EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-037-14

(UNFAIR LABOR PRACTICE)

ILWU LOCAL 8,	)	
	)	
	)	
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.

This Board recently dismissed a complaint filed by the International Longshore and Warehouse Union Locals 8 and 40 (ILWU) against the Port of Portland (Port). In that complaint, ILWU alleged that the Port violated ORS 243.672(1)(e) and (g) by purportedly refusing to submit disputes with regard to a collective bargaining agreement to arbitration. *See International Longshore and Warehouse Union, Locals 8 & 40 v. Port of Portland*, Case No. UP-019-14, 26 PECBR 156, *recons*, 26 PECBR 163 (2014), *appeal pending*. In dismissing the complaint, we concluded, and ILWU did not dispute, that the International Container Terminal Services, Inc. (ICTSI), and not the Port, employed the ILWU members involved in that case. *See id.* at 163.[1]

[1]ILWU appealed our order in Case No. UP-019-14 and has submitted a brief to the court contending that we erred in concluding that there was no issue of fact or law regarding whether or not the Port employs ILWU members. In that submission, ILWU contends that the Port *does employ* ILWU members. As set forth above and in our prior order, ILWU did not advance such a position before this Board, despite multiple opportunities to do so. Rather, when specifically asked by the ALJ in the investigative stage of Case No. UP-019-14 if the Port employed any ILWU members, ILWU answered "[n]o, not currently in a direct sense

On November 24, 2014, ILWU Local 8 (Local 8) filed a new complaint against the Port, again alleging violations of ORS 243.672(1)(e) and (g). In this complaint, Local 8 alleged that the Port refused to bargain the decision (and impact) of the Port's issuance of a request for proposal (RFP) from contractors to perform mechanical crane maintenance. The complaint also alleged that the Port's actions with respect to the RFP violated a contractual obligation, and, therefore, ORS 243.672(1)(g).

The Port responded, as it did in Case No. UP-019-14, that it had not employed Local 8 members for decades and, therefore, had no obligation to bargain with Local 8. The Port further averred that no collective-bargaining relationship existed between the Port and Local 8.

An Administrative Law Judge (ALJ) investigated this complaint and then forwarded this matter to the Board, recommending that the complaint 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. *Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon, Judicial Department*, Case No UP-6-04, 20 PECBR 677, 678 (2004). We may also rely on undisputed facts that we discover during our investigation. *Upton v. Oregon Education Association/UniServ*, Case No. UP-58-06, 21 PECBR 867, 867-68 (2007).

Here, the well-pleaded and undisputed facts are as follows. Under a service contract between the Port and ICTSI, effective through February 2015, ICTSI provides day-to-day mechanical crane maintenance at terminals owned by the Port. ICTSI currently employs Local 8 members to perform that mechanical crane maintenance. Although the Port at one time employed Local 8 members to perform that work, the Port has not done so for decades,[2] and has instead entered into service contracts in which contractors perform the work with employees hired by the

* * *." We understood that response "to mean that the Port does not employ members of ILWU." *See id.* at 157. If ILWU wanted to take the position that the Port was the employer of ILWU members, which it is now advancing before the Court of Appeals, it merely had to answer "yes" to the ALJ's question. Likewise, after this Board dismissed the complaint because the Port did not employ ILWU members, ILWU could have, in its request for reconsideration, asserted that this Board had somehow misunderstood that ILWU's "no" really meant "yes." However, ILWU accepted our conclusion that there was no issue of fact or law regarding whether the Port employed ILWU members and instead argued that the lack of an employer-employee relationship between the Port and ILWU members was irrelevant. *See id.* at 163. Consequently, the current position taken by ILWU at the Court of Appeals in Case No. UP-019-14 is at odds with the information and arguments presented to this Board in our dismissal of that case.

[2]As noted above, we understand that Local 8 is now disputing this conclusion before the Court of Appeals in Case No. UP-019-14. However, as also explained above, Local 8 did not dispute this conclusion before this Board. Moreover, Local 8 has not asserted that any type of intervening change has occurred between our dismissal order in Case No. UP-019-14 and this case, with respect to the employment relationship between the Port and Local 8 members.

contractors. Due to the pending expiration of the ICTSI/Port service contract (in February 2015), the Port issued an RFP on October 24, 2014, seeking bids from contractors to perform the mechanical crane maintenance at Terminals 2 and 6. That RFP did not include any provision requiring that a bidding contractor employ Local 8 members to perform the mechanical crane maintenance.

In its complaint, Local 8 contends that the Port was required under ORS 243.672(1)(e) to bargain over the decision to issue the October 2014 RFP, as well as any impacts on mandatory subjects of bargaining resulting from that decision. Although less clear, Local 8 also appears to contend that the Port violated ORS 243.672(1)(g) by not agreeing to arbitrate the issuance of the RFP under a 1984 collective bargaining agreement, which was executed back at a time when the Port, rather than various subcontractors, including ICTSI, actually employed Local 8 members.

As set forth in our order in Case No. UP-019-14, the bargaining obligations of the public employer under the Public Employee Collective Bargaining Act (PECBA) are with respect to "a public employer and the representative of *its employees*." *See* 26 PECBR at 163-64 (emphasis in original) (citing ORS 243.650(4)). It is the "law of the case" per our dismissal in Case No. UP-019-14 that the Port does not employ Local 8 members.[3] Notwithstanding that conclusion, which Local 8 does not contest in its submissions to this Board, Local 8 asserts that this complaint "presents a different issue." As we understand Local 8's argument, even though the Port has not employed Local 8 members for over 20 years, the Port has, until the recent RFP, required subcontractors to use Local 8 members to perform the contracted-out mechanical crane maintenance. Because the Port is allegedly no longer choosing to impose such a requirement on service providers who submit bids in response to the RFP, the Port is, according to Local 8, required to bargain both that decision and its impacts with Local 8.

Like its argument in Case No. UP-019-14, Local 8's argument here still bypasses the basic statutory requirement that the Port employ members of Local 8 in order for this Board to have jurisdiction over the alleged bargaining dispute. In other words, even assuming, as we must at this stage, that the Port promised Local 8 that the Port would "exercise its control" over subcontractors by requiring those subcontractors to use Local 8 members to perform mechanical crane maintenance, it does not follow that we have jurisdiction over that dispute. In order for this Board

[3]The "law of the case" doctrine "is a general principle of law and one well recognized in this state that when a ruling or decision has been once made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal or other proceeding for review." *See Kennedy v. Wheeler*, 356 Or 518, 524 (2014) (citations omitted). Although the doctrine typically refers to relitigation of a ruling or decision in the same case, its applicability to this case is apt because, like Case No. UP-019-14, the instant complaint concerns whether the Port has a bargaining obligation under the PECBA with respect to Local 8. As explained in Case No. UP-019-14, if the Port does not employ Local 8 members, there is no such bargaining obligation and the Board does not have jurisdiction over the dispute. Additionally, the policies underlying the doctrine, including "consistency of judicial decision" and "putting an end to litigation of matters once determined," apply to this matter. *See id.* Finally, we reiterate that there is no assertion in the instant matter that the employer-employee relationship has changed between our dismissal in Case No. UP-019-14 and the filing of this complaint.

to have jurisdiction over the alleged dispute, there must be an employer-employee relationship between the public employer (the Port) and the employees represented by the exclusive bargaining representative (Local 8). Because the law of the case establishes that there is no disputed issue of fact or law on that dispositive jurisdictional matter, we will dismiss the complaint.

ORDER

The complaint is dismissed.

DATED this 23 day of January, 2015.

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-004-14

(PETITION FOR CERTIFICATION WITHOUT AN ELECTION)

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

On December 15, 2014, this Board heard oral argument on Respondent's objections to an October 31, 2014, recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew, after a hearing on June 23 and 24, 2014, in Salem, Oregon. The record closed on July 28, 2014, upon receipt of the parties' post-hearing briefs.

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

Ashley Boyle, Attorney at Law, formerly of LGPI, Salem, Oregon, and currently of Beery, Elsner, and Hammond, Portland, Oregon, represented Respondent Douglas County (County).

On May 5, 2014, AFSCME filed this Petition for Certification Without an Election under OAR 115-025-0065. The petition seeks certification of a new bargaining unit.

The issue is: Is a bargaining unit of full-time and regular part-time employees in the Douglas County Assessor's Office, excluding managers, supervisors, on-call and temporary and confidential employees, an appropriate unit under ORS 243.682(1)(a) and OAR 115-025-0050?[1]

[1]The parties stipulated that the Petition, which identified the employees at issue as working in the County "Tax and Assessment Department," does not include employees of the County's Tax Collection department, whose relationship to the Assessor's Office is explained in more detail below. In accordance with that stipulation, and for clarity, we have modified the issue statement to refer to the department at issue as the "Assessor's Office." The issue statement for hearing also included, "[i]f the bargaining unit is appropriate, are there casual employees who should be excluded," but no evidence or argument was submitted regarding any such employees, and we do not address the issue.

For the reasons explained below, we conclude that the proposed unit is appropriate.

RULINGS

At the time of hearing, a newly elected Assessor was to take office in January 2015. The County objected to the Union offering evidence of the incoming Assessor's "political position and potential changes the Assessor may make," and renewed its objection in its post-hearing brief. The ALJ properly received this evidence, which was relevant to the employees' desire for a separate bargaining unit and illustrative of the variability of working conditions resulting from the County's structure and changes in elected leadership.

The remaining rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The County is a public employer as defined by ORS 243.650(20). AFSCME is a labor organization as defined by ORS 243.650(13).

2. The County has 683 employees working in 27 subdivisions or departments. Seven County departments are headed by individual elected officials and do not report to the elected Board of Commissioners, including: the Assessor's Office (with 23 full-time employees (FTE));[2] the County Clerk's office (7 FTE); the District Attorney's office (22 FTE); 4 Justices of the Peace operating as separate departments (11 FTE); the Sheriff's office (127 FTE); the Surveyor's office (5 FTE); and the Treasurer's office (2 FTE).

3. Twenty County departments report to the Board of Commissioners, including: the Building Department (8 FTE), Building Facilities (18 FTE), the Commission on Children and Families (2 FTE), Communications (20 FTE), County Counsel (4 FTE), the Fair Board (9 FTE), Financial Services (8 FTE), Fleet Management (12 FTE), Forest Management (5 FTE), Health and Social Services (196 FTE),[3] Human Resources (7 FTE), Information Technology (10 FTE), Juvenile (39 FTE), the Library (26 FTE), Public Works (95 FTE), Planning (15 FTE), the Museum (4 FTE), Parks (14 FTE), Salmon Harbor (10 FTE), Tax Collection (3 FTE), and Watermaster (1 FTE).

4. There are four County bargaining units and a number of unrepresented employees. AFSCME represents separate units of the Deputy District Attorneys and the Juvenile Department employees. Teamsters Local 223 represents a single unit comprised of public works employees in

[2]Although some County organizational documents describe the Assessor's Office as including the Assessor employees and Tax Collection employees, the three tax employees do not report to the Assessor and are budgeted under the County Financial Services Department.

[3]In June 2014, the County decided to "[n]o longer be a provider of basic or local public health services." This means that most or all of the County Health and Social Services Department will soon disappear. This led to AFSCME's withdrawal of a petition (CC-005-14) to represent "[a]ll employees in the Douglas County Public Health Department, excluding managers, supervisors, and confidential employees."

the Public Works Department and the Fleet Services Department. The Douglas County Law Enforcement Association represents the full time Sheriff's Department employees; the part-time employees in that department are unrepresented.[4]

5. In 1992, the Oregon Public Employees Union, SEIU Local 503 (SEIU), attempted to organize a bargaining unit of "[a]ll full-time and regular part-time employees of Douglas County, *excluding* employees who work at the Salmon Harbor Marina, all supervisory, confidential, management employees, employees represented pursuant to the certification of any other labor organization, temporary employees, seasonal and casual employees." An election was held, and employees voted for no representation. This Board certified the results of that election on March 23, 1993.[5]

6. On April 14, 2014, AFSCME filed a petition seeking an election to determine whether the remaining unrepresented full and part-time employees of the County wished to be represented by AFSCME.[6] AFSCME withdrew that petition after it determined that it was unlikely to prevail in an election.

7. Forty-four positions in 12 County departments require employees to be registered, certified, or licensed. Employees in 47 positions spend substantial amounts of time in the field. Positions in seven departments have employees who spend substantial time in the field and who are registered, certified, or licensed.

8. Employees in three types of positions work in multiple County departments. The County employs 7 Office Managers and 64 Department Assistants in various departments throughout the County. There are some Information Systems Technical Support Analyst positions in multiple County Departments. No Office Managers, Department Assistants, or Information Systems Technical Support Analysts are currently represented by a labor organization.

9. Most County employees work in the County Courthouse, including the employees in the positions discussed at length in this Order.

10. The County has formal, written, personnel rules. County departments headed by individual elected officials that are not covered by a collective bargaining agreement are generally subject to all of these rules, except for County Personnel Rule 12, which contains the County's

[4]At present, no County assessor's department in Oregon has its own bargaining unit; either the assessor employees are unrepresented or they are part of a much larger unit.

[5]We take official notice of the certification results from the election in *Oregon Public Employees Union, SEIU, Local 503 v. Douglas County,* Case No. RC-69-92 (1993). *See SAIF v. Calder*, 157 Or App 224, 227, 969 P2d 1050 (1998) (an administrative agency may take judicial notice of facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned). *Cf. Arlington Ed. Assn. v. Arlington Sch. Dist. No. 3*, 177 Or App 658, 34 P3d 1197 (2001), *rev. den.*, 333 Or 399, 42 P3d 1243 (2002) (this Board was not authorized to take official notice of a party's letter, which had not been submitted at the evidentiary hearing, but that had appeared elsewhere in the Board's files; the letter was not a source whose accuracy could not reasonably be questioned).

[6]*AFSCME Council 75 v. Douglas County,* Case No. RC-003-14 (2014).

policies for termination and discipline. Rule 12 provides that an employee may not be disciplined except for cause. Elected department heads can choose to adopt Rule 12 for their department, but none of them has done so. Individual elected department heads may opt out of other County rules with the approval of the County Board of Commissioners, although there is no evidence in the record that any have done so. In addition to the County personnel rules, each County department has its own supplementary policies and procedures.

11. The unrepresented employees outside the Assessor's Office, who work for individually elected officials and therefore may be disciplined without cause, are as follows: one Accountant Clerk, one Office Manager, and three Records and Election Technicians (County Clerk); one District Attorney Office Manager, nine Legal Assistants, and one Victim Assistance Coordinator (District Attorney); seven Department Assistants (Justices of the Peace); all part time employees (Sheriff's Office); three Survey Technicians and one Survey Support Supervisor (County Surveyor); and one Accounting Clerk (Treasurer's Office).

12. There is a salary classification system covering all employees with the goal of compensating comparable positions with equal compensation. All unrepresented employees receive the same medical, dental, life insurance, sick leave, vacation, holiday, and retirement benefits.

County Assessor's Office

13. The Assessor's Office is a County department that is responsible for the data used to support County tax billing. As such, the Assessor's Office performs property valuation and mapmaking functions. The Assessor's Office includes positions directly concerned with the assessment function, such as Property Appraisers and Assessment Technicians. Assessor's Office employees input data into County-wide TSG[7] program databases, which share data with the Assessor's Office, Tax Collection office, Planning Department, Building Department, Surveyor's Office, Clerk's Office, Land Department, and Public Works Department. Employees from these offices can also enter data into the TSG program.

14. The Assessor's Office also includes positions with mapmaking duties such as the Cartographic/GIS (geographic information system) Technicians. Maps and data created by the mapmaking employees are used by the assessment employees, and also by a variety of other County employees including those working for the Planning Department and Surveyor.

15. The Assessor's Office is headed by an elected official, who has chosen not to adopt County Personnel Rule 12, which provides that discipline must be for cause. At the time of hearing, Susan Acree was the elected Douglas County Assessor. Before being elected to that position, Acree worked in the office for more than 32 years, holding the positions of Department Assistant, Appraiser 1 and 2, Lead Residential Appraiser, and Appraiser Manager. Acree's term ended in January 2015, and a newly elected Assessor took the position. Department employees believe that the new Assessor's electoral campaign included statements critical of their competence.

[7]The record does not contain the meaning of this acronym.

16. The Assessor's Office is located on the second floor of the County Courthouse. It is physically separate from other County offices, except that it shares a lobby and a break room with the Tax Collection Office. The cartography division of the Assessor's Office is in a nearby office with its own entrance.

17. The Assessor's Office has supplemented County policies with a six-page, largely single-spaced, nine-and-ten-point-font "Assessor Office Guidelines," and a "Dress Code Policy" made up of one similarly formatted page of written rules and one-and-a-half pages of illustrative photographs.

18. The Assessor Office Guidelines, a document drafted by County Assessor Acree, establish rules covering a range of employee conduct and working conditions, including the following: employees should speak with the Assessor about issues regarding working conditions instead of one another, as this "only fuels the fire; employees may not flex their hours; staff who regularly fail to arrive on time or are not ready to work by 8:00 a.m., including time spent visiting with coworkers, putting lunch in the refrigerator, getting water/coffee, making coffee, etc., should share those facts with their supervisors or take vacation time; employees should question themselves whether time off is really necessary before asking for it; employees will not be granted leave during the busy seasons (leave blackout period); the guidelines "strongly suggest" that employees not have their personal cell phones at their desks; employees should not have personal items such as plants, memorabilia, and photos at their desks; employees should not whisper because it "draws attention and indicates to others that the conversation is probably not work related;" employees who whisper or have personal conversations during work hours may account for the minutes spent doing so by adjusting their break time, adjusting their lunch hour, or taking vacation time; employees who miss or cut short a break due to work should first "be conscious of times when doing non-work related / personal business on county time – it probably evens out for those times"; employees on sick leave on a Thursday and Friday are presumed to be sick on the following Saturday and Sunday (triggering County personnel rules requiring employees on sick leave for four or more consecutive days to supply a doctor's note to return to work on Monday); and employees donating sick leave may only donate hours they have accrued over 40. The record does not reveal any other County department with comparably specific and detailed employee rules.

19. The Assessor's Office dress code is detailed and includes attire worn in the office and the field. Jeans are allowed on Fridays, if they are "very dark blue dress jeans," not "blue denim," and if a $1.00 donation is paid. Nylons or knee highs with open-toed shoes are "optional" during warmer weather, but "suggest[ed]" during other times of the year. Employees may not wear "dresses, skirts, etc. * * * any shorter than 4" above the top of the kneecap[,]" * * * "tight fitting pants of any type[,]" * * * "too high of heels if struggle to walk[,]" and are to limit wearing jackets and coats in the office. While in the field, employees may wear "[c]asual colored pants/jeans," if they are not "too relaxed or * * * too baggy," except when the field work involves "better quality homes." Capri pants can be worn if they are no shorter than mid-calf. Employees may not wear field clothes to work unless they work at least six hours in the field that day. Although some other County departments have written or unwritten dress codes, the record contains few specifics regarding those codes.

20. The dress code includes a disciplinary framework for violations, including an oral or e-mail warning by a supervisor, a written warning to be placed in the employee's personnel file, and further disciplinary action "at the discretion of the Assessor and HR involvement."

21. The Assessor's Office employs 20 nonsupervisory employees, in the following positio: one Assessment Database Technician; three Assessment Technicians 1 and 2; two Cartographic/GIS Technicians 2; three Department Assistants 4; one Information Systems Technical Support Analyst 2; one Office Manager 2; one Personal Property Technician 2; six Property Appraisers 2 or 3; and two Property Appraiser Trainees.[8] The Assessor's Office employees have never been part of a bargaining unit.

22. Assessor's Office technical employees interact weekly with employees from the Surveyor's Office, usually by obtaining surveys and sharing maps. They interact with employees from the Planning Department weekly, usually regarding planning worksheet notifications or zoning information. Some of these discussions are technical; others involve simply exchanging information about particular real property. Most of these interactions take place electronically. Appraisers interact with the cartographers weekly, usually about the boundaries of fire districts or other similar valuation borders or new construction revealed by their satellite photos.

23. Appraisers interact with the employees from the Building Department during their busy reappraisal season (when the appraisers cannot personally visit every property) to obtain building plans and permits to use as a basis for valuation of new structures.

24. Assessor's Office employees see other County employees mostly when passing by them in the building's hallways. Those employees include Deputy District Attorneys, Public Works employees, Sheriff's employees, and Juvenile Department employees.

Property Appraisers

25. The Property Appraiser position has levels 1 through 4.[9] The wages range from $13.01 to $28.52 per hour.

26. Each Appraiser specializes in one type of real property: residential, commercial, or farm/forest. Higher-level Appraisers provide working supervision of lower-level Appraisers and perform appraisals of more complex or unusual properties. Appraisers perform data collection and analysis and conduct ratio studies. Appraisers also update assessment information and conduct special studies or projects. Finally, they defend appraisals as expert witnesses in appeals before the Board of Property Tax Appeals, Department of Revenue, Board of Ratio Review, Small Claims Court, and Tax Court.

[8]The department also employs the Assessor, the Chief Deputy Assessor/Chief Appraiser, and the Cartographic Supervisor. The parties appear to agree that these positions are supervisory.

[9]The differences between the Property Appraiser levels do not affect our analysis of the appropriate unit; we summarize the position description for the Property Appraiser 2.

27. Principal duties of the Appraisers during the "reappraisal cycle" (annual valuation of property) are as follows:

> "Prepare maps and aerial photos; inspect, verify and analyze sales for assigned appraisal area. Prepare pre-appraisal studies such as time trend analysis, local cost modifier, depreciation schedules, market benchmarks, basic unit land values, base adjustment factors, etc. Physically inspect buildings and land to determine market value; observe construction type and quality to classify buildings and assign appropriate costs; observe physical, functional and economic factors and apply appropriate accrued depreciation. Enter data into the department automated system." (Enumeration omitted.)

28. Principal duties of the Appraisers during the "Maintenance Cycle" (checking for property changes that affect valuation over the rest of the year) are as follows:

> "Compile all building permits, computer printouts, notes and accounts for assigned area. Field inspect properties adjusting values for new construction, segregation, removal of buildings, damage, depreciation, etc. Conduct special studies and prepare reports as requested. Enter value changes into the department automated system. Respond to requests for value reviews and complaints; explain appraisal process; [and] revalue properties judged inequitable." (Enumeration omitted.)

29. The Appraisers also revalue properties that are divided or consolidated, and process property exemption applications and review them for continued compliance. They also assist members of the public with special assessment programs, including evaluating applications, designated forest-land plans, and proof of income; identifying areas of non-compliance; sending out questionnaires; and informing the public of statutory requirements.

30. The knowledge, skills, and abilities required for the Appraiser positions are as follows:

> "**Knowledge of:** Considerable knowledge of theories, principles, practices and techniques of property appraisal including property description and measurement, building construction practices, materials and costs and appeal procedures; reasonable knowledge of Oregon Revised Statutes and Department of Revenue guidelines, laws, rules, regulations and ordinances relating to appraisal; reasonable knowledge of local zoning/planning regulations as related to property values; reasonable knowledge of special assessment programs such as farm use and designated forest land; reasonable knowledge of exemption programs. **Skill in:** Performing mathematical and statistical calculations; operation of office equipment including calculator, camera, copy machine, microfiche reader, automated equipment and systems; reading aerial photos and maps; use of reference manuals for valuation purposes; writing clear and concise records, appeal responses, reports and statistical data. **Ability to:** Communicate effectively in both oral and written form; perform research; perform effectively at appeal hearings; make decisions independently in accordance with established policies and procedures and use

> initiative and judgment in completing tasks and responsibilities; make sound judgment in making decisions regarding property values; utilize problem identification and resolution techniques; gather and analyze sales data and compile into meaningful reports; establish and maintain records and statistical data; understand and interpret deeds, legal property descriptions and maps; work independently; efficiently manage time to meet deadlines; prepare and present reports; courteously meet and deal effectively with other employees, property owners, boards, courts, real estate and title companies, fee appraisers, other agency representatives, businesses, professionals and the public." (Emphasis in original.)

31. The minimum qualifications for the Appraiser positions include a bachelor's degree or a combination of experience, education, and training in property appraisals. State certification is required.

32. Appraisers perform their work with minimal supervision.

33. Appraisers spend one-third of their time in the field doing inspections, including in inclement weather. In addition to the data generated by physical inspections, the resources used by the appraisers include a field data card containing information and notes from the cartography division of the Assessor's Office, the Building Department, and the Planning Department. Appraisers also consult the Assessor Permitting System, which contains data entered by the Building Department, including the permit number (issued by the cartographer), the type of permit (Building Department permit, Planning Department worksheet, or Assessor's Office permit), the type of project (remodel, electrical, review), the date that the permit was issued, and the appraisal status. The Permitting System also contains a "Building Work Value" created by the Building Department. Some Appraisers use this number as a check on their assessed value for properties under construction.

34. When not in the field, Appraisers spend most of their time entering data into the County's TSG computer program.

<u>Property Appraiser Trainee</u>

35. The Property Appraiser Trainee has one level. The wage for the position ranges from $11.55 to $16.81 per hour.

36. An employee hired into this position is a trainee to the Property Appraiser series and is trained to perform standardized appraisals of urban, rural, personal, or commercial property and other activities of the Property Appraiser. Employees work under the supervision of an appraiser of a higher classification. After the initial training period, the employee is required to pass the registered appraiser test and will then be promoted to Property Appraiser 1. This is a training position and requires a high degree of supervision and review.

37. The knowledge, skills, and abilities required by this position are as follows:

> "**Knowledge of:** Basic knowledge of real estate values. **Desired Skill in:** computer operation and considerable knowledge of computer software. **Skill in:** Performing mathematical and statistical calculations; operation of office equipment including calculator, camera, copy machine, microfiche reader and automated equipment and systems; reading aerial photos and maps; use of reference manuals for valuation purposes; writing clear and concise records, reports and statistical data. **Ability to:** Communicate effectively in both oral and written form; perform research; make decisions independently in accordance with established policies and procedures and use initiative and judgment in completing tasks and responsibilities; use sound judgment in making decisions; gather and analyze sales data and compile into meaningful reports; establish and maintain records and statistical data; understand and interpret deeds, legal property descriptions and maps; effectively and efficiently manage time to meet deadlines; prepare reports; courteously meet and deal effectively with other employees, property owners, boards, courts, real estate and title companies, other agency representatives, fee appraisers, private agencies, businesses, professionals and the public." (Emphasis in original.)

38. The minimum requirements for the position are three years of work experience or education affording knowledge of business administration, land values, or a related field. The employee is expected to obtain certification as a Property Appraiser 1 at completion of the training period.

39. This classification works in the office and in the field, including in inclement weather.

Assessment Technician

40. The Assessment Technician position has levels 1 and 2.[10] The wages range from $11.55 to $18.93 per hour.

41. Assessment Technicians "provide computer application and peripheral support" to the Assessor's Office including "installing, on a limited basis, and/or under the guidance of the Information Technology department, hardware/software and peripheral equipment, solving inter-office user operation problems[,] and providing daily support for appraisal and data operations." They work primarily in an office setting.

42. The Technicians perform "farm/forest support duties, appraisal support, field audits, technical work, and support to the Assessor or Assessor's managers and work in an analytical environment." They perform this work with minimal supervision.

[10]The differences between the Assessment Technician levels do not affect our analysis of the appropriate unit; we summarize the position description for the Assessment Technician 2.

43. Specific duties are as follows: troubleshoot and diagnose software failures; compute values based on reported or typical cost and depreciation using guidelines established by the Department of Revenue and other reference materials; enter data into the Assessor's computer system; prepare and defend values and assessments at the Board of Equalization, Department of Revenue and Tax Court; assign work to, lead, monitor and review the work of technical and clerical employees working with the Assessment Technician 2 position and/or within the imaging department of the office; coordinate work flow; analyze and correct software utilization and problems; and create and maintain policy and procedure manual according to changes made by legislature, department of revenue guidelines, administrative rules, and case law and of user's procedures within the imaging department.

44. The knowledge, skills, and abilities required by this position are as follows:

> "Extensive knowledge of property valuation techniques and procedures; considerable knowledge of Oregon Revised Statutes, Administrative Rules and Department of Revenue guidelines, laws, regulations and ordinances relating to property valuation; Considerable knowledge of mathematical practices and principles and statistical analysis; considerable knowledge of record keeping principles. Extensive knowledge of computer operating principles, capabilities, and general uses; considerable knowledge of recommended computer hardware, software and peripheral equipment/software. **Skill in:** Performing mathematical computations; operation of all office equipment including calculators, cameras, copy machine, microfiche reader and automated equipment and systems; writing clear and concise records, reports, procedure manuals and statistical data. Diagnosing and correcting computer hardware and software problems; guiding and encouraging computer system users and translating technical instructions into understandable language for users. **Ability to:** Communicate effectively in both oral and written form; make decisions independently in accordance with established policies and procedures, establish new procedures when applicable, and use initiative and judgment in completing tasks and responsibilities; make sound judgment in making decisions regarding property values; utilize problem identification and resolution techniques; establish and maintain records and reports; lead support staff; work independently and meet established deadlines; support the defense of values, courteously meet and deal effectively with other employees, property owners, boards, courts, other agency representatives, vendors and the public." (Emphasis in original.)

45. The minimum requirements for the position are an associate degree in a related field and two years of experience in an assessor's office or a combination of education, experience, and training. A desirable qualification is an associate degree in business administration or closely related field. State certification is not required.

46. It does not appear, in this record, that Assessment Technicians rely to a significant degree upon employees in other departments to provide information or other material necessary for their work.

47. It is common for Assessment Technicians to be promoted to Property Appraiser.

Personal Property Technician

48. The Personal Property Technician position has at least two levels, 1 and 2. (Only the position description for the level 2 position is in the record.) The wages for this position range from $13.01 to $18.93 per hour.

49. An employee in this position performs and coordinates the identification, valuation, and assessment of personal property for placement on assessment and tax rolls. The technicians process personal property returns, conduct field audits, assess personal property, compute and depreciate values, defend appraisals at hearings, and coordinate staff who assist personal-property-section work during peak periods. These technicians lead the work of lower classified technicians.

50. Other principal duties of the Personal Property Technician are as follows: contacting personal property owners to obtain needed information to determine appropriate value; physically canvassing the county for the purpose of identifying taxable personal property; reviewing accounts flagged for tax correction; maintaining the personal property section policy and procedure manual according to changes made by state laws, rules, and judicial decisions; researching various subjects and issues; and preparing records, reports, and statistical data.

51. The knowledge, skills, and abilities required by this position are as follows:

> "**Knowledge of:** Thorough knowledge of personal property valuation techniques and procedures; considerable knowledge of Oregon Revised Statutes, Administrative Rules and Department of Revenue guidelines, laws, regulations and ordinances relating to personal property valuation; reasonable knowledge of mathematical practices and principles and statistical analysis; considerable knowledge of record keeping principles. **Skill in:** Performing mathematical computations; operation of office equipment including calculators, cameras, copy machine, microfiche reader and automated equipment and systems; writing clear and concise records, reports, procedure manuals and statistical data. **Ability to:** Communicate effectively in both oral and written form; perform effectively at appeal hearings; make decisions independently in accordance with established policies and procedures, establish new procedures when applicable, and use initiative and judgment in completing tasks and responsibilities; make sound judgment in making decisions regarding property values; utilize problem identification and resolution techniques; establish and maintain records and reports; lead support staff; work independently and meet established deadlines; defend values of personal property; courteously meet and deal effectively with other employees, property owners, boards, courts, other agency representatives, vendors and the public." (Emphasis in original.)

52. The minimum requirements for the Personal Property Technician position are four years of experience in an assessor's office personal property section or an equivalent combination

of education, experience, and training. An associate degree in business administration or a closely related field is a desirable qualification. State certification is not required.

53. The Personal Property Technicians work in the office and in the field under the general direction and instructions of an appraisal supervisor. They refer to department policy and procedures; federal, state and county statutes, rules, and regulations; assessment principles and practices; manufacturers' catalogs and handbooks; sales and condition information; and valuation factor tables.

Assessment Database Technician[11]

54. The Assessment Database Technician position has only one level. The wage for the position ranges from $15.48 to $22.56 per hour. The technician provides technical assistance, and analyzes and facilitates the use of computer hardware and software for the Assessor's Office, which includes creating, maintaining, troubleshooting, and diagnosing assessment applications to ensure program quality, integrity, and performance. The technician also coordinates with supervisors, managers, and assessment technician staff in providing daily support for appraisal and data operations. The position requires the employee to have knowledge of valuation techniques and procedures in compliance with state law, rules, and established guidelines. The employee is minimally supervised, and may participate in assigning and overseeing work and monitoring the methods and quality of the department's scanning and imaging.

55. Other principal duties of the position include monitoring program systems for efficiency and effectiveness, recommending procedural changes, and participating in system analysis; using mathematical techniques and statistical analysis and procedures to calculate and compute necessary factors and values, including preparation of charts, graphs, reports, and working papers; preparing materials for defense of values, appraisals, appeals, and assessments before the Board of Property Tax Appeals, Oregon Department of Revenue, and Oregon Tax Court; assisting in research projects to develop assessment data; and assisting auditor and/or appraisers in obtaining information.

56. The knowledge, skills, and abilities required by this position are as follows:

> "**Knowledge of:** Computer operating principles, capabilities, and general uses; recommended computer hardware, software and peripheral equipment/software. Visual Basic of Applications (VBA). Property valuation techniques and procedures. Knowledge of Oregon Revised Statutes, Administrative Rules and Department of Revenue guidelines, laws, regulations and ordinances relating to property valuation. Mathematical practices and principles and statistical analysis. Record keeping principles. **Skill in:** Strong proficiency in MS Excel, Access 2003 or newer, database design and development. Performing mathematical computations; operation of all office equipment including calculators, cameras, copy machine, microfiche reader and automated equipment and systems; writing clear and concise records, reports, procedure manuals and statistical data. Diagnosing and correcting computer hardware and software problems; guiding and

[11]The employee who holds this position is also licensed as, and works as, a Property Appraiser.

> encouraging computer system users and translating technical instructions into understandable language for users. **Ability to:** Communicate effectively in both oral and written form; make decisions independently in accordance with established policies and procedures, recommend new procedures when applicable, and use initiative and judgment in completing tasks and responsibilities; make sound judgment in making decisions regarding property values; utilize problem identification and resolution techniques; establish and maintain records and reports; assist support staff; be able to work independently and meet established deadlines. Courteously meet and deal effectively with other employees, property owners, boards, other agency representatives, vendors and the public." (Emphasis added.)

57. The minimum qualifications for the Assessment Database Technician position include an associate or technical degree in computer science or a related field and three years of work experience in database analysis and data modeling with a high level of computer efficiency and systems knowledge, or an equivalent combination of education, training, and/or experience relevant to the position. Preference is given to those with work experience in an assessor's office.

58. The technician works in the office and in the field under the general direction of the Chief Deputy Assessor, Assessment Database Manager, or his/her designee. The level of supervision is minimal. Employees refer to department policy and procedures; federal, state, and county statutes, rules, and regulations; assessment principles and practices; and manufacturers' catalogs and handbooks, sales and condition information, and valuation factor tables.

Information Systems Technical Support Analyst

59. Only the level 1 position description for this position is in the record, and it is unclear how many additional levels exist.[12] The wage for the level 1 position ranges from $20.69 to $30.18 per hour.

60. The analyst performs complex technical duties that involve design, administration, and maintenance of the County's web site, operating systems support, end-user systems analysis and support, network and systems administration, software application design, development, installation, support maintenance and problem resolution, and network planning, administration, and management. It is the only position whose duties require, with varying degrees of difficulty, highly technical work involving the design, development, testing, implementation, and maintenance of networks and systems deployed throughout the County and the departments within the County. The analyst is involved in establishing and maintaining relevant department policies and procedures.

61. Persons in the level 1 position handle more routine or specialized projects within the County's Information Technology Department, such as basic County web design and maintenance, basic level system diagnostic and problem resolution, basic network monitoring, diagnostic and problem resolution, and general technical interaction with vendors, suppliers, and other technical personnel. Major technical decisions are deferred to senior level support analysts, and the analyst has limited responsibility regarding system decisions that impact volumes of users.

[12] The Assessor's Office has a level 2 position.

62. Principal duties are as follows: respond to individual requests for technical support; install new software, system upgrades, system backups and recovery; documentation/project tracking and management reporting; install, configure, and maintain County network; design, implement, and manage backup strategies for all County servers; prepare system specifications based on information obtained from analysis; convert specifications into specific programming language and/or vendor software applications; document new and existing systems for users and information systems staff, including operating instructions, internal controls, error conditions, recover/restart procedures, report generation and layouts, computer languages and support utilities used, special systems software, file layouts, user approval documents, system flow charts, agency documentation and system narrative; participate in departmental planning for procedure and policy changes, budget strategy and equipment/facility needs; serve as project manager for purchased/adapted systems, including acting as team leader, monitoring budget and scheduling performance; serve as database manager; act as vendor liaison; assist with preparation of RFP's; provide support during the procurement process; assure delivered products meet requirements; train users in the use of new, existing, and enhanced systems; train information systems staff on new/revised hardware and software; assist lower level analysts with complex technical problems; and serve as County information systems security officer and County network systems administrator.

63. The knowledge, skills, and abilities required by the Information Systems Technical Support Analyst are:

> "Thorough knowledge of commonly used concepts, practices, and procedures within a particular field is required. Depending on the level of responsibility, the incumbent will rely on experience and judgment to plan and accomplish goals and rely on instructions and pre-established guidelines to perform the functions of the job. Performs a variety of complex tasks. **Skill in:** Developing, adapting, modifying, testing, documenting and operating applications programs; system-level programming. **Ability to:** Communicate effectively in both oral and written forms; obtain appropriate information and analyze needs of user department and translate needs into automated system solutions; integrate vendor-supplied software into County systems; reason logically when analyzing data and developing computer systems and programs; utilize problem identification and resolution techniques; make decisions independently in accordance with established policy, establish new policy when applicable, and use initiative and judgment in completing tasks and responsibilities; remain calm and use good judgment during confrontational or high pressure situations; work within a team concept; plan, organize, schedule and monitor projects; prepare clear and concise documentation; courteously meet and deal effectively with other employees, vendors and the public." (Emphasis in original.)

64. The minimum qualifications for the position are a bachelor's degree in computer science or a related field and two years related experience in network and/or systems-related analysis, design, installation, and maintenance, or an equivalent combination of education, experience, and training.

65. The Information Systems Technical Support Analyst position works in an office environment under the general direction of the department head or designee with minimal supervision.

66. Employees in the position refer to established policy and procedures; County rules, regulations, orders, resolutions, and ordinances; standards manuals for information systems; systems and programming manuals; vendor-supplied documentation; and program management principles and practices.

67. Information Systems Technical Support Analysts also work in the departments of Public Works (1), Management and Finance (1), Information Technology (2), and Health (3). These other Analysts all work in departments subject to County Personnel Rule 12, providing for discipline for cause. None of them are part of a bargaining unit.

Cartographer/GIS Technician

68. The Cartographer/GIS Technician position has levels 1 and 2.[13] The wages range from $13.01 to $21.28 per hour.

> "The classifications in this two-level series perform duties associated with developing and maintaining the County cadastral mapping system. Incumbents apply cartographic principles and practices to maintain records and cadastral maps aiding the Assessor's Office in the identification, location, inventory and mapping of land for assessment and valuation of property. All positions prepare a variety of cartographic maps, solve problems requiring knowledge of the subject matter of surveying, mapping and legal ownership. Individual positions perform, at varying levels of difficulty, all types of cartographic projects from basic preparation of partitions, segregations and consolidations to more complex projects requiring research and resolution of ownership, boundary and taxing district issues as well as involvement with the County geographic information system (GIS) program."

69. Cartographer/GIS Technician duties are as follows:

> "Plot annexations, formations, mergers, consolidations and withdrawals of taxing districts on code and cadastral maps; record changes on maps, tax lot records and assessment rolls; prepare new boundary maps for new districts. Prepare segregation, consolidations and partitions of property by plotting new boundaries on map, computing acreage of new parcel, assign new tax lot and account number and prepare new prints of revised maps for map books. Construct complex maps such as base control maps, cadastral maps and specialized maps from beginning to finalization; revise maps to conform to official government land surveys, highway maps, BLM public land surveys and new aerial photos. Receive and review deed records and other instruments indicating ownership changes of property and change assessment roll, tax lot card and other pertinent records. Review subdivision and condominiums for conformance to statutes and revise maps and

[13]The differences between the Cartographer/GIS Technician levels do not affect our analysis of the appropriate unit; we summarize the position description for the Cartographer/GIS Technician 2.

assessment roll to conform and reflect new subdivisions or condominiums. Assist the GIS project by performing research; input and update basemaps, plot, compare to existing maps and analyze differences. Perform extensive title searches to determine ownership on questioned properties; review ownership boundary, taxing district, tax code area issues; interprets legal descriptions. Assist other departments, agencies and the public with property questions or complaints regarding cadastral maps and records. Prepare and maintain records, reports and statistical data." (Enumeration omitted.)

70. The knowledge, skills, and abilities required by the positions are as follows:

"**Knowledge of:** Considerable knowledge of cartographic principles, practices and techniques involved in the preparation of appraisal maps; considerable knowledge of mathematics including algebra, geometry and trigonometry; basic knowledge of surveying and engineering principles and practices; considerable knowledge of legal property descriptions, deed records, survey files and other documents pertaining to boundary and ownership of property; reasonable knowledge of the Oregon Administrative Rules as applied to preparation of cadastral maps. **Skill in:** Using calculator, automated equipment and systems; drafting instruments, planimeter and blue print machine, other job-related equipment; writing clear and concise records, reports and statistical data. **Ability to:** Communicate effectively in both oral and written forms; understand and interpret deeds and legal property descriptions; conduct records searches; work independently and manage time efficiently; make decisions independently in accordance with established policies and procedures and use initiative and judgment in completing tasks and responsibilities; utilize problem identification and resolution techniques; courteously meet and deal effectively with other employees, professionals, title companies, courts, other agency representatives, real estate agents, utility companies and the public." (Emphasis in original.)

71. The minimum requirements for the position are an associate degree in cartography, land surveying, engineering technology, or a related field and two years of cartographic experience in an assessor's office,[14] or an equivalent combination of education, experience, and training. State certification is not required.

72. The work of the Cartographer/GIS Technician, who reports to the Cartographic Supervisor, is performed with minimal supervision. The employees in the positions refer to department policy and procedures; state and county statutes, rules, and regulations; the Manual of Cadastral Map Standards, Concepts and Cartographic Procedures; and various state and technical manuals.

73. The work of the Cartographer/GIS Technician takes place exclusively in an office setting.

[14]This requirement emphasizes the connection between the work of the cartographic employees and that of the property assessment employees.

74. The Cartographer/GIS Technicians obtain information from other County departments, which the Technicians need to update the maps that they create.. Other County departments create maps and other tools based on information and base maps created by Cartographer/GIS Technicians. The Technicians may also alert employees in other departments to changes in property that the Technicians discover.

Office Manager 2

75. The Office Manager position has levels 1 through 3.[15] The wage for the Office Manager 2 ranges from $12.25 to $17.86 per hour.

76. The focus of the position is

> "organizing and directing office operations and providing support to a department or division head in addition to providing direct secretarial assistance as needed and/or supervising support staff. Organizing and directing an office typically include coordinating workflow and communication, and developing procedures, policies, materials/forms, and filing and other support systems (including confidential documents) for efficient office operations. Direct secretarial support typically includes responsibility for incoming and outgoing information and paper-flow for the assigned manager, coordinating and maintaining confidential documents and files, assisting in the budget process and coding invoices for payment. Supervision of support staff typically includes having primary responsibility for hiring, work assignments, discipline, performance assessment and termination of assigned employees. All levels within this series may provide staff research and project/program management as assigned."

77. The knowledge, skills, and abilities required by the Office Manager position are as follows:

> "Thorough knowledge of methods of modern office management and general office practices and procedures; considerable knowledge of record keeping and reporting; considerable knowledge of bookkeeping principles; considerable knowledge of word processing, spreadsheet and data base software capabilities. **Skill in:** Report writing and composing correspondence; typing rapidly and accurately; use of complex office equipment which includes automated equipment and systems; processing information on a computer; taking and transcribing dictation either manually or by machine. **Ability to:** Communicate effectively in both oral and written forms; plan and organize office operations, including developing office systems, policies, and procedures; plan, organize, assign, coordinate, and review work of staff; establish and maintain records, reports and statistical data; make decisions independently in accordance with established policies and procedures, establish new policies when applicable, and use initiative and judgment in completing tasks and responsibilities; represent department or division in a variety of settings; maintain confidentiality; courteously meet and deal effectively with

[15]The record contains only the job description and salary for the Office Manager 2.

other employees, other agency representatives, advisory boards, committees, vendors and the public." (Emphasis in original.)

78. The minimum requirements for the position are: five years of progressively responsible clerical experience (which include one year of office management and lead or supervisory experience), or a satisfactory equivalent combination of education, experience, and training. No State certification is required.

79. An Office Manager's work is performed in an office environment under the general instruction and direction of a department or division head. The work is guided by departmental policy and procedures; federal, state, and county statutes, rules, and regulations; secretarial handbooks; software and equipment manuals; specialized dictionaries; and reference materials. Office Manager is one of three job classifications that appears in multiple County departments. The County employs seven Office Managers. All of the positions have the same job description and are paid on the same wage scale. They often transfer to different County departments, although there is no evidence that any have transferred into, or out of, the Assessor's Office. Depending on their assignment, Office Managers may have unique duties. In the Assessor's Office, the Office Manager performs data entry regarding manufactured homes.

80. The other six Office Managers work in the Building Department (1), Clerk's Office (1), the Health Department (which is to be closed) (3), the Library (1), Public Works (2), and Salmon Harbor (1).[16] None of these positions is part of a bargaining unit. These six Office Managers are covered by Rule 12. The Office Managers in the Clerk's Office and Assessor's Office are supervised by an elected official and do not have Rule-12 protection.

Department Assistant

81. The Department Assistant position has levels 1 through 4.[17] The wage for the Department Assistant 4 ranges from $10.29 to $14.97 per hour. The focus of the position is

> "providing support to a department in the preparation, processing, organization and maintenance of information, records and materials. * * * [Higher level Department Assistants perform] senior-level support activities to assist technical, professional and administrative functions within guidelines which require interpretation. Duties assigned to this classification are significantly varied and/or specialized, and the employee uses considerable judgment and independence to determine appropriate procedures and conduct of assignment. [The employee] may supervise or lead lower-level department assistants and may have sole responsibility for specialized projects or assignments."

82. The knowledge, skills, and abilities required by this position are as follows:

[16]There is also a position called "District Attorney Office Mgr;" there is no evidence that this is the same position as "Office Manager."

[17]The record contains only the job description and salary for the Department Assistant 4.

> "Considerable knowledge of general office practices and procedures; considerable knowledge of word processing and data spreadsheets; considerable knowledge of record keeping and reporting; considerable knowledge of systematic filing and retrieval processes or systems relating to assigned department or program area; considerable knowledge of English composition, spelling and grammar; reasonable knowledge of bookkeeping principles. **Skill in:** Typing rapidly and accurately; use of complex office equipment which includes automated equipment and systems; processing information on a computer; taking and transcribing dictation either manually or by machine. **Ability to:** Communicate effectively in both oral and written forms; estimate and manage time efficiently; make decisions independently in accordance with established policy; maintain records, reports and statistical data; maintain confidentiality; lead or supervise support staff; courteously meet and deal effectively with other employees and the public." (Emphasis in original.)

83. The minimum requirements for the Department Assistant position are: three years of work-related support experience of a progressively responsible nature or an equivalent combination of education, experience, and training. Specific knowledge or experience related to the assigned department or program area is a desirable qualification. No State certification is required.

84. The employee in this position works in an office environment under general direction and instructions from a clerical, professional, or administrative employee.

85. The Department Assistants perform work within established department policy and procedure; federal, state, and county statutes, rules, regulations, and ordinances; secretarial handbooks; software and equipment manuals; specialized dictionaries; and reference materials. A considerable amount of judgment and initiative is used to interpret these guidelines.

86. The Department Assistant is one of three job classifications that appears in multiple County departments. The County employs 64 Department Assistants, and all of the positions have the same job description and are paid on the same wage scale. They often transfer to different County departments, although there is no evidence that any have transferred into, or out of, the Assessor's Office.

87. The other 61 Department Assistant positions are in the Fairgrounds Department (1), Human Resources (1), Justices of the Peace (7), Library (21), Parks (1), Planning (2), Public Works (2), Salmon Harbor (2), Sheriff's Department (1), and the Health Department (23). None of these positions is part of a bargaining unit. Like the Assessor's Office, the Justices of the Peace and Sheriff's department are supervised by an elected official. The rest of these Office Managers are covered by County Personnel Rule 12.

Building Department

88. The Building Department is generally responsible for reviewing, approving, and issuing permits regarding construction in the County. It employs approximately six nonsupervisory employees; two Building Inspectors, one Electrical Inspector, one Building Permit Technician,

and one Office Manager 3. As part of its work, this department assesses the value of a structure based on the average cost of construction per square foot for the type of structure and the type of construction. This information, along with the permitting information, is available to the Assessor's Office via the Assessor Permitting System database. Employees report to the Building Services Supervisor, who in turn reports to the Building Official, who reports to the County Board of Commissioners.

89. The Building Department is subject to all of the County Personnel Rules, including Rule 12, providing for discipline only with cause. The Department also has its own written and unwritten policies and procedures.

Building Inspectors

90. The Building Inspector position has one level. The wage ranges from $16.39 to $32.11 per hour.

91. Building Inspectors issue permits for new construction and for improvements on existing structures. A Building Inspector may visit a site on multiple occasions throughout the process. Appraisers or Assessment Technicians may also visit sites visited by Building Inspectors.

92. Building Inspectors perform:

> "regular to complex duties in inspecting building construction, remodeling and repair, installation of mechanical devices and plumbing systems to assure compliance to appropriate State codes, Oregon Revised Statutes, Oregon Administrative Rules, city and county ordinances related to safety, health, and welfare of the public; examine plans and specifications for approval for proposed construction when necessary; [and] inspect manufactured home installation."

93. The duties of the Building Inspector position are as follows:

> "Inspect and evaluate structures (within certification level) while being constructed, remodeled or repaired (in areas of structural, mechanical, and/or plumbing); approve or disapprove work; write correction notices; enforce appropriate state specialty codes; assure construction, remodeling, or repair is in compliance with approved plans and state building, mechanical, and plumbing codes; conduct final inspection. Issue stop work order when directed by supervisor to do so. Inspect fire damaged structures; estimate necessary repairs. Inspect and approve manufactured home installations; [*i.e.*] blocking, sewer, water, and electrical connections; decking. Document inspections and establish and maintain record keeping. * * * [E]xamine plans, drawings, and specifications for proposed construction or remodeling projects. Work with builder/architect to correct code violation. Determine value of structures and issue building permits. Provide information regarding permits, building codes, and compliance procedures to contractors, builders, and public." (Enumeration omitted.)

94. The knowledge, skills, and abilities required by this position are:

> "**Knowledge of:** Considerable knowledge of building construction, mechanical, and plumbing principles, practices, and procedures as applied to commercial and residential construction; considerable knowledge of construction and manufactured home inspection methods; considerable knowledge of Oregon Revised Statutes, Oregon Administrative Rules, Oregon specialty codes, city and county ordinances that govern building, mechanical, plumbing inspection. **Skill and ability to:** Conduct inspections, document findings, determine correction actions, and implement compliance according to appropriate specialty codes; perform mathematical computations related to construction estimating. **Ability to:** Communicate effectively in both oral and written forms; conduct inspections, document findings, determine correction actions and implement compliance according to appropriate specialty codes; establish and maintain records and reports; make decisions independently in accordance with established rules and regulations and use initiative and judgment in carrying out tasks and responsibilities; utilize problem identification and resolution techniques; remain calm and use good judgment during confrontational or high pressure situations; efficiently manage time; courteously meet and deal effectively with employees, builders, architects, engineers, city officials and the public." (Emphasis in original.)

95. Minimum qualifications for the position are a State A-level certification in one specialty code, supported by one and two-family specialty dwelling code certification, including a manufactured-home certification. State A-level certification in more than one specialty code is a desirable qualification.

96. Building Inspectors work with minimal supervision under the general direction of the Building Inspection Supervisor. Building Inspectors use their independent, professional judgment in determining and enforcing the appropriate code. If they determine that a project fails to comply with the relevant code, they refer the matter to the Building Official. Building Inspectors' decisions can be appealed, and the inspectors may have to defend their position in an adversarial proceeding.

97. In the course of their work, Building Inspectors refer to departmental policy and procedure, state statutes, Oregon Uniform Building, Plumbing, and Mechanical Codes, city and county ordinances, and building inspection reference materials.

98. Building Inspectors spend 90 percent of their time in the field and their work may include climbing, crawling in confined areas, and moving through structures under construction and on uneven ground, sometimes in inclement weather. Interactions with affected members of the public may be adversarial. Their remaining time is spent in the office.

Building Permit Technician

99. The Building Permit Technician position has one level. The wage ranges from $15.48 to $22.56 per hour. Building Permit Technicians coordinate the building permit application

process between the public and County departments. They provide information to the public regarding Building Department procedures; review construction plans and specifications for compliance with building and planning codes and ordinances; issue building permits; receive and answer public questions; and perform inspection duties when necessary.

100. The duties of Building Permit Technicians are as follows:

"[P]rovide information regarding permits, specialty codes and compliance procedures to architects, engineers, builders and the public. Coordinate permit application process between the public and county and other agencies as necessary. Determine value of structure and necessary permits; compute fees; issue permits. Examine and evaluate building plans and specifications for structural, mechanical, plumbing, fire/life safety and zoning code compliance; approve or disapprove plans; explain appropriate state specialty codes, ORS, OAR, city and county ordinances. Document examination. Maintain recordkeeping utilizing automated permit application tracking systems. * * * [I]nspect and evaluate structures while being constructed, remodeled[, or] repaired (in areas of structural, mechanical); approve or disapprove work; write correction notices; enforce appropriate state specialty codes, ORS, OAR, city and county ordinances; work with builders to assure construction, remodeling, or repair is in compliance with approved plans and state building, mechanical, grading, and plumbing codes. Document inspections." (Enumeration omitted.)

101. The knowledge, skills, and abilities required by this position are as follows:

"**Knowledge of:** Considerable knowledge of Oregon Revised Statutes, Oregon Administrative Rules, Oregon specialty codes, city and county ordinances that govern building permit process; considerable knowledge of permitting process; considerable knowledge of coordination between appropriate departments and agencies for permit purposes; considerable knowledge of structural engineering design to determine structural soundness of plans and specifications; considerable knowledge of building construction, mechanical, and plumbing principles, practices, and procedures as applied to construction. **Skill to:** Read and interpret blue prints, plans, and specifications; conduct plans reviews, use automated permit application tracking systems and equipment. **Ability to:** Communicate effectively in both oral and written forms; establish and maintain records and reports; perform mathematical computations related to permit fees; make decisions independently in accordance with established rules, regulations and codes and use initiative and judgment in carrying out tasks and responsibilities; utilize problem identification and resolution techniques; remain calm and use good judgment during confrontational or high pressure situations; efficiently manage time; conduct inspections, document findings, determine correction actions, and implement compliance according to appropriate specialty codes; courteously meet and deal effectively with other employees, builders, architects, engineers, city officials[,] contractors and the public." (Emphasis in original.)

102. The minimum requirements for the position are four years of code or zoning administration, plan review, or building inspection, architectural or engineering experience/training; or an associate degree plus two years of work related experience; or any combination of education, experience, and training. A desirable qualification is public employer work experience related to building inspection services, plan review, and permit processing. State certification is not required.

