Local 483 (LIUNA), an affiliate of the District Council of Trade Unions (DCTU), filed a unit clarification petition under OAR 115-025-0005(4). LIUNA seeks to add all unrepresented park rangers employed at the City of Portland (City), including those working without an annual hours limitation ("full-time park rangers") and those who work up to 1,400 hours per calendar year ("1400-hour park rangers" or "hours-limited park rangers"), to the existing LIUNA/DCTU bargaining unit.

The City filed timely objections to the petition asserting that: (1) the park rangers, who perform security duties, do not have a community of interest with other LIUNA-represented employees, who primarily perform manual labor; (2) a grievance filed by AFSCME, Local 189, is evidence that the park rangers lack a community of interest with the LIUNA/DCTU-represented employees; (3) it is not appropriate to add hours-limited park rangers because they are allegedly "temporary employees"; and (4) the park rangers do not represent a logical group of employees to be added to the bargaining unit.[1]

The issue is: Is it appropriate to include the petitioned-for employees in the LIUNA bargaining unit under ORS 243.650(1), ORS 243.683(1)(a), and OAR 115-025-0050(2)?

For the reasons discussed below, we conclude that it is appropriate to add the petitioned-for park rangers to the LIUNA/DCTU bargaining unit.

## RULINGS

1. At the hearing, the parties agreed to withdraw Exhibits P-48 and R-24 and submit a stipulation after the hearing in lieu of those exhibits. After the parties were unable to enter into the stipulation, the ALJ appropriately allowed the parties to resubmit Exhibits P-48 and R-24, which were received into the record on July 8, 2013.

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

## FINDINGS OF FACT

1. The City is a public employer that provides services through various bureaus and offices, including the Bureau of Parks and Recreation (Parks Bureau), the Water Bureau, the Bureau of Transportation (BOT), and the Bureau of Environmental Services (BES).

2. LIUNA is a labor organization and a member of the DCTU. DCTU is a coalition of seven unions, including LIUNA; AFSCME, Local 189 (AFSCME); IBEW, Local 48 (IBEW); Machinists and Mechanics, District Lodge 24; Operating Engineers, Local 701; Plumbers, Local 290; and Painters and Allied Trades, District Council 5 (Painters).[2] DCTU, on behalf of these unions, and the City were parties to a collective bargaining agreement, effective July 1, 2010 to June 30, 2013 (DCTU Agreement).

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[1]Before the hearing, the City withdrew two other objections: (1) that another union was attempting to organize the park rangers; and (2) that the eleven 1400-hour park rangers were "casual employees." Given the City's concession that none of the petitioned-for rangers are "casual employees," we have modified the description of the petitioned-for unit, which had included a voter-eligibility limitation designed to exclude "casual employees."

[2]The parties disagree about whether there are seven or eight unions under the DCTU Agreement. Although resolution of this conflict is not critical to our decision, we refer to seven unions because that is the number of unions on the Agreement's signature page.

3. The DCTU-affiliated unions are the collective bargaining agents for a City-wide bargaining unit of "all employees of the City in all classifications contained in Schedule A of this agreement, as defined in sections 1.1.1, 1.1.2, 1.1.3, 1.1.6, and 1.2 below." The employees represented by the DCTU-affiliated unions include approximately 1600 employees in approximately 189 classifications who work throughout the City. Some classifications are exclusively represented by one of the seven unions, while others are represented by multiple unions. For example, utility workers are represented by AFSCME in the Water Bureau and by LIUNA in the Parks Bureau and BES.

4. Section 1.1.2 of the DCTU Agreement defines permanent/probationary employees as those employees working in positions budgeted on a yearly basis in Schedule A classifications with permanent or probationary status under the City's Human Resources Administrative Rules (HRARs). Section 1.1.3 defines permanent part-time employees as those working less than full-time in Schedule A classifications. Under Section 1.1.6, temporary employees working in full-time budgeted positions are included in the bargaining unit, but have limited contract rights.

5. Section 1.1.5 of the DCTU Agreement addresses seasonal employees as follows:

> "**Seasonal Employee**. Seasonal employees as defined herein shall be excluded from the bargaining unit covered by this Agreement. A seasonal employee shall be defined as an employee who is employed for a limited duration of up to 860 hours in a calendar year.
>
> "The City may employ seasonal employees at any time of the year. However, a seasonal employee may only be employed for up to 860 hours in a calendar year. After working for 860 hours, a seasonal employee must have a break in service of at least ninety (90) days before they may be reemployed. Except for continuation overtime, permanent employees in the work unit will be offered overtime before seasonal employees.
>
> "Seasonal workers will normally be assigned to common labor jobs and will not normally be up-graded to classifications covered by the contract except on an incidental basis as required by day-to-day work flow. Nothing in this Agreement will be construed to limit the City's right to hire additional personnel in emergencies beyond the City's control."

6. HRAR 3.03 defines casual/casual other appointments as follows:

> "Casual/Casual Other appointments are used for positions that occur, terminate, and recur periodically or regularly. Casual/Casual Other employees serve at-will and do not accrue status in the class to which they have been appointed and have no appeal rights upon demotion, suspension or termination from employment.

> "Casual/Casual Other employees do not accrue vacation or sick leave, service credit, and are not eligible for health benefits. Casual/Casual Other employees generally are not eligible for retirement benefits unless they have worked at least 600 hours in a calendar year in a qualified position. Full-time Casual/Casual Other employees are eligible for holiday pay if they were hired at least two weeks prior to the holiday and are in pay status the day before and the day following the holiday. Part-time Casual/Casual Other employees are not eligible for holiday pay.
>
> "Casual/Casual Other employees are not eligible for reemployment under the Administrative Rules on Reinstatement or Layoff & Recall and do not have bumping rights. Casual/Casual Other appointments are limited to 1400 hours per calendar year." (Emphasis omitted).

Parks Bureau

7. The Parks Bureau is overseen by Director Mike Abatt and Assistant Director Warren Jimenez. It consists of four sections: 1) parks and recreation services, which oversees the community centers; 2) city nature, which manages and is responsible for the preservation of the City's natural areas; 3) the director's office/professional services, which provides bureau-wide services; and 4) planning, development, and assets, which is responsible for planning, construction, turf, and irrigation. The director's office/professional services section is overseen by Assistant Director Jimenez and consists of five separate divisions: workforce development/human resources; community relations; property/acquisitions and services; business/finance; and security.

8. LIUNA represents a significant majority of Parks Bureau employees, including all employees who work outside, except for a few electricians represented by IBEW and a few painters represented by Painters. Parks Bureau employees in the classifications of office support specialist and accountant work indoors and are represented by AFSCME.

9. Some Parks Bureau employees are represented by the City of Portland Professional Employees Association, which is not affiliated with DCTU. Independent of the DCTU, LIUNA is also the exclusive bargaining representative of a bargaining unit of Parks Bureau employees in the seasonal maintenance worker classification and a bargaining unit of approximately 85 Parks Bureau employees in the classifications of recreation leader and coordinator. The LIUNA-represented recreations leaders and coordinators work at recreation centers and sun schools. The City does not believe that it would be appropriate to include the park rangers in LIUNA's recreation bargaining unit.[3]

10. The Parks Bureau also employs thousands of unrepresented, casual employees who work in recreation centers, recreation programs, and sun schools, many of whom are classified as recreation leaders.

[3]We use "park ranger" to refer to all of the petitioned-for employees because this term is generally used to refer to both full-time and "1400-hour" employees in the City's park ranger program.

LIUNA/DCTU Bargaining Unit

11. LIUNA/DCTU represents approximately 548 employees in various City bureaus in approximately 45 DCTU classifications.

12. LIUNA/DCTU-represented classifications in the Parks Bureau include: arborist (high climber trainee, high climber, high climber lead, tree inspector); automotive equipment operator (I, striper operator, bus driver, II, sewer vacuum operator, street sweeper, and tractor-trailer combination); carpenter (apprentice, carpenter, and lead); construction equipment operator; facilities maintenance technician (apprentice, technician, and lead); greenskeeper (I, II, and III); horticulturist (apprentice, horticulturist, and lead); maintenance mechanic (may require licenses/certifications such as respirator certificate, backflow tester's certificate, playground safety inspector's certificate, and aquatic facility operator's certificate); maintenance worker; parks maintenance crew leader; parks technician (technician and lead); storekeeper/acquisition specialist (I, II, automotive parts specialist, III, and lead); turf maintenance technician; utility worker (apprentice, I, and II); and welder (apprentice, welder, and lead). Except for storekeepers, the employees in these classifications primarily work outdoors and travel to different locations within the park system to perform their duties. Storekeepers work in the business/finance division of the director's office/professional services section.[4] LIUNA/DCTU-represented employees also work in some of these classifications in other City bureaus.

13. LIUNA/DCTU-represented classifications in other City bureaus include: asphalt raker; auto servicer; collection system video inspector (uses a track-mounted CCTV camera to remotely inspect and identify issues in sewer and storm water pipes); collection system investigator; concrete finisher (apprentice, concrete finisher, and lead); environmental systems crew leader; environmental systems maintenance technician; equestrian trainer (develops and provides training to horses and mounted police officers); industrial machinist (requires journey machinist classification or demonstrated skill); industrial maintenance millwright (apprentice, trainee, millwright, and lead—lead must have or complete four-year journey program and licenses/certifications, such as back flow prevention, welding, forklift operation, crane operation, self-contained breathing apparatus, confined space entry); laboratory analyst (I, II, analytical specialist, and coordinator—coordinator requires course work or degree in chemistry, environmental science, biology, microbiology, geology, or a related field and two years of analytical laboratory experience or the equivalent); parking collection technician (criminal background checks required); parking pay station technician and lead; police impound technician (works with law enforcement computer and records systems and must obtain PPDS/LEDS certification); public works crew leader; sidewalk inspector; sign maker; stable attendant; street maintenance crew leader; traffic crew leader; wastewater operator (trainee, I, II, and lead/journey level positions that may require operator III, operator IV, or crane certifications); and wastewater operations specialist.

[4]The City's contention that no LIUNA/DCTU-represented employees currently work under the director's office/professional services section is not supported by the evidence.

14. The LIUNA/DCTU-represented park technicians are responsible for ensuring the safety, cleanliness, and operability of the City's parks and recreational grounds and facilities. Their typical duties include performing grounds maintenance; applying chemicals and fertilizers; maintaining facilities and equipment; installing and repairing irrigation equipment; and ensuring park users' overall safety by inspecting grounds and equipment and removing or mitigating hazards. These employees work outside for extended periods. The qualifications for the park technician positions include knowledge of parks maintenance techniques; ability to perform minor equipment repairs, routine cleaning, and building maintenance; knowledge of safe pesticide application techniques; effective oral and written communication skills; ability to work effectively with coworkers and respond to questions/concerns from other employees and the public; and teamwork. Park technicians receive training in verbally interacting with park patrons who are drunk, using drugs, abusive, or possibly mentally ill.

15. Until recently, employees in the LIUNA/DCTU-represented turf maintenance technician classification worked nine months per year. Employees in this classification now work year-round.

16. Schedule A of the DCTU Agreement includes a step-wage structure for the 189 DCTU-represented classifications, under which employees are eligible for various hourly rates on a schedule of one to six steps. Classifications at the low end of Schedule A include the maintenance worker with two steps at $11.77 per hour and $13.95 per hour. Classifications at the high end of Schedule A include the laboratory coordinator with six steps, ranging from $26.89 to $37.94 per hour.

17. Under the DCTU Agreement, permanent bargaining unit employees are eligible for an employer contribution toward health insurance benefits that is prorated for part-time employees, holidays, paid vacations, and other paid and unpaid leaves. The DCTU Agreement also addresses shift schedules and pay, lateral transfers, job bidding, and promotions within a bureau. Temporary bargaining unit employees are eligible for holiday pay, paid vacations, and other leaves, but eligibility for health care benefits is based on the *status quo* as provided for under the City's benefit plans. Other provisions in the Agreement, including promotions, layoff/recall, and seniority, do not apply. Under the DCTU Agreement, the Parks Bureau is recognized as a single work unit for purposes of filling vacancies.

18. Discipline of bargaining unit employees is subject to a just cause standard and a grievance/arbitration process under the DCTU Agreement. The steps of the grievance process include an informal conference with the employee's immediate supervisor followed by a formal grievance filed with the bureau head or designee.

Petitioned-For Park Ranger Positions

19. The Parks Bureau has operated a park ranger program since approximately 1995, the purpose of which is to provide a safe, meaningful, and positive experience for park users. Under the program, the City employs park rangers to patrol approximately 200 City parks and park facilities in the downtown, central business district, and outlying areas. At the time that the petition

was filed, there were four full-time and 11 hours-limited park rangers. In May 2013, the City added 12 new hours-limited park ranger positions.

20. The park ranger program falls within the security division of the Parks Bureau director's office/professional services section. The park rangers work under the direction of Park Ranger Supervisor Hasan Artharee. Artharee reports to Security Manager Art Hendricks, who reports to Assistant Director Jimenez.

21. **Park ranger classifications.** The City assigns park rangers to three different classifications. Full-time Forest Park Ranger Robert McCoy is classified as a community outreach and information assistant. McCoy, who began work as an hours-limited park ranger in 2006, was placed into this classification when his full-time position was created in August 2010 because it was the most appropriate classification at the time. His position is currently funded through BES.[5] The general purpose of a community outreach and information assistant is to perform specific public information, awareness, and community involvement projects, including creating and developing materials and media for use in public and internal communications.

22. Full-time Park Rangers Asa Arden, Lionel Eyres, and Sam Sachs work under a park ranger classification that was created in April 2011. That classification's specifications emphasized public safety and security enforcement, which distinguishes it from the LIUNA-represented parks technician classification.

23. 1400-hour park rangers generally work "full-time" weekly hours up to 1400 hours per calendar year. In April 2013, the City reassigned the 1400-hour park rangers from the recreation leader classification, which is limited to 1200 hours per calendar year, to the community service aide 1 (CSA) classification. CSA is a City-wide classification assigned to any employees working up to 1400 hours per calendar year in an unbudgeted casual appointment regardless of the type of work performed. The City administratively designates "1400-hour" park rangers as "casual" employees under HRAR 3.03.

24. Originally, the park ranger season occurred during the summer months. The current park rangers, however, were hired for seasons starting in the summer, fall, or beginning of the calendar year.

25. **Park ranger duties.** The park rangers' duties include patrolling assigned parks by foot, bicycle, or vehicle; monitoring the parks for safety issues and damage to grounds, facilities, or equipment; addressing nuisance issues, including removing drug paraphernalia and cleaning up homeless camps; assisting and educating the public by providing general information and answering questions about the park, park history, and schedules of events; interpreting park codes, ordinances, rules, and regulations, and providing this information to the public; addressing code violations, including issuing warnings and park exclusions; working with law enforcement authorities, other City bureaus, outside organizations, and neighborhood/community citizen

[5]Due to the position's funding, the City asserts that the Forest Park Ranger is in BES. However, this position is designated and treated as part of the Parks Bureau in all other respects.

groups to address nuisance issues and criminal activity; assisting in problem-solving and resolving park-user conflicts; assisting other Parks Bureau employees with safety and user issues; responding to citizen complaints; and maintaining accurate logs, notes, and reports for use by the Parks Bureau, police, City Attorney, or outside agencies.

26. For safety reasons, park rangers generally work in pairs. All park rangers wear identical park ranger uniforms and work out of the same office, referred to as the ranger bunker. Park rangers generally come to the office at the beginning and end of their shift to file reports, attend staff meetings, and respond to e-mails. Park rangers spend approximately 85 to 90 percent of their time patrolling the park and 10 to 15 percent of their time on administrative duties and meetings. They generally work day or swing shifts. Some shifts include weekends.

27. Due to their experience, full-time park rangers are usually expected to act as lead workers providing support and assistance to 1400-hour rangers. Full-time park rangers also provide training during the park ranger academy for new 1400-hour rangers and are assigned other special projects. Forest Park Ranger McCoy is also an instructor for the Department of Public Safety Standards and Training (DPSST) security certification. 1400-hour park rangers are not generally required to work with community groups.

28. **Park ranger qualifications and abilities.** Employees in the park ranger classification are required to have a high school diploma or equivalent, with a preference for some college-level courses or experience in law enforcement, criminal justice, recreation management, security, or social services. These employees must be able to understand, interpret, and apply codes, policies, and procedures; establish and maintain good interpersonal relationships with diverse individuals and organizations; have effective communication skills; investigate and assess violations and develop solutions; remain calm and professional in response to verbal abuse and threats; maintain accurate records; prepare for and testify at code or judicial proceedings; use practical judgment and critical reasoning during enforcement and information gathering situations; deal tactfully and effectively with the public; resolve conflicts; and mediate disputes.

29. The minimum qualifications for employees in the community outreach and information assistant classification include public information, advertising, marketing, and public relations-related skills.

30. The CSA classification does not list any specifications or requirements. A recent 1400-hour ranger position posting sought employees with excellent communication skills and basic conflict resolution abilities who are able to work in teams, do extensive walking and biking, provide a positive presence in City parks, and educate the public on and enforce park rules and regulations. The posting stated that previous park or security experience was preferred.

31. All park rangers are required to obtain a State of Oregon unarmed security guard license through the DPSST within six months of their hire; pass a background check and physical capacity test; obtain bicycle, defensive tactics, and first aid/CPR certifications; and become familiar with crisis intervention and social services.

32. **Wages and benefits.** The salary scale for the park ranger classification is based on the City's non-represented employee pay grade 1, with a range of $16.42 to $23.50 per hour. The salary scale for the community outreach and information assistant classification is based on the non-represented pay grade 4, with a range of $21.67 to $33.39 per hour. McCoy currently earns $21.67 per hour. The salary scale for a CSA 1 is $8.95 to $13.17 per hour. The salary range included in a recent 1400-hour park ranger posting was from $11.00 to $17.00 per hour.[6] 1400-hour park rangers generally start at $11.00 per hour and receive a $.50 increase each year that they return. Park rangers sometimes work overtime or flex their schedules to work certain park events.

33. The four full-time park rangers receive paid vacation leave, sick leave, holiday pay, and retirement and health insurance benefits. 1400-hour park rangers are eligible for retirement benefits after they work at least 600 hours in a calendar year and receive holiday pay if they were hired at least two weeks before the holiday and are in pay status the day before and the day following the holiday. 1400-hour park rangers are not eligible for health insurance benefits or other paid leaves.

34. **Hiring of full-time park rangers**. McCoy's hours-limited park ranger position was converted to a full-time position in 2010. When the other three full-time park ranger positions were created in 2011, applicants were required to go through the City's formal external recruitment and interview panel process. The City hired hours-limited park rangers to fill these three positions. In 2012, the City filled a full-time park ranger vacancy through an internal City recruitment process. 1400-hour park rangers must apply for and are given no preference for full-time positions, but may apply as internal applicants if they are working at the time of the recruitment. During the 2012 recruitment, then hours-limited ranger Arden's supervisor told him not to work all of his 1400 hours so that he could apply as an internal applicant.

35. **Hiring/rehiring of hours-limited park rangers**. Before 2010, the City hired a fluctuating number of hours-limited park rangers for short periods of time. In the summer of 2012, the City significantly increased its number of hours-limited park rangers after it took over patrolling its downtown area parks, work that the City had previously contracted out. The City is not required to use a formal recruitment process for hiring 1400-hour park rangers. In four out of the past five recruitments, new applicants were required to submit an application and resume and were interviewed by the park ranger supervisor and security manager. In the July/August 2012 recruitment, prior hours-limited park rangers were invited to apply and were hired after being informally interviewed by either the park ranger supervisor or security manager.

36. 1400-hour park rangers do not have a right to return in subsequent years and not all of those rangers are asked to come back after their tenure ends. Security Manager Hendricks tells employees that recurring opportunities exist to return in the next year, subject to performance, budget, and availability. Hours-limited park rangers who have not exhausted their 1400 hours by the end of December are usually continued into the next calendar year without reapplying for the

[6]The salary range for a CSA 2 is $12.38 to $22.56 per hour. None of the 1400-hour park rangers are classified as a CSA 2.

position. Supervisors have contacted hours-limited park rangers who exhausted their 1400 hours in one year when employment opportunities arose in a subsequent year. Park rangers who return for a second employment tenure do not go through a formal interview process, but are usually required to fill out the necessary administrative/payroll paperwork.

37. Eight of the 11 hours-limited park rangers who were working at the time the petition was filed (Cardis Berry, Travis Bonneau, Michael Gaither, Alex Gastille, Katie Gribbon, Vicente Harrison, Dustin Meyer, and Jonathan Wilkins) began working in the summer or fall of 2012 and were still working in May 2013, without a break in service. These eight employees could work as long as August or September 2013, which is approximately when their 1400 hours would be exhausted. The majority of these employees were hired in August 2012, although a few were hired in June or July 2012. One of the 11 hours-limited park rangers (Nathan Hepp) worked in the 2012 season through September and then returned to work in January 2013. Another of the 11 hours-limited park rangers (Josh Larsen) began in October 2012 and was working in May 2013, but took a break in service during that time when he had a child. The remaining hours-limited park ranger (Nicholas McAfee) was hired in January 2013. Three of the 11 employees (Berry, Hepp, and Meyer) also worked as hours-limited park rangers before the 2012 season.[7] The employees hired to fill the 12 new hours-limited park ranger positions in May 2013 included one employee (Karras Kalivas) who previously worked as a park ranger for the City.

38. **Interactions with LIUNA-represented employees.** Park rangers in the central business district and some outlying parks interact with park technicians on a daily basis. Park rangers notify the park technicians about maintenance issues that they observe while patrolling the parks and park technicians seek assistance from park rangers regarding issues related to park patrons and drug or drinking activity in the parks. Some park rangers, such as McCoy, only see park technicians every few weeks. Park rangers occasionally work with park technicians and Parks Bureau seasonal maintenance staff to clean up homeless camps. Park rangers sometimes see or interact with arborists, urban forestry employees, seasonal maintenance workers, and the city nature section employees. Park rangers also occasionally interact with Water Bureau employees, parking enforcement officers, and other City employees.

39. **Transfer/promotion into LIUNA positions.** There is no history of an interchange or transfer of employees or promotional ladders between park ranger and LIUNA-represented positions.

40. **History of collective bargaining.** The park rangers have not previously been represented.

41. **Desires of employees.** The park rangers desire to be represented by LIUNA under the DCTU Agreement. Before filing the petition in this matter, the park rangers asked the City to recognize their positions as represented by LIUNA/DCTU. These employees are seeking

[7]Due to the parties' failure to reach a stipulation, there is limited evidence regarding rehiring of hours-limited park rangers, other than the employees working at the time that the petition was filed.

representation through LIUNA because, unlike the other unions the employees contacted, LIUNA agreed to seek to represent both the full-time and 1400-hour park rangers.

Other Relevant Positions

42. In early 2013, the City employed Bryan Tierney in the Parks Bureau dog enforcement program. Tierney is hired on a seasonal basis under the CSA classification, currently makes $15.00 per hour, and is unrepresented. He is supervised by Security Manager Hendricks. Tierney works both in the field and in an office environment, where he is developing and coordinating the dog enforcement program. He wears a shirt that identifies him as a Parks Bureau employee. Tierney previously worked as a park ranger, but was laid off in October 2012.

43. Adriana Hays is assigned to the Parks Bureau office working on a specific project. She is classified as a CSA, makes $13.00 per hour, and is unrepresented. She previously worked as a park ranger.

44. There are approximately six other employees working under the classification of community outreach and information assistant in several other City bureaus. Colleen Keyes works under this classification in the Parks Bureau in an office environment, developing public relations and information materials for Parks Bureau programs. Keyes is paid $33.39 per hour. McCoy once worked with Keyes when he helped write an instruction manual for Forest Park volunteers.

45. Parking code enforcement officers are represented by AFSCME under the DCTU Agreement, work out of BOT, and are responsible for patrolling assigned areas to enforce parking ordinances. In March 2013, AFSCME filed a grievance after the City announced its intent to have park rangers issue parking citations in City parks, which was not a park ranger duty at that time. AFSCME objected to the City assigning this work outside of the bargaining unit.

46. Water security specialists are represented by AFSCME under the DCTU Agreement, work out of the Water Bureau, and are responsible for water system maintenance and emergencies. In May 2013, AFSCME filed a grievance after the City announced its intent to have park rangers patrol Water Bureau properties, which was not a park ranger duty at that time.

## CONCLUSIONS OF LAW

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

2. The petitioned-for park rangers are appropriately included in the LIUNA/DCTU bargaining unit.

## DISCUSSION

LIUNA has petitioned to add all park rangers to the bargaining unit that it currently represents under the DCTU Agreement. The City objects to the petition on the following grounds: (1) the park rangers lack a community of interest with other LIUNA/DCTU-represented

employees; (2) the park rangers do not represent a logical group of employees to be added to the bargaining unit; and (3) it is not appropriate to add the seasonal park rangers because they are "temporary employees."

Under ORS 243.682(1)(a), we determine whether it is appropriate to add a group of employees to an existing bargaining unit based on "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." Community-of-interest factors include "similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, [and] common supervisor." OAR 115-025-0050(2). We have the authority to determine how much weight to give these factors. *OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251 (2001). We also only add the petitioned-for employees to an existing bargaining unit if they constitute "a logically defined group or class of employes (as opposed to interested individuals or fragments of a group)." *Oregon Public Employees Union, SEIU, Local 503 v. Executive Department, State of Oregon*, Case No. UC-59-87, 10 PECBR 456, 471 (1988).

We first address the City's objection that the park rangers do not share a community of interest with the existing LIUNA-bargaining unit employees. In considering this issue, we jointly address the full-time and 1400-hour park rangers because all park rangers perform essentially the same work under the same conditions, work directly with other park rangers in the same locations and on the same shifts, work out of the same office, attend the same staff meetings, go through the same training, obtain the same certifications, and share the same line of authority and supervision. They also have similar interactions with other Parks Bureau and City workers. The primary differences between the full-time and 1400-hour park rangers, such as their pay and benefits, are the result of the City's budgeting process and assignment of classifications. These differences are within the City's discretion and do not significantly impact our analysis of the community of interest factors.

To be sure, there are differences between the park rangers and the LIUNA-represented employees. The park rangers have different duties, responsibilities, skills, and qualifications; and are paid under different wage scales. They also work under different classifications and do not share the same supervision except at the level of assistant bureau director and above. And although the full-time park rangers have health insurance, retirement, and other leaves and benefits in common with the bargaining unit employees, the 1400-hour park rangers only receive holiday pay and retirement benefits if they qualify for those benefits based on hours worked.

However, these "differences" are not uncommon among employees in a "collector" bargaining unit, such as that represented by LIUNA.[8] LIUNA represents employees in approximately 45 classifications. The employees in these 45 classifications also perform different work and have various skills, qualifications, knowledge, abilities, and training. For example, some LIUNA-represented classifications have minimal qualifications. Other classifications require

[8]As set forth above, LIUNA is part of the DCTU coalition, which is essentially a coalition of seven collector City-wide bargaining units. The DCTU unions (of which LIUNA is one) represent employees in over 180 different classifications throughout the City, and those employees work in various bureaus and departments and have very different classifications, duties, responsibilities, skills, and qualifications.

employees to go through apprenticeship programs, be at a journey level, or have a specific college degree.

The salaries and benefits under the parties' agreement also reflect the "collector" nature of the bargaining units it covers. Employees under the agreement receive very different levels of pay and are eligible for different numbers of steps. The agreement also provides for a different level of benefits for permanent full-time, permanent part-time, and temporary employees. And, although the agreement excludes "seasonal" workers, it defines such workers as those employed for a limited duration up to 860 hours in a year. In fact, until recently, the LIUNA-represented turf maintenance technicians only worked nine months per year.

The park rangers also have a number of factors in common with the LIUNA-represented employees. The majority of employees in the Parks Bureau, including almost all of the employees who work outside, are already included in the LIUNA bargaining unit. The park rangers and these LIUNA-represented employees work under the same Parks Bureau director, who is the first step in a formal grievance process under the parties' agreement. One LIUNA-represented classification also works under the assistant director in the same Parks Bureau section as the park rangers. The park rangers and the LIUNA-represented Parks Bureau employees generally work outside under the same conditions and in the same or similar physical locations. The park rangers see or interact with some LIUNA-represented Parks Bureau employees during their work day. They even sometimes provide assistance to the park technicians and have a few similar duties, such as surveying the park for safety concerns, interacting with the public, and cleaning up homeless camps and drug paraphernalia. There is no evidence that the park rangers have similar commonalities with employees in other DCTU or non-DCTU bargaining units.

The City argues that the park rangers should not be included in the LIUNA bargaining unit because the park rangers are DPSST-certified security employees whose work is focused on safety and enforcement, while other LIUNA-represented Parks Bureau employees perform manual labor focused on the maintenance and care of properties and machinery. The City relies on *International Brotherhood of Teamsters v. Bay Area Hospital*, Case No. RC-36-01, 19 PECBR 898 (2002), in which this Board concluded that a separate unit of security employees was an appropriate bargaining unit because their work was sufficiently distinct from other hospital employees. In that case, however, we limited ourselves to addressing the issue before us—the union's petition to represent the security employees in a separate bargaining unit. We specifically qualified our decision by stating that we were not addressing the issue of whether the security employees also could appropriately be included within the hospital collector unit. The City's reliance on that case, therefore, is not persuasive.

Moreover, the work performed by the park rangers is insufficient to distinguish them from other LIUNA-represented employees so as to cause us to deny this petition. As previously stated, the LIUNA-represented employees perform a variety of duties. Although many perform manual labor, this is not the focus of work for all classifications. For example, the collection system video inspector operates a track-mounted camera to remotely inspect and identify issues in sewer and storm water pipes; the equestrian trainer develops and provides training to horses and mounted police officers; and the laboratory analyst prepares and performs laboratory work and analysis. In

addition, there are other commonalities. The "police impound technician" works with law enforcement and is required to have a specific certification to access police records. The parking collection technician is also required to go through a criminal background check.

The City also asserts that including the park rangers in the LIUNA bargaining unit would be detrimental because park rangers may be placed in the position of investigating other bargaining unit employees and, in periods of labor unrest or strike, the park rangers' security obligations would conflict with those of the LIUNA members. However, there is little evidence of actual investigations conducted by park rangers of LIUNA-represented employees. In addition, the City makes no claim that these employees are prohibited from striking as emergency or public safety personnel under ORS 243.736. Therefore, if added to the existing LIUNA bargaining unit, they would be entitled to participate in a lawful strike under the same conditions as other bargaining unit employees.

The City's assertion that the grievances filed by AFSCME support a lack of community of interest with the LIUNA-represented employees is not convincing. AFSCME has neither petitioned to represent the park rangers nor sought to intervene in the petition filed by LIUNA. AFSCME is only objecting to the City's intent to assign work performed by employees it represents to the unrepresented park rangers. It is unclear how the grievances are relevant to our community-of-interest analysis.

In addition to the above-described shared community of interest, the park rangers expressed a desire to be represented in the LIUNA bargaining unit, which is a factor in determining whether the proposed unit clarification is appropriate. The park rangers are public employees within the meaning of ORS 243.650(19). As public employees, they "have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation." ORS 243.662. The City objects to including the park rangers in the LIUNA bargaining unit. It also takes the position that the LIUNA-represented recreation leader unit is not appropriate for the park rangers. The City does not identify what bargaining unit, if any, it considers to be appropriate.

Our charge is to determine whether the proposed bargaining unit is *an* appropriate unit. This does not mean that the proposed unit is the *most* appropriate unit, or that other bargaining units are not appropriate. However, due to the small number of park rangers, it is unlikely that we would conclude that a separate unit of the park rangers is appropriate. This is especially true because designation of another bargaining unit in light of the number of existing bargaining units at the City would lead to additional fragmentation. *Laborers' International Union of North America, Local #483 v. City of Portland*, Case No. RC-30-00, 19 PECBR 384 (2001). There is also insufficient evidence to conclude that another bargaining unit is more appropriate. Therefore, including the park rangers within the LIUNA bargaining unit is consistent with our policies of certifying the largest possible unit and providing an opportunity for these public employees to engage in collective bargaining.

**1400-Hour Park Rangers**

We next address whether the 1400-hour park rangers are "temporary employees" that should be excluded from the bargaining unit. In *Service Employees International Union Local 503, Oregon Public Employees Union v. Marion County (SEIU v. Marion County)*, Case No. UC-11-10, 24 PECBR 521, 552-54, *nunc pro tunc order*, 24 PECBR 557 (2011), this Board explained that, going forward, we would look to two tests used by the National Labor Relations Board (NLRB) to determine whether employees are "temporary": (1) the date certain test; and (2) the reasonable expectation test.[9] *See also Kinney Drugs, Inc. v. N.L.R.B.*, 74 F3d 1419, 1434 (2d Cir. 1996) (explaining those tests); *NLRB v. S.R.D.C., Inc.*, 45 F3d 328, 331-32 (9th Cir 1995) (same); *NLRB v. New England Lithographic Co., Inc.*, 589 F2d 29, 33 (1st Cir 1978) (same). "Under the date certain test, an employee may be fully aware that his or her employment will be short-lived, but, as long as no definite termination date is known and the employee was employed on the eligibility and election dates, he or she will be eligible to vote." *S.R.D.C.*, 45 F3d at 332 (quoting *New England Lithographic Co.*, 589 F2d at 34). Under the "reasonable expectation test," "the Board looks at the employee's reasonable expectation of permanent employment within the bargaining unit." *S.R.D.C.*, 45 F3d at 331. The First and Ninth Circuits have treated these two tests as competing tests and have endorsed the "date certain" test as the better approach, whereas the Second Circuit has concluded that both are "relevant to the temporary employee issue." *Kinney Drugs, Inc.*, 74 F3d at 1434. We need not determine, in this case, whether the "date certain" or the "reasonable expectation" test (or both) is preferred because, under either test, we conclude that the "1400-hour" park rangers are not "temporary employees," and are, therefore, properly included in the proposed unit and eligible to vote.

As set forth above, "[u]nder the date certain test, an employee may be fully aware that his or her employment will be short-lived, but, as long as no definite termination date is known and the employee was employed on the eligibility and election dates, he or she will be eligible to vote." *S.R.D.C.*, 45 F3d at 332 (quoting *New England Lithographic Co.*, 589 F2d at 34). Here, the 1400-hour park rangers are hired under the condition that they work no more than 1400 hours per calendar year. However, they are not given a specific date for the end of their employment at the time they are hired. The actual termination date varies based on the number of hours worked per week and whether a limited-hours park ranger is laid off before the exhaustion of their 1400 hours in a calendar year, works all of their 1400 hours in a calendar year, or is continued into the next calendar year without a break in service. Consequently, there is "no definite termination date" for these employees and they are not "temporary employees" under the date certain test.

The "1400-hour" park rangers also have a reasonable expectation of permanent employment. As set forth above, although these park rangers are limited to 1400 annual hours, they are not hired for just a specific project or for only a fixed period. They simply may not exceed

[9]We also used the NLRB's general rule for determining whether certain employees are "casual workers who are ineligible to vote on inclusion in the Union bargaining unit." *SEIU v. Marion County*, 24 PECBR at 553. As set forth above, however, the City has withdrawn its objection that the petitioned-for park rangers are "causal employees."

1400 hours per calendar year. Moreover, all but one of the 11 of the petitioned-for "1400 hour" park rangers were employed in 2012 and had their hours "renewed" in January 2013. Specifically, eight of the 11 hours-limited park rangers began working in the summer or fall of 2012 and were still working in May 2013, without a break in service. One of the 11 hours-limited park rangers worked in the 2012 season through September and then returned to work in January 2013. Another of the 11 hours-limited park rangers began in October 2012 and was working in May 2013, but took a break in service during that time when he had a child. Three of the 11 hours-limited park rangers also worked as hours-limited park rangers before the 2012 season.

The City has also routinely used the 1400-hour park rangers to fill full-time park ranger vacancies. Finally, although the 1400-hour employees are not "guaranteed" to be recalled the following year, they are told in hiring meetings that they can expect to be rehired if they do a good job and the budget allows. Under these circumstances, we conclude that the 1400-hour park rangers have a reasonable expectation of permanent employment (*i.e.*, those employees reasonably expect continued employment).

In disagreeing with the City's contrary position, we observe that, under the reasonable expectation test, the expectation of permanent employment must only be reasonable, not certain. We also note that the City's memorandum in aid of oral argument relies on evidence that was not admitted at the hearing. As set forth above, we have agreed with the ALJ's rulings and we do not consider any such evidence proffered by the City in its memorandum, which was not admitted by the ALJ.

Finally, the City objects that the park rangers are not a "logically defined group of employees" to be added to the bargaining unit. Specifically, the City asserts that LIUNA's failure to include Parks Bureau CSAs Tierney and Hays, who previously worked as hours-limited park rangers, shows that LIUNA has engaged in a selective choice of individuals. The City questions what will happen if either of these employees were reassigned as park rangers in the future.

The City's objection misses the mark. The identified CSAs are not logically tied to the petitioned-for park rangers. The park rangers all perform essentially the same duties patrolling the City parks and have generally the same qualifications, skills, and certification requirements. From the evidence in the record, the current duties performed by CSAs Tierney and Hays are not similar to those of the park rangers. In addition, aside from having a classification and salary range in common, there is little evidence that Forest Park Ranger McCoy shares any community of interest with the other unrepresented employees in the community information and information assistant classification. The same is true for the 1400-hour park rangers and other unrepresented employees in the CSA classifications. The park rangers have little in common with other CSAs, except assignment to that classification, which is purely a result of budgeting. Therefore, the park rangers constitute a logically defined group of employees to be added to the LIUNA/DCTU bargaining unit.

## ORDER

1. It is appropriate to include the following employees in the LIUNA/DCTU bargaining unit: all park rangers employed by the City of Portland, including full-time park rangers and park rangers limited by City administrative rule to 1400 hours per calendar year.

2. This Board's elections coordinator shall, as soon as practicable, conduct a secret mail ballot election among the group of unrepresented employees described above to determine whether they wish to be represented by LIUNA for the purposes of collective bargaining. Eligible voters are unrepresented park rangers employed by the City of Portland on the date of this Order who are still employed at the close of the election. The choices on the ballot shall be: Laborers' International Union of North America, Local 483, and No Representation.

3. Within 10 days of the date of this Board's final Order, the City shall provide an alphabetized list of the names, current home addresses, position titles, and job classifications for the eligible voters to the elections coordinator and LIUNA.

DATED this 6 day of March 2014.

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-016-13

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 659, | ) | |
| Complainant, | ) | RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |
| v. | ) | |
| EUGENE WATER & ELECTRIC BOARD, | ) | |
| Respondent. | ) | |

Paul C. Hays and Ping Tow-Woram, Attorneys at Law, Carney Hays & Marsh, Portland, Oregon, represented Complainant.

Jens Schmidt, Attorney at Law, Harrang Long Gary Rudnick P.C., Eugene, Oregon, represented Respondent.

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On March 3, 2014, Administrative Law Judge B. Carlton Grew issued a recommended order in this matter. The parties had 14 days from the date of service in which to file written objections. *See* OAR 115-010-0090; OAR 115-035-0050(2). Neither party filed objections.

When neither party objects to a recommended order, we generally adopt the recommended order as our final order, and we consider any objections that could have been made to that order unpreserved and waived. *International Brotherhood of Electrical Workers, Local Union No. 659 v. Eugene Water & Electric Board,* Case No. UP-008-13, 25 PECBR 901 (2014). The final order is binding on, and has precedential value for, the named parties only. We do not publish the recommended order because it would not be of benefit to anyone other than the named parties.

ORDER

1. The Board adopts the recommended order as the final order in this matter.

2. The complaint is dismissed.

DATED this 19 day of March 2014.

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-025-12

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| EAGLE POINT EDUCATION ASSOCIATION/OEA/NEA, | ) | |
| Complainant, | ) | RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |
| v. | ) | |
| JACKSON COUNTY SCHOOL DISTRICT #9, | ) | |
| Respondent. | ) | |

Thomas K. Doyle, Attorney at Law, Bennett, Hartman, Morris and Kaplan, LLP, Portland Oregon, represented Complainant.

Jackie Marks, Legal, Labor & PACE Services Attorney, Oregon School Boards Association, Salem, Oregon, represented Respondent.

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On February 18, 2014, Administrative Law Judge Julie D. Reading issued a recommended order in this matter. The parties had 14 days from the date of service in which to file written objections. *See* OAR 115-010-0090; OAR 115-035-0050(2). Neither party filed objections.

When neither party objects to a recommended order, we generally adopt the recommended order as our final order, and we consider any objections that could have been made to that order unpreserved and waived. *International Brotherhood of Electrical Workers, Local Union No. 659 v. Eugene Water & Electric Board,* Case No. UP-008-13, 25 PECBR 901 (2014). This final order is binding on, and has precedential value for, the named parties only. We do not publish the recommended order because it would not be of benefit to anyone other than the named parties.

ORDER

1. The Board adopts the recommended order as the final order in this matter.

2. The District will cease and desist from violating ORS 243.672(1)(a).

3. Within 30 days of the date of this Order, the District shall sign and post copies of the attached notice to employees for a period of 30 days in prominent places.

DATED this 26 day of March 2014.

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-025-12, *Eagle Point Education Association/OEA/NEA v. Jackson County School District #9,* 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 Jackson County School District #9 violated the PECBA by engaging in an unfair labor practice. The violation occurred when, during the 2012 strike, the District paid regular teachers their normal pay for working one five-hour shift, or paid regular teachers their normal pay, plus $165 for working two five-hour shifts.

The Employment Relations Board has ordered the District to cease and desist from violating ORS 243.672(1)(a).

Dated this _____ day of_____, 2014.

EMPLOYER

By: _____
Jackson County School District #9

**********

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. FR-004-12

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| STEVEN STOTLER, JR., Complainant, v. MEDFORD POLICE OFFICERS' ASSOCIATION and CITY OF MEDFORD, Respondents. | ) | SUPPLEMENTAL ORDER DENYING MOTION TO EXTEND TIME FOR FILING OBJECTIONS |

G. Jefferson Campbell, Jr., Attorney at Law, Medford, Oregon, represented Complainant.

Becky Gallagher, Attorney at Law, Fenrich and Gallagher, PC, Eugene, Oregon, represented Respondent Association.

Dian S. Rubanoff, Attorney at Law, Peck, Rubanoff, and Hatfield, Portland, Oregon, represented Respondent City.

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On February 3, 2014, the Administrative Law Judge issued a recommended order. The parties had 14 days from the date of service of the recommended order in which to file written objections. *See* OAR 115-010-0090; OAR 115-035-0050(2). Because neither party filed timely written objections, this Board entered an order adopting the recommended order as the final order and dismissing the complaint.

Complainant did file objections, which were received on February 20, 2014 – 17 days after the date of service of the recommended order. On February 28, 2014, Complainant filed a motion to extend the time period for filing objections. He stated that he was unaware of our administrative rule requiring that the objections be *received* (rather than just *mailed*) within the 14-day time period.

OAR 115-010-0090 provides that "[u]pon good cause shown, the Board may extend the time within which the objections shall be filed." Lack of awareness of the Board's administrative rules is not "good cause." The Complainant's motion will be denied and the Board will adhere to the original order.

ORDER

1. The motion to extend time for filing objections is denied.
2. The Board adheres to the February 21, 2014 order.

DATED this 26 day of March 2014.

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-017-13

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| OREGON SCHOOL EMPLOYEES ASSOCIATION,<br><br>Complainant,<br><br>v.<br><br>NORTH CLACKAMAS SCHOOL DISTRICT,<br><br>Respondent. | ) | RULINGS,<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND ORDER |

On March 11, 2014, the Board heard oral argument on Respondent's objections to a recommended order issued by Administrative Law Judge (ALJ) Larry L. Witherell on January 17, 2014, after a hearing held on October 8, 2013, in Salem, Oregon. The record closed on November 12, 2013, following receipt of the parties' post-hearing briefs.

Katelyn S. Oldham and Nicole L. McMillan, Attorneys at Law, Tedesco Law Group, Portland, Oregon, represented Complainant.

Bruce Zagar, Attorney at Law, Garrett, Hemann, Robertson, Salem, Oregon, represented Respondent.

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On April 5, 2013, the Oregon School Employees Association (Association) filed this unfair labor practice complaint against the North Clackamas School District (District) alleging that the District violated ORS 243.672(1)(g) by refusing to process a grievance to arbitration. The District filed a timely answer to the complaint.

The issues are:

1. Is the complaint timely?

2. Did the District refuse to proceed to arbitration for a grievance regarding Frank Iranshad? If so, did this conduct violate ORS 243.672(1)(g)?

For the reasons set forth below, we conclude that the Association's complaint was timely, and that the District violated ORS 243.672(1)(g) when it refused to proceed to arbitration over the Iranshad grievance.

## RULINGS

The rulings of the ALJ were reviewed and are correct.

## FINDINGS OF FACT

1. The District 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 for certain classified employees of the District.

2. During the relevant times and events, or where otherwise specified, the following individuals were representatives or officials of the Association:

| | |
|---|---|
| Pamela Briece | North Clackamas Local Chapter President |
| Tia Call | Employee and Transportation Department Steward |
| Gary Cates | Field Representative |
| Pat Fontaine | Field Representative (until April 22, 2012) |
| Larry Miller | Field Representative |
| Rick Shidaker | Director of Field Operations (until October 2013 and thereafter Executive Director of Oregon School Employees Association) |

3. During the relevant times and events, or where otherwise specified, the following individuals held leadership positions with the District:

| | |
|---|---|
| John Beight | Associate Director of Human Resources (until July 2013) |
| Mark Moser | Executive Director of Human Resources (as of July 1, 2013) |
| Marla Shuman | Executive Director of Human Resources (until July 1, 2013) |
| Matt Utterback | Superintendent |
| Susan Waters | Associate Director of Human Resources |

4. The District and Association were parties to a collective bargaining agreement (CBA) covering the period from July 1, 2010 to June 30, 2013.

5. Article 10.3 of the CBA provides for a three-level grievance procedure. A grievant is either an employee, group of employees, or the Association. Article 10.1.B. of the CBA defines a grievance as:

> "a claim by a grievant that a dispute or disagreement exist[s] involving interpretation or inequitable application of the terms of this Agreement, administrative rule, or Board policy. A grievance filed solely over Board policy will conclude at Level Two (Superintendent Level), the Superintendent's decision being final."

6. At level one of the grievance procedure, a "grievant shall first discuss the grievance with the immediate supervisor * * * no later than the 15th workday after occurrence or event which led to the dispute." If the grievant is not satisfied, then at Level Two, the grievant "may appeal in writing to the Superintendent within 10 workdays of the Level One decision." Where the grievant remains unsatisfied with the disposition of the grievance at level two or if no decision has been rendered within 10 work days after the grievance was considered by the Superintendent (or a designee of the Superintendent), the grievant may request that the Association pursue the grievance to level three, which is arbitration. If the Association decides to pursue the grievance to arbitration, then

> "it may submit the grievance to arbitration within 15 workdays after receipt of the Superintendent's decision. The Superintendent or designee and the Association representative shall confer to determine a mutually acceptable arbitrator. If no arbitrator can be mutually agreed upon, either the Superintendent or the Association shall request a list of arbitrators from the Employment Relations Board (ERB). The parties shall then be bound by the rules and procedures of ERB in the selection of an arbitrator."

7. Article 10.3.B., the arbitration clause, provides:

> "The arbitrator shall confer with the representatives of the Superintendent and the Association and hold a hearing promptly and shall issue the decision not later than 30 calendar days from the date of the hearing, or, if oral hearings have been waived, then from the date that final statements and proofs on the issues are submitted to the arbitrator. The Superintendent and the Association may present evidence, witnesses, and exhibits at the hearing scheduled by the arbitrator; and each shall have the right to cross-examine. The arbitrator's decision shall be in writing and shall set forth findings of fact, reasoning, and conclusions on the issues submitted. The arbitrator shall be without power or authority to make any decision, which requires the commission of an act prohibited by law or which is in violation of this Agreement. The decision of the arbitrator shall be submitted to the Superintendent and the Association and shall be final and binding on the parties."

8. Article 6.1.B., which provides for employee discipline and dismissal, states that

> "[n]o dismissal, suspension, or demotion shall be brought against an employee under this provision without just cause. * * * Discipline shall be administered in private and shall be progressive. Progressive discipline shall mean verbal warning,

written reprimand, suspension with or without pay, then termination. The nature of the offense shall determine where progressive discipline is initiated."

9. On November 4, 2011, and after a pre-termination hearing with Associate Director of Human Resources Beight, the District terminated Frank Iranshad from his position as a bus driver with the District.

10. On November 10, 2011, Field Representative Fontaine sent an e-mail letter to Beight, disagreeing with the District's termination decision, and providing "notice that OSEA and OSEA Chapter 71 wish to pursue this issue further in accordance with ***Article 10 – Grievance Procedure***. OSEA is willing to begin the grievance procedure at the District Level, or, if the District is in agreement, we would propose to move to arbitration as quickly as possible." (Emphasis in original.) Fontaine concluded by asking Beight, "[p]lease notify us as soon as possible with your decision as to which direction the District would prefer. Either way, OSEA and OSEA Chapter 71 stand ready to represent Mr. Iranshad for what we believe to be excessive discipline under ***Article 6 – Discipline and Dismissal***, in moving for termination without Just Cause." (Emphasis in original.)[1]

It was typical for grievances to be filed or submitted by e-mail. It was not unprecedented for the parties simply to bypass grievance levels and take grievances directly to arbitration. It was also not unusual for an Association representative to address a grievance to the District official who sent the termination letter to the employee.

11. Fontaine's e-mail shows that copies were sent to Executive Director of Human Resources Shuman, Associate Director of Human Resources Waters, Director of Field Operations Shidaker, Employee and Steward Call, Local Chapter President Briece, the Association's attorney Michael Tedesco, and Grievant Iranshad.[2]

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[1]There can be no dispute about whether the e-mail was sent, contrary to the District's assertion at oral argument. The Association, in its complaint, alleged that Fontaine sent the November 10, 2011 e-mail to the District. The District admitted that allegation in its answer. It is axiomatic that an admitted factual allegation cannot be contested, subject to certain exceptions that are not present in this case. Therefore, we find that the November 10, 2011 e-mail was sent by Fontaine.

[2]In its objections and argument, the District asserted that the District did not "receive" the November 10, 2011 e-mail, contrary to the ALJ's recommended findings of fact. For purposes of our analysis and decision in this matter, however, we need not decide whether the e-mail was "received" by the District. We note, however, that such a finding is reasonable, despite the testimony of Beight and Shuman that they did not recall receiving the e-mail and that they were unable to locate the e-mail after conducting a search for it. To begin, the e-mail search occurred approximately 18 months after it was sent. Additionally, there is no dispute that the e-mail was sent to the correct e-mail addresses of various District representatives. Moreover, an Association representative who was also an addressee in the e-mail, confirmed receipt of the e-mail. Finally, in an April 3, 2013 letter, District counsel confirmed that the District had received the e-mail in November 2011.

12. From November 10, 2011 until early April 2012, Fontaine continued to have regular, almost weekly, contact and/or communications, including meetings, with District officials concerning other matters. On April 2, 2012, Iranshad e-mailed Fontaine and asked whether there had been any new development on his case, and when his case would be heard. Fontaine responded the next day: "As I think I told you a while back, this process does not move quickly. I will get in touch with the parties involved and see if I can find out where we are. As soon as I know something, I will be back in touch." There is no evidence that Fontaine had any additional communications with any District official concerning the Iranshad grievance. Fontaine died on April 22, 2012.

13. After Fontaine's death, Field Representative Miller temporarily covered Fontaine's responsibilities. In June 2012, Field Representative Cates permanently assumed Fontaine's duties. Neither Miller nor Cates discovered anything about the Iranshad grievance in Fontaine's files or computer. Cates did not know anything about the grievance until February 14, 2013, when Iranshad contacted Cates and asked about his grievance. The next day, Cates e-mailed Beight, explaining that he did not know Iranshad or anything about the grievance. Cates asked Beight, "[d]o you have anything that would help me understand where this matter was left?"[3] Cates also contacted Executive Director of Human Resources Shuman and asked whether she had any additional information about the Iranshad grievance. Both Beight and Shuman informed Cates that they had no information about the grievance.

14. On March 22, 2013, Cates sent a letter to Superintendent Utterback, advising him that the Association was submitting the Iranshad grievance to arbitration as set forth in Article 10 of the CBA. Cates requested that the District's representative contact Association attorney Tedesco in order to select an arbitrator. On April 3, 2013, the District's attorney, Bruce Zagar, advised Tedesco by letter that

> "[p]ursuit of the [Iranshad] grievance to arbitration by OSEA is most untimely. It is so untimely that it is now substantively non-arbitrable. The grievance is approximately a year and a half old. The Association has failed to pursue this grievance in a timely manner. The District has not heard anything official from the Association *since it received an email from Pat Fontaine on November 10, 2011.*
>
> "Please be advised that the District will not process this grievance nor will it proceed to arbitration as requested in Mr. Cates' March 22, 2013, letter. The grievance is procedurally and substantively non-arbitrable." (Emphasis added.)

The letter of April 3, 2013, was the first time that the District made any response to the Association about the Iranshad grievance.

[3]Cates testified that he wrote to Beight because it was Cates's understanding that Beight was the human resources official responsible for grievances from the transportation department and employees.

## CONCLUSIONS OF LAW

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

2. The complaint was timely filed.

Timeliness of Complaint

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 fundamental issue for resolution is did the alleged unfair labor practice occur within 180 days of when the complaint was filed? The Association claims that the unfair labor practice occurred on April 3, 2013, when the District notified the Association that the District would not proceed to arbitration. As the complaint was filed on April 5, 2013 (two days later), the Association asserts that it is timely filed. The District, however, alleges that the unfair labor practice occurred more than 180 days before the complaint was filed. Although the District does not suggest a specific date for the alleged unfair labor practice, it states that the complaint was untimely filed because the Association should have known of the District's alleged action—meaning a refusal to arbitrate—at some point before October 7, 2012, which represents 180 days before the complaint was filed.

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 including an agreement to arbitrate or to accept the terms of an arbitration award." This Board has long held in this type of claim that it is the *refusal* to arbitrate that is the occurrence of the unfair labor practice. *IAFF, Local 1062 v. City of Gresham*, Case No. C-143-81, 6 PECBR 5093, 5096-97 (1982). Following, we have stated "that the 180-day limitation period starts to run when the employer makes it clear that it will not submit a grievance to arbitration." *Nash v. City of Oregon City*, Case No. UP-33-87, 10 PECBR 686, 694 (1988) (emphasis in original). Further, "[a] refusal to arbitrate need not be phrased or conveyed in any particular manner. Its expression, however, must be sufficiently definite (judged objectively) to apprise the grievant that the employer will not consent to arbitration." *Id.* (Emphasis in original.)

We have continued to adhere to that standard of "a *clear* employer refusal to proceed to arbitration" as being the actionable event. *International Union of Operating Engineers, Local 701 v. City of Portland*, Case No. UP-50-96, 17 PECBR 385, 393 (1997) (emphasis in original); *also see Mt. Hood Community College Faculty Association and Kotulski v. Mt. Hood Community College,* Case No. UP-7-99, 18 PECBR 636, 647-49 (2000). More recently, this Board has stated, "[a]n unfair labor practice alleging that an employer violated [ORS 243.672(1)(g)] by refusing to arbitrate a grievance is timely if filed within 180 days of the date on which the employer 'clearly and unequivocally' communicates a refusal to arbitrate." *Oregon AFSCME Council 75, Local #1329 v. Crook County Road Department*, Case No. UP-39-07, 22 PECBR 287, 290 (2008).

Here, the District first refused to arbitrate the Iranshad grievance on April 3, 2013, which is the actionable event for purposes of this claim. The Association filed its complaint two days later on April 5, well within the 180 days of the alleged unfair labor practice (*i.e.*, the refusal to arbitrate the grievance). In arguing otherwise, the District focuses on the date of Iranshad's *termination*, not the date that it refused to arbitrate the grievance. This unfair labor practice claim, however, specifically concerns the District's refusal to arbitrate the grievance, not whether the District violated the parties' agreement by terminating Iranshad. Therefore, we conclude that the complaint was timely filed.[4]

3. The District violated ORS 243.672(1)(g) by refusing to arbitrate the Iranshad grievance.

Issue of Arbitratility

The Association alleges that the District refused to arbitrate the Iranshad grievance in violation of ORS 243.672(1)(g), which 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." The District appears to argue that the Association waived its right to proceed further with its grievance or that the grievance had become fatally stale by the inaction of the Association. In other words, the District is suggesting that the grievance suffers from a procedural malady.

This Board has long held that it will send a dispute to arbitration unless it can be said with positive assurance that the dispute is not arbitrable. *Luoto and Long Creek Education Association v. Long Creek School District No. 17*, Case No. UP-16-86, 9 PECBR 9314, *ruling on motion to stay*, 9 PECBR 9440, *aff'd*, 89 Or App 34, 747 P2d 370 (1987), *rev den,* 305 Or 576, 753 P2d 1382 (1988). We have consistently adhered to the following principles set out in *Luoto*:

> "(1) arbitration is a matter of agreement, (2) the question of arbitrability is an issue for the court, not the arbitrator, (3) the court, however, in deciding that arbitration must be ordered, is not to rule on the merits of the underlying claim, and (4) arbitration should be ordered unless it can be said with positive assurance that the underlying dispute is not arbitrable." 9 PECBR at 9325.

[4]The Respondent mistakenly attempts to squeeze the instant case into the issue addressed by *Rogue River Education Association/Southern Oregon Bargaining Council/OEA/NEA v. Rogue River School District 35,* Case No. UP-17-08, 22 PECBR 577 (2008), *rev'd and rem'd*, 244 Or App 181, 260 P3d 619 (2013), *order on remand*, 25 PECBR 230 (2012). That case concerned when a complainant knew or should have known of the occurrence of an alleged unfair labor practice, whereas this case concerns when the alleged unfair labor practice occurred. Accordingly, *Rogue River* is not applicable to the instant case.

*See Portland Association of Teachers and Gray v. Portland School District No. 1*, Case No. UP-114-86, 10 PECBR 216, 227 (1987), *appeal dismissed as moot*, 94 Or App 215, 764 P2d 965 (1988); *International Union of Operating Engineers, Local 701, v. City of Portland*, 17 PECBR at 392.

It follows that "[t]he positive assurance test creates a 'presumption of arbitrability' that can be overcome only by an express exclusion of the grievance from arbitration or by other most forceful evidence of a purpose to exclude the claim from arbitration." *Oregon School Employees Association v. Camas Valley School District 21J*, Case No. UP-59-86, 9 PECBR 9367, 9376 (1987).

In our application of *Luoto*, we have concluded that

> "[t]he 'positive assurance' inquiry does not involve subtleties such as diagraming or dissecting sentences, or examining the context of one provision in relationship to another in order to determine the intended meaning of the language. Doing so would require this Board to delve into interpreting the agreement more than is appropriate for a determination of whether the parties agreed to arbitrate a particular dispute. The positive assurance test by its nature requires an examination of only the grievance procedure, plus any specific references to arbitration that appear in other portions of the collective bargaining agreement. Any doubts regarding arbitrability are resolved in favor of submitting the dispute to arbitration." *Meadows-West, Mid-Valley Bargaining Council; State Teachers Association v. State of Oregon, Department of Education*, Case No. UP-50-97, 17 PECBR 664, 672 (1998).

In the instant case, the CBA contains a broad arbitration provision and defines a grievance as any "dispute or disagreement * * * involving interpretation or inequitable application of the terms of the Agreement, administrative rule or Board policy." As a result, we cannot conclude with positive assurance that the parties intended to exclude the grievance from arbitration.[5]

We next address the issue of the procedural problem associated with the alleged untimeliness or staleness of the grievance. In *Oregon State Employes Association v. Executive Department, Labor Relations Division*, *and Demusiak, Administrator*, Case No. C-154-80, 5 PECBR 4196, 4199 (1980), we recognized that "[t]he great weight of judicial authority states that, once it is determined that a grievance under a collective bargaining agreement is substantively arbitrable, 'procedural' questions--such as timeliness--should be left to the arbitrator to decide."

[5]The only contractual limitation to arbitration in the CBA is "[a] grievance filed solely over Board policy will conclude at Level Two (Superintendent Level), the Superintendent's decision being final."

This Board has had to consider a situation where a union withdrew its original grievance, and subsequently sought arbitration, only to be met with the employer's refusal. We directed arbitration, holding that "[i]t is well-established that questions of procedural arbitrability are arbitrable issues to be determined in the first instance by an arbitrator rather than the Board." *AFSCME Council 75, Local 1246 v. Labor Relations Division, Executive Department, and Sayan, State of Oregon*, Case No. UP-91-85, 8 PECBR 8457, 8462 (1986); *also see Oregon Public Employes Union v. Linn County and Linn County Clerk*, Case No. UP-19-87, 9 PECBR 9430, 9436 (1987) (the question of the timeliness of a grievance is a procedural issue and therefore a matter for the arbitrator). In *AFSCME Local 2064 v. Benton County*, Case No. UP-36-95, 16 PECBR 281, 285-86 (1995), we addressed whether a grievance had been abandoned, and again concluded that it is a procedural issue for an arbitrator. This Board has recently reaffirmed the principle that "[o]nce we conclude a grievance is substantively arbitrable, procedural questions, such as timeliness, will be left to the arbitrator. * * * The issue of whether the grievances are timely under the contract will be for an arbitrator to determine." *Teamsters Local 670 v. City of Ontario*, Case No. UP-40-08, 23 PECBR 210, 217 (2009).

As a result, we conclude that the District's refusal to proceed to arbitration violated ORS 243.672(1)(g).

Remedy

Because we have determined that the District violated ORS 243.672(1)(g) by refusing to proceed to arbitration, we will order the District to cease and desist from refusing to arbitrate the Iranshad grievance. ORS 243.676(2)(b).

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 Public Employee Collective Bargaining Act 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 of a notice. *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, 19 PECBR 684, 685 (2002). The District's violation does not meet the criteria required for posting a notice.

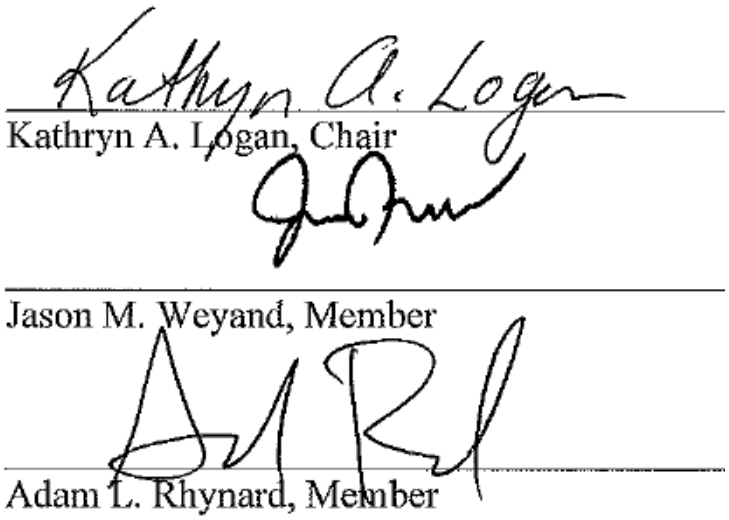
## ORDER

1. The District violated ORS 243.672(1)(g) when it refused to proceed to arbitration over the Iranshad grievance.

2. The District shall cease and desist from violating ORS 243.672(1)(g).

3. Immediately upon issuance of the final order in this matter, the District shall proceed to arbitration over the grievance.

DATED this 4 day of April 2014.



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,<br><br>Complainant,<br><br>v.<br><br>CITY OF PORTLAND, BUREAU OF HUMAN RESOURCES,<br><br>Respondent. | ) | FINDINGS AND ORDER ON PETITIONS FOR REPRESENTATION COSTS |

On May 9, 2012, Laborers' International Union of North America, Local 483 (Union) filed an unfair labor practice complaint against the City of Portland, Bureau of Human Resources (City). The complaint, as amended, alleged that the City violated ORS 243.672(1)(b), (e), and (f) by unilaterally changing the maximum hours of Seasonal Maintenance Workers (SMWs). It also alleged that the City 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.

On November 5, 2013, the Board issued an order concluding that the complaint was timely and that the City violated ORS 243.672(1)(e) when it unilaterally decided to increase the maximum hours for SMWs without first bargaining with the Union. The Board dismissed the Union's claims under (1)(b) and (1)(f), and the Union's second claim under (1)(e) (that the City misrepresented its intent to increase hours). 25 PECBR 810 (2013). On November 19, 2013, the City filed a petition seeking reconsideration of the Board's conclusions. The Board granted reconsideration and on December 31, 2013, issued an order adhering to its original order, as explained and clarified in the order on reconsideration. 25 PECBR 892 (2013).

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

1. On November 26, 2013, both parties filed timely petitions for representation costs. The Union filed timely objections to the City's petition on December 13, 2013, and the City filed timely objections to the Union's petition on December 17, 2013.

2. This case required two days of hearing.

3. The Union is the prevailing party.

In an unfair labor practice, only a "prevailing party" is entitled to representation costs. ORS 243.676(2)(d); OAR 115-035-0055(1). The Union prevailed under the (1)(e) unilateral change charge. However, the Board dismissed the Union's additional claim that the City violated subsection (1)(e) by mischaracterizing its intent to increase the SMW hours of work. We also dismissed the Union's claims under subsections (1)(b) and (1)(f). Accordingly, we must determine whether the City is also a "prevailing party."

In cases like this "[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 others." OAR 115-035-0055(1)(b). For a charge to be considered "separate," it must meet both parts of this test. *See AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 24 PECBR 720, 721 (2012) (Rep. Cost Order).

With this test in mind, we conclude that the Union is the sole prevailing party because the charges at issue were based on the same operative facts. We held that 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. We dismissed the Union's second subsection (1)(e) claim, which alleged that the City misrepresented its position during the same course of events. In addition, we dismissed the Union's subsection (1)(b) and (1)(f) complaints arising from this same set of events. We conclude that all of these claims were based on the same set of operative facts. As such, the charges were not separate, and the Union is the sole prevailing party.

4. Counsel for the Union submitted affidavits stating that she spent 76.40 hours of legal work on the case, billed at $165 per hour, with a total cost to the Union of $12,606. 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(1)(a).

5. The Union's requested hourly rate of $165 per hour is within 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). The number of hours claimed is below average for a two-day hearing. Cases generally require an average of 45 to 50 hours per day of hearing. *Josephine County,* 24 PECBR 723. The Union's claimed number of hours is reasonable.

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). Here, an average award would exceed the 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 in this case, this Board awards representation costs to the Union in the amount of $3,500.

ORDER

The City shall remit $3,500 to the Union within 30 days of the date of this Order.

DATED this 10 day of April, 2014.

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. UC-017-13

(PETITION FOR UNIT CLARIFICATION)

| | | |
|---|---|---|
| CITY OF PORTLAND,<br><br>Petitioner,<br><br>v.<br><br>PORTLAND POLICE COMMANDING OFFICERS ASSOCIATION,<br><br>Respondent. | ) | RULINGS,<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND ORDER |

On May 1, 2013, the City of Portland (City) filed a petition for unit clarification with the Board. The Portland Police Commanding Officers' Association (Association) filed timely objections and a hearing was held before Administrative Law Judge Wendy Greenwald on September 10-13, 2013, in Salem, Oregon. The record closed on November 29, 2013, following receipt of the post-hearing briefs. The matter was then transferred to the Board for decision.

Mark P. Amberg, Senior Deputy City Attorney, City of Portland, Portland, Oregon, represented Petitioner.

Henry J. Kaplan, Partner, Bennett, Hartman, Morris and Kaplan, LLP, Portland, Oregon, represented Respondent.

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The City filed this petition for unit clarification under OAR 115-025-0005(2),[1] contending that every employee in the existing Association-represented bargaining unit should be "clarified" out of the unit because they are all "supervisory employees" under ORS 243.650(23), and thus are not "public employees" for the purposes of coverage under the Public Employee Collective Bargaining Act (PECBA). The Association disagrees, arguing that the members of the existing unit do not meet the statutory definition of supervisory employees.

The issue is:

Are lieutenants, captains and commanders excluded from the Association bargaining unit because they are supervisory employees within the meaning of ORS 243.650(23)?

For the reasons set forth below, we conclude that commanders and captains serving as Reporting Unit (RU) managers are supervisors and should be excluded from the Association bargaining unit.[2] However, based on the record before us, the lieutenants and captains who are not serving as RU managers do not meet the statutory definition of supervisory employees, and are appropriately included in the bargaining unit.

## FINDINGS OF FACT

1. The City is a public employer and the Association is a labor organization.

2. The Association is the exclusive representative of a bargaining unit of City employees who work in the Portland Police Bureau (PPB). The existing bargaining unit consists of:

> All commanding officers employed in the Police Bureau of the City of Portland, excluding confidential and supervisory employees as defined in ORS 243.650(6) and (23).

3. The bargaining unit was first formed in 1988, in response to the concerns of commanding officers who believed that they could not "hire, promote, transfer, discipline, reward, reassign, and ha[d] little control over providing enhanced training or travel opportunities to subordinates."

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[1]OAR 115-025-0005(2) states in relevant part:

> "When the issue raised by the clarification petition is one of public employee status under ORS 243.650(6), (16), or (23), the petition may be filed at any time; except that where a position sought to be excluded is expressly by title included within the unit description, a petition may be filed only during the open period provided for in OAR 115-025-0015(4)."

[2]The term Reporting Unit is explained in more detail below, beginning with Finding of Fact 13.

4. The first collective bargaining agreement was signed in 1991. Since 1991, the City and the Association have been parties to a series of collective bargaining agreements, the most recent of which expired June 30, 2013 (Contract).

5. Article 1 of the Contract contains the recognition clause, which states that:

> "The City recognizes the Association as the sole and exclusive bargaining agent for the purposes of establishing salaries, wages, hours, and other conditions of employment for all commanding officers employed in the Police Bureau of the City of Portland, excluding confidential and supervisory employees as defined in ORS 243.650(6) and (23).
>
> "The parties agree that the ranking commanding officers assigned to the Personnel and Internal Affairs Divisions are confidential and excluded. With the exception of Articles 30 and 31, these commanding officers shall receive all the benefits of this collective bargaining agreement. It is also agreed that the Deputy Chief(s) and the Assistant Chief(s) are supervisory employees. As used in this agreement the terms 'commanding officer' or 'commanding officers' refers to any Lieutenant, Captain, or Commander who is a member of the bargaining unit." (Emphasis in the original.)

6. At the time of the hearing, the Association's bargaining unit included 31 lieutenants, 8 captains, and 5 commanders.[3]

PPB Structure

7. As of August 15, 2013, the PPB employed approximately 1,168 employees; including 943 sworn employees and 226 non-sworn employees.

8. The sworn employees operate under a paramilitary structure, and are organized according to rank. Sworn employees may hold the rank of police officer, detective, criminalist, sergeant, lieutenant, captain, commander, assistant chief, or chief of police.

9. The Portland Police Association (PPA) represents the sworn employees of the PPB below the rank of lieutenant. The District Council of Trade Unions (DCTU) represents many of the non-sworn employees in the PPB.

[3]At the time of the hearing, several Association-represented captain positions were vacant. In addition, both parties agree that the captain in charge of the Professional Standards Division (Cpt. David Famous) and the Personnel Division lieutenant (currently Lt. Morgan, previously Lt. Elmore) are excluded from the bargaining unit as confidential employees.

10. Michael Reese is the current Chief of Police.

11. The PPB is divided into three separate branches: Operations, Services and Investigations. Each branch is lead by an assistant chief. Assistant Chief (AC) Lawrence O'Dea leads the Operations Branch, AC Michael Crebs leads the Services Branch, and AC Donna Henderson leads the Investigations Branch. The Chief and the Assistant Chiefs are supervisory employees and have always been excluded from the Association bargaining unit.

12. Within the Operations Division, there are three separate precincts that provide police coverage to different geographic areas within the City: the Central, North and East Precinct. Each precinct is located in a separate building within those geographic areas, with each precinct overseen by a precinct commander and a precinct captain. The precinct commanders report to Operations AC O'Dea.

13. Structurally, the PPB is divided into separate "Reporting Units," commonly referred to as RUs. Each RU is responsible for a particular area of operations. Each precinct is an independent RU, as are the 16 divisions of the PPB: the Personnel Division, Professional Standards Division, Property/Evidence Division, Records Division, Strategic Services Division, Tactical Operations Division, Traffic Division, Training Division, Transit Police Division, Youth Services Division, Information Technology Division, Drugs and Vice Division, Family Services Division, Fiscal Services Division, Forensic Evidence Division, and the Detective Division.

14. The RUs are each led by a designated "RU manager" who reports to the assistant chief that supervises the particular RU. A majority of RU managers are captains, but the RU managers for the three precincts and two divisions (Detective and Transit Division) are commanders. In addition, the RU managers for the Property/Evidence, Fiscal Services, and Personnel Divisions are non-sworn administrators.

15. Each RU is further divided into smaller components, with staff assigned to specific teams or units with a particular substantive area of responsibility. For example, the Detective Division is divided into 11 teams with responsibility for investigating cases in nine different general categories of alleged crime, including: homicides, missing persons, assaults, cold cases, robbery, human trafficking, sex crimes, burglary, and white collar crimes. A sergeant leads each of these teams. Three lieutenants in turn oversee three or four teams each. The lieutenants report to the Detective Division commander, Commander Burke.

16. The Training Division, led by Captain Bryan Parman, the RU manager, is similarly divided into three branches with responsibility for providing training in different substantive areas (*e.g.*, responsibility for the Field Training and Evaluation Program or the training Academy). A lieutenant oversees each of these three subdivisions and the officers, sergeants, and non-sworn employees assigned to them.

17. Some subdivisions of the PPB report directly to the Chief of Police and are not included in a particular RU. These subdivisions include the Public Information Unit, the Adjutant, the PPB Advisory Committees, the Criminal Intelligence Unit (CIU), and the Sunshine Division.

18. The PPB maintains several "specialty units," the assigned employees of which receive specialized training and are responsible for unique areas of law enforcement activities. Several of these specialty units are led by lieutenants, including the CIU, Special Emergency Response Team (SERT), Explosives Disposal Unit (EDU), Gang Enforcement Team, Gun Task Force, Air Support Unit, Behavioral Health Unit, Rapid Response Team, and three Neighborhood Response Teams. With the exception of the CIU, all of these specialty units are housed under either the Investigations or Operations Branches, and are contained within an individual RU that is managed by a captain or commander.

19. The PPB maintains a Manual of Policy and Procedure (Manual) that provides detailed guidance on a wide variety of subjects, including certain conditions of employment for PPB employees that are not established by collective bargaining agreements. At the time of the hearing, the PPB was operating under a Manual last updated in January 2010. The Manual is over 600 pages long. All PPB employees are expected to follow the policies and procedures set forth in this document.

20. PPB precincts operate 24 hours per day, 365 days a year. To provide full coverage, precincts run three overlapping 10-hour shifts. Although there is some variation between the precincts, generally day shifts run from 7:00 a.m. to 5:00 p.m.; afternoon shifts from 4:00 p.m. to 2:00 a.m.; and night shifts from 10:00 p.m. to 8:00 a.m.

21. Association-represented employees occasionally serve in a higher classification when a senior ranking officer is on leave, at training, or otherwise unavailable. Employees also perform work out of their classification during the time that it takes to fill a vacancy through the City's internal hiring process. For example, a lieutenant may work as a captain or a captain may work as a commander. If these assignments exceed three consecutive days, Article 2 of the Contract requires that the employee working out of class receive additional compensation.

Duties and Position Descriptions for Bargaining Unit Members

22. Consistent with the paramilitary structure that it employs, the PPB affords higher ranking sworn employees a greater level of authority and responsibility with each rank achieved. However, there are significant gradations of responsibility and authority within each rank depending on the division in which the employee works. Certain lieutenants, for example, do not directly oversee any employees, although others may oversee an entire shift. Most captains serve as RU managers, and therefore have enhanced authority under the PPB's structure and Manual, while precinct captains have less authority because there is a commander above them in the chain of command who serves as the RU manager.

23. Despite the differences in job duties for employees of the same rank, there is only one position description for each of the three classifications represented by the Association. Each position description, however, acknowledges that there are differences in the work performed by employees within the same classification, stating that "[n]ot all the work performed is specifically described. Not all tasks are done at all work locations."

Lieutenants

24. The position description for the Police Lieutenant classification provides, in relevant part:

> "**Class Summary**:
>
> "This is supervisory and limited administrative police work. Employees occupying positions of this class are responsible for performing supervisory and limited administrative duties of a line or staff nature. Some positions of this class may serve as a commander of a precinct on an assigned shift in the absence of a Captain or may assist a Captain with the administration and supervision of subordinates. Some positions may serve as supervisors of units designed to support and augment field operations. Some positions may perform specialized administrative duties designed to improve effectiveness of the entire Bureau and reports to a Deputy Chief or the Chief. Work is performed with considerable independence within the guidelines of Bureau policies and under the direction of a superior officer. Work is reviewed for accomplishments of objectives and for effective law enforcement services provided by the unit supervised.
>
> "**Examples of Work**:
>
> "Commands a unit or an assigned shift; acts as second in command to a Police Captain, or serves as an Aide to a Deputy Police Chief.
>
> "Plans, organizes, and assigns work to subordinate officers; prepares plans for handling special events.
>
> "Reviews reports of subordinate officers and takes corrective action, where necessary, to insure [*sic*] compliance with departmental rules and regulations and with effective law enforcement practices and procedures.
>
> "Studies law enforcement problems and recommends actions for more effective law enforcement programs; keeps Police Sergeants and other subordinate personnel informed of new laws, court decisions, Police Bureau policies and problems.
>
> "Prepares or supervises the preparation of records and reports, and prepares official departmental correspondence.
>
> "Coordinates the work of a support unit with the appropriate line division(s), and devises procedures and methods to increase the efficiency of the unit.
>
> "Establishes and maintains communications with community organizations and other groups.

"Participates in the personnel processes; makes recommendations on appointments, promotions, transfers, disciplinary actions, and discharges; and prepares or reviews the preparation of work and time records.

"Reviews the effectiveness of a police unit and administers a program to develop and improve the unit through guidance, instruction, and encouragement of participation in the training programs.

"**Not all the work performed is specifically described. Not all tasks are done at all work locations.**" (Emphasis in original.)

25. At the time of the hearing, the Association represented lieutenants in the following divisions: Family Services (1), Central Precinct (4), East Precinct (4), North Precinct (3), Chief's office (3), Youth Services (1), Detective (3), Tactical Operations (3), CIU (1), Traffic (1), Training (2), Professional Standards (2), Transit (1), Drugs and Vice (1), and Strategic Services (1).[4]

26. In the chief's office, one lieutenant serves as the adjutant for the chief, and two serve as executive officers for two of the assistant chiefs. Lt. Mike Marshman, the chief's adjutant, spends a great deal of time attending meetings with the chief or on the chief's behalf, taking notes, and following up on action items from those meetings. He also aids in communication between the chief and various departments within the City and outside of the City. Lt. Kaer, the executive officer in the Operations Division, primarily reviews policies and standard operating procedures, reviews findings on internal investigations, monitors staffing levels at the precincts, and reviews "after-action" reports.[5] These particular lieutenants do not directly oversee any employees.

27. Each precinct has one lieutenant assigned to each of the three shifts who leads that particular shift. This lieutenant works an assigned shift, Monday through Friday. Many of the precinct lieutenants oversee multiple sergeants who in turn generally oversee multiple police officers. However, much of the precinct lieutenants' time is spent filling out paperwork (including, among other things, budget requests, overtime forms, "findings" for RU managers, and procurement requests) and attending community and PPB meetings. In addition, precinct lieutenants also conduct patrols and respond to, and often direct, significant tactical operations.

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[4]There was limited testimony concerning the specific job duties and actual examples of the exercise of authority held by the lieutenants. The City did not call any bargaining unit employees as witnesses, and the Association called only three lieutenants from two of the divisions. However, from the limited evidence in the record, we conclude that the daily activities and authority of lieutenants vary widely depending on their position.

[5]An "after-action" report is a document created after a significant event involving police personnel, including but not limited to situations where force is used, where there is damage to City property or injuries to PPB employees, or where special tactical units, such as SERT, have been used. These reports summarize the events and include an after-the-fact critique of the event and recommendations on how the situation could have been handled more effectively, if applicable. The reports do not contain disciplinary recommendations. These reports are often reviewed by all sworn staff in the chain of command, up to the assistant chief of the applicable division.

28. In the Detective Division, the three lieutenants are not expected to make case assignments. Instead, each lieutenant has different types of criminal investigations that they are responsible for overseeing. The sergeants generally assign cases, while the lieutenants coordinate among the division, the District Attorney's office, the Internal Affairs Division, and other groups to ensure that the work is being accomplished in the appropriate manner. Lieutenants also review and forward warrants to the District Attorney's office.

29. Some lieutenants draft performance evaluations for sworn and non-sworn employees. However, sworn employees only receive evaluations when they are on initial or promotional probation, and lieutenants in some divisions do not evaluate non-sworn employees.

Captains

30. The position description for the Police Captain classification provides, in relevant part:

> "**Class Summary**:
> "This is a police command classification. Employees occupying positions of this class are responsible for serving as the commanding officer of a service branch division within the Police Bureau. Service Divisions exist to support the work of the primary core operational and investigative divisions. Work involves planning, organizing, staffing, directing, and controlling work of assigned units to accomplish immediate supporting objectives as well as to reach long-range community policing goals. Duties include preparing and revising plans, which have significant [e]ffect on Bureau policies and strategies. Work is performed independently within bureau policies but involves interpretation of policies under limited direction of a supervisor.
>
> "This level is distinguished from the Police Lieutenant by the greater complexity and scope of support operations directed and the responsibility for long-range planning. Through appointment by the Police Chief, employees of this class may serve in special assignments as a[n] Assistant Police Chief or Police Commander. In all assignments, work is reviewed through conferences and reports for effectiveness of area administered.
>
> "In addition to the above, Captains may also be assigned to precincts to augment the day-to-day work of Precinct Commanders as well as serving as acting Commanders in their absence.
>
> "**Examples of Work**:
> "Plans and develops program objectives, operational goals; implements and adjusts, if necessary, to meet changing conditions.
> "Meets and deals with officials and citizens on program administration matters; serves as a member of law enforcement committees, boards, and ad hoc groups.

"Reviews budget proposals and justifications to insure correct priorities and effectiveness.

"Plans, coordinates, directs, controls, evaluates, and reports on assigned responsibilities; identifies problems and prepares recommendations for resolution.

"Supervises professional, technical, clerical personnel, and subordinate supervisors and administrators; evaluates force strength to assign, reassign, or request personnel and equipment to meet priorities; meets with labor organizations to resolve grievances; recommends and administers approved discipline.

"Not all the work performed is specifically described. Not all tasks are done at all work locations."

31. At the time of the hearing, the Association represented six captains who were serving as RU managers in the Records, Forensics, Drugs and Vice, Training, Youth Services, and Tactical Operations Divisions. Several RU manager/captain positions were vacant at the time of the hearing.

32. In addition to captains who serve as RU managers, the Association represents four captain positions that are not classified as RU managers: the North, Central and East precinct captains, and the captain that will be assigned to oversee reform efforts coming as a result of a settlement agreement with the United States Department of Justice (the DOJ captain). At the time of the hearing, the Central precinct and DOJ captain positions were vacant.

33. Captains typically work day shifts, Monday through Friday, but are expected to be available after hours for emergencies.

Commanders

34. The position description for the Police Commander classification provides, in relevant part:

"**Class Summary**:

"This is a senior command assignment. Employees in this assignment are responsible for serving as the commanding officer of the Police Bureau's core primary operational (Precincts) and investigative (Detectives) divisions within the Police Bureau and hold the rank of Captain. Work involves planning, organizing, staffing, directing and controlling work of these assigned core function units to accomplish immediate objectives as well as to reach long-range community policing goals. Work also involves providing regular input and assistance to the Police Chief's executive team in the areas of strategic, emergent and organizational planning. Generally Police Commanders are responsible for divisions that perform the Bureau's primary core operational and investigative responsibilities.

"This level is distinguished from the Police Captain classification by greater complexity typically due to such factors as larger staff size, core primary

operational or investigative responsibilities as opposed to support or specialized responsibilities, diversity of area served, police first-response responsibilities, scope of operations, responsibility for long-range planning, and fostering relationships to secure cooperation and coordination within the community. It is further distinguished by providing regular input and assistance to the Police Chief's executive team in the areas of strategic, emergent, and organizational planning. Work is performed under general policy direction. Notwithstanding the above, the commanding officer of the Transit Division shall be designated as a Police Commander using this premium assignment, due to the scope and complexity of the work assigned to that position, provided that position is assigned to a member of the Portland Police Bureau.

"Responsibilities are broad in scope, allow for a higher degree of program and administrative discretion, and are evaluated in terms of the overall effectiveness of program or unit performance.

"(Note: This is a premium pay assignment from the rank of Police Captain. Assignments are made at the sole discretion of the Police Chief. Employees so assigned may be removed from the position without a statement of cause and shall have no appeal rights.)

"**Examples of Work**:

"Plans and develops program, goals and objectives; implements and adjusts, if necessary, to meet changing conditions; enforces and interprets bureau policies, rules, and regulations; reviews precinct and bureau-wide operations and recommends and implements policy changes.

"Meets and deals with officials and citizens on special community, project or program administration matters.

"Plans, develops and implements strategies; coordinates, directs and controls operations involving a number of divisions, units, and/or other bureaus and agencies such as dignitary security, emergency occurrences or large-scale tactical situations.

"Plans, coordinates, directs, controls, evaluates, and reports on assigned responsibilities; identifies problems and takes appropriate action for resolution.

"Develops budget proposals and justifications to ensure correct priorities and effectiveness.

"Provides insight and recommendations in a structured and regular format to Police Chief's executive team regarding major issues such as strategic planning, policy direction, major incident planning and response, organizational structure and labor matters.

"Supervises professional, technical, clerical personnel and subordinate supervisors and administrators; evaluates force strength to assign, reassign or request personnel and equipment to meet priorities; meets with labor organizations to resolve grievances; recommends and administers approved discipline.

"Manages complex policy review/development projects and other long term or complex projects assigned by Assistant Chief which have significant effect on the bureau and community.

"Prepares and administers complex intergovernmental agreements and leads multi-jurisdictional teams composed of both local and federal law enforcement personnel.

"Represent[s] the senior leadership of the bureau out in the community.

"Not all the work performed is specifically described. Not all tasks are done at all work locations."

35. At the time of the hearing, the Association represented five commanders, all of whom served as RU managers in the following positions: North Precinct Commander, East Precinct Commander, Central Precinct Commander, Transit Division Commander, and Detective Division Commander.

36. Commanders work day shifts, Monday through Friday, but are expected to be available after hours should issues arise that require their attention.

PPB Hiring Process

37. The City uses different processes for hiring sworn and non-sworn employees, and the involvement of Association-represented employees in those processes varies accordingly. The City's Bureau of Human Resources (BHR) is very involved in the hiring process.

*Hiring of Sworn Employees*

38. The PPB fills all vacancies for sworn positions above the rank of police officer by internal promotion, as discussed in more detail below.[6] Thus, the only hiring decisions involving external applicants for sworn positions are for new police officers. The hiring process for new police officers requires candidates to pass a written test, a physical agility test, and a background check. Members of the Association bargaining unit have little to no involvement in these stages of the process.

39. If candidates pass the initial requirements, they then proceed to an interview. The PPB typically forms an interview committee of three to five PPB employees. Association-represented employees occasionally sit on these interview panels, as do sergeants, non-sworn staff, and citizen representatives. Lower ranking commanding officers serve on interview panels more frequently than do captains and commanders serving as RU managers.

40. The committee then ranks potential candidates, and submits the list to the chief. Each member of the interview panel's recommendation on a candidate counts equally, regardless of rank or position.

[6]There was testimony regarding one exception to this practice, but both parties agree that the City chooses to promote from within its ranks of current employees.

41. The chief or his or her designee makes the final hiring decision, based in part on the recommendation of the interview panel.

*Hiring of Non-Sworn Employees*

42. The hiring process varies for non-sworn employees, depending on whether the vacancy is for a DCTU-represented position, the nature of the particular position to be filled, and the division of the PPB involved. The level of involvement of Association-represented employees varies accordingly.

43. In most situations, the PPB fills vacancies in non-sworn positions represented by the DCTU with internal candidates based on seniority or an existing layoff recall list, as required by the applicable collective bargaining agreement. In such cases, the BHR conducts the hiring process and Association-represented employees do not have discretion or authority to make hiring decisions, or to effectively recommend hiring decisions. The majority of non-sworn vacancies are filled using this method.[7]

44. If no current or laid off employee with reinstatement rights applies for the vacant position or if the position is non-represented, then the PPB may conduct an external hiring process. However, some of these positions may have an existing hire list from previous applicant pools, and the BHR will provide the RU manager with a list of the top two candidates from the existing list. The RU manager may then choose the preferred candidate from that list.

45. In situations where a hire list does not exist, RU managers have the authority to work with BHR to initiate and help design the application and interview process, and ultimately select their preferred candidate and make the hiring decision. The RU manager may delegate some or all authority to make the selection, but there is no evidence concerning whether or how often such delegations occur.

46. There is no evidence in the record that captains or lieutenants who are not RU managers have authority to hire or effectively recommend the hiring of non-sworn employees. They may be asked for input on hiring decisions and they may serve on interview panels, but when serving on interview panels, all panel members have an equal vote in the process.

47. After a hiring decision is made, offer letters for non-sworn employees are signed by a BHR representative and the appropriate RU manager, whether that be a captain, commander, or non-sworn administrator.

PPB Promotion Process

48. When a promotional opportunity in a sworn position arises, only internal candidates are considered. The promotion process varies by the rank of the promotional position.

[7]AC Crebs estimated that these procedures are followed for non-sworn vacancies approximately 75% of the time. This is consistent with the testimony of Association witnesses, who testified that they rarely, if ever, participated in the hiring process for non-sworn employees.

49. Employees seeking promotion to the rank of lieutenant or captain go through an "assessment center" process. The PPB utilizes assessors who are not City employees, including other law enforcement agencies, social service agencies, and citizen members. The candidate for promotion undergoes the required testing on various subjects, which may include written tests prepared by subject matter experts within the PPB. Association-represented employees often serve as subject-matter experts in creating tests.

50. Upon successful completion of the testing process, the RU managers (be they a captain or commander) are then asked to provide recommendations to the chief on whether particular candidates should or should not be promoted. The chief makes the final decision on who is eligible for promotion, but considers the recommendations of the RU managers.

51. There was no specific evidence of how often Chief Reese did or did not follow RU managers' recommendations that an employee should be promoted. However, he could not recall promoting an employee where the RU manager recommended against promotion.

52. A ranked "eligibility list" of qualified promotional candidates is then created for the classification. This list may contain multiple candidates from the same RU, or candidates from a number of RUs. RU managers do not rank the eligible candidates; they merely make a "do promote" or "do not promote" recommendation.

53. If an eligibility list contains multiple candidates who are qualified for promotion, the chief selects the successful candidate from the list. The chief may fill future promotional opportunities from the remaining names on the list without going through the assessment center process again.

54. For promotions to the rank of sergeant or detective, employees take a written exam. If they pass that exam, they then undergo the assessment center process. Employees seeking promotion to the rank of criminalists only take a written exam, with no assessment center process.

55. Candidates who pass the assessment center process then go through a "360 review" process where multiple people who work with the employees regularly are offered the opportunity to provide input on whether the candidate should be promoted. Association-represented lieutenants, captains and commanders are afforded the opportunity to provide their input and recommendations on a candidate, as are officers, sergeants and non-sworn staff. In prior years, this process has been contracted out to an outside vendor. Recently, however, the process has been handled internally due to budgetary reasons.

56. Association-represented employees who are not RU managers may be asked to offer input during the review process, but the record does not establish that decisions makers follow these recommendations with any regularity.

PPB Disciplinary Process

57. The PPB has a detailed set of procedures in the Manual that addresses situations that may require investigation and corrective action for employees. The particular process utilized depends on the nature of the issue to be addressed, the severity of the possible disciplinary action being contemplated, and the source of the complaint being investigated. These processes and procedures are set forth in detail in PPB Policies 330.00 (Internal Affairs, Complaint Investigation Process), 335.00 (Use of Force Boards), 336.00 (Performance Review Boards), 341.00 (Discipline Process), 342.00 (Performance Deficiencies), and 343.00 (Criminal Investigations of PPB Employees).

58. An investigation into potential misconduct or performance deficiencies may be initiated by an external citizen complaint or an internal complaint from another PPB employee. PPB employees may initiate an investigation by submitting their concerns to the next person above them in the chain of command.

59. Internal complaints may be submitted directly to Internal Affairs Division (IAD), or they may be passed up to the RU managers, who may initiate the disciplinary process by referring the issue to IAD, or in certain circumstances, by conducting an investigation within the RU. Most issues involving alleged misconduct by an employee within an RU will be referred to IAD for investigation. IAD is part of the Professional Standards Division, and maintains several investigators to gather evidence, interview witnesses, and prepare summaries of the investigation results. Captain Famous is the RU Manager for the Professional Standards Division. The Personnel Division is also very involved in the processing of potential disciplinary situations.

60. Citizen complaints regarding minor issues that would not warrant disciplinary action may be treated as a "service complaint." Service complaints are generally investigated and handled by RU managers with non-disciplinary debriefings or clarification of expectations.

61. RU managers may also be responsible for investigating and dealing with performance deficiencies within their RU, in accordance with Policy and Procedure 342.00 in the Manual. However, IAD also conducts some performance investigations. Performance deficiencies may lead to discipline or other non-disciplinary actions.

62. If allegations are made against a PPB employee that potentially involves criminal misconduct, the Detective Division investigates the complaint.

63. In addition to IAD, the City also maintains three separate committees that review potential disciplinary situations based on the nature of the complaints, the severity of the possible discipline, or both. These committees include the Police Review Board (PRB), the Independent Police Review Division (IPR), and the Collision Review Board (CRB).

64. The PRB is an advisory committee that reports to the chief. It is comprised of six voting and six advisory members. The six voting members include the three assistant chiefs, with the Services Branch AC as the chair; one citizen member; one peer member of the same rank as the employee whose conduct is at issue before the PRB; and the employee's RU Manager. The

advisory members include the manager of the Office of Accountability and Professional Standards; the Review Board Coordinator; a representative from the BHR; a representative from the City Attorney's Office; the IAD Manager; and the Independent Police Review Division Director. During the presentation of the case before the PRB, representatives from the Training Division, the investigating division (IAD, Detective Division, or the Precinct), and the employee's labor organization may be present.

65. The PRB reviews any investigations resulting in a sustained finding where the proposed discipline is a suspension or greater, all controverted investigation findings, investigations into serious uses of force and officer-involved shootings, completed Equal Employment Opportunity investigations, and other situations where review is requested by the chief or an assistant chief.

66. The Discipline Coordinator within the Standards and Accountability department of the Professional Standards Division also serves as the coordinator for the PRB. Christopher Paille, a non-sworn employee, currently holds this position.

67. The IPR is "responsible for receiving and numbering citizen complaints regarding allegations of misconduct against members of the Bureau, monitoring [IAD] investigations of citizen complaints, coordinating appeals of Bureau findings of citizen complaints, and recommending changes in police practice and policy."

68. The IPR is not part of the PPB. Rather, the IPR Director reports directly to elected officials. The IPR may conduct its own initial investigation and findings or it can send the case to IAD for review. Depending on the outcome of these investigations, the IPR can dismiss a complaint, make recommendations to the Chief on a course of action, and can recommend that a complaint goes to the PRB.

69. All automobile collisions are reviewed by the CRB. The CRB examines the collision and determines whether it was preventable and whether an employee was at fault. This process yields recommendations that can result in discipline, command counseling, training recommendations, or other actions.

70. When an investigation is completed by IAD or within the RU, the investigatory documents such as transcripts of interviews, statements, investigative summaries, and related documents or evidence are compiled and sent to the Professional Standards captain who reviews them to ensure that the investigation was complete and fair. Upon approval of the investigation, the RU manager is assigned to draft "findings" based on the results of the investigation. The RU manager may delegate this task to a captain or lieutenant. The RU manager or their designee will review all of the evidence and information gathered by IAD or the relevant investigator, and make assessments of whether any alleged misconduct is sustained or exonerated, or whether the employee's conduct was within policy.

71. The chief, an assistant chief, the Professional Standards captain, or the IPR may disagree with the RU manager's findings and send the matter to the PRB. Chief Reese has overturned an RU manager's findings in the past.

72. If the matter is not sent to PRB, the findings may also recommend a possible disciplinary action, up to a letter of reprimand. If the matter is referred to the PRB, RU managers or their designee will present their findings to the PRB for review. These findings do not include a recommended disciplinary action. The PRB will issue its own recommendation for disciplinary action to the chief if appropriate.

73. Once the findings are completed, they are reviewed by the Professional Standards captain, the IPR director, and the RU manager (if that person did not drafting the findings). These individuals may concur with the findings, request more investigation, or controvert the results. On the form, they may make comments and suggest additional actions, such as training, debriefing, or sending the matter to the PRB. The findings are then sent to the assistant chief that supervises the involved employee for review and approval.

74. If the assistant chief agrees with the findings and a recommendation of discipline (up to a letter of reprimand), then the RU manager may draft a proposed letter of reprimand, often with the assistance of BHR and the City attorney's office. After the employee receives the proposed discipline, the employee may request a due process meeting with the assistant chief to offer a response and any mitigating information. After the due process meeting, the chief or assistant chief makes the final decision on whether the RU manager's proposed discipline will be followed or not. If an employee does not request the due process meeting, the proposed discipline becomes final and the RU manager and a BHR representative sign the disciplinary document and issue it to the employee.

75. Captains and commanders serving as RU managers only have the authority to issue proposed written reprimands to subordinate employees; they do not have authority to issue economic sanctions or to terminate employees. The chief and the mayor are the ultimate decision makers when it comes to discipline involving economic sanctions or terminations.

76. In ten recent situations where Association-represented employees recommended a specific disciplinary action and a due process meeting was requested, those recommendations were followed by the chief or the assistant chief only three times.

77. According to a recent PPB conducted review, in the past 22 months the chief followed the full PRB's disciplinary recommendations in approximately 72 percent of the cases. There is no evidence as to whether Association-represented employees serving on the PRB concurred or disagreed with those recommendations.

78. Lieutenants and captains who are not RU managers do not have the authority to issue discipline. They may issue command counseling, conduct debriefings, or place employees on a work plan, but these actions are not considered discipline under the City's policies and collective bargaining agreements. In many cases, the decision to issue command counseling or conduct a debriefing is a result of a separate process such as the CRB, IPR, or PRB. After one of these processes is completed, a lieutenant or captain may then be assigned to talk to the employee and issue the counseling letter. Commanding officers may not conduct a debriefing or command counseling until the appropriate process is completed.

79. Sworn PPB employees only receive performance evaluations when they are on probation, either as a new hire or after a promotion. Probationary performance evaluations are initially drafted by the employee's immediate superior, and then reviewed by the next person in the chain of command. For example, a probationary sergeant's performance evaluation would be conducted by a lieutenant (or non-sworn administrator in certain divisions), and reviewed by a captain or commander to whom the lieutenant reports. The forms allow the evaluating officer to rate the employee as Acceptable, Needs Improvement, Unacceptable, or Not Observed. There is space on the form to provide specific narrative comments concerning the employee.

80. The employee conducting the probationary evaluation does not have authority to terminate a probationary new hire or to restore a newly promoted employee to the employee's previous rank. However, the evaluating employee may recommend that the employee not pass probation. Captain Bryan Parman, the Training Division RU manager, makes recommendations to the chief about when new officer recruits should be removed during the probationary period. Captain Parman's recommendations are based in part on the recommendations from Field Training Officers (FTO), Training Division sergeants, training officers and lieutenants. The chief makes the final decision, but Captain Parman's recommendations have almost always been followed.

81. RU managers and some lieutenants perform annual evaluations for non-sworn staff. A negative evaluation may result in a non-sworn employee not receiving a merit step increase, but there is no evidence that this has ever happened.

Authority to Suspend Employees

82. As stated above, Association-represented employees do not have the authority to suspend employees without pay. However, they may temporarily relieve a subordinate PPB employee from duty with pay under limited circumstances, consistent with PPB policies.

83. Under PPB Policy 330.00, certain PPB personnel may take a non-disciplinary "temporary personnel action" by relieving an employee from duty with pay

> "if the alleged conduct is so serious in nature that prompt action is necessary to protect the public, the member, or the Bureau, or when it is reasonable to question the member's mental, physical, or emotional ability to properly and safely pursue his/her normal duties and responsibilities."

84. A commanding officer that is not serving as an RU manager must first consult with the RU manager or an assistant chief before relieving an employee from duty. In addition, the policy requires notification to the Personnel manager as soon as possible, and the chief must approve the relief from duty before the start of the employee's next shift. The policy lists several factors that might lead to an employee being relieved from duty, including:

"a. The likelihood of criminal charges against the member.
"b. The member's ability to effectively continue performance of duty.
"c. Involvement in alleged serious misconduct.
"d. Potential or actual bringing of extreme discredit to the Bureau."

This authority is not limited to commanding officers, but could also be exercised by a sergeant or non-sworn administrator. It is rare for this authority to be exercised.

85. In addition, under PPB Policy and Procedure 210.23, employees involved in a lethal use of force situation are automatically placed on paid administrative leave and removed from duty. This is considered non-disciplinary and the removal from duty is non-discretionary.

86. Captains who do not serve as an RU manager do not have the authority to suspend an employee without checking with the RU manager or BHR. If someone comes in and appears unfit for duty, they may initiate the process by contacting the appropriate people.

87. The record does not establish that any of the Association-represented commanding officers have exercised any authority to remove an employee from duty with pay or effectively recommended the removal of an employee.

PPB Process for Employee Transfers

88. The authority to grant voluntary or involuntary transfers between divisions lies with the AC of the transferring department, as set forth in PPB Procedure 060.40. No Association member has the authority to approve or effectuate such inter-division transfers without the applicable AC's agreement. In most, but not all cases, RU managers may block a transfer into their division if they do not believe that the employee would be a good fit.

89. Association members receive transfer requests from lower ranking employees and can pass the requests to the AC or next person in the chain of command for review. The AC will generally solicit the recommendation of the non-sworn staff, sergeants, lieutenants, captains, and commanders whose units would be involved in the potential transfer to determine whether a transfer would be acceptable and a good fit. These recommendations are not always followed.

Authority of Association Members to Reward Employees

90. Association-represented employees may, per BHR policies, give what are commonly called "coffee cards" to employees. These cards may have a value of up to $50. The authority to give a "coffee card" is not limited to Association-represented employees, but may also be given by sergeants, other non-sworn employees, and any City employee with a "procurement card." Captain Parman testified that he has never given any employee a coffee card and Lieutenant Steinbronn testified that she has given out coffee cards, but paid for them out of her own pocket. No evidence was presented concerning the frequency or typical basis for issuance of these coffee cards.

91. Lieutenant Steinbronn "guess[ed]" that she had "the power" to select a high-performing employee over "a person that calls in sick all the time" for purposes of attending a desired training.

92. Commanding officers, sergeants and some non-sworn employees may issue commendation letters to employees. Often, commendations for actions that impact a large portion of the PPB are submitted to the chief or an assistant chief for review and signature.

93. Under PPB Policy 210.90, which sets forth an internal process for issuing special commendations or awards, any PPB employee may nominate another employee for an award by submitting a nomination to the employee's RU manager. The RU manager then passes the nomination to the AC, and the award is considered by the Review Board Coordinator and then the Employee Assistance Program Awards Facilitator. The nomination, if sufficient, is then advanced to the full Award Committee, who may recommend to the chief that the award be granted. The chief has the final decision on whether any award under this Policy is issued.

Authority of Association-Represented Employees to Assign and Responsibly Direct Employees

94. RU managers can assign and reassign work within their RU, reassign employees within their division (so long as the reassignment is consistent with any applicable collective bargaining agreements), and modify the priorities of the division and assign staff accordingly. For example, in the Training Division, there are three lieutenant positions with different substantive areas of responsibility. Captain Parman, the RU manager for the division, has the authority to assign employees among these three positions as he sees fit.

95. Commander Burke, the RU manager for the Detective Division, confirmed that decisions to reassign employees within that division were his to make. Former Detective Division RU manager Ferraris also confirmed that when he served in that position, he had the authority to reassign sergeants to different substantive areas or shifts within the division, and that he had the authority to reassign an employee to a specialty unit within his RU.

96. However, any reassignments must be consistent with the requirements of any applicable collective bargaining agreement. For example, an in-unit reassignment of sworn employees represented by the PPA that involved a change in shift and days off would have to be consistent with the seniority based shift bidding procedures in the PPA collective bargaining agreement.

97. Lieutenants and captains who do not serve as RU managers cannot grant a reassignment even within their shift or unit without the RU manager's agreement. They may only pass on requests for a reassignment to the RU manager and, when asked, provide their input on whether the reassignment would be appropriate.

98. Pursuant to PPB Policy and Procedure 060.00, RU managers may also draft division or precinct orders, as well as standard operating procedures (SOPs) that apply within their RU. These orders

> "may be for information purposes or may be SOPs, which spell out procedures to be followed in handling specific problems or functions of a recurring nature and which are not covered by directives or Special Orders. They are derived from Bureau policies, procedures and command guidance, but are more detailed in content and application. SOPs may be used as a vehicle for contingency planning."

99. RU managers also exercise authority to approve work-out-of-class assignments, so long as the approval is consistent with the terms of the PPA and DCTU collective bargaining agreements. The forms required to document work-out-of-class assignments are signed by RU managers.

100. Some lieutenants do not have any employees that directly report to them. For example, Lieutenants Derek Rodriguez, Jeffrey Kaer, and Mike Marshman do not have any employees that directly report to them. In addition, Force Inspector Lieutenant Jim Dakin has no employees that report to him. However, other lieutenants have multiple sergeants and police officers, and in some cases non-sworn employees, who report directly to them. Non-sworn administrators often supervise non-sworn employees.

101. Although lieutenants oversee each shift within the precincts and oversee specialty units, they do not generally assign cases, assign the patrol area to an officer, or assign the majority of day-to-day work for line staff. In many areas involving sworn employees, staffing decisions are guided by minimum staffing requirements that are set by policy. Sergeants and officers who are represented by the PPA select their shifts by seniority, and sergeants generally determine the geographic area they will work in on a given day.

102. Under the PPB's paramilitary structure, a lieutenant or other higher ranking officer may modify the assignments made by a sergeant or lower ranking officer, but this rarely occurs. Some lieutenants do not believe that they have the authority to modify a sergeant's assignments. Others testified that they could not adjust the workload of non-sworn employees without obtaining approval of a superior.

103. Sergeants, lieutenants, captains, and commanders (and even lower-ranking employees) may authorize overtime to meet minimum staffing requirements. This most often occurs when employees call in sick, and the position must be filled to ensure staffing standards are met. Many overtime assignments within precincts are done by seniority through an established overtime list.

104. Some lieutenants grant vacation and other leave requests if the request does not incur overtime, as is generally required by collective bargaining agreements. If granting a request would involve incurring overtime, lieutenants are generally required to obtain approval of a superior before granting the request.

PPB Layoff and Recall Procedures

105. The parties stipulated that Association members do not have any role in the layoff or recall of employees.

Adjustment of Grievances

106. Under the collective bargaining agreement between the PPA and the City, grievances are initially required to be filed with the PPA employee's "immediate supervisor outside of the bargaining unit." Ostensibly, this would include lieutenants, captains and commanders in the Association bargaining unit. However, the parties agree that the general practice is for grievances to be filed with PPB personnel outside of the Association bargaining unit.

107. Association-represented employees have, on rare occasions, received copies of grievances filed by employees. In addition, commanding officers have been called on as a source of information when the City investigates the merits of a grievance. However, grievance responses are typically processed through BHR and the chief's office.

108. The record does not establish that any Association member has ever sustained, or granted the relief requested, in a grievance. That authority lies with the BHR and the chief's office.

## CONCLUSIONS OF LAW

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

2. Commanders and captains serving as RU managers are "supervisory employees" within the meaning of ORS 243.650(23) and are not appropriately included in the Association bargaining unit. The remaining employees in the existing unit are not "supervisory employees" within the meaning of the statute and are appropriately included in the Association bargaining unit.

Legal Standards

Under the PECBA, "[p]ublic employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." ORS 243.662. However, under ORS 243.650(19), "supervisory employees" are not "public employees" and they cannot be appropriately included in a bargaining unit. *Office and Professional Employees International Union, Local #11 v. City of Hillsboro,* Case No. RC-4-99, 18 PECBR 269, 274-75 (1999).

A supervisory employee is defined under ORS 243.650(23) as:

> "any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection therewith, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment."

This Board assesses whether an employee has authority under the specific criteria set out in the statute to determine supervisory status.[8]

This definition, which mirrors the definition of supervisor under the National Labor Relations Act (NLRA), has largely remained unchanged since the PECBA's enactment in 1973, with one exception relevant to this case. In 1995, the legislature amended the statute to eliminate the following sentence: "However, the exercise of any function of authority enumerated in this subsection shall not necessarily require the conclusion that the individual so exercising that function is a supervisor * * *."[9] The deletion of this sentence ensured that the enumerated supervisory functions would be read in the disjunctive, which is how the NLRA had been interpreted by the National Labor Relations Board (NLRB) and federal courts. The result is that, if an otherwise "public employee" has authority under one of the 12 statutory criteria, the employee is a "supervisory employee" and not covered by the PECBA.

Since the passage of the 1995 amendments, this Board has consistently explained that "supervisory-employee" status requires the resolution of three questions, each of which must be answered in the affirmative for an employee to be deemed a supervisory employee: (1) does the employee have the authority to take action (or to effectively recommend action be taken) in any of the 12 listed activities; (2) does the exercise of that authority require "the use of independent judgment"; and (3) does the employee hold the authority in the interest of management. *See Deschutes County Sheriff's Association v. Deschutes County,* Case No. UC-62-94, 16 PECBR 328, 339 (1996) (citing to *NLRB v. Security Guard Service,* 384 F2d 143, 66 LRRM 2247, 2248 (5th Cir. 1967)). For an employee to effectively recommend actions, their

[8]A putative supervisor's particular title or, in this case, an employee's rank under a paramilitary organizational structure, is not dispositive of supervisory status under the PECBA.

[9]The 1995 amendments also added the following sentence: "Notwithstanding the provisions of this subsection, no nurse, charge nurse or similar nursing position shall be deemed to be supervisory unless such position has traditionally been classified as supervisory." This amendment appears to be a response to *N.L.R.B. v. Health Care & Ret. Corp. of Am.*, 511 US 571, 573-74, 114 S Ct 1778, 1780, (1994), in which the Supreme Court of the United States determined that the charge nurses at issue in that case were "supervisors" within the meaning of the NLRA. Because charge nurses are not at issue here, this statutory change is not relevant to this case.

Additionally, after this petition was filed, the legislature passed SB 1518 (effective March 3, 2014), which modified the definition of "supervisory employee" in ORS 243.650(23) by specifying that firefighters who assign, transfer, or direct work of other employees, but do not have authority to hire, discharge, or impose economic discipline on those employees, are not supervisory employees. Like the 1995 "charge nurse" proviso, the "firefighter" amendment does not affect this petition.

position must be given "substantial credence" "more often than not." *Oregon AFSCME, Council 75 v. Benton County,* Case No. C-210-82, 7 PECBR 5973, 5986 (1983). Evidence of an effective recommendation can be found by the lack of any independent review or investigation of the recommendation by a higher level supervisor. *American Federation of State, County and Municipal Employees, Council 75 v. Lane County Sheriff's Office,* Case No. C-281-79, 5 PECBR 4507, 4517 (1981).

Because the City filed this unit clarification petition under OAR 115-025-0005(2), the hearing is considered "investigatory" and, under our current rules "[t]here is no burden of proof" on either party. OAR 115-010-0070(5)(a).[10] Nevertheless, because a "supervisory employee" is a statutory exclusion from the otherwise broadly defined term "public employee," there must be sufficient evidence establishing that the statutory exclusion applies before we will conclude that an otherwise "public employee" is a "supervisory employee." Mere inferences and conclusory statements regarding supervisory authority are insufficient to render an employee a supervisor. Accordingly, in the absence of detailed, specific evidence establishing that a putative supervisor has authority under the statutory indicia, we will conclude that the employee is a "public employee" covered by the PECBA and not a "supervisory employee" under ORS 243.650(23).

The City contends that currently the lieutenants, captains and commanders represented by the Association are all supervisory employees, and thus, should be removed from the Association's bargaining unit. This would leave the bargaining unit without any employees for the Association to represent. The Association asserts that all of the bargaining unit members are appropriately included in the unit, as they are not supervisory employees. Before applying the legal principles to the disputed positions, we note that this case involves 44 putative supervisory employees, grouped within three separate ranks with common job descriptions. The parties acknowledge, however, that the authority and day-to-day responsibilities of many of the Association-represented employees vary significantly based on numerous factors, including the division, unit, or precinct in which the employee works and the amount of authority delegated to the employee by the next person in the chain of command. Thus, we do not determine "supervisory-employee" status based solely on rank or classification, as advocated by the City. Rather, after reviewing the record, there is one common factor that consistently predicted the level of supervisory authority held by the Association-represented employees: namely, whether the employee was an RU manager. As discussed more fully below, the witness testimony and the documentary evidence submitted by the parties confirmed that a clear line exists in the PPB's structure between RU managers and commanding officers who are not RU managers. Accordingly, we will analyze the statutory indicia for RU managers and non-RU managers as two distinct groups. With that framework in mind, we turn to the disputed positions in this case.

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[10]Footnote 18 in *American Federation of State, County And Municipal Employees, Local 1085 v. State of Oregon, Department of Justice*, Case No. UC-003-10, 24 PECBR 893, 924 n 18 (2012), stated that "[t]he party asserting an individual's supervisory status has the burden of proving it." (Citing *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995)). That case, however, like this one, involved a unit clarification petition. As set forth above, under our current rules "[t]here is no burden of proof" in unit clarification matters. OAR 115-010-0070(5)(a). Therefore, we disavow that footnote, which is at odds with OAR 115-010-0070(5)(a).

## Analysis: RU Managers

Authority to Hire Employees

The PPB uses different hiring processes to fill sworn and non-sworn positions. Therefore, we will separately analyze RU managers' involvement in the hiring process for each type of vacancy. We begin by addressing RU managers' involvement in the hiring of sworn employees.

The City only hires new sworn employees into the entry-level position of police officer. All vacancies above the rank of police officer are filled by internal promotion.[11] RU managers do not have of the authority to hire new police officers, and are only minimally involved in the interview process. The chief of police makes the ultimate decision on whom is hired. Thus, we conclude that RU managers do not have actual authority to directly hire sworn employees.

This conclusion, however, does not end our inquiry regarding sworn employees. We must next examine whether RU managers have the authority to effectively recommend the hiring of sworn employees. Here, the only role RU managers play in recommending the hiring of sworn employees is occasionally sitting on interview panels, along with civilians, non-sworn employees, and non-supervisory sworn employees. Although the chief considers the recommendation of the hiring committee as a whole, each member's vote counts equally. RU managers' votes are not entitled to any special treatment or weight. We have previously held that participation as a member of a hiring panel, when the employee's individual vote carries the same weight as other members of the panel, does not establish that a potential supervisor has the authority to effectively recommend the hiring of employees. *See City of Union v. Laborers' International Union of North America, Local 121,* Case No. UC-9-08, 22 PECBR 872, 887 (2008). Further, the chief conducts an independent review and investigation of the recommendations of the hiring panel before deciding whom to hire. Consequently, we conclude that RU managers do not have the authority to effectively recommend the hiring of sworn personnel. *See Lane County Sheriff's Office*, 5 PECBR at 4517 (a subsequent independent investigation reflects a lack of effective recommendation).

With respect to the hiring of non-sworn employees, we conclude that in certain circumstances, RU managers have actual authority to make hiring decisions for certain non-sworn personnel. For example, if no current or laid-off employee with reinstatement rights applies for a vacant non-sworn position, or if the position is non-represented, then the PPB may conduct an external hiring process. If there is no existing "hire list" for the vacancy, RU managers work with the BHR to initiate and help design the application and interview process, and ultimately select their preferred candidate and make the hiring decision. If there is an existing hire list from previous applicant pools, the BHR will provide the RU manager with a list of the top two candidates from the list. The RU manager, as the individual responsible for the overall performance of the RU, may then choose their preferred candidate from the list. RU

[11] We address the authority to "promote" under that statutory criterion below.

managers use their independent judgment in choosing whom to hire, and that decision is not so limited by policy that it is of a merely routine or clerical nature. Accordingly, we conclude that commanders and captains who serve as RU managers have the authority in the interest of management to hire employees, and that the exercise of that authority requires independent judgment.

As set forth above, this conclusion is sufficient to establish that RU managers are "supervisory employees." Nevertheless, we will address two additional criteria under ORS 243.650(23).

Authority to "Assign" and "Responsibly to Direct" Employees

This Board has not explained in great detail how we analyze or define the statutory terms "assign" and "responsibly to direct" under ORS 243.650(23). These two factors have frequently been analyzed together with little discussion, likely because the authority to hire, fire, promote and discipline employees has generally been the dispositive factors in most of our cases. Thus, we find our prior cases of limited utility in the present matter, and we take this opportunity to clarify the meaning of these indicia and how they are to be applied.

To clarify the meaning of the terms "assign" and "responsibly to direct," we must interpret the relevant portions of ORS 243.650(23). When we interpret and apply statutes, our goal is to determine and give effect to the legislature's intent. ORS 174.020. To accomplish this goal, we apply the methodology set forth in *PGE v. Bureau of Labor and Industries,* 317 Or 606, 859 P2d 1143 (1993), as subsequently modified by *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). We first review the text and context of the statute. We may then review any relevant legislative history offered by the parties. If we are unable to determine the legislature's intent, we then apply maxims of statutory construction. *Id.*

As explained above, the 12 statutory indicia are listed disjunctively, and the terms "assign" and "responsibly to direct" are separated by two other statutory indicia in ORS 243.650(23). Thus, the structure and context of the statute distinguish "assign" and "responsibly to direct." Therefore, we conclude that the term "assign" and "responsibly to direct" are distinct terms with distinct meanings that must be addressed separately. This approach is consistent with the approach taken by the NLRB. *See Oakwood Healthcare, Inc., and International Union, United Automobile Aerospace and Agriculture Implement Workers of America, AFL-CIO,* 348 NLRB 686, 688-89, 180 LRRM 1257 (2006).

We first address the meaning of the term "assign," as that word is used in ORS 243.650(23). When we analyze the text and context of a statutory term, we normally give the term its normal meaning. *PGE,* 317 Or at 611. To determine the normal meaning of words, we, like the courts, often look to the dictionary. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon,* Case No. UP-39-10, 25 PECBR 325, 345 (2012)*, citing to State v. Ausmus,* 336 Or 493, 504, 85 P3d 864 (2003). The dictionary defines the term "assign," in pertinent part, as "2a: to appoint (one) to a post or duty." *Webster's Third New Int'l Dictionary* 132 (unabridged ed 2002). The NLRB relied on an earlier

yet nearly identical version of this same dictionary in its discussion defining the term "assign" in *Oakwood Healthcare*, stating:

> "The ordinary meaning of the term 'assign' is 'to appoint to a post or duty.' *Webster's Third New International Dictionary* 132 (1981). Because this function shares with other [Section] 2(11) functions—i.e., hire, transfer, suspension, layoff, recall, promotion, discharge, reward, or discipline—the common trait of affecting a term or condition of employment, we construe the term 'assign' to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment. * * *
>
> "The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as 'assign' within our construction. However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to 'assign.' * * * In sum, to 'assign' for purposes of Section 2(11) refers to the * * * designation of significant overall duties to an employee, not to the * * * instruction that the employee perform a discrete task." *Oakwood Healthcare, Inc.,* 348 NLRB at 689.

We find this definition consistent with the text and context of ORS 243.650(23), and will apply it in our analysis of the Association-represented employees' authority to assign work.

With these standards in mind, we review the evidence first to determine whether RU managers have the authority to assign or effectively recommend the assignment of employees under ORS 243.650(23), and, if so, whether such assignments require the use of independent judgment. The City witnesses testified, in conclusory terms, that all commanding officers have broad authority to assign employees. This evidence, in the absence of additional, specific evidence of the authority to assign or effectively recommend the assignment of employees, is not sufficient to establish supervisory status.

However, RU managers testified that they have authority to assign and reassign people to different areas of responsibility within the RUs that they oversee to ensure that the division's goals are accomplished, so long as those reassignments do not violate the terms of any collective bargaining agreement. For example, in the Detective Division, a sergeant or officer working the homicide caseload could be reassigned to work the burglary caseload should the RU manager determine that was appropriate. Additionally, in the Training Division, Captain Parman conceded that he could reassign lieutenants within his RU to different substantive assignments.

The record also establishes that this authority is held in the interest of the employer and requires the use of independent judgment. RU managers must make a management-based assessment to assign subordinate employees in a manner that accomplishes the overall objectives

of the RU, as determined by the RU manager. Additionally, these assignments require the use of independent judgment, based on individualized assessments by RU managers on the needs of the RUs and the skills of the subordinate employees. Although there are some restrictions on what assignments and reassignments an RU manager may make, these limitations are not of such a nature as to render the assignments to be of a mere routine or clerical nature. Therefore, we find that there is sufficient evidence that RU managers have the authority to assign employees to render them supervisors under ORS 243.650(23).

We now turn to the factor of "responsibly to direct." Again, we find guidance in the NLRB's decision in *Oakwood Healthcare, Inc.,* which held that for putative supervisors to meet this criterion, they must have employees under them and decide "what job shall be undertaken next or who shall do it." *Oakwood Healthcare, Inc.,* 348 NLRB at 691. The direction must also be both "responsible" and carried out with "independent judgment." The NLRB explained further that for direction to be "responsible," the employee who is directing the work must be accountable for the success or failure of those whom they are directing:

> "We agree with the circuit courts that have considered the issue and find that for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. * * *
>
> "Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Oakwood Healthcare, Inc.,* 348 NLRB at 691-92.

We agree generally with the NLRB's approach as described above, and in particular with the conclusion that the term "responsibly to direct" requires that a putative supervisor must be accountable (such that some adverse consequence may befall the supervisor) should the employees that they allegedly direct fail to adequately perform their duties.

Here, RU managers clearly have people working under them, for whom they prioritize the jobs to be undertaken and decide who shall undertake them. In addition, RU managers acknowledged that ultimately it is their responsibility to ensure that their individual divisions meet PPB standards. Should the division fail to meet these standards, RU managers understand that they may be held accountable to the chief of police and the assistant chief of their branch for this failure, such that an adverse consequence may befall RU managers. Therefore, although it is a close call, we conclude that the RU managers do have sufficient authority "responsibly to direct" the work of employees.

In sum, we have concluded that RU managers have sufficient supervisory authority in three separate areas under ORS 243.650(23): authority to hire employees, authority to assign employees, and authority responsibly to direct employees. Moreover, the authority in those three

areas is held in the interest of the employer, and the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment. As a result and because satisfying even one criterion would mean that RU managers are "supervisory employees" under that statute, we conclude that the RU managers are supervisory employees under the PECBA and cannot be included in the Association bargaining unit. Having reached this conclusion, it is not necessary to determine whether RU managers have supervisory authority under the remaining statutory indicia. We now turn our attention to the remaining Association-represented employees who are not RU managers.

**Analysis: Bargaining Unit Employees Not Serving as RU Managers**

Authority to Discipline and Discharge Employees

Non-RU managers have no authority to discharge or suspend employees without pay. The chief of police and the mayor retain that authority. And unlike RU managers, lieutenants and captains not serving as RU managers cannot issue proposed letters of reprimand. The only authority to take actions that could even arguably be considered disciplinary that these employees maintain is the authority to issue "command counseling" and conduct "debriefings." The City asserts that this is sufficient to establish authority to discipline employees. Yet, under the City's policies and applicable collective bargaining agreements, such actions do not constitute discipline. Further, the decision to issue command counseling or conduct debriefings is not usually made by commanding officers. That decision is normally made by an established PPB body such as the CRB or PRB. In those cases, the commanding officers merely implement the decision made by others. Therefore, we conclude that non-RU managers do not have authority to discipline or discharge employees. In addition, the record does not establish that these employees can effectively recommend that employees be disciplined or discharged.

Authority to Suspend Employees

It is undisputed that non-RU managers lack the authority to suspend employees without pay, or to effectively recommend such action. Moreover, assuming, *arguendo,* that sending an employee home on paid leave amounts to "suspending" that employee, Chief Reese testified that there were only two narrow circumstances where such action is permitted: (1) a deadly-force incident; and (2) where immediate action is necessary "to protect the public." Chief Reese acknowledged, however, that no discretion is involved in either circumstance because these actions are required by PPB policies. Moreover, with respect to the latter, Reese acknowledged that a "sergeant" or "anybody" has authority to send someone home, and that "everybody's got the responsibility to do that equally." Reese also indicated that non-RU managers could only take that action *after* getting approval from an RU manager or an assistant chief.

Consequently, on this record, we conclude that non-RU managers lack the authority to suspend employees.[12] Specifically, with respect to an employee involved in a deadly-force

[12]Again, this analysis assumes that "suspend" may be understood to include sending an employee home on paid leave.

incident, the record establishes that it is required for that employee to be sent home on paid leave. There is no discretion or independent judgment involved. Likewise, any authority held by by a non-RU manager to send an employee home "to protect the public" does not require the use of independent judgment, as the action is not discretionary. Moreover, the record does not establish that non-RU managers have the authority, in the first instance, to send an employee home "to protect the public" because they must first receive the approval of an RU manager or assistant chief. The record also does not establish that non-RU managers may "effectively recommend" such action. Furthermore, as also confirmed by Chief Reese, the authority is not exercised in the interest of management, but rather is an obligation equally shared by "everybody."

Authority to Hire Employees

We concluded that RU managers have sufficient hiring authority to render them supervisors because they make hiring decisions for non-sworn positions, but the record does not support the same finding with regard to the captains and lieutenants who do not serve as RU managers. Rather, the only role for non-RU managers in the hiring process is serving as members of interview panels and occasionally providing their opinion on potential candidates. The record does not establish that they actually make any hiring decisions or that their limited input amounts to an effective recommendation to hire employees. As a result, we conclude that commanding officers who do not serve as RU managers have insufficient authority to hire or effectively recommend the hiring of non-sworn employees to render them supervisory employees under the statute.

Authority to Transfer Employees

Lieutenants and captains in non-RU manager positions have no authority to transfer employees.[13] At most, they act as a conduit for transfer requests by passing those requests up the chain of command. In some instances, these commanding officers may be asked their opinion on whether a transfer would be a good idea, but ultimately, all transfer requests must be approved by an assistant chief or the chief of police. Thus, non-RU managers have no authority to transfer employees. There is also no specific evidence that any "transfer" recommendations by these employees are regularly followed by decision makers. Accordingly we do not conclude that they effectively recommend the transfer of employees.

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[13]In its brief, the City contends that non-RU managers have the authority to "transfer" an employee by assigning that employee to a specialty unit within that employee's existing RU. We address that purported authority under the appropriate statutory criterion of "assign."

[13]In its brief, the City contends that non-RU managers have the authority to "transfer" an employee by assigning that employee to a specialty unit within that employee's existing RU. We address that purported authority under the appropriate statutory criterion of "assign."

Authority to Promote Employees[14]

The chief of police retains the authority to promote sworn employees based on the complex testing, assessment center, and interview process employed by the City. Captains and lieutenants in non-RU manager positions have very limited involvement in this process. They may on occasion serve on interview panels or as subject matter experts when promotional exams are created. When serving on promotional interview panels, these commanding officers' votes do not carry any more weight than other panelists. And although captains and lieutenants may occasionally be asked for their opinion on whether or not an employee should be promoted, there is no evidence that these recommendations are followed with any regularity. As a result, based on the record before us, RU managers do not have the authority to promote or to effectively recommend the promotion of employees.

Authority to Reward Employees

With respect to the authority to reward employees, the City did not identify any specific supervisory authority held by captains who do not serve as RU managers. Instead, the City referred back to its argument concerning the authority of commanders to reward employees, without acknowledging that some captains do not serve as RU managers. In its brief, the City acknowledged that there was no direct testimony on the authority of captains and commanders to reward employees, but nevertheless contended that they may reward employees because they "conduct formal annual performance evaluations" of non-sworn employees. According to the City, that evaluation is a "reward" because the evaluation may determine whether the non-sworn employee receives a step increase in pay, so long as the employee is not at the top step.

We disagree with the City that the authority to "evaluate" an employee is synonymous with the authority to "reward" an employee. As a mere matter of word usage, "evaluate" does not mean "reward," and the legislature did not include the authority to "evaluate" an employee as a statutory criterion for a supervisory employee. We decline to insert an additional statutory criterion, as the City's contention would effectively have us do.

However, the City separately asserted that lieutenants had the authority to "reward" high-performing employees by granting them the first opportunity to attend a "training session" or by issuing them a "coffee card." Its assertion relies on testimony by Lt. Steinbronn, a non-RU manager, that she considers it a "privilege" to send an employee who is doing "a great job" to a training session over an employee who does not "call[] in sick all the time," and that she "guess[es]" that she has that "power." Even assuming that giving a training-session preference constitutes a "reward" within the meaning of ORS 243.650(23), Lt. Steinbronn's "guess" that she has that power is insufficient to establish that she has such authority, or that she may effectively recommend as much. Additionally, the record does not establish that other non-RU managers have this authority (or the authority to effectively recommend).

[14]During the hearing, there was little to no evidence provided concerning the promotion of non-sworn employees. As a result, we will focus solely on the promotion of sworn employees under this particular factor.

With respect to the authority to "reward" employees by way of giving a coffee card, Lt. Steinbronn testified that she had given out such cards, but always paid for them out of her own pocket. This does not constitute supervisory authority in the interest of the employer, but merely establishes one employee expressing personal gratitude toward another. Although there was testimony that other non-RU managers could also give a coworker a coffee card, such gift-giving is not limited to Association-represented employees; rather, lower-ranking employees, other non-sworn employees, and any City employee with a "procurement" card can all give out coffee cards, subject to BHR Citywide policies. No evidence was presented concerning the frequency or typical basis for issuance of these coffee cards. On this record, we do not conclude that giving a coffee card establishes supervisory authority, in the interest of the employer, to "reward" subordinate employees, or that the exercise of that authority requires the use of independent judgment.

Finally, the City argues that non-RU managers have authority to assign employees to specialty units as a form of reward. Although the City acknowledges that this is an assignment, it states that it also has an element of "reward." We disagree with the proposition that we should conflate the distinct statutory criteria by finding that certain authority has "elements" of other criteria. Instead, we address below this purported authority to "assign" under the proper statutory criterion. For these reasons, we conclude that non-RU managers do not have the authority to reward or effectively recommend the rewarding of employees.

Authority to Adjust Grievances

The collective bargaining agreement with the PPA states that the first step of the grievance procedure for sworn employees below the rank of lieutenant is with that employee's immediate supervisor outside of the PPA bargaining unit. As a result, per the terms of the PPA contact, Association-represented commanding officers can and on rare occasions have *received* grievances filed by PPA-represented employees. However, there is insufficient evidence in the record that any employee in the Association bargaining unit has ever *adjusted* a grievance. Rather, the evidence in the record demonstrates that the practice at the City is for grievances to be handled by the chief's office and the BHR. To be a supervisory employee, the employee must have some actual authority to affirmatively adjust a grievance, or to effectively recommend the adjustment of a grievance. *The Dalles Police Association v. City of the Dalles,* Case No. UC-7-08, 22 PECBR 995, 1007 (2009). We have no evidence of this type of authority in the present matter. As a result, we conclude that commanding officers do not have the authority to adjust grievances or effectively recommend the adjustment of grievances.

Authority to Layoff and Recall Employees

The parties stipulated that no Association-represented employees have the authority to layoff or recall employees, or to effectively recommend these actions.

Authority to Assign Employees

The City asserts generally that captains and lieutenants who do not serve as RU managers have nearly unfettered discretion to assign work to lower-ranking employees. However, other

than these conclusory statements, there was insufficient specific evidence confirming these assertions to support a finding that these employees have the requisite authority to assign or effectively recommend the assignment of employees, as defined above. To the contrary, the evidence establishes that the captains and lieutenants not serving as RU managers spend a significant amount of time attending meetings, filling out paperwork, and coordinating between various departments within the PPB. Much of this work is administrative in nature. Lieutenants also spend a significant amount of time patrolling in certain assignments, and responding to significant tactical events alongside of bargaining unit members.

The City asserted specifically that lieutenants could assign employees to specialty units such as the Neighborhood Response Teams. They cite to the testimony of Lt. Steinbronn, who stated that she had "a lot of say" in who gets assigned to those specialty units that she oversaw. However, she also testified that she would have a conversation with a captain and commander where she would explain to them the reason for her recommendation before any decision was made. She did not testify, nor did any RU manager testify, that she had the actual authority to make the final decision to assign an employee to a specialty unit. Further, there was not any testimony or other evidence about how often those recommendations were or were not followed. The record also does not establish that other non-RU managers (beyond Lt. Steinbronn) had this authority. Thus, we do not conclude from this limited evidence that lieutenants have the authority to assign or to effectively recommend assigning employees to specialty units.

Chief Reese testified that the authority of commanding officers to *assign* overtime was done according to the parties' collective bargaining agreement. Chief Reese likewise confirmed that the use of overtime for purposes of attending court was not discretionary and did not involve independent judgment. Accordingly, we conclude that any authority to assign overtime does not require the use of independent judgment. Additionally, the authority to assign overtime is even further limited by City policies, and largely driven by minimum staffing requirements and other factors that the lieutenants and captains do not control. This further supports our conclusion that any assignment of overtime by non-RU managers does not require the use of independent judgment. For these reasons, we conclude that captains and lieutenants who are not RU managers lack the necessary authority to assign or effectively recommend the assignment of employees.

Authority "Responsibly to Direct" Employees

Finally, we examine whether non-RU managers have the authority to responsibly direct employees. It is undisputed that captains and lieutenants not serving as RU managers have employees working under them. However, the evidence on the authority of these employees to direct employees (as defined above) was conclusory in nature and lacked specific details or examples of the exercise of this authority. As a result, the actual extent of non-RU managers' authority to direct employees is unclear, as is whether any such authority requires the use of independent judgment, so as to render non-RU managers supervisory employees. Additionally, the non-RU managers do not have the same level of accountability to their supervisors should the employees that they purportedly direct fail to perform as expected. Above, we concluded that although it was a close call, RU managers have the authority "responsibly to direct" employees because RU managers acknowledged that they were ultimately accountable to the chief or assistant chiefs for the success or failure of their RU. We have no such acknowledgment in the

case of non-RU managers, or other evidence establishing that adverse consequences would befall non-RU managers in the event that any direction was not followed by subordinate employees. As a result, we conclude that non-RU managers do not have the authority "responsibly to direct" the work of employees sufficient to render them supervisory employees under ORS 243.650(23).

## CONCLUSION

Association-represented employees who serve as RU managers have authority in the interest of the employer to hire, assign, and responsibly to direct employees, and the exercise of that authority requires the use of independent judgment. Consequently, we conclude that they are supervisory employees under the PECBA and cannot be appropriately included in the Association bargaining unit. However, lieutenants and captains who do not serve as RU managers lack the necessary authority to take or effectively recommend actions in any of the areas enumerated by the statute.[15] Accordingly, Association-represented employees who do not serve as RU managers are not supervisory employees within the meaning of the PECBA and are appropriately included in the Association bargaining unit.[16]

## ORDER

1. The bargaining unit represented by the Association is clarified to exclude all captains and commanders serving as RU managers.

2. The portion of the petition pertaining to lieutenants and captains not serving as RU managers is dismissed.

DATED this 28 day of April, 2014.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

[15]As set forth above, to have the necessary statutory authority in any of the 12 enumerated areas, the authority must be held in the interest of the employer, and the exercise of that authority must require the use of independent judgment.

[16]The Association noted in its brief that some members of the Association bargaining unit more closely resemble the definition of "managerial employee" under ORS 243.650(16) than they do supervisory employees. Under the PECBA, however, a managerial employee is *an employee of the State of Oregon*, not the City.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-014-13

(UNFAIR LABOR PRACTICE)

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| CLACKAMAS COUNTY PEACE OFFICERS ASSOCIATION AND CHAD ATKESON,<br><br>Complainants,<br><br>v.<br><br>CITY OF WEST LINN,<br><br>Respondent. | ) | RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |

Barbara J. Diamond, Attorney at Law, Diamond Law, Portland, Oregon, represented Complainants.

Kathy A. Peck, Attorney at Law, Peck, Rubanoff & Hatfield, Lake Oswego, Oregon, represented Respondent.

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On April 3, 2014, this Board received Complainants' objections to a March 20, 2014, Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald, after a hearing on October 2 and 3, 2013, in West Linn, Oregon, and on December 4, 5, and 6, 2013, in Salem, Oregon. The record closed on February 3, 2014, following receipt of the parties' post-hearing briefs. On April 30, 2014, Complainants withdrew their objections.

When neither party objects to a recommended order, we generally adopt the recommended order as our final order, and we consider any objections that could have been made to that order unpreserved and waived. *International Brotherhood of Electrical Workers, Local Union No. 659 v. Eugene Water & Electrical Board*, Case No. UP-008-13, 25 PECBR 901 (2014). This final order is binding on, and has precedential value for, the named parties only.

We have previously elected not to publish recommended orders, reasoning that there would not be a benefit to anyone other than the named parties. However, on further consideration, we have decided that we will publish uncontested recommended orders as an attachment to our final order in a case, even though such final orders are precedential only with respect to the named parties.

ORDER

1. The Board adopts the recommended order as the final order in this matter.

2. The City will cease and desist from violating the "in" the exercise portion of ORS 243.672(1)(a).

3. All other claims are dismissed.

DATED this 9 day of May, 2014.

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-015/27-13

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| WASHINGTON COUNTY DISPATCHERS ASSOCIATION,<br><br>Complainant,<br><br>v.<br><br>WASHINGTON COUNTY CONSOLIDATED COMMUNICATIONS AGENCY,<br><br>Respondent. | ) | RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |
| WASHINGTON COUNTY CONSOLIDATED COMMUNICATIONS AGENCY,<br><br>Complainant,<br><br>v.<br><br>WASHINGTON COUNTY DISPATCHERS ASSOCIATION,<br><br>Respondent. | ) | |

On April 1, 2014, this Board heard oral argument on Washington County Dispatchers Association's (Association or WCDA) objections to a Recommended Order issued on February 13, 2014 by Administrative Law Judge (ALJ) Larry L. Witherell.[1] Thereafter, we invited

[1]In a periodic reassignment of cases, the matter had been transferred to ALJ Witherell for the issuance of the recommended order after a hearing was held by ALJ B. Carlton Grew on November 18, 2013, in Salem, Oregon. The record closed on December 23, 2013, following receipt of the parties' post-hearing briefs. In its objections, the Association contends that this Board was not permitted to transfer the matter to ALJ Witherell. This Board has previously addressed and rejected such a contention,

interested parties to file *amicus curiae* briefs regarding legal and policy questions concerning electronic recording of collective bargaining sessions. We also allowed the named parties to file supplemental briefs concerning those same questions.[2] Having considered the *amicus curiae* and supplemental briefs, we proceed with our consideration.

Elizabeth Lemoine, Attorney at Law, Makler, Lemoine, & Goldberg, P.C., Portland, Oregon, represented Washington County Dispatchers Association.

Daniel Rowan, Attorney at Law, Bullard Law, Portland, Oregon, represented Washington County Consolidated Communications Agency.

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On March 26, 2013, the Association filed an unfair labor practice complaint against the Washington County Consolidated Communications Agency (Agency or WCCCA). The complaint, as amended on April 30, 2013, alleged that the Agency violated ORS 243.672(1)(e) by refusing to meet and bargain when the Association insisted on electronically recording the parties' bargaining sessions.

On June 5, 2013, the Agency filed an unfair labor practice complaint against the Association. The complaint, as amended on August 28, 2013, alleged that the Association violated ORS 243.672(2)(b) by conditioning bargaining on the Agency's concession that the Association electronically record the bargaining sessions; that the Association violated ORS 243.672(2)(b) by insisting that the Agency continue to bargain over the bargaining ground rules; and that the Association violated ORS 243.672(2)(d) by refusing to comply with a written agreement (the bargaining ground rules) with the Agency.

The Association and Agency each filed timely answers to the complaints. The complaints were consolidated for hearing and decision.

The issues are:

1. Did the Association violate ORS 243.672(2)(b) or (d) by insisting on electronically recording (and then actually recording) the parties' bargaining sessions, over the Agency's objection?

2. Did the Agency violate ORS 243.672(1)(e) by initially refusing to bargain with the Association in light of the Association insisting that all bargaining sessions be electronically recorded?

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and we adhere to that case precedent. *See Arlington Education Association v. Arlington School District No. 3*, Case No., Case No. UP-65-99, 18 PECBR 901, 903 (2000), *rev'd and remanded on other grounds*, 177 Or App 658, 34 P3d 1197 (2001), 19 PECBR 762 (2002) (on remand), *aff'd*, 196 Or App 586, 103 P3d 1138 (2004).

[2]Those supplemental briefs were submitted on May 9, 2014.

3. If the Agency prevails, should the Association be required to pay the Agency a civil penalty?

For the reasons set forth below, we conclude that the Association violated ORS 243.672(2)(b), and that the Agency did not violate ORS 243.672(1)(e).[3] We further conclude that a civil penalty is not warranted.

## RULINGS

The rulings of the ALJ have been reviewed and are correct.

## FINDINGS OF FACT

1. The Agency is a public employer within the meaning of ORS 243.650(20) and employs certain public safety employees represented by the Association. The Association is a labor organization within the meaning of ORS 243.650(13). The Agency and Association were parties to a collective bargaining agreement that was effective from July 1, 2010 to June 30, 2013.

2. During the relevant times and events, Mark Makler, an attorney, served as the Association's chief spokesman and negotiator. During the relevant times and events, Jim Mooney, an outside human resources and labor relations consultant, served as chief spokesman and negotiator for the Agency.[4]

3. In late 2012, the Association informed the Agency that it wished to negotiate a successor agreement. The parties began the process for bargaining a successor agreement in January 2013, when the Agency sent the Association a proposed set of ground rules for the negotiations. The Agency proposed the ground rules that originally had been used during negotiations for the 2010-2013 agreement. Proposal Number 5 stated that "[e]ach bargaining team will be responsible for maintaining its own notes of negotiation meetings." Proposal Number 6 provided that

[3]Because the Agency's ORS 243.672(2)(d) claim is based on the same conduct *(i.e.*, electronically recording the bargaining sessions) as the ORS 243.672(2)(b) claim, and because finding a separate violation for that same conduct would add nothing to our remedy, we do not address the (2)(d) claim. *Lebanon Education Association/OEA* v. *Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 354 (2008).

[4]Unless stated otherwise, all the communications noted herein, whether written or oral, were made either by Mooney (representing the Agency) or Makler (representing the Association).

"[t]he parties agree that there shall be no public comment or press releases made during the period of negotiations until impasse has been declared, and then only after giving good faith advanced notification to the other party before the issuance of the public comment or press release. The parties agree that bargaining sessions will be closed to the press and public."[5]

4. The first face-to-face meeting between Agency and Association representatives was held on February 19, 2013. The Association submitted its proposed ground rules, including proposals Number 9 and 10, which stated:

"**9. <u>News Releases and Confidentiality</u>**

"It is agreed that any information regarding the status of negotiations or mediation will be released to the news media only with the express written consent of both parties, with a copy presented to the other party at least twenty-four (24) hours prior to release. This does not restrict the parties from communicating with their respective constituents; however each party will make their best efforts to ensure the confidentiality of such information. The parties agree either party may unilaterally exclude any press from attending negotiations.

"**10. <u>Notes</u>**

"The WCDA will provide electronic recording equipment to electronically record bargaining sessions, exclusive of the February 19, 2013, session at which ground rules were discussed. A copy of the recordings will be provided to WCCCA bargaining team representative _____, within three (3) working days following the bargaining session." (Blank, underscoring, and bold in original.)[6]

The Association wanted to digitally record the bargaining sessions because of an issue of trust between the parties and because of problems that arose over the interpretation of the 2010-2013 agreement. In particular, Brett Goodman was the prior Association president and was principally responsible for negotiating the 2010-2013 agreement for the Association. However, Goodman was subsequently promoted to a management position and became a member of the Agency's bargaining team. This situation contributed to the Association's concern about lacking an understanding of the bargaining history for the 2010-2013 agreement.

[5]In addition to Numbers 5 and 6, the Agency proposed ground rules on the composition/membership of the bargaining teams; observers; making tentative agreements; priority of language issues before economic issues; scheduling of meetings; and the commencement of the 150-day bargaining period.

[6]In addition to Numbers 9 and 10, the Association proposed rules covering meeting schedules; designated spokespersons; authority for tentative agreements; requesting caucuses; making proposals and counter-proposals; a moratorium date; and composition/membership of the bargaining teams.

5. The Agency had concerns about the size of the Association's bargaining team (proposal Number 7) and the recording of bargaining sessions (proposal Number 10). Mooney objected to the Association's proposed ground rule concerning the digital recording of bargaining sessions. Mooney stated that he did not think that recording the sessions would improve the trust in labor relations. Makler responded that he thought that it would, and further said that the two would just have to agree to disagree about the benefits of recording the bargaining sessions.[7]

6. The parties then went into their respective caucuses. After the caucuses, the Association clarified the size of the Association's team, which satisfied the Agency. Faced with the Agency's objection, Makler deleted – by physically striking out – the recording proposal contained in Number 10. At that time, Makler considered it to be a permissive subject and that he could not force it on the other party. Makler stated that the Association was not going to talk about recordings, and because the Agency did not want the provision in the ground rules, Makler stated that the provision was "gone." Makler then made another proposal under the heading of Number 10. The replacement proposal stated:

> "**10. <u>Notes, Records and CBA Preparation</u>**
>
> "Each bargaining team is responsible for monitoring its own notes of bargaining. WCDA will be the keeper of official TA's. WCDA will be responsible for preparing any drafts of the CBA and WCDA will be responsible for preparing the final version of the CBA. WCDA will provide Word and PDF e[-]copies of drafts and/or final versions of the CBA to the Agency and designated Agency bargaining team members." (Emphasis in original.)

The Agency accepted this new proposal, and Makler and Mooney then executed the ground-rules agreement with the changes only to Numbers 7 and 10. Makler made no statement at the February 19 meeting that the Association believed that it could or could not record the bargaining sessions, notwithstanding the ground rule discussion and agreement. After the execution of the ground rules, the parties began to exchange and discuss substantive bargaining proposals.

7. The second bargaining session was held on March 5, 2013. The Agency began the session by making four or five language proposals. This was followed by a discussion of the items, and then the parties retired to their respective caucuses. When the two sides reconvened at the bargaining table, Makler announced that the Association intended to openly use an electronic digital recorder to record the bargaining sessions between the parties. Makler provided Mooney with a selection from Chapter 5, "The PECBA Collective Bargaining Process," from *Labor and*

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[7]The Association asserts that Makler's "agree to disagree" declaration referred to whether the Association had agreed that it would or would not record bargaining. Mooney testified that the statement referred to the discussion with Makler over the disputed usefulness of recording negotiations. The explanation given by Mooney and the specificity of his testimony over Makler's testimony, lead us to accept Mooney's version of events; the logic of the interpretation in the context of the surrounding events also lead us to conclude that the statement referred to the usefulness issue.

*Employment Law: Public Sector. Volume One* (Oregon State Bar Legal Publication, 2011 ed). He also provided copies of criminal statutes ORS 165.535 (Definitions applicable to obtaining contents of communications) and ORS 165.540 (Obtaining contents of communications). Makler stated that the Association was going to record the sessions under ORS 165.540 because, he claimed, the law allowed the Association do so. Mooney stated that the Agency would consider the Association's intent to electronically record the bargaining sessions and would get back to the Association. The session, which began at 8:05 a.m., then ended at 10:18 a.m.

8. On March 7, 2013, Mooney e-mailed Makler concerning the Association's stated intent to record the sessions.

> "First, I don't believe that recording our meetings will enhance trust or lead to more open and constructive discussion at the bargaining table. Second, while someone may hold the opinion that because Oregon's ERB has yet to rule on the issue, a unilateral decision to record negotiations sessions (albeit with proper notification) is not inconsistent with Oregon law, I believe that if and when this issue goes before the ERB, they are quite likely to follow the NLRB. Finally, you raised the issue of recording our negotiating sessions at our first meeting when we were discussing ground rules. On behalf of the employer, I objected, and my understanding is that we agreed that there would be no digital recording.
>
> "I hope that you and your team will reconsider your position on this subject. Either way, please let us know if we should still be planning to meet on the 18th."

9. On March 13, 2013, Mooney e-mailed Makler and asked if the parties were meeting. The next day, Makler responded that the Association still intended to electronically record the session on Monday, March 18. On March 15, Mooney notified Makler that he was canceling the upcoming bargaining session. Mooney explained:

> "If the ERB rules that we have to consent to being digitally recorded, we will comply. Otherwise, especially given the ground rules we agreed to at our first meeting, we will continue to insist that our negotiation meetings not be electronically recorded.
>
> "I suppose that WCDA can file a ULP accusing WCCCA of refusing to meet or that WCCCA can file a ULP accusing WCDA of bargaining in bad faith regarding the ground rules. To me that seems like a waste of both time and money for our clients. We should be getting down to the business of working out a successor agreement.
>
> "If it is truly important to you to establish a precedent for forcing an unwilling negotiating partner to electronically record confidential negotiations, I submit that a situation like this one – when the partner specifically refused to agree to electronic recording, you produced the alternate language, and you finished that session and two-thirds of the subsequent session before announcing your unilateral intention to

record – does not afford the kind of fact pattern that is likely to make your case. The ERB might not even address the recording issue.

"I realize that this is all speculative. If, upon further consideration, you and your team decide to continue negotiations according to our ground rules (without electronic recording devices), WCCCA's team will be available to meet as scheduled on the 28th."

10. On March 16, 2013, Makler responded to Mooney.

"In short – there was no agreement NOT to record – there was mutual agreement to agree to disagree and since ground rules are a permissive subject of bargaining (at least per the ERB) we (WCDA) chose to not allow you to file a ULP and to seek other avenues and ways to lawfully record the negotiations. The fact that 1 + bargaining meetings occurred before we asserted a lawful position and the ORS has no bearing on whether the law in Oregon allows us to unilaterally record the negotiations – we intend to do so and we have lawfully and [*sic*] put you on notice that we intend to do so.

"Now you have responded that you intend to refuse to meet and bargain because we have asserted a lawful right to record – how do you square your current position to refuse to meet and bargain with our ground rules and with the [Public Employee Collective Bargaining Act] PECBA and with the ORS that I cited and provided that indicate that WCDA can record." (Emphasis in original.)

11. On March 24, 2013, Mooney informed Makler that "[a]t this point our position has not changed. We will not agree to participate in recorded negotiations meetings unless ordered to do so by the ERB. If your position remains unchanged then I propose that we cancel the meeting scheduled for the 28th."

12. On March 26, 2013, the Association filed its unfair labor practice complaint against the Agency.

13. On May 21, 2013, the Agency decided to return to the bargaining table and the parties met for face-to-face bargaining. Makler began the meeting by announcing that the Association would be electronically recording the session. In response, Mooney stated the Agency's objection to the recording. The Association nevertheless recorded the session. The Association recorded every bargaining session beginning with the May 21 session. At each subsequent bargaining session, Makler announced at the beginning of the meeting that the Association would be recording the session. Mooney promptly stated his objections to the Association's recording of the bargaining session. At no time did Makler withdraw the Association's demand to record the session when confronted with Agency's objection. On June 5, the Agency filed its unfair labor practice complaint.

## CONCLUSIONS OF LAW

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

2. The Association violated ORS 243.672(2)(b) by insisting, over the Agency's objection, that the parties' bargaining sessions be electronically recorded.

We first address the Agency's claim that the Association violated ORS 243.672(2)(b), which prohibits a labor organization from "[r]efus[ing] to bargain collectively in good faith with the public employer." The Agency alleges that the Association insisted on electronically recording bargaining sessions, and that in doing so, it violated ORS 243.672 2(b). The Association does not dispute that it insisted, in no uncertain terms, that it would electronically record all bargaining sessions as of March 5, 2013, and that it did electronically record the parties' bargaining sessions over the Agency's objections. The Association asserts, however, that its conduct was lawful because it purportedly had a "right" to do so. For the following reasons, we agree with the Agency.

We begin with the areas of agreement. The parties agree that the subject of audio recording collective bargaining sessions is a permissive subject of bargaining and that it is a *per se* violation of the duty to bargain in good faith to insist on a permissive subject of bargaining, such as a "ground rules" proposal, as a precursor to bargaining. *See, e.g., Lane County v. AFSCME Local 626, AFL-CIO,* Case No. C-59-80, 5 PECBR 4042, 4044 (1980). Additionally, the parties agree that, if we adopt longstanding National Labor Relations Board (NLRB) precedent, the Association's conduct is unlawful. The parties part ways, however, on whether we should adopt the NLRB's precedent for parties subject to the PECBA, and conclude that a party may not insist (over the other party's objection) that bargaining sessions be electronically recorded. We turn to those questions.

In *Bartlett-Collins, Co.*, 237 NLRB 770, 772-73 (1978), *enf'd*, 639 F2d 652 (10th Cir.), *cert den*, 452 US 961, 101 S.Ct. 3109 (1981), the NLRB determined that "a court reporter during negotiations or, in the alternative, the issue of the use of a device to record those negotiations" did not constitute a mandatory subject of bargaining under the NLRA, but rather a permissive subject. Therefore, if a party "insist[ed] to impasse" over the other party's objection on using a court reporter or a recording device in bargaining sessions, the insisting party violated the duty to collectively bargain in good faith. *Id.*

In enforcing the NLRB's order, the court observed that the purpose of the NLRA "is to foster collective bargaining and the resolution of industrial disputes," and that such policies would be undermined if negotiations were allowed to breakdown over a threshold procedural issue of a party insisting on electronically recording bargaining sessions. 639 F2d at 656. The court further noted that a contrary ruling "would create a tool of avoidance for those who wish to impede or vitiate the collective bargaining process" and that "[t]oo often negotiations would flounder before their true inception." *Id.*

The court rejected the employer's argument "that no honest bargainer can be disadvantaged by the recording of bargaining sessions." The court explained that the NLRB "and numerous experts in the field of labor relations believe that the presence of a court reporter has a tendency to inhibit the free and open discussion necessary for conducting successful collective bargaining." *Id.* (internal quotations omitted). The court further explained that insisting on a verbatim recording of collective bargaining sessions: (1) "may cause parties to talk for the record rather than to advance toward an agreement"; (2) may formalize the bargaining, "sapping the spontaneity and flexibility often necessary to successful negotiations"; (3) may begin the bargaining "on a discordant note"; and (4) "may give notice that one party lacks confidence in the collective-bargaining process, anticipating litigation rather than agreement." *Id.*

The court acknowledged the employer's argument "that recording bargaining sessions provides important benefits" by purportedly: (1) speeding up bargaining by freeing parties of the burden of note taking; (2) helping parties in later construing and applying the final agreement; (3) helping the NLRB and courts in the event of litigation; and (4) promoting responsibility in bargaining by minimizing idle chatter, filibustering and intemperate behavior." *Id.* The court noted that, in support of these contentions, the employer pointed to the fact that all of the NLRB's formal proceedings are transcribed. *Id.*

The court agreed that "[r]ecording of bargaining sessions does have some positive aspects," but then explained that the value is not as great as the employer asserted when the recording is done over the objection of a party. *Id.* "Making a verbatim transcript," the court explained,

> "does not necessarily facilitate party interpretation of a labor contract and [the] resolution of refusal-to-bargain charges. The parties remain 'free to discuss points outside of the bargaining room and even while in bargaining sessions they are free to make 'off the record' statements.' *NLRB v. Southern Transport, Inc.*, 355 F.2d 978, 984 (8th Cir. 1966). Thus, the parties could continue to haggle over the meaning of the contract. In unfair labor practice proceedings, the Board would still be required to take testimony and make findings of fact as to what occurred when the parties were not speaking on the record. Moreover, the temperate and responsible bargaining the Company asserts would follow from the use of a court reporter may simply reflect a stultified process of negotiations and posturing for the record instead of the spontaneous, frank, no-holds-barred interchange of ideas and persuasive forces that successful bargaining often requires.
>
> "The Company's analogy to recording of formal Board proceedings is misplaced. The purposes of collective bargaining and those of the judicial process are not the same. Court reporters are an integral part of an adjudicatory hearing because they facilitate the main goal of adjudication, ascertaining the truth. Collective bargaining, on the other hand, "cannot be equated with an academic collective search for truth or even with what might be thought to be the ideal of one." *NLRB v. Insurance Agents' International Union*, 361 U.S. at 488, 80 S.Ct. at 426. Agreement is the result of, among other things, the relative economic power of the opposing parties, reason, public opinion, accommodation, and persuasion. *Id.* at 489-90, 80 S.Ct. at 427. The pursuit of truth and justice is not always the guiding

> beacon in collective bargaining. The goal of ascertaining with 100 percent accuracy what was said in negotiations may be subordinate to other concerns, such as ensuring peaceful resolution of industrial disputes.
>
> "The number of cases in which bargaining parties resort to adjudication and in which resolution depends upon an accurate record of the bargaining process is small in comparison to the number of labor contracts negotiated. This fact supports the reasonableness of the Board's conclusion that any advantages from stenographic recording of negotiations are outweighed by the negative effects on the bargaining process of allowing one side to insist upon the presence of a court reporter." *Id.* at 657.

*See also Local No. 455, Bakery, Confectionary and Tobacco Workers International Union, AFL-CIO (Nabisco Brands, Inc.)*, 272 NLRB 1362, 1364, LRRM (BNA) 1007 (1984) ("[e]xperience has taught that the presence of a stenographer or tape recorder does inhibit free collective bargaining," and that "[b]oth sides talk for the record and not for the purpose of advancing negotiations towards eventual settlement."

For over 35 years following the NLRB's decision in *Bartlett-Collins*, that precedent has continued to guide labor/management collective bargaining for those parties under the NLRB's jurisdiction. We are unaware of (and have not been provided with) any labor-management disharmony or unrest in this area of the law (in either the private or public sector). Nor have we been provided with persuasive information establishing that changes in technology have undermined the rationale behind this longstanding federal precedent. To the contrary, the submitted *amicus curiae* briefs overwhelmingly endorse this precedent and convincingly explain that the negative consequences of allowing a party to insist on electronic recording of bargaining sessions remain detrimental and deleterious to successful collective bargaining.

In arguing to the contrary, the Association advances two arguments: (1) that this precedent is, in the words of the Association, "ancient"; and (2) that this private-sector precedent should not be adopted by this Board for purposes of the PECBA because Oregon law expressly allows collective bargaining sessions to be electronically recorded. We reject both arguments.

To begin, we disagree with the Association's assertion that we should devalue precedent because it is longstanding. Rather, that such precedent has withstood the changes of time, the workplace, and labor-management practices speaks to its soundness and vitality. To be sure, there are undoubtedly instances in which changes in society or labor relations might warrant revisiting and overruling precedent that no longer comports with those changes. As noted above, we afforded interested parties in both labor and management to provide us with arguments as to how electronic recording of bargaining sessions should be treated under the PECBA. With one exception, *amici* strongly urged that the aforementioned precedent be embraced by this Board, and asserted that allowing a party to insist on electronic recording of bargaining sessions would be damaging to collective bargaining under the PECBA.[8]

[8]We received *amicus curiae* briefs on behalf of the following organizations, all in support of the conclusion that we reach today: Oregon Public Employer Labor Relations Association; National Public Employer Labor Relations Association; Oregon School Board Association; League of Oregon Cities;

We also disagree with the Association's contention that we are barred from adopting this precedent for purposes of the PECBA. According to the Association, it had the unfettered right to electronically record the parties' bargaining sessions under Oregon's Public Meetings Law (PML) (ORS 192.610 to 192.690).[9] The Association's argument is premised, however, on a conclusion that the sessions here were "public meetings" within the meaning of the PML. That premise, however, is faulty. In *Southwestern Oregon Publishing Co., Inc. v. Southwestern Oregon Community College Dist.*, 28 Or App 383, 559 P2d 1289 (1977), the court concluded that the PML "has no applicability to the negotiations conducted by a retained negotiator." *Id*. at 386. Here, there is no dispute that Mooney, who negotiated on behalf of the Agency, was a retained negotiator, and not a member of either the Agency's governing or public body. Accordingly, under binding court precedent, the PML has no applicability here.

Echoing an earlier theme, the Association asks this Board to disregard *Southwestern Oregon Publishing* because it is "very old." The Association also asserts that the case "has no substantive analysis, logic or argument." As explained above, we disagree with the Association's position that we may or should ignore an Oregon appellate case merely because it was decided long ago. Moreover, regardless of the age of the case or the Association's perception of the quality of the court's legal analysis, this Board is not free to disregard binding court precedent.

Therefore, having considered the parties' respective positions and the *amicus curiae* briefs, we have decided to adopt the approach taken by the NLRB on the subject of recording bargaining sessions. As set forth above, the Association does not dispute that, under that precedent, its conduct was unlawful under ORS 243.672(2)(b) because it insisted on recording the bargaining sessions (a permissive subject) as a prerequisite to the parties bargaining over mandatory subjects. Accordingly, we will find that the Association violated ORS 243.672(2)(b).

Our dissenting colleague would take a different approach and analyze whether the recording of collective bargaining sessions violates the duty to bargain in good faith under the particular circumstance of each case. That approach is not without precedent, as it is the approach taken by the NLRB before its decision in *Bartlett-Collins. See* 237 NLRB at 772. For the reasons

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Association of Oregon Counties; Oregon Association of Chiefs of Police; Oregon Fire Chiefs Association; and Tri-County Metropolitan Transportation District. We received one *amicus curiae* brief in opposition to this approach, which was submitted by John Witty, an attorney who has represented public sector employers for approximately 26 years.

[9]The Association also forwards the criminal provisions ORS 165.535 and ORS 165.540 as having some significance. *See* Findings of Fact 7. ORS 165.540(1)(c) states that a person may not

> "[o]btain or attempt to obtain the whole or any part of a conversation by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, if not all participants in the conversation are specifically informed that their conversation is being obtained."

Although an announcement at the beginning of the bargaining sessions may insulate an individual from criminal liability under ORS 165.540, ORS 243.672(2) still applies to the Association's conduct.

expressed by the NLRB in *Bartlett-Collins* (and its progeny), enforcing federal courts, and our decision here, recording bargaining sessions should be considered a permissive subject of bargaining, meaning that a party may not insist, over the other party's objection, that bargaining sessions be recorded.

3. The Agency did not violate ORS 243.672(1)(e) when it initially declined to cede to the Association's demand that the parties' bargaining sessions be electronically recorded.

Relatedly, we dismiss the Association's claim that the Agency violated ORS 243.672(1)(e) when it initially refused to bargain in light of the Association insisting that the bargaining sessions be recorded. In *Jackson County v. Jackson County Sheriff's Employees' Association*, Case No. UP-24-11, 25 PECBR (2012), we dismissed the employer's claim that the union had violated ORS 243.672(2)(b) when the union walked out of a bargaining session and refused to bargain for a brief period based on the union's misunderstanding that the employer was conditioning bargaining on a permissive subject. In doing so, we observed that, although the union's understanding was based on a mistaken belief that the employer was conditioning bargaining on a permissive subject, that misunderstanding was immediately conveyed to the employer and entirely within the purview of the employer to correct.

Here, as set forth above, there was no *misunderstanding* that the Association was insisting on a permissive subject as a prerequisite to bargaining over mandatory subjects. Rather, the Association was doing so expressly. Thus, there is even greater reason to apply the rationale in *Jackson County* to dismiss the Association's complaint, as it was entirely within the purview of the Association to stop insisting on the permissive subject of recording the bargaining sessions as a requirement of bargaining. Moreover, the Agency's suspension of bargaining was temporary and the Agency did return to the bargaining table even though the Association continued to insist on a permissive subject.

Our decision here is also consistent with NLRB precedent that one party's insistence on a permissive subject of bargaining as a condition to bargaining may temporarily suspend the bargaining duty of the other party. *See Nassau Ins. Co.*, 280 NLRB 878, 878 n 3, 124 LRRM (BNA) 1075 (1986). That NLRB precedent recognizes that in certain circumstances one party's unlawful conduct may temporarily suspend the other party's duty to bargain so long as the breach or unlawful action continues. *See*, *e.g.*, *Arundel Corp.*, 210 NLRB 525, 527 (1974). Thus, although one unfair labor practice does not condone another, there are limited circumstances as outlined above and applicable here in which a party may temporarily suspend bargaining in the face of significant unlawful conduct of the other party. Therefore, we will dismiss the Association's complaint in Case No. UP-015-13. ORS 243.676(3)(a).

Remedy

Because we have determined that the Association violated ORS 243.672(2)(b) by insisting on the Agency's acceptance of a permissive subject, namely electronically recording the bargaining sessions, we are required to enter a cease and desist order. ORS 243.676(2)(c). Therefore, we will order the Association to meet and bargain collectively in good faith with the Agency with respect to employment relations. As explained above, that means that the Association

is to cease and desist from electronically recording the parties' bargaining sessions, unless the Agency voluntarily agrees that such bargaining sessions may be recorded.

Upon finding a respondent has violated the PECBA, this Board "shall * * * [t]ake such affirmative action * * * as necessary to effectuate the purposes of * * * ORS 243.650 to 243.782." ORS 243.676(2)(c). Because the Association's conduct has led to a substantial delay in good faith bargaining, the Agency requests that we require the Association to pay members of the bargaining unit interest on any retroactive wage increases that the parties agree to in a successor agreement. However, we conclude that the conduct, which presents a case of first impression, does not warrant such a remedy, and we decline to order one.

We will not order the Association to post a notice of its wrongdoing as requested by the Agency. We generally order such a posting if we determine that 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 of a notice. *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, 19 PECBR 684, 685 (2002). Under the circumstances of this case, especially given that this is a case of first impression under the PECBA, we conclude that a posting is not warranted.

Finally, the Agency requests that we award a civil penalty. 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 "[t]he complaint has been "affirmed" after finding: (1) "that the person who has committed, or who is engaging, in an unfair labor practice has done so repetitively, knowing that the action taken was an unfair labor practice and took the action disregarding this knowledge"; or (2) "that the action constituting the unfair labor practice was egregious." ORS 243.676(4)(a); *see also* OAR 115-035-0075. Here, given our disposition of this issue of first impression, we do not find that the Association knew that its conduct constituted an unfair labor practice or that the Association's actions were egregious. Consequently, we do not award a civil penalty.

## ORDER

1. The Association violated ORS 243.672(2)(b) when it insisted on electronically recording bargaining sessions over the objections of the Agency. The Association will cease and desist from violating ORS 243.672(2)(b).

2. The Association will meet and bargain in good faith with the Agency over employment relations. The Association will not insist on electronically recording the parties' bargaining sessions and may not record the parties' bargaining sessions unless the Agency voluntarily agrees that it may do so.

3. The complaint in Case No. UP-015-13 is dismissed.

DATED this 16 day of June 2014.

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 dissenting.

I disagree with my colleagues' conclusions that the Association committed a *per se* violation of ORS 243.672(2)(b) when it insisted on recording bargaining sessions over the WCCCA's objections, and that the WCCCA did not violate ORS 243.672(1)(e) when it conditioned bargaining on the Association's agreement not to record bargaining. For the reasons set forth below, I would reach the opposite conclusion.

This case involves competing unfair labor practice complaints alleging that both parties violated the obligation to bargain in good faith. We recognize two distinct types of bad faith bargaining violations: "*per se"* violations and "totality of conduct" violations. *Salem Police Employees Union v. City of Salem,* Case No. UP-121-87, 11 PECBR 282, 289 (1989). A *per se* violation occurs when a party's conduct is "so inimical to the negotiations process" that it is sufficient to establish a violation even absent a showing of subjective bad faith. *See Federation of Oregon Parole and Probation Officers, Multnomah County Chapter v. Multnomah County,* Case No. UP-032-12, 25 PECBR 629, 635 (2013). We find a "totality of conduct" violation if a party's behavior during negotiations, when viewed comprehensively, indicates an unwillingness to reach an agreement through good faith bargaining. *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, 453, *AWOP,* 146 Or App 777, 932 P2d 1216 (1997).

Here, the majority has adopted private sector precedent and established a rule that a party who insists on recording bargaining over the other party's objections commits a *per se* violation of the duty to bargain in good faith. Implicit in this ruling is a conclusion by the majority that one party's insistence on recording bargaining over the other party's objections is "inimical" to the

negotiating process. I disagree. Undoubtedly, electronic recording of negotiations will impact negotiations in a variety of ways, some negative and some positive. But the magnitude and the nature of the impact in the public sector is speculative at best, and it is far from clear that recording negotiations is so inherently damaging to the collective bargaining process that it is "inimical" to successful negotiations. Thus, I see no need to establish a "one-size-fits-all" approach to this issue. Doing so effectively creates a default rule prohibiting the recording of negotiations in the public sector unless both parties agree. Such a rule is easily administered, but I am not convinced that it is necessary or that the rule serves the public interest well.

If we were to establish a default rule concerning the right to record collective bargaining sessions under the PECBA, we should not follow the private sector's lead. The services performed by the employers and employees covered by the PECBA are provided for the benefit of the public, and are paid for by the public. This is not the case in the private sector. Consequently, public policy considerations not relevant to the private sector must be taken into account before we create a blanket rule that significantly impacts public sector negotiations. Perhaps the most important public policy impacted is, as the Oregon Supreme Court described in *Jordan v. MVD,* Oregon's "strong and enduring policy that public records and governmental activities be open to the public." 308 Or 433, 438, 781 P2d 1203 (1989), citing *to MacEwan v. Holm et al,* 226 Or 27, 359 P2d 413 (1961). Thus public policy favoring open government is derived from many sources, but most notably from our Public Records Law, ORS 192.410 through 192.505, and our Public Meetings Law, ORS 192.610 through 192.690.[10]

Given this well-established preference for open government, and the impact that public sector collective bargaining has on the public, it is axiomatic that the public has a significant interest in having a reasonable level of access to information about how negotiations are conducted and why particular decisions are made. Recordings of bargaining sessions can serve as a source of valuable information about negotiations not only for the parties involved in the negotiations, but also for the public. Establishing a default rule that substantially limits rather than expands when such recordings may be made does nothing to promote open government or public access to information concerning ongoing negotiations.

I do not intend to suggest that the recording of bargaining sessions should be allowed under all situations. Certainly, it would be lawful for the parties to both agree not to record bargaining. Additionally, there are situations where recording bargaining over the objections of the other party could violate the PECBA. For example, if the negotiations were recorded in a manner that would unreasonably chill the parties' willingness to bargain openly, this could be the basis for a bad faith bargaining charge under ORS 243.672(1)(e) or (2)(b). However, the recording of bargaining over the other party's objections should be considered only as one possible factor under a "totality of conduct" analysis rather than an automatic "*per se*" violation. As a result, there would have to be some additional facts or circumstances surrounding the recording of negotiations that would support a finding of bad faith. To the extent, to the extent that recording bargaining sessions might

[10]Specifically, ORS 192.620 states in part that "[t]he Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made," while ORS 192.420(1) provides that "[e]very person has a right to inspect any public record of a public body in this state," except for certain specific records enumerated under statutory exceptions under ORS 192.501 through 192.505.

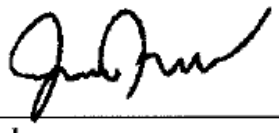
chill protected employee activity, a labor organization or public employee could bring a claim under ORS 243.672(1)(a) or (1)(c).

If we were to apply a "totality of conduct" analysis to this case, I would conclude that the WCCCA did not prove by a preponderance of the evidence that the Association violated ORS 243.672(2)(b). As a result, I would dismiss this claim.

I now turn to the Association's claim that the WCCCA violated ORS 243.672(1)(e) when it refused to continue negotiations until the Association agreed not to record bargaining sessions. We have long held that a party commits a *per se* violation of the duty to bargain in good faith if it "conditions" further negotiations on a concession made by the other party. *Lane County v. AFSCME Local 626, AFL-CIO,* Case No. C-59-80, 5 PECBR 4042, 4044 (1980) (union committed a *per se* violation of ORS 243.672(2)(b) by conditioning further bargaining on the employer's agreement to ground rules proposals). Here, it is undisputed that the WCCCA unambiguously refused to even meet for negotiations for two months unless the Association agreed to reverse its decision to electronically record bargaining sessions. Thus, while the WCCCA was put in a difficult position by the Association's aggressive tactics, it did condition further bargaining on a concession by the Association. Therefore, the WCCCA, not the Association, violated its obligation to bargain in good faith and thus, ORS 243.672(1)(e).

The WCCCA's refusal to bargain was not justified by its concerns about the possible chilling impact of recording bargaining sessions. In general, a party to negotiations who believes that the other party is engaging in unlawful behavior should not respond with its own unlawful refusal to bargain, as is the case here. Rather, a party with this type of concern should utilize this Board's lawful dispute resolution procedures while continuing with the negotiations process in good faith.

For these reasons, I do not join in the majority's decision.



*Jason M. Weyand, Member

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-029-13

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| INDEPENDENT ASSOCIATION OF LINN-BENTON COMMUNITY COLLEGE CLASSIFIED EMPLOYEES, | ) | |
| Complainant, | ) | RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |
| v. | ) | |
| LINN-BENTON COMMUNITY COLLEGE, | ) | |
| Respondent. | ) | |

On May 9, 2014, the Board heard oral argument on Complainant's objections to a recommended order issued by Administrative Law Judge (ALJ) Larry L. Witherell on March 31, 2014, after a hearing held on December 9, 2013, in Salem, Oregon. The record closed on January 15, 2014, following receipt of the parties' post-hearing briefs.

John Sutter, Attorney at Law, Law Office of John Sutter, LLC, Portland, Oregon, represented Complainant.

Brian Hungerford, Attorney at Law, The Hungerford Law Firm, Oregon City, Oregon, represented Respondent.

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On June 26, 2013, the Independent Association of Linn-Benton Community College Classified Employees (Association) filed this unfair labor practice complaint against Linn-Benton Community College (College) alleging that the College unilaterally failed or refused to grant a step increase to bargaining unit employees in violation of ORS 243.672(1)(e) and (1)(f). The College filed a timely answer.

The issues, as agreed to by the parties, are:

1. Did the College fail to bargain in good faith by not granting step increases after the expiration of the 2008-2013 collective bargaining agreement in violation of ORS 243.672(1)(e)?

2. Did the College fail to comply with obligations under ORS 243.712(2)(d) by not granting step increases after the expiration of the 2008-2013 collective bargaining agreement in violation of ORS 243.672(1)(f)?

For the reasons set forth below, we conclude that the College did not violate ORS 243.672(1)(e) or (1)(f) as alleged.

## RULINGS

The rulings of the ALJ were reviewed and are correct.

## FINDINGS OF FACT

1. The College 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 for a bargaining unit of approximately 195 classified employees.

2. The College and Association were parties to a collective bargaining agreement that was effective from July 1, 2008 through June 30, 2013 (Agreement).

3. Article 31, Salary Schedule, of the Agreement is as follows:

> "A. Appendices A-E, attached to this Agreement, shall be the salary schedules for classified employees effective July 1, 2008 through June, 2013. The new schedules are comprised of 16 steps. The process for transitioning to this 16-step schedule is explained below: *Any adjustments to compensation after June 30, 2013 shall be controlled by a successor agreement.*
>
> > "1. Effective July 1, 2008 the college shall increase the salary schedule in effect July 1, 2007 through June 30, 2008 by 3.5%. Current employees will progress two steps on that salary schedule, effective July 1, 2008. Employees at step 17 of their salary grade as of academic year 2007-08 will progress one step on the salary schedule and will receive a one-time bonus of 2.04% of their 2008-09 salary, effective July 1, 2008. Employees at step 18 of their salary grade will not progress a step but will receive a one-time bonus of 4.08% of their 2008-09 salary, effective July 1, 2008. The salary resulting from the 3.5% schedule increase and the individual step progression shall be the employee's salary for fiscal year 2008-09.

"2. Following the implementation of paragraph A.1., the college will transition employees to the new 16-step salary schedule by placing each employee at the step equivalent to his or her salary for fiscal year 2008-09. (For example, an employee at Step 4 under the schedule in effect during academic year 2007-08 will be at Step 4 under the new schedule).

"B. For the fiscal year 2009-10, the salary schedule shall be increased by 3.5% at each step, effective July 1, 2009. Current employees will progress one step on the salary schedule, effective July 1, 2009.

"C. For the fiscal year 2010-11 the salary schedule shall be increased by 3.5% at each step, effective July 1, 2010. Current employees will progress one step on the salary schedule, effective July 1, 2010.

"D. For the fiscal year 2011-12 the salary schedule shall be increased by 3.5% at each step, effective July 1, 2011. Current employees will progress one step on the salary schedule, effective July 1, 2011.

"E. For the fiscal year 2012-13 the salary schedule shall be increased by 3.5% at each step, effective July 1, 2012. Current employees will progress one step on the salary schedule, effective July 1, 2012.

"F. The compensation provided for in this Article extinguishes any obligation owed by the College to its classified employees for savings due to lowered insurance premiums ('insurance gap money') under the contract in effect from July 1, 2005 through June 30, 2008.

"G. Classified employees hired after July 1, 2008, will be placed in the appropriate grade for their job classification in accordance with District guidelines for initial placement.

"H. It is the practice of the College that new employees will start employment at the initial step of the salary range provided that they meet the minimum qualifications of the position. Placement above Step 1 will be allowed in special circumstances (such as recruitment problems) with notification and consultation with the Association." (Italics added.)

4. During bargaining for the Agreement, the parties did not discuss the last sentence in paragraph A, "[a]ny adjustments to compensation after June 30, 2013 shall be controlled by a successor agreement." This sentence was included in the final agreement signed in June 2008.

5. During bargaining for a successor agreement in May 2013, it became apparent to the Association and College that the negotiations would not be concluded by June 30, the expiration date of the existing Agreement. At one of the bargaining sessions in May, a question

arose regarding what the College would do with respect to step increases and cost of living increases when the contract expired. The College made it clear that there would not be any increases in compensation after June 30, except as provided for in a successor agreement. The College pointed to the language in the Agreement in Article 31, Section A, and Sections B through E. Sections B through E provide that specific step increases were granted on July 1 of each year of 2009 through 2012.

6. In August 2013, the parties reached an agreement for a contract effective July 1, 2013 to June 30, 2015 (the 2013-15 Agreement), which was ratified in September 2013. The Agreement provided retroactive compensation increases from July 1, 2013.

7. In addition to the contract discussed above, the Association and College were parties to the following agreements:

July 1, 1978 through June 30, 1981
July 1, 1981 through June 30, 1983
July 1, 1983 through June 30, 1985
July 1, 1985 through June 30, 1988
July 1, 1988 through June 30, 1991
July 1, 1991 through June 30, 1994
July 1, 1994 through June 30, 1997
July 1, 1997 through June 30, 2000
July 1, 2000 through June 30, 2003
July 1, 2003 through June 30, 2005
July 1, 2005 through June 30, 2008.

All the contracts identified above granted salary increases on July 1 for each year during the contract, but did not provide for any increases on the July 1 immediately following the expiration of the particular contract. On those occasions when some of the bargaining for the contracts extended beyond the expiration date, there was no occasion on which the College granted any compensation increases after the expiration date unless it was specifically provided for by the successor contract.

## CONCLUSIONS OF LAW

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

2. The College did not violate ORS 243.672(1)(e) or (1)(f) when it did not grant step increases after the expiration of the 2008-13 Agreement.

## DISCUSSION

The Association and the College were parties to a collective bargaining agreement that expired on June 30, 2013. The College did not grant step increases on July 1, 2013. The Association alleges that the College was required to do so. Because the College did not grant step increases, the Association claims that the College unilaterally changed employment conditions after the expiration of the agreement, in violation of ORS 243.672(1)(e) and (1)(f).

Under ORS 243.672(1)(e), an employer is required to bargain in good faith with the labor organization. That duty includes the obligation to maintain the *status quo* for mandatory subjects of bargaining after the expiration of a collective bargaining agreement and during negotiations for a successor agreement. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-06, 22 PECBR 159, 165 (2007).

In these cases, we first identify the *status quo* and determine whether the employer has changed it. If the *status quo* has been changed, we then determine whether the change concerns a mandatory or permissive subject of bargaining. We may further need to determine whether the employer exhausted its duty to bargain and consider any affirmative defenses raised by the employer. However, we do not need to 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 crux of this case is determining the *status quo*, which the parties agree is established by the expired contract. According to the Association, the expired agreement contained a longevity step pay increase that should be part of the *status quo* because the agreement did not expressly provide otherwise. Therefore, the Association argues, the College was required by ORS 243.712(d)[1] to preserve that *status quo* (*i.e.*, grant a longevity step increase to employees) until "completion of the impasse procedures." Specifically, the Association contends that, under the expired agreement, a longevity step pay increase was due July 1, 2013, and that the College's refusal to grant the increase failed to preserve that *status quo*. The College disagrees, asserting that the contract did not require it to provide any salary increases after the expiration of the contract.

Thus, as a threshold matter, we must review the expired 2008-13 Agreement and determine whether that Agreement contained provisions regarding merit or longevity step pay

[1]Under ORS 243.712(2)(d),

> "* * * [a]fter a collective bargaining agreement has expired, and prior to agreement on a successor contract, the status quo with respect to employment relations shall be preserved until completion of impasse procedures 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."

increases. As discussed below, we find that the expired collective bargaining agreement did not provide for either merit or longevity step increases as part of the *status quo*.

"Merit step and longevity step pay increases" are not defined by statute. They are, however, terms of common usage in the world of labor relations. Merit step increases link pay increases to work performance (Harold S. Roberts, *Roberts' Dictionary of Industrial Relations,* 468 (4th ed 1994)), while longevity step increases link pay increases to an employee's length of service or seniority. (*Id*. at 435.) There is nothing in this record to suggest that step increases provided during the life of the Agreement related to how work was performed. We are left, then, with determining whether the Agreement provided for longevity pay step increases.

We interpret labor contracts in the same manner that we interpret other contracts. *Portland Fire Fighters' Assn. v. City of Portland*, Case No. UP-58-99, (2000), 181 Or App 85, 91, 45 P3d 162, *rev den*, 334 Or 491, 52 P3d 1056 (2002). In *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005), this Board explained that

> "[w]e first examine the text of the disputed provision in the context of the document as a whole. If the provision is clear, the analysis ends. If the provision is ambiguous, we proceed to the second step, which is to examine extrinsic evidence of the contracting parties' intent. Finally, if the provision remains ambiguous after applying the second step, we resort to the use of appropriate maxims of contract construction. *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997)."

Article 31 of the Agreement, which is the Salary Schedule, provided for a 3.5% increase in the salary schedule and a two-step increase on July 1, 2008, along with 3.5% increases in the salary steps and one-step increases on July 1 of 2009, 2010, 2011 and 2012, respectively. According to the Association, an additional step increase was due on July 1, 2013. These steps, granted on July 1, are not based on an employee's length of service or seniority but rather, are granted to the employee for simply being employed by the College on those specific dates. Additionally, the Agreement is devoid of any language establishing that employees receive an automatic yearly step increase, or that a step increase is automatically granted upon being employed for a specified length of time. The agreement also provided no substantive right to future step increases, much less a date on which employees would purportedly be entitled to such step increases. Thus, the contractual step increases granted on July 1 of each year from 2008-2013, were not longevity step increases, but merely yearly salary increases that the parties agreed to through the prior bargaining process.

To agree with the Association, we would need to find that the *status quo* in the expired agreement contained a longevity step pay increase on a date certain, and that the College discontinued that *status quo* by not paying that increase. As we understand the Association's argument, that date certain was July 1, 2013. The expired agreement, however, makes no mention of any future step advances beyond July 1, 2012, much less establish that on July 1, 2013, the *status quo* included an additional step advancement. Under these circumstances, we do not conclude that the expired agreement contained a longevity step pay increase as part of

the *status quo*. Consequently, when the College maintained the employees' current salaries on July 1, 2013, it did not unilaterally change the *status quo*.

This assessment is bolstered by the statement that "any adjustments to compensation" after the end of the contract are controlled by the successor agreement. This agreed-upon language supports our conclusion that these step increases under this particular agreement are not longevity step increases. Finally, when bargaining extended beyond the expiration date of a previous contract, the College did not grant any compensation increases after the expiration date unless the parties agreed to such an increase in the successor contract.[2]

The language of the Agreement is clear—it did not provide for longevity step increases as part of the *status quo*. Rather, it provided for specific step increases on certain dates identified in the contract. Consequently, the College did not change the *status quo* when it maintained the employees' existing compensation after June 30, 2013. As the *status quo* was not altered, the Association's complaint must be dismissed.[3]

ORDER

The complaint is dismissed.

SIGNED AND ISSUED on June 19, 2014.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

[2]In fact, the College and Association agreed to step increases effective July 1, 2013, in their successor agreement.

[3]The Association also alleges a violation of ORS 243.672(1)(f) which makes it an unfair labor practice to "[r]efuse or fail to comply with any provision of ORS 243.650 to 243.782." Because we conclude that the College has not violated ORS 243.672(1)(e) or ORS 243.712, we will dismiss the (1)(f) allegation.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-025-12

(UNFAIR LABOR PRACTICE)

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| EAGLE POINT EDUCATION ASSOCIATION/OEA/NEA,<br><br>Complainant,<br><br>v.<br><br>JACKSON COUNTY SCHOOL DISTRICT #9,<br><br>Respondent. | ) | FINDINGS AND ORDER ON COMPLAINANT'S PETITION FOR REPRESENTATION COSTS |

On April 26, 2012, the Eagle Point Education Association/OEA/NEA (Association) filed an unfair labor practice complaint alleging that the Jackson County School District #9 (District) violated ORS 243.672(1)(a) by polling bargaining unit members about their intention to participate in a potential strike. On May 7, 2012, the Association amended the complaint to add other allegations. Subsequently, the Association withdrew all but one allegation claiming a violation of ORS 243.672(1)(a) regarding the payment of teachers during a strike. The matter was submitted to an Administrative Law Judge (ALJ) on a joint stipulation of facts and exhibits. No hearing was held.

On March 26, 2014, after no objections to the recommended order were received, this Board issued an Order adopting the recommended order as the final order. The Association filed a petition for representation costs on April 16, 2014. The District filed timely objections to the petition on May 6, 2014.

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

1. The Association's petition and the District's objections are timely filed.

2. The Association is the prevailing party.

3. Counsel for the Association submitted an affidavit and exhibit reflecting that 28.1 hours of legal work was performed at the rate of $150 per hour, and .6 hours of legal work was performed at the rate of $140 per hour. The Association's petition requests payment in the amount of $4,299. 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 case submitted on a joint stipulation with no hearing. Such cases generally require between 16 and 25 hours of time. *See Teamsters Local 670 v. City of Ontario,* Case No. UP-40-08, 23 PECBR 384, 385 (2009) (Rep. Cost Order). We will adjust our award accordingly.

5. The District objects to the number of hours claimed by the Association, stating that the matter consisted of a joint stipulated fact statement written by the District's representative, no hearing was held, no objections were made to the recommended order, and the legal and factual issues were not unusually complex. Further, the District asserts that it only spent 11 hours preparing the stipulation, verifying facts and exhibits with the District, and "attempting to make contact with the Union's Representative." The District did not submit an affidavit.

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). We generally adjust the award upward when an employer violates subsection (1)(a) because such conduct "strikes at core Public Employee Collective Bargaining Act (PECBA) rights." *American Federation of State, County and Municipal Employees Council 75, Local 88*, 25 PECBR at 151. We make such an adjustment here.

7. 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 Association in the amount of $1,100.

ORDER

The District will remit $1,100 to the Association within 30 days of the date of this Order.

DATED this 24 day of June 2014.

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. CC-004-13

(REPRESENTATION PETITION)

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| SALEM CITY ATTORNEY'S COLLECTIVE BARGAINING UNIT,<br><br>Petitioner,<br><br>v.<br><br>CITY OF SALEM,<br><br>Respondent. | ) | RULINGS,<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND ORDER |

Daryl S. Garrettson, Attorney at Law, of Counsel, Fenrich & Gallagher PC, Lafayette, Oregon, and Thomas Cupani, Attorney at Law, Salem, Oregon, represented Petitioner.

Taylor L.M. Murdoch and Diana Moffat, Attorneys at Law, Local Government Personnel Institute, Salem, Oregon, represented Respondent.

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On June 10, 2014, Administrative Law Judge B. Carlton Grew issued a recommended order in this matter. The parties had 14 days from the date of service to file written objections. *See* OAR 115-010-0090; OAR 115-035-0050(2). Neither party filed objections.

When neither party objects to a recommended order, we generally adopt the recommended order as our final order, and we consider any objections that could have been made to that order unpreserved and waived. *International Brotherhood of Electrical Workers, Local Union No. 659 v. Eugene Water & Electric Board*, Case No. UP-008-13, 25 PECBR 901 (2014). Consistent with that practice, we will adopt the recommended order as our final order in this matter.[1] This final order is binding on, and has precedential value for, the named parties only. *Id.* Despite the precedential limitations of such a final order, we publish the uncontested recommended order

[1]For purposes of clarity, we have made minor, non-substantive revisions to the "Order" portion of the recommended order.

as an attachment to the final order. *Clackamas County Peace Officers Association and Atkeson v. City of West Linn*, Case No. UP-014-13, 26 PECBR 1 (2014).

ORDER

1. The Board adopts the recommended order as the final order in this matter.

2. An appropriate bargaining unit is: Assistant City Attorneys for the City of Salem, excluding confidential and supervisory employees. The parties stipulated that Atchison is excluded from the bargaining unit as a supervisory employee under ORS 243.650(23), and that Zimmerman is excluded from the bargaining unit as a confidential employee under ORS 243.650(6). The remaining employees are appropriately included in the bargaining unit.

3. The Elections Coordinator shall modify the list of employees provided by the City consistent with this Order, and check the authorization cards against the modified list. If it is determined that a majority of the employees wish to be represented by the Petitioner for purposes of collective bargaining, this Board shall certify the Petitioner as the exclusive representative of the bargaining unit.

DATED this 1 day of July, 2014.

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-066-12

(UNFAIR LABOR PRACTICE)

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| OREGON AFSCME COUNCIL 75, LOCAL 974,<br><br>Complainant,<br><br>v.<br><br>STATE OF OREGON, ACTING THROUGH ITS DEPARTMENT OF ADMINISTRATIVE SERVICES & DEPARTMENT OF CORRECTIONS (TRCI),<br><br>Respondent. | ) | RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |

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

Stephen D. Krohn and Tessa M. Sugahara, Assistant Attorneys General, Department of Justice, Salem, Oregon, represented Respondent.

On April 15, 2014, this Board received Respondent's objections to an April 2, 2014, recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew, after a hearings held on August 29 and 30, and October 25 and 28. 2013, in Salem, Oregon. The record closed on November 18, 2013 upon receipt of the parties' post-hearing briefs. On July 14, 2014, Respondent withdrew its objections.

When neither party objects to a recommended order, we generally adopt the recommended order as our final order, and we consider any objections that could have been made to that order unpreserved and waived. *International Brotherhood of Electrical Workers, Local Union No. 659 v. Eugene Water & Electric Board*, Case No. UP-008-13, 25 PECBR 901 (2014). Consistent

with that practice, we will adopt the recommended order as our final order in this matter. This final order is binding on, and has precedential value for, the named parties only. *Id.* Despite the precedential limitations of such a final order, we publish the uncontested recommended order as an attachment to the final order. *Clackamas County Peace Officers Association and Atkeson v. City of West Linn*, Case No. UP-014-13, 26 PECBR 1 (2014).

ORDER

1. The Board adopts the recommended order as the final order in this matter.

2. The Department shall cease and desist from violating ORS 243.672(1)(e) by refusing to bargain in good faith over the impact of the one up/one down rule regarding overtime.

3. The Department shall return to the *status quo* regarding overtime prior to the imposition of the one up/one down rule.

4. The Department shall make any employees whole who have lost voluntary overtime opportunities because of the change to the one up/one down rule.

DATED this 18 day of July, 2014.

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-066-12

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| OREGON AFSCME COUNCIL 75, LOCAL 974,<br><br>Complainant,<br><br>v.<br><br>STATE OF OREGON, ACTING THROUGH ITS DEPARTMENT OF ADMINISTRATIVE SERVICES & DEPARTMENT OF CORRECTIONS (TRCI),<br><br>Respondent. | ) | RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER |

A hearing was held before Administrative Law Judge (ALJ) B. Carlton Grew on August 29, August 30, October 25, and October 28, 2013, at the offices of the Employment Relations Board (ERB) in Salem, Oregon. The record closed on November 18, 2013 upon receipt of the parties' post hearing briefs.

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

Stephen D. Krohn, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, represented Respondent at hearing; Tessa M. Sugahara, Attorney in Charge, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent in post-hearing briefing.

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On December 6, 2012, AFSCME Council 75, Local 974 (AFSCME), filed this complaint alleging that the State, acting through the Department of Corrections (Department) at its Two

Rivers Correctional Institution (Two Rivers or prison), had unilaterally changed Two Rivers overtime procedures in violation of ORS 243.672(l)(e). The Department filed a timely Answer.

The issues presented for hearing[1] are:

1. Is the complaint timely?

2. In May and June 2012, did the Department of Corrections unilaterally implement changes in the procedure used to assign overtime at the Two Rivers Correctional Institution from first come/first served to selection based on rank and qualifications? If so, did this conduct violate ORS 243.672(l)(e)?

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

## DECISION

The Department violated ORS 243.672(l)(e) when it unilaterally implemented changes in the procedure used to assign overtime at the Two Rivers Correctional Institution from first come/first served to selection based on rank and qualifications without first bargaining the impact of that decision.

## RULINGS

The rulings of the ALJ were reviewed and are correct.

## FINDINGS OF FACT

**Parties**

1. AFSCME is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a bargaining unit of all correctional officers, corporals and sergeants[2] employed

[1]AFSCME agreed with the ALJ's statement of the issues. At the prehearing conference, the Department proposed that Issue No. 1 be changed to include the following (italicized) language: "did the Department of Corrections unilaterally implement changes in the procedure used to assign overtime *for staff who showed interest in working the next shift as overtime by signing up no sooner than 30 minutes before the start of their shift* from first come/first served to selection based on rank and qualifications?" However, the Department does not argue the issue in the post-hearing brief, and we conclude that the ALJ's statement of the issues was appropriate.

[2]In order of increasing rank, the bargaining unit positions are officer, corporal, and sergeant. These positions are supervised by managers holding the ranks of lieutenant and captain, as well as higher administrative positions such as Superintendent and Assistant Superintendent.

in various Department institutions including Two Rivers.[3] The Department is a public employer as defined by ORS 243.650(20).

2. AFSCME and the Department have a single collective bargaining agreement which permits some practices to vary from institution to institution, including shift bidding and overtime procedures. Collective bargaining agreements between the Department and AFSCME are bargained on a Department-wide basis with additional negotiations on some matters between management and labor representatives of each institution.

3. Because of the number of staff, the need for 24-hour coverage through three shifts, and the importance of fully staffing each shift, the availability of voluntary overtime, imposition of mandatory overtime, and the overtime procedures are of great importance to Two Rivers management and employees.

4. While some vacancies are filled in advance, a significant number of vacancies in a shift do not occur until the prior shift. The Officer-in-Charge (OIC) of the preceding shift is responsible for filling vacancies in the following shift.

5. Shift vacancies may be caused by vacation, scheduled sick leave, unscheduled sick leave, and security and transport requirements for transporting inmates outside of Two Rivers for medical treatment. Bargaining unit employees are supposed to call in sick for a shift no later than an hour before that shift starts. Ensuring that the following shift is staffed often takes hours and sometimes the OIC's entire shift.

6. During most of the relevant time period, OICs draw staff to fill the following shift from several sources. The first are the employees working the same shift as the OIC, who reaches them by putting out announcements through the employees' radios ("all calls"). The second is a list of employees who signed up at the start of their current shift to work the following shift. That sign-up sheet, usually on a clipboard, is called the tickler file or list. The third source is a list of employees who signed up if needed for specific dates and shifts, up to two weeks before. This sign up list is called the voluntary overtime list or tickler book. The fourth source of employees is a list of employees eligible to be called in even if they do not wish to work that shift, that is, mandatory overtime. This list is called the mandatory overtime or bucket list, and employees called in off that list refer to that status as 'mandatoried' or 'bucketed.'

7. Throughout the relevant time period, the ultimate priority of Two Rivers was to fill the needed slots with an employee even if it meant normal procedures could not be followed. Imposing mandatory overtime on employees was not favored. In addition, OICs were also under pressure to complete filling a shift in a reasonable time frame because they had other duties to complete. They were also subject to pressure from individual employees seeking better shifts.

[3]According to its web site, Two Rivers is a Medium/Minimum security facility with a total inmate capacity of 1,632.

8. Effective January 5, 2004, the Superintendent of Two Rivers published rules regarding overtime for bargaining unit members working in its Security Section. Those rules state in part:

"I. PURPOSE

"The purpose of this procedure is to establish a process by which overtime is assigned to an employee of the Two Rivers Correctional Institution Security Section.

"II. DEFINITIONS

"A. Overtime: Overtime shall be voluntary except during periods of emergency or when management is unable to fill a work assignment by voluntary means.

"B. Overtime Volunteer List: An alphabetical list of all Correctional Officers, Corporals, and Sergeants who will voluntarily report to work, from home, when contacted by a supervisor or designee to work a shift.

"C. Mandatory Overtime List: A list for each shift of all Correctional Officers, Corporals and Sergeants that is used when a position cannot be filled by voluntary means.

"D. Scheduled Overtime: Overtime to cover posts that are known to be vacant in advance.

"E. Unscheduled Overtime: Overtime that is not known about in advance.

* * *

"H. Shift Trades: Mutually agreeable, one-day shift exchanges, that do not incur overtime.

"III. PROCEDURE

"A. Unscheduled overtime (Call-Ins): When required to fill unscheduled vacant shifts of more than four (4) hours for any reason, the OIC will attempt to contact employees on duty to determine if any on-duty staff will volunteer to work the vacant shift. If not, the OIC will follow the procedure below, using the voluntary overtime list.

"B. Scheduled Volunteer Overtime:

"1. *The OIC will contact volunteers on the Volunteer Overtime List in order to fill the scheduled overtime*.[4]

"2. Employees who decline to work overtime when called from the Voluntary Overtime List will be moved to the bottom of the list, but not removed.

"3. Employees who work the overtime when called from the Voluntary Overtime List will be moved to the bottom of the list.

"4. Correctional Officers, Corporals, and Sergeants may add or delete their names from the Voluntary Overtime List at any time by e-mailing the [Institution Staff Deployment System Coordinator] ISDSC.

"5. The Voluntary Overtime List will be updated and maintained by the ISDS Coordinator, as directed by the Operations Captain.

"C. Unscheduled Volunteer Overtime:

"1. If no employee on duty volunteers to work the vacant post, the OIC will attempt to contact those employees on the Volunteer Overtime List who are not on duty.

"2. The OIC is required to make only one attempt to contact an employee on the Voluntary Overtime List.

"3. Employees who decline to work overtime when called from the Voluntary Overtime List will be moved to the bottom of the list, but not removed.

"4. Employees who work the overtime when called from the Voluntary overtime List will be moved to the bottom of the list.

"5. Correctional officer, Corporals and Sergeants may add or delete their names from the Voluntary Overtime List at any time.

[4]It appears that the Union interprets this unpunctuated sentence as if it were punctuated 'contact volunteers on the Volunteer Overtime List, in order, to fill the scheduled overtime.' It appears that Two Rivers interprets this sentence as if it were punctuated 'contact volunteers on the Volunteer Overtime List, in order to fill the scheduled overtime.' Resolution of this difference in interpretation is not necessary to the decision in this case.

"6. The Voluntary Overtime List will be updated and maintained by the ISDSC, as directed by the Operations Captain.

"7. All means to cover Unscheduled Overtime will be exhausted before Mandatory Overtime is assigned.

"E. Splitting Shifts:

"1. Employees may contact each other in order to work out an agreement to split an overtime shift.

"2. The OIC is not obligated to contact employees to make an agreement to split an eight (8) hour shift.

"3. All agreements to split overtime shifts must be approved by the Operations Captain, or the OIC on duty.

* * *

"G. Maintenance of Voluntary Overtime List: The Voluntary Overtime List will be maintained in the OIC's office.

"H. Shift Trades:

"1. Requests for Shift Trade, CD263, will be submitted to the Operations Captain no less than seven (7) days prior to the date(s) requested. In emergency circumstances, shift trades will be considered with less than seven (7) days notice.

"2. All trades must be completed within a 30 day time period.

"3. Both parties must be trained and qualified to fulfill all duties of requested posts.

"4. Time trades shall not cause financial liability to the department.

* * *

"9. Approval of time trades shall not be withheld without valid cause." (Exh. C-9, italics added.)

9. On October 25, 2005, AFSCME's David Nielsen and Assistant Superintendent of Security Laney signed a memorandum of agreement regarding the "Voluntary Overtime List," addressed to all Two Rivers security staff. The memorandum stated in part:

"We are changing the Voluntary Overtime Log only, the process will still be the same.

"1. The call to shift, notifying staff that overtime is available, and if you are interested please contact the OIC. The sign up is on a [first] come first serve basis.[5]

"2. The voluntary overtime list. (explained below)

"3. Mandatory overtime.

"#2 Explained: On Sunday October 30, 2005, the First Shift OIC will place the new Voluntary Overtime List out. It will be a perpetual 14 day list. Staff can then sign up for overtime based on day and shift. For example: you can look at the overtime list and decide that you are available to work all three shifts on your day off, but no other days and just sign up for those. You will only be called on the shifts and days you indicate you are available. You must also sign up personally, no call in sign-up, and no sign up by proxy. Staff are also required to provide a valid contact number if you expect to be contacted.

"You will be offered overtime by what posts are available. There will be no staff moved to accommodate overtime. Example: I will work if I can have the corridor of perimeter. You will be offered the position that needs to be filled. If staff are moved it must and will be for operational need and be explained and justified directly to The Asst. Supt. of Security." (Exh. C-10.)

10. On November 9, 2005, Flexible Relief Captain James Deacon sent an e-mail to Two Rivers captains regarding "Step by Step to Filling Overtime." The memorandum stated in part:

"Step by Step to Filling Overtime

"**Important Please Read**

"There appears to be inconsistencies in the way we managers are filling overtime. I have had conversations with Mr. Laney and these are his expectations in the filling of overtime:

"Step 1: Collect names of staff that come to you with an interest in filling overtime on the next shift using the quarter sheet 'Tickler List.' From that list fill overtimes based on a *first come first serve basis by rank*.

[5]The parties understood that a first come/first served method of selecting employees was not based on their rank. For example, an officer could fill a sergeant's position, and vice versa. This also meant that when two employees split a shift vacancy, the employees could be of differing rank.

"Step 2: If you still have posts to fill and have remaining staff on the 'Tickler List' then you fill the remaining posts with those staff *regardless of rank*.

"Step 3: If you still have posts to fill make an 'all call' over the radio for overtime on shift and fill spots by rank if possible.

"Step 4: If you still have posts to fill, begin using the 'Voluntary Overtime Sign-Up' binder, begin calling staff for the remaining posts based on a *first come first serve basis by rank.*

"Step 5: If you still have posts to fill and have remaining staff in the 'Voluntary Overtime Sign-Up' binder continue to fill the remaining posts with those staff *by rank if possible.*

"Step 6: If you still have posts to fill, utilize the Mandatory Overtime Lists. Fill the posts evenly using the Mandatory Overtime lists.

"Important Points

"Do not tell staff the post they are filling, just tell them they have been hired for overtime. This way if you need to move staff around to better utilize rank, you can.

"Unless operational needs dictate, do not move staff from their posts to accommodate other staff's overtimes. But you can adjust for operational needs (*i.e.* Armed Posts, Master Control, etc.).

"If you have any questions, contact Mr. Laney, Captain Rider or myself." (Exh. C-11, boldface and underlining in original, italics added.)

11. On November 20, 2005, Two Rivers Assistant Superintendent of Security Garrett Laney circulated an e-mail to Two Rivers captains regarding "Voluntary overtime." Laney first stated,

"If there is something inside this you do not understand, please ask. You will be held accountable for deviations. We continue to do things in a mixture from shift to shift, this has to stop. So I repeat if there is something you don't understand, ask before not after." (Exh. C-12 at 1.)