103. Building Permit Technicians work under the general direction and instruction of the building inspection supervisor. Procedures and problem resolution are left to employee discretion and interpretation. The employee uses considerable judgment in choosing and enforcing appropriate guidelines. Building Permit Technicians refer to departmental policy and procedures, state statute, Oregon Uniform Building Code, city and county ordinances, zoning codes and regulations, building inspection and engineering reference material, and data-processing manuals.

104. Building Permit Technicians perform most of their work in the office, working infrequently in the field, including in inclement weather conditions.

Planning Department

105. The Planning Department is responsible for County planning regarding land use, zoning, and relevant County code enforcement. The Department employs 17 employees, one Senior Planner, one Senior Sanitarian, one Planning Director, one Planning Manager, three Planners, six Planning Technicians, one Environmental Inspection Specialist, one Executive Administrative Assistant, and two Department Assistants. The Department is not headed by an elected official; employees report to the Senior Planner or the Senior Sanitarian, who in turn reports to the Department Head, who reports to the County Board of Commissioners.

106. The Planning Department is subject to all of the County personnel rules, including Rule 12. The department has its own written dress code, which is strictly enforced. The dress code differs from that of the Assessor's Department. For example, although the Planning Department does not encourage women to wear nylons, it does not allow any employees to wear sneakers.

107. The Planning Department and Assessor's Office share information required for their work. Appraisers and Planners interact about once a week, and the departments' technicians interact twice a week, on average. The Planning Department employees view Assessor's Office records daily in processing land use applications and for customer service purposes. The Planning Department uses the base maps created by the Assessor's Office Cartographers, and the Cartographers update their maps based on information from the Planning Department. Once a week, the two departments exchange physical maps and discuss map updates and changes. Assessor's Office employees often ask Planners questions about notifications and conditional use permits. The Assessor's Office also has access to zoning and file information created and updated by the Planning Department. County Planning Administrator Keith Cubic believes that the Assessor's Office, the Planning Department, the Building Department, and the Surveyor's Office work together as a whole, each within their own area of specialization.

Planner Position

108. The Planner position has levels 1 through 5.[18] The wage ranges from $15.48 to $26.89 per hour for Planners at levels 1 through 3. The focus of the position is "perform[ing] professional planning duties including research, analysis, presentation of data; interpretation and enforcement of state and local land use regulations and development of plan or ordinance provision, coordination and comprehensive plan maintenance and updates." The five levels differ in the amount of judgment required in interpreting and adapting guidelines; the difficulty of their work in carrying out the County's comprehensive plan and development ordinance; and the level of responsibility in supporting the department in meeting administrative and long-range planning goals and objectives.

109. The duties of Planners are as follows:

> "Interpret local ordinances for determination of appropriate land use actions. Conduct conferences with clients using the land use system. Write and monitor administrative land use decisions. Assist clients in the development permit process. Provide information and interpret ordinances. Direct citizen involvement program. Manage the day-to-day functions of the program; provide professional advisory support to and oversee ten committees; conduct monthly meetings; develop and present informational workshops; prepare newsletter, prepare annual report. Review applications for completeness, write legal descriptions, oversee notification, perform field check to determine compliance with comprehensive goals and policies, investigate provided written and oral comments. Prepare for conferences by reviewing research material and determine appropriate application and alternate courses of action. On a weekly basis, conduct pre-application conferences. Explain procedural matters, substantive requirements, opportunities, constraints, and otherwise provide professional assistance to clients. Process appropriate supportive material. Administer land use and development ordinance provisions pertaining to ministerial and administrative land use decisions; provide staff level decisions delegated by director. Research, analyze, and prepare studies, reports, recommendations and statistics on comprehensive land use planning and state-wide issues. Update and republish plan elements; interpret state amendment proposals and formulate county response. Counsel the public, state agencies, special districts and cities in person or by phone with problems, questions and complaints regarding land use, land development and zoning and the statewide planning program; interpret local and state rules and regulations. Prepare documents required to satisfy conditions of approval, ensure compliance with the condition of approval, review maps for completeness and format, and coordinate with the director for signature. Mediate resolutions of objections to application through utility coordination sessions and meetings between applicants and parties to applications. Serve as expert staff responsible for clearance of complex development approval requests and in agency coordination issues. Attend meetings

[18]The differences between the Planner levels do not affect our analysis of the appropriate unit; we summarize the position description for the Planner 3.

and hearings with public groups and provide professional planning support." (Enumeration omitted.)

110. The knowledge, skills, and abilities required by the Planner position are as follows:

> "**Knowledge of:** Considerable knowledge of planning concepts, principles, theory and development techniques; considerable knowledge of state and local procedures, regulations and ordinances associated with land use planning; considerable knowledge of research methodology and statistical techniques; considerable knowledge of use maps, land use data and other professional planning materials; considerable knowledge of industrial, commercial, residential developments, subdivision design to review and evaluate proposals. **Ability to:** Communicate effectively in both oral and written form; conduct research and to compile and analyze data; establish and maintain recordkeeping systems and reports; make decisions independently in accordance with established policy and procedures, and use initiative and judgment in completing tasks and responsibilities; utilize problem identification and resolution techniques; remain calm and use good judgment during confrontational or high pressure situations; efficiently organize time and meet established deadlines; courteously meet and deal effectively with other employees, other agency representatives, commissions, committees, contractors, engineers and the public." (Emphasis in original.)

111. Planners' work is performed under minimal supervision. They use considerable judgment in interpreting guidelines and adapting to special situations. A Planner is supervised by either a senior planner or planning manager.

112. Planners refer to department policy and procedures; federal, state, county, and local statutes, rules, regulations and ordinances; the Douglas County Comprehensive Plan; and the Douglas County Land Use and Development Ordinance.

113. Planners work primarily in the office, but perform occasional field investigations. In the field, they may have challenging encounters with disgruntled citizens. Assessor employees assess the value of property visited by Planners.

114. The minimum qualifications for a Planner are a bachelor's degree in planning or a related field, or an equivalent combination of training, experience and education.

115. Planners must use independent judgment to apply County standards, statutes and regulations to situations requiring sometimes subtle distinctions, such as the standard of compatibility. Most land use decisions must be justified and accompanied by a finding of fact. Aggrieved citizens may appeal discretionary staff decisions to the Land Use Board of Appeals or to court, and Planners must defend their decisions at the lower levels.

Planning Technician

116. The Planning Technicians positions have levels 1 through 3. The wages range from $10.92 to $22.56 per hour.[19] The focus of these positions is assisting the public and providing technical support to the Planning Department and public in cartography, graphics production, drafting, GIS operations, research and data compilation.

117. The duties of Planning Technicians are as follows:

> "Prepare pre-application conference packets for client appointments. Research and document ownership history; interpret ordinances and/or policies and apply land-use provisions and policies to specific land use action. Process applications resulting from pre-application conference; prepare files for legal notification to adjacent land owners and public agencies; prepare for planner review. Regularly serve as counter support and, as necessary, as primary counter position to assist clients. Includes application of ordinances and policies, answer questions and concerns regarding applications, ordinances, planning process, requirements, other general information and processing planning clearance for development. Maintain files and update records using automated equipment. Operate standard drafting equipment. Research and prepare special projects. Provide staff assistance and representation to planning advisory committee(s). Regularly provide support services to the public and higher level staff in specialty areas of addressing, land use information, technical research and/or graphics. Research and issue new addresses. Notify emergency services and public facilities of new addresses and changes. Draft updates to addressing maps and digital file corresponding to assessor accounts. Process requests. Maintain and update land use, zoning, subdivision maps, address files and maps, information, logs, files, and records. Involves computer updates. Provide technical research assistance for planners on a variety of issues. Prepare charts, graphs, signs and other graphic art projects." (Enumeration omitted.)

118. The Planning Technician position requires the following knowledge, skills, and abilities:

> "**Knowledge of:** Considerable knowledge of cartographic and drafting principles and practices to develop and revise maps and other documents for planning projects; considerable knowledge of GIS principles and practices; considerable knowledge of mathematics to compute necessary data for cartographic and drafting projects; reasonable knowledge of land use planning concepts and theories; basic knowledge of surveying principles and practices. **Skill in:** Understanding and interpreting deeds and legal property descriptions; interpreting maps and aerial photographs; use of calculator, automated equipment and systems, drafting tools, reproduction equipment and drafting and office equipment; conducting record searches. **Ability to:** Communicate effectively in both oral and written forms; work

[19] The differences between the Planning Technician levels do not affect our analysis of the appropriate unit; we summarize the position description for the Planning Technician 2.

> independently and manage time efficiently to meet established deadlines; conduct research and prepare maps, graphics, reports, etc.; utilize problem identification and resolution techniques; courteously meet and deal effectively with other employees, other agency representatives, contractors, committees and the public." (Emphasis in original.)

119. The minimum qualifications for the Planning Technician position are three years of cartographic or drafting experience; or an associate degree plus one year of experience in cartography, drafting, planning, land survey, or a related field; or a combination of education, experience, or training. Specific knowledge or experience related to the assigned program area is a desirable qualification.

120. Planning Technicians work under minimal supervision. The work of the position may be supervised by a higher level planning technician, technical manager, or planning manager. Recurring routine assignments are independently performed by the employee on the basis of past experience.

121. Planning Technicians refer to departmental policy and procedures, state and county statutes, ordinances, rules, and regulations, the Douglas County Land Use and Development Ordinance, the comprehensive plan, urban growth management agreements and committed lands documents, maps, and drafting manuals. The guidelines provide a basis for employee interpretations; however, when encountering complex questions, discussions, or interpretations, the employee refers to a supervisor or an employee in a higher classification.

122. Employees in these positions generally work in an office environment with some field work.[20]

123. One Planning Department employee left for employment in Deschutes County and subsequently returned to a position in the Assessor's Office.

Tax Collection Department

124. The Tax Collection Department and the Assessor's Office are adjacent to each other on the County's organizational chart and share a lobby and a break room. However, the Tax Collection Department is not supervised by the Assessor. It is budgeted separately and its employees do not report to the Assessor. Instead, employees report to the Tax Collector, who in turn reports to the County Financial Services Department, and, in turn, the County Board of Commissioners.

[20] From the County's perspective, the Planning Technician position and Cartographer/GIS Technician positions are very similar, with identical qualifications and similar duties. However, the Cartographer/GIS job description lists experience in an assessor's office as a desirable qualification, while the Planning Technician job descriptions do not refer to assessor or planning office experience. There are three levels of Planning Technicians and two levels of Cartographers/GIS Technicians.

125. In addition to the Tax Collector, the Department employs one Tax Collector Deputy and two Tax Clerks.[21] The Department is covered by all of the County personnel rules, including Rule 12.

126. The Tax Collection Department uses the information provided by the Assessor's Office, such as value, address, and ownership information, and the tax levy and special assessments, to collect property taxes. Employees in both departments work together daily to provide taxpayers with information and assistance, and to solve problems such as ensuring that deeds are processed correctly and tax liens are secured.

Land Department

127. The Land Department obtains property for County roads and rights of way, determines property values to establish minimum bid levels for tax foreclosure auctions, obtains comparable lease values for the County's actions as lessee and lessor, and sells County property. The Department employs five employees: one Administrative Assistant, two Foresters, a Land and Park Director, and a Real Property Officer. Of these employees, only the job description of the Real Property Officer is part of the record. The Department is subject to all of the County personnel rules, including Rule 12.

Real Property Officer

128. There is only one Real Property Officer in the County. The wage ranges from $16.40 to $23.89 per hour. The responsibilities of the position are to "plan, appraise, negotiate, monitor and complete the process of acquisition and/or disposal of real property for the Land Department. The Real Property Officer performs specialized duties including appraisal of real property; negotiation with property owners; and preparation of tax foreclosed and surplus properties for sale. The Real Property Officer's primary duty is to "prepare real property appraisals" of public and private property.

129. The duties of the position are as follows:

> "Prepare real property appraisals for public works and forestry projects; review appraisals submitted by outside appraisers. Negotiate with property owners for the acquisition of property needed by the county for projects of road construction, building sites, etc.; prepare options, deeds and other documents necessary for the acquisition or use of properties by the county. Provide information to the public and other agencies regarding county-owned real property. Identify, inventory, describe and perform on-site inspections of tax foreclosed properties; identify hazards, liabilities and potential uses of tax foreclosed properties and make recommendations. Prepare tax foreclosed and surplus properties for sale including valuation, descriptions and marketing; solicit bids and supervise contract execution with title companies, appraisers, public, etc. Review and analyze market rental and lease data. Serve as staff representative at various meetings; provide appraisals and opinions of value for county departments to use in long range project planning.

[21]The job descriptions of the Tax Department employees do not appear in the record.

> Prepare and maintain records, reports and statistical data; participate in establishing and maintaining policy and procedures. Coordinate maintenance and other real property management activities for tax foreclosed and surplus County properties, including securing properties, [and] arranging for site cleanup and weed abatement." (Enumeration omitted.)

130. The knowledge, skills, and abilities required by the Real Property Officer position are as follows:

> "**Knowledge of:** Thorough knowledge of principles, practices and procedures of real estate appraisal practices; considerable knowledge of procedures and techniques regarding real property legal document preparation including deeds, contracts and leases; considerable knowledge of laws, regulations, policies, and procedures pertaining to management and acquisition of real property; considerable knowledge of contract administration. **Skill in:** Writing clear and concise reports, records, contracts and statistical data. **Ability to:** Communicate effectively in both oral and written forms; establish and maintain records, reports, and statistical data; read and interpret real estate related documents such as legal descriptions, deeds, easements, contracts, maps, plot plans, construction plans, etc.; make decisions independently in accordance with established policy and procedures, and use a considerable degree of initiative and judgment in completing tasks and responsibilities; efficiently organize time and meet established deadlines; courteously meet and deal effectively with other employees, other agency representatives, real estate related agencies, property owners and the public." (Emphasis in original.)

131. The minimum requirements for the position are an associate degree in business administration or related field and four years of progressively responsible work experience in property acquisition and real estate appraisal; or an equivalent combination of education, experience, and training.

132. The Real Property Officer is subject to minimal supervision, working under the general supervision of the land director who gives general verbal or written instructions concerning the results to be accomplished.

133. The Real Property Officer refers to department policy and procedures; federal, state, and county statutes, rules, regulations, and ordinances; professional appraisal standards; real estate acquisition guides; and contract administration guidelines. The employee uses a considerable degree of judgment in interpreting guidelines and contributes to modification of existing guidelines by recommending changes or adapting guidelines to solve problems encountered.

134. Work is performed in both an office and the field, including undeveloped land.

135. The Real Property Officer position is currently held by a registered appraiser who was formerly a property appraiser in the Assessor's Office for eight years. The employee's

experience with the Assessor's Office aided him in obtaining the Real Property Officer position. In the position as the Real Property Officer, he uses the same skills and performs many of the same job duties he did as an appraiser. If the position became vacant, the Land Department would seek a replacement Real Property Officer from those employed by the Assessor's Office.

136. The Real Property Officer spends 75 percent of his time conducting appraisals. As part of that work, the employee conducts market surveys similar to those conducted by the Assessor's Office.

CONCLUSIONS OF LAW

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

2. The proposed bargaining unit is an appropriate bargaining unit.

DISCUSSION

AFSCME seeks to form a new bargaining unit described as all full-time and regular part-time employees in the Douglas County Assessor's Office, excluding managers, supervisors, on-call, temporary and confidential employees. The ultimate issue here is whether the proposed unit is appropriate under ORS 243.682(1)(a) and OAR 115-025-0050.

This proposed unit consists of 20 unrepresented employees working in the following job classifications: Property Appraisers (6), Assessment Database Technician (1), Assessment Technicians (3), Property Appraiser Trainees (2), Personal Property Technician (1), Cartographer GIS Technicians (2), Information Services Technician Support Analyst (1), Office Manager (1) and Department Assistants (3).[22]

AFSCME claims that the employees' community of interest, wages, hours, and working conditions, as well as the desires of the employees and the history of collective bargaining, warrant finding the proposed unit appropriate. The County argues that the proposed unit (1) does not have a clearly distinct community of interest required to create a bargaining unit of a portion of a group of unrepresented employees, and (2) would unduly fragment the County's workforce. For the following reasons, we conclude that the petitioned-for unit is appropriate.

Standards for Decision

The Public Employee Collective Bargaining Act (PECBA) defines an "appropriate bargaining unit" broadly as a "unit designated by [this] Board or voluntarily recognized by the public employer to be appropriate for collective bargaining." ORS 243.650(1). ORS 243.682(1)(a) further provides that when determining whether a unit is appropriate for collective bargaining, we "shall consider such factors as community of interest, wages, hours and other working conditions

[22]Neither party specifically referred to the Personal Property Technician position in their briefs or devoted much discussion to the Information Services and clerical support employees. AFSCME generally described the proposed unit as "roughly 20 positions, including 12 appraisers or appraiser trainees, 4 assessment technicians, 2 cartographers, and 2 cartographic technicians."

of the employees involved, the history of collective bargaining, and the desires of the employees." *See also Oregon AFSCME Council 75 v. Washington County*, Case No. CC-008-12, 25 PECBR 466, 474 (2013); *OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251 (2001). These factors are not exclusive; we also weigh various other factors, including our preference for certifying the largest possible appropriate unit. *Washington County*, 25 PECBR at 474. As a result, our analysis of the propriety of a proposed unit is necessarily fact-driven, with the outcome depending on the specific facts and circumstances of the workplace and workforce at issue. 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; *OSEA v. Deschutes County*, 40 Or App 371, 376, 595 P2d 501 (1979). Finally, the statute does not require that a petition set forth *the* most appropriate unit, only *an* appropriate unit. ORS 243.682(1)(a). Therefore, we may determine a unit to be appropriate even though some other unit might also be appropriate. *Id.*

Community of Interest

We begin by examining the community of interest of the proposed unit. Whether (and the extent to which) employees share a "community of interest" depends on "similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, common supervisor," and other factors that indicate whether the proposed unit is appropriate for purposes of collective bargaining. OAR 115-025-0050(2).

Here, all of the employees in the proposed unit receive the same benefits package, including medical, dental, insurance, retirement, vacation, holidays, and sick leave. In addition, all members in the proposed unit share a single common supervisor, the elected County Assessor, a factor that we give particular weight to in this case. Moreover, the petitioned-for employees work together and assist each other in furthering the work of the Assessor's Office, which is reflective of how the County is organizationally structured.

The Property Appraisers, Assessment Technicians, Assessment Database Technician, and Property Appraisal Trainees share a particularly strong community of interest, as those positions work in a specific field and share similar duties, skills, promotional ladders, and common immediate and higher-level supervisors. Likewise, the Personal Property Technician performs a similar role to these positions, except that the work involves personal property instead of real property. The Personal Property Technician also shares similar duties, skills, and a common supervisor with the Property Appraisers, Assessment Technicians, Assessment Database Technician, and Property Appraisal Trainees.

The Cartographer/GIS Technicians work complementarily with the Appraisers and Assessment Technicians to fulfill the Assessor's Office's mission of fairly and accurately assessing the taxable value of property. Although the Cartographer/GIS Technicians do not share promotional ladders with the appraisal/assessment employees, and there is no apparent interchange or transfers between these two groups of employees, the work-related interactions among the employees are essential to the work of the Assessor's Office. Finally, the Cartographer/GIS Technicians positions are unique to the Assessor's Office.

The Office Manager in the Assessor's Office is responsible for organizing and directing the office's operations, which requires regular interaction with the other office employees. Like the Office Manager, the Department Assistants regularly interact with other Assessor's Office employees to ensure the proper preparing, processing, organizing, and maintaining of the office's information, records, and materials. The Department Assistants also assist other Assessor's Office employees with data collection and entry to fulfill the mission of the Office. Although the Office Manager and Department Assistants do not share a common promotional ladder (or interchange) with the other Assessor's Office positions, all of the Assessor's Office positions regularly work with each other to advance a specific mission that is unique to the Assessor's Office.

The final petitioned-for position, Information Services Technician Support Analyst, works in support of the assessment and mapmaking functions. The position is primarily concerned with obtaining, creating, and maintaining the computer hardware and software tools used in those functions. Although the position's duties are not similar to the duties of the other Assessor employees, and there is no interchange between the positions or a common promotional ladder, the Analyst position is essential to the fulfillment of the Office's mission. The Analyst position requires a specific understanding of the unique work of the Assessor's Office, as well as regular interaction with Assessor's Office employees to accomplish that work.

After considering the community-of-interest factors, we conclude that the employees in the petitioned-for unit have a sufficiently shared community of interest to make that unit appropriate for purposes of collective bargaining. Although some employees share a stronger community of interest than others (*e.g.*, the Property Appraisers, Assessment Technicians, Assessment Database Technician, Property Appraisal Trainees, and Personal Property Technician), all of the petitioned-for employees are sufficiently linked by the specific nature of the work of the Assessor's Office, as well as by the shared interaction and assistance necessary to perform that work. Moreover, there is common supervision across all of the petitioned-for unit, a factor that we deem particularly significant under the facts of this case, given that the common supervisor, the County Assessor, exercises great control over the working conditions of the employees, as discussed in more detail below.

Wages, Hours, and Other Working Conditions

All of the positions in the proposed bargaining unit are compensated hourly, based on the employee's placement on the same existing County salary schedule. Per the Assessor's Office Guidelines, all of the petitioned-for employees are required to work from 8:00 a.m. to 5:00 p.m., unless they are travelling or had a preexisting flexible work arrangement with the Assessor.

The employees in the petitioned-for unit are all subject to many of the County-wide Personnel Rules that establish many working conditions. However, they are also subject to numerous rules specific to the Assessor's Office, which are determined by the County Assessor. These rules heavily regulate the working conditions of the petitioned-for employees. Among other restrictions, these rules involve: (1) regulating employee discussions about personal and work related issues; (2) limiting how and when employees may speak on a personal cell phone; (3) creating a presumption that an employee was ill for four days when two sick days are taken before the weekend (triggering a County requirement that the employee then provide verifying documents

upon their return to work); (4) prohibiting eating or drinking at work stations visible to the public; (5) dictating when and how employees must request leave (suggesting that employees question whether leave is necessary) or notify the Assessor of the need for sick leave, including blackout periods during which employees may not take leave; (6) prohibiting employees from having personal items, such as plants, memorabilia, and photos at their desks; (7) telling employees to limit personal conversation and whispering during work hours and directing any non-complying employees that they may have to account for the minutes spent doing so by adjusting their break time or lunch hour, or by taking vacation time; (8) specifying in great detail what can be worn in the office and in the field; and (9) not applying County Rule 12, which requires "for-cause" disciplinary treatment. In concluding that the petitioned-for unit is appropriate, we give great weight to these shared working conditions, which are ultimately controlled by the County Assessor, a common supervisor of the petitioned-for employees. There is no evidence that any other County departments have similarly detailed guidelines in place.[23]

After assessing the wages, hours, and other working conditions of the petitioned-for unit, we conclude that those factors weigh heavily in favor of deeming the unit appropriate for collective bargaining. We give particularly great weight to the unique working conditions (set forth above) of the petitioned-for unit.

History of Collective Bargaining

The petitioned-for positions have never been represented, but the County has a history of collective bargaining with four other bargaining units. Previous attempts to organize the petitioned-for employees within a larger unit by SEIU in 1993 and AFSCME in 2014 failed.

Desire of Employees

AFSCME has submitted a sufficient showing of interest to demonstrate that the proposed unit of employees wish to form the petitioned-for bargaining unit.

[23]There are other working conditions that weigh in favor of the appropriateness of this unit. The majority of the petitioned-for employees work in the same offices. The Appraisers, Assessment Technicians, Assessment Database Technician, Information Systems Technical Support Analyst, Office Manager and Department Assistants work in one office that is separate from other departments. The Tax Department is adjacent and shares a lobby and a break room. The Cartographers work in an adjacent but separate office.

Appraisers spend approximately 35 to 50 percent of their time working independently in the field. Assessment Trainees and Technicians and the Assessment Database Technician also spend a significant amount of time in the field, while the Cartographers, Information Systems employees, the Office Manager and Department Assistants work almost exclusively in the office.

The general organization of work in the Assessor's Office includes a number of highly-trained and sometimes State-certified specialists such as Assessors and Cartographer/GIS Technicians who are supported by other employees such as the Assessment Database Technician, Information System Technical Support Analyst, Office Manager, and Department Assistants.

The Largest Possible Appropriate Unit/Undue Fragmentation

As set forth above, in determining whether a proposed unit is appropriate, this Board has long weighed a preference for certifying the largest possible appropriate unit. *Washington County*, 25 PECBR at 473, 475. This preference is rooted in avoiding undue fragmentation of the workforce into excessive bargaining units, as such a result is contrary to many of the policies underlying the PECBA. *Id.* at 475. We do not, however, blindly apply this preference, but rather weigh it, along with the aforementioned statutory factors, in determining the appropriateness of a particular unit in any given case. *Id.*

Here, although there is arguably a larger possible appropriate unit, we give this factor less weight. To begin, we do not believe that certifying this unit as appropriate will result in undue fragmentation of the County's workforce. Specifically, the County already has four bargaining units, each of which is roughly organized by function: Deputy District Attorneys, Juvenile Department employees, employees in the Public Works Department and Fleet Services Department, and the full time Sheriff's Department employees. The petitioned-for unit is consistent with the County's chosen structure and historical practices. We do not believe that allowing this additional unit, which is formed along lines already created by the County, will unduly fragment the County's already-fragmented workforce.

We are also not convinced that the natural result of this decision will be to open up the floodgates to a surge of departmental units in the County (or other public employers). As we noted above, the determination of whether a proposed bargaining unit is appropriate is always going to be evaluated based on the specific facts surrounding that particular workforce and employer. Our decision here is based on the County's unique structure and the wide-ranging ability of the elected Assessor to determine employee working conditions, as demonstrated by the Assessor's Office Guidelines. In other words, the unique nature of the working conditions of the petitioned-for employees, particularly the highly-codified oversight and restrictions on workplace behavior, sets them apart from other department-wide units.

We also give weight to the desires of these employees to be represented, in light of past failed attempts to organize larger bargaining units. As we have previously recognized, in exercising our discretion as to the appropriateness of a proposed unit, we sometimes must strike a balance between employee free choice and the need to establish and maintain stable labor relations and to equalize bargaining power. *See Washington County*, 25 PECBR at 476. Here, that balance weighs in favor of employee free choice. *Cf. id.*

Finally, we disagree with the County's assertion that *Laborers' International Union of North America, Local 320 v. City of Keizer*, Case No. RC-37-99, 18 PECBR 476 (2000) controls the outcome of this case. To begin, because representation matters are fact specific and call on this Board to exercise its discretion in weighing factors on a case-by-case basis, it is unlikely that a prior case involving a different employer will conclusively resolve a future case. Additionally, we reject the proposition that *City of Keizer* announced a rigid four-part test, each part of which must be satisfied, to be applied to *all* petitions for departmental units. Rather, *City of Keizer* attempted to summarize factors that the Board had looked to in earlier cases in determining whether some department-wide units might be appropriate. *See* 18 PECBR at 483-84. We reject and disavow a

more expansive reading of that case. As our analysis in the instant matter should clarify, we weigh the appropriateness of petitioned-for units (departmental or otherwise) using the same statutory criteria, as filtered through the factual lens of each individual case.

Conclusion

In sum, we conclude that the community of interest; wages, hours, and other working conditions; history of collective bargaining; and the desires of the employees support a conclusion that the proposed bargaining unit is appropriate. *See* ORS 243.682(1)(a). In reaching that conclusion, we give particular weight to the shared community of interest, working conditions, and common supervision of the petitioned-for employees. Although a larger unit might also be appropriate, and there may be some additional future fragmentation of the County's workforce, we give that factor less weight in this particular case and conclude that the petitioned-for unit is appropriate. *See id.* Therefore, we will order the Elections Coordinator to continue processing the Petition in accordance with this order.

ORDER

1. An appropriate bargaining unit is: All full-time and regular part-time employees in the Douglas County Assessor's Office, excluding managers, supervisors, on-call, temporary, and confidential employees.

2. The Elections Coordinator shall check the authorization cards against the list of employees provided by the County. If it is determined that a majority of the employees wish to be represented by AFSCME for purposes of collective bargaining, this Board shall certify AFSCME as the exclusive representative of the bargaining unit.

DATED this 4 day of February, 2015.

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

OREGON AFSCME COUNCIL 75, Petitioner, v. DOUGLAS COUNTY, Respondent.	Case No. CC-004-14 CERTIFICATION OF REPRESENTATIVE PURSUANT TO ORS 243.682(2)(a)

CERTIFICATION OF REPRESENTATIVE

Pursuant to ORS 243.682, the Employment Relations Board has determined that a majority of eligible bargaining unit members signed valid authorization cards requesting that OREGON AFSCME COUNCIL 75 represent the designated bargaining unit. Any timely challenges and/or objections to the petition have been resolved. Therefore, it is hereby certified that

OREGON AFSCME COUNCIL 75

is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

> All full-time and regular part-time employees in the Douglas County Assessor's Office, excluding managers, supervisors, on-call, temporary, and confidential employees.

ISSUED FEBRUARY 4, 2015, to:

Jennifer Chapman (Petitioner)

Ashley Boyle (Respondent)

Form cc-cert (2007)

Linda J. Gregg
Elections Coordinator
EMPLOYMENT RELATIONS BOARD
Old Garfield School Building
528 Cottage Street NE, Suite 400
Salem, OR 97301-3807
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EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-057-13

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, OREGON PUBLIC EMPLOYEES UNION, Complainant, v. STATE OF OREGON, DEPARTMENT OF JUSTICE, Respondent.	)	RULING ON RECONSIDERATION

Respondent seeks reconsideration of this Board's December 12, 2014, order, which held that: (1) Complainant's complaint should not be deferred until the outcome of a pending grievance arbitration; and (2) Respondent violated ORS 243.672(1)(b) and (e) by directly dealing with an employee regarding a pending grievance. *See* 26 PECBR 276 (2014). Specifically, Respondent asserts that we erred with respect to both holdings, and that we erred by ordering Respondent to post a notice of these violations as part of the remedy. For the reasons set forth below, we grant reconsideration and adhere to our prior order, as supplemented herein.

Pre-Arbitration and Post-Arbitration Deferral

In our prior order, we explained the distinction between how this Board has historically analyzed two types of arbitration-related "deferrals": (1) pre-arbitration deferral (or abeyance); and (2) post-arbitration deferral. Respondent's motion for reconsideration characterizes that distinction as "arbitrary" and one that fails to adhere to the Board's preference for "avoiding multiple litigation and the possibility of inconsistent results." According to Respondent, the "timing" of the deferral (pre- or post-arbitration) is insignificant. Respondent further avers that this distinction elevates the Public Employee Collective Bargaining Act (PECBA) over the terms of a parties' collective bargaining agreement. Consequently, Respondent asks us to reconsider our precedent of distinguishing between pre- and post-arbitration deferral requests.

We decline Respondent's invitation to overrule our precedential distinction in how we approach requests for pre- and post-arbitration deferral. As set forth in our prior order, this Board's distinction between pre- and post-arbitration deferrals is longstanding. Moreover, it is a distinction that has long been made by the National Labor Relations Board (NLRB) under the National Labor Relations Act (NLRA), after which the PECBA was modeled. As a matter of logic, post-arbitration deferral, which looks to the terms of an arbitration award that has already been issued, cannot be applied to pre-arbitration deferral because an arbitration award does not yet exist. Thus, the deferral standards must necessarily be different. Consequently, far from being "arbitrary," the distinction between pre- and post-arbitration deferral is fundamental.

We further disagree with Respondent's assertion that distinguishing between pre- and post-arbitration deferrals erodes our preference for avoiding multiple litigation and the possibility of inconsistent results. According to Respondent, our approach in pre-arbitration deferrals encourages multiple litigation over the same issues and runs the risk of our decision conflicting with a future arbitration decision. In Respondent's own words, "the practical result [of the Board's approach] is multiple litigation (ULP hearing first and then arbitration), with the possibility of inconsistent results ([this Board] concludes [that] the conduct violates [the] PECBA where the Arbitrator concludes [that] the conduct was negotiated and authorized by the [collective bargaining agreement (CBA)]."

Respondent's argument rests on a flawed premise—namely, that the issues in the case to be decided by this Board and an arbitrator are the same. As set forth in our prior order, if a pending grievance and a pending unfair labor practice complaint have the same facts and congruent decisional standards, we *will* defer the processing of the complaint until the arbitration is complete. In this case, however, we have not concluded that congruent decisional standards will be applied by this Board and an arbitrator. That is so, as we previously explained, because the contract provision at issue is not analogous to the alleged statutory violation. Stated simply, it is possible that Respondent's actions did not violate the particular contract provision, but did violate the PECBA. Unless the matter includes both the same facts and congruent decisional standards, we will not order a pre-arbitration deferral.

This brings us to Respondent's next argument, which is that our decision to not hold the complaint in abeyance places the PECBA above the terms of the parties' CBA. To begin, Respondent's argument rests on a failed understanding of our order. Because we have concluded that the contract provision and the statutory provision at issue are distinct, there is no necessary conflict between our order and any potential arbitration award, even one that agrees with Respondent's argument that its conduct was not proscribed by the CBA. In other words, our pre-arbitration deferral requirements (that a pending grievance involve the same facts and apply congruent decisional standards) are meant to avoid multiple litigation on the same issue and the possibility of inconsistent results.

Moreover, if a conflict did exist—*i.e.*, if the parties had negotiated terms that are in violation of the PECBA, then the PECBA *would* control. Indeed, under both our pre- and post-arbitration deferral, any invalid provision in a collective bargaining agreement would not be upheld by this Board, even if the matter went to arbitration and an award was issued upholding the invalid provision. *See* ORS 240.086(2)(g) (award in violation of law not enforceable).

Waiver

Respondent further states that the "clear and unmistakable" waiver test does not apply to the facts of the case. Rather, according to Respondent, we should apply the three-part test for interpreting contracts, because if the Board is not going to defer to pending arbitration, we "must then ascertain what process the parties agreed to in bargaining."

In its answer, Respondent raised affirmative defenses of "waiver through action" and "waiver through bargaining." By raising these affirmative defenses, Respondent is asserting that the labor representative has "waived" its statutory right to collectively bargain with the employer and represent its bargaining unit members in dealing with the employer. To prevail on this waiver defense, Respondent is required to show that such a waiver is "clear and unmistakable." *See Ass'n of Oregon Corr. Employees v. State*, 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). The contract language cited by Respondent does not clearly and unmistakably establish that Complainant waived its right to represent the grievant.

Remedy

Finally, Respondent asks us to reconsider issuing a Notice of Posting, particularly because Complainant did not object to this portion of the recommended order. Respondent is correct that this Board generally will not revisit an issue unless a party has filed a timely objection. With respect to the remedy matter, however, we are inclined to exercise our discretion to ensure that the unfair labor practice is appropriately remedied. When we determine that an unfair labor practice has occurred, we are required to "take such affirmative action, * * * as necessary to effectuate the [statutory] purposes." ORS 243.676(2)(c). We have broad authority to determine the appropriate remedy in any given case. *Oregon School Employees Association v. Parkrose School District*, Case No. UP-030-12, *recons*, 25 PECBR 845, 846 (2013). As stated in our Order, the Respondent's actions of bypassing the exclusive representative and dealing directly with the employee has an inherent significant impact on the representative's functioning. We affirm that requiring a Notice of Posting was, and is, necessary to effectuate the purposes of the PECBA.

The remaining matters need no further discussion. Although we will grant Respondent's request for reconsideration, we will adhere to our prior order, supplementing it with our discussion above.

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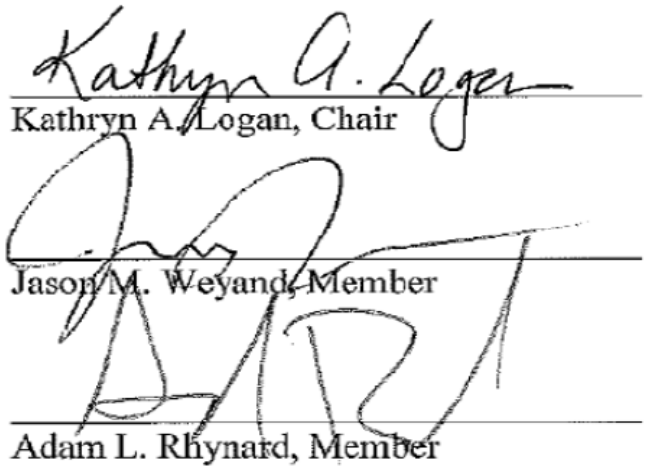
ORDER

1. Respondent's motion for reconsideration is granted.

2. We adhere to our prior order, as supplemented herein.

3. If the Respondent has not already posted the Notice of the violation attached to our original order, it must do so within seven days of the date of this order.

Dated this 4 day of February, 2015.



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. DC-010-14/UC-001-15

(REVOCATION OF CERTIFICATION)

KLAMATH HOUSING AUTHORITY, Petitioner, v. OREGON AFSCME COUNCIL 75, Respondent.	)	ORDER REVOKING CERTIFICATION

On February 18, 1998, in Case Number RC-59-97, this Board certified Oregon AFSCME Council 75 (AFSCME) as exclusive representative of a bargaining unit of employees described as:

> All regular employees of Klamath Housing Authority, *excluding* supervisory, confidential, seasonal, temporary and less than 20 hour per week personnel.

On October 2, 2014, Ann Malfavon and other employees of Klamath Housing Authority (Housing Authority) filed a petition to decertify AFSCME as exclusive representative for the bargaining unit described in the collective bargaining agreement that expired December 31, 2014:

> All full-time employees, excluding supervisors, managers, confidential, part-time (37 hours or less per week), temporary, casual, relief or on-call employees.

This petition was supported by an adequate showing of interest.

On October 20, 2014, AFSCME filed a disclaimer of interest in representing the bargaining unit in this matter under OAR 115-025-0009.

On February 2, 2015, the Housing Authority filed a petition for revocation with documentation that confirmed that no collective bargaining agreement is in effect.

Based on the foregoing, a showing has been made that no collective bargaining agreement between the parties is in effect, and that AFSCME disclaims further interest in representing the bargaining unit. *See* OAR 115-025-0009.

ORDER

1. The certification of Oregon AFSCME Council 75 as exclusive representative for a bargaining unit of employees of Klamath Housing Authority is revoked.

2. The petition for decertification election is dismissed.

DATED this 10 day of February, 2015.

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-037-14

(UNFAIR LABOR PRACTICE)

ILWU LOCAL 8,	)	
	)	
	)	
Complainant,	)	
	)	
v.	)	RULING ON RECONSIDERATION
	)	
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.

ILWU Local 8 (Local 8) seeks reconsideration of this Board's January 23, 2015, order, which dismissed Local 8's complaint against the Port of Portland (Port) for alleged violations of ORS 243.672(1)(e) and (g). *See* 26 PECBR 350 (2015). In dismissing the complaint, we concluded that there was no disputed issue of fact or law on the dispositive question as to whether the Port currently employed members of Local 8. That conclusion was based, in part, on a recently issued order that dismissed a similar complaint for the same reason—*i.e.*, because the Port did not currently employ members of Local 8. *See International Longshore and Warehouse Union, Locals 8 & 40 v. Port of Portland*, Case No. UP-019-14, 26 PECBR 156, *recons*, 26 PECBR 163 (2014), *appeal pending* (*Port of Portland I*). In its reconsideration request, Local 8 asserts that we erred in dismissing the complaint (as well as in dismissing the complaint in *Port of Portland I*). We grant Local 8's request for reconsideration, but adhere to our prior order, as supplemented herein.[1]

In *Port of Portland I*, we concluded, and Local 8 did not dispute, that the Port did not currently employ Local 8 members. *See* 26 PECBR at 154 n 2, 163. In its initial submissions to

[1]Local 8 also requested oral argument on its motion for reconsideration. We do not believe that oral argument would further edify the Board on Local 8's position. Therefore, we deny the request for oral argument.

the Board in this case, Local 8 did not take issue with that conclusion, and we reached the same conclusion in this case. *See* 26 PECBR at 352.[2]

In its request for reconsideration, Local 8 avers, for the first time to this Board, that the Port *does* employ Local 8 members.[3] To Local 8, its failure to make this critical assertion to this Board is inconsequential. Rather, Local 8 asserts that it had no obligation to dispute our conclusion regarding the employer/employee relationship in *Port of Portland I*, or to advance such an assertion in its initial submissions in this case. In Local 8's words: "The Board's own rules impose no such requirement and there is no such requirement in order to preserve an issue for appellate review."

To begin, the Court of Appeals, not this Board, will determine whether Local 8 had an obligation to raise this issue to this Board in order to preserve it for appellate review. *See* ORAP 5.45. With respect to Local 8's obligations to this Board, we disagree with Local 8's position, which fails to understand how we process unfair labor practice complaints. Specifically, once a party files a complaint with this Board, we are statutorily charged with "[i]nvestigat[ing] the complaint to determine if a hearing on the unfair labor practice charge is warranted." ORS 243.676(1)(b). "If the investigation reveals that no issue of fact or law exists, [we] may dismiss the complaint." *Id.*

In *Port of Portland I*, we investigated Local 8's complaint and, based on that investigation, it appeared that the Port did not (and had not for decades) employed Local 8 members. However, rather than summarily dismiss the complaint, we provided Local 8 with the opportunity to refute such a conclusion by directly asking it whether the Port currently employed Local 8 members. As set forth in that order, Local 8 did not answer "yes." To the contrary, Local 8 responded: "No, not currently in a direct sense. The Port does direct the work through [the International Container Terminal Services, Inc. (ICTSI)], and has directed the work through another contractor." 26 PECBR at 157 n 2; *see also* 26 PECBR at 350 n 1. We understood this to mean that the Port did not employ members of ILWU. 26 PECBR at 157 n 2.

Local 8 requested reconsideration of our dismissal order, which we granted. Again, Local 8 did not dispute our conclusion regarding whether the Port employed Local 8 members. 26 PECBR at 163. Instead, Local 8 argued that the lack of an employment relationship was irrelevant with respect to its complaint. *Id.* at 163-64. We rejected that argument and dismissed the complaint. *Id.*

When Local 8 filed this complaint, we again investigated the complaint. In its submissions to the Board as part of that investigation, Local 8 again did not assert that the Port employed Local 8 members. Rather, Local 8 attempted to distinguish the dismissal in *Port of Portland I* based on

[2]In doing so, we noted that there was no evidence or assertion of any change with respect to the employer/employee relationship regarding the Port/Local 8 members between the dismissal in *Port of Portland I* and the filing of the complaint in this case.

[3]As we noted in our prior order in this case, Local 8 appealed our order in *Port of Portland I* and did make this argument in its opening brief to the Court of Appeals.

the different nature of this unfair labor practice complaint. For the reasons set forth in our prior order in this case, we dismissed this second complaint as well. *See* 26 PECBR at 350-52.

To argue, as Local 8 does now, that it had no prior obligation to contest the issue of whether the Port employed Local 8 members misses the point of our statutorily-charged investigation of unfair labor practice complaints. As a complainant, Local 8 has the affirmative obligation to respond to questions posed by this Board (typically by way of an assigned Administrative Law Judge) in conducting our investigation of an unfair labor practice complaint. If a complainant fails to respond to dispositive questions, or its response to those questions establishes that there is not an issue of fact or law that warrants a hearing, we may dismiss the complaint. *See* ORS 243.676(1)(b). We categorically disagree with Local 8's assertion that it had no obligation during the investigative stage, or in its submissions to this Board at the dismissal and reconsideration stages, to affirmatively assert and provide any other requested information that would establish an issue of fact or law as to whether the Port currently employs Local 8 members.

Finally, Local 8 argues that dismissal of the complaint in this case (and in *Port of Portland I*) was premature. According to Local 8, if we had allowed a hearing to take place, it could have proved that the Port continued to employ Local 8 members. Again, this argument bypasses Local 8's obligations during the investigative stage of the complaint process. During that stage, we might ask parties for responses to questions, documents to support a particular position, or anything else that might assist us in determining whether a hearing is warranted in the first place. It is not sufficient for a party to say, in effect, that it has no obligation to participate in the investigative process or that the information produced in that process is inconsequential.

In sum, we grant Local 8's request for reconsideration, but adhere to our prior order, as supplemented by this order.

ORDER

Reconsideration is granted. The complaint is dismissed. DATED this 11 day of February, 2015.

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. MA-022-14

(TRIAL SERVICE REMOVAL)

SAWYER G. EPLING, Appellant, v. STATE OF OREGON, DEPARTMENT OF HUMAN SERVICES, Respondent.	)	DISMISSAL ORDER

Sawyer G. Epling, Beaverton, Oregon, appeared *pro se*.

Tessa M. Sugahara, Attorney-in-Charge, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

On December 15, 2014, Sawyer G. Epling filed this appeal regarding a November 18, 2014 removal from trial service as a represented Office Specialist 2 for the State of Oregon, Department of Human Services (Department).

By e-mail dated December 24, 2014, Administrative Law Judge (ALJ) Julie D. Reading sent a letter to the parties asking them to show cause why the appeal should or should not be dismissed because the Board lacked jurisdiction in this matter. The Department filed a timely response. Appellant did not respond. Thereafter, ALJ Reading transferred the case to the Board with a recommendation that the appeal be dismissed.

For purposes of this Order, we assume that the allegations in the appeal are true. We also rely on undisputed facts discovered during our investigation. *Miller v. State of Oregon, Department of Human Services, Seniors and People with Disabilities*, Case No. MA-010-10 at 2 (April 2011).

Pursuant to ORS 240.086(1), this Board has jurisdiction to review personnel actions affecting a state employee "who is *not* in a certified or recognized appropriate collective bargaining

unit." (Emphasis added.) At the time of Appellant's removal from trial service, she worked in a represented position. As a result, this Board has no jurisdiction under ORS 240.086(1) to hear this appeal. *Woosley v. State of Oregon, Department of Agriculture*, Case No. MA-012-13 (November 2013), *citing Thorson v. State of Oregon, Department of Human Services, Medford Child Welfare Office*, Case No. MA-15-04 (February 2005).

ORDER

The appeal is dismissed.

DATED this 11 day of February 2015.

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,	)	
	)	
v.	)	FINDINGS AND ORDER ON
	)	COMPLAINANT'S PETITION
MEDFORD SCHOOL DISTRICT 549C,	)	FOR REPRESENTATION COSTS
	)	
Respondent.	)	
	)	

On August 23, 2014, this Board issued an 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 reached with the Medford Education Association (Association). 26 PECBR 143 (2014). In a December 1, 2014, supplemental order, this Board ordered the District to remit $345,067 (plus appropriate interest) to Association-represented employees, to remedy the (1)(g) violation. 26 PECBR 272 (2014). On August 25, 2014, the Association filed a petition for representation costs. On August 28, 2014, the District 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 District filed timely objections to the petition.

2. The Association is the prevailing party.

3. This case required one day of hearing, which extended beyond normal hearing hours.

4. Counsel for the Association submitted an affidavit reflecting total representation costs of $16,244, based on 102.4 hours of legal work at a rate of $150 per hour, as well as an additional $1,109 in costs.[1] Based on these costs, the Association requests an award of $3,500 in representation costs, which is the maximum awardable amount under *former*

[1]Photocopying, clerical, mileage, postage, and telephone costs are not awarded in representation cost awards. *AFSCME Local 2746 v. Clatsop County*, Case No. UP-59-95, 16 PECBR 664 (1996) (Rep. Cost Order).

OAR 115-035-0055(1)(a) in the absence of a civil penalty.[2] *See Oregon School Employees Association v. North Clackamas School District*, Case No. UP-017-13, 26 PECBR 129 (2014) (Rep. Cost Order).

5. The District objects to the petition on two grounds. First, the District asserts that no representation costs should be awarded because the District did not file any objections to the recommended order, but rather accepted the order "without prolonging or exacerbating the dispute." Second, the District asserts that, if representation costs are awarded, the amount should be minimal because the District has already spent a considerable amount (more than $25,000) in its own representation costs.

6. The Association's requested rate is below 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 above 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). However, counsel for the District acknowledged spending in excess of 155 hours preparing for this case, significantly more than that spent by the Association. As we assume that the District would say that the number of hours it needed was reasonable, we conclude that the hours claimed by the Association were reasonable.

7. 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). 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. In doing so, we reject the District's assertion that we may summarily dismiss the Association's petition on the ground that the District did not file objections to the recommended order. *See* ORS 243.676(2)(d) (after concluding that a party has engaged in an unfair labor practice, this Board *shall* designate and award representation costs, if any, to the prevailing party).

ORDER

The District will remit $3,500 to the Association within 30 days of the date of this Order. DATED this 25 day of February, 2015.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

[2]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-014-14

(UNFAIR LABOR PRACTICE)

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA LOCAL 483, Complainant, v. CITY OF PORTLAND, Respondent.	)	FINDINGS AND ORDER ON RESPONDENT'S PETITION FOR REPRESENTATION COSTS

On October 21, 2014, this Board issued an order dismissing the complaint filed by the Laborers' International Union of North America, Local 483 (LIUNA), which alleged that the City of Portland (City) violated ORS 243.672(1)(a), (c) and (e). 26 PECBR 269 (2014). On November 10, 2014, the City filed a petition for representation costs. On November 26, 2014, LIUNA filed objections to the petition.[1]

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

1. The City filed a timely petition for representation costs, and LIUNA filed timely objections to the petition.

2. The City is the prevailing party. LIUNA objects to this finding, asserting that our order dismissing the complaint made no conclusion with respect to whether the City engaged in an unfair labor practice, which is required for an award of representation costs under ORS 243.676(3). We disagree with LIUNA's assertion. Under ORS 243.676(3), this Board shall award representation costs after finding that a respondent has not engaged in an unfair labor practice. Here, we dismissed the complaint before hearing because LIUNA was unable to submit evidence to carry its burden of proving that the City committed the alleged unfair labor practice violations. In doing so, we made a finding (at least implicitly) that the City had not committed the

[1]This Board subsequently asked the City to respond to LIUNA's objections, and the City did so on January 30, 2015.

alleged unfair labor practice violations. Our dismissal of this complaint is similar to other dismissals that may occur after a hearing in which a complainant has not produced sufficient evidence to meet its burden of proving the alleged unfair labor practice. Because we have found that the City did not engage in the alleged unfair labor practices, we will award the City its reasonable representation costs.

4. The City requests an award of $3,300 in representation costs, asserting that such an award represents the reasonable value of the services provided by counsel for the City. *See* OAR 115-035-0055(1)(c). In support of that request, the City avers that $165 per hour is a reasonable rate and estimates that over 60 hours were spent on the case, for a total of $9,900 in costs.[2]

5. LIUNA asserts that the affidavit submitted by counsel for the City is insufficient to support any award of representation costs. According to LIUNA, the affidavit must do more than "estimate" the total number of hours spent, but rather must break down how many hours were spent on each task.

We disagree with LIUNA's assertion that the affidavit submitted by the City's counsel is *per se* insufficient to award representation costs. Where, as here, a petitioner "was not charged fees," the petition must include, among other things, a statement of the costs requested, supported by an affidavit that describes in detail "the basis for the amount of costs requested." *See* OAR 115-035-0055(2)(b). Here, counsel for the City submitted a detailed list of the tasks performed in the case and a sworn estimation of the time spent on those tasks. The affidavit further averred that this represented the City's customary practice of timekeeping in these matters. We find the affidavit sufficient to support the petition.

6. The City's requested rate of $165 per hour is average. *See Oregon School Employees Association v. North Clackamas School District*, Case No. UP-017-13, 26 PECBR 129, 130 (2014) (Rep. Cost Order) (the average rate for representation costs is between $165 and $170 per hour). The number of hours claimed (60) is above 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). However, as noted above and in our dismissal order, this case is unusual in that it was referred to this Board for a decision *just before* the scheduled first day of a two-day hearing. Because the two days of hearing were scheduled on consecutive days, it would be reasonable for the City's counsel to have fully prepared for a two-day hearing at the time that the matter was referred to this Board. Under such circumstances, we find the City's claimed 60 hours to be reasonable.

7. 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). LIUNA asserts, however, that we should award a lesser fraction of the City's reasonable representation costs because no "finding was made exonerating the City." As set forth above, we disagree with

[2]The City does not bill City bureaus at an hourly rate for labor law matters such as this, but City attorneys do complete time sheets for purposes of public accountability. Although those time sheets generally reflect the number of hours worked per day, they do not typically break down the number of hours spent per day on any particular task or case.

LIUNA's characterization of our dismissal order. In short, the dismissal order "exonerated" the City of the alleged unfair labor practices in a manner similar to other dismissal orders that issue after a hearing took place. 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 City representation costs of $3,300.

ORDER

LIUNA will remit $3,300 to the City within 30 days of the date of this Order.

DATED this 3 day of March, 2015.

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. AR-001-14

(PETITION FOR REVIEW OF ARBITRATION AWARD)

In the Matter of an Arbitration Between the STATE OF OREGON, OREGON HEALTH AUTHORITY, Petitioner, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503, OPEU, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Lisa M. Umscheid, Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Petitioner.

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

On February 13, 2015, Administrative Law Judge (ALJ) B. Carlton Grew issued a recommended order in this matter. The parties had 14 days from the date of service of that order to file written objections. *See* OAR 115-010-0090. Neither party filed objections.

When neither party objects to a recommended order, we generally adopt the recommended order as our final order and 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 petition is denied.

DATED this 5 day of March, 2015.

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. AR-001-14

(PETITION FOR REVIEW OF ARBITRATION AWARD)

In the Matter of an Arbitration Between the	)	
	)	
STATE OF OREGON, OREGON HEALTH AUTHORITY,	)	RECOMMENDED RULINGS,
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND PROPOSED ORDER
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503, OPEU,	)	
	)	
Respondent.	)	
	)	

A hearing was held before Administrative Law Judge (ALJ) B. Carlton Grew on December 5, 2014, in Salem, Oregon. The record closed on December 24, 2014, following receipt of the parties' post-hearing briefs.

Lisa M. Umscheid, Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Petitioner.

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

On September 16, 2014, the State of Oregon, Oregon Health Authority (OHA), filed this Petition alleging that an arbitration award reinstating the Grievant is unenforceable under ORS 240.086(2)(d) and ORS 243.706(1) because reinstatement would violate public policy as established by ORS 419B.010. On September 30, 2015, the Service Employees International Union, Local 503, OPEU (SEIU or Union), filed an opposition to the petition, asserting that the

award ordering the Grievant's reinstatement does not violate any clearly defined public policy and must be enforced.

The issue is: Is the August 29, 2014 arbitration award enforceable under ORS 240.086(2)(d) and ORS 243.706(1)?

We conclude that the arbitration award is enforceable under ORS 240.086(2)(d) and ORS 243.706(1), and we deny OHA's petition.

RULINGS

The rulings of the Administrative Law Judge were reviewed and are correct.

FINDINGS OF FACT

1. OHA is a public employer as defined by ORS 243.650(20). The Union is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a bargaining unit which includes Grievant, a Transporting Mental Health Aide at Oregon State Hospital.

2. OHA and the Union were parties to a collective bargaining agreement in effect from August 2011 until June 30, 2013. The agreement included provisions stating that: (1) the principles of progressive discipline shall be used when appropriate; (2) grievances are defined as acts, omissions, applications, or interpretations alleged to be violations of the terms or conditions of the collective bargaining agreement; (3) all grievances shall be processed in accordance with these provisions and it shall be the sole and exclusive method of resolving grievances; (4) the final step in the grievance process is arbitration, and the decision or award of the arbitrator shall be final and binding on each of the parties. (Exh. P-1 at 17-18.)

3. OHA has a crisis response protocol for occasions when a patient acts in a destructive or violent manner. Grievant had received training in this protocol, which involved calling additional staff, creating a plan, and acting on the plan.

4. On December 27, 2012, Grievant grabbed a patient, who had been acting in a destructive and violent manner, around the waist and fell with the patient to the floor. On April 9, 2013, DHS terminated Grievant's employment for using physical force against a patient that was unnecessary and inconsistent with patient treatment.