The e-mail then provided a revised description of the overtime process:

"**Important Please Read**
"**Step by Step for Filling Overtime (Revised 11/18/05)**

"There appears to be inconsistencies in the way we managers are filling overtime. These are my expectations in the filling of overtime:

"Step 1: Collect names of staff that come to you with an interest in filling overtime on the next shift using the quarter sheet 'Tickler List.' The staff can call from a telephone on institution grounds, by radio or request the overtime in person only. *From that list fill overtimes based on a first come first serve basis regardless of rank.*

"Step 2: By utilizing the 'Tickler List,' fill staff into the open positions keeping institutional needs in mind and *utilizing staff in those positions that most appropriately use their rank*. Call the staff and inform them that they have been hired for overtime. **Do not barter or make deals staff either accept the assignment or they don't. If staff refuses the overtime, they will not be considered for overtime for the entire shift.**

"Step 3: If you still have posts to fill make an 'all call' over the radio for overtime on shift and fill spots if possible.

"Step 4: If you still have posts to fill, begin using the *'Voluntary Overtime Sign Up' binder, begin calling staff for the remaining posts based on a first come first serve basis by rank.*

"Step 5: If you still have posts to fill and have remaining staff in the 'Voluntary Overtime Sign-Up' binder *continue to fill the remaining posts with those staff by rank if possible.*

"Step 6: If you still have posts to fill utilize the Mandatory Overtime Lists. Fill the posts evenly using the Mandatory Overtime lists.

"Important Points

"Do not ask staff their preference of post they are filling, just tell them they have been hired for overtime and what post they will be working. *This way if you need to move staff around to better utilize rank, you can.*

"Unless operational needs dictate do not move staff from their posts. But you can adjust for operational needs (i.e. Armed Posts, Master Control, etc.).

"If there is something inside this you do not understand, please ask. You will be held accountable for deviations. We continue to do things in a mixture from shift to shift, this has to stop. So I repeat if there is something you don't understand, ask before not after." (Exh. C-12; boldface and underlining in original, italics added.)

12. On March 16, 2006, Captain Tony Kornegay (who was either Operations Captain or Special Operations Captain at the time), sent an e-mail to all Two Rivers Captains and Lieutenants regarding an attached document entitled "Step by Step to Filling Overtime." (Exh. R-3.) The e-mail stated in part,

"There was a recent error on our part in filling OT. Grievance filed and resolved. However this morning there is another probable problem. So I'm sending this out so we are consistent." (Exh. R-3.)

The attachment to the e-mail was a copy of the November 18, 2005 revision of "Step by Step for Filling Overtime." (Exh. C-12.)[6]

13. On September 12, 2008, Union official Robert Kennedy sent an e-mail to Assistant Superintendent of Security Laney regarding "Overtime Memo Laney." (Exh. R-4 at 1.) Kennedy stated, "Just a reminder, on what we agreed to as far as overtime being assigned.....and not moving other staff to accommodate. Your OIC's don't seem to be following this on a consistent basis." (Exh. R-4 at 1.) Kennedy attached the October 25, 2005 memo from Laney set out in Finding of Fact 9, above. (Exh. R-4 at 2.)

14. Laney forwarded Kennedy's e-mail and attachment to all Two Rivers Captains and Lieutenants, with the statement "[i]f this is happening STOP." (Exh. R-4 at 1.)

15. On April 22, 2010, Captain Daniel Thornton sent an e-mail to all Two Rivers Sergeants, Captains, and Lieutenants regarding "Restricted Post Breaks." (Exh. R-5.) The e-mail stated:

"The following Posts are Restricted to Sergeants this includes Breaks and Lunch Periods[7].

"1. Master Control Sergeant
"2. Key Distribution Sergeant
"3. Vehicle Gate Sergeant
"4. Work Force Sergeant

"We understand that Corporals and Officers have been left in charge of these posts. These breaks will be conducted by the (this is not in any order) Vehicle Gate Sergeant, Tool and Key Sergeant, Armory Sergeant, R&D Sergeant and the Clothing Sergeant. If none of these posts are available then Complex or Housing Unit Sergeants will be utilized through the OIC/AOIC.

"Sergeants are requested to coordinate this task." (Exh. R-5.)

[6]Department witness Captain Tony Kornegay, subsequently Operations Captain and then Special Operations Captain, believed that this document governed Two Rivers overtime issues from 2005 through the time of hearing.

[7]The Union was aware of these restrictions prior to the time frame covered by its complaint and does not dispute that these positions were not generally available for correctional officers to fill on voluntary overtime.

16. On September 13, 2010, Captain Russ Nichols sent an e-mail to all Two Rivers security staff regarding "Overtime sign up-updated," referring to the voluntary sign-up/tickler list. (Exh. C-13.) The e-mail stated,

> "After talking with Sgt. J. Herron the agreement was the LOA with the union to sign up for overtime is;
>
> "• No sooner than 30 minutes before the start of the shift
>
> "• The staff members wishing to sign up for overtime must be present at key distribution where the attendance is taken
>
> "• *It is on a first come basis*" (Exh. C-13, italics added.)

17. During a bargaining session on January 27, 2011, the parties discussed the issue of voluntary overtime. Notes taken by an employer representative state, in part: "Discussion Re: obo could fill vacancies. Was 1 up → 1 down.[8] Union want positions moved around."[9] (Exh. R-6 at 3.) However, all of the Two Rivers' written bargaining proposals in the record use the first come/first served system; none of them refer to one up/one down.

Union executive Board Member (and Union President in 2010 and 2011) Kevin Tassie, then Union Negotiator and Executive Board Member Robert Kennedy, Union Security Representative and Chief Negotiator Greg Clouser, Union Council Representative Roger Bouch, Union officials Anton J. Wanous and P. Hoege, Superintendent Franke, Assistant Superintendent of Security Jeri Taylor, Acting Food Service Manager Sue Washburn, Operations Captain Iverson, Acting Physical Plant Manager Russ Nichols, and another Captain were present at this bargaining session.

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[8]The one up/one down method of employee selection for a shift focused on the rank of the employee who normally held the vacant position and the rank of the employee to be called in to fill that position on a shift. Under this method, a shift vacancy could only be filled by a substituting employee whose rank was one step above or below the rank of the employee normally filling the position. Thus, officers could substitute only for officers and corporals, sergeants only for sergeants or corporals, and corporals for corporals, officers, and sergeants. In addition to reducing opportunities for officers and sergeants, this method causes employees of different rank who sought to split shifts to have fewer opportunities. While the one up/one down rule increased overtime opportunities for corporals, it also meant they were more likely to be called in for mandatory overtime.

[9]At hearing, Franke recalled that the one up/one down system was in place in January 2011, and these notes reflected Two Rivers representatives' statements to that effect; Union official Clouser recalled discussion of a one up/one down system of selecting employees at bargaining but contended that the discussion concerned a Two Rivers proposal to change the system from first come/first served to one up/one down. Given the other evidence in the record, including Two Rivers bargaining proposals and other documentary evidence and testimony, we conclude that the one up/one down system was not in effect at this time (except, perhaps, for critical sergeant positions).

18. On May 2, 2011, at a bargaining session, a Two Rivers package proposal addressed voluntary overtime. It stated in part: "An employee wishing to sign up for voluntary overtime may do so in person at key distribution, no earlier than twenty (20) minutes prior to an employee's scheduled shift on a first come, first serve basis." (Exh. C-4 at 5.)

19. A June 6, 2011 Two Rivers' bargaining proposal regarding voluntary overtime included the same language as on May 2. (Exh. C-6 at 5.)

20. On August 17, 2011, Two Rivers and the Union agreed to "continue current practice" regarding voluntary overtime.[10] (Exh. C-8 at 1.)

21. On September 30, 2011, Union Security Representative Greg Clouser sent an e-mail to Acting Physical Plant Manager Nichols regarding "I new [*sic*] it happened but it was a while ago. Next time I will get with you sooner." (Exh. R-10.) The e-mail stated,

> "On 8-11-11 at 2:14 a.m., Espinoza was pulled from Key Dist. to go on a Med. Trip requiring an armed escort. C/O Greenup was pulled from Unit 3 to replace Espinoza. I was told, (by a Sgt.), tonight that an officer is allowed to give breaks to key dist. and M/C. I know when C/O Kornegay, T. was on 1st shift he was giving breaks to both. Lt. Harris had Seg. Sgt. complete the breaks." (Exh. R-10.)

22. Nichols responded on the same day, stating, "Please remember officers do not [substitute for, in order to] break Key Dist. Sgt. or Master Control Sgt.[11] Officers are not to be assigned to either of those positions. Thank you for your assistance." (Exh. R-10.)

23. On March 20, 2012, Assistant Superintendent of Security Jeri Taylor sent an e-mail to all Two Rivers Captains and Lieutenants regarding "Roster Management." (Exh. R-12.) The e-mail stated:

> "It's come to my attention that we have been utilizing a Correctional Officer to fill a Sergeant's post in Key Distribution. I'd just like to remind you *that you are authorized to utilize a Corporal to fill a* ***critical*** *Sergeant's post, but not an Officer. One up or one down*. If you have a question about this directive please let me know. If you have been left a roster by the previous shift that violates this practice, you need to fix it." (Exh. R-12; boldface and italics added.)

24. At a labor/management meeting on May 3, 2012, Union Security representative Jeff Randolph commented on voluntary overtime. According to the minutes of the meeting, the following exchange took place:

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[10]There is evidence that one reason for tabling this issue was that Two Rivers was considering changing many of its procedures to match those in effect at the Eastern Oregon Correctional Institution (EOCI).

[11]While, at hearing, the parties did not discuss any difference between providing breaks and filling all or part of a position for a shift, breaks were not the focus of the testimony.

> "Officer Randolph reported that he signed up for voluntary overtime and was skipped. The post that needed to be filled was a Sergeant which resulted in him being passed to have a Sergeant fill the post. Action: Captain Jorgensen will discuss with Captain and Lieutenants." (Exh. C-14 at 6.)

25. On May 29, 2012, Union President Scott Campbell e-mailed Operations Captain Iverson and Jorgensen regarding "Overtime Procedure." (Exh. C-15 at 1.) Campbell stated,

> "I received information today that voluntary overtime continues to be offered to individuals based on rank and/or qualifications. We discussed this item briefly at the last labor/management meeting with the action item being the topic would be discussed with Captains and Lieutenants. Was this completed? Am I mistaken the practice was to stop?
>
> "The overtime procedure requires use of the overtime list in order. Therefore, the local union considers the practice of selective hiring to be a violation of procedure. Would you please advise me if the selective practice will continue or if mistakes happened and will be corrected." (Exh. C-15.)

26. Later on May 29, Iverson responded: "Can we get more specific information as to who was involved and what shift? There could be situations that we are not aware of, and would like to discuss this incident with the Capt./Lt. involved, before we reply." (Exh. C-15 at 1.)

27. Also on May 29, Campbell replied:

> "The reports I have had are swing shift. As I understand it, [two] Units * * * have been filled with corporals or sergeants and not officers. Another staff member reported they were not offered an APQ post because their split partner was not APQ qualified rather than move staff to accommodate. The referenced APQ post was then given to a different officer as their split was with a sergeant. I do not have staff names to give you.
>
> "What I am more interested in is if the conversation with Captains and Lieutenants occurred, if the overtime procedure is to be followed and do you feel the overtime procedure can be circumvented to selectively hire overtime by rank." (Exh. C-19 at 3.)

Iverson responded, "[t]hanks for the information. I will investigate as to what had happened, and get back to you, with an answer." (Exh. C-19 at 3.)

28. At a labor/management meeting on June 7, 2012, Union President Campbell stated that he had received complaints that staff who signed up for voluntary overtime were being passed over while other staff were being held over on mandatory overtime. Captain Jorgensen asked for the dates this had occurred so he could investigate the matter, and Assistant Superintendent of Security Taylor asked to be informed immediately if it occurred again.

29. On June 8, 2012, Iverson sent an e-mail to Campbell and all Two Rivers Captains and Lieutenants. Iverson stated, in part:

> "Please exhaust the Voluntary Overtime List (Tickler File) and the Voluntary Overtime List (Pre-dated Book) before using the Mandatory Overtime List." (Exh. C-16.)

30. On June 12, Taylor e-mailed Campbell, asking him to find some representatives for a work group to update Two Rivers overtime procedures, noting that the last update was in 2004. On June 13, Campbell responded with some names, stating that the Union had selected them "to participate in revising the overtime procedure to reflect current practice." (Exh. C-18.) Campbell went on to list some specific overtime issues the Union wished to address, but did not refer to the issue of passing over overtime volunteers based on their rank.

31. On June 19, 2012, Operations Captain Iverson responded to Campbell's May 29 e-mailed questions. Iverson stated:

> "Voluntary Overtime *will* be utilized in the order that staff sign up for the available overtime. For all open posts (including posts that assigned staff call in sick for) the first staff on the Voluntary List is notified of the available post. This staff has the option to either accept or deny the overtime.
>
> "If the first staff listed on the voluntary list is an Officer, and there is only an Officer post available, that Officer *will have the option* to either accept or deny the overtime. If there is only a Sergeant's post available, a Corporal may be pulled and assigned to the Sergeant's post and the Officer is then assigned to the Corporal's post. Once the Officer denies the available overtime, the next staff listed on the Voluntary Overtime list is consulted.
>
> "If the first staff listed on the voluntary overtime list is a Corporal, and there is only a Corporal post available, that Corporal *will have the option* to either accept or deny the overtime. If there are several overtime posts available, the Corporal *will have the option* to accept or deny the Officer, Corporal or Sergeant's post. Once the Corporal denies the overtime available, the next staff listed on the Voluntary Overtime list is consulted.
>
> "If the first staff listed on the voluntary overtime list is a Sergeant, and the only post available is a Sergeant's post, that Sergeant *will have the option* to either accept or deny the post. If there is a Corporal's post available for overtime, the sergeant has the option to accept or deny the post. If the only post available is an officer post, and another corporal post is available, the corporal may be pulled and assigned to the officer's post and the sergeant may be assigned to the Corporal's post. Once the Sergeant denies the overtime available, the next staff listed on the Voluntary Overtime list is consulted.

*"The OIC/AOIC will fill his roster by utilizing the 'one up, one down' system. In other words, an Officer can be assigned to an Officer's Post, or a Corporal's post.*

*"A Corporal can be assigned to an Officer's, Corporal's, or Sergeant's post.*

*"A Sergeant can be assigned to a Corporal's or Sergeant's post."* (Exh. C-19 at 1-2; italics added, minor misspellings corrected.)

32. On June 21, Union President Campbell e-mailed Iverson, stating in part:

"I am slightly confused. Several years ago the institution moved away from separate hiring lists and went to what the local union now considers past practice. We will be addressing the issue in the near future.

"Prior to the overtime procedure meeting, I need an interpretation of something that occurs occasionally based on the policy you have written below. First shift, June 21, 2012, Officer Baltazar was assigned as inside sergeant. How can this happen based on your one up, one down system? In particular I am addressing your last paragraph(s)." (Exh. C-20 at 2.)

33. On June 22, Campbell e-mailed Iverson again, stating in part:

"Having not received a response from you yesterday, I am resending this e-mail and adding an additional first shift, inside sergeant post worked on June 19, 2012 by correctional officers Randolph and Tassie (split). Is your e-mail the cause of the confusion or is it simply a matter of inconsistent application or disregard for the overtime procedure when convenient?" (Exh. C-20 at 1-2.)

34. On June 22, Iverson responded to Campbell by e-mail, stating,

*"TRCI is currently in the process of adjusting our business model and our service delivery that will require several changes. We will experience occasional inconsistencies and staff adjustment, that our current bucket system does not provide for.*

"Currently, as you are aware, we do not have a Corporal position on first shift to utilize the one up, one down process, and we did not have one sergeant that signed up for voluntary overtime on that shift, on the days you referred to below." (Exh. C-20 at 1, italics added.)

35. On August 6 and 9, 2012, Union President Campbell sent the following e-mails to Assistant Superintendent of Security Taylor. On August 6, Campbell wrote,

"Thursday, August 2, 2012, we met to discuss the labor union's demand to bargain the voluntary overtime procedure. As part of the discussion Mr. Franke stated he would get back to the local union if he would return to past practice and stop

utilizing the one up, one down hiring process. Do you have that information as Mr. Franke is away from the institution this week." (Exh. C-21 at 2.)

On August 9, Campbell wrote:

> "This e-mail is being sent to document our verbal discussion * * *. You stated to me that it was the institution's intent to continue utilizing the one up, one down voluntary overtime hiring process rather than return to past practice. The reason you provided was that you felt the institution had bargained in good faith the voluntary overtime procedure with the past executive board. I did state to you that you could expect an unfair labor practice complaint to be filed." (Exh. C-21 at 1.)

36. On December 6, 2012, the Union filed the complaint in this case.

## CONCLUSIONS OF LAW

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

2. The Complaint is timely.

**Legal Standards: Timeliness of an Unfair Labor Practice Complaint**

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 Assoc. 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." 244 Or App at 190. See also *Laborers' International Union of North America, Local 483 v. City of Portland, Bureau of Human Resources*, Case No. UP-27-12, 25 PECBR 810, *recons,* 25 PECBR 892 (2014).

**Analysis: Timeliness**

This Board's case specific analysis begins by identifying the alleged unfair labor practice and the date the complaint was filed. Here, the Union alleges that the Department unilaterally changed the selection process for employees to work overtime from a first come/first served system to the one up/one down system. The union alleges that this was a change in mandatory subjects of bargaining in violation of ORS 243.672(1)(e). The complaint was filed on December 6, 2012. Therefore, we must determine if the Union reasonably should have known before June 9, 2012, that Two Rivers had decided to make that change without first bargaining with the Union.

The Union argues that the change took place in June 2012, and that the Union "was not given formal notice of any of the changes that TRCI made, and none of the changes were

negotiated" with the Union prior to implementation. Union post-hearing brief at 5. Two Rivers argues that the prison had no uniform, mutually understood practice regarding overtime, and so it does not propose a date of occurrence. Instead, it argues that Two Rivers managers informed the Union of the one up/one down rule at a bargaining session on January 27, 2011. It also argues that Union official's questions about employees being passed over for overtime because of rank, at labor/management meetings in May 2012, demonstrates that they knew of the change. The Union acknowledges that Two Rivers used rank as a factor in overtime assignments prior to June 2012, but only regarding critical sergeant positions.

The parties appear to agree that the phrase "one up/one down" is the heart of the new procedure at issue. While the phrase was mentioned in bargaining in January 2011, we credit the testimony of Union officials that Department managers did not effectively communicate that an across the board one up/one down rule was in use at that time. Subsequent communications by Two Rivers managers reinforce that conclusion. On September 30, 2011, Acting Physical Plant Manager Nichols e-mailed Union Security Representative Greg Clouser to state that "officers do not break key Dist. Sgt. or Master Control Sgt. Officers are not to be assigned to either of those positions." Finding of Fact 22. Were the one up/one down rule in effect, it would be reasonable to expect that Nichols would mention it, or at least mention that officers were not permitted to be used to provide breaks for *any* sergeant's post.[12]

In March 2012, Assistant Superintendent of Security Taylor e-mailed Two Rivers captains and lieutenants to state, "you are authorized to utilize a Corporal to fill a *critical* Sergeant's post, but not an Officer. One up or one down." Finding of Fact 23; emphasis added. Were the one up/one down rule in effect for all positions, it would be reasonable to expect that Taylor would have not have used the term "a critical Sergeant's post" but would have referred to 'a Sergeant's post.' Similarly, when Union officials told Captain Jorgensen in May 2012 that an officer was passed over for a sergeant's post, Jorgensen responded that he would discuss the issue with management staff rather than simply informing the Union that this was an application of the one up/one down rule. Even when a Union official asked Operations Captain Iverson later in May for information explaining why "voluntary overtime continues to be offered to individuals based on rank and/or qualifications," Two Rivers' response was to ask for specifics because "there could be situations we are not aware of," instead of mentioning the one up/one down rule.[13] Findings of Fact 25 and 26.

Even as late as June 7, Assistant Superintendent of Security Taylor asked to be notified immediately if staff were passed over on the voluntary list while others were called in on mandatory overtime, rather than raising the one up/one down rule. It was not until June 19 that Iverson provided an adequate description of the one up/one down rule to Union officials, and, significantly, Iverson used the future tense throughout the document: "Voluntary Overtime *will* be utilized," "The OIC/AOIC *will* fill his roster." Finding of Fact 31; emphasis added. Finally, in

[12]As noted above, the parties did not discuss different handling of breaks and shift substitutions.

[13]The record also shows that Union questions and complaints about possible violations of procedure were part of the normal interactions between the parties, and sometimes led to reminders to supervisors from Two Rivers managers.

response to questions about his June 19 memo, Operations Captain Iverson stated that the prison was "*currently* in the process of adjusting our business model and our service delivery that *will* require several changes." Finding of Fact 34, italics added.

We conclude that, even if Two Rivers applied the one up/one down rule more broadly than to critical sergeant positions prior to June 19, 2012, the record does not establish that Union officials reasonably should have known of that policy prior to Iverson's June 19 memo. This Board concludes that the Complaint was timely filed.

3. In May and June, 2012, the Department of Corrections unilaterally implemented changes in the procedure used to assign overtime at Two Rivers from first come/first served to selection based on rank and qualifications, in violation of ORS 243.672(l)(e).

**Legal Standards: 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." Under most circumstances, a public employer commits a *per se* violation of its duty to bargain in good faith if it makes a unilateral (*i.e.*, unbargained) change in a past practice or *status quo* concerning a subject that is mandatory for bargaining. *Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11, 25 PECBR 525, 534 (2013). The Union argues that Two Rivers unlawfully changed the *status quo* when it changed the selection of employees for voluntary overtime from the first come/first served rule to the one up/one down rule.

In a unilateral change case, we apply the following standards, in the most appropriate order for each case: (1) identify the *status quo* and determine whether the employer changed it; (2) decide whether the change concerns a mandatory subject for bargaining; (3) examine the record to determine whether the employer completed its bargaining obligation before it decided to make the change; and (4) consider any affirmative defenses the employer raised (e.g., waiver, emergency, or failure to exhaust contract remedies). *Assn. of Oregon Corrections Emp. v. State*, 353 Or 170, 177, 295 P3d 617 (2013); *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-04-06, 22 PECBR323, 360 (2008).

**Analysis: ORS 243.672(1)(e)**

In this case, we begin by identifying the status quo. The *status quo* can be established by an expired collective bargaining agreement, past practice, work rule, or policy. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-53-00, 19 PECBR 656, 665, *supplemental orders*, 19 PECBR 804 and 19 PECBR 848, *recons,* 19 PECBR 895 (2002), *aff'd*, 187 Or App 92, 67 P3d 951 (2003). Where a past practice is implicated, the party relying upon the practice bears the burden of establishing its existence. *AFSCME Local 88 v. Multnomah County*, Case No. UP-18-06, 22 PECBR 279, 285, *recons,* 22 PECBR 444 (2008). In addition,

> "We will find that a past practice exists if it is clearly established. To be clearly established, the practice must be 'clear and consistent, occur repetitively over a long period of time, and be acceptable to both parties. We must also consider the circumstances under which the past practice was created, and the existence of mutuality. Mutuality concerns the question of whether practice arose from a joint understanding by the employer and the union, either in their inception or their execution, or whether the practice arose from choices made by the employer in the exercise of its managerial discretion without any intention of future commitment.'" *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-62-05, 22 PECBR 911, 946-47 (2009), quoting *Oregon AFSCME Council 75, Local 2831 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987, 993 (2005) (citations omitted).

Here, the Union relies on a comprehensive written rule which was modified by Two Rivers documents and practice over time. The comprehensive rule was issued by the Two Rivers Superintendent in January 2004. The rule stated, in part, "The OIC will contact volunteers on the Volunteer Overtime List in order to fill the scheduled overtime." Finding of Fact 8. While that sentence may be ambiguous, Two Rivers subsequent practice was in accord with the Union's interpretation that employees would be called in based on placement on the list, not their rank. Subsequent documents from Two Rivers administrators confirm this. For example, in November 2005, Assistant Superintendent of Security Laney corrected a previous memorandum from a captain to state that voluntary overtime would be provided "on a first come first serve basis regardless of rank." Finding of Fact 11. We conclude that the January 5, 2004 memo, as modified by the November 2005 memo and as modified by the practice of using the one up/one down system for filling critical sergeant positions, was the *status quo*. The only apparent confusion expressed in the various e-mails from Two Rivers managers and Union officials between 2004 and 2012 is whether the critical sergeant positions were subject to that rule. The Department stated that they were not and the Union apparently acceded.

The Department argues that there was, in fact, no mutually acceptable or consistent practice. While the Department is correct that rank was a factor regarding the filling of some positions, first come/first served was a key criteria for filling non-critical positions until June 2012, when it was replaced by one up/one down. The detail and future tense of Iverson's June 2012 e-mail, and acknowledgment of a change in the prison's business model, underscore that point. Therefore, this Board concludes that the first come/first served practice establishes the *status quo*. *See AFSCME v. Lane County Human Resources*, at 993-94 (discussing factors for establishing a past practice as the *status quo*).

The final criteria that must be satisfied for a subsection 1(e) claim is whether the subject is mandatory for bargaining. The Department argues that "[s]etting standards for a particular post is analogous to qualifications for promotion to a higher rank, which the Board has also ruled is permissive," Respondent's post-hearing brief at 5, citing *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-91-93, 14 PECBR 832, 869-70, *AWOP*, 133 Or App 602 (1995). The Department also contends that the assignment of posts is "analogous to the 'scheduling of duties during the work day.'" Respondent's

post-hearing brief at 5, quoting *Wy'east Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05, 22 PECBR 108, 156 (2007). The Union argues that the issue is not the *position* where the substituting employee is posted, but the *order* of calling them in off the overtime list. The Union states,

> "AFSCME has never disputed that critical sergeant posts should be filled by sergeants. However, the process used to fill critical sergeant posts is separate from the process used to assign and award overtime. In other words, overtime would always be assigned based on first-come, first-serve regardless of what posts were available. Employees on the overtime list were never skipped because of their rank or qualifications. However, TRCI could (separately) adjust the roster and post assignments when necessary for operational need." Complainant's post-hearing brief at 17-18.

The Union's view is that if the vacant post is a critical sergeant's post, and the first employee on the voluntary overtime list is an officer, the Department should shift another sergeant to the critical sergeant post and fill that new vacancy with the first person on the list. While that might present a solution to the issue, the Union has not established that this is part of the past practice it claims was changed. Indeed, the Union argues,

> "During the hearing, TRCI also focused on the fact that AFSCME and DOC have always resisted other staff being moved to accommodate the desires of an employee on the voluntary overtime list. This argument is also a red herring.
>
> "As explained by witnesses on both sides, problems had arisen in prior years with employees who would make acceptance of overtime contingent on being placed in a certain desirable post, even if that post was not one of the posts available. Both AFSCME and DOC desired to curb this practice. This did not mean that employees could not choose the post that they worked; it simply meant that their choices were limited to the posts that were available. Curbing this practice also did not mean that DOC would never have to move staff around as a result of voluntary overtime assignments; it simply meant that operational needs--not employee desires--would be what motivated such moves." Complainant's post-hearing brief at 18.

While the Union established that Two Rivers had a past practice of calling employees into vacancies regardless of rank except for critical sergeant positions, it did not establish that the prison had a practice of moving employees into different positions solely because the next employee on the relevant overtime list could not serve in the original vacancy. The Two Rivers practice established by this record was first come/first served for the vacant position, not moving employees around to create a new vacancy. If the practice were to move employees for the next employee on the overtime list, switching to the one up/one down system would have little effect on Union employee overtime. The Union's claim of a change in practice rests on the change to the one up/one down system, not to a sudden refusal to move employees around on a shift to create a new vacancy for which an employee is qualified. Put another way, the Union objected to the new one up/one down system, not to the end of an employee transfer system.

Therefore, we address the mandatory or permissive status of the one up/one down system, and conclude without difficulty that this rank-based system of employee assignment is a permissive subject for bargaining. It is based on a "determination of the minimum qualifications necessary for any position" and an "assignment of duties." ORS 243.650. [14] *See AOCE v. State of Oregon, Department of Corrections*, 14 PECBR at 869-70; *Marion County Law Enforcement Association v. Marion County*, Case No. UP-113-94, 15 PECBR 832, 837-38 (1995*); Lane County v. Lane County Peace Officers Association, and Lane County Peace Officers Association v. Lane County and Lane County Sheriff*, Case Nos. UP-102/105/109-93, 15 PECBR 53, 64-65 (1994); *Springfield Police Association v. City of Springfield*, Case No. UP-37-94, 15 PECBR 325 (1994), *rev'd and remanded in part, aff'd in part*, 134 Or App 26, 894 P2d 546 (1995), *order on remand*, 16 PECBR 139, 145-46 (1995). See also *Oregon Trail School District No. 46*, 22 PECBR at 156.

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[14]ORS 243.650(7) provides in part:

"(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.

"(b) 'Employment relations' does not include subjects determined to be permissive, nonmandatory subjects of bargaining by the Employment Relations Board prior to June 6, 1995.

"(c) After June 6, 1995, 'employment relations' does not include subjects that the Employment Relations Board determines to have a greater impact on management's prerogative than on employee wages, hours, or other terms and conditions of employment.

"(d) 'Employment relations' does not include subjects that have an insubstantial or de minimis effect on public employee wages, hours, and other terms and conditions of employment.

* * *

"(f) For employee bargaining involving employees covered by ORS 243.736, 'employment relations' includes 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.

"(g) For all other employee bargaining except school district bargaining and except as provided in paragraph (f) of this subsection, 'employment relations' excludes staffing levels and safety issues (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 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."

However, that system also has an impact on the mandatory subjects of wages and overtime work, illustrated by the higher probability that corporals will be called in on mandatory overtime because they are the only employees who can fill vacancies of officers, corporals and sergeants. Reduction in the overtime available to officers and sergeants is also a mandatory impact of the one up/one down system. See *Oregon Public Employes Union, Local 503, SEIU, AFL-CIO, CLC v. State of Oregon, Executive Department*, Case No. UP-64-87, 10 PECBR 51, 71-74 (1987) (overtime work is a mandatory subject of bargaining). Therefore, we conclude that the Department violated ORS 243.672(1)(e) by adopting the one up/one down overtime system without notice to the Union and without first bargaining the impact of that change on mandatory subjects of bargaining.

**Remedy**

We will order that Two Rivers return to the overtime selection status quo (set out in Assistant Superintendent of Security Laney's November 20, 2005 e-mail, except that the one up/one down rule applies to filling critical sergeant positions); that parties bargain over the impacts of changing that policy on mandatory subjects of bargaining; and that the Department make any employees whole who have lost voluntary overtime opportunities because of the change to the one up/one down rule.

As an additional remedy, the Union has asked that we order the Department to post a notice of its wrongdoing. This Board generally requires posting such a notice when the violation meets the following critera:

> "(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." *Portland Fire Fighters' Association, Local 43, IAFF v. City of Portland*, Case No. UP-14-07, 23 PECBR 43, 77 (2009); *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 (1984).

This Board need only find that the violation involved one or more of the named factors to require the posting. *Laborers' Local 483 v. City of Portland*, Case No. UP-15-05, 21 PECBR 891, 908 (2007); *Blue Mountain Faculty Association/Oregon Education Association /NEA v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 781-82 (2007).

We conclude that the Union has failed to establish that any of these criteria have been met. In particular, the Union failed to establish that the mandatory impacts of the one up/one down system affected a significant portion of bargaining unit employees. We will not order that the Department post a notice.

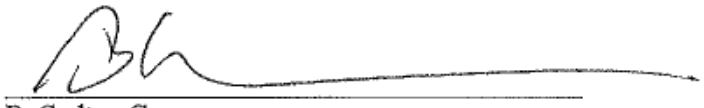
## ORDER

1. The Department shall cease and desist from violating ORS 243.672(1)(e) by refusing to bargain in good faith over the impact of the one up/one down rule regarding overtime.

2. The Department shall return to the status quo regarding overtime prior to the imposition of the one up/one down rule.

3. The Department shall make any employees whole who have lost voluntary overtime opportunities because of the change to the one up/one down rule.

SIGNED AND ISSUED 2 April 2014.



B. Carlton Grew
Administrative Law Judge

NOTE: The Employment Relations Board's rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The "date of filing objections" means the date objections are received by this Board; "the date of service" of a recommended order means the date this Board mails or personally serves it on the parties.) A party that files objections to a recommended order with this Board must simultaneously serve a copy of the objections on all parties of record in the case and file with this Board, proof of such service. This Board may disregard the objections of a party that fails to comply with those requirements, unless the party shows good cause for its failure to comply. (See Board Rules 115-010-0010(5) and (6); 115-010-0090; 115-035-0050; 115-045-0040; and 115-070-0055.)

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-021-13

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| ROSEBURG PROFESSIONAL FIREFIGHTERS ASSOCIATION, | ) | |
| Complainant, | ) | RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |
| v. | ) | |
| CITY OF ROSEBURG, | ) | |
| Respondent. | ) | |

On May 23, 2014, the Board heard oral argument on Complainant's objections to a recommended order issued by Administrative Law Judge (ALJ) Larry L. Witherell on March 21, 2014, after a hearing held on November 14 and 25, 2013, in Salem, Oregon. The record closed on January 17, 2014, following receipt of the parties' post-hearing briefs.

Barbara Diamond, Attorney at Law, Diamond Law, Portland, Oregon, represented Complainant.

Adam Collier, Attorney at Law, Bullard Law, Portland, Oregon, represented Respondent.

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On April 12, 2013, the Roseburg Professional Firefighters Association (Association) filed this unfair labor practice complaint against the City of Roseburg (Department). The complaint, as amended on November 13, 2013, alleged that: (1) the Department violated ORS 243.672(1)(e) when it unilaterally decreased workload and compensation by eliminating two Emergency Medical Service (EMS) lead tech positions and contracting out work performed by bargaining unit members; and (2) the Department violated ORS 243.672(1)(e) by negotiating directly with bargaining unit employees.[1] The Department filed a timely answer.

[1]On November 13, the day before the hearing, the Association filed a First Amended Complaint. The ALJ and parties agreed to treat the First Amended Complaint as a motion to withdraw paragraphs 24-27 and 33 from the original complaint, all of which concerned a headset program. The Department then did not need to file an Amended Answer.

As agreed to by the parties, the issues are:

1. Did the Department violate ORS 243.672(1)(e) by bargaining directly with the lead EMS tech unit, unilaterally making changes to their work duties and/or workload, or by unilaterally reducing the number of lead EMS techs?

2. If so, what is the appropriate remedy?

For the reasons set forth below, we conclude that the Department violated ORS 243.672(1)(e) by unilaterally contracting out work that had been performed by lead EMS techs, which resulted in the elimination of two lead EMS tech positions. We further conclude that the Department bargained directly with the lead EMS tech unit in violation of ORS 243.672(1)(e).

## RULINGS

The rulings of the ALJ were reviewed and are correct.

## FINDINGS OF FACT[2]

1. The Department 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 for a bargaining unit of approximately 34 firefighters.

2. During the relevant times and events, or where otherwise specified, the following individuals held the respective positions with either the Department or Association:

| | |
|---|---|
| Mike Lane | Fire Chief (since February 2010) |
| Gregg Timm | Division Chief of Operations |
| Josh Voynick | Shift Battalion Chief |
| Irik Rinnert | Association President |
| Lt. Ryan Martin | Association Vice President |

3. The Department and Association were parties to a collective bargaining agreement covering the period from July 1, 2009 to June 30, 2012. Bargaining for a successor agreement began in November 2011, and the new agreement was signed in June 2013. Accordingly, the events in dispute in this matter occurred during negotiations for the successor agreement. The Department and Association are currently parties to an agreement for the period from July I, 2012 to June 30, 2015.

[2]The Association filed numerous objections to findings of fact in the recommended order, and the Department disagreed with the Association's objections. Many of those contested findings of fact, however, were not relevant to our ultimate conclusion. Therefore, we have modified the findings of fact to focus only on those facts that are pertinent to our resolution of this matter. In doing so, we have not made any independent factual findings that are contrary to factual findings in the recommended order.

4. The Association represents, and the agreement covers, a bargaining unit consisting of three employee classifications: lieutenant, driver/engineer, and firefighter (collectively referred to as firefighters).

5. The Department operates out of three fire stations. It operates three shifts that are supervised by battalion chiefs. Employees work one 24-hour shift and then are off for 48 hours. The firefighters are quartered at the station.

6. All firefighters are required to hold an emergency medical technician (EMT) certification from the State of Oregon Department of Human Resources, Health Division. There are three levels of certifications: basic, intermediate, and advanced or paramedic. Firefighters are required to hold at least an EMT basic certification. A few firefighters hold either an EMT intermediate or an EMT advanced or paramedic certification, for which they receive a higher rate of compensation under the agreement. Firefighters are required to complete an annual number of continuing education or training hours to maintain their certification. As an example, under the Health Division rules, firefighters holding an EMT-basic certification are required to complete 25 hours in order to renew their certification. They are required to complete continuing education in several areas, including, but not limited to, trauma assessment and management, trauma case review, medical emergency assessment, pediatric patient assessment and management, medications, and use of defibrillators.[3]

7. The Department generally makes time available for the firefighters to take continuing education or training classes. In addition to an EMT, as will be explained below, the Department's administrative assistant, who is not in the bargaining unit, tracks the continuing education hours and reporting. In the end, however, it is the firefighter's responsibility to make sure that the continuing education requirements are satisfied and reported to the Health Division.

Development of the Lead EMS Tech

8. From at least the mid-1980s, at least one firefighter has been designated as a lead EMS tech and, as a result, has received incentive pay.[4]

9. In 1986, Jeff Farris was the lead EMS tech and received a six percent salary premium for serving in that capacity.

10. In 1994, Bryan Kollen replaced Farris as the lead EMS tech and received that same six percent pay premium.

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[3]We take notice of OAR 333-265-0110 (Licensed EMS Provider Continuing Education Requirements for License Renewal).

[4]Witnesses, exhibits, and attorneys used several terms interchangeably to identify the position in dispute (*e.g.*, EMT coordinator, EMS coordinator, and lead EMS tech). For simplification, except where stated in an exhibit, we will use lead EMS tech in discussing the disputed position.

11. The parties' 1997-99 collective bargaining agreement expressly provided language that "[e]mployees assigned to serve as [lead EMS tech] for their respective shift shall receive 2% above actual pay (including applicable incentive pay)."

12. Effective July 1, 1998, Kollen (then a driver/engineer) and Tom Edwards (then a firefighter) were the first two employees to serve as lead EMS techs under this contractual provision. In July 1999, the Department assigned Ryan Martin (firefighter) to serve as a third lead EMS tech.

13. The Department continued to have three lead EMS techs until 2006, when Martin stepped down from that position. For the next four years, only Kollen and Edwards served as lead EMS techs and each received the contractual two percent annual pay differential for that service.

14. In April 2010, Dallas Sullivan was designated as a third lead EMS tech.

15. There is no job description for the lead EMS techs and the duties performed by the lead EMS tech have varied over the years, evolving with changes in technology.

16. During his time as a lead EMS tech, Kollen taught EMS classes, ordered and stocked EMS supplies and equipment, ensured that there was proper EMS equipment on the engines, reviewed and evaluated medical reports prepared by the other firefighters to make sure that the reports met appropriate legal standards, and tracked training to make sure that the firefighters obtained the required hours for recertification.

17. As a lead EMS tech, Edwards's tasks included managing EMS supply requisitions and drugs, training probationary employees, supervising responses to fires and EMS calls, researching and ordering supplies, rotating medicines to avoid expiration, and repairing (and arranging for the repair of) medical equipment.

18. When Sullivan came on board as a lead EMS tech in 2010, the three lead EMS techs agreed to divide the various responsibilities. Sullivan would be responsible for: conducting EMS report reviews; producing "benchmarks" for EMS reports; managing protocols; assembling and maintaining PPE packs; and coordinating defibrillator maintenance. Edwards would be responsible for managing supply requisition and drugs. Kollen would be responsible for EMS certification and tracking; instruction coordination; and EMS bag maintenance.

Events Leading to the Complaint

19. The amount or level of training provided by the lead EMS techs has changed over time. At certain times, instruction was provided by a combination of instructors from three different agencies: the Department, a private ambulance company, and Douglas County Fire District 2 (District 2). The personnel from the three agencies created a pool of 12 instructors. As a result, the three lead EMS techs taught one class per year. From approximately 2002 to late 2011 or early 2012, District 2 provided most of the continuing education or training for the Department firefighters. However, in late 2011 or early 2012, the Department became dissatisfied by the

quality of classes and the limited class offerings by District 2. At that time, the lead EMS techs were charged with providing that training and education.

20. Each lead EMS tech taught two to four continuing education or training classes per year. For instance, in 2012, Sullivan taught Trauma 1, Trauma 2, Trauma Practical, and Advanced IVs/Catheters. During the same period, Kollen taught Medical Emergencies 1, 2, and 3. Edwards taught Pediatric Medicine 1 and Pediatric Medicine 2. Each class was offered to each shift, and each class could have been two to three hours in length and required two to three hours to prepare per each hour of instructional time. When lead EMS techs taught courses, they received overtime for teaching outside their own shifts.

21. However, District 2 continued to offer continuing education and training, and the Department firefighters could still attend District 2 classes. In 2012, District 2 offered courses in Post Resuscitation Care, Respiratory Distress, Pediatric Shock, Strokes, Pediatric Respiratory Distress, and Newborn/Mother Care. District 2 continued to offer courses only from January through March. The lead EMS techs, therefore, scheduled their courses from April through December.

22. By 2012, in addition to training, Edwards's responsibilities as a lead EMS tech included monitoring the status of EMS supplies, and then ordering supplies and equipment. He researched the quality and price of needed supplies and equipment, and determined whether a particular product was appropriate for use with the Department's EMS activities. He also repaired much of the EMS equipment when necessary. Edwards monitored the expiration dates of drugs and medicines held by the Department. As drugs and medicines came within six months of their expiration date, Edwards rotated the drugs to ambulance units, where they would be used much more quickly.

23. By 2012, in addition to training, Sullivan was responsible for reviewing medical reports prepared by other firefighters. He established the benchmarks and then reviewed the medical reports to ensure that they met the appropriate legal standards. This generally took one to two hours per month. Sullivan also managed protocols,[5] oversaw defibrillator maintenance, and assembled and maintained PPE packs.[6] Before he was assigned as a lead EMS tech, Sullivan had

[5]Managing protocols meant that a lead EMS tech telephonically contacted a battalion chief at Douglas County Fire District No. 2 to inquire whether there were any new or updated medical treatment protocols or changes in protocols that might affect the Department. Sullivan did not personally meet with the battalion chief but would instead talk to her by telephone. This occurred about once a month, and the telephone call was only a few minutes at most.

[6]PPE refers to personal protection equipment or gear contained in a vacuum-sealed bag or pack and carried on the engine. The gear, which generally included safety glasses, extra gloves, mask and shield, containers holding other masks, gowns, and gauntlets, is used to protect firefighters against blood-borne or air-borne pathogens when they respond to medical emergencies or related incidents. By organizing all the needed gear in the sealed plastic bag, contaminants are kept out, and the integrity of the gear is protected. Before Sullivan becoming a lead EMS tech, the gear was not organized or stored in a protective bag. As a result, the equipment became dirty and its protective integrity was in doubt or voided. There were about 10

been putting PPE packs together. At that time, he was not paid anything extra for assembling those packs and held no special designation or title for doing this extra duty, which he individually developed and performed. He assembled the packs for the three fire stations.[7] After he became lead EMS tech, he continued putting together PPE packs as part of his lead EMS tech duties. He also managed the supply requisition and the current drug supplies.

24. By 2012, in addition to training, Kollen provided and coordinated the training for the other firefighters. He also made sure that the firefighters had completed the required continuing education hours necessary for recertification. Not only are the firefighters required to submit the appropriate reports demonstrating that they have completed the hours, but the Department is also required to maintain corresponding records for each firefighter's continuing education. These reports are subject to audits by the Health Division.

25. Not long after the lead EMS techs resumed offering courses, some firefighters complained about the quality of the in-house training. When the Department stepped away from the District 2 program, the lead EMS techs tried to identify an appropriate curriculum for their classes and the firefighters. As a result, they ended up using a large number of PowerPoint presentations and much of the material was merely read to the firefighters. Much of the material was too in-depth and difficult to comprehend. The firefighters lacked the necessary basic knowledge that would have made the instruction useful. Therefore, much of the training was considered boring and provoked numerous complaints and criticisms, which were conveyed to the chiefs. The Association leadership made similar complaints to management about the quality of the in-house training.

26. For several years, Edwards knew about and had experience with CentreLearn, a company that offered computer-based or online training programs. Edwards used CentreLearn as a training tool well before 2009. He had taken a few courses from CentreLearn on his own, and he used parts of their programs for the training courses that he offered in the Department. He informed the chiefs about CentreLearn, and at one of the EMS committee meetings, Edwards and the other EMS techs proposed using CentreLearn for their training classes on a one-year trial and as an adjunct to the in-house classes. He even obtained the pertinent cost information, which he provided to one of the battalion chiefs. This proposal would allow employees who were short of continuing education hours to take a CentreLearn course. Firefighters were consistently short of hours as the annual deadline approached for the submission. Edwards suggested that the Department consider CentreLearn for training within the Department. Initially, Timm was opposed; he wanted to keep the training within the Department. He thought that it was best to maintain an interaction between the Department personnel. However, in November 2012, given the level of frustration and complaints from the firefighters over the in-house training, Timm considered adopting CentreLearn.

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back PPE packs at each of the three stations; there were three to four packs in the cab of each of the engines and one to two packs in the red/medical bag on the engines.

[7]Sullivan was unable to specify how much the time was required to put together a PPE pack. Several weeks would go by before he had to prepare a new pack.

27. On about December 3, 2012, Timm had a conversation or meeting with Association President Rinnert about the quality of the training. Timm said that the Department was considering and researching a number of options for training, including possibly going to computer-based and online training programs. Rinnert said that the Association would have a conflict or an issue with that. Timm said that he was just throwing out ideas, and that the Department had not decided anything yet, but was just considering and talking about possibilities.

28. A few days later, Timm had a second conversation or meeting with Rinnert. Timm acknowledged the frustration that existed over the quality of the current training classes. This time, Timm said that he had decided to go with a computer-based or online training program. He said that he could fund the computer-based or online training program with the elimination of two of the lead EMS tech positions.

December 2012 EMS Committee Meeting and Aftermath

29. The lead EMS techs and Battalion Chief Voynick held regular meetings to discuss issues pertinent to the lead EMS techs and emergency services.[8] Timm and Voynick met with Kollen, Sullivan, and Edwards for a regular EMS committee meeting on December 20, 2012. They initially discussed old business such as stethoscope feedback, PPE triage, protocol changes, and drug shortage. At some point, Timm turned the discussion to training. He explained that the Department wanted to go with an online training program, provided by CentreLearn. He said that he wanted to get it up and running by January 2013. As a result, Timm explained, the Department needed only one lead EMS tech. He said that the Department would be dropping two lead EMS techs and retaining one position for two percent premium pay. When asked the reason for this, Timm said that this was how he was going to sell it to the city manager. Timm explained that the money savings of having only one lead EMS tech would be used to contract with CentreLearn. At some point, one of the employees said that the online training was wanted in order to supplement, not replace, the in-house, hands-on training provided by the local EMS techs.

30. Timm tried to explain the change, but he also wanted to know who of the three employees would be interested in the remaining lead EMS tech position. Timm did this through a visual demonstration. He wrote the initials of the three coordinators, BK, DS, and TE, on a white board. Under each set of initials, he wrote "training." He asked each lead EMS tech what their duties were and then he listed the duties under their respective initials. Under Kollen, he wrote "defibrillator replacement" and "clean EMS bags";[9] under Edwards he wrote "supplies"; and under Sullivan he wrote "PPE packs" and "protocols." Timm wanted to see if they could blend together the non-training tasks into one EMS tech assignment. Timm erased training from the list because of the decision to contract out that work to CentreLearn.

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[8]Meetings had been held on June 10 and July 19, 2010; August 29 and December 22, 2011; and January 26, March 22, July 25, and December 20, 2012.

[9]Cleaning EMS bags was a project that Kollen and the Department were considering but the project never got off the ground before the December meeting. Accordingly, it was merely a prospective task within the lead EMS tech assignment.

31. Timm said that the remaining tasks were just a one-person job. He asked who was interested in taking on the remaining tasks for the two percent incentive pay. All three men turned it down. Timm was frankly surprised at the refusal because he believed that the remaining lead EMS tech assignment would have fewer duties than what was currently required of the three lead EMS techs. As a result, Timm said something to the effect that the three lead EMS techs did not know how to negotiate or that they were poor negotiators. Timm emphasized that whoever took the position would have fewer duties. Sullivan asked Timm if the one lead EMS tech position could be for six percent. Timm said that the two percent was not negotiable, but that he would discuss the duties. Edwards then went to the white board and wrote down "4.5%," and said he that would take the assignment for that amount. Timm said "no," adding that he was not there to negotiate. He erased the figure and wrote "2%" on the board and circled it. After Kollen, Sullivan, and Edwards refused the assignment, Timm responded that he was sure that any of the younger firefighters, who were "full of piss and vinegar," would be willing to take the assignment. Edwards said it was not a matter of "being full of piss and vinegar," but rather that the remaining position would have too many tasks for the two percent incentive pay.

32. The conversation then turned away from the tasks and assignments to discuss whether the firefighters would still be given adequate time to complete their EMS training hours using the CentreLearn program. Both Voynick and Timm assured the firefighters that they would. Timm told them that they "could have the whole 8 hours a day during EMS training week" if they wanted.

33. As the meeting came to a close, Timm stated that he would still like to have one of the three men agree to accept the lead EMS tech assignment. Kollen rejected the offer because he did not think that the position was defined. Timm offered Edwards the opportunity to get the pay that he then received, meaning the two percent premium, with only the responsibility for ordering EMS supplies. Timm said that he would assign the other coordinator duties to the various firefighters. Timm then wrote "1/7/13" on the board, and asked Edwards to make a decision by January 7, 2013.

34. Immediately after the December meeting, Sullivan and Edwards contacted Rinnert. They informed Rinnert that Timm had announced the elimination of two lead EMS tech positions and that the chiefs were talking about money and duties. Rinnert instructed them to write everything down that they could remember about the meeting.

35. Rinnert arranged a meeting with management for January 3, 2013, in order to discuss the change in lead EMS tech assignments. Chief Lane, Timm, Rinnert, Association Vice President Martin, and driver/engineer Smith attended the meeting. Rinnert stated that he was concerned about the chiefs bargaining with lead EMS techs about pay and job descriptions. Lane responded that that did not happen and denied that "bargaining" took place. Rinnert responded to Lane, that, if it was not bargaining, then why did Timm say that the lead EMS techs did not know how to negotiate. Lane stated that Rinnert and the lead EMS techs misinterpreted or misunderstood what happened at the meeting. Rinnert also expressed his concern about the number of lead EMS techs that the Department intended to have. Lane responded that it was management's right to make such changes. Lane said that the chiefs would handle the duties until they found someone to whom those duties could be assigned.

36. On January 9, 2013, Rinnert sent Lane an e-mail demanding that the Department bargain the decision and impacts of its decision. Rinnert also demanded that the Department maintain the *status quo* pending any negotiations. The Department refused to bargain, asserting that it had the right to unilaterally make the decision.

37. Edwards, Sullivan, and Kollen stopped performing lead EMS tech duties in December 2012, although they continued to be paid the two percent incentive pay until January 31, 2013. In January, the Department began offering online or computer-based training through CentreLearn. Before the January 7, 2013 deadline, Edwards advised the chief that he was not interested in the lead EMS tech assignment. Thereafter, no firefighter volunteered to take the assignment.

38. By the end of February 2013, none of the other firefighters had voluntarily expressed any interest in the lead EMS tech position.[10] Accordingly, on February 27, 2013, Chief Lane sent an e-mail to all the firefighters informing them of the vacant lead EMS tech position, along with the two percent incentive pay that went with the position. The e-mail asked that any interested employee inform Chief Lane before March 15, 2013. The e-mail also included an attachment, which set forth the duties for the position.

39. No firefighter volunteered for the vacant lead EMS tech position. From about January 1 to August 2013, Timm and the Department's staff assistant performed EMS supply ordering that previously had been performed by Edwards. Historically, bargaining unit employees checked EMS equipment, supplies and drugs once a month and prepared a list of needed supplies. Beginning in January, Timm took that list and ordered supplies. This took about an hour per month. The tracking of continuing education and EMS certification, which was a duty that was previously performed by Kollen in his capacity as a lead EMS tech, was undertaken by CentreLearn as part of its contract with the Department.

40. On August 7, 2013, Chief Lane assigned Edwards to be the lead EMS tech with two percent incentive pay.

## CONCLUSIONS OF LAW

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

2. The Department violated ORS 243.672(1)(e) by unilaterally contracting out EMS training for the Department firefighters, thereby reducing the number of lead EMS techs and changing their workload and compensation.

We first address the Association's allegation that the Department unilaterally contracted out work to an online training company at a time when the parties were negotiating a successor

[10]There was testimony by Timm that a firefighter volunteered for the lead EMS tech assignment, but after apparently being given a hard time by his colleagues, he withdrew his interest and did not accept the assignment.

collective bargaining agreement.[11] In contracting out that work, the Department eliminated two lead EMS tech positions, decreased bargaining-unit compensation, and changed the workload of bargaining unit employees. When an employer contracts out work being performed by bargaining unit members, "all circumstances surrounding the change generally must be considered in determining whether, in any particular case, bargaining will be required under the [Public Employee Collective Bargaining Act (PECBA)]." *Federation of Oregon Parole and Probation Officers v. Corrections Division, Field Services Section, Robert J. Watson, Administrator & Executive Department, State of Oregon*, Case No. C-57-82, 7 PECBR 5649, 5655, *recons*, 7 PECBR 5664 (1983) (*FOPPO*).[12]

Under this "all-things-considered" approach, we "balance the employer's right to manage its enterprise against the effects of the decision on the bargaining unit in light of all relevant circumstances." *Id.* (emphasis omitted); *accord Multnomah County Correction Deputies Association v. Multnomah County*, Case No. UP-58-05, 22 PECBR 422, 437 (2008). Common considerations under the test include: (1) the motive or reason for the decision; (2) the nature of the work affected; (3) the parties' collective bargaining history; and (4) the past practices of the employer. *FOPPO*, 7 PECBR at 5655. One "important consideration is the impact of the work transfer on bargaining unit members' working conditions." *American Federation of State, County and Municipal Employees Local 189 v. City of Portland (Portland Police Bureau)*, Case No. UP-049-08, 24 PECBR 612, 641 (2012). "If the employer's transfer of work traditionally performed by bargaining unit members has the potential to significantly and adversely affect bargaining unit members' working conditions, we will require the employer to bargain its transfer decision and the impacts of that decision." *Id.* (quoting *Washington County Police Officers' Association v. Washington County*, Case No. UP-15-08, 23 PECBR 449, 478 (2009)); *see also*

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[11]The dissent questions whether the "contracting out matter is properly before us." As set forth above (and in the recommended order), the Association's complaint specifically alleged that the Department violated ORS 243.672(1)(e) in numerous ways, including contracting out bargaining unit work. Further, the issue statement agreed to by the parties included the issue of whether the Department violated subsection (1)(e) by: (1) making a unilateral change to employee workload (which in this case we understand to mean the contracting out of the training work); and (2) eliminating the lead EMS tech positions, which the Department did in conjunction with contracting out the training work. Consistent with the complaint and the agreed-to issues, the contracting out of the training work was expressly raised in the Association's opening arguments, with no objection by the Department that the contracting out was somehow not at issue. Moreover, both parties expressly briefed the contracting-out issue in their post-hearing briefs and memoranda in aid of oral argument. Finally, at no point has the Department intimated that the contracting-out issue is not before us. Under these circumstances, we have no cause to question that the Department's unilateral change of contracting out of the training work is squarely before us.

[12]To the extent that the Department argues that it did not contract out the training work, we reject that argument. It is undisputed that the lead EMS techs performed the training work as a required duty for their two percent incentive pay. It is further undisputed that the work did not just stop—*i.e.*, that there was no longer a need for the training work. Rather, the training work continued with the Department opting to contract that work to an outside entity. This is a paradigmatic example of contracting out bargaining unit work.

*Multnomah County*, 22 PECBR at 437. In contrast, if the contracting out has only a slight or remote effect on the bargaining unit, then the employer need not bargain that change. *FOPPO*, 7 PECBR at 5656-58.

Here, the record establishes that the Department decided to contract out the training work performed by the lead EMS techs primarily because it had received complaints about that training. The Department also believed that contracting out the work would allow them to eliminate two lead EMS tech positions. Although a transfer-of-work decision motivated *solely* by economic reasons factors in favor of the employer being permitted to lawfully bypass bargaining (*see City of Portland*, 24 PECBR at 641), the record in this case does not establish that the Department was motivated solely (or even primarily) by economic reasons.

The nature of the work, as set forth above, involved training for bargaining unit members and was an extra duty performed by three lead EMS techs for extra pay (a two percent salary differential). Although the duties performed by lead EMS techs have changed over the years, there is no dispute that the lead EMS techs performed the contracted-out training for at least one year as part of their lead EMS tech duties. When the Department decided to transfer that work to an outside entity, the lead EMS techs suffered a loss of extra-duty pay, as well as overtime. In previous cases, we have concluded that the loss of extra-duty pay and potential overtime have a significant effect on bargaining unit members. *See Washington County*, 23 PECBR at 478-79; *Multnomah County*, 22 PECBR at 438; *FOPPO*, 7 PECBR at 5657-58. Here, given the small size of the bargaining unit (approximately 34 people), eliminating extra-duty pay for two members amplifies that effect. Likewise, the loss of a two percent pay differential for two employees is significant. Finally, the change in workload also amounts to a substantial effect on unit employees.

The parties have a longstanding collective-bargaining relationship, as well as a longstanding contractual provision that provides for a lead EMS tech position with a two percent salary differential. The parties were also in the process of negotiating a successor agreement when the Department unilaterally contracted out the training services then performed by the lead EMS techs. Under these circumstances, we conclude that the parties' collective bargaining relationship weighs in favor of requiring the Department to bargain over the decision to contract out the training work.

Finally, the past practices of the Department are mixed with respect to the contracting out of training work. Although lead EMS techs had not always performed this work, they had done so as part of their core responsibilities for the past year.

After considering all of the relevant circumstances, we conclude that the Department's decision to contract out training services previously performed by lead EMS techs has a greater effect on bargaining unit work conditions than on the Department's right to manage its enterprise. We particularly give great weight to the substantial effect of the subcontracting decision on the two percent pay differential and loss of overtime. Consequently, the Department was required to bargain in good faith with the Association over that decision, and its failure to do so violated ORS 243.672(1)(e).

3. The Department violated ORS 243.672(1)(e) on or about December 20, 2013, when it met with lead EMS techs and bargained with them over changes in lead EMS tech workload.

We next address the Association's contention that the Department additionally violated ORS 243.672(1)(e) during a December 20, 2012, meeting. It is an unfair labor practice for an employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." ORS 243.672(1)(e). "An employer violates its bargaining duty when it attempts to negotiate directly with its employees." *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 769 (2007) (citing *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8195 (1985)); *see also 911 Professional Communications Employees Association v. City of Salem*, Case No. UP-62-00, 19 PECBR 871, 890 (2002) ("the good faith bargaining obligation imposed by (1)(e) encompasses a prohibition on direct dealing by an employer with members of the bargaining unit").[13]

Here, at the December 2012 meeting, the Department (*via* Timm) informed the three lead EMS techs of its decision to contract out the training work and eliminate two of the three lead EMS tech positions (and the accompanying incentive pay). This announcement alone does not constitute "bargaining" or "direct dealing" with the lead EMS techs, as it merely informed the employees of a decision that had already been made. However, Timm then began negotiating with the three lead EMS techs over the appropriate workload to be performed by the potential lone lead EMS tech in exchange for the collectively-bargained two percent incentive pay. Specifically, Timm wrote a list of various work duties currently performed by the three lead EMS techs. He then invited the techs to construct a workload that they believed would represent fair compensation for the two percent incentive pay. In doing so, he crossed the line that prohibits a public employer from negotiating directly with employees.

Although Timm did not budge on the Department's position to only pay a two percent salary differential in exchange for the extra work, he did express a willingness to negotiate over the amount of work that would be required of a lead EMS tech to receive that incentive pay. When faced with resistance from the lead EMS techs, who believed that the proposed workload was too much for a lone employee to provide for a two percent salary increase, Timm emphasized that he was offering them less work for the same pay. He further told the lead EMS techs that they were poor negotiators and that if they refused to accept some variation of the workload-for-incentive pay that was being proposed, he would find a younger firefighter "full of piss and vinegar" who would be willing to perform the work. Under these circumstances, we conclude that the Department negotiated directly with the lead EMS tech employees over the workload required to receive the collectively-bargained incentive pay. In doing so, the Department violated ORS 243.672(1)(e).

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[13] The Board has also concluded that a public employer violates ORS 243.672(1)(b) when it bypasses the exclusive representative and deals directly with bargaining unit members. *See City of Salem*, 19 PECBR at 888-89; *AFSCME, Local 2909 v. City of Albany*, Case No. UP-26-98, 18 PECBR 26, 38-39 (1999). In this case, the Association alleged only that the Department's conduct at the December 2012 meeting violated subsection (1)(e), not (1)(b). Therefore, we do not address any potential (1)(b) violation.

In arguing to the contrary, the Department contends that no "bargaining" took place at the December 2012 meeting because Timm never made a formal proposal to the three lead EMS techs that would be included in a collective bargaining agreement. We disagree with the Department's contention that the subsection (1)(e) prohibition on direct dealing or negotiating is limited to a public employer making a formal proposal to be included in a collective bargaining agreement. Under that theory, an employer could bypass the exclusive bargaining representative and directly negotiate side deals on wages and other benefits, so long as those side deals were not formal proposals to be included in a collective bargaining agreement. Such conduct, however, would nevertheless constitute direct negotiations with employees that undermine the union's role as the exclusive bargaining representative of the employees that they represent. *See McKenzie School District #68*, 8 PECBR at 8195 (quoting *NLRB v. General Electric Co.*, 418 F2d 736 (2d Cir. 1969), *cert den.*, 397 US 975 (1970)).

The dissent also concludes that the Department's conduct at the December 2012 meeting did not violate ORS 243.672(1)(e), but for a different reason. The dissent would find that Timm only negotiated with the employees over the permissive subject of "assignment of duties" (*see* ORS 243.650(7)(g)), rather than the mandatory subject of "workload" (*see Three Rivers Ed. Assn. v. Three Rivers Sch. Dist.*, 254 Or App 570, 575, 294 P3d 547 (2013)). According to the dissent, a public employer does not violate ORS 243.672(1)(e) when it bypasses the exclusive representative and negotiates directly with represented employees regarding permissive subjects of bargaining. Such direct dealing, according to the dissent, is not proscribed by ORS 243.672(1)(e). Although we are skeptical of that distinction, we need not address it here because we have concluded, as set forth above, that Timm directly negotiated with the lead EMS techs over workload.

The dissent maintains that Timm only broached the "assignment of duties" to be performed by the to-be-determined lead EMS tech and did not cross the line into negotiating over the "workload" of that position. Admittedly, the distinction between "workload" and "assignment of duties" can be somewhat nebulous. Yet, as explained above, in pushing for one of the lead EMS techs to take the new "solo" lead EMS tech position, Timm expressed his dismay at the lack of willingness by one of three employees to take that position. In doing so, Timm explained that he was proposing *less work* for the *same amount of pay*. The three employees disagreed, asserting that Timm was proposing was *too much work* for the *same amount of pay*. Moreover, in that context, Timm told the three employees that, although the amount of pay was not negotiable, the work to be done by the lead EMS tech for that pay was negotiable. Although it is conceivable that Timm was referring to a particular assignment (or group of assignments) that the employees found undesirable, we find it more probable that Timm was referring to the overall workload to be performed for the incentive pay. Thus, under these circumstances, we disagree with the dissent that Timm only bargained over "assignment of duties," rather than "workload." Therefore, we conclude that the Department violated ORS 243.672(1)(e) when it bargained directly with the three lead EMS techs over workload at the December 2012 meeting.

Remedy

We turn to the remedy for the Department's unlawful transfer of the training work previously performed by the three lead EMS techs and for the Department's unlawful direct negotiations with Association-represented employees regarding workload. We will order the

Department to cease and desist from refusing to bargain about its decision to transfer out the training work. ORS 243.676(2)(b). We will also order the Department to cease and desist from bypassing the Association and directly negotiating with represented employees regarding workload. *Id.*

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. *Oregon School Employees Association v. Parkrose School District*, Case No. UP-030-12, 25 PECBR 783, 792, (2013); *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 Department is ordered to return Sullivan and Kollen to their lead EMS tech positions and to restore all wages (including the two percent salary differential) and benefits lost by Sullivan, Kollen, and Edwards due to the Department's unlawful conduct, until the Department has fulfilled its bargaining obligations.[14] The Department is also ordered to return the contracted-out training work to the bargaining unit until it has completed its bargaining obligations.

We will also order the Department to post a notice of its wrongdoing. We generally order such a posting if we determine that 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 of a notice. *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, 19 PECBR 684, 685 (2002). Here, the Department's conduct, particularly its direct negotiations with Association-represented employees, undermined the role of the Association as the exclusive representative of those employees, thereby negatively affecting the Association's functioning as that exclusive representative. That violation occurred directly after the Department had unlawfully refused to bargain with the Association regarding its decision to contract out work previously performed by lead EMS techs. Both of these violations occurred during a time at which the parties were negotiating a successor agreement. Under these circumstances, we conclude that a posting is warranted.

[14]As set forth above, the Department paid all three employees the lead salary differential through January 31, 2013, meaning that the back pay obligation commenced on February 1, 2013. Additionally, Edwards was returned to a lead EMS tech position with the two percent salary differential as of August 7, 2013, and that date ends the Department's back pay obligation with respect to his two percent incentive pay.

## ORDER

1. The Department violated ORS 243.672(1)(e) when it contracted out training work previously performed by lead EMS techs without first bargaining with the Association and when it directly negotiated with Association-represented employees regarding lead EMS tech workload.

2. The Department shall cease and desist from: (1) refusing to bargain in good faith with the Association about the Department's decision to contract out the training work (and any mandatory impacts of that decision); and (2) directly negotiating with Association-represented employees regarding workload.

3. The Department is ordered to return Sullivan and Kollen to their lead EMS tech positions and to restore all wages and benefits lost by Sullivan, Kollen, and Edwards due to the Department's unlawful conduct, consistent with this opinion, until the Department has fulfilled its bargaining obligations.

4. The Department is ordered to return the contracted-out training work to the bargaining unit until it has completed its bargaining obligations.

5. Within 15 days of the date of this Order, the Department shall post a notice of its violations in each of its fire stations in a prominent location where Association-represented employees are likely to view it. The notice shall remain posted for 30 days. The Fire Chief shall sign the notice.

DATED this 23 day of July 2014.

*Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This order may be appealed pursuant to ORS 183.482.

*Chair Logan, dissenting.

My colleagues have determined that the Department violated ORS 243.672(1)(e) by contracting out the EMS training and by bargaining directly with the lead EMS techs over "workload." I disagree with both determinations, and therefore respectfully dissent.

First, I question whether the contracting out matter is properly before us. The Association's demand to bargain, which Association President Rinnert sent by e-mail to Chief Lane, states that

the Association "demands to bargain the decision and impact of eliminating two Lead EMT positions." This demand appears to incorporate only the District's decision to reduce the number of lead EMS techs – not any action by the District about sending the training work to CentreLearn. Additionally, the parties agreed that the issues before the ALJ, and consequently the Board, were whether the Department bargained directly with the techs, made changes to work duties or workloads, or unilaterally reduced the number of lead EMS techs. This list of issues does not include the issue of "contracting out." Because the Association did not demand to bargain about the contract with CentreLearn, and because the parties limited their issues to direct dealing and elimination of two lead EMS tech "positions," it does not appear that the contracting out of the training is even properly before us.

That said, assuming *arguendo* that the contracting out matter is before the Board, I agree with my colleagues that the "all things considered" approach is what we should use in analyzing this matter. I also agree that when using this approach, we engage in a balancing of the employer's right to manage against the effects of the decision on the bargaining unit. Where we diverge is in the results when "all things considered" is applied to the case before us. In sum, the transfer of this training work did not have the "potential to significantly and adversely affect bargaining unit members' working conditions." *City of Portland,* 24 PECBR at 641.

When applying the "common considerations" outlined in our case law, this matter represents an extremely close case. The City's reason for contracting out the training is that the training provided by the lead EMS techs was not suitable – in sum, the City wanted better training. Further, the nature of the work provided, which was training, was tangential to the core work actually performed by bargaining unit employees. Training was a duty required of only three lead EMS techs. And only two techs, out of a unit of approximately 34 firefighters, were affected by this reduction in work. These elements are aligned on the employer's side of the scale.

However, the parties' collective bargaining history is aligned with the bargaining unit, as the lead work differential has been in place in one form or another since the mid-1980s. Although the amount of time that these lead EMS techs exclusively conducted the training was limited to approximately one year, they had performed some type of training for the bargaining unit for a number of years.

I understand that this Board's case law, cited by the majority, stands for the proposition that loss of pay and overtime opportunities for bargaining unit members triggers the determination that the City must bargain its decision to contract out. My difficulty is that these cases never evaluate how much loss of pay or potential/actual loss of overtime is the catalyst, and whether such loss needs to affect most, some, or a very few members of the bargaining unit. I am not closing my eyes to the effect on these two bargaining unit members, but a two percent cut and loss of overtime for two out of 34 bargaining unit members has a fairly limited effect on the bargaining *unit*. I also note that no employee wanted the third lead EMS tech position for a two percent pay increase, causing me to wonder how much of a difference a pay increase or decrease made on the bargaining unit members.

Next, I disagree with the majority decision that the Department bargained with the three lead EMS techs about workload on December 20, 2012. In order for the Association to prevail, it must prove that the Department bargained directly with the bargaining unit employees, rather than the Association, regarding a mandatory subject of bargaining. *See* ORS 243.650(4). The Association has failed to meet its burden of proof.

This allegation rests on whether Timm and the three lead EMS techs were discussing assignment of duties or workload.[15] Assignment of duties, as well as workload "when the effect on duties is insubstantial," are permissive subjects of bargaining. ORS 243.650(7)(g). Workload may be a mandatory subject for bargaining when the effect on duties is more than insubstantial.

While I agree that the lone tech's *duties* would change and increase, the evidence does not establish that the *workload* of the lone EMS tech would actually increase or decrease. One cannot equate an increase in duties with an increase in workload. There are situations, and this appears to be such a case, where the removal of the most time-intensive duty (training) appears to offset the addition of other duties. The effect on the duties is unknown. Without more, I am unable to conclude that the preponderance of evidence establishes that workload as a mandatory subject was what was being discussed.

My assessment is that Timm and the lead EMS techs were discussing the assignment of duties, although this is yet another very close case. An equally justified reading of the established facts is that Timm, not knowing who would step forward to take the single position, was trying to figure out which duties that unknown person was interested in doing. Timm was willing, and we so found, that he would assign any non-desired duties to others. Consequently, what occurred more closely reflects a conversation about the assignment of duties.

The Department was not particularly artful in the way it chose to discuss the duty assignments. Informing the lead EMS techs that they were poor negotiators clearly muddied the waters. But an employer can lawfully discuss the assignment of duties with employees without involving the exclusive representative.

So, while I lean to this being an assignment of duties discussion between Timm and the techs, which is not bargaining, I would decide this matter by holding that the Association failed to meet its burden of proof that the subject of the discussion was mandatory.

In sum, I would dismiss the complaint.

Kathryn A. Logan

*Kathryn A. Logan, Chair

[15] I agree with the majority decision that informing the lead EMS techs about the elimination of training did not constitute bargaining.

# 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-021-13, *Roseburg Professional Firefighters Association v. City of Roseburg*, 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 City of Roseburg (Department) violated ORS 243.672(1)(e) by: (1) unilaterally contracting out work that had been performed by lead EMS techs, without first fulfilling its obligation to bargain with the Roseburg Professional Firefighters Association (Association); and (2) directly negotiating with Association-represented employees over lead-EMS-tech workload.

To remedy this violation, the Employment Relations Board ordered the Department to:

1. Cease and desist from refusing to bargain in good faith with the Association regarding the contracting out of training work previously performed by lead EMS techs and cease and desist from directly negotiating with Association-represented employees regarding lead-EMS-tech workload;

2. Return employees Dallas Sullivan and Bryan Kollen to their lead EMS tech positions and to restore all wages and benefits lost by Sullivan, Kollen, and Tom Edwards due to the Department's unlawful conduct, until the Department has fulfilled its bargaining obligations;

3. Return the contracted-out training work to the bargaining unit, until the Department has completed its bargaining obligations; and

4. Post this notice for 30 days in each of its fire stations where Association-represented employees are likely to view it.

City of Roseburg

Dated_____, 2014 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-017-13

(UNFAIR LABOR PRACTICE)

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| OREGON SCHOOL EMPLOYEES' ASSOCIATION,<br><br>Complainant,<br><br>v.<br><br>NORTH CLACKAMAS SCHOOL DISTRICT,<br><br>Respondent. | ) | FINDINGS AND ORDER ON COMPLAINANT'S PETITION FOR REPRESENTATION COSTS |

On April 4, 2014, this Board issued an order holding that the North Clackamas School District (District) violated ORS 243.672(1)(g) by refusing to arbitrate a dismissal grievance filed by the Oregon School Employees Association (Association). 25 PECBR 983 (2014). The Association filed a petition for representation costs on April 24, 2014. The District filed objections to the petition on May 5, 2014, asserting that the number of hours sought by the Association was excessive and contesting the need for the creation of a transcript.

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

1. The Association's petition and the District's objections are timely filed.

2. The Association is the prevailing party.

3. This case required one day of hearing.

4. Counsel for the Association submitted an affidavit and exhibit reflecting a total cost of $16,343 for 130.75 hours of legal work performed at the rate of $125 per hour. A copy of the recording of the hearing was obtained for $15, and $857.50 was spent obtaining a transcript of the recording, for a total of $872.50. The Association's petition requests a payment in the amount of $3,500, the maximum amount that this Board awards in the absence of a civil penalty. *See 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.

The requested hourly rate is lower than average. The average rate for representation costs is between $165 and $170 per hour. *Clackamas County Employee's 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 significantly above average for a case requiring one day for hearing. 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. 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). We generally adjust the award upward when a party refuses to arbitrate a grievance because the Public Employee Collective Bargaining Act (PECBA) favors the resolution of disputes through arbitration and because our case law establishes a strong presumption of arbitrability. *Teamsters Local 670 v. City of Ontario,* Case No. UP-40-08, 23 PECBR 384, 385 (2009) (Rep. Cost Order). We make such an adjustment here.

The cost of obtaining a recording of the hearing and the creation of a transcript of the hearing are the type of out-of-pocket costs that this Board has typically not considered as part of a prevailing party's representation costs. *See Joseph Education Association v. Joseph School District No. 6*, Case No. UP-56-95, 16 PECBR 775 n 1 (1996) (Rep. Cost Order), *citing to OSEA Chapter 7 v. Salem School Dist.,* Case No. C-271-83 (Rep. Cost Order, Nov. 29, 1984). As a result, we will not consider these expenses as part of the Association's representation costs.

6. 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 Association in the amount of $3,125.

## ORDER

The District will remit $3,125 to the Association within 30 days of the date of this Order.

DATED this 31 day of July 2014.

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-040-13

(UNFAIR LABOR PRACTICE)

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|---|---|---|
| SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, OREGON PUBLIC EMPLOYEES UNION,<br><br>Complainant,<br><br>v.<br><br>CITY OF TIGARD,<br><br>Respondent. | ) | RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |

On June 18, 2014, this Board heard oral argument on Complainant's objections to a recommended order issued by Administrative Law Judge (ALJ) Julie D. Reading, after a hearing held on January 27, 2014, in Salem, Oregon. The record closed on February 26, 2014, following receipt of the parties' post-hearing briefs.

Christy Te, Staff Attorney, Service Employees International Union Local 503, Oregon Public Employees Union, Salem, Oregon, represented Complainant.

Daniel Rowan, Attorney at Law, Bullard Law, Portland, Oregon, represented Respondent.

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On September 18, 2013, the Service Employees International Union Local 503, Oregon Public Employees Union (Union), filed a complaint alleging that the City of Tigard (City) violated ORS 243.672(1)(a) by directing employees to remove Union materials from the outside of their lockers and from specific areas in and around their cubicles. The Respondent filed a timely answer.

The issues are:

1. In August and September 2013, did the City require removal of, or remove, Union materials from a bargaining unit employee's cubicle and another unit employee's locker while permitting non-Union material in these areas?

2. If so, did the City violate ORS 243.672(1)(a)?

We conclude that the City violated ORS 243.672(1)(a) when it removed Union flyers from a bargaining unit employee's locker. The City's other actions did not violate ORS 243.672(1)(a).

## RULINGS

The rulings of the ALJ were reviewed and are correct.

## FINDINGS OF FACT

1. The Union is a labor organization within the meaning of ORS 243.650(13).

2. The City is a public employer within the meaning of ORS 243.650(20).

3. The City and the Union were parties to a collective bargaining agreement (CBA) effective through June 30, 2013.

4. Article 6, section 3 of the CBA was titled "Bulletin Boards." It stated that the "City agrees to furnish and maintain suitable bulletin board space in convenient places to be used by the Union. The Union shall limit its posting of notices and bulletins to such bulletin boards."

5. On March 6, 2013, the Union and the City began bargaining a successor agreement. While bargaining, the parties struggled to reach consensus on health care cost apportionment.

6. In order to show support for the Union's position on health care, bargaining unit employees began wearing Union stickers to work and placing Union flyers in their work spaces. Employees also attended bargaining sessions and City Council meetings. Some employees were part of a designated Contract Action Team (CAT). CAT members actively worked to raise support for the Union's position in negotiations and presented members of management with letters requesting support of the Union's position.

7. Employees staged a Union support rally on August 25, 2013.

8. While waiting for the opportunity to mediate with the City, the Union began discussing the possibility of a strike. The Union started to analyze whether there would be bargaining unit employee support for a strike and how health care benefits would be administered during one.

9. On October 16, 2013, the parties reached an agreement on a new CBA.

Requested Moving of Poster in Utility Billing Employee's Cubicle

10. The City's Finance and Information Services Department (Department) is managed by Director Toby LaFrance. Utility Billing and Passports (Division) is a division in the Department and is headed by Ron Blecker, Utility Billing Supervisor. Blecker became the Utility Billing Supervisor in April of 2013.

11. The Division is located in City Hall. It has a lobby area, a passport counter, and a utility billing counter for members of the public. Employee cubicles are located directly behind those counters.

12. The passport counter is to the left of the utility billing counter. It is open on Tuesdays and Thursdays. It is typically visited by five to 15 members of the public on those days. Most passport customers are pleasant, but some are upset about the circumstances surrounding their need to obtain a passport and direct their frustrations at employees.

13. The utility billing counter is to the right of the passport counter. It is open Monday through Thursday. It is typically busier than the passport counter. Utility billing counter customers are generally pleasant and known to the employees. However, some customers are upset about their utility bills and direct anger at Division employees.

14. On his third day as Utility Billing Supervisor, Blecker told Division employees that the work area needed to be cleaned up to promote a more professional environment. Blecker met with employees individually and as a group to provide this directive. Items that Blecker asked employees to remove included dead plants, dirty dishes, food, and trash. Blecker did not prohibit all personal items. He allowed employees to keep small sentimental personal items in their cubicles. Blecker stated that employees were prohibited from displaying items that were "offensive" or that a member of the public could "use against them personally."

15. Jill Bentley is an Accounting Assistant 2 in the Division. Bentley has worked for the City for 16 years. Bentley has served as Union President since 2011. She was an active member of the Union's collective bargaining team in 2013, acting as the general spokesperson.

16. Bentley's cubicle is approximately 17 feet directly behind the passport counter. The back wall of Bentley's cubicle faces the passport counter directly. Along the cubicle's back wall, Bentley maintains a filing cabinet where she stores Union information in her capacity as President.

17. Bentley has always displayed a number of personal items in her cubicle that have varied over the years. Items that she has displayed include pictures of family and friends, calendars, humorous flyers, stuffed animals, and purple balloons in support of the Union.

18. In April 2013, shortly after becoming Utility Billing Supervisor, Blecker asked Bentley to remove a framed poster depicting an illustrated lion as part of his efforts to professionalize the Utility Billing office area. Also, sometime between April and August 2013, Blecker asked Bentley to remove a large plastic rat that bore a Harley-Davidson sticker after receiving a complaint about it from a customer.

19. In mid-July 2013, Bentley displayed a Union poster above her Union filing cabinet, directly in view of the passport counter. The poster was approximately 11 by 17 inches. It was purple and stated "Affordable Healthcare for All" with the Union logo. Bentley placed the poster there to designate the location of Union materials. She had not previously displayed personal items there.

20. At the time that Bentley displayed the Union poster, she had some personal items in her cubicle. Most of these items were located on a wall visible from the passport counter, at approximately a 45 degree angle. Against the wall were bookshelves and a corkboard. Items on the bookshelves include or have included: a Christmas nutcracker dressed as a police officer, a chicken statue with a plaque stating "[r]aising children is like being pecked to death by a chicken," and a child's building block. In addition, Bentley keeps photos of her children in this area. On the corkboard, Bentley displays personal items such as photos and calendars. This area is where Bentley had displayed the framed illustrated lion poster before Blecker asked her to remove it.

21. After the Union poster had been displayed in Bentley's cubicle for approximately two to four weeks, Blecker approached LaFrance. Blecker and LaFrance discussed that Bentley had been wearing a Union t-shirt to work, although t-shirts violated the office dress code policy. Further, Blecker asked LaFrance if he should direct Bentley to either remove the Union poster or move it outside the direct public view.

22. LaFrance stated that he wanted to talk to human resources and City management before removing the Union poster or asking Bentley to do so.

23. After consulting management, human resources, and legal counsel, LaFrance asked Bentley to move the Union poster to an area of her cubicle outside direct public view. LaFrance also told Bentley that she could wear Union insignia on office appropriate apparel, but that t-shirts were prohibited under the dress code.

24. Bentley complied with LaFrance's request by taking the Union poster down and setting it on a filing cabinet. The City did not administer any warnings or discipline to Bentley due to the t-shirt or poster.

25. Another Division employee removed a Union poster from the outside of her own cubicle after learning that LaFrance had directed Bentley to move or remove her poster.

Library Manager Removal of Union Items from Locker

26. Margaret Barnes is the Director of the City Library (Library) and was a member of the City's 2013 management bargaining team. Craig Carter is the Library's Circulation Manager. Sandra Hughs is the Circulation Supervisor and reports to Carter. Theresa Ferguson is the Library's Technical Services Manager.

27. The Library building was constructed in 2004. It has two floors. The second floor includes administrative offices and the adult services work room. The first floor contains Library materials for the public. It has an area that is off limits to patrons, but is accessible by employees,

volunteers, and vendors with keycard access. This area has a hallway leading to a break room. It also contains the circulation work room area for employees.

28. Employee lockers are located in the hallway outside the break room. The Library does not have any written policies on the use of the lockers or limitations on what can be displayed on them. Further, employees have not been given any verbal guidance on locker decoration. However, Library employees typically have not decorated the outside of their lockers.

29. Barnes has expressed a verbal policy to employees that items are not to be affixed to vertical flat services in the Library building unless blue painter's tape is used. Employees are generally familiar with this policy and refer to it colloquially as the "blue tape rule."

30. The Library has between 40 and 48 employees. It also has approximately 200 volunteers, with about 100 reporting weekly.

31. Dela Burgess is a part-time employee who reports to the Library four days a week. Burgess also serves as an on-call employee for several other libraries in the area. Burgess has an assigned locker on the first floor. She has sometimes decorated the outside of her locker with summer reading program stickers, Christmas decorations, and items to support fellow employees. Library managers have not asked Burgess to remove any of these items. Decorating lockers is a common practice in some other libraries where Burgess works.

32. When the parties began collective bargaining, Burgess started wearing a Union sticker each day that she reported to the Library. At the end of her shift, she would place the sticker on the outside of her locker door. In order to prevent her locker door from appearing cluttered, Burgess began arranging the stickers in a configuration that resembled a daisy.

33. In September 2013, Barnes noticed that the area around the circulation mailboxes had become cluttered. Therefore, Barnes raised this with the Library management team at a September 12, 2013, meeting. Ferguson, having recently noticed Burgess's stickers, mentioned that there were stickers on an employee's locker. Barnes directed Carter to take care of it.

34. On September 12, 2013, Carter removed the Union stickers from Burgess's locker. Carter also sent an e-mail to the Library circulation staff, stating, "[p]lease don't put stickers, labels or anything adhesive on the lockers. Once on, they are extremely difficult to get off."

35. Hughs had previously noticed Burgess's stickers and had asked Carter about locker decorations shortly after seeing the September 12, 2013 e-mail. Carter instructed Hughs to remove items displayed on the outside of lockers based on the discussion at the management meeting.

36. Not knowing that Carter had already removed her stickers, Burgess responded to his e-mail, stating "I'll be responsible for removing any adhesive on my locker when I remove the floral design of the stickers on my locker, just as I have removed adhesive from the inside of my locker when necessary. It wasn't that hard for me to get it off but perhaps your experience has been different. Meanwhile, my stickers will remain for a bit longer unless you are requiring them to be removed."

37. Carter responded to Burgess by e-mail, stating "It is OK to have stickers, pictures, etc. inside your locker, but please we don't want them on the outside. Thanks[.]"

38. After Carter removed Burgess's Union stickers, she replaced them with a Union flyer affixed with blue painter's tape. Hughs, relying on Carter's previous direction regarding employees not putting items on the outside of lockers, removed the flyer.

39. Following Hughs's removal of Burgess's taped flyer, Burgess hung another Union flyer on her locker by cutting and folding the edges so that it would hang securely and flat on the outside of her locker door without requiring adhesive.

40. Hughs removed the altered flyer. Hughs pinned either that flyer or the previous flyer on the Union break room bulletin board after removing it from Burgess's locker.

41. The City did not administer any warnings or discipline to Burgess due to the Union materials.

42. Library employees with personal cubicles outside the public view were permitted to display Union flyers on their cubicle walls.

City Policies

43. The City has a 69-page handbook of personnel policies. These policies cover several areas of personnel matters and were last updated in December 2012.

44. Policy 32 is titled "Conduct and Appearance." One requirement under that policy is that "each employee shall exhibit care and responsibility with public property and shall strive to reduce costs of materials and services in the performance of their duties."

45. Policy 54 is titled "Use of City Property and Information," and states in relevant part that "[a]ll city property and information is to be used solely for job related purposes. Use of such property or information for personal purposes is strictly prohibited unless specifically authorized by city policy or the department director."

46. Policy 63 is titled "Solicitation on City Property." It states in relevant part that the City

> "does not allow peddling, solicitation or sale of goods or services for charitable or any other purposes on city property during working hours without the approval of the City Manager. In addition, the City Manager may designate specified locations on city property to be used by employees for the purpose of posting notices of items for sale or otherwise of interest to other employees."

## CONCLUSIONS OF LAW

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

2. The City's actions regarding the poster in the Division did not violate ORS 243.672(1)(a).

ORS 243.662 provides that "[p]ublic employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." 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." 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); *see also International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-049-12, 25 PECBR 871, 887-88 (2013). The Union 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. *Portland Assn. Teachers*, 171 Or App at 623; *Klamath County Fire District #1*, 25 PECBR at 888. 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 in order to show a violation of the "because of" prong of subsection (1)(a). *Klamath County Fire District #1*, 25 PECBR at 888. A complainant need only show that the employer took the disputed action because an employee exercised a protected right. *Id.*

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. *Id.* If the employer's conduct, when viewed objectively, has the natural and probable effect of deterring employees from engaging in activity protected by the Public Employee Collective Bargaining Act (PECBA), 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 derivative "in" violation may also be found when an employer commits a "because of" violation, as the natural and probable consequence of an employer taking actions because of protected activity is to deter protected activity. *Klamath County Fire District #1*, 25 PECBR at 888; *Oregon Public Employes Union and Termine v. Malheur County*, Case No. UP-47-87, 10 PECBR 514, 521 (1988).

We begin our analysis of the alleged "because of" violation by examining the record to determine the reason that the City asked Bentley to move the poster from the back wall of her cubicle to another location in her cubicle. This is a fact determination. *Portland Assn. Teachers*, 171 Or App at 626; *Klamath County Fire District #1*, 25 PECBR at 888. Here, after assuming the position of Utility Billing Supervisor, Blecker determined that the employee cubicles behind the passport and utility billing counters should appear more professional given their public visibility.

Blecker spoke with employees individually and collectively about removing personal items from their cubicles. Items that Blecker asked employees to remove included dead plants, dirty dishes, food, and trash. Applying this effort to Bentley's cubicle specifically, Blecker requested that she remove a framed poster featuring an illustrated lion. Subsequently, after receiving a customer complaint, Blecker asked Bentley to remove a large plastic rat. Then, in August 2013, Blecker talked with LaFrance about Bentley's Union poster. After consulting with management and legal staff, LaFrance asked Bentley to move it out of the public's direct view to a different area in her cubicle.

On these facts, we conclude that the City asked Bentley to move the poster to a different area of her cubicle to make the work area that was visible to the public look cleaner and more professional and not because Bentley had exercised a protected right. In reaching this conclusion, we note that the City did not, as the Union alleged, ask Bentley to move the Union poster from the back wall of her cubicle, while allowing other non-union posters or displays on that back wall. Bentley had not previously displayed *any* items on this back cubicle wall. Moreover, the City's request that Bentley move the Union poster to an area of her cubicle that was less visible to the public was consistent with its request that Bentley and other employees not display such non-work materials in areas of high public visibility. Consequently, we conclude that the Union has not proved a "because of" violation.

We turn to the alleged "in" violation. As set forth above, when analyzing such an allegation, 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 an employee's exercise of protected rights under an objective standard. *Portland Assn. Teachers*, 171 Or App at 624. Here, LaFrance asked Bentley to merely move the poster to a different area of her cubicle. In doing so, LaFrance did not threaten discipline or any form of reprisal. Moreover, LaFrance did not attempt to prevent Bentley from displaying the poster; to the contrary, he suggested that she move it to another location within her cubicle. Further, other employees were not asked to remove posters or other Union-related materials from their workspaces and there were numerous other displays of Union-related messages displayed throughout the workplace that were not objected to by the City. Having considered the totality of the circumstances in this case, we conclude that asking Bentley to move her poster to a different area of her cubicle would not have the natural and probable effect of interfering with an employee's exercise of protected rights.

Finally, we disagree with the Union's assertion that the City discriminatorily enforced a rule with respect to Union-related communications. "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." *Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon, Judicial Department*, Case No. UP-3-04, 20 PECBR 864, 873 (2005).

At the outset, we note that, unlike many cases involving employer prohibitions on union-related communications, the City's request that Bentley move the poster to a different area in her cubicle did not target the nature of that communication. In other words, the City did not

seek to enforce a rule barring "union posters" on cubicle walls. *Cf. Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Service*s, Case No. UP-043-11, 25 PECBR 525, *recons*, 25 PECBR 764 (2013) (employer issued directive barring employees from using the employer's e-mail system for union-related communications); *Judicial Department*, 20 PECBR at 875-76 (employer barred employee discussions concerning union issues); *Oregon Public Employees Union v. Jefferson County*, Case No. UP-22-99, 18 PECBR 146, 152-53 (1999) (employer sought to ban employee discussions of strike-related issues). Rather, the City asked Bentley to move a poster from her back cubicle that happened to contain a union message. Moreover, the record does not establish that the City permitted Bentley to post other non-Union and nonwork materials in that same area on the back cubicle wall. Rather, the City's request that Bentley move the poster was consistent with the City's overall directives concerning displays of nonwork materials in areas of high public visibility, such as Bentley's back cubicle wall. Consequently, the Union has not established that the City discriminatorily enforced an otherwise facially neutral directive in violation of ORS 243.672(1)(a) when it asked Bentley to move her poster.

In arguing for a different result, the Union contends that Bentley's display of the poster is identical to the wearing of union insignia, for which this Board has adopted a special rule that mirrors a rule adopted by the National Labor Relations Board (NLRB) under the National Labor Relations Act (NLRA). *See*, *e.g.*, *International Association of Firefighters, Local 1817 v. Jackson County Fire District, No. 3*, Case No. UP-64-90, 12 PECBR 656, 662 (1991) ("[t]his Board analyzes union insignia cases under the principles announced in *Republic Aviation Corporation v. NLRB*, 324 U.S. 793, [65 S Ct 982] (1945), and its federal case law progeny"). Under that precedent, as a general rule, the wearing of union insignia or buttons in the work place is protected activity, and an employer may not prohibit such activity unless the employer can demonstrate that "special circumstances" exist that justify the prohibition. *Id.* The general rule also applies to employees' rights to wear shirts or buttons with slogans that demonstrate union support. *Id.* The facts of each case determine whether "special circumstances" exist to warrant a particular prohibition. *Id.* at 662-63.

Neither this Board nor the NLRB (or enforcing federal courts), however, has extended this doctrine for the *wearing* of union insignia to the *posting* of union-related material anywhere in the workplace. Presumably, that is because what an employee wears in the workplace has less of an effect on an employer's property and managerial rights than the physical posting of materials throughout the workplace. This Board has also adopted NLRB precedent concerning other forms of union support in the workplace, including those that concern solicitation of union support and the distribution of union literature. *See, e.g.*, *Judicial Department*, 20 PECBR at 872-74; *Oregon Public Employees Union v. Executive Department*, *Adult and Family Services Union*, Case Nos. UP-111/124-87, 11 PECBR 79, 86-87 (1988); *Oregon Public Employes Union, Local 503, SEIU, AFL-CIO v. Department of Revenue, Executive Department, State of Oregon*, Case No. C-56-81, 6 PECBR 4901, 4905 (1981). The display of union support in this case (a poster on an employee's cubicle wall), however, does not comfortably fit into any of the above categories, and we decline to squeeze such a display into one of those existing categories, or to apply one of the particularized special rules for those categories to the cubicle poster in this case. It is sufficient that, as set forth above, the City's request that Bentley move the poster to a different area in her

cubicle did not "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." ORS 243.672(1)(a). Therefore, we will dismiss the complaint.

3. The City's removal of Union stickers from the outside of a Library employee's locker did not violate ORS 243.672(1)(a).

The Union also alleges that the City violated ORS 243.672(1)(a) when it removed Union-related stickers and flyers from Burgess's locker, while allowing personal, non-Union material on employee lockers. As with the directive concerning Bentley's poster, the City's actions regarding Burgess's locker do not concern a directive specifically prohibiting Union-related materials. Rather, the Union similarly contends that the City discriminatorily enforced an otherwise facially neutral policy when it removed the stickers and flyers from Burgess's locker because Burgess had previously displayed other personal, nonwork material on her locker without interference. For the following reasons, we agree with the Union's contention with respect to the flyers on Burgess's locker, but not with respect to the stickers.[1]

Employee lockers in the Library are located in the hallway outside the break room. Although Library employees have not typically decorated the outside of their lockers, the Library does not have any written policies on the use of the lockers or limitations on what can be displayed on them. Further, Library employees have not been given any verbal guidance on locker decorations, with one caveat. The Library's Director, Barnes, has expressed a verbal policy to employees that items are not to be affixed to vertical flat services in the Library building unless blue painter's tape is used. Employees are generally familiar with this policy and refer to it colloquially as the "blue tape rule."

Even though Burgess was aware of the "blue tape rule," she began placing a Union sticker on the outside of her locker at the end of each shift. When this was brought to Barnes's attention, she directed Carter, the Library's Circulation Manager, to take care of it, and Carter removed the stickers from Burgess's locker. Carter also sent an e-mail to the Library circulation staff, telling them not to put stickers "or anything adhesive on the lockers" because they were "extremely difficult to get off."

Here, the record does not establish that the City's actions, which were consistent with the Library's "blue tape rule," discriminatorily targeted Union communications, while allowing other similar personal communications on the outside of employee lockers. Specifically, the City did not permit Burgess or other employees to affix personal stickers or other adhesives to the outside of their lockers in violation of the "blue tape rule." The record also does not establish that the City had previously permitted any stickers or adhesives to be affixed to the outside of employee lockers. Therefore, we conclude that the City did not discriminatorily enforce its neutral "blue tape rule" when it removed the Union stickers from Burgess's locker.

[1]For the same reasons set forth above regarding the cubicle wall poster, we decline the Union's request to apply our rule regarding the wearing of union insignia to the posting of stickers and flyers on City employee lockers.

4. The City's removal of flyers affixed to the outside of the employee's locker that complied with the "blue tape rule" violated ORS 243.672(1)(a).

In light of the City's removal of the stickers from her locker (and Carter's directive), Burgess then replaced the stickers with a Union flyer that she affixed with blue painter's tape, in compliance with the "blue tape rule." Hughs, the Circulation Supervisor, removed the flyer. Burgess then hung another Union flyer on her locker by cutting and folding the edges so that it would hang securely and flat on the outside of her locker door, without requiring any adhesive. Hughs again removed the flyer.

Here, unlike the stickers, Burgess's posting of the flyers comported with the Library's "blue tape rule." Yet, despite this compliance, the City nevertheless removed the flyers. Moreover, Burgess had previously placed other personal items on the outside of her locker without any interference by the City. Under these circumstances, we conclude that the City discriminatorily enforced a rule with respect to Union communications and that the City's removal of the Union flyers from Burgess's locker interfered with employees in the exercise of rights guaranteed in ORS 243.662.[2] *See Judicial Department*, 20 PECBR at 873.

In arguing for a different result, the City contends that the Union failed to establish that the City's Library managers or supervisors were aware of Burgess's other personal, non-Union, postings on her locker. Yet, Burgess testified without contradiction that she had displayed multiple personal items on the outside of her locker, which was visible to other employees. We find it highly improbable that managers and supervisors did not notice these personal items, which were posted on the outside of her locker in full visibility of anyone walking by the locker area. Rather, we find it more probable that those personal, non-Union, items were noticed by Library managers and supervisors and were left undisturbed.

Remedy

Because we have determined that the City committed an unfair labor practice, we will order that it cease and desist from any such further violations. ORS 243.676(2)(b). The Union requests that we also order the City to post a notice of its wrongdoing. We generally order such a posting if we determine that 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

[2]The recommended order reached this same conclusion of law, and the City did not file specific written objections to that order within 14 days, as required by OAR 115-010-0090 and OAR 115-035-0050(2). Yet, in its memorandum in aid of oral argument, the City nevertheless challenged this conclusion of law. Citing OAR 115-010-0090, the City contends that we may consider the objections raised for the first time in its memorandum upon a showing of good cause. Although the City is correct that we may, in our discretion, extend the time for filing objections upon good cause shown, the City made no motion to extend the time for filing specific written objections. Moreover, the City has not demonstrated "good cause" for why it did not file specific written objections to the recommended order within the required period. Therefore, we will not consider the objections raised in the City's memorandum in aid of oral argument.

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). These factors are typically understood to be in the disjunctive and thus, not all of these criteria need be satisfied to warrant posting a notice. *Laborers' Local 483 v. City of Portland*, Case No. UP-015-05, 21 PECBR 891, 908 (2007).

The City's removal of Burgess's flyers: (1) did not affect a significant number of employees, (2) did not involve a strike, lockout, or discharge, (3) was not committed by a significant number of the City's personnel, (4) was not part of a continuing course of illegal conduct, or (5) did not significantly (or potentially) impact the Union's functioning. Further, there is no evidence in the record that it was calculated or flagrant. Therefore, we decline to order the posting of a notice.

## ORDER

The City shall cease and desist from violating ORS 243.672(1)(a) as described above.

DATED this 1 day of August, 2014.

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-047-13

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| MEDFORD EDUCATION ASSOCIATION, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | RULINGS, |
| v. | ) | FINDINGS OF FACT, |
| | ) | CONCLUSIONS OF LAW, |
| MEDFORD SCHOOL DISTRICT 549C, | ) | AND ORDER |
| | ) | |
| Respondent. | ) | |
| | ) | |

On June 17, 2014, the Board heard oral arguments on Complainant's objections to a recommended order issued by Administrative Law Judge (ALJ) Julie D. Reading, after a hearing on January 16, 2014, in Salem, Oregon. The record closed on February 18, 2014, following receipt of the parties' post-hearing briefs.

Aruna A. Masih, Attorney at Law, Bennett, Hartman, Morris and Kaplan, Portland, Oregon, represented Complainant.

Kelly D. Noor, Attorney at Law, Garrett Hemann Robertson, Salem, Oregon, represented Respondent.

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On October 22, 2013, the Medford Education Association (Association) filed a complaint alleging that the Medford School District 549C (District) violated ORS 243.672(1)(g) when it failed to abide by a 2011 Memorandum of Agreement (MOA).[1] Specifically, the Association alleged that after the District received additional school funding, the MOA required the District to restore teacher work days and increase salaries and contributions to bargaining unit employees' insurance premiums. The District filed a timely answer.

[1]The complaint also pleaded an alternative allegation that the District's actions violated ORS 243.672(1)(e), but the Association withdrew the alternative (1)(e) claim and agreed to proceed only on the (1)(g) claim.

The issues are:

1. Did the District fail or refuse to comply with the MOA in terms of restoring school days, insurance coverage, and salaries, and, if so, did this violate ORS 243.672(1)(g)?

2. If the District violated ORS 243.672(1)(g), what is the appropriate remedy?

For the reasons discussed below, we conclude that the District violated the MOA, and thus ORS 243.672(1)(g), when it refused to restore four additional teacher work days[2] to the 2013-14 school year, and refused to apply additional funding to employee insurance premiums and salary increases in the manner set forth under the 2011 MOA and Appendix A to the 2011-13 collective bargaining agreement (CBA).