5. The Union grieved Grievant's termination, and the matter proceeded to arbitration before Arbitrator Timothy D.W. Williams. The parties agreed that the issues before the arbitrator were:

"1. Did the Employer have just cause to terminate the Grievant?

"2. If not, what is the appropriate remedy?" (Exh. P-2 at 7.)

6. On August 29, 2014, Arbitrator Williams issued his award. The Arbitrator concluded that OHA met its burden of establishing, by clear and convincing evidence, that the Grievant's conduct constituted physical abuse as defined by the pertinent employer rules and governing legal authority.[1] The Arbitrator held that OHA had failed to establish that Grievant's actions, viewed in light of all of the circumstances, were sufficient to justify his termination.

7. In reviewing the punishment, the Arbitrator quoted OHA's brief, which stated that "[t]his is an unfortunate case in which a well-regarded, well-intentioned, and well-liked employee with no disciplinary record made a tragic decision to physically restrain a patient at Oregon State Hospital." (Exh. P-2 at 32.)

8. Arbitrator Williams compared Oregon Administrative Rules governing patient care, cited by OHA, with the contractual just cause standard. The arbitrator noted that they both required that discipline of employees be commensurate with the seriousness of the conduct and with aggravating or mitigating factors.[2]

9. In summarizing his decision, the Arbitrator stated:

> "[T]he Grievant, a good employee, went prematurely hands-on with a patient that was engaged in a behavioral incident including the destruction of OHA property and making loud threats against staff. Because the hands-on action was not authorized, the Grievant's actions are correctly classified as physical abuse. Clearly, however, the Grievant's actions were not malicious or intended to harm the patient. Given all of the facts of this case, the progressive discipline requirement of the [collective bargaining agreement] CBA must be applied and the Grievant given the opportunity to correct his deficiency. Thus the decision to discharge the Grievant violated Article 20, Section 1 -- progressive discipline should have been used. The grievance is sustained." (Exh. P-2 at 35.)

10. Arbitrator Williams concluded,

> "The Arbitrator was tasked with the responsibility to determine whether OHA had just cause to terminate the Grievant's employment. The Grievant's employment was terminated based on an allegation that he had physically abused a patient. The Arbitrator found that the Employer had clear and convincing evidence to establish the truth of that charge. However, the Arbitrator noted that the CBA required the use of progressive discipline unless the Employer could establish a compelling case to move for immediate discharge. The Arbitrator determined that the Employer's case for immediate

[1]As used in this employment setting, the term "physical abuse" is not the same as its meaning to laypersons. As used by OHA, the term does not require an intent to do harm, and OHA does not contend that Grievant had an intent to do harm. At one point OHA characterizes Grievant's conduct as a violation of treatment protocols.

[2]OHA argues that Arbitrator Williams erred in concluding that aggravating or mitigating factors are relevant to evaluating Grievant's termination.

> discharge was extremely weak and almost nonexistent. As a result, the Arbitrator sustained the grievance in that he found the proven charges sufficient to warrant a suspension but not discharge. As a remedy, the Arbitrator is directing the Employer to reinstate the employment of the Grievant and make him whole for lost wages and benefits." (Exh. P-2 at 36-37.)

The Arbitrator entered the award as described, and this petition followed.

CONCLUSIONS OF LAW

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

Standards for Decision

Under Article 21 of the collective bargaining agreement, OHA and the Union agreed to resolve disputes arising under that contract by submitting the matter to arbitration, and that the decision or award issued by the arbitrator would be final and binding on them both. Despite this agreement, OHA argues that this Board must determine that the arbitration award ordering Grievant's reinstatement is unenforceable.

Public policy strongly favors the use of binding arbitration to resolve labor disputes. *See generally, Marion County Law Enforcement Association v. Marion County,* Case No. UP-24-08, 23 PECBR 671, 685-86 (2010). The Court of Appeals has held that this Board's consideration of arbitration awards under ORS 240.086(2) and ORS 243.672 is only a "sparing review, in the interest of promoting the efficiency and finality of arbitration as a decision-making process for those who contract to use it." *Fed. of Ore. Parole Officers v. Corrections Div.*, 67 Or App 559, 563, 679 P2d 868, *rev den,* 297 Or 458 (1984). We do not treat an arbitration award challenged under ORS 240.706(1) any differently. *In the Matter of an Arbitration Between the State of Oregon, Department of Human Services, v. Service Employees International Union, Local 503, OPEU*, Case No. AR-001-13, 25 PECBR 836 (2013). Further, we do not review the arbitrator's decision to determine whether it is right or wrong, and we must enforce the decision even if we believe it was erroneous. *Portland Association of Teachers v. Portland School District 1J*, Case No. UP-64-99, 18 PECBR 816, 836-37 (2000), *ruling on motion to stay*, 19 PECBR 25 (2001), *AWOP*, 178 Or App 634, 39 P3d 292, 293, *rev den*, 334 Or 121, 47 P3d 484 (2002).

OHA and the Union agreed to use binding arbitration as the sole means of resolving contractual grievances, and therefore agreed to accept the arbitrator's interpretation of their contract. When an arbitrator's award is based an interpretation of the contract language, the parties are bound by that decision unless a statutory exception applies. *Clatsop Community College Faculty Association v. Clatsop Community College*, Case No. UP-139-85, 9 PECBR 8746, 8761-62 (1986).

OHA filed its petition under ORS 240.086(2)(d), which grants this Board authority to review arbitration awards issued in disputes between a state agency and the exclusive

representative of the agency's employees.[3] This statute requires that we enforce an arbitration award unless it meets certain listed exceptions. OHA argues that the award is unenforceable under ORS 240.086(2)(d), which precludes enforcement where "[t]he arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."[4] Specifically, OHA argues that the award violates public policy and is unenforceable under ORS 243.706(1), which states that:

> "A public employer may enter into a written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in binding arbitration or any other dispute resolution process agreed to by the parties. As a condition of enforceability, any arbitration award that orders the reinstatement of a public employee or otherwise relieves the public employee of responsibility for misconduct shall comply with public policy requirements as clearly defined in statutes or judicial decisions including but not limited to policies respecting sexual harassment or sexual misconduct, unjustified and egregious use of physical or deadly force and serious criminal misconduct, related to work."

When a party alleges that an arbitration award that reinstates an employee violates public policy, we apply a three-part analysis. First, we determine whether the arbitrator found that the grievant engaged in the misconduct for which discipline was imposed. If so, we then determine if the arbitrator reinstated or otherwise relieved the grievant of responsibility for the misconduct. If both of these tests are met, we then determine if the award violates a clearly defined public policy expressed in statutes or judicial decisions. *Portland Police Association v. City of Portland,* Case No. UP-023-12, 25 PECBR 94, 111 (2012), *appeal pending*; *see also Deschutes County Sheriff's Association v. Deschutes County*, Case No. UP-55-97, 17 PECBR 845, 860 (1998), *rev'd and rem'd*, 169 Or App 445, 9 P3d 742 (2000), *rev den*, 332 Or 137, 27 P3d 1043, 1044 (2001), *order on remand*, 19 PECBR 321 (2001).

The statutory public policy exception is a narrow one. The Oregon Supreme Court has stated that this Board may not overturn an arbitrator's award because we believe that an employee's *conduct* violated public policy. Rather, "[t]he proper inquiry * * * is whether the *award itself* complies with the specified kind of public policy requirements." *Washington Cty. Police Assn. v Washington Cty.*, 335 Or 198, 205, 63 P3d 1167 (2003) (emphasis in original). Therefore, the question here is whether an award ordering reinstatement of an employee whose actions

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[3]This Board also reviews arbitration awards in the context of unfair labor practice complaints alleging violations of ORS 243.672(1)(g) and 243.672(2)(d) (refusal to accept the terms of an arbitration award when the parties have agreed to accept the awards as final and binding). We apply the same "sparing review" standard to arbitration awards under ORS 240.086(2) that we apply in reviewing arbitration awards under subsections (1)(g) and (2)(d). *See Fed. of Ore. Parole Officers v. Corrections Div.*, 67 Or App at 563; *In the Matter of the Arbitration Between the State of Oregon, Department of Transportation v. State Employees International Union Local 503, Oregon Public Employees Union*, Case No. AR-1-06, 21 PECBR 838, 842 (2007).

[4]DHS does not assert a "typical" ORS 240.086(2)(d) claim that the arbitrator lacked the authority to decide the grievance as presented or that a final and definite award was not made on the matter. Rather, the sole contention advanced by DHS is that the arbitration award is contrary to public policy and, therefore, is unenforceable under ORS 243.706(1) *and* ORS 240.086(2)(d).

constituted physical abuse of a patient "fail[s] to comply with some public policy requirements that are clearly defined in the statute or judicial decision." *Id.* More specifically, the decision before us is not whether there is a statute or judicial decision that clearly defines a public policy requiring an individual to refrain from actions constituting physical abuse of a patient. The decision before us is whether a statute or judicial decision contains a clearly defined public policy against *reinstating* an employee whose actions constituted physical abuse. *See Washington Cty. Police Assn. v. Washington Cty.*, 187 Or App 686, 691-92, 69 P3d 767 (2003). The Oregon Supreme Court has also held that a "clearly defined" statute or judicial decision "must outline, characterize, or delimit a public policy in such away as to leave no serious doubt or question respecting the content or import of that policy." *Washington Cty.*, 335 Or at 205-06.

2. The August 29, 2014 arbitration award is enforceable under ORS 240.086(2)(d) and ORS 243.706(1).

OHA fails to identify any public policy against reinstating Grievant.

The arbitrator found that Grievant's conduct constituted physical abuse, the misconduct alleged. The arbitrator also concluded that OHA did not have just cause to terminate the grievant, holding that a one week unpaid suspension was the appropriate level of discipline, followed by reinstatement. Therefore, the first two standards are satisfied.

We turn to whether clearly a defined public policy against reinstating an employee whose actions constituted physical abuse renders the award unenforceable.

OHA claims that the award violates the public policy embodied in various statutes and rules against physical abuse of patients. It is correct that the various statutes and rules establish a clearly defined public policy against physical abuse of patients. In fact, Arbitrator Williams concluded that Grievant's conduct violated this clearly defined public policy.

However, OHA cites no statutes "about employment or reinstatement" as described by *Washington County*. *Washington Cty.* 335 Or at 206. OHA has provided no credible answer to the precise question at issue here, which is *not* whether public policy dictates that Grievant should have refrained from physical intervention with the patient. The precise question at issue here is whether some statute or judicial opinion outlines, characterizes, or delimits a public policy against *reinstating* a public or private official (such as Grievant) who has not complied with standards of conduct defining and governing physical abuse of patients.[5] *Washington Cty.*, 187 Or App at 691-92; *see also Salem-Keizer Assn. v. Salem-Keizer Sch. Dist. 24J*, 186 Or App 19, 25 (2003) ("whether the underlying conduct violates public policy is not the

[5]OHA argues that some of these statutes and rules are about employment and reinstatement because some of these mandates can only be effectuated by employees. Whether or not it is correct that only employees can effectuate some of these rules, the rules do not, in fact, address whether an employee must be terminated for their violation. As Arbitrator Williams noted in his Opinion and Award, examples of such provisions exist in other jurisdictions. Illinois law provides that a mental health care worker who engages in certain statutorily defined abuse has their name placed on a registry, and no one on the registry may be employed in any capacity in any licensed entity providing mental health services. 20 ILCS 1705/7.3. OHA points to no such statute or rule in Oregon.

relevant inquiry"). Further, if there is such a statute or judicial decision, does the statute or decision "articulate that policy in such a way as to leave no serious doubt or question respecting the content or import of that policy." 187 Or App at 692 (interior quotation marks omitted).

OHA has not identified any statute or judicial decision that clearly prohibits the reinstatement of a public or private official who failed to comply with standards of conduct defining and governing physical abuse of patients. Therefore, OHA has presented no meritorious arguments, and the arbitration award is enforceable.

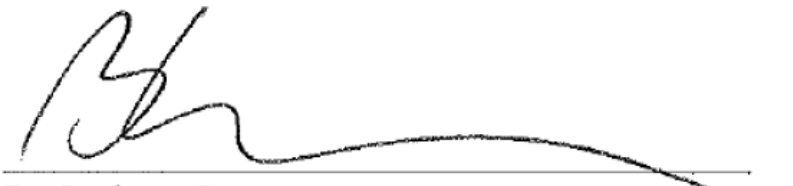
Our decision here is consistent with prior decisions of the Oregon Court of Appeals and this agency. In its order on remand from the Supreme Court in *Washington Cty.*, the Court of Appeals held that an arbitration award reinstating a public safety officer who used marijuana off-duty was enforceable because there was no clear statute or judicial decision barring arbitral *reinstatement* of a public safety officer who had engaged in such conduct. Therefore, the employer's refusal to implement that award constituted an unfair labor practice. 187 Or App at 690-91. In *Salem-Keizer Sch. Dist. 24J*, the Court of Appeals held that an arbitration award reinstating an instructional assistant who admitted to, but had not been convicted of, second-degree theft was enforceable because no statute or judicial decision clearly prohibited reinstatement. 186 Or App at 26. Finally, in *State of Oregon, Department of Human Services*, 25 PECBR 836, this Board concluded that the Department of Human Services had failed to establish the existence of a public policy against the reinstatement of an employee who had failed to report suspected child abuse in violation of ORS 419B.010.

The standards of limited review set out in the statutes and judicial decisions above require that this Board order that the petition be denied.

PROPOSED ORDER

The petition is denied.

SIGNED AND ISSUED 13 February 2015.



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-069-11

(UNFAIR LABOR PRACTICE)

ASSOCIATION OF OREGON CORRECTIONS EMPLOYEES, Complainant, v. STATE OF OREGON, DEPARTMENT OF CORRECTIONS, Respondent.	)	FINDINGS AND ORDER ON RESPONDENT'S PETITION FOR REPRESENTATION COSTS

On December 30, 2011, this Board issued an order dismissing the complaint filed by the Association of Oregon Corrections Employees (AOCE), which alleged that the State of Oregon, Department of Corrections (Department), violated ORS 243.672(1)(e). 24 PECBR 559 (2011).[1] AOCE then filed a petition for review with the Court of Appeals, which issued an order on October 22, 2014, dismissing the petition as moot. *See Association of Oregon Corrections Employees v. DOC*, 266 Or App 496, 337 P3d 998 (2014). The appellate judgment issued with an effective date of February 11, 2015.

On January 18, 2012, the Department filed a petition for representation costs. On February 1, 2012, AOCE filed objections to the petition.

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

1. The Department filed a timely petition for representation costs, and AOCE filed timely objections to the petition.

2. This case involved a single day of hearing.

3. The Department is the prevailing party, as we dismissed AOCE's complaint in its entirety, and the petition for judicial review was dismissed.

[1]AOCE's petition for reconsideration was subsequently denied. *See* 24 PECBR 655 (2012).

4. The Department requests an award of $9,727 in representation costs, based on 73.9 hours of professional legal services that were billed as follows: 58.2 hours of attorney time at a rate of $143 per hour; 12.1 hours of paralegal time at a rate of $79 per hour; and 3.6 hours of law-clerk time at a rate of $39 per hour. The Department also seeks $12.73 in copying costs and reimbursement of its filing fee.[2]

5. The Department's requested rate of $143 per hour is below average. *See Oregon School Employees Association v. North Clackamas School District*, Case No. UP-017-13, 26 PECBR 129, 130 (2014) (Rep. Cost Order) (the average rate for representation costs is between $165 and $170 per hour). AOCE asserts that the number of hours spent on the case is excessive. The number of hours claimed (73.9) is above 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 adjust our award accordingly.

6. 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).[3] AOCE asserts, however, that we should award a lesser fraction of the Department's reasonable representation costs because this case concerned a novel issue of law. *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). We agree with AOCE that the primary issue in this case (the Department's bargaining obligations concerning a Health Engagement Model) involved a novel issue, and we will award one-fourth of the Department's reasonable representation costs.

7. 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 Department representation costs of $1,788.

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[2]Photocopying, clerical, mileage, postage, and telephone costs are not awarded in representation cost awards. *AFSCME Local 2746 v. Clatsop County*, Case No. UP-59-95, 16 PECBR 664 (1996) (Rep. Cost Order). We also do not order reimbursement of filing fees as part of representation costs incurred by a party. *IBEW, Local 48 and District Council of Trade Unions v. School District No. 1J, Multnomah County*, Case No. UP-69-03, 21 PECBR 13 (2005) (Rep. Cost Order).

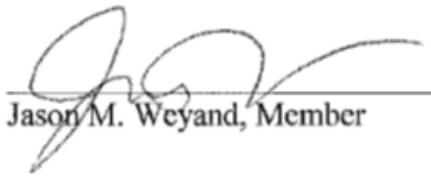
[3]Effective September 10, 2014, OAR 115-035-0055(1)(a) was amended to increase the representation-costs cap to $5,000. We apply the rule in effect at the time that the petition was filed.

ORDER

AOCE will remit $1,788 to the Department within 30 days of the date of this Order.

DATED this 11 day of March, 2015.

Kathryn A. Logan, Chair*



Jason M. Weyand, Member

Adam L. Rhynard, Member

*Chair Logan did not participate in the deliberations or decision in this matter.

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-007-14

(MANAGEMENT SERVICE REMOVAL)

RICHARD C. BLANK, Appellant, v. STATE OF OREGON, CONSTRUCTION CONTRACTORS BOARD, Respondent.	)	RULING ON RECONSIDERATION

Richard C. Blank (Blank or Appellant) seeks reconsideration of this Board's December 4, 2014, order, which adopted the administrative law judge's recommended order that the appeal be dismissed. *Blank v. State of Oregon, Construction Contractors Board*, Case No. MA-007-14 (December 2014). Although objections had been filed by Appellant, the Board determined that the Appellant's objections were untimely filed.

In his motion, Appellant asked that we reconsider our conclusion that the objections were untimely and that we review the merits of the case. The Board granted reconsideration and, on January 22, 2015, oral arguments were heard on the timeliness of the objections as well as the merits of underlying dispute.

The issues for the reconsideration hearing were:

1. Did the Appellant timely file his objections?

2. If the objections were not timely filed, did the Appellant have good cause sufficient to excuse the late filing?

3. Did the Construction Contractors Board (CCB) appropriately remove Richard Blank from management service, and dismiss him from state service, effective March 20, 2014, for failing to intervene to stop a pattern of sexual harassment of a

subordinate by another employee, and thus committing misconduct, malfeasance and unfitness to render effective service under ORS 240.555?

For the purposes of this reconsideration order, we reach no conclusion about the timeliness of the filing and assume without deciding that the Appellant's objections were timely filed. We therefore proceed directly to the merits of the case. Having reviewed the record in this case and Appellant's objections, we conclude that the CCB did not violate the statute in removing and dismissing Blank.

RULINGS

At hearing and during oral argument, Appellant objected to the admission of Exhibit R-7, an investigative report. Appellant asserts that this report is inadmissible because it "relates alleged admissions of [Blank] and others in a loose, narrative style, with speculative and probabilistic conclusions, and contains fragments of sentences with ambiguous meaning."

OAR 115-010-0050(1) provides that "[e]vidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs shall be admissible." Exhibit R-7 consists of a 79-page report that contains information describing the process used by the investigator, a summary of the investigator's findings, and notes from interviews with Blank and several other witnesses to the events at issue. In addition, attached to the report is more than 100 pages of documentary evidence gathered during the investigation, many of which relate directly to the allegations at issue in this matter. Investigative reports such as this are frequently prepared by investigators in disciplinary matters, and employers often rely on these reports in determining whether discipline is appropriate. To the extent that any summaries of witness statements in the report were inaccurate or wrong, Appellant had the opportunity to call those witnesses to testify in this proceeding to correct or contradict the report. Blank also had the opportunity to testify directly to any inaccuracies regarding the report's summaries of his statements. In sum, we conclude that the report submitted by CCB meets the standards for admissibility under our rules and was properly received by the ALJ.

The remaining rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties

1. The CCB is a state agency that regulates construction contractors who work on real property.

2. At the time of his termination, Blank was the CCB Enforcement Section Program Manager, a Principal Executive Manager C position in management service. He had served at that level since 2001 with some intervening work out of class as a Principal Executive Manager D in 2008. Before his managerial service, Blank worked as an Administrative Specialist 2 at CCB, a position in the classified service, beginning in 1999.

3. The employees of CCB are subject to statewide policies and rules from the Department of Administrative Services (DAS). DAS Statewide Policy 50.010.01, Discrimination and Harassment Free Workplace, provides in part:

"**(a)** **Discrimination, Workplace Harassment and Sexual Harassment.** The State of Oregon provides a work environment free from unlawful discrimination or workplace harassment based on or because of an employee's protected class status. Additionally, the state of Oregon provides a work environment free from sexual harassment. Employees at every level of the organization, including state temporary employees and volunteers, must conduct themselves in a business-like and professional manner at all times and not engage in any form of discrimination, workplace harassment or sexual harassment.

"**(b)** **Higher Standard.** *Managers/supervisors are held to a higher standard and are expected to take a proactive stance to ensure the integrity of the work environment. Managers/supervisors must exercise reasonable care to prevent and promptly correct any discrimination, workplace harassment or sexual harassment they know about or should know about.*

"**(c)** **Reporting.** *Anyone who is subject to or aware of what he or she believes to be discrimination, workplace harassment, or sexual harassment should report that behavior to the employee's immediate supervisor, another manager, or the agency, board, or commission Human Resource section, Executive Director, or chair, as applicable. A report of discrimination, workplace harassment or sexual harassment is considered a complaint. A supervisor or manager receiving a complaint should promptly notify the Human Resource section, Executive Director, or chair, as applicable*."

"* * * * *

"**(g)** **Penalties.** Conduct in violation of this policy will not be tolerated.

"(A) Employees engaging in conduct in violation of this policy may be subject to disciplinary action up to and including dismissal.

"* * * * *

"(C) An agency, board or commission may be liable for discrimination, workplace harassment or sexual harassment if it knows of or should know of conduct in violation of this policy and fails to take prompt, appropriate action.

"(D) *Managers and supervisors who know or should know of conduct in violation of this policy and who fail to report such behavior or fail*

to take prompt, appropriate action may be subject to disciplinary action up to and including dismissal." (Italics added.)

4. DAS Statewide Policy 50.010.03, Maintaining a Professional Workplace, provides in part:

"**(a)** **Conduct** Employees at every level of the agency should foster an environment that encourages professionalism and discourages disrespectful behavior. All employees are expected to behave respectfully and professionally and refrain from engaging in inappropriate workplace behavior.

"**(b)** **Addressing Inappropriate Workplace Behavior**

"(A) *Supervisors must address inappropriate behavior that they observe or experience and should do so as close to the time of the occurrence as possible and appropriate.*

"(B) If an employee observes or experiences inappropriate workplace behavior and the employee feels comfortable in doing so, they should:

"(i) redirect inappropriate conversations or behavior to workplace business; and/or

"(ii) tell an offending employee his/her behavior is offensive and ask him/her to stop.

"**(c)** **Reporting Inappropriate Workplace Behavior**

"(A) *An employee should report inappropriate workplace behavior he/she experiences or observes to his/her immediate supervisor as soon as practicable. If the employee's immediate supervisor is the one engaging in the inappropriate behavior, the employee should report the behavior to upper management, the agency head or Human Resource section, as soon as practicable. The report may be made orally or in writing.*

"* * * * *

"**(d)** **Responding to a Report of Inappropriate Workplace Behavior** Inappropriate workplace behavior must be addressed and corrected before it becomes pervasive, causes further workplace disruption or lowers employee morale. Unless the agency decides otherwise, the supervisor of the employee allegedly engaging in the inappropriate workplace behavior must investigate the report as soon as possible.

"**(e)** **Consequences**

"(A) Any employee found to have engaged in inappropriate workplace behavior, will be counseled, or, depending on the severity of the behavior, may be subject to discipline, up to and including dismissal.

"(B) *A supervisor who fails to address inappropriate behavior, will be counseled, or, depending on the severity of the behavior, may be subject to disciplinary action, up to and including dismissal.*

"**(f)** **Retaliation** Retaliating against someone for reporting or addressing inappropriate workplace behavior is prohibited. The agency will investigate reports of retaliation. Any employee found to have engaged in retaliation may be subject to discipline, up to and including dismissal." (Italics added.)

5. Blank signed acknowledgements of Policy 50.010.03 on April 7, 2010, stating "I understand that as a State of Oregon employee, the policy applies to me. I also understand that any violation of the policy constitutes misconduct."

6. Blank attended the following training relevant to the issues in this case: "Preventing and Minimizing Lawsuits" (2009); "Documentation, Discipline and Discharge" (2009); "How to Deal With Unacceptable Employee Behavior" (2010); and "Employment Discrimination Based on Protected Class Status" (2010).

7. During the events at issue here, Blank reported to CCB Administrator Craig Smith. Smith, in turn, reported directly to the Board members of the CCB. Within the CCB work unit at issue here, Smith had a reputation as a micromanager.

8. Before the events at issue, CCB had not imposed any discipline on Blank.

9. During the events at issue here, Traci Barnett was CCB's human resources manager and the sole human resources employee at CCB. Barnett reported to Smith.

10. Employee EL[1] is a Compliance Specialist at the CCB and has held that position since 2006. He is of Japanese and Native-American descent.

11. Throughout his employment, EL reported to Blank. The two were also close personal friends who often communicated at work daily, often for lengthy periods of time, and met outside of work for activities such as attending sporting events.

12. EL's position is in a bargaining unit represented by the American Federation of State, County & Municipal Employees (AFSCME). EL has been president and chief steward of the CCB local for the last eight years.

[1]We have elected to identify this employee by his initials rather than full name.

13. During the events at issue here, employee WR[2] was employed by CCB as an Information System Specialist in the Information Technology (IT) Department, reporting to the IT manager, Shelly Wiles. WR, an 18-year employee, had a longstanding personal connection to CCB Administrator Smith. WR's IT work occasionally brought him to Blank and EL's work area. WR's position was also in the AFSCME bargaining unit, and he was a former union local president. The CCB IT Department is located in a locked room some distance from EL's work location. However, for the period at issue here, WR's work station was in the CCB server room, where he was alone.

14. Beginning in August 2011, and continuing through 2013, WR engaged in a pattern of homophobic and ethnicity-based harassment of EL.[3] WR's harassment included the following acts:

- Attached pink streamers to the handlebars of EL's Harley Davidson motorcycle;
- Logged in to EL's state-owned computer and put a racially insensitive picture on his computer;
- Logged in to EL's state-owned computer to change the computer wallpaper to include an image of scantily clad males in Speedo swimsuits;
- Signed EL up on mailing lists aimed at gay readers so that EL would receive unwanted mailings at work, including gay pornography;
- Left a DVD of the film "Brokeback Mountain" on EL's desk;
- Sent EL an e-mail in which WR refers to a "male gay black lover" WR had invented and repeatedly mentioned to EL; and
- Put a note on the back of EL's vehicle that said "I ♥ PENIS."

15. During the same period, when EL would talk to men, WR would repeatedly stand behind the men and make kissing sounds and facial expressions. WR also arranged for EL, who is not tall, to receive advertisements for elevator shoes.

16. Blank was aware of all of the conduct listed above shortly after it occurred, usually by hearing of it from EL.[4]

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[2]This employee will also be identified by his initials.

[3]There is no evidence that WR's behavior was based on any actual knowledge or evidence of EL's sexual orientation.

[4]Appellant asserted that CCB had not met its burden of proof in establishing that he knew of all of the incidents of harassment listed in Findings of Fact 14 and 15. In support of this position, Appellant relies on statements made by EL during his testimony at the hearing. After reviewing EL's testimony in conjunction with the other evidence in the record, we disagree.

17. Before August 2011, EL participated in bantering with WR and did not inform WR that his conduct was unwelcome and inappropriate. In August 2011, EL informed WR in a heated conversation that his actions were not welcome and inappropriate. Blank was aware of this change in EL' approach to WR, but was also aware that WR's conduct before August 2011 was nevertheless inappropriate.

18. Throughout much of the period of WR's harassment, EL was concerned that, if he reported the harassment, he might endanger WR's job. EL believed that, as a union official, it was morally wrong and dishonorable for him to cause another bargaining unit member to lose his or her job. The harassment took a toll on him, however, and he did want it to end.

19. In February 2013, shortly after the "I ♥ PENIS" sticker appeared on his car, EL went to Barnett to complain and get her assistance in obtaining security camera footage of the employee parking area at the time the sticker was put on his car.

20. In early 2013, two classified CCB mailroom employees discovered mail addressed to EL that contained content inappropriate for work. The mail included material of a sexual nature with a gay theme. They showed the material to their supervisor, CCB Business Manager Stan Jessup. Jessup immediately showed the material to Blank, who responded: "don't let it get to [EL] because he is sensitive about it." The next time that similar mail was received, Jessup contacted CCB Administrator Smith and showed him the material. After that, Jessup gave Barnett the material as it arrived, and HR Manager Barnett would put it in a file.

EL was asked directly if he told Blank of the ongoing harassment by WR, but EL did not answer that question clearly. EL did not testify that he never told Blank about the ongoing harassment, or that he believed that Blank was not aware of it. At best, EL's testimony established that he never made a formal complaint to Blank until early 2013. Further, EL testified that "everybody knew" about WR's harassment of him for years and that it was "not a big secret." Thus, EL's testimony supports, rather than contradicts, the finding that Blank was aware of much of the conduct at issue in the dismissal.

More importantly, Blank's own statements confirm his knowledge of WR's harassment of EL. Although Blank chose not to testify at the hearing, the record contained a transcript of Blank's statements made during his pre-dismissal meeting. In that meeting, despite being told that this was his opportunity to refute the charges or offer mitigating information, Blank initially refused to comment about the specific allegations. However, he then proceeded to admit that he was aware of some of the incidents.

When asked again to respond to the specific items listed in his pre-dismissal letter, Blank was more forthcoming and admitted that he was aware of the specific items listed in the pre-dismissal letter. When asked why he failed to act in response to that knowledge, Blank responded that "I didn't know what to do. And that's about as honest as I can be is I didn't know what to do."

Blanks' statements at the pre-dismissal meeting are consistent with summaries of statements Blank made to the investigator in three separate interviews as well as statements made by other CCB employees during the investigation. If these statements were incorrect or taken out of context, Blank certainly could have explained as much by testifying at the hearing. In the absence of such testimony, this evidence is unrebutted, and is sufficiently credible to establish by a preponderance of the evidence that Blank knew of the harassment directed at EL.

21. During this period, EL and Blank repeatedly discussed WR's actions. Between May and October 2013, EL told Blank that "this needs to stop." EL also told Blank that CCB employees were ganging up on him, and tattling on him to make his life miserable. Blank told EL that he didn't know what to do about the harassment.

In early September 2013, EL asked AFSCME Council Representative Randy Ridderbusch for advice. EL told Ridderbusch that he had informed Blank of the abuse, that Blank would do nothing, and that he had given up on Blank. Ridderbusch suggested that they meet with Barnett. That meeting took place on September 16. At the meeting, EL and Ridderbusch focused on ending the conduct and did not name the individual. Barnett quickly identified the individual as WR, and it was apparent that she was already aware of some of the instances of harassment. The meeting with Barnett did not result in any change in WR's conduct or CCB's lack of response to that conduct.

22. On September 20, 2013, Smith and EL had a conversation in the men's room about WR's harassment. Blank entered the room during the conversation, and Smith suggested that the conversation move to Blank's office. During that conversation, EL described the conduct of WR and argued that it was inappropriate and offensive. Smith disputed EL's views, stating that he believed that WR was a "good guy." Blank offered little comment during the meeting.

23. Blank told no one else about EL's workplace concerns and Blank took no action to stop it.

24. Blank was personally and privately supportive, and personally loyal, to EL.

25. On October 17, 2013, EL submitted a tort claims notice to Smith and DAS. The notice stated that EL was "being subjected to a severe and pervasive hostile work environment of which his employer had notice and failed to take meaningful action to stop the ongoing pattern of co-worker harassment." The notice included a chronological list of events and stated that the harassment began in 2006 and persisted despite EL's "reports" to CCB managers. In response to the notice, the Department of Justice hired private attorney Jill Goldsmith as a Special Assistant Attorney General to investigate the matter. Goldsmith began her investigation in the fall of 2013. Her charge was simply to determine what had occurred, not to make disciplinary recommendations.

26. Goldsmith interviewed 20 CCB employees, including EL, WR, Blank, Smith, Barnett, and WR's supervisor Wiles. Goldsmith interviewed EL twice and Blank three times.

27. Goldsmith also reviewed CCB e-mail files and other documents, including the "I ♥ PENIS" sign left on EL's car and multiple examples of gay pornography and other gay-themed mailings that EL received at work.

28. Blank told Goldsmith that he had done nothing about the harassment and did not realize that he could do anything about it. Blank said that when EL came to him about a problem, Blank would say that he was not sure what to do or if there was anything that he could do. Blank stated that he viewed EL's disclosures as "friend to friend" rather than employee to manager.

Blank also told Goldsmith that EL had been telling him, since the "I ♥ PENIS" sticker was put on his car, that "this needs to stop."

29. On January 30, 2014, Goldsmith submitted her 79-page report to the CCB, along with approximately 100 pages of exhibits. Detailed summaries of Goldsmith's interviews of CCB employees take up 60 pages in the report.

30. On February 12, 2014, Smith tendered his resignation to the CCB, effective on the appointment of an interim Administrator. Because he retired, CCB made no personnel deliberations or decisions regarding Smith.

31. During early 2014, HR Manager Barnett was out on leave. The CCB entered into an interagency agreement with the Department of Consumer and Business Services (DCBS) to have that agency provide human resources services to CCB. Pursuant to that agreement, DCBS Human Resources Analyst 3 Linda Bures effectively became the CCB human resources manager in mid-February.

32. On February 18, 2014, Berri Leslie, Deputy Director of the Insurance Division at the DCBS, was appointed interim Administrator of the CCB. As part of her assignment, Leslie was instructed to terminate WR, Barnett, and Blank.

33. On February 24, Leslie issued a pre-dismissal letter to Blank based on his failure to act regarding WR's harassment of EL. The letter, drafted by Bures, described WR's conduct as set out in Findings of Fact 14 and 15 above.

34. The CCB issued a pre-dismissal letter to WR. On March 4, 2014, WR attended a pre-dismissal meeting, along with a union representative and a union attorney.

35. On March 5, 2014, Bures held a pre-dismissal meeting with Blank. Interim Administrator Leslie also attended as CCB management. Blank did not bring a representative. At the meeting, Bures reviewed the pre-dismissal letter with Blank paragraph by paragraph. Blank stated that he was aware of WR's conduct, as listed in the pre-dismissal letter, and that he had learned of it close to the time in which it had taken place. He also acknowledged that EL had told him that the harassment "needs to stop" in the six months before October 2013. Blank also acknowledged that he did not report WR's conduct to anyone or take any remedial measures.

36. During the pre-dismissal meeting, Blank was offered the opportunity to provide mitigating information to CCB or to refute the allegations in the pre-dismissal letter. Blank admitted knowing of the harassment directed at EL and did not dispute the veracity of the findings of the investigation, which were discussed in some detail. Blank refused to comment on the allegations contained in the pre-dismissal letter, other than debating the use of certain language. At no point during this meeting did Blank specifically deny that he knew of the harassment directed at EL, as alleged in the pre-dismissal letter. His only explanation as to why he failed to take action was that he did not know what to do.

37. CCB Interim Administrator Leslie concluded that Blank's statements at the pre-dismissal meeting, and the evidence obtained through Goldsmith's investigation, warranted Blank's removal from management service and dismissal from state service.

38. On March 20, the CCB dismissed WR from state service. WR's termination did not result in a grievance arbitration.

39. On March 20, 2014, Leslie issued a termination letter to Blank, effective on that date. The letter stated, in part:

> "You are aware that, as a manager with the [CCB], you are required to inform your staff of Board and State policies and enforce compliance with such policies. Nevertheless, you failed to take appropriate action when you became aware (or should have been aware) that the conduct of [WR], if accurately described by [EL], violated multiple statewide policies and was inappropriate in the workplace. At the pre-dismissal meeting, you declined to confirm or deny that [EL] told you about his concerns over at least a two-year period. Based on the long time period during which the conduct occurred, your close relationship with [EL], and your descriptions during your investigatory interview of your knowledge of the conduct, we conclude that you knew enough information to know over at least a two-year period that inappropriate conduct was occurring at work. In addition, you failed to inform any member of your management team or human resources of your knowledge of the conduct, of the policy violations and of the inappropriate conduct. Your actions and inactions represent violations of Statewide Policy 50.010.03 Maintaining a Professional Workplace Policy, and Statewide Policy 50.010.01 Discrimination and Harassment Free Workplace Policy.
>
> "You failed to carry out your required managerial responsibilities by failing to take action to correct or to report when you became aware of (or should have been aware of) behavior in the workplace which was clearly inappropriate. Statewide policy makes clear that unsolicited verbal or physical conduct of a sexual nature, such as that of which you became aware (or should have been aware of), can be considered sexual harassment if the conduct is unwelcome and has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.
>
> "Statewide policy also clearly outlines a manager's responsibility to take proactive steps to ensure the integrity of the work environment. Your inaction exposes the Board to potential liability for a claim of hostile work environment based on sexual harassment. In addition, you have demonstrated serious lack of judgment, as well as disrespect and disregard for the State's policies and reputation by failing to address and respond to repeated inappropriate behavior toward an employee directly under your supervision. You compounded your misconduct by undermining the very policies that you are expected to enforce as a manager.

> "Your inaction also rises to the level of misconduct, inefficiency, incompetence, as well as other unfitness to render effective service.
>
> "We have carefully reviewed and considered all the information regarding the proposed removal from the management service and dismissal from state service and the circumstances surrounding this matter. Based on our review, we have concluded that the information presented by you is not sufficient to refute the charges or basis for this action. Your failure to perform your management responsibilities indicates that you are unable or unwilling to fully and faithfully perform the duties of your position satisfactorily. In addition, your inaction in the face of inappropriate workplace conduct constitutes misconduct, inefficiency, incompetence, and other unfitness to render effective service."

40. CCB also placed HR Manager Barnett on administrative leave and issued a pre-dismissal letter to her because she failed to take action after EL reported the "I ♥ PENIS" sign to her in February 2013. Barnett attended a pre-dismissal meeting represented by a private attorney.

41. On April 2, 2014, Barnett and CCB entered into an agreement in which Barnett agreed to resign in lieu of termination, effective April 3.

42. On May 2, 2014, CCB and EL signed a settlement agreement. The State agreed to pay EL $25,000 in exchange for his release of claims and his agreement to withdraw the tort claim notice and the complaint filed with the Bureau of Labor and Industries.

43. At the hearing, EL testified that he thought his settlement was too low.

44. Blank was present at the first day of hearing, during which CCB presented its case for termination. Blank did not attend the second day of hearing or testify.

CONCLUSIONS OF LAW

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

2. Blank's removal from management service did not violate ORS 240.570(3), and his dismissal from state service did not violate ORS 240.570(5) and 240.555.

DISCUSSION

Legal Standards

ORS 240.570(3) provides that a "management service employee may be disciplined by reprimand, salary reduction, suspension or demotion or removed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." Under ORS 240.570(5), a management service employee with immediate prior status as a classified employee "may be dismissed from state service only for reasons specified by

ORS 240.555 and pursuant to the appeal procedures provided by ORS 240.560." *Mabe v. State of Oregon, Department of Corrections*, Case No. MA-09-09 at 22 (July 2010). Under ORS 240.555, an employee may be disciplined or dismissed for "misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance or other unfitness to render effective service."

Because Blank had status as a classified service employee before he was promoted to management service, we consider two separate personnel actions: (1) his removal from management service under ORS 240.570(3); and (2) his dismissal from state service under ORS 240.570(5) and 240.555.

CCB has the burden of proving that both actions were lawful. OAR 115-045-0030(6). The employer meets its burden of proof if this Board determines, under all of the circumstances, that the employer's actions were "objectively reasonable." *Brown v. Oregon College of Education*, 52 Or App 251, 260, 628 P2d 410 (1981); *Lucht v. State of Oregon, Public Employees Retirement System*, Case No. MA-16-10 at 24 (December 2011). We have defined a reasonable employer as one that "disciplines employees in good faith and for cause; imposes sanctions that are proportionate to the offense; [and] considers the employee's length of service and service record * * *." *Zaman v. State of Oregon, Department of Human Resources*, Case No. MA-21-12 at 12 (April 2013). "A reasonable employer also administers discipline in a timely manner and clearly defines performance expectations, provides those expectations to employees, and tells employees when those expectations are not being met. In addition, a reasonable employer applies the principles of progressive discipline, except where the offense is so serious or unmitigated as to justify summary dismissal[5], or the employee's behavior probably will not be improved through progressive measures." *Nash v. State of Oregon, Department of Human Services*, Case No. MA-008-14 at 23 (December 2014) (citations omitted).

We apply a two-step analysis in reviewing appeals under the statute. "First, this Board determines whether the employer has proven the charges that are the basis of the discipline. However, the employer need not establish all of the charges. If we find that the State has proven any of the charges, we then apply a reasonable employer standard to determine whether the State was justified in imposing the disciplinary action that it did." *Id.* at 24 (citations omitted).

Removal from Management Service

We first determine whether CCB has proven the charges against Blank. Here, CCB established (and Blank does not dispute) that Blank was aware of CCB's policies against harassment of employees and against inappropriate workplace behavior. CCB also established that WR had engaged in longstanding and egregious harassment of EL, Blank's subordinate, from approximately August 2011 until shortly before WR's termination in March 2014. Finally, CCB established that WR engaged in inappropriate conduct even before that conduct was expressly identified by EL as unwelcome.

[5]Our earlier opinions use the term "gross," *e.g.*, "an employee's offense is gross." This term has taken on new meaning since we first used that phrase, and generally is no longer descriptive of the employee actions involved. Our use of a different phrase, however, does not change our test—*i.e.*, some employee actions justify dismissal even where no prior discipline has been imposed.

The issue remaining is whether Blank was aware of WR's conduct, and if so, whether he failed to take action. Blank was aware of many, if not most, of the specific instances of inappropriate conduct and harassment shortly after they occurred. Those instances included the six events listed in the pre-dismissal and dismissal letters. In addition, CCB proved that, shortly after EL discovered racially insensitive and scantily clad male images on his computer, Blank learned that WR was responsible for those images. Blank was also aware of the unwanted and pornographic mail aimed at gay readers being sent to EL, and EL's distress over it, telling mailroom employees who reported it to him "don't let it get to [EL], because he is sensitive about it." Blank also knew about the pink "girl's bicycle" streamers placed on EL's motorcycle.

CCB proved that Blank knew that WR's conduct after August 2011 was unwelcome and distressing to EL. Over the next two plus years, Blank was repeatedly reminded by EL and others that EL was deeply troubled by WR's conduct. This includes a situation between February and April 2013, when EL told Blank that EL "needed this [activity] to stop." Blank was also aware of the August 2011 verbal exchange between EL and WR. Blank knew that WR's conduct was imposing a personal cost on EL. In response to this information, Blank told EL that he did not know what to do.

In the face of this knowledge, Blank did nothing except (1) apparently, be personally supportive to EL, and (2) attend, at Smith's request, an impromptu meeting with EL and Smith to discuss WR's conduct. Blank said nothing substantive at the meeting. In his interview with Goldsmith, and in his pre-dismissal hearing, Blank acknowledged that he had done nothing about the situation and offered no substantive justification or excuse for his conduct.

Blank's only explanation for his conduct in the record is his repeated statement that he "didn't know what to do." That statement, however, means even less than it appears to because the obvious, literal meaning is not accurate. Blank acknowledged receiving policies directing him to report harassment to managers, and there was no evidence that, despite his 15 years at CCB, he was unaware of who WR's supervisor was, who his own supervisor was, who the CCB Board was, or that there were other officials in State government to whom he could have at least attempted to report the harassment.

Further, even if Blank truly did not "know what to do," there is no evidence in the record that he took any steps to find out "what to do." Thus, we are left with a record that demonstrates that Blank was familiar with an extended period of harassment of an employee, was aware of his responsibilities with respect to that harassment, and yet chose to do nothing. For these reasons, we conclude that CCB has proven the allegations against Blank.

Having concluded that CCB has established that Blank engaged in the conduct for which he was dismissed, we must next determine whether CCB's removal of Blank from management service was the action of a reasonable employer. In applying the "objectively reasonable" standard to management service cases, an employer may hold a management service employee to strict standards of behavior, so long as these standards are not arbitrary or unreasonable. *Lucht* at 24; *Helfer v. Children's Services Division*, Case No. MA-1-91 at 22 (February 1992). A significant factor for this Board's consideration is the extent to which the employer's trust and confidence in the employee have been harmed, compromising the employee's ability to act as a member of the

"management team." *Salchenberger v. State of Oregon, Department of Corrections*, Case No. MA-19-12 at 11 (July 2013); *Lucht* at 24. In addition, our precedent gives weight to the effect of the management service employee's actions on the mission and the image of the agency and the extent to which those actions do or do not reflect the proper use of judgment and discretion. *Salchenberger* at 11; *Lucht* at 24. We have stated that "[t]he employer's burden in justifying a removal from management service is relatively minor." *Zaman* at 15 (quoting *Plank v. Department of Transportation, Highway Division*, Case No. MA-17-90 at 29 (March 1992)).

Under these standards, we conclude that CCB's removal of Blank from management service was the act of a reasonable employer. It was not unreasonable or arbitrary for CCB to expect that Blank would take steps to report or stop the harassment of EL. However, Blank's lack of action regarding EL was clearly unreasonable. Blank's failure to act allowed an unacceptable pattern of improper harassment to continue for a long period. Through his conduct, and his unpersuasive explanation for his conduct, Blank demonstrated that he "is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." ORS 243.570(3). Consequently, CCB did not violate ORS 243.570(3) when it removed Blank from management service.

Dismissal from State Service

We now turn to CCB's dismissal of Blank from state service. Having determined that CCB established that Blank engaged in the conduct for which he was dismissed, we begin our analysis by determining whether Blank's actions constituted misconduct, malfeasance, or other unfitness to render effective service as asserted by CCB.

This Board has defined "misconduct" as "a transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, unlawful behavior, willful in character, improper or wrong behavior." *Mabe* at 26. The conduct must also involve intentional wrongdoing. *Greenwood v. Oregon Department of Forestry*, Case No. MA-3-04 at 30 (July 2006), *recons denied*, (September 2006) (emphasis omitted).

We conclude that Blank intentionally engaged in the conduct for which he was dismissed from state service—taking no action to stop, or report, a lengthy course of inappropriate conduct violating state policies and laws. Although one might imagine a host of explanations or mitigating circumstances that might excuse that inaction, Blank chose to limit his response to stating that he "didn't know what to do." As noted above, Blank had a variety of choices available to him, and chose to do nothing. We conclude that this level of fecklessness, without a credible or meaningful explanation, was a willful dereliction of his duties and constituted willful, intentional actions. Therefore, we conclude that Blank engaged in "misconduct" within the meaning of ORS 240.055.

We turn to whether CCB acted as a reasonable employer in dismissing Blank. When we apply the reasonable employer test to review a dismissal from state service, we scrutinize an agency's conduct more stringently, under rules that are substantially different from those governing management service removal. *Mabe* at 23; *Peyton v. Oregon State Health Division, Office of Environment and Health Systems*, Case No. MA-4-87 (January 1989). Charges that are adequate to support removal from management service might not be sufficient to justify dismissal

from state service. *Mabe* at 23; *Stoudamire v. State of Oregon, Department of Human Services*, Case No. MA-4-03 at 7-8 (November 2003). An employer must show that it dismissed the employee in good faith for cause. *Mabe* at 23; *Plank* at 29.

We conclude that CCB dismissed appellant in good faith for cause and acted as a reasonable employer under all of the circumstances. Blank knew more details of the harassment than anyone except WR and EL. He knew this information not only from EL, but from other employees, including the mailroom supervisor. He also knew his responsibilities under the state anti-harassment and anti-discrimination policies. Faced with that situation, Blank chose to do nothing and, when confronted about his behavior, provided no credible explanation for his actions and offers nothing in mitigation of his failure to act. When presented with an opportunity to do so in his pre-dismissal hearing and in this hearing, Blank declined. Blank points to no similarly situated employee or group of employees who knew what he did, and made the choices he did, and who did not resign or was not terminated.[6]

Blank contends that CCB did not act as a reasonable employer in dismissing him from state service, emphasizing that the focus of Blank's wrongdoing was supervisory and that no non-managerial employees, except for WR, were disciplined regarding WR's conduct. We disagree with this argument. Blank failed to follow policies that applied to all employees, not just supervisors. His inaction regarding all of the events that he knew of was extreme, and constituted misconduct. The CCB's decision to remove Blank from State service was the act of a reasonable employer.

We also determine that a reasonable employer could conclude that Blank's length of service and value as a manager did not sufficiently mitigate his conduct. Leslie's conclusion that it was not appropriate to retain an employee who had demonstrated no ability or interest in responding to wrongdoing is not unreasonable on this record.

Finally, Blank argues that Leslie was directed to terminate Blank before his pre-dismissal process began. Leslie, however, credibly testified that she had the authority to modify those directions. Moreover, Blank never offered Leslie any differing narrative of events or any satisfactory explanation or mitigating circumstances for his own conduct. For these reasons, we conclude that Blank's conduct was sufficiently egregious to establish that the State acted as a reasonable employer when it removed him from State service.

In sum, we grant Blank's request for reconsideration. We reach no conclusion about the timeliness of the filing and assume without deciding that the Appellant's objections were timely filed. We conclude that CCB did not violate ORS 240.570(3), ORS 240.570(5), or ORS 240.555 in removing Blank from management service and dismissing him from state service. Therefore, we will adhere to our prior order dismissing Blank's appeal. Our prior order is withdrawn and replaced by this order.

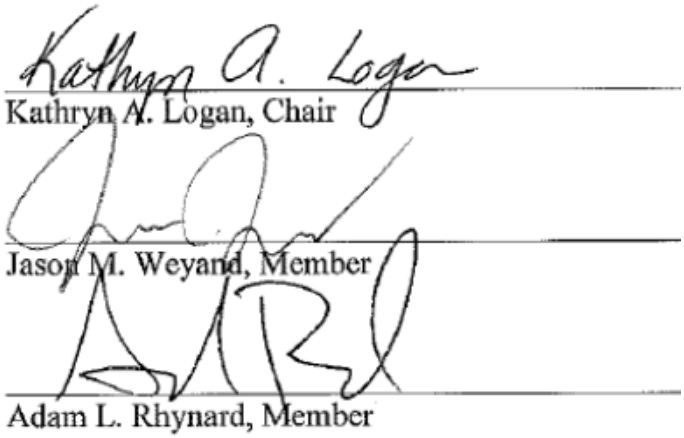
[6]Blank argues that WR's supervisor should have been terminated, not Blank. However, there is no evidence that the supervisor had anything approaching the level of information possessed by Blank.

ORDER

1. Reconsideration is granted. Our December 4, 2014 order is withdrawn and replaced with this order.

2. Blank's appeal is dismissed.

Dated this 13 day of March, 2015.



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-006-14

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503, OREGON PUBLIC EMPLOYEES UNION, Complainant, v. STATE OF OREGON, DEPARTMENT OF REVENUE, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Haley Rosenthal, Tedesco Law Group, Portland, Oregon, represented Complainant.

Lisa M. Umscheid, Senior Assistant Attorney General, Department of Justice, Salem, Oregon, represented Respondent.

On February 2, 2015, 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 Department shall cease and desist from violating ORS 243.672(1)(g) by failing to recognize meal periods during overnight travel as compensable time. Within 30 days of this Order, the Department shall make all CCTAs whole for previously deducted meal periods time from January 2009 to the present.

a. With respect to CCTAs hired on or before September 1, 2011, the Department shall compensate the following CCTAs for the following number of hours:

Joe DiNicola - 1.5 hours;
Bruce Hale - 3.75 hours;
Michael Halter - 0.75 hours;
Jason Iverson - 3.75 hours;
Brian Rainwater - 1.50 hours;
Nancy Ramirez - 7.50 hours;
Rebecca Segovia - 1.50 hours;
Charles West - 3.75 hours;
Shirley Yee - 4.50 hours; and
Michelle Yoon - 0.75 hours.

b. The Department shall calculate and pay amounts owed for previously deducted meal periods for employees hired after September 1, 2011, including:

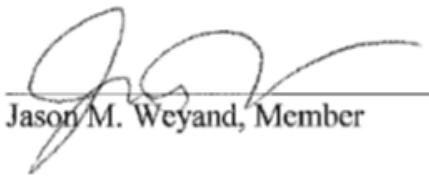
Alisha Dryden (hired January 21, 2014);
Jennifer Hemphill (hired January 21, 2014);
Connie Buber (hired January 21, 2014);
John Koehnke (hired January 21, 2014);
Jason Larimer (hired January 21, 2014);
Tyler Wallace (hired January 21, 2014);
Anita Puckey (hired April 1, 2013);
Kyle Quiring (hired April 1, 2013); and
Ronald White (hired April 1, 2013).

3. The Department shall cease and desist from violating ORS 243.672(1)(g) by failing to recognize meal periods during overnight travel as compensable time and shall not deduct pay for meal periods on overnight travel days for as long as the Settlement Agreement and 2013-2015 CBA are in effect.

4. 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 employes are likely to view it.

Dated this 16 day of March, 2015.

*Kathryn A. Logan, Chair



Jason M. Weyand, Member

Adam L. Rhynard, Member

*Chair Logan did not participate in the deliberations or decision in this matter.

This Order may be appealed pursuant to ORS 183.482.

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-006-14, *Service Employees International Union, Local 503, Oregon Public Employees Union v. State of Oregon, Department of Revenue,* 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 Department violated the PECBA by violating a Settlement Agreement and prior Board Order that required the Department to recognize all hours traveling during overnight travel as compensable work time. The Department failed to recognize all hours spent traveling by the following actions:

1. By deducting pay equal to one half-hour meal period on overnight travel days between 12 and 14 hours after November 5, 2010 from compensation owed to Corporation and Cigarette Tax Auditors.

2. By not paying Corporation and Cigarette Tax Auditors hired after September 1, 2011 for all hours spent traveling during overnight travel, including meal periods.

The Employment Relations Board has ordered the party to post this notice.

The Department shall comply with the Board Order. The Department shall cease and desist from such unlawful conduct in the future.

Dated this ____ day of _____, 2015.

STATE OF OREGON,
DEPARTMENT OF REVENUE

By: _____

_____
Title

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THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

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EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-006-14

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503, OREGON PUBLIC EMPLOYEES UNION, Complainant, v. STATE OF OREGON, DEPARTMENT OF REVENUE, Respondent.	)	RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER

A hearing was held before Administrative Law Judge (ALJ) Julie D. Reading on November 7 and 21, 2014, in Salem, Oregon. The record closed on December 23, 2014, following receipt of the parties' post-hearing briefs.

Haley Rosenthal, Tedesco Law Group, Portland, Oregon, represented Complainant.

Lisa M. Umscheid, Senior Assistant Attorney General, Department of Justice, Salem, Oregon, represented Respondent.

On February 18, 2014, Service Employees International Union, Local 503, Oregon Public Employees Union, (Union or SEIU) filed a Complaint alleging that the State of Oregon, Department of Revenue (Department or Revenue) violated, and continues to violate, ORS 243.672(1)(g) by not fully compensating former and current Corporate and Cigarette Tax Auditor 2s (CCTAs), as required by a Settlement Agreement and the prior Public Employment Relations Board (Board) Order in *SEIU Local 503 v. State of Oregon, Department of Revenue*, Case No. UP-31-12, 25 PECBR 691 (2013) (Board Order). Specifically, the Union asserts that the Department has failed to properly compensate: (1) CCTAs hired after September 1, 2011

(Post-2011 Hires) for all hours spent traveling, by deducting pay equal to meal period time (whether or not meal periods were taken) and (2) CCTAs hired on or before that date (Pre-2012 Hires) for all previously deducted pay for meal period time on travel days between 12 and 14 hours. The Department filed a timely answer.