## RULINGS

At oral argument, the District asserted that the Association's complaint was rendered moot when the parties agreed to a successor CBA, which purportedly resolved all of the underlying issues between the parties. In order to allow the Board to consider this mootness argument, the District moved at oral argument to reopen the record for the limited purpose of providing the Board with the successor contract and the ratification date of that contract. The Association did not object to the District's request, and the Board granted the District's motion. On June 18, 2014, the District submitted five proposed exhibits: the 2013-16 CBA; two e-mails regarding the tentative agreement and the new contract; minutes from the Medford School Board meeting where the new school year calendar was adopted; and minutes from the Medford School Board meeting where the new contract was ratified. On June 19, 2014, the Association objected in part to the District's proposed exhibits and submitted a response regarding the reopening of the record. On June 19, 2014, this Board informed the parties that it intended to: (1) admit the 2013-16 CBA as Exhibit R-25; and (2) supplement the record to include findings of fact that the Association ratified the 2013-16 CBA on March 6, 2014, and the District ratified that CBA on March 10, 2014.[3] This Board further stated that it would not receive other exhibits submitted by the parties or consider the Association's June 19 response. The Board incorporates those rulings into this order.

The remaining rulings of the ALJ were reviewed and are correct.

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[2]We use the term "teacher work days," instead of "school days," because the term "school days" could be construed to mean only instructional days, whereas "teacher work days" encompasses instructional days, preparation days and training days.

[3]"We generally grant a party's motion to reopen a record for submission of additional evidence if the evidence offered is material to the issues and was unavailable at the time of the hearing." *SEIU Local 503, OPEU v. State of Oregon, Department of Transportation*, Case No. UP-11-09, 23 PECBR 939, 943 (2010) (citing *Cascade Bargaining Council v. Bend-LaPine School District No. 1*, Case No. UP-33-97, 17 PECBR 609, 610 (1998)). Here, the admitted evidence is material to the issues in this case and was unavailable at the time of the hearing.

## FINDINGS OF FACT

Parties and Relevant Contract Language

1. The Association is a labor organization within the meaning of ORS 243.650(13). The District is a public employer within the meaning of ORS 243.650(20).

2. The District and Association were parties to a CBA that was in effect from July 1, 2008 to June 30, 2011 (2008-11 CBA).

3. In 2011, the economic recession created state revenue shortfalls that significantly reduced the District's funding. The District was facing difficult financial decisions and considering extensive layoffs.

4. The parties began bargaining a successor agreement in March 2011. The Association wanted to help the District manage with limited resources and reduce layoffs. Therefore, as part of bargaining a successor agreement, the parties endeavored to create an extrinsic contract to adjust the number of teacher work days based on the District's funding.

5. The collective bargaining team members designated a subcommittee to develop the extrinsic agreement. The subcommittee met on May 19 and 26, 2011. During the May 19, 2011 meeting, the subcommittee developed the first draft of the proposed side agreement. The subcommittee organized the agreed on provisions in an outline format consisting of sections A through E, with corresponding subsections. The subcommittee developed the second draft agreement on May 26, 2011. That day, the subcommittee presented a draft of its language to the entire bargaining group. After additional discussion, the bargaining teams approved the language to be included in the MOA.

6. The parties reached agreement on a 2011-13 CBA, signing it on August 26, 2011. Article IX, section B of the 2011-13 CBA provided that the school year "shall not exceed one hundred-ninety (190) days, including not more than one hundred-seventy-seven (177) days when pupils are in attendance." In addition, the parties agreed to a wage freeze for bargaining unit members.

7. On August 26, 2011, the parties also signed the MOA. Changes were made between the May 26, 2011 version and the final signed version.[4] Specifically, an additional section had been added as section B and titled "Working Conditions During School Days." The remaining provisions had been renumbered to accommodate this addition, resulting in the MOA containing sections A through F with corresponding subsections.

8. The MOA became effective on signature and stated that it "shall expire upon ratification of a successor contract for the 2013 year."

[4]The process and reasons for these additional changes are not clear on the record. However, these details are not relevant to our analysis.

9. The MOA's opening paragraph and alphabetized provisions stated:

"This Memorandum of Agreement contains the agreement of the undersigned parties with respect to the work year and the status quo period following the expiration of the 2011-2013 collective bargaining agreement. * * * As part of those negotiations the parties agreed to reduce the number of contract days each year of the agreement to 182 as follows:

"A. Employee Work Year/School Calendar

1. For the 2011-13 school years, the number of workdays provided for in Articles 9 and 12 of the parties[']collective bargaining agreement for members of the bargaining unit shall be reduced eight (8) days. The 182 contract days shall be as follows:
   a. 170 student contact days
   b. 7 paid holidays
   c. 5 In-service days as outlined in Article 9(B)(5) and (6).

"B. Working Conditions During School Days

1. Article VII.C.2.iii will change from 'Wednesday sixty (60) minute preparation time' to 'Wednesday one hundred and twenty (120) minute preparation time.'

2. The parties further agree that the status quo 190 day cont[r]act for the 2013 year shall be reduced four (4) days until the parties ratify a successor agreement. The 186 contract days shall be as follows:
   a. 170 student contact days
   b. 7 paid holidays
   c. 5 In-service days as outlined in Article 9 (B)(5) and (6)
   d. 2 School Improvement days and 2 Professional Development days (4 total)
      i. 3.5 hours for training
      ii. 1.5 hours buildings
      iii. 2 hours preparation

"C. Compensation
1. Salary
   a. The 2010-11 contractual salary schedule shall become the 2011-13 salary schedule.
   b. Salaries for bargaining unit members shall be reduced on a pro-rated full-time equivalent (FTE) basis to each member's normal work year.
   c. The District agrees that the total salary losses related to the reduction of the school year shall be calculated and deducted

in equal amounts from paychecks remaining following the signing of this agreement.

* * * * *

2. Insurance
   a. Insurance contributions shall not be affected by the furlough days.
   b. There shall be no loss or interruption of insurance coverage to bargaining unit members due to the reduction of the work year.

* * * * *

"D. Employment Status

Since seniority is calculated based on employee's first day of service, the reduction in the work year shall not impact the seniority status of any bargaining unit members.

"E. Formula for [R]estoration of [D]ays.

1. The parties agree that restoration of cut days is a high priority. To that end, the parties have agreed to restore Professional Development/Preparation days (see A.2.d of this agreement) with additional revenues under the following conditions:
   i. If the District receives one time additional funding during the term of this agreement that is expendable on general payroll, for every $350,000 a day shall be restored up to a maximum of 190 days.
   ii. For every 0.5% increase in the per pupil allocation from the State of Oregon from 2010-11 to 2011-12 or from 2011-12 to 2012-13, a day shall be restored up to a maximum of 190 per year.
2. Days will be restored if the additional funding described above is received prior to April 15 of the given year. If funds are received after April 15, the days shall be restored in the subsequent year. If there are not days to be restored, the additional funding will be applied to the funding formula in Appendix A."

10. Appendix A was the first appendix in the 2011-13 CBA. It provided a formula for how increases in the amount of state funding received by the District would be allocated to bargaining unit member salaries and insurance contributions. It provided that if the state funding increased sufficiently, the additional funds would be first used to increase the District's contribution towards employee health insurance premiums, and any remaining moneys would go towards salary increases. Appendix A included an example of how the calculations had been performed in prior school years.

School District Funding – Generally

11. The Oregon State Legislature determines the amount of school district funding it will provide statewide. The Oregon Department of Education (ODE) serves as the facilitator for allocating and distributing school district funding.

12. To assist ODE in determining the proper allocation, school districts provide it with estimates of district enrollment numbers. School districts also provide ODE with enrollment estimates for students in designated categories such as those that are disabled, impoverished, and in pregnancy programs.

13. After a school district estimates its likely annual enrollment, ODE determines how much funding a school district should receive based on that enrollment and available legislative funding. ODE then provides school districts with a funding estimate at the beginning of the school year. ODE continues to provide school districts with monthly estimates that are submitted with funding payments. These are referred to as warrants. As the school year end approaches, ODE determines if a district's enrollment estimates were correct. ODE then provides the school districts with a May 15 warrant and tells them the amount that they should have received. This is referred to as the "enrollment reconciliation." ODE makes this determination from total actual enrollment, weighted by students in specific categories. This is considered a school district's per-pupil allocation.

14. In the May 15 warrant, ODE also makes adjustments to a school district's previous year's funding. This figure is an adjustment based on a school district's apportionment of statewide total public funding. ODE also determines the school districts' apportionment of an annual state high-disability grant, which like the general apportionment, may be less or more than what they initially received. Accordingly, in the annual May warrants, ODE provides school districts with information and a corresponding payment reflecting: (1) their enrollment reconciliation, (2) with apportionment reconciliation added or subtracted, and (3) the high disability grant added or subtracted separately. This is referred to as the "apportionment reconciliation."[5]

District's May 2012 Reconciliation

15. In May 2012, the District received revised State School Funding Estimates for the 2010-11 and 2011-12 school years. These estimates showed that the District's 2010-11 per-pupil allocation equaled $5,688 and its 2011-12 per-pupil allocation equaled $5,848.

16. In May 2012, the District also received its final payment and warrant, including its 2010-11 apportionment reconciliation. The apportionment reconciliation increased District funding by $828,582.96 (state school fund of $681,704.46, plus $146,878.50 in additional high-cost disability funds).

[5]At different times, witnesses used the terms "true-up" and "reconciliation" to refer to both the enrollment reconciliation and the apportionment reconciliation. For the sake of clarity, we will refer to each type of reconciliation separately.

17. Applying MOA section E, the District considered the May 2012 additional apportionment reconciliation funds as "one time additional funding." Because the District received the funding after April 15, 2012, the District determined that it should be applied to the 2012-13 school year. The District determined to restore teacher work days by dividing $350,000 (contract amount needed to restore one day) into $828,582.96 (2010-11 additional one-time funding), which equaled two restorable days in the 2012-13 school year.

18. The District restored an additional two days based on the $160.00 per-pupil increase from 2010-11 to 2011-12.[6] In total, the District restored four days to the 2012-13 school year, for a total of 186 teacher work days.[7]

Events Related to the 2013-14 School Year

19. In spring 2013, the Association and the District began negotiating a successor CBA. At a May 23, 2013 bargaining meeting, the parties discussed their understanding that the District had received $800,000 in one-time additional funding.

20. On April 15, 2013, District Superintendent Phil Long shared three proposed 2013-14 school year calendars with the Association's President, Cheryl Lashley. Two of the proposed calendars included 190 teacher work days. One of the proposed calendars provided for 186 teacher work days.

21. In May 2013, the District received revised State School Funding Estimates for the 2011-12 and 2012-13 school years. These estimates reflected that the District's 2011-12 per-pupil allocation equaled $5,859 and its 2012-13 per-pupil allocation equaled $5,983.

22. In May 2013, the District also received its final payment and warrant, including its apportionment reconciliation, showing one-time additional funding in the amount of $1,532,870.99 (additional state school fund of $1,549,140.04 minus $16,269.05 in reduced high-cost disability funds).

23. On June 3, 2013, Long wrote to Lashley and stated that he planned to take a tentative 2013-14 school year calendar to the District Board of Education. He explained that the "proposed tentative calendar is similar to this year's calendar and makes no presumptions about how the contract will be resolved. It is, effectively, a status quo calendar." Long attached a copy of a 186-day school year calendar.

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[6]The District's method of calculating the additional two days based on the per-pupil increase was complex and not relevant to our analysis. Accordingly, we do not describe it here.

[7]At hearing, the Association presented calculations to suggest that the District should have restored seven teacher work days to the 2012-13 school year instead of four. The District responded that the Association did not plead any allegation regarding the 2012-13 school year, and that, in any event, such a claim would be untimely. At oral argument, the Association clarified that it was not making a claim regarding the 2012-13 school year and that the calculations were not offered for that purpose, but rather as context for arguments regarding the claim for the 2013-14 school year. The evidence regarding the 2012-13 school year, therefore, is considered only for that limited purpose.

24. Lashley responded immediately, stating "[o]ur current MOA has the 'trigger' language for either adding back PD [Professional Development] days, and with the addition of the $800,000 that would equate to a 2 day add back, or some other compensation for that money."

25. On June 10, 2013, the District School Board of Education approved a 2013-14 school year calendar, with 186 teacher work days.

26. On June 20, 2013, Oregon Education Association (OEA) Consultant Jane Bilodeau wrote to Superintendent Long, requesting that the District restore school days and/or increase insurance coverage and salaries in accordance with section E of the MOA. Bilodeau stated that the District had received $800,000 in additional one-time monies and a per-pupil increase of 2.1 percent between the 2011-12 school year and the 2012-13 school year.

27. The District's attorney responded to Bilodeau on July 8, 2013, stating "[t]here is no support in the MOA language for your interpretation that the District is required to take the steps you have listed."

28. On August 10, 2013, Bilodeau requested that the District provide her with information regarding the District's additional funding in 2013, along with other financial data about insurance and budgeting.

29. On September 6, 2013, the District responded to the Association, providing the requested information. On October 22, 2013, the Association filed the complaint in this case.

30. At the time of the January 16, 2014 hearing, the parties had not yet reached agreement on a successor CBA. The District had implemented its final offer, which stated that the school work year "shall not exceed one hundred-ninety-two (192) days." However, the teacher work days for the 2013-14 school year remained at 186.

31. After the hearing, the parties reached a tentative agreement on a successor CBA. On March 6, 2014, the Association ratified the tentative agreement. The District ratified the tentative agreement on March 10, 2014. The resulting 2013-16 CBA was signed by the Association representative on June 12, 2014, and by District representatives on June 13, 2014.

32. The 2013-16 CBA set the teacher work year at 190 days for the 2013-14 school year. The new agreement also set the compensation and insurance benefits package for bargaining unit employees.

## CONCLUSIONS OF LAW

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

2. The District violated the MOA and ORS 243.672(1)(g) when it refused to restore teacher work days to the 2013-14 school year and refused to increase salaries and contributions to insurance premiums for bargaining unit employees under the Appendix A formula.

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." The Association contends that the District violated the terms of the MOA, and therefore, subsection (1)(g), when it refused to restore teacher work days for the 2013-14 school year and refused to increase bargaining unit salaries and contributions to insurance premiums after receiving additional one-time revenues. The District responds that it did not violate the MOA as alleged, arguing that the provisions of the MOA (Section E) governing restoration of work days and applying additional funding according to the formula in Appendix A did not apply during the *status quo* period. For the following reasons, we agree with the Association.

To resolve this dispute, we must interpret the relevant provisions of the MOA. Our goal when interpreting contracts 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, 91, 45 P3d 162, (2001), *rev den*, 334 Or 491 (2002). Contract language is ambiguous if it can be given more than one plausible interpretation. *Id.* If the provision is ambiguous, we proceed to the second step and examine extrinsic evidence of the parties' intent. 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.

Here, the parties primarily disagree about the scope of Sections B.2 and E. Section B.2 states that the "parties further agree that the status quo 190 contract for the 2013 year shall be reduced four (4) days until the parties ratify a successor agreement." The District argues that Section B.2 established 186 as the fixed number of teacher work days for the 2013-14 school year (unless the parties reached an agreement, ending the *status quo*), and that Section E had no application once the parties entered the *status quo* period. In essence, the District reads Section B.2 as the exclusive provision that governed the *status quo* period and reads the remaining MOA provisions as having controlled the parties' obligations before the expiration of the 2011-13 CBA. The Association argues that the 186 teacher work days in Section B.2 were a baseline for the 2013-14 school year, subject to possible restoration under Section E, which provided for reduced days to be restored according to a specific formula if the ODE provided the District with additional funding.

In the recommended order, the ALJ first examined the text and context of the language in Sections B.2 and E, and concluded that this language was ambiguous. After reviewing the extrinsic evidence offered by the parties, the ALJ concluded that the Association's interpretation of the contract gave meaning to all provisions of the MOA and was otherwise consistent with the intent of the parties. As a result, the ALJ concluded that Section E's requirements were intended to continue during the *status quo* period, and that the District violated the MOA and ORS 243.672(1)(g) when it failed to restore four school days to the 2013-14 school year.

We agree with and adopt this portion of the recommended order's reasoning and conclusion, to which the District did not object.[8] In short, considering the MOA as a whole, along with the extrinsic evidence, we conclude that Section E continued to apply during the *status quo* period, and therefore, the District violated ORS 243.672(1)(g) as alleged.

Although the District has not objected to this conclusion of law, it raised a new contention at oral argument as to why the complaint should nevertheless be dismissed. Specifically, the District argued that because the parties had agreed to a new CBA after the hearing record had closed, the case had become "moot." Under that theory, because the MOA "expire[d] upon ratification of a successor contract for the 2013 year," and the parties had ratified such a successor contract in March 2014, there was no longer any viable dispute under the MOA.[9] For the following reasons, we disagree with the District's "mootness" defense.

A case before this Board "is moot, despite a continuing dispute between a union and an employer over the meaning or legality of a contractual provision or proposal, if there are no longer any specific rights of specific parties at issue." *Portland Assn of Teachers v. Portland Sch. Dist. 1,* 94 Or App 215, 218, 764 P2d 965 (1988). Alternately stated, we will consider a case moot if a "decision no longer will have a practical effect on or concerning the rights of the parties." *Jefferson County v. Oregon Public Employees Union*, Case No. UP-18-99, 20 PECBR 217, 226 (2003) (Order on Remand), citing *to Brumnett v. PSRB,* 315 Or 402, 406, 848 P2d 1194 (1993).

Here, although the parties have signed a successor CBA, the District has not cited (and we have not found) a contractual provision that addresses, much less extinguishes, the dispute as to whether employees were entitled under the MOA to additional compensation or insurance contributions under the Appendix A formula, as asserted by the Association (and discussed below). Consequently, on this record, we are unable to conclude that our decision will not "have a practical effect on or concerning the rights of the parties" regarding the District's violation of the MOA. *See Jefferson County*, 20 PECBR at 226.

We now turn to the Association's limited objection to the recommended order. As a remedy to the District's breach of the MOA, the recommended order required the District to restore the maximum number of work days allowed under the MOA (four days added to 186 days for a total of 190 days), or provide the Association's members with the "financial equivalent" of those four days. Although the recommended order also concluded that there was additional funding left over after restoring the teacher work year to 190 days, the recommended order declined to require that the remaining funding be applied to the Appendix A formula, pursuant to section E of the MOA. The recommended order reasoned that, under the terms of the MOA, additional funding would be applied to the Appendix A formula only if there was insufficient funding to restore *any* work days at all. The Association contests this reading of the MOA, arguing that the parties intended for the

[8]When a party does not object to a recommended order, any potential objections are deemed waived and unpreserved. *See International Brotherhood of Electrical Workers, Local Union No. 659 v. Eugene Water & Electric Board*, Case No. UP-008-13, 25 PECBR 901 (2014); *Jackson County Sheriff's Employees' Association v. Jackson County Sheriff's Department*, Case No. UP-023-11, 25 PECBR 449, 459 (2013).

[9]As set forth above, we granted the District's motion, which was not objected to by the Association, to reopen the record and submit evidence regarding the successor CBA and its ratification.

District to apply additional funding to the Appendix A formula once the 190 maximum work days had been restored. The District argues that any remedy should be limited to that set forth in the recommended order because to do otherwise would grant the Association a "double remedy."

We begin by determining whether the MOA language at issue is ambiguous. As noted above, in order to 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.'" *Tualatin Employees' Association v. City of Tualatin*, Case No. UC-012-12, 25 PECBR 565, 572 (2013) (quoting *Cassidy v. Pavlonnis*, 227 Or App 259, 264, 205 P3d 58 (2009)). The "threshold to show an ambiguity in a contract is not high." *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03, 23 PECBR 222, 238 (2009), *rev'd and rem'd*, 246 Or App 477, 268 P3d 627 (2011), *rev'd and rem'd*, 353 Or 170, 295 P3d 38 (2013) (citing *Milne v. Milne Construction Co.*, 207 Or App 382, 388, 142 P3d 475, *rev den*, 342 Or 253 (2006)).

Here, we have little difficulty concluding that Section E, the disputed provision of the MOA, is ambiguous—*i.e.*, susceptible to more than one plausible interpretation. Section E.2 of the MOA states that, "[i]f there are not days to be restored, the additional funding will be applied to the funding formula in Appendix A." The Association argues that this language was meant to apply to the situation here—namely, if the District received sufficient funding to restore all of the reduced teacher work days up to the 190 day maximum, then there were "not days to be restored" and the District was obligated to apply any additional remaining funding in the manner set forth in Appendix A. The District argues that the recommended order correctly interpreted this language to mean that funding would only be applied to the Appendix A formula if the additional funding was so little that there were no days to be restored at all.

Both interpretations are plausible. It is plausible that the parties intended for Section E.2 to apply once the cut days were fully restored up to the 190-day maximum, at which point there "are not days to be restored." It is also plausible that the language would only apply if the additional funding was so little that there were not *any* "days to be restored."

The extrinsic evidence, however, clarifies the intention of the parties. Specifically, both parties offered testimony from witnesses who participated in the negotiation of the MOA, as well as notes and minutes from the bargaining sessions where the MOA was discussed. The testimony from witnesses for both parties confirmed that the intent behind Section E.2 was to first use any additional funds to restore teacher work days, as both parties agreed that this was the top priority. That intention was also captured in Section E.1 of the MOA. Further, these witnesses (and bargaining notes) confirmed that Section E.2 was meant to apply in the event that all of the cut days were restored (up to the 190 day limit) and additional funds were still available. Under such circumstances, the additional funds would be applied to the formula in Appendix A. Consequently, we agree with the Association that Section E.2 of the MOA required the District to apply any remaining additional funds (after restoring cut days to the 190-day maximum) to the formula for salary and insurance contribution increases set forth in Appendix A.

We must now determine whether the District received sufficient additional revenues to trigger the Appendix A formula. The calculations presented by both parties are significantly

different, but both calculations make it clear that there would be at least some level of funds remaining after the final four teacher work days are restored. The Association calculated that, after restoring the additional four teacher work days to the 2013-14 school year, the District would still have $728,933 of additional funding to be applied to the Appendix A formula. The District disagreed, asserting that the calculation for the revenue available for restoration of days, salary and insurance contributions under the MOA should be "normalized" to exclude certain federal and state funding contributions that the District did not view as "additional one time funding" under the MOA. Under its calculations, there would only be $132,870.99 of additional funding after restoring the four additional teacher work days to the 2013-14 school year.[10]

The parties presented extensive evidence and arguments relevant to their respective calculations, including whether special funding received from the federal and state governments to compensate for revenue shortfalls should have been characterized and calculated as one-time funding, or increases in per-pupil funding. However, it is not necessary to decide at this point the exact amount of additional funds available for application to the Appendix A formula. Under both the District and the Association's calculations, there were additional funds available even after restoring the four teacher work days to the 2013-14 school year. These funds, regardless of the amount, should have been applied to the Appendix A formula as required by the MOA. As a result, the District violated the terms of the MOA when it failed to apply the additional funds to salary and insurance contribution increases for bargaining unit members.

## REMEDY

Having concluded that the District violated ORS 243.672(1)(g), we now turn to the remedy. In its complaint, the Association requested that we issue an order that the District: (1) cease and desist from violating the MOA; (2) restore four teacher work days to the 2013-14 school year and make bargaining unit members whole for the difference in insurance and salary they were paid and what they should have been paid under the MOA and the Appendix A formula; (3) post a notice of the violations; (4) pay a civil penalty of $1,000; and (5) reimburse the Association's filing fee.

Because we have determined that the District violated the MOA and ORS 243.672(1)(g) by failing to restore school days during the 2013-14 school year, and by failing to follow the formula set forth in Appendix A, we will order the District to cease and desist from engaging in such conduct. *See* ORS 243.676(2)(b). We also agree that a make whole remedy is appropriate, which would normally include restoration of the four teacher work days to the 2013-14 school year

[10]In May 2013, the District received the revised State School Funding Estimates for the 2011-12 and 2012-13 school years. These estimates reflected that the District's 2011-12 per-pupil allocation equaled $5,859, and its 2012-13 per-pupil allocation equaled $5,983 (showing a 0.98 percent increase). At that time, the District also received its final payment and warrant, including information about its 2011-12 apportionment reconciliation in the amount of $1,532,870.99 (additional state school fund of $1,549,140.04 minus $16,269.05 in reduced high-cost disability funds). In both the District's calculation for adding days to the 2012-13 school year, and its May 2013 hypothetical calculation for the hearing, the District considered the apportionment reconciliation funds it received as "additional one time funding." Under the MOA, the District was required to restore one day for every $350,000 in one-time funding, up to 190 days. Dividing $350,000 into $1,532,870.00, equals 4.4 days. Per the MOA, the maximum number of teacher work days was 190, which the District would reach after restoring four days. This leaves a minimum of $132,700 available, even using the District's more conservative estimates.

and the payment of whatever additional money and benefits the bargaining unit members should have received under the MOA, plus interest. However, as noted above, the exact amount of additional money that should have been applied to salary increases and insurance contributions under the Appendix A formula is in dispute between the parties. In addition, it is difficult to discern what impact, if any, the recently ratified 2013-16 CBA should have on the remedy. At oral argument, the parties acknowledged that it would be appropriate to provide them time to bargain over an appropriate remedy, should we award an additional remedy beyond that set forth in the recommended order. We agree that it would be appropriate to allow the parties an opportunity to come to a mutually satisfactory agreement. Accordingly, we will order the parties to bargain in good faith over the remedy (which might include the posting of a notice or payment of a civil penalty). If the parties do not reach agreement after 60 days of bargaining, each party shall submit to the Board the last offer made to the other party within seven days of the conclusion of bargaining. The Board may choose the Association or District's final offer, or craft an alternate remedy that best effectuates the purposes and policies of the Public Employee Collective Bargaining Act.

## ORDER

1. The District violated ORS 243.672(1)(g) by failing to restore teacher work days and failing to increase contributions to employee insurance premiums and salaries as required by the MOA. The District shall cease and desist from engaging in such conduct.

2. The District and the Association shall bargain in good faith over an appropriate remedy consistent with the Remedy section of this Order. The parties have 60 days from the date of this Order to reach an agreement. If the parties do not reach an agreement within 60 days, each party shall submit to the Board the last proposal that it made to the other party within seven days of the conclusion of bargaining. The Board will either select one of the parties' last offers or craft its own remedy.

DATED this 13 day of August, 2014.

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-002-13

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| JOE HORN,<br><br>Complainant,<br><br>v.<br><br>SALEM POLICE EMPLOYEES' UNION,<br><br>and<br><br>CITY OF SALEM AND SALEM POLICE DEPARTMENT,<br><br>Respondents. | ) | RULINGS,<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND ORDER |

Sean J. Riddell, Attorney at Law, Portland, Oregon, represented Complainant.

Jaime B. Goldberg, Attorney at Law, Makler, Lemoine, & Goldberg, PC, Portland, Oregon, represented Respondent Salem Police Employees' Union.

Jeffrey P. Chicoine, Attorney at Law, Miller Nash, LLP, Portland, Oregon, represented Respondents City of Salem and Salem Police Department.

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On August 29, 2014, Administrative Law Judge Larry L. Witherell issued a recommended order in this matter. The parties had 14 days from the date of service in which to file written objections. *See* OAR 115-010-0090; OAR 115-035-0050(2). Neither party filed objections.

When neither party objects to a recommended order, we generally adopt the recommended order as our final order, and we consider any objections that could have been made to that order unpreserved and waived. *International Brotherhood of Electrical Workers, Local Union No. 659 v. Eugene Water & Electric Board*, Case No. UP-008-13, 25 PECBR 901 (2014). Consistent with that practice, we will adopt the recommended order as our final order in this matter. The final order

is binding on, and has precedential value for, the named parties only. *Id.* Despite the precedential limitations of such a final order, we publish the uncontested recommended order as an attachment to the final order. *Clackamas County Peace Officers Association and Atkeson v. City of West Linn*, Case No. UP-014-13, 26 PECBR 1 (2014).

ORDER

1. The Board adopts the recommended order as the final order in this matter.

2. The complaints against the Salem Police Employees' Union and the City of Salem/Salem Police Department are dismissed.

Dated this 24 day of September, 2014

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-002-13

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| JOE HORN,<br><br>Complainant,<br><br>v.<br><br>SALEM POLICE EMPLOYEES' UNION,<br><br>and<br><br>CITY OF SALEM AND SALEM POLICE DEPARTMENT,<br><br>Respondents. | ) | RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER |

A hearing was held before Administrative Law Judge (ALJ) Larry L. Witherell on April 28-29, 2014, in Salem, Oregon. The record closed on June 2, 2014, with the receipt of the parties' post-hearing briefs.

Sean J. Riddell, Attorney at Law, Portland, Oregon, represented Complainant.

Jaime B. Goldberg, Attorney at Law, Makler, Lemoine, & Goldberg, PC, Portland, Oregon, represented Respondent Union.

Jeffrey P. Chicoine, Attorney at Law, Miller Nash, LLP, Portland, Oregon, represented Respondents City of Salem and Salem Police Department.

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On August 19, 2013, Joe Horn (Horn or Complainant), filed this unfair labor practice complaint against Salem Police Employees' Union (Union), and the City of Salem and Salem Police Department (collectively City or Department). The complaint, as amended on April 1, 2014, alleges that the Association breached its duty of fair representation in violation of ORS 243.672(2)(a) and that the City breached the collective bargaining agreement in violation of ORS 243.672(1)(g). The Union and City filed timely answers to the complaint.

The issue presented for hearing was:

Did the Salem Police Employees' Union (SPEU) conduct toward and treatment of Joe Horn, relative to his termination by the City, violate SPEU's duty of fair representation and ORS 243.672(2)(a)?

For the reasons set forth below, we conclude that the Union did not violate ORS 243.672(2)(a) as alleged. We further dismiss the complaint against the City.

## RULINGS

The ALJ bifurcated the case. In duty of fair representation cases, we bifurcate the claims in order to address the allegations against the labor organization first. *Slayter v. Service Employees International Union Local 503, and State of Oregon, Department of Fish and Wildlife*, Case No. FR-01-12, 25 PECBR 494, 495 (2013); *Gibson-Boles v. Oregon AFSCME Council 75, and State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-46-01, 20 PECBR 483, 487 (2003), *AWOP*, 195 Or App 185, 99 P3d 1238 (2004), *rev den*, 338 Or 16, 107 P3d 26 (2005); *Mengucci v. Fairview Training Center and Teamsters Local 223*, Case Nos. C-187/188-83, 8 PECBR 6722, 6734 (1984).

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

## FINDINGS OF FACT

1. The City is a public employer as defined by ORS 243.650(20). The Union is a labor organization as defined by ORS 243.650(13).

2. The Union is the exclusive bargaining representative for a unit of all employees in the City's police department, including police officers, corporals, police laboratory technicians, community service officers, custody officers and special investigators. The City and Union are parties to a collective bargaining agreement, which, at the time of the hearing, was effective from July 1, 2011 to June 30, 2014.

3. During the relevant times and events, or where otherwise specified, the following individuals held the following positions with the Union:

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|---|---|
| Richard Beal | Member of Executive Board |
| Jacob Burke | Secretary and Member of Executive Board |
| Mark Makler | Attorney for the Union |
| Tom Rousseau | Member of Executive Board |
| Jeff Staples | President and Member of Executive Board |
| Dustin Wann | Member of Executive Board |

4. Officer Beal has been a police officer for 26 years, including 13 years with the City, and has been on the Union executive board (E-Board) for 6 years. Officer Burke has been a police officer with the City for 16 years, and has been on the executive board for a little over 2 years. Officer Rousseau has been a police officer for the City for 26 years and has been a member of the executive board for 7 years. Detective Staples has been a police officer for 31 years, including 27 years with the City. He was the Union secretary from 1999 to July 2007, when he became the Union president. Detective Wann has been a police officer with the City for about 10 years and has been on the executive board for about 2 years.

5. During the relevant times and events, or where otherwise specified, the following individuals held the following positions with the City:

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|---|---|
| James Anglemier | Lieutenant |
| Ben Bales | Sergeant, Internal Affairs Unit |
| Jeff Barratt | Sergeant |
| Steve Bellshaw | Deputy Chief of Police |
| James Ferraris | Deputy Chief of Police, Investigations Division |
| Aaron (Pat) Garrett | Sergeant, Internal Affairs Unit |
| Mark Keagle | Lieutenant, Special Operations Section |
| Skip Miller | Lieutenant, Internal Affairs |
| James Mooney | External Investigator for the City |
| Gerald Moore | Chief of Police |

6. Joe Horn worked for the City as a police officer from November 2008 until March 27, 2013. During that time he was also a member of the Union. (First Amended Complaint, ¶3 and ¶4; Union Answer ¶1 and ¶2.)

Internal Affairs Investigation (August 14, 2012): The Photo and Phone Incident

7. In July 2012, Sgt. Barratt learned that Officer Horn possessed on his cell phone a photo showing a partially nude, female City employee, and that Horn had shown it to another police officer. As a result, Barratt met with Lt. Keagle, Special Operations, and Deputy Chief Ferraris, Investigations Division, to recount the details.

8. On July 20, 2012, Deputy Chief Ferraris directed that Sgt. Garrett conduct an internal affairs (IA) investigation into the allegations.

9. On August 13, 2012, Garrett informed Horn of the complaint (in which Horn was alleged to have shown the photo to another Salem police department employee), and scheduled an IA interview with Horn for August 14. Garrett informed Horn that the complaint, if substantiated, may constitute violations of Policy 2.01, Personal Conduct, Section III (Conducting Unbecoming an Officer); Rules of Conduct, Part II (General Conduct and Responsibilities), Section A (General Conduct); and the City Policy of Nondiscrimination and Harassment. (Exh. R-3 at 133.)

10. Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer) states: "Since the conduct of an officer, on or off duty, may reflect directly upon the department, an officer must at all times conduct himself in a manner which does not bring discredit to himself, the department, or the City." (Exh. R-3 at 144.)

11. The Rules of Conduct, Part II (General Conduct and Responsibilities), Section A (General Conduct), states that "[m]embers, on and off duty, shall be governed by the ordinary and reasonable rules of good conduct and behavior, and shall not act in such a manner as to bring reproach or discredit upon the department or the City of Salem." (Exh. R-3 at 149.)

12. The pertinent sections of the City's Policy of Nondiscrimination or Harassment states:

> "The City of Salem is committed to providing all employees with a work environment free of discrimination or harassment of any kind. The purpose of this policy statement is to reaffirm our commitment to equal employment opportunity and to provide a harassment free work environment for all employees. Employees include all part-time exempt, seasonal, career status employees, and volunteers working for the City and Housing Authority.
>
> "* * * * *
>
> "Harassment or discriminatory conduct, of any kind, whether physical or verbal, committed by supervisors or non-supervisory personnel or agents of the City, is prohibited in the workplace. Prevention of discriminatory activities must be practiced at all times, especially by supervisors. Supervisors and managers have additional responsibility to listen to harassment and/or discrimination complaints and to take corrective actions where appropriate. In those cases where discrimination can be established, disciplinary action up to and including termination may be taken by the City." (Exh. R-3 at 135.)

13. Garrett interviewed Horn on August 14, 2012. Union President Staples was also present to represent Horn at the investigatory interview. During the interview, Horn stated that he received the topless photo 11 months earlier, in the summer of 2011. He also stated that he showed or electronically forwarded the photo to Detective Lance Diede within a couple of days after receiving the picture. Garratt asked Horn, "are you still in possession of it?" (Exh. R-3 at 172.) Horn answered, "[n]o, I'm not. * * * It was on my other phone and it's in the bottom of the Deschutes River. Um, about last September, or last August [2011]. Uh, I only had it for like a week and then went rafting. * * * And it disappeared." (*Id.*)

Garrett asked Horn if he had a social relationship with the City employee shown in the photo. Staples objected to that line of questioning, asserting that the issue was not within the IA

notice, also referred to as a *Weingarten* notice, to Horn, and therefore, not an appropriate line of inquiry.[1] Garrett discontinued that line of inquiry.

14. During the investigation of Horn, Garrett and IA Sgt. Ben Bales also interviewed Diede. During the interview, Diede stated that Horn forwarded the photo to his cell phone in April or May 2012. Bales asked Diede, "could it have been last summer," meaning 2011? Diede answered, "[n]o. I didn't know Joe [Horn] last summer. I didn't really know Joe until I became, uh, his partner and when I joined the [Drug Activity Response Team] Unit in January [2012]." (Exh. R-3 at 176.)

15. On September 20, 2012, Garrett submitted a report on his investigation of Horn to Deputy Chief Ferraris. In the report, Garrett concluded that Horn violated the City's sexual harassment policy by forwarding the photo to another police officer; and that Horn engaged in conduct unbecoming an officer in violation of the City's personal conduct policy by forwarding the photo to another police officer.

In his report, Garrett also stated that "there is substantial evidence to support an investigation into untruthfulness on the part of Officer Horn during his interview with me." (Exh. R-3 at 118.) During the interview, it was established that in the summer of 2011 the female co-worker asked Horn if he still had the photo. Garrett concluded that Horn, when asked by the female co-worker, untruthfully represented that he did not. Garrett also concluded that Horn untruthfully represented to Garrett that he did not have the photo anymore because he claimed to have lost the cell phone in the Deschutes River in August or September 2011, even though Diede stated he received the photo from Horn in April or May 2012. Diede was certain about the time frame because he did not know Horn until January 2012, and Horn would not have had Diede's cell phone number in August or September 2011.

16. Garrett initiated a formal complaint against Horn for lying during an official investigation, and assigned the case to Bales for investigation.

Internal Affairs Investigation (September 17, 2012): Untruthfulness

17. On September 7, 2012, Bales informed Horn that a complaint had been filed against him for "[u]ntruthfulness during an official interview." (Exh. R-3 at 23.) On September 14, Bales gave Horn the formal *Weingarten* notice of the complaint against him and scheduled the IA interview for September 17. This notice alleged that Horn had been "untruthful during an official interview with Sgt. Garrett." (Exh. R-8.) The alleged conduct could be in violation of the Rules of Conduct, Part III (Professional Conduct), Section L (Truthfulness); and Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer).

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[1]The *Weingarten* notice refers to the City's notice to an employee that he/she is subject to an investigatory interview that could result in discipline, and therefore the employee may have union representation at the interview. It refers to *NLRB v. J. Weingarten*, 420 US 251, 95 S Ct 959 (1975), in which the court concluded that an employee is entitled to union representation at an investigatory interview if the employee has a reasonable belief that the interview could result in disciplinary action.

18. The City's Rules of Conduct cover police department employees. The Rules of Conduct, Part III (Professional Conduct), Section L (Truthfulness) require that all police officers "shall be truthful in their spoken and written word at all times as it relates to their professional and official conduct and duties. This applies also to official reports and court testimony which shall be factual, complete, and accurate in all details." (Exh. C-40 at 8.)[2]

19. Between September 14 and 17, Staples met with Horn and gave him some documents related to his prior interview with Garrett so that Horn could review them and prepare for his interview with Bales. During this meeting, Horn brought up the phone issue and said he may have been mistaken about the timeline, about when he lost his phone and which phone actually had the picture on it. Staples explained that at the upcoming IA interview, Bales would begin by asking Horn if he has anything he would like to tell Bales, anything he would like to add or explain before they begin the questioning. Staples advised Horn to explain to Bales that he had several phones and that he was confused about the timeline of when he lost the phone and which phone had the picture.

20. On September 17, Bales met with Horn for the IA investigation into the allegation of untruthfulness. Staples and Union Secretary Burke were present to represent Horn.

21. As Staples expected, Bales began the interview by asking Horn, "[d]o you have anything you want to say before we start asking questions." (Exh. R-3 at 25.) Instead of following the instructions that Staples had given him a day or two earlier, Horn merely answered, "[n]o sir." (*Id.*)

After a series of questions, Horn acknowledged that in his first interview he told Garrett that he had lost the cell phone that had the picture of the female employee on it a year earlier, in August 2011, on a rafting trip. He also acknowledged that he did not know Diede until Diede joined the drug activity response team (DART), in January 2012. Bales asked how Horn could send Diede the photo when the phone was on the bottom of the Deschutes River. Horn responded, "[w]ell, that's where my error was in the timeframe, 'cause when I answered the question, I said initially that I didn't know when I had, when I sent the picture and I said nine months to a year ago, and then I started processing it out loud saying it had to be on my old phone, the one that I lost in the bottom of the Deschutes." (*Id.* at 27.)

Bales then reviewed the transcript of the first interview with Horn. Bales pointed to several instances where Horn was unsure or could not recall with any certainty. He then pointed out that Horn, however, was very specific and certain about the photo and phone. Bales noted where, in the first interview, that Horn stated with certainty that he sent Diede the photo within a couple of days after receiving it. Bales stated to Horn, "there's nothing in there that says I don't know, I don't recall." (*Id.*)

Bales again noted that when Garrett asked Horn when he last had the picture, Horn said with certainty that it is on the bottom of the Deschutes River. Bales said that was not true. Horn responded,

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[2]For Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer), see Findings of Fact 10.

"[w]ell, I know that I did lose the phone and I went to Verizon and I got a printout of the phones that I had used, or that I had got over the last year. * * * And I had lost that phone, or I lost a phone, the, the, uh, a Droid Incredible, on 7/31. Got a new phone, then got that one, which was another Droid Incredible, through the warranty deal, and then I actually, that one went into the river at, down at the Willamette and I ended up putting rice in it to try and fix that one. So as far as what phone that picture was on, I don't know. Uh, as, I, I mean, yes I had the picture, yes I showed it. As far as the, the timeframe, I don't know. I, I really, I don't know." (*Id.* at 28.)

Horn acknowledged that after his interview with Garrett he realized he could not have sent Diede the photo until after January 2012. Bales then asked Horn, "[s]o what effort did you make to contact Sergeant Garrett to clarify your statement?" Horn answered, "I didn't make any effort sir." (*Id.* at 29.) When asked why not, Horn claimed not to know whether it would be appropriate. Horn did not dispute Bales when he stated, "[y]ou knew your statement wasn't truthful and accurate at the time that you were in, you were being interviewed by Sergeant Garrett, you realized that your statement wasn't true and accurate, but you made no effort to clarify that statement with Sergeant Garrett." (*Id.*)

Horn originally said the female employee asked if he still had the photo, and he said he did not, that he had lost it the summer of 2011. Bales stated that Horn lied to the female employee when he told her he no longer had the photo. Horn, however, claimed that he did not lie to her or to Garrett in the first interview, but that he merely made an error about the time frame. Horn acknowledged that his statement that the phone with the photo is at the bottom of the Deschutes River is not a true statement. Horn also acknowledged that he became aware it was not a truthful statement and that he made no effort to correct the untruthfulness during the month after the first interview with Garrett.

At one point during the interview, Bales tried to pin Horn down about why Horn could and could not remember certain facts. Bales asked if Horn texted such an amount that he would not be able to remember if he sent the picture or merely showed the picture to another officer. When Horn conceded he texted a lot, Bales asked how many per month. Horn said 11,000 per month. Bales attempted to inquire whether his excessive texting was happening on duty time or personal time. Staples objected to that line of inquiry since it was beyond the formal IA notice. Bales terminated that line of inquiry.

22. On October 2, 2012, Bales submitted a report on his investigation to Chief Moore via the chain of command. In his report, Bales concluded that Horn violated the Rules of Conduct, Part III (Professional Conduct), Section L (Truthfulness); and Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer).

Internal Affairs Investigation (September 17, 2012): Personal Use of Evidence Tape

23. On July 25, 2012, Detective Kistner reported to Internal Affairs that he believed Horn had used police evidence tape at his personal residence. Kistner visited a house that had been

rented by Horn from August 2010 to July 2012, and that was owned by another police officer. While visiting the house, Kistner observed that police evidence tape had been put on the walls.

24. On September 13, 2012, Garrett gave Horn a written *Weingarten* notice of a complaint concerning the alleged personal use of evidence tape. Garrett advised that the complaint, if sustained, could constitute violations of Policy 2.01, Personal Conduct, Section V (Integrity), and Section III (Conduct Unbecoming an Officer); and Rules of Conduct, Part II (General Conduct and Responsibilities; Section C (Obey the Law).

25. Policy 2.01, Personal Conduct, Section V (Integrity), states:

> "The public demands that the integrity of its law enforcement officers be above reproach, and the dishonesty of a single officer may impair public confidence and cast suspicion upon the entire department. Succumbing to even minor temptation can be the genesis of a malignancy which may ultimately destroy an individual's effectiveness and may contribute to the corruption of countless others. An officer must scrupulously avoid any conduct which might compromise the integrity of himself, his fellow officers, or the department." (Exh. R-3 at 91-92.)[3]

26. The Rules of Conduct, Part II, General Conduct and Responsibilities, Section C (Obey the Law), provides that "[m]embers of this department shall not violate any of the laws, statutes, or ordinances of federal, state, or local governments." (*Id.* at 79.)

27. Garrett interviewed Horn on September 17, 2012. Staples and Burke were also in attendance to represent Horn. During the interview, Horn stated that he had placed the police evidence tape on the walls of the house he was renting, and that he obtained the tape, which was property of the City, from his duty bag. He explained that he put the tape up as part of decorations for his daughter's birthday-Halloween party.

28. Later on September 17, 2012, after the IA interview, Horn asked Staples if he could get a copy of the transcript of his interview. After checking, Staples explained that IA will not release a transcript until they are ready for the next meeting.

Some Pre-Disciplinary Actions

29. Later on September 17, 2012, after Horn's second IA interview with Garrett, Chief Moore assigned Horn to paid administrative leave. Horn was required to surrender his police department identification card(s), badge, department-owned firearms, department taser, department keys, and all entry keys and devices. Horn was prohibited from entering any secure portion of a police facility or performing any police-related duties, including testifying in court proceedings, without prior written authorization from a supervisor, the police chief or his designee.

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[3]For Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer), see Findings of Fact 10.

30. On October 9, 2012, Garrett submitted his report to Deputy Chief Ferraris, in which he concluded that Horn violated Policy 2.10, Personal Conduct, Section III (Conduct Unbecoming an Officer), and Section V (Integrity); and the Rules of Conduct, Part II (General Conduct and Responsibilities), Section C (Obey the Law). On October 18, Ferraris asked Bales to determine when Horn actually rented the house in question. Bales checked into it and confirmed that Horn rented the house from August 2010 until July 2012.

31. On October 26, 2012, Chief Moore informally advised Staples that the City was prepared to provide Horn with a pre-disciplinary hearing, and that the City was proposing to terminate Horn. On October 29, the City gave Horn formal notice for his pretermination or pre-disciplinary meeting. The meeting was scheduled for November 15.

32. During this same time period, in late October or early November 2012, Staples discussed a possible resignation with both Horn and the chief. Staples wanted to negotiate Horn's resignation, which might not result in the loss of certification by the Department of Public Safety and Standards Training (DPSST). This way, Horn might be able to secure employment as a police officer with another jurisdiction. However, the chief would not agree to check "resignation" on the personnel action report that is submitted to the DPSST when a law enforcement officer leaves employment. Instead, he proposed to categorize it as a "resignation during investigation." Horn would not agree to resign under this situation since this would most likely result in the revocation of his licensure by DPSST.

33. During this same time period, Staples had discussions with Union attorney Makler. Staples informed Makler about the IA investigations and the interviews conducted with Horn. Staples advised Makler about the allegations; what the IA investigators are asking about; the focus of the IA investigations; and where the process seemed to be heading. Given their understanding of the allegations and their experience with IA investigations, Staples and Makler concluded that the investigators had reached or would reach the conclusion that Horn has been untruthful.

34. In early November 2012, Staples asked Makler to meet with Horn. On November 12, Staples and Makler met with Horn at Starbucks at the Wilsonville Fred Meyer. At the request of Staples, Makler discussed the situation with Horn, and explored likely scenarios, the likely outcome, and options should a conclusion of untruthfulness be sustained at the end of the investigation. Makler explained that there are significant ramifications to a police officer's licensure and certification if an officer is found to be untruthful. The DPSST most likely would proceed to revoke the officer's license and certification. This would make it virtually impossible to regain a license and employment as a police officer in another jurisdiction. Makler then explored options with Horn, including the option of resigning or negotiating a separation agreement with the City, which could leave Horn with the possibility of preserving his licensure and finding employment in law enforcement elsewhere; or he could just go forward with the investigation and see what happens.

35. During the Wilsonville meeting, Horn disclosed to Staples and Makler that he had had conversations with FF, an employee in the City's human resources department, about Horn's IA investigations. Horn revealed that he had a detailed memorandum containing four pages of

notes of what purported to be several communications with FF.[4] Staples asked for and received a copy of the memorandum and permission to discuss it with, and provide it to, the City.

Horn-FF Communications and Further Inquiries

36. After having been told about Horn's communications with FF, the next day, on November 13, Staples wrote to Chief Moore. Staples expressed concern that the City may have been interfering in an IA investigation of Horn. Staples wrote:

> "Officer Horn was placed on administrative leave on September 17, 2012 while he was being investigated by the City of Salem for offenses that could lead to his termination. * * * Officer Horn * * * advised me he has been in contact with [FF] from the Human Resources department during this investigation.
>
> "Officer Horn told me he had several conversation[s] with [FF] during the time he was out of state and when he returned, [FF] told him 'the City could not fire him.' According to Officer Horn[,] [FF] advised him the City would make some type of a separation agreement with Officer Horn if he came in and resigned providing him with pay and benefits for an undisclosed amount of time. According to Officer Horn, [FF] talked to him on September 11, 2012, and for over an hour * * * during the time of September 19 to 25. Officer Horn was under the impression that [FF] had the ability to change the course of the investigation by providing input as Human Resources often does on personnel matters. Officer Horn felt [FF] had information the Union did not and provided this to Officer Horn making him feel this could 'all go away' if Officer Horn came in and resigned on his own.
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> "Officer Horn said he met with [FF] at [W]est Salem Starbucks after sending an email to [FF] on September 11, 2012. [FF] called Officer Horn telling him not to communicate by email since 'they can be tracked.' [FF] told Officer Horn he is a target now. He told Officer Horn that the Police Department 'does rogue stuff and no one knows of the investigations going on.' [FF] told Officer Horn several times the Police Department could not fire him because the sexual harassment policy 'sucks' and said he would make sure Officer Horn[']s DPSST certification does not get affected. The last thing [FF] told Officer Horn was 'not to burn me by telling anyone we are talking.'
>
> "As you know if this is true, this information undermines the ability of the Union to provide Officer Horn with a fair defense and protecting his employment rights and options. This also violates article two, recognition in our current CBA, along with article three and six. Given this new information, I request the Loudermill

[4]At the request and agreement of the parties, and approval of the ALJ, the individual is identified only as FF.

[pretermination] hearing[5] scheduled for November 15, 2012 be delayed until the City can provide me with all reports generated by [FF].

"This letter is a PECBA information request with information being requested that is relevant to mitigation on behalf of Officer Horn and exculpatory information that may benefit the Salem Police Employees Union and Officer Horn in his Loudermill meeting. [FF]'s contact with Officer Horn has opened mitigating issues that have impacted the sanctity of the investigation by talking with Officer Horn while he was placed on administrative leave in [FF]'s official capacity. Not only do I request reports generated by [FF]'s contact with Officer Horn, but all notes, emails, and files that are stored in the Human Resources department regarding Joseph Horn." (Exh. R-14 at 1-2.)

37. Horn had a pre-disciplinary hearing scheduled for November 15, and Staples wanted it postponed. Staples wanted to determine if the City held any information that might have come from Horn's communications with FF, and that might be advantageous to Horn's case or provide some mitigating circumstances that the Union could use in Horn's defense. The chief agreed to postpone the pre-disciplinary hearing pending an investigation into FF's communications with Horn. The postponement also gave Staples additional time to attempt to negotiate a resignation in lieu of termination with the chief. Staples asked Horn for his phone records regarding his telephone calls with FF.

38. As a result of Staples's letter to City and his request for information, the City discovered for the first time that FF may have had communications with Horn. As a result, the City hired James Mooney, an outside human resources consultant, to inquire into Horn's allegations and the extent to which communications may have occurred between Horn and FF.

Horn and FF had at least seven conversations between September 11 and 25, 2012. According to the notes, Horn advised FF of the allegations he was facing. In his notes, Horn claims that FF assured him it was not a big deal and that he should trust FF because his role is to help employees such as Horn. On September 11, 2012, Horn wrote in his notes that FF assured Horn:

"I wasn't going to get fired and [FF] instructed for me to relax. He said it wasn't sexual harassment because the city[']s policy 'sucked' in that because it was very broad. He said I was ok and the worst that would happen is prob[ably] a day off but he was going to fight to prevent that even. He said if a day off happened then take it and move on. He told me several times to relax I wasn't going to get fired. * * * He said could the [police department] fire me, yes they could, but he wouldn't allow that to happen because that's what he does, he protects the employees['] rights." (Exh. R-13 at 2.)

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[5]A *Loudermill* hearing is a reference to *Cleveland Board of Education v. Loudermill*, 470 US 532, 105 S Ct 1487 (1985), in which the Court held that certain non-probationary, public employees have a property interest in their employment, and under the due process clause are entitled to some kind of hearing before they can be terminated. The hearing would give the employee formal notice of the charges against them and an opportunity to present a response.

On September 15, according to Horn's notes, FF purportedly told Horn not to worry about the untruthfulness allegation.

> "[It was] no big deal, I just made a mistake on the time frame and to 'not sweat it.' He said it[']s not like I lied about not showing [the picture]. He said for me to just explain that I made an error in the time frame and if they showed me in black and white when it was sent, agree. * * * He again said it[']s fine and to relax, it was just a time frame issue because I had no intent." (*Id.*)

39. Investigator Mooney found that Horn unilaterally e-mailed FF on September 11, 2012, over his employment concerns. They then met face-to-face once and had several telephone conversations over the next two weeks. Horn claimed that FF assured him that the substance of the charges was not serious enough to warrant termination, and he encouraged Horn not to resign. FF denied to Mooney that he made any of the alleged statements or representations to Horn.

Investigator Mooney did not find that there was any tampering by the City in Horn's case as the result of Horn's communications with FF. Horn had unilaterally contacted FF. While the Union was concerned that FF might have access to information that the Union did not, Mooney concluded that all of FF's information came from Horn. FF did not engage in any misconduct but he was just not very experienced, particularly in a union environment, and probably should have been more forceful in advising Horn to contact the Union. FF did not provide Horn with any negative comment about the Union or the police command.

After the initial inquiry, the City requested that Mooney re-interview FF. The City wanted Mooney to ask FF specifically about the purported statements Horn claimed FF made to him. After re-interviewing FF, Mooney again concluded that Horn attributed to FF opinions and conclusions that Horn actually held and that he communicated to FF.

40. After the City's investigation of the FF-Horn communications, the Union requested a copy of the investigation results. On December 18, 2012, the Union's attorney made a written request for a copy of the FF investigation and any future information or documents that constitute the FF investigation. He argued that the information from the FF investigation, as it related to FF's communications with Horn, might include exculpatory material or material that contained mitigating circumstances. The City provided the investigatory materials to Makler subject to a non-disclosure agreement.

41. In late February 2013, Staples asked Makler for his legal opinion on the FF matter, based on Makler's review of the FF investigatory materials. On February 28, Makler advised Staples that the investigation revealed that FF violated several City rules and policies, but he did not believe that any of the investigatory materials were exculpatory for Horn, or mitigated Horn's conduct. As a result, Makler advised Staples that he still believed that the City had a factual basis to dismiss Horn. Since untruthfulness is one of the City's conclusion, it was anticipated that the City would inform the DPSST, which would then proceed to revoke Horn's certifications.

42. The Union was twice able to delay the pre-disciplinary or pretermination hearing that was originally scheduled for November 15, 2012. By delaying the matter, the Union was able to have Horn remain on the payroll with his benefits; and the Union and Horn were given additional time to pursue an exit strategy. Horn was still considering resignation and was actively applying for positions with other jurisdictions.

Termination of Officer Horn

43. With the conclusion of the FF matter, on about March 4, 2013, the City notified Horn and Staples that it intended to move forward with the pre-disciplinary hearing. Staples met with Horn before the hearing, and informed him that the Union attorney's found nothing beneficial to Horn from the results of the Mooney-FF investigation.

44. On March 11, 2013, Deputy Chief Ferraris met with Horn. Barratt, Garrett, Bales, and Lt. Miller were also in attendance. Staples was present, representing Horn. The purpose of the meeting was to provide Horn with an opportunity to furnish any information, explanation, mitigating circumstances, or other evidence for Ferraris's review and consideration that might bear on the allegations and the contemplated disciplinary action.

In the meeting, Horn took full responsibility for sending an inappropriate photo to a fellow officer. However, he claimed that he did not lie during the investigation concerning the loss of the cell phone, but rather that he made a mistake with reference to the time frame of events. He stated that he believed he lost his phone in August 2011. When he determined he had the time frame wrong, he spoke with Staples who, Horn claimed, said it was probably a clarification issue and that Horn should clarify it during his interview (with Bales). Horn stated that he did not think he had the option to just come in to internal affairs and re-explain the time frame and his confusion. Horn said he had six cell phones and averaged over 6,000 text messages per month. Horn stressed that he took responsibility for his other conduct.

Ferraris pointed out that between the interview with Garrett on August 14, 2012, and the interview with Bales on September 17, 2012, Horn did nothing to mitigate the situation, or to make anybody aware of the error that Horn discovered about the timeline. Ferraris noted that at the beginning of the second interview, Bales asked if Horn had any information he wished to provide. At that point, Horn told Ferraris that he did not feel comfortable going to Bales and explaining himself; and, further, he did not know he could do that, or that that was an option. However, Ferraris pointed out that when Horn acknowledged that when he received notice of the untruthfulness investigation, he discussed the matter with Staples and suggested it could be about the time frame. Yet, Ferraris pointed out, Horn neither went to see Bales, nor volunteered anything at the interview with Bales. Again, Horn tried to describe the problem as an error and not untruthfulness or a lie.

At one point during the meeting, Staples requested a break. Staples was concerned with the way the conversation between Ferraris and Horn was going. He believed Horn was going down a path that was not consistent with his previous statements. Staples wanted to interrupt that development and take a break so he could consult with Horn.

45. On March 27, 2013, Ferraris terminated Horn. In his letter to Horn, Ferraris concluded that "[b]y forwarding the photograph of one employee to another employee, your actions showed a lack of good judgment. Based on your actions, you disregarded the potential for rumors or embarrassment to the [female employee]. Therefore, you violated Salem Human Resource[s] Rules and Salem Police Department Policies." (Exh. R-3 at 2.)

Ferraris concluded that Horn violated the City Human Resources Rules, Section 18, subsections 18.01, 18.02, and 18.03; Department Policy 2.01 Personal Conduct, Section III (Conduct Unbecoming an Officer); and Directive 11; Rules of Conduct, Part II (General Conduct and Responsibilities), Section A (General Conduct).

Ferraris also found that Horn took City property without permission and used it for personal purposes in violation of Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer); Section V (Integrity); Directive 11; and Rules of Conduct, Part II, Section C (Obey the Law).

Lastly, Ferraris found that Horn made untruthful statements in his IA interview in violation of Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer); Directive 11; and Rules of Conduct, Part III, Section L (Truthfulness). Ferraris took special note of Horn's statements made during the pre-disciplinary meeting on March 11.

> "With regard to the untruthful statement, you indicated that you made a mistake or an error in recounting the loss of a cell phone that contained a partially nude photograph of the female [employee]. You stated that you did not intend to lie. You stated once you realized you had made a mistake or error in your statement (regarding the loss of that phone) you did not disclose this realization to any official of the Salem Police Department prior to the second interview with Sgt. Bales. However, you indicated that you disclosed that information to your union representative, Detective Staples.
>
> "I did not find your explanation regarding the statements to Sergeant Garrett to be credible. I find that the other witness statements were credible. I further find that you provided inconsistent explanations to Sgt. Garrett, Sgt. Bales and to me. You made these statements at different times, making no effort to correct these 'errors' or 'mistakes.' I am particularly troubled by this fact in that that you did not come forward or advise any city official during the four week period between internal affairs interviews with the information about the 'error in timeframe' that you said you discovered, even though you had ample time and opportunity to do so.
>
> "The three primary areas of policy that you violated involve untruthfulness, sexual or workplace harassment, and conversion of department property to your personal use. Your actions as described, not only as recounted in each of three internal affairs investigations, but by your own account are disturbing and concerning to me. Integrity and truthfulness are the cornerstones of the police profession. How we treat and interact with our fellow employees is critical to achieving the mission and the effective operation of our organization. Because of the responsibility and power

the government has conferred on us, we are appropriately held to a higher standard by our community. Your actions indicate that you do not recognize or appreciate the impact of your behavior. Finally, by providing inconsistent and conflicting statements during your various interviews with the department, you were not credible or truthful." (Exh. R-3 at 5-6.)

Grievance Procedure

46. The grievance procedure, which is set out in Article 31 of the 2011-2014 collective bargaining agreement, provides as follows:

> "A. A grievance for the purpose of this Contract is defined as a dispute regarding the meaning or interpretation of a particular clause of this Contract or regarding an alleged violation of this Contract. A grievant is an employee or the Union filing a grievance on behalf of a group of employees similarly affected or on behalf of the Union's interests under this Contract. If the Union is a grievant, it shall be represented by an officer of the Union." (Exh. Jt-2 at 33.)

At Step I, an aggrieved employee or the Union may file a grievance with the employee's immediate supervisor with 15 days from the disputed event. If unresolved, at Step II, the grievance may be submitted to division commander within 20 days. Again, if unresolved, at Step III, the grievance may be submitted to the chief of police within 20 days. Step IV provides for arbitration.

Union By-Laws

47. The executive board consists of five individuals: the president, treasurer, secretary, and two at-large elected members.

48. Article VI (B)(4)(b) of the by-laws states that all "grievance duties shall be the responsibility of the Executive Board acting as the Grievance Committee." (Exh. C-4 at 9.) However, practice suggests that not all grievances go to the grievance committee. Article VI (B)(1), which concerns officers and duties, states that the "[p]resident shall be responsible for writing grievances." (*Id.* at 7.) Since at least 1999, when Staples became a member of the Union executive board, the president generally has been responsible for writing grievances. The president has the flexibility to carry a grievance forward unilaterally, or to work with an aggrieved employee whether the grievance goes forward, or even mitigate the grievance somewhere along the grievance process.

49. The grievance committee is explained in the Union by-laws at Article IX, Section B.

> "1. The Grievance Committee shall be the Executive Board chaired by the President. A grievance shall be defined as any dispute between labor and management cognizable under the [collective bargaining agreement].

"2. The Grievance Committee will determine by vote, the validity of the grievance after due investigation. If the Grievance Committee finds the alleged grievance is valid, it will determine to which level, if any, the Grievance Committee will seek resolution with the City through the procedures set forth in the [collective bargaining agreement].

"3. If an aggrieved member disagrees with the Grievance Committee's decision to not further the grievance steps, he may 1) appeal to the Grievance Committee and eventually through arbitration through the steps in Article Seven, Conflict Resolution,[6] or 2) appeal to the membership as set forth at a Special or Regular Meeting called by the aggrieved as set forth in these By-Laws, or 3) both.

"4. The UNION will endeavor to ensure that there is an appropriate amount of money available to assist in the legal defense of any member disciplined or dismissed for reasons believed to be unjust, and any other grievance found by the membership at large to be warranted." (*Id.* at 16.)

50. The Union believes nothing in the by-laws requires every grievance go to the grievance committee. The president can take a grievance to the grievance committee. An aggrieved employee also can take a grievance to the grievance committee. Since 2007, when Staples became president, the Union has only taken one grievance to arbitration. That case involved a change in hours for the department bicycle unit. Staples took the grievance to the grievance committee for its consideration and action, and the committee then voted to take the case to arbitration.

51. The by-laws contain a provision on conflict resolution, Article XII, which provides as follows:

"If, in the course of UNION business, a conflict arises between the UNION and a member based on internal UNION actions such as the refusal to process a grievance, the member may resolve this conflict through the following procedure:

"**STEP ONE**: The aggrieved member will discuss the grievance with a UNION representative. In this discussion, the aggrieved member will present, in writing, the issue giving rise to the grievance and all supporting facts and documentation, if any. The UNION representative shall bring the conflict to the attention of the E-Board no later than fourteen (14) calendar days after the discussion with the aggrieved member took place. The E-board will respond to the conflict within seven (7) calendar days.

[6]The reference to the conflict resolution section of the by-laws mistakenly refers to Article VII when it should be identified as Article XII.

"**STEP TWO**: If the aggrieved member is unsatisfied with the response of the E-Board they can request a meeting with the E-Board to explain their position. The E-Board will set a meeting within thirty (30) calendar days of the member's request. The E-board will respond to the member within seven (7) calendar days of this meeting.

"**STEP THREE**: If the aggrieved member continues to disagree with the conclusion of the E-Board, they may submit the issue of whether the UNION violated its duty of fair representation to arbitration. Arbitration costs will be the responsibility of the aggrieved member and must be paid in advance. However, if the UNION is at fault, the parties will equally split the arbitration costs with the UNION reimbursing the member for one-half (1/2) the cost. The decision of the arbitrator will be final and binding on both parties.

"Nothing in this article prevents the conflicted member from seeking resolution of the conflict through a vote of the membership as defined in the Special Meetings provisions of these By-Laws. The E-Board will take such steps as are necessary to preserve the conflicted member's rights to proceed to arbitration should his appeal to the UNION by successful or unsuccessful." (*Id.* at 17-18; bold in original.)

52. Article VII (B)(1) of the Union by-laws, provides that special meetings may be called by the president, a majority vote of the executive board, or "[b]y a member for the express purpose of appeal to a decision by the Grievance Committee regarding any grievance filed by said member." (*Id.* at 14.)

53. The Union believes that, in the last sentence under Step Three, "The E-Board will take such steps as are necessary to preserve the conflicted member's rights to proceed to arbitration should his appeal to the Union be successful or unsuccessful," arbitration refers to an employee's dispute with the Union and not arbitration of his grievance with the City. (Testimony: Staples.)

Officer Horn's Grievance

54. Between March 27 and April 1, 2013, Staples notified the Union executive board that Horn had been terminated for untruthfulness, sexual or workplace harassment, and conversion of department property for personal use. Staples asked the executive board to read the case materials. The 190 pages of documents concerned all three investigations (sexual harassment, untruthfulness, and use of department property), and were in a three-ring binder available for the executive board members to read. In a memorandum dated April 1, 2013, which Staples left with the binder, he informed the members that "[o]ur Attorney has weighed in on this with his legal advice. His feeling is there is nothing the Union can do to help Joe." (Exh. C-17.) However, Staples

stressed, "[t]his is our Union and we do have the final say regarding grievances and arbitration." (*Id.*) Each member of the executive committee is a veteran officer with investigation experience and knows how to read the materials.[7]

Staples asked the available board members (Burke, Rousseau, and Wann) to read the file and the termination statement to determine if there is a truthfulness issue and then to vote whether the Union should go to arbitration in order to fight to keep Horn's job. (Executive board member Beal was on injury leave and did not participate in the April review and decision.) The three executive board members and Staples signed under "No we do not go to arbitration" and no executive board member signed under "Yes we go to arbitration." (*Id.*) A copy of the April 1 memorandum, with the signatures, was given to Horn by Staples.

The executive board members concluded that Horn had not been truthful and that his explanation of the events and circumstances was not credible. The board members concluded that the allegations had been proven by the investigations and that termination was the expected penalty for a finding of untruthfulness.[8]

55. At the time of their decision on April 1, 2013, the executive board members were not aware of any dispute or controversy between or involving Officer EM and Horn.[9] None of the board members were personal friends with either EM or Horn. They only had professional, work relationships with both officers. No executive board member held any ill-will toward Horn or held any special favor for EM.

56. On April 2, 2013, Staples informed Horn that the executive board members had read the investigatory materials, along with the opinion of the Union attorney and a copy of Article IX (B) (Grievance Committee) of the Union by-laws. Staples explained that "[t]he four out of the five members available voted unanimously to not file a grievance on your behalf per Article 31 of

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[7]Since Staples joined the executive board in 1999, Horn's case is only the second time that the Union has dealt with a termination. The first time was in 2006. For consideration of the Horn case, Staples followed the same procedure used in the other termination case. In the 2006 case, an officer was found to be untruthful in both his verbal statements and his police reports. In that case, the Union president made the investigatory and other materials available to the executive board members and, after reading and considering the materials, the executive board, acting as grievance committee, was asked to vote on whether the Union should grieve the officer's termination. The executive board voted against pursuing a grievance. The officer appealed to and appeared before the executive board. He provided a significant amount of additional materials to the executive board and there were a good deal of questions and answers at the meeting. However, the executive board again voted not to grieve his termination.

[8]The three parties agree that a charge of dishonesty or untruthfulness generally ends an officer's career. As a result, no participant in Horn's case indicated any surprise over the severity of the discipline. As Officer Burke aptly stated, it was a "death sentence for a police officer's career" to have their "integrity or honesty questioned. You cannot do the job anymore. That is about as simple as you can put it. * * * When you are being questioned formally about something, and you are untruthful about it, then you can't be believed anymore. So that is something that's kind of a death sentence for our career." (Testimony: Burke.)

[9]The purported difficulty between Office EM and Horn is set out below in Findings of Fact 83-91.

our contract." (Exh. C-18.) Staples concluded, "[i]f you feel you want to address the E-Board I will make arrangements for that." (*Id.*)

57. On April 8, 2013, Horn filed a Step I grievance with the City, asserting that it violated Article 37, the disciplinary provision of the collective bargaining agreement. The grievance stated:

> "I was terminated without just cause violating article 37. My conduct relating to the untruthfulness allegation as a Salem police officer did not rise to the level of untruthfulness. I was not untruthful during an official investigation while employed as a Salem Police Officer. The second violation of Conduct Unbecoming of an [O]fficer did not meet the standard for conduct unbecoming of an officer. I did not engage in conduct unbecoming of an officer while employed as a Salem Police Officer. If my actions are/were found to be conduct unbecoming of a Police Officer then it did not rise to the level of discharge. I am considering retaining legal council [*sic*] if this matter doesn't come to a mutual resolution." (Exh. C-19.)

58. Article 37 of the collective bargaining agreement, which concerns discipline, appeals and the representation rights of disciplined employees, provides, in pertinent part, as follows:

> "A. The parties agree that discipline may be imposed only for just cause and establishes [*sic*] a right to appeal from discipline. The intent of this Article is to establish a contractual discipline procedure, and specify differences between the procedures.
>
> "* * * * *
>
> "C. Forms of discipline are limited to: oral reprimand, written reprimand, suspension, demotion, pay reduction not to exceed thirty calendar (30) days, or discharge.
>
> Serious violations, as determined by the City, may be dealt with by any of the above measures on the first offense or subsequent offenses.
>
> "* * * * *
>
> "E. **Appeal of Discipline**
>
> "1. Imposition of discipline on an employee is appealed through this Contract's grievance procedure under Article 31.
>
> "F. **Disciplinary Interview – Right to Representation**
>
> "1. An employee has the right to have a representative of the Union at an [i]nterview or meeting with the City when the employee has a reasonable belief that the interview or meeting is part of an

> investigation which may result in a disciplinary action. No right to representation exists for interviews, meetings, or conversations involving unit members regarding work instructions, training, constructive correction of work techniques or methods, and work planning. Work performance appraisal sessions are exempt from the right to representation unless, prior to the beginning of the meeting, the City informs the employee that the performance appraisal may result in disciplinary action being taken by the City against the employee." (Exh. Jt-2 at 41-42.)

59. The practice between the Union and the City is that grievances are controlled by the specific provision asserted at the Step I level of a grievance. Accordingly, the Union cannot add at Step II or Step III a new or additional provision of the collective bargaining agreement that it believes has been violated. Based on the parties' practice, such a grievance would be denied by the City.

60. On April 16, 2013, the deputy chief responded to Horn's grievance. He stated that "[f]acts and circumstances rising to the level of just cause for your employment to be terminated do exist and are set forth in your discharge letter dated March 27, 2013. * * * Therefore, your grievance is denied at Step I." (Exh. C-20.)

61. On April 26, 2013, Horn pursued the grievance to Step II. Again, Horn claimed his termination violated article 37. The Step II grievance stated:

> "Contract articles violated: Discipline – article 37 untruthfulness and Conduct [U]nbecoming of an [O]fficer[.]
>
> "Statement of facts giving rise to the grievance: I was terminated without just cause violating article 37. My conduct relating to the untruthfulness allegation as a Salem police officer did not rise to the level of untruthfulness. I was not untruthful during an official investigation while employed as a Salem Police Officer.
>
> "A mistake in time frame regarding when a picture was shown or lost does not constitute a lie at the reasonable standard.
>
> "The second violation of Conduct Unbecoming of an [O]fficer did not meet the standard for conduct unbecoming of an officer. I did not engage in conduct unbecoming of an officer while employed as a Salem Police Officer. If my actions are/were found to be conduct unbecoming of a Police Officer then it did not rise to the level of discharge.
>
> "Equal discipline to that of past practice is a standard that all employees should be entitled to. My discipline of termination is not the equal discipline of previous employees." (Exh. C-21.)

62. On May 2, 2013, Chief Moore responded by denying Horn's Step II grievance. He stated that the facts and circumstances, as set forth in the March 27 termination letter, rose to the level of just cause for termination.

63. On May 1, 2013, Horn's attorney wrote to Union attorney Makler appealing the decision of the executive board, acting as grievance committee, not to grieve Horn's termination. He declared that Horn "requests the opportunity to be heard and appeal the Executive Board's decision not to grieve his termination. If there is not [an] appeal process and the Executive Board's decision is final please let me know at your earliest possible convenience." (Exh. C-24.)

64. On May 2, 2013, Staples informed the executive board that Horn wanted to appeal the decision of the grievance committee to the executive board. Staples set May 13 as the date for the meeting with Horn.

65. Although Staples informed Horn about an appeal to the executive board, the Union believes that Horn ceased to be a member of the Union on March 27, 2013, the day he was terminated, and only members can invoke any benefits or rights under the by-laws. (Testimony: Staples and Makler.) However, the Union did nothing to prevent Horn from filing the Step I, II, or III grievances. The Union was willing to allow Horn to file the grievances in the hope that the City would voluntarily change its position. Since Horn took it upon himself to file grievances to try to keep his job, Staples did not want to get in his way.

66. On May 3, 2013, Staples wrote Horn to remind him of certain timelines.

> "Joe, per SPEU Attorney Makler I am reminding you of your step three time line which I have copied for you. [S]ubmit this to the Chief requesting to meet. Also I have been advised through correspondence from your Attorney you would like to appeal to the E-Board per article 12 in the SPEU bylaws. I have scheduled this meeting with the E-Board for May 13, 2013 at 1500 in the Salem Police Department, conference room H." (Exh. C-23.)

67. On May 7, 2013, Horn's attorney wrote the chief and deputy chief asserting that Horn was terminated without just cause because it was based on a faulty and incomplete investigation; the investigators failed to document facts and witness statements; the investigators failed to document personal biases; Horn was subject to disparate treatment; the policies and general orders were vague and overly broad; there was a disparate application of policies and general orders; and the punishment was overly severe.

He also asserted that grievance rights under the collective bargaining agreement belong to the individual member unless the Union chooses to grieve the matter on behalf of the membership. Since the Union has chosen not to grieve the matter, he claimed that Horn can assert his rights under the collective bargaining agreement.

Lastly, Horn's attorney requested a meeting with the chief as Step III of the grievance procedure, pointing out that "[i]n this situation the Union does not represent Mr. Horn's interests.

I do. I respectfully request that this meeting take place with Mr. Horn and I. To that end * * * I am prepared to meet the first week in June." (Exh. C-26 at 2.)

68. On May 7, 2013, Horn's attorney also wrote to the Union acknowledging that Horn must appeal the executive board's decision by May 13. However, Horn's attorney objected to that particular date since he was to be out of state on military duty. He requested the Union reschedule the meeting for the first week of June so that he could be present and properly represent Horn's interests.

Horn's attorney also sought to have the Union join with Horn's grievance for several reasons. With respect to the conduct unbecoming allegation, he claimed:

> "Sergeant Garrett makes several factual errors in his report that[,] if left unchallenged[,] lower the standard of investigations for fellow members of the SPEU. I am prepared to point out several inaccuracies in Sergeant Garrett's report. For your reference I ask you to make note that Sergeant Garrett bases two of his conclusions on the 'negative' reaction of the civilian witness. Sergeant Garrett never interviewed the civilian witness, has no personal knowledge [that] the civilian witness had a negative reaction[,] and only assumes from a third party that the civilian witness had a negative reaction to Officer Horn's acts. This fact alone sets a dangerous precedent for SPEU members. If unchallenged[,] SPEU members can be found in violation of a policy or general order based upon assumptions, hearsay[,] and an incomplete investigation. Not grieving this matter will endanger every member of the SPEU. Once again, I am prepared to show numerous errors and assumptions made in this investigation that endanger all members." (Exh. C-27 at 1.)

With respect to the allegation of Horn's untruthfulness, he asserted the following:

> "As you are aware a finding of untruthfulness is not only a firing offense, but also a mandatory revocation of an officer's certification from the [DPSST]. There are numerous errors with this investigation. More errors than I can accurately list in this letter, but I am prepared to identify in front of a[n] arbitrator or jury. What is most troubling for your membership and should not be allowed to go unchallenged is that Officer Horn is being accused of untruthfulness when he was told at the time of his statement that he only needed to answer to the best of his recollection. During Officer Horn's original interview he was told by Sergeant Pat Garrett to answer the questions to the best of his recollection in the beginning of the interview and specifically when he was asked questions that management is now claiming he lied about. Management cannot have it both ways. They cannot tell an employee to answer to the best of their recollection and then accuse the employee of lying when his recollection is not the best. Allowing this assertion and others in the investigation to go unchallenged sets a dangerous precedent for other members of the SPEU. This is only one example of the dangerous precedents in this investigation that threaten your members. I am prepared to point out numerous others at arbitration and in front of a jury." (*Id.* at 1-2.)

69. On May 13, 2013, Horn appeared before the executive board to appeal the decision not to pursue his grievance. Including introductions, the meeting lasted only two or three minutes. Horn spoke for just a minute or two. He stated that he did not lie, that the Union is setting a bad precedent by not grieving the matter, and he asked that the executive board reconsider its decision. He did not present any new information or anything that led the executive board to change its decision. Beal, who did not participate in the April 3 decision, was present and asked a couple of clarifying questions.

There was no extended discussion among the executive board members after Horn departed. The members were generally disappointed because Horn had not provided any mitigating information or circumstances which the Union could use in a grievance. Staples asked the executive board for their position on Horn's grievance. The executive board members continued to believe that Horn had not been truthful and that his explanation of the events and circumstances was not credible. Staples did not tell them or instruct them how to vote. Before the meeting with Horn, Beal read the investigatory files concerning the charges against Horn. Based on his review and consideration of the file, Beal also concluded that Horn had been untruthful during the internal affairs investigation.

70. After the verbal vote of the executive board members, Staples prepared a memorandum dated May 16, 2013, which was signed by Staples and the four other executive board members. Staples sent the memorandum to Horn in which he stated:

> "As a result of your request to the SPEU E-Board and in compliance with the SPEU by-laws, on 05/13/2013 the SPEU E-Board met with you. This meeting took place in a private location at the Salem Police Department. In compliance with the bylaws, this was your opportunity to explain your position to the SPEU E-Board as to why the SPEU's decision to not arbitrate your just cause termination was in error and should be reversed. At this meeting you failed to provide any new information to the SPEU E-Board and/or you chose not to talk about your belief and position that a grievance should be filed, why a grievance should be field and/or what basis there was to file a grievance on your behalf.
>
> "Without any new information being provided to the SPEU E-Board either from you or your Attorney the E-Board unanimously confirmed its prior position and decision that the SPEU would not file a grievance contesting your just cause termination." (Exh. C-25.)

71. At the time of the decision on May 16, the executive board members were not aware of any dispute between Officer EM and Horn. No board member was a personal friend with either EM or Horn. They only had a professional, work relationship with both officers. The executive board members did not hold any animosity toward Horn or any favor for EM. The letter was signed by Union President Staples and the four members of the Union's executive board.

72. Horn and his attorney met with Chief Moore on June 7, 2013, as Step III of the grievance procedure. After the meeting, the chief reviewed Horn's file. He then wrote Horn's attorney:

"I considered the statements you made during our meeting regarding why Mr. Horn believes that the conclusions of Deputy Chief Ferraris were in error and that the level of discipline imposed was inappropriate.

"After fully evaluating the matter, I believe that both the conclusions were accurate and the level of discipline was appropriate. In the May 7, 2013, Step III Grievance, you do not specifically allege which Articles of the Salem Police Employees' Union and City's Collective Bargaining Agreement (CBA) have been violated. Therefore, you have not sufficiently preserved any arguments associated with the discipline imposed on Mr. Horn. Further, I note that Article 42 of the CBA relates to the duration of the current agreement and is in no way relevant to Mr. Horn's matter. In any event, the grievance at [S]tep III is denied." (Exh. C-28.)

73. Some time in June 2013, Union attorney Makler learned that Horn's attorney made a request with the Employment Relations Board (ERB) for grievance arbitration. On June 21, 2013, Makler wrote Horn's attorney:

"Please take note that you have not been authorized to act on behalf of the SPEU, you do not represent the SPEU, and SPEU has not authorized the filing of a request for grievance arbitration, on behalf of the SPEU related to Joe Horn. As such, I would request that you make it clear to the City and the ERB that your filing for arbitration with ERB, on behalf of Joe Horn, is an individual action by Joe Horn. At this point given the filing that you submitted and that I reviewed I believe that you have created a[n] inappropriate perception that you are representing the SPEU and that you are acting on behalf of the SPEU – which is not the case.

"I have copied City Attorney Natasha Zimmerman on this email so that she is aware of the SPEU position." (Exh. R-33 at 1.)

74. On June 27, 2013, the City's outside labor counsel wrote Horn's attorney:

"It is the City's position that an individual has no right to take a case to arbitration under the City's collective bargaining agreement with the Union. Article 31 of the agreement clearly anticipates that the union must be party to an arbitration and does not authorize individuals to pursue arbitration individually. Because it is now clear that Mr. Horn is attempting to pursue this grievance individually, and not on behalf of the union, Mr. Horn's grievance has not been properly taken to arbitration. That said, the City has no obligation to arbitrate Mr. Horn's grievance and refuses to do so.

"This position is supported by the plain language of Article 31 of the collective bargaining agreement, the Union's position as expressed by Mr. Makler's email and the U.S. Supreme Court case in *Vaca v. Sipes*. * * * *Vaca* holds that an individual lacks the right to bring a grievance to arbitration. The Court reasoned that such a rule weeds out unmeritorious claims before the most costly stage of the grievance process (i.e. arbitration) and helps unions retain control of the

enforcement and regulation of the parties' agreement as the sole representative of the bargaining unit. * * * 'When the union refuses to proceed to arbitration, an individual employee may obtain judicial review of his breach of contract claim only if he can demonstrate that the union wrongly refused to process his grievance.'" (Exh. R-34 at 1-2; citations omitted.)

75. On June 30, 2013, Horn wrote Staples and informed him that the City refuses to acknowledge any individual right to pursue a grievance under the collective bargaining agreement. Horn asked Staples if there was any other method to appeal the executive board's decision not to grieve his termination or whether he had exhausted all his appeal options.

76. On July 1, 2013, Makler wrote to Horn's attorney, providing him with a set of the SPEU bylaws. He added:

"If you or your client believe that there is an action, pursuant to the SPEU bylaws, that you want to pursue then please address this claim in conformance with the SPEU bylaws.

"As you know, the SPEU position is and remains that the termination of your client was done for/with just cause, and the SPEU E-Board/Grievance Committee, after due diligence and investigation of the entire matter and allegations, confirmed this same SPEU position after your client appealed the E-Board decision to not support to arbitrate your client's termination." (Exh. C-31.)

77. On July 12, 2013, Horn's attorney asked Makler:

"1. If my client elects to arbitrate the Grievance Board's decision, how do we go about choosing an arbitrator? The bylaws are silent on that matter.

"2. Article XII of the bylaws states, in part, that the Union will take such steps that are necessary to preserve the members[']rights to proceed to arbitration should his appeal be successful or unsuccessful. What steps has the e-board taken or, is the e-board willing to take to preserve Mr. Horn's rights to proceed to arbitration?" (Exh. C-32 at 1.)

78. On July 15, 2013, Horn's attorney wrote to Makler "that Mr. Horn wishes to exercise his Salem Police Employees' Union's By-Laws Step Three appeal rights and request a Special meeting of the Salem Police Employees' Union and, if necessary, a third party arbitrator[.]" (Exh. C-33 at 1.) Horn's attorney cited Article IX (B)(3) on the grievance committee and stated:

"If an aggrieved member disagrees with the Grievance Committee's decision to not further the grievance steps, he may 1) appeal to the Grievance Committee and eventually through arbitration through the steps in Article Seven, Conflict Resolution, or 2) appeal to the membership as set forth at a Special o[r] Regular Meeting called by the aggrieved as set forth in these By-Laws, or 3) both." (*Id.*)

Horn's attorney then asserted that Horn

> "wishes to address a Special Meeting of the union membership. * * * Please accept this letter as Mr. Horn's request for a Special Meeting in writing. Mr. Horn also requests that I be afforded the opportunity to address the membership and outline his arguments. * * * Mr. Horn also wishes to arbitrate the E-Board's decision in the event his appeal to the membership at large is unsuccessful. * * * Article XII states, 'STEP THREE: If the aggrieved member continues to disagree with the conclusion of the E-Board, they may submit the issue of whether the UNION violated its duty of fair representation to arbitration.' As I mentioned in an earlier e-mail, the By-Laws are silent on how the parties are to choose an arbitrator. Please let me know, after the Special Meeting, how you would like to choose an arbitrator and we will begin the process.
>
> "Finally, ARTICLE XII states, '[t]he E-Board will take such steps as are necessary to preserve the conflicted member's rights to proceed to arbitration should his appeal to the UNION be successful or unsuccessful.' I am sure you and the E-Board have taken whatever steps that are necessary to preserve Mr. Horn's right to arbitrate his dismissal with the City of Salem, with or without the Union's assistance. To put my client at ease, I respectfully request that you inform us what steps the E-Board has taken or is willing to take to preserve Mr. Horn's rights under the By-Laws." (*Id.* at 1-2.)

79. On July 29, 2013, Horn wrote to Staples that he wanted to exercise his rights under the by-laws and request a special meeting of the Union membership and, if necessary, arbitration of his dispute with the Union executive board.

80. On July 31, 2013, Horn's attorney wrote to Makler and reiterated his request originally made in his July 15 letter.

81. On August, 8, 2013, Horn's attorney wrote to Makler for the fourth time and repeated the requests contained in his July 15 letter.

82. The Union and Makler did not respond to any of these communications from Horn and his attorney.

Officer EM, Officer Horn, and the DART

83. The Complainant suggests that the Union's decision not to pursue his grievance was influenced by Horn's contentious relationship with Officer EM.[10]

[10]At the request and agreement of the parties, and approval of the ALJ, the individual is referred to only as EM.

84. EM worked on the DART since about 2004. The DART was formed to investigate suspected drug activity, particularly alleged drug house complaints. Responding to hot-line calls, members of the DART would "knock and talk," meaning the officers would knock at the house and talk to the residents where there had been reports of suspected drug activity, explain the nature of the complaint, and, while doing so, effectively investigate the situation.

85. Horn was assigned to the DART in May 2009, and EM was assigned to act as his partner and to train Horn. In July 2009, EM began to have concerns about the manner in which Horn was conducting DART investigations; that Horn was not properly giving *Miranda* warnings; that Horn gained consent to search a premises through improper or coercive methods. EM discussed the situation with Horn, who disputed EM's contentions. EM then took the matter to his supervisor, and asked permission to speak with the district attorney because he did not want to be in a situation where he and Horn were giving conflicting statements or testimony. The supervisor refused to give him permission, but rather instructed EM to go through the chain of command within the department. The supervisor spoke with Horn about the situation and Horn denied the conduct.

86. In September 2009, EM again had concerns about Horn's investigatory conduct, particularly over an incident involving a marijuana arrest, probable cause, and identity theft. EM again expressed his concerns to his supervisor, Sgt. Engel. EM next discussed it with Lt. Anglemier and stated that he did not want to partner with Horn. He asked to ride with another officer. His requests were declined. EM then met with Deputy Chief Bellshaw and finally with Chief Moore.

87. On October 6, 2009, Engel and Anglemier informed EM that they were concerned for EM's reputation, and there were rumors no other officer wanted to partner with him. Officers had heard that EM had spoken with the chief about the situation in the DART. It was suggested that an officer left the DART because of EM.

88. EM went on vacation the later part of October 2009. Upon returning to work, EM was taken by Anglemier to a meeting with Bellshaw. EM was informed of accusations by the district attorney's office regarding his investigations, and EM was directed to cease conducting any investigation. Anglemier and Engel would speak to the district attorney's office to determine if a formal investigation was warranted.

89. On November 6, 2009, during a meeting with Bellshaw, EM stated that he believed Horn had gone outside the chain of command, in violation of department policy, and made accusations about EM to the district attorney's office. Bellshaw believed that Horn may have done so. At about this time, EM filed an internal affairs complaint against Horn. At the same time, Bellshaw informed EM that he was under an unofficial investigation, and he would send EM's supervisors to interview individuals.

90. EM protested the unofficial investigation and requested that an official investigation be conducted. That way, it would be conducted by officers other than his supervisor, in whom he did not have faith of impartiality; witnesses would have to provide sworn testimony to the investigators; his exoneration would be publicly known to the other officers; and there would be no basis for other officers to believe his supervisors had whitewashed him, and in effect

themselves as well. At some time after this meeting, EM did seek Staples's assistance in obtaining an official investigation.

On November 18, 2009, EM met with Bellshaw, who informed him that there had been no basis to the allegations made against him, and that the formal investigation had been concluded. However, Bellshaw removed EM from the DART and reassigned him to the patrol division.

91. EM had no conversations with any representative of the Union concerning Horn's termination or grievance. EM only has a professional relationship with members of the Union's executive board. He is not personal friends with any of the executive board members.

## CONCLUSION OF LAW

1. This Board has jurisdiction over the parties.

2. The Respondent Union did not violate ORS 243.672(2)(a) in its treatment and conduct toward the Complainant's termination of employment by the City.

## DISCUSSION

### Legal Standards for Duty of Fair Representation Cases

The Complainant alleges that the Respondent Union violated ORS 243.672(2)(a) by refusing to process his grievance through arbitration, and that this was "an unintentional act or omission that amounted to a violation of its duty to fairly represent the Complainant." (Complainant's post-hearing brief at 13.)

Complainant relies on *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, 424 (1993). There, we followed *Robesky v. Quantas Empire Airways Limited*, 573 F2d 1082, 1089-90 (9th Cir 1978), and held that unintentional acts or omissions by union officers may be actionably arbitrary if (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. *Ralphs*, 14 PECBR at 423-24.

The Union's conduct in the instant case was neither unintentional nor an act of omission. It was made with full intent and deliberateness. The complainant misconstrues the application of the *Ralphs* test. That case did not concern the union's judgment about pursuing or not pursuing a grievance, but rather concerned "the failure of a union to correctly perform 'ministerial' or 'procedural' acts[;]" the union representative failed to "timely file the grievance in the appropriate place," a species of negligence that amounted to a violation of the union's duty of fair representation. (*Id.* at 422-23.) In *Ralphs*, this Board continued to hold that "'ordinary negligence' in performance is not sufficient to create liability on the part of the union," but we adopted a

standard to find "that a union should not be totally immune to liability for its non-performance or misperformance of a non-discretionary duty." (*Id.* at 423.)

Therefore, in the instant case, the Complainant is really presenting us with a traditional duty of fair representation case: that the Union's decision not to grieve or arbitrate the Complainant's termination was arbitrary, discriminatory, or made in bad faith.

ORS 243.672(2)(a) prohibits a labor organization from interfering with, restraining, or coercing any employee in or because of the exercise of rights guaranteed by the Public Employee Collective Bargaining Act (PECBA). Out of this provision, this Board has historically extrapolated an affirmative duty that applies to a labor organization's relationship with its members. We have long held that "[a]s a corollary to its statutory rights, a labor organization has the duty to fairly represent bargaining unit employes; and an employe is given the right to be free from unfair or invidious treatment by his exclusive bargaining representative in matters affecting his employment." *Powell v. Monmouth Police Officers Association,* Case No. C-95-76, 3 PECBR 2038, 2041, *rev'd and rem'd other grounds,* 33 Or App 93, 575 P2d 175 (1978). A labor organization has the duty to fairly represent all employees for whom it is the exclusive representative. *Chan v. Clackamas Community College and Clackamas Community College Association of Classified Employees, OEA/NEA,* Case No. UP-13-05, 21 PECBR 563, 574 (2006), *recons,* 21 PECBR 597 (2007); *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).

An employee, however, does not have an absolute right to have a grievance taken to arbitration. *Vaca v. Sipes,* 386 US 171, 191, 87 S Ct 903 (1967); *Chan,* 21 PECBR at 575;

Labor organizations are afforded broad discretion for their decisions concerning the representation of employees and, specifically as it relates to the instant case, the Union's "decisions about whether to file or how far to pursue a grievance is entitled to substantial deference." *Conger v. Jackson County and Oregon Public Employees Union,* Case No. UP-22-98, 18 PECBR 79, 88 (1999); *see Bjornsen v. Jackson County Sheriffs' Officers Association, Affiliated with Teamsters Local 223 and Jackson County,* Case Nos. C-130/131/132/133/134/135-83, 8 PECBR 6783, 6795 (1985) (absent evidence of bad faith, dishonesty, or hostility, a union should be granted a "wide range of reasonableness" in making judgments about employee grievances).

Since a significant purpose of the PECBA is to insure public employees the right to form, join, and participate in the activities of a labor organization of their own choosing, this purpose would be frustrated unless a labor organization is

> "free to act in what it perceives to be the best interests of its members, without undue fear of lawsuits from individual members. * * * If a union's decisions are constantly attacked by disgruntled members, the organization's collective power is weakened and the employees' interest in having a strong and effective organization to represent them is defeated." *Ralphs,* 14 PECBR at 422 (citation omitted).

We have nevertheless concluded that a labor organization can violate its duty of fair representation if that labor organization's decision not to pursue a grievance is arbitrary, discriminatory, or made in bad faith. *Chan*, 21 PECBR at 574; *Putvinskas*, 18 PECBR at 894. We have explained these standards as follows:

> "A union's decision is 'arbitrary' if it lacks a rational basis. *Howard v. Western Oregon State College Federation of Teachers*, Case No. UP-80/93-90, 13 PECBR 328, 354 (1991). Its decision is 'discriminatory' if there is 'substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives.' *Id.* * * * 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)." *Chan*, 21 PECBR at 574-75.

For instance, this Board has stated that "[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." *Wright v Local 2277, Portland Community College Federation of Faculty and Academic Professionals, AFT, AFL-CIO, and Portland Community College*, Case No. FR-004-11, 25 PECBR 910, 932, *recons*, 25 PECBR 951 (2014) (*citing Ralphs*, 14 PECBR at 422).

We extend to labor organizations "substantial discretion in deciding whether to arbitrate, or even to file, a grievance." *Grisham-Tittle v. American Federation of State, County and Municipal Employees, Local 1246-3, and State of Oregon, Department of Administration Services*, Case No. FR-03-10, 24 PECBR 228, 238 (2011). Given such deference, "[t]his Board generally does not substitute its judgment for that of a union that rationally decided not to process a grievance. Instead, this Board primarily determines whether the union conducted a proper investigation and used a rational method of decision-making in reaching its conclusion." *Putvinskas*, 18 PECBR at 895 (footnotes omitted).

We even apply this discretion "to how the union investigates a potential grievance, so long as some reasonable good-faith investigation is undertaken." *Tancredi v. Jackson County Sheriff's Employee Association and Jackson County Sheriff's Office*, Case No. UP-31-04, 20 PECBR 967, 974 (2005) (*citing 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). We have held that "[w]hat is important is the process by which the [union] determined not to pursue the grievance, not whether the grievance was filed." *Tancredi*, 20 PECBR at 976.

We accept that "a union has a wide range of reasonableness in deciding how to exercise its discretion," and, "[t]herefore, without violating its duty of fair representation, a union may rationally decide not to pursue a grievance that the union would likely win in arbitration." *Martin v. Ashland School District #5, Morris, OSEA; Fields, Helman Elementary*, Case No. UP-30-01, 20 PECBR 164, 177 (2003); *see Putvinskas*, 18 PECBR at 895; *Chan*, 21 PECBR 575. The union is not required to represent a member in the same manner as an attorney represents a client. *Tancredi*, 20 PECBR at 974; *Putvinskas*, 18 PECBR at 898. A "union's failure to take witness

statements or to allow the union member to rebut aspects of the union's investigation does not breach the duty of fair representation." *Tancredi*, 20 PECBR at 974; *Putvinskas*, 20 PECBR at 898. It is also permissible for a union to consider the cost of arbitration in deciding whether to arbitrate a grievance. *Tancredi*, 20 PECBR at 974; *Strickland v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO, CLC*, Case No. UP-134-90, 13 PECBR 113, 123-34 (1991). A union has the discretion to withdraw a grievance when it believes that there is insufficient evidence to support the claim. *Tancredi*, 20 PECBR at 974.

We, therefore, focus not on the merits of the grievance but on the conduct of the labor organization. *Chan*, 21 PECBR at 575. In order "[f]or a union's actions to fall outside this wide range of reasonableness, they must be wholly irrational or arbitrary." *Tancredi*, 20 PECBR at 974 (internal quotes omitted); *quoting Baltus v. Multnomah County School District No. 1J and Portland Association of Teachers*, Case Nos. UP-51/52-94, 15 PECBR 764, 778 (1995). It follows that the Complainant must establish that the Union "had a hostile motive, acted dishonestly, or made its decision not to pursue the grievance without any basis." *Morgan-Tran v. AFSCME Local 88 and Multnomah County*, Case No. UP-67-03, 20 PECBR 948, 959 (2005) (*quoting Conger*, 18 PECBR at 88; *citing Coan and Goar v. City of Portland, Bureau of Parks, and Laborers' International Union of North America, Municipal Employees Local 483*, Case Nos. UP-23/24/25/26-86, 10 PECBR 342, 351 (1987), *recons*, 10 PECBR 438, *AWOP*, 93 Or App 780, 764 P2d 625 (1988)).

The Case

In the instant case, the City conducted three internal affairs investigations into the Complainant's conduct, and held a pre-disciplinary interview with the Complainant. As a result, the City concluded that the Complainant had improperly forwarded a photo of a topless female co-worker to another employee in violation of City rules and policies; that the Complainant improperly converted City property for personal use in violation of City rules and policies; and that the Complainant had been untruthful during an official internal affairs investigation. The City concluded that the conduct was serious enough that on March 27, 2013, the City terminated the Complainant.[11]

The Union president fully and fairly represented the Complainant during the disciplinary process. At the investigatory interviews with the Complainant, the Union president prevented the investigators from expanding their inquiry beyond the allegations contained in the formal notice. The Union president also fully and fairly represented the Complainant when knowledge of the Complainant's communications with FF surfaced and caused the City formally to inquire into the

[11]The City points out the significant difficulty for a police officer and a police department, when an officer has been found to have been untruthful. Under *Brady v. Maryland*, 373 US 83, 83 S Ct 1194 (1963), the Supreme Court established an obligation on prosecutors to reveal exculpatory material to defendant. This developed to include evidence reflecting upon the credibility of prosecution witnesses, including police officers. *Giglio v. United States*, 405 US 150, 92 S Ct 763 (1972). This situation makes it impossible for a police officer, who has been found to be untruthful, to perform his duties as a police officer, where those duties include investigation of crimes and assistance in the prosecution of alleged criminals by giving sworn testimony. As all the parties and witnesses concede, for a police officer to be found to be untruthful in an official investigation is a career-ending event.

matter. The Union president arranged to have the Complainant meet with the Union attorney in order to receive the attorney's assessment of the potential disciplinary action and its consequences. The Union president also attempted to negotiate a resignation agreement between the City and the Complainant that might have allowed the Complainant to retain his license.

On April 1, 2013, the Union president provided the three available executive board members with a copy of the Complainant's 190-page termination file. It included the three internal affairs investigations, with transcripts of all the interviews, and the relevant City policies and regulations. On April 3, after considering the file, the president and the three executive board members, acting as the grievance committee, decided not to pursue a grievance on behalf of the Complainant.

As veteran police officers with an average of 22 years of police service and considerable investigation experience, the members of the executive board, after having read the internal affairs investigations and reports, concluded that the Complainant had been untruthful in an official investigation. Naturally, the concurrent, although unstated, conclusion is that an arbitrator would sustain the City's termination of the Complainant. Therefore, the executive board members voted not to grieve the Complainant's dismissal. Their decision was recorded and Horn was advised of the decision. The record contains no suggestion that executive board members made their decision based on anything other than their conclusion that he had been untruthful during an official investigation. There is no evidence to suggest that it was based on an improper reason.

The Complainant appealed the decision under the by-laws and on May 13, 2013, he personally appeared before the full executive board to ask that they reverse the decision not to grieve his dismissal. During his two-to-three minute appearance, the Complainant merely stated that he did not lie and that the Union is setting a bad precedent by not grieving his termination. He gave no additional or new facts which could have persuaded the executive board to reverse the earlier decision. As a result, the executive board sustained the decision not to grieve his termination. Their decision was recorded and the Complainant was subsequently advised of the decision.

Allegation No. 1

Initially, we must examine the Union's actions toward the Complainant. The complaint alleges that the executive board's decision not to grieve Complainant's termination was "arbitrary and based on bad faith" because (a) the April 3 vote by the Union officials was not documented in writing; (b) the Union president advised the Complainant that if he resigned during the internal investigation rather than being terminated it would be easier for him to maintain his law enforcement certification with the DPSST; (c) some of the executive board members did not read the investigations associated with the Complainant's termination; (d) the executive board members were not informed that Complainant reported to the Union president that he made an error during his first IA interview and the Union president instructed him to report the error at a later date; (e) the Union president did not provide the executive board members with a written summary or opinion regarding the validity of the Complainant's termination or grievance; (f) the Union attorney did not provide the executive board with a written summary or opinion regarding the validity of Complainant's termination or grievance; and (g) the Union did not use any

documented objective criteria when determining whether to grieve a member's termination. (First Amended Complaint, ¶17(a)-(g).)[12]

The Complainant has not provided any legal authority that would persuade this Board to conclude that the above allegations are a cause of action under a duty of fair representation complaint. Further, the focus of Complainant's post-hearing brief leads us to conclude that he has abandoned the above-enumerated allegations. Nevertheless, we presently are not prepared to hold that the conducted alleged above, either individually or collectively, would constitute a violation of a union's duty of fair representation.