The issues are:

1. Did the Department violate the Board Order and the prior Settlement Agreement by deducting pay equal to one half-hour meal period on travel days between 12 and 14 hours after November 5, 2010 from compensation owed to Pre-2012 Hires?

2. Did the Department breach the September 1, 2011 Settlement Agreement by not compensating Post-2011 Hires for all hours spent traveling during overnight travel, and instead deducting pay equal to meal period time?

We conclude that:

1. The Department violated the Board Order and the prior Settlement Agreement by deducting pay equal to one half-hour meal period on travel days between 12 and 14 hours after November 5, 2010 from compensation owed to Pre-2012 Hires.

2. The Department breached the September 1, 2011 Settlement Agreement by not compensating Post-2011 Hires for all hours spent traveling during overnight travel, and instead deducting pay equal to meal period time.

RULINGS

The rulings of the Administrative Law Judge were reviewed and are correct.

FINDINGS OF FACT[1]

Parties and Collective Bargaining Agreements

1. The Union is a labor organization as defined in ORS 243.650(13) and is the exclusive representative of certain Department employees.

2. The Department is a public employer as defined in ORS 243.650(20).

3. The Department employs CCTAs. CCTAs are represented by the Union. During some corporate audits, the CCTAs travel to a corporation's out-of-state headquarters to interview managers and review documents. The CCTAs work directly with the corporation to schedule the

[1]The findings of fact in this Recommended Order have been derived from the parties' stipulated facts, the findings of fact in the Board Order, and from the November 7 and 21, 2014 hearing in the present case.

audit. CCTAs must seek approval from their supervisors regarding their travel arrangements before taking the out-of-state trip.

4. On days when CCTAs travel to an out-of-state location, they are required to leave their home or office for the airport by a certain time. They often spend the entire day traveling. CCTAs may have time to eat at an airport or while on an airplane, but they are rarely able to take time that is entirely for personal purposes because it is most cost effective for the CCTAs to reach their destination as soon as possible. CCTAs are responsible for ensuring the security of equipment and documents used for the audits while traveling. Often the documents are highly confidential in nature and cannot be reviewed in public.

5. CCTAs record their worked hours on monthly time sheets, showing the total number of hours worked each day, but not whether they actually took a meal period or deducted any time for meal periods from their total hours on a given day.

6. The Union and the Department are parties to a collective bargaining agreement (CBA) effective through June 30, 2015, and were parties to a series of collective bargaining agreements effective July 1, 2007 through June 30, 2009, July 1, 2009 through June 30, 2011, and July 1, 2011 through June 30, 2013.[2]

7. Article 90.5, Section 4 of the parties' Combined CBAs provides for employees to be granted an unpaid meal period of at least 30 minutes, which is normally scheduled in the middle of their shift. In addition, it requires that the Department count an employee's entire shift as time worked if the Department required the employee to work a full shift without a meal period.

8. Under Article 32 of the Combined CBAs, titled "OVERTIME," employees are entitled to overtime pay at the rate of one-and-one-half time for "time worked" in excess of eight hours per day or 40 hours per week. "Time [w]orked" is defined as "[a]ll time for which an employee is compensated at the regular straight time rate of pay, except on-call time and penalty payment(s) * * * but including holiday time off, compensatory time off, and other paid leave[.]"

Grievances

9. Before March 3, 2009, CCTAs normally worked their regular 40-hour schedule during the week before an out-of-state audit, traveled on Sunday to the audit location, conducted the audit Monday through Thursday, and traveled back to Oregon on Friday. CCTAs received overtime compensation for their Sunday travel time. Under the Combined CBAs, CCTAs could request to work fewer hours the week before they traveled to adjust for the overtime hours. CCTAs were compensated for all time spent travelling, and did not have meal periods deducted.

10. On March 3, 2009, the Department began requiring CCTAs who were traveling on a Sunday to reduce their prior week's regularly scheduled hours by an amount necessary to avoid overtime compensation for the Sunday travel.

[2]We refer to these and the current CBA as the Combined CBAs. If we are referring to one in effect during a relevant event, we refer to it as the Effective CBA.

11. On March 9, 2009, Joesph DiNicola, a Union steward, filed a grievance alleging that the State violated numerous articles in the parties' Effective CBA by requiring him to limit his work schedule in the week before his Sunday travel to an out-of-state audit.

12. Before March 12, 2009, the Department compensated CCTAs for all overnight travel time even when the travel time exceeded their normal 8-hour or 10-hour workday. Then on March 12, the Department began directing CCTAs to only report as hours worked the time traveling during out-of-state travel days that cut across their scheduled work day, pursuant to Oregon Bureau of Labor and Industries (BOLI) Administrative Rule OAR 839-020-0045(5). Under the cut across rule, if an employee works a regular schedule of eight hours per day, the employee only records and receives compensation for up to eight hours of work on a travel day even if the employee traveled for more than eight hours.[3]

13. Along with the cut across rule, the Department began requiring CCTAs to deduct time from their daily hours reflecting meal period times during travel. The Department instructed CCTAs to deduct a half-hour meal period for travel days exceeding six hours and two half-hour meal periods for travel days exceeding twelve hours.

14. From May through November 2009, the Union filed seven grievances alleging that the Department had violated the Effective CBA by only compensating CCTAs for time that cut across their normal work hours, rather than for all hours worked while in overnight travel status, and requiring CCTAs to alter their 40-hour work schedules during the week before overnight travel. The grievances alleged a violation of Article 90.5, Work Schedules, Sections 2 and 3, as well as numerous other articles in the Effective CBA. The grievances did not specifically allege a violation of Article 90.5, Section 4, which addresses meal periods generally (but not during overnight travel), or specifically directly refer to meal period time.

15. The Union filed the cut-across grievances on behalf of the following named groups: March 2009 Corporation and Cigarette Tax Auditors, April 2009 Corporation Tax Auditors, May 2009 Corporation Tax Auditors, June 2009 Corporation Tax Auditors, July 2009 Corporation Tax Auditors, and August 2009 Corporation Tax Auditors. In October 2009, the Union filed a group grievance on behalf of "August 2009 Continuing DOR Group Grievance (on behalf of Corporation Tax Auditors named above and all subsequent similarly situated DOR employees)." In November 2009, the Union grieved on behalf of "September 2009 Revenue Continuing Group Grievance." It named "Thu Anh Nguyen, Fred Nichol, Norman Trinh and all similarly situated DOR employees" as grievants.

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[3]BOLI Administrative Rule OAR 839-020-0045(5) provides:

> "(5) Travel away from the home community: Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is work time when it cuts across the employee's workday. The employee is substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on non-working days. Time that is spent in travel away from home outside of regular work hours as a passenger on an airplane, train, boat, bus, or automobile is not considered work time."

16. On November 5, 2010, CCTA supervisors Janielle Lipscomb and Katie Lolley sent an e-mail to the CCTAs who reported to them, stating that while conducting overnight travel, they needed to "take into account": (1) one half-hour unpaid meal period for any day worked over six hours and less than 13 hours and 59 minutes, and (2) two half-hour meal periods for travel days over 14 hours. The e-mails contained a chart from BOLI showing the meal periods that employers must provide to employees based on the hours worked. CCTAs not supervised by Lipscomb and Lolley may or may not have also received this e-mail.

September 1, 2011 Arbitration and Settlement

17. DiNicola's scheduling grievance and the seven cut-across grievances were processed collectively through all provided steps and ultimately culminated in an arbitration. At a pre-arbitration conference before Arbitrator Sylvia Skratek, the parties discussed the scope of employees that the arbitration decision would cover. The Union argued that it would cover all Department employees. The Department argued it would only cover specifically named grievants. The Arbitrator ruled that would apply to all Department CCTAs. The parties reached a tentative settlement before the arbitration hearing proceeded. However, ultimately, the parties did not ratify that settlement and another arbitration was scheduled for September 1, 2011.

18. On September 1, 2011, Arbitrator Skratek convened the arbitration hearing on the eight grievances. The Union was represented by attorneys Michael Tedesco and Naomi Loo. The Department was represented by Department of Justice Attorney Sylvia Van Dyke. While Van Dyke was presenting her opening statement, Arbitrator Skratek interrupted and indicated that she did not find the Department's argument convincing. Arbitrator Skratek recessed the hearing and the parties began settlement discussions.

19. After discussing settlement, the parties reached an agreement. That same day, the parties drafted and executed the Settlement Agreement, the stated purpose of which was to resolve and settle the eight grievances. The Settlement Agreement provides, in relevant part, as follows:

"RECITALS

> "1. The State and the Union are parties to a Collective Bargaining Agreement ('the CBA') which establishes terms and conditions of employment for a collective bargaining unit of certain employees within Revenue. The term 'Grievants' shall be defined as Tax Auditor 2s who are (or were at the time the Grievances were filed) Corporation and Cigarette Tax Auditors at Revenue and who are (or were at the time the Grievances were filed) on regular or alternate work schedules.
>
> "2. On March 9, 2009, DiNicola and SEIU filed a grievance claiming the State violated the CBA by requiring him to modify his work schedule during weeks when DiNicola was in travel status (the 'individual grievance').

"3. On May 28, June 30, July 29, August 28, September 29, October 30, and November 25, 2009, Grievants and SEIU filed grievances which (a) claimed the State violated the CBA by requiring Grievants to modify their work schedules during weeks when they were in overnight travel status, and (b) claimed the State violated the CBA by changing the manner in which travel time was calculated so that employees were no longer paid for all time spent in overnight travel status, but only for time that cut across normal work hours (plus time spent driving or working) (collectively, the 'group grievances').

"* * * * *

"AGREEMENT

"NOW, THEREFORE, the parties agree as follows:

"1. The Employer will not require Grievants who are on alternate or regular work schedules to adjust their alternate or regular work schedules for travel time. However, the Grievants agree to work 8-hour days, Monday through Friday, while conducting an audit at an out-of-state-location. Grievants are not waiving their right to overtime compensation for hours worked in excess of 8 per day or 40 per week, pursuant to the CBA.

"2. The Employer will recognize all hours traveling during overnight travel as compensable work time.

"3. From January 2009 through September 1, 2011, the Employer will compensate Grievants for .5 times their regular rate of pay for travel time that took place on weekends which has not already been compensated at the rate of 1.5.

"4. This settlement agreement applies only to Grievants as defined in Recital 1.

"* * * * *

"7. This Agreement shall in all respects be interpreted, enforced, and governed under the laws of the State of Oregon. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against either party.

"* * * * *

"9. This Agreement is the sole and entire agreement between the parties relating to the Grievances. No change or modification of this Agreement is valid

> unless it is in writing and signed by all of the parties to this Agreement. All signatories below acknowledge this is the complete Settlement Agreement and no part of the grievances remains unresolved. This Agreement becomes effective on the date of the final signature below." (Exh. R-3 at 2.)

20. During the negotiations, the parties discussed the issue of whether CCTAs who had been employed when the grievances were filed, but had since left, would be parties to the Settlement Agreement. To resolve this issue, the parties had defined "Grievants" as "Tax Auditor 2s who are (or were at the time the Grievances were filed) Corporation and Cigarette Tax Auditors at Revenue" so that it was clear that previously employed CCTAs would also be entitled to compensation. Neither party discussed whether it would apply to CCTAs hired after September 1, 2011. The Department caucus discussed whether it would apply to CCTAs hired on September 1, but this conversation was not held in the presence of, or as part of negotiations with, the Union.

21. After the Settlement Agreement, the Department instituted a "least-cost method" for analyzing CCTA proposed overnight travel. Under this method, a CCTA is required to compare the cost of staying in the audit city during the weekend preceding the audit, with the cost of overtime incurred by traveling on a weekend. The costs of staying over the weekend include the hotel room, meals, hotel parking, other hotel fees, and airport parking expenses. CCTAs are not compensated for their time during the weekend. The overtime cost is based on weekend hours when the CCTA is in travel status, including payroll expenses such as social security, insurance, and workers' compensation. CCTAs are required to select the least-cost option for out-of-state travel. If the least-cost option results in the CCTA staying in the audit city over the weekend and the CCTA does not want to do this, he or she can chose to travel on a Saturday or Sunday and reduce his or her hours in the prior week to offset the overtime cost.

22. In October 2011, the Department compensated CCTAs for some of the compensatory time owed under the Settlement Agreement, covering the period between January 2009 and September 1, 2011. However, the Department deducted pay for meal periods that it had presumed CCTAs had taken.

23. In May 2012, the Union filed an unfair labor practice complaint with the Board, challenging the Department's failure to compensate employees for meal periods as required by the Settlement Agreement, implementation of the least-cost method and the manner in which some specifically named employees were compensated.

24. Following a hearing, a recommended order, filed objections and oral argument, the Board issued the Board Order on August 5, 2013. Relying on the Settlement Agreement language stating that "[t]he Employer will recognize all hours traveling during overnight travel as compensable work time[,]" the Board held that the Department breached the Settlement Agreement in violation of ORS 243.672(1)(g) by "failing to compensate former employees for meal periods during overnight travel that they worked before leaving the Department." (Exhs. R-3 at 1; R-1 at 2.) The Board ordered that the:

> "[d]epartment shall cease and desist from violating ORS 243.672(1)(g) by failing to recognize meal periods taken during overnight travel as compensable time. Within 30 days of this Order, the Department shall make all Grievants and former employees whole for meal periods that have not been recognized as compensable time from January 2009, until the Order is fully implemented." (Exh. R-1 at 18.)

25. On September 4, 2013, Department Human Resources Manager Kim Dettwyler and Assistant Human Resources Manager Dickson Henry met with Union stewards DiNicola and Paula Allen for the purpose of discussing payments and credits to implement the Order. Van Dyke and Union attorney Christy Te also attended the meeting. The Department proposed to allow currently employed CCTAs to choose to be compensated for meal periods either through the payment of wages or through a credit of compensatory time. Formerly employed CCTAs would be compensated with cash.

26. Dettwyler explained that the Department had reviewed time sheets and expense records, and in some cases, information submitted by the CCTAs about unrecorded meal periods, Dettwyler believed that the Department owed, under the Board Order, a total of $14,927.15 in gross wages to Pre-2012 Hires who preferred cash, and a total of 130.5 hours of compensatory time to those Pre-2012 Hires who preferred a credit of compensatory time. The gross amount of $14,927.15 represented 661 hours of time deduct for meal periods.

27. At the meeting, Union representatives identified several areas of disagreement based on the Board Order−specifically, disagreements about the Department's calculations and the omission from the calculations of compensation for Post-2011 Hires. Dettwyler and DiNicola expressed their desire to work cooperatively to resolve disagreements about the number of unpaid overtime hours the Department would pay to the CCTAs.

28. At the September 4, 2013 meeting, the parties agreed that, notwithstanding their disagreement about the amounts owed, and whether Post-2011 Hires were covered by the Settlement Agreement and Order, the Department would pay or credit Pre-2012 Hires for the amounts the Department believed were owed, and the Union agreed to accept partial payment while continuing to work cooperatively to resolve the disagreements regarding compensation.

29. On September 6, 2013, Te sent an e-mail to Van Dyke as a follow up to the September 4 meeting. Te reiterated the Union's objection to the exclusion of Post-2011 Hires from the implementation of the Order. She noted the Union's view that CCTAs who were hired on April 1, 2013, should be included in the Department's calculations.

30. On September 13, 2013, the Department paid pre-2011 CCTAs who chose payment in cash the gross amount of $14,927.15 and the Department credited current CCTAs and Pre-2012 Hires who chose compensatory time with a total of 130.50 hours of compensatory time. Both parties recognized that they did not agree about the Department's calculations, nor did they agree about the exclusion of Post-2011 Hires from the Department's calculations.

31. Following the September 13, 2013 partial payments, DiNicola and Dettwyler exchanged e-mails in which DiNicola requested additional information in order to check the Department's calculations. Thereafter, DiNicola communicated with the individual CCTAs to verify the Department's information and calculations. On October 2, 2013, DiNicola submitted a spreadsheet to Dettwyler. The spreadsheet showed DiNicola's calculations which included an additional 82 hours that the Union contended were owed to Pre-2012 Hires under the Settlement Agreement and Board Order. DiNicola contended that the Department's calculations were incorrect in part because CCTAs had been following the directive to deduct two half-hour meal periods on travel days exceeding 12 hours. The Department's calculations assumed that CCTAs had deducted two half-hour meal periods only for shifts of 14 hours or longer. DiNicola also informed the Department that there were other computation errors in the Department's original calculations.

32. Dettwyler reviewed the spreadsheet and the new calculations submitted by DiNicola. Dettwyler disagreed that the Department should compensate CCTAs for all time traveling and instead should deduct a half-hour meal period for travel days of more than six hours and two half-hour meal periods for travel days of 14 hours or more after November 2010. Dettwyler selected this date because of the e-mails sent by Lolley and Lipscomb on that date, instructing CCTAs to take two half-hour meal periods for work days 14 hours or longer.

33. On November 1, 2013, Dettwyler met with DiNicola to discuss DiNicola's calculations. DiNicola asked for documentation supporting the Department's use of November 5, 2010 as a cut-off date for compensating CCTAs under the Board Order for all meal periods during overnight travel time. Dettwyler asked for specific information from DiNicola to substantiate additional amounts he contended were owed to some specific CCTAs.

34. On November 1, 2013, Henry sent DiNicola the Department's spreadsheet showing its calculations of amounts owed. Thereafter, DiNicola provided the Department with additional information about hours the Department should pay to 20 CCTAs. On November 19, 2013, the Department received the last information it had requested from DiNicola related to the hours traveled by the CCTAs.

35. On November 29, 2013, the Department sent an updated spreadsheet to DiNicola showing the amounts the Department had calculated as remaining due to employees. Following November 29, 2013, DiNicola and the Union contended that 82 hours remained owed to Pre-2012 Hires and reiterated the Union's contention that Post-2011 Hires should be compensated for meal periods during overnight travel.

36. On March 10, 2014, the Department paid some CCTAs an additional $1,109.00, representing 52.75 hours of the 82 hours that the Union contended the Department was still required to pay. The Union contends that the Department still owes pay equal to 29.25 hours. This time represents the second half hour that some CCTAs deducted on travel days between 12 and 14 hours, believing that they were to deduct an hour for each travel day exceeding 12 hours. Specifically, the following number of hours are in dispute between for the following CCTAs:

DiNicola - 1.5 hours;
Bruce Hale - 3.75 hours;
Michael Halter - 0.75 hours;
Jason Iverson - 3.75 hours;
Brian Rainwater - 1.50 hours;
Nancy Ramirez - 7.50 hours;
Rebecca Segovia - 1.50 hours;
Charles West - 3.75 hours;
Shirley Yee - 4.50 hours; and
Michelle Yoon - 0.75 hours.

37. The Department has hired 10 CCTAs after the ones hired on September 1, 2011. The first were hired on April 1, 2013. The Department had deducted pay equal to meal period time for three of these CCTAs at the time the Complaint was filed, including Anita Puckey, Kyle Quiring, and Ron White. In some cases, CCTAs hired after September 1, 2011 have travelled with employees hired before that date. In that situation, the Department has compensated the CCTAs differently, despite the CCTAs having travelled the same number of hours.

CONCLUSIONS OF LAW

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

2. The Department violated the Board Order and the prior Settlement Agreement by deducting pay equal to one half-hour meal period on travel days between 12 and 14 hours after November 5, 2010 from compensation owed to CCTAs.

3. The Department breached the September 1, 2011 Settlement Agreement by not compensating Post-2011 Hires for all hours spent traveling during overnight travel, and instead deducted pay equal to meal period time.

DISCUSSION

Legal Standards

At issue here is whether the Department breached the parties' Settlement Agreement in violation of ORS 243.672(1)(g) and the Board Order which interpreted a relevant portion of that Settlement Agreement. Subsection (1)(g) makes it an unfair labor practice for a public employer or its designated representative to "[v]iolate the provisions of any written contract with respect to employment relations." A written grievance settlement is a "contract with respect to employment relations," within the meaning of subsection (1)(g). *Oregon Public Employees Union, SEIU Local 503 v. Wallowa County*, Case No. UP-77-96, 17 PECBR 451, 462 (1997), *adh'd to on recons*, 17 PECBR 536 (1998). Therefore, a breach of a settlement agreement constitutes a violation of subsection (1)(g). *Oregon AFSCME Council 75, Local 3336 v. State of Oregon, Department of Environmental Quality*, Case No. UP-47-06, 22 PECBR 18, 28 (2007).

We determine the meaning of a labor agreement under general rules of contract construction. The general rule applicable to the construction of an unambiguous agreement is that it must be enforced according to its terms. *Jackson County School District #9 v. Eagle Point Education Association/OEA/NEA*, Case No. UP-26-12, 25 PECBR 746, 749 (2013) (citing *Portland Police Assoc. v. City of Portland*, 248 Or App 109, 113, 273 P3d 192 (2012)). Specifically, when considering a written contractual provision in a labor agreement, we look at the four corners of a written contract, and consider the contract as a whole with emphasis on the provision or provisions in question. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-053-11, 25 PECBR 795, 802 (2013). A reviewing court or administrative body must, if possible, construe the contract so as to give effect to all of its provisions. *Williams v. RJ Reynolds Tobacco Company*, 351 Or 368, 379-80, 271 P3d 103, (2011) (citing *Johnson v. School District No. 12*, 210 Or 585, 592, 312 P2d 591 (1957). If the meaning of the provision is clear from the text and context, then the analysis ends. *Id.*

If a labor agreement is ambiguous, meaning it can reasonably be given more than one interpretation, then we are required to resolve the ambiguity by examining extrinsic evidence of the contracting parties' intent. *Portland School District No. 1 v. Portland Association of Teachers, Portland Association of Teachers v. Portland School District No. 1*, Case Nos. UP-23/25-03, 20 PECBR 701, 714 (2004). In determining the parties' intent, the objective manifestations of intent control, rather than the parties' "'subjective intentions or unspoken understandings and assumptions.'" *Id*. (quoting *Stedman v. Eugene School District 4J*, Case No. UP-9-91, 13 PECBR 211, 216 (1991)). If the ambiguity persists despite the extrinsic evidence, we resolve it by resorting to appropriate maxims of contractual construction. *Id*.

1. <u>The Department violated the Board Order and the prior Settlement Agreement by deducting pay equal to one half-hour meal period on travel days between 12 and 14 hours after November 5, 2010 from compensation due to CCTAs</u>.

The Union asserts that the Department violated the Board Order in Case No. UP-31-12 by deducting pay equal to meal period time instead of paying CCTAs for all time spent traveling. Specifically, the Union asserts that the Board's Order interpreting the Settlement Agreement required the Department to compensate CCTAs for all time spent traveling to and from overnight travel locations, without deducting pay equal to meal period time. The Department asserts that it does not owe further compensation for deducted meal periods exceeding that amount, because on November 5, 2010, it instructed CCTAs to take one half-hour meal period for travel days exceeding six hours, and two half-hour meal periods only on travel days exceeding 14 hours.

The Department's position is in direct contradiction of the Board Order. In the Board Order, we interpreted the Settlement Agreement provision providing that "[t]he Employer will recognize all hours traveling during overnight travel as compensable work time" with respect to whether the Department properly deducted pay for meal periods. (Exh. R-3 at 1.) We held "[t]he Department breached the Settlement Agreement and violated ORS 243.672(1)(g) by failing to

compensate Grievants for meal periods during overnight travel from January 2009 **through September 1, 2011, and thereafter**." (Exh. R-1 at 11; emphasis added.) We reasoned that the term "all" broadly defined what would be treated as compensable time, including meal periods. As such, this Board ordered that **"[t]he Department shall cease and desist from violating ORS 243.672(1)(g) by failing to recognize meal periods taken during overnight travel as compensable time**. Within 30 days of this Order, the Department shall make all Grievants and former employees whole for meal periods that have not been recognized as compensable time from January 2009, until the Order is fully implemented." (Exh. R-1 at 18, emphasis added.)

The Department partially complied with the Board Order. However, the Department did not compensate Pre-2012 Hires for pay equal to a half-hour meal period on travel days of longer than 12, but less than 14, hours after November 2010. The Department determined this was appropriate, because in November 2010, CCTAs had been instructed to deduct one half-hour meal period on overnight travel days worked up to 13 hours and 59 minutes, and two half-hour meal periods for overnight travel days of 14 hours or more. Therefore, whether or not a CCTA had been able to take a meal period during overnight travel (which they typically could not due to their need to reach the travel location as efficiently as possible), but had deducted time, the Department refused to compensate them for it.

The parties presented contradicting evidence on whether all CCTAs received the November 2010 supervisory instruction regarding meal periods and whether it constituted a policy. However, we decline to address the parties' arguments regarding the distribution and impact of the November 2010 instructions regarding meal periods. These arguments are only relevant to an issue that was resolved on August 5, 2013, when this Board determined that the Department violated the Settlement Agreement and ORS 243.672(1)(g) by failing to compensate for all time traveling, including meal periods. This Board ordered the Department to recognize meal periods taken during overnight travel as compensable and to make all Grievants and former employees whole for meal periods that had not been compensated. This Board clearly held that the Department had violated the Settlement Agreement and consequently ORS 243.672(1)(g) by failing to recognize all meal periods during overnight travel as compensable.

We also decline to address any of the parties' other arguments or evidence regarding the language in the Settlement Agreement pertaining to the compensation of meal periods. This issue was adjudicated in the prior case. To consider this issue would be to re-adjudicate an issue that we have already resolved by the Board Order. While issue preclusion is typically raised as a Respondent's affirmative defense and therefore its elements are not directly applicable, its underlying principles are relevant here – all parties are best served when they can rely on the Conclusions of Law and Orders of this Board, which become final and enforceable absent a petition for judicial review.

2. The Department breached the September 1, 2011 Settlement Agreement by not compensating Post-2011 Hires for all hours spent traveling during overnight travel, and instead deducted pay equal to meal period time.

The Department is requiring Post-2011 Hires to deduct meal period time from their time sheet on overnight travel days (whether or not the CCTA was able to take a meal break). The Union asserts that the Settlement Agreement resolved a group grievance covering all CCTAs employed during the Settlement Agreement's valid period. The Department asserts that the Settlement Agreement plainly only applies to CCTAs who were employed on or before September 1, 2011, the date the parties signed the Settlement Agreement.

Prior Board Order

In Case No. UP-31-12, this Board ordered that "[t]he Department shall cease and desist from violating ORS 243.672(1)(g) by failing to recognize meal periods taken during overnight travel as compensable time." (Exh. R-1 at 18.) This language suggests that we intended this to be a required Department policy change, applicable to all CCTAs both retroactively and prospectively. However, because we did not directly address the issue of applicability to Post-2011 Hires, we analyze the Settlement Agreement to determine this issue.

Plain language

We begin by determining whether the Settlement Agreement language at issue is ambiguous. Both parties initially assert that the disputed language unambiguously supports their interpretation. As a secondary argument, both assert that the extrinsic evidence supports their respective arguments regarding the correct interpretation of ambiguous language.

As stated 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). The "threshold to show an ambiguity in a contract is not high." *Assn. of Oregon Corrections Emp. v. State of Oregon*, 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 the disputed language is ambiguous – *i.e.*, susceptible to more than one plausible interpretation. The provisions at issue include Agreement 4, which states "[t]his settlement agreement applies only to Grievants as defined in Recital 1." Recital 1 one reads:

> "1. The State and the Union are parties to a Collective Bargaining Agreement ('the CBA') which establishes terms and conditions of employment for a collective bargaining unit of certain employees within Revenue. The term 'Grievants' shall be defined as Tax Auditor 2s who **are** (or were at the time

> the Grievances were filed) Corporation and Cigarette Tax Auditors at Revenue and who are (or were at the time the Grievances were filed) on regular or alternate work schedules." (Exh. R-3 at 1, emphasis added.)

The parties dispute whether this language renders Post-2011 Hires subject to its provisions. More specifically, the parties dispute whether "are" refers only to CCTAs who were in employment as of September 1, 2011 (the date the parties bargained and signed the Settlement Agreement) or would also include CCTAs hired within the Settlement Agreement's effective period.

We find both of these interpretations to be plausible because, as the Union asserts, the Settlement Agreement does not contain any language specifying that it only applies to certain named persons or CCTAs hired on or before a specific date. However, the Settlement Agreement also contains language stating that "[t]his settlement agreement applies only to Grievants as defined in Recital 1" and it specifically defined "Grievants," suggesting that the parties intended some sort of limitation to the applicability. *Id.* Therefore, we determine that the Settlement Agreement language is ambiguous and look to the extrinsic evidence to determine the proper meaning instead of applying plain language analysis.

Extrinsic evidence

We determine that the extrinsic evidence supports the Union's position that the Settlement Agreement applies to CCTAs hired after September 1, 2011. The Department's arguments regarding extrinsic evidence rely primarily on the fact that the Union failed to communicate its intent to apply the Settlement Agreement to future CCTAs while bargaining. To support its arguments regarding extrinsic evidence, the Union relies on the Settlement Agreement language defining the Grievants, a previous ruling by the Arbitrator, and the Department's actions subsequent to the Settlement Agreement. The Union's arguments and evidence are persuasive for the following reasons.

First, the Settlement Agreement settled group grievances that had been filed on behalf of all CCTAs. Specifically, the Union filed the cut-across grievances on behalf of: March 2009 Corporation and Cigarette Tax Auditors, April 2009 Corporation Tax Auditors, May 2009 Corporation Tax Auditors, June 2009 Corporation Tax Auditors, July 2009 Corporation Tax Auditors, and August 2009 Corporation Tax Auditors. In October 2009, the Union filed a group grievance on behalf of "August 2009 Continuing DOR Group Grievance (on behalf of Corporation Tax Auditors named above **and all subsequent similarly situated DOR employees**)." In November 2009, the Union filed a grievance on behalf of "September 2009 Revenue Continuing Group Grievance." It named the grievants as "Thu Anh Nguyen, Fred Nichol, Norman Trinh and **all similarly situated DOR employees**." (Exhs. C-6 at 2; C-7 at 2; C-8 at 2; C-9 at 2; C-10 at 1; C-11 at 1, 6; C-12 at 5; emphases added.) We consider this to be the most compelling evidence that the term "Grievants" was intended to include all CCTAs in the Corporation Division going forward, as they are "subsequently similarly situated."

Second, the parties had previously addressed the scope of the grievances before the Arbitrator. The Union had argued that it would include all Department employees. The Department had argued that it would only cover specifically named Grievants. The Arbitrator determined that it would apply to all Department CCTAs. While the Arbitrator's ruling does not control our decision, it provides support for our identical determination that the Settlement Agreement applies to all Department CCTAs. Most importantly, the fact that the parties discussed the scope of the Settlement Agreement undermines the Department's insinuation that the Union intentionally remained silent about the issue of prospective employees during the Settlement Agreement negotiations, hoping that they could use this ambiguity to their advantage later.

Third, the Department's position regarding deducting pay equal to meal period time for Post-2011 Hires is not consistent with its overall actions in implementing the Settlement Agreement. Specifically, the Settlement Agreement primarily addressed grievances regarding the cut-across rule. Following the Settlement Agreement's applicability, the Department did not continue to utilize the cut-across rule for **any** employees, whether hired before or after September 1, 2011. The Department is only deducting payment equal to meal period time for Post-2011 Hires and has offered no rationale for applying part, but not all, of the Settlement Agreement to those employees. Accordingly, their own actions contradict their position.

The Department asserts that it discussed the applicability of CCTAs hired on September 1, 2011 during its internal caucus discussions, thereby demonstrating its understanding that the Settlement Agreement would not apply to employees hired after that date. However, there is no evidence this conversation occurred during the settlement discussions with, or otherwise in the presence of, the Union. Finally, the Department argues that the parties clearly intended to limit the Settlement Agreement's applicability with the language defining Grievants and by limiting its application to them. However, the undisputed evidence shows that the parties intended this language to exclude non-CCTA Department employees. Additionally, based on the undisputed testimony of both parties, the specific definition of "Grievants" resulted from the parties' discussions regarding CCTAs who were employed at the time of the grievances were filed, but had since left. (Test. Van Dyke and Tedesco). This, and the parties' previous discussions regarding applicability, undermines the Department's arguments about the limitations of the Settlement Agreement.

In sum, we hold that the language in the Settlement Agreement is ambiguous regarding applicability to Post-2011 Hires. However, the extrinsic evidence supports the Union's position that the Settlement Agreement applied to subsequently employed CCTAs. Specifically, all subsequently similarly situated CCTAs were named in the settled grievances and Arbitrator Skratek ruled that the Settlement Agreement applied to all Department CCTAs. This undermines the Department's insinuation that the Union had somehow attempted to remain silent regarding subsequently hired employees. Finally, the history and negotiations of Settlement Agreement bargaining show that the limitation language was written to include all Department CCTAs and exclude all Department employees. Finally, the Department has partially applied the Settlement Agreement to post-September 1, 2011 employees, undermining its own arguments regarding their exclusion from applicability.

REMEDY

We have broad authority to fashion an appropriate remedy under the circumstances of each particular case to effectuate the purposes of the Public Employee Collective Bargaining Act (PECBA). *See, e.g., Elvin v. OPEU*, 102 Or App 159, 164, 793 P2d 338 (1990), *aff'd*, 313 Or 165, 832 P2d 36 (1992); *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections, Oregon Corrections Enterprises*, Case No. UP-22-00, 19 PECBR 437 (2001); ORS 243.676(2)(c). The Union has requested that we issue a cease and desist order, make employees whole for uncompensated wages, and require the District to post a notice of the violation. The Union has also requested that we award a civil penalty, reimbursement of their filing fee, and all reasonable representation costs.

Cease and Desist Order

Since we have determined that the Department violated ORS 243.672(1)(g) we are required to enter a cease and desist order. ORS 243.676(2)(b).

Notice Posting

We order the Department to post a notice of its wrongdoing. We generally order such a posting if we determine a party's violation of the PECBA was: (1) calculated or flagrant, (2) part of a continuing course of illegal conduct, (3) committed by a significant number of the respondent's personnel, (4) affected a significant number of bargaining unit employees, (5) significantly (or potentially) impacted the designated bargaining representative's functioning, or (6) involved a strike, lockout, or discharge. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J, et al.* 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-15-05, 21 PECBR 891, 907-908 (2007); and *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, 19 PECBR 684, 685 (2002). However, we typically require the presence of multiple factors before requiring a posted notice. *See Wy'East Education Association/ East County Bargaining Council/Oregon Education Association, et al. v. Oregon Trail School District No. 46*, Case No. UP-16-06, 22 PECBR 668, 714 (2008).

In this case, the Union has had to come to this Board in order to enforce a previous Board Order that unambiguously required the Department to compensate CCTAs for improper deduction of pay equal to meal period time from January 2009 through September 1, 2011, and thereafter. Therefore, this is a repeat violation. Further, there have been nine CCTAs hired since September 1, 2011, at least three of whom have been denied full compensation. Further, there are 10 CCTAs hired before that date who have not been compensated, and would not be compensated, for all hours spent traveling if not for this Order. As such, the Department has committed an ongoing course of action that affected a significant number of bargaining unit employees. Accordingly, we order that the Department post a notice of its wrongdoing.

Civil Penalty

In its Complaint, the Union sought the award of a civil penalty. We may award a civil penalty when the action constituting an unfair practice was egregious or the party committing an unfair labor practice did so repetitively, knowing that the action taken was an unfair labor practice and took such action disregarding that knowledge. OAR 115-035-0075(1)(a). However, in order for us to consider a civil penalty, a Complainant must include a statement as to why a civil penalty is appropriate in the case under these rules, with a clear and concise statement of the facts alleged in support of the statement. OAR 115-035-0075(2). The Union seeks a civil penalty citing that the Department repetitively committed an unfair labor practice by knowingly violating the Settlement Agreement. We determine that our requirement of a notice posting already addresses this concern. Accordingly, we decline to levy a civil penalty.

Make-Whole Remedy

"[T]he goal of a make whole order 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). Because the Department has denied CCTAs compensation that they were entitled to and denied under the Collective CBAs, the Settlement Agreement, and the Board Order, we determine that a make-whole remedy is appropriate. We set out the specific make-whole remedy below.

PROPOSED ORDER

1. The Department shall cease and desist from violating ORS 243.672(1)(g) by failing to recognize meal periods during overnight travel as compensable time. Within 30 days of this Order, the Department shall make **all** CCTAs whole for previously deducted meal periods time from January 2009 to the present.

a. With respect to CCTAs hired on or before September 1, 2011, the Department shall compensate the following CCTAs for the following number of hours:

Joe DiNicola - 1.5 hours;
Bruce Hale - 3.75 hours;
Michael Halter - 0.75 hours;
Jason Iverson - 3.75 hours;
Brian Rainwater - 1.50 hours;
Nancy Ramirez - 7.50 hours;
Rebecca Segovia - 1.50 hours;
Charles West - 3.75 hours;
Shirley Yee - 4.50 hours; and
Michelle Yoon - 0.75 hours.

b. The Department shall calculate and pay amounts owed for previously deducted meal periods for employees hired after September 1, 2011, including:

Alisha Dryden (hired January 21, 2014);
Jennifer Hemphill (hired January 21, 2014);
Connie Buber (hired January 21, 2014);
John Koehnke (hired January 21, 2014);
Jason Larimer (hired January 21, 2014);
Tyler Wallace (hired January 21, 2014);
Anita Puckey (hired April 1, 2013);
Kyle Quiring (hired April 1, 2013); and
Ronald White (hired April 1, 2013).

2. The Department shall cease and desist from violating ORS 243.672(1)(g) by failing to recognize meal periods during overnight travel as compensable time and shall not deduct pay for meal periods on overnight travel days for as long as the Settlement Agreement and 2013-2015 CBA are in effect.

SIGNED AND ISSUED February 2, 2015.

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 to this Board. (The "date of file objections" means the date the 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; 115-045-0045-0040; and 115-07-0055.)

PROPOSED 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-006-14, *Service Employees International Union, Local 503, Oregon Public Employees Union v. State of Oregon, Department of Revenue,* 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 Department violated the PECBA by violating a Settlement Agreement and prior Board Order that required the Department to recognize all hours traveling during overnight travel as compensable work time. The Department failed to recognize all hours spent traveling by the following actions:

1. By deducting pay equal to one half-hour meal period on overnight travel days between 12 and 14 hours after November 5, 2010 from compensation owed to Corporation and Cigarette Tax Auditors.

2. By not paying Corporation and Cigarette Tax Auditors hired after September 1, 2011 for all hours spent traveling during overnight travel, including meal periods.

The Employment Relations Board has ordered the party to post this notice.

The Department shall comply with the Board Order. The Department shall cease and desist from such unlawful conduct in the future.

Dated this ____ day of January, 2015.

STATE OF OREGON
DEPARTMENT OF REVENUE

By: _____

_____
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-013-14

(UNFAIR LABOR PRACTICE)

PORTLAND STATE UNIVERSITY CHAPTER AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,	)	
Complainant,	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
v.	)	
PORTLAND STATE UNIVERSITY,	)	
Respondent.	)	

On February 13, 2015, this Board heard oral arguments on both parties' objections to a December 11, 2014 Recommended Order issued by Administrative Law Judge (ALJ) Larry L. Witherell after a hearing was held on September 3, 2014, in Portland, Oregon. The record closed on October 3, 2014, with the receipt of the parties' post-hearing briefs.

Jennifer Sung, Attorney at Law, McKanna Bishop Joffe, Portland, Oregon, represented Complainant.

P.K. Runkles-Pearson and Jeffrey Chicoine, Attorneys at Law, Miller Nash, LLP, Portland, Oregon, represented Respondent.

On March 25, 2014, the Portland State University Chapter American Association of University Professors (Association), filed this unfair labor practice complaint against Portland State University (University). The complaint, as amended at the hearing, alleges that the University violated ORS 243.672(1)(a), (b), and (e) by announcing, two days before an Association strike vote, that it would disable log-in credentials to University-provided e-mail and other electronic accounts for any striking faculty. The University timely filed an answer to the complaint.

The issues agreed to by the parties are:

1. Did the University interfere with employees in and because of the exercise of protected rights when it decided to disable the log-in credentials for e-mail and/or other electronic accounts for striking employees, and thereby violate ORS 243.672(1)(a)?

2. Did the University interfere with the existence and administration of the Association when it decided to disable the log-in credentials for e-mail and/or other electronic accounts for striking employees, and thereby violate ORS 243.672(1)(b)?

3. Did the University unilaterally change the *status quo* when it decided to disable the log-in credentials for e-mail and/or other electronic accounts, and thereby violate ORS 243.672(1)(e)?

As set forth below, we conclude that the University's March 9 announcement that it would disable the log-in credentials for employees who participated in a strike violated ORS 243.672(1)(a). Because any additional violations would not alter our remedy in this case, we choose not to address the (1)(b) and (e) claims.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties and Bargaining Relationship

1. The University is a public employer within the meaning of ORS 243.650(20). The Association is a labor organization within the meaning of ORS 243.650(13). The Association represents approximately 1250 full-time faculty (tenured, tenure-track and fixed-term) and academic professionals at the University (collectively referred to as faculty).

2. The University is on an academic quarter system. Winter term classes began on January 6, 2014, and the term ended with the conclusion of final examinations on March 22. Spring term classes then commenced on March 31.

3. The University and Association were parties to a collective bargaining agreement that was in effect from September 1, 2011 through August 31, 2013. The parties mutually extended the collective bargaining agreement several times, finally allowing it to expire on February 28, 2014.

4. In March 2013, the parties exchanged initial proposals and then commenced bargaining for a successor contract on April 24, 2013. On November 5, 2013, the University requested mediation. The first mediation session was held on December 18, 2013. On February 24, 2014, the Association declared that the parties had reached an impasse in bargaining.

On March 3, 2014, the parties submitted their final offers to the mediator and the "cooling-off period" began.

5. In February 2014, the Association began to publicize that it was considering a strike-authorization vote. On March 11-12, the Association conducted a strike-authorization vote among its members, and the results were announced on or about March 12. The membership voted in favor of authorizing a strike. The University would have been able to implement its final offer on or about April 3. Similarly, the faculty could have engaged in a strike on or about the same date. However, in the interim, the parties agreed on the terms of a new collective bargaining agreement before either situation occurred.

University E-Mail System

6. The University uses a single sign-on computer system known as Odin. The Odin single sign-on system gives faculty and other users access to nearly 100 systems, accounts, or programs. The systems accessible through Odin include, *inter alia*, the University's e-mail system, Banner (the student recordkeeping system), VPN (which gives the user access to the University electronic resources when off campus), DARS (the degree audit reporting system, which tracks a student's degree progress), webpage infrastructure, parking management, and library resources. Users can access each of these electronic resources or accounts via a single-sign-on procedure.

An Odin ID is given to University faculty, staff, and students. Additionally, affiliate accounts can be provided to individuals closely associated with the University (*e.g.*, volunteers, visitors, contractors/vendors, retired associates of the University, and courtesy appointments). The level of access and number of systems that a user may access varies depending on the user's relationship with the University. For example, students have access to University e-mail but would not have access to the systems used to input student grades.

7. The Odin system is not designed to allow the University to disable access to individual systems while allowing employees to continue having access to other systems, such as the e-mail system. It would take several months or longer to design and program the system to permit the University to turn off or disable access only to the University e-mail.

8. The University will generally turn off or disable an employee's access to the Odin account within 24 hours of the separation date of the employee. However, the human resources office can direct the information technology office to disable the access even earlier if the safety and security of the technology or electronic resources warrant it.

9. The University continues to provide Odin access to professors who retire but are granted *emeritus* status. Additionally, adjunct faculty, who generally teach a single course during a term or the academic year, continue to have access to their Odin account for one year after the end of the last term that they taught.

E-mail, the Association, and the Faculty

10. The University has provided e-mail accounts to faculty since the early 1990s. E-mail is referenced in certain articles within the collective bargaining agreement. Article 24, which concerns working conditions, stipulates that the University will provide e-mail and Internet access to all represented members, and that the University will provide members with a personal computer that should be adequate for normal Internet access, word processing, and use of e-mail.

11. The use of the University e-mail accounts can be allocated to one of four categories. The primary purpose of the University e-mail accounts and e-mail system is to communicate with faculty, staff, and students, and is for University purposes. The University owns the e-mail accounts. Second, it is understood that faculty and employees use the University e-mail accounts for personal and non-University communications. Third, faculty also may and do use the University e-mail account for personal-professional purposes that are more associated with the faculty member's professional interests than the University's interests. The employment contract between the University and the faculty require the latter to satisfy three obligations: faculty are to be successful teachers, perform research, and engage in service. By virtue of their career, faculty are scholars. That is, they engage in research and scholarship, and engage in the larger academic community associated with their research or professional or scholarly interests. It is natural that faculty would pursue such engagements whether or not it directly benefits the University. Accordingly, faculty use their University e-mail and some of the other electronic systems for these personal-professional purposes. Fourth, the faculty and the Association use the University e-mail for Association-related business. Article 3, which concerns the rights of the Association as representative agent, provides that "[t]he Association shall have reasonable use of University facilities and services, including mail, telephone, duplicating, computing, audio-visual, and meeting rooms." The Association and University have traditionally interpreted "mail," as referenced in Article 3, to mean both campus mail and e-mail.

Since the early 1990s, the University e-mail accounts and system have been the principal means of communication between the Association and its members. E-mail is the expected method of communication between the Association and the membership. The Association has a database with the University e-mail addresses or accounts of all its members. E-mail is the most effective and convenient way for the Association to communicate with its membership. Association members work in more than 24 University buildings; some members may be located around the world conducting field work or research and many faculty telecommute for part of their duty time. As a result, e-mail is the most effective way for the Association to communicate with its membership. Sending communications via U.S. postal service is expensive, costing approximately $900 per event. Using the campus mail system generally takes a few days. It is unproductive to attempt telephonic communications with the membership. The Association has one on-campus bulletin board, on the second floor of the student union. The second floor consists principally of meeting rooms and there is little reason for faculty to go to that location.

12. The Association maintains a membership database. The information in that database comes from the University and the Association's independent information-gathering efforts. Under Article 6, Section 2(a), of the collective bargaining agreement, by the fifteenth of each month, the University provides the Association with updated employment information on the membership, which includes name, ID, rank and date of rank, salary, appointment date, tenure status, term of service, degrees, current University e-mail and campus addresses. Effective March 2014, the Association had the University e-mail address for all of the bargaining unit members.

13. In the beginning of 2014, the Association made a deliberate effort to try to collect non-University e-mail addresses from its membership. By March, the Association had the non-University e-mail addresses for approximately 400 bargaining unit members. Personal e-mail addresses were solicited individually by Association organizers and at Association events during the process of negotiations. Approximately 250 members do not have a personal or non-University e-mail address or account.

14. The Association's executive director receives between 20 to 50 e-mails per day from members concerning Association business or inquiries, including contractual questions or issues, questions about grievances, and how to navigate the University bureaucracy. Membership meetings are announced and publicized via e-mail communications to the membership. The Association communicates via e-mail with the membership about the bargaining process and related developments. Absentee voting in Association-sponsored elections is undertaken by e-mail through an online voting service.

15. The Association has a webpage, a twitter account, and a blog. The Association also set up a webpage specifically referencing the strike activities. This page was generally directed to the press or media rather than to its membership. However, the Association's websites are not built on a foundation that would have a log-in mechanism restricting access to the website. To do so would have been extremely expensive and required reprogramming the Association's entire website. The strike website has a link to the Association's main webpage. Even when the Association posts something on its webpage that it specifically wishes the membership to see and consult, the Association will send e-mails to the membership directing them to go to the Association's webpage or to the links that are listed on the webpage. The Association's webpage and Facebook page are also accessible by the public and, therefore, cannot be used for confidential or membership-only communications.

University Policies

16. Article 8 of the collective bargaining agreement, which references past practices or maintenance of standards, provides that "[a]ll well-established practices and policies in effect on the date this Agreement is executed, concerning terms and conditions of employment which significantly affect members shall be maintained for the period of this Agreement unless modified by this Agreement or by mutual consent."

17. The University has an acceptable use policy governing the use of University computers and networks. The University "encourages the use and application of information technologies to support the research, instruction, and public service mission of the institution. The University computers and networks can provide access to resources on and off campus, as well as the ability to communicate with other users worldwide." The University policy sets out the following conditions:

> "The primary purpose of electronic systems and communications resources is for University-related activities only.
>
> "Users do not own accounts on University computers, but are granted the privilege of exclusive use. Users may not share their accounts with others, and must keep account passwords confidential.
>
> "Each account granted on a University system is the responsibility of the individual who applies for the account. Groups seeking accounts must select an individual with responsibility for accounts that represent groups.
>
> "The University cannot guarantee that messages or files are private or secure. The University may monitor and record usage to enforce its policies and may use information gained in this way in disciplinary and criminal proceedings.
>
> "Users must adhere strictly to licensing agreements and copyright laws that govern all material accessed or stored using PSU computers and networks.
>
> "When accessing remote systems from PSU systems, users are responsible for obeying the policies set forth herein as well as the policies of other organizations.
>
> "Misuse of University computing, networking, or information resources may result in the immediate loss of computing and/or network access."

18. In November 2013, the University proposed to amend or modify its acceptable use policy. On November 18, 2013, the Association sent the University a demand to bargain over the proposed acceptable use policy. The demand stated:

> "The University's Acceptable Use Policy concerns terms and conditions of employment which significantly affect members of the AAUP bargaining unit, and thus cannot be changed except by mutual agreement under Collective Bargaining Agreement Article 8. And, even if Article 8 did not apply, the University would be obligated to bargain with AAUP regarding the proposed changes to the Acceptable Use Policy under PECBA. Without waiving any rights under the Agreement or PECBA, PSU-AAUP hereby demands to bargain both the decision to modify the Acceptable Use Policy and the effects of that decision with the understanding that no changes to the policy may be implemented by the University until and unless we reach mutual agreement pursuant to the Collective Bargaining Agreement Article 8.

"* * * * *

"First, we are concerned that the proposed policy does not clearly explain to employees that they may continue to use university information technology resources for union-related communication, which is protected by the Public Employee Collective Bargaining Act and by collective bargaining agreements. Without a clear statement, it is ambiguous whether the University includes union-related communication in Article V Paragraph 1 as 'University-related business,' or under paragraph 3 as 'personal.' We believe the proposed policy should be clarified as follows:

"1.0 PSU information technology resources are provided for University-related academic, business, and research activities and are to be used in a manner consistent with PSU policies, regulations, and procedures, including PSU's Professional Standards of Conduct and Student Conduct Code. PSU employees may use University information technology resources for employment-related communications, including but not limited to union-related communications and communications regarding terms and conditions of employment.

"Second, we are also concerned with the proposed provision that states, 'PSU information technology may not be used by University employees for more than incidental personal use.' The scope of this restriction is vague and ambiguous. Depending on the intended scope of the proposed restriction, it could represent a change to well-established past practice regarding permitted personal use of University information technology resources that would have a significant impact on faculty members." (Underline in original.)

19. On an unknown date, the Association and the University had discussions about the proposed revisions to the accepted use policy.

20. Faculty use of University e-mail accounts has been considered by all parties a right of faculty as if it were a contractual provision in the collective bargaining agreement as well as established by past practice. There has never been any issue about the faculty or the Association using University e-mail accounts for Association business and communications. The University has never informed the Association of any restrictions on the use of University e-mail for Association business and communications.

21. The University has an e-mail communication policy that establishes the formal protocol concerning formal communications between the University and the faculty. The current policy was adopted January 29, 2013. Under the policy, the University e-mail address is the formal method of communication regarding employment-related matters. In pertinent part, it states:

"**I. Policy Statement**

"It is the policy of Portland State University that the University e-mail system is an appropriate medium for official communications from the University to employees

and students. It is the responsibility of employees and students to receive such communications and to respond to them as may be necessary.

"**II. Reason for Policy/Purpose**

"The University must be able to communicate quickly and efficiently with employees and students in order to conduct official University business. E-mail is an appropriate medium for such communication and supports University goals regarding cost efficiency, expediency, and sustainability. This policy is not intended to limit the use of communication tools for pedagogical uses or reasons.

"* * * * *

"**V. Policy/Procedure**

"**1. E-mail Accounts**

"1.1 The University will provide every student and employee with a University e-mail Account in order to access Official Communications.

"* * * * *

"**2. Rights and Responsibilities**

"2.1 E-mail sent by the University to a University e-mail account is an official form of communication to employees and students. It is the responsibility of employees and students to receive such communications and to respond to them as may be necessary.

"2.2 Official Communications may be time-critical and employees and students are expected to review messages sent to their University e-mail account on a reasonably frequent and consistent basis.

"2.3 Persons with University e-mail accounts are responsible for managing the account in a manner that maintains sufficient space for e-mail to be delivered. Assistance with managing a University e-mail account can be requested from the [Office of Information Technology] Helpdesk." (Bold in original.)

22. Faculty may have nine (9) month or twelve (12) month employment contracts or appointments. However, regardless of length of contracts, faculty have e-mail for the entire twelve months. Faculty may take unpaid leaves of absence. While on an unpaid leave of absence, those faculty members will continue to have access to the Odin system, including e-mail and other electronic accounts. For instance, in 2012 and 2013, a faculty member took an unpaid leave of absence for 18 months while working in New Zealand. During that period, the faculty member

continued to have Odin access and continued to communicate with the Association and the University through her University e-mail account. She also continued to have access to her files on the University electronic information system.

23. Faculty are encouraged and expected to engage in service outside of the University. Faculty are particularly encouraged to engage in "pro bono scholarly and philanthropic activities outside their campus which may not provide the faculty member with anything other than reimbursement of direct expenses." Accordingly, the University expects faculty "to accept invitations to serve on advisory bodies or public commissions related to their academic work, as well as to travel to other institutions or conferences for the purpose of presenting lectures, leading seminars or workshops, or visiting the laboratories of colleagues." Faculty regularly use their University e-mail accounts to communicate with respect to such activities and engagements. Faculty will also use resources accessed through the University electronic accounts with respect to making such presentations, lectures, or visits.

24. To obtain a check stub and tax information, the faculty must access it online through a human resources or payroll department site. To obtain access, the faculty must log in through the Odin gateway.

25. In 2010 and 2013, the Association and University entered into two unique, non-precedential, grievance-related settlement agreements involving the suspension without pay of faculty members. During these suspensions without pay, the members were not allowed to be physically on University property and were not allowed to work. While the members were not allowed access to their offices, the members retained access to their e-mail accounts and access to other electronic accounts and resources provided by the University.

26. The University provides the Association executive director with an e-mail account. To access that account, he must log in through the Odin Gateway. He also has access to Google Apps, which is a suite of services that include the calendar, contact lists, and the University e-mail directory (referred to as LGAP or address protocol), and online document storage facilities.

Distribution of the FAQ (March 9, 2014)

27. During the bargaining process, the University administration received a number of inquiries from the University community, particularly faculty and chairs, about the implications of a strike. In particular, the University received questions about access to e-mail. As a result of the inquiries, the University wanted to have ready and consistent answers.

On March 9, 2014, the Office of University Communications sent a brief e-mail to faculty and presumably other employees with the subject heading of "PSU strike guidelines and FAQs." The March 9 communication was also sent to and received by the Association. The e-mail made references to frequently asked questions (FAQs) in the event of a strike. The e-mail directed faculty and employees to a University website that contained a four-page information sheet, entitled "FREQUENTLY ASKED STRIKE-RELATED QUESTIONS" and dated March 7, 2014. The University announced that it intended to treat the physical and virtual workplace in an identical

way. The University also announced that it wanted to give the faculty advance notice so that they could prepare accordingly, both with respect to the physical and virtual workplace.

The information sheet, in pertinent part, states as follows:

"**How can I keep updated on what is happening regarding negotiations?**

"Refer to the Office of Academic Affairs website: http://www.pdx.edu/oaa/2013-2015-psu-aaup-collective-bargaining-update

" * * * * *

"**Would a striking AAUP-represented employee have access to email, their office or lab during a strike?**

"No. Striking employees will not be permitted to engage in any activities related to their employment. The electronic log-in credentials for striking employees will be disabled during a strike, preventing access to email, Banner, D2L, VPN and other electronic systems. Similarly, striking employees will not be permitted to enter non-public areas of campus, such as offices or laboratories.

" * * * * *

"**What areas of campus would be open to striking AAUP-represented employees?**

"Striking AAUP-represented employees will only have access to public spaces. Not all campus spaces are public spaces. The retail space on the first floor of Smith Memorial Student Union and some areas of the Millar Library and sidewalks are considered public spaces. Other areas in those buildings are not. Academic buildings are considered academic spaces and are not open to the general public. Classrooms, laboratories and private offices are not considered public spaces. Portland police and campus security are very knowledgeable about property rights and the use of public spaces. They can be called upon for counsel or assistance if the need arises. (Bold in original.)

28. The University did not notify the Association before sending the FAQ that it was considering taking away Odin access for striking employees. After receiving the University's March 9 announcement contained in the FAQ distribution, the Association did not demand to bargain over the decision or its impact.

29. After receiving the University's March 9 e-mail and FAQ informational sheet, dozens of faculty contacted the Association and expressed concern about losing access to their e-mail accounts and other electronic systems.

30. Faculty generate approximately $75 million annually in externally-funded or sponsored projects at and for the University. Some faculty, who were working on grant-funded projects or who were designated as the principal investigator, were concerned that the funding sources or sponsors would think that the faculty member would not be able to complete the project. Accordingly, faculty wanted to be able to continue to communicate via e-mail with project partners and funding sources, particularly to keep the funding sources informed of timelines and the strike's impact on the project. Other faculty expressed concern to the Association about not being able to receive e-mail status reports on bargaining and the strike. Finally, others expressed concern about losing the ability to receive communications from the University because the University has declared that e-mail is the official means of communications from the University and, where necessary or directed, the University expects faculty to respond to e-mail communications or to take certain action in response to or as a result of the e-mail communications.

31. After receiving the University's March 9 e-mail and FAQ informational sheet, approximately 50 faculty members contacted Association Executive Director Phil Lesch and expressed reservations about striking. Faculty members also contacted other Association representatives and expressed similar concerns about going on strike. Faculty had a variety of concerns about their loss of access to the Odin systems, and this potential loss was one of the primary topics of discussion within the bargaining unit in the weeks leading up to the strike vote.

32. The University did not inform or instruct faculty that they would lose access to their telephone voicemail if there was a strike. The University did not inform or instruct faculty that they would have to turn in their campus or office keys or access cards if there was a strike.

33. If the faculty went on strike and lost access to their University e-mail accounts, the Association's ability to keep faculty fully and accurately informed of the status of bargaining, calling membership meetings or holding membership votes, and the status of the strike, including return to work developments, would be significantly obstructed.

CONCLUSIONS OF LAW

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

2. The University's March 9 announcement, via the FAQ, that it would disable striking faculty's log-in access to the Odin system violated ORS 243.672(1)(a) by interfering with, restraining, or coercing Association members "in" the exercise of rights guaranteed by ORS 243.662.

ORS 243.662 guarantees public employees the "right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." In order to protect and enforce these rights, ORS 243.672(1)(a) provides that a public employer may 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) 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 Association asserts that the University violated both portions 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, or 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.

We begin with whether the University interfered with, restrained, or coerced Association-represented employees "in" the exercise of a protected right. It is well settled that the right to participate in lawful strike activity, including voting for or against a strike, is guaranteed by ORS 243.662. *See, e.g., Wy'East Education Association/East County Bargaining Council/Oregon Education Association, et al. v. Oregon Trail School District No. 46*, Case No. UP-16-06, 24 PECBR 786, 799 (2012) ("The right to strike is protected PECBA activity."). The dispute here concerns whether the University's March 9 statement, which was issued two days before Association-represented employees were scheduled to vote on a strike authorization, interfered with, restrained, or coerced those employees in the exercise of that protected activity. For the following reasons, we conclude that it did.

As set forth above, the University's issuance of the March 9 statement violates the "in" prong of ORS 243.672(1)(a) if the natural and probable effect of that statement would be to chill employees in exercising their right to engage in protected activity, including the right to authorize a strike. The record establishes that Association-represented employees are highly dependent on being able to access the Odin system. Association-represented employees use this system for personal and professional reasons, as well as for those hybrid "personal-professional" reasons described above. For some employees, the University-provided e-mail account, which is accessed through the Odin system, is their sole account. Moreover, Association-represented employees rely on Odin access to conduct research and perform other tasks necessary to meet their work and

professional obligations. The University's March 9 statement told employees who were about to vote to authorize a strike that any striking employee would lose this access. Under these circumstances, we conclude that the March 9 statement would naturally and probably chill these employees in exercising their statutorily-guaranteed rights, including the strike-authorization vote.

Indeed, the University devotes little energy to contending otherwise. The University does assert, in short order, that the natural and probable effect of its statement would not impede the employees in the exercise of their protected "strike right" because "[m]any alternate sources of communication" would be available to those employees. Specifically, the University avers that Association-represented employees could sign up for a free, non-University e-mail account, or choose to communicate by telephone or the "regular mail." To be sure, Association-represented employees could avail themselves (at any time) of these other communication methods, related or unrelated to protected activity. It does not necessarily follow, however, that the natural and probable consequences of the University's March 9 announcement—stating that it would rescind a previously granted benefit to any employee that exercised the right to strike—would leave the employees unaffected with respect to their right to participate in protected activity.

We turn to the University's primary defense. The University asserts that, even if its announcement would have the natural and probable effect of chilling employees in the exercise of a protected activity, the announcement nevertheless did not violate ORS 243.672(1)(a) because it was a statement that merely reflected the University's intention to undertake a lawful action. In other words, the University asserts that it would be lawful to disable strikers' log-in access to the Odin system. Therefore, according to the University, it was lawful for the University to inform employees about that consequence if they decided to strike. In support of this argument, the University relies on a series of cases that concluded that an employer did not violate (1)(a) by stating that striking employees could be permanently replaced. *See, e.g.*, *Oregon Public Employees Union v. Jefferson County*, Case No. UP-55-98, 18 PECBR 109, 126-27 (1999) (there is nothing inherently unlawful about a public employer telling its employees that it intended to exercise its right to hire replacement workers in the event of a strike, so long as that information was not communicated in a hostile or threatening manner) (citing *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 590 (1996) and *Klamath County Education Association v. Klamath County School District*, Case No. C-28-78, 5 PECBR 2991, 3000 (1980)). According to the University, its actions here are "directly in line" with those determined to be lawful in the aforementioned "permanent-replacement" cases.

We disagree with the University's argument. To begin, an employer's ability to state that strikers can be permanently replaced is not unfettered. For example, as noted above, an employer may not make such a statement in a hostile or threatening manner. *See Jefferson County*, 18 PECBR at 126. Additionally, an employer may not falsely state that strikers have been permanently replaced. *See, e.g., Citizens Publ'g & Printing Co. v. NLRB*, 263 F3d 224, 237 (3d Cir. 2001) (citing cases).

Moreover, we have previously concluded that statements that might otherwise be lawful can nevertheless violate (1)(a) depending on the timing and circumstances of the statement. For example, in *Klamath County*, 5 PECBR at 3000, the principal, on the day of a widely-publicized teacher-strike-vote meeting, directed teachers "to present him with two weeks of lesson plans by

the following afternoon." We observed that, although announcing such a requirement "might have been lawful and reasonable under most circumstances," it had "the quality of a reprisal against teachers for choosing to exercise their right to engage in concerted labor organization activity," due to the timing of the announcement in relation to the strike-vote meeting. *Id.* Accordingly, we found that this statement interfered with the free exercise of employee-protected rights and "was coercive in violation of ORS 243.672(1)(a)." *Id.*

Here, the University announced that it would disable access to the Odin system for any employee who exercised the statutorily-protected right to strike. Significantly, the University made this announcement *two days before* those employees were scheduled to vote on a strike. Similar to *Klamath County School District*, we find that the timing of this announcement and the nature of the lost access to the Odin system (which was particularly significant to this group of higher-education instructors) "had the quality of a reprisal" against employees should they exercise their right to engage in activities protected by the PECBA. *See id.* We reach this conclusion, even assuming that the University's announcement might, in different circumstances, have been lawful.

In sum, we conclude that the University's March 9 announcement interfered with, restrained, or coerced Association-represented employees in the exercise of their PECBA-protected rights. Consequently, the University violated the "in" prong of ORS 243.672(1)(a). Even if we concluded that the University also violated the "because of" prong of ORS 243.672(1)(a), our remedy would be the same. Therefore, it is not necessary to address that additional violation, and we decline to do so in this case.

Likewise, because our remedy would remain unchanged even if we found that the University's conduct violated subsections (1)(b) or (e), we exercise our discretion not to address those additional claims.[1]

Remedy

Because the University violated ORS 243.672(1)(a), we are required to enter a cease and desist order. ORS 243.676(2)(c).

We will also order the University to post a notice of its wrongdoing, as requested by the Association. We generally order such a posting if we determine that a party's violation of the PECBA (1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was 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 (1984).

[1]The remedy in a unilateral-change case usually involves ordering the employer to restore the *status quo ante*. *See, e.g., Oregon School Employees Association v. Parkrose School District*, Case No. UP-030-12, 25 PECBR 783, 792, (2013). Here, however, a strike never occurred and the University did not disable log-in access to the Odin system. As such, the Association rightfully does not pursue such a remedy, and that "usual remedy" does not apply to this case. Accordingly, in this case, any finding of a (1)(e) violation would not change our remedy for the (1)(a) violation.

Not all 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 University's actions affected a significant number of bargaining unit employees and involved a strike. Under such circumstances, we conclude that a posting is warranted.

Moreover, we conclude that, in addition to the traditional physical posting of the notice, the University must distribute the notice to Association-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. *Southwestern Oregon Community College Federation of Teachers, Local 3190, American Federation of Teachers v. Southwestern Oregon Community College*, Case No. UP-032-14, 26 PECBR 254, 262 (2014). Here, the record establishes that e-mail is the common method of communication between the University and Association-represented employees. Therefore, we will order the University to e-mail the posting to Association-represented employees.

Finally, the Association seeks an order awarding 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." *Southwestern Oregon Community College*, 26 PECBR at 262. Here, although we have concluded that the University violated ORS 243.672(1)(a) and (e), we do not conclude that the University acted repetitively with knowledge that its actions were unlawful. We also do not find the violations to be "conspicuously bad or flagrant." Accordingly, we will deny the Association's request for a civil penalty.

ORDER

1. The University shall cease and desist from violating ORS 243.672(1)(a).

2. The University shall post this notice for 30 days in prominent places where bargaining unit personnel are employed.

3. The University shall distribute this notice by e-mail to all bargaining unit personnel within 10 days of the date of this order.

Dated this 17 day of April, 2015.

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-013-14, *Portland State University Chapter American Association of University Professors v. Portland State University*, and in order to effectuate the policies of the Public Employee Collective Bargaining Act, we hereby notify our employees that:

The Employment Relations Board has found that Portland State University (University) violated ORS 243.672(1)(a) by announcing, two days before a scheduled strike vote, that it would disable log-in access to the University's Odin system for any bargaining unit member that went on strike. To remedy this violation, the Employment Relations Board ordered the University to:

1. Cease and desist from violating ORS 243.672(1)(a).
2. Post this notice for 30 days in prominent places where bargaining unit personnel are employed.
3. Distribute this notice by e-mail to all bargaining unit personnel within 10 days of the date of this order.

EMPLOYER

Dated_____, 2015 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-012-14

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, OPEU, Complainant, v. LANE COUNCIL OF GOVERNMENTS, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Marc Stefan, Supervising Attorney, Service Employees International Union, Local 503, Oregon Public Employees Union, Salem, Oregon, represented Complainant.

Steven Schuback, Attorney at Law, Peck, Rubanoff, and Hatfield, Lake Oswego, Oregon, represented Respondent.

On March 17, 2015, 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). Although Complainant initially filed objections to the recommended order, those objections were later withdrawn. Consequently, we treat this matter as if no objections had been filed.

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

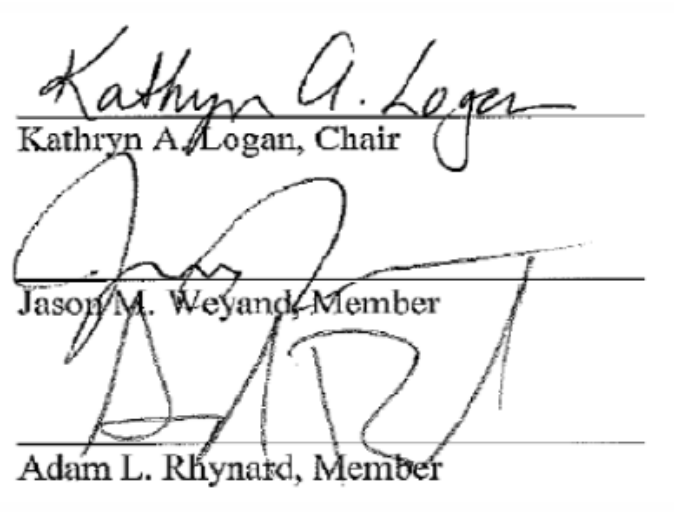
limitations of such a final order, we publish the uncontested recommended order as an attachment to the final order. *Clackamas County Peace Officers Association and Atkeson v. City of West Linn*, Case No. UP-014-13, 26 PECBR 1 (2014).

ORDER

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

2. The complaint is dismissed.

DATED this 30 day of April 2015



This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-012-14

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, OPEU,	)	
Complainant,	)	RECOMMENDED RULINGS, FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW, AND PROPOSED ORDER
LANE COUNCIL OF GOVERNMENTS,	)	
Respondent.	)	

A hearing was held before Administrative Law Judge (ALJ) Larry Witherell on November 25 and 26, 2014, in Eugene, Oregon. The record closed on January 9, 2015, following receipt of the parties' post-hearing briefs. In a periodic reassignment of cases, the matter was transferred to ALJ B. Carlton Grew for issuance of this Recommended Order.

Marc Stefan, Supervising Attorney, Service Employees International Union, Local 503, Oregon Public Employees Union, Salem, Oregon, represented Complainant.

Steven Schuback, Attorney at Law, Peck, Rubanoff, and Hatfield, Lake Oswego, Oregon, represented Respondent.

On March 21, 2014, Service Employees International Union Local 503, Oregon Public Employees Union (Union) filed this unfair labor practice complaint against Lane Council of Governments (Council or LCOG). The complaint, as amended on May 27, 2014, alleges that the Council violated ORS 243.672(1)(a) when it dismissed employee Jane Doe.[1] The Council timely filed an answer to the complaint.

[1]A pseudonym.

With the agreement of the parties, the issue presented for hearing was:

Did the Respondent terminate Jane Doe in violation of ORS 243.672(1)(a)?

As set forth below, we conclude that the Council did not violate ORS 243.672(1)(a) when it terminated Doe.

RULINGS

Toward the conclusion of the hearing, the Union requested the production of certain documents. Specifically, the Union wanted the Council to produce internal memoranda that Unit Manager Rachel Jacobsen prepared for herself that relate to the conduct of employees other than Doe. Under the circumstances, the ALJ acted properly within his discretion in denying the Union's request. The Union could have and, given the theory of the Union's case, should have sought such documents prior to the hearing.

The remaining rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The Council is a public employer as defined by ORS 243.650(20). The Union is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a bargaining unit that included Doe's position as a call center ADRC screener.[2]

2. Doe served in the U.S. Army beginning in March 1987 and was honorably discharged in May 2004. She served as a unit supply logistical manager and was released because of a physical disability due to several injuries. She is currently under a 60 percent disability rating. After release from the military, Doe attended the University of Oregon and earned a Bachelor of Science degree in public policy, planning and management.

3. Thereafter, a veterans' counselor requested that Doe complete an internship. As a result, on January 1, 2013, she began an unpaid internship program at the Council through a government program assisting disabled veterans. She completed approximately 400 hours. As an intern, Doe worked for a contract manager performing general office work. Doe also helped with a fundraising project concerning senior connections. She worked on other projects, including data entry for the Older Americans Act (which concerns senior connections).

4. On September 1, 2013, the Council hired Doe as a limited duration or temporary employee. It was a six month temporary position and consisted of various jobs that were patched together to provide Doe with a full-time position. She performed a variety of tasks, from general office work to data entry. The latter responsibility was an information and resource (I&R) position. Doe reviewed documents that had been manually created by other staff members regarding the Oregon Access/Older Americans Act programs. She then verified the information and entered the data into the computer.

[2]This position is described below.

5. Doe also developed a special project for herself, correcting ten years of data regarding the Oregon Access/Older American Act.

6. In October 2013, Doe began to serve as a backup employee to the Council's newly created adult disability resource connection workgroup called ADRC. As a result, she tried to learn how to give out resource information.

7. In November, Council managers encouraged Doe to apply for a permanent ADRC position. Since the position involved telephone interviewing or screening and then entering data into the computer, they thought Doe would be successful in the position. Initially, Doe did not want to apply because she enjoyed what she was doing. However, the managers emphasized that Doe was employed in a temporary position. Doe eventually applied and was offered the position. However, she was still uncertain whether she wanted the position or whether it would best meet her skills. She was currently in a data entry position that she enjoyed and in which she was performing well. Doe was also concerned about being on the telephone for a major part of the job, but ultimately took the position because of her temporary status. Doe began work in the permanent ADRC position on December 1, 2013, subject to a six month trial service period.

8. ADRC was primarily a busy call center, serving members of the public on a walk-in and phone-in basis. ADRC was a stressful work environment. It served a high volume of client contacts while often understaffed and while creating, implementing, and refining procedures for its work and training its employees. Many of the clients were elderly and had health and cognitive issues.

9. Jacobsen was the ADRC unit manager, overseeing Doe and the ADRC bargaining unit staff. Jacobsen was supervised by Council Program Manager Christy Williams, who in turn reported to Council Division Director Jody Cline and Council Executive Director Brenda Wilson. Council Human Resources Manager Joshua Burstein also assisted Council managers.

10. On December 5, one of Doe's co-workers approached unit manager Jacobsen to report that Doe was abrupt with other ADRC staff. ADRC managers addressed issues related to employee attitude and judgments of others in a general way at the daily staff meeting on December 6.

11. In early December, Doe provided input to a co-worker about handling a client issue. After their discussion, the co-worker decided not to follow all of Doe's suggestions. When Doe learned of this, Doe pointed her finger in the co-worker's face and told the co-worker never to cross Doe or do that again.

12. Shortly before December 20, a co-worker sought to relieve client congestion at the ADRC front desk by taking a completed intake form to an ADRC screener, in this instance Doe. Doe became angry with the co-worker, raising her voice and insisting that the issue raised by the intake form was not appropriate for ADRC. The co-worker was embarrassed by Doe's conduct. Doe's loud, angry voice prompted manager Williams, in an office 10 to 15 feet away, to investigate. Williams told Doe to calm down.

13. Later on December 20, Williams met with Doe and told Doe that her conduct was not appropriate at the workplace and, if repeated, could result in Doe's being asked to leave her employment. Doe acknowledged that her conduct had been inappropriate. After the meeting, Doe sought out the co-worker to apologize.

14. On December 23, Jacobsen and another manager gave Doe a trial service progress report. The managers rated Doe as "not on track for passing Probation" in interpersonal skills, communication skills, and workplace professionalism; "improving, area needs attention" in job/technical knowledge, computer/system knowledge, quantity of work, quality of work output, and focus on customer services. They rated Doe as "on track for passing Probation" for dependability and responsibility, attendance, and initiative and motivation. (Exh. R-4 at 1.)

15. In the narrative of the report, the supervisors wrote that Doe's position required good customer service skills and effective and positive relations with co-workers and community partners. They stated that Doe's "interface with colleagues has been less supportive. When difficulties in negotiating our new systems arise, she raises her voice to co-workers, is defensive, and uses accusatory language." (Exh. R-4 at 2.) The report noted that Council managers "have spoken with [Doe] about these situations and will continue to work with her to assure good customer service and a positive work environment," and "it was explained to [Doe] that if she should have another similar altercation with a coworker, she may be asked to leave. Should her interpersonal and communication skills not improve she will not pass her probationary period." (Exh. R-4 at 2.)

16. On January 22, 2014, Jacobsen made the following notes regarding Doe:

> "[Doe] is a conscientious, detail-oriented, and earnest worker. Her skill level with the ADRC-only aspects of the position is good and she is on track to pass probation in her knowledge of Eligibility and Screening policies, procedures, and computer databases. She is still working on finding the sweet spot in screening and often does more than she needs to, which results in taking a longer time than the ADRC screeners have to take given the quantity of calls and also being 'too helpful' with clients (sometimes giving misinformation). [Other staff] are working with her to find better boundaries with this. [Doe] continues to have challenges with being a team player and with her interpersonal communication with colleagues. She is visibly and vocally apprehensive about changes and the need to be flexible with coworkers' differences and the continuously evolving structure of the ADRC. However, given time, she does adjust to change and appears to not hold a grudge. She has not had any angry outbursts." (Exhibit R-5.)

17. Prior to January 31, 2014, Doe was nominated and elected to serve on the Union bargaining committee as an alternate. Rosemary Barton was president of the Union's LCOG sub local. On January 31, 2014, Barton sent out an e-mail announcing the membership of the bargaining team. Barton also put the information on the sub local's blog.

18. On February 5, 2014, Jacobsen recorded that Doe's lead worker had made a

> "third voicing of concern regarding [Doe]'s level of professionalism with coworkers and other Unit staff. She reports that [Doe] snaps at coworkers, argues with their answers to questions, and is not a team player when it comes to negotiating break and lunch times. She says that the same is true with her [own] interactions with [Doe]. [Doe] is not accepting of training or new perspectives." (Exh. R-6.)

19. In early February 2014, unit manager Jacobsen learned that Doe had impaired hearing. Jacobsen asked Doe if she heard well enough to do the job she was in, and what LCOG could do to assist Doe in hearing well enough for the job. The Council ordered a new phone headset and placed a device on employees' computer screens displaying which phones were engaged and what calls are waiting. The device visually alerted staff to pick up a waiting call.

20. On February 12, a co-worker complained to Jacobsen about Doe's conduct. Jacobsen recorded that there was "concern[ ] regarding [Doe's] level of professionalism with clients, coworkers and other Unit staff." (Exh. R-7.) The coworker reported to Jacobsen that Doe was "frequently snippy" with co-workers and abrupt with clients, to the point that the co-worker believed that the client "would likely not call the ADRC back after this experience." (Exh. R-7.) The co-worker stated that Doe's conduct was affecting clients calling in for assistance, co-workers, and the operation of the ADRC.[3]

21. On February 12, 2014, Union field organizer Tera Martinez wrote to Council Human Resources Manager Burstein, agreeing to meet for bargaining on February 18. In that communication, Martinez identified the Union's bargaining team: sub local president and unit employee Barton, four unit employees, Martinez (committee spokesperson) and Jim Bakken (Union field coordinator for Eugene). Martinez also listed two alternates, one of whom was Doe.

22. On February 14, 2014, unit manager Jacobsen met with Doe about the "concerns expressed by her coworkers." (Exh. R-8 at 1.) Jacobsen discussed the following issues with Doe:

> "1. [Doe] being snippy with coworkers
>
> "a. I talked with [Doe] about reports from coworkers in Support, Eligibility, and ADRC regarding her tone and aggressive manner. [Doe] reported being unaware of this and asked for an example. I talked with her regarding a situation when a Support Staff person was delivering a walk-in slip and she didn't want to take it and then said she would if she had to in an abrupt and snappy manner. [Doe] disputed this, so I asked her about her recollection of the events, which she gave me. When she role played herself, it was the same

[3]Not all of Doe's co-workers were offended or affected by Doe's conduct, and the record suggests that, in the moment, Doe was unaware of how her conduct was perceived by coworkers and clients. The record also suggests that Doe was not intentionally abrupt and was less angry than she was perceived to be. However, viewed as a whole, the record demonstrates that it was not unreasonable for the Council to terminate Doe's trial service.

aggressive, snappy, and condescending tone. I brought this to her attention and she was unaware she just did it. We talked about techniques for practicing not snapping at coworkers.

"2. [Doe] being abrupt with clients

"a. I started with a client phone call I sat in on with her as an example. Then we talked about how she is feeling on the phone that leads to this. She reported * * * wandering thoughts of clients, the clients' irritation over the phone, and the pressure she feels to complete the phone screenings. We thought of 3 ways she can remain calm with clients: (1) talk with the client about the importance of completing the screening in order to start the process of receiving benefits, but taking time/breaks in the call for the client to explain themselves prior to redirecting the conversation back to the screening; (2) smiling when talking, even if she felt irritated; (3) ask the client if she can put him/her on hold for a minute, take some deep breathers, and go back to the call.

"3. [Doe] being argumentative

"a. We discussed taking input/feedback from coworkers gracefully instead of refuting their advice immediately." (Exh. R-8 at 1.)

23. At 9:22 a.m., on February 18, Union sub local president Barton e-mailed Doe and two other employee members of the bargaining team that "Alternate Bargaining Team Members will be able to attend 02-18-14 Bargaining Session without being required to use personal time." (Exh. R-9 at 3.) At 10:19 a.m., Doe forwarded the e-mail to her supervisor, Rachel Jacobsen, and added, "Hi Rachel, I wanted to forward this to you for your approval. Thank you." (Exh. R-9 at 3.)

24. At 12:48 p.m., Jacobsen, who had been unaware that Doe was on the Union bargaining team, wrote to Williams, "Can I assume from this that [Doe] is on the bargaining team? Is there a place I could look to see what other staff is on the team, and when I could expect them to be in meetings, so that I can plan call center coverage accordingly[?] We should be fine this afternoon because our ADRC is fully staffed today for the first time this month." (Exh. R-9 at 2-3.)

25. At 12:58 p.m., Williams forwarded the e-mail to Cline, and added: "Jody, See below and advise. Also, [Doe] is still on probation with areas needing improvement. Is it appropriate she is in bargaining?" (Exh. R-9 at 2.) Williams had no collective bargaining experience, was uncertain what to tell Jacobsen, and did not know whether a probationary employee could serve on a bargaining team. Council management responded that there were no obstacles to Doe's service on the bargaining team.

26. During the afternoon of February 18, the Union and Council bargaining committees met for their first session. The Council was represented by Cline, Burstein, and Jamon Kent, Council chief operating officer and head of government services. Cline had no previous labor relations or bargaining experience. At the beginning of the meeting, Cline asked, without identifying Doe, whether the Union bargaining team was aware that one of its members was a trial service employee. Cline had not discussed the issue with anyone before asking the question.

Knowing that Doe had been working at the Council in different positions for nearly a year, Cline thought Union officials did not know that Doe was a trial service employee.

27. The Union spokesperson responded by asking for a caucus. The Union seeks to avoid putting bargaining unit members at risk for difficulties arising from bargaining should they be having performance problems. During the caucus, the Union bargaining team wanted to be certain that Doe was comfortable serving on the bargaining committee. Doe assured them that she was.

28. The Council bargaining team also caucused. The other Council team members told Cline that there was no problem with a trial service employee serving on the bargaining team. After the teams reconvened, Union representatives said they had no concerns regarding Doe's service on the bargaining team, and asked whether the Council had such a concern. The LCOG team stated that they did not, and the parties moved on to other issues.

29. On February 19, at 7:28 a.m., Jacobsen e-mailed Cline,

> "Hi Jody,
> "I'd like to give Doe a more educated reply when she asks for approval to attend bargaining. I think it should be fine, but it would be good to know more than 3 hours in advance (at a minimum by morning huddle at 8:45) so that we can juggle phone time. Was yesterday the only time?" (Exh. R-9 at 2.)

At 8:03 a.m., Cline responded to Jacobsen, with a copy to Williams: "We now know the schedule & she [Doe] can share with you. We did point out that a member of their team is on probation but they wanted to allow that & we didn't object." (Exh. R-9 at 2.)

30. At 3:11 p.m., on February 19, Jacobsen e-mailed Doe to approve Doe's absence for the bargaining team. Jacobsen also asked, "[c]ould you please give me a calendar of when you will be participating in bargaining so that we can plan for phones accordingly?" (Exh. R-10 at 2.)

31. Meanwhile, Doe had become concerned that her participation on the bargaining team was not being perceived well by ADRC bargaining unit members.[4] As a result, on February 18 or 19, Doe raised the matter with Jacobsen. Doe asked whether she should step down from the committee. Jacobsen stated that she could not tell Doe what to do.

32. On February 25, 2014, a co-worker told Doe that she could not talk to a third party about a client without the client's permission. Doe then had a heated confrontation with the co-worker. The co-worker, a non-confrontational person who used a wheelchair, turned away and rolled back towards her cubicle, but Doe continued to argue with her in a raised voice. Doe then turned to another co-worker and accused her and other ADRC employees of always trying to prove Doe wrong. Another co-worker tried to defuse the incident with humor by asking whether he needed to get out boxing gloves.

[4]Upon learning of Doe's proposed absence for bargaining, Doe summed up the attitude of her co-workers as, "great – now we have to answer *her* phone calls." (Doe Testimony, emphasis in testimony.)

33. A co-worker reported the incident to a supervisor. Jacobsen also discussed the incident with the lead worker, and at least one co-worker, who stated that, according to Jacobsen's notes, "this is an everyday occurrence b/w all of them & [Doe] & that they all watch what they say w/ [Doe] because of her treatment of them." (Exh. R-12.)

34. Around this time, Doe told the lead worker that she feared she was not going to pass her probationary period. The lead worker tried to offer reassurance, but also stated that everyone needs to be considerate and respectful in their communications with coworkers.

35. By the end of February 2014, Jacobsen had two major concerns about Doe. The first was her interactions with clients. Typically, an individual's contact with ADRC is the first time they are seeking services. This is because ADRC is the resource for other agencies as well as providing its own resources and services. As a result, the initial telephone call is important to ensuring that the caller gets the necessary and appropriate services. Jacobsen had personal knowledge and co-worker reports about Doe's treatment of client callers. Jacobsen had become concerned about Doe's interactions with those clients. She believed that Doe's treatment of callers was efficient, but not effective in getting the callers to accept needed services. She believed that Doe's tone and the overall way she treated callers was not appropriate or proper. As a result, Jacobsen believed that the clients would likely not call back or pursue needed services after speaking with Doe.

36. Jacobsen was also concerned about Doe's effect on her co-workers' effectiveness as a team. ADRC was a busy unit and was designed and intended to operate as a team. Failure to operate as a team would prevent ADRC from fulfilling its function. Jacobsen believed that the relationship between Doe and her co-workers had become untenable.

37. Jacobsen met with Executive Director Wilson, Division Director Cline, Program Manager Williams, and Human Resources Manager Burstein. During the meeting, the managers reviewed Doe's treatment of clients. The managers considered Jacobsen's personal experience and reports from coworkers about Doe's treatment of clients on the telephone.

38. The managers discussed the boxing glove incident and concluded that it was the type of conduct that Williams had previously told Doe that the Council would not tolerate, and that if it occurred again Doe would be asked to leave. The managers were concerned that Doe's interaction with other staff was not respectful and was not contributing to the work environment that management desired and considered necessary for the effective operation of ADRC. The Council managers concluded that Doe was not a good fit for the ADRC caseworker position, based on her personality and the type of work required by her position.

39. On March 6, 2014, human resources manager Burstein prepared the dismissal letter for Doe. The Council's intention was that Burstein and ADRC manager Jacobsen would meet with Doe that day and explain her dismissal. Burstein was also to provide Doe with her final paycheck and information about post-employment benefits, such as COBRA. However, Doe was out ill on

March 6. Jacobsen and Burstein met with Doe on March 7 in Jacobsen's office. Jacobson explained that the reason for Doe's termination was due to her unacceptable interpersonal relationship with the other staff members, and that Doe was not a team player. Burstein then provided Doe with the letter containing the check and benefit information.

40. Tensions in the ADRC work unit decreased significantly after Doe's separation. Doe's absence was a significant cause of the reduction in tension.

CONCLUSIONS OF LAW

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

Standards for Decision

The Union contends that the Council's actions terminating Doe violated ORS 243.672(1)(a) because these actions were taken in retaliation for Doe's participation on the Union's bargaining team. ORS 243.672(1)(a) makes it unlawful for a public employer to interfere with, restrain, or coerce employees "in" the exercise or "because of" the exercise of rights guaranteed in ORS 243.662. ORS 243.662 guarantees public employees "the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations."

To determine if an employer violated the "because of" portion of subsection (1)(a), we examine the employer's reason for the disputed action. If the employer acted "because of" an employee's exercise of rights protected by the Public Employee Collective Bargaining Act (PECBA), the employer's actions are unlawful. In order to show a violation of the "because of" prong of subsection (1)(a), it is not necessary to demonstrate that an employer acted with hostility or anti-union animus. Nor must a complainant prove that the employer was motivated by an intent to restrain or interfere with protected rights. A complainant need only show that the employer took the disputed action because an employee exercised a protected right. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon,* Case No. UP-039-10, 25 PECBR 325, 339 (2012).

When we analyze an employer's actions under the "in the exercise" portion of subsection (1)(a), the employer's motive is irrelevant. We focus only on the effect of the employer's actions on the employees. If the employer's conduct, when viewed objectively, has the natural and probable effect of deterring employees from engaging in PECBA-protected activity, the employer violates the "in the exercise" prong of subsection (1)(a). A violation of the "in the exercise" portion of subsection (1)(a) may be either derivative or independent. An employer who commits a "because of" violation also generally violates the "in the exercise" portion of the statute because the natural and probable effect of the employer's unlawful action is to chill the exercise of protected rights. An employer's actions may also independently violate the "in the exercise" prong, typically when the employer makes threats that are directed at protected activity. 25 PECBR at 339.

We first consider whether the Council decided to end Doe's employment "because of" Doe's exercise of protected rights. We begin our analysis by examining the record to determine the reason the Council acted. This is a fact determination. We then decide if the Council's reasons were lawful or unlawful. If the reasons were lawful, we will dismiss the allegation. If the reasons are unlawful or a lawful reason is a pretext for unlawful conduct, we will find a violation of the "because of" prong of subsection (1)(a). If we find the employer acted for both lawful and unlawful reasons, we apply a mixed motive analysis. Under that analysis, we determine whether the Council's unlawful motivation—as one of two or more coinciding reasons for the employment action—was a sufficient factor to attribute the decision to it. In other words, we determine whether the employer would not have taken the disputed action but for the unlawful motive. 25 PECBR at 339-340.

The Union contends that the Council made the decision to end Doe's employment because of her participation on the Union bargaining team. There is no dispute that participation on a labor representative's bargaining team is protected activity. The Council asserts, however, that it acted for lawful reasons: Doe's performance during her trial service period included repeated instances of conduct which were inappropriate, counterproductive to ADRC's goals, and reflected her inability to integrate into this particular work environment.

We conclude that the motives for the Council's actions were lawful. The record shows that on multiple occasions, Doe was loud, blunt, angry, argumentative, and disrespectful of her co-workers, upsetting not only the recipients of her aggressive tone but also those who witnessed it. The record shows that Doe was a poor fit for this work environment and was not capable of a prompt adaptation to the corrections she received. While the Union argues that the Council's failure to use more corrective measures showed bias, the Council had no requirement to use techniques relevant to progressive discipline for a trial service employee. In addition, Doe was well aware of her failure to meet the Council's expectations. The Council had no reason to continue to expend effort and endure further office disruption, disaffected clients, and lowered employee morale in order to work with Doe to temper her occasional angry outbursts at co-workers. Nor did the Council have an obligation to allow the effects of Doe's conduct to extend to the end of her scheduled trial service period.

The Union also points to Council management employees' raising the issue of Doe's trial service status with the Union bargaining team. The record does not support a finding that these actions reflected an animus by the managers. Instead, we conclude that it reflected surprise and some confusion on some Council managers' part that the Union would consider it prudent or appropriate to place a struggling trial service employee on this bargaining team. Once the Union informed the Council that they were aware of Doe's trial service status, the Council accepted the Union's choice.[5]

We also conclude that the Council did not violate the "in the exercise" prong of subsection (1)(a). Doe's public and documented interactions with her fellow employees reflected

[5]Because a labor organization has substantial incentives to demonstrate commitment to its bargaining team members, and a natural desire to defend its decisions, placement of a trial service employee on a union bargaining team will almost inevitably result in the filing of an unfair labor practices complaint if that employee is deemed to have failed trial service.

her inability to experience the pressures of this particular job without expressing anger, and to fit into this particular work environment. Therefore the Council's conduct in terminating Doe from trial service, when viewed objectively, does not have the natural and probable effect of deterring employees from engaging in PECBA-protected activity such as serving on the Union bargaining team. We will dismiss the Complaint.

PROPOSED ORDER

The complaint is dismissed.

SIGNED AND ISSUED 17 March 2015.

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. UC-005-14

(UNIT CLARIFICATION)

OREGON AFSCME COUNCIL 75, LOCAL 88,	)	
	)	
Petitioner,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
MULTNOMAH COUNTY,	)	AND ORDER
	)	
Respondent.	)	
	)	

On March 12, 2015, this Board heard oral arguments on Petitioner's objections to a recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew, after a hearing held on September 11, 2014, at the offices of Multnomah County in Portland, Oregon. The record closed on October 29, 2014, following receipt of the parties' post-hearing briefs.

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

Kathryn A. Short, Assistant County Attorney, Sr., Multnomah County, Portland, Oregon, represented Respondent.

On June 9, 2014, Oregon AFSCME Council 75, Local 88 (Union), filed this Petition seeking clarification of the bargaining unit status of the Office Assistant Senior (OASr) in the County Benefits Office. On July 3, 2014, Multnomah County (County) filed objections to the Petition, asserting that the OASr is a "confidential employee" within the meaning of ORS 243.650(6).

The issue is:

Is the OASr in the Benefits Office a confidential employee within the meaning of ORS 243.650(6)?[1]

[1]The County also raised a timeliness objection that was resolved by the parties at hearing.

We conclude that the OASr in the Benefits Office is not a confidential employee and is properly included in the Union's bargaining unit. Therefore, we will grant the Union's petition.

RULINGS

The Union failed to exchange exhibit and witness lists within the time frame designated in the ALJ's prehearing letter. The ALJ acted properly within his discretion in declining to receive the testimony of the Union's witnesses and in declining to receive the Union's exhibits into the record. However, the ALJ directed that the employee currently holding the position must testify because this matter involves the statutory status of an employee and because there is no burden of proof in such matters. The remaining rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties

1. The County is a public employer as defined by ORS 243.650(20). The Union is a labor organization within the meaning of ORS 243.650(13), and the exclusive representative of a bargaining unit of County employees.

2. The Union and the County were parties to a 2011-2014 collective bargaining agreement (Agreement) that expired on June 30, 2014. The parties began negotiations for a successor agreement in March 2014, and had not reached agreement at the time of hearing.

The County Labor Relations and Benefits Offices

3. In September 2013, the County hired Alyssa Sonne as a temporary OASr in the Benefits Office. In March 2014, the County reclassified the OASr from a bargaining-unit classification to an excluded "confidential" classification. In May 2014, the County made Sonne's appointment permanent, and she continues to be the OASr in the Benefits Office.

3. Both the County's Labor Relations and Benefits Offices are located on the third floor of the County's main administration building.

4. Steve Herron, the County's Labor Relations and Class and Compensation Director (Labor Director), is in charge of the County Labor Relations Office. The Labor Relations Office also includes three human resource managers, one human resource technician, and an Office Assistant 2/NR. None of the Labor Relations staff is a member of a bargaining unit. The Labor Director also oversees the Classification and Compensation Office, with four full-time employees. The Labor Director reports to the County Director of Central Human Resources, Travis Graves.

5. The County Benefits and Wellness Manager (Benefits Manager) is in charge of the Benefits and Wellness Department. The Benefits Manager reports to County Director Graves. The Benefits Office is staffed by a benefits operations manager, five human resource analysts, a human resources technician, and the OASr. The benefits operations manager is the OASr's direct supervisor. The OASr position was the only position in the benefits office that had historically

been part of a bargaining unit until the County unilaterally designated the position as confidential and removed it from the Union unit in early 2014. The Benefits Manager also oversees the Wellness Office, with three full-time equivalent employees.

6. The Benefits Manager oversees the County's relationships with providers of medical, dental, and other benefits for the Union's County employees and other County employees. It also performs research and planning regarding future benefit needs and vendor options.

7. The two most recent Benefits Managers have not served on the County's bargaining team, but have occasionally attended bargaining sessions related to benefits.

County benefits and collective bargaining

8. Article 11(I)(B)(1) of the Agreement provided for the creation of an Employee Benefit Team (EBT), comprised of Union and County representatives to collaborate on health care cost containment and possible plan design changes that might be necessary during the term of the Agreement. The Agreement provided that the EBT would meet to review and approve non-mandated proposed changes in plan designs, changes in plans offered, or changes in carriers, before implementation for the following plan year. The Agreement also provided that changes in plans or plan designs that are mandated by carriers, and that cannot be resolved by the EBT, would be subject to Public Employee Collective Bargaining Act (PECBA) bargaining procedures.

9. In 2011, the EBT was the only committee of its kind in the County. Herron began work as the Labor Director in mid-2011, and one of his charges was to increase collaboration and communication between the County and County unions about benefits issues. This effort was based in part on future changes in County benefits mandated by the federal Patient Protection and Affordable Care Act, commonly referred to as the Affordable Care Act (ACA). Pub L 111-148, 124 Stat 119 (2010). Some of the required changes were expanding dependent coverage for adult children, eliminating annual and lifetime limits on medical plans, expanding preventative care, modifying the Flexible Spending Account (FSA) annual maximum election, addressing insurance plan 'grandfather' status and an excise tax on certain types of plans.

10. The Labor Director began obtaining the agreement of other County unions to join the EBT, and it was renamed the Employee Benefits Advisory Team (EBAT). The County continued to negotiate successor collective bargaining agreements with other unions and secured their contractual agreement to participate in EBAT. At the time of hearing, nine County unions were participating in the EBAT process, one union had agreed to do so in the future, and the remaining union had a "me too" agreement with the County based on another participating union.

11. The County's goals regarding the EBAT also included reaching consensus or agreement between the parties regarding the need for changes in benefits and the menu of options for those changes, if not specific changes, for current and future years. Collective bargaining between the County and the various unions would then proceed in light of the consensus established by the EBAT.

12. One future impact of the ACA on the County medical insurance plans is an imposition of excise taxes on the County if certain features of the County plans are not changed.[2] After passage of the ACA, the Benefits Office was doing substantial work to prepare the County for those changes. The Benefits Manager took back aspects of administration of County benefits plans from the consultants, and performed more work with the Labor Director and the Labor Relations Office.

13. During 2013, then Benefits Manager Abbey Hendricks was concerned about using the OASr, who was in the bargaining unit, to assist in gathering, drafting, or preparing information, or to work with the Labor Director concerning strategic presentation of benefits-related information to the EBAT.

14. When Hendricks served as the Benefits Manager, she believed that her workload increased as a result of the way that the previous, non-confidential OASr was used. Hendricks believed that this increased workload included preparing materials for distribution at EBAT and other meetings, consolidating different materials together, photocopying, proofreading, revising materials to ensure they made sense to a layperson, and planning meetings, including meetings with representatives of Kaiser Permanente and Moda Health.

15. In 2013, Hendricks proposed to Herron and Graves that the OASr position be removed from the Union's bargaining unit. Hendricks believed that it was important that a non-represented employee perform certain EBAT and non-EBAT related duties, and that Union-represented employees should not see related documents before the final revisions were made. At the time, the position was held by an employee who was also a Union steward, and Herron demurred. However, the position became vacant in late 2013 or early 2014, and the County began its internal process to remove the position from the Union bargaining unit over the Union's objection. In late February 2014, the Benefits Office Human Resources Manager submitted a Reclassification Request to the County Classification and Compensation Unit. The manager stated in part:

> "This position is the only position in benefits that is represented and the risk of confidential negotiated benefits leakage is high. This position is privileged [*sic*] to all BU [bargaining unit] benefits changes or potential changes. I feel at this time that it is perfect timing to reclass this [OASr] to non-represented."

16. Before the reclassification, the OASr position description stated that the employee "provides administrative support for all benefit administration staff, including generating reports, providing confidential personnel/benefits information, including for the purposes of retrieving, reviewing and compiling information for purposes of collective bargaining." That position description's list of essential job functions provided that 50% of the employee's time is spent on reception and administrative support for Benefits and Wellness, a category of work that included participating in meetings related to bargaining.

[2] *See* generally, 26 USC §4980I (excise tax on high-cost employer sponsored health plan).

17. The County Classification and Compensation Unit approved the reclassification request in early March 2014.

18. The first purportedly confidential task that Hendricks assigned to the OASr was preparing a handout to be distributed at an EBAT meeting. The handout was a compilation of various Kaiser and Moda proposals for plan changes for the next plan year, 2015, including changes written by Kaiser, Moda, and Hendricks. The proposed changes included changes related to the ACA (such as changes to ACA grandfathered status), changes related to plan eligibility, and changes related to the Kaiser out-of-pocket maximums. The handout included Hendricks' preliminary recommendations. Hendricks prepared a draft of the handout herself, and then had the OASr review it for comprehensibility to a layperson, make copies of the handout, and set it out for the EBAT meeting.

19. In June 2014, Hendricks took another position within the County. Hendricks was succeeded by Karen Daly, who started working for the County as the new Benefits Manager on June 9, 2014. Consequently, the current OASr only worked with Hendricks for approximately one month before Daly took over the Benefits Department.

20. At the time of the hearing, Daly had only supervised Sonne for three months. During that time, Sonne continued to take minutes of the EBAT meetings. Sonne forwarded those minutes to Daly, who generally accepted them as written. The Benefits Manager and Labor Director could review those minutes and make alterations to them to remove, emphasize, or de-emphasize certain items. However, by the time of the hearing, Sonne had not been asked to make any substantive changes to the EBAT minutes. The final minutes are circulated to the union EBAT members for approval at the following EBAT meeting.

21. Sonne testified that the only new duties actually assigned to her since being granted confidential status pertain to EBAT meetings. Those duties are: (1) to review, revise, and copy the materials to be handed out in advance of the monthly EBAT meetings, (2) to attend and take notes at the EBAT meetings, and (3) to revise her notes afterwards and then e-mail them to the Benefits Manager and, once she has approved them, e-mail them to the EBAT participants. Sonne estimates that she spends approximately six to seven hours each month on these tasks, including two hours preparing handouts before the meeting, two hours taking notes at the meeting, and two to three hours revising and distributing the notes.

22. Sonne also assists the Benefits Manager in planning benefits-related meetings, including meetings with County vendors. In providing this assistance, Sonne often will learn the purpose of a proposed meeting. The purpose, as described to her, is typically brief, such as to review prescription plan options for a unit of prosecuting attorneys.

23. Sonne did not recall attending meetings with the Benefits Manager other than EBAT and Benefits Office staff meetings. At staff meetings, the Benefits Manager has given updates regarding benefit related collective bargaining negotiations. Sonne has not attended any collective bargaining sessions and Herron uses the HR Tech in Labor Relations as the minutes-taker for collective bargaining. In the event that the HR Tech is unavailable, Herron uses the Office Assistant 2 in Labor Relations for that task. If neither of those two was available, Herron

would use the Administrative Analyst under the HR Director. If all three of those individuals were unavailable, Herron anticipated that he would ask Sonne to take bargaining minutes.

CONCLUSIONS OF LAW

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

2. The OASr in the Benefits Office is not a confidential employee and is properly included in the bargaining unit.

Standards for decision

The PECBA defines a confidential employee as "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." ORS 243.650(6). Because the terms are listed in the conjunctive, for us to conclude that an employee is confidential, the employee must provide confidential assistance to one who performs all three functions; *i.e.*, one who 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). This Board applies a three-part test to determine the confidential status of an employee: (1) Does the allegedly 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 to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies? *Service Employees International Union Local 503, Oregon Public Employees Union v. Oregon Cascades West Council of Governments*, Case No. UC-16-04, 20 PECBR 786, 793 (2004); *AFSCME, Council 75 v. Illinois Valley Fire District*, Case No. RC-38-97, 17 PECBR 493, 498 (1998).

To be classified as a confidential employee under the PECBA, "the employee[] at issue must *currently* act in a confidential capacity." *Group of Unrepresented Battalion Chiefs Employed by the City of Medford v. City of Medford*, and *IAFF Local 1431 v. City of Medford*, Case Nos. CU-003-14 & CC-002-14, 26 PECBR 294, 316 (2014) (emphasis in the original). Additionally, "the confidential assistance contemplated by the statute is narrow and determined by an employee's direct and specific involvement in collective bargaining matters." *Id.*, citing to *Oregon Public Employes Union, Local 503, SEIU, AFL-CIO, CLC v. City of Beaverton*, Case No. UC-54-86, 10 PECBR 25, 31 (1987).

Finally, in a unit clarification case such as this, no party bears the burden of proof. OAR 115-010-0070(5)(a). Nevertheless, because this case involves a statutory exclusion to the definition of "public employee," there must be sufficient evidence establishing that the exclusion applies before we will conclude that an otherwise public employee is a confidential employee. In the absence of detailed, specific evidence establishing that a putative confidential employee meets the statutory definition, we will conclude that the employee is a public employee covered by the

PECBA and not a confidential employee under the statute. *City of Portland v. Portland Police Commanding Officers Association*, Case No. UC-017-13, 25 PECBR 996, 1018 (2014).

Analysis

We first consider whether Sonne provides assistance to an individual who formulates, determines, and effectuates management policies in the area of collective bargaining. Here, the record establishes that Sonne provides assistance to Daly, the current Benefits Manager. As of the hearing, Sonne had provided that assistance for about three months. Although Daly effectuates management policies with respect to employee benefits, a key aspect of collective bargaining, she does not formulate and determine management policies in this area. Specifically, Daly does not serve as a member of the County's collective bargaining team, and the record does not establish that she makes substantive decisions on what direction the County's negotiating team should take during bargaining. Rather, the evidence establishes that Daly's role is largely limited to implementing (*i.e.*, effectuating) whatever benefits-related decisions are made by other County officials. Although Daly also provides technical updates and guidance on changes in benefits laws and changes in plans offered by County vendors, she does not formulate and determine the County's benefits policies in collective bargaining. The same is true for Hendricks, whom Sonne assisted for approximately one month before Daly became the Benefits Manager. Because the Benefits Manager does not determine and formulate management policies in the area of collective bargaining, Sonne's assistance to that manager does not render her a confidential employee.

The County argues, however, that Sonne is a confidential employee because she assists Daly, and Daly assists Herron, who does formulate, determine, and effectuate management policies in the area of collective bargaining. Although we agree with the County's characterization of Herron's authority, we disagree with the County's assertion that Sonne, who works in the Benefits Office under Daly, provides Herron with confidential assistance. The record does not establish that Herron has directly assigned work to Sonne or asked her to provide him with any particular assistance. At most, Herron anticipates that he might, in the future, use Sonne as a third back-up to take notes in collective bargaining sessions. Such speculative future potential confidential use does not establish that Sonne currently provides confidential assistance to Herron. *See City of Medford*, 26 PECBR at 316 (to be classified as a confidential employee under the PECBA, the employee must *currently* act in a confidential capacity); *Oregon Cascades West Council of Governments*, 20 PECBR at 793 (employees designated to back up a confidential employee are not confidential employees). Therefore, under the County's theory, Sonne does not provide confidential assistance to anyone who formulates, determines, and effectuates management policies in the area of collective bargaining. Consequently, she is not a confidential employee.[3]

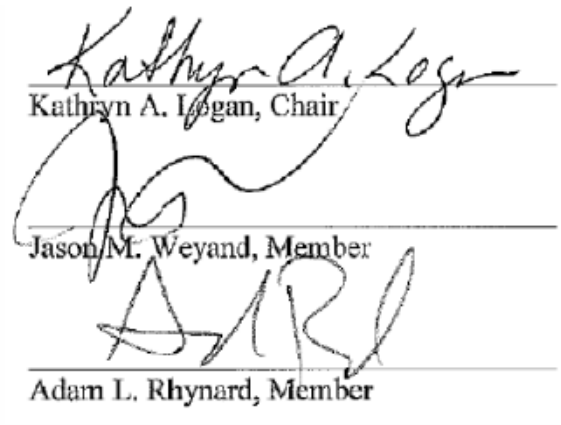
Based on the record before us, we conclude that the OASr is not a confidential employee under ORS 243.650(6). Accordingly, she should be included in the Union's bargaining unit. We will grant the Union's petition.

[3]Because Sonne does not meet the first of our three-part test for confidential employee status, we need not address the remaining two tests.

ORDER

The Union's petition is granted. The bargaining unit is clarified to include the Office Assistant Senior (OASr) in the County Benefits Office.

Dated this 8 day of May, 2015.



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-006-14

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503, OREGON PUBLIC EMPLOYEES UNION, Complainant, v. STATE OF OREGON, DEPARTMENT OF REVENUE, Respondent.	)	FINDINGS AND ORDER ON COMPLAINANT'S PETITION FOR REPRESENTATION COSTS

On March 16, 2015, this Board issued an order concluding that the State of Oregon, Department of Revenue (Department), violated ORS 243.672(1)(g) by failing to comply with the terms of a September 1, 2011 Settlement Agreement (Settlement Agreement) between it and the Service Employees International Union, Local 503, Oregon Public Employees Union (Union). 26 PECBR 415 (2015). On April 3, 2015, the Union submitted its petition for representation costs. The Department did not file objections to the Union's petition.

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

1. The Union filed a timely petition for representation costs, and the Department did not object to that petition.

2. This case involved two days of hearing.

3. The Union is the prevailing party.

4. Counsel for the Union submitted affidavits stating that 142.50 hours of legal work were spent on the case, with 8.75 hours billed at a rate of $165 per hour, and 133.75 hours billed at a rate of $135 per hour. The total amount billed was $19,500. The Union's petition requests an award of representation costs in the amount of $5,000, which is the maximum amount that this Board awards in the absence of a civil penalty. OAR 115-035-0055(1)(a).

5. The Union's requested hourly rates ($135 and $165) are at or below the average representation rate of $165 to $170 per hour. *See Oregon School Employees Association v. North Clackamas School District*, Case No. UP-017-13, 26 PECBR 129 (2014) (Rep. Cost Order). We conclude that those requested rates are reasonable.

6. The Union's requested number of hours is greater than average. Cases generally require an average of 45 to 50 hours per day of hearing. *See id*. We will adjust our award accordingly.

7. An average award is generally one-third of the reasonable representation costs of the prevailing party, subject to the $5,000 cap contained in OAR 115-035-0055(1)(a). *Laborers' International Union of North America Local 483 v. City of Portland*, Case No. UP-014-14, 26 PECBR 400, 401 (2014) (Rep. Cost Order). However, when designating the amount of representation costs, we consider what award would be consistent with the policies and purposes of the Public Employee Collective Bargaining Act (PECBA). OAR 115-035-0055(4). One of the factors that we consider in designating these amounts is whether the respondent "was guilty of an aggravated or pervasive unfair labor practice or the repetition of a type of conduct previously found to be unlawful." OAR 115-035-0055(4)(a)(B). This Board found in a separate proceeding that the Department violated ORS 243.672(1)(g) by violating the same written agreement at issue in this case. *See Service Employees International Union, Local 503 v. State of Oregon, Department of Revenue*, Case No. UP-31-12, 25 PECBR 691 (2013). Because these violations were of the same written agreement and of a similar nature, we conclude that the unlawful conduct was repetitive, and we will adjust our award upwards.