We do not find that that union's decision not to grieve or arbitrate the Complainant's termination to be arbitrary. So long as there is a rational basis for the union's decision not to arbitrate, or even to file a grievance over the Complainant's termination, we will accord the union substantial discretion in making that decision. *Grisham-Tittle*, 21 PECBR at 238; *Conger*, 18 PECBR at 88. The union can demonstrate that its decision is rational by its investigation of the employee's complaint. We will accord discretion "to how the union investigates a potential grievance, so long as some reasonable good-faith investigation is undertaken." *Randolph*, 15 PECBR at 106. After considering the City's investigation, it was not unreasonable for the Union to have concluded that the Complainant had been untruthful during an official investigation, and that the City most likely would prevail on that issue at arbitration. Where the union, as here, conducted a good-faith investigation prior to making its decision, "[t]his Board generally does not substitute its judgment for that of a union that rationally decided not to process a grievance." *Putvinskas*, 18 PECBR at 895. A union may rationally decide not to pursue a grievance that the union would likely win in arbitration without violating its duty of fair representation. *Balch v. Oregon Public Employees Union,* UP-6-96, 16 PECBR 478, 480 (1996) (union deliberately closed the grievance because it believed there was insufficient evidence to support it); *Martin*, 20 PECBR at 177 (union official reasonably concluded the complainant admitted actions for which he was disciplined); *Chan*, 21 PECBR at 576 (based on investigation, union concluded it would not prevail at arbitration; also union had no obligation to proceed further when employee resigned).

Accordingly, the Union's decision was not arbitrary or arbitrarily made, and we will dismiss these allegations.

Allegation No. 2

The complaint also alleges that the executive board's decision not to grieve Horn's termination was "arbitrary and based on bad faith" because "[o]ne or more of the members based their decision not to grieve Horn's termination based upon his participation in the 2009 unofficial investigation of [EM]." (First Amended Complaint, ¶17(h).) In the opening statement, Complainant described the allegation this way: The Union's decision not to grieve the

[12]The votes were documented in writing. The executive board members credibly testified that they each read the investigation reports on Horn's termination. There is no evidence to suggest that the executive board members were not informed that Horn reported that he had made an error during his first IA interview.

Complainant's termination was retaliatory for his participation in the investigation of Officer EM in 2009.

In essence, the Complainant alleges that the members of the executive board voted not to grieve the Complainant's termination because they held him in disfavor as a result of the enmity that existed between Horn and Officer EM, when the two served together on the DART back in 2009. The Complainant's suggestion is that the Union officials were friends with EM and held a grudge against Horn, who might have been responsible for EM's removal from the DART. Factually, it is clear that Horn and EM did not get along personally or professionally. Yet, the executive board members did not know of that troubled relationship until well after the dates they made their decision not to grieve the termination. There also is no evidence that the Union officials had any particular friendship toward EM or hostility toward the Complainant, and there is no evidence even to imply that the Union officers voted the way they did because of any friendship with EM or hostility toward the Complainant.

To prevail on this allegation, the Complainant must prove discrimination or bad faith. He may do so by establishing that the Union had a hostile motive or acted dishonestly. *Morgan-Tran*, 20 PECBR at 959 (*citing Conger*, 18 PECBR at 87-88; *Coan and Goar*, 10 PECBR at 351). In the alternative, to establish proscribed discriminatory conduct, the Complainant must demonstrate that the Union's decision was "intentional, severe, and unrelated to legitimate union objectives." *Chan*, 21 PECBR at 575; (*citing Howard*, 13 PECBR at 354). To prove a bad faith allegation, the Complainant must establish that the Union's decision was against the Complainant's interests and was done "for an improper reason." *Chan*, 21 PECBR 575. The record does not reveal any evidence that would lead this Board to conclude that the Union's decision was made for an improper reason. *Putvinskas*, 18 PECBR at 898 (refusal to grieve based on complainant's work conduct, not on the union official's personal relationship with the complainant). The Complainant has not established any of the requisite elements.

Accordingly, we will dismiss this allegation in the complaint.

Allegation Nos. 3 and 4

The complaint alleges that the Union's decision not to grieve the Complainant's termination to arbitration was "arbitrary and based on bad faith" because the collective bargaining agreement "specifically affords an individual member the right to grieve and arbitrate discipline and that right does not exclusively belong to the Executive Board at Step 4/Arbitration phase of the grievance procedure." (First Amended Complaint, ¶17(i).) In his opening statement, the Complainant presents the allegation in this fashion: the Union has an obligation to grieve the Complainant's termination because he is the grievant as defined by collective bargaining agreement, and, as the grievant, he gets to decide how far the grievance goes, including whether it goes to arbitration. Of course, the Union and City dispute that interpretation of the collective bargaining agreement.

Notwithstanding the Complainant's assertion that he has some variety of superior status under the collective bargaining agreement's grievance provision, even the Complainant appears to concede that his grievance nevertheless requires action by the Union (or otherwise why would

we be where we are now). Therefore, this concession brings the case back to the traditional duty of fair representation analysis.

In order to prevail, the Complainant must establish that the Union's action, decision, or even perhaps its divergent interpretation of the grievance provision was arbitrary, discriminatory, or made in bad faith. It does not benefit the Complainant to argue that the Union has failed to interpret its own collective bargaining agreement consistent with the Complainant's interpretation. We do not need to debate or analyze the various interpretations of the contractual grievance procedure. *Coan and Goar*, 10 PECBR at 439-440 (the union official permissibly decided not to grieve based on his understanding of the collective bargaining agreement and a reasonably thorough knowledge of the facts); *Morgan-Tran*, 20 PECBR at 960 (we need not decide whether the union's interpretation of contract is correct, and will not substitute our judgment for that of the union's).

It follows from a long line of Board decisions that we will permit a union to be mistaken in its understanding of the complainant's purported grievance so long as it makes its decision in good faith or not with a malicious purpose. *Wright*, 25 PECBR at 932; *Chan*, 21 PECBR at 575; *Tancredi*, 20 PECBR at 974; *Ekstrom and Bedortha v. Oregon School Employees Association*, Case No. UP-54-93, 14 PECBR 565, 567 (1993). Even the Supreme Court accepts that "the grievance processes cannot be expected to be error-free." *Hines v. Anchor Motor Freight*, 424 US 554, 571, 96 S Ct 1048 (1976)

Lastly, the complaint alleges that the Union violated its duty of fair representation by failing to follow its by-laws. (First Amended Complaint, ¶39-¶54.) The Complainant asserts that under the by-laws, he had a right to appeal to the full union membership and even to take his dispute with the Union to arbitration. However, this Board has held that "absent some persuasive evidence of arbitrary or bad faith conduct by the union," we do not have authority to enforce compliance with a labor organization's internal by-laws. *Witherell v. Marion County Law Enforcement Association*, Case No. UP-42-94, 15 PECBR 729, 742 (1995) (*citing Powell*, 3 PECBR 2038).

Accordingly, we treat this allegation as we have addressed the contractual contention set out above, and this brings the case back to the traditional duty of fair representation analysis and burden. In order to prevail, the Complainant must establish that the Union's action, decision, or application of the by-laws was arbitrary, discriminatory or made in bad faith. We have found no basis on which to conclude that the Union has followed or not followed its by-laws in an arbitrary or discriminatory manner or in bad faith. The Complainant failed to demonstrate that the Union acted dishonestly in deciding not to pursue the grievance; that the decision was based on any hostility toward the Complainant; or that the Union lacked a reasonable basis for its decision.

In *Slayter*, we stated that "[t]his 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." 25 PECBR at 504. We dismissed that complaint where, similar to the instant case, the union reviewed the employer's investigation, including transcripts, and found that the employee had given "evasive answers about his alcohol consumption," and the employer had a policy of "zero tolerance for alcohol in

the workplace." *Id.* at 503. As a result, the union "determined that the likelihood of reversing the [employer's] decision was slim;" and further there was "no evidence that the Union had any reason to change its decision." *Id.* at 503-04.

The fact that the Complainant is "not satisfied with the outcome does not establish that the Association acted without a rational basis or in bad faith." *Chan*, 21 PECBR at 576 (*citing Leah Moore v. Mount Hood Community College Classified Employees Association and Mount Hood Community College*, Case No. UP-39-99, 18 PECBR 279, 284 (1999); *Martin*, 20 PECBR at 177 (failure to speak to complainant's witness not a sufficient claim); *Putvinskas*, 18 PECBR at 897 (complainant's dissatisfaction with extent of union's investigation is not basis for a claim).

Accordingly, we will dismiss these allegations.

The City's Alleged Violation of ORS 243.672(1)(g)

Where no violation is found against the labor organization in a duty of fair representation case, the complaint against the public employer will automatically be dismissed. *Seehawer v. American Federation of State, County and Municipal Employees, Council 75, and State of Oregon, Department of Corrections*, Case No. FR-02-11, 25 PECBR 47, 53-54 (2012); *Mengucci*, 8 PECBR at 6734.

ORDER

The complaint against the Respondent Union and Respondent City are dismissed.

SIGNED AND ISSUED this 19th day of August, 2014.

Larry L. Wittherell
Administrative Law Judge

NOTE: The Employment Relations Board's rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The "date of filing objections" means the date objections are received by this Board; "the date of service" of a recommended order means the date this Board mails or personally serves it on the parties.) A party that files objections to a recommended order with this Board must simultaneously serve a copy of the objections on all parties of record in the case and file with this Board, proof of such service. This Board may disregard the objections of a party that fails to comply with those requirements, unless the party shows good cause for its failure to comply. (See Board Rules 115-010-0010(5) and (6); 115-010-0090; 115 035-0050; 115-045-0040; and 115-070-0055.)

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-019-14

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCALS 8 & 40, | ) | |
| Complainant, | ) | |
| v. | ) | DISMISSAL ORDER |
| PORT OF PORTLAND, | ) | |
| Respondent. | ) | |

Kevin Keaney, Attorney at Law, Portland, Oregon represented Complainant.

Randolph C. Foster, Attorney at Law, Stoel Rives LLP, Portland, Oregon, represented Respondent.

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On May 28, 2014, the International Longshore and Warehouse Union Locals 8 and 40 (ILWU) filed this complaint against the Port of Portland (Port), alleging that the Port refused to negotiate for a successor agreement in violation of ORS 243.672(1)(e) and refused to submit the parties' disputes regarding the collective bargaining agreement to arbitration in violation of ORS 243.672(1)(g). The complaint was assigned to an Administrative Law Judge (ALJ).

By letter dated May 29, 2014, the ALJ asked the Port to submit an informal response, which it did by letter dated June 11, 2014.[1] On June 20, the ALJ ordered ILWU to show cause why the complaint should not be dismissed because 1) it was untimely filed, 2) the Port was not the employer for the ILWU employees, and 3) the October 1984 agreement was invalid and unenforceable. ILWU submitted its response on July 2, 2014.

[1]The Port sent a copy of its informal response to ILWU's counsel. On June 24, 2014, ILWU submitted an unsolicited response to the Port's informal response.

After receipt of ILWU's response, the ALJ asked the parties to respond to five additional questions as part of the investigation. On July 11, 2014, the parties submitted answers to those questions. The ALJ then forwarded this matter to the Board, recommending that the matter be dismissed.

ORS 243.676(1)(b) requires this Board to investigate unfair labor practice charges to determine if a hearing is warranted. If our investigation "reveals that no issue of fact or law exists, the board may dismiss the complaint." *Id.* For purposes of deciding whether to dismiss a complaint without a hearing, we assume that the well-pleaded facts in the complaint are true. *Schroeder v. State of Oregon, Department of Corrections, Oregon State Correctional Institution, and Association of Oregon Correctional Employees,* Case Nos. UP-49/50-98, 17 PECBR 907, 908 (1999). We may also rely on undisputed facts we discover during our investigation. *Upton v. Oregon Education Association/UniServ,* Case No. UP-58-06, 21 PECBR 867, 867-68 (2007); *Hood River Education Association v. Hood River County School District,* Case No. UP-38-93, 14 PECBR 495, 498 n 2 (1993).

The complainant alleges that the Port violated ORS 243.672(1)(e) and (g) by "refus[ing] to submit the parties disputes with regard to the CBA to arbitration." The respondent asserts that no collective bargaining relationship exists between ILWU and the Port. Further, even if such relationship existed, ILWU did not file a timely complaint.

Our investigation has determined that we have no jurisdiction over this matter. The Port, although a public employer, does not employ members of ILWU.[2] Rather, the involved ILWU members are employed by the International Container Terminal Services, Inc. (ICTSI), which is a private, not public, employer. Consequently, ILWU is unable to meet the statutory requirements of an ORS 243.672(1)(g) or (e) violation because it is unable to plead that the *public employer* (or designated representative) of the affected employees acted unlawfully.

As we have no jurisdiction over this matter, we do not address any of the reasons posited by the Port for dismissing this complaint (timeliness and invalidity/unenforceability of the 1984 agreement).[3]

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[2]When the ALJ asked whether members of ILWU were employed by the Port, ILWU responded, "Not currently in a direct sense. The Port does direct the work through ICTSI and has directed the work through another contractor." We understand this to mean that the Port does not employ members of ILWU.

[3]Our determination that we lack jurisdiction is supported by the NLRB's involvement in related matters with the Port, ICTSI and ILWU.

ORDER

The complaint is dismissed.

DATED this 5 day of September, 2014.

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-015/27-13

(UNFAIR LABOR PRACTICE)

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|---|---|
| WASHINGTON COUNTY DISPATCHERS ASSOCIATION,<br><br>Complainant,<br><br>v.<br><br>WASHINGTON COUNTY CONSOLIDATED COMMUNICATIONS AGENCY,<br><br>Respondent. | FINDINGS AND ORDER ON PETITION FOR REPRESENTATION COSTS |
| WASHINGTON COUNTY CONSOLIDATED COMMUNICATIONS AGENCY,<br><br>Complainant,<br><br>v.<br><br>WASHINGTON COUNTY DISPATCHERS ASSOCIATION,<br><br>Respondent. | |

On June 16, 2014, this Board issued an order holding that the Washington County Dispatchers Association (Association) violated ORS 243.672(2)(b), and that the Washington County Consolidated Communications Agency (Agency) did not violate ORS 243.672(1(e). The Agency filed a petition for representation costs on July 7, 2014. The Association filed objections to the petition on July 28, 2014, asserting, among other things, that the petition should be dismissed because it did not include a supporting affidavit as required by OAR 115-035-0055(2). Pursuant to OAR 115-035-0055, this Board dismisses the Agency's petition because it fails to comply with our rules. *See Deschutes County 911 Employees Association v. Deschutes County 911 Service District*, Case No. UP-32-04, 21 PECBR 493, *recons*, 21 PECBR 530 (2006) (Rep. Cost Order).

Under OAR 115-035-0055(2), a petition for representation costs must be accompanied by "a supporting affidavit." Specifically, the petition must include a statement of the amount of the costs requested, "supported by an affidavit that describes in detail the actual amount of the fees incurred by [the] petitioner or, where the petitioner was not charged fees, the basis for the amount of costs requested." "Filings that do not strictly comply with these rules will be dismissed." OAR 115-035-0055(5). *Accord Deschutes County 911 Service District*, 21 PECBR at 494; *Springfield Education Association v. Springfield School District No. 19*, Case Nos. C-144/161-83, 8 PECBR 6563, 6564 (1984) (Rep. Cost Order) (and citing cases).

Here, the Agency did not include an affidavit with its petition, as required by our rules. Because the petition did not strictly comply with our rules, the petition is dismissed. *See Deschutes County 911 Service District*, 21 PECBR at 494; *Springfield School District No. 19*, 8 PECBR at 6564-65; OAR 115-035-0055(5).

ORDER

The petition is dismissed.

DATED this 10 day of September 2014.

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-029-13

(UNFAIR LABOR PRACTICE)

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|---|---|---|
| INDEPENDENT ASSOCIATION OF LINN-BENTON COMMUNITY COLLEGE CLASSIFIED EMPLOYEES, | ) | |
| Complainant, | ) | FINDINGS AND ORDER ON RESPONDENT'S PETITION FOR REPRESENTATION COSTS |
| v. | ) | |
| LINN-BENTON COMMUNITY COLLEGE, | ) | |
| Respondent. | ) | |

On June 19, 2014, this Board dismissed Complainant's complaint, which alleged that Respondent violated ORS 243.672(1)(e) and (f) by unilaterally refusing to implement a salary increase after the parties' collective bargaining agreement expired. On July 8, 2014, Respondent filed a petition for representation costs. On July 29, 2014, Complainant filed objections to the petition, asserting, among other things, that the petition was not properly and timely served because it was mailed with insufficient postage. Pursuant to OAR 115-035-0055, this Board dismisses the petition because it fails to comply with our rules. *See Deschutes County 911 Employees Association v. Deschutes County 911 Service District*, Case No. UP-32-04, 21 PECBR 493, *recons*, 21 PECBR 530 (2006) (Rep. Cost Order).

Under OAR 115-035-0055(2), a copy of a petition for representation costs must be "served upon the opposing party at the time the petition is filed and proof of service shall be provided to the Board." "Filings that do not strictly comply with these rules will be dismissed." OAR 115-035-0055(5). *Accord Deschutes County 911 Service District*, 21 PECBR at 494; *Springfield Education Association v. Springfield School District No. 19*, Case Nos. C-144/161-83, 8 PECBR 6563, 6564 (1984) (Rep. Cost Order) (and citing cases).

Here, Respondent did not include sufficient postage necessary to properly serve the opposing party, as evidenced by the copy of the envelope submitted showing $.21 postage due. Moreover, the proof of service provided to the Board was defective, in that the proof of service averred that the petition had been served on Respondent with "postage paid." Because proper

postage was not paid in serving the petition on the opposing party, we conclude that Respondent did not strictly comply with our rules regarding representation costs. Consequently, we will dismiss the petition. *See Deschutes County 911 Service District*, 21 PECBR at 494; *Springfield School District No. 19*, 8 PECBR at 6564-65; OAR 115-035-0055(5).

ORDER

The petition is dismissed.

DATED this 10 day of September 2014.

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-019-14

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCALS 8 & 40, Complainant, | ) | |
| v. | ) | RECONSIDERATION ORDER |
| PORT OF PORTLAND, Respondent. | ) | |

Kevin Keaney, Attorney at Law, Portland, Oregon represented Complainant.

Randolph C. Foster, Attorney at Law, Stoel Rives LLP, Portland, Oregon, represented Respondent.

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On May 28, 2014, the International Longshore and Warehouse Union Locals 8 and 40 (ILWU) filed an unfair labor practice complaint against the Port of Portland (Port). On September 5, 2014, this Board dismissed the complaint, stating that we had no jurisdiction over the matter. On September 8, 2014, ILWU filed a petition for reconsideration and request for oral argument. On September 10, 2014, the Port filed a response.

In dismissing ILWU's complaint, we concluded that the involved ILWU members were not employed by the Port, a public employer, but by International Container Terminal Services, Inc. (ICTSI), a nonpublic employer. As such, we held that we did not have jurisdiction over the matter.

On reconsideration, ILWU does not dispute that the involved members are employed by ICTSI (and not the Port). Nevertheless, ILWU asserts that the Port is required to collectively bargain with ILWU and that we do have jurisdiction over the matter. That is so, according to ILWU, because nothing in the Public Employee Collective Bargaining Act (PECBA) requires the purported public employer to currently employ employees, in order for that public employer to have a bargaining obligation under the PECBA. We disagree. ORS 243.650(4) defines collective

bargaining as the "performance of the mutual obligation of a public employer and the representative of *its employees*" to meet and engage in good faith negotiations regarding mandatory subjects of bargaining (emphasis added). Thus, for the Port to be required to collectively bargain with ILWU, the involved ILWU members must be Port employees. As we previously determined (and ILWU does not contest), the Port has no such employees. Consequently, the Port has no duty to collectively bargain with ILWU with respect to this complaint, and we have no jurisdiction over any collective bargaining dispute between ILWU and ICTSI.

The Board grants reconsideration, and adheres to our initial order, as supplemented by this reconsideration order.

ORDER

Reconsideration is granted. The complaint is dismissed.

DATED this 12 day of September, 2014.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to C

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-054-13

(UNFAIR LABOR PRACTICE)

| | | |
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| AFSCME COUNCIL 75, LOCAL 1082, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | RULINGS, |
| v. | ) | FINDINGS OF FACT, |
| | ) | CONCLUSIONS OF LAW, |
| HOOD RIVER COUNTY, | ) | AND ORDER |
| | ) | |
| Respondent. | ) | |
| | ) | |

Giles Gibson, Legal Counsel, AFSCME Council 75, Portland, Oregon represented Complainant.

Nancy J. Hungerford, Attorney at Law, Hungerford Law, Oregon City, Oregon, represented Respondent.

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On August 15, 2014, Administrative Law Judge Julie D. Reading issued a recommended order in this matter. The parties had 14 days from the date of service in which to file written objections. *See* OAR 115-010-0090; OAR 115-035-0050(2). Neither party filed objections.

When neither party objects to a recommended order, we generally adopt the recommended order as our final order, and we consider any objections that could have been made to that order unpreserved and waived. *International Brotherhood of Electrical Workers, Local Union No. 659 v. Eugene Water & Electric Board*, Case No. UP-008-13, 25 PECBR 901 (2014). Consistent with that practice, we will adopt the recommended order as our final order in this matter. The final order is binding on, and has precedential value for, the named parties only. *Id.* Despite the precedential limitations of such a final order, we publish the uncontested recommended order as an attachment to the final order. *Clackamas County Peace Officers Association and Atkeson v. City of West Linn*, Case No. UP-014-13, 26 PECBR 1 (2014).

ORDER

1. The Board adopts the recommended order as the final order in this matter.

2. The complaint, as amended, is dismissed.

Dated this 15 day of September, 2014

Kathryn A. Logan
Kathryn A. Logan, Chair

*Jason M. Weyand, Member

Adam L. Rhynard, Member

*Member Weyand Dissenting

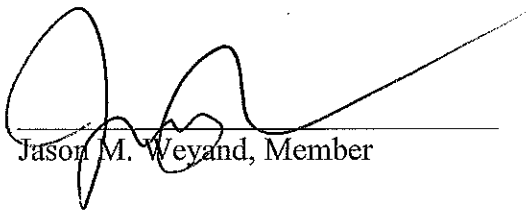
Consistent with the procedure established in *International Brotherhood of Electrical Workers, Local No. 659 v. Eugene Water & Electric Board,* Case No. UP-008-13, 25 PECBR 901 (2014) (*EWEB*), my colleagues have adopted the ALJ's recommended order as our final order in this case because neither party filed objections. In *EWEB*, I dissented from the majority's decision to utilize this procedure, stating that I would not adopt recommended orders that I felt incorrectly applied the Public Employee Collective Bargaining Act (PECBA). I believe this is such a case, and therefore, I respectfully dissent from the order above.

This case involved an allegation that the County violated ORS 243.672(1)(a) by, among other things, denying an employee's request for union representation in an investigatory meeting. I agree with the recommended order's conclusion that the employee was entitled to union representation and made a satisfactory request for such representation. However, I disagree with the ultimate legal conclusion that the County did not unlawfully deny the employee union representation. I do not believe that, in this situation, the County's obligation to provide *union* representation was satisfied by allowing a coworker who was not a designated representative of the labor organization (such as a steward, officer or business agent) to attend the investigatory meeting with the employee. Therefore, I would conclude that the County violated ORS 243.672(1)(a).

I am also concerned with *dicta* in the recommended order that implies that it was lawful for the County to compel the employee to accept an alternate union representative because the employee's supervisor and the particular union representative had a heated argument earlier in the

day. In *Lane County Peace Officers Association v. Lane County Sheriff's Office,* Case No. UP-32-02, 20 PECBR 444, 463 (2003), we concluded that the employer did not violate ORS 243.672(1)(a) by prohibiting association representatives who were under investigation from representing bargaining unit members who were subjects of *the same investigation.* We noted that this apparent or actual conflict of interest "could interfere with both the County's investigation and the Association's ability to represent its members." *Id.* However, the general rule is that, absent compelling reasons that require a different result, the employer should provide the union representative of the employee's choice.

The exception to the general rule recognized in *Lane County Sheriff's Office* is a narrow one, and there are no facts present that justify the application of such an exception here. A mere history of tense interactions between representatives of labor and management alone cannot justify an employer's decision to prohibit a union representative from providing representation to bargaining unit members. Allowing such a result would undermine the value of an employee's right to union representation, and would be inconsistent with the purposes and policies of the PECBA.



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-054-13

(UNFAIR LABOR PRACTICE)

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|---|---|---|
| AFSCME COUNCIL 75, LOCAL 1082, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | RECOMMENDED RULINGS, |
| v. | ) | FINDINGS OF FACT, |
| | ) | CONCLUSIONS OF LAW, |
| HOOD RIVER COUNTY, | ) | AND PROPOSED ORDER |
| | ) | |
| Respondent. | ) | |
| | ) | |

A hearing was held before Administrative Law Judge (ALJ) Julie D. Reading on April 16, 2014, in Hood River, Oregon. The record closed on June 2, 2014, following receipt of the parties' post-hearing briefs.

Giles Gibson, Legal Counsel, AFSCME Council 75, Portland Oregon, represented Complainant.

Nancy J. Hungerford, Attorney at Law, Hungerford Law, Oregon City, Oregon, represented Respondent.

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On November 27, 2013, AFSCME Council 75, Local 1082 (Union) filed a complaint alleging that Hood River County (County) violated ORS 243.672(1)(a) because a supervisor: (1) denied an employee's request for Union representation during an investigatory meeting, (2) drove by a Union steward's home when he was using sick leave, and (3) questioned the same Union steward about a vacation leave request. On December 4, 2013, the Union filed an amended complaint based on the same claims. On January 28, 2014, the ALJ issued a Notice of Hearing that: identified the issues in the case, constituted formal service of the amended complaint, and scheduled the hearing for April 16, 2014. The County filed a timely answer.

On April 9, 2014, the Union moved to file a second amended complaint thereby withdrawing its claims that a supervisor drove by a Union steward's home, and questioned him about his vacation leave request. The County did not oppose the motion and the ALJ granted it.

On April 15, 2014, the Union moved to amend the statement of issues as stated in the Notice of Hearing. The County opposed the motion. Prior to the hearing, the ALJ heard the parties' arguments on the motion. Upon the Union's admission that the ALJ's phrasing of the issues was more consistent with the second amended complaint, the ALJ denied the Union's motion to amend the issues.

Accordingly, the issues are:

1. Did the County Records and Assessment Director Brian Beebe: (1) refuse to let shop steward Hoby Hansen represent employee Diana McCrea during a May 31 meeting; (2) tell McCrea he was offended that she had chosen to consult with Hansen rather than talk to him directly about a time sheet issue; and (3) refuse to postpone the May 31 meeting until a shop steward could be present? If so, did the County interfere with and restrain McCrea in, or because of, the exercise of rights guaranteed in ORS 243.662, in violation of ORS 243.672(1)(a)?

2. Did the County Records and Assessment Director Brian Beebe deny employee and shop steward Hoby Hansen the opportunity to represent Diana McCrea during a May 31 meeting? If so, did the County interfere and restrain Hansen in, or because of, the exercise of rights guaranteed in ORS 243.662, in violation of ORS 243.672(1)(a)?

We conclude that the County did not deny McCrea's request for Union representation, as McCrea was allowed to bring Keller to the meeting as she requested. Accordingly, the County did not violate ORS 243.672(1)(a) as alleged.

## RULINGS

On April 9, 2014, the Union requested to have McCrea present her testimony by telephone. The County opposed the motion, but proposed an internet-based video conferencing service as a compromise. The ALJ ruled that the testimony could be provided by video conferencing. Given the late request of the Union and the availability of an alternative that was acceptable to the County, we determine that the ALJ's ruling was correct.

The remaining rulings of the ALJ were reviewed and are correct.

## FINDINGS OF FACT

### The Parties

1. The Union is a labor organization within the meaning of ORS 243.650(13).

2. The County is a public employer within the meaning of ORS 243.650(20).

3. The Hood River County Records and Assessment Department (Department) is headed by Director Brian Beebe. Beebe supervises Kim Keene and Duane Ely. In May 2013, Kim Keene supervised Diana McCrea, the Elections and Personal Property Clerk, and Micaela Keller, the Recording Clerk. Duane Ely supervised the Department appraisers, including Hoby Hansen. In May 2013, Hoby Hansen was the Union Vice President and Steward.

4. During the weekend of May 18, 2013, McCrea left her dog in the care of Keene. McCrea had told Keene that her dog would only be there for one day, but instead McCrea left her dog with Keene the entire weekend.

5. On May 20, 2013, McCrea came into the office and started the process of opening the public counters. During this time, she spoke with Keller about her weekend. Shortly thereafter, Keene confronted McCrea about not picking up her dog.

6. McCrea was very upset about Keene's confrontation and started to cry. McCrea decided she would not be able to perform work that day. McCrea went to Beebe and told him that she would be going home and using sick leave for the remainder of the day. Beebe permitted her to do so.

7. Beebe reviews all Department employee time cards at the end of each month and often finds errors that employees correct without incident.

8. On May 31, 2013, Department employees submitted their timecards to Beebe. Beebe noted that Hansen had erroneously failed to report holiday leave. Further, Beebe identified three concerns with McCrea's time card. Specifically, McCrea had failed to report some overtime worked and had forgotten to report some vacation leave used. Beebe also noticed that McCrea had claimed 15 minutes of work time for May 20, and had reported sick leave for the remainder of the day.

9. Beebe asked McCrea into his office to address the timecard concerns. McCrea noticed that Beebe had circled her 15 minutes of reported worked time on May 20, 2013, and had written, "did not work" in red ink. Beebe showed McCrea her errors with the vacation time and overtime. Beebe also told McCrea that she needed to report using sick leave for the entire day on May 20 because she had not worked. McCrea told Beebe that she had worked for the first fifteen minutes of the day. McCrea and Beebe briefly argued the issue. Beebe explained that he was watching out for the County and did not want it cheated. After deciding that she was not going convince Beebe that she had worked, McCrea agreed to claim sick leave for the entire day.

10. McCrea returned to her desk, which was outside Beebe's office and next to Keller's desk. McCrea told Keller that Beebe had told her to change her timecard. Keller told McCrea that since she had worked for 15 minutes that day, she should discuss the issue with Union steward Hoby Hansen.

11. After some deliberation, McCrea decided to discuss her timecard issue with Hansen. McCrea went to Hansen's office and expressed her concern. Hansen told McCrea that he needed to submit his corrected time sheet to Beebe and he would discuss her concern with Beebe at that time.

12. Shortly thereafter, Hansen walked into Beebe's office and up to his desk.[1] Hansen provided Beebe with his time sheet. Hansen made a statement that clearly communicated that he was there to discuss McCrea's time card.[2]

13. Beebe then came out from behind his desk.[3] Beebe asked Hansen to shut the office door so that the entire office would not be involved in the discussion. Hansen backed up against the door and partially closed it.

14. Beebe then explained his direction to McCrea to report sick leave for the entire day on May 20. He stated that McCrea would be paid more if she claimed sick leave for the entire day. Beebe further explained that he was trying to be fair and prevent McCrea from cheating the county. Hansen responded that Beebe was pushing employees too hard. Hansen and Beebe began arguing. Hansen again asked Beebe to close his office door. Hansen closed it. The mechanics of the door cause it to shut loudly even when the person closing it does not intend to slam it. Therefore, the door sounded as if it had been intentionally slammed.

15. Beebe and Hansen continued to argue. Beebe stated that maybe he should push employees even harder and tighten things up more. At this point, Beebe's voice became louder, and it increased until Keller and McCrea could hear that Beebe was yelling at Hansen, even though they could not discern what he was saying.[4]

16. The argument between Beebe and Hansen continued for approximately five minutes, with Keller and McCrea being able to hear Beebe yelling during that time. Keller and McCrea were frightened by the yelling. Because McCrea had talked to Hansen about her timecard, she assumed the argument related to her.

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[1]Hansen and Beebe offered conflicting testimony regarding whether Hansen knocked before coming in, approached Beebe from behind, and was aggressive in his movements. However, because these are not facts that need to be resolved for our analysis, we decline to make specific findings.

[2]Hansen testified he calmly told Beebe that McCrea was entitled to the 15 minutes of work time while putting down McCrea's timecard. Beebe testified that Hansen said "You're going to pay Diana for the 15 minutes or I'm going to file a grievance!" Because what Hansen said is not a fact that needs to be resolved for our analysis, we decline to make a specific finding.

[3]Hansen and Beebe offered conflicting testimony about what Beebe said as he walked out from his desk. Further, their testimony differed on whether Beebe sat down at his conference table after coming out from behind the desk. Again, because these are not facts that need to be resolved for our analysis, we decline to make specific findings.

[4]Beebe testified that he did not yell. However, his testimony is contradicted by the testimonies of Keller, McCrea, and Hansen. Therefore, we find their collective testimony more credible due to the corroboration. Further, future events, such as McCrea expressing fear of meeting with Beebe alone, only make sense if Keller and McCrea heard yelling.

17. After the argument, Hansen left Beebe's office, came to McCrea's desk, and told her to complete her time card as Beebe had instructed.

18. Beebe then left his office and went to the office of Human Resource Director Denise Ford. Beebe discussed the situation with McCrea's time card with Ford. Ford advised Beebe that 15 minutes of claimed work time was not worth significant conflict. Ford told Beebe, however, that he could ask McCrea why she believed she was entitled to claim the 15 minutes of worked time.

19. Beebe returned to his office and phoned McCrea at her desk. Beebe requested that McCrea come into his office. McCrea told Beebe that she did not feel comfortable coming in alone. Beebe told her it was not necessary to bring someone. McCrea again said she did not feel comfortable coming in alone and asked if she could be joined by either Keller or Hansen.[5] Beebe again told McCrea that it was not necessary for her to bring one of them, but he stated that she could bring Keller with her.[6] McCrea explained she could not come in until the front counter customers had been assisted, and Beebe agreed.

20. Shortly thereafter, Beebe walked by McCrea's desk and asked her if it would be okay if Ely also joined them in the meeting. McCrea agreed.

21. Approximately 30 minutes after Beebe requested the meeting, Keller, Ely, McCrea, and Beebe met in Beebe's office, sitting at his small conference table. Beebe started the meeting by telling McCrea that he was hurt that she felt she needed to have someone else there.[7] Beebe then began telling McCrea that he had done a great deal for the Department and if it was not appreciated, he could tighten up the rules.[8] Keller became uncomfortable with Beebe's statements. Keller interrupted Beebe and stated that McCrea should have union representation because Keller did not feel comfortable representing McCrea. Beebe did not respond to Keller.

22. Beebe then started repeatedly asking McCrea why she felt she was entitled to the 15 minutes of worked time and what she considered "work." McCrea attempted to answer Beebe's questions and defend her claim of 15 minutes of regular work time.

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[5]Keller testified that McCrea initially requested Hansen, and then asked if she could bring Keller. However, as Keller was not a direct party to the conversation, and her testimony is not consistent with that of Hansen and McCrea we do not accord it any weight.

[6]The record is not clear as to why Beebe chose Keller of the two options rather than stating either would be fine. It may have been due to the heated exchange he had recently had with Hansen.

[7]Beebe testified that he started the meeting by telling McCrea that she would be able to claim the 15 minutes of regular work time. However, both McCrea and Keller testified that he started the meeting by stating that he had been hurt by McCrea's need to have others attend the meeting.

[8]Beebe testified that he told Keller that McCrea was not in trouble and union representation was not necessary. However, his statement was contradicted by the testimony of both Keller and McCrea who stated that he simply ignored Keller.

23. Throughout the questioning, McCrea felt that Beebe was trying to impugn her character and accuse her of wrongdoing. McCrea asked Beebe on at least one occasion if she was in trouble. After a while, Keller again interrupted Beebe and stated that McCrea should have union representation because Keller did not feel comfortable representing McCrea given the lines of questioning. Again, Beebe did not respond to Keller.

24. After one of the times McCrea asked Beebe if she was in trouble, Beebe told her that she was not and she would be allowed to claim the 15 minutes as regular worked time.[9]

25. Subsequently, the Union filed a grievance on McCrea's behalf, but did not take it to arbitration. McCrea has since voluntarily left employment with the County and lives in another state. She provided her testimony via the webcam service Skype.

## CONCLUSIONS OF LAW

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

2. The County did not refuse a request by McCrea for Union representation at the May 31 meeting, and therefore did not violate ORS 243.672(1)(a).

## DISCUSSION

### Standards of Review

The Union asserts that McCrea requested Union representation before and during the May 31 meeting, and Beebe denied the requests, which interfered with and restrained McCrea in, or because of, the exercise of rights guaranteed by ORS 243.662. *See* ORS 243.672(1)(a). A bargaining member who requests union representation at an investigatory interview that could reasonably result in discipline exercises a right guaranteed by ORS 243.662. As a result, an employer's denial of such representation may violate ORS 243.672(1)(a).

An employer can violate ORS 243.672(1)(a) in two ways. One violation occurs if we conclude that the employer violated the "because of" prong of the statute. When an employer takes action "because of" an employee's activities, which are protected under the Public Employer Collective Bargaining Act (PECBA), the natural and probable effect of this conduct will be to chill employees in their exercise of protected rights. *See International Longshore and Warehouse Union, Local 28 v. Port of Portland,* Case No. UP-35-10, 25 PECBR 285, 295 (2012) (*citing State Teachers Education Association/OEA/NEA and Andrews, et al. v. Willamette Education Service District and State of Oregon, Department of Education,* Case No. UP-14-99, 19 PECBR 228, 249 (2001)). An employer may also violate the "in the exercise" prong of subsection (1)(a). Such a violation typically occurs when an employer representative makes threatening or coercive statements. *See Clackamas County Employees' Assn. v. Clackamas County*, 243 Or App 34, 42, 259 P3d 932 (2011).

[9]It is not clear from the record when McCrea first asked Beebe if she was in trouble, or how many times.

Under the PECBA, an employee is entitled to union representation at an investigatory interview if the following three criteria are met: (1) the employee reasonably believes that disciplinary action may result from the interview; (2) the employer insists upon the interview; and (3) the employee requests representation. *Port of Portland,* 25 PECBR at 293 (*citing Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon,* Case No. UP-21-88, 11 PECBR 480, 488 (1989)). Having originated in the case of *NLRB v. J. Weingarten, Inc*., 420 US 251, 88 LRRM 2689 (1975), the right to union representation during an investigatory interview is colloquially referred to as a *Weingarten* right. As the complainant, the Union has the burden of proof and must establish by a preponderance of the evidence that the County denied McCrea her *Weingarten* rights.

In *Washington County Police Officers Association v. Washington County*, UP-15-90, 12 PECBR 693 (1991), *adh'd to on recons,* 12 PECBR 727 (1991), we defined the role of the union representative in an investigatory interview under the PECBA. We held that (1) before the meeting, the representative may inquire about the purpose of the interview; (2) during the meeting the representative may seek clarification and elaboration of the employer's questions and employee's answers; and (3) at the end of the meeting, the representative may suggest to the employer other witnesses to interview, and discuss prior situations or other mitigating factors that could bear on the employer's deliberations concerning discipline. We made it clear that the representative does not have the right to counsel the employee in answering questions. 12 PECBR at 704-705. Accordingly, under the PECBA, a union representative is not a silent observer who cannot assist the employee, nor does a union representative serve as an employee advocate who turns the interview into an adversarial proceeding. Rather, the union representative's role is that of a monitor to ensure that the integrity of the investigation is not compromised by factual inaccuracies, misunderstandings, or incomplete information. *Id*.

The issues in this case as identified in the complaint are whether Beebe: (1) refused to let shop steward Hoby Hansen represent McCrea on May 31; (2) told McCrea he was offended that she had chosen to consult with Hansen rather than talk to him directly about a time sheet issue; and (3) refused to postpone the May 31 meeting until a shop steward could be present. In arguing its request to modify the issue statements, the Union acknowledged that there is insufficient factual support for the second allegation as stated, so we will not address that here.

With respect to the first and third allegations, we address those together under the *Weingarten* criteria, separately analyzing McCrea's request for Hansen or Keller, and Keller's request for a Union steward under the third criterion. We conclude that the County did not deny McCrea her *Weingarten* rights. Specifically, although Beebe insisted on an investigatory meeting, and McCrea reasonably believed that disciplinary action may result, we conclude that Beebe did not deny a direct request from McCrea for Union representation. Accordingly, the County did not deny McCrea's *Weingarten* rights and violate ORS 243.672(1)(a).

REASONABLE BELIEF THAT DISCIPLINARY ACTION MAY RESULT

McCrea reasonably believed that disciplinary action might result from her meeting with Beebe. We first note that Beebe did not intend to discipline McCrea when he met with her. Beebe and Ford decided to allow McCrea to claim the 15 minutes as work time and they did not discuss

discipline. However, an employee has a right to union representation even if the employer does not contemplate taking any disciplinary action against the employee at the time of the interview since disciplinary action will rarely be decided upon until after the results of the inquiry are known. *Port of Portland,* 25 PECBR at 293 (2012) (*citing Oregon AFSCME Council 75, Local 3940 v. State of Oregon, Department of Corrections,* Case No. UP-3-00, 19 PECBR 568, 577 (2002)).

The right to the presence of a union representative attaches when an employee reasonably believes that the purpose of the meeting is to obtain information that could be the basis of discipline. To determine if an employee's belief that discipline may result from a meeting is reasonable, we examine the totality of the circumstances. We have previously identified the following factors, which are merely illustrative and not exhaustive or all-inclusive:

> "1) Whether the interview concerns a subject that may result in discipline;
>
> "2) Evidence of employee wrongdoing;
>
> "3) Whether the employer representative conducting the interview has authority to impose discipline;
>
> "4) Whether the employee attending the meeting knows about discipline imposed on others for similar conduct;
>
> "5) Whether other circumstances suggest a possibility of discipline, *e.g.*, a more formal-style of meeting is more likely to suggest the possibility of discipline." *Id*. at 294 (*citing Oregon AFSCME Council 75, Local 3940 v. State of Oregon, Department of Corrections, Snake River Correctional Institution,* Case No. UP-9-01, 20 PECBR 1, 17 (2002)).

The Union did not present any evidence that other County employees had been disciplined for time card errors. Additionally, Beebe testified that employees routinely made inadvertent errors on their time cards that were corrected without incident. Further, in testifying about her meeting with Beebe, McCrea did not use the term "disciplinary action" or specifically state that she feared it might result. However, McCrea's testimony indicates that she reasonably feared that there may be consequences to her and the entire office based on her timesheet and her responses to Beebe's questions. Specifically, with respect to her meeting with Beebe and his assertions about how he had done good things for the office, McCrea testified:

> "I just felt like if I wasn't going to follow in his direction or do something, you know, stand up to him, that he was going to change his ways. So, I felt I was the person that was going to make things tighter in the office. That's what I felt like he implied, that I was going to cause that." (Testimony of McCrea.)

With respect to McCrea claiming fifteen minutes of work time on May 20, McCrea testified that Beebe continually questioned her work ethic and her definition of work. Specifically, McCrea described her meeting with Beebe as follows:

> "He was, he, it fully felt like he was trying to tear down my character. He, he was just doing his normal thing where he tries to act like you're doing something wrong or that you're in trouble or something like that. And, and, I even asked him at one part of the conversation…that…sorry…I asked him, like, '[A]m I in trouble here?' like, '[W]hat's happening?' And he said '[N]o, no, you're not in trouble.' But then he kept asking questions like that, like '[W]ell do you think that's working? What did you do?' * * * I mean, a couple times, I asked him more than once if I was in trouble because of his interrogating questions, and how he was interrogating me. And at the time, he was like, '[E]verything is going to be okay, you're going to get to claim this.' But then he would start interrogating again and asking those questions. So then you felt like '[I]f you are going to do that, then why are you asking these questions?' It just continued on." (Testimony of McCrea.)

McCrea also testified that she believed Beebe was attempting to get her to admit that she had lied when she claimed the fifteen minutes for May 20. (Testimony of McCrea.) Additionally, Beebe's questioning was intensive enough that it upset Keller and caused Keller to request Union representation on McCrea's behalf.

By focusing on McCrea's definition of work and what she did during the disputed fifteen minutes, Beebe's questions reasonably suggested to McCrea that she may be disciplined directly or that the entire office may suffer consequences based on her actions. It is axiomatic that public employees are expected to report their work time accurately and an intentional failure to do so can result in disciplinary action. Additionally, Beebe had told McCrea earlier that he was trying to prevent the County from being cheated. Finally, although Beebe was not McCrea's direct supervisor, he was the Department Director and had the authority to discipline McCrea. Therefore, we conclude that McCrea reasonably believed that disciplinary action might result from her meeting with Beebe. *See, e.g., Port of Portland,* 25 PECBR 285 (employee could reasonably view meeting as an interview that could result in discipline following his refusal to sign a letter imposing medical restrictions), and *Department of Corrections*, 19 PECBR 568 (employees who knew they violated policy reasonably believed that their interviews could lead to disciplinary action despite the employer's assurances that they were only witnesses).

THE EMPLOYER INSISTS UPON THE INTERVIEW

We conclude that Beebe insisted on the interview. He asked McCrea to meet with him. She told Beebe that she was uncomfortable meeting with him alone. Beebe did not cancel the meeting at that time. He also did not conclude the meeting when Keller asked for it to stop until McCrea could have Union representation. We determine this is sufficient to show that Beebe insisted on the interview.

THE EMPLOYEE REQUESTS REPRESENTATION

Finally, under the *Weingarten* third criterion, we conclude McCrea requested Union representation. The Union asserts that McCrea requested Union representation before the May 31 meeting when she said she wanted to bring Keller or Hansen, and Beebe denied the request when he stated that she may bring Keller. The Union also asserts that by ignoring Keller's request for a

Union steward during the meeting, Beebe violated McCrea's representation request. The County responds that McCrea herself never directly requested Union representation, and therefore, Beebe did not deny her representation. Having considered the arguments of both parties, we construe McCrea's request as a request for Union representation. However, as McCrea requested Keller or Hansen in the alternative, and was allowed Keller, we conclude she was not denied representation.[10] Additionally, we conclude that, as it was Keller, not McCrea, who requested Hansen or another steward at the interview, Beebe did not deny McCrea's request for a Union representative.

We first conclude that McCrea's request to have Keller or Hansen join her in Beebe's office constituted a request for Union representation. This Board has never analyzed the "employee requests representation" element in our *Weingarten* cases to determine how specifically a request must be phrased. However, the National Labor Relations Board (NLRB) has addressed this issue under the National Labor Relations Act (NLRA) in at least three previous cases, determining that an employee's request to simply have "someone" or "somebody" accompany them to an investigatory interview sufficed to be considered a request for union representation. *See General Die Casters, Inc.*, 358 NLRB 85 (2012), *Circuit-Wise, Inc*., 308 NLRB 1091 (1992), and *Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977). The NLRB's rulings in these cases have been based on its determination that the employer either knew that the employee was requesting union representation or had sufficient reason to infer it. *Id*. In this case, Beebe testified that the reason he asked Ely to join the meeting is that he had always been taught that if the union brings someone to a meeting, management should as well. (Testimony of Beebe.) Therefore, Beebe's testimony indicates that he understood McCrea's request for accompaniment to be a request for Union representation. As such, we find no reason to diverge from the NLRB rulings holding that an employee's request for "someone" or "somebody" was sufficient in cases where the employer understands the request to be one for union representation.

While we have determined that McCrea requested representation, we also conclude that Beebe did not deny her request. After hearing the yelling between Beebe and Hansen over her timecard claim, McCrea was fearful of meeting with Beebe alone. Therefore, before the meeting, McCrea asked Beebe if either Keller or Hansen could join her. Beebe originally said that it would not be necessary. After McCrea again requested either Keller or Hansen, Beebe told her she could bring Keller. Therefore, McCrea sought accompaniment at the meeting for the purpose of personal comfort, and Beebe permitted her to bring Keller for that purpose. Accordingly, Beebe did not deny McCrea's request for Union representation prior to the meeting.

During the meeting, it was Keller, not McCrea who requested Union representation for McCrea. We have not previously considered the issue of whether a third party can request representation on behalf of an interviewed employee. However, we have always phrased the final

[10]We have never analyzed whether a fellow employee who is not an elected union representative can accompany an employee during an investigatory interview. The NLRB has considered this issue several times; however, it has always been in the context of whether employees in non-Union work environments were subject to *Weingarten* rights. *See* Christine Neylon O'Brien, *The NLRB Waffling on Weingarten Rights*, 37 Loy. U. Chi. L.J. 101 (2005). Because we are not considering *Weingarten* in the context of non-union environments, we do not rely on the NLRB's discussion of co-worker representation in investigatory meetings.

requirement for finding a *Weingarten* violation as "**the employee** requests representation." *See Port of Portland,* 25 PECBR at 293 (emphasis added). We do not find any reason to expand this requirement for the following reasons. First, the NLRB has considered this issue and has consistently required that the involved employee be the one to initiate the request. *See Appalachian Power Co.*, 253 NLRB 931 (1980) (citing *Kohl's Food Company*, 249 NLRB 75 (1980); *First National Supermarkets, Inc*., *d/b/a Pick-N-Pay Supermarkets, Inc*., 247 NLRB 1136 (1980); *Lennox Industries, Inc*., 244 NLRB 607 (1979); and *Inland Container Corporation*, 240 NLRB 1298 (1979). Second, the Union has not provided us with any compelling authority or arguments to support an assertion that we should diverge from the NLRB's rulings and expand the request rights to a third party. Third, McCrea did not echo Keller's request and has not provided a compelling reason for failing to do so. When asked why she did not repeat Keller's request or make the request herself, Keller testified that she felt like it would not do any good since Beebe did not respond to Keller's request. (Testimony of McCrea.) However, McCrea's testimony also indicates that although she reasonably anticipated discipline from the interview, she did not feel intimidated and continued to successfully defend herself. Fourth, McCrea did not testify that she felt that the presence of a Union steward was necessary. Therefore, while McCrea may have assumed that the request would be futile, the onus was still on her to verbalize it and give Beebe the opportunity to respond.

Finally, even if McCrea had made or echoed Keller's request for Hansen during the meeting, we have held that in given circumstances, the employer can compel the choice of one representative over another. Specifically, in *Lane County Peace Officers Association v. Lane County Sheriff's Office*, Case No. UP-32-02, 20 PECBR 444 (2003), we held that the employer could exclude the employees' requested union representatives because they were subjects of the same ongoing investigation, and there was no evidence that the employees received inadequate representation or suffered a hardship. In this case, Beebe's previous explosive meeting with Hansen could lead to the interview with McCrea turning unnecessarily hostile. Therefore, this would be a valid reason for Beebe to have initially excluded Hansen. Further, McCrea's testimony does not indicate that *she* felt as if she received inadequate representation or suffered a hardship beyond what Keller was providing. As noted above, the Union representative's role is not that of an advocate, but more that of a monitor to ensure that the integrity of the investigation is not compromised by factual inaccuracies, misunderstandings, or incomplete information. Keller was upset by Beebe's approach and was not an elected Union official; however, there is no indication that she could not fulfill the monitoring process to the extent McCrea needed. Accordingly, we determine that Keller's request was not sufficient to meet the requirement of the employee making the request.

In conclusion, we hold that the Union met the first two prongs – that McCrea reasonably believed disciplinary action may result, and that Beebe insisted on the interview. However, the Union fails on the third prong – that McCrea requested representation and Beebe denied it. Specifically, McCrea requested, and was granted, representation by Keller and did not suffer inadequate representation or hardship.

3. The County did not refuse a request by McCrea for Union representation at a May 31 meeting, and therefore did not deny employee and shop steward Hoby Hansen the opportunity to represent Diana McCrea.

## DISCUSSION

Having concluded that Beebe did not deny McCrea's request for a Union representative, we also conclude that the County did not deny employee and shop steward Hoby Hansen the opportunity to represent Diana McCrea during a May 31 meeting.

## PROPOSED ORDER

The complaint, as amended, is dismissed.

SIGNED AND ISSUED on the 15th day of August, 2014.

Julie D. Reading
Administrative Law Judge

NOTE: The Employment Relations Board's rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The "date of filing objections" means the date objections are received by this Board; "the date of service" of a recommended order means the date this Board mails or personally serves it on the parties.) A party that files objections to a recommended order with this Board must simultaneously serve a copy of the objections on all parties of record in the case and file with this Board, proof of such service. This Board may disregard the objections of a party that fails to comply with those requirements, unless the party shows good cause for its failure to comply. (See Board Rules 115-010-0010(5) and (6); 115-010-0090; 115-035-0050; 115-045-0040; and 115-070-0055.)

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-002-13

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| JOE HORN,<br><br>Complainant,<br><br>v.<br><br>SALEM POLICE EMPLOYEES' UNION,<br><br>and<br><br>CITY OF SALEM AND SALEM POLICE DEPARTMENT,<br><br>Respondents. | ) | RULINGS,<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND ORDER |

Sean J. Riddell, Attorney at Law, Portland, Oregon, represented Complainant.

Jaime B. Goldberg, Attorney at Law, Makler, Lemoine, & Goldberg, PC, Portland, Oregon, represented Respondent Salem Police Employees' Union.

Jeffrey P. Chicoine, Attorney at Law, Miller Nash, LLP, Portland, Oregon, represented Respondents City of Salem and Salem Police Department.

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On August 29, 2014, Administrative Law Judge Larry L. Witherell issued a recommended order in this matter. The parties had 14 days from the date of service in which to file written objections. *See* OAR 115-010-0090; OAR 115-035-0050(2). Neither party filed objections.

When neither party objects to a recommended order, we generally adopt the recommended order as our final order, and we consider any objections that could have been made to that order unpreserved and waived. *International Brotherhood of Electrical Workers, Local Union No. 659 v. Eugene Water & Electric Board*, Case No. UP-008-13, 25 PECBR 901 (2014). Consistent with that practice, we will adopt the recommended order as our final order in this matter. The final order

is binding on, and has precedential value for, the named parties only. *Id.* Despite the precedential limitations of such a final order, we publish the uncontested recommended order as an attachment to the final order. *Clackamas County Peace Officers Association and Atkeson v. City of West Linn*, Case No. UP-014-13, 26 PECBR 1 (2014).

ORDER

1. The Board adopts the recommended order as the final order in this matter.

2. The complaints against the Salem Police Employees' Union and the City of Salem/Salem Police Department are dismissed.

Dated this 24 day of September, 2014

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-002-13

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| JOE HORN,<br><br>Complainant,<br><br>v.<br><br>SALEM POLICE EMPLOYEES' UNION,<br><br>and<br><br>CITY OF SALEM AND SALEM POLICE DEPARTMENT,<br><br>Respondents. | ) | RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER |

A hearing was held before Administrative Law Judge (ALJ) Larry L. Witherell on April 28-29, 2014, in Salem, Oregon. The record closed on June 2, 2014, with the receipt of the parties' post-hearing briefs.

Sean J. Riddell, Attorney at Law, Portland, Oregon, represented Complainant.

Jaime B. Goldberg, Attorney at Law, Makler, Lemoine, & Goldberg, PC, Portland, Oregon, represented Respondent Union.

Jeffrey P. Chicoine, Attorney at Law, Miller Nash, LLP, Portland, Oregon, represented Respondents City of Salem and Salem Police Department.

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On August 19, 2013, Joe Horn (Horn or Complainant), filed this unfair labor practice complaint against Salem Police Employees' Union (Union), and the City of Salem and Salem Police Department (collectively City or Department). The complaint, as amended on April 1, 2014, alleges that the Association breached its duty of fair representation in violation of ORS 243.672(2)(a) and that the City breached the collective bargaining agreement in violation of ORS 243.672(1)(g). The Union and City filed timely answers to the complaint.

The issue presented for hearing was:

Did the Salem Police Employees' Union (SPEU) conduct toward and treatment of Joe Horn, relative to his termination by the City, violate SPEU's duty of fair representation and ORS 243.672(2)(a)?

For the reasons set forth below, we conclude that the Union did not violate ORS 243.672(2)(a) as alleged. We further dismiss the complaint against the City.

## RULINGS

The ALJ bifurcated the case. In duty of fair representation cases, we bifurcate the claims in order to address the allegations against the labor organization first. *Slayter v. Service Employees International Union Local 503, and State of Oregon, Department of Fish and Wildlife*, Case No. FR-01-12, 25 PECBR 494, 495 (2013); *Gibson-Boles v. Oregon AFSCME Council 75, and State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-46-01, 20 PECBR 483, 487 (2003), *AWOP*, 195 Or App 185, 99 P3d 1238 (2004), *rev den*, 338 Or 16, 107 P3d 26 (2005); *Mengucci v. Fairview Training Center and Teamsters Local 223*, Case Nos. C-187/188-83, 8 PECBR 6722, 6734 (1984).

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

## FINDINGS OF FACT

1. The City is a public employer as defined by ORS 243.650(20). The Union is a labor organization as defined by ORS 243.650(13).

2. The Union is the exclusive bargaining representative for a unit of all employees in the City's police department, including police officers, corporals, police laboratory technicians, community service officers, custody officers and special investigators. The City and Union are parties to a collective bargaining agreement, which, at the time of the hearing, was effective from July 1, 2011 to June 30, 2014.

3. During the relevant times and events, or where otherwise specified, the following individuals held the following positions with the Union:

| | |
|---|---|
| Richard Beal | Member of Executive Board |
| Jacob Burke | Secretary and Member of Executive Board |
| Mark Makler | Attorney for the Union |
| Tom Rousseau | Member of Executive Board |
| Jeff Staples | President and Member of Executive Board |
| Dustin Wann | Member of Executive Board |

4. Officer Beal has been a police officer for 26 years, including 13 years with the City, and has been on the Union executive board (E-Board) for 6 years. Officer Burke has been a police officer with the City for 16 years, and has been on the executive board for a little over 2 years. Officer Rousseau has been a police officer for the City for 26 years and has been a member of the executive board for 7 years. Detective Staples has been a police officer for 31 years, including 27 years with the City. He was the Union secretary from 1999 to July 2007, when he became the Union president. Detective Wann has been a police officer with the City for about 10 years and has been on the executive board for about 2 years.

5. During the relevant times and events, or where otherwise specified, the following individuals held the following positions with the City:

| | |
|---|---|
| James Anglemier | Lieutenant |
| Ben Bales | Sergeant, Internal Affairs Unit |
| Jeff Barratt | Sergeant |
| Steve Bellshaw | Deputy Chief of Police |
| James Ferraris | Deputy Chief of Police, Investigations Division |
| Aaron (Pat) Garrett | Sergeant, Internal Affairs Unit |
| Mark Keagle | Lieutenant, Special Operations Section |
| Skip Miller | Lieutenant, Internal Affairs |
| James Mooney | External Investigator for the City |
| Gerald Moore | Chief of Police |

6. Joe Horn worked for the City as a police officer from November 2008 until March 27, 2013. During that time he was also a member of the Union. (First Amended Complaint, ¶3 and ¶4; Union Answer ¶1 and ¶2.)

Internal Affairs Investigation (August 14, 2012): The Photo and Phone Incident

7. In July 2012, Sgt. Barratt learned that Officer Horn possessed on his cell phone a photo showing a partially nude, female City employee, and that Horn had shown it to another police officer. As a result, Barratt met with Lt. Keagle, Special Operations, and Deputy Chief Ferraris, Investigations Division, to recount the details.

8. On July 20, 2012, Deputy Chief Ferraris directed that Sgt. Garrett conduct an internal affairs (IA) investigation into the allegations.

9. On August 13, 2012, Garrett informed Horn of the complaint (in which Horn was alleged to have shown the photo to another Salem police department employee), and scheduled an IA interview with Horn for August 14. Garrett informed Horn that the complaint, if substantiated, may constitute violations of Policy 2.01, Personal Conduct, Section III (Conducting Unbecoming an Officer); Rules of Conduct, Part II (General Conduct and Responsibilities), Section A (General Conduct); and the City Policy of Nondiscrimination and Harassment. (Exh. R-3 at 133.)

10. Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer) states: "Since the conduct of an officer, on or off duty, may reflect directly upon the department, an officer must at all times conduct himself in a manner which does not bring discredit to himself, the department, or the City." (Exh. R-3 at 144.)

11. The Rules of Conduct, Part II (General Conduct and Responsibilities), Section A (General Conduct), states that "[m]embers, on and off duty, shall be governed by the ordinary and reasonable rules of good conduct and behavior, and shall not act in such a manner as to bring reproach or discredit upon the department or the City of Salem." (Exh. R-3 at 149.)

12. The pertinent sections of the City's Policy of Nondiscrimination or Harassment states:

> "The City of Salem is committed to providing all employees with a work environment free of discrimination or harassment of any kind. The purpose of this policy statement is to reaffirm our commitment to equal employment opportunity and to provide a harassment free work environment for all employees. Employees include all part-time exempt, seasonal, career status employees, and volunteers working for the City and Housing Authority.
>
> "* * * * *
>
> "Harassment or discriminatory conduct, of any kind, whether physical or verbal, committed by supervisors or non-supervisory personnel or agents of the City, is prohibited in the workplace. Prevention of discriminatory activities must be practiced at all times, especially by supervisors. Supervisors and managers have additional responsibility to listen to harassment and/or discrimination complaints and to take corrective actions where appropriate. In those cases where discrimination can be established, disciplinary action up to and including termination may be taken by the City." (Exh. R-3 at 135.)

13. Garrett interviewed Horn on August 14, 2012. Union President Staples was also present to represent Horn at the investigatory interview. During the interview, Horn stated that he received the topless photo 11 months earlier, in the summer of 2011. He also stated that he showed or electronically forwarded the photo to Detective Lance Diede within a couple of days after receiving the picture. Garratt asked Horn, "are you still in possession of it?" (Exh. R-3 at 172.) Horn answered, "[n]o, I'm not. * * * It was on my other phone and it's in the bottom of the Deschutes River. Um, about last September, or last August [2011]. Uh, I only had it for like a week and then went rafting. * * * And it disappeared." (*Id.*)

Garrett asked Horn if he had a social relationship with the City employee shown in the photo. Staples objected to that line of questioning, asserting that the issue was not within the IA

notice, also referred to as a *Weingarten* notice, to Horn, and therefore, not an appropriate line of inquiry.[1] Garrett discontinued that line of inquiry.

14. During the investigation of Horn, Garrett and IA Sgt. Ben Bales also interviewed Diede. During the interview, Diede stated that Horn forwarded the photo to his cell phone in April or May 2012. Bales asked Diede, "could it have been last summer," meaning 2011? Diede answered, "[n]o. I didn't know Joe [Horn] last summer. I didn't really know Joe until I became, uh, his partner and when I joined the [Drug Activity Response Team] Unit in January [2012]." (Exh. R-3 at 176.)

15. On September 20, 2012, Garrett submitted a report on his investigation of Horn to Deputy Chief Ferraris. In the report, Garrett concluded that Horn violated the City's sexual harassment policy by forwarding the photo to another police officer; and that Horn engaged in conduct unbecoming an officer in violation of the City's personal conduct policy by forwarding the photo to another police officer.

In his report, Garrett also stated that "there is substantial evidence to support an investigation into untruthfulness on the part of Officer Horn during his interview with me." (Exh. R-3 at 118.) During the interview, it was established that in the summer of 2011 the female co-worker asked Horn if he still had the photo. Garrett concluded that Horn, when asked by the female co-worker, untruthfully represented that he did not. Garrett also concluded that Horn untruthfully represented to Garrett that he did not have the photo anymore because he claimed to have lost the cell phone in the Deschutes River in August or September 2011, even though Diede stated he received the photo from Horn in April or May 2012. Diede was certain about the time frame because he did not know Horn until January 2012, and Horn would not have had Diede's cell phone number in August or September 2011.

16. Garrett initiated a formal complaint against Horn for lying during an official investigation, and assigned the case to Bales for investigation.

Internal Affairs Investigation (September 17, 2012): Untruthfulness

17. On September 7, 2012, Bales informed Horn that a complaint had been filed against him for "[u]ntruthfulness during an official interview." (Exh. R-3 at 23.) On September 14, Bales gave Horn the formal *Weingarten* notice of the complaint against him and scheduled the IA interview for September 17. This notice alleged that Horn had been "untruthful during an official interview with Sgt. Garrett." (Exh. R-8.) The alleged conduct could be in violation of the Rules of Conduct, Part III (Professional Conduct), Section L (Truthfulness); and Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer).

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[1]The *Weingarten* notice refers to the City's notice to an employee that he/she is subject to an investigatory interview that could result in discipline, and therefore the employee may have union representation at the interview. It refers to *NLRB v. J. Weingarten*, 420 US 251, 95 S Ct 959 (1975), in which the court concluded that an employee is entitled to union representation at an investigatory interview if the employee has a reasonable belief that the interview could result in disciplinary action.

18. The City's Rules of Conduct cover police department employees. The Rules of Conduct, Part III (Professional Conduct), Section L (Truthfulness) require that all police officers "shall be truthful in their spoken and written word at all times as it relates to their professional and official conduct and duties. This applies also to official reports and court testimony which shall be factual, complete, and accurate in all details." (Exh. C-40 at 8.)[2]

19. Between September 14 and 17, Staples met with Horn and gave him some documents related to his prior interview with Garrett so that Horn could review them and prepare for his interview with Bales. During this meeting, Horn brought up the phone issue and said he may have been mistaken about the timeline, about when he lost his phone and which phone actually had the picture on it. Staples explained that at the upcoming IA interview, Bales would begin by asking Horn if he has anything he would like to tell Bales, anything he would like to add or explain before they begin the questioning. Staples advised Horn to explain to Bales that he had several phones and that he was confused about the timeline of when he lost the phone and which phone had the picture.

20. On September 17, Bales met with Horn for the IA investigation into the allegation of untruthfulness. Staples and Union Secretary Burke were present to represent Horn.

21. As Staples expected, Bales began the interview by asking Horn, "[d]o you have anything you want to say before we start asking questions." (Exh. R-3 at 25.) Instead of following the instructions that Staples had given him a day or two earlier, Horn merely answered, "[n]o sir." (*Id.*)

After a series of questions, Horn acknowledged that in his first interview he told Garrett that he had lost the cell phone that had the picture of the female employee on it a year earlier, in August 2011, on a rafting trip. He also acknowledged that he did not know Diede until Diede joined the drug activity response team (DART), in January 2012. Bales asked how Horn could send Diede the photo when the phone was on the bottom of the Deschutes River. Horn responded, "[w]ell, that's where my error was in the timeframe, 'cause when I answered the question, I said initially that I didn't know when I had, when I sent the picture and I said nine months to a year ago, and then I started processing it out loud saying it had to be on my old phone, the one that I lost in the bottom of the Deschutes." (*Id.* at 27.)

Bales then reviewed the transcript of the first interview with Horn. Bales pointed to several instances where Horn was unsure or could not recall with any certainty. He then pointed out that Horn, however, was very specific and certain about the photo and phone. Bales noted where, in the first interview, that Horn stated with certainty that he sent Diede the photo within a couple of days after receiving it. Bales stated to Horn, "there's nothing in there that says I don't know, I don't recall." (*Id.*)

Bales again noted that when Garrett asked Horn when he last had the picture, Horn said with certainty that it is on the bottom of the Deschutes River. Bales said that was not true. Horn responded,

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[2]For Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer), see Findings of Fact 10.

"[w]ell, I know that I did lose the phone and I went to Verizon and I got a printout of the phones that I had used, or that I had got over the last year. * * * And I had lost that phone, or I lost a phone, the, the, uh, a Droid Incredible, on 7/31. Got a new phone, then got that one, which was another Droid Incredible, through the warranty deal, and then I actually, that one went into the river at, down at the Willamette and I ended up putting rice in it to try and fix that one. So as far as what phone that picture was on, I don't know. Uh, as, I, I mean, yes I had the picture, yes I showed it. As far as the, the timeframe, I don't know. I, I really, I don't know." (*Id.* at 28.)

Horn acknowledged that after his interview with Garrett he realized he could not have sent Diede the photo until after January 2012. Bales then asked Horn, "[s]o what effort did you make to contact Sergeant Garrett to clarify your statement?" Horn answered, "I didn't make any effort sir." (*Id.* at 29.) When asked why not, Horn claimed not to know whether it would be appropriate. Horn did not dispute Bales when he stated, "[y]ou knew your statement wasn't truthful and accurate at the time that you were in, you were being interviewed by Sergeant Garrett, you realized that your statement wasn't true and accurate, but you made no effort to clarify that statement with Sergeant Garrett." (*Id.*)

Horn originally said the female employee asked if he still had the photo, and he said he did not, that he had lost it the summer of 2011. Bales stated that Horn lied to the female employee when he told her he no longer had the photo. Horn, however, claimed that he did not lie to her or to Garrett in the first interview, but that he merely made an error about the time frame. Horn acknowledged that his statement that the phone with the photo is at the bottom of the Deschutes River is not a true statement. Horn also acknowledged that he became aware it was not a truthful statement and that he made no effort to correct the untruthfulness during the month after the first interview with Garrett.

At one point during the interview, Bales tried to pin Horn down about why Horn could and could not remember certain facts. Bales asked if Horn texted such an amount that he would not be able to remember if he sent the picture or merely showed the picture to another officer. When Horn conceded he texted a lot, Bales asked how many per month. Horn said 11,000 per month. Bales attempted to inquire whether his excessive texting was happening on duty time or personal time. Staples objected to that line of inquiry since it was beyond the formal IA notice. Bales terminated that line of inquiry.

22. On October 2, 2012, Bales submitted a report on his investigation to Chief Moore via the chain of command. In his report, Bales concluded that Horn violated the Rules of Conduct, Part III (Professional Conduct), Section L (Truthfulness); and Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer).

Internal Affairs Investigation (September 17, 2012): Personal Use of Evidence Tape

23. On July 25, 2012, Detective Kistner reported to Internal Affairs that he believed Horn had used police evidence tape at his personal residence. Kistner visited a house that had been

rented by Horn from August 2010 to July 2012, and that was owned by another police officer. While visiting the house, Kistner observed that police evidence tape had been put on the walls.

24. On September 13, 2012, Garrett gave Horn a written *Weingarten* notice of a complaint concerning the alleged personal use of evidence tape. Garrett advised that the complaint, if sustained, could constitute violations of Policy 2.01, Personal Conduct, Section V (Integrity), and Section III (Conduct Unbecoming an Officer); and Rules of Conduct, Part II (General Conduct and Responsibilities; Section C (Obey the Law).

25. Policy 2.01, Personal Conduct, Section V (Integrity), states:

> "The public demands that the integrity of its law enforcement officers be above reproach, and the dishonesty of a single officer may impair public confidence and cast suspicion upon the entire department. Succumbing to even minor temptation can be the genesis of a malignancy which may ultimately destroy an individual's effectiveness and may contribute to the corruption of countless others. An officer must scrupulously avoid any conduct which might compromise the integrity of himself, his fellow officers, or the department." (Exh. R-3 at 91-92.)[3]

26. The Rules of Conduct, Part II, General Conduct and Responsibilities, Section C (Obey the Law), provides that "[m]embers of this department shall not violate any of the laws, statutes, or ordinances of federal, state, or local governments." (*Id.* at 79.)

27. Garrett interviewed Horn on September 17, 2012. Staples and Burke were also in attendance to represent Horn. During the interview, Horn stated that he had placed the police evidence tape on the walls of the house he was renting, and that he obtained the tape, which was property of the City, from his duty bag. He explained that he put the tape up as part of decorations for his daughter's birthday-Halloween party.

28. Later on September 17, 2012, after the IA interview, Horn asked Staples if he could get a copy of the transcript of his interview. After checking, Staples explained that IA will not release a transcript until they are ready for the next meeting.

Some Pre-Disciplinary Actions

29. Later on September 17, 2012, after Horn's second IA interview with Garrett, Chief Moore assigned Horn to paid administrative leave. Horn was required to surrender his police department identification card(s), badge, department-owned firearms, department taser, department keys, and all entry keys and devices. Horn was prohibited from entering any secure portion of a police facility or performing any police-related duties, including testifying in court proceedings, without prior written authorization from a supervisor, the police chief or his designee.

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[3]For Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer), see Findings of Fact 10.

30. On October 9, 2012, Garrett submitted his report to Deputy Chief Ferraris, in which he concluded that Horn violated Policy 2.10, Personal Conduct, Section III (Conduct Unbecoming an Officer), and Section V (Integrity); and the Rules of Conduct, Part II (General Conduct and Responsibilities), Section C (Obey the Law). On October 18, Ferraris asked Bales to determine when Horn actually rented the house in question. Bales checked into it and confirmed that Horn rented the house from August 2010 until July 2012.

31. On October 26, 2012, Chief Moore informally advised Staples that the City was prepared to provide Horn with a pre-disciplinary hearing, and that the City was proposing to terminate Horn. On October 29, the City gave Horn formal notice for his pretermination or pre-disciplinary meeting. The meeting was scheduled for November 15.

32. During this same time period, in late October or early November 2012, Staples discussed a possible resignation with both Horn and the chief. Staples wanted to negotiate Horn's resignation, which might not result in the loss of certification by the Department of Public Safety and Standards Training (DPSST). This way, Horn might be able to secure employment as a police officer with another jurisdiction. However, the chief would not agree to check "resignation" on the personnel action report that is submitted to the DPSST when a law enforcement officer leaves employment. Instead, he proposed to categorize it as a "resignation during investigation." Horn would not agree to resign under this situation since this would most likely result in the revocation of his licensure by DPSST.

33. During this same time period, Staples had discussions with Union attorney Makler. Staples informed Makler about the IA investigations and the interviews conducted with Horn. Staples advised Makler about the allegations; what the IA investigators are asking about; the focus of the IA investigations; and where the process seemed to be heading. Given their understanding of the allegations and their experience with IA investigations, Staples and Makler concluded that the investigators had reached or would reach the conclusion that Horn has been untruthful.

34. In early November 2012, Staples asked Makler to meet with Horn. On November 12, Staples and Makler met with Horn at Starbucks at the Wilsonville Fred Meyer. At the request of Staples, Makler discussed the situation with Horn, and explored likely scenarios, the likely outcome, and options should a conclusion of untruthfulness be sustained at the end of the investigation. Makler explained that there are significant ramifications to a police officer's licensure and certification if an officer is found to be untruthful. The DPSST most likely would proceed to revoke the officer's license and certification. This would make it virtually impossible to regain a license and employment as a police officer in another jurisdiction. Makler then explored options with Horn, including the option of resigning or negotiating a separation agreement with the City, which could leave Horn with the possibility of preserving his licensure and finding employment in law enforcement elsewhere; or he could just go forward with the investigation and see what happens.

35. During the Wilsonville meeting, Horn disclosed to Staples and Makler that he had had conversations with FF, an employee in the City's human resources department, about Horn's IA investigations. Horn revealed that he had a detailed memorandum containing four pages of

notes of what purported to be several communications with FF.[4] Staples asked for and received a copy of the memorandum and permission to discuss it with, and provide it to, the City.

Horn-FF Communications and Further Inquiries

36. After having been told about Horn's communications with FF, the next day, on November 13, Staples wrote to Chief Moore. Staples expressed concern that the City may have been interfering in an IA investigation of Horn. Staples wrote:

> "Officer Horn was placed on administrative leave on September 17, 2012 while he was being investigated by the City of Salem for offenses that could lead to his termination. * * * Officer Horn * * * advised me he has been in contact with [FF] from the Human Resources department during this investigation.
>
> "Officer Horn told me he had several conversation[s] with [FF] during the time he was out of state and when he returned, [FF] told him 'the City could not fire him.' According to Officer Horn[,] [FF] advised him the City would make some type of a separation agreement with Officer Horn if he came in and resigned providing him with pay and benefits for an undisclosed amount of time. According to Officer Horn, [FF] talked to him on September 11, 2012, and for over an hour * * * during the time of September 19 to 25. Officer Horn was under the impression that [FF] had the ability to change the course of the investigation by providing input as Human Resources often does on personnel matters. Officer Horn felt [FF] had information the Union did not and provided this to Officer Horn making him feel this could 'all go away' if Officer Horn came in and resigned on his own.
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> "Officer Horn said he met with [FF] at [W]est Salem Starbucks after sending an email to [FF] on September 11, 2012. [FF] called Officer Horn telling him not to communicate by email since 'they can be tracked.' [FF] told Officer Horn he is a target now. He told Officer Horn that the Police Department 'does rogue stuff and no one knows of the investigations going on.' [FF] told Officer Horn several times the Police Department could not fire him because the sexual harassment policy 'sucks' and said he would make sure Officer Horn[']s DPSST certification does not get affected. The last thing [FF] told Officer Horn was 'not to burn me by telling anyone we are talking.'
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> "As you know if this is true, this information undermines the ability of the Union to provide Officer Horn with a fair defense and protecting his employment rights and options. This also violates article two, recognition in our current CBA, along with article three and six. Given this new information, I request the Loudermill

[4]At the request and agreement of the parties, and approval of the ALJ, the individual is identified only as FF.

[pretermination] hearing[5] scheduled for November 15, 2012 be delayed until the City can provide me with all reports generated by [FF].

"This letter is a PECBA information request with information being requested that is relevant to mitigation on behalf of Officer Horn and exculpatory information that may benefit the Salem Police Employees Union and Officer Horn in his Loudermill meeting. [FF]'s contact with Officer Horn has opened mitigating issues that have impacted the sanctity of the investigation by talking with Officer Horn while he was placed on administrative leave in [FF]'s official capacity. Not only do I request reports generated by [FF]'s contact with Officer Horn, but all notes, emails, and files that are stored in the Human Resources department regarding Joseph Horn." (Exh. R-14 at 1-2.)

37. Horn had a pre-disciplinary hearing scheduled for November 15, and Staples wanted it postponed. Staples wanted to determine if the City held any information that might have come from Horn's communications with FF, and that might be advantageous to Horn's case or provide some mitigating circumstances that the Union could use in Horn's defense. The chief agreed to postpone the pre-disciplinary hearing pending an investigation into FF's communications with Horn. The postponement also gave Staples additional time to attempt to negotiate a resignation in lieu of termination with the chief. Staples asked Horn for his phone records regarding his telephone calls with FF.

38. As a result of Staples's letter to City and his request for information, the City discovered for the first time that FF may have had communications with Horn. As a result, the City hired James Mooney, an outside human resources consultant, to inquire into Horn's allegations and the extent to which communications may have occurred between Horn and FF.

Horn and FF had at least seven conversations between September 11 and 25, 2012. According to the notes, Horn advised FF of the allegations he was facing. In his notes, Horn claims that FF assured him it was not a big deal and that he should trust FF because his role is to help employees such as Horn. On September 11, 2012, Horn wrote in his notes that FF assured Horn:

"I wasn't going to get fired and [FF] instructed for me to relax. He said it wasn't sexual harassment because the city[']s policy 'sucked' in that because it was very broad. He said I was ok and the worst that would happen is prob[ably] a day off but he was going to fight to prevent that even. He said if a day off happened then take it and move on. He told me several times to relax I wasn't going to get fired. * * * He said could the [police department] fire me, yes they could, but he wouldn't allow that to happen because that's what he does, he protects the employees['] rights." (Exh. R-13 at 2.)

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[5]A *Loudermill* hearing is a reference to *Cleveland Board of Education v. Loudermill*, 470 US 532, 105 S Ct 1487 (1985), in which the Court held that certain non-probationary, public employees have a property interest in their employment, and under the due process clause are entitled to some kind of hearing before they can be terminated. The hearing would give the employee formal notice of the charges against them and an opportunity to present a response.

On September 15, according to Horn's notes, FF purportedly told Horn not to worry about the untruthfulness allegation.

> "[It was] no big deal, I just made a mistake on the time frame and to 'not sweat it.' He said it[']s not like I lied about not showing [the picture]. He said for me to just explain that I made an error in the time frame and if they showed me in black and white when it was sent, agree. * * * He again said it[']s fine and to relax, it was just a time frame issue because I had no intent." (*Id.*)

39. Investigator Mooney found that Horn unilaterally e-mailed FF on September 11, 2012, over his employment concerns. They then met face-to-face once and had several telephone conversations over the next two weeks. Horn claimed that FF assured him that the substance of the charges was not serious enough to warrant termination, and he encouraged Horn not to resign. FF denied to Mooney that he made any of the alleged statements or representations to Horn.

Investigator Mooney did not find that there was any tampering by the City in Horn's case as the result of Horn's communications with FF. Horn had unilaterally contacted FF. While the Union was concerned that FF might have access to information that the Union did not, Mooney concluded that all of FF's information came from Horn. FF did not engage in any misconduct but he was just not very experienced, particularly in a union environment, and probably should have been more forceful in advising Horn to contact the Union. FF did not provide Horn with any negative comment about the Union or the police command.

After the initial inquiry, the City requested that Mooney re-interview FF. The City wanted Mooney to ask FF specifically about the purported statements Horn claimed FF made to him. After re-interviewing FF, Mooney again concluded that Horn attributed to FF opinions and conclusions that Horn actually held and that he communicated to FF.

40. After the City's investigation of the FF-Horn communications, the Union requested a copy of the investigation results. On December 18, 2012, the Union's attorney made a written request for a copy of the FF investigation and any future information or documents that constitute the FF investigation. He argued that the information from the FF investigation, as it related to FF's communications with Horn, might include exculpatory material or material that contained mitigating circumstances. The City provided the investigatory materials to Makler subject to a non-disclosure agreement.

41. In late February 2013, Staples asked Makler for his legal opinion on the FF matter, based on Makler's review of the FF investigatory materials. On February 28, Makler advised Staples that the investigation revealed that FF violated several City rules and policies, but he did not believe that any of the investigatory materials were exculpatory for Horn, or mitigated Horn's conduct. As a result, Makler advised Staples that he still believed that the City had a factual basis to dismiss Horn. Since untruthfulness is one of the City's conclusion, it was anticipated that the City would inform the DPSST, which would then proceed to revoke Horn's certifications.

42. The Union was twice able to delay the pre-disciplinary or pretermination hearing that was originally scheduled for November 15, 2012. By delaying the matter, the Union was able to have Horn remain on the payroll with his benefits; and the Union and Horn were given additional time to pursue an exit strategy. Horn was still considering resignation and was actively applying for positions with other jurisdictions.

Termination of Officer Horn

43. With the conclusion of the FF matter, on about March 4, 2013, the City notified Horn and Staples that it intended to move forward with the pre-disciplinary hearing. Staples met with Horn before the hearing, and informed him that the Union attorney's found nothing beneficial to Horn from the results of the Mooney-FF investigation.

44. On March 11, 2013, Deputy Chief Ferraris met with Horn. Barratt, Garrett, Bales, and Lt. Miller were also in attendance. Staples was present, representing Horn. The purpose of the meeting was to provide Horn with an opportunity to furnish any information, explanation, mitigating circumstances, or other evidence for Ferraris's review and consideration that might bear on the allegations and the contemplated disciplinary action.

In the meeting, Horn took full responsibility for sending an inappropriate photo to a fellow officer. However, he claimed that he did not lie during the investigation concerning the loss of the cell phone, but rather that he made a mistake with reference to the time frame of events. He stated that he believed he lost his phone in August 2011. When he determined he had the time frame wrong, he spoke with Staples who, Horn claimed, said it was probably a clarification issue and that Horn should clarify it during his interview (with Bales). Horn stated that he did not think he had the option to just come in to internal affairs and re-explain the time frame and his confusion. Horn said he had six cell phones and averaged over 6,000 text messages per month. Horn stressed that he took responsibility for his other conduct.

Ferraris pointed out that between the interview with Garrett on August 14, 2012, and the interview with Bales on September 17, 2012, Horn did nothing to mitigate the situation, or to make anybody aware of the error that Horn discovered about the timeline. Ferraris noted that at the beginning of the second interview, Bales asked if Horn had any information he wished to provide. At that point, Horn told Ferraris that he did not feel comfortable going to Bales and explaining himself; and, further, he did not know he could do that, or that that was an option. However, Ferraris pointed out that when Horn acknowledged that when he received notice of the untruthfulness investigation, he discussed the matter with Staples and suggested it could be about the time frame. Yet, Ferraris pointed out, Horn neither went to see Bales, nor volunteered anything at the interview with Bales. Again, Horn tried to describe the problem as an error and not untruthfulness or a lie.

At one point during the meeting, Staples requested a break. Staples was concerned with the way the conversation between Ferraris and Horn was going. He believed Horn was going down a path that was not consistent with his previous statements. Staples wanted to interrupt that development and take a break so he could consult with Horn.

45. On March 27, 2013, Ferraris terminated Horn. In his letter to Horn, Ferraris concluded that "[b]y forwarding the photograph of one employee to another employee, your actions showed a lack of good judgment. Based on your actions, you disregarded the potential for rumors or embarrassment to the [female employee]. Therefore, you violated Salem Human Resource[s] Rules and Salem Police Department Policies." (Exh. R-3 at 2.)

Ferraris concluded that Horn violated the City Human Resources Rules, Section 18, subsections 18.01, 18.02, and 18.03; Department Policy 2.01 Personal Conduct, Section III (Conduct Unbecoming an Officer); and Directive 11; Rules of Conduct, Part II (General Conduct and Responsibilities), Section A (General Conduct).

Ferraris also found that Horn took City property without permission and used it for personal purposes in violation of Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer); Section V (Integrity); Directive 11; and Rules of Conduct, Part II, Section C (Obey the Law).

Lastly, Ferraris found that Horn made untruthful statements in his IA interview in violation of Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer); Directive 11; and Rules of Conduct, Part III, Section L (Truthfulness). Ferraris took special note of Horn's statements made during the pre-disciplinary meeting on March 11.

> "With regard to the untruthful statement, you indicated that you made a mistake or an error in recounting the loss of a cell phone that contained a partially nude photograph of the female [employee]. You stated that you did not intend to lie. You stated once you realized you had made a mistake or error in your statement (regarding the loss of that phone) you did not disclose this realization to any official of the Salem Police Department prior to the second interview with Sgt. Bales. However, you indicated that you disclosed that information to your union representative, Detective Staples.
>
> "I did not find your explanation regarding the statements to Sergeant Garrett to be credible. I find that the other witness statements were credible. I further find that you provided inconsistent explanations to Sgt. Garrett, Sgt. Bales and to me. You made these statements at different times, making no effort to correct these 'errors' or 'mistakes.' I am particularly troubled by this fact in that that you did not come forward or advise any city official during the four week period between internal affairs interviews with the information about the 'error in timeframe' that you said you discovered, even though you had ample time and opportunity to do so.
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> "The three primary areas of policy that you violated involve untruthfulness, sexual or workplace harassment, and conversion of department property to your personal use. Your actions as described, not only as recounted in each of three internal affairs investigations, but by your own account are disturbing and concerning to me. Integrity and truthfulness are the cornerstones of the police profession. How we treat and interact with our fellow employees is critical to achieving the mission and the effective operation of our organization. Because of the responsibility and power

the government has conferred on us, we are appropriately held to a higher standard by our community. Your actions indicate that you do not recognize or appreciate the impact of your behavior. Finally, by providing inconsistent and conflicting statements during your various interviews with the department, you were not credible or truthful." (Exh. R-3 at 5-6.)

Grievance Procedure

46. The grievance procedure, which is set out in Article 31 of the 2011-2014 collective bargaining agreement, provides as follows:

> "A. A grievance for the purpose of this Contract is defined as a dispute regarding the meaning or interpretation of a particular clause of this Contract or regarding an alleged violation of this Contract. A grievant is an employee or the Union filing a grievance on behalf of a group of employees similarly affected or on behalf of the Union's interests under this Contract. If the Union is a grievant, it shall be represented by an officer of the Union." (Exh. Jt-2 at 33.)

At Step I, an aggrieved employee or the Union may file a grievance with the employee's immediate supervisor with 15 days from the disputed event. If unresolved, at Step II, the grievance may be submitted to division commander within 20 days. Again, if unresolved, at Step III, the grievance may be submitted to the chief of police within 20 days. Step IV provides for arbitration.

Union By-Laws

47. The executive board consists of five individuals: the president, treasurer, secretary, and two at-large elected members.

48. Article VI (B)(4)(b) of the by-laws states that all "grievance duties shall be the responsibility of the Executive Board acting as the Grievance Committee." (Exh. C-4 at 9.) However, practice suggests that not all grievances go to the grievance committee. Article VI (B)(1), which concerns officers and duties, states that the "[p]resident shall be responsible for writing grievances." (*Id.* at 7.) Since at least 1999, when Staples became a member of the Union executive board, the president generally has been responsible for writing grievances. The president has the flexibility to carry a grievance forward unilaterally, or to work with an aggrieved employee whether the grievance goes forward, or even mitigate the grievance somewhere along the grievance process.

49. The grievance committee is explained in the Union by-laws at Article IX, Section B.

> "1. The Grievance Committee shall be the Executive Board chaired by the President. A grievance shall be defined as any dispute between labor and management cognizable under the [collective bargaining agreement].

"2. The Grievance Committee will determine by vote, the validity of the grievance after due investigation. If the Grievance Committee finds the alleged grievance is valid, it will determine to which level, if any, the Grievance Committee will seek resolution with the City through the procedures set forth in the [collective bargaining agreement].

"3. If an aggrieved member disagrees with the Grievance Committee's decision to not further the grievance steps, he may 1) appeal to the Grievance Committee and eventually through arbitration through the steps in Article Seven, Conflict Resolution,[6] or 2) appeal to the membership as set forth at a Special or Regular Meeting called by the aggrieved as set forth in these By-Laws, or 3) both.

"4. The UNION will endeavor to ensure that there is an appropriate amount of money available to assist in the legal defense of any member disciplined or dismissed for reasons believed to be unjust, and any other grievance found by the membership at large to be warranted." (*Id.* at 16.)

50. The Union believes nothing in the by-laws requires every grievance go to the grievance committee. The president can take a grievance to the grievance committee. An aggrieved employee also can take a grievance to the grievance committee. Since 2007, when Staples became president, the Union has only taken one grievance to arbitration. That case involved a change in hours for the department bicycle unit. Staples took the grievance to the grievance committee for its consideration and action, and the committee then voted to take the case to arbitration.

51. The by-laws contain a provision on conflict resolution, Article XII, which provides as follows:

"If, in the course of UNION business, a conflict arises between the UNION and a member based on internal UNION actions such as the refusal to process a grievance, the member may resolve this conflict through the following procedure:

"**STEP ONE**: The aggrieved member will discuss the grievance with a UNION representative. In this discussion, the aggrieved member will present, in writing, the issue giving rise to the grievance and all supporting facts and documentation, if any. The UNION representative shall bring the conflict to the attention of the E-Board no later than fourteen (14) calendar days after the discussion with the aggrieved member took place. The E-board will respond to the conflict within seven (7) calendar days.

[6]The reference to the conflict resolution section of the by-laws mistakenly refers to Article VII when it should be identified as Article XII.

"**STEP TWO**: If the aggrieved member is unsatisfied with the response of the E-Board they can request a meeting with the E-Board to explain their position. The E-Board will set a meeting within thirty (30) calendar days of the member's request. The E-board will respond to the member within seven (7) calendar days of this meeting.

"**STEP THREE**: If the aggrieved member continues to disagree with the conclusion of the E-Board, they may submit the issue of whether the UNION violated its duty of fair representation to arbitration. Arbitration costs will be the responsibility of the aggrieved member and must be paid in advance. However, if the UNION is at fault, the parties will equally split the arbitration costs with the UNION reimbursing the member for one-half (1/2) the cost. The decision of the arbitrator will be final and binding on both parties.

"Nothing in this article prevents the conflicted member from seeking resolution of the conflict through a vote of the membership as defined in the Special Meetings provisions of these By-Laws. The E-Board will take such steps as are necessary to preserve the conflicted member's rights to proceed to arbitration should his appeal to the UNION by successful or unsuccessful." (*Id.* at 17-18; bold in original.)

52. Article VII (B)(1) of the Union by-laws, provides that special meetings may be called by the president, a majority vote of the executive board, or "[b]y a member for the express purpose of appeal to a decision by the Grievance Committee regarding any grievance filed by said member." (*Id.* at 14.)

53. The Union believes that, in the last sentence under Step Three, "The E-Board will take such steps as are necessary to preserve the conflicted member's rights to proceed to arbitration should his appeal to the Union be successful or unsuccessful," arbitration refers to an employee's dispute with the Union and not arbitration of his grievance with the City. (Testimony: Staples.)

Officer Horn's Grievance

54. Between March 27 and April 1, 2013, Staples notified the Union executive board that Horn had been terminated for untruthfulness, sexual or workplace harassment, and conversion of department property for personal use. Staples asked the executive board to read the case materials. The 190 pages of documents concerned all three investigations (sexual harassment, untruthfulness, and use of department property), and were in a three-ring binder available for the executive board members to read. In a memorandum dated April 1, 2013, which Staples left with the binder, he informed the members that "[o]ur Attorney has weighed in on this with his legal advice. His feeling is there is nothing the Union can do to help Joe." (Exh. C-17.) However, Staples

stressed, "[t]his is our Union and we do have the final say regarding grievances and arbitration." (*Id.*) Each member of the executive committee is a veteran officer with investigation experience and knows how to read the materials.[7]

Staples asked the available board members (Burke, Rousseau, and Wann) to read the file and the termination statement to determine if there is a truthfulness issue and then to vote whether the Union should go to arbitration in order to fight to keep Horn's job. (Executive board member Beal was on injury leave and did not participate in the April review and decision.) The three executive board members and Staples signed under "No we do not go to arbitration" and no executive board member signed under "Yes we go to arbitration." (*Id.*) A copy of the April 1 memorandum, with the signatures, was given to Horn by Staples.

The executive board members concluded that Horn had not been truthful and that his explanation of the events and circumstances was not credible. The board members concluded that the allegations had been proven by the investigations and that termination was the expected penalty for a finding of untruthfulness.[8]

55. At the time of their decision on April 1, 2013, the executive board members were not aware of any dispute or controversy between or involving Officer EM and Horn.[9] None of the board members were personal friends with either EM or Horn. They only had professional, work relationships with both officers. No executive board member held any ill-will toward Horn or held any special favor for EM.

56. On April 2, 2013, Staples informed Horn that the executive board members had read the investigatory materials, along with the opinion of the Union attorney and a copy of Article IX (B) (Grievance Committee) of the Union by-laws. Staples explained that "[t]he four out of the five members available voted unanimously to not file a grievance on your behalf per Article 31 of

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[7]Since Staples joined the executive board in 1999, Horn's case is only the second time that the Union has dealt with a termination. The first time was in 2006. For consideration of the Horn case, Staples followed the same procedure used in the other termination case. In the 2006 case, an officer was found to be untruthful in both his verbal statements and his police reports. In that case, the Union president made the investigatory and other materials available to the executive board members and, after reading and considering the materials, the executive board, acting as grievance committee, was asked to vote on whether the Union should grieve the officer's termination. The executive board voted against pursuing a grievance. The officer appealed to and appeared before the executive board. He provided a significant amount of additional materials to the executive board and there were a good deal of questions and answers at the meeting. However, the executive board again voted not to grieve his termination.

[8]The three parties agree that a charge of dishonesty or untruthfulness generally ends an officer's career. As a result, no participant in Horn's case indicated any surprise over the severity of the discipline. As Officer Burke aptly stated, it was a "death sentence for a police officer's career" to have their "integrity or honesty questioned. You cannot do the job anymore. That is about as simple as you can put it. * * * When you are being questioned formally about something, and you are untruthful about it, then you can't be believed anymore. So that is something that's kind of a death sentence for our career." (Testimony: Burke.)

[9]The purported difficulty between Office EM and Horn is set out below in Findings of Fact 83-91.

our contract." (Exh. C-18.) Staples concluded, "[i]f you feel you want to address the E-Board I will make arrangements for that." (*Id.*)

57. On April 8, 2013, Horn filed a Step I grievance with the City, asserting that it violated Article 37, the disciplinary provision of the collective bargaining agreement. The grievance stated:

> "I was terminated without just cause violating article 37. My conduct relating to the untruthfulness allegation as a Salem police officer did not rise to the level of untruthfulness. I was not untruthful during an official investigation while employed as a Salem Police Officer. The second violation of Conduct Unbecoming of an [O]fficer did not meet the standard for conduct unbecoming of an officer. I did not engage in conduct unbecoming of an officer while employed as a Salem Police Officer. If my actions are/were found to be conduct unbecoming of a Police Officer then it did not rise to the level of discharge. I am considering retaining legal council [*sic*] if this matter doesn't come to a mutual resolution." (Exh. C-19.)

58. Article 37 of the collective bargaining agreement, which concerns discipline, appeals and the representation rights of disciplined employees, provides, in pertinent part, as follows:

> "A. The parties agree that discipline may be imposed only for just cause and establishes [*sic*] a right to appeal from discipline. The intent of this Article is to establish a contractual discipline procedure, and specify differences between the procedures.
>
> "* * * * *
>
> "C. Forms of discipline are limited to: oral reprimand, written reprimand, suspension, demotion, pay reduction not to exceed thirty calendar (30) days, or discharge.
>
> Serious violations, as determined by the City, may be dealt with by any of the above measures on the first offense or subsequent offenses.
>
> "* * * * *
>
> "E. **Appeal of Discipline**
>
> "1. Imposition of discipline on an employee is appealed through this Contract's grievance procedure under Article 31.
>
> "F. **Disciplinary Interview – Right to Representation**
>
> "1. An employee has the right to have a representative of the Union at an [i]nterview or meeting with the City when the employee has a reasonable belief that the interview or meeting is part of an

> investigation which may result in a disciplinary action. No right to representation exists for interviews, meetings, or conversations involving unit members regarding work instructions, training, constructive correction of work techniques or methods, and work planning. Work performance appraisal sessions are exempt from the right to representation unless, prior to the beginning of the meeting, the City informs the employee that the performance appraisal may result in disciplinary action being taken by the City against the employee." (Exh. Jt-2 at 41-42.)

59. The practice between the Union and the City is that grievances are controlled by the specific provision asserted at the Step I level of a grievance. Accordingly, the Union cannot add at Step II or Step III a new or additional provision of the collective bargaining agreement that it believes has been violated. Based on the parties' practice, such a grievance would be denied by the City.

60. On April 16, 2013, the deputy chief responded to Horn's grievance. He stated that "[f]acts and circumstances rising to the level of just cause for your employment to be terminated do exist and are set forth in your discharge letter dated March 27, 2013. * * * Therefore, your grievance is denied at Step I." (Exh. C-20.)

61. On April 26, 2013, Horn pursued the grievance to Step II. Again, Horn claimed his termination violated article 37. The Step II grievance stated:

> "Contract articles violated: Discipline – article 37 untruthfulness and Conduct [U]nbecoming of an [O]fficer[.]
>
> "Statement of facts giving rise to the grievance: I was terminated without just cause violating article 37. My conduct relating to the untruthfulness allegation as a Salem police officer did not rise to the level of untruthfulness. I was not untruthful during an official investigation while employed as a Salem Police Officer.
>
> "A mistake in time frame regarding when a picture was shown or lost does not constitute a lie at the reasonable standard.
>
> "The second violation of Conduct Unbecoming of an [O]fficer did not meet the standard for conduct unbecoming of an officer. I did not engage in conduct unbecoming of an officer while employed as a Salem Police Officer. If my actions are/were found to be conduct unbecoming of a Police Officer then it did not rise to the level of discharge.
>
> "Equal discipline to that of past practice is a standard that all employees should be entitled to. My discipline of termination is not the equal discipline of previous employees." (Exh. C-21.)

62. On May 2, 2013, Chief Moore responded by denying Horn's Step II grievance. He stated that the facts and circumstances, as set forth in the March 27 termination letter, rose to the level of just cause for termination.

63. On May 1, 2013, Horn's attorney wrote to Union attorney Makler appealing the decision of the executive board, acting as grievance committee, not to grieve Horn's termination. He declared that Horn "requests the opportunity to be heard and appeal the Executive Board's decision not to grieve his termination. If there is not [an] appeal process and the Executive Board's decision is final please let me know at your earliest possible convenience." (Exh. C-24.)

64. On May 2, 2013, Staples informed the executive board that Horn wanted to appeal the decision of the grievance committee to the executive board. Staples set May 13 as the date for the meeting with Horn.

65. Although Staples informed Horn about an appeal to the executive board, the Union believes that Horn ceased to be a member of the Union on March 27, 2013, the day he was terminated, and only members can invoke any benefits or rights under the by-laws. (Testimony: Staples and Makler.) However, the Union did nothing to prevent Horn from filing the Step I, II, or III grievances. The Union was willing to allow Horn to file the grievances in the hope that the City would voluntarily change its position. Since Horn took it upon himself to file grievances to try to keep his job, Staples did not want to get in his way.

66. On May 3, 2013, Staples wrote Horn to remind him of certain timelines.

> "Joe, per SPEU Attorney Makler I am reminding you of your step three time line which I have copied for you. [S]ubmit this to the Chief requesting to meet. Also I have been advised through correspondence from your Attorney you would like to appeal to the E-Board per article 12 in the SPEU bylaws. I have scheduled this meeting with the E-Board for May 13, 2013 at 1500 in the Salem Police Department, conference room H." (Exh. C-23.)

67. On May 7, 2013, Horn's attorney wrote the chief and deputy chief asserting that Horn was terminated without just cause because it was based on a faulty and incomplete investigation; the investigators failed to document facts and witness statements; the investigators failed to document personal biases; Horn was subject to disparate treatment; the policies and general orders were vague and overly broad; there was a disparate application of policies and general orders; and the punishment was overly severe.

He also asserted that grievance rights under the collective bargaining agreement belong to the individual member unless the Union chooses to grieve the matter on behalf of the membership. Since the Union has chosen not to grieve the matter, he claimed that Horn can assert his rights under the collective bargaining agreement.

Lastly, Horn's attorney requested a meeting with the chief as Step III of the grievance procedure, pointing out that "[i]n this situation the Union does not represent Mr. Horn's interests.

I do. I respectfully request that this meeting take place with Mr. Horn and I. To that end * * * I am prepared to meet the first week in June." (Exh. C-26 at 2.)

68. On May 7, 2013, Horn's attorney also wrote to the Union acknowledging that Horn must appeal the executive board's decision by May 13. However, Horn's attorney objected to that particular date since he was to be out of state on military duty. He requested the Union reschedule the meeting for the first week of June so that he could be present and properly represent Horn's interests.

Horn's attorney also sought to have the Union join with Horn's grievance for several reasons. With respect to the conduct unbecoming allegation, he claimed:

> "Sergeant Garrett makes several factual errors in his report that[,] if left unchallenged[,] lower the standard of investigations for fellow members of the SPEU. I am prepared to point out several inaccuracies in Sergeant Garrett's report. For your reference I ask you to make note that Sergeant Garrett bases two of his conclusions on the 'negative' reaction of the civilian witness. Sergeant Garrett never interviewed the civilian witness, has no personal knowledge [that] the civilian witness had a negative reaction[,] and only assumes from a third party that the civilian witness had a negative reaction to Officer Horn's acts. This fact alone sets a dangerous precedent for SPEU members. If unchallenged[,] SPEU members can be found in violation of a policy or general order based upon assumptions, hearsay[,] and an incomplete investigation. Not grieving this matter will endanger every member of the SPEU. Once again, I am prepared to show numerous errors and assumptions made in this investigation that endanger all members." (Exh. C-27 at 1.)