8. Having considered the purposes and polices of the PECBA, our awards in prior cases, and the reasonable costs of services rendered in this case, we will order representation costs to the Union in the amount of $5,000.

ORDER

The Department shall remit $5,000 to the Union within 30 days of the date of this Order.

DATED this 12 day of May, 2015.

*Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

*Chair Logan did not participate in the deliberations or decision in this matter.

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-033-03

(UNFAIR LABOR PRACTICE)

ASSOCIATION OF OREGON CORRECTIONS EMPLOYEES, Complainant, v. STATE OF OREGON, DEPARTMENT OF CORRECTIONS, Respondent.	)	FINDINGS AND ORDER ON COMPLAINANT'S PETITION FOR REPRESENTATION COSTS

On December 13, 2014, the Court of Appeals affirmed this Board's order, which had concluded that the State of Oregon, Department of Corrections (Department), violated ORS 243.672(1)(e) by refusing to bargain over changes to employee days off and start-stop times. Although this case has an extensive and complicated procedural history[1], this petition concerns only representation costs incurred by the Association of Oregon Corrections Employees (Association) for the above-mentioned (1)(e) violation after the first remand from the court.

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 did not file objections to the petition.

2. The Association is the prevailing party.[2]

3. The case required one day of hearing on remand.

[1]For a brief overview of that history, see *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 295 P3d 38 (2013).

[2]Because the Association only seeks representation costs related to the Board proceedings on remand from the first Court of Appeals decision, and the Association alone prevailed in those proceedings, we consider the Association the sole prevailing party for the purposes of this petition.

4. Counsel for the Association submitted affidavits stating that she spent 50.9 hours of legal work on the case on remand, billed at $225 per hour, for a total cost to the Association of $11,425.50. The Association's petition requests an award of representation costs in the amount of $3,500.

5. The Association's requested hourly rate of $225 per hour is above the average rate charged. *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 (50.9) is nominally higher than average for a single-day hearing. *See id.* (cases generally require an average of 45 to 50 hours per day of hearing). However, the remand stage of the proceedings also included a motion for reconsideration filed by the Department. Therefore, we conclude that the 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 in *former* OAR 115-035-0055(1)(a).[3] 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 Association in the amount of $2,884.

ORDER

The Department shall remit $2,884 to the Association within 30 days of the date of this Order.

DATED this 12 day of May, 2015.

*Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

*Chair Logan did not participate in the deliberations or decision in this matter.

This Order may be appealed pursuant to ORS 183.482.

[3]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-013-10

(UNFAIR LABOR PRACTICE)

PORTLAND FIREFIGHTERS' ASSOCIATION, LOCAL 43, IAFF,	)	
Complainant,	)	
v.	)	FINDINGS AND ORDER ON COMPLAINANT'S PETITION FOR REPRESENTATION COSTS
CITY OF PORTLAND,	)	
Respondent.	)	

On November 15, 2011, this Board issued an Order holding that the City of Portland (City) violated ORS 243.672(1)(g) by refusing to implement the terms of an arbitrator's award. 24 PECBR 472 (2011). On January 23, 2012, we issued a reconsideration order that adhered to our original order. 24 PECBR 583 (2012). On February 13, 2012, the City filed a petition for review with the Court of Appeals.[1] On December 10, 2014, the court affirmed this Board's order. *See Portland Fire Fighters' Assn. v. City of Portland*, 267 Or App 491, 341 P3d 770 (2014). The Appellate Judgment was entered on March 16, 2015.

While the matter was pending before the court, Complainant Portland Firefighters' Association, Local 43, IAFF (Association), filed a motion with this Board seeking compliance with our order. The City responded, asserting that it was in compliance. On December 12, 2012, we issued a Compliance Order that set forth the City's obligations under our prior order and that gave the City 30 days to comply with those obligations. On January 8, 2013, the City filed a petition for review with the Court of Appeals with respect to the Compliance Order. On December 10, 2014, the court affirmed this Board's Compliance Order. *See City of Portland v. Portland Fire Fighters' Assn.*, 267 Or App 512, 341 P3d 143 (2014). The Appellate Judgment was entered on March 16, 2015.

The Association filed its petition for representation costs on February 23, 2012. The City filed its objections to that petition on February 28, 2012. On January 2, 2015 (after the court

[1]Thereafter, the City filed a motion with this Board to stay our order pending the outcome of the appellate review. On May 17, 2012, we denied that motion. 24 PECBR 809 (2012).

affirmed both of our orders), the Association filed a supplemental petition for representation costs.[2]

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

1. The Association's February 13, 2012 petition for representation costs is timely.

2. The City filed a timely objection to the Association's petition for representation costs.

3. The Association's January 2, 2015, supplemental petition for representation costs is not timely. The Association's supplemental petition seeks costs for services performed regarding this Board's December 12, 2012, Compliance Order. Under OAR 115-035-0055(2), a petition for representation costs must be filed "within 21 days of the date of the issuance of the Board Order in the case for which costs are requested." Here, the Association seeks costs regarding the December 12, 2012, Compliance Order, meaning that any petition for representation costs needed to be filed within 21 days of that order. The Association, however, filed its petition on January 2, 2015, over two years after the issuance of our Compliance Order. That supplemental petition, therefore, is not timely.[3]

4. The Association is the prevailing party.

5. This case required one day of hearing.

6. Counsel for the Association submitted affidavits stating that she spent 56.60 hours of legal work on the case, billed at $165 per hour, with a total cost to the Association of $9,339. The Association's petition requests an award of representation costs in the amount of $3,500.

7. The Association's requested hourly rate of $165 per hour is average. *See Oregon School Employees Association v. North Clackamas School District*, Case No. UP-017-13, 26 PECBR 129, 130 (2014) (Rep. Cost Order) (the average rate for representation costs is between $165 and $170 per hour). The number of hours claimed (56.6) is slightly above average for a typical single-day hearing. *See id.* (cases generally require an average of 45 to 50 hours per day of hearing). Here, however, the City filed a motion for reconsideration, and Association counsel spent nine hours responding to that motion. Thus, Association counsel spent 46.6 hours regarding our initial order and an additional nine hours on the reconsideration order. Under these circumstances, we consider the claimed 56.6 hours to be reasonable.

[2]On that same date, the Association filed a 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.

[3]Because the petition was not timely filed, we need not decide whether representation costs would otherwise be awardable to the Association with respect to our Compliance Order.

8. 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).[4] However, we typically award a larger amount in cases involving a refusal to comply with an arbitrator's award because the Public Employee Collective Bargaining Act (PECBA) favors the resolution of contract disputes through arbitration. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District Of Oregon*, Case No. UP-64-03, 21 PECBR 443, 445 (2009) (Rep. Cost Order). Having considered the purposes and policies of the PECBA, our awards in prior cases, and the reasonable costs of services rendered in this case, this Board awards representation costs to the Association in the amount of $3,500.

ORDER

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

DATED this 15 day of May, 2015.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

[4]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-013-10

(UNFAIR LABOR PRACTICE)

PORTLAND FIREFIGHTERS' ASSOCIATION, LOCAL 43, IAFF,	)	
Complainant,	)	
v.	)	FINDINGS AND ORDER ON COMPLAINANT'S PETITION FOR ATTORNEY FEES ON APPEAL
CITY OF PORTLAND,	)	
Respondent.	)	

On November 15, 2011, this Board issued an Order holding that the City of Portland (City) violated ORS 243.672(1)(g) by refusing to implement the terms of an arbitrator's award. 24 PECBR 472 (2011). On January 23, 2012, we issued a reconsideration order that adhered to our original order. 24 PECBR 583 (2012). On February 13, 2012, the City filed a petition for review with the Court of Appeals.[1] On December 10, 2014, the court affirmed this Board's order. *See Portland Fire Fighters' Assn. v. City of Portland*, 267 Or App 491, 341 P3d 770 (2014). The Appellate Judgment was entered on March 16, 2015.

While the matter was pending before the court, Complainant Portland Firefighters' Association, Local 43, IAFF (Association), filed a motion with this Board seeking compliance with our order. The City responded, asserting that it was in compliance. On December 12, 2012, we issued a Compliance Order that set forth the City's obligations under our prior order and that gave the City 30 days to comply with those obligations. On January 8, 2013, the City filed a petition for review with the Court of Appeals with respect to the Compliance Order. On December 10, 2014, the court affirmed this Board's Compliance Order. *See City of Portland v. Portland Fire Fighters' Assn.*, 267 Or App 512, 341 P3d 143 (2014). The Appellate Judgment was entered on March 16, 2015.

On January 2, 2015, the Association filed its petition for attorney fees on appeal, with respect to both court opinions.[2]

[1]Thereafter, the City filed a motion with this Board to stay our order pending the outcome of the appellate review. On May 17, 2012, we denied that motion. 24 PECBR 809 (2012).

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

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

1. The Association submitted a timely petition for attorney fees, and the City submitted timely objections to that petition.

2. The appellant judgments named the Association as the prevailing party.

3. Counsel for the Association submitted affidavits stating that she spent a total of 37.6 hours on both appeals, at a rate of $165 per hour, for a total of $6,204 in attorney fees on appeal.

7. The Association's requested hourly rate of $165 per hour is average. *See Portland Police Association v. City of Portland*, Case No. UP-05-08, 25 PECBR 116 (2012) (Attorney Fees Order) (the average rate for attorney fees is between $165 and $170 per hour). The number of hours claimed for two appeals (37.6) is below the average set forth in *City of Portland*. *See id.* at 117 (each case generally require an average of 35 hours).

8. An average award is generally one-third of the reasonable attorney fees of the prevailing party, subject to the $5,000 cap in OAR 115-035-0057(3). However, we typically award a larger amount in cases involving a refusal to comply with an arbitrator's award because the Public Employee Collective Bargaining Act (PECBA) favors the resolution of contract disputes through arbitration. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District Of Oregon*, Case No. UP-64-03, 21 PECBR 443, 445 (2009) (Rep. Cost Order); *Salem-Keizer Association of Classified Employees v. Salem-Keizer School District 24J*, Case No. UP-83-99 (2003) (Unpublished Attorney Fees Order). Having considered the purposes and policies of the PECBA, our awards in prior cases, and the reasonable costs of services rendered in this case, this Board awards attorney fees to the Association in the amount of $3,102.

ORDER

The City shall remit $3,102 to the Association within 30 days of the date of this Order.

DATED this 15 day of May, 2015.

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

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 4619,	)	
Petitioner,	)	Case No. CC-004-15
v.	)	
CENTRAL OREGON COAST FIRE & RESCUE,	)	CERTIFICATION OF REPRESENTATIVE PURSUANT TO ORS 243.682(2)(a)
Respondent.	)	

CERTIFICATION OF REPRESENTATIVE

Pursuant to ORS 243.682, the Employment Relations Board has determined that a majority of eligible bargaining unit members signed valid authorization cards requesting that the INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 4619 represent the designated bargaining unit. Any timely challenges and/or objections to the petition have been resolved. Therefore, it is hereby certified that

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 4619

is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

> All full-time and part-time, paid Fire District employees working for Central Oregon Coast Fire and Rescue District except for supervisory, clerical, stipend volunteers, and confidential employees.

ISSUED JUNE 10, 2015 to:

Haley Rosenthal (Petitioner)

Ronald Guerra (Respondent)

Linda Gregg
Elections Coordinator
EMPLOYMENT RELATIONS BOARD
Old Garfield School Building
528 Cottage Street NE, Suite 400
Salem OR 97301-3807
(503) 378-6471

Form cc-cert (2007)

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. CR-001-15

(PETITION FOR ELECTION)

DUGAN GAUER AND FULL TIME AUDIO VISUAL TECHNICIANS, Petitioner, v. METRO EXPOSITION AND RECREATION COMMISSION AND INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES LOCAL 28 (IATSE), Respondents.	)	DISMISSAL ORDER

On May 22, 2015, IATSE Local 28 filed a petition for certification without an election under OAR 115-025-0000(1)(c) (ERB Case No. CC-007-15) seeking to represent all Audio Visual employees at the Oregon Convention Center. The notice was dated June 2, 2015.

Under OAR 115-025-0075(1), employees in the proposed bargaining unit may petition the Board for a representation election. However, this petition must be accompanied by at least a 30% showing of interest of employees in the bargaining unit designated in the petition for certification without an election.

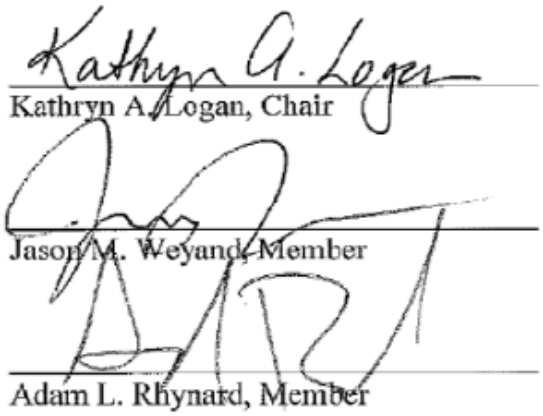
On June 16, 2015, Dugan Gauer filed this petition for an election. The petition was not accompanied by any showing of interest.

We will dismiss the petition as it does not comply with the showing of interest requirement under OAR 115-025-0075.

ORDER

The petition is dismissed.

DATED this 25 day of June, 2015.



This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-001-15

(DUTY OF FAIR REPRESENTATION)

SHIRLEY BLOCK, Complainant, v. AMALGAMATED TRANSIT UNION, DIVISION 757, Respondent.	)	DISMISSAL ORDER

Shirley Block, Portland, Oregon, appeared *pro se*.

Lane Toensmeier, General Counsel, Amalgamated Transit Union, Division 757, Portland, Oregon, represented Respondent.

On March 13, 2015, Shirley Block (Block or Complainant) filed an unfair labor practice complaint against the Amalgamated Transit Union, Division 757 (ATU), alleging that ATU violated ORS 243.672(2)(g) by breaching the terms of the collective bargaining agreement between it and the Tri-County Metropolitan District of Oregon (TriMet). The case was assigned to Administrative Law Judge (ALJ) Martin J. Kehoe.

On April 10, ALJ Kehoe directed Complainant to show cause why the complaint should not be dismissed, noting that the complaint was filed under the incorrect statute and did not appear to state a claim for relief against ATU. Complainant submitted a response on April 19, which in part sought permission to amend her complaint to allege a violation of ORS 243.672(2)(d) instead of subsection (2)(g). ALJ Kehoe granted Complainant's request to amend her complaint effective April 20. However, "[a] represented employee's right to seek relief against a union is limited to claims under ORS 243.672(2)(a)." *Teeter and Keepers v. Service Employees International Union, Local 503 and State of Oregon, Oregon Health Licensing Agency*, Case No. FR-04-09, 23 PECBR 831, 851 (2010). Accordingly, ALJ Kehoe again directed Complainant to show cause why the first amended complaint should not be dismissed.

Complainant's response was due on May 14. On May 14, Complainant e-mailed ALJ Kehoe her written response to the show cause order. Complainant attached a copy of a second amended complaint to the e-mail, which for the first time alleged that ATU's conduct violated ORS 243.672(2)(a). The Board did not receive a hard copy or facsimile copy of these documents until May 18. Shortly thereafter, ALJ Kehoe recommended to this Board that we dismiss Complainant's second amended complaint without a hearing.[1]

In considering whether Block's complaint presents an issue of fact or law that requires a hearing, we assume that the facts alleged 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 (1999). We may also rely on undisputed facts discovered during our investigation of the complaint. *Upton v. Oregon Education Association/UniServ,* Case No. UP-58-06, 21 PECBR 867, 868 (2007).

We have considered the complaint, the attached exhibits, and the filings of the parties. We summarize the undisputed facts as follows:

1. ATU is a labor organization under ORS 243.650(13), and TriMet is a public employer under ORS 243.650(20).

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[1]In response to the ALJ's second order to show cause why her complaint should not be dismissed, Block submitted a second amended complaint under ORS 243.672(2)(a), the appropriate statute for a duty of fair representation claim. However, Complainant did not comply with our rules or the instructions of the ALJ when filing her second amended complaint. This Board's rules do not list e-mail service as an acceptable method of filing pleadings or other documents in contested cases. Nonetheless, Block submitted her second amended complaint and related documents by e-mail. She did not simultaneously submit the filings in a timely manner by an accepted method of service (*e.g.*, facsimile transmission, hand delivery, or delivery through the U.S. mail). Moreover, a copy of all motions and most other documents must be served on all parties to the case, not just the Board or its agent. OAR 115-010-0045(5). In earlier communications, ALJ Kehoe had reminded Block of her obligation to provide ATU with copies of correspondence and filings in the case. Despite this reminder, Block did not copy counsel for ATU on her May 14 e-mails submitting her second amended complaint, nor did she submit a certificate of service or other proof that she served copies of these documents on ATU by another acceptable method of service.

Because Complainant did not properly file or serve the second amended complaint, we will not consider it. However, Block is appearing *pro se,* and this Board liberally construes complaints filed by *pro se* individuals. For example, in previous duty of fair representation cases where complainants cited the incorrect statute in their complaint, but it was clear that they were alleging a violation of the duty of fair representation, the Board disregarded the erroneous statutory citation and construed the complaint as alleging a violation of ORS 243.672(2)(a). *Eldred v. Association of Engineering Employees and State of Oregon, Department of Transportation,* Case No. FR-03-09, 23 PECBR 245, 246 n 1 (2009) (ignoring an "erroneous citation" to ORS 243.752 by *pro se* complainant and instead analyzing the complaint under ORS 243.672(2)(a)); *Martin v. Ashland School District #5 and Morris, OSEA; Fields, Helman Elementary,* Case No. UP-30-01, 20 PECBR 164, 165 (2003) (analyzing complaint under ORS 243.672(2)(a) despite complainant filing the complaint under subsection (2)(c)).

Here, despite the first amended complaint's citation to the incorrect statute, it is clear that Block was alleging that ATU violated its duty of fair representation. Therefore, we will follow our previous approach in similar cases and analyze Block's first amended complaint under ORS 243.672(2)(a).

2. ATU is the exclusive representative of a bargaining unit of TriMet employees that includes bus operators. Block is a TriMet employee and a member of the ATU bargaining unit.

3. ATU and TriMet are parties to a collective bargaining agreement (CBA) that expires on November 30, 2016. Article 2, Section 1, Paragraph 7 of the CBA provides generally that operators in the ATU bargaining unit may select their work schedules and assignments, referred to as "runs," by seniority. Paragraph 7 states in relevant part that:

> "a. Operators shall have the right of choice runs according to seniority in continuous service; provided that on lines which require special qualifications (such as Council Crest Line) only Operators having the necessary qualifications for the particular run or work shall have the choice of same. When an Operator loses pay because of the lack of qualifications of another Operator, [s/]he shall be reimbursed for all time lost.
>
> "b. A new sign-up shall take place on the request of the representatives of the Union, it being understood that prior to the effective date of any new schedule or schedules the District shall have all schedules prepared, posted, and ready to operate the same before any sign-up takes place. Said schedule shall remain in effect until such time as a new set of schedules has been prepared, posted, signed, and become effective. By mutual agreement between the District and the Union, the District may make minor changes in schedules without a sign-up.
>
> "* * * * *
>
> "e. A member of the scheduling department and the Union transportation executive board officers will meet to review the sign-up prior to posting and to study and revise sign-up procedures and rules."

4. In August 2014, ATU and TriMet entered into a written agreement establishing a pilot program to test a new system for bus operators to apply their seniority in selecting runs (Block Run Agreement). The Block Run Agreement, among other things, requires that bus operators choose their runs on a weekly basis rather than continuing the previous practice of choosing their runs on a day-to-day basis. The new system is commonly referred to as "block runs."

5. Under the Block Run Agreement, operators continue to select their weekly runs by seniority.

6. The Block Run Agreement was signed by ATU President Bruce Hansen and three ATU Executive Board Members from the employee groups affected by the pilot program. The Block Run Agreement was not submitted to the ATU membership for ratification.

7. The pilot program created by the Block Run Agreement went into effect on November 30, 2014. After September 13, 2015, either party may unilaterally terminate the pilot program. If neither party terminates the program, then the pilot program continues in effect.

8. In December 2014, for the first time under the pilot program, bus operators were required to select weekly block runs instead of daily runs. Many bargaining unit members were upset by the new block runs system and requested that the previous system be reinstated. ATU and TriMet did not return to the previous system.

DISCUSSION

Complainant alleges that the Block Run Agreement violates the terms of the CBA, and that ATU violated its duty of fair representation to bargaining unit members by entering into that agreement. Specifically, Complainant asserts that "ATU President Bruce Hansen implemented [the Block Run Agreement] without bargaining unit membership approval, in violation of ATU 757 bylaws, the ATU constitution and general laws, and past practices between ATU 757 and Tri-Met."

Claims that a labor organization breached its duty of fair representation under the Public Employee Collective Bargaining Act (PECBA) are brought under ORS 243.672(2)(a), which makes it an unfair labor practice for a labor organization to interfere with, restrain or coerce an employee in or because of the exercise of any right guaranteed under the PECBA. *See Mengucci v. Fairview Training Center and Teamsters Local 223,* Case Nos. C-187/188-83, 8 PECBR 6722, 6731 (1984). This provision of the PECBA requires that the exclusive representative of a group of employees represent all employees in the bargaining unit fairly, without hostility, and without discrimination. *Griffin v. Service Employees International Union Local 503, Oregon Public Employees Union and State of Oregon, Employment Department,* Case No. FR-02-09, 24 PECBR 1, 24 (2010).

When reviewing duty of fair representation claims, this Board has long held that a labor organization's actions and decisions as the exclusive representative of employees must be afforded broad discretion. *See Caddy and Van Hooser v. Multnomah County Deputy Sheriff's Association,* Case No. C-62-84, 7 PECBR 6545, 6554-55 (1984), citing *Ford Motor Co. v. Huffman,* 345 US 330 (1953); *see also Conger v. Jackson County and Oregon Public Employees Union,* Case No. UP-22-98, 18 PECBR 79, 88 (1999). We will find a violation of subsection (2)(a) only where a labor organization's actions are arbitrary, discriminatory, or taken in bad faith. *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 labor organization's conduct 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 action is arbitrary if it lacks a rational basis. *Howard Jr. v. Western Oregon State College Federation of Teachers, Local 2278, OFT and Western Oregon State College,* Case Nos. UP-80/93-90, 13 PECBR 328, 354 (1991). Finally, a union's conduct 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.

Complainant does not assert that ATU's conduct was discriminatory. Rather, she alleges that ATU's actions with respect to the Block Run Agreement were arbitrary and taken in bad faith. The sole argument raised in support of this position is Complainant's assertion that the Block Run Agreement was inconsistent with the CBA, and that under ATU's bylaws and constitution, as well as ATU's "past practices," the ATU's leadership did not have the authority to enter into such an agreement without first allowing its members to vote on the change.

Even assuming for the sake of argument that the Block Run Agreement was inconsistent with the CBA, and that ATU's constitution or bylaws required a membership vote before the leadership signed off on the agreement, that alone would be insufficient to establish that ATU violated its duty of fair representation. We have long held that a union's violation of its constitution or bylaws does not by itself constitute an unfair labor practice under the PECBA. *John, Jr Et. Al. v. Oregon School Employees Association, Local 119 and Mosher, President*, Case No. UP-70-90, 12 PECBR 409, 410 (1990). There must be other evidence to support a determination of arbitrariness or bad faith conduct by a labor organization. *Powell v. Monmouth Police Officers Association*, Case No. C-95-76, 3 PECBR 2038, 2042, *rev'd on other grounds,* 33 Or App 93, 575 P2d 175 (1978).

Here, there are no allegations of any improper motives by ATU's leadership when it entered into the Block Run Agreement, which precludes a finding of bad faith. Further, Complainant did not allege facts sufficient to demonstrate that ATU's conduct was arbitrary. Complainant does suggest that we should find that ATU violated its duty of fair representation because some bus operators were negatively impacted by the Block Run Agreement, and because that decision was unpopular with the affected bargaining unit members. But the fact that a labor organization's actions may have had a negative impact on some members of the bargaining unit is not enough to establish that those actions are arbitrary and in violation of ORS 243.672(2)(a). *Tancredi v. Jackson County Sheriff's Employee Association and Jackson County Sheriff's Office,* Case No. UP-31-04, 20 PECBR 967, 974 (2005). This is particularly true in cases such as this, which involve the application of seniority for bargaining unit members. A union's decisions on how to define and apply seniority generally disadvantage some employees while benefiting others. *Zemmer and Kirk v. American Federation of State, County and Municipal Employees and State of Oregon, Department of Corrections,* Case No. FR-01-10, 23 PECBR 886, 892 (2010).

Therefore, even assuming that the facts alleged in the first amended complaint are true, the complaint does not state a claim for relief under ORS 243.672(2)(a). As such, there is no issue of fact or law that merits a hearing, and we will dismiss the complaint. *See* ORS 243.676(1)(b).

ORDER

The complaint is dismissed.

DATED this 26 day of June, 2015.

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-009-14

(PETITION FOR CERTIFICATION WITHOUT AN ELECTION)

HILLSBORO SERGEANT'S ASSOCIATION, Petitioner, v. CITY OF HILLSBORO, OREGON, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On June 16, 2015, this Board heard oral argument on Petitioner's objections to an April 9, 2015, recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe, after a hearing was held on January 7, 8, and 9, 2015, in Hillsboro, Oregon.[1] The record closed on February 20, 2015, upon receipt of the parties' post-hearing briefs.

F. Robert Bletko, Thenell Law Group, P.C., Portland, Oregon, represented Petitioner.

Kathy Peck, Peck Rubanoff & Hatfield, P.C., Lake Oswego, Oregon, represented Respondent.

The Hillsboro Sergeant's Association (Association) seeks recognition of a new collective bargaining unit comprised of individuals employed as sergeants by the City of Hillsboro (Hillsboro) police department. Hillsboro objects to the petition and contends that the sergeants are supervisory employees as defined by the Public Employee Collective Bargaining Act (PECBA). Alternatively, if we conclude that the sergeants are not supervisory employees, Hillsboro asserts that a separate collective bargaining unit of sergeants is inappropriate and that the sergeants should be added to the Hillsboro Police Officers' Association collective bargaining unit.

[1]The case was initially assigned to ALJ Julie Reading. After the hearing, the matter was transferred to ALJ Kehoe in a periodic reassignment of cases.

The issues are:

1. Whether the police sergeants are supervisors within the meaning of ORS 243.650(23);

2. If not, is a bargaining unit of only sergeants an appropriate bargaining unit?

We conclude that the sergeants are supervisors within the meaning of ORS 243.650(23). Consequently, it is not appropriate for them to be in any bargaining unit.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT[2]

1. Hillsboro is a public employer as defined by ORS 243.650(20).

2. Hillsboro maintains a police department that currently employs 22 sergeants who oversee and work with subordinate officers and other support personnel as assigned. Ordinarily, each sergeant reports to one of seven lieutenants, who report to one of two commanders, who report to the deputy chief, who reports to Chief Lee Dobrowolski. At the time of the hearing, the deputy chief position was vacant.

3. General assignments given to sergeants are temporary and rotated. Sergeants are typically tasked with overseeing a specific division, team, or unit and are responsible for the smooth, successful operation of the same. Sergeants' shifts largely parallel those of the officers assigned to them. At times during several shifts, sergeants are regularly the highest-ranking police department employees on duty.

4. Sergeants observe and evaluate their subordinate officers on a daily and ongoing basis in order to ensure that each officer's appearance, attitude, and work comply with police department policies and procedures. Those functions include reviewing the quality and quantity of officers' work.

5. On a daily basis, sergeants decide which cases and tasks should be assigned to their officers. They also decide when and where officers' work should be done, how many officers are necessary for each assignment, and which officers should work together to complete the work.

6. Sergeants normally do not need to consult with a superior before making assignments. When deciding how to assign work, sergeants regularly use their own judgment and consider the type and magnitude of the work to be done and the availability, experience,

[2]The Association objected to numerous findings of fact in the recommended order regarding the sergeants' authority to discipline. The Association did not object to other findings of fact, which we leave intact. Because, as described below, we address only the sergeants' authority to assign, we have modified the findings of fact to include only those most relevant to that statutory criterion.

preferences, seniority, skills, specializations, and workload of each subordinate officer. They can also choose to allow a secretary to make some low-level assignments for them.

7. Some officer assignments are rotated and ordinarily last for a fixed period of time, but sergeants have extended the amount of time that officers were committed to those assignments. Sergeants do not need a superior's permission to extend an officer's assignment, but a superior can override a sergeant's extension. Sergeants can also simply recommend that an assignment be extended, and that recommendation has been followed.

8. Sergeants have assigned and recommended that certain officers get "specialty assignments." Those recommendations are normally followed. Additionally, sergeants can give input regarding the selection of officers, vocally support an applicant under consideration, or refuse to permit an officer to be part of a specialty team. While performing a specialty assignment, an officer is paid an additional five percent on top of the officer's base salary.

9. No rules specify how sergeants should select officers for specialty assignments. Sergeants use their own judgment when selecting officers, and generally do not need a superior's permission to do so. Nonetheless, some sergeants have notified superiors of their selections in advance.

10. Many specialty assignments are given to officers after a formal application process involving two review panels that give applicants numerical ratings. At the end of that process, sergeants can choose to select the applicant with the highest rating, but that is not required and does not happen in every instance.

11. Officers' regular work schedules are ordinarily prescribed by the collective bargaining agreement (CBA), and officers typically bid for shifts according to seniority. Nevertheless, sergeants are left with some authority to make temporary changes to work hours and work schedules and have done so.

12. Sergeants can summarily send an officer home with pay at any time during a shift if an officer complains about being tired or if sergeants determine that the officer is unfit for duty. That authority has been exercised. Sergeants do not need a superior's permission to send an officer home with pay, but sergeants can choose to speak with a superior first. A sergeant's decision to send someone home with pay can be overridden by a superior.

13. Sergeants assign officers overtime and can approve or deny officers' overtime requests. They can choose to direct an officer to continue working beyond the end of a shift, call an officer back to work after a shift ends, or have an officer report to work before the beginning of a subsequent shift. Sergeants often do this in order to address a staffing shortage or critical incident or to have an officer complete or modify an unacceptable police report.

14. Overtime decisions regarding requests that are made with at least 72 hours' advance notice are largely guided by the CBA's seniority requirements. However, when less notice is given or sergeants determine that there is an operational need, sergeants can use discretion and assign

overtime as necessary. They also decide how many officers must work that overtime. Overall, 30 to 40 percent of sergeants' overtime decisions are discretionary.

15. When sergeants consider whether to assign overtime, they consider the availability of volunteers, the CBA's seniority requirements, the costs involved, minimum staffing standards, and whether the assignment would cause a hardship. In the context of overtime, sergeants can use discretion and choose to go beyond the minimum staffing number. They are not strictly required to notify a superior ahead of time.

16. Sergeants can approve or deny officers' time off requests. When determining whether to approve such requests, sergeants consider minimum staffing standards, officer workloads, operational needs, and seniority. If sergeants decide that those concerns are adequately addressed, they can approve the requests without seeking a superior's approval. However, sergeants can opt to consult with a lieutenant first. They can also recommend that an officer pursue a shift trade. In this context, sergeants can choose to go below the standard minimum staffing number if they get approval to do so from a superior.

CONCLUSIONS OF LAW

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

2. The sergeants are supervisory employees within the meaning of ORS 243.650(23). Consequently, it is inappropriate for the sergeants to be in any 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 cannot be appropriately included in a bargaining unit. *City of Portland v. Portland Police Commanding Officers Association*, Case No. UC-017-13, 25 PECBR 996, 1017 (2014); *Office and Professional Employees International Union, Local #11 v. City of Hillsboro*, Case No. RC-4-99, 18 PECBR 269, 274 (1999).

To determine supervisory status, this Board assesses whether an employee meets the criteria set out in ORS 243.650(23), which defines a supervisory employee 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 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."

Supervisory employee status therefore 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. *City of Portland*, 25 PECBR at 1018; *Deschutes County Sheriff's Association v. Deschutes County*, Case No. UC-62-94, 16 PECBR 328, 339 (1996).

As this is a representation case, no party bears a burden of proof. OAR 115-010-0070(5)(a); *City of Portland*, 25 PECBR at 1018.

> "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.' . . . 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)." *City of Portland*, 25 PECBR at 1018.

Analysis

Because it is dispositive, we address only the sergeants' authority to assign. The ALJ's recommended order concluded, in part, that the sergeants satisfied the statutory definition of "supervisory employee" with respect to the factor of "assign." The Association objects to that legal conclusion, asserting that the record does not establish supervisory authority in that category. For the following reasons, we conclude that the sergeants have the supervisory authority to "assign," within the meaning of ORS 243.650(23).

Authority to Assign

We define the statutory term "assign" to mean "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." *City of Portland*, 25 PECBR at 1021 (quoting *Oakwood Healthcare, Inc., and International Union, United Automobile Aerospace and Agriculture Implement Workers of America, AFL-CIO*, 348 NLRB 686, 689 (2006)). Thus, assignment of an employee to a certain department, to a certain shift, or to certain overall tasks all "generally qualify as 'assign' within our construction." *Id.*

Here, we have little difficulty concluding that the sergeants have the authority to "assign" based on the following uncontested facts. Sergeants have the authority to: (1) decide, on a daily basis, which cases and tasks should be assigned to their officers; (2) decide how many officers are necessary for each assignment and which officers should work together to complete the work; (3) assign officers to specialty, premium-pay assignments; and (4) assign officers overtime and approve or deny officers' overtime requests. This authority fits squarely within the meaning of "assign" set forth above.

Merely having the authority to assign, however, does not end the inquiry. We must next determine whether the exercise of that authority requires the use of independent judgment. *Id.* at

1018. The uncontested facts establish that daily workload assignments require the use of independent judgment by the sergeants, including an individualized assessment of the availability, experience, preferences, seniority, skills, specializations, and workload of each subordinate officer. Likewise, determining specialty, premium-pay assignments requires the use of independent judgment. Although sergeants may employ and utilize various metrics in making the assignment, independent judgment is still required for making the ultimate decision. Lastly, the assigning of discretionary overtime also requires sergeants to use independent judgment. Unlike the "72-hours-or-more" overtime assignments, the discretionary overtime assignments require sergeants to use their independent judgment, including an assessment of operational needs and fit, relevant deadlines, appropriate staffing levels, and any relevant personal circumstances.[3]

Lastly, we conclude that the sergeants hold the authority to assign in the interest of management. *See id.* Sergeants directly oversee and are in charge of their subordinate officers, and it is in this role that they hold the authority to assign, as discussed above. In other words, this authority is in the capacity of a supervisory representative of the employer, not, for example, in the capacity of a peer-to-peer relationship.

Having concluded that the sergeants have the authority to assign within the meaning of ORS 243.650(23), we hold that the sergeants are "supervisory employees" under the PECBA. Consequently, we will dismiss the petition.

ORDER

The petition is dismissed.

DATED this 10 day of July 2015.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

[3]Overall, 30 to 40 percent of sergeants' overtime decisions are discretionary.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-013-14

(UNFAIR LABOR PRACTICE)

PORTLAND STATE UNIVERSITY CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,	)	
Complainant,	)	FINDINGS AND ORDER
	)	ON COMPLAINANT'S PETITION
v.	)	FOR REPRESENTATION COSTS
PORTLAND STATE UNIVERSITY,	)	
Respondent.	)	

On April 17, 2015, this Board issued an order holding that Portland State University (University) violated ORS 243.672(1)(a) by announcing two days before its employees were scheduled to vote on a strike that it would disable the log-in credentials of those employees who exercised their right to strike. The Complainant, Portland State University Chapter of the American Association of University Professors (Association), filed a timely petition for representation costs. The University did not file objections.

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

1. The Association is the prevailing party.

2. This case required one day of hearing.

3. The Association requests an award of $5,000, which is the maximum amount that we award in the absence of a civil penalty. *See* OAR 115-035-0055(1)(a). In support of that request, the Association submitted an affidavit and petition reflecting $26,755.55 in representation costs.[1] The majority of that time was billed at $155 per hour, with approximately 10 hours billed at $165 and 1.5 hours billed at $85.

[1]Although the Association's affidavit reflected representation costs of $39,963.50, the Association explained that approximately one-third of that amount was attributable to a claim that was settled by the parties. The Association, therefore, does not seek those additional costs in this petition.

4. The Association's hourly rate of $155 per hour is slightly lower than average. *See Oregon School Employees Association v. North Clackamas School District*, Case No. UP-017-13, 26 PECBR 129, 130 (2014) (Rep. Cost Order) (the average rate for representation costs is between $165 and $170 per hour). The number of hours claimed (approximately 173)[2] is greater than the average for a single-day hearing. *See id.* (cases generally require an average of 45 to 50 hours per day of hearing). We will adjust our award accordingly.

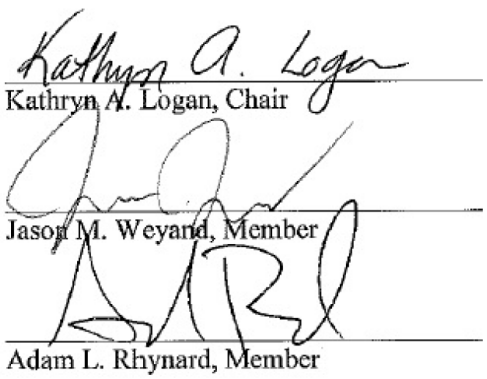
5. An average award is generally one-third of the reasonable representation costs of the prevailing party, subject to the $5,000 cap in OAR 115-035-0055(1)(a). However, this case presents two competing factors for awarding representation costs. We typically increase representation costs in cases involving a violation of ORS 243.672(1)(a) because such violations strike at core Public Employee Collective Bargaining Act (PECBA) rights. *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). We also, however, generally decrease representation costs in cases involving a novel issue, which this case presented. *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 we are presented with factors that increase and decrease our average award, we will adhere to the average award of one-third of the reasonable representation costs, subject to the $5,000 cap. *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).

6. Having considered the purposes and policies of the PECBA, our awards in prior cases, and the reasonable costs of services rendered in this case, this Board awards representation costs to the Association in the amount of $2,583.

ORDER

The University shall remit $2,583 to the Association within 30 days of the date of this Order.

DATED this 17 day of July, 2015.



This Order may be appealed pursuant to ORS 183.482.

[2]This number of hours is consistent with the Association's acknowledgment regarding the appropriate costs allocated to this petition, as explained in footnote 1 of this order.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-012-14

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, OPEU, Complainant, v. LANE COUNCIL OF GOVERNMENTS, Respondent.	)	FINDINGS AND ORDER ON RESPONDENT'S PETITION FOR REPRESENTATION COSTS

On April 30, 2015, this Board issued an order that dismissed the complaint filed by Service Employees International Union Local 503, OPEU (Union) against Lane Council of Governments (LCOG). *See* 26 PECBR 454 (2015). LCOG filed a timely petition for representation costs, and the Union filed timely objections to that petition. Pursuant to ORS 243.676(3)(b) and OAR 115-035-0055, this Board finds that:

1. LCOG is the prevailing party.

2. This case required two days of hearing.

3. LCOG requests an award of $5,000, which is the maximum amount that we award in the absence of a civil penalty. *See* OAR 115-035-0055(1)(a). In support of that request, counsel for LCOG submitted an affidavit and petition reflecting 84.9 hours billed at a rate of $190 per hour, for a total of $16,131 in representation costs.

4. LCOG's hourly rate of $190 per hour is slightly above average. *See Oregon School Employees Association v. North Clackamas School District*, Case No. UP-017-13, 26 PECBR 129, 130 (2014) (Rep. Cost Order) (the average rate for representation costs is between $165 and $170 per hour). We will adjust our award accordingly.

5. The number of hours billed (84.9) is less than the average for a two-day hearing. *See id.* (cases generally require an average of 45 to 50 hours per day of hearing).

6. The Union objects to LCOG's petition primarily on the ground that we should exclude time spent by LCOG's counsel in attempting to settle the dispute.[1] We have not previously excluded such time in awarding representation costs and we decline to do so here.

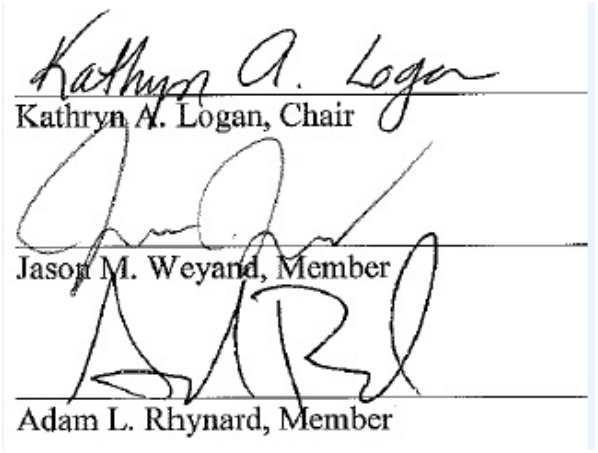
7. An average award is generally one-third of the reasonable representation costs of the prevailing party, subject to the $5,000 cap in OAR 115-035-0055(1)(a). As this case presents no circumstances to depart from that practice, we will award our average award.

8. 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 LCOG in the amount of $4,811.

ORDER

The Union shall remit $4,811 to LCOG within 30 days of the date of this Order.

DATED this 24 day of July 2015.



This Order may be appealed pursuant to ORS 183.482.

[1]The Union also asks us to exclude time spent by LCOG's counsel that involved conducting certain investigatory interviews. We decline to do so because the basis of the Union's request is, on this record, unproven and speculative. Alternatively, the Union asks us to hold this petition in abeyance, pending the conclusion of a different complaint that has yet to go to hearing and that concerns those investigatory interviews. Because any conclusion to that different complaint is too remote and unknown, we will not hold this petition in abeyance.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-027-14

(UNFAIR LABOR PRACTICE)

JACKSON COUNTY, Complainant, v. SEIU LOCAL 503, OPEU/JACKSON COUNTY EMPLOYEES ASSOCIATION, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On July 9, 2015, the Board heard oral argument on Complainant's objections to a recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe on May 22, 2015, after a hearing held before ALJ B. Carlton Grew on February 20, 2015, in Medford, Oregon.[1] The record closed on March 31, 2015, upon receipt of the parties' post-hearing briefs.

Brett A. Baumann, Attorney for Jackson County, Office of the Jackson County Counsel, Medford, Oregon, represented Complainant.

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

On July 21, 2014, Jackson County (County) filed an unfair labor practice complaint against SEIU Local 503, OPEU/Jackson County Employees Association (Union) alleging that the Union failed to bargain in good faith in violation of ORS 243.672(2)(b). The Union did not file an answer.

The issues are:

1. Did the Union:

   (a) refuse to provide information requested by the County in a timely manner, refuse to provide information at all, condition providing the information on the County's

[1]The matter was transferred to ALJ Kehoe in a periodic reassignment of cases.

use of that information, or condition providing the information on the County's submission of an initial proposal?

(b) fail to respond to the County's proposal, provide the County with any proposals, or otherwise bargain with the County?

2. If so, did the Union violate ORS 243.672(2)(b)?

As set forth below, we conclude that the Union did not violate ORS 243.672(2)(b).

RULINGS

1. The Union did not file an answer. Pursuant to OAR 115-035-0035(5) and OAR 115-035-0042(9), ALJ Grew precluded the Union from providing evidence at the hearing and restricted the Union to making legal arguments. He also barred the Union from cross-examining the County's witnesses or presenting its own. The Union did not dispute the ruling. The ALJ's ruling was correct.

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

FINDINGS OF FACT

1. The County is a public employer within the meaning of ORS 243.650(20). The Union is a labor organization within the meaning of ORS 243.650(13).

2. The County and the Union are parties to a collective bargaining agreement (CBA) that is effective from July 1, 2013 to June 30, 2016. In relevant part, Article 16, Section 3(b) provides,

> "On or before February 1, 2014, the parties agree that either the County or the Union may submit a written notification to the other party for the purpose of opening negotiations between the parties on the provision of a health insurance program for eligible bargaining unit employees to be effective on August 1, 2014. The parties agree that the only topics that may [be] bargained as part of these negotiations is the provision of a health insurance program for eligible bargaining unit employees through a fully self-insured plan or a high deductible/deductible reimbursement plan and a separate health insurance plan for eligible part[-]time bargaining unit employees."

3. Article 16, Section 3(b)(1) of the CBA further provides,

> "If the parties open negotiations pursuant to this paragraph and the negotiations do not result in an agreement between the County and the Union for the provision of a health insurance program for eligible bargaining unit employees through a fully self-insured plan or a high deductible/deductible reimbursement plan, then effective August 1, 2014, the County shall make available for health, dental, vision, disability and life insurance premiums, a maximum of one thousand three hundred thirty five

dollars ($1,335.00) per month for each eligible bargaining unit employee toward current premium costs."

4. In January 2014, the Union gave the County written notification of its intent to open negotiations in accordance with the reopener clause. At the time, the County provided the Union a monthly fixed dollar amount for each bargaining unit member, and the Union used those funds to purchase coverage from a health insurance provider of the Union's choosing. Most recently, the Union had used a provider named PacificSource. That particular coverage was set to expire on July 31, 2014. The County's unrepresented managerial employees have historically been covered by a separate County-managed self-insured plan handled by Regence BlueCross.

5. On March 6, 2014, the Union's chief bargaining spokesperson, Laure Stockton, sent the County's chief bargaining spokesperson, Joel Benton, an e-mail directing the County to have the County's consultants contact the Union's broker, Jeffrey Jones, regarding "any information [that the County] would like to see in preparation for the upcoming re-opener." Stockton's e-mail also noted that the Union had advised Jones to be prompt in the delivery of requested information to ensure that there were no delays going forward.

6. In an April 16, 2014, e-mail, Benton gave Stockton the County's response to an earlier information request. On April 17, 2014, Stockton asked Benton for an initial proposal from the County. Benton replied that the County was still "finalizing" and asked Stockton when she thought that the Union would have a proposal. On April 18, 2014, Stockton wrote that the Union would "be looking at several avenues so it might take a little longer on [the Union's] end."

7. In a May 2, 2014, e-mail to Benton, Stockton indicated that the Union hoped that the bargaining unit members could join the managers' plan and requested an assortment of information related to that plan. She also asked when the Union would receive the County's proposals, provided a projected timeline, and noted that PacificSource had promised to have a renewal quote by May 12, 2014.

8. Renewal quotes contain a variety of health insurance information including an estimate of how much it will cost to renew an expiring plan. Brokers need that renewal information to confirm risk and formulate accurate bids for their customers. Renewal quotes are typically available 90 days before a plan expires, and are sometimes available 120 days beforehand.

9. In a May 6, 2014, e-mail, Jones asked the County's broker, Douglas DeAngelis, when the County would provide the Union with a proposal for a self-insured option. DeAngelis responded that, in order for the County to generate that proposal, the County needed a renewal quote and other information from PacificSource. Jones then replied that the Union had not given him the authority to release the requested quote, and that he was still waiting for some final renewal numbers that would take into account the bargaining unit members' "April experience." In response, DeAngelis told Jones that the renewal information would be necessary "at some point," but admitted that they could "cross that bridge" later. DeAngelis also shared Jones's reply with Benton.

10. In a May 7, 2014, e-mail to Stockton, Benton noted Jones's purported lack of authority, claimed that the requested renewal quote was "within the scope of material which the

County is entitled to request as part of negotiations," and repeated the County's prior request. Stockton responded that the Union would have the quote from PacificSource at a time "close to June or the beginning of it." Stockton also wrote that she would make sure that Jones knew that Benton was expecting it when it became available. A few hours later, Stockton informed Benton that the Union actually hoped to have the quote in a couple of weeks.

11. On May 14, 2014, Stockton sent Benton an e-mail asking if the County's self-insurance proposal was ready. The e-mail also sought to "verify what changes would be coming up on that plan," as the County's renewal was "coming up soon." Benton answered that the County was still waiting for the Union's renewal quote, which, according to Benton, the County needed to finalize its proposal. In addition, Benton asked if PacificSource had provided the Union with the renewal quote yet, and explained that the County was not interested in bargaining the managers' plan and had not made a final decision as to what, if any, changes would be made to the managers' benefit levels for the next year. Later that day, Stockton asked Benton what a PacificSource renewal quote had to do with adding the bargaining unit members to the managers' plan, clarified that the Union wanted to compare the managers' plan with its own, and confirmed that she had not seen the renewal quote yet.

12. In a May 15, 2014, e-mail, Stockton told Benton that she believed that the Union had provided the County or its broker everything that had been asked for, except for the requested renewal quote. She also proposed having the bargaining unit members join the managers' plan, and suggested that the County offer a self-insured proposal that was 12 to 14 percent lower than the Union's renewal quote. Stockton then went on to explain that the Union was reluctant to provide the requested quote first because it feared that the County would use the quote "to shadow price [the Union's] current renewal."

13. In a follow-up e-mail, Benton countered that the County's right to the requested documents trumped the Union's concerns, and argued that refusing to provide the documents was not bargaining in good faith and was an unfair labor practice. Stockton, in turn, responded that the Union did not think that the County needed the renewal quote before giving the Union a proposal. She also clarified that Jones was "continuing to work on the renewal issue" and that the Union was not refusing to give the County the requested quote.

14. Next, Benton charged that Stockton was conditioning providing the requested information on the County providing a proposal and argued that that was an additional bad faith bargaining practice. He also asked for the Union to "provide any and all renewal quotes, be they designated draft, initial, revised, final or otherwise." Stockton then denied that she was putting a condition on the County's proposal, explained that she was merely sharing the Union's concerns, repeated the Union's request for a proposal from the County, and reassured Benton that the Union would provide the requested quote.

15. In a subsequent May 15, 2014, e-mail, Benton asked Stockton why the managers' plan was such a big issue for the Union, indicated that he was not sure that the County would be agreeable to the Union's ("abundantly clear") proposal that bargaining unit members join the managers' plan, and suggested that the Union could instead use a separate self-insured plan.

16. In a May 18, 2014, e-mail, Stockton informed Benton that she did not have the renewal quote, that she would be out of the office for a week, and that she would be in contact with Benton when she returned.

17. On May 28, 2014, Benton wrote to Stockton that he was fairly certain that the Union had the quote and the other information that the County had requested, and warned that, without the data, bargaining would be very difficult. He also cautioned that, if he did not get the information by the next day, the County would have to consider other options to get the Union to comply with its legal obligation to bargain in good faith.

18. In a June 2, 2014, e-mail to Stockton, Benton alleged that Jones had confirmed that Stockton had the renewal quote. The e-mail also asserted that the Union's delay and refusal to provide the quote was a violation of the Public Employee Collective Bargaining Act and warned that the County would be filing an unfair labor practice complaint against the Union if Benton was not provided with the renewal quote by the next day.

19. On June 3, 2014, Stockton indicated to Benton that she had received the renewal quote the day before while she was out of town, expressed that her plan was to send the quote to Benton after attending a meeting, and asked when the County would send its proposal. A few hours later, Stockton e-mailed the quote to Benton, who then forwarded it to DeAngelis. The renewal quote included a 22.1 percent increase in costs over the Union's existing plan.

20. When DeAngelis received the quote, he provided it to Regence BlueCross and later submitted a bid to the County. Subsequently, Benton presented a health insurance proposal to Stockton on June 13, 2014. The County's proposed plan, which was based on the benefit levels contemplated by the Union's renewal quote, provided new benefit levels that were "substantially similar" to those of the bargaining unit members' existing plan but included "high premium increases."

21. In a July 2, 2014, e-mail, Benton asked Stockton for a status update regarding the Union's consideration of the County's proposal, noted that it had been almost three weeks since Benton sent Stockton the County's offer, and cautioned that transitioning from providing lump sum payments to a self-insured plan would take time to implement.

22. On July 7, 2014, Benton was contacted by Ashlei Richmond of the County's human resources department about implementing a new PacificSource plan that the Union had purchased for the bargaining unit members. Richmond had learned of the Union's new plan through an e-mail from Jones's assistant, Linn Eagan.

23. The same day, Benton sent an e-mail to Stockton informing her that he still had not received a response from the Union. Shortly after receiving that e-mail, Stockton rejected the County's offer, wrote that self-insuring was too costly for the Union, and confirmed that the Union had renewed its coverage with PacificSource. Purportedly, in order to make it affordable, the Union's new plan had markedly different benefit levels than those of the Union's existing plan. In reply, Benton asked Stockton why the County was not given a quote that reflected the changed benefit levels.

24. In a July 8, 2014, e-mail to Benton, Stockton explained that renewal quotes always reflected a plan's current benefits, and that she had not been aware that the County was interested in considering anything other than what the County had already proposed. Later, Benton responded, alleging that the Union had not merely misunderstood the County but instead had completely failed to bargain in good faith.

25. In a July 9, 2014, e-mail to Benton, Stockton apologized and explained that she had intended to inform him of the Union's intentions earlier, but had been out sick the week before and "was dealing with the death of a dear friend." She also claimed that Jones had been reassured that DeAngelis was not missing anything.

CONCLUSIONS OF LAW

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

2. The Union did not violate ORS 243.672(2)(b).

Legal Standards

The County alleges that the Union violated ORS 243.672(2)(b), which makes it an unfair labor practice for a labor organization or its designated representative to refuse to bargain collectively in good faith with a public employer. 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. *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757*, Case No. UP-001-13, 26 PECBR 322, 342 (2014). In reviewing the totality of the circumstances involved, we often consider whether dilatory tactics were used, the contents of proposals, the behavior of a party's negotiator, the nature and number of concessions made, failure to explain a bargaining proposal, the course of negotiations, and other relevant factors. *Id.* at 343.

A party is also obligated to provide a timely response to a request from the other for information relevant to the collective bargaining process. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-56-09, 25 PECBR 152, 164 (2012). If a party does not already possess the requested information, it is generally required to make reasonable, good faith efforts to acquire the information. *Multnomah County Sheriff's Office v. Multnomah County Corrections Officers Association*, Case No. UP-5-94, 15 PECBR 448, 472 (1994).

DISCUSSION

We first address the alleged failure to provide information. There is no dispute over any of the factors that we usually consider in deciding these cases, such as the reason for the request, the ease of producing the data, the kind of information requested and the history of labor-management relations. *See Oregon School Education Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81, 6 PECBR 5027, 5031-32 (1982). Rather, the sole issue is whether the Union failed to timely provide the requested renewal quote information. We hold that it did not.

The record before us establishes that the County made its initial request for the renewal quote on May 6, 2014, and that the Union provided the requested information on June 3, 2014. Although approximately one month elapsed between the County's request and the Union's compliance, the evidence establishes that the Union did not *have* the renewal quote information until June 2.

It is axiomatic that the Union cannot provide information that it does not have. The Union told the County, the day after the County's request, that the renewal quote information would be available "close to June or the beginning of it." And in fact, the renewal quote information was received by Stockton on June 2, and turned over to the County on June 3. The Union was not untimely in its delivery of information.

The County also asserts that the Union deliberately delayed providing its renewal quote and actively blocked Jones from doing so, but those assertions are largely speculative and against the weight of the evidence. The mere fact that the Union's timing does not neatly align with DeAngelis's assertion that a renewal quote is typically available 90 days before a plan expires, although notable, does not, in and of itself, establish bad faith. The County could arguably rely on the May 6, 2014, e-mail in which Jones indicated that the Union had not given him the authority to release the requested quote. However, that statement cannot be read in isolation, and the same e-mail later clarifies that Jones had not yet completed the quote, as he was still waiting to take into account the bargaining unit members' April experience−an action that DeAngelis's testimony suggests was a "very common strategy" in the industry.

Because the Union furnished a renewal quote and other information upon request, we do not hold that the Union failed to provide information "at all," and we dismiss that allegation. To the extent that the County also alleges that the Union failed to provide other renewal quotes as requested, the evidence presented fails to show that such documents existed. Accordingly, we dismiss that allegation as well.

We turn to the County's assertion that the Union unlawfully "conditioned" bargaining by suggesting that it would provide the County with renewal quote information if the County conceded to submitting a proposal that was 12 to 15 percent below the Union's renewal quote information. *See, e.g.*, *Oregon School Employees Association v. Medford School District #549C*, Case No. UP-77-11, 25 PECBR 506, 518 (2013) (a party may not condition its participation in bargaining on the other party making a concession). As stated above, however, the renewal quote information was provided to the County once the Union received it, which was before the County submitted its initial proposal. Although the Union expressed reluctance about turning over some information and voiced concerns about how that information might be used, the overall record indicates that the Union shared the quote shortly after receiving it and repeatedly expressed a general willingness to comply with the County's requests. Accordingly, we conclude that the Union did not truly put unlawful conditions on providing the information requested by the County.

We next address the County's claim that the Union "never responded" to the County's proposal. The County's exhibits and Benton's testimony readily demonstrate that the Union unambiguously rejected the County's proposal. A rejection is plainly a response, and as a general proposition, no party is obligated to agree to a particular proposal during negotiations. ORS 243.650(4). That is particularly true when parties engage in one-issue bargaining or are

bargaining under a limited reopener, as they were here. *Oregon School Employees Association v. Clatskanie School District*, Case No. UP-9-04, 21 PECBR 599, 614-15 (2007).

The County also claims that the Union made no proposals, but it is evident that the Union repeatedly proposed having the bargaining unit members join the managers' plan–a proposal that one of Benton's May 15, 2014, e-mails describes as "abundantly clear"–and urged the County to offer a self-insured proposal that was 12 to 14 percent lower than the Union's renewal quote. Although those proposals were not particularly developed or collaborative, they at least established a general framework for subsequent negotiations and signaled an intent to bargain.

To be certain, not all of the Union's actions were consistent with a willingness to reach an agreement. We are particularly troubled by the fact that, in essence, the Union unilaterally concluded the bargaining process without notifying the County in advance. According to DeAngelis, had the Union worked with the County on benefit levels, the County could have revised its proposal within a day or two. It is also significant that, despite the approaching expiration date, the Union waited approximately three weeks to overtly reject the County's purportedly "lowball" proposal, and only did so after it had already renewed with PacificSource while away from the bargaining table.

Both of those actions had a clear negative effect on negotiations, but do not establish that the totality of the Union's conduct constituted bad faith bargaining. The Union was not simply going through the motions of bargaining with no intent of reaching an agreement. *See Lane Unified Bargaining Council v. McKenzie School District #68*, Case No UP-14-85, 8 PECBR 8160, 8196 (1985). The Union's interest was in being placed in the managers' insurance plan. After the Union's proposal was rejected, and the County proposed a plan that greatly increased costs for the bargaining unit members, the Union turned to another avenue to resolve the insurance issue. This avenue was contemplated by the parties' CBA, which set a finite period for bargaining, anticipated that the parties would not reach an agreement, designated what would happen if that occurred, and expressly provided for a subsequent reopener period in 2015. Although the parties certainly did not model good bargaining practice, the Union did not fail to bargain in good faith. The complaint will be dismissed.

ORDER

The complaint is dismissed.

DATED this 11 day of August 2015.

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-022-14

(UNFAIR LABOR PRACTICE)

911 PROFESSIONAL COMMUNICATION EMPLOYEES' ASSOCIATION,	)	
Complainant,	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
v.	)	
CITY OF SALEM,	)	
Respondent.	)	

Becky Gallagher, Attorney at Law, Fenrich & Gallagher, P.C., Eugene, Oregon, represented Complainant.

Natasha Zimmerman, Attorney for City of Salem, Salem, Oregon, represented Respondent.

On September 9, 2015, Administrative Law Judge Martin Kehoe 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). No objections were filed.

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 City shall cease and desist from violating ORS 243.672(1)(e).

3. Within 60 days from the date of this Order, the City shall restore the *status quo* that existed before the unlawful change.

DATED this 5 day of October 2015.

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-022-14

(UNFAIR LABOR PRACTICE)

911 PROFESSIONAL COMMUNICATION EMPLOYEES' ASSOCIATION,	)	
Complainant,	)	RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER
v.	)	
CITY OF SALEM,	)	
Respondent.	)	

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on June 3, 2015, in Salem, Oregon. The record closed at the conclusion of the hearing, as no post-hearing briefs were filed for the case.

Becky Gallagher, Attorney at Law, Fenrich & Gallagher, P.C., Eugene, Oregon, represented the Complainant.

Natasha Zimmerman, Attorney for City of Salem, Salem, Oregon, represented the Respondent.

On June 23, 2014, the Complainant, the 911 Professional Communication Employees' Association (Union), filed an unfair labor practice complaint with the Board against the Respondent, the City of Salem (City). The complaint alleges that the City violated ORS 243.672(1)(e) when it unilaterally changed the *status quo* by changing the overtime signup procedure from a remote electronic system to an on-site paper system. The City denies that allegation. As set forth below, we conclude that the City violated ORS 243.672(1)(e) as alleged.

RULINGS

All rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The City is and has been a "public employer" within the meaning of ORS 243.650(20). The Communications Division of the Salem Police Department manages and operates the Willamette Valley Communications Center (WVCC), which currently provides emergency and non-emergency call answering and dispatching services for a variety of public safety agencies in Lincoln County, Marion County, and Polk County. Presently, the WVCC is exclusively located in Salem, Oregon.

2. Lincoln County used to be covered by its own dispatch center in Newport, Oregon called LinCom. That arrangement changed when the WVCC and Lincoln County signed a service contract on July 1, 2012 and agreed that the WVCC would absorb LinCom and take over coverage of the region. All of LinCom's work and employees were fully transferred to the WVCC in Salem by April 2, 2013. During the interim, a number of former LinCom employees moved to Salem.

3. The Union is and has been a "labor organization" within the meaning of ORS 243.650(13). It is the exclusive representative of a bargaining unit of about 57 City employees who work at the WVCC and are classified as Call Takers and Communications Specialist Is, IIs, and IIIs. At the moment, the unit includes employees who still commute from Newport to Salem for work and were once employed by LinCom.

4. The City and the Union are parties to a collective bargaining agreement (CBA). Article 2.1 of that CBA provides that the City has a management right "to schedule and assign work, including overtime." (Exh. C-1 at 5.) Article 13.1(B) provides that basic overtime pay is 150 percent of an employee's regular rate of pay. (Exh. C-1 at 28.) Article 8.8(B) provides that overtime hours worked during a holiday shall be compensated at two times the employee's normal rate of pay. (Exh. C-1 at 19.)

5. The parties' CBA does not specifically delineate when, where, or how overtime hours are offered or selected. However, according to Article 13.8(A) of the CBA, "Operational needs shall be controlling regarding overtime assignments. When possible, overtime work shall be offered equally to eligible employees." As stated by Article 13.8(B), "Overtime work shall first be offered on a voluntary basis, except in cases of emergency operations. In cases where sufficient personnel do not accept the offered overtime on a voluntary basis, additional personnel, as deemed necessary by the City, may be required to work overtime on an equally assigned basis." (Exh. C-1 at 31.)

6. Although the actual number can vary, presently, each bargaining unit employee is generally required to work a total of 13.5 hours of overtime each week. By design, unassigned overtime hours are made available to unit employees without warning at widely varying times. Whenever the City does make the overtime hours available, employees can voluntarily sign up for (or "star") 13.5 of those hours on a first-come, first-served basis. If an employee fails to sign up

for a full 13.5 hours of overtime, he or she risks being served a "mandate slip" requiring the employee to work unaccounted-for overtime hours of the City's choosing.

7. Since as early as 1998, bargaining unit employees selected their overtime hours by hand using an on-site "pen and paper" overtime book. In October of 2012, the City switched to using an electronic scheduling system called ScheduleExpress. For the first time, unit employees could sign up for overtime and see what overtime hours were available whenever and wherever they could connect to the Internet, no matter how many employees were logged in at a time. The Union did not demand that the City bargain that change.

8. On November 15, 2012, the Union's local vice president, Jennifer Hagan, sent the City an email claiming that, while ScheduleExpress had some great features, it was "causing more problems than good." The email also detailed several problems the Union was having with the system and suggested that, if those problems could not be fixed, the overtime book should be reinstated "until at the very least the system allows for automatic (real time) approval when you volunteer for the OT selected." (Exh. R-1.) The City did not reply to the email.

9. On December 19 and 20, 2014, the City presented every bargaining unit employee with a poll sheet that allowed each employee to select from two options: (1) keep ScheduleExpress or (2) return to paper. It also contained a small space for each employee to share his or her comments. Ultimately, a clear majority of the employees polled voted to return to paper. However, many of the employees who voted for that option nevertheless commented that they liked having an online signup system that could be accessed from home. (Exh. R-2.) As a result of the poll, the director of the Communications Division, Mark Buchholz, made a preliminary decision to get rid of ScheduleExpress.

10. On May 13, 2014, a shift supervisor named Brenda Faxon sent an email to every bargaining unit employee. Her email stated that, "[e]ffective immediately," the WVCC would no longer be using ScheduleExpress and would instead be using an overtime book again. In addition, the email noted that, "[i]n order to be as fair as possible in the distribution of the overtime book," the book would be made available during a different shift each week. (Exh. C-2.) The Union was not warned of the change in advance of the May 13, 2014 email and was not given an opportunity to discuss the matter or bargain the impacts of the change or possible alternatives.

11. On May 16, 2014, Buchholz sent a letter to all WVCC staff. He explained that the City had abandoned ScheduleExpress because the WVCC could no longer sustain the time, energy, and mistakes involved in maintaining ScheduleExpress and a manual system, and ScheduleExpress "was insufficient and/or unable to handle [the City's] policies and procedures without some sort of manual system." (Exh. R-3.)

12. On May 22, 2014, the Union's attorney, Becky Gallagher, sent Buchholz written objections to the May 13, 2014 change. Therein, the Union claimed that the new method was a substantial change to the past practice and concerned mandatory subjects of bargaining, and demanded the City bargain the change and the impact of the change.

13. Since the May 13, 2014 change, bargaining unit employees must physically be in the WVCC whenever the overtime book is made available in order to select overtime hours or see what hours are available, and only one employee can use the book at a time. Employees cannot call in to schedule overtime. Off-duty employees can and sometimes do come into or remain at the office at their own expense and wait for the book released. However, employees are never told in advance when the book will be made available, and even when it is released, off-duty employees must wait until all of the on-duty employees who are interested in using the book have had a chance to do so first. That wait can possibly last for hours. Alternatively, employees can seek out another employee and try to negotiate a trade.

CONCLUSIONS OF LAW

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

2. The City violated ORS 243.672(1)(e) when it made a unilateral change to a mandatory bargaining subject.

Legal Standards

The complaint alleges that the City violated ORS 243.672(1)(e), the provision of the Public Employee Collective Bargaining Act (PECBA) that prohibits a public employer from refusing to bargain collectively in good faith with the bargaining representative of its employees. Under the PECBA, the public employer's duty to bargain is limited to changes to employment conditions that are deemed "mandatory subjects of bargaining." For other, "permissive" subjects, the public employer is free to bargain or not to bargain. However, if a change to a permissive subject has an impact on a mandatory subject, the public employer may also be required to bargain regarding that impact. *Three Rivers Ed. Assoc. v. Three Rivers Sch. Dist.*, 254 Or App 570, 574, 294 P3d 547 (2013) (citations omitted).

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. According to that subsection, 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." Subjects defined in ORS 243.650(7)(b), (d), (e), (f), and (g) are permissive. Of those subsections, ORS 243.650(7)(d) provides that "'[e]mployment 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." To determine the status of subjects the PECBA does not designate as mandatory or permissive, we use the balancing test set forth in ORS 243.650(7)(c). Under that test, a subject is permissive if the impact of the subject on management's prerogatives is greater than the impact on employees' wages, hours, or other conditions of employment. *Portland Fire Fighters Assoc. v. City of Portland*, 305 Or 275, 282-85, 751 P2d 770 (1988); *Oregon AFSCME Council 75 v. State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-56-99, 19 PECBR 76, 89-92 (2001).

In general, unilaterally changing an employment condition that is a mandatory subject of bargaining is an unfair labor practice. Whenever an unlawful unilateral change is alleged, we must first identify the *status quo* and determine whether the employer changed it. If the employer did change the *status quo*, we then decide whether the change concerns a mandatory bargaining subject. *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008). To determine the *status quo*, we often look to a variety of sources including the terms of a CBA or other memorialized polices or work rules. In other cases, the *status quo* can simply be the product of an employer's pattern of behavior. *See Oregon AFSCME Council 75, Local 2831 v. Lane County Human Resources Division*, Case No. UP- 22-04, 20 PECBR 987, 993-95 (2005); *Coos Bay Police Officers' Association v. City of Coos Bay and Coos Bay Police Department*, UP-61-92, 14 PECBR 229, 233 (1993), citing *East County Bargaining Council (David Douglas Education Association) v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184, 9192 n 11 (1986).

DISCUSSION

There is little doubt in the instant case that swiftly abandoning ScheduleExpress without a prior discussion with the Union was in fact a unilateral change in the *status quo*. Granted, the record provides no written policies or work rules that are directly applicable to the disputed change. However, it is clear that the WVCC's Salem office used ScheduleExpress without interruption from October of 2012 until it suddenly returned to using an overtime book on May 13, 2014. In our view, that is a sufficiently longstanding and consistent enough practice to establish a legitimate *status quo*. Logically, the fact that the WVCC has previously used the current "pen and paper method" for an even longer period of time does not change that. Moreover, it is evident that the two signup methods are meaningfully distinct from each other, and that, while it was available, ScheduleExpress was understood and accepted by all as the customary and exclusive means for overtime signup. *See Lane County Human Resources Division*, 20 PECBR at 993-94 (a past practice is characterized by clarity and consistency, repetition over a long period of time, acceptability to both parties, and mutuality).

Regarding the central question of whether the change concerns a mandatory bargaining subject, we note once again that ORS 243.650(7)(a), which provides a list of mandatory subjects, includes "direct or indirect monetary benefits." As outlined above, bargaining unit employees' income is directly tied to the particular overtime hours they work. By contract, holiday overtime always pays double. When individuals could use ScheduleExpress, they inevitably had a much better chance of being able to choose to work those higher paying timeslots, or even getting overtime at all. In addition, they never had to go to work while off duty at their own expense in order to avoid the very real risk of unwanted or mandated hours. To that extent, the change at issue involves more than merely substituting one selection tool for another; it affects monetary benefits, a subject that is *per se* mandatory for negotiations. *See Multnomah County Correction Deputies Association v. Multnomah County*, Case No. UP-58-05, 22 PECBR 422, 437-38, *recons*, 22 PECBR 571 (2008) (wherein a loss of unspecified overtime wages necessitated bargaining); *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-91-93, 14 PECBR 832, 867 (1993) (a subject is mandatory for bargaining if it "directly concerns" a subject listed in ORS 243.650(7)(a)); *Goya Foods of Florida*, 351 NLRB 94, 96 (2007).

We must also reiterate that ORS 243.650(7)(a) specifically lists "hours" as a mandatory bargaining subject. As this Board has observed in the past, the legislature intended the term "hours" to have a broad meaning given to it. Accordingly, we have concluded that the particular hours of the day and the particular hours of the week during which employees shall be required to work (i.e., the scheduling of employees' work) are subjects well within the realm of what public employers and unions must bargain. *International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-16-00, 19 PECBR 533, 547 (2001); *Oregon Public Employees Union v. State of Oregon, Executive Department*, Case No. UP-71-93, 14 PECBR 746, 771-73 (1993); *see Meat Cutters, Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965). The City's new restrictions on the unit's freedom to schedule overtime plainly have real bearing on those subjects, and therefore should have been bargained. *See Oregon Public Employees Union, Local 503, SEIU, AFL-CIO, CLC v. State of Oregon, Executive Department*, Case No. UP-64-87, 10 PECBR 51, 71-74 (1987) (the order in which employees will be offered the opportunity to work overtime and the method by which employees will be scheduled to work certain hours are mandatory subjects); *Blue Circle Cement Company, Inc.*, 319 NLRB 954, 960 (1995) (wherein a new restriction on employees' freedom to schedule vacations was a substantial change affecting a condition of employment); *J.L.M. Inc.*, 312 NLRB 304, 307 (1993) (policies concerning how employees must go about securing a day off or switching days off are terms and conditions of employment).

To be sure, we are cognizant of the fact that the overall workload and number of overtime hours available to the bargaining unit as a whole were not impacted by the City's unilateral change. We also recognize that, despite the change, bargaining unit employees still have some relatively equitable ability to voluntarily sign up for available overtime. However, given the circumstances before us, we must nevertheless conclude that the effects of the change on the unit's working conditions were not *de minimis*, and that the City's unilateral action violated ORS 243.672(1)(e) as alleged.

Broadly speaking, a subject cannot be characterized as mandatory and *de minimis* at the same time, and as explained, the change at issue is inextricably intertwined with subjects that ORS 243.650(7)(a) states are *per se* mandatory. *See Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03, 20 PECBR 890, 898 (2005). Furthermore, having the ability to sign up for overtime from anywhere and at any time clearly provided bargaining unit employees a number of material and significant benefits, especially for those employees who must commute from Newport, frequently travel abroad, or have to make childcare arrangements. According to unrebutted testimony, the loss of those benefits has caused morale issues and infighting in the unit and has caused unit employees to change their behavior and spend off-duty time at work. It also follows that, for any individual employee, the cumulative effect of routinely missing out on extra income rapidly builds up when measured by months and years.

PROPOSED ORDER

1. The City shall cease and desist from violating ORS 243.672(1)(e) as described above.

2. Within 60 days from the date of this Order, the City shall restore the *status quo* that existed before the unlawful change.

SIGNED AND ISSUED on September _9_, 2015.

Martin Kehoe

Martin Kehoe
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-027-14

(UNFAIR LABOR PRACTICE)

JACKSON COUNTY, Complainant, v. SEIU LOCAL 503, OPEU/JACKSON COUNTY EMPLOYEES ASSOCIATION, Respondent.	)	FINDINGS AND ORDER ON RESPONDENT'S PETITION FOR REPRESENTATION COSTS

On August 11, 2015, this Board issued an order that dismissed the complaint filed by Jackson County (the County) against SEIU Local 503, OPEU/Jackson County Employees Association (the Association). *See* 26 PECBR 501 (2015). The Association timely filed a petition for representation costs, and the County timely filed objections to the petition. Pursuant to ORS 243.676(3)(b) and OAR 115-035-0055, this Board finds that:

1. The Association is the prevailing party. *See* OAR 115-035-0055(1)(b).

2. This case required one day of hearing.

3. The Association requests an award of $4,907.50, based on 24.5 hours of attorney time at $170 per hour and 4.5 hours of attorney time at $165 per hour.

4. The Association's hourly rate is reasonable. *See Oregon School Employees Association v. North Clackamas School District*, Case No. UP-017-13, 26 PECBR 129, 130 (2014) (Rep. Cost Order) (the average rate for representation costs is between $165 and $170 per hour).

5. The County objects to the petition on the ground that the time spent by Association counsel on one particular task was excessive. We generally consider the average time spent on a case in its totality, as opposed to looking at the minutiae of how much time was spent on any given activity. Using our general approach, the time claimed by the Association (29 hours) is significantly less than that spent on an average case that requires one day of hearing. *See id.* (cases

generally require an average of 45 to 50 hours per day of hearing). Following that approach, we consider the Association's claimed hours to be reasonable.[1]

6. 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). Reasonable representation costs are costs that are calculated using the Board's criteria of hourly rate and number of hours. As this case meets the applicable criteria, we will award the Association one-third of its claimed representation costs.

7. 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 Association in the amount of $1,636.

ORDER

The County shall remit $1,636 to the Association within 30 days of the date of this Order.

DATED this 23 day of October 2015.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482

[1]Under OAR 115-035-0055(3)(b), a party that objects to costs "based on excessive time spent must submit a supporting affidavit describing the amount of time spent on the case by the objecting party." Here, the County submitted such an affidavit, which acknowledged that the County spent 92 hours on the case. Although the County acknowledges that the time spent by its counsel significantly exceeds the time spent by Association counsel, the County asserts that the discrepancy is explained by the Respondent's failure to file an answer, and the ruling that limited the Association to making legal argument. *See* 26 PECBR at 502. However, even taking into consideration that ruling, we conclude that the County's affidavit supports our conclusion that the totality of the time claimed by the Association falls within the range of reasonableness.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-015-15

(MANAGEMENT SERVICE LAYOFF)

DEBORAH WESTON, Appellant, v. STATE OF OREGON, OREGON HEALTH AUTHORITY, Respondent.	)	DISMISSAL ORDER

Deborah Weston, Portland, Oregon, appeared *pro se*.

Yael Livny, Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon represented Respondent.

On September 1, 2015, Appellant filed this appeal alleging that Respondent unlawfully reduced her salary. This salary reduction occurred when Respondent reorganized, resulting in the abolishment of Appellant's Principal Executive/Manager D position in the management service. Appellant was restored to an Operations and Policy Analyst 3 (OPA 3) position in the classified service, resulting in a monthly salary reduction of $517.00.

On September 21, 2015, Respondent requested that the appeal be dismissed because this Board lacked jurisdiction. On October 4, 2015, Appellant responded to Respondent's request for dismissal, stating that she was appealing the salary reduction as a violation of DAS Statewide Policy 30.005.01 or, in the alternative, Policy 20.005.10. She specifically stated that she was not appealing the abolishment of her position or the establishment of a new position, nor was she requesting to be returned to her management service position. On October 6, 2015, Administrative Law Judge Julie Reading, transferred this case to the Board with a recommendation that the appeal be dismissed.

For purposes of this Order, we assume the allegations in the appeal are true. We also rely on undisputed facts discovered during our investigation. *Miller v. State of Oregon, Department of Human Services, Seniors and People with Disabilities,* Case No MA-010-10 (April 2011).

Appellant was removed from management service due to Respondent's reorganization. She does not challenge her removal. Rather, she challenges the loss of salary due to her placement in a classified position, claiming that certain DAS statewide policies were violated. Because this is not a management service personnel action listed in ORS 240.570, this Board does not have "authority to set aside or modify a personnel action that is in violation of a personnel rule." *Knutzen v. Dept. of Ins. and Finance,* 129 Or App 565, 569, 879 P2d 1335 (1994).

As Appellant's appeal does not state a claim for which this Board has jurisdiction, the appeal will be dismissed. The hearing scheduled for December 8, 2015, will be cancelled.

ORDER

1. The hearing scheduled for December 8, 2015, is cancelled.

2. The appeal is dismissed

DATED this 5 day of November 2015.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482

BEFORE THE EMPLOYMENT RELATIONS BOARD

FOR THE STATE OF OREGON

LANE COMMUNITY COLLEGE EDUCATION ASSOCIATION,

Complainant,

vs.

LANE COMMUNITY COLLEGE,

Respondent.

Case No. UP-045-14

CONSENT ORDER

I. STATEMENT OF THE CASE

In December 2014 complainant Lane Community College Education Association ("LCCEA" or "Association") filed an unfair labor practice complaint against respondent Lane Community College ("College") alleging violations of ORS 243.672(1)(a), (b) and (e). The parties have agreed to settle this matter by entry of this consent order, subject to Board approval. The parties agree to waive all further proceedings in this matter, including a hearing before the Board, and judicial review of this consent order. The signatories warrant that they are authorized by their respective principals to sign the stipulation and waive reading of the Administrative Procedure Act rights (ORS 183.413). The parties further represent that the statements and the stipulations of fact are accurate and constitute all of the evidence that either party wished to present to the Board.

II. STIPULATED FACTS

1. The LCCEA is a labor organization as defined by ORS 243.650(13).

2. The College is a public employer as defined by ORS 243.650(20).

3. The allegations arose out of an investigation conducted by Lane Community College into a formal complaint filed against an Association representative. The Association filed two consolidated grievances arising out of alleged violations of the complaint procedures, and also requested information specifying the alleged misbehavior of the Association representative, including investigation materials developed during the investigation.

4. The College initially refused the Association's investigation request, and on July 17, 2014 issued a notice of findings that alleged unprofessional conduct but did not impose any discipline. The notice conditioned the Association representative's continued participation in the College governance system on the conformance of behavior to an undeveloped "protocol." In October, 2014, the College furnished the Association's attorney with a copy of the investigator's report, with names of interviewees redacted. In January, 2015, the College withdrew the letter of July 17, 2014, and substituted a letter that did not threaten any bar to participation by the Association representative.

5. The parties received an award from Arbitrator William Reeves on or about July 23, 2015. The arbitrator found that the College violated complaint procedures under the contract.

6. The parties now wish to resolve remaining pending issues that were not determined by the arbitrator.

III. STIPULATED CONCLUSIONS OF LAW

1. The Board has jurisdiction over these parties and the subject matter.

2. The College violated ORS 243.672(1)(e) by its failure to timely provide the Association with the Kilcullen investigative report and the information supporting that report.

3. The College violated ORS 243.672(1)(a) and (b) by its threat to exclude the Association representative from participation in College governance if the representative did not refrain from certain undisclosed types of conduct, and had the impact of interfering with or coercing him in the exercise of his PECBA-protected rights to represent the Association.

IV. STIPULATED ORDER

1. The College violated ORS 243.672(1)(a), (b), and (e) by its failure to provide requested investigation materials and by its threat to exclude the Association Representative from College governance meetings under some circumstances.

2. The College will provide the Association's legal counsel with an un-redacted copy of the Kilcullen investigative report and any supporting notes or materials maintained in any investigative file in the control of the College or its attorneys. This report shall not be copied, distributed, or read by anyone except the Association Executive team and Association counsel.

3. The College shall cease and desist from threatening to remove any Association representative from governance meetings based on undeveloped standards of conduct.

4. The parties will pay their own representation costs.

5. The Association will waive its request for a civil penalty.

6. The College will reimburse the Association's filing fee.

7. A copy of the attached Notice will be posted on the College Bulletin Board inside the South second floor entrance to the College Administration Building within 30 days of the date of the Board's Final Order, and will remain posted for 30 days. Lane Community College shall send an electronic copy of this order and notice to all College Administrators and Board members on their work email account.

LANE COMMUNITY COLLEGE EDUCATION ASSOCIATION

By: Henry J. Kaplan
Henry J. Kaplan
Bennett Hartman Morris & Kaplan
210 SW Morrison Street, Suite 210
Portland, OR 97204
Attorney for Complainant

Nov. 6, 2015
Date

LANE COMMUNITY COLLEGE

By: Nancy Hungerford
Nancy Hungerford
The Hungerford Law Firm
P.O. Box 3010
Oregon City, OR 97045
Attorney for Respondent

Nov. 11, 2015
Date

This consent order is approved and adopted this 17 day of November 2015.

FOR THE EMPLOYMENT RELATIONS BOARD

Kathryn A. Logan
Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

PURSUANT TO A STIPULATED ORDER of the Employment Relations Board in Case No. UP-045-14, *Lane Community College Education Association v. Lane Community College*, and in order to effectuate the policies of the Public Employee Collective Bargaining Act (PECBA), we hereby notify our employees that:

Lane Community College violated the PECBA by (1) interfering with, restraining, and coercing an employee in and because of the exercise of protected rights in violation of ORS 243.672(1)(a); (2) interfering in the administration of the Lane Community College Education Association in violation of ORS 243.672(1)(b) and (3) failing to provide information requested by the LCCEA in violation of ORS 243.672(1)(e). The violations occurred in connection with a complaint investigation.

The Employment Relations Board has ordered Lane Community College to cease and desist from violating ORS 243.672(1)(a), (b), and (e).

Lane Community College shall comply with the Board's order. Lane Community College shall cease and desist from such conduct in the future.

EMPLOYER

Dated this 17th day of Nov., 2015

By: _____
LANE COMMUNITY COLLEGE

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-023-14

(UNFAIR LABOR PRACTICE)

DISTRICT COUNCIL OF TRADE UNIONS; AFSCME LOCAL 189; LABORERS' INTERNATIONAL UNION, LOCAL 483; IBEW LOCAL 48; MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 24; AUTO MECHANICS, DISTRICT LODGE 24; OPERATING ENGINEERS, LOCAL 701; PLUMBERS, LOCAL 290; AND PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 5,	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
Complainants,	)	
v.	)	
CITY OF PORTLAND,	)	
Respondent.	)	

On August 26, 2015, the Board heard oral argument on the parties' objections to a recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew on June 19, 2015, after a hearing was held on January 13, 14, and 15, 2015, in Portland, Oregon. The record closed on March 3, 2015, following receipt of the parties' post-hearing briefs.

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

Lory Kraut, Deputy City Attorney, City of Portland, Portland, Oregon, represented Respondent.

On June 30, 2014, District Council of Trade Unions; American Federation of State, County, and Municipal Employees Local 189 (AFSCME); Laborers' International Union of North America, Local 483 (Laborers'); International Brotherhood of Electrical Workers, Local 48 (IBEW); International Union of Machinists and Aerospace Workers, District Lodge 24 (Machinists); Auto Mechanics, District Lodge 24; International Union of Operating Engineers,

Local 701 (IUOE); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States, Canada, Local 290 (Plumbers); and the International Union of Painters and Allied Trades, District Council 5 (Painters), collectively "DCTU," filed this unfair labor practice complaint against the City of Portland (City). The complaint, as amended on September 8, 2014, alleges that the City: (1) violated ORS 243.672(1)(e) when it refused to bargain over the impacts of installing GPS location reporting devices on City vehicles driven by DCTU bargaining unit members, and (2) violated ORS 243.672(1)(g) by failing to comply with the terms of the parties' ground rules for successor contract negotiations. The City timely filed an answer to the amended complaint.

The issues are:

1. Does the DCTU have standing under the Public Employee Collective Bargaining Act (PECBA) to bring this action?

2. Was the complaint timely?

3. Did the City violate ORS 243.672(1)(e) when it unilaterally implemented installation of GPS location reporting devices on City vehicles operated by members of the DCTU bargaining units and then refused to bargain over the mandatory impacts of the City's use of the GPS information?[1]

4. Did the City fail to abide by the timelines of the parties' collective bargaining ground rules and violate ORS 243.672(1)(g)?

5. If DCTU prevails, what is the appropriate remedy?

As set forth below, we conclude that DCTU has standing to file this action, and that the complaint was timely. We further conclude that the City violated ORS 243.672(1)(e) when it refused to bargain over the mandatory impacts of the City's utilization of GPS location reporting devices. The remaining claims are dismissed.[2]

RULINGS

At the prehearing conference, DCTU objected to the City's exhibits 13-19, 21-22, 24, and 26-28, claiming that the City failed to produce these documents in response to an information request made by DCTU on April 8, 2014. The information request was not a discovery request pursuant to this litigation, and the failure to provide the information was not raised as a claim in this proceeding or as a separate unfair labor practice. The ALJ deferred ruling on the motion. In

[1]Although DCTU initially complained that the City refused to bargain both the decision and the impacts regarding the GPS installation, it now only pursues the City's refusal to engage in impact bargaining. Consequently, we limit our order to that issue.

[2]In its amended complaint, the DCTU raised a claim under ORS 243.672(1)(f), but did not address that claim in its post-hearing brief, objections, or memorandum in aid of oral argument. We consider that claim abandoned and dismiss it.

his Recommended Order, the ALJ properly admitted the exhibits as the alleged failure to provide information was in response to a request not connected to this proceeding. We agree with that ruling.

At the end of the hearing, the City sought to introduce over 600 pages of exhibits as "rebuttal" exhibits. These exhibits were not listed on the City's "Exhibit List" prepared in accordance with the ALJ's November 12, 2014, prehearing order. DCTU objected to some, but not all, of the proposed exhibits, and the unobjected-to exhibits were received into evidence. The City argued that the remaining exhibits were rebuttal to DCTU's contentions that the City had, in practice, recognized DCTU as an exclusive representative. The purposes of the requirement that the parties exchange exhibits before hearing are in part to alert parties to the evidence to be submitted, eliminate duplication, and allow evidentiary issues to be addressed before or at the start of the hearing, in order to streamline the hearing. The City's proposed "rebuttal" exhibits were presented too late in the hearing to permit their orderly receipt and did not comply with the ALJ's prehearing order. We disagree with the City's assertion that it could not reasonably have foreseen that DCTU's case would include this issue. Permitting the introduction of exhibits in this fashion would defeat the purpose of requiring the prehearing exchange of exhibits as part of an orderly hearing process. The ALJ properly denied admission of the late exhibits.

The remaining rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties

1. The City is a public employer as defined by ORS 243.650(20).

2. DCTU is a labor organization as defined by ORS 243.650(13). DCTU was created by a group of City labor organizations no later than the enactment of the PECBA. Those labor organizations, as listed above, comprise the current membership of DCTU. DCTU is governed by a "Constitution and By-Laws," a single three-page document. Membership is voluntary and limited to "recognized labor groups whose membership includes public employees." The listed purposes of DCTU are to: (a) "improve and strengthen labor relations of affiliated organizations between public employees and public officials"; (b) "advise and assist in drawing up agreements pertaining to wages, hours and working conditions of the affiliated organizations"; and (c) "organize into its respective trades, public employees who come under each Union's trade jurisdiction."

3. DCTU is governed by a President, Vice-President, Secretary-Treasurer and three Trustees. Each member Union appoints its own delegate(s) to DCTU. International Unions are entitled to two delegates; local Unions get one delegate.

4. The DCTU President "appoints" a negotiating committee, but in bargaining with the City, "[e]ach affected Local Union shall have representation on the negotiating committee."

5. All "contracts negotiated under the DCTU Council affiliation shall be ratified by a majority vote of the employees affected."

6. DCTU is the entity that bargains the collective bargaining agreements for the represented employees, and is the labor organization identified on the signature page of those agreements. Specifically, the parties' 2010-2013 collective bargaining agreement is signed "For the City of Portland" for the public employer and "For the DCTU" for the labor organization.[3]

7. The cover page of the parties' agreement states "Labor Agreement Between the City of Portland and the District Council of Trade Unions[,] * * * Representing Public Employees for and on behalf of its Affiliated Local Unions Signatory Hereto," followed by a list of those affiliated local unions. The Preamble to the agreement similarly states: "[t]his Agreement, made and entered into this 1st day of July 2010, by and between the City of Portland, Oregon, hereinafter called the City, and the District Council of Trade Unions, for and on behalf of the Local Unions signatory hereto, hereinafter collectively called Unions."

8. The agreement's recognition clause states, "[t]he City recognizes the Unions as sole collective bargaining agent for all employees of the City in all classifications contained in Schedule A * * *."

9. The City/DCTU agreement also provides that contractual grievances may be submitted by "the Union involved" in the matter, and that each "local Union" has the right to submit unresolved grievances to binding arbitration.

10. Cherry Harris was the DCTU President at the time of hearing and had served for approximately five years. Harris is an employee of the IUOE.

11. Approximately 1600 City employees are covered by the City/DCTU collective bargaining agreement, with employees in all City Bureaus. Approximately 800 of these employees are represented by AFSCME, and between 400 and 600 are represented by the Laborers. Other unions are much smaller. For example, the IUOE represents approximately 30 City employees.

12. During recent contract negotiations, the City's formal bargaining communications were made to the DCTU President and Chief Spokesperson. Such communications included notices of disavowals, declarations that proposals were permissive, and declarations of impasse. The City did not give such notices, or bargain with, individual Union members of the DCTU, at least in the most recent negotiations. In his capacity as DCTU Chief Bargaining Spokesperson, Rob Wheaton initialed the official tentative agreement (TA) reached in negotiations, not representatives of the individual DCTU Unions. Communications between the parties and the Employment Relations Board (ERB) were sent to DCTU officials, including communications about mediation, final offers and cost summaries, and the declaration of impasse.

13. In the event of certain occurrences that cause "a worsening of the City's financial position" during the term of the agreement, it is the City and DCTU that are required to "meet and

[3]Citations are to the 2010-2013 collective bargaining agreement. There is no evidence that, if these provisions have changed over time, such changes are relevant to the analysis in this case.

discuss the economic impact and, by mutual agreement, [make] a good faith effort to arrive at alternatives to a reduction in the work force."

14. In 2013, the City filed a complaint with ERB naming the DCTU as a party respondent, alleging that it violated its duty to bargain in good faith under the PECBA. The complaint was later withdrawn.

15. The DCTU is the exclusive representative of the employees in the Local Unions' bargaining units for the purposes of contract negotiations.

Successor Contract Negotiations

16. On November 13, 2012, DCTU Chief Negotiator Wheaton sent a letter to the City initiating negotiations for a successor agreement to the parties' 2010-2013 collective bargaining agreement (CBA), which was set to expire on June 30, 2013. On November 27, 2012, City Labor Relations Coordinator Julia Getchall responded to Wheaton's letter, informing him that she would serve as the City's Chief Negotiator and listing the City's bargaining team. In this letter, the City agreed to an initial bargaining session on February 5, 2013.

17. On February 19, 2013, the parties signed ground rules for successor negotiations. Paragraph 11 of these ground rules provided that "the last date to exchange new issues/articles shall be March 26, 2013. Exceptions may be agreed upon by the Chief Negotiators or designees in writing."

18. The parties began mediation in July 2013. On January 6, 2014, the City filed a written declaration of impasse with ERB. The parties' final offers were due by January 13, 2014.

19. On January 13, the DCTU and the City reached a TA for a successor contract. However, on February 10, the DCTU ratification vote failed, and the parties continued with successor negotiations.

20. The City filed a second declaration of impasse with ERB on February 18, 2014, with final offers due on February 25.

21. On March 27, 2014, the parties reached a second TA, which was ratified by both parties in April 2014.

Global Positioning Systems in City Vehicles

22. A global positioning system (GPS) device is designed to identify the location of a GPS unit. GPS devices in vehicles are perhaps most widely known for providing vehicle operators with current geographic locations and directions from one location to another. The GPS equipment at issue here is installed in City vehicles and, in addition to determining the location of the vehicles, provides reports to City offices regarding the contemporaneous location of the vehicles, as well as other related factors such as speed and direction.

23. In 2008 or 2009, the City's Water Bureau began exploring the use of GPS devices in City vehicles. The early units were installed on the Water Bureau's large dump trucks, whose drivers are represented by AFSCME. The Water Bureau also installed some GPS location reporting devices on utility locators' vehicles. Those employees work alone, sometimes in isolated locations, and one locator had filed a safety complaint about the isolated working conditions. Bureau officials believed the location reporting system would add a measure of safety to utility locator staff.

24. Before these installations, Water Bureau staff met with the affected employees, two of whom were AFSCME stewards. The issue was also discussed at the AFSCME/Water Bureau Labor Management Committee in April 2008 and February 2009.

25. In 2012, the Water Bureau installed GPS location reporting devices in additional types of vehicles, including street sweepers driven by employees represented by the Laborers. The location reporting devices did not perform well and were not used for long. In 2013, the Bureau added GPS location reporting equipment to a road striping truck.

26. In late 2012, City officials received a complaint about a Water Bureau employee's use of a City vehicle. The City reviewed the vehicle's GPS location data from July 1, 2012 to October 31, 2012, which revealed that the vehicle was located at or near the employee's home at inappropriate times. On March 4, 2013, the employee was terminated for inappropriate use of City resources, absence from duty without authorization, and misuse of paid time. In late 2013, a City Water Bureau supervisor saw a vehicle assigned to a Water Bureau employee parked at a location not near any job. In response to that discovery, City officials reviewed GPS location records for the employee's assigned vehicle. The data revealed that, for the previous 18 months, the employee's vehicle had stopped over 50 times at or near the employee's mother's home. The employee stated that he had been doing wellness checks on his mother who was ill. On January 23, 2014, the City issued a five-day suspension without pay to the employee.

27. In 2012 or 2013, City officials concluded that a single GPS equipment provider working under a single bid would be more efficient than the Bureau-by-Bureau process used up to that time. In July 2013, the City asked for bidders to equip City vehicles. The invitation to bid created by the City set forth the purposes for the installation of GPS devices, including the ability to access the location of City resources and reduce certain vehicle related costs. The City also stated that the GPS devices could "also provide[] an element of safety for employees who work alone that might need assistance from their peers."

28. The City signed a price agreement with one manufacturer, NavMan, on January 1, 2014. The agreement provided for the supply of NavMan units "as requested by the City on an as needed basis," for payment "not to exceed $500,000 per year." Before this agreement, the City had GPS location reporting equipment in approximately 90 City vehicles.

29. On January 3, 2014, City Labor Relations Coordinator Patrick Ward sent an email with an attached letter to Rob Wheaton of AFSCME, Donna Hammond of IBEW, Pat Christiansen of the Plumbers, Bud Bartunek of the Painters, Richard Beetle of the Laborers, Cherry Harris of the Operating Engineers, Scott Lucy of IBEW, and Behnaz Nelson of COPPEA.

In the letter, Ward stated as follows: "[t]his letter is to notify you of the City of Portland's intention to install GPS devices on bureau and fleet vehicles. This device has capabilities that will allow the City and its bureaus to better manage and track its fleet. The installation of GPS devices on vehicles is a permissive subject of bargaining." In the body of the email, Ward specified that the City would begin installing GPS devices on its vehicles beginning in the third week of that month (January 2014).

30. On January 3, an officer of COPPEA replied to Ward (and the union officials also on Ward's email), stating that COPPEA wanted to meet with Ward and the other DCTU-represented unions, if they wished, to discuss the impacts of the City's decision. Ward responded the same day to all recipients that the City was "willing to meet," but that Ward "believe[d] it would be most efficient to meet at the bureau level. At present, each bureau is determining the potential uses of GPS information and vehicles on which it will be installed."

31. On January 22, 2014, DCTU President Harris sent a demand to engage in "effects bargaining" regarding the City's decision to install GPS in vehicles as set out in Ward's January 3 letter. That same day, Ward e-mailed Harris to state that he had received the demand to bargain. He also wrote, "[a]s I stated in my letter of January 3rd, the [Employment Relations Board] ERB has determined this to be a permissive subject of bargaining. Before scheduling a meeting, please inform the City of what issues the DCTU and COPPEA considers to be mandatory subjects of negotiations."

32. On January 27, Harris responded to Ward's January 3 email about meeting "at the bureau level," stating that handling the issue bureau-by-bureau basis was "not efficient" and that they should have "one meeting" with representatives from every bureau.

33. On January 27, Ward replied that "the City believes the installation of GPS is a permissive subject of bargaining" and that even if it were mandatory, four of the unions had already waived their right to bargain, namely "ASFCME 189, IBEW 48, Plumbers 290 and COPPEA." Ward referred to a March 19, 2013 notice to those unions that the City planned to install GPS devices at the Bureau of Development Services. Ward did not claim that there had been prior notice to the DCTU, Operating Engineers, Painters, or Laborers.

34. There was no further correspondence on this issue until April 8, when Harris repeated the demand to bargain over the City's "unilateral decision to install GPS devices on City vehicles and its impact on DCTU members who operate those City vehicles." Harris included a lengthy information request. She asked for "[a] list of all Bureaus and classifications where the City has already implemented or intends to implement its GPS tracking system, including any specifics regarding which vehicles will be affected." She also asked for the "[r]eason behind the City's intent to install GPS devices on City vehicles, and a list of all intended uses for the data collected."

35. Also on April 8, Ward responded to Harris's letter, opining that the demand to bargain was untimely and claiming that DCTU had not complied with his request to identify what mandatory subjects were affected by the GPS devices.

36. On April 9, Harris replied as follows:

> "In response to your e-mail yesterday regarding GPS installations on City vehicles, the City is the party that was not timely. I was simply responding with a fresh unnecessary demand to bargain since there has been no action since my first demand to bargain, and the City has already made this unilateral change in at least one Bureau.
>
> "You cited timelines under the expedited bargaining process, but that process only applies during the term of a collective bargaining agreement. Since our CBA is expired and the parties have been in bargaining since February 2013, the law requires you to utilize the successor bargaining process to discuss the issue, and you are not entitled to avoid that process by carving out issues and forcing resolution through expedited bargaining. Unfortunately, your notice in January was well past the timeline agreed to in the ground rules for bringing forth new proposals.
>
> "You also claimed that AFSCME 189, UA 290, and IBEW 48 waived their right to bargain, but in fact the initial notification letter to them was dated March 19, 2013, also during the 150 days of contract bargaining. The City never attempted to raise this issue at the bargaining table, even though it would have been timely under the ground rules.
>
> "In addition, you requested in January that we provide a list of what we consider to be mandatory subjects related to this issue. I believe Amy Bowles put it quite well in her letter of January 24, 2014: '...this is difficult for us to do since your January 3, 2014 letter ... does not also include the City's purpose(s) for installing these devices.' Certainly the most obvious mandatory impact is discipline, but without understanding your purposes for installation, it is impossible for us to know if there are others."

37. Harris received no response to her information request.

38. Subsequently, DCTU officials obtained the bid information for the NavMan system through an internet search. Wheaton examined the invitation to bid, and concluded that the City sought to use the GPS equipment for investigation and potential discipline of employees.

39. In 2014, the location reporting equipment was installed in vehicles operated by the Bureau of Maintenance, which includes AFSCME, IBEW, and Laborers bargaining unit members, as well as the Facilities Group, which includes IUOE. At the time of hearing, all of the Unions had some members driving City vehicles equipped with GPS location reporting devices.[4]

[4]City manager Leader credibly testified that a flatbed truck driven by Painters Union members had GPS location reporting equipment installed.

40. By the end of 2014, NavMan GPS location reporting equipment was installed in approximately 470 additional City vehicles to make the total number of location reporting equipped vehicles approximately 568.

41. In late 2014, some misuse of City cameras occurred in the City's Albina equipment yard and garage. The City was aware of the approximate date and time of the incident. The City used GPS location reporting records to learn which vehicles assigned to particular employees were parked in the yard at the time of the incident. The location reporting record stated that the vehicle of a particular Water Bureau employee in the Laborers' bargaining unit was in the yard at the time of the incident. The employee was called into a meeting with City managers with the suggestion that he bring a union steward, which he did. The employee reported that his vehicle's GPS location equipment regularly malfunctioned, reporting his vehicle as present in the yard whether it was or not. City officials determined that the employee was not present and that he was not involved in the incident. This is the first incident in the record of City managers selecting an employee for investigation based on GPS location reporting data alone.

42. The NavMan system has a desktop interface that allows users to track location, speed, idle time, set "geofences," and perform other functions. A geofence is a boundary that, when crossed by a designated vehicle, prompts the vehicle to inform City managers of that crossing. To date, the City has not activated this feature.

43. City managers obtain access to the NavMan system through assigned identification codes and passwords. City fleet manager Donnie Leader provides those codes and passwords to any manager who requests them. At the time of hearing, Leader believed he had issued codes to more than one hundred but less than 1,000 managers.

44. The City has no formal policies regarding use or access to GPS location reporting data. The City does not train managers or supervisors on the use of GPS units, such as guidance on appropriate versus inappropriate use of GPS devices, before they are given the NavMan access codes.

45. At the time of hearing, the City had not completed the installation of the GPS location reporting devices, and at least some City Bureaus had not begun utilizing the GPS system for all of its intended functions, such as dispatching City vehicles. Because of staffing, funding, and other issues, some Bureaus or departments are not using the system at all. Others, such as the Water Bureau, use it extensively.

46. The City has other methods to track the location of individual employees. Managers can contact employees by phone or radio, with a disciplinary option for employees found to make false reports. City employees must use "swipe cards" to enter or leave some City parking lots and facilities, and employees' use of those cards is recorded. The City's fuel management system records when and where vehicles are fueled and how much fuel is used. (The City has not disciplined any employees based on data from the fuel management system.) The work-order systems used by the Bureaus of Developmental Services and Transportation, and City Fleet, record when employees do particular tasks, such as inspections or work orders. Some employees carry pagers or smart phones for quick contact by supervisors. Various City facilities and other locations

used by City employees have recording surveillance cameras. Supervisors can check the location of employees by visiting their work sites. Like members of the public, City employees are subject to various forms of public surveillance, and, if an employee drives through a red light, the red light cameras may result in notification to the City through issuance of a ticket. Some City employees have received discipline because of this. DCTU has not demanded to bargain over the above technology.

47. Officials of AFSCME have received reports from bargaining unit members employed in the Water Bureau of increased queries from managers regarding why their vehicle was in a particular location, suggesting that City managers are using GPS location reporting to determine the location of City vehicles in real time.

48. Shortly before the hearing, a Water Bureau manager told employees in the IUOE bargaining unit that GPS location reporting equipment would be installed on all Bureau vehicles. The manager also stated that some people are no longer employed by the City because they failed to recognize that "time is a city resource." The manager told employees that the location reporting records would be kept for two years, and that "[i]f you're not doing anything wrong, you have nothing to worry about." Water Bureau managers did not recall using GPS location information to discipline or monitor employee performance. In one manager's experience, the "main use" of GPS location reporting is for dispatching vehicles.

CONCLUSIONS OF LAW

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

2. DCTU has standing to bring the complaint.

We first consider the City's claim that DCTU does not have standing to be a party to this case. Under ORS 243.672(3), an "injured party" may file an unfair labor practice complaint with this Board. "[T]he word 'injured' in ORS 243.672 refers to the common understanding of what constitutes an 'injured' litigant in other controversies." *Jefferson County v. OPEU*, 174 Or App 12, 21, 23 P3d 401 (2001); *see also Ahern v. OPEU*, 329 Or 428, 434 (1999) ("[t]o achieve the goals of [the] PECBA, ORS 243.672(3) provides that 'an injured party'—that is, *anyone* who has been injured by an unfair labor practice—may file a complaint with ERB." (Emphasis in original.)) Thus, a party is "injured" if it has "suffered or will suffer a substantial injury as a consequence of the alleged unfair labor practice." *Oregon City Fed. of Teachers v. OCEA*, 36 Or App 27, 32, 584 P2d 303 (1978); *see also Jefferson County*, 174 Or App at 25 (a party has "standing to bring a claim so long as it can demonstrate that it has suffered a substantial injury").

With that in mind, we first address whether DCTU has standing—*i.e.*, has or will suffer a substantial injury—with respect to the allegation that the City "[r]efuse[d] to bargain collectively in good faith with the exclusive representative." ORS 243.672(1)(e). There is no dispute that "the exclusive representative" would be injured by a public employer's refusal to bargain with it in good faith as required by the PECBA. The City, however, asserts that *only* "the exclusive representative" can be injured by such a refusal, and that DCTU is not "the exclusive

representative" in this case. For the following reasons, we conclude that DCTU qualifies as "the exclusive representative" in this matter and, therefore, that it has standing to pursue this claim.[5]

The term "exclusive representative" is defined as "the labor organization that, as a result of certification by the board or recognition by the employer, has the right to be the collective bargaining agent of all employees in an appropriate bargaining unit." ORS 243.650(8). Thus, a party may become an exclusive representative either through certification by this Board *or* voluntary recognition by an employer. Here, the City has long recognized DCTU as the collective bargaining agent for all of the employees represented by the coalition unions. DCTU was created by the coalition unions no later than the enactment of the PECBA. For more than 35 years, the City has voluntarily engaged in this mutually agreed-on bargaining relationship. *See City of Portland Engineering Employees Association v. City of Portland and International Union of Operating Engineers Local 87*, 4 PECBR 2334, 2340 (1979). During this time, the City and DCTU have negotiated numerous successor collective bargaining agreements. In this long-recognized relationship with the City, it is *DCTU* that sits at the bargaining table, advances proposals, accepts and rejects proposals, and that functions as "the collective bargaining agent" of employees represented by DCTU and its coalition unions. Likewise, it is *DCTU* and the City that are the signatories to the collective bargaining agreement. Thus, the City has, through its long standing practices and actions, voluntarily recognized *DCTU* as the bargaining agent for successor negotiations. That is sufficient for DCTU to be "the exclusive representative" for purposes of unfair labor practices arising out of those negotiations.

Despite this longstanding relationship and prodigious evidence of DCTU's role as the collective bargaining agent for the at-issue employees, the City asserts that DCTU is not (and presumably never has been) the collective bargaining agent of DCTU-represented employees. As support for that assertion, the City relies on the recognition clause in the parties' collective bargaining agreement. That clause, however, does not support the City's argument. Specifically, the clause states that the agreement is "made and entered into * * * by and between the [City] and the District Council of Trade Unions [(DCTU)], for and on behalf of the Local Unions signatory hereto, hereinafter collectively called Unions." Thus, the agreement expressly states that the City and DCTU are the entities that negotiated and signed the agreement, and that DCTU did so "for and on behalf of the Local Unions" (*i.e.*, the coalition unions that comprise DCTU). The agreement then defines DCTU and the "Local Unions" collectively as the "Unions," and "recognizes the

[5]Consequently, we do not determine whether another person (*i.e.*, *not* the exclusive representative) might also be substantially injured for purposes of standing in a (1)(e) claim, particularly in a case where the parties have elected to engage in coalition-type bargaining. *Cf. On'gele and Oregon Association of Corrections Employees v. Department of Corrections, Oregon State Penitentiary*, Case No. UP-42-93, 14 PECBR 825 (1993) (in the absence of evidence that the labor organization's failure to pursue a (1)(e) claim violated its duty of fair representation, an individual member that is represented by that labor organization does not have standing to independently pursue a (1)(e) claim).

Unions as sole collective bargaining agent for all employees of the City * * * *."[6] This language reinforces and mirrors the longstanding relationship between DCTU (and its Local Unions) and the City. Specifically, under this arrangement, which is borne out in practice, DCTU and the Local Unions are recognized as collective bargaining agents and DCTU and the Local Unions perform different roles as such under the agreement. For purposes of this case, it suffices to say that DCTU functions (and has long functioned) as the collective bargaining agent in contract negotiations.[7]

In sum, the record establishes that the City has long recognized DCTU (in both word and action) as the collective bargaining agent for the at-issue represented employees. Accordingly, when the City refused to bargain in good faith with DCTU (discussed below), DCTU suffered a substantial injury for purposes of standing.[8]

Likewise, DCTU has standing to bring the subsection (1)(g) claim. That claim alleges that the City violated the terms of the ground rules for successor negotiations between the City and DCTU, thereby committing the unfair labor practice alleged in the complaint. The ground rules at issue specifically name DCTU and the City as parties to the agreement. Rob Wheaton signed the agreement in his role as Chief Negotiator for DCTU, and City Chief Negotiator Getchell signed on behalf of the City. Therefore, the ground rules were a written agreement between DCTU and the City, and DCTU clearly would be an injured party in the event that the City violated the terms of that agreement. Accordingly, we conclude with little difficulty that DCTU also has standing to bring the subsection (1)(g) complaint.

3. The Complaint was timely filed.

We now turn to the City's claim that the complaint—insofar as the subsection (1)(e) claim applies to AFSCME—was not timely filed. ORS 243.672(3) requires that an injured party must file its complaint for a violation of the PECBA "not later than 180 days following the occurrence of an unfair labor practice." In *Rogue River Education Assn. v. Rogue River School*, 244 Or App 181, 189, 260 P3d 619 (2011), the court held that ORS 243.672(3) incorporates a discovery rule, which requires us to determine when a party knew or, in the exercise of reasonable diligence, should have known that an unfair labor practice occurred. This determination is fact specific and depends on the nature of the allegations in the particular complaint.

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[6]The City's interpretation of the recognition clause is that "Unions" refers to only "Local Unions." If that were correct, however, there would be no need to distinguish between "Unions" and "Local Unions." Likewise, if only the "Local Unions" were recognized as the collective bargaining agent of the employees, the agreement easily could have been limited to using the phrase "Local Unions," as opposed to "Unions," the latter of which we interpret to include both DCTU and the Local Unions. Our interpretation, as noted above, is also consistent with the parties' practice, whereas the City's interpretation is in direct contrast to over 35 years of bargaining history.

[7]The Local Unions generally function as the collective bargaining agent for purposes of contract administration, once the collective bargaining agreement has been agreed to by DCTU and the City.