With respect to the allegation of Horn's untruthfulness, he asserted the following:

> "As you are aware a finding of untruthfulness is not only a firing offense, but also a mandatory revocation of an officer's certification from the [DPSST]. There are numerous errors with this investigation. More errors than I can accurately list in this letter, but I am prepared to identify in front of a[n] arbitrator or jury. What is most troubling for your membership and should not be allowed to go unchallenged is that Officer Horn is being accused of untruthfulness when he was told at the time of his statement that he only needed to answer to the best of his recollection. During Officer Horn's original interview he was told by Sergeant Pat Garrett to answer the questions to the best of his recollection in the beginning of the interview and specifically when he was asked questions that management is now claiming he lied about. Management cannot have it both ways. They cannot tell an employee to answer to the best of their recollection and then accuse the employee of lying when his recollection is not the best. Allowing this assertion and others in the investigation to go unchallenged sets a dangerous precedent for other members of the SPEU. This is only one example of the dangerous precedents in this investigation that threaten your members. I am prepared to point out numerous others at arbitration and in front of a jury." (*Id.* at 1-2.)

69. On May 13, 2013, Horn appeared before the executive board to appeal the decision not to pursue his grievance. Including introductions, the meeting lasted only two or three minutes. Horn spoke for just a minute or two. He stated that he did not lie, that the Union is setting a bad precedent by not grieving the matter, and he asked that the executive board reconsider its decision. He did not present any new information or anything that led the executive board to change its decision. Beal, who did not participate in the April 3 decision, was present and asked a couple of clarifying questions.

There was no extended discussion among the executive board members after Horn departed. The members were generally disappointed because Horn had not provided any mitigating information or circumstances which the Union could use in a grievance. Staples asked the executive board for their position on Horn's grievance. The executive board members continued to believe that Horn had not been truthful and that his explanation of the events and circumstances was not credible. Staples did not tell them or instruct them how to vote. Before the meeting with Horn, Beal read the investigatory files concerning the charges against Horn. Based on his review and consideration of the file, Beal also concluded that Horn had been untruthful during the internal affairs investigation.

70. After the verbal vote of the executive board members, Staples prepared a memorandum dated May 16, 2013, which was signed by Staples and the four other executive board members. Staples sent the memorandum to Horn in which he stated:

> "As a result of your request to the SPEU E-Board and in compliance with the SPEU by-laws, on 05/13/2013 the SPEU E-Board met with you. This meeting took place in a private location at the Salem Police Department. In compliance with the bylaws, this was your opportunity to explain your position to the SPEU E-Board as to why the SPEU's decision to not arbitrate your just cause termination was in error and should be reversed. At this meeting you failed to provide any new information to the SPEU E-Board and/or you chose not to talk about your belief and position that a grievance should be filed, why a grievance should be field and/or what basis there was to file a grievance on your behalf.
>
> "Without any new information being provided to the SPEU E-Board either from you or your Attorney the E-Board unanimously confirmed its prior position and decision that the SPEU would not file a grievance contesting your just cause termination." (Exh. C-25.)

71. At the time of the decision on May 16, the executive board members were not aware of any dispute between Officer EM and Horn. No board member was a personal friend with either EM or Horn. They only had a professional, work relationship with both officers. The executive board members did not hold any animosity toward Horn or any favor for EM. The letter was signed by Union President Staples and the four members of the Union's executive board.

72. Horn and his attorney met with Chief Moore on June 7, 2013, as Step III of the grievance procedure. After the meeting, the chief reviewed Horn's file. He then wrote Horn's attorney:

"I considered the statements you made during our meeting regarding why Mr. Horn believes that the conclusions of Deputy Chief Ferraris were in error and that the level of discipline imposed was inappropriate.

"After fully evaluating the matter, I believe that both the conclusions were accurate and the level of discipline was appropriate. In the May 7, 2013, Step III Grievance, you do not specifically allege which Articles of the Salem Police Employees' Union and City's Collective Bargaining Agreement (CBA) have been violated. Therefore, you have not sufficiently preserved any arguments associated with the discipline imposed on Mr. Horn. Further, I note that Article 42 of the CBA relates to the duration of the current agreement and is in no way relevant to Mr. Horn's matter. In any event, the grievance at [S]tep III is denied." (Exh. C-28.)

73. Some time in June 2013, Union attorney Makler learned that Horn's attorney made a request with the Employment Relations Board (ERB) for grievance arbitration. On June 21, 2013, Makler wrote Horn's attorney:

"Please take note that you have not been authorized to act on behalf of the SPEU, you do not represent the SPEU, and SPEU has not authorized the filing of a request for grievance arbitration, on behalf of the SPEU related to Joe Horn. As such, I would request that you make it clear to the City and the ERB that your filing for arbitration with ERB, on behalf of Joe Horn, is an individual action by Joe Horn. At this point given the filing that you submitted and that I reviewed I believe that you have created a[n] inappropriate perception that you are representing the SPEU and that you are acting on behalf of the SPEU – which is not the case.

"I have copied City Attorney Natasha Zimmerman on this email so that she is aware of the SPEU position." (Exh. R-33 at 1.)

74. On June 27, 2013, the City's outside labor counsel wrote Horn's attorney:

"It is the City's position that an individual has no right to take a case to arbitration under the City's collective bargaining agreement with the Union. Article 31 of the agreement clearly anticipates that the union must be party to an arbitration and does not authorize individuals to pursue arbitration individually. Because it is now clear that Mr. Horn is attempting to pursue this grievance individually, and not on behalf of the union, Mr. Horn's grievance has not been properly taken to arbitration. That said, the City has no obligation to arbitrate Mr. Horn's grievance and refuses to do so.

"This position is supported by the plain language of Article 31 of the collective bargaining agreement, the Union's position as expressed by Mr. Makler's email and the U.S. Supreme Court case in *Vaca v. Sipes*. * * * *Vaca* holds that an individual lacks the right to bring a grievance to arbitration. The Court reasoned that such a rule weeds out unmeritorious claims before the most costly stage of the grievance process (i.e. arbitration) and helps unions retain control of the

enforcement and regulation of the parties' agreement as the sole representative of the bargaining unit. * * * 'When the union refuses to proceed to arbitration, an individual employee may obtain judicial review of his breach of contract claim only if he can demonstrate that the union wrongly refused to process his grievance.'" (Exh. R-34 at 1-2; citations omitted.)

75. On June 30, 2013, Horn wrote Staples and informed him that the City refuses to acknowledge any individual right to pursue a grievance under the collective bargaining agreement. Horn asked Staples if there was any other method to appeal the executive board's decision not to grieve his termination or whether he had exhausted all his appeal options.

76. On July 1, 2013, Makler wrote to Horn's attorney, providing him with a set of the SPEU bylaws. He added:

"If you or your client believe that there is an action, pursuant to the SPEU bylaws, that you want to pursue then please address this claim in conformance with the SPEU bylaws.

"As you know, the SPEU position is and remains that the termination of your client was done for/with just cause, and the SPEU E-Board/Grievance Committee, after due diligence and investigation of the entire matter and allegations, confirmed this same SPEU position after your client appealed the E-Board decision to not support to arbitrate your client's termination." (Exh. C-31.)

77. On July 12, 2013, Horn's attorney asked Makler:

"1. If my client elects to arbitrate the Grievance Board's decision, how do we go about choosing an arbitrator? The bylaws are silent on that matter.

"2. Article XII of the bylaws states, in part, that the Union will take such steps that are necessary to preserve the members[']rights to proceed to arbitration should his appeal be successful or unsuccessful. What steps has the e-board taken or, is the e-board willing to take to preserve Mr. Horn's rights to proceed to arbitration?" (Exh. C-32 at 1.)

78. On July 15, 2013, Horn's attorney wrote to Makler "that Mr. Horn wishes to exercise his Salem Police Employees' Union's By-Laws Step Three appeal rights and request a Special meeting of the Salem Police Employees' Union and, if necessary, a third party arbitrator[.]" (Exh. C-33 at 1.) Horn's attorney cited Article IX (B)(3) on the grievance committee and stated:

"If an aggrieved member disagrees with the Grievance Committee's decision to not further the grievance steps, he may 1) appeal to the Grievance Committee and eventually through arbitration through the steps in Article Seven, Conflict Resolution, or 2) appeal to the membership as set forth at a Special o[r] Regular Meeting called by the aggrieved as set forth in these By-Laws, or 3) both." (*Id.*)

Horn's attorney then asserted that Horn

> "wishes to address a Special Meeting of the union membership. * * * Please accept this letter as Mr. Horn's request for a Special Meeting in writing. Mr. Horn also requests that I be afforded the opportunity to address the membership and outline his arguments. * * * Mr. Horn also wishes to arbitrate the E-Board's decision in the event his appeal to the membership at large is unsuccessful. * * * Article XII states, 'STEP THREE: If the aggrieved member continues to disagree with the conclusion of the E-Board, they may submit the issue of whether the UNION violated its duty of fair representation to arbitration.' As I mentioned in an earlier e-mail, the By-Laws are silent on how the parties are to choose an arbitrator. Please let me know, after the Special Meeting, how you would like to choose an arbitrator and we will begin the process.
>
> "Finally, ARTICLE XII states, '[t]he E-Board will take such steps as are necessary to preserve the conflicted member's rights to proceed to arbitration should his appeal to the UNION be successful or unsuccessful.' I am sure you and the E-Board have taken whatever steps that are necessary to preserve Mr. Horn's right to arbitrate his dismissal with the City of Salem, with or without the Union's assistance. To put my client at ease, I respectfully request that you inform us what steps the E-Board has taken or is willing to take to preserve Mr. Horn's rights under the By-Laws." (*Id.* at 1-2.)

79. On July 29, 2013, Horn wrote to Staples that he wanted to exercise his rights under the by-laws and request a special meeting of the Union membership and, if necessary, arbitration of his dispute with the Union executive board.

80. On July 31, 2013, Horn's attorney wrote to Makler and reiterated his request originally made in his July 15 letter.

81. On August, 8, 2013, Horn's attorney wrote to Makler for the fourth time and repeated the requests contained in his July 15 letter.

82. The Union and Makler did not respond to any of these communications from Horn and his attorney.

Officer EM, Officer Horn, and the DART

83. The Complainant suggests that the Union's decision not to pursue his grievance was influenced by Horn's contentious relationship with Officer EM.[10]

[10]At the request and agreement of the parties, and approval of the ALJ, the individual is referred to only as EM.

84. EM worked on the DART since about 2004. The DART was formed to investigate suspected drug activity, particularly alleged drug house complaints. Responding to hot-line calls, members of the DART would "knock and talk," meaning the officers would knock at the house and talk to the residents where there had been reports of suspected drug activity, explain the nature of the complaint, and, while doing so, effectively investigate the situation.

85. Horn was assigned to the DART in May 2009, and EM was assigned to act as his partner and to train Horn. In July 2009, EM began to have concerns about the manner in which Horn was conducting DART investigations; that Horn was not properly giving *Miranda* warnings; that Horn gained consent to search a premises through improper or coercive methods. EM discussed the situation with Horn, who disputed EM's contentions. EM then took the matter to his supervisor, and asked permission to speak with the district attorney because he did not want to be in a situation where he and Horn were giving conflicting statements or testimony. The supervisor refused to give him permission, but rather instructed EM to go through the chain of command within the department. The supervisor spoke with Horn about the situation and Horn denied the conduct.

86. In September 2009, EM again had concerns about Horn's investigatory conduct, particularly over an incident involving a marijuana arrest, probable cause, and identity theft. EM again expressed his concerns to his supervisor, Sgt. Engel. EM next discussed it with Lt. Anglemier and stated that he did not want to partner with Horn. He asked to ride with another officer. His requests were declined. EM then met with Deputy Chief Bellshaw and finally with Chief Moore.

87. On October 6, 2009, Engel and Anglemier informed EM that they were concerned for EM's reputation, and there were rumors no other officer wanted to partner with him. Officers had heard that EM had spoken with the chief about the situation in the DART. It was suggested that an officer left the DART because of EM.

88. EM went on vacation the later part of October 2009. Upon returning to work, EM was taken by Anglemier to a meeting with Bellshaw. EM was informed of accusations by the district attorney's office regarding his investigations, and EM was directed to cease conducting any investigation. Anglemier and Engel would speak to the district attorney's office to determine if a formal investigation was warranted.

89. On November 6, 2009, during a meeting with Bellshaw, EM stated that he believed Horn had gone outside the chain of command, in violation of department policy, and made accusations about EM to the district attorney's office. Bellshaw believed that Horn may have done so. At about this time, EM filed an internal affairs complaint against Horn. At the same time, Bellshaw informed EM that he was under an unofficial investigation, and he would send EM's supervisors to interview individuals.

90. EM protested the unofficial investigation and requested that an official investigation be conducted. That way, it would be conducted by officers other than his supervisor, in whom he did not have faith of impartiality; witnesses would have to provide sworn testimony to the investigators; his exoneration would be publicly known to the other officers; and there would be no basis for other officers to believe his supervisors had whitewashed him, and in effect

themselves as well. At some time after this meeting, EM did seek Staples's assistance in obtaining an official investigation.

On November 18, 2009, EM met with Bellshaw, who informed him that there had been no basis to the allegations made against him, and that the formal investigation had been concluded. However, Bellshaw removed EM from the DART and reassigned him to the patrol division.

91. EM had no conversations with any representative of the Union concerning Horn's termination or grievance. EM only has a professional relationship with members of the Union's executive board. He is not personal friends with any of the executive board members.

## CONCLUSION OF LAW

1. This Board has jurisdiction over the parties.

2. The Respondent Union did not violate ORS 243.672(2)(a) in its treatment and conduct toward the Complainant's termination of employment by the City.

## DISCUSSION

### Legal Standards for Duty of Fair Representation Cases

The Complainant alleges that the Respondent Union violated ORS 243.672(2)(a) by refusing to process his grievance through arbitration, and that this was "an unintentional act or omission that amounted to a violation of its duty to fairly represent the Complainant." (Complainant's post-hearing brief at 13.)

Complainant relies on *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, 424 (1993). There, we followed *Robesky v. Quantas Empire Airways Limited*, 573 F2d 1082, 1089-90 (9th Cir 1978), and held that unintentional acts or omissions by union officers may be actionably arbitrary if (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. *Ralphs*, 14 PECBR at 423-24.

The Union's conduct in the instant case was neither unintentional nor an act of omission. It was made with full intent and deliberateness. The complainant misconstrues the application of the *Ralphs* test. That case did not concern the union's judgment about pursuing or not pursuing a grievance, but rather concerned "the failure of a union to correctly perform 'ministerial' or 'procedural' acts[;]" the union representative failed to "timely file the grievance in the appropriate place," a species of negligence that amounted to a violation of the union's duty of fair representation. (*Id.* at 422-23.) In *Ralphs*, this Board continued to hold that "'ordinary negligence' in performance is not sufficient to create liability on the part of the union," but we adopted a

standard to find "that a union should not be totally immune to liability for its non-performance or misperformance of a non-discretionary duty." (*Id.* at 423.)

Therefore, in the instant case, the Complainant is really presenting us with a traditional duty of fair representation case: that the Union's decision not to grieve or arbitrate the Complainant's termination was arbitrary, discriminatory, or made in bad faith.

ORS 243.672(2)(a) prohibits a labor organization from interfering with, restraining, or coercing any employee in or because of the exercise of rights guaranteed by the Public Employee Collective Bargaining Act (PECBA). Out of this provision, this Board has historically extrapolated an affirmative duty that applies to a labor organization's relationship with its members. We have long held that "[a]s a corollary to its statutory rights, a labor organization has the duty to fairly represent bargaining unit employes; and an employe is given the right to be free from unfair or invidious treatment by his exclusive bargaining representative in matters affecting his employment." *Powell v. Monmouth Police Officers Association,* Case No. C-95-76, 3 PECBR 2038, 2041, *rev'd and rem'd other grounds,* 33 Or App 93, 575 P2d 175 (1978). A labor organization has the duty to fairly represent all employees for whom it is the exclusive representative. *Chan v. Clackamas Community College and Clackamas Community College Association of Classified Employees, OEA/NEA,* Case No. UP-13-05, 21 PECBR 563, 574 (2006), *recons,* 21 PECBR 597 (2007); *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).

An employee, however, does not have an absolute right to have a grievance taken to arbitration. *Vaca v. Sipes,* 386 US 171, 191, 87 S Ct 903 (1967); *Chan,* 21 PECBR at 575;

Labor organizations are afforded broad discretion for their decisions concerning the representation of employees and, specifically as it relates to the instant case, the Union's "decisions about whether to file or how far to pursue a grievance is entitled to substantial deference." *Conger v. Jackson County and Oregon Public Employees Union,* Case No. UP-22-98, 18 PECBR 79, 88 (1999); *see Bjornsen v. Jackson County Sheriffs' Officers Association, Affiliated with Teamsters Local 223 and Jackson County,* Case Nos. C-130/131/132/133/134/135-83, 8 PECBR 6783, 6795 (1985) (absent evidence of bad faith, dishonesty, or hostility, a union should be granted a "wide range of reasonableness" in making judgments about employee grievances).

Since a significant purpose of the PECBA is to insure public employees the right to form, join, and participate in the activities of a labor organization of their own choosing, this purpose would be frustrated unless a labor organization is

> "free to act in what it perceives to be the best interests of its members, without undue fear of lawsuits from individual members. * * * If a union's decisions are constantly attacked by disgruntled members, the organization's collective power is weakened and the employees' interest in having a strong and effective organization to represent them is defeated." *Ralphs,* 14 PECBR at 422 (citation omitted).

We have nevertheless concluded that a labor organization can violate its duty of fair representation if that labor organization's decision not to pursue a grievance is arbitrary, discriminatory, or made in bad faith. *Chan*, 21 PECBR at 574; *Putvinskas*, 18 PECBR at 894. We have explained these standards as follows:

> "A union's decision is 'arbitrary' if it lacks a rational basis. *Howard v. Western Oregon State College Federation of Teachers*, Case No. UP-80/93-90, 13 PECBR 328, 354 (1991). Its decision is 'discriminatory' if there is 'substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives.' *Id.* * * * 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)." *Chan*, 21 PECBR at 574-75.

For instance, this Board has stated that "[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." *Wright v Local 2277, Portland Community College Federation of Faculty and Academic Professionals, AFT, AFL-CIO, and Portland Community College*, Case No. FR-004-11, 25 PECBR 910, 932, *recons*, 25 PECBR 951 (2014) (*citing Ralphs*, 14 PECBR at 422).

We extend to labor organizations "substantial discretion in deciding whether to arbitrate, or even to file, a grievance." *Grisham-Tittle v. American Federation of State, County and Municipal Employees, Local 1246-3, and State of Oregon, Department of Administration Services*, Case No. FR-03-10, 24 PECBR 228, 238 (2011). Given such deference, "[t]his Board generally does not substitute its judgment for that of a union that rationally decided not to process a grievance. Instead, this Board primarily determines whether the union conducted a proper investigation and used a rational method of decision-making in reaching its conclusion." *Putvinskas*, 18 PECBR at 895 (footnotes omitted).

We even apply this discretion "to how the union investigates a potential grievance, so long as some reasonable good-faith investigation is undertaken." *Tancredi v. Jackson County Sheriff's Employee Association and Jackson County Sheriff's Office*, Case No. UP-31-04, 20 PECBR 967, 974 (2005) (*citing 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). We have held that "[w]hat is important is the process by which the [union] determined not to pursue the grievance, not whether the grievance was filed." *Tancredi*, 20 PECBR at 976.

We accept that "a union has a wide range of reasonableness in deciding how to exercise its discretion," and, "[t]herefore, without violating its duty of fair representation, a union may rationally decide not to pursue a grievance that the union would likely win in arbitration." *Martin v. Ashland School District #5, Morris, OSEA; Fields, Helman Elementary*, Case No. UP-30-01, 20 PECBR 164, 177 (2003); *see Putvinskas*, 18 PECBR at 895; *Chan*, 21 PECBR 575. The union is not required to represent a member in the same manner as an attorney represents a client. *Tancredi*, 20 PECBR at 974; *Putvinskas*, 18 PECBR at 898. A "union's failure to take witness

statements or to allow the union member to rebut aspects of the union's investigation does not breach the duty of fair representation." *Tancredi*, 20 PECBR at 974; *Putvinskas*, 20 PECBR at 898. It is also permissible for a union to consider the cost of arbitration in deciding whether to arbitrate a grievance. *Tancredi*, 20 PECBR at 974; *Strickland v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO, CLC*, Case No. UP-134-90, 13 PECBR 113, 123-34 (1991). A union has the discretion to withdraw a grievance when it believes that there is insufficient evidence to support the claim. *Tancredi*, 20 PECBR at 974.

We, therefore, focus not on the merits of the grievance but on the conduct of the labor organization. *Chan*, 21 PECBR at 575. In order "[f]or a union's actions to fall outside this wide range of reasonableness, they must be wholly irrational or arbitrary." *Tancredi*, 20 PECBR at 974 (internal quotes omitted); *quoting Baltus v. Multnomah County School District No. 1J and Portland Association of Teachers*, Case Nos. UP-51/52-94, 15 PECBR 764, 778 (1995). It follows that the Complainant must establish that the Union "had a hostile motive, acted dishonestly, or made its decision not to pursue the grievance without any basis." *Morgan-Tran v. AFSCME Local 88 and Multnomah County*, Case No. UP-67-03, 20 PECBR 948, 959 (2005) (*quoting Conger*, 18 PECBR at 88; *citing Coan and Goar v. City of Portland, Bureau of Parks, and Laborers' International Union of North America, Municipal Employees Local 483*, Case Nos. UP-23/24/25/26-86, 10 PECBR 342, 351 (1987), *recons*, 10 PECBR 438, *AWOP*, 93 Or App 780, 764 P2d 625 (1988)).

The Case

In the instant case, the City conducted three internal affairs investigations into the Complainant's conduct, and held a pre-disciplinary interview with the Complainant. As a result, the City concluded that the Complainant had improperly forwarded a photo of a topless female co-worker to another employee in violation of City rules and policies; that the Complainant improperly converted City property for personal use in violation of City rules and policies; and that the Complainant had been untruthful during an official internal affairs investigation. The City concluded that the conduct was serious enough that on March 27, 2013, the City terminated the Complainant.[11]

The Union president fully and fairly represented the Complainant during the disciplinary process. At the investigatory interviews with the Complainant, the Union president prevented the investigators from expanding their inquiry beyond the allegations contained in the formal notice. The Union president also fully and fairly represented the Complainant when knowledge of the Complainant's communications with FF surfaced and caused the City formally to inquire into the

[11]The City points out the significant difficulty for a police officer and a police department, when an officer has been found to have been untruthful. Under *Brady v. Maryland*, 373 US 83, 83 S Ct 1194 (1963), the Supreme Court established an obligation on prosecutors to reveal exculpatory material to defendant. This developed to include evidence reflecting upon the credibility of prosecution witnesses, including police officers. *Giglio v. United States*, 405 US 150, 92 S Ct 763 (1972). This situation makes it impossible for a police officer, who has been found to be untruthful, to perform his duties as a police officer, where those duties include investigation of crimes and assistance in the prosecution of alleged criminals by giving sworn testimony. As all the parties and witnesses concede, for a police officer to be found to be untruthful in an official investigation is a career-ending event.

matter. The Union president arranged to have the Complainant meet with the Union attorney in order to receive the attorney's assessment of the potential disciplinary action and its consequences. The Union president also attempted to negotiate a resignation agreement between the City and the Complainant that might have allowed the Complainant to retain his license.

On April 1, 2013, the Union president provided the three available executive board members with a copy of the Complainant's 190-page termination file. It included the three internal affairs investigations, with transcripts of all the interviews, and the relevant City policies and regulations. On April 3, after considering the file, the president and the three executive board members, acting as the grievance committee, decided not to pursue a grievance on behalf of the Complainant.

As veteran police officers with an average of 22 years of police service and considerable investigation experience, the members of the executive board, after having read the internal affairs investigations and reports, concluded that the Complainant had been untruthful in an official investigation. Naturally, the concurrent, although unstated, conclusion is that an arbitrator would sustain the City's termination of the Complainant. Therefore, the executive board members voted not to grieve the Complainant's dismissal. Their decision was recorded and Horn was advised of the decision. The record contains no suggestion that executive board members made their decision based on anything other than their conclusion that he had been untruthful during an official investigation. There is no evidence to suggest that it was based on an improper reason.

The Complainant appealed the decision under the by-laws and on May 13, 2013, he personally appeared before the full executive board to ask that they reverse the decision not to grieve his dismissal. During his two-to-three minute appearance, the Complainant merely stated that he did not lie and that the Union is setting a bad precedent by not grieving his termination. He gave no additional or new facts which could have persuaded the executive board to reverse the earlier decision. As a result, the executive board sustained the decision not to grieve his termination. Their decision was recorded and the Complainant was subsequently advised of the decision.

Allegation No. 1

Initially, we must examine the Union's actions toward the Complainant. The complaint alleges that the executive board's decision not to grieve Complainant's termination was "arbitrary and based on bad faith" because (a) the April 3 vote by the Union officials was not documented in writing; (b) the Union president advised the Complainant that if he resigned during the internal investigation rather than being terminated it would be easier for him to maintain his law enforcement certification with the DPSST; (c) some of the executive board members did not read the investigations associated with the Complainant's termination; (d) the executive board members were not informed that Complainant reported to the Union president that he made an error during his first IA interview and the Union president instructed him to report the error at a later date; (e) the Union president did not provide the executive board members with a written summary or opinion regarding the validity of the Complainant's termination or grievance; (f) the Union attorney did not provide the executive board with a written summary or opinion regarding the validity of Complainant's termination or grievance; and (g) the Union did not use any

documented objective criteria when determining whether to grieve a member's termination. (First Amended Complaint, ¶17(a)-(g).)[12]

The Complainant has not provided any legal authority that would persuade this Board to conclude that the above allegations are a cause of action under a duty of fair representation complaint. Further, the focus of Complainant's post-hearing brief leads us to conclude that he has abandoned the above-enumerated allegations. Nevertheless, we presently are not prepared to hold that the conducted alleged above, either individually or collectively, would constitute a violation of a union's duty of fair representation.

We do not find that that union's decision not to grieve or arbitrate the Complainant's termination to be arbitrary. So long as there is a rational basis for the union's decision not to arbitrate, or even to file a grievance over the Complainant's termination, we will accord the union substantial discretion in making that decision. *Grisham-Tittle*, 21 PECBR at 238; *Conger*, 18 PECBR at 88. The union can demonstrate that its decision is rational by its investigation of the employee's complaint. We will accord discretion "to how the union investigates a potential grievance, so long as some reasonable good-faith investigation is undertaken." *Randolph*, 15 PECBR at 106. After considering the City's investigation, it was not unreasonable for the Union to have concluded that the Complainant had been untruthful during an official investigation, and that the City most likely would prevail on that issue at arbitration. Where the union, as here, conducted a good-faith investigation prior to making its decision, "[t]his Board generally does not substitute its judgment for that of a union that rationally decided not to process a grievance." *Putvinskas*, 18 PECBR at 895. A union may rationally decide not to pursue a grievance that the union would likely win in arbitration without violating its duty of fair representation. *Balch v. Oregon Public Employees Union,* UP-6-96, 16 PECBR 478, 480 (1996) (union deliberately closed the grievance because it believed there was insufficient evidence to support it); *Martin*, 20 PECBR at 177 (union official reasonably concluded the complainant admitted actions for which he was disciplined); *Chan*, 21 PECBR at 576 (based on investigation, union concluded it would not prevail at arbitration; also union had no obligation to proceed further when employee resigned).

Accordingly, the Union's decision was not arbitrary or arbitrarily made, and we will dismiss these allegations.

Allegation No. 2

The complaint also alleges that the executive board's decision not to grieve Horn's termination was "arbitrary and based on bad faith" because "[o]ne or more of the members based their decision not to grieve Horn's termination based upon his participation in the 2009 unofficial investigation of [EM]." (First Amended Complaint, ¶17(h).) In the opening statement, Complainant described the allegation this way: The Union's decision not to grieve the

[12]The votes were documented in writing. The executive board members credibly testified that they each read the investigation reports on Horn's termination. There is no evidence to suggest that the executive board members were not informed that Horn reported that he had made an error during his first IA interview.

Complainant's termination was retaliatory for his participation in the investigation of Officer EM in 2009.

In essence, the Complainant alleges that the members of the executive board voted not to grieve the Complainant's termination because they held him in disfavor as a result of the enmity that existed between Horn and Officer EM, when the two served together on the DART back in 2009. The Complainant's suggestion is that the Union officials were friends with EM and held a grudge against Horn, who might have been responsible for EM's removal from the DART. Factually, it is clear that Horn and EM did not get along personally or professionally. Yet, the executive board members did not know of that troubled relationship until well after the dates they made their decision not to grieve the termination. There also is no evidence that the Union officials had any particular friendship toward EM or hostility toward the Complainant, and there is no evidence even to imply that the Union officers voted the way they did because of any friendship with EM or hostility toward the Complainant.

To prevail on this allegation, the Complainant must prove discrimination or bad faith. He may do so by establishing that the Union had a hostile motive or acted dishonestly. *Morgan-Tran*, 20 PECBR at 959 (*citing Conger*, 18 PECBR at 87-88; *Coan and Goar*, 10 PECBR at 351). In the alternative, to establish proscribed discriminatory conduct, the Complainant must demonstrate that the Union's decision was "intentional, severe, and unrelated to legitimate union objectives." *Chan*, 21 PECBR at 575; (*citing Howard*, 13 PECBR at 354). To prove a bad faith allegation, the Complainant must establish that the Union's decision was against the Complainant's interests and was done "for an improper reason." *Chan*, 21 PECBR 575. The record does not reveal any evidence that would lead this Board to conclude that the Union's decision was made for an improper reason. *Putvinskas*, 18 PECBR at 898 (refusal to grieve based on complainant's work conduct, not on the union official's personal relationship with the complainant). The Complainant has not established any of the requisite elements.

Accordingly, we will dismiss this allegation in the complaint.

Allegation Nos. 3 and 4

The complaint alleges that the Union's decision not to grieve the Complainant's termination to arbitration was "arbitrary and based on bad faith" because the collective bargaining agreement "specifically affords an individual member the right to grieve and arbitrate discipline and that right does not exclusively belong to the Executive Board at Step 4/Arbitration phase of the grievance procedure." (First Amended Complaint, ¶17(i).) In his opening statement, the Complainant presents the allegation in this fashion: the Union has an obligation to grieve the Complainant's termination because he is the grievant as defined by collective bargaining agreement, and, as the grievant, he gets to decide how far the grievance goes, including whether it goes to arbitration. Of course, the Union and City dispute that interpretation of the collective bargaining agreement.

Notwithstanding the Complainant's assertion that he has some variety of superior status under the collective bargaining agreement's grievance provision, even the Complainant appears to concede that his grievance nevertheless requires action by the Union (or otherwise why would

we be where we are now). Therefore, this concession brings the case back to the traditional duty of fair representation analysis.

In order to prevail, the Complainant must establish that the Union's action, decision, or even perhaps its divergent interpretation of the grievance provision was arbitrary, discriminatory, or made in bad faith. It does not benefit the Complainant to argue that the Union has failed to interpret its own collective bargaining agreement consistent with the Complainant's interpretation. We do not need to debate or analyze the various interpretations of the contractual grievance procedure. *Coan and Goar*, 10 PECBR at 439-440 (the union official permissibly decided not to grieve based on his understanding of the collective bargaining agreement and a reasonably thorough knowledge of the facts); *Morgan-Tran*, 20 PECBR at 960 (we need not decide whether the union's interpretation of contract is correct, and will not substitute our judgment for that of the union's).

It follows from a long line of Board decisions that we will permit a union to be mistaken in its understanding of the complainant's purported grievance so long as it makes its decision in good faith or not with a malicious purpose. *Wright*, 25 PECBR at 932; *Chan*, 21 PECBR at 575; *Tancredi*, 20 PECBR at 974; *Ekstrom and Bedortha v. Oregon School Employees Association*, Case No. UP-54-93, 14 PECBR 565, 567 (1993). Even the Supreme Court accepts that "the grievance processes cannot be expected to be error-free." *Hines v. Anchor Motor Freight*, 424 US 554, 571, 96 S Ct 1048 (1976)

Lastly, the complaint alleges that the Union violated its duty of fair representation by failing to follow its by-laws. (First Amended Complaint, ¶39-¶54.) The Complainant asserts that under the by-laws, he had a right to appeal to the full union membership and even to take his dispute with the Union to arbitration. However, this Board has held that "absent some persuasive evidence of arbitrary or bad faith conduct by the union," we do not have authority to enforce compliance with a labor organization's internal by-laws. *Witherell v. Marion County Law Enforcement Association*, Case No. UP-42-94, 15 PECBR 729, 742 (1995) (*citing Powell*, 3 PECBR 2038).

Accordingly, we treat this allegation as we have addressed the contractual contention set out above, and this brings the case back to the traditional duty of fair representation analysis and burden. In order to prevail, the Complainant must establish that the Union's action, decision, or application of the by-laws was arbitrary, discriminatory or made in bad faith. We have found no basis on which to conclude that the Union has followed or not followed its by-laws in an arbitrary or discriminatory manner or in bad faith. The Complainant failed to demonstrate that the Union acted dishonestly in deciding not to pursue the grievance; that the decision was based on any hostility toward the Complainant; or that the Union lacked a reasonable basis for its decision.

In *Slayter*, we stated that "[t]his 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." 25 PECBR at 504. We dismissed that complaint where, similar to the instant case, the union reviewed the employer's investigation, including transcripts, and found that the employee had given "evasive answers about his alcohol consumption," and the employer had a policy of "zero tolerance for alcohol in

the workplace." *Id.* at 503. As a result, the union "determined that the likelihood of reversing the [employer's] decision was slim;" and further there was "no evidence that the Union had any reason to change its decision." *Id.* at 503-04.

The fact that the Complainant is "not satisfied with the outcome does not establish that the Association acted without a rational basis or in bad faith." *Chan*, 21 PECBR at 576 (*citing Leah Moore v. Mount Hood Community College Classified Employees Association and Mount Hood Community College*, Case No. UP-39-99, 18 PECBR 279, 284 (1999); *Martin*, 20 PECBR at 177 (failure to speak to complainant's witness not a sufficient claim); *Putvinskas*, 18 PECBR at 897 (complainant's dissatisfaction with extent of union's investigation is not basis for a claim).

Accordingly, we will dismiss these allegations.

The City's Alleged Violation of ORS 243.672(1)(g)

Where no violation is found against the labor organization in a duty of fair representation case, the complaint against the public employer will automatically be dismissed. *Seehawer v. American Federation of State, County and Municipal Employees, Council 75, and State of Oregon, Department of Corrections*, Case No. FR-02-11, 25 PECBR 47, 53-54 (2012); *Mengucci*, 8 PECBR at 6734.

ORDER

The complaint against the Respondent Union and Respondent City are dismissed.

SIGNED AND ISSUED this 19th day of August, 2014.

Larry L. Wittherell
Administrative Law Judge

NOTE: The Employment Relations Board's rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The "date of filing objections" means the date objections are received by this Board; "the date of service" of a recommended order means the date this Board mails or personally serves it on the parties.) A party that files objections to a recommended order with this Board must simultaneously serve a copy of the objections on all parties of record in the case and file with this Board, proof of such service. This Board may disregard the objections of a party that fails to comply with those requirements, unless the party shows good cause for its failure to comply. (See Board Rules 115-010-0010(5) and (6); 115-010-0090; 115 035-0050; 115-045-0040; and 115-070-0055.)

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-009-14

(UNIT CLARIFICATION)

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| OREGON AFSCME COUNCIL 75,<br><br>Petitioner,<br><br>v.<br><br>METRO REGIONAL GOVERNMENT,<br><br>Respondent. | ) | ORDER CLARIFYING BARGAINING UNIT |

On August 11, 2014, Oregon AFSCME Council 75, (Petitioner) filed a petition under OAR 115-025-0005(5) to merge two bargaining units of employees of the Metro Regional Government (Metro).

Petitioner's Local 3580-1 represents a bargaining unit of approximately 59 utility workers employed by Metro through its Metropolitan Exposition-Recreation Commission (MERC). The bargaining unit is described in the 2013-2016 collective bargaining agreement as:

> "all full-time or part-time utility personnel employed by MERC at the Oregon Convention Center, Operations Department, including Event Custodians as reflected in Exhibit A of this Agreement, excluding supervisors and confidential employees as defined by ORS 243.650(6) and (14), employees guards and professional employees. The Employer also recognizes the Union as the exclusive representative for full-time Utility Maintenance Specialists employed by MERC at the Portland Expo Center, excluding all other employees at that facility."

Petitioner's Local 3580 represents a bargaining unit of approximately 312 Metro employees. This is the larger of the two bargaining units and is described in the 2011-2014 collective bargaining agreement as:

> "all regular and limited duration status employees of Metro, excluding employees who are covered under a separate collective bargaining agreement with Metro, confidential and supervisory employees as defined by ORS 243.650(6) and (23), and employees assigned to the Office of the Chief Operating Officer and Council Office."

For the purposes of that agreement, a "Regular Status Employee" is defined as:

> "[a]n employee who is in a budgeted FTE position which is not designated limited duration and has passed the initial probationary period in effect at the time of his/her appointment or hire, and has been employed by Metro in such status continuously since passing the probationary period."

A "Limited Duration Status Employee" is defined by the agreement as:

> "[a]n employee who is in a budgeted FTE position and has passed the initial probationary period; and is serving in a limited duration position for a duration not less than three months, and not to exceed the duration of the soft funding source when assigned to such a position. Employees hired into a limited duration position serve a probationary period and are governed under the same terms of the contract as regular status employees unless otherwise specified in this agreement."

Additionally, under the agreement, temporary employees are not included in the bargaining unit, with those employees defined as those "working less than one thousand forty (1040) hours per year in a twelve (12) month period from initial hiring, or any 12-month period thereafter."

The merger petition was supported by an adequate and timely showing of interest. No objections were filed in response to the petition.

On September 18, 2014, the parties filed an agreement with this Board stipulating to the following description of the merged bargaining unit sought under the petition:

> "All regular and limited duration status employees of Metro, including temporary employees that are Program Assistant[s] 1 at the Zoo, Hazardous Waste Technicians, Safety/Security Officers and Scalehouse Technicians, that work more than an average of four hours per week per calendar quarter. All full-time or part-time utility personnel at the Oregon Convention Center, Operation Department and all regular Utility Maintenance Specialists and Lead Utility Workers at the Expo Center. Excluding supervisors, confidential employees as defined under ORS 243.650(6) and (23), employees represented by other unions, employees assigned to the Office of the Chief Operating Officer and Council Office, and MERC employees in security, office, audio visual, clerical and professional employees at the Oregon Convention Center, and all other employees at the Expo Center and the Oregon Convention Center."

The stipulated description describes an appropriate bargaining unit and is accepted as including all employees in the two existing units.

## ORDER

The two petitioned-for bargaining units of Metro Regional Government are merged.

DATED this 26 day of September 2014.

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-009-13

(UNFAIR LABOR PRACTICE)

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

On July 30, 2014, the Board heard oral arguments on both parties' objections to a recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew on May 6, 2014, after a hearing held on July 8 through 11, 2013, at the offices of Respondent in Beaverton, Oregon. The record closed on November 25, 2013, upon receipt of the parties' post-hearing briefs.

Elizabeth A. Joffe and Noah T. Barish, Attorneys at Law, McKanna Bishop Joffe, LLP, Portland, Oregon, represented Complainant.

Shelley Devine, General Counsel, Tri-County Metropolitan Transportation District of Oregon, Portland, Oregon, and Keith Garza, Attorney at Law, Oak Grove, Oregon, represented Respondent.

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On February 27, 2013, Amalgamated Transit Union, Division 757 (ATU or Union), filed this complaint alleging, among other issues, that the Tri-County Metropolitan Transportation District of Oregon (TriMet) violated its statutory duty to bargain in good faith under ORS 243.672(1)(e) by unilaterally deciding to expand the type and scope of electronic surveillance of bus operators and to implement new policies regarding employee parking, employee smoking,

and employee promotion. ATU filed an amended complaint on April 26, 2013. TriMet filed a timely answer including affirmative defenses and counterclaims on June 4, 2013, and ATU filed its timely answer to the counterclaims on June 14.

The issues, as agreed to by the parties, are:[1]

1. In December 2012, did TriMet unilaterally implement changes in electronic bus operator surveillance and refuse to bargain those changes or their impact before implementation? If so, did TriMet violate ORS 243.672(1)(e)?

2. In January 2013, did TriMet unilaterally implement changes in employee free parking policies and refuse to bargain those changes or their impact before implementation? If so, did TriMet violate ORS 243.672(1)(e)?

3. In January 2013, did TriMet refuse to bargain unilateral changes in employee smoking policies, to be implemented in July 2013? If so, did TriMet violate ORS 243.672(1)(e)?

4. In December 2012, did TriMet offer to bargain over the impact on certain employees, but not the decision, to change its policies regarding work record reviews of employees who apply for internal positions to include customer service records? If so, did TriMet violate ORS 243.672(1)(e)?

5. If ATU prevails, should TriMet be required to pay ATU a civil penalty?

6. Has ATU failed to exhaust its contractual remedies, waived its right to bargain, and untimely filed its claims, and are ATU's claims inconsistent with the past practices of the parties?

## DECISION

TriMet violated ORS 243.672(l)(e) when it unilaterally decided to: (1) implement changes in electronic bus operator surveillance, and (2) begin using unsubstantiated customer complaints in the internal employee promotion process. The remaining allegations in the complaint will be dismissed.

[1]ATU pleaded nine counts in the amended complaint. The parties settled Counts 1, 2, and 3 before hearing. At TriMet's request, the ALJ severed the Union's claims in count 9 and TriMet's counterclaims, ruled that they would be processed as a separate case (UP-028-13), and placed that case in abeyance pending the outcome of this case and a related grievance arbitration. In its post-hearing brief, ATU argued for the first time that TriMet violated ORS 243.672(1)(f) when it refused to bargain in good faith as required by ORS 243.672(1)(e). We will not consider ATU's subsection (1)(f) claims because they were not pleaded in the Amended Complaint. Accordingly, only counts 4, 5, 6, 7, and 8 are before the Board.

## RULINGS

### Motions to Reopen Record

On September 11, 2013, ATU moved to reopen the evidentiary record to submit an affidavit in support of its position that TriMet was using data from "Device 8," an eighth surveillance device focused on bus operators, in disciplinary investigations. On September 30, TriMet objected to that motion and offered an affidavit in opposition to ATU's affidavit.

This Board has long required that parties present all evidence during the evidentiary stage of case processing. Post-hearing motions asking to supplement the record are not granted "unless the evidence is material to the issues and was unavailable or there was some other good and substantial reason the evidence was not presented at hearing." *Cascade Bargaining Council v. Bend-LaPine School District No. 1*, Case No. UP-33-97, 17 PECBR 609, 609-10 (1998). This Board may also decline to reopen the record to receive cumulative evidence. *Id.* at 610. The ALJ declined to reopen the record, concluding that the evidence was cumulative and not material to the dispositive issues in the case. We agree with the ALJ's conclusion and reasoning.

The remaining rulings of the ALJ were reviewed and are correct.

## FINDINGS OF FACT

### Parties

1. ATU is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a bargaining unit of bus operators and other transit workers, maintenance workers, and administrative workers employed by TriMet, a public employer as defined by ORS 243.650(20).

2. ATU and TriMet were parties to a collective bargaining agreement in effect from December 1, 2003 until November 30, 2009. The parties' subsequent agreement was created through interest arbitration in July 2012, when an arbitrator awarded TriMet's Last Best Offer to be effective December 1, 2009 through November 30, 2012. That award was challenged through unfair labor practice proceedings, upheld by this Board in large part, and appealed; the case is currently before the Oregon Court of Appeals.[2]

3. During mid-2012, the parties anticipated that negotiations for the successor agreement would begin in late 2012. Those negotiations were indefinitely postponed due to a dispute between the parties over whether those negotiations would be open to the public, an issue

[2] *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon and Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757*, Case Nos. UP-42/50-12, 25 PECBR 640 (2013), *appeal pending.*

that is now before this Board.[3] At the time of hearing in this matter, bargaining for the parties' successor agreement was scheduled to begin in September 2013.

TriMet Bus Electronic Surveillance (Before 3000 Series Buses)

4. Bus operators' work time is generally governed by the geography and timing of bus runs and shift schedules, including split shifts. Bus operators' break times vary widely in length and are often taken in the bus, alone. Operators' reasons for staying on the bus include inclement weather, privacy, quiet, and a desire to use their break time for their own purposes rather than interact with people seeking transit assistance or money at transit centers where they are stopped. During these breaks, operators attend to personal matters such as intimate clothing and body part adjustments, food, and hygiene, and engage in telephone communications, including those about family, relationship, financial, union, employment, and medical issues. Surveillance would also reveal an operator's exercise of choices in eating, reading, music, and film viewing material.[4]

5. TriMet periodically brings new buses into service in groups or series, denoted by a four digit number. The 2500 series buses began service in the early 2000s; the 2900 series buses began service in 2009. At the time of hearing, TriMet was in the process of continuing to bring its 55 new 3000 series buses into service.

6. In 1997, TriMet began using video and audio surveillance and recording devices on new buses brought into service. The number of those devices in each bus gradually increased over the years, partly because of expanded capability added by bus manufacturers and partly because of TriMet's decisions regarding how many surveillance devices[5] to add to each bus series. The 40 2900 series buses, added in 2009, had seven surveillance devices. The 3000 series buses, which began to be introduced into service in October 2012, had eight. The quality of the visual recording of the 2900 and 3000 series buses is excellent, with 300 frames per second at a high

[3]A recommended order in that case (*Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757, and Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-001-13) was issued on June 18, 2014. Oral argument is scheduled before this Board on October 2, 2014.

[4]The record does not clearly describe the actual length of bus operator breaks and the feasibility or necessity of turning the bus off during a break. There is no evidence that TriMet has instructed operators to leave their buses during breaks, or that doing so is generally practical.

[5]Although the parties refer to these devices as 'cameras,' we use the term 'surveillance devices' for clarity because the devices capture both video and audio.

resolution.[6] TriMet does not generally retrofit older buses with newer surveillance technology. Information captured by those devices had been used in disciplining bus operators in the past.

7. TriMet did not enable the audio recording feature until the 3000 series buses and their eighth surveillance device.[7] Before that time, bus operators had the option of turning on an emergency system that recorded and broadcasted audio from inside the bus to a TriMet dispatch center. The use of the emergency broadcast feature was part of a 1997 negotiated agreement between the parties regarding the Bus Dispatch System (BDS), which also included real-time tracking of buses. In addition, radio conversations between bus operators and dispatch centers are recorded, a practice dating back many years.

8. Bus operators ride in a van under electronic surveillance for a brief period of time if they are taken to a drug testing facility. They also sometimes pass within the range of TriMet surveillance devices located on transit station platforms and driveways.

9. The surveillance devices on the 2900 series buses are located on the inside and outside of the bus. The visual field of the first seven devices are as follows: (1) entrance door from over the operator's head; (2) out front window; (3) aisle from front of bus; (4) aisle to front of bus, from mid bus; (5) exit (middle) doors, from opposite side of bus; (6) area to the outside right of bus, from the front of the bus; and (7) area to the outside left of bus, from the front of the bus.[8]

10. Despite adding surveillance capacity with each bus series since 1997, TriMet never added the capability for direct video or audio surveillance of bus operators during work or break time until the 3000 series buses.

11. TriMet officials believe that the surveillance data are public records. TriMet has few written policies regarding the pulling and use of recordings; the procedures at the time of hearing were communicated verbally. Bus operators are often in the view of their passengers and the public. Some of those people have observed and recorded operators committing misconduct.

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[6]These devices capture audio or video or both, and transmit that information to a data storage device on the bus called a data pack. The video capture includes both visual and infrared spectra, so that the devices 'see in the dark.'

There is evidence in the record that there had been an informal understanding between some Union leaders and some former TriMet executives that the Union objected to the use of surveillance devices focused on bus operators, and that TriMet had either agreed with those concerns or had decided not to push the issue. This understanding, if it existed at all, disappeared with the turnover of leadership at ATU and TriMet.

[7]Although the 2900 series buses have microphones built into their surveillance devices, the microphones are not connected to a recording device. TriMet and Union officials were unaware of these microphones until this dispute arose. Each microphone is concealed under five small holes in the device housing and likely invisible to a casual observer. The surveillance devices themselves are identical on the 2900 and 3000 series buses.

[8]There is some type of posted notification inside the buses that passengers are under surveillance.

A TriMet bus passenger recorded a cellphone video of the bus operator reading an electronic book while driving. One blogger posted videos on his website of a bus operator driving.

12. Bus operators are subject to significant stress due to traffic, schedules, difficult and sometimes unpredictable customers, and long driving hours. There is some research supporting the view that electronic surveillance of operators increases that stress and may itself be a distraction. At hearing, one bus operator described work time electronic surveillance as "creepy" and that it "freaked [her] out." She also expressed concern about telephone calls to doctors and paying bills or having other financial conversations where she had to give out debit card numbers and the like. Another operator, with gastric problems, feels unable to pass gas or adjust his pants while driving while under electronic surveillance. TriMet executive director of operations Shelly Lomax, who had previously been an employee in a TriMet "money room" under constant surveillance, did not believe surveillance as a bus operator would bother her, because she did not have "anything to hide" and was not embarrassed by being seen making undergarment adjustments.

13. In the three years before hearing, there were approximately a dozen assaults on bus operators ranging from being spat on to being struck. During the aftermath of the Sale/Hammel fatalities described below, someone outside the bus punched bus operator Day in the head through the open driver's side window. On another occasion, a bicyclist punched an operator through an open driver's side window.[9] Other individuals have reached through that window to steal items such as an operator's watch, transfer tickets, and a transfer punch. In addition to surveillance of the operator, Device 8 "also captures a pretty nice view of the area outside of the bus that could also be material to what [TriMet managers] were investigating."

14. Lomax believes that the surveillance devices on buses "do serve as a deterrent, but they also serve as a mechanism for TriMet to re-create what happened in the event of criminal matters or collisions, claims or to investigate allegations." Since 2009, bus surveillance devices have led to a number of individuals being identified and prosecuted for, or pleading guilty to, criminal activity including sexual assault, smartphone theft, child abuse, and harassment. They have also helped TriMet defend against lawsuits arising out of vehicle collisions.

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[9]TriMet Executive Director of Labor Relations and Human Resources Randy Stedman, however, denied that Device 8 was relevant to operator safety where it captured an assault on an operator:

> "A: When you're talking about workplace safety as compared to an assault, what I think it means is we have a public place and we have a situation where an operator can be assaulted. We want to be able to capture that and investigate it just like any other activity on the bus that needs to be investigated.
>
> Q: But you can't say one way or the other that's a safety issue for the operator?
>
> A: It's not a safety issue, it's a matter of being assaulted.
>
> Q: That's not a safety issue for an operator?
>
> A: In the context of workplace safety, I would say no."

15. In the three years before hearing, TriMet officials have investigated numerous allegations of unsafe bus operator driving, and concluded that the accusations were founded in 30 to 40 instances during that time. The unsafe activity included driving down the wrong side of the road, running red lights and stop signs, using cell phones, and falling asleep. In addition, TriMet officials consider distracted driving to be a public safety issue that they continue to address. Those officials believe that surveillance Device 8 would "help us to both confirm and/or clear operators of allegations of distracted and unsafe driving."

16. In the recent past, audio recording of telephone calls to TriMet has enabled TriMet to identify false complaints. Lomax recalled a situation where an audio recording of a passenger on his cellphone identified a false injury complaint resulting from a train/truck collision. In some explanatory material, TriMet summarized the benefits of Device 8 as follows:

> "The new 3000 series buses have the most cameras–eight–and also have an audio recording device located near the front of the bus, near the operator's seat. This device will be crucial in providing more safety for operators, clarifying exchanges between operators and riders and assisting authorities in investigating criminal incidents."

17. In light of the incidents and issues described above, Lomax and other TriMet officials believe that "[p]ublic safety is the central purpose [of Camera 8]. * * * Camera 8's particular purpose would be to take pictures of what happened in the operating compartment. We want to capture -- that's the one piece of the vehicle that we don't have a full picture of what's going on, and that's what it's intended to do. * * * The purpose is to record what's happening that the operator is doing. It is a public -- to answer the question when the public asks, it's public safety."

18. On an evening in April 2010, bus operator Day made a left turn with her bus across a crosswalk, striking five pedestrians, three of whom were injured and two of whom died (Sale and Hammel). Lomax described this event as "the worst accident that TriMet has ever been involved in." None of the bus surveillance cameras captured any details of the incident as to why Day failed to see or react to the pedestrians in time. News reporters and relatives of the victims asked TriMet officials why TriMet did not have surveillance footage of the bus operator's actions.

19. TriMet engaged in a "top to bottom safety review" after the Sale/Hammel fatalities, which included the use of an outside consultant and a safety and service excellence task force created by TriMet General Manager Neil McFarlane. The safety reviewers made 19 or 20 recommendations.[10] One recommendation was to "continue to evaluate the use of having cameras on the operators."

20. In September 2010, a bus rider made a visual recording of a bus operator appearing to read an electronic book while driving in rush-hour traffic, turning the steering wheel with his elbows. The recording was featured on the internet and in the local news media.

[10]This report, and the date it was issued, are not part of the record in this case.

21. The electronic book incident caused TriMet officials to reconsider direct audio and video surveillance of operators. This decision led to press coverage for TriMet, including an article in *The Oregonian* newspaper on September 23, 2010. The newspaper characterized this step as "a sudden U-turn" from TriMet's past position. The article quoted the father of victim Sale challenging TriMet's lack of operator surveillance.[11] The article also stated that, although TriMet has other surveillance cameras, "it has yet to join a growing number of transit agencies using the technology to monitor drivers." The article also quoted then-Union president Jon Hunt as opposing cameras pointed at drivers and stating that such a change would requiring bargaining.

22. At some point after September 2010,[12] the TriMet management team decided to direct the bus manufacturer to install an eighth surveillance device (Device 8) on the 3000 series buses to provide a view of the operator and out the operator's left window. Had Device 8 been on the bus involved in the Sale/Hammel accident, it would have provided images of both the operator and the pedestrians who were struck. The actual order for Device 8 was placed by a member of TriMet's Safety and Security Department, who was also a member of the Union bargaining unit. That employee reported to TriMet Executive Director of Safety and Security Harry Saporta.

23. The visual field of Device 8 is the bus operator, viewed in profile from the right side of the bus above the doors. It shows a seated bus operator from head to the top of the foot, and some of the view above the operator's head and out the operator's left window. Although the top of a bus operator's head, if tall enough, or right arm, if the operator's body is broad enough, appear from the rear in other device views, Device 8 is the first to be placed so as to monitor the bus operator. Videos from other surveillance devices have been used to provide evidence to support discipline of operators.

24. At present, the devices record to a hard drive ("data pack") inside the bus, and do not broadcast their feed for real-time viewing. In order to play the recordings, which are at least partially protected by encryption, the data pack is physically removed ("pulled") from a locked location on the bus and physically attached to a laptop or other computer. The technician/mechanic can view the recordings after entering an encryption key. At present, TriMet managers and technicians may play the recordings after taking the keys from the relevant manager's office (these are not formally signed in or out). Most, but not all, pulling and viewing of recordings is noted on an electronic maintenance log by incident report number. This is the procedure followed with any other maintenance on a bus. Recordings are also provided to law enforcement officials or litigants in court upon specific request, along with documentation of the chain of custody.[13] The

[11]"He didn't think eyes were on him, * * * so he started reading his Kindle. Put a camera in their face, and it will keep the honest and the dishonest people honest."

[12]The parties do not identify a specific date for the decision to add Device 8, and we did not locate it in the record. We infer from the facts in the record that it is more likely than not that the decision was made before delivery of the first three 3000 series buses displayed to employees in May and June 2012.

[13]It appears that the recordings are not, as yet, generally provided to national or regional government entities or commercial surveillance data collection vendors. They are available to members of the public through a public records request.

surveillance system automatically records over previous recordings after 72 hours if the data pack is not pulled.

25. The recorded surveillance data relating to bus operators is usually pulled and viewed by TriMet only in response to a complaint of driver misconduct or an incident such as a vehicle accident. Some data may be viewed as part of research related to the operation of the transit system, such as to evaluate traffic, or for marketing use, or use by other entities such as law enforcement. Those uses are not given a number in the maintenance log system.

26. On at least one occasion, a data pack recording revealed that an operator had committed an offense that TriMet was unaware of before playing the recording. The data pack was pulled because the operator was believed to have been talking on his cellphone while driving. Review of the recording revealed that the operator was, in fact, eating.

Notice to the Union and Demands to Bargain Changes in Bus Operator Surveillance

27. In June or July 2012, TriMet parked a 3000 series bus in its Powell garage for employees to view and inspect informally. The bus was a "pilot bus," not a concept or exemplar vehicle, but simply one of the first two or three to be delivered, with the expectation that it had the same features as its successors. TriMet chose this method of delivery to provide an opportunity to fix problems with the buses before all of the buses were manufactured and delivered.

28. At some point in June or July 2012, Bruce Hansen and Union president Jon Hunt viewed the interior of the 3000 series pilot bus. TriMet Powell Garage Maintenance Manager Greg Haley, who was the project manager for the 3000 series bus and TriMet's resident expert on all features of the bus, except its surveillance system, may have been present.[14]

29. On August 23, 2012, new Union president Hansen presented Stedman with a "DEMAND TO RECEIVE NOTICE AND BARGAIN ORS 243.698 OVER SURVEILLANCE CHANGES SHOULD ANY OCCUR." (Emphasis in original.) Hansen stated:

> "I write to prospectively demand that TriMet comply with the above cited statute in the event of future changes in bus tracking/recording technologies. For a number of years, the parties have relied upon a negotiated BDS policy to successfully address issues arising out [of] that technology. The Union has heard rumors but, received nothing from TriMet, to the effect that management may be intending to install some new type of technology or equipment which has surveillance capabilities different from or, additional to, those of the current BDS system.

[14]The parties dispute many of the details of this June/July 2012 incident, including who was present and what level of information, if any, was provided about the recording capabilities of the new bus. For the reasons set forth more fully in our discussion of the timeliness of the complaint below, we need not resolve the dispute about the specifics of what happened during that June/July 2012 incident because, even assuming the accuracy of Haley's testimony, the complaint would still be timely.

"If true, TriMet would need to notice the Union of this intention and the parties would need to bargain over issues related to that technology before such a system is installed and used against union members. In the meantime, please provide the union with the product information related to that technology showing its various functions."

30. On September 13, 2012, Stedman responded to Hansen, stating in part:

"Why don't we address the rumors by first having a tour of the new buses so you can inquire of the subject matter experts first hand what its capabilities are? As it happens, I have not yet had a tour of those buses, either, so it would be good to tour the new ones at the same time. Whatever the capabilities they have, my understanding is that we have no intention to retrofit existing buses to match the new ones."

31. On September 14, Hansen e-mailed agreement to the tour. He also repeated the demand for notice and opportunity to bargain, and asked some questions about the new surveillance capabilities, including the possibility of audio and video recording of the operator. On September 19, Stedman replied with possible dates for the bus tour, suggested that Hansen ask the bus manufacturer's experts about surveillance during the tour, and stated that he would respond to the Union's demand to bargain after the tour.

32. On September 28, the parties met for the tour. Stedman, Lomax, and Haley represented TriMet; Hansen and Hunt represented the Union. No bus manufacturer's expert was present. During the tour, TriMet officials told the Union officials that a surveillance device would be pointed directly at the bus operator, and that all of the interior bus surveillance devices had cameras and working microphones. The TriMet officials did not describe the timing of audio or video recording or whether the surveillance feed would be available in real time. Hansen asked TriMet officials to provide additional information about the surveillance system including screen shots from the various devices.

33. On October 1, Hansen wrote Stedman with a "RE-ASSERTED DEMAND TO RECEIVE NOTICE AND BARGAIN ORS 243.698 OVER SURVEILLANCE CHANGES." He stated, in part:

"Last Friday, September 28, 2012, Jon Hunt and I toured the new buses as you requested. Unfortunately, there was no 'expert' there to explain the system. What we did learn was that our demand to bargain was justified. The cameras will be trained on the operators, they will be audio taped and there even appears to be the potential of a live feed invasion of their workspace.

"None of this is acceptable to the Union's members. We demand to bargain for the third time. In the meantime, you will be violating the law should you put the buses into service without bargaining pursuant to the statute. We are willing to work with you on identifying a way for TriMet to put the buses into service prior to the completion of the statutory bargaining. If you, however, continue to be less than

> forthcoming and begin service without bargaining, we will take all necessary steps to preserve our members[’] rights.”

34. On October 2, Stedman responded. He stated that the 3000 series buses would have a new surveillance device with “a full view of the operator instead of the current partial view,” “no live video feed,” and audio. Stedman stated that “the audio feed is exactly the same as it is in current buses—a covert mic is engaged for dispatch to use only when the operator presses the alarm.” He also stated that “TriMet plans no change in the way it uses recordings from the new buses compared to the way they are used now.”

35. Stedman stated that the Union’s demand to bargain was “misplaced” because bus surveillance systems “are a matter of public safety and security,” a permissive subject of bargaining, a *de minimis* change from the status quo, and the data would be “pulled and reviewed only in response to incidents that must be investigated.” Stedman also stated that although TriMet believed that there was no duty to bargain, it was “willing” to meet with the Union “should the [Union] wish to engage in impact bargaining.”

36. Also on October 2, Hansen responded. Hansen requested dates to meet for bargaining, asserted that the Union would “not accept any limitation on the scope of that bargaining,” asked that his previous requests for information be granted before bargaining, and stated that TriMet should not put the new buses into service until the completion of bargaining or an interim agreement about how to proceed.

37. On October 3, Stedman responded that he would be away for a period and asked for bargaining dates beginning October 22. He also maintained that

> “TriMet plans no change in the way it uses recordings from the new buses compared to the way they are used now. So, while we believe there is no impact to employment relations, we are willing to engage in impact bargaining. The District will not bargain over its decision to deploy its new buses because the recording technologies are a matter of safety and security, this is a permissive subject of bargaining, and, at any rate, the change in recording capabilities is *de minimis*. The buses will go into service as scheduled.”

38. During this period, the parties were also contemplating negotiations over their next collective bargaining agreement. On October 9, Hansen wrote Stedman regarding “Contract Opening and Demand to Bargain – Surveillance.” Hansen did not mention contract bargaining in the body of the letter. He proposed bargaining dates of November 30 and December 19, 20, and 21, and repeated that he needed the requested surveillance device information before bargaining. Hansen also offered a solution to the disagreement about putting the buses into service, namely “to temporarily disable the enhanced surveillance features of the new system while the parties are engaged in bargaining.”

39. On October 16, TriMet Director of Labor Relations Evelyn Minor-Lawrence responded to Hansen’s October 9 letter and accepted November 30 as the initial successor contract bargaining date. Regarding surveillance, she stated that TriMet would only engage in impact

bargaining and not bargain the decision to put the surveillance devices into service. She accepted December 19 as the date for the impact bargaining. Minor-Lawrence also included information in response to the Union's information requests, including answers to Hansen's questions, and screen shots taken from the devices (including Device 8).

40. Minor-Lawrence stated that no changes to the audio recording practices would occur because of the radio replacement project, and that the system would continue capturing only conversations with the dispatch center through the bus operator's covert alarm system. She added that the video recording cameras would also have the capability to simultaneously record sound, as the supplier of these surveillance devices no longer manufactured them without audio recording capability. She also stated that Device 8 would "capture the operator in this image when the operator is in the operator's seat." (Italics omitted.)

41. On October 17, Hansen confirmed December 19 as the date for surveillance impact bargaining and repeated and expanded the Union's request to disable surveillance until after bargaining:

> "For example, the camera that invades the operator's privacy be turned off, any audio system not deliberately engaged by the operator be disabled; any live or streaming feed capacity not be utilized; and that none of the data obtained through the new technology be used against the operator for disciplinary purposes."

Hansen stated that "it appears" that there are three sources of audio recording: the radio, the alarm in the BDS system, and the "one mounted on the camera." Hansen asked for the "exact location" of each microphone along with how it is activated, reports about the accuracy of the BDS system, an opportunity to review the operating manual for the 3000 series buses, and the testing protocols for the 3000 series buses.

42. Hansen also listed Union concerns about the new surveillance:

> "One issue is that being under close camera supervision the entirety of a work day constitutes a se[vere] invasion of an individual's right to privacy. Secondly, the Union is deeply concerned that the system data will be used to discipline operators and as an offensive weapon against those management wants to 'target.' Your assurance that the system's new data sources will not be used to justify discipline would do much to alleviate the second concern."

43. On October 29, Stedman responded to Hansen's information request, clarifying that there would be two audio recording systems: (1) the operator-initiated covert alarm, and (2) the microphones on each of the eight surveillance devices. He stated that the eight surveillance devices "are active and record audio with the video images to the data pack" whenever the bus is on and for 15-30 minutes after the bus engine is turned off. Stedman attached a list of the eight surveillance devices with their placement, recording view, and color/infrared capability. Although the location and recording view for Device 8 was listed as "TBD" [to be determined], Stedman stated that "[t]he eighth camera is new and located inside, above the front entrance door, capturing external images out the front left side of the windshield and left operator's window, internal images of the

fare box, and operator's area at the front of the bus." Stedman also included a disk copy of the 3000 series bus operator's manual and testing protocols. On November 1, Stedman confirmed that impact bargaining would occur on December 19.

44. On December 11 or 12, 2012, Hansen and Hunt went to TriMet's Powell Garage to gather more information about the 3000 series buses to prepare for the December 19 bargaining session.

Surveillance Device Impact Bargaining

45. On December 19, the parties met to bargain about the surveillance devices. Union representatives included Hansen, Hunt, and Executive Board member David Kay; TriMet representatives included Stedman, Lomax, and Haley. Stedman stated that TriMet would not reconsider the decision to deploy the 3000 series buses with the new surveillance devices and that the purpose of the bargaining was to discuss impacts.

46. At the December 19 bargaining, Union officials listed their concerns about the surveillance devices, including: (1) operator discomfort with being recorded for their entire work day; (2) managers' ability to review recordings to determine whether operators were doing anything wrong (Union officials called this activity a "fishing expedition");[15] (3) managers' ability to target particular operators (Union officials called this activity "witch hunts"); (4) members of the public requesting or hacking into surveillance data in order to target or embarrass operators (Union officials called this activity "cyberbullying"); (5) additional anxiety imposed by surveillance on an already stressful job; (6) illness caused by the stress of constant surveillance; and (7) operators' lack of privacy on layovers or breaks because many operators take their breaks on the bus and the surveillance equipment records for 15-30 minutes after the bus is turned off.

47. Union officials made no proposals to mitigate the impacts of the new surveillance device. Instead, they focused on stopping their use. Hansen suggested that TriMet reposition Device 8 and disable the audio for all of the devices. TriMet officials rejected these suggestions.

48. The parties reached no substantive agreements during this bargaining session, which lasted two or three hours. At the end of the session, the Union agreed to provide dates for another session. The Union did not do so. Instead, the Union decided to move the issue into regular contract bargaining, without informing TriMet of this decision.

[15]Although TriMet's practice at the time of hearing was that data packs are only viewed when there is an incident, Lomax told the Union during the December 19 bargaining session that TriMet had disciplined operators based on actions revealed in videos that were originally viewed for other reasons. TriMet has no written policies regulating the use of surveillance data and none that prohibit managers from viewing and using that data for other than incident-related reasons. David Kay, a mechanic who is often assigned to pull data packs, has performed that task many times without a specific incident or claim number attached to the manager's request. Although TriMet states that it considers the surveillance data to be public records, the record does not reveal how often TriMet provides that data based on public record requests.

Center Street Parking

49. For at least 22 years, a large group of TriMet administrative staff positions, such as payroll and finance clerks, customer service specialists, schedulers, and information development specialists, were stationed at TriMet's main offices in two buildings located near SE Center Street in Portland (Center Street). These employees include bargaining unit and non-bargaining unit staff. During that period, TriMet had a written policy providing free, permitted-access parking to TriMet Center Street employees in a fixed number of first-come, first-served spaces in designated lots nearby on SE 17th Avenue. TriMet also provides free transit to its employees.

50. For at least several years, TriMet has employed a small number of staff at a ticket office in downtown Portland, and at an office on Holladay Street in the Lloyd District. TriMet has never provided free parking for employees at either of these locations.

51. The parties have never bargained parking issues. In 1999, the Union brought a grievance involving a bargaining unit employee who wanted a parking spot at the Sunset Transit Center, as other similar employees had at other locations. The Union and TriMet grievance committee unanimously denied the grievance, stating "[t]he committee recognizes that under the Working and Wage Agreement [TriMet] is not obligated to provide employee parking."

52. TriMet has never provided free parking to any bargaining unit employee who transferred from Center Street to other TriMet locations that did not already have free employee parking.

53. TriMet is building a new light rail line between Portland and Milwaukie, called the Portland-Milwaukie Light Rail project, scheduled for completion in 2015. In 2013, as part of that project, TriMet planned to demolish one of TriMet's Center Street offices and renovate the other. Therefore, TriMet decided to transfer the Center Street employees to various other locations until the Center Street work was done. Some of those locations, TriMet's Elmonica and Ruby Junction garages, also had free parking.

54. TriMet transferred a small number of bargaining unit employees to buildings in the Harrison Square building in downtown Portland and the Holladay/Lloyd District building.[16] TriMet has not provided free parking near Harrison Square or Holladay. Parking rates near the Holladay office range from $76.80 to $107.00 per month. TriMet has leased office space in the Holladay Street site since 1982; the Harrison Square office was created to house some employees during the Center Street construction.

55. Although some free parking exists at other TriMet locations, there are not free-parking spaces for all employees. TriMet Executive Director of Operations Lomax sometimes finds the Ruby lot full and has to seek parking on neighboring streets.

[16]After the moves, there were 21 bargaining unit employees and 95 non-bargaining unit employees at Holladay; 12 unit employees and 176 non-unit employees at Harrison Square; and 9 unit employees only at the downtown ticket office.

56. TriMet informed employees in mid-November 2012 that some employees would be moved from Holladay and Center Street to Harrison Square on January 11, 2013, and others from Center Street to Holladay on January 25, 2013. TriMet did not provide notice of the transfers to the Union.

57. The Center Street parking areas unaffected by construction work are not available to the former employees to use as part of a park and ride, partly because of construction issues and partly because of TriMet's choice.

58. On December 11, 2012, after the scheduled start of successor contract bargaining, ATU's Hansen wrote TriMet's Stedman that the Union had heard rumors that some bargaining unit members would be moved into the new Harrison Square offices. Hansen stated that, during bargaining for a successor collective bargaining agreement, TriMet should maintain the *status quo* of free parking for the Center Street employees who were being transferred. On December 13, Stedman responded that TriMet would not provide free parking to any employees at Harrison Square, whether in or out of the bargaining unit. On December 17, Hansen replied that unilaterally removing the benefit of free parking during negotiations would constitute an unfair labor practice. On December 18, Stedman responded that Hansen had misinterpreted his position and referred Hansen back to Stedman's December 13 letter.

59. The parties have not engaged in any bargaining on this issue since that time.

Smoke-Free Workplace Policy

60. Before the changes at issue here, and since at least April 1991, TriMet prohibited smoking in all enclosed TriMet buildings, all TriMet owned or leased vehicles, and public and private areas in the transit system. The policy permitted smoking in designated outdoor smoking areas. These areas typically included shelter from the elements. The policy was intended to be consistent with the Oregon Indoor Clean Air Act, ORS 433.845 *et seq*.

61. Employees were permitted to smoke during breaks and lunch, and, under some circumstances, while at work. Examples of the latter include an employee smoking while crossing the parking lot before driving a bus into the shop, and a dispatcher or station agent smoking outside a building while remaining within earshot of the dispatch radio. The policy treats electronic cigarettes the same as traditional cigarettes.

62. In 2007, the legislature amended the Oregon Indoor Clean Air Act. Before 2007, the policy section of the Act stated that "because the smoking of tobacco creates a health hazard to those present in confined spaces, it is necessary to reduce exposure to tobacco smoke by requiring nonsmoking areas in certain places." Or Laws 1981, ch 384, § 1. The 2007 amendments changed that policy to read that "[t]he people of Oregon find that because exposure to secondhand smoke is known to cause cancer and other chronic diseases such as heart disease, asthma and bronchitis, it is necessary to reduce exposure to tobacco smoke by prohibiting smoking in all public places and places of employment." Or Laws 2007, ch 602, § 2, ORS 433.840.

63. On December 6, 2012, Stedman wrote Hansen to inform him that, in January 2013, the TriMet Board of Directors would consider a resolution regarding smoking. The resolution would designate all TriMet facilities, including outdoor areas, smoke free effective March 1, 2013. Stedman wrote that the proposed resolution was based on the "clear * * * health risk associated with smoking and secondary smoke in the workplace."

64. On December 11, Hansen responded that TriMet "facilities" were already smoke free, and that if TriMet's intent was to make all TriMet "property" smoke-free, then that would need to be presented at the bargaining table because bargaining unit members have always been allowed to smoke outdoors in areas adjacent to TriMet buildings on TriMet property. Hansen indicated that TriMet should maintain the *status quo* during negotiations for the successor collective bargaining agreement. On December 21, Stedman responded by stating in part that smoking was not a mandatory subject of bargaining, referring Hansen to ORS 243.650(7)(g).

65. On January 23, 2013, the TriMet Board of Directors approved the resolution prohibiting smoking on all TriMet property. TriMet then informed its employees that those who wanted to smoke during the work day were required to leave TriMet property to do so. On January 25, Stedman informed Hansen that the Board resolution had passed, and that the March 1 implementation date had been changed to July 1. On January 28, Hansen responded by renewing the demand to bargain and asking Stedman to advise if TriMet continued to refuse to bargain. On January 29, Stedman responded that TriMet had not changed its position that smoking was not a mandatory subject of bargaining.

66. On July 1, 2013, TriMet adopted a new "Smoke-Free Workplace" policy banning smoking on all TriMet property. The policy, effective that date, provided that violations would be subject to progressive discipline, up to and including termination. TriMet posted maps on its intranet showing the property lines and the new TriMet smoke-free outdoor areas. Shortly thereafter, TriMet dismantled the previously designated outdoor smoking shelters.

67. TriMet provides an unpaid meal break of at least 30 minutes for employees who work at least 6 hours, and at least a 10-minute paid rest period for every segment of four hours worked. This schedule tracks the meal and rest break requirements under Oregon law.

68. Because of the new policy, and the large size of many TriMet properties, some bargaining unit employees who smoke must take a substantial amount of time to walk to a location where they can smoke. Some TriMet facilities border private property, further reducing potential smoking opportunities. In addition, TriMet policy prohibits these employees from driving off site while at work (although exceptions have been made, most commonly for a regular Monday trip to obtain take-out food for a group of employees). A significant portion of some unit employees' breaks are spent simply getting to and from a location where they can smoke.[17]

[17]The parties disputed the actual amount of time spent walking to each smoking location from various employee work stations. We conclude that the new policy required some employees to spend between five and seven minutes of their 10 minute rest period walking to and from the nearest location off TriMet property where they could smoke.

69. It has been the TriMet rule "forever" that night maintenance workers are not permitted to leave the premises during breaks. This is because of liability issues arising from opening gates at night and incidents that had occurred. For that reason, the lunch periods of these employees are paid time.

70. Pursuant to TriMet policies, a small number of other unit employees, such as station agents, and graveyard shift dispatchers and controllers, cannot leave TriMet property during their breaks because they must be available to hear and respond immediately to radio and telephone communications, and there are no qualified backup employees during their shifts. These employees also have paid lunch periods for that reason. Before the new policy, these employees could smoke in the designated smoking areas while listening for their radio or telephone calls through an open window or door, or transfer the telephone calls to their personal cellphones. The policy would not appear to allow them to leave TriMet property. However, in practice, at least one station agent is permitted to transfer the calls to his personal cellphone and walk off the property to smoke.

71. As of the date of hearing, TriMet had continued a 'soft open' of the new smoking policy, making sure that employees who violate the policy are aware that management has observed them doing so, but not imposing discipline. TriMet managers have observed some employees smoking in their cars in the parking lot. Others find a secluded corner outside a TriMet building. Most employees who smoke leave TriMet property to do so. TriMet Powell Garage Maintenance Manager Greg Haley characterized the break policies as not inflexible but "managed."[18]

72. Individual employees, including those who are constrained from leaving TriMet property during their breaks, have been engaging in discussions with their managers about how their smoking needs can be met under the new policy. These discussions have sometimes resulted in some temporary accommodations that do not comply with existing written TriMet policies. Those accommodations include longer employee breaks.

Use of Unsubstantiated Customer Complaints in the Internal Hiring Process

73. TriMet receives a significant number of complaints from the public about bus and rail operators. Some of those complaints are based on voluntary or discretionary operator conduct; others are based on TriMet's rules or procedures, customer confusion, or other matters out of the operators' control. Examples of the latter include complaints for refusing to make change (TriMet bars operators from making change) and missing connections. All things being equal, operators driving routes with a higher volume of riders may be the subject of more complaints than others. Complaints based on significant negative operator conduct lead to investigation and possibly discipline. Complaints based on less important operator conduct, especially in isolation, may not be investigated at all.

[18]There is evidence that the meal and break times in some TriMet locations had a practice of informality.

74. During recent years, TriMet has used two systems or policy frameworks to evaluate the work performance and other work-related behavior of its employees. From 1999 to 2009, with a revision in 2005,[19] TriMet used a framework called the "Customer Service Policy and Procedures" (CSI policy). From 2009 to present, TriMet has used the "Service Improvement Process" (SIP) framework.[20]

75. The SIP policy places most categories of non-urgent complaints under a category of Non-Immediate Action.[21] Complaints in that category are generally not investigated and are recorded in a database regardless of whether they were substantiated or not. If the database reveals a pattern of complaints against an employee, TriMet managers are instructed to counsel the employees. If counseling fails to change the pattern, managers are to investigate the conduct and possibly begin a disciplinary process against the employee.

76. Under the SIP framework, TriMet keeps records of customer complaints regarding individual employees. Except for complaints that lead to possible discipline, TriMet does not determine whether the complaints were substantiated. Although operators can ask to review their customer service complaint record, TriMet does not generally notify operators of complaints. Operators are generally unable to have unsubstantiated complaints removed from their complaint records, even when they can prove that the complaints were unwarranted.

77. Until the events at issue here, TriMet had not used unsubstantiated complaints in the promotion process for bargaining unit employees.

78. On August 9, 2012, Hansen wrote Lomax to state, in part, that "if TriMet is contemplating any other change regarding the handling and impact of customer complaints, TriMet must give notice to the Union and offer to bargain before implementing any such change." (Emphasis omitted.) On August 29, 2012, Hansen wrote Stedman, stating in part that "any changes to the current status quo with regard to customer complaints would have to be bargained prior to implementation."

79. Since at least 2003, TriMet has included a "Work Record Review" process in evaluating bargaining unit employees who seek promotions within TriMet. The process assigns positive and negative scores to employees based on a variety of factors including amounts of attendance, oversleeps, preventable accidents, discipline, and, until adoption of the SIP process,

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[19]The Union unsuccessfully challenged the 2005 policy revision. *Amalgamated Transit Union, Division 757 v. TriMet*, Case No. UP-62-05, 22 PECBR 911, *recons,* 23 PECBR 34 (2009), *aff'd,* 250 Or App 681, 282 P3d 2 (2012). There were other revisions to the CSI between 1999 and 2005, but those are not material to this case.

[20]The Union unsuccessfully challenged the adoption of the SIP process. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-24-09, 24 PECBR 730 (2012).

[21]Such complaints could include rudeness, unhelpfulness, fare disputes, inappropriate personal behavior, failing to stop for a customer, being off schedule, and some lower level driving behavior such as a failure to signal or aggressive driving.

complaints regarding customer service. Before adoption of the SIP process, two or more substantiated customer service complaints would disqualify an operator for promotion. Work Record Review scores alone may disqualify an employee from obtaining another TriMet position through its internal hiring process. The disqualification can result from poor scores in any one category or a poor total score.

80. When TriMet adopted the SIP framework in 2009, it granted all employees a clean slate regarding customer service scores. TriMet found that some employees hired internally under this system had very poor customer service skills.

81. After the Board's 2012 SIP decision, TriMet officials began discussions about using SIP in the internal hiring process. TriMet HR Business Partner Barry Chapman, who oversees hiring in TriMet's Operations Division, developed an approach using the number of unsubstantiated customer complaints to derive Work Record Review customer service scores. During the fall of 2012, Chapman proposed[22] that points be awarded in the following manner:

0-5 recorded complaints = +2 customer service points
5-10 complaints = +1 point
10-15 complaints = 0 points
15+ complaints = automatic disqualification from position.

82. From October 1, 2011 through October 1, 2012, TriMet employed approximately 1250 bus and rail operators. During this period, 260 operators received no complaints, 900 received five or fewer complaints, 1100 received 10 or fewer complaints, 1160 received 15 or fewer complaints, and 60 operators received more than 15 complaints. TriMet receives at least 10,000 complaints per year.

83. One operator received three complaints in three years, which he estimated as one per 100,000 riders. He was certain that one of the three complaints was not accurate. TriMet executive director of operations Lomax, who had extensive experience evaluating customer complaints under the CSI system, estimated that as many as one-half of the complaints were unsubstantiated.

84. Some unsubstantiated customer complaints would not require investigation to determine whether they were substantiated. Such complaints include complaints arising from an operator's compliance with TriMet procedures. Other customer service complaints against bus

[22]The parties dispute whether Chapman's assignment of outcomes to these specific numbers of unsubstantiated complaints was TriMet's final decision on the matter. TriMet suggests that it was not, a position strongly supported by the contradictions within the proposal, such as "(For one thing, what would happen to operators with exactly 5, 10, or 15 complaints in the prior years?)." Therefore, it argues, the issue may not be ripe. There is no dispute, however, that TriMet decided that it would use unsubstantiated complaints to score, rank, and potentially disqualify employees seeking internal promotions, and that TriMet refused to bargain over that use. We conclude that the record is sufficient to decide the issue of whether the use of unsubstantiated complaints in the promotion process is a mandatory subject of bargaining, and will do so. However, we will address the specific elements of Chapman's scoring proposal only as an illustration.

operators appear to be of little relevance to what is generally understood to be customer service skills, such as complaints of excessive speed.

85. On December 20, 2012, after successor bargaining had begun, TriMet notified the Union that it intended "to include customer service as part of the Work Record Review for existing union employees who apply for internal positions." On December 21, Hansen responded with a demand that TriMet maintain the *status quo* regarding "the review process for promotion." Hansen stated that "[d]uring the pendency of bargaining, the status quo must be maintained." On December 31, Minor-Lawrence responded that, because the change affected only minimum qualifications for positions, the issue was not a mandatory subject of bargaining. Minor-Lawrence stated that TriMet was "willing to bargain over the impact, if any, on those individuals who, due to a change in the minimum qualifications, no longer qualify for a position."

86. As of the date of hearing, the parties had not addressed the issue at the bargaining table.

## CONCLUSIONS OF LAW

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

2. The Union's complaint is timely.

TriMet asserts that the portion of ATU's complaint alleging that TriMet violated subsection (1)(e) by unilaterally changing the *status quo* with regard to the surveillance of bus operators is untimely. 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." However, 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 Assoc. 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." 244 Or App at 190. *See also Laborer's International Union of North America, Local 483 v. City of Portland Bureau of Human Resources*, Case No. UP-027-12, 25 PECBR 810, *recons*, 25 PECBR 892 (2013).

To begin our analysis, we first identify the alleged unfair labor practice at issue and the date that the complaint was filed. *City of Portland*, 25 PECBR at 821. Here, the relevant portion of the complaint alleged that TriMet unilaterally changed the *status quo* by deciding to expand the type and scope of surveillance of buses and bus operators. The original complaint, which included the surveillance claim, was filed on February 27, 2013. Therefore, we must determine if the Union knew or reasonably should have known of the potential unfair labor practice before August 30, 2012.

TriMet argues that ATU was aware of the decision to impose additional surveillance on bus operators well before August 30, 2012, because TriMet had put the new 3000 series buses with the additional camera and audio recording capabilities out for employees to view in June or

July 2012. TriMet points to testimony by Haley that Union representatives Hansen and Hunt took an informal tour of a sample bus during that time and were informed by Haley about the additional recording capabilities in the new bus. ATU disputes the timing of the bus tour, claiming that the tour occurred in September or December of 2012, after the demand to bargain was submitted and within the 180 days preceding the complaint.

However, we need not decide if the informal bus tour (or tours) with Haley, Hansen and Hunt occurred in June/July, September or December. Even assuming that the informal tour occurred at the earlier date and that Haley's description of the tour is accurate, such evidence is not sufficient to put ATU on notice of the occurrence of the unfair labor practice. Haley did not claim to have informed ATU leadership that any specific decision had been made about whether any new recording equipment would actually be utilized or in what matter, only that the recording equipment existed on the new buses. Further, Haley was not a member of TriMet's bargaining or labor relations team; he was the Powell Garage Manager, who, as noted in Finding of Fact 30, was not an expert on the surveillance systems in the new 3000 series buses. More importantly, the decision to merely install additional equipment on the new buses does not establish that TriMet had decided to change its surveillance practices without bargaining with ATU. TriMet, for example, could have decided to install the same equipment without yet making any decision on changing its surveillance practices and with the full intention of bargaining with ATU before making such a decision. Thus, Haley's statements during the alleged informal tour are not sufficient to put the Union on notice that TriMet had decided to change its surveillance practices without bargaining with ATU. Consequently, even if the June/July informal tour occurred as testified to by Haley, it would not start the 180-day period of ORS 243.672(3).

Moreover, in September 2012, TriMet was characterizing any change in bus-operator surveillance as "rumors" and asking ATU officials to first tour the new buses to ask "subject matter experts" about the surveillance capabilities of the 3000 series buses before TriMet responded to ATU's demand to bargain. At that time, TriMet's Stedman added that "[a]s it happens, I have not yet had a tour of those buses, either, so it would be good to tour the new ones at the same time." Thus, in September 2012, TriMet was indicating to ATU that a decision on bus-operator surveillance had not been made, but were just "rumors." Moreover, Stedman stated that TriMet would respond to ATU's demand to bargain after the proposed September 2012 tour. Consequently, ATU's February 27, 2013 complaint is timely.

3. TriMet violated ORS 243.672(1)(e) when it refused to bargain over the decision to make changes in the electronic surveillance of bus operators.

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." Under most circumstances, a public employer commits a *per se* violation of its duty to bargain in good faith if it makes a unilateral (*i.e.*, unbargained) change in a past practice or the *status quo* concerning a subject that is mandatory for bargaining. *Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11, 25 PECBR 525, 534 (2013); *Portland Fire Fighters' Association, Local 43, IAFF v. City of Portland*, Case No. UP-14-07, 23 PECBR 43, 70 (2009), citing *Lebanon*

*Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008).

In a unilateral change case, we take the following approach in the most appropriate order for each case: (1) identify the *status quo* and determine whether the employer changed it; (2) decide whether the change concerns a mandatory subject for bargaining; (3) examine the record to determine whether the employer completed its bargaining obligation before it decided to make the change; and (4) consider any affirmative defenses raised by the employer (*e.g.*, waiver, emergency, or failure to exhaust contract remedies). *Department of Administrative Services*, 25 PECBR at 534-35.

When we determine whether a subject is mandatory for bargaining in a unilateral change case, we follow a two-step process. We first identify the subject of the change. 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. 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.[23] If not, we examine whether it is specifically excluded from the definition of employment relations under ORS 243.650(7)(g). If the subject is not one of the enumerated permissive subjects in subsection (7)(g), we determine whether paragraphs (b) (subjects determined to be permissive by this Board before June 6, 1995) or (d) (subjects that have an insubstantial or *de minimis* effect on public employee wages, hours, and other conditions of employment) apply. Finally, if the proposal does not fall within any of these categories, we apply the balancing test in ORS 243.650(7)(c). *Department of Administrative Services,* 25 PECBR at 535-36. Under the 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).

Here, the parties do not dispute the *status quo* of electronic recording of bus operators or that TriMet made a unilateral decision to change it. TriMet contends, however, that its decision concerned only a permissive subject of bargaining because, under a proper application of the ORS 243.650(7)(c) balancing test, the subject of electronic recording of bus operators has a greater impact on management's prerogatives than on employee conditions of employment.[24] For the following reasons, we disagree with that contention.

We begin by reviewing the impact on management's prerogatives. TriMet contends that the electronic recording of bus operators concerns "public safety," which it characterizes as "the quintessential management prerogative." TriMet further argues that, as a common carrier under Oregon law, it "owes its passengers the highest degree of care and skill practicable for it to

[23]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."

[24]Neither party contends that the subject is expressly designated as mandatory or permissive under the statute, or that this Board has previously decided that the subject is mandatory or permissive. Moreover, although TriMet initially asserted that the subject was permissive under subsections (7)(d) and (7)(g), it no longer pursues those arguments.

exercise," quoting *Simpson v. The Gray Line Co.*, 226 Or 71, 76, 358 P2d 516 (1961). Certainly, TriMet has a significant operational interest in its buses safely conveying passengers. However, what is less clear in TriMet's arguments to this Board, is the particular management prerogative at stake in using electronic recording of bus operators to accomplish its goal of "public safety." In any event, electronically recording its employees does involve some other management prerogatives, including TriMet management's ability to monitor TriMet equipment and employee performance. The impact on those management prerogatives is particularly significant while employees are on duty.

The impact on TriMet's management prerogatives, however, is less than that on employee conditions of employment. Specifically, the electronic recording of bus operators can be used as a tool to investigate employee misconduct and impose discipline, including termination. Indeed, this appears to be one of the reasons that motivated TriMet's decision to expand the use of surveillance devices. This Board has previously concluded that similar investigatory tools are mandatory for bargaining, as are other subjects that involve discipline and job security. *See IAFF Local 890 v. Klamath County Fire District No. 1*, Case No. UP-16-00, 19 PECBR 533, 549 (2001) (drug and alcohol testing procedures); *Oregon AFSCME Council 75 v. State of Oregon, Department of Public Safety Standards and Training,* Case No. UP-56-99, 19 PECBR 76, 93-97 (2001) (background check procedures and form requiring substantial personal information were mandatory for bargaining), *supplemental order* 19 PECBR 317, *recons,* 19 PECBR 344, *supplemental ruling*, 19 PECBR 473 (2001); *Federation of Oregon Parole and Probation Officers v. State of Oregon, Department of Corrections*, Case No. UP-117-89, 12 PECBR 816, 823 (1991), *aff'd*, 114 Or App 214 (1992), *on remand*, 14 PECBR 693, 701 (1993) (methods and procedures for drug testing concerned employee privacy, discipline and job security).

Moreover, the constant electronic surveillance of the bus operators proposed by TriMet, particularly while employees are on break time, clearly impacts employee privacy interests. There is undoubtedly a significant impact on employee conditions of employment when every workplace movement, gesture, and utterance is recorded, even those that take place on an employee's break time, a time in which there is little (if any) impact on management's prerogatives.[25]

In sum, after considering both parties' positions, we conclude that the subject of continuous electronic recording of bus operators has a greater impact on employee conditions of employment than on management's prerogatives. Accordingly, the subject is mandatory for bargaining, and TriMet violated ORS 243.672(1)(e) when it made a unilateral change regarding that subject.

[25]Our decision is consistent with similar decisions of the National Labor Relations Board (NLRB) and federal courts under the National Labor Relations Act (NLRA), after which the Public Employee Collective Bargaining Act (PECBA) was modeled. The NLRB has held on multiple occasions, with court approval, that an employer's use of surveillance devices on employees is a mandatory subject of bargaining. *See*, *e.g.*, *Anheuser-Busch, Inc.,* 342 NLRB 560 (2004), *aff'd in relevant part sub nom Brewers & Maltsters Local No. 6 v. NLRB*, 414 F3d 36 (DC Cir 2005); *National Steel Corporation*, 335 NLRB 747 (2001), *enf'd*, 324 F3d 928 (7th Cir. 2003); *Colgate-Palmolive Co.*, 323 NLRB 515 (1997).

4. ATU did not prove that TriMet violated ORS 243.672(1)(e) with regard to alleged changes to employee parking.

The ALJ concluded that ATU failed to establish that TriMet changed the *status quo* regarding its employee parking policies. Neither party objected to that conclusion. We agree with and adopt the ALJ's conclusion that ATU did not meet its burden of proof that TriMet changed the *status quo*. Therefore, we will dismiss this claim.

5. TriMet did not violate ORS 243.672(1)(e) when it refused to bargain over changes in at-work smoking policies for employees.

Before July 2013, TriMet maintained non-smoking buildings, but provided adjacent smoking shelters. After July 2013, TriMet removed the smoking shelters and made its properties smoke-free. The parties agree that this was a change in the *status quo* regarding smoking and that TriMet did not bargain over this change with ATU. The sole issue in dispute is whether the change in policy regarding smoking involved a mandatory or permissive subject of bargaining.

ORS 243.650(7)(g), which is applicable to TriMet, excludes "reasonable dress, grooming, and at-work personal conduct requirements respecting smoking, gum chewing, and similar matters of personal conduct at work" from the definition of "employment relations."[26] The parties interpret this language to mean that if the Board found TriMet's smoke-free-workplace rule "reasonable," then it was permissive under subsection (7)(g). Conversely, if we found the policy "unreasonable," then it would be mandatory for bargaining. This interpretation is premised on an assumption that the term "reasonable" was intended to modify all of the following subjects and to impose a requirement on this Board to determine whether a particular dress code, grooming, smoking, or gum-chewing policy or proposal is "reasonable." For the reasons that follow, we disagree with that statutory interpretation. Instead, we conclude that the legislature intended for this Board to determine whether an at-work policy concerns "reasonable dress, grooming, and * * * personal conduct requirements respecting smoking, gum chewing, and similar matters of personal conduct." *See* ORS 243.650(7)(g). If a policy concerns one of those subjects, it is permissive under subsection (7)(g).

When we interpret and apply statutes, our goal is to determine and give effect to the legislature's intent. ORS 174.020. To accomplish this goal, we apply the methodology set forth in *PGE v. Bureau of Labor and Industries,* 317 Or 606, 859 P2d 1143 (1993), as subsequently modified by *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042, 1050-51 (2009). Because the words chosen by the legislature are the best evidence of its intent, we first review the text and context of the statute in question. We may then review any relevant legislative history. *Gaines,* 346 Or at 171-172. If we are still unable to determine the legislature's intent, we then apply maxims of statutory construction. *Id.*

[26]Before the enactment of SB 750 (*see generally* Or Laws 1995, ch 286, section 1), the Board had determined that the subject of smoking in the workplace constituted "employment relations" and was, therefore, mandatory for bargaining. *See Junction City Police Association v. Junction City,* Case No. UP-94-88, 11 PECBR 732, 739 (1989).

We begin with the text and context of the statute. ORS 243.650(7)(g) lists seven individual subjects as permissive before the appearance of the term "reasonable," which is immediately followed by the term "dress" with no intervening comma or other punctuation. The statute continues, listing additional specific subjects, including grooming and "at-work personal conduct requirements respecting smoking, gum chewing and similar matters of personal conduct" as permissive topics. This structure of the list, and the fact that there are multiple individual subjects separated by commas, supports an inference that "reasonable dress" was meant to establish a single permissive subject, rather than modifying the remaining subjects listed after the term "reasonable." However, the language can reasonably be interpreted differently, and we are unable to clearly determine the legislature's intent from the text alone, so we move to the context and legislative history.

The sponsors of SB 750 made it apparent that the changes to the scope-of-bargaining provisions of the PECBA were largely in response to specific Board and court rulings. In discussions of the changes relevant to this dispute, SB 750 co-sponsor Senator Bryant stated in the final floor debate that:

> "An important change is to define as permissive, 'reasonable dress, grooming and at work personal conduct' type of things which are a result of a 1989 Junction City Police case determined by ERB which held public employers were required to bargain over certain personal pursuits, this included such things as smoking, chewing gum, drinking coffee and wearing shorts during the work day, drinking beverages in the classroom. Those type of things are permissive under this bill." SB 750 Senate Floor Debate at 6, (June 2, 1995).[27]

A mirror explanation was offered by Representative Watt during the House Floor Debate shortly thereafter. *See also* Statement of Representative Watt, SB 750 House Floor Debate, Tape 223, Side A (June 3, 1995). This legislative history demonstrates that the legislature intended to, at least in part, overturn the Board's decision in *Junction City,* which concluded that an employer's smoking policy was a mandatory subject for bargaining. This history also does not suggest that the legislature wanted this Board to make a "reasonableness" assessment of an employer's policy regarding "reasonable dress," grooming, smoking, or gum-chewing. Likewise, the legislative history does not establish that term "reasonable" was intended to modify each of the subsequent subjects listed in ORS 243.650(7)(g). Rather, the history suggests that the legislature wanted to mandate that certain "personal pursuits," such as "smoking, chewing gum, drinking coffee and wearing shorts during the work day" would all be permissive subjects of bargaining. Thus, an at-work policy that concerns "reasonable dress" is permissive for bargaining, as are other similar at-work personal conduct policies, including those concerning smoking and gum chewing. We see nothing in the legislative history suggesting that the legislature wanted this Board make an individualized assessment of whether we think that a particular employer's gum-chewing, dress code, or smoking policy is "reasonable" and then determine whether that policy needed to be bargained based on our assessment of its reasonableness.

[27]As a co-sponsor of SB 750, Senator Bryant's remarks are particularly significant to our analysis of the legislative history and context of these changes. *See Marion County Law Enforcement Association v. Marion County,* Case No. UP-24-08, 23 PECBR 671, 693 (2010).

Our interpretation of ORS 243.650(7)(g) is also supported by the maxims of statutory construction, which we look to if the text, context, and legislative history do not definitively resolve ambiguity in a statute. "One maxim that the courts frequently invoke is the obligation to attempt to do what the legislature would have done had it addressed the particular dispute at issue." *State v. Walker*, 192 Or App 535, 546, 86 P3d 690 (2004) (citing *PGE*, 317 Or at 612). "In attempting to determine what the legislature would have intended, we are also permitted to assume that the legislature would not have intended that its enactment produce absurd results." *Walker*, 192 Or App at 546 (citing *State v. Vasquez-Rubio*, 323 Or 275, 283, 917 P2d 494 (1996), for the proposition that "where text and legislative history are inconclusive, 'the court will refuse to adopt the meaning that would lead to an absurd result that is inconsistent with the apparent policy of the legislation as a whole'").

Here, if we were to interpret the statute to require us to first determine whether an employer's at-work smoking or gum-chewing policy was reasonable, and then order parties to bargain over only unreasonable policies, it would lead to an absurd result that would be inconsistent with the purposes and policies of the PECBA, particularly the amendments of SB 750. Specifically, inserting a reasonableness requirement into the equation for determining the bargaining status of subjects would require this Board to make a proposal-based, rather than a subject-based, scope-of-bargaining assessment. It is well settled, however, that we analyze the mandatory or permissive nature of a bargaining *subject*, rather than a particular proposal or policy. *See Springfield Police Association v. City of Springfield*, Case No. UP-28-96, 16 PECBR 712, 718-21 (1996). Moreover, if this Board were to make a scope-of-bargaining determination based on this Board's assessment about whether a particular grooming, smoking, or gum-chewing policy was "reasonable," then the mandatory/permissive categorization of that policy would flip-flop as the policy or bargaining proposals became more or less "reasonable." Such an approach would inject uncertainty into the bargaining process and deter, rather than promote, stable, harmonious labor relations. We do not believe that the legislature intended such a result.

Our conclusion here is supported by our prior decision in *In the Matter of the Petition for Declaratory Ruling Filed Jointly by Oregon AFSCME Council 75, Local 3351, Oregon Association of Justice Attorneys and State of Oregon, Department of Justice,* Case No. DR-3-00, 19 PECBR 40 (2001) (*DOJ*). There, we concluded that the employer was obligated to bargain with the union over a change in its policies that restricted employees' ability to use alcohol on lunch and rest breaks and any time that the employee represented the employer. In doing so, we concluded that the policy was not merely an "at work" policy as required under subsection (7)(g) (then subsection (7)(f)) because the policy extended to off-duty personal conduct. 19 PECBR at 48. In doing so, we emphasized that "the question of whether a policy or proposal is reasonable is not germane to its bargaining status." *Id.* Consistent with this decision, we decline to make a scope-of-bargaining determination contingent on our assessment about whether a particular at-work personal conduct policy is, in our estimation, "reasonable." Rather, so long as the at-work policy concerns the *subjects* identified in subsection (7)(g) (*e.g.*, smoking, gum chewing, reasonable dress), it is permissive for bargaining. In this case, TriMet changed its at-work smoking policy from providing designated at-work smoking shelters to prohibiting smoking on its premises. This policy falls within the statutory ambit of "at-work personal conduct requirements respecting

smoking." ORS 243.650(7)(g). Therefore, the change concerns a permissive subject of bargaining, and TriMet did not violate ORS 243.672(1)(e) when it refused to bargain over the adoption of the policy. Consequently, we will dismiss this claim.

6. TriMet violated ORS 243.672(1)(e) when it refused to bargain over the decision to begin utilizing unsubstantiated customer complaints against bargaining unit members when considering them for internal promotions.

The central facts of this claim are simple. TriMet believed that it had been promoting bargaining unit employees who had poor customer service skills. Therefore, TriMet decided to use the number of unsubstantiated customer complaints against individual applicants to penalize or eliminate applicants for promotion. TriMet had previously considered only substantiated complaints in the promotion process. The Union objected and demanded to bargain over the decision. TriMet took the position that the decision was a permissive subject but offered to bargain the impacts of that decision. The Union insisted on bargaining over the decision and rejected the offer to only bargain impacts, and ultimately filed the complaint at issue in this case.

There is no dispute that TriMet's decision to use unsubstantiated complaints in this manner changed the *status quo*.[28] Rather, the crux of this dispute is whether the use of unsubstantiated complaints is a mandatory subject of bargaining. ATU asserts that the subject involved is promotional criteria for bargaining unit members, which constitutes a mandatory subject of bargaining. *See Milwaukie Police Employees Association v. City of Milwaukie,* Case No. UP-63-05, 22 PECBR 168, 178 (2007), *AWOP* 229 Or App 96, 211 P3d 381 (2009). TriMet disagrees, arguing that the decision concerns "minimum qualifications for any position," which is, by statute, a permissive subject. ORS 243.650(7)(g). *See also City of Milwaukie*, 22 PECBR at 178.

To resolve this dispute, we must first determine whether TriMet's decision to use unsubstantiated customer complaints involves the subject of promotions or minimum qualifications. To make that determination, we weigh the actual effect of the change to see if the change has a greater effect on promotions or minimum qualifications for a position. *City of Milwaukie,* 22 PECBR at 178-79. A promotion is a raise in position or rank. *Id.* at 179. The "minimum qualifications for [a] position" reflect the "knowledge, skills, and abilities necessary to perform the work." *Oregon AFSCME Council 75 v. State of Oregon, Department of Public Safety Standards and Training,* Case No. UP-56-99, 19 PECBR 76, 91, *supp order*, 19 PECBR 317, *recons*, 19 PECBR 344, *ruling*, 19 PECBR 473 (2001).

Here, the change to using unsubstantiated customer complaints targeted existing bargaining unit employees applying for internal promotional positions. Based on the number of overall complaints, including those that are unsubstantiated, bargaining unit employees may be completely disqualified for promotional opportunities or severely compromised in those opportunities. Consequently, we conclude that this change has a substantial effect on promotions.

[28]TriMet argues that this claim is not ripe because TriMet has yet to implement this change, and the details about that implementation have not been resolved. It does not dispute, however, that it made the decision to determine an applicant's customer service skills through the number of unsubstantiated complaints, and we conclude, therefore, that the claim is ripe.

In contrast, using unsubstantiated complaints to determine whether existing employees are promoted to another position bears little relationship to whether an employee has the "knowledge, skills, and abilities necessary" to do the work of that new position. This is particularly true when those unsubstantiated complaints are inaccurate or baseless. *See Service Employees International Union, Local 503, Oregon Public Employees Union v. State of Oregon, Department of Transportation*, Case No. UC-35-02, 20 PECBR 142, 159-61 (2002) (although the employer had an interest in being able to remove home care workers from a registry of qualified workers when those workers engaged in improper conduct or demonstrated poor performance, the employer did not have a legitimate interest in removing those workers for reasons not factually supported). Therefore, after weighing the actual effect of the change, we conclude that the change to using unsubstantiated complaints to determine whether existing employees may promote to another position has a greater effect on promotions than on the minimum qualifications for a position. *See City of Milwaukie*, 22 PECBR at 178-79. Consequently, we conclude that the change concerns the subject of promotions, which both parties agree is mandatory for bargaining. *See id*. at 179 (the subject of promotion is mandatory for bargaining).

TriMet agrees that it refused to bargain the decision. Therefore, TriMet violated ORS 243.672(1)(e).[29]

Remedy

We will order TriMet to cease and desist from violating ORS 243.672(1)(e) as set forth above. We will also TriMet to restore the *status quo* in effect before the unilateral changes were made and to make any affected employee whole. This remedy does not require TriMet to stop using the new 3000 series buses, only that it cease using the expanded surveillance capabilities until such time as it has completed its bargaining obligation with ATU.

As an additional remedy, the Union has asked that we order TriMet to post a notice of its wrongdoing. This Board generally requires posting such a notice when the violation meets the following criteria:

> "(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." *International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-049-12, 25 PECBR 871, 891 (2013).

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 Union argues that TriMet's conduct was calculated and flagrant,

[29]TriMet's offer to bargain the "impacts" of its decision does not cure its failure to bargain the decision itself. *See Three Rivers Ed. Assn v. Three Rivers Sch. Dist.*, 254 Or App 570, 575, (2013) (explaining the difference in bargaining obligations regarding mandatory versus permissive subjects of bargaining).

but does not support this conclusion with convincing argument or evidence. Although TriMet did not prevail on all of the Union's claims, its interpretation of the legal authorization for its conduct presented complicated issues, several of first impression. We conclude that TriMet's conduct was not calculated and flagrant, and that its violation of the law does not otherwise warrant posting a notice of its wrongdoing.

Finally, the Union asks that TriMet 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). We do not find that ATU established that a civil penalty is warranted, and we will deny the request.

ORDER

1. TriMet shall cease and desist from violating ORS 243.672(1)(e) by refusing to bargain in good faith over its decisions to electronically record bus operators and use unsubstantiated customer complaints in the internal promotion process.

2. TriMet shall restore the *status quo* in effect before those unlawful unilateral changes.

3. If any employees were affected by the use of unsubstantiated customer complaints in the employee promotion process or the use of the enhanced surveillance of bus operators, TriMet shall make those employees whole.

4. The other claims are dismissed.

DATED this 2 day of October 2014.

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-014-14

(UNFAIR LABOR PRACTICE)

| | | |
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| LABORERS' INTERNATIONAL UNION OF NORTH AMERICA LOCAL 483,<br><br>Complainant,<br><br>v.<br><br>CITY OF PORTLAND,<br><br>Respondent. | ) | DISMISSAL ORDER |

Erica B. Askin, Business Manager, Laborers' International Union of North America, Local 483, Portland, Oregon represented Complainant.

Lory J. Kraut, Deputy City Attorney, City of Portland, Portland, Oregon, represented Respondent.

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On March 27, 2014, the Laborers' International Union of North America, Local 483 (LIUNA) filed an unfair labor practice complaint against the City of Portland (City), alleging that the City had violated ORS 243.672(1)(a), (c) and (e). LIUNA filed an amended complaint on May 20, 2014, and removed the ORS 243.672(1)(c) allegations. The complaint was assigned to an Administrative Law Judge (ALJ).

On August 21, 2014, the ALJ issued a Notice of Hearing and Pre-hearing Order (prehearing order), setting a hearing for October 15 and 16, 2014.[1] Sections 8 and 9 of the prehearing order required each party to deliver a witness list, an exhibit list, and copies of all exhibits regarding the party's case-in-chief to the other party by no later than seven days before the hearing date, *i.e.* by October 8, 2014. Failure to do so, according to the prehearing order, would result in a party not being able to call witnesses and offer exhibits unless good cause was shown.

On October 8, 2014, the City provided LIUNA with the City's lists and exhibits, pursuant to the prehearing order. LIUNA, however, did not provide the City with LIUNA's lists and

[1]The parties subsequently agreed to add hearing dates in November, if needed.

exhibits. On October 10, 2014, the City filed a Motion to Dismiss, citing OAR 115-010-0068(3) and (4), and asking the ALJ to cancel the hearing and dismiss the complaint.

The ALJ directed LIUNA to show cause why the City's motion should not be granted. LIUNA filed a timely response to the show cause order.

On October 13, the ALJ determined that LIUNA lacked good cause for failing to provide an exhibit list, witness list, and copy of the exhibits to the City as required by the prehearing order. He postponed the hearing indefinitely and referred the case to this Board for a decision.[2] For the following reasons, we dismiss LIUNA's complaint.

Generally, an issue of dismissal without a hearing arises immediately after the informal investigation that is required by ORS 243.676(1)(b) has been completed. That is not the case here. We are being asked to dismiss this matter because if the complaining party is unable to call witnesses and submit exhibits in order to meet its burden of proof, there is no need for a hearing. For purposes of this order, we may rely on undisputed facts that we discover during our investigation and case processing. *Upton v. Oregon Education Association/UniServ,* Case No. UP-58-06, 21 PECBR 867, 867-68 (2007); *Hood River Education Association v. Hood River County School District,* Case No. UP-38-93, 14 PECBR 495, 498 n 2 (1993).

Here, the relevant undisputed facts are as follows. LIUNA was required, by prehearing order and OAR 115-010-0068,[3] to submit an exhibit list, witness list and copies of exhibits to the City by October 8, 2014. LIUNA did not do so. Its failure to comply means that it is "denied the right to offer such evidence or make argument regarding such matter at the hearing unless good cause is shown." OAR 115-010-0068(4). If LIUNA is unable to call witnesses or offer exhibits in support of its complaint, it cannot establish a *prima facie* case or meet its burden of proof. Therefore, the sole issue before us is whether LIUNA had good cause for not complying with the prehearing order and rule. We hold that LIUNA does not.

LIUNA, in its show cause response, states that it had a "good faith idea" that the matter was "substantively settled." However, Askin, LIUNA's business manager, knew as of early afternoon on October 7 that there was no agreement to postpone exchanging exhibits. Specifically, in response to LIUNA's October 7 suggestion that the parties "agree to wait to exchange exhibits," the City unequivocally responded that it was "ready to exchange exhibits tomorrow [October 8]." Moreover, LIUNA does not claim that the parties agreed to not exchange lists and exhibits after their early evening discussion on October 7.

The Board evaluates good cause based on the circumstances of the individual case. *SEIU Local 503, OPEU v. Oregon University System, Portland State University,* Case No. UC-07-09, 23 PECBR 137, 140 (2009). In this case, the City informed LIUNA on October 7 that the City

[2]After the matter was transferred to the Board, both parties made "*sua-sponte*" submissions to the Board. Those "*sua-sponte*" submissions have not been considered in our determination.

[3]Although the current rule has changed from when the ALJ issued the prehearing order, none of the changes affect the long-standing purpose of the rule.

expected to exchange the lists and exhibits the following day, as required by the prehearing order. LIUNA does not claim that the City agreed at any point to delay that exchange or that the ALJ permitted LIUNA to do so. Under these facts, LIUNA has not shown that it had "good cause" for failing to comply with the prehearing order and rule (OAR 115-010-0068).

The complaint is dismissed.

DATED this 5 day of October, 2014.

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-032-14

(UNFAIR LABOR PRACTICE)

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| SOUTHWESTERN OREGON COMMUNITY COLLEGE FEDERATION OF TEACHERS, LOCAL 3190, AMERICAN FEDERATION OF TEACHERS,<br>Complainant,<br>v.<br><br>SOUTHWESTERN OREGON COMMUNITY COLLEGE,<br>Respondent. | ) | RULINGS,<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND ORDER |

A hearing was held before Administrative Law Judge (ALJ) Larry L. Witherell on September 25, 2014, in Salem, Oregon. The record closed on that date, and the matter was transferred to the Board for decision.

Gene Mechanic, Attorney at Law, Mechanic Law Firm, Portland, Oregon, represented Complainant.

Bruce A. Zagar, Attorney at Law, Garrett Hemann Robertson, PC, Salem, Oregon, represented Respondent.

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On September 4, 2014, the Southwestern Oregon Community College Federation of Teachers, Local 3190, American Federation of Teachers (Federation) filed this unfair labor practice complaint against Southwestern Oregon Community College (College), alleging that the College refused to comply with an arbitration award in violation of ORS 243.672(1)(g). The College filed a timely answer.[1]

[1]At the direction of the ALJ, the College filed an amended answer.

On September 4, 2014, the Federation filed a motion, with a supporting affidavit, requesting expedited consideration of its complaint under OAR 115-035-0068. On the same date, the College filed an objection to the Federation's motion. After having considered the submissions by both parties, on September 4, 2014, this Board granted the Federation's request for expedited consideration. We assigned the case to ALJ Witherell to conduct a hearing at which the parties submitted their evidence. The parties were permitted to submit pre-hearing briefs. No post-hearing briefs were permitted.

The issues are:

1. Did the College fail to implement the arbitrator's decision and award regarding Professor Kelly Leavitt in violation of ORS 243.672(1)(g)?

2. If the College violated ORS 243.672(1)(g), what is the appropriate remedy?

3. Is a civil penalty appropriate?

For the reasons set forth below, we conclude that the College violated ORS 243.672(1)(g) as alleged. As a remedy, we order the College to: (1) cease and desist from that conduct; (2) make the grievant (Professor Kelly Leavitt) whole as set forth below; (3) physically post and electronically distribute a notice; and (4) pay the Federation a civil penalty of $1,000.

## RULINGS

The rulings of the ALJ were reviewed and are correct.

## FINDINGS OF FACT

1. The College is a public employer as defined by ORS 243.650(20). The Federation is a labor organization as defined by ORS 243.650(13) and the exclusive representative for a bargaining unit of tenured, tenure-track, visiting and adjunct faculty, who work more than 50 percent during 10-month, 11-month, or 12-month contracts.

2. During the relevant time period, the College and Federation were parties to a collective bargaining agreement (CBA). The agreement includes an article governing a reduction in force (RIF) (Article 31), as well as a grievance-procedure article that provides for final and binding arbitration (Article 32).

3. Professor Leavitt began working for the College in September 2007, in a 10-month, tenure-track position. The position had dual responsibilities. Under her employment contract, Leavitt spent 60 percent of her time providing athletic trainer services to the College's intercollegiate athletes. These responsibilities included the care, injury prevention, treatment and rehabilitation of students on various athletic teams. The other 40 percent of her employment was teaching both activity-based and lecture courses in physical education, athletic training, and other courses offered by the physical education department. Leavitt earned tenure status with the beginning of the 2011-12 academic year.

4. During the 2011-12 academic year, due to financial exigencies, the College decided to eliminate the athletic training degree program, eliminate Leavitt's position, and eliminate a classified position in the library. On February 27, 2012, the College president told Leavitt that she would be laid off at the end of the 2011-12 academic year (June 30), pursuant to the provisions of Article 31 of the CBA.

5. During the 2012-13 academic year, the Federation learned that courses previously taught by Leavitt were still being offered and taught by a part-time, non-bargaining-unit employee. When the College refused or failed to give the Federation an explanation, the Federation filed a grievance alleging a violation of the RIF provisions of the CBA. The grievance went through the contractual process and resulted in an arbitration.

6. Arbitrator Howell Lankford heard the case on March 5, 2014 and issued his decision and award on April 19. That award sustained the grievance, concluding that the College violated the recall provision of Article 31.2 of the CBA. The arbitrator, as part of the award, ordered the College to: (1) "promptly offer to recall Professor Leavitt for the 2014-2015 year"; (2) make Professor Leavitt "whole for all income lost from the date of the March 14, 2013, grievance until the end of the 2013-2014 academic year"; and (3) pay the arbitrator's fees and expenses pursuant to Article 23.8 of the parties' CBA.

7. On May 20, 2014, the College stated that it intended to offer Leavitt a reduced or part-time position that was currently being performed by another employee (KS), at about 85 percent of Leavitt's prior salary. Further, the College stated its intention to offset Leavitt's back pay by the amount of unemployment compensation that she received.

8. The Federation disagreed that the College's stated intentions complied with the arbitrator's award and sought the assistance of the arbitrator. The Federation claimed that Leavitt was entitled to be recalled to her prior tenured faculty position in the bargaining unit, and that her back pay should be based on what she had earned in that prior position. On June 5, the College also appealed to the arbitrator, arguing that Leavitt should not be reinstated to her prior position, but rather should be offered "the 'disassembled' and reduced position that was filled by [KS] * * *." The College also argued that it should be entitled to offset unemployment compensation from the back pay that it owed to Leavitt under the award.

9. On June 6, 2014, the arbitrator held a telephonic hearing and on June 16 issued a written clarification of his award. The arbitrator concluded that the College's proposal to return Leavitt to the "reduced position" as performed by KS "quite misse[d] the point of the original [a]ward." The arbitrator explained that his award concluded that the College had no legitimate basis to disassemble Levitt's former bargaining unit position into several fractional non-bargaining-unit positions. Noting that the discontinuation of the Athletic Trainer degree program had reduced the College's course offerings by a single course (PE 261), the arbitrator ordered the College to recall Leavitt to "her full prior assignment less PE 261." The arbitrator also stated that the back pay calculation must be based on "the bargaining unit pay rate for that position that was appropriate during the period of the College's improper failure to recall [Leavitt]." The arbitrator refused to allow the College to offset Leavitt's unemployment compensation from the back pay calculation.

10. In sum, the arbitrator's June 16, 2014, clarification award stated that:

> "The original Award in this case, reasonably interpreted, requires the College to reinstate Professor Leavitt to her prior, bargaining unit position with the single exception of PE 261; and the compensation for that position is the standard against which she must be made whole. The College is not permitted to offset Professor Leavitt's received unemployment compensation in the calculation of the back pay and benefits due to her. The College is the losing party with respect to this clarification proceeding and shall pay the entire arbitration cost under the terms of the parties' collective bargaining agreement."

11. On June 19, 2014, the College informed the Federation that it would reinstate Leavitt to a position comprised of 40 percent athletic trainer and 60 percent class instruction, with the courses to be determined.

12. The Federation objected to the College's determination, asserting that it violated the arbitration award. Specifically, the Federation maintained that the award required the College to reinstate Leavitt to her prior bargaining-unit position, with the single exception of PE 261. That prior position, explained the Federation, consisted of 60 percent athletic trainer duties and 40 percent class instruction. The College's proposal inverted that position to 40 percent athletic trainer duties and 60 percent class instruction.

13. On June 30, 2014, the College informed the Federation that the College believed that the arbitrator had overstepped his authority and jurisdiction, and that his award violated public policy. The College asserted that it had the right to determine Leavitt's workload and assignments. The College, therefore, stated that it was willing to reinstate Leavitt "to a full-time faculty instructional position this fall," with assignments to "courses for which she is qualified" to teach. The College also stated that it was "willing to implement the back-pay award." The College stated that if Leavitt or the Federation did not accept this offer, "then the College has no other position to offer."

14. On July 8, 2014, the Federation continued to insist that Leavitt be reinstated to her prior tenured faculty position, which consisted of 60 percent athletic trainer duties and 40 percent classroom instruction. The Federation emphasized that the athletic trainer duties "were not affected by the elimination of the athletic degree program." The Federation noted that "there is no legitimate reason why the College would be unable to provide Professor Leavitt with the same classes she taught previously, with the exception of PE 261." The Federation asserted that the "College still appears to be unwilling to fully accept Arbitrator Lankford's award." As a result, the Federation stated that it would seek another conference with the arbitrator.

15. On July 17, 2014, the College offered the Federation three options to resolve the parties' disagreement over the arbitration award: (1) reinstatement to a full-time instructor position, without any athletic trainer responsibilities; (2) reinstatement to a full-time athletic trainer position (outside of the bargaining unit); or (3) a resignation agreement with a monetary component. On the same day, the College wrote to the arbitrator that it opposed any extension of the arbitrator's jurisdiction because further clarification of the award was not necessary. The

College attached a draft stipulation (pending Federation approval) "further defining the reinstatement order from [the arbitrator's] award." The College averred that:

> "As the Stipulation demonstrates, the College understands your reinstatement order, but the College's position is that it must retain the right of assignment and is refusing to comply with the Award on those and other grounds."

16. The stipulation attached to the College's July 17, 2014 e-mail to the arbitrator interpreted the May 19, 2014, and June 16, 2014, arbitration awards as requiring the College to reinstate Leavitt "to her prior, bargaining unit position with the single exception of PE 261." The stipulation also stated that those awards "require the College to reinstate [Leavitt] to a tenured, Assistant Professor bargaining unit position at Step 7 of the salary scale under the parties' [CBA], commencing with the 2014-2015 academic year, consisting of 60% athletic trainer and 40% classroom instructor of classes assigned to [Leavitt] at the time of her lay off with the exception of PE 261."

17. On July 22, 2014, the Federation wrote to the arbitrator seeking further clarification of the award. The Federation believed that the proposed language in the College's stipulation required the College "to provide [Leavitt] with only the exact same classes she taught during her last term before" being laid off, "seemingly in perpetuity." The Federation did not believe that the arbitrator's award "intended such [a] limitation," but merely required the College to reinstate Leavitt to a 60 percent athletic trainer and 40 percent instructor position and "retain the same class assignment practices that existed at the time that she was laid off. In other words, she is to return to the status quo ante." Therefore, the Federation requested that the arbitrator issue a clarification order and attached proposed clarification orders, one reflecting the language in the College's stipulation and the other reflecting the language in the Federation's proposed stipulation. The only differences in the two stipulations is reflected below (Federation additions underlined and deletions bracketed):

> "The College shall reinstate Kelly Leavitt to a tenured, Assistant Professor bargaining unit position at Step 7 of the salary scale under the parties' Collective Bargaining Agreement, commencing with the 2014-2015 academic year, consisting of an assignment of 60% athletic trainer and 40% classroom instructor of classes <u>for which she is qualified to teach in accordance with the assignment process</u> at the time [of her lay off] <u>she was laid off</u>, with the exception of PE 261."

18. On July 23, 2014, the College reiterated that there was no need for further clarification of the arbitrator's award because the dispute between the College and the Federation was one of enforcement, not clarification.

19. On July 23, 2014, the Federation renewed its request for further clarification of the award and indicated an intent to file a complaint with this Board. However, to mitigate damages, the Federation offered to agree to a 100 percent classroom position starting in fall term 2014, pending the final outcome of a complaint filed with this Board. Later that same day, the College responded that it was only offering Leavitt a full-time faculty position on the condition that it completely resolved this dispute.

20. On July 25, 2014, the arbitrator extended his remedial jurisdiction to August 15. He added, "[i]n case it helps, the Award in the prior clarification explained that the College must (italics not in the original) 'reinstate Professor Leavitt to her prior, bargaining unit *position* with the single exception of PE 261.'"

21. On August 6, the arbitrator held a telephone conference call with the parties. He then wrote to the parties that

> "[a]fter our conversation today, there appears to be no dispute for me to resolve here: All the parties agree that the College is required to reinstate the grievant to her prior position. The award here did not address the degree of the College's discretion of assigning the grievant within the position to which she is reinstated."

22. The parties have agreed on the amount of back pay to which Leavitt is entitled for the 2013-14 academic year. The parties also agreed that the College has not paid any back pay to Leavitt.

23. The College commonly communicates with its employees by e-mail.

## CONCLUSIONS OF LAW

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

2. The College violated ORS 243.672(1)(g) by refusing to accept the terms of the arbitrator's award as final and binding.[2]

An employer violates ORS 243.672(1)(g) if it "[v]iolate[s] 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." Here, the College first contends that it did not refuse to accept and implement the arbitrator's award. Alternatively, the College contends that any refusal is justified because the arbitrator exceeded his authority and the award violates public policy. For the following reasons, we disagree with all of the College's contentions.

The arbitrator's initial award ordered the College to: (1) "promptly offer to recall Professor Leavitt for the 2014-2015 year"; and (2) make Professor Leavitt "whole for all income lost from the date of the March 14, 2013, grievance until the end of the 2013-2014 academic year." When the parties asked for a clarification as to whether the College was to reinstate Leavitt to her prior position or to the "reduced" position that had been performed by a different employee, the arbitrator issued a clarification award requiring the College to reinstate Leavitt "to her prior, bargaining unit position with the single exception of [one class (PE 261)]." That clarification award also stated that the back pay compensation was to be based on Leavitt's prior position, with no

[2]We use the singular term "award" to include the arbitrator's initial award and subsequent clarifications.

offsetting of unemployment compensation. The arbitrator deemed the College as "the losing party with respect to this clarification proceeding * * *."

There is no dispute that Leavitt's prior bargaining-unit position was comprised of 60 percent athletic trainer functions and 40 percent classroom instruction. Moreover, the College has acknowledged on numerous occasions that, under the award, it was required to promptly reinstate Leavitt to that prior position. Nevertheless, the College informed the Federation and the arbitrator that the College was "refusing to comply with the [a]ward" because the College believed that the arbitration award impermissibly interfered with the College's "right of assignment." The College also included a draft stipulation acknowledging that the arbitrator's award required the College to reinstate Leavitt to her prior bargaining unit position, which consisted of 60 percent athletic trainer and 40 percent classroom instruction.

Moreover, the College has repeatedly acknowledged that the arbitration award required it to make Leavitt whole, including back pay compensation. The College does not even dispute the amount that it owed through the 2013-14 academic year.[3] Nevertheless, the College still has not complied with the make-whole requirements of the arbitration award.

Under these circumstances, we conclude that the College has refused to accept the terms of the arbitrator's final and binding arbitration award, which required the College to reinstate Leavitt to her prior position of 60 percent athletic trainer duties and 40 percent class instruction and to make her whole. Therefore, the College violated ORS 243.672(1)(g), unless the College is correct that the award is unenforceable under the standard set forth in *Willamina Education Association 30J and Lucanio v. Willamina School District No. 30-44-63J*, Case No. C-253-79, 5 PECBR 4086 (1980), *aff'd*, 60 Or App 629, 655 P2d 189 (1982) (*Willamina*). Under that standard, we will enforce an arbitration award "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)." *Willamina*, 5 PECBR at 4100.

Here, the College first contends that the arbitrator exceeded a limitation on his authority expressly provided in the parties' CBA. According to the College, the arbitrator "found no specific violation of the contract; he simply found a violation of what he thinks the parties should have agreed to." Contrary to the College's contention, the arbitrator specifically found that the College violated Article 31.2 of the parties' CBA. The College's argument, in essence, is that the

[3]Because the College has yet to reinstate Leavitt to her position in time for the beginning of the 2014-15 school year, the College owes Leavitt additional back pay.

arbitrator's interpretation of the parties' CBA is incorrect. Under the *Willamina* standard of review, however, "[w]hether the arbitrator correctly interpreted the contract is the very question that neither [this Board] nor [a] court can[]consider on review." *Willamina*, 60 Or App at 636. Moreover, our review of arbitration awards under ORS 243.672 is limited and we do not review the arbitrator's decision to determine whether we believe it is right or wrong. *See Brookings-Harbor Education Association/OEA v. Brookings-Harbor School District 17C*, Case No. UP-074-11, 25 PECBR 584, 601 (2013); *see also Fed. of Ore. Parole Officers v. Corrections Div.*, 67 Or App 559, 563, 679 P2d 868, *rev den*, 297 Or 458 (1984). Therefore, we disagree with the College's contention that the parties did not agree to accept this arbitration award as final and binding on them. *See Willamina*, 5 PECBR at 4099.

The College next asserts that enforcement of this arbitration award would be contrary to public policy. That is so, says the College, because the award purportedly "ignores the legal requirements of the provisions of ORS 341.009," which sets forth legislative findings for Oregon community colleges. The "public-policy" exception in *Willamina* is "exceedingly narrow" and only applies if a party "clearly show[s] that the award requires it to commit an unlawful act." *Brookings-Harbor School District 17C*, 25 PECBR at 602. The cited provisions of ORS 341.009 essentially set forth legislative findings with respect to community colleges' intended purposes, locations, organizational patterns, relationships with public universities, programs, and governing boards. Suffice it to say, the College has not established that the arbitration award requires it to violate those provisions of ORS 341.009 or otherwise commit an unlawful act. Consequently, the College has not established that enforcement of the arbitration award would be contrary to public policy.

Remedy

We will order the College to cease and desist from refusing to accept and implement the terms of Arbitrator Lankford's award. ORS 243.676(2)(b). We will also order the College to make Leavitt whole for any loss or injury that she suffered due to the College's failure to promptly implement those awards, including back pay and benefits. In addition to the compensation already admittedly owed for the 2013-14 school year, the College is to make Leavitt whole for losses suffered by the failure to reinstate her by the beginning of the 2014-15 school year. All compensation owed under this order shall be paid with interest at the legal rate of nine percent per annum.[4]

We will also order the College to post a notice of its violation. We generally order such a posting if we determine that a party's violation of the Public Employee Collective Bargaining Act 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. *Roseburg Professional Firefighters Association v. City of Roseburg*, Case No. UP-021-13, 26 PECBR 111, 124 (2014); *Brookings-Harbor School District 17C*, 25 PECBR at 605. Not all of these criteria need be satisfied

[4]The College may offset interim earnings, but consistent with the arbitration award, the College may not offset unemployment compensation from the back pay owed.

to warrant posting of a notice. *Roseburg*, 25 PECBR at 124; *Brookings-Harbor School District 17C*, 25 PECBR at 605. Here, the College's actions were calculated and flagrant. Specifically, shortly after the arbitrator issued his clarifying June 16, 2014, award, the College acknowledged that it understood its obligations under that award, but nevertheless was not going to accept the award because the College disagreed with it. Moreover, we have repeatedly recognized that an unlawful refusal to implement an arbitrator's award significantly impacts the designated bargaining representative's functioning. *See*, *e.g.*, *Brookings-Harbor School District 17C*, 25 PECBR at 605. Under these circumstances, we conclude that a posting is warranted.

Moreover, we conclude that, in addition to the traditional physical posting of the notice, the College must distribute the notice to Federation-represented employees by e-mail. We require an employer to electronically notify employees of its wrongdoing when evidence indicates that electronic communication is the customary and preferred method that the employer uses to communicate with employees. *Gresham-Barlow Education Association/OEA/NEA v. Gresham-Barlow School District No. 10J*, Case No. UP-32-07, 23 PECBR 170, *recons,* 219, 220 (2009). Here, the College acknowledged that e-mail is the common method of communication with its employees. Therefore, we will order the College to e-mail the posting to Federation-represented employees.

Civil Penalty

Finally, the Federation requests that we order 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 that its actions were unlawful, or (2) the party's conduct was "egregious." ORS 243.676(4)(a); OAR 115-035-0075(1). We have defined "egregious" to mean "conspicuously bad or 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). Here, as set forth above, the College's refusal to accept and implement the arbitrator's awards was flagrant. Even assuming that the College was initially confused about its reinstatement and back pay obligations under the award, that confusion was removed when the arbitrator issued his clarifying June 16, 2014, award. Indeed, shortly thereafter, the College acknowledged that it understood its obligations, but was refusing to honor them based on its beliefs that the arbitrator exceeded his authority and that the award violated public policy. Those beliefs, however, are not well founded and contrary to long-settled precedent. *See*, *e.g.*, *Brookings-Harbor School District 17C*, 25 PECBR at 602-4 (setting forth this Board's historical approach that final and binding arbitration awards are subject to limited review and that the public policy exception is "exceedingly narrow"). Moreover, the College has long since acknowledged the back pay owed to Leavitt for the 2013-14 school year. Yet, the College has inexplicably refused to accept and implement even the undisputed portion of the award. Under such circumstances, we hold that the College's actions are egregious and we will award a civil penalty of $1,000.

## ORDER

1. The College violated ORS 243.672(1)(g) by failing to accept the terms of Arbitrator Lankford's award as final and binding. The College shall cease and desist from engaging in that conduct.

2. The College shall immediately recall Leavitt to her prior position in the Federation-represented bargaining unit, as set forth in this Order.

3. Within 30 days of the date of this Order, the College shall make Leavitt whole for any loss or injury suffered as a result of the College's failure to promptly implement the arbitration award, including back pay and benefits, plus interest at the legal rate of 9 percent per annum, minus any interim earnings.

4. Within 30 days of the date of this Order, the College shall sign and post copies of the attached notice in prominent places at the College where Federation-represented employees are likely to see it. The notice shall remain posted for at least 30 days. In addition to the physical postings of the paper notice, the College shall, within the same 30-day period, electronically distribute (*i.e.*, e-mail) the notice to all Federation-represented employees.

5. Within 30 days of the date of this Order, the College shall pay the Federation a civil penalty of $1,000.

DATED this 9 day of October, 2014.

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-032-14, Southwestern Oregon Community College Federation of Teachers, Local 3190, American Federation of Teachers v. Southwestern Oregon Community College, 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 Southwestern Oregon Community College (College) violated ORS 243.672(1)(g) of the PECBA by refusing to accept the terms of an arbitration award as final and binding. The violation occurred when the College refused to promptly recall Professor Kelly Leavitt and make her whole as ordered by the arbitrator. To remedy this violation, the Employment Relations Board ordered the College to:

1. Cease and desist from violating ORS 243.672(1)(g) by way of refusing to accept the terms of the arbitration award as final and binding.

2. Immediately recall Professor Leavitt to her prior bargaining unit position and make her whole for any loss or injury that she suffered due to the College's failure to promptly implement the arbitration award, including back pay and benefits, plus interest at the legal rate of 9 percent per annum.

3. Post this notice in prominent places at the College for at least 30 days and electronically distribute by e-mail this notice to all employees represented by Southwestern Oregon Community College Federation of Teachers, Local 3190, American Federation of Teachers (Federation).

4. Pay the Federation a civil penalty of $1,000.

EMPLOYER

Dated_____, 2014 By _____

Title _____

**********

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

*This notice must remain posted for 30 consecutive days from the date of posting in each employer facility in which bargaining unit personnel are employed. This notice must not be altered, defaced, or covered by any other materials. This notice must also be electronically distributed (such as by e-mail) to all bargaining unit personnel. 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-021-13

(UNFAIR LABOR PRACTICE)

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| ROSEBURG PROFESSIONAL FIREFIGHTERS ASSOCIATION,<br><br>Complainant,<br><br>v.<br><br>CITY OF ROSEBURG,<br><br>Respondent. | ) | FINDINGS AND ORDER ON COMPLAINANT'S PETITION FOR REPRESENTATION COSTS |

On July 23, 2014, this Board issued an order holding that the Fire Department of the City of Roseburg (Department) violated ORS 243.672(1)(e) by unilaterally contracting out work that had been performed by lead EMS techs and by bargaining directly with lead EMS techs over their workload. On August 13, 2014, Roseburg Professional Firefighters Association (Association) filed a petition for representation costs. On September 3, 2014, the Department filed objections to the petition.

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

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

2. The Association is the prevailing party.

3. This case required two days of hearing.

4. Counsel for the Association submitted an affidavit and exhibit reflecting total representation costs of $14,008.50, based on 84.9 hours of legal work at a rate of $165 per hour. Based on those total costs, the Association requests an award of $3,500 in representation costs, which is the maximum amount that we award in the absence of a civil penalty. *See former* OAR 115-035-0055(1)(a);[1] *Oregon School Employees Association v. North Clackamas School District*, Case No. UP-017-13, 26 PECBR 129 (2014) (Rep. Cost Order).

[1]Effective September 10, 2014, OAR 115-035-0055(1)(a) was amended to increase the representation-costs cap to $5,000. We apply the rule in effect at the time that the petition was filed.

The requested hourly rate is average. *See North Clackamas School District*, 26 PECBR at 130 (the average rate for representation costs is between $165 and $170 per hour). The number of hours claimed is slightly below average for a case requiring two days of hearing. *See id.* (cases generally require an average of 45 to 50 hours per day of hearing).

5. An average award is generally one-third of the reasonable representation costs of the prevailing party, subject to the $3,500 cap in *former* OAR 115-035-0055(1)(a). *Id.* Here, one-third of the claimed reasonable representation costs would result in the maximum $3,500 award. The Department contends, however, that the hours claimed are excessive because the matter could have been completed in a single day of hearing if Association counsel had been willing "to stay late."[2] The record reflects that the second day of hearing lasted approximately four hours (excluding breaks), which would have resulted in an extremely long first day. The record does not establish, therefore, that the entire case could have been completed in a typical single day of hearing. In any event, as set forth above, the hours claimed by the Association are slightly below average for a two-day case.

6. 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 Association representation costs of $3,500.

ORDER

The Department will remit $3,500 to the Association within 30 days of the date of this Order.

DATED this 10 day of October, 2014.

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.

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[2]The Department also contends that some of the time claimed by Association counsel likely concerned a withdrawn claim. Even assuming that the Department's assertion is correct and would be a valid basis for slightly reducing the number of hours that the Association could properly claim, the reasonable representation costs awarded to the Association would still be $3,500. Therefore, we need not address this objection.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-066-12

(UNFAIR LABOR PRACTICE)

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| OREGON AFSCME COUNCIL 75, LOCAL 974,<br><br>Complainant,<br><br>v.<br><br>STATE OF OREGON, ACTING THROUGH ITS DEPARTMENT OF ADMINISTRATIVE SERVICES & DEPARTMENT OF CORRECTIONS (TRCI),<br><br>Respondent. | ) | FINDINGS AND ORDER ON COMPLAINANT'S PETITION FOR REPRESENTATION COSTS |

On July 18, 2014, this Board issued an order holding that the State, acting through the Department of Corrections (Department), violated ORS 243.672(1)(e) when it failed to bargain with Oregon AFSCME Council 75, Local 974 (AFSCME) regarding the impact of the Department's decision to change the procedure used to assign overtime at the Two Rivers Correctional Institution. On August 6, 2014, AFSCME filed a petition for representation costs. On August 20, 2014, the Department filed objections to the petition.

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

1. AFSCME filed a timely petition for representation costs and the Department filed timely objections to that petition.

2. AFSCME is the prevailing party.

3. This case required four days of hearing.

4. Counsel for AFSCME submitted an affidavit and exhibit reflecting total representation costs of $10,807.50, based on 65.5 hours of legal work at a "reasonable value" of $165 per hour. *See* OAR 115-035-0055(1)(c)(B). In the absence of a civil penalty, the maximum

amount of representation costs awardable by this Board is $3,500. *Former* OAR 115-035-0055(1)(a);[1] *Oregon School Employees Association v. North Clackamas School District*, Case No. UP-017-13, 26 PECBR 129 (2014) (Rep. Cost Order).

The requested hourly rate is average. *See North Clackamas School District*, 26 PECBR at 130 (the average rate for representation costs is between $165 and $170 per hour). The number of hours claimed is below average for a case requiring four days of hearing. *See id.* (cases generally require an average of 45 to 50 hours per day of hearing). We conclude that the claimed $10,807.50 reflects AFSCME's reasonable representation costs.

5. An average award is generally one-third of the reasonable representation costs of the prevailing party, subject to the $3,500 cap in OAR 115-035-0055(1)(a). *Id.* The Department requests that we adjust our award downward to one-fourth (or less) of $10,807.50 because the case purportedly presented novel legal issues. *See Association Of Engineering Employees v. State Of Oregon, Department Of Administrative Services*, Case No. UP-043-11, 25 PECBR 941, 943 (2014) (Rep. Cost Order) (in "novel-issue" cases, we generally decrease the award to one-fourth of the prevailing party's reasonable costs, so that parties will not be deterred from litigating novel issues). Here, however, we do not find that the Department's bargaining obligation presented a novel legal issue for this Board to decide, but rather concerned longstanding precedent applied to the particular facts of this case. Consequently, we will order our average award.

6. 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 AFSCME representation costs of $3,500.

ORDER

The Department will remit $3,500 to AFSCME within 30 days of the date of this Order.

DATED this 10 day of October, 2014.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

[1]Effective September 10, 2014, OAR 115-035-0055(1)(a) was amended to increase the representation-costs cap to $5,000. We apply the rule in effect at the time that the petition was filed.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-047-13

(UNFAIR LABOR PRACTICE)

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| MEDFORD EDUCATION ASSOCIATION, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | SUPPLEMENTAL ORDER |
| | ) | |
| MEDFORD SCHOOL DISTRICT 549C, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

Aruna A. Masih, Attorney at Law, Bennett, Hartman, Morris and Kaplan, Portland, Oregon, represented Complainant.

Kelly D. Noor, Attorney at Law, Garrett Hemann Robertson, Salem, Oregon, represented Respondent.

On August 13, 2014, this Board issued a final order holding that the Medford School District 549C (District) violated ORS 243.672(1)(g) by failing to restore teacher work days and increase contributions to employee insurance premiums and salaries as required by a Memorandum of Agreement (MOA) reached with the Medford Education Association (Association). 26 PECBR 143 (2014). As a remedy, we ordered the District to cease and desist from that conduct. We also ordered the parties to bargain in good faith over an appropriate "make-whole" remedy. In the event that the parties were unable to reach an agreement after bargaining in good faith for 60 days, we ordered the parties to submit their final remedy proposals to this Board so that we could determine an appropriate make-whole remedy. Although the parties bargained in good faith for an appropriate make-whole remedy, they were unable to come to an agreement. Consistent with our prior order, both parties submitted their most recent proposals to this Board.

The only issue before us in this order is what constitutes an appropriate make-whole remedy. We begin with each party's proposed remedy. The District proposes that it remit $49,295.43 to the Association to be distributed to the Association-represented employees. The District did not make the source of this number clear and, from the District's perspective, is a gratuity because the District believes that it owes nothing for its violation of the MOA. Although

the District acknowledges that a minimum of $132,871 is owed under our final order (even using the District's calculations), the District asserts that its payment of retroactive salary increases of $383,926 under the parties' most recent collective bargaining agreement (CBA) means that nothing is owed for the MOA violation.

The Association sees the remedy issue differently. The Association's final proposal would require the District to remit $728,993. According to the Association, we should take into account the significant passage of time since the District breached the MOA and apply the Appendix A formula (per the terms of the MOA) to result in a payment of $728,993.[1] Although the Appendix A formula is triggered only after the four cut days had been restored, the Association argues that it had to subsequently bargain for those days to be restored as part of a CBA that was reached after the District's unilateral implementation and an Association strike. According to the Association, crediting the District with the monetary value of those restored days ignores that the Association had to bargain for those days in its successor agreement, even though those days were already bargained and should have been awarded as required by the MOA.[2] Thus, according to the Association, crediting the District with the monetary value of the restored days effectively rewards the District for breaching the MOA.

In ordering a remedy for an unfair labor practice violation, this Board has "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)." *Oregon School Employees Association v. Parkrose School District*, Case No. UP-030-12, *recons*, 25 PECBR 845, 846 (2013). *See also Elvin v. OPEU*, 102 Or App 159, 164, 793 P2d 338 (1990), *aff'd*, 313 Or 165, 832 P2d 36 (1992); ORS 243.676(2)(c). The goal of a make-whole remedy is to restore an injured party to the status that existed before the violation occurred. *Central Education Association and Vilches v. Central School District 13J*, Case No. UP-74-95 17 PECBR 93, 94 (1997), *aff'd*, 155 Or App 92, 962 P2d 763 (1998). Here, however, attempting to restore the Association to the status that existed before the District violated the PECBA is particularly complicated. As set forth above and in our prior order, the District's unlawful conduct occurred in the midst of negotiations for a successor CBA that resulted in a strike. The parties ultimately reached an agreement that included terms and conditions of employment (*e.g.*, number of work days, insurance contributions, and wages) that were also central to the MOA breached by the District. Moreover, a substantial amount of time has passed since the District breached the MOA. As a practical matter, it is impossible to completely rewind back to the time of the District's violation and accurately assess what would have happened had the District not breached the MOA. Rather than engaging in such speculation, we find it more appropriate to provide an equitable remedy that advances the purposes of the PECBA, but that also recognizes the subsequent events that occurred, including the signing of a new CBA.

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[1]Under the MOA and Appendix A formula, the first step is to determine the difference in the yearly General Purpose Grant Estimates. Making that determination for the 2012-13 and 2013-14 years equals $8,599,191 ($98,761,488-$90,162,297), which is then converted to a percentage change of 9.54 percent. Next, the insurance change for 2012-13 and 2013-14 is calculated, which is 1.06 percent, and that amount is subtracted from the funding increase (9.54 percent), yielding 8.48 percent. That percent is multiplied by the aforementioned dollar increase ($8,599,191), which equals $728,993.

[2]We made this determination in our prior order.

With that in mind, we are not convinced that either party's proposal achieves that goal. The District's proposal of remitting $49,295.43 falls short of even the minimum amount that it would have had to contribute at the time of the breach under its own calculations had it not violated the PECBA. The Association's proposal does not take into account the retroactive wage increase that was included in the parties' recently-signed agreement. Consequently, we order our own remedy, which shall require the District to remit $345,067 (plus interest at nine percent per annum from June 10, 2013 to August 13, 2014)[3] to Association-represented employees.[4] This amount recognizes the $728,993 that the District should have contributed under the Appendix A formula.[5] However, the amount also recognizes (and subtracts) the retroactive pay increase of $383,926. Finally, we believe that this remedy most accurately fulfills our charge to make the aggrieved party whole and to effectuate the purposes of the PECBA. *See* ORS 243.676(2)(c).

The Association also requests that we order the District to post a notice of its violation and that we award a civil penalty, along with the reimbursement of the Association's filing fee. We decline to order those additional remedies in this case. We generally order a posting if the violation 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. *International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-049-12, 25 PECBR 871, 891 (2013). Not all of these criteria need to be satisfied to warrant the posting of a notice. *Id.* Here, the District's conduct did affect a significant number of bargaining unit employees. The Association has not established that any of the other factors warrant a posting. Moreover, as described in detail in our prior order, the disputed contract language was far from clear. Under these circumstances, we do not believe that a posting is necessary to effectuate the purposes of the PECBA. *See* ORS 243.676(2)(c).

We turn to the request for 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). Here, the record does not establish that either criterion has been satisfied, and we will deny the request.

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[3]These dates reflect the date that the District approved the school calendar without the restored work days (thereby violating the MOA) and the date that our order issued. We decline to award interest for the period after our award issued, during which the parties bargained (as required by our order) and mediated over a potential remedy.

[4]This amount shall be distributed on a full-time-equivalent basis. In other words, after calculating the interest, the District shall divide that number by the number of full-time-equivalents in the Association bargaining unit. A full-time employee would then receive that amount, while a .5 employee would receive half of that amount.

[5]We agree that the Association's methodology and calculation best reflects the intent of the MOA and Appendix A formula and should be used as the starting point in our determination of an appropriate remedy.

Lastly, the Association requests that we order filing fee reimbursement, which we may do if the District's answer was "frivolous or filed in bad faith." OAR 115-035-0075. Although we have concluded that the District violated ORS 243.672(1)(g), the record does not establish that its answer was frivolous or filed in bad faith. Therefore, we will deny the Association's request.

## ORDER

1. Within 60 days of the date of this order, the District shall remit $345,067, plus nine percent interest per annum from June 10, 2013 to August 13, 2014, to Association-represented employees. That amount shall be divided among the Association-represented employees on a full-time-equivalent basis, as described in this order. If the District has not satisfied the payment required by this order within 60 days, interest will begin to run again 61 days after the date that this order issues, until such time that such payment is made.

DATED this 1 day of December, 2014.

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-057-13

(UNFAIR LABOR PRACTICE)

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| SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, OREGON PUBLIC EMPLOYEES UNION,<br><br>Complainant,<br><br>v.<br><br>STATE OF OREGON, DEPARTMENT OF JUSTICE,<br><br>Respondent. | ) | RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |

On October 30, 2014, this Board heard oral argument on Respondent's objections to a September 5, 2014, Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew, after a hearing held on April 4, 2014, in Salem, Oregon. The record closed on May 21, 2014, following receipt of the parties' post-hearing briefs.

Christy Te and Marc Stefan, Attorneys at Law, Service Employees International Union Local 503, Oregon Public Employees Union, Salem, Oregon, represented Complainant.

Neil F. Taylor, Assistant Attorney General, Oregon Department of Justice, Labor and Employment Section, Salem, Oregon, represented Respondent.

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On December 12, 2013, the Service Employees International Union Local 503, Oregon Public Employees Union (SEIU or Union) filed this complaint alleging that the State of Oregon, Department of Justice (Department) violated ORS 243.672(1)(b) and (e) by directly dealing with an employee regarding the resolution of a pending Step 3 grievance. The Department filed a timely answer, including affirmative defenses that its conduct was authorized by the parties' collective

bargaining agreement and that the Union had waived objections to the Department's communications and grievance resolutions with the employee.

The issues are:

1. Should this Board defer acting on the complaint, pending the conclusion of an arbitration?

2. Did the Department's November 2013 communications and actions with Kastl violate ORS 243.672(1)(b) and (e)?

For the reasons set forth below, we conclude that deferral is not appropriate and that the Department violated ORS 243.672(1)(b) and (e) by bypassing the Union and directly dealing with a Union-represented employee to resolve a contractual grievance.

## RULINGS

The rulings of the ALJ were reviewed and are correct.[1]

## FINDINGS OF FACT

### Parties

1. SEIU is a labor organization within the meaning of ORS 243.650(13), representing a group of employees in the Department, a public employer within the meaning of ORS 243.650(20).

2. SEIU and the Department were parties to a 2011-13 collective bargaining agreement (CBA), effective from July 1, 2011, through June 30, 2013.

### CBA

3. Article 90.5 §2 of the CBA provided in part:

> "An employee may request in writing to work any alternate or flexible work schedule defined in this Agreement (see Article 90, Work Schedules and, for applicable Agencies, Section 15, below). No employee requests will be arbitrarily denied or rescinded. In reaching its decision, the Agency will consider whether the employee's request meets all of the following criteria:

[1]The Department's request that we hold the complaint in abeyance pending an arbitration hearing and decision requires an analysis of the facts regarding that arbitration, which in turn requires an understanding of the facts leading up to that arbitration. Therefore, we discuss our ruling on the Department's request below, after setting forth our factual findings.

"(a) That the operational needs of the Agency are met;
"(b) That the requested work schedule will not interfere with his/her ability and availability to perform the job;
"(c) That the needs of the public are adequately served; and
"(d) That a forty (40) hour workweek is maintained.

"The Agency may also consider other relevant criteria, including, but not limited to, employee use of carpooling, mass transit, or demonstration of an unusual hardship."

4. Article 21 of the CBA contains a dispute resolution (grievance and arbitration) procedure. The process applicable to this case includes Step 1, with the employee's "management/executive service supervisor"; Step 2, with the "Agency Head" or designee; Step 3, with the Department of Administrative Services (DAS) Labor Relations Unit (LRU); and Step 4, arbitration. An individual employee or the Union may file a grievance at Step 1. Only the Union may move the grievance to additional steps.

5. The CBA Step 1 grievance procedure states in part:

"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. Upon request of either Party, the Parties will meet to discuss the grievance. The supervisor shall respond in writing to the grievant(s) within fifteen (15) calendar days from the receipt of the grievance. In all cases, *the grievant and his/her management/executive service supervisor will attempt to meet within the thirty (30) calendar day filing period in an attempt to resolve the grievance at the lowest possible level of management.*[2] Failure to meet will not invalidate the grievance.

*All Step 1 grievance settlements are non-precedential and shall not be cited by either Party or their agents or members in any arbitration or fact-finding proceedings now or in the future.* Step 1 grievance settlements shall be reduced to writing and signed by the grievant and management/executive service supervisor. *Actions taken pursuant to Step 1 settlement agreements shall not be deemed to establish or change practices under the Collective Bargaining Agreement*, including but not limited to Article 5, or ORS Chapter 243, and shall not give rise to any bargaining or other consequential obligations." (Italics added.)

6. Article 21 also provides: "Time limits specified in this and the above-referenced Articles shall be strictly observed, unless either Party requests a specific extension of time, which if agreed to, must be stipulated in writing and shall become part of the grievance record."

[2]The reference to resolving a grievance at the lowest possible level appears only in the contractual provision regarding Step 1 of the grievance process.

7. The term "abeyance" does not appear in the dispute resolution section of the CBA.

8. Article 10, the "UNION RIGHTS" provision of the party's CBA, provides in part:

> "(b) Employees covered by the Agreement are at all times entitled to act through a Union representative in taking any grievance action or following any alternate procedure under this Agreement.
>
> "(c) Once a bargaining unit member files a grievance, *the employee shall not be required to discuss the subject matter of the grievance without the presence of the Union representative if the employee elects to be represented by the Union.*" (Emphasis added.)

9. The CBA also provides for lunch breaks for employees:

> "Consistent with the operating requirements of the Agency, an employee shall be granted a meal period of not less than thirty (30) minutes nor more than one (1) hour, unless mutually agreed otherwise. Meal periods shall normally be scheduled by the Agency at approximately mid-part of the shift."

Kastl Grievance

10. Kastl is a legal secretary for the Department's Appellate Division. Her position is included in the Union's bargaining unit.

11. On May 30, 2013, Kastl requested an alternate work schedule under Article 90.5 of the CBA, which the Department denied on June 24, 2013. On July 19, Union steward Lori Hartman filed a grievance alleging that the Department's denial of the alternate work schedule violated the CBA. The grievance included information regarding the various contractual criteria for granting the request, including the operational needs of the Department and noninterference with Kastl's ability to perform her work.

12. Department officials denied the grievance at Steps 1 and 2.

13. On August 28, 2013, Steward Hartman notified the Department that the Union was advancing the grievance to Step 3 (with DAS LRU). DAS LRU assigned Labor Relations Manager Laurie Grenya to process the grievance. Grenya's role was to advise and direct the Department in resolving the grievance; Grenya also had the authority to decide the grievance on behalf of the employer. Thus, Grenya had the authority to agree with Department managers, agree with the Union, or come up with an alternative resolution of the dispute. The parties agreed to extend the Department's response deadline until September 30 to allow time to investigate and meet and discuss the grievance. In Hartman's experience, DAS officials always requested such extensions, and it was her practice to grant them.

14. On September 17, 2013, the parties held the Step 3 meeting. Grievant Kastl and Steward Hartman appeared for the Union. Grenya and LRU Manager Thomas Perry represented the Department. The parties discussed various ways of resolving the grievance, but did not reach a conclusion.

15. On September 27, Grenya telephoned Hartman. Grenya stated that the Department had decided to perform an operational review of the Appellate Division to determine if it could accommodate Kastl's alternate schedule request. Grenya asked if the Union would agree to place the grievance in "abeyance," which meant, to Grenya, put the grievance "on hold," so that no Step 3 grievance response would be due while that review took place. Hartman expressed interest in the Department's possible granting of the grievance, and the parties agreed to hold the grievance in abeyance[3] until November 1, 2013.

16. On October 31, 2013, Grenya wrote Hartman:

> "The agency has followed up with me to confirm they are continuing to work on the operational review. They have collected the needed data and still need to review and finalize the assessment of needs. I believe they are making good progress and would ask that you grant an additional month's extension to allow for completion of the review."

17. On November 4, Union Steward Joseph Ederer notified Grenya that he was replacing Hartman as the steward for the grievance because Hartman had transferred to a different section of the Department. Ederer also stated:

> "Can you confirm [Kastl's] Article 90.5 grievance initially filed 6/24/13 is awaiting a step 3 response. I understand in a separate email that you've requested an additional month's response – if that's correct, then yes we agree to an additional 30 days. I think that would put the response due December 3, is that your understanding as well?
>
> "Please feel free to contact me directly if you have any questions."

18. On November 5, Grenya replied to Ederer, stating, "[t]hank you for the update. Yes, December 3rd was the intention for response. Thank you for the extension. *I will keep you informed of any updates I receive along the way.*" (Emphasis added). Grenya also e-mailed Donna Bennett, Department Human Resources Director, stating "[t]he union has agreed to an additional month extension. My response is due December 3rd. I will follow up the week prior for status and determination of next steps with the response."

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[3]The Department states that "[r]espondent understood that the parties agreed to deactivate the grievance process while the issue was sent back to the DOJ management level for possible resolution at the lowest possible level." The parties' agreement, however, was only to grant the Department time to conduct a review of the circumstances to determine whether it would grant the grievance. The record does not establish that the parties agreed to remand the grievance to "the lowest possible level," Step 1, or, in fact, to address the grievance at any other level besides Step 3.

Completion of Operational Review and Meeting with Kastl

19. In November 2013, the Department completed the operational review and concluded that it could accommodate Kastl's alternate schedule request. Management Assistant Mistie Slauson, Kastl's supervisor, discussed the matter with the Department's Human Resources Director Bennett. On November 19, Slauson sent Bennett a draft of the terms of the alternate schedule. Slauson stated, in part, "[h]ere is the proposed language we talked about this morning *that should be communicated to Laurie Grenya,* [*Kastl*]*, and Lori Hartman*[4] *as a condition to us approving her 4/10 schedule.*" (Emphasis added.)

20. The draft letter stated in part:

> "*An agreement was reached between the Department of Justice, [] Kastl, and her union representative that the step 3 grievance would be held in abeyance* while management within the Agency conducted an internal review of operations. *First, we want to thank you for allowing us that time.* That review has since been concluded, and we are prepared to respond to Ms. Kastl's request. During our review, problems were identified that have impacted the operational needs of the Agency. Management within the Appellate Division has been working to implement solutions geared toward improving operations, as well as improving staff job satisfaction.
>
> "* * *
>
> "Due to the noted improvements [in Department absenteeism and other production-related issues], we are prepared to approve Ms. Kastl's 4/10 work schedule request on a three (3) month, trial basis. At the end of the three month period a reassessment will be conducted to ensure the approval of Ms. Kastl's 4/10 schedule has not interfered with any of the criteria outlined in Article 90.5. For added clarification, the following expectations will be considered when deciding whether to extend approval of the modified schedule.
>
> "1. A 4/10 work shift will have no negative impact on Ms. Kastl's ability to conform to the DOJ Basic Expectations or the Department's policy on maintaining a professional workplace.
>
> "2. A 4/10 work shift will not require additional work or impose additional obligations on attorneys, management, or other staff members beyond what is currently experienced.
>
> "For example, support staff are employed to minimize the administrative obligations of attorneys and managers. To be successful, this change in schedule must not impose burdens on division team members beyond those that would otherwise be present if Ms. Kastl were to work a 5/8 work shift. If, for instance, a

[4]As noted above, by this time Ederer had replaced Hartman as the Union representative responsible for the grievance.

brief is due on a Friday, Ms. Kastl would be responsible for ensuring that her unavailability on that day does not create a disruption that requires additional work by the assigned attorney. As reassignments are necessary, the volume and frequency in those reassignments will be consistent with that of others due to periodic leave.

"3. From time to time an employee's absence requires management to assign that employee's tasks to other employees to meet the operational needs of the division. This need might arise if an employee is ill or takes a vacation. This change in work shift must not negatively impact Ms. Kastl's availability to complete another employee's tasks in the event that [it] is necessary for her to do so to meet the operational needs of the division.

"4. * * * The allowance of Ms. Kastl's schedule change may be rescinded if there is an increase in staff absences and a normal 5/8 work shift is necessary to meet the operational needs of the division.

"*If agreed upon by Ms. Kastl*, this trial phase will begin effective Monday, December 2, 2013. The review will be conducted no later than March 2, 2014. The Agency retains the right to, upon proper notice, assign other work hours, either temporarily or permanently, if required to assure that all conditions are met. *In addition, Ms. Kastl's work schedule request will need to be resubmitted to ensure the requested meal period conforms to standards set out by the Bureau of Labor and [Industries]* (BOLI). (Please double-check this! In the BOLI Q and A available online, it appears as though lunch must be taken and completed between the third and sixth hour worked. In this case 9:30-12:30 since Kim is asking to work from 6:30-5:30.)" (Emphasis added.)

21. After at least one other Department manager commented on the draft (urging additional emphasis on the importance of attorney work deadlines), Bennett replied to Slauson, stating "I've sent all you [sic] and Michael's communications to Laurie [Grenya] at LRU for her consideration and inclusion in the Step 3 response."

22. Grenya responded to Bennett as follows:

"After reading the attached, it seems best to have Mistie [Slauson] meet with [Kastl], approve the 4/10 on re-check at 3 months, make her expectations clear, then notify me of completion. I can then respond to the grievance with [an] understanding of the change in the agency decision. This allows the agency to maintain (or forge) a relationship without giving the appearance that DAS had to get involved."

23. Bennett recommended that Slauson meet with Kastl regarding the Department's decision.

24. On November 20, 2013, Slauson approached Kastl and called her into a meeting. The purpose of the meeting was to discuss Kastl's request for an alternate schedule. Neither Slauson, Grenya, nor Bennett notified the Union about the meeting.[5] Kastl asked if she would need a steward for the meeting. Slauson said no, because the meeting was not disciplinary. Slauson did not, however, disclose the purpose of the meeting to Kastl in advance. Slauson chose to have another manager, William Beaty, at the meeting with Kastl so that there would be, as Slauson told Bennett, "two sets of ears on the management side."

25. Kastl relied on Slauson's assurance in not requesting a Union representative to attend the meeting. Had Kastl requested that a Union representative be present, it was Slauson's intention to postpone the meeting and ask "Human Resources," presumably Bennett and Grenya, for instructions.

26. During the meeting, Slauson offered Kastl an alternate work schedule in accordance with the November 14 draft letter and presented Kastl with her original May 30 "Work Schedule Request" form. That form contained information about Kastl's employee identity and proposed schedule, including her lunch time and weekday off, but it did not contain the other information in the November 14 letter, such as the three month trial period.

27. The Work Schedule Request form stated, in part, "I voluntarily request a change of my work hours schedule to the hours shown below." The managers told Kastl that her requested lunch hour would have to be changed to comply with BOLI requirements. The lunch times on the form were then lined out and replaced, with Kastl signing the document next to those changes. The parties also agreed that Kastl's schedule could be changed back to the conventional 5/8 schedule if the Department needed the change. Neither the form, nor the participants in the meeting, mentioned the contractual lunch scheduling requirements[6] or whether this agreement would set a precedent under the CBA. The form stated that the schedule change "Effective Date" was December 2, 2013. Beaty and Slauson also signed the form. The meeting lasted 30 to 45 minutes.[7]

28. Once the meeting was over, Kastl believed that the grievance process was no longer necessary because the issue had been resolved to her satisfaction.

29. Later on November 20, 2013, Slauson e-mailed Kastl regarding the meeting, with a copy to Beaty.

> "I just wanted to send you a quick recap of our discussion surrounding your 4/10 work schedule request.

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[5]There is no evidence of any communications between the Department and the Union about Kastl's grievance between November 5 and January 21, despite Grenya's assurance that she would keep Ederer informed of any "updates" received "along the way."

[6]The CBA provided that an employee's lunch should generally take place in the mid-part of the shift for between 30 and 60 minutes.

[7]There is no evidence that the meeting participants discussed anything besides the schedule change and its implementation.

"*Your agreement to give us time to review the operational needs of the division was very helpful*. Through the one-on-ones, I was able to identify assignments that have hindered the operational effectiveness of the Appellate Division. Also, when I started here, you and others expressed concerns surrounding the reliability of some staff within the Division. Since the rollout of the Department's basic expectations, and as a result of addressing some of the concerns, I've seen improvement. *Due to the noted improvements and plans for the Division, I am inclined at this time to approve your 4/10 schedule request on a 3-month, trial basis.* At the end of that period, we will conduct another review to ensure that the operational needs of the division have not been impacted and that other issues have not come up that make the 4/10 schedule no longer practical.

"*In order to ensure your request aligns with standards set by BOLI, you modified your original request so that your lunch happens ½ hour sooner than originally requested*. I've attached a copy for your records.

"You and Bill also talked about some appointments you currently have on the calendar. The two of you can work together to adjust future appointments, if needed; like the appointment at your suggestion that could be moved from a Wednesday to a Friday since you will now have that day off. I'll leave the decision up to you as to whether a change is necessary.

"Your 4/10 schedule will start effective December 2, 2013. The 3-month review will take place on or before March 2, 2014.

"*You agreed that pursuing this 4/10 schedule is something you are still interested in pursuing and agreed to the 3-month trial basis. We also talked about you being responsible for ensuring the 4/10 schedule doesn't impact the operational needs of the Division. You let us know that you are willing to revert back to 5/8s in the event something needs to be covered*. We appreciate that.

"Let me know if you have any questions." (Emphasis added.)

30. On November 21, Grenya e-mailed Ederer, stating in part:

"As per my voice mail, I understand the agency has completed its organizational review and has granted the 4/10 schedule requested by Kim. The step 3 response had been in abeyance until the review was complete.

"As the 4/10 schedule was the requested remedy it seems carrying forward with the grievance may not be needed. Please let me know if you are withdrawing the grievance."

31. On December 13, 2013 Steward Ederer responded to Grenya, stating "[a]s per the reason best articulated in the attached, the Union does not withdraw its grievance." The attachment

to the e-mail was the unfair labor practice complaint filed in this proceeding. Department officials were surprised and disappointed by the Union's failure to withdraw the grievance. One of Ederer's objections to the Department's actions was that it deprived the Union of a victory on the grievance.

32. On December 12, 2013, the Union filed a grievance alleging that Slauson's November 20, 2013 meeting with Kastl on the work-schedule grievance violated Article 10(c) of the parties' CBA. In February 2014, the Union advanced that grievance to arbitration and an arbitrator was subsequently assigned to hear the grievance. The arbitration is pending.

## CONCLUSIONS OF LAW

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

2. This Board declines the Department's request to hold the complaint in abeyance pending the outcome of an arbitration hearing and decision.

### Pre-Arbitration and Post-Arbitration Deferral

Before the hearing in this matter, the Department asked the ALJ to "defer" the processing of this case until an arbitrator issued a decision and award regarding the grievance filed by SEIU under Article 10 of the parties' CBA. The ALJ denied this request, and the Department reasserted its request at oral arguments before the Board. Before responding to that request, we begin by providing an overview of the two distinct types of arbitration-related "deferrals" that this Board generally receives and how this Board has historically analyzed such requests.

The first, and more common type of deferral issue presented to this Board, concerns post-arbitration deferral. In that situation, an arbitrator has already rendered an award that is arguably related to a pending unfair labor practice, and a party asks this Board to defer to that award rather than conducting our own independent assessment of the facts and conclusions reached by the arbitrator. Whether we give deference to such an award depends on a number of factors, including the nature of the claim filed with this Board and the nature of the matter grieved before the arbitrator. Broadly speaking, this Board has promulgated two categories of post-arbitration deferral: *Greater Albany Education Association v. Greater Albany School District No. 8J (Greater Albany)*, Case No. C-6-80, 5 PECBR 4158, 4160-61(1980) and *Willamina Education Association 30J and Lucanio v. Willamina School District No. 30-44-63J (Willamina)*, Case No. C-253-79, 5 PECBR 4086 (1980). *See also Portland Police Association v. City of Portland*, Case Nos. UP-25/26/27-11, 25 PECBR 481 (2013) (explaining the difference between the *Greater Albany* and *Willamina* deferral standards). In short, the Board applies its *Willamina* deferral analysis for contract claims filed under ORS 243.672(1)(g) and (2)(d), and its *Greater Albany* deferral analysis for all other claims. *See id.*

The instant matter, however, concerns a *pre*-arbitration deferral request, in which a party asks that we hold a matter in abeyance pending the outcome of a particular arbitration dispute.[8] This Board has, in limited situations, held (1)(e) and (g) unfair labor practice claims in abeyance

[8]The Department's reliance on several unpublished opinions concerning *post*-arbitration deferral, therefore, is misplaced.

pending an arbitration decision in the context of an employer's unilateral change of a subject also covered by a collective bargaining agreement. *See*, *e.g.*, *Oregon Public Employes Union, SEIU, Local 503, AFL-CIO, CLC v. State of Oregon, Executive Department, Labor Relations Division (OPEU)*, Case No. C-64-84, 8 PECBR 7863 (1985); *West Linn Education Association v. West Linn School District No. 3JT*, Case No. C-151-77, 3 PECBR 1864 (1978); *AFSCME, Council 75, Local #1393 v. Umatilla County Board of Commissioners, and Vanelsberg, Roadmaster*, Case No. C-183-82, 8 PECBR 6559(a), *recons*, 8 PECBR 6767 (1985). The standards that we apply in pre-arbitration abeyance requests are significantly different from the standards that we apply in *post*-arbitration deferral situations. Distilled to its essence, this Board has placed such unilateral change (1)(e) and (g) complaints in abeyance if: "(1) there is a pending grievance, and (2) the arbitrator and the Board 'may be requested to consider separate cases [that] have the same facts and congruent decisional standards." *International Union of Operating Engineers, Local 701 v. City of Portland*, Case No. UP-50-96, 17 PECBR 385, 396 (1997) (citing *OPEU*, 8 PECBR at 7868).

This Board has not previously determined whether, and under what standard, we might hold a (1)(b) or (1)(e) "direct dealing" claim in abeyance. For purposes of this case, we will assume without deciding that abeyance may be appropriate in such "direct dealing" claims and that the *City of Portland* standards apply to those claims. Nevertheless, even applying those standards, we decline to hold SEIU's claims in abeyance.

Under *City of Portland*, the two dispositive questions in this case are: (1) is there a pending grievance; and (2) if so, do the matters before this Board and the arbitrator assigned to that grievance have the same facts and congruent decisional standards? It is undisputed that there is a pending grievance under Article 10 of the parties' CBA and that an arbitrator was selected to hear the dispute. Additionally, both the Article 10 grievance and the (1)(b) and (1)(e) claims have the same basic facts. Specifically, both concern the November 20, 2013 meeting between Slauson and Kastl, which involved the Department attempting to settle the Union's grievance over Kastl's work schedule.

The more difficult question is whether this Board's decision and a potential arbitration decision would apply "congruent decisional standards." *See id.* To answer that question, we first set forth this Board's decisional standards regarding the (1)(b) and (1)(e) claims.

It is an unfair labor practice for an employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." ORS 243.672(1)(e). "An employer violates its bargaining duty when it attempts to negotiate directly with its employees." *Roseburg Professional Firefighters Association v. City of Roseburg*, Case No. UP-021-13, 26 PECBR 111, 122 (2014) (quoting *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 769 (2007)); *see also 911 Professional Communications Employees Association v. City of Salem*, Case No. UP-62-00, 19 PECBR 871, 890 (2002) ("the good faith bargaining obligation imposed by (1)(e) encompasses a prohibition on direct dealing by an employer with members of the bargaining unit").

Likewise, a public employer violates ORS 243.672(1)(b) when it bypasses the exclusive representative and deals directly with bargaining unit members regarding contractual matters. *See*, *e.g.*, *City of Roseburg*, 26 PECBR at 122 n 13 (citing *Professional Communications Employees Association v. City of Salem*, Case No. UP-62-00, 19 PECBR 871, 888-89 (2002); *AFSCME, Local 2909 v. City of Albany*, Case No. UP-26-98, 18 PECBR 26, 38-39 (1999)). That is so because the exclusive representative "has the statutory *right* to represent those employees in dealing with the employer." *City of Albany*, 18 PECBR at 39 (emphasis in original). When a public employer bypasses the exclusive representative and directly deals with employees on contractual matters, the employer "impairs the representative's ability to discharge its statutory obligations," and the employees "will inevitably lose confidence in the exclusive representative's capability to represent their interests in dealing with the employer." *Id.*[9]

Thus, under both of SEIU's (1)(b) and (1)(e) claims, this Board would essentially determine whether the Department, in the November 20 meeting with Kastl, attempted to bypass SEIU and deal directly with Kastl regarding SEIU's contractual grievance.

We turn to the decisional standards under SEIU's (10)(c) grievance. Under Article 10(c) of the CBA, "[o]nce a bargaining unit member files a grievance, the employee shall not be required to discuss the subject matter of the grievance without the presence of the Union representative if the employee elects to be represented by the Union." Thus, as applied to this case, Article (10)(c) prohibits the Department from *requiring* Kastl to discuss the subject matter of the work-schedule grievance without the presence of an SEIU representative, so long as Kastl elected SEIU representation. The contract article does not, on its face, necessarily prohibit the Department from bypassing SEIU and directly dealing with Kastl. Although an arbitrator could ultimately read the contract provision as such, an arbitrator could also read Article 10(c) as requiring Kastl to have affirmatively requested SEIU representation before the "direct-dealing" prohibition applied, a requirement not mandated by ORS 243.672(1)(b) or (e). Moreover, the gravamen of the contract provision concerns whether or not the Department *required* Kastl to discuss the subject matter of the grievance. In contrast, ORS 243.672(1)(b) or (e) concerns whether the Department attempted to deal directly with Kastl regarding the grievance, irrespective of whether or not the Department *required* Kastl to discuss the grievance. Alternately stated, Kastl's voluntary agreement to meet with the Department and consent to the grievance adjustment may be a defense to the Union's 10(c) grievance, but it would not be a defense to the Union's complaint before this Board. Thus, on this record, we are not convinced that our decision and an arbitrator's decision would necessarily apply "congruent decisional standards." *See City of Portland*, 17 PECBR at 396. Consequently, we decline to hold this matter in abeyance pending the outcome of the (10)(c) arbitration.

3. The Department violated ORS 243.672(1)(b) and (e) by bypassing SEIU and directly attempting to resolve the grievance with Kastl regarding her work schedule in the November 20, 2013, meeting.

[9]Therefore, we reject the Department's assertion that SEIU was required to specifically show how and to what extent the Department's direct dealing interfered with the formation, existence, or administration of SEIU.

In this case, the parties were engaged in the grievance process when Grenya of DAS, who represented the Department, proposed that the grievance be put on hold while the Department reviewed facts regarding the contractual criteria for granting an alternate schedule. The Union agreed to that request. Following consultation between the Department Human Resources Director, the DAS Labor Relations Manager, and Kastl's supervisor, the Department chose to resolve the merits of the dispute by way of a meeting with Kastl and her supervisor.

As set forth above, both ORS 243.672(1)(b) and (e) prohibit a public employer from bypassing the exclusive representative and directly dealing with a represented employee on a contractual matter. Here, SEIU's grievance regarding Kastl's work schedule constitutes a contractual matter. Moreover, although the Department initially (and properly) attempted to resolve the grievance with SEIU after the matter advanced beyond the first step, the Department then elected to bypass SEIU and attempted to directly resolve the matter with Kastl. We find that action proscribed by ORS 243.672(1)(b) and (e).

The Department argues, however, that it did not "deal" with Kastl, but merely "notified" her that it was granting her request for an alternate schedule.[10] Although such a distinction may or may not be legally significant, that is not what occurred here.[11] To the contrary, the Department worked with Kastl to amend her initial request to include certain conditions that were not part of her initial request, but that were important to the Department, even to the point of having Kastl initial and change the requested lunch breaks. Kastl and Department representatives then signed the document. In short, rather than merely announcing that it was granting Kastl's initial alternate schedule request, the Department representatives memorialized an agreement about an employee's contractually identified working conditions in the face of a pending grievance regarding those same working conditions. That memorialized agreement was substantively different from Kastl's initial request. It is undisputed that the meeting and its resolution were not identified or discussed between the Union and the Department. The connection between the Department officials' meeting with the grievant and the grievance itself is underlined by the fact that the Department officials were surprised and disappointed that the Union did not abandon the grievance after the Department's meeting with Kastl. Therefore, we conclude that the Department bypassed the Union and directly dealt with Kastl regarding SEIU's grievance, which violates ORS 243.672(1)(b) and (e).[12]

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[10]The Department also contends that, by agreeing to place the grievance in abeyance at Step 3, the Union agreed that the matter would be referred back to "the lowest possible level" for resolution. The evidence does not establish, however, that Union representatives Hartman or Ederer understood or agreed to this condition.

[11]Thus, our decision should not be read to prohibit all communications between an employer and an employee while a grievance is pending that affects the employee.

[12]The Department's actions are not insignificant. First, the Department's proposed resolution of the grievance may have deprived the Union of precedential value in handling future disputes. Second, the "private" resolution negotiated with Kastl could have included terms that would be unpalatable for the Union and potentially damaging in future grievances or contract negotiations. In any event, the grievance constituted a subject for negotiation between the Department and *the Union*, not the Department and Kastl.

We turn to the Department's affirmative defense that its actions were authorized by the parties' CBA, such that the Union waived its right to act as the exclusive representative of employees in grievance matters. We have followed federal precedent under the National Labor Relations Act, which requires the waiver of a statutory right to be clear and unmistakable, and not something that will be satisfied by a general contract provision. *See Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 179, 295 P3d 38 (2013); *see also 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, *recons*, 25 PECBR 892, 895 (2013). Here, the Department relies on the language of Article 10(c) discussed above, which simply states that an employee is not required to discuss the subject matter of the grievance without the presence of a Union representative. That provision does not clearly and unmistakably state that the Union waives its right to act as the exclusive bargaining representative of employees for purposes of processing grievances. Therefore, we reject the Department's waiver argument.

In sum, we conclude that the Department violated ORS 243.672(1)(b) and (e) when it bypassed SEIU and directly dealt with Kastl regarding SEIU's contractual grievance. *See City of Roseburg*, 26 PECBR at 122; *City of Salem*, 19 PECBR at 888-89.

Remedy

We turn to the remedy. Because we have determined that the Department committed an unfair labor practice, we will order that it cease and desist from that conduct. ORS 243.676(2)(b). The Union requests that we also order the Department to post a notice of its wrongdoing. We generally order such a posting if we determine that 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. *Service Employees International Union Local 503, Oregon Public Employees Union v. City Of Tigard*, Case No. UP-040-13, 26 PECBR 131, 141-42 (2014). Not all of these criteria need to be satisfied to warrant posting a notice. *Id.* at 142.

The Department's actions regarding Kastl's grievance did not involve a strike, lockout, or discharge; was not committed by a significant number of the Department's personnel; and was not part of a continuing course of illegal conduct. However, as set forth above, when a public employer bypasses the exclusive representative and directly deals with a represented employee on contractual matters, the represented employees inevitably lose confidence in the capability of the exclusive representative to represent the employees' interests in dealing with the employer. Moreover, such conduct inherently has a significant impact on the designated bargaining representative's functioning. Under such circumstances, we conclude that a posting is warranted.

ORDER

1. The Department shall cease and desist from violating ORS 243.672(1)(b) and (e) as described above.

2. Within 15 days of the date of this Order, the Department shall post the attached notice of its violations in prominent places at the Department where SEIU-represented employees are likely to view it.

Dated this 12 day of December, 2014.

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-057-13, Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon, Department of Justice, 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 State of Oregon, Department of Justice (Department) violated ORS 243.672(1)(b) and (e) of the PECBA by bypassing the Union and directly dealing with a Union-represented employee regarding a contractual grievance. To remedy this violation, the Employment Relations Board ordered the Department to:

1. Cease and desist from violating ORS 243.672(1)(b) and (e).

2. Post this notice in prominent places at the Department for at least 30 days.

EMPLOYER

Dated_____, 2014 By: _____

Title:_____

**********

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

*This notice must remain posted for 30 consecutive days from the date of posting in each employer facility in which bargaining unit personnel are employed. This notice 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-054-13

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| AFSCME COUNCIL 75, LOCAL 1082, Complainant, | ) | |
| v. | ) | FINDINGS AND ORDER ON RESPONDENT'S PETITION FOR REPRESENTATION COSTS |
| HOOD RIVER COUNTY, Respondent. | ) | |

On September 15, 2014, this Board issued an order dismissing an unfair labor practice complaint filed by AFSCME Council 75, Local 1082 (Union), alleging that Hood River County (County) violated ORS 243.672(1)(a). On September 30, 2014, the County filed a petition for representation costs.

Pursuant to ORS 243.676(3)(b) and OAR 115-035-0055, this Board finds that:

1. The County filed a timely petition for representation costs.

2. The County is the prevailing party.

3. This case required one day of hearing.

4. Counsel for the County submitted an affidavit reflecting total representation costs of $8,892, based on 39.92 hours of legal work at a rate of $225 per hour. Based on these costs, the County requests an award of $3,500 in representation costs, which was the maximum amount that we awarded under *former* OAR 115-035-0055(1)(a) in the absence of a civil penalty. *See Oregon School Employees Association v. North Clackamas School District,* Case No. UP-017-13, 26 PECBR 129 (2014) (Rep. Cost Order).

The requested rate is above average. *See North Clackamas School District,* 26 PECBR at 130 (the average rate for representation costs is between $165 and $170 per hour). The number of hours claimed is slightly below average for a case requiring one day of hearing. *See id.* (cases

generally require an average of 45 to 50 hours per day of hearing). We will consider these factors in our award below.

5. An average award is generally one-third of the reasonable representation costs of the prevailing party, subject to the $5,000 cap in *current* OAR 115-035-0055(1)(a).[1] 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 County representation costs of $2,263.

ORDER

The Union will remit $2,263 to the County within 30 days of the date of this Order.

DATED this 17 day of December, 2014.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

[1] *Current* OAR 115-035-0055(1)(a) applies to this case because it became effective September 10, 2104, before the County's September 30, 2014, petition for representation costs. In any event, one-third of the reasonable representation costs in this case is less than the cap under either the former or current rule.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. CU-003-14 and CC-002-14

(PETITION FOR CERTIFICATION WITHOUT AN ELECTION)

| | | |
|---|---|---|
| GROUP OF UNREPRESENTED BATTALION CHIEFS EMPLOYED BY THE CITY OF MEDFORD,<br><br>Petitioner,<br><br>v.<br><br>CITY OF MEDFORD,<br><br>Respondent. | ) | RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |
| INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1431,<br><br>Petitioner,<br><br>v.<br><br>CITY OF MEDFORD,<br><br>Respondent. | ) | |

On October 2, 2014, the Board heard oral argument on the City of Medford's objections to a recommended order[1] issued by Administrative Law Judge (ALJ) Larry L. Witherell on July 31, 2014, after a hearing held on April 21, 2014, in Medford, Oregon. The record closed on May 6, 2014, following receipt of the parties' post-hearing briefs.

[1]After this Board received objections to the recommended order, the Oregon Public Employer Labor Relations Association and the Oregon State Fire Fighters Council applied to appear as *amicus curiae*. We granted both applications and both *amici* submitted briefs, which we considered in reaching our decision.

Michael J. Tedesco and Julie Falender, Attorneys at Law, Tedesco Law Group, Portland, Oregon, represented the Group of Unrepresented Battalion Chiefs Employed by the City of Medford and the International Association of Fire Fighters, Local 1431.

Dian Rubanoff, Attorney at Law, Peck Rubanoff & Hatfield, PC, Lake Oswego, Oregon, represented the City of Medford.

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On March 10, 2014, the Group of Unrepresented Battalion Chiefs Employed by the City of Medford (City) filed a petition in Case No. CU-003-14 seeking to be added to an existing bargaining unit without an election under ORS 243.682(2)(a) and OAR 115-025-0000(1)(c). The petitioners seek representation by the International Association of Fire Fighters, Local 1431 (Union), and propose to add Fire Battalion Chiefs, Fire Battalion Chief/Fire Marshal and Fire Battalion Chief of Training and Safety to the existing bargaining unit, resulting in a new bargaining unit comprised of

> all regular employees of the Medford Fire Department in the Firefighter, Fire Inspector, Fire Engineer, and Fire Captain classifications, and all Fire Battalion Chief classifications, including Fire Battalion Chiefs, Fire Battalion/Fire Marshal, and Fire Battalion Chief of Training and Safety; excluding supervisors, confidential, and temporary employees.

The City filed three timely objections to the petition in Case No. CU-003-14:

(1) The City first objected that the Battalion Chiefs are supervisors as defined by ORS 243.650(23) and confidential employees as defined by ORS 243.650(6).

(2) Secondly, the City objected that the petition should be designated as a unit clarification petition under OAR 115-025-0005(2) because the issues include (a) public employee status under ORS 243.650(6) and (23); (b) whether the positions are or are not included by terms of the collective bargaining agreement; and (c) whether the petition is untimely because it purportedly should have been filed during the open period under OAR 115-025-0015(4).

(3) Lastly, the City claimed that the Petitioner must demonstrate a showing of interest of more than 50 percent of all employees in the proposed bargaining unit under ORS 243.682(2)(a) and *Coalition of Graduate Employees, Local 6069, AFT, v. Oregon University System, Oregon State University*, Case No. UC-04-12, 25 PECBR 356 (2013).

Also on March 10, 2014, the Union filed the petition in Case No. CC-002-14 seeking certification without an election under ORS 243.682 and OAR 115-025-0000(1)(c). The petition proposes the formation of a new bargaining unit comprised of

> all regular employees of the Medford Fire Department in the Fire Battalion Chief classification, including the Fire Battalion Chiefs, Fire Battalion/Fire Marshal, and

Fire Battalion Chief of Training and Safety; excluding all Firefighter, Fire Inspector, Fire Engineer, and Fire Captain classifications, supervisors, confidential, and temporary employees.

The City filed three timely objections to the petition in Case No. CC-002-14:

(1) First, the City objected that the Battalion Chiefs are supervisors as defined by ORS 243.650(23) and confidential employees as defined by ORS 243.650(6).

(2) Secondly, the City objected that the petition should be designated as a unit clarification petition under OAR 115-025-0005(2) because of the "public employee status."

(3) Lastly, the City objects that the proposed unit is not an appropriate unit because the employees would have a community of interest with other non-supervisory fire department employees represented by the Association.

The issues in Case No. CC-002-14 are:

1. Are the Fire Battalion Chiefs, Fire Battalion Chief/Fire Marshal, and Fire Battalion Chief of Training and Safety supervisors within the meaning of ORS 243.650(23)(b)?

2. Are the Fire Battalion Chiefs, Fire Battalion Chief/Fire Marshal, and Fire Battalion Chief of Training and Safety confidential employees within the meaning of ORS 243.650(6)?

3. Is a bargaining unit limited to all employees in the Fire Battalion Chief classification, including the Fire Battalion Chiefs, Fire Battalion Chief/Fire Marshal, and Fire Battalion Chief of Training and Safety, an appropriate bargaining unit?

The issues in Case No. CU-003-14 are:

1. Are the Fire Battalion Chiefs, Fire Battalion Chief/Fire Marshal, and Fire Battalion Chief of Training and Safety supervisors within the meaning of ORS 243.650(23)(b)?

2. Are the Fire Battalion Chiefs, Fire Battalion Chief/Fire Marshal, and Fire Battalion Chief of Training and Safety confidential employees within the meaning of ORS 243.650(6)?

For the reasons discussed below, in Case No. CC-002-14, we hold that the battalion chiefs are neither supervisory nor confidential employees and that the proposed bargaining unit is an appropriate unit. We will dismiss the petition in Case No. CU-003-14.[2]

## RULINGS

On April 15, 2014, the ALJ issued an order consolidating Case Nos. CU-003-14 and CC-002-14 for hearing. The cases were heard on April 21. With the issuance of the recommended

[2]Because we have determined that the unit in CC-002-14 is an appropriate bargaining unit under ORS 243.682(1), we need not address the petition in Case No. CU-003-14.

decision and order, the ALJ ordered, *sua sponte*, that the cases be consolidated for decision. We agree with that ruling and also treat these cases as consolidated for purposes of this order.

The remaining rulings of the ALJ were reviewed and are correct.

## FINDINGS OF FACT

### The Parties and Organization

1. The Union is a labor organization within the meaning of ORS 243.650(13).

2. The City is a public employer within the meaning of ORS 243.650(20).

3. The Union and the City are parties to a collective bargaining agreement that is effective from July 1, 2013 to June 30, 2016. The bargaining unit consists of all fire captains, fire engineers, fire inspectors, and firefighters employed by the City; excluding supervisory, confidential, and temporary employees.

4. In addition to the Union, the City has collective bargaining agreements with three other labor organizations, covering six separate bargaining units. Those units are represented by: the Medford Police Officers Association (effective from July 1, 2012 to June 30, 2015); Teamsters Local Union No. 223, representing Medford municipal mechanics (effective July 1, 2012 to June 30, 2014); Teamsters Local Union No. 223, representing operators (effective July 1, 2011 to June 30, 2014); Teamsters Local Union No. 223, representing construction and maintenance employees (effective July 1, 2012 to June 30, 2014); Teamsters Local Union No. 223, representing Medford park employees (effective July 1, 2012 to June 30, 2014); and AFSCME Local 2621, Council 75, AFL-CIO, representing Medford municipal employees (effective July 1, 2012 to June 30, 2014).

5. This case concerns the status of the battalion chiefs (BC) in the City's fire department. At the time of this hearing the following individuals were BCs:

| | |
|---|---|
| Brian Fish | BC for Training and Safety, 1997-2007; Shift BC, 2007-2014; promoted to Deputy Chief of Operations in April 2014 |
| Ken Goodson | Shift BC since August 1995 |
| Greg Kleinberg | Fire Marshal BC since June 2008 |
| Tom McGowan | BC for Training and Safety since October 2013 |
| Erin Sawall | Shift BC since November 2011 |

6. The City's fire department is a chain-of-command organization. The City operates five fire stations. The City's fire department is currently headed by an interim fire chief. Two deputy chiefs report to the fire chief. Deputy Chief Gordon Sletmoe is responsible for administration.[3] Deputy Chief Justin Bates is responsible for operations.

[3]At the time of the hearing, Deputy Chief Sletmoe was scheduled to leave the City and take a position in another jurisdiction. He has been replaced by Deputy Chief of Operations Bates. BC Fish was being promoted to the position of deputy chief of operations at the time of the hearing.

7. Deputy Chief Sletmoe is supported by Office Administrator Pam Webber and five office employees. Fire Marshal BC Kleinberg reports to the deputy chief of administration.

8. The City runs three 24-hour shifts. BC Goodson is responsible for A shift; BC Sawall is responsible for B shift; and BC Fish is responsible for C shift. BC McGowan is responsible for training and not responsible for a particular shift. The Shift BCs report to Deputy Chief Bates.

9. On their shifts, the shift BCs monitor and respond to calls and are responsible for assigning individuals to one of the five stations and to where they will work within the particular station. The City has set the number of employees to cover a station and shift. Both A shift and C shift are supported by 5 captains, 5 engineers, and 12 firefighters, and they report to the BC for the particular shift. B shift is supported by 5 captains, 5 engineers, and 11 firefighters.

10. Four fire inspectors report to BC Fire Marshal Kleinberg.

11. BC Fire Marshal Kleinberg and BC for Training McGowan work 40 hours per week. BC Goodson, BC Sawall, and BC Fish average 56 hours per week.

12. The captains are each responsible for an engine company (composed of the captain, fire engineer, and firefighters) and the fire station during the 24-hour shift. They are responsible for crew continuity and safety and support the career development of members of the crew. The captains also oversee the crew's training, and assist the BC in the evaluation of crew members. They are responsible for strategy and tactics of the emergency team, and for the maintenance of the fire and station equipment. The captains respond to public or customer complaints. Each captain is in close communication and coordination with the BC and the other captains.

13. Fire Inspectors I are responsible for performing code compliance inspections, fire cause and arson investigations, and safety education programs. Fire Inspectors II and III conduct code and ordinance inspection for educational, commercial, industrial, and residential properties; conduct fire inspections and cause determinations; conduct safety programs, classes, and demonstrations; and review fire and life safety plans for code compliance.

14. The BCs, firefighters, fire inspectors, fire captains, and fire engineers have very similar and comparable benefits under the City benefit plans and the collective bargaining agreement. They have similar skill sets, training background, and training requirements. Firefighters, engineers, and fire inspectors are eligible for promotion to captain. Captains are eligible for promotion to a BC position.

15. The BCs work together with many of the same occupational and professional duties, responsibilities, and objectives; they enjoy the same city employment benefits and salary schedules; they report to the same supervisors and have the same location in the chain of command; they possess the same skill sets and receive common training; they can transfer among themselves; and they have the same promotional opportunities.

Duties and Responsibilities: City "Rules and Regulations"

16. The City maintains "Rules and Regulations for Executive, Supervisory, and Confidential-Professional Employees." The most recent set is January 1, 2014, and covers nearly 80 executive, supervisory and confidential-professional classifications, including the fire chief, deputy fire chief, and fire battalion chief.

17. The Rules and Regulations are given to an individual when promoted to or made a BC. Elizabeth Simas, Human Resource Analyst, provides the executive, supervisory and professional employees with a copy of the Rules and Regulations and goes over the Rules and Regulations with the employees. Section 4 (Authority) of Article V (Discipline and Discharge) sets out provisions for authority to carry out discipline.

> "A. All Executive, Supervisory, and Professional personnel are empowered to give oral and written warnings, written reprimands, and suspensions, without pay for no more than five (5) work shifts, without higher level prior approval to their assigned subordinate personnel.[4]
>
> "B. Suspensions without pay of up to ten (10) work shifts may be given, without higher level prior approval, to subordinate personnel by Executive personnel. Personnel below this level may effectively recommend suspensions without pay of up to ten (10) work shifts.
>
> "C. The City Manager may give suspensions without pay for an appropriate duration. Executive personnel may effectively recommend suspensions without pay of more than ten (10) work shifts relative to their subordinate personnel.
>
> "D. Demotion and discharge actions are retained as a prerogative of the City Manager. However, all other Executive, Supervisory, and Confidential-Professional personnel may effectively recommend such discipline relative to their subordinate personnel." (Underline in original.)

18. Each executive, supervisory, and confidential-professional signs an "acknowledgement of receipt" that states:

> "This is to acknowledge that I have received a copy of the Rules and Regulations effective [date of signature].
>
> "These Rules and Regulations supersede all previous statements, memos, policies, and practices that are in conflict with their provisions.

[4]The language in Article V, Section 4(A), has been in the Rules and Regulations in this form since 1995. Notwithstanding the language of subsection (A), BCs cannot independently impose such economic discipline. Rather, the deputy chief and human resources department needed to vet any BC-imposed discipline.

"I understand these Rules and Regulations contain important information on the City's general personnel policies and rules and my privileges and obligations as an employee.

"I will familiarize myself with the materials in the Rules and Regulations and understand that I am governed by their contents.

"I further understand that the City may change, rescind, or add to any policies, benefits, or practices described in the Rules and Regulations with the notice prescribed in these Rules and applicable Medford Code provisions."

BC Goodson signed acknowledgements on August 21, 1995 and August 10, 1999; BC Kleinberg on August 2, 2010; BC Sawall on November 30, 2011; and BC McGowan on October 9, 2013. Former BC Fish signed on September 22, 1997, August 23, 1999, and July 22, 2010.

Duties and Responsibilities: Existing Job Descriptions

19. The job description for the Shift BC was most recently revised in September 2004. The typical essential duties specified in the 2004 job description, including their frequency, are as follows:

"1. Supervises lower level employees classified as Firefighter, Fire Engineer, and Fire Captain, to include: distributing work assignments; creating and maintaining shift rosters; providing guidance and training; conducting performance evaluations; and, scheduling staff related matters. [Daily 40%]

"2. Responds to emergency incidents, which includes: directing fire companies to mitigate the emergency; driving shift commander vehicle code III; operating shift command vehicle on scene; performing manual skills at emergency scenes; investigating or participating in the investigation of fire causes; directing the restoration of employees and equipment to ready status following emergencies; and, performing other related tasks. [Daily 10%]

"3. Ensures that fire companies are prepared to perform at emergency incidents by instructing, assigning instructors, and planning and scheduling training. [Daily 10%]

"4. Facilitates meetings with fire companies; attends staff meetings; participates in meetings with management and outside agencies. [Daily 10%]

"5. Oversees the care and maintenance of apparatus and equipment. [Daily 10%]

"6. Prepares a variety of reports, logs, and other related documentation. [Daily 5%]

"7. Plans and organizes specialized programs as assigned. [Daily 5%]

"8. Participates in assessment center evaluations; assists in the development of promotional materials and written examinations; may conduct background investigations. [Bi-Annually 5%]

"9. May participate in union negotiations, mediations, and/or arbitrations. [Varies 0-5%]

"10. Performs other duties of a similar nature or level. [As required.]."

20. The BC fire marshal is responsible for "enforcing the fire code, related enforcement programs, administering fire inspection programs, fire investigations, fire and life safety public education programs, and pre-construction plan reviews for code compliance." The BC fire marshal is also "responsible for employee training and development, performance evaluation and discipline, succession planning, and performing routine analysis of the [Fire Prevention] Bureau to insure operational efficiency." The October 2009 job description provides the following typical essential duties for the BC fire marshal as follows:

"1. Under the direct supervision of the Deputy Fire Chief, the Fire Marshal supervises and coordinates the fire prevention and inspection activities of the fire department, including fire and life safety prevention, inspections, and public education programs. [Daily 40%]

"2. Manages fire investigation activities, processes evidence, preparing routine incident and Bureau activity reports, and managing activities related to amending and adopting the fire code. Exercises considerable independent judgment in the management and operation of the Bureau. [Daily 10%]

"3. Responsible for the management of hazardous materials programs, fire cause and arson determination, testifying as an expert and legal witness in matters related to arson cause, and management of pre-construction plan checks for compliance with fire codes. [As Required 5%]

"4. Exercises direct supervision, trains, and evaluates assigned staff, prepares and administers a bi-annual budget, inspect buildings and facilities; assist in the development and implementation of policies, goals, objectives, and priorities; develops and implement procedures and practices for providing public fire and life safety education, coordinates the activities of the Bureau in accordance with department-wide policies and goals, makes presentations before the City Council, Board of Directors, meets with architects, engineers, contractors, consultants involved in development and

construction activities, coordinates line personnel inspections, and conducts field inspections of construction projects. [Daily 40%]

"5. Assist with labor/management relations activities, respond as a command officer to emergency incidents and is subject to emergency call when off duty. [As Required 5%]."

21. The BC for Training and Safety is responsible for managing the training for the emergency medical services program. The 2012 job description for the position lists the typical essential duties as follows:

"● Planning, organization, implementation, and evaluation of the Fire Department's training programs for all personnel including Operations, Fire and Life Safety, and Administration Divisions.

"● Development and oversight of the Fire Department's succession plan.

"● Administration of fire accreditation with Oregon Department of Public Safety Standards and Training (DPSST) and EMS certification with the Oregon Health Division.

"● Development and administration of the training department budget; oversees the maintenance and development of all training equipment and facilities.

"● Development of goals and objectives for the training and safety programs that are consistent with the organizational goals; routinely reports progress on those goals and objectives.

"● Oversight of hiring and promotions for the Fire Department, including coordinating with the Human Resources Department and background investigations for new hires.

"● Serves as the Fire Department Safety Officer including representing management on the Safety Committee and conducting injury / illness investigations.

"● Participation in local, regional, and state training activities and committees."

Disputed Changes to BC Job Descriptions (February-April 2014)

22. Senate Bill 1518 (SB 1518) was introduced in the 2014 legislative session.[5] As early as February 4, 2014, the City was actively engaged in opposition to passage of SB 1518, and

[5]"An Act Relating to supervisory employees under collective bargaining law; creating new provisions; amending ORS 243.650; and declaring an emergency."

closely monitored the process of SB 1518 at the legislature. SB 1518 passed the Senate on February 14 and the House on February 21. The Governor signed the bill on March 3, 2014. *See* Or Laws 2014, ch 15, § 1. There was coordination between the City and other Oregon cities and the Oregon Fire Chiefs Association (OFCA) to express opposition to SB 1518. After the bill's passage, there was coordination between the City, other cities, and the OFCA about how to respond to unit clarification cases before this Board.

23. Michael Snyder became the human resources director for the City in December 2013. Snyder became aware that the legislature was considering, and eventually passed, SB 1518. On February 24, 2014, Snyder made inquiries into the status of SB 1518, and on the morning of February 25, he was informed that the bill was awaiting the governor's signature. The legislative change in the definition of supervisory status as it would apply to the BCs contributed to his action in adjusting the job descriptions for the BCs. The City was concerned that the effect of the legislation would be to remove the BCs from management, and, as a result, Snyder proceeded to update the BCs' job descriptions.

24. On February 25, 2014, after receiving the update on SB 1518, Snyder e-mailed Deputy Chief Bates and Deputy Chief Sletmoe that he was "updating the managerial job descriptions to clarify responsibilities as they relate to discipline and collective bargaining." He asked them to review the three BC job descriptions and suggest anything that needed to be added or removed. Snyder modified the job descriptions by adding the following as a typical essential duty for the BCs:

> "*Assist with labor/management relations activities which include, but is not exclusive of:*
> "● *Exercising independent judgment to issue or recommend disciplinary action, to include the imposition of economic discipline;*
> "● *Participating in internal investigations of subordinates;*
> "● *Interpreting and administering the collective bargaining agreement;*
> "● *The formulation, determination and effectuation of management policies regarding collective bargaining*." (Underline omitted.)

25. At a command staff meeting held on March 3, 2014, the BCs first learned that the City intended to change their job descriptions.[6] The BCs were also told that Snyder would be meeting with them about the changes.

26. On March 7, 2014, Snyder e-mailed the BCs, informing them that he was working on a project to update the classifications throughout the City. He wanted the BCs to know that the process to review and revise their job descriptions and duties was proceeding quickly because the new legislation affected their supervisory status. The City was concerned that people would see the new legislation as removing the BCs from the City's management team. Accordingly, Snyder claimed to want to create "clarity" with respect to their duties and responsibilities by revising the job descriptions.[7]

---

[6]BC Goodson, however, learned that Snyder was working on the job descriptions on February 28, 2014, when Snyder contacted Goodson with a question about his current job description.

He explained to the BCs that their job descriptions

> "popped to the surface because of the need for the City to create clarity in light of a change that was being proposed in the Oregon Legislature.
>
> "Over the past several weeks, I have worked closely with the Deputy Chiefs to gather an understanding of the BC job duties and responsibilities. Based on this I have updated your job descriptions to make them current and create clarity with respect to your primary job duties and the level of responsibility as it relates to collective bargaining and disciplinary matters. The next step in this process is for me to get feedback from you regarding your specific job description before we finalize the document. I will be contacting you soon to discuss HR's work on your job descriptions and receive feedback. * * * I will be scheduling a meeting with each of you, while on shift, to have a personal discussion regarding the process and receive your feedback."

Snyder conceded in his e-mail to the BCs that "the Union disagrees with the City having contact with you. My contact with you on this issue is merely due to course of business and necessary for me to effectively continue the HR function for the City." He told the BCs that he was aware that they had all signed Union representation or authorization cards. He stated that there was no need for the BCs "to be put in the middle of the disagreement between the Union and the City regarding representation issues when we are discussing internal issues of this nature."

Snyder attached a copy of the job description that he had drafted to his e-mail. He asked the BCs to review the document so that he could gain their feedback when they met.

27. Snyder changed the typical essential duties for the Shift BC to read as follows:

> "1. Manages and supervises lower level employees classified as Firefighter, Fire Engineer, and Fire Captain, to include: distributing work assignments; creating and maintaining shift rosters; providing guidance and training; conducting performance evaluations; and, scheduling staff related matters;
>
> "2. Responds to emergency incidents, which includes: directing fire companies to mitigate the emergency; driving shift commander vehicle; operating shift command vehicle on scene; performing manual skills at emergency scenes; investigating or participating in the investigation of fire causes; directing the restoration of employees and equipment to ready status following emergencies; and, performing other related tasks;
>
> "3. Ensures that fire companies are prepared to perform at emergency incidents by instructing, assigning instructors, and planning and scheduling training;

[7]Snyder consistently employed the term "clarity" when describing the purpose of changing the BC job descriptions. Likewise, as discussed below, the City asserted at oral argument that the updated job descriptions were intended to "clarify" the longstanding authority of BCs.

"4. Facilitates meetings with fire companies; attends staff meetings; participates in meetings with management and outside agencies;

"5. Oversees the care and maintenance of apparatus and equipment;

"6. Prepares a variety of reports, logs, and other related documentation;

"7. Plans and organizes specialized programs as assigned;

"8. *Assist with labor/management relations activities which include, but is not exclusive of:*

- "● *Exercising independent judgment to issue or recommend disciplinary action, to include the imposition of economic discipline;*
- "● *Participating in internal investigations of subordinates;*
- "● *Interpreting and administering the collective bargaining agreement;*
- "● *The formulation, determination and effectuation of management policies regarding collective bargaining*;

"9. Participates in assessment center evaluations; assists in the development of promotional materials and written examinations; may conduct background investigations;

"10. Performs other duties of a similar nature or level." (Italics added.)

28. Snyder changed the list of typical essential duties for the BC for training and safety to read as follows:

"1. Planning, organization, implementation, and evaluation of the Fire Department training programs for all personnel including Operations, Fire and Life Safety, and Administration Divisions;

"2. Development and oversight of the Fire Department's succession plan including the development and monitoring of training programs for probationary Firefighters;

"3. Administration of fire accreditation with Oregon Department of Public Safety Standards and Training (DPSST) and EMS certification with the Oregon Health Division;

"4. Administration of fire accreditation with Oregon Department of Public Safety Standards and Training (DPSST) and EMS certification with the Oregon Health Division;

"5. The Battalion Chief-Training and Safety functions as a Department Duty Officer on a rotating basis and may function as a command officer at emergency scenes;

"6. Development of goals and objectives for the training and safety programs that are consistent with the organizational goals; routinely reports progress on those goals and objectives;

"7. Oversight of hiring and promotions for the Fire Department, including coordinating with the Human Resources Department and background investigations for new hires;

"8. Serves as the Fire Department Safety Officer including representing management on the Safety Committee and conducting injury / illness investigations;

"9. Participation in local, regional, and state training activities and committees;

"10. Will be responsible for Fire Battalion Chief shift duties as required;

"11. *Assist with labor/management relations activities which include, but is not exclusive of:*

- "● *Exercising independent judgment to issue or recommend disciplinary action, to include the imposition of economic discipline;*
- *"*● *Participating in internal investigations of subordinates;*
- *"*● *Interpreting and administering the collective bargaining agreement;*
- *"*● *The formulation, determination and effectuation of management policies regarding collective bargaining*;"

"12. Regular, reliable and punctual attendance." (Italics added.)

29. Snyder changed the list of typical essential duties for the BC fire marshal by inserting the following as a replacement for item 5:[8]

"5. *Assist with labor/management relations activities which include, but is not exclusive of:*

- "● *Exercising independent judgment to issue or recommend disciplinary action, to include the imposition of economic discipline;*
- "● *Participating in internal investigations of subordinates;*
- "● *Interpreting and administering the collective bargaining agreement;*
- "● *The formulation, determination and effectuation of management policies regarding collective bargaining*;" (*Id*. at 2; italics added.)

[8]See above, No. 5 in Findings of Fact 18.

30. On an unknown date, but probably in early March 2014, Snyder had a conversation about the process of changing the BC job descriptions with Bryan Baumgartner, president of the Union. However, shortly after that conversation, on March 4, 2014, Baumgartner informed Snyder in writing that the Union

> "has become aware of recent efforts by the League of Oregon Cities encouraging cities in the state of Oregon to modify fire department supervisory employee policy that may [a]ffect the current Battalion Chief job description. It appears this has been initiated since the recent passage of Senate Bill 1518[.] * * * We would point out that such a policy change is unnecessary and unwise from an operational point of view and would merely be a very transparent attempt to circumvent the implications of SB 1518."

Snyder and Baumgartner met later that same day. Snyder explained that since he was hired he had been reviewing all the City's human resources policies. He further explained that he had discussed the Union's organizing efforts with the city manager and that the City would be objecting to the Union's efforts to organize the BCs.

31. On March 6, 2014, Baumgartner informed Snyder that the Union had received five card-check authorization cards from the BCs, and that the Union would be filing a petition with this Board. Baumgartner stated that the Union considered it inappropriate for the City to discuss job duties and descriptions with the BCs. Snyder responded that the "City disagrees with the notion that the [BCs] are covered under the [Public Employee Collective Bargaining Act (PECBA)] and will continue business as usual in that regard." These same positions were reiterated by Baumgartner and Snyder on March 7.

BCs' Comments on Disputed New Job Descriptions

32. During the process of changing the BC job descriptions, Snyder met individually with each BC. Snyder met with Shift BC Goodson on March 11, 2014. Snyder told Goodson that he was pleased that the BCs "were all unified in the card count." Snyder explained that the job descriptions were being clarified. He also mentioned that the legislature had just changed the law concerning the BCs; that he did not agree with the new law; and that some of the changes in the job description were because of the new law. Goodson told Snyder that he has given oral and written reprimands but has never given any economic discipline. Snyder also brought up the issue of salary compression, and stated that the City had a solution in place for the problem. Snyder gave Goodson a copy of the proposed job description and asked for his comments.[9]

33. Snyder met with BC Fire Marshal Kleinberg on March 6, 2014. Snyder began by acknowledging the card check process being undertaken by the Union, and then added that the City was updating the BC job descriptions. Snyder gave Kleinberg a draft revision of the Fire Marshal BC job description and asked him to review it and get back to him with any issues.

[9]Salary compression developed when newly hired employees (firefighters) received a starting salary that was at or above the salary of more senior and superior incumbent employees (BCs).

On March 13, 2014, Kleinberg provided Snyder with a detailed response to the proposed job description. Kleinberg stated he was uncomfortable with some of the language, particularly with respect to disciplinary authority added by Snyder. Kleinberg wrote that

> "● I have been involved in giving oral and written reprimands, however, never imposed economic discipline and believe it would be at the level of Deputy Chief or above to make this decision and implement it. All disciplinary action is expected to have the authorization and direction of the Deputy Chief or above prior to taking action. Implementing disciplinary measures have never been an independent action.
> "● I have not been given the task of performing internal investigations. This has traditionally been directed at the level of the Deputy Chief or above having a 3rd party conduct it.
> "● I have not conducted formulation, determination, etc. of policies regarding collective bargaining. I have been asked for input and opinion, however I believe these have always been carried out by HR, the Fire Chief, and the Deputy Chiefs."

34. On March 7, 2014, Snyder met with Shift BC Sawall and advised him that a BC would be subject to corrective action, including possible discipline, for failing to impose discipline on another employee when the City considered discipline to be appropriate.

35. During their meetings with Snyder, the BCs emphasized to Snyder that they had never imposed economic discipline and considered it to be a bad idea to do so.

36. In March 2014, after meeting with Snyder, BC Fish, BC Sawall, and BC Goodson wrote to Snyder to say that they opposed being given authority and responsibility for imposing economic discipline. With respect to No. 3 (in Findings of Fact 27) concerning training, they pointed out that "[m]ost of the training is coordinated by the Training Chief and Training Committee. Battalion Chiefs do not assign instructors, plan or schedule that much training anymore. We facilitate and occasionally instruct training." With respect to the discipline provision, No. 8, they stated:

> "So much of our leadership is built on the ability to have casual/informal discussions with our shift members. Many of these conversations have led to corrections in actions way before any type of discipline was needed. There is a great amount of **Trust** built into our relationships making strong bonds. Having the ability to 'issue' disciplinary action which includes 'economic discipline' would erode much of what we have worked so hard to build up.
>
> "● We do not engage in economic discipline and we do not feel we should have to implement that level of discipline.
> "● We do not direct internal investigations; we may give input as directed by the Fire Chief or Deputy Chiefs.

"● We are not exactly sure what is meant by the [fourth] bullet point.[10] Collective bargaining is directed and led by the Human Resource Director at the discretion of the City Manager and the City Council. The Fire Chief gives direct input into the process. The Battalion Chiefs may submit suggestions to the Fire Chief."

Goodson also disagreed with Snyder's changes in the job description, which suggested that the BCs conduct assessment or examinations of employees or candidates. "The 'testing' and 'examination' activity," Goodson wrote, "has historically been conducted by the Training Division, with very minimal help/input from the [BCs] (with the exception of the Captain's Exam—have more involvement at this level). We have participated as facilitators in hiring and promotional processes."

37. Training BC McGowan met with Snyder in early March 2014, and very soon thereafter, he sent his comments and suggestions to Snyder. McGowan suggested changing No. 11, which concerned Snyder's proposed supervisory and confidential responsibilities. (See Findings of Fact 28.)

McGowan disagreed with Snyder's suggestion that the BCs can independently impose economic discipline. McGowan understood that recommendations would be made to a deputy chief or to the fire chief, and they would impose discipline if they agreed with the recommendation. It was not his understanding that BCs could ever independently impose economic discipline. He wrote to Snyder, "[l]ine Battalion Chiefs do not have the authority to implement economic discipline. We make recommendations to the Operations [Deputy] Chief for disciplinary purposes." Accordingly, he struck out the disputed line from Snyder's proposed changes: "~~Exercising independent judgment to issue or recommend disciplinary action, to include the imposition of economic discipline~~[.]" (Emphasis in original.)

McGowan also disagreed with the idea that BCs participated in the formulation of collective bargaining policies and strategies. He said, "I do not see this being a role of a Battalion Chief. I do not formulate Management Policies." He, therefore, struck out "~~The formulation, determination and effectuation of management policies regarding collective bargaining~~[.]" (Emphasis in original.)

38. The interim fire chief held a meeting with the BCs on March 17, 2014. Snyder, Pam Webber, the administrative assistant for the fire department, BC Goodson, and BC Sawall were physically in attendance. BC Kleinberg was present via cell phone connection because he was at a conference in Reno. BC Fish and BC McGowan were out of town and unable to participate.

Snyder explained that the City objected to the Union's petition, and that there would be a hearing. Snyder discussed how economic discipline would be administered by the BCs. The BCs expressed disagreement with Snyder's announcement. The City officials also discussed the salary compression, and that the City was opposed to a labor organization representing the BCs.

[10] "The formulation, determination and effectuation of management policies regarding collective bargaining."

39. During this period, perhaps in late March 2014, Deputy Chief Bates discussed Snyder's proposed job descriptions with Shift BC Fish. Fish suggested that the job description use only the term "recommend" in association with economic discipline, and remove the term "impose" as it applied to economic discipline. However, thereafter, on April 2, 2014, Bates sent an e-mail to Snyder, in which Bates stated that he believed that the job description "should keep both 'impose ***and*** recommend' discipline." (Bold and italics in original.)

40. On April 2, 2014, Snyder wrote to Deputy Chief Bates and BC Fish about the updated job descriptions. Snyder acknowledged that the BCs disagreed with the inclusion of the economic discipline language. However, he stated that it is clear that the City wants the BCs and the deputy chiefs to have that authority. Snyder also emphasized that

> "[t]he clear expectation here is that the BCs and [deputy chiefs] will **assist** in a confidential capacity to management staff and Human Resources in the formulation, determination and effectuation of management policies regarding collective bargaining (**assist** is the operative word here). The BCs, in particular, are important advisors when it comes to operational issues and administration of the contract." (Bold in original.)

41. On April 3, 2014, Snyder sent the final version of the job descriptions to the city manager for approval and enactment. The job descriptions were approved and became effective on April 3. The final version of the job description for the Shift BCs and the Training BC included the statements that the BCs

> "Exercise[ ] independent judgment to issue or recommend disciplinary action, to include the imposition of economic discipline.
>
> "Assist with labor/management relations activities which include, but is not exclusive of:
> "● Participating in internal investigations of subordinates;
> "● Interpreting and administering the collective bargaining agreement;
> "● Assisting in a confidential capacity to management staff and Human Resources in the formulation, determination and effectuation of management policies regarding collective bargaining."

The job description for the Fire Marshal BC stated that the incumbent "[e]xercises direct supervision over Fire & Life Safety Division staff, including:

> "○ Training;
> "○ Evaluation;
> "○ Exercising independent judgment to issue or recommend disciplinary action, to include the imposition of economic discipline;
> "○ Assignments."

As with the other two BC classifications, the Fire Marshal BC was also expected to "[a]ssist with labor/management relations activities which include, but is not exclusive of:

"● Participating in internal investigations of subordinates;
"● Interpreting and administering the collective bargaining agreement;
"● Assisting in a confidential capacity to management staff and Human Resources in the formulation, determination and effectuation of management policies regarding collective bargaining[.]"

42. The City did not give the newly approved job descriptions to the BCs. In fact, by the date of the hearing, the BCs still had not been given or seen copies of newly approved and changed job descriptions.

Exercise of Purported Supervisory and Confidential Responsibilities

43. There are five stations with five station captains. The BC is only at one station. As a result, the captains at the four stations without a BC act as a supervisor of their crews and stations. Each captain is responsible for ensuring that the station operates effectively and properly. The BC is the supervisor of the shift when the deputy chief of operations and the fire chief are not on duty, that is, during the evening and night hours. The BC is responsible for ensuring that the crews and stations on the assigned shift operate effectively and properly. During the evening, night, and weekend hours, there is always an on-call duty officer available for the BC to consult. One of the deputy chiefs, the fire chief, and the BC for training may serve as the duty officer. The fire chief, the chief of operations, and the training chief from the Douglas County fire department (Fire District 3) can also be available to serve as an on-call duty officer.[11]

Hiring and Promotions

44. The fire chief has the ultimate authority and responsibility for hiring and promotion decisions. However, the fire chief regularly asks BCs for recommendations or assessments when the City considers hiring new firefighters or when promoting firefighters. BC recommendations, which are one of many, are followed a majority of the time. Recommendations are also solicited from captains and engineers when the chief is considering certain promotions. BC Fire Marshal Kleinberg, Training BC McGowan, and Shift BCs Goodson and Fish have never made the decision to hire a firefighter or other employee.[12]

45. The BCs routinely have been asked to participate in the hiring assessment process for applicants and new employees. The hiring process is generally conducted or managed by the training division, under the direction of the Training BC. The department has developed and followed a practice that aims to include many levels of personnel in the hiring process. Bargaining unit employees, such as firefighters, and non-firefighting personnel may also participate in the assessment process and make recommendations on applicants or candidates. Based on examinations and interviews, the total applicant pool is reduced to a handful of candidates. This

[11]The current interim fire chief does not serve as a duty officer because he is a civilian with minimal fire service experience. However, when a regular fire chief holds the position, the incumbent would normally serve as on-call duty officer.

[12]Shift BC Sawall did not testify at the hearing.

smaller pool of candidates, most recently seven applicants, is forwarded for interviews that are usually conducted by the fire chief and the deputy chiefs. The fire chief makes the final decision and offer of employment to an applicant.

In the most recent hiring round, the interim fire chief wanted a backup pool of candidates to consider. He instructed three BCs to interview the next eight candidates, who were all very close in scores and ranking, and then recommend two to four finalists to be forwarded for consideration by the interim chief. The BCs narrowed the eight applicants to five finalists, and forwarded their names to the interim chief for consideration.

46. A process similar to the hiring process is conducted for the promotion of employees, except that firefighters will not participate in the assessment process where firefighters will be applying for promotion to engineer or captain. Similarly, captains will not serve on the assessment process where captains are seeking promotion to a BC position. The chief follows the recommendations for promotions a majority of the time.

Disciplinary Action

47. The current BCs have not independently imposed economic discipline. Even under the job descriptions approved and enacted on April 3, 2014, BCs would not independently impose or administer economic discipline without some involvement of others such as the human resources department, fire chief, or deputy chiefs. It would be incumbent upon a BC to consult with the human resources department, the appropriate deputy chief, and even the fire chief.

48. BC Fire Marshal Kleinberg has never independently imposed a termination, suspension, or other economic discipline. Those decisions have been made by the deputy chief and the fire chief.

On one occasion in 2009, a fire inspector failed to complete fire investigation reports. BC Kleinberg gave the fire inspector oral and written reprimands. Kleinberg, however, consulted closely with the deputy chief concerning the reprimands. The deputy chief gave approval for the reprimands, and was even consulted over and approved the language of the written reprimand. When the fire inspector failed to complete the reports, Kleinberg recommended to the deputy chief that the inspector be given a one-day suspension without pay. The deputy chief, who was kept fully informed of the employees' performance and the prior disciplinary actions, accepted the recommendation. The deputy chief suspended the fire inspector.

A second fire inspector was suspended and terminated in 2009, but that case was handled completely by the deputy chief, and did not involve Kleinberg's input, recommendation, or participation.

49. As a BC, Fish believed that he had the authority to issue a written reprimand to a subordinate, but never did so. He did not believe that he had authority to independently suspend or terminate an employee.

50. BC McGowan has never made the decision to suspend or discharge an employee. He believes that the fire chief makes those decisions.

51. BC Goodson has never independently imposed economic discipline. Based on more than 18 years as a BC, Goodson is aware of two employees being given one-day suspensions without pay and two employees being terminated. In one suspension case, Goodson discovered that the employee had inappropriately called in sick. Goodson reported it to his supervisor, the deputy chief for operations, who took the matter to the fire chief. After consultation with the human resources department, the fire chief and deputy chief decided to suspend the employee for one day without pay. The fire chief called in the employee; Goodson, the deputy chief, and the president of the Union were also present when the chief gave the employee his suspension. The other suspension involved an employee on another shift, and did not involve Goodson in any way.

Both terminations involved employees on Goodson's shift. Both employees failed to pass their probationary period. Both Goodson and the Training BC made recommendations to the operations chief,[13] who made a further recommendation to the fire chief. The fire chief terminated the individuals. One termination occurred in the 1990s and the other occurred in either 2007 or 2008.

BC Participation in Prior Labor Negotiations

52. BC Fish is listed as having been a member of the City's bargaining team during negotiations in 2001 and 2011.[14] BC Bennett and BC Fish are listed as having served on the City's bargaining team during negotiations in 2008.[15] None of the BCs served on the City's bargaining team during negotiations for the 2013-2016 collective bargaining agreement, which is the most recent contract.

53. The City has occasionally asked the BCs for their comments or input on certain issues at bargaining. During bargaining for the 2013-2016 collective bargaining agreement, the City was discussing guidelines concerning the granting of vacations and staffing with the Union. As a result, the City discussed the vacation proposal with command staff personnel, including some of the BCs. The City asked the BCs for their opinion or input on the proposed vacation scheduling and its possible implementation.

[13]In the 1990s, the City did not have deputy chief classifications. Instead, one of the BCs was designated as an operations chief. Later, the City established deputy chief positions as have been described in Findings of Fact 5-7.

[14]The other members listed for the 2011 City bargaining team included the director of human resources (as lead negotiator), Deputy Chief Kurt Bennett, and a representative from both the finance department and the human resources department.

[15]The other members listed for the 2008 City bargaining team included the director of human resources (as lead negotiator), the City's outside labor attorney, and representatives from the finance and the human resources departments. BC Kurt Bennett appears to have served on the City's bargaining team in the 1990s when he was chief of operations.

## CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of these petitions.

2. In Case No. CC-002-14, the BCs are not supervisory employees.

## DISCUSSION

### Legal Context

During the 2014 legislative session, SB 1518 amended ORS 243.650(23) to read, in relevant part, as follows:

> "'Supervisory employee' means any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection therewith, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment. * * * Notwithstanding the provision of this subsection, 'supervisory employee' does not include:
>
> (a) * * *
>
> (b) A firefighter prohibited from striking by ORS 243.736 who assigns, transfers or directs the work of other employees but does not have the authority to hire, discharge or impose economic discipline on those employees." Or Laws 2014, ch 15, § 1 (23).

Sections §§ 2 and 3 of SB 1518 state:

> "SECTION 2. The amendments to ORS 243.650 by section 1 of this 2014 Act apply only to collective bargaining agreements executed on or after the effective date of this 2014 Act.
>
> "SECTION 3. This 2014 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2014 Act takes effect on its passage."[16]

The effective date of the amendments is March 3, 2014.

Initially, we must decide how Sections 2 and 3 of the Act apply to this petition. Section 3 is an emergency clause that establishes March 3, 2014, as the effective date of the statutory amendments. Section 2, however, states that the statutory amendments apply only to collective bargaining agreements executed on or after March 3, 2014.

The employees seeking representation in this petition are not members of any other existing bargaining unit. Rather, they seek to create a stand-alone bargaining unit of BCs, for whom a

[16]Only the definition of "supervisory employee" was amended.

collective bargaining agreement does not exist. If we grant this petition, any collective bargaining agreement on behalf of these employees would necessarily be executed after March 3, 2014. Therefore, Section 2 of the Act does not bar applying the statutory amendments to the employees in this petition.

Next, we must determine whether these BCs are supervisors under the revised definition of "supervisory employee," which states that "'supervisory employee' does not include * * * [a] firefighter prohibited from striking by ORS 243.736 who assigns, transfers or directs the work of other employees but does not have the authority to hire, discharge or impose economic discipline on those employees." ORS 243.650(23)(b). The parties agree that, under this statute, the dispositive issues are whether the petitioned-for BCs "have the authority to hire, discharge or impose economic discipline." The City contends that the BCs have always possessed this authority and that the recent position descriptions merely "clarified" that longstanding authority. For the following reasons, we disagree with the City's contention.

Hiring

We first address whether, as the City contends, the BCs have long had the authority to hire employees. The record establishes that the BCs participation in hiring has mostly consisted of being on interview panels, along with other non-bargaining unit and bargaining unit employees. The record does not establish that these interview panels possess the authority to hire employees. To the contrary, the fire chief has the sole authority and responsibility for making the decision to hire a firefighter. Moreover, this Board has consistently said that participation as a member of a hiring panel, when the employee's individual vote carries the same weight as other members of the panel, does not establish that a potential supervisor has the authority to hire employees. *See City of Portland v. Portland Police Commanding Officers Association*, Case No. UC-017-13, 25 PECBR 996 (2014) (citing *City of Union v. Laborers' International Union of North America, Local 121*, Case No. UC-9-08, 22 PECBR 872, 887 (2008)). Where, as here, the fire chief holds complete sovereignty over hiring of employees, the participation of the BCs and others on the City's hiring panels is insufficient to establish hiring authority. *See Tualatin Police Officers Association v. City of Tualatin*, Case No. UC-61-89, 12 PECBR 413, 422 (1990) ("the direct and substantial involvement of higher authority usually precludes an accurate assessment of the subordinate's role and reflects * * * the retention of authority by management, rather than its delegation to a lower level.").

Discharge and Economic Discipline

We next examine whether the BCs have historically possessed the authority to discharge or impose economic discipline. On this record, we conclude that, although the BCs have issued oral and written warnings, they have not independently imposed economic discipline or discharged anyone. Specifically, although a BC (along with captains and others) may initiate a disciplinary process, the deputy chief or fire chief would independently determine culpability, as well as the type and severity of discipline. Moreover, even when a BC has issued a written warning, it was done in consultation with and sanctioning by a deputy chief. Over the last 10 years, the City has terminated two firefighters and suspended two firefighters with loss of pay. The decision to terminate the firefighters was made by the fire chief, not a BC. Although the fire chief's decision

took into account the Training BC's recommendation because the issue concerned employees who failed the training academy and probation, the record does not establish that the Training BC had the authority to discharge those employees. Likewise, the decisions to suspend the two employees were made by the deputy chief and fire chief, not a BC. Based on the record before us, we find that the BCs have not historically possessed the authority to impose economic discipline or terminate employees.

In sum, we disagree with the City's assertion that the BCs have had longstanding authority to hire, discharge and impose economic discipline on employees. Because, as argued by the City at oral argument, the April 2013 changes to the BCs' job descriptions were merely meant to clarify, rather than substantively change the BCs' authority to hire, discharge and impose economic discipline, it follows that the BCs still lack such authority. Consequently, we conclude that this record does not establish that the BCs are supervisory employees within the meaning of ORS 243.650(23)(b).

3. In Case No. CC-002-14, the BCs are not confidential employees.

The City also asserts that all five BCs are confidential employees under the PECBA. ORS 243.650(6) provides that a "'[c]onfidential employee' means one who assists and acts in a confidential capacity to a person who formulates, determines and effectuates management policies in the area of collective bargaining." Under ORS 243.650(19), a confidential employee is not a public employee and, therefore, may not be included in a bargaining unit.

In determining whether an individual is a confidential employee, we apply a three-part test, each part of which must be satisfied: (1) Does the purportedly confidential employee provide assistance to an individual who actually formulates, determines, and effectuates management policies in the area of collective bargaining? (2) Does the assistance relate to collective bargaining negotiations and administration of a collective bargaining agreement? (3) Is it reasonably necessary for the employee to be designated as confidential in order to provide protection against the premature disclosure of management's collective bargaining policies, proposals, and strategies? *IAFF Local 851 v. Lane Rural Fire/Rescue*, Case No. RC-7-03, 20 PECBR 512, 521 (2003); *AFSCME, Council 75 v. Illinois Valley Fire District*, Case No. RC-38-97, 17 PECBR 493, 498 (1998). To be a "confidential employee" within the meaning of ORS 243.650(6), the employee(s) at issue must *currently* act in a confidential capacity. *See*, *e.g.*, *IBEW, Local Union No. 659 v. City of Canyonville*, Case No. UC-15-10, 23 PECBR 962, 968 (2010). Finally, the confidential assistance contemplated by the statute is narrow and determined by an employee's direct and specific involvement in collective bargaining matters. *Oregon Public Employes Union, Local 503, SEIU, AFL-CIO, CLC v. City of Beaverton*, Case No. UC-54-86, 10 PECBR 25, 31 (1987). With those standards in mind, we turn to whether the BCs are confidential employees.[17]

[17]As noted above, the City acknowledged at oral argument that the revised job descriptions clarified, rather than substantively changed, the BCs' duties. Thus, our analysis of whether the BCs are confidential employees does not turn on whether those clarifying documents are sufficient to establish confidential-employee status. Rather, our analysis focuses on whether the BCs have acted and continue to act as confidential employees.

Our "first inquiry is whether the manager or supervisor in question 'formulates, determines and effectuates' employer policies in the area of collective bargaining. A finding of confidential status requires a showing of confidential assistance to one who performs all three functions; i.e., formulates, determines, *and* effectuates employer policies in the area of collective bargaining." *AFSCME Local 1724, Council 75, AFL-CIO v. City of Eugene*, Case No. UC-10-85, 9 PECBR 8591, 8599 (1986) (emphasis in original).

Although "confidential" employees are typically clerical employees who assist a manager or supervisor, the City argues that the "confidential" status applies to the BCs. The BCs are supervised by, or work under, two deputy chiefs and the fire chief. The record does not establish that the deputy chiefs or fire chief formulate, determine, and effectuate the City's policies in the area of collective bargaining. Instead, we are asked to conclude that the BCs currently provide the director of human resources (who does formulate, determine and effectuate City policies in the area of collective bargaining) with confidential assistance in all three of those areas. The best evidence of such authority consists of the previous director of human resources asking the BCs for their input on a vacation proposal during the City's and the Union's bargaining over their most recent contract. The record does not establish, however, that the BCs provided confidential assistance to the human resources director. Specifically, the BCs provided their opinions on the proposed vacation schedule, particularly on how it could be implemented given the staffing needs. The information that they provided was not possessed only by the BCs and the record does not establish that the feedback provided by the BCs was (or was intended to be) confidential. *See Oregon AFSCME, Council 75 v. Eastern Oregon Correctional Institution*, Case No. UC-76-87, 10 PECBR 820, 828-29 (1988) (merely providing input to a manager on collective bargaining matters does not amount to confidential assistance); *City of Eugene*, 9 PECBR at 8601 (mere access to information regarding labor negotiations does not establish confidential assistance). Moreover, that isolated past request for input on a vacation proposal request does not establish that the BCs currently provide confidential assistance to the director of human resources. Under these circumstances, we do not conclude that the BCs are confidential employees under ORS 243.650(6).

As set forth above, the second and third elements of our confidential-employee test require that the first element be satisfied. Because that first element has not been satisfied on this record, the BCs are not confidential employees.

Even if we assumed, however, that the BCs currently provide confidential assistance to the human resources director, we would still conclude that the BCs are not confidential employees under the other two elements. As set forth above, the second element requires that the confidential assistance concerns collective bargaining. *See Lane Rural Fire/Rescue*, 20 PECBR at 521. To be sure, the "vacation-proposal" incident cited above concerned collective bargaining. The City also asserts that a prior BC sat with the City's bargaining team during a prior episode of contract negotiations.

None of the BCs, however, sat with the City's bargaining team during the parties' 2013-2016 contract negotiations. As previously explained, the statute requires that a confidential employee *currently* act in a confidential capacity. The isolated past example cited by the City does not satisfy that requirement, particularly when the more recent history indicates otherwise.

Moreover, the presence of *one* BC sitting with the City's bargaining team during past collective bargaining does not establish that *all* of the BCs *currently* perform that function.

With respect to the human resources director seeking input from BCs on a vacation proposal during the negotiations for the 2013-16 collective bargaining agreement, we have concluded in other similar situations that merely providing input is insufficient to consider such employees as confidential. *See Eastern Oregon Correctional Institution*, 10 PECBR at 828-29; *City of Beaverton* 10 PECBR at 30-32; *City of Eugene*, 9 PECBR at 8600.

The third element of our confidential-employee test is also not satisfied. Under the third element, we ask whether it is reasonably *necessary* for the employee to be designated as confidential in order to provide protection against the premature disclosure of management's collective bargaining policies, proposals, and strategies. *Lane Rural Fire/Rescue*, 20 PECBR at 521. In making that determination, we seek to avoid the proliferation of confidential employees. *City of Beaverton*, 10 PECBR at 31. Thus, the mere fact that management finds it more convenient to utilize an employee for confidential aid or assistance will not justify undue proliferation of confidential employee status. *Id.*

The City seeks to have all five BCs designated as confidential employees. That amounts to the entire unit sought in Case No. CC-002-14. However, the City does not suggest any specific rationale for the *necessity* of such an arrangement, other than an implied convenience. The City's position could lead to an unacceptable result; that is, an employer could effectively vitiate the existence of a bargaining unit and negate bargaining rights under the PECBA by bestowing confidential status on an excessive number of bargaining unit employees; and this could be accomplished by merely soliciting the employees' input or comments on bargaining proposals. Again, even assuming that the BCs are currently providing confidential assistance to the City concerning collective bargaining, the record does not establish that such assistance by all five BCs is reasonably necessary. Although it might be more convenient to have all five BCs provide confidential assistance to bargaining, we find no compelling reason for doing so in this case. We adhere to a long established policy that an employer cannot justify proliferation of confidential employees solely on the ground "that it is convenient" to have a larger number of employees provide assistance. *Rogue Community College,* 5 PECBR at 4130; also see *Baker School District 5J*, 5 PECBR at 2935 (the employer's convenience alone is insufficient to exclude support services secretary). We also have not been inclined to find confidential status where the amount or extent of assistance provided was insignificant, as is the instant case with a BC providing an opinion on a proposed vacation schedule. *AFSCME Local Union No. 2746 v. Clatsop County*, Case No. UC-4-93, 14 PECBR 434, 438-39 (1993) (assistant provided minimal amount of work toward collective bargaining process); *Pendleton School District 16R v. Oregon School Employees Association*, Chapter 115, Case Nos. C-208/218-83, 7 PECBR 6435 (1984) (employee involvement in bargaining matters was *de minimis*).

Finally, any assistance, or input, that the City might seek from the BCs can easily be obtained from the deputy chiefs and fire chief. *See City of Beaverton*, 10 PECBR at 33 (it was not reasonably necessary for employee to be designated as confidential when the information sought from that employee could have been obtained by currently excluded confidential employees). Accordingly, we conclude that it is not reasonably necessary for the BCs to be designated as

confidential in order to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies. *Oregon Cascades West Council of Governments*, 20 PECBR at 794-95.

In sum, we conclude that, on this record, the petitioned-for BCs are not confidential employees. Therefore, we decline the City's request to exclude them from the petitioned-for unit.

4. A bargaining unit of all regular employees of the Medford Fire Department in the Fire Battalion Chief classifications, including Fire Battalion Chiefs, Fire Battalion/Fire Marshal, and Fire Battalion Chief of Training and Safety; excluding all Firefighter, Fire Inspector, Fire Engineer, and Fire Captain classifications, supervisors, confidential and temporary employees, as petitioned for in Case No. CC-002-14, is an appropriate bargaining unit.

In Case No. CC-002-14, the Union seeks certification by means of the card check procedure to represent a bargaining unit of only BCs. The City initially objected that a unit of only BCs was not appropriate, but the recommended order concluded otherwise, and the City did not object to that conclusion.[18] For the following reasons, we agree with the recommended order that the petitioned-for unit is *an* appropriate unit.

The card check procedure is set out in ORS 243.682(2)(a), which provides, in pertinent part, that

> "when an employee, group of employees or labor organization acting on behalf of the employees files a petition alleging that a majority of employees in a unit appropriate for the purpose of collective bargaining wish to be represented by a labor organization for that purpose, the board shall investigate the petition. If the board finds that a majority of the employees in a unit appropriate for bargaining have signed authorizations designating the labor organization specified in the petition as the employees' bargaining representative * * * the board may not conduct an election but shall certify the labor organization as the exclusive representative[.]"

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 *Oregon AFSCME Council 75 v. Washington County*, Case No. CC-008-12, 25 PECBR 466, 473 (2013); *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. *Washington County*, 25 PECBR at 473; *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; *U of O*, 92 Or App at 617-18; *Washington*

[18]The City has, consequently, waived and failed to preserve any objection to the appropriateness of the BC-only unit.

*County*, 25 PECBR at 473. 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; *Washington County*, 25 PECBR at 474. With those factors in mind, we turn to the appropriateness of the proposed unit.

We first address the "community of interest" of the proposed BC unit. The term "community of interest" includes such factors as "similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, [and] common supervisor[s]." OAR-115-025-0050(2); *see also Washington County*, 25 PECBR at 474. Here, although each BC may have slightly different duties, they work together with similar occupational and professional duties, responsibilities, and objectives; they report to the same supervisors and have the same location in the chain of command; they possess the same skill sets and receive common training; they can transfer among themselves; and they have the same promotional opportunities. Thus, the petitioned-for employees share a very strong community of interest. Likewise, the BCs largely share the same employment benefits, salary schedules, and other working conditions, another significant indicator that the petitioned-for unit is an appropriate unit.

Because the BCs were supervisory employees under the old statutory regime, they have no history of collective bargaining as a group. The City has a history of collective bargaining with different labor organizations, including a unit of firefighters.

The BCs have presented a showing of interest demonstrating that the BCs wish to be represented in a new unit consisting only of BCs.

Despite the substantial indicia that the petitioned-for unit is appropriate, the City has argued that we should find the unit inappropriate because it goes against our preference for certifying the largest possible bargaining unit. We have explained, however, that this preference should not be applied too rigidly and is but one factor among many that we consider. *See Washington County*, *Id.* at 475-76.

Here, we find that the overwhelming weight of the factors establish that the petitioned-for unit is *an* appropriate unit. Moreover, because of section 2 of SB 1518, it may well be that a unit of only BCs is, for the time being, the largest appropriate unit. In any event, we conclude that, under the circumstances of this case, the BCs shared community of interest, wages, hours, and other working conditions, and the shared desired of the BCs should be given the greatest weight. *See OPEU*, 173 Or App at 436 (we have discretion to decide how much weight to give each relevant factor in any particular case); *U of O*, 92 Or App at 617-18 (same); *Washington County*, 25 PECBR at 473 (same). After weighing all of the factors, we conclude that the petitioned-for unit is appropriate, even though other units may also be appropriate. *See* ORS 243.682(1)(a); *OPEU*, 173 Or App at 436.

## ORDER

1. Case No. CU-003-14 and Case No. CC-002-14 are herein consolidated for purposes of this Order.

2. With respect to Case No. CC-002-14, the battalion chiefs are not supervisory employees under ORS 243.650(23)(b) or confidential employees under ORS 243.650(6).

3. The unit proposed by Petitioners in Case No. CC-002-14 is an appropriate bargaining unit. This bargaining unit includes:

> All regular employees of the Medford Fire Department in the Fire Battalion Chief classifications, including Fire Battalion Chiefs, Fire Battalion/Fire Marshal, and Fire Battalion Chief of Training and Safety; excluding all Firefighter, Fire Inspector, Fire Engineer, and Fire Captain classifications, supervisors, confidential and temporary employees.

5. The Elections Coordinator shall check the showing of interest against the original list of employees provided by the City. If it is determined that a majority of the employees in the designated bargaining unit wish to be represented by the Union for purposes of collective bargaining, this Board shall certify the Union as the exclusive representative of the bargaining unit.

6. The petition in Case No. CU-003-14 is dismissed.

Dated this 18 day of December, 2014.

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-001-13

(UNFAIR LABOR PRACTICE)

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

On October 2, 2014, the Board heard oral arguments on objections filed by the Amalgamated Transit Union, Division 757 (ATU), to a recommended order issued by Administrative Law Judge (ALJ) Larry L. Witherell on June 18, 2014.[1]

[1]A hearing was held before ALJ Wendy L. Greenwald on August 7 and 8, and October 8, 2013, in Portland, Oregon. The record closed on February 11, 2014, following receipt of the parties' post-hearing briefs. The filing of the briefs in this matter was delayed after a problem was discovered with the hearing recordings. Transcripts of the three days of hearing were ultimately produced in early February 2014. In a periodic reassignment of cases due to workload adjustment, this matter was transferred to ALJ Witherell for the issuance of the recommended order.

Aruna A. Masih, Attorney at Law, Bennett, Hartman, Morris & Kaplan LLP, Portland, Oregon, represented the Amalgamated Transit Union, Division 757.

Shelley Devine, Attorney at Law, Tri-County Metropolitan Transportation District of Oregon, Portland, Oregon, and Keith Garza, Attorney at Law, The Law Office of Keith Garza, Oak Grove, Oregon, represented the Tri-County Metropolitan Transportation District of Oregon.

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On January 3, 2013, the Tri-County Metropolitan Transportation District of Oregon (TriMet) filed an unfair labor practice complaint against ATU. The complaint, as amended on May 30 and June 6, 2013, alleges that ATU: (1) failed to bargain in good faith with TriMet in violation of ORS 243.672(2)(b) by refusing to meet with TriMet on agreed-upon bargaining dates; and (2) refused to bargain in good faith with TriMet in violation of ORS 243.672(2)(b) by engaging in dilatory tactics or practices designed to delay the start of bargaining.[2] ATU filed timely answers to the original and amended complaints.

On June 24, 2013, ATU filed a counterclaim alleging that TriMet refused to bargain in good faith under ORS 243.672(1)(e) based on a series of alleged actions.[3] TriMet filed a timely answer to the counterclaim, which set out a number of affirmative defenses, including an affirmative defense that some of the claims were untimely under ORS 243.672(3).

As agreed to by the parties, the issues are:

1. After demanding to bargain in September 2012, did ATU engage in a series of dilatory tactics or practices designed to delay the start of collective bargaining? If so, did this amount to refusal to bargain collectively in good faith with TriMet in violation of ORS 243.672(2)(b)?

2. After demanding to bargain a new contract in September 2012, did ATU agree to bargaining dates, and then refuse to meet with TriMet to collectively bargain on any of those agreed dates? If so, did this amount to a refusal to bargain collectively in good faith with TriMet in violation of ORS 243.672(2)(b)?

3. If ATU violated ORS 243.672(2)(b), what is the appropriate remedy?

4. Did TriMet refuse to bargain in good faith in violation of ORS 243.672(1)(e) by:

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[2]TriMet originally alleged that ATU violated ORS 243.672(2)(c) by engaging in tactics and practices designed to delay the start of the 150-day bargaining period under ORS 243.712. However, TriMet subsequently withdrew the claim and we are not considering it.

[3]ATU also originally alleged that TriMet failed or refused to provide ATU with requested health insurance information in violation of ORS 243.672(1)(e). However, ATU withdrew this claim prior to the hearing.

a) conditioning bargaining on scheduling bargaining sessions after first receiving and reviewing ATU's proposals, on ATU agreeing to sessions closed to the public, limited access to certain members of the media, or on locations with security checks and security checks by TriMet's security personnel;

b) taking inconsistent positions about its bargaining team's authority or intent to enter into or recommend tentative agreements;

c) providing ATU an unsatisfactory caucus room on April 27, only one copy of its proposal, no access to a copy machine, and abruptly and prematurely ending that meeting;

d) providing only one date for bargaining in May and June (and then withdrawing that date) and proposing dates in July that ATU had already rejected; or

e) offering no dates between July 22 and September 7, 2013?

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

For the reasons discussed below, we dismiss TriMet's amended complaint and ATU's counterclaims.

## RULINGS

The rulings of the ALJ were reviewed and are correct.

## FINDINGS OF FACT

1. ATU is a labor organization and the exclusive representative of a strike-prohibited bargaining unit of employees at TriMet, a public employer.

2. During the relevant time and events, or where otherwise specified, Neil McFarlane was the TriMet General Manager, and the following individuals served on TriMet's bargaining team:

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| Dan Caufield | Director of Operations Support |
| Shelly Lomax | Executive Director of Operations |
| Evelyn Minor-Lawrence | Labor Relations Director |
| Tom Nielsen | Maintenance Director |
| Claire Potter | Director of Finance |
| Lucy Shipley | Director Compensation, Benefits, HRIS |
| Randy Stedman | Executive Director of Human Resources and Labor Relations (since November 2011) |
| Cynthia Wegesend | Legal Analyst and Notetaker for TriMet Bargaining Team |

3. During the relevant time and events, or where otherwise specified, the following individuals represented ATU:

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| Bruce Hansen | ATU President-Business Representative (since July 1, 2012) |
| Ron Heintzman | Consultant for ATU and former ATU officer |
| Jon Hunt | ATU Vice-President/Assistant Representative (ATU President until July 1, 2012) |
| Susan Stoner | ATU General Counsel and Notetaker for ATU Bargaining team |

4. TriMet and ATU were parties to a collective bargaining agreement effective from December 1, 2003 to November 30, 2009 (2003-09 Agreement). The negotiations for the 2003-09 Agreement and the successor to the 2003-09 Agreement took place at local hotels. These negotiations were closed to the media and public.

5. The negotiations for a successor to the 2003-09 Agreement were contentious and resulted in a number of unfair labor practice complaints.[4] Both parties issued press releases during the bargaining process that resulted in a certain amount of press coverage. Some of TriMet's press releases outlined its perspective on how employee benefits were too expensive, which factored into TriMet's need to cut public services. Some ATU members, including Bruce Hansen, who at that time was an operator, experienced an increase in negative comments from the public about employee wages and benefits.

6. The parties were unable to reach an agreement on a successor to the 2003-09 Agreement and proceeded to interest arbitration before Arbitrator David Gaba. During the interest arbitration hearing, TriMet offered numerous newspaper articles, press releases and letters to the editor concerning TriMet's budget problems as evidence in support of its last best offer (LBO). On July 12, 2012, Arbitrator Gaba awarded TriMet's LBO as the parties' successor agreement (2009-12 Agreement or Gaba Award). The Gaba Award designated November 30, 2012, as the expiration date for the 2009-12 Agreement. After the arbitrator issued his interest arbitration award, the parties filed unfair labor practice complaints regarding TriMet's LBO and the implementation of the Gaba Award.[5]

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[4] *See*, *e.g.*, *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), *compliance order,* 24 PECBR 602*, nunc pro tunc order,* 24 PECBR 610 (2012) (new issues in final offer); *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, UP-56-09, 25 PECBR 152 (2012) (information request); *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-39-10, 25 PECBR 325 (2012) (cost of living, health care plan, and health care premium status quo issues).

[5] *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757 and Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case Nos. UP-42/50-12, 25 PECBR 640 (2013)(interest arbitration issues).

7. On June 16, 2012, Bruce Hansen was elected ATU President-Business Representative. His term commenced on July 1, 2012. Hansen had been a member of the ATU executive board from 2007 to 2009.

8. On September 25, 2012, Hansen wrote to TriMet General Manager Neil McFarlane seeking to reopen negotiations over terms of a new agreement. Executive Director of Human Resources and Labor Relations Randy Stedman answered on September 27, proposing that the parties meet for an initial bargaining session on October 30, 2012. Stedman added that due to budgetary issues, TriMet was not willing to incur costs to rent space to conduct negotiations. He also provided a list of TriMet's eight-person bargaining team.

9. On October 9, 2012, Hansen responded, offering November 30, December 19, 20, and 21 as dates for an initial bargaining meeting. On October 16, on behalf of Stedman, Director of Labor Relations Evelyn Minor-Lawrence responded to Hansen and accepted November 30 for an initial meeting.

10. On October 26, 2012, Stedman wrote Hansen to confirm the meeting on November 30, at 9:00 a.m. to 1:00 p.m. at the State Office Building on NE Oregon in Portland. Stedman offered additional meetings on December 20 and 21. On October 29, 2012, Hansen responded, confirming negotiations on those dates, but asking TriMet to notify him if the location for negotiations changed.

11. ATU was concerned that the upcoming negotiations for a successor contract would be difficult. Based on information that ATU had received from its members and outside sources, ATU believed that Stedman, who was hired in November of 2011, was anti-union. ATU was also troubled by a financial plan timeline that it asserted Stedman had created.[6] Although bargaining had not yet started, the document projected that an interest arbitration decision was possible in October 2013. Due to these and other concerns, Hansen sent out a letter to members of the TriMet bargaining unit on November 6, 2012, warning that bargaining was likely to be difficult and asking the members "to approve a temporary, 12-month dues increase of $25 per month for full time members and $15 per month for part time members." ATU intended to create a "war chest" with the additional funds to "[l]aunch a public relations campaign to educate the public about the truth of TriMet management," and "[h]ire the experts and legal help needed to win the fight."

12. During bargaining for previous contracts, ATU officials and members came to believe that TriMet issued a number of misleading press releases regarding the negotiations. ATU officials and members believed that TriMet's press releases falsely portrayed ATU and its members as greedy and recipients of overly generous benefits. As early as the summer of 2012, ATU representatives became interested in bargaining in public. ATU members also had expressed their unhappiness over the public's negative response to TriMet's press releases issued during the

[6]ATU did not prove that Stedman created the document. However, it is likely that someone at TriMet created the document because Stedman had seen it once before the hearing and Lomax recalled it being discussed in a TriMet leadership meeting.

prior bargaining. ATU members and TriMet passengers had also expressed an interest in the bargaining process, as well as a desire to participate in bargaining sessions.

13. Based on this past experience, ATU decided at some point in 2012 to demand public bargaining. In the autumn of 2012, Hansen asked ATU Attorney Susan Stoner to research the topic of ground rules for the successor negotiations. At the time, Stoner and Hansen discussed ATU's ability to demand to bargain with TriMet in public during the negotiations for a successor to the 2009-12 Agreement. Stoner subsequently researched whether bargaining sessions were subject to the Oregon Public Meetings Law, ORS 192.610 through 192.690 (PML).

14. On November 15, 2012, Stedman wrote Hansen again confirming the upcoming meetings for December 20 and 21, and informing ATU that the December negotiations would take place in a different location.[7] On November 16, 2012, Hansen responded, confirming the November 30 date and location, and stating that he would take TriMet's "suggestions of the other dates under advisement."

15. On November 19, 2012, Stedman wrote Hansen noting that on October 29, ATU agreed to the November 30, December 20, and December 21 dates. Stedman provided the details for the rooms and locations for November 30, December 20 and 21. Hansen subsequently informed Stedman that he had "viewed the proposed location and, assuming the caucus room is for the Union's use, that location will be fine."

16. Sometime before November 19, Stoner advised Hansen that she believed that there was legal support to demand to bargain in an open meeting, that is, with the public and press in attendance. As a result, in his November 19 letter to Stedman, Hansen informed TriMet that it expected bargaining sessions to be conducted under the PML, and that ATU did not consent to conducting bargaining in "executive sessions."

17. On November 21, 2012, Stedman sent Hansen a letter setting forth various reasons that TriMet did not agree that the negotiations sessions between the parties were subject to the PML. Among other things, Stedman explained that

> "[o]ur negotiating team includes no TriMet Board members. No negotiation session will be a public 'meeting' because it will not include a 'convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter.' ORS 192.610(5)."

18. On November 21, 2012, Hansen responded to Stedman's letter, citing ORS 192.660(3) in support of ATU's assertion that negotiations were subject to the PML.[8] He further stated that

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[7]Tri-Met proposed to hold the November 30 session at the State Office Building on NE Oregon; and the December 20 and 21 sessions at the Oregon Department of Transportation (ODOT) Building on NW Flanders, both located in Portland.

[8]ORS 192.660(3) provides that "[l]abor negotiations shall be conducted in open meetings unless negotiators for both sides request that negotiations be conducted in executive session."

> "[u]nless TriMet provides written notice of its intention to abide by Oregon law and conduct negotiations in the open meeting format, with all legal rights accorded those in attendance, the Union will not participate. The Union has made a moral commitment to its members, community stakeholder groups and members of the media that its negotiations with TriMet will be conducted in the full light of day. We intend to honor that commitment."

19. On November 26, 2012, Stedman again asserted in a letter to Hansen that labor negotiations were not subject to the PML. Stedman argued that the issue had been decided by the Oregon Court of Appeals in *SW Ore. Pub. Co. v. SW Ore. Comm. Coll.*, 28 Or App 383, 559 P2d 1289 (1977). However, Stedman also expressed a willingness to continue discussing the issue of transparent and open negotiations:

> "That said, it seems to me that you are picking a fight where there is no fundamental disagreement about the desire for transparency in the negotiations. TriMet has no objection to bona fide members of the press, unaffiliated with either party, being allowed to attend the negotiation sessions and cover the story. You may wish to propose such a ground rule. TriMet likely would be willing to negotiate such a ground rule with an agreement that they are invited outside the requirements of ORS 192.610, *et seq*. TriMet would not agree to bloggers or affiliated members of the press."

20. In his November 26 letter, Stedman also informed ATU that TriMet was planning on providing "security personnel" for the November 30 bargaining session. Stedman asked Hansen to provide TriMet the names of any people on ATU's bargaining team beyond the ATU officers and e-board members so that TriMet could inform security of those additional names.

21. On November 27 through 29, the parties engaged in a number of communications regarding the applicability of the PML and discussed whether negotiations should be open to the public and the press. ATU continued to demand that negotiations were subject to the PML and should be conducted in public. TriMet insisted that the negotiations were not subject to the PML because no member of TriMet's negotiating team was a member of TriMet's governing body. However, Stedman expressed a willingness to take certain steps to promote transparent negotiations, stating

> "[r]egarding your press release, the ATU is tilting at windmills where there is no fundamental disagreement about the desire for transparency in the negotiations. TriMet has no objection to bona fide members of the press, unaffiliated with either party, being invited to sit in on negotiations. TriMet likely would agree to a ground rule inviting such members of the press with the understanding and agreement they are being invited outside the requirements of the [PML]. To assist with public interest and disclosure, both parties also are free to make public all proposals, exhibits, and their minutes of the negotiations. TriMet certainly intends to do so."

22. On November 29, 2012, Hansen again wrote Stedman about ATU's continued concerns about the application of the PML and TriMet's statements about providing security

services for bargaining sessions. Hansen stated that the parties were "at an impasse as to the conditions under which the negotiating process can begin." Hansen suggested that the parties resolve the dispute concerning the PML by submitting the issue to Employment Relations Board (ERB) for decision.

23. Later on November 29, 2012, Stedman declined ATU's proposal to submit the public access issue to this Board because he did not believe that the ERB had jurisdiction to decide the dispute. As an alternative, TriMet offered to submit the question of the PML's applicability to negotiations to the Multnomah County Circuit Court. TriMet proposed that the parties "stipulate to facts necessary to the decision and a briefing schedule so that the court can decide the matter on an expedited basis."

24. Hansen first saw Stedman's November 29 letter on the morning of November 30. At approximately 8:30 a.m. that day, Hansen faxed a letter to Stedman informing TriMet that ATU's bargaining team would not be attending that day's bargaining session because of the dispute regarding the conditions under which the parties would negotiate. ATU did not show up for negotiations on November 30, 2012. However, TriMet's bargaining team went directly to the state office building where the bargaining session was scheduled. Sometime after they arrived, an employee informed Wegesend about Hansen's letter. A news reporter informed Stedman that ATU had issued a press release announcing that ATU would not attend the bargaining session.

25. Later on November 30, 2012, Stedman wrote Hansen that TriMet was extremely disappointed that ATU did not show up for negotiations that morning, and once again reasserted TriMet's belief that the PML did not apply to the parties' bargaining sessions. Stedman enclosed TriMet's contract proposals with a memorandum summarizing the key proposals. He advised Hansen that with the submission of TriMet's proposals to the ATU, TriMet considered that the 150-day statutory period for negotiations had commenced.[9]

26. On November 30, 2012, Hansen responded to Stedman's letter, affirming ATU's position on the PML and arguing that the 150-day bargaining clock had not begun because the parties had not met for the first bargaining session and each party had not received the other party's initial proposal. Hansen further expressed surprise that TriMet showed up at the scheduled meeting because, Hansen claimed, ATU "has made clear in prior communications, at least five times," that ATU would not attend. Hansen concluded by stating that

> "[w]e certainly hope the parties will be able to obtain a judicial determination in time for the scheduled meeting [on] December 20, 2012. As an interim option, if TriMet agrees to hold public negotiations until such time as the legal determination is made, the Union is prepared to meet prior to December 20th at a mutually-agreeable place and time that accommodates those interested in attending."

[9]ORS 243.712(1) provides that a party may ask the Employment Relations Board to assign a mediator after the parties have completed 150 days of good faith bargaining and that "[t]he 150 days of negotiation shall begin when the parties meet for the first bargaining session and each party has received the other party's initial proposal."

27. On December 3, 2012, Stedman complained to Hansen that TriMet "did not know in advance that the ATU would not show up to negotiate as the parties had previously agreed. That is because you chose to send a fax to our office at 7:57 a.m., a time that you knew, or should have known, we would be traveling to the negotiations site to meet with you." On December 3, Hansen challenged Stedman's purported lack of knowledge that ATU's bargaining team would not show up at the November 30 meeting. In doing so, Hansen cited to previous correspondence between the parties that he believed put TriMet on notice that ATU would not be showing up for the bargaining session until the parties agreed on the PML issue. Hansen again conveyed ATU's willingness to obtain a judicial resolution of the PML question, stating that "[o]ur legal counsel is ready to work with TriMet to obtain a court decision on the applicability of ORS 192.660(3). Please have your legal counsel contact ours."

28. On December 4, 2012, Stedman asked Hansen to provide the name of ATU's legal counsel. On December 5, Greg Hartman, who was representing ATU in the Multnomah County Circuit Court proceeding, contacted TriMet's legal counsel.

29. On December 7, 2012, TriMet filed a complaint for declaratory judgment in Multnomah County Circuit Court requesting a declaration that the parties' negotiations were not public meetings subject to the PML. In its complaint, TriMet stated, in part, that

> "[t]he negotiating team does not have the authority to enter into a labor contract with the ATU nor does it make recommendations to the Board. Authorization to enter into a collective bargaining agreement is by resolution of the Board on recommendation of the General Manager."

30. On December 11, 2012, Hansen wrote to Stedman about concerns arising from this paragraph, stating that "TriMet's submission to the Multnomah County Circuit Court, * * * is extremely troublesome. Parties negotiating labor agreements are required to have a bargaining team that is empowered to carry on meaningful bargaining." Hansen, citing to Board case law, asserted that it appeared that the TriMet bargaining team "does not have authority to enter into a tentative agreement that must be presented to the TriMet Board of Directors for ratification." Hansen insisted that "TriMet must either state that your team has authority to reach a tentative agreement [that] it will send to the Board for ratification or TriMet must provide the Union with Mr. McFarlane's and/or the [TriMet] Board's dates and times of availability to bargain."

31. On December 12, 2012, General Manager Neil McFarlane responded to Hansen, affirming that, "TriMet's negotiating team has the authority to carry on meaningful collective bargaining in good faith to tentative agreement consistent with the requirements of [the Public Employee Collective Bargaining Act (PECBA)]." McFarlane further acknowledged that TriMet's negotiating team was obligated to present and support the ratification of any tentative agreements reached.

32. On December 13, 2012, Hansen informed McFarlane that ATU was prepared to meet with TriMet on December 20 and 21. Hansen reiterated, however, ATU's belief that the law required that those negotiations take place in a "public meeting." Hansen requested TriMet's

"immediate reassurance that the negotiation sessions scheduled for December 20th and 21st will be open public meetings and that there will be no 'security' screening of attendees." Hansen noted that TriMet's team was entitled to propose ground rules addressing the provision of security and closing negotiations to the public at the initial session on December 20.

33. On December 14, 2012, Stedman responded, confirming TriMet's prior position that the negotiations were not subject to the PML, "unless and until the parties mutually agree otherwise." He continued, stating that, "[o]f course, the ATU can propose a ground rule allowing public access at the December 20 session." Stedman also suggested two alternatives regarding the PML dispute. First, Stedman stated that TriMet was willing to agree to ground rules in advance of the December 20 session. TriMet proposed two ground rules, including one that provided that "[r]eporters from news organizations unaffiliated with either party shall be allowed to sit in and report on the negotiation sessions in order to ensure both transparency and an orderly process of good faith negotiations." Second, Stedman suggested that the parties could mutually agree to submit their last best offers immediately and proceed directly to binding interest arbitration. With respect to the security issues, Stedman explained that "ATU's unreasonable position regarding open sessions has created safety concerns. The ATU repeatedly has refused to provide the names of its bargaining team, and it has communicated its intent to invite the public to closed meetings." Stedman also informed Hansen that the Department of Transportation, which was providing space for the negotiation session, required that a list of attendees be provided to its security office in advance of the meetings.

34. On December 18, 2012, Hansen claimed that "it is our understanding that, at this time, TriMet is refusing to bargain unless the public and rider advocates are excluded, and will allow only the media *it* deems acceptable." (Italics in original.) In addition, Hansen notified Stedman that ATU did not agree to security screenings and that if a building owner required such screenings, then ATU did not want to use that location for bargaining. Hansen announced that ATU "rejects these conditions" and, therefore, "[t]he continuing disagreement as to whether the negotiations must be public leaves the parties at an impasse." Hansen informed Stedman that ATU would not attend bargaining sessions on December 20 and 21 if those conditions remained in place.

35. The TriMet bargaining team showed up on December 20. ATU's bargaining team did not show up to the bargaining session.

36. On December 21, 2012, Stedman challenged what he called the "manufactured preconditions" to bargaining that Hansen purportedly "attribute[d] to TriMet. * * * TriMet has never said only members of the press it considers acceptable can attend." Instead, Stedman asserted that "TriMet has said it would agree to a ground rule admitting reporters from news organizations unaffiliated with either party to sit in and report on the negotiation sessions" and that "TriMet has never said that the public and rider advocates are barred from attending." Although Stedman stressed TriMet's belief that the PML did not apply to the parties' negotiations, he invited ATU "to offer a ground rule proposal regarding public attendance."

37. The parties jointly requested that the Multnomah County Circuit Court expedite the process. In late December 2012, the parties' attorneys began the process of expediting the discovery that they anticipated would be necessary for the circuit court proceeding.

38. On January 3, 2013, TriMet filed the original unfair labor practice complaint in this matter.

39. On January 7, 2013, Stedman and Hansen exchanged letters about ATU's information requests from December 3, 2012, as well as the parties' positions with respect to the delay in negotiations.

40. On January 22, 2013, McFarlane testified at a deposition that the TriMet bargaining team had the authority to enter into a global tentative agreement, which would be submitted to McFarlane for his review. McFarlane would then submit the tentative agreement to the Board with "either a yea or nay recommendation." The TriMet Board had authority to ratify the final and binding collective bargaining agreement and authorize McFarlane to sign it. During the hearing in this matter, McFarlane explained that Stedman, on behalf of the TriMet bargaining team, would present McFarlane with a recommended contract and McFarlane would consider the recommendations of the bargaining team and then exercise independent judgment about whether or not he would present the recommended contract to the TriMet board.

41. On March 20, 2013, the Multnomah County Circuit Court ruled that only collective bargaining negotiations held as meetings of governing bodies within the meaning of ORS 192.660(3) are required to be conducted in public under the PML.[10] Because the judge was unable to determine whether the parties' bargaining sessions constituted such a meeting based on the facts before her, she denied the parties' cross motions for summary judgment.

42. In April 2013, the parties filed renewed cross motions for summary judgment with supporting affidavits. Attached to TriMet's motion was Stedman's affidavit, in which he stated that he selected TriMet's bargaining team members, who are individuals from different divisions with subject matter expertise and that "[t]here is no minimum number of members of the bargaining team that must be present before the bargaining team can engage in negotiations or take any action."

43. On April 8, 2013, Hansen wrote to both McFarlane and Stedman that he believed that the parties should begin bargaining before resolution of the Multnomah County Circuit Court case. Hansen stated that the ATU's team would include at least the 18 officers mandated by its bylaws and proposed that the parties agree to a series of bargaining sessions on weekends and weeknights to minimize the impact on the employees' pay. Hansen suggested that the parties

[10]ORS 192.610(3) defines a "[g]overning body" as "members of any public body which consists of two or more members, with the authority to make decisions for or recommendations to a public body on policy or administration." ORS 192.610(4) defines a "[p]ublic body" as "the state, any regional council, county, city or district, or any municipal or public corporation, or any board, department, commission, council, bureau, committee or subcommittee or advisory group or any other agency thereof." ORS 192.610(5) defines the term "[m]eeting" as "the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter."

alternate their meetings between TriMet properties and ATU-selected facilities, and that TriMet schedule the location of the first meeting.

44. On April 10, 2013, Stedman agreed to the proposed number of additional bargaining sessions and offered to meet in order to establish the meeting schedule. Stedman also requested that ATU submit its proposals to TriMet, noting that ATU had received TriMet's proposals months earlier. Stedman wrote that the parties could begin by addressing ground rules, but "before substantive bargaining can occur, obviously TriMet needs to consider the ATU's contract proposals." Stedman proposed that he and Hansen meet for coffee to discuss scheduling and ground rules. Later that day, Stedman also sent Hansen a request for information regarding four programs for which TriMet provides funds to ATU.

45. On April 11, 2013, Hansen rejected Stedman's offer for an informal meeting over coffee. He said "that the Union believes negotiations should be transparent," and that "such a private meeting is inappropriate. The Union membership, in particular, would strongly object to that approach." Hansen informed Stedman that ATU was available to bargain on April 25-27, May 1-2, 17-19, and 28-31. Hansen proposed to discuss ground rules at the first meeting and, in response to a media-related ground rule that TriMet had proposed, asked Stedman to "[p]lease provide a list of what you consider to be 'mainstream' media."

46. On April 15, 2013, Stedman notified Hansen that he had hoped to meet informally to agree on ground rules so that members of the press could attend the first bargaining session, but because ATU was not willing to meet informally, TriMet proposed to discuss ground rules in a closed session on April 27 and 28 from 9:00 a.m. to 5:00 p.m. Stedman stated that TriMet hoped that the ground rules "can be agreed to promptly so that members of the press agreed to by the parties can attend all subsequent sessions and report on the proceedings." He again stated that TriMet preferred to wait until ATU had provided it with its proposals before scheduling substantive bargaining sessions.

47. On April 17, 2013, Hansen sent Stedman a list of at least 20 media organizations that ATU proposed be invited and allowed to attend the ground rules meeting and subsequent bargaining sessions.[11] Hansen agreed to meet on April 27 and indicated that one day was sufficient for the discussion of the ground rules. He stated that TriMet could schedule the meeting location subject to ATU's prior approval and that there would be no security checks. Hansen also claimed that Stedman was "refus[ing] to schedule future bargaining sessions until [Stedman] receive[d] the union's proposal."

48. On April 18, 2013, Stedman responded to Hansen that TriMet still disagreed with ATU's interpretation of the PML, and that, therefore, TriMet was only willing to have the press attend bargaining sessions if the ground rules had been agreed to in advance. Stedman also indicated that rather than limiting attendance to a list of named media organizations, TriMet

[11]ATU proposed to invite representatives from the *Asian Reporter*, *Beaverton Valley Times*, *Gresham Outlook*, *Hillsboro Tribune*, *Hollywood Star*, *Labor Press*, *NW Examiner*, *Oregonian*, *PDX Memo*, *Portland Afoot*, *Portland Mercury*, *Portland Observer*, *Portland Transport*, *Portland Tribune*, *SE Examiner*, *Sellwood Bee*, *Skanner*, *SW Connection*, *Willamette Week*, and reporters from various television stations.

preferred to agree on a definition of what types of media organizations could attend. TriMet intended to give its two proposed ground rules, including press attendance, to ATU at the April 27 meeting. Stedman also explained that TriMet selected conference room number one at the Holladay Street station, and reminded Hansen that all TriMet facilities are secured-access locations. He stated that ATU's officers and Executive Board members have Tri-Met badges that would be activated on April 27.

49. On April 23, 2013, Hansen agreed to the meeting details but added that because TriMet was refusing to allow media to attend, ATU would not invite any media organizations. On April 24, Hansen asked that Stedman provide five parking spaces and an adequately-sized breakout room at the bargaining location in order to accommodate the ATU bargaining team.

50. On April 25, 2013, Stedman provided Hansen with five parking passes. He notified Hansen that an adequately sized break out room would be available, and listed the names of the 12 ATU officers and Executive Board members whose badges would be activated to allow access to the building. Stedman developed this list of names after Lomax and Minor-Lawrence told him that ATU usually brought its elected officers and Executive Board members to bargaining.

51. The parties met on April 27, 2013, to consider ground rules and other preliminary matters. TriMet bargaining team members Lomax and Wegesend arrived at approximately 8:15 a.m. They found that the air conditioning was not operating because it was a weekend and, as a result, the air was stifling. Lomax contacted the facilities director, who attempted to address the issue. He later notified Lomax that he was unable to have the air conditioning turned on and, instead, offered to bring fans. Lomax declined his offer because she thought that the parties would finish by early afternoon. The remainder of TriMet's team, including Minor-Lawrence, Nielsen, and Stedman, arrived at approximately 8:30 a.m. They arranged the second floor conference room for the parties' discussions, and set up coffee and refreshments. There were also smaller conference rooms on the second floor, one of which was set aside as a caucus room.

52. ATU's 18-member bargaining team arrived shortly before 9:00 a.m. The team included Hansen, Hunt, Heintzman, Stoner, the members of ATU's Executive Board, and the extra board liaison officers. The parties met in the large conference room. Lomax apologized for the lack of air conditioning. The ATU members were offered refreshments and introductions were made.

53. ATU confirmed that Hansen was its chief negotiator and TriMet confirmed that Stedman was its chief negotiator. The parties then exchanged their initial ground rules proposals. TriMet provided ATU one printed copy of its ground rules proposal and projected the proposal onto a screen. The screen was difficult to read and Hansen requested a copy of TriMet's proposal for each team member. Stedman was reluctant to make so many copies, but after the parties discussed the issue, Wegesend made and provided copies of TriMet's proposal to the ATU members. Hansen read ATU's proposal aloud and Stedman read TriMet's proposal aloud.

54. ATU initially proposed eight ground rules, including proposals that "[a]ll negotiation sessions will be open meetings that can be attended by the public and any interested parties"; and that "[a]ll provisions of the current or most recently expired labor agreement for

which no change is proposed will be carried into the successor agreement." Minor-Lawrence and Stedman asked if the phrase "the current or most recently expired labor agreement" referred to the 2009-12 Agreement resulting from the Gaba Award. The ATU team did not precisely answer. Instead, Hansen or another team member replied that they were still waiting for this Board's decision on a then-pending unfair labor practice complaint.

55. TriMet initially proposed two ground rules, including provisions allowing media representatives to attend bargaining between the parties while stipulating that the PML did not apply to bargaining sessions.

56. At approximately 9:20 a.m., the parties adjourned to caucus. An ATU team member asked if they should stay in the large conference room because they had the larger team. Stedman replied that because TriMet was the host, the TriMet team would stay in the conference room and ATU would leave for its caucus and use the other conference room; and the next time, when ATU was the host, TriMet would leave. One of ATU's team members said that the room next to the large conference room was pretty small. Someone on TriMet's team said that ATU could use the first floor conference room that was identical to the room in which they were currently meeting. There is an elevator and stairs between the first and second floors. Someone from ATU's team said that it would take three elevator trips for the ATU team to get down to the first floor. The ATU team decided to use the small second floor conference room for their caucus.

57. At approximately 10:25 a.m., Stedman reviewed ATU's second proposal, which was labeled "Union Ground Rule Counter – Second April 27, 2013 (9:45 am)." ATU proposed to abide by interim ground rules on the public meeting issue until a legal determination was made. As an interim ground rule, ATU proposed that the parties agree on locations that could accommodate "all qualifying media," including the 20 named media organizations and all the television stations. In addition, ATU proposed that the parties be required to provide sufficient copies of proposals for each team's members, bargain for a minimum of eight hours each session, and agree to all of the ground rules in ATU's original proposal.

58. Stedman identified four ground rules from ATU's original proposal to which TriMet could agree and several to which it could not agree. Stedman also explained that TriMet did not want to pick from ATU's list of media and preferred a definition of the types of acceptable media. In addition, Stedman indicated that TriMet could not agree to ATU's proposed ground rule that referenced the current or most recently expired labor agreement because it was unclear if ATU was referring to the 2003-09 Agreement or the 2009-12 Agreement (Gaba Award), which ATU was challenging before the ERB. At approximately 10:40 a.m., TriMet agreed to draft the next proposal and the parties adjourned to caucus.

59. At approximately 11:25 a.m., TriMet presented its second proposal, which included or accepted four of ATU's eight original proposed rules and one modified ATU proposal, based on a change that the parties had agreed to during their prior discussion. TriMet also proposed its prior definitions addressing which news media representatives could attend bargaining sessions, but added a list of 17 "print media entities proposed by ATU" that the parties agreed met the definition. TriMet's list included all of the organizations on the list that ATU proposed, except those that TriMet had determined were blogs. TriMet also proposed that the parties provide no

more than 18 copies of their proposals to the other team and that the parties meet at locations accommodating at least 35 individuals. At approximately 11:45 a.m., the parties adjourned to caucus.

60. At approximately 1:00 p.m., Stoner e-mailed ATU's third proposal to TriMet because ATU's printer ran out of ink and the parties then met to review the proposal. ATU's proposal included the five provisions on which the parties were in agreement. In addition to its previously proposed list of qualifying news media representatives, ATU added a modified version of TriMet's proposal that defined the media representatives eligible to attend and inserted a media advanced notice requirement so that the parties could provide an adequately sized location. ATU also proposed a maximum of 21 copies of proposals to be presented to the other bargaining team. In response to Stedman's question about which agreement constituted the current agreement, ATU proposed that if ERB remanded or modified the Gaba Award, then all tentative agreements reached before that decision would be rendered null and void.

61. Stedman asked about ATU's inclusion of blogs on the media list and ATU's modifications of TriMet's definition of media representatives. Stedman suggested that the media list be designated as ATU's list, so as not to give the impression that it was TriMet's list. Someone from ATU's bargaining team said if TriMet wanted to exclude bloggers, it should propose it.

62. Hansen asked about TriMet's press credential requirement, which ATU had not included in its proposal, and noted that blogger Lane Jensen had created his own press credentials. Lomax stated that she did not think Jensen's press credentials would meet TriMet's definition. The parties adjourned to caucus at approximately 1:17 p.m.

63. At approximately 1:45 p.m., TriMet presented its counter proposal. Because the TriMet team was optimistic, they included signature lines on their proposal. In addition to the ground rules on which the parties agreed, TriMet proposed its original definition of news media and the list of enumerated print media entities proposed earlier by the ATU; increased its previously proposed room size from 35 to 40 persons; and increased the number of copies of proposals from 18 to 21. TriMet did not include ATU's proposals on the Gaba Agreement or the media advance notice requirement. When Hansen questioned TriMet's press credential requirement, Stedman responded by adding the word "legitimate." The parties then caucused at approximately 1:50 p.m.

At this point, the parties still had not had lunch and the rooms were becoming warm and stuffy. During its caucus, the ATU team decided that the parties were stuck on the definition of media and decided to focus on this issue in its next proposal. At 2:16 p.m., Stoner sent an e-mail to TriMet in which the "regarding line" indicated "Consolidated Ground Rules" and the document was entitled "Union 4th Counter to TriMet 'Proposal' (TM 3d)." The proposal stated that, pending the resolution of the PML dispute, the parties would allow specific media representatives to attend bargaining. It further stated that "[t]he Union understands that TriMet's acceptance of the above list is contingent on the Union agreeing that certain bloggers will be excluded, specifically, Lane Jensen, Al Margulies, Portland Transport, Ellen Fox, etc." She included the word "End" at the end of the message to signify the end of her e-mail message, but did not intend the word to mean this

was the end of their discussions or the only language on which ATU was willing to agree to that day.

64. The TriMet team became very confused and upset by ATU's proposal. Stedman and other team members considered the proposal to be offensive and inflammatory because it attributed the exclusion of named bloggers to TriMet, even though no TriMet team member had named any blogger who should be excluded and it was ATU that had brought up Jenson's name. The TriMet team was also unclear if the absence of the other proposed ground rules and the word "End" meant that this was ATU's entire proposal. Lomax, who had believed that the parties were really making headway, felt like she had been sucker-punched. Stedman became quite upset.

65. At 2:24 p.m. on April 27, 2013, Stedman e-mailed Stoner that "TriMet has not raised the issue of any specific bloggers, although the ATU did. While TriMet's proposed definition of the media does not include bloggers, we resent this comment and reject your insinuation that any specific bloggers were mentioned by TriMet." The ATU team did not see the e-mail at this time.

66. At approximately 2:30 p.m., Hansen came to the door of the main conference room, with one other person from the ATU team. As he came through the door, Hansen delivered a printed version of ATU's last proposal to Stedman and stated that "it looks like this is all we can agree to today."[12]

Stedman became angry. After the entire ATU team came into the room and was seated, Stedman read his 2:24 p.m. e-mail. ATU consultant Ron Heintzman asked whether TriMet's proposed definition of media would exclude bloggers. Stedman responded that it likely would, "but the way the ATU proposal was written was a f***ing lie." At that point, as Lomax described it, "the room sort of erupted." ATU's team members were very upset at Stedman's response. Some members expressed offense at Stedman's use of an obscenity. One ATU team member noted that ATU employees were disciplined for using such obscenities. Stedman said that ATU's proposal was not acceptable and asked Hansen if the parties were done for the day. Hansen agreed that they were done for the day.[13]

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[12]Hansen believes he stated something else. He testified that he entered before the other ATU team members, and said something more like "if we look at this and we narrow this down, this is what it would look like" to the TriMet team members. Although Wegesend's notes do not include Hansen's comment, this is not determinative because her notes are limited to the parties' joint discussion of the proposals, and at the time Hansen made this comment, this discussion had not yet begun. ATU did not introduce either the testimony of ATU team member Dan Martin, who Hansen testified was with him when he first entered the room, or the notes of Stoner, who was ATU's official note taker, to support its witnesses' testimony.

The testimony of Lomax, Stedman, and Wegesend that Hansen made this statement when he first entered the room is most credible. They testified consistently and their testimony is supported by Lomax's notes, which were taken contemporaneously during the meeting and shown to be accurate in all other respects.

[13]Wegesend recorded in her notes that Hansen stated "this was all they could agree to today."

As ATU team members started gathering up their belongings, Lomax reminded everyone that they had already agreed on a lot of things and tried to talk everyone into staying. She finally asked, "[s]o that's it, we are done?" Someone from ATU said "I guess so based on what Stedman just said," and the ATU team left.

67. On April 27, 2013, at nearly 8:00 p.m., Mary Fetsch, TriMet's media relations official, sent an e-mail press release to more than 40 journalists, reporters, and media organizations describing TriMet's view of the day's negotiations. It stated in part that "[a]fter nearly six hours of negotiating ground rules, both TriMet and the ATU could not reach agreement. However, TriMet agreed to the ATU's final list of proposed representatives of the news media to attend and report on the proceedings." ATU sent a similar press release that same evening.

68. On April 28, 2013, at about 4:00 p.m., Stedman e-mailed Hansen that

> "[o]nce we have the union's proposals, and a reasonable opportunity to review them, we are willing to schedule substantive negotiations. Before then, we remain hopeful we can reach agreement to open otherwise closed negotiations to the mainstream press so they can attend and report on them in accordance with our last ground rule proposal # 1."

Later that day, TriMet was asked by one of the recipients of its earlier press release, "'what's next' after negotiation of ground rules did not result in an agreement to move forward." Fetsch sent a response to the journalists, reporters, and media organizations, which reiterated what was communicated to ATU:

> "After yesterday's negotiation session with the Amalgamated Transit Union ended with no agreed upon ground rules, TriMet has communicated with the ATU that we remain open to negotiation. **Once we have the union's proposals and a reasonable opportunity to review them, we are willing to schedule substantive negotiations.** Before then, we remain hopeful we can reach agreement with the union to open otherwise closed negotiations to the mainstream press to attend and report on them. [TriMet's] ground rule proposals presented during yesterday's session would have accomplished that." (Bold in original.)

69. On April 29, 2013, Hansen offered six dates in May and nine dates in June on which ATU was available to bargain.[14] He asked Stedman if they could invite to the first meeting the media organizations that they had agreed on in their ground rule proposals. He also told Stedman that ATU "prefer[s] to present our initial proposals in the actual bargaining session so that we can explain them before any misinterpretation can arise." He then stated his concern that an e-mail from Stedman "suggests that TriMet is conditioning its attendance at the first session on its prior

[14]Lomax and Hansen met on an unrelated topic a few times before May 1. At some point, when they were trying to schedule subsequent meetings, Lomax told Hansen that June was the Rose Festival and the Sandy Day federal court trial, so it would be impossible for her to meet. The Sandy Day trial was a major civil trial in federal court involving a TriMet operator and pedestrians. Lomax was personally named as a party in the case.

receipt of the Union's initial proposals." Hansen cited to a prior Board case, and warned Stedman "that conditioning attending bargaining on prior receipt of the other parties' proposals would be a violation of PECBA."

70. On May 2, 2013, Stedman responded to Hansen's letter, reminding Hansen that ATU had had TriMet's proposals for five months. He stated that, although TriMet would prefer to receive and review ATU's proposals in advance, it would agree to schedule future bargaining sessions where ATU could provide and explain its proposals in person. Stedman had not yet identified dates at this time because he was reviewing his team's availability. This was around the time that he was scheduling knee surgery.

71. Stedman then turned to the media question. He stated that "[w]e remain hopeful an agreement can be reached to open to the mainstream media negotiations that are otherwise closed." He noted that the Multnomah County Circuit Court had scheduled another hearing, and suggested that perhaps ATU "wishes to postpone negotiations until the court rules. That is not ideal, but it is preferable to negotiation shenanigans." Stedman stated that ATU's "April 29 letter fails to disclose a substantive alternation [*sic*] to the list of media entities listed therein compared to your final proposal on April 27, or any earlier proposal." He continued, "as we explained at the table, your list of print media is acceptable only as one element of a ground rule regarding the media." Stedman included with his letter a new TriMet ground rule counter-proposal for media and press coverage of the negotiations, which included both a list of agreed-on media and press organizations, and a definition of eligible news media.

72. On May 6, 2013, Hansen notified Stedman that ATU was still waiting for dates from the TriMet team and cautioned that there was much competition for ATU's dates due to the contracts that ATU was bargaining with other employers. Hansen stated that "[t]he Union will be prepared to discuss both TriMet's and the Union's initial proposals at the first session." Hansen did not respond to the TriMet press proposal conveyed on May 2, but instead stated that ATU assumed that TriMet "will not agree to allow the attendance at our first session, of any representative from any of the media organizations listed by the Union in its letter of April 28, 2013."

73. Later that same day, Stedman informed Hansen that "[y]ou should understand from our May 2 letter that we remain hopeful an agreement can be reached to open to the mainstream media negotiations that are otherwise closed. In that regard, we await your response to the media proposal we transmitted with our May 2 letter." Stedman confirmed that TriMet was available on June 24, and would notify ATU of additional dates as they became available. Stedman did not offer other dates in June at this point because he was working around Lomax's schedule. He believed that TriMet needed Lomax for at least the initial meetings during which TriMet explained its proposal and ATU presented its proposal. The majority of employees covered by the parties' collective bargaining agreement work in the Operations Division. Lomax was unavailable during June due to the civil trial in federal court.

74. On May 6, 2013, Hansen notified Stedman that ATU agreed to the meeting on June 24 and would notify TriMet as soon as it found a location. He added:

> "As noted in my April 28, 2013 letter, the parties did agree on the list of media representatives who could attend our bargaining sessions. The bargaining space the Union selects will be large enough to accommodate them. The ground rule you proposed has been proposed by you at least five times and the Union has rejected it each time as being capable of too narrow and restrictive an interpretation. Do not misconstrue this statement. The Union has accepted TriMet's position that, pending a Circuit Court decision on the public meeting status, bloggers will not be allowed to attend."

75. On May 8, 2013, Stedman had just learned that the schedule for the Sandy Day federal court trial had changed, and this made Lomax unavailable for the June 24 bargaining session. Stedman notified Hansen that TriMet was no longer available for the June 24 meeting due to changes in the federal court trial schedule and that he would provide Hansen with available dates in July and August as soon as possible.

76. On May 13, 2013, Hansen protested TriMet's delay in scheduling meetings because ATU had asked to begin bargaining in early April. Hansen pointed out that TriMet only accepted one of the 16 dates that ATU offered in May and June, and that TriMet was now cancelling that date.

77. On May 16, 2013, Stedman responded that because most of TriMet's proposals related to the Operations Division and ATU had indicated its intent to present its proposals during the first bargaining session, Stedman believed that it was necessary for Operations Director Lomax, an essential member of the TriMet bargaining team, to be present. Stedman claimed that Hansen knew that Lomax was unavailable from June 3 through 27 because of her role in the federal court trial, and suggested that ATU offered the June dates knowing that TriMet would not be able to meet on those dates.

78. On May 16, 2013, the Multnomah County Circuit Court granted TriMet's motion for summary judgment, effectively concluding that the parties' negotiations were not subject to the PML. The notice of judgment in the matter was filed on June 19, after which ATU filed an appeal with the Court of Appeals.

79. On May 17, 2013, Hansen advised Stedman that ATU was not aware of Lomax's unavailability in June and also disputed the need to have Lomax at the bargaining table. Hansen indicated that ATU was not available on July 2 and 3, but offered 15, 16, and 20-26, August 1, and 14-20.

80. On May 21, 2013, Stedman notified Hansen that, subject to scheduling changes in the federal trial currently scheduled for June and July, TriMet was available on July 2, 3, and 22, August 27-29, and September 4-13, 16-20, and 22-30.

81. On May 30, 2013, Stedman notified Hansen that the federal civil trial had been set over for August 12 through September 6 (due to the hospitalization of a key witness). TriMet was now available on June 24, 26, and 27, but no longer available on the proposed August dates or September 4 through 6.

82. On June 3, 2013, Hansen notified Stedman that ATU was no longer available on the June dates and expressed concern that TriMet had offered no viable July dates except for July 22, and now offered no dates until September 7. He added that the number of changes proposed by TriMet would require an excessive amount of bargaining, and ATU did not want to exhaust the 150-day bargaining clock with one session in July and a huge gap in bargaining until September. Hansen told Stedman that ATU would meet on July 22 "only if TriMet agrees that the intervening time between July 22nd and September 7th is not counted as part of the 150-day time limit."[15] Otherwise, Hansen proposed that the parties meet on September 7, 8, 10 through 13, 16 through 20, and 22 through 30. He also asked Stedman to propose dates in October.

83. On June 4, 2013, Stedman wrote to Hansen that TriMet now understood that ATU had accepted TriMet's offer to meet on bargain on September 7, 8, 11-13, 16-20, 22-30. Stedman concluded his letter by stating that

> "[d]uring our April 27 negotiation session, and in the days following, TriMet offered multiple ground rule proposals that would open to the press what are otherwise closed negotiations. The ATU has rejected all of those offers. TriMet has no further proposals to make in that regard, so unless the ATU offers a mutually acceptable ground rule, the negotiations will remain closed."

84. On June 7 and July 25, 2013, Hansen asked Stedman to provide ATU with dates of TriMet availability in October. He reminded Stedman that ATU was bargaining 10 other contracts, which complicated scheduling. Hansen also indicated that ATU would determine the location for the September 7 meeting, after which the parties would alternate finding locations.

85. On July 31, 2013, Stedman responded that TriMet was still waiting for ATU to provide the location information for the September 7 meeting. He also stated that the parties had 20 meetings scheduled and, once TriMet had ATU's proposals, "we can better judge what commitment of time will be required for October negotiation sessions." Stedman suggested that the parties discuss October dates during the September meetings.

86. During September, the parties engaged in numerous communications concerning the scheduling of future negotiations, with ATU insisting that insufficient bargaining dates had been set and TriMet repeatedly requesting ATU's proposals so that negotiations could progress.

87. By October 2, 2013, Stedman notified Hansen that TriMet was also available on October 16 and 30 to bargain. By this date, the parties had met for 19 days of bargaining, which the parties agreed had been productive. In his letter, Stedman also raised a concern about statements allegedly made by ATU team member Heintzman at the bargaining table "that the ATU's strategy is to delay resolution of this contract until a new administration is in place at TriMet that may have priorities more aligned with the ATU's interests."

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[15]Hansen claims that ATU would have been prepared to present its non-economic proposal on July 22. He also admits that he scheduled July 22 for bargaining with another employer.

88. On October 3, 2013, Hansen notified Stedman that ATU agreed to meet on all of the six November and five December dates. Hansen complained that TriMet had not offered sufficient dates in November and December, and asked for dates in January.

89. On October 7, 2013, Hansen responded to Stedman's concerns about Heintzman's comments at the bargaining table, asserting that the statements were taken out of context, and that the statements accurately reflected a change in the management culture at TriMet.

90. ATU's bargaining team has authority to enter into a tentative agreement and make recommendations to its membership. The membership votes to ratify the contract. The ATU International also has to approve the contract.

91. As of the date of the hearing, ATU had not provided TriMet with its economic proposal. Since the April 27 meeting, the parties have held some negotiation sessions at the location of the April 27 meeting and ATU has used the first floor conference room for its caucus. The parties have also met at the ATU offices for negotiations sessions, during which there is no separate room designated for a caucus—one party either goes outside or uses the hall to caucus.

## CONCLUSIONS OF LAW

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

2. ATU did not violate ORS 243.672(2)(b) as alleged in TriMet's complaint.

3. TriMet did not violate ORS 243.672(1)(e) as alleged in ATU's counterclaims.

## DISCUSSION

TriMet and ATU have each alleged that the other violated its duty to bargain in good faith during negotiations for a successor agreement. TriMet's complaint alleges that ATU violated ORS 243.672(2)(b) by engaging in a variety of actions that TriMet characterizes as dilatory. ATU responded with counterclaims alleging that TriMet, not ATU, refused to bargain in good faith, thereby violating ORS 243.672(1)(e).

### Legal Standards: ORS 243.672(2)(b) and (1)(e)

ORS 243.672(2)(b) makes it an unfair labor practice for a labor organization to refuse to "collectively bargain in good faith" with a public employer. ORS 243.672(1)(e) contains mirror provisions making it an unfair labor practice for a public employer to refuse to collectively bargain in good faith with a labor organization. In assessing whether a party has refused to collectively bargain in good faith, we generally examine the totality of the bargaining conduct to determine whether the party demonstrated a willingness to reach an agreement that is the result of good-faith negotiations. *Oregon School Employees Association v. Medford School District #549C*, Case No.

UP-77-11, 25 PECBR 506, 516-17 (2013).[16] The totality of a party's bargaining conduct typically includes: (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. *Id.* at 517; *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. *Medford School District #549C*, 25 PECBR at 517; *Rogue Valley Transportation District*, 16 PECBR at 587.

TriMet's Allegations Under ORS 243.672(2)(b)

TriMet alleges that ATU violated ORS 243.672(b) by: (1) engaging in a series of dilatory tactics or practices designed to delay the start of collective bargaining; and (2) refusing to meet with TriMet to collectively bargain on dates that ATU had previously agreed to meet. Although identified as separate allegations, TriMet acknowledges that both nominally separate charges concern dilatory tactics. As succinctly summarized by TriMet in its brief, "[t]hat is almost all this case is about: ATU's intentional delay." Thus, although we look to the totality of ATU's bargaining conduct, TriMet's claims rise and fall on whether it has established that ATU engaged in dilatory tactics, and, if so, whether such conduct demonstrated that ATU had no intention of reaching an agreement. *See Medford School District #549C*, 25 PECBR at 516.

We first address TriMet's claim that ATU agreed to November 30, December 20 and 21, 2012 bargaining sessions, but then, without justification, failed to show up and bargain on those dates. The crux of TriMet's allegation is that ATU refused to attend these bargaining sessions in order to stall negotiations for improper strategic reasons, including: (1) to maintain the *status quo* with regard to wages and benefits for as long as possible; (2) to "wait out" current TriMet management; (3) to provide ATU extra time to build a "war chest" to fight possible cuts in wages and benefits; and (4) to allow time for ATU's legal efforts to overturn a prior interest arbitration award.

[16]In addition, we have recognized certain types of actions as being so destructive of the bargaining relationship or so inconsistent with the good faith required by the statute that those actions *per se* violate (2)(b) or (1)(e), regardless of whether subjective bad faith is proven. *Medford School District #549C*, 25 PECBR at 515. In its post-hearing brief, TriMet requested that this Board recognize a new *per se* violation to be applied in circumstances where the parties disagree over a legal question concerning bargaining, but agree to submit the question to a forum for resolution. We decline to add this to our limited group of existing *per se* violations. Rather, we believe that our totality-of-the-conduct approach is the better tool to assess whether ATU violated ORS 243.672(2)(b).

Additionally, the recommended order addressed a separate question of whether ATU violated (2)(b) by insisting to impasse on a permissive subject of bargaining—in particular, on a "ground rule" of whether the public and the media were allowed to attend the bargaining sessions under the PML. We agree with ATU that this issue is not before us, as the issue was not pleaded, agreed to in the issues statement, or briefed by the parties in their post-hearing briefs. Consequently, we decline to address it. We note, however, that the record does not appear to establish that the parties were ever at "impasse" over this issue.

ATU concedes that there was an initial agreement to meet on November 30, but asserts that there was no firm agreement to meet on December 20 and 21 because the location of those sessions had not been determined when ATU accepted those dates. In any event, ATU contends that even assuming that all three dates were agreed on, its failure to attend those bargaining sessions does not establish that it lacked serious intention to reach a bargaining agreement.

As a preliminary matter, we conclude that the parties did initially agree to bargain on November 30, December 20 and 21, 2012. ATU's subsequent claim that those dates were not agreed to because Hansen requested to be notified if the location for bargaining changed is not persuasive. It was ATU, not TriMet, that first offered the December 20 and 21 dates for bargaining. Additionally, Hansen's letter, which was in response to TriMet's agreement to those proposed dates, clearly stated that ATU agreed to bargain on those dates. A mere request to be informed if the location changed is not sufficient to render the agreement to meet on those dates as a "soft" commitment.

However, after the parties agreed on these three dates, they engaged in a protracted dispute about whether, and to what extent, the PML might apply to their negotiation sessions. ATU believed that the PML applied to the parties' negotiations and repeatedly expressed its desire to bargain under the auspices of the statute. From TriMet's perspective, the PML was inapplicable and ATU's arguments to the contrary were clearly wrong. Despite these firmly held positions, the parties continued to discuss possible compromises or solutions that would provide for some transparency for their negotiations. For example, TriMet had no objection to having some media attend ("bona fide members of the press, unaffiliated with either party"), and was willing to consider other "ground-rule proposals" from ATU on the issue of public and media access to negotiation sessions. Likewise, ATU invited TriMet to make ground rules proposals on the subject. Additionally, on November 29, ATU proposed to have this Board issue a declaratory ruling to resolve the dispute regarding the PML. TriMet rejected this option, but did offer to submit the dispute to the Multnomah County Circuit Court for an expedited determination.

Because the PML dispute had not been resolved before the November 30 bargaining session, ATU did not attend the first scheduled meeting consistent with its earlier communications to TriMet. TriMet's bargaining team, however, did show up. The parties were unable to resolve their dispute even after November 30, but ultimately agreed to submit the PML dispute to the Multnomah County Circuit Court. On December 7, TriMet filed a declaratory judgment action seeking a judgment that the parties' bargaining sessions were not subject to the PML. For its part, ATU committed to working with TriMet "to obtain a swift judicial determination on the issue." After this complaint was submitted, the parties continued to discuss possible ground rules for negotiations or alternative solutions to the dispute. When the parties were unable to reach an agreement before the December 20 or 21 bargaining sessions, ATU again elected not to show up to bargain on those dates.

TriMet construes ATU's absences from these three bargaining sessions as conclusive proof of ATU's desire to stall negotiations. TriMet dismisses ATU's legal arguments as pretext for the delays, calling the arguments "engineered" and "manufactured" in its post-hearing brief. However, under these circumstances, we do not conclude that ATU's cancellation of the November 30, December 20 and 21, 2012 bargaining sessions was a deliberate attempt to delay bargaining or that

ATU had no serious intention of reaching an agreement with TriMet. Rather, we conclude that the cancellations were motivated by a good-faith belief in ATU's interpretation of the PML, as well as its desire for open negotiations. Moreover, the record establishes that both parties continued to work towards a solution to the dispute, and that both parties advanced ground rules proposals over the course of several months that would allow for various levels of public and media attendance. That the parties did not reach an immediate agreement on those proposals does not establish that ATU was merely going through the motions of bargaining when it canceled the scheduled bargaining sessions. Accordingly, we will dismiss this claim.

We now turn to TriMet's second allegation, that ATU unlawfully delayed the start of collective bargaining through a series of actions that TriMet characterizes as dilatory. The majority of these alleged "dilatory" actions relate to the cancelled bargaining sessions in November and December, or to the lengthy dispute between the parties regarding the application of the PML. As set forth above, the primary reason for the delayed start of bargaining involved the parties' competing ground rules proposals over whether, and to what extent, the bargaining sessions would be open to the public. We have concluded that the parties' differences in that respect were rooted in good-faith positions, not out of a bad-faith desire to avoid negotiating a collective bargaining agreement. We have reviewed the remaining actions that TriMet asserts were dilatory, and we conclude that TriMet has not established that ATU intended to improperly stall collective bargaining. Consequently, we will dismiss this claim.

ATU's Counterclaims Under ORS 243.672(1)(e).

We next address ATU's counterclaims against TriMet. ATU points to a variety of allegations that it believes support a finding that TriMet did not intend to reach an agreement through collective bargaining, but rather intended to proceed as quickly as possible to interest arbitration. ATU argues that these actions, when viewed in totality, demonstrate that TriMet failed to bargain in good faith in violation of ORS 243.672(1)(e).[17] Specifically, ATU alleges that TriMet delayed bargaining in six primary ways, including: (1) conditioning bargaining on ATU's agreement to conduct bargaining sessions closed to the public, or with limited access to certain members of the media; (2) conditioning the scheduling of additional bargaining sessions on first receiving and reviewing ATU's proposals; (3) conditioning bargaining on ATU's agreement to bargain in locations with security checks and security checks by TriMet's security personnel; (4) taking inconsistent positions about its bargaining team's authority or intent to enter into or

[17]TriMet asserted as an affirmative defense that several allegations in ATU's counterclaims were untimely and should be dismissed. The recommended order agreed, dismissing as untimely the allegations that TriMet's decision to hold bargaining at a location with security present, taking inconsistent positions on the authority of its bargaining team, and insisting that bargaining be closed to the public and (at least some) press. ATU objects to this portion of the recommended order, asserting that it did not allege these facts as stand-alone claims, but rather as evidence that should be considered as part of our "totality of conduct" review of its surface bargaining claim against TriMet. We agree with ATU that we should consider these allegations as evidence in this case. *See Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College,* Case No. UP-22-05, 21 PECBR 673, 676 (2007) (evidence concerning events outside the statute-of-limitations period may be admitted in a bad-faith-bargaining complaint to better understand the course of bargaining and the evolution of the parties' positions).

recommend ratification of tentative agreements; (5) providing ATU an unsatisfactory caucus room on April 27, only one copy of its proposal, no access to a copy machine, and abruptly and prematurely ending that meeting; and (6) providing only one date for bargaining in May and June and then withdrawing that date, proposing dates in July that ATU had already rejected, and offering no dates between July 22 and September 7, 2013.

As set forth above, when examining whether a party has failed to collectively bargain in good faith, we look to the totality of the bargaining conduct to see if that conduct demonstrated that the party had no serious intention of reaching an agreement. *See Medford School District #549C*, 25 PECBR at 516. We begin by assessing whether TriMet conditioned bargaining on ATU's agreement to conduct bargaining sessions closed to the public and press. This allegation involves the same issue as TriMet's claim against ATU above, with the parties switching their roles as the complaining and responding parties.

As we indicated above in our discussion of ATU's conduct, it is not clear that the parties were ever truly at impasse regarding the PML issue. Moreover, TriMet did attend the initially scheduled bargaining sessions, and consistently stated that it was willing to entertain proposals from ATU for ground rules that would provide some measure of media or public access to negotiations. At different points, TriMet and ATU exchanged ground rules to that effect, indicating a willingness by both parties to compromise on the issue. Therefore, we conclude that TriMet did not condition further bargaining over ATU's agreement to bargain in private.

Similarly, we conclude that TriMet did not condition future bargaining on first receiving ATU's proposals or on ATU agreeing that TriMet-provided security personnel must be present during negotiations. To be sure, TriMet did on multiple occasions ask ATU to submit its bargaining proposals. TriMet did not, however, refuse to engage in further bargaining on that condition. Similarly, although TriMet did state that it would provide security at some of the initial negotiation sessions, it did not refuse to continue with negotiations unless ATU accepted this condition. This conduct falls short of conditioning bargaining, as alleged by ATU.

We next turn to ATU's complaints about the April 27 bargaining session. ATU alleges that TriMet demonstrated bad faith by providing it with an unsatisfactory caucus room with no access to a copy machine, and only one copy of its proposals. The facts regarding this claim are largely undisputed, but the PECBA does not require one party to provide a set number of copies of proposals to the other side, nor does it mandate what level of room accommodations must be provided for good-faith bargaining to occur. There may be hypothetical scenarios where inadequate accommodations for bargaining could be indicative of bad faith, but this is not such a case. Any inconvenience experienced by ATU was *de minimis,* and we do not find these instances to be persuasive evidence of bad faith. We are also not convinced that the premature ending of the April 27 bargaining was attributable solely to either party, and even if it was, it is not necessarily a sign of bad faith when bargaining sessions end early or for the parties to have tense interactions at the table. Again, this situation is not persuasive evidence of bad faith by TriMet.

Finally, we turn to the allegation that TriMet failed to provide bargaining dates for long periods in order to ensure that certain members of its bargaining team were available. It is undisputed that there were long periods that TriMet was unavailable to schedule negotiations, but

these delays were primarily caused by conflicting legal obligations and medical issues of key members of its bargaining team.[18] TriMet's desire to have all members of its team present is understandable, but this desire did contribute to the delay in negotiations. This delay was compounded by TriMet's initial refusal to schedule further bargaining sessions until ATU provided TriMet with its proposals in advance of negotiations. However, these delays in bargaining are not enough to establish that TriMet was unwilling to reach an agreement through collective bargaining. Ultimately, TriMet did provide sufficient dates for bargaining and the parties began the negotiation process in earnest. Moreover, in its correspondence with ATU, TriMet continually requested and even demanded that ATU return to the table and expressed a strong desire to continue negotiations. It also quickly filed the complaint with Multnomah County Circuit Court seeking to resolve the PML dispute, and appears to have tried to expedite that process. These facts demonstrate a willingness and a desire to reach an agreement and continue bargaining.

For these reasons, we conclude that TriMet did not violate ORS 243.672(1)(e), and we will dismiss ATU's counterclaims.

ORDER

1. TriMet's amended complaint is dismissed.

2. ATU's counterclaims are dismissed.

Dated this 26 day of December, 2014.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

[18]ATU also had some difficulty in providing open dates due to other bargaining obligations during certain portions of the negotiation process.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-002-13

(UNFAIR LABOR PRACTICE)

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| JOH HORN,<br><br>Complainant,<br>v.<br><br>SALEM POLICE EMPLOYEES' UNION,<br><br>and<br><br>CITY OF SALEM AND SALEM POLICE DEPARTMENT,<br><br>Respondents. | ) | FINDINGS AND ORDER ON SALEM POLICE EMPLOYEES' UNION'S PETITION FOR REPRESENTATION COSTS |

On September 24, 2014, this Board issued an order dismissing an unfair labor practice complaint filed by Joe Horn (Horn), alleging that the Salem Police Employees' Union (Union) violated its duty of fair representation to Horn under ORS 243.672(2)(a), and that the City of Salem and Salem Police Department (City) violated ORS 243.672(1)(g) by terminating Horn. 26 PECBR 183 (2014). On October 7, 2014, the Union filed a petition for representation costs. Horn filed timely objections to that petition on October 22, 2014.

Pursuant to ORS 243.676(3)(b) and OAR 115-035-0055, this Board finds that:

1. The Union filed a timely petition for representation costs and Horn filed timely objections to that petition.[1]

2. The Union is a prevailing party.

[1]Horn objects to any award of representation costs to the Union, asserting that this was a case of first impression and that an award of representation costs would undermine the purposes and policies of the Public Employee Collective Bargaining Act (PECBA) by "punishing" Horn for "a reasonable exercise of rights." As an initial matter, we do not agree that this case involved a matter of first impression. This Board has extensive case law discussing and delineating the duty of fair representation that a labor organization owes to employees that it represents, and there is nothing unusual about this case that required a deviation or significant clarification of that case law. Moreover, ORS 243.676(3)(b) states that, if this Board finds that a party has not engaged in an unfair labor practice, we "shall" issue an order dismissing the complaint and "[d]esignate the amount and award representation costs, if any, to the prevailing party."

3. This case required two days of hearing.

4. Counsel for the Union submitted an affidavit reflecting total representation costs of $38,430, based on 128.10 hours of legal work at a rate of $300 per hour. Based on these costs, the Union requests an award of $5,000 in representation costs, which is the maximum amount that we award in the absence of a civil penalty. *See* OAR 115-035-0055(1)(a).

The requested rate is above average. *See Oregon School Employees Association v. North Clackamas School District,* Case No. UP-017-13, 26 PECBR 129 (2014) (Rep. Cost Order) (the average rate for representation costs is between $165 and $170 per hour). The number of hours claimed is also above average for a case requiring two days of hearing. *See id.* (cases generally require an average of 45 to 50 hours per day of hearing). We will consider these factors in our award below.

5. An average award is generally one-third of the reasonable representation costs of the prevailing party, subject to the $5,000 cap in OAR 115-035-0055(1)(a). However, in cases such as this, where complainants rely on their personal resources to litigate the claim, we usually make a smaller-than-average award. OAR 115-035-0055(4)(a)(D). We typically award approximately ten percent of the petitioner's reasonable representations costs. *Zemmer and Kirk v. American Federation of State, County and Municipal Employees and State of Oregon, Department of Corrections,* Case No. FR-01-10, 24 PECBR 52 (2010) (Rep. Cost Order). Having considered the purposes and policies of the PECBA, our awards in prior cases, and the reasonable costs of services rendered, this Board awards the Union representation costs of $1,485.

## ORDER

Horn will remit $1,485 to the Union within 30 days of the date of this Order.

DATED this 30 day of December, 2014.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.