[8]We note that, although it is infrequent, coalition-type bargaining is not unheard of, and nothing in the PECBA prohibits parties from agreeing to this type of arrangement or prohibits a public employer from recognizing such an exclusive representative.

Here, as discussed below, DCTU asserts that the City refused to bargain the mandatory impacts of its decision to install a large number of additional GPS devices on City vehicles driven by DCTU-represented employees. On January 22, 2014, DCTU requested to bargain over what it considered mandatory effects of the installation of GPS location devices. On January 27, 2014, the City responded to the demand, asserting, among other things, that the subject at issue was permissive. The City never agreed to bargain in response to DCTU's request. Thus, January 27, 2014, is the earliest possible "occurrence" for the purposes of DCTU's claim. DCTU filed the complaint in this case on June 30, 2014, less than 180 days after the alleged refusal to bargain. Therefore, this portion of the complaint is timely.

4. The City violated ORS 243.672(1)(e) when it refused to bargain over the mandatory impacts of the installation of GPS devices on City vehicles.

A public employer commits a *per se* violation of ORS 243.672(1)(e) when it issues a "flat refusal" to bargain over a mandatory subject of bargaining. *See Oregon School Employees Association v. Parkrose School District*, Case No. UP-030-12, 25 PECBR 783, 790 n 4 (2013); *see also, Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11, 25 PECBR 525, 534, *recons*, 25 PECBR 764 (2013) (observing that both a flat refusal to bargain and a unilateral change over a mandatory subject of bargaining constitute *per se* violations of the obligation to bargain in good faith). Our inquiry under this claim is straightforward: did DCTU seek to bargain over a mandatory subject for bargaining, and did the City refuse to bargain?[9]

It is undisputed that on January 22, 2014,[10] DCTU demanded to bargain over the mandatory impacts of the installation of the GPS devices on the City's vehicles. This demand to bargain was made while the parties were in successor negotiations and in response to a notification from the City that it was planning to expand the use of GPS devices in City vehicles operated by

[9]DCTU asserted that the City violated (1)(e) both by refusing to bargain the mandatory impacts of the installation of GPS devices on City vehicles and by unilaterally changing the *status quo* with respect to that subject. Therefore, we disagree with the dissent's conclusion that this case was only presented as "a unilateral change case." Moreover, both a unilateral change claim and an alleged "refusal to bargain" over a mandatory subject of bargaining are brought under the same statutory language in subsection (1)(e), which makes it an unfair labor practice for a public employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." This Board reserves the right to address an alternate legal theory regarding an issue that was undisputedly before the Board. *Cf. Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case Nos. UP-042/50-12, 25 PECBR 641, 671 (2013).

[10]It is also undisputed that the DCTU reiterated its demand to bargain on April 8, and that the City maintained its position that it was not obligated to bargain because, from the City's perspective, there was no impact on a mandatory subject of bargaining.

DCTU members.[11] The City flatly refused to bargain over those mandatory impacts, thereby violating its statutory obligation under ORS 243.672(1)(e).[12]

Although the City avers otherwise, there can be little dispute that the installation of GPS devices has some impact on a mandatory subject of bargaining. Specifically, at a minimum, the installation of the GPS devices impacts the mandatory subject of discipline. The City itself has provided multiple examples of situations where GPS devices had been utilized in employee investigations and disciplinary actions. Disciplinary standards and procedures are mandatory subjects of bargaining. *City of Springfield v. Springfield Police Association*, Case No. UP-28-96, 16 PECBR 712, 721 (1996), *AWOP*, 147 Or App 729, 939 P2d 172, 173 (1997).

We also conclude that the installation of GPS devices has an impact on the mandatory subject of safety. The City itself cites employee safety as a core justification for its decision to utilize GPS technology, stating that the technology would "enhance the safety and security of Water Bureau equipment and employees by allowing the bureau to know where the equipment was at all times." (City's post-hearing brief at 3.) In addition, the City's invitation for bids to provide the GPS equipment at issue made it clear that the City was seeking the bid in part because GPS devices "also provide[] an element of safety for employees who work alone that might need assistance from their peers." Under ORS 243.650(7)(g), safety issues are mandatory for bargaining if the subject has a "direct and substantial effect on the on-the-job safety of public employees."

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[11]Under the dissent's reasoning, DCTU is effectively barred from demanding to bargain over a mandatory subject of bargaining because the City waited to inform DCTU about the GPS decision until the "exchange-of-new-issues date" had passed. We disagree with such an approach. As set forth above, the City injected this new issue into the negotiations at such a late date when it waited until January 2014 to inform DCTU about its plan to vastly expand GPS installation on City vehicles. DCTU was not barred from demanding to bargain over the mandatory impacts of that decision, as the dissent's approach posits, merely because the City waited to inform DCTU of that decision until after the "new-issues" date had passed. In other words, the City cannot use its sword of delay as a shield against an unfair labor practice. We also see no "long-range confusion" resulting from our decision, which we see as quite straightforward: a public employer may not refuse a union's demand to bargain the mandatory effects of a decision that the employer has announced while the parties are still in successor negotiations.

[12]The dissent avers that our "opinion does not provide a mechanism by which the City could have bargained this matter, if it had decided to do so." Assuming that our opinion needs to provide such a mechanism, we would respond that the City merely needed to say "okay" when DCTU demanded to bargain the mandatory effects of the decision, and then bargain in good faith with DCTU. Whether the parties would then agree to incorporate any agreement into the master contract or negotiate a separate MOU would be up to the parties. In any event, as discussed above, the City does not get an exemption from its statutory obligation to bargain in good faith because it announced its GPS decision late in the bargaining process.

Finally, the dissent posits that our decision puts public employers in an inescapable quandary in the rare case where an employer wants to change employment conditions during successor negotiations, but a ground-rules agreement limits the exchanging of new issues/proposals to an earlier date. Any quandary, however, can simply be avoided by the public employer giving the labor organization timely notice (*i.e.*, before the "new issues/proposals" date has expired) of the desire to change employment conditions. Any alternative decision gives public employers a free pass to make a unilateral change in employment conditions so long as they wait until a "new-issues/proposals" date has passed.

See also Federation of Oregon Parole and Probation Officers v. Washington County, Case No. UP-70-99, 19 PECBR 411, 425 (2001). Here, there is enough information that the impact of installing GPS devices on City vehicles has an impact on employee safety that is sufficiently direct and substantial to require impact bargaining.

DCTU also identifies other potential mandatory impacts of bargaining. We need not, and do not, catalogue the entire list of mandatory subjects impacted by the City's installation of GPS devices on vehicles. For our purposes, it is sufficient that there is a mandatory impact (set forth above) that the City must bargain at DCTU's request. Because the City flatly refused to do so, it violated ORS 243.672(1)(e).

Finally, we disagree that the City has established an affirmative defense that DCTU waived its right to bargain the mandatory impacts of the City's GPS decision. In essence, the City argues that it had installed GPS devices as far back as 2009, and that a failure to demand bargaining at that time constitutes a waiver regarding its current expansion of GPS installation. We disagree. The City's letter informing DCTU of the City's GPS installation decision, and DCTU's demand to bargain the mandatory impacts of that decision, both took place during successor negotiations. Any prior decision by DCTU as to whether it wanted to bargain over GPS-related matters in prior contracts does not foreclose DCTU's ability to do so in this successor negotiation. If the City was correct, a labor organization would be unable to bargain over any mandatory subject that was not bargained over in an initial contract. Although there are certainly limitations that apply during the term of a contract once bargaining has been completed, those limitations do not apply once a new round of successor negotiations has begun. In short, once the parties began successor negotiations, DCTU was entitled to demand to bargain over any mandatory subject of bargaining, regardless of whether it had elected to demand bargaining over that subject in prior contracts. Once that demand was issued, the City was obligated to bargain.

In sum, we conclude that, during negotiations for a successor contract, the City flatly refused to bargain over mandatory impacts regarding the installation of GPS devices on City vehicles. Therefore, the City violated ORS 243.672(1)(e).[13]

5. The City did not violate ORS 243.672(1)(g) by failing to comply with the terms of the parties' ground rules for negotiations.

We now turn to DCTU"s claim that the City violated ORS 243. 672(1)(g), which makes it an unfair labor practice for a public employer to violate the terms of a written agreement with respect to employment relations. DCTU claims that the City violated a provision of the parties' written ground rules for collective bargaining by failing to raise the issue of GPS installation before the deadline to submit new issues and articles for inclusion in successor negotiations.

DCTU is correct that written ground-rules agreements entered into by parties are enforceable under ORS 243.672(1)(g). *Oregon AFSCME Council 75, Local 3742 v. Umatilla*

[13]Having reached this conclusion, we need not address DCTU's alternative legal theory for the (1)(e) violation—*i.e.*, a unilateral change—as such a finding would add nothing to our order or remedy.

County, Case No. UP-18-01, 19 PECBR 816, 819-20 (2002). However, we conclude that the City did not violate the ground rules as alleged by DCTU. The language at issue is contained in paragraph 11 of the ground rules, and states that "the last date to exchange new issues/articles shall be March 26, 2013. Exceptions may be agreed upon by the Chief Negotiators or designees in writing." In our discussion above, we concluded that the City refused to bargain over issues related to GPS location devices. This refusal to bargain over the issue is the opposite of bringing forward a new issue. It cannot also be said that the City "exchanged" a new issue or article in bargaining when it refused to consider the same issue that DCTU sought to negotiate over. In short, because the City never sought to "exchange new issues/articles" related to the GPS installation, it did not violate the parties' ground-rules agreement. Accordingly, the City did not violate ORS 243.672(1)(g), and we will dismiss this portion of the complaint.

Remedy

Because the City violated ORS 243.672(1)(e), we are required to enter a cease and desist order. ORS 243.676(2)(b). We will also "[t]ake such affirmative action * * * as necessary to effectuate the purposes of [the PECBA]." ORS 243.676(2)(c). In this case, because the City refused to bargain the mandatory of impact of discipline with respect to the installation of GPS devices on vehicles driven by bargaining unit members, the City is directed to refrain from further proceeding on any pending disciplinary matter in which information from those devices has been used as part of the disciplinary investigation, process, or decision regarding those members. The City is directed to do so, until it has completed its bargaining obligation.

We will also order the City to post a notice of its wrongdoing, as requested by DCTU. We generally order such a posting if we determine that a party's violation of the PECBA: (1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was 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 (1984). Not all 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 City's actions affected a significant number of bargaining unit employees, such that a posting is warranted.

DCTU also requests that we order the City to pay a civil penalty of $500. We 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 first address whether the City's conduct was repetitive. To show that a violation was "repetitive," a complainant generally must prove "the existence of a prior Board order involving the same parties that establishes that prior, similar activity was unlawful." *Association of Oregon Corrections Employees v. State or Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 74 (1999). The greater the similarity between the earlier violation and the current

violation, the more likely it is that we will find this conduct repetitive and award a civil penalty. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-27-02, 20 PECBR 571, 594 n 19 (2004).

Here, DCTU cites to several recent Board decisions where the City committed unfair labor practices in cases brought by individual unions that are part of DCTU. Five of the cases cited involved violations of ORS 243.672(1)(e), including: (1) *Laborers' International Union of North America, Local 483 v. City of Portland, Bureau of Human Resources*, Case No. UP-027-12, 25 PECBR 810 (2013) (the City violated subsection (1)(e) by unilaterally increasing the annual work hour for certain LIUNA-represented employees); (2) *American Federation of State, County and Municipal Employees, Local 189 v. City of Portland, Portland Police Bureau*, Case No. UP-49-08, 24 PECBR 612 (2012) (the City violated subsection (1)(e) by reclassifying positions out of the bargaining unit without first bargaining over the mandatory effects of that decision); (3) *AFSCME Local 189 v. City of Portland*, Case No. UP-46-08, 24 PECBR 1008 (2012) (the City violated subsection (1)(e) by failing to timely respond to AFSCME's information request); (4) *AFSCME Local 189 v. City of Portland*, Case No. UP-13-06, 21 PECBR 858 (2007) (Consent Order concluding that the City violated subsection (1)(e) by refusing to provide information requested by AFSCME); and (5) *Laborers' Local 483 v. City of Portland*, Case No. UP-15-05, 21 PECBR 891 (2007) (the City violated subsection (1)(e) when it denied LIUNA access to information related to a grievance).

We find that the City's refusal to bargain over the mandatory impacts of its decision on the installation of GPS devices is sufficiently similar to earlier violations to warrant a civil penalty. Specifically, we have twice found that the City refused to bargain over mandatory subjects in the past three years. Additionally, although the remaining three cases involve refusals to provide information to DCTU unions, those cases also involve a repeated disregard for the obligation to bargain in good faith under ORS 243.672(1)(e). Therefore, we will order the City to pay a civil penalty of $500, as requested by DCTU.

ORDER

1. DCTU has standing to bring this complaint.

2. The City shall cease and desist from refusing to bargain in good faith about the impacts of the adoption of the GPS location reporting system. The City will bargain with DCTU about the impacts of these changes. Moreover, the City is directed to refrain from proceeding on any pending disciplinary action of DCTU-represented bargaining unit members, *if*: (1) the City used information from installed GPS devices as part of its disciplinary investigation, process, or decision; and (2) DCTU requests that the City so refrain. The City also may not prospectively use GPS-related information as part of any disciplinary investigation, proceeding, or decision regarding DCTU-represented bargaining unit members, until it has completed its bargaining obligation.

3. The City shall pay a civil penalty of $500 to DCTU.

4. Within 30 days of the date of this Order, the City shall sign and post copies of the attached notice in prominent places throughout the City where DCTU-represented employees are likely to see it. The notice shall remain posted for at least 30 days.

5. The remaining claims are dismissed.

DATED this 25 day of November 2015.

*Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482

*Chair Logan, Concurring in Part, Dissenting in Part:

While I concur with the majority opinion regarding standing, timeliness, and the ORS 243.672(1)(g) charge, I strongly disagree with the analytical framework used by the majority in deciding that the City violated ORS 243.672(1)(e). First, this case was presented and argued as a unilateral change case, not as a "refusal to bargain during successor negotiations" matter. Next, as discussed below, it was not possible for the parties to "add" this issue to their successor negotiations due to the bargaining framework that the parties themselves had established. By choosing the "refusal to bargain" pathway, the majority was able to bypass making a decision about whether the City changed the *status quo*, and granted DCTU an avenue for bargaining that DCTU was not permitted to have at this point in its bargaining process. Further, I foresee that only long-range confusion will emanate from the majority's chosen analytical path rather than clarity for what parties should do in the future.

A brief summation of the relevant facts and timeline is in order. The City began installing GPS units on vehicles driven by DCTU bargaining unit members in 2008 and 2009. Over the years, more installations occurred, until by 2014, GPS units had been installed in up to 90 vehicles.

On February 5, 2013, successor negotiations began. The parties agreed that the last date to "exchange new issues/articles" was March 26, 2013. By letter dated March 19, 2013, the City informed DCTU that GPS devices would be installed in all Bureau of Development Services vehicles that were driven by DCTU bargaining unit members. There was no response to the letter, and specifically, no demand to bargain by DCTU. Further, neither party introduced an article or language regarding the issue of installation and use of GPS systems by the March 26 cut-off date, or at any point during the course of negotiations.

On January 3, 2014, the City sent a letter to various bargaining unit leaders, including DCTU Chief Negotiator Rob Wheaton, telling them that the City would be installing GPS units in all City vehicles driven by DCTU bargaining unit members. On January 13, 2014, DCTU and the City reached a tentative agreement on the successor contract.

On January 22, after reaching a tentative agreement on the successor contract, DCTU President Harris sent a demand to the City to bargain the effects of installing the GPS units. The City responded, asking DCTU, among other things, to identify the issues DCTU believed were mandatory for bargaining. On January 27, President Harris sent a response to the City, but the response did not contain any subjects that DCTU believed were mandatory for bargaining. The City answered that same date, stating that various unions had waived their right to bargain, but did not proffer any subjects for bargaining.

The ratification vote failed on February 10, 2014. The parties went back to mediation, where a second tentative agreement was reached on March 27, 2014. This tentative agreement contained no language about the GPS installation or any impacts of the use of GPS devices. On April 8, President Harris repeated DCTU's demand to bargain about GPS units. The parties' tentative agreement was ratified by DCTU on April 25, 2014, and by the City on April 30, 2014. The contract took effect on the date of the City's ratification.

The majority states that DCTU's demand to bargain, made on January 22, "was made while the parties were in successor negotiations." The opportunity to "exchange new issues/articles" in those negotiations, however, expired on March 26, 2013, the parties' cut-off date. Although the parties could always mutually agree to add issues to the bargaining table beyond the cut-off date, that particular avenue was closed to them on January 22, 2014 because both parties were now obligated to support the tentative agreement.[14] *See Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections and State of Oregon, Department of Administrative Services and Department of Corrections v. Oregon AFSCME Council 75*, Case Nos. UP-006/016-10, 24 PECBR 864, 884 (2012) (negotiators must present agreement to ratifying entities and support its approval). Assuming without deciding that a mandatory subject for bargaining existed, no process existed to address this bargaining issue within the context of successor negotiations.[15] The parties legally could not add issues at this point of successor negotiations.[16]

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[14]The parties' ground rules agreement stated that a full contract is contingent on ratification by "the City Council and the Unions."

[15]DCTU was very clear in its argument that any attempt by the City to add "new issues" to the bargaining table would be a violation of ORS 243.672(1)(g). So the City could not have added it to the issues as part of the "successor negotiations" as there was no ability to agree to do so. It appears that the only option left for the City to complete a bargaining process would have been to wait until the new contract was ratified, and then bargain under ORS 243.698—a practice that is likely not encouraged by the Board and certainly not one the unions have wanted.

[16]This is not to say that the parties could not have bargained and reached a separate agreement outside of "successor negotiations," but that it not what the majority opinion posits. It is the fact that the parties were in successor negotiations that is the basis of the majority opinion.

These parties, however, did not ratify the initial tentative agreement. Was the City now obligated to bargain over the effect of GPS installation after February 14 in the "successor negotiations?" Again, our case law discusses that parties are to narrow the issues, not expand them. Further, for either party to have raised the issue during those negotiations and during mediation likely would have drawn a different unfair labor practice complaint. This Board has been fairly clear about the legality, or rather lack thereof, when attempting to raise new issues late in the bargaining process. *See Blue Mountain Faculty Association /Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 754 (1985) ("[a] new issue injected late in the bargaining process frustrates the [PECBA] statutory process").

To decide this issue as a matter of a refusal to bargain during successor negotiations simply confuses what has been clearly settled case law. During a hiatus period, refusal to bargain charges arise when a party refuses to bargain at the collective bargaining table over a properly presented proposal containing a mandatory subject, or when a party (usually the employer) refuses to bargain over a *status quo* change regarding a mandatory subject of bargaining. The majority cites no cases similar to this—where the matter did not arise at the bargaining table, but outside of it, and this Board determined that it was a per se refusal during "successor negotiations."

So, how should DCTU raise this issue to have us resolve the matter? As it did—asserting that ORS 243.672(1)(e) was violated when the City changed the *status quo* regarding a mandatory subject for bargaining. *See* ORS 243.712(2)(d).[17]

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). *Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11, 25 PECBR 525, 534-35 (2013). In this case, the City did not change the *status quo*.

DCTU has the burden of establishing that the *status quo* was changed. *Deschutes County 911 Employees Association v. Deschutes County 911 Service District*, Case No. UP-32-04, 21 PECBR 493 (2006). The *status quo* is generally established based on 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, 664-65, *supplemental orders*, 19 PECBR 804 and 19 PECBR 848, *recons*, 19 PECBR 895 (2002), *aff'd*, 187 Or App 92, 67 P3d 951 (2003). In this instance, the only possible applicable standard is past practice.

Here, the parties' past practice is that of the City installing and using GPS units in vehicles driven by DCTU members. The City has been doing so since 2008. The parties do not dispute that

[17] "After 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 * * *."

GPS units have been installed and used in vehicles driven by DCTU bargaining unit members. DCTU also knew that the City had used GPS data in disciplinary matters.[18] So has the City changed a past practice? The answer is clearly "no."

DCTU asserts that since four of the unions within DCTU did not have GPS units installed in work vehicles, the *status quo* with those unions was "no GPS monitoring." (Complainant's post-hearing brief at 20.) But if DCTU is the exclusive representative, a position with which I am in agreement with the majority, then for purposes of the *status quo* determination, we must look to the entire DCTU bargaining unit, not to what occurred with the different unions within the bargaining unit.

The ultimate question raised by DCTU is whether the City's *expansion* of its GPS use, with a concomitant demand to bargain, required the City to bargain about employee impacts. In other words, the *status quo* is not the City installing or using the GPS units, but rather that more GPS units are being installed, and can be used. This is not a *status quo* change.

In support of its argument, DCTU cites several ERB cases. Each of those cases, however, is clearly differentiated from the current matter before us. In *AFSCME Council 75 v. State of Oregon, Department of Public Safety Standards and Training,* Case No. UP-56-99, 19 PECBR 76 (2001), the main issue was whether a background information form (BIF) was mandatory for bargaining. The BIF previously had been used with nonbargaining unit applicants (initial hires) only, and was now being used by the state for AFSCME bargaining unit members who either had been promoted, or wanted to promote. The difference is that while the BIF had never been used for AFSCME bargaining unit members, GPS devices and information had been used by the City with DCTU bargaining unit members.

The next cited case is *Federation of Parole and Probation Officers v. State of Oregon, Oregon Corrections Division,* Case No. UP-117-89, 12 PECBR 816 (1991) *aff'd,* 114 Or App 214, 834 P2d 519, *vacated and remanded,* 116 Or App 572, 841 P2d 704 (1992), *order on remand,* 14 PECBR 693 (1993). In this matter, no FOPPO-represented bargaining unit member had been required to take a drug test, even though employees in other Corrections Division bargaining units had been required to do so. Again, this case is easily distinguishable from the case before us, as it involves implementing a drug testing requirement not previously in existence with this bargaining unit.

Finally, DCTU refers to a series of cases involving an increase in student contact time. This situation is not analogous to the one at bar.

DCTU must establish that the *status quo* has been changed, as it is a required element of a unilateral change analysis. It has failed to so. Consequently, it is not necessary to discuss any of the other elements. Contrary to what the majority decided, the ORS 243.672(1)(e) complaint should be dismissed.

[18]DCTU Chief Negotiator Wheaton stated that the installation of the GPS units "was not a big deal."

I briefly touch upon the quandary that parties now face due to the majority's decision. Many parties may be in bargaining during the hiatus period, and beyond the cutoff period negotiated in the ground rules to bargain new issues. Under this decision, unless the labor organization agrees to bargain the matter as part of the successor negotiations, the employer may only move forward with deciding and implementing, after appropriate notice, a mandatory subject at its peril. Further, interjecting new subjects of bargaining later in the bargaining cycle as part of "successor negotiations" does not aid the parties in reaching resolution.

For all of the above, I respectfully dissent from the majority's conclusion, analysis and order regarding ORS 243.672(1)(e), including the issuance of a civil penalty and posting of a notice.

Kathryn A. Logan

Kathryn A. Logan, Chair

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-023-14, *District Council of Trade Unions; American Federation of State, County, and Municipal Employees Local 189; Laborers' International Union of North America, Local 483; International Brotherhood of Electrical Workers, Local 48; International Union of Machinists and Aerospace Workers, District Lodge 24; Auto Mechanics, District Lodge 24; International Union of Operating Engineers, Local 701; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States, Canada, Local 290; and the International Union of Painters and Allied Trades, District Council 5 v. City of Portland,* and in order to effectuate the policies of the Public Employee Collective Bargaining Act, we hereby notify our employees that:

The Employment Relations Board has found that the City of Portland (City) violated ORS 243.672(1)(e) by refusing to bargain in good faith about the impacts of the installation of GPS location reporting devices on City vehicles. To remedy this violation, the Employment Relations Board ordered the City to:

1. Cease and desist from violating ORS 243.672(1)(e);
2. Post this notice for 30 days in prominent places where bargaining unit personnel are employed;
3. Bargain with DCTU about the impacts of these changes;
4. Refrain from proceeding on any pending disciplinary action of DCTU-represented bargaining unit members, *if*: (1) the City used information from installed GPS devices as part of its disciplinary investigation, process, or decision; and (2) DCTU requests that the City so refrain. The City also may not prospectively use GPS-related information as part of any disciplinary investigation, proceeding, or decision regarding DCTU-represented bargaining unit members, until it has completed its bargaining obligation; and
5. Pay a civil penalty of $500 to DCTU.

EMPLOYER

Dated_____, 2015 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-059-13

(UNFAIR LABOR PRACTICE)

PORTLAND FIRE FIGHTERS' ASSOCIATION, IAFF LOCAL 43,	)	
Complainant,	)	
v.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW,
CITY OF PORTLAND,	)	AND ORDER
Respondent.	)	

On July 30, 2015, this Board heard oral argument on the parties' objections to an April 6, 2015, recommended order issued by Administrative Law Judge (ALJ) Julie D. Reading, after a hearing held on July 9, 10, 11, and 21, 2014, and on August 18, 19, and 27, 2014, in Portland, Oregon, and on October 9, 2014, by telephone.[1] The record closed on December 12, 2014, following receipt of the parties' post-hearing briefs.

Barbara Diamond, Attorney at Law, Diamond Law, Portland, Oregon, represented Complainant.

Lory J. Kraut, Senior Deputy Attorney, Portland City Attorney's Office, Portland, Oregon, represented Respondent.

On December 26, 2013, the Portland Fire Fighters' Association, IAFF Local 43 (Union) filed an unfair labor practice complaint alleging that the City of Portland (City) violated ORS 243.672(1)(e) by failing to bargain before unilaterally: (1) making several operational changes due to a budget reduction, (2) promoting a lower-ranked candidate over a higher-ranked one to Senior Inspector from a ranked eligibility list, and (3) developing an unranked eligibility

[1]Due to the voluminous record, number of issues, and complexities of this matter, a transcript was necessary for this Board to determine the matter. The transcript was received on September 28, 2015.

list to promote candidates to Battalion Chief.[2] In an amended complaint filed on July 9, 2014, the Union added allegations that the City violated ORS 243.672(1)(g) and ORS 243.672(1)(h) by violating, and refusing to sign, a Memorandum of Understanding (MOU) regarding the use of Rapid Response Vehicles (RRVs).

The City timely filed an answer and amended answer. The City's amended answer contained several affirmative defenses, including waiver, estoppel, timeliness and failure to exhaust available remedies.

The issues are:

1. Did the City unilaterally make several operational changes due to a budget reduction without bargaining in violation of ORS 243.672(1)(e)?

2. Did the City unilaterally change the status quo when it promoted a lower-ranked candidate to Senior Inspector over a higher-ranked one in violation of ORS 243.672(1)(e)?

3. Did the City unilaterally change the status quo when it used an unranked eligibility list to promote Battalion Chiefs in 2013, violating ORS 243.672(1)(e)?

4. Did the City refuse to sign a valid and final MOU regarding the use of RRVs in violation of ORS 243.672(1)(h)?

5. Did the City violate the terms of a valid and final MOU regarding the use of RRVs in violation of ORS 243.672(1)(g)?

For the reasons set forth below, we conclude that the City violated ORS 243.672(1)(e) by promoting a lower-ranked candidate to Senior Inspector and using an unranked eligibility list to promote candidates to Battalion Chief in 2013. The remainder of the complaint is dismissed.

RULINGS

City Witness List

Before the hearing, the Union moved to bar the City from presenting any witnesses because the City had not copied the Board on a witness list that was sent to the Union, pursuant to OAR 115-010-0068(3) and a prehearing order. The ALJ properly denied the motion, given that OAR 115-010-0068(3) does not contain any requirement to copy the Board on the exchanged witness list, and the Union did not assert or demonstrate any prejudice.

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

[2]The complaint also contained an allegation that the City violated ORS 243.672(1)(g) in using that unranked list. Because the Union's post-hearing brief did not address the (1)(g) allegation, we limit our analysis to the (1)(e) claim.

FINDINGS OF FACT

Parties, Collective Bargaining Agreement, and General Background

1. The City is a public employer as defined by ORS 243.650(20). The City is comprised of several bureaus including Portland Fire and Rescue (the Bureau).

2. The Bureau is the largest fire and emergency services provider in the State of Oregon, serving Portland and the regional metropolitan area. The Bureau provides critical public safety services including fire prevention, public education, and emergency response to fire, medical, and other urgent incidents.

3. The Union is a labor organization as defined by ORS 243.650(13) and is the sole and exclusive bargaining agent for establishing wages, hours, and working conditions for all sworn bargaining unit members in the Bureau.

4. The Bureau is a paramilitary organization. Employees join the Bureau as Fire Fighters and may be promoted to the following ranks in ascending order: Lieutenant, Captain, Battalion Chief, Deputy Chief, Division Chief and Fire Chief.

5. Fire Fighters, Lieutenants, Captains, and Battalion Chiefs are in the Union's bargaining unit. The Fire Chief, Division Chiefs, Deputy Chiefs and Assistant Fire Marshals are not in the bargaining unit.

6. The Bureau has five primary divisions: the Fire Chief's office, which is headed by the Fire Chief; Emergency Operations (E-ops), which is headed by a Division Chief (Operations Division Chief); Training, Safety, and EMS (Training), which is headed by a Deputy Chief; Prevention, which is headed by a Division Chief (Fire Marshal); and Management Services, which is headed by a Senior Business Operations Manager.

7. The Bureau assigns personnel various roles, which are available based on rank. These are referred to interchangeably as assignments, specialty pay assignments, and premium pay assignments. Specialty pay assignments include, but are not limited to: Fire Investigators, Senior Inspector Specialists, Hazardous Materials Specialists, EMS Coordinators, Paramedics, and employees assigned to the Dive Team.

8. The City and the Union are parties to a collective bargaining agreement (CBA) covering the period of July 1, 2012 through June 30, 2016, the terms of which are not disputed.[3]

[3]We will discuss the specifics and applicability of any particular provision below in the Conclusions of Law portion of the order.

9. The following Bureau employees hold, or previously held, the following roles:

Name	Rank(s)	Role(s) or Assignment(s)
Alan Ferschweiler	Lieutenant Since 2007	(1) Union President since January 2013 (2) Union Vice President – January 2007 to January 2013
Jim Forquer	(1) Division Chief of E-ops since June 19, 2014 (2) Deputy Chief of E-ops – March 2014 to June 2014	(1) Union President – January 2010 to January 2013 (2) Union Vice President – Before Ferschweiler
Erin Janssens	(1) Fire Chief since June 5, 2012 (2) Division Chief – 2009 to June 5, 2012	(1) Served as the Fire Marshal in rank of Division Chief – 2009 to 2012
John Klum	Fire Chief – 2008 to 2012	
John Nohr	Fire Battalion or Division Chief since October 2003	Previously served as Safety Officer, Special Operations Chief, Emergency Operations Chief, Fire Prevention (Fire Marshal) Chief, Training Chief in rank of Division Chief.
Nathan Takara	Division Chief	Fire Marshal since December 2012

RRV Program Bargaining History

10. The E-ops division is responsible for emergency medical and fire suppression activities that operate out of 30 stations strategically located throughout Portland.

11. A fire truck, also known as a ladder truck, carries ladders and equipment for forcible entry, ventilation, and extraction. It is used for a variety of rescue operations, including fires. A fire engine primarily carries hoses and water for extinguishing fires. A quint is a hybrid apparatus that carries both water and ladders, but not to the extent that a truck or engine would individually. An RRV is a van, sport utility vehicle, or pick-up that carries medical equipment and a small amount of fire suppression equipment. RRV companies respond to minor injuries and traumas, but do not respond to potentially life threatening issues such as cardiac arrest.

12. Before 2009, the Bureau used two-person response teams for lower acuity medical calls. However, they were later eliminated due to budget concerns.

13. In early 2012, the City Council became interested in the Bureau implementing the use of two-person RRVs as a pilot program, and putting the personnel assigned to the program on a 40-hour workweek schedule (eight hours per day) instead of the standard 24/48 compression schedule (meaning 24 hours on duty and 48 hours off duty).

14. The Bureau notified the Union of its intent to implement the proposed RRV program. At that time, the parties were bargaining the terms of the CBA. Although the parties initially included the RRV negotiations as part of the negotiations for the CBA, they ultimately decided to embody the negotiated RRV terms in a separate MOU. One of the Union's primary

concerns was the City's desire to staff RRVs on a 40-hour workweek schedule, instead of a 24/48 compression schedule.

15. On July 5, 2012, the Union submitted an MOU proposal regarding RRV use. The City provided counterproposal language on July 10 and 12, 2012. On July 31, 2012, the City provided two additional counterproposals. On August 10, 2012, the City provided another counterproposal.[4]

16. On September 12, 2012, then-Union President Jim Forquer signed a draft version of an RRV MOU. It did not contain any City representative signatures. The basic terms provided for staffing the RRVs Monday through Thursday from 0800 hours to 1800 hours, and addressed the consequent details involved with converting employees from a 24/48 compression to a 40-hour workweek schedule. Further, the September 12, 2012, MOU provided that the "funding for the additional four (4) positions to staff the RRV pilot program is on a one time basis ending June 30, 2013. If the program is extended beyond June 30, 2013, the City will notify the Union of the proposed extension."[5]

17. In September 2012, the Bureau shifted the RRV employees back to a 24/48 compression schedule due to the Bureau employees' strong preference for that schedule. The Bureau did not believe that it needed to negotiate the schedule change, because the 24/48 compression schedule was reflective of the status quo in the CBA and favorable to employees.

18. On November 5, 2012, City Labor Relations Coordinator Patrick Ward sent a draft of an RRV MOU to Forquer. Forquer forwarded it to members of Union leadership. This draft version differed in language from the one that Forquer signed on September 12, 2012, but was consistent on the substantive terms.

19. The Union filed this unfair labor practice complaint on December 26, 2013. The Union alleged in its initial complaint that it had entered into an agreement permitting the City to adopt its desired RRV program on a trial basis. The Union attached an unsigned and undated draft of the RRV MOU that had been circulated by the parties via email on November 5 and 6, 2012.

20. In its answer, the City stated that the City entered into an agreement with the Union regarding the conditions for the 40 hour workweek RRV program.

21. As the hearing neared, neither party could locate a copy of an RRV MOU that both parties had signed. As a result, the City asserted that there was not a valid signed agreement.

22. Several days before the hearing, the Union made a demand on the City to sign the version of the RRV MOU attached to the complaint as Exhibit B. The City refused, stating that

[4]The record does not contain the Union's counterproposals to the Bureau.

[5]Multiple versions of the MOU were submitted in evidence. The quoted language is from the document signed by Forquer.

the City did not receive any communications from the Union after sending it the MOU draft on November 5, 2012, and therefore there was not a final agreement.

23. As a result, the Union requested to amend its complaint to include an ORS 243.672(1)(h) claim. The ALJ granted the motion. The ALJ also provided the City with leave to amend its answer in light of the amended complaint. In its amended answer, the City stated that it did not sign the RRV MOU as demanded and it no longer believed the RRV MOU draft attached to the complaint as Exhibit B reflected an agreement between the City and the Union.

Bureau Hiring and Promotions

24. Bureau promotions are done through the Bureau of Human Resources (Human Resources) using a standardized process. Candidates seeking promotions to Captain and Battalion Chief positions start with an "assessment center," where high-ranked personnel from external jurisdictions administer exercises to challenge candidates in handling situations similar to what they would encounter in the position. The assessment center evaluators score the candidates' performance. Candidates who pass the assessment center then complete an oral panel interview. The panelists score the candidates, and the Bureau then ranks candidates on an eligibility list based on their combined assessment center and oral panel interview scores. The Bureau publishes the eligibility lists to all Bureau employees and they typically remain valid for two years. When vacancies occur, the Fire Chief interviews candidates. In some cases, the Fire Chief may delegate the interview to a lower-ranking manager.

25. Before 2008, the City Charter contained a provision about how to fill a vacancy from an eligibility list. Specifically, that provision directed Human Resources to submit the names of the five highest-ranking candidates from the appropriate eligibility list to the appointing authority. For equally ranked lists, Human Resources was directed to certify all applicants. The City's Human Resources Administrative Rules (HRARs) codified those charter provisions.

26. Sometime around 2008, the city charter was changed to eliminate language regarding what kind of eligibility lists existed or how those lists were used.

27. In 2011, the City deleted an HRAR provision that directed Human Resources to certify the names of the candidates who were highest on the eligibility list for a position.

28. In July 2008, a Union bargaining unit member with the initials GP applied for a promotion to Captain and was placed on the ranked eligibility list. The Fire Chief interviewed him, but passed over him for a lower-ranked candidate. Due to the Bureau's failure to promote GP, he filed a grievance. The Union alleged that the Bureau improperly used the Fire Chief's interview to eliminate GP.

29. Based on GP's grievance, the Bureau entered into a settlement agreement with the Union, agreeing that the following would apply to all promotional recruitments for sworn personnel on an eligibility list: (1) Fire Chief interviews would be part of the selection process and would be pass or fail; (2) any member who failed a Fire Chief interview would be provided with a summary of improvement areas; (3) any member who failed a Fire Chief interview would not be

eligible for another interview for one year; and (4) a vacancy would have to be available in order for a candidate to interview.

30. After a full year, another vacancy opened. GP was not given an opportunity to interview and a lower-ranked candidate was selected. GP filed a grievance and was then given the opportunity to interview as a result. Although GP passed the interview, the eligible list expired and GP withdrew the grievance.

31. In April 2009, the Bureau opened the promotional process for Battalion Chief positions. The Bureau determined that two employees failed the oral interview panel and removed them from the ranked list, rather than ranking them at the bottom.

32. The Union filed a grievance and an unfair labor practice complaint, alleging that the Bureau had changed the process by allowing the oral panel interview to become a basis for elimination rather than a lower ranking. Subsequently, the Bureau and the Union entered into a settlement agreement that: (1) the aggrieved individuals would be added to the eligible list; (2) the Union would withdraw its ULP; (3) the Bureau could develop an equally ranked recruitment process for the next Battalion Chief examination to be used on a trial basis; (4) as part of the selection process for the next Battalion Chief promotion, the Bureau could develop a ranked eligibility list at the conclusion of the Chief's interview; and (5) the parties agreed that the terms of the settlement agreement would not establish any precedent.

33. The Bureau opened the process for promotion to Battalion Chief in 2011, using the one-time unranked list as agreed to in the settlement agreement. Otherwise, the Bureau continued to use ranked lists for other officer promotions until October 2013, when the Bureau requested and received an equally ranked list for a Battalion Chief promotion. After receiving the list, the Fire Chief interviewed all candidates on the list and then ranked them according to her preference.

34. In addition to the above instances, the Bureau has passed over (or not selected someone for a promotion in ranked order) in the following recruitments: Battalion Chief in 1995, Fire Captain in 1995 (two individuals passed over), Fire Lieutenant in 1998 (at least two individuals passed over), Battalion Chief in 2003 (at least two individuals passed over), Captain in 2007, and Lieutenant in 2010. There may have been two or three other instances of promotional candidates being selected out of ranked order.[6] In some cases, candidates that were initially passed over were subsequently promoted.

Louisa Jones

35. The Bureau hired Louisa Jones as a Fire Fighter in 2001. In 2006, she was promoted to Lieutenant through an examination process. In 2009, Jones moved into the Investigations unit after successfully testing for a promotion to Investigator.

[6]Deputy Chief Nohr testified that he remembered some additional examples of times when higher-ranked promotional candidates were passed over in favor of a lower-ranked candidate. However, the City did not provide the eligibility lists for these individuals. Therefore, there are no specific details or documentary evidence about these promotions.

36. In fall 2011, Jones sought to promote to the position of Senior Inspector. She had not previously served as an Inspector. Previous work as an Inspector was not a requirement for taking the Senior Inspector exam and did not affect a candidate's score. However, in the City's class specification, the knowledge, skills and abilities desired of a Senior Inspector include knowledge of fire prevention inspection methods and knowledge of current literature, trends, and developments in the field of fire prevention inspection, including codes, laws, and legal inspections.

37. On October 27, 2011, the Bureau issued a ranked list for the Senior Inspector promotion. The list contained the first four following names in ranked order: (1) Gary Boyles, (2) Peter DeVal, (3) Louisa Jones, and (4) Kari Schimel.

38. The first Senior Inspector vacancy occurred in early 2013. The first five eligible candidates on the ranked list were interviewed in March 2013.[7] Jones passed the interview. Gary Boyles was selected for the first vacancy. Shortly thereafter, Fire Marshal Nathan Takara learned that a retirement may create another vacancy. Around that time, Peter DeVal told Takara in confidence that he might be leaving the Bureau soon.

39. Because of the potential vacancy and because DeVal would likely decline a promotion, Fire Chief Janssens and Fire Marshal Takara encouraged Jones to transfer to inspections work in order to gain direct experience. However, such a transfer would have meant a pay reduction for Jones as she would have lost premium pay bonuses, including 11 percent as a paramedic and 6 percent for training. As a result, she declined to do so in the absence of any guarantee of being promoted to the Senior Inspector position.

40. Although there was not a vacancy at the time, Fire Chief Janssens and Fire Marshal Takara promoted Kari Schimel, the fourth ranked candidate, to the Senior Inspector position, passing over Jones. Their decision was based on Janssens's subjective determination that Schimel was the more highly qualified candidate for promotion.

City Budget Process

41. The Bureau receives its funding from the City's general fund, and therefore its funding allocation is determined as part of the City's budget process. The City's fiscal year is from July 1 to June 30 of the following year. The budget process usually starts in November with the "budget kick-off." At that time, the mayor and City Council supply the City bureaus with guidance on the proposed budgets. The bureaus then work on developing a proposed budget between November and January, often through the process of a Budgetary Advisory Committee (BAC).

42. The Bureaus' budget proposals are usually due to the City Budget Office in late January or early February. After receiving the proposals, the City Budget Office spends the next five or six weeks reviewing them in light of the City's overall spending priorities. During that time, the City Budget Office primarily communicates with the bureaus through the review process.

[7]Both Takara and Janssens credibly testified that the top five ranked candidates were all initially interviewed after the eligibility list was generated.

43. After completing its review, the City Budget Office then submits the budgets to the City Council, who hold budgetary sessions with the bureaus and hold forums for community input on the bureaus' budget requests. This process supports the development of the Mayor's Proposed Budget (MPB), which is the first formal step in the budget process and typically happens in early May. After the mayor develops and releases the MPB, the City hosts additional public forums.

44. When approving the budget, the City Council convenes as the City Budget Committee. The City Council members review the MPB, make any desired changes, and approve a budget, typically at the end of May. It then becomes the Approved Budget. The Approved Budget then goes to the Tax Supervising and Conservation Commission (TSCC), which reviews the budget to make sure that it is accurate and legally compliant. The TSCC has 21 days to review the budget and hold a hearing to determine compliance. Once the TSCC has determined that a budget is compliant, it sends it back to the City Council.

45. The City Council makes any recommended changes and ultimately adopts a final approved budget (FAB) in June. If the City Council votes to pass it on an emergency basis, it goes into effect immediately.

46. After the FAB, the City Council can change how it spends money throughout the year. Although changes can happen at any time, they typically occur three times a year (October, February and May) in a budget monitoring process known as a "BUMP." A BUMP is similar to the budget process, but on a smaller scale. In exceptional circumstances, such as a civil judgment against the City, the City can change the budget. However, changes are typically limited to the BUMPs.

47. In December 2012, the City was facing a $25 million deficit for the fiscal year when the budget process began. At this time, Fire Chief Janssens began sending all Bureau personnel detailed memoranda containing information about the budgetary process. These memoranda were emailed to all Bureau employees and were often printed and distributed at the fire stations. The memoranda also contained internet hyperlinks to webpages with more detailed information.

48. On December 13, 2012, the City issued its 2013-2014 Current Appropriation Level (CAL) target budgets to the City's bureaus. Instead of providing bureaus with a specific reduction target, the City Council asked bureaus to use a modified zero-based budget development process. Under this system, bureaus were allowed to request up to 90 percent of the CAL target, while cutting 10 percent, and submitting prioritized add-back packages for the cut items. The CAL targets were developed based on the 2012-2013 budget, with a variety of adjustments for inflation and other factors.

49. In early December, the Bureau convened its first BAC meeting. The BAC's purpose was to determine budget priorities and areas that could provide savings. The Bureau's BAC was comprised of 16 members, including six citizens, the Multnomah County Medical Director, a management employee, Union President Alan Ferschweiler and the Bureau's core leadership team.

50. The BAC met twice in January. On January 23, 2013, it issued a 64 page report, detailing the proposed budget, which reflected 10 percent in reductions (approximately $9.25

million) and prioritizing add-back packages. The BAC's budget-saving measures included closing seven stations, transferring the Safety Officer and Chief Inspector assignments out of the bargaining unit, eliminating two Training Academy Specialist positions, discontinuing the Dive Team, eliminating the Hazmat Coordinator position, reducing overtime, closing the Safety Learning Center (thereby eliminating an Inspector position), and eliminating 3.8 FTE support positions.

51. On February 4, 2013, the Bureau submitted its requested budget to the City Budget Office. The City Budget Office worked with the Bureau, and then provided the proposed budget to the City Council and mayor.

52. On April 30, 2013, the mayor released the MPB (discussed below). His office formally submitted the MPB to the City Council on May 15, 2013. The MPB reflected a projection of a $21.8 million City budget shortfall and a $4.4 million (4.7 percent) budget reduction from the Bureau's CAL. Therefore, the budget cuts for the City or the Bureau were not as significant as originally projected.

53. Around this time, the City, the Bureau, and Union staff were aware of an existing federal grant that could provide the Bureau with significant additional funds. This grant, named the Staffing for Adequate Fire and Emergency Response (SAFER) grant, was available through the Federal Emergency Management Agency (FEMA). Chief Janssens began to explore the possibility of applying for the SAFER grant and obtaining bridge funding from the City until grant monies could be received in order to avoid Bureau lay-offs.

54. Between May 9 and approximately May 25, Ferschweiler met with Noah Siegel, the mayor's Budget Liaison, on several occasions to discuss the budget, the pending operational reductions, and the SAFER grant. Chief Janssens was present during one of these meetings.[8]

55. The purpose of the meetings, from the City's perspective, was to see if the City and the Union could come to some sort of accord regarding how the Bureau would implement the directive to cut 4.4 million dollars from its budget.

56. At the outset, the mayor's proposed budget directed the Bureau to replace four companies with four RRVs, which would have resulted in laying off 26 firefighters. That budget also directed the Bureau to eliminate: (1) the Safety Battalion Chief position (shifting all functions to the Deputy Chiefs Office): (2) two Firefighter Specialists assigned during the Training Academy; (3) one Inspector position; (4) two carpenters; (5) the Hazardous Materials Coordinator (shifting those duties to the Training Division); (6) the Dive Rescue Team; and (7) three Investigators positions.[9]

[8]The parties presented conflicting testimony on whether there ultimately was an agreement that resulted from these meetings. Where the testimony conflicts, we rely on the corroborated testimony of Siegel and Janssens, which was more specific and detailed than the testimony of Ferschweiler.

[9]The MPB reflected some additional areas of operational budget cuts not relevant to this complaint.

57. When Siegel and Ferschweiler first met (May 9, 2013), the two discussed the proposed budget and identified key concerns. The City (via Siegel) communicated that savings needed to be achieved, and that replacing the companies with RRVs was the identified method to accomplish that. For the City, the highest priority was "achieving the innovations," meaning expanding the use of RRVs and reducing the number of companies. The Union's (via Ferschweiler) highest priority was preserving the firefighter positions. Siegel asked Ferschweiler to think about whether the parties could agree to a compromise, wherein the City would achieve the RRV innovations without a reduction in the firefighter positions, and the Union would agree to not oppose or grieve those innovations. The two also discussed the possibility of the City applying for a SAFER grant.

58. After the meeting, Siegel discussed the SAFER grant option with the mayor, who was quite resistant to that option because he believed that option to be a "band-aid" for larger financial and structural problems at the Bureau.

59. Siegel and Ferschweiler met again on May 16, this time accompanied by Janssens. At the meeting, the three agreed to a common course of action—namely, that they would try to reach the following compromise. The City would not close four companies or eliminate 26 firefighter positions, but would instead introduce quints and consolidate double-engine companies by adding RRVs to stations that already had an engine. The City would also apply for a SAFER grant, although Siegel explained that the SAFER component would be a difficult sell to the mayor, who had made clear that such an option "was not his first choice." Thus, if Siegel were to pursue this option with the mayor, he needed the assurance that the Union would not object to or grieve the "innovation" changes outlined above.

60. On May 21, 2013, *The Oregonian* published a story asserting that Janssens had successfully convinced the mayor and City commissioners to keep four-person staffing at each station and to use RRVs *in addition to* engines, rather than *replacing* engines. The article also stated that Stations 2 and 8 would lose engine and ladder trucks to be replaced by quints. The article quoted Ferschweiler as stating that he had concerns about the quint-truck replacements in those two stations.

61. Also on May 21, 2013, the Union wrote to its members to discuss the Union's "work to mitigate the budget cuts proposed by [the mayor]." The Union referenced the *Oregonian* article of the same day and asserted that the Union had been "successful in moving the [m]ayor away from his original proposal." The Union asserted that the agreement outlined in the article, however, was reached by Janssens and the mayor. The Union also stated that it had met with the mayor earlier that day "to discuss our two primary concerns" and to offer "several solutions to avoid cutting positions." According to the document, the Union: (1) requested to delay any changes until October 1, 2013, but the mayor made no such commitment; (2) asked the mayor to consider releasing contingency funds, with the mayor indicating that he had already released what he was comfortable with; and (3) requested that the City apply for the SAFER grant, with the mayor responding that he would not commit to that because it was one-time funding that could not be relied on in the future.

62. The mayor did meet with the Union (among others) on May 21 to discuss the budget cuts and his proposed options. In preparation for that meeting, Siegel prepared a briefing book that outlined talking points for the mayor. That briefing book was an internal document intended only for the mayor and his staff. The book included endorsing the proposal laid out in *The Oregonian* article. The briefing book also noted that, at that point, 26 positions would still be lost, but that those positions could be saved "through a combination of internal bureau savings and a COLA reduction by [the Union]." Lastly, the briefing book asserted that Ferschweiler "want[ed] to do it, but his people still think that they can hold out, apply for the SAFER grant, and wait for better times."

63. The briefing book was inadvertently left out after the meeting and was obtained by a newspaper, the *Portland Mercury*, which published the contents of the book on May 22, 2013. The article that published the briefing book characterized Ferschweiler as personally supporting that his members forego some COLA amount, but doubtful that his members would "go along."

64. The May 22 *Portland Mercury* publication made things difficult for Ferschweiler with the Union members, as it indicated that he was willing to consider COLA reductions. Siegel called Ferschweiler to apologize about the inadvertent disclosure and to ask to meet again, which they did a few days later.

65. At this meeting, both Siegel and Ferschweiler expressed their respective positions on the outstanding issues. Specifically, Siegel stated that getting the mayor to sign off on the SAFER grant would be difficult, and Ferschweiler indicated similar difficulty getting his members to sign off on a COLA reduction. Siegel indicated, however, that he believed that he could get the mayor on board with the SAFER grant, so long as the Union would not oppose the "innovations" (*i.e.*, RRVs, company consolidation, and quints discussed above). Siegel explained that he could not get the mayor to agree to apply for the SAFER grant, though, if the Union was then going to "grieve" those "innovation" changes. At the end of the meeting, Siegel committed to getting the mayor to agree to apply for the SAFER grant with the *quid pro quo* that the Union would not grieve the changes of consolidating the two companies and expanding the use of RRVs and quints, as discussed above.

66. Siegel then returned to the mayor's office and delivered on his end of the bargain—*i.e.*, the mayor agreed to pursue the SAFER grant so that the Union would not lose the 26 positions. The City ultimately received the SAFER grant, which was used as contemplated by the parties' agreement—namely, to pay for the 26 represented positions that otherwise would have been lost.

67. In sum, after the back-and-forth of multiple negotiations with the Union's president, the City agreed to move off of its original position and cede to the Union's primary objective-namely, that no bargaining unit positions would be lost, in exchange for the "innovations." Thus, the City and the Union agreed to the following terms: (1) two double companies would be consolidated into single companies with each station's truck and engine being replaced with a quint; (2) two additional RRVs would be added (for a total of four); (3) the Union would not oppose or contest these changes; (4) the bargaining unit members would retain their COLA; (5) all stations would be kept open; and (6) the City would apply for the SAFER grant,

with the understanding that receiving the grant would prevent 26 bargaining unit members from being laid off.

After the agreement was reached, Siegel briefed the City commissioners on the deal that had been bargained with the Union, and the City Council approved a budget that reflected the deal. Specifically, on June 20, 2013, the City Council approved the following Final Approved Budget (FAB): (1) eliminating the Dive Team; (2) transferring Safety Chief and Chief Investigator assignments to management; (3) replacing some trucks and engines with quints; (4) permanently implementing an RRV program; (5) eliminating three Fire Investigator positions; and (6) eliminating standby pay in the Investigations unit.[10]

68. On June 20, 2013, Chief Janssens sent a budget memorandum to all employees explaining that the FAB had passed and had provided bridge funding to maintain employment of 26 Fire Fighters through the fall and that the City would apply for the SAFER grant to fund the continued employment of those Fire Fighters.

69. On July 14, 2013, the Union filed a grievance by email, challenging the implementation of the RRV program and associated consolidation of companies, the loss of standby pay in the Investigations unit and an increase in health care premiums. The Union filed the same grievance by letterhead hard copy on July 30, 2013. The grievance advanced through the steps to arbitration. Before the arbitration, the City informed the Union that it intended to assert that the Union had not timely filed the grievance. The Union responded that, if the City would not waive the timeliness defense, it would pursue an unfair labor practice complaint.

CONCLUSIONS OF LAW

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

2. The City did not violate ORS 243.672(1)(e) with respect to the operational changes made in 2013 due to a budget reduction.

The Union alleges that in 2013, the City made the following operational changes to accommodate a budget reduction: (1) eliminated the Dive Team; (2) transferred the duties of the Safety Chief and Chief Investigator to management; (3) consolidated companies by replacing trucks with quints and permanently implementing RRVs; (4) eliminated three Fire Investigator positions; and (5) eliminated standby pay in the Investigations unit. According to the Union, these changes concern mandatory subjects of bargaining and were made unilaterally—*i.e.*, without bargaining with the Union. The City counters that it made these changes only after coming to an agreement with the Union *via* its president (Ferschweiler), and that the Union waived its right to contest the changes. For the following reasons, we agree with the City.

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

[10]There were also additional budget reductions that are not relevant to this complaint.

duty to bargain in good faith if it makes a unilateral (*i.e.*, unbargained) change in 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, *recons*, 25 PECBR 764 (2013).

Our methodology for analyzing unilateral change allegations involves considering: (1) whether an employer changed the status quo; (2) whether the change concerned a mandatory subject of bargaining; (3) whether the employer exhausted its duty to bargain; and (4) any affirmative defenses raised by the employer. *Id.* We need not apply this analysis in a mechanical manner and may proceed to a particular step if that step will be dispositive of the issue. *Id.*

Here, the record establishes that the City exhausted its duty to bargain over the changes regarding consolidating companies by replacing trucks with quints and permanently implementing RRV. Specifically, the City met multiple times with the Union's president over these changes, and the Union's president ultimately agreed not to contest the changes as part of the package agreement that saved 26 jobs for the Union's members. Relying on Ferschweiler's testimony, the Union argues that such an agreement was not reached. We, however, are more persuaded by the corroborated testimony of Siegel and Janssens. Accordingly, because the employer and the Union bargained the contested changes, the City did not violate ORS 243.672(1)(e).

In reaching this conclusion, we disagree that the meetings between the City and Ferschweiler were not "collective bargaining" or that such a legal determination be resolved by way of witness testimony. "Collective bargaining" is a statutory term that means meeting and "confer[ring] in good faith with respect to employment relations for the purpose of negotiations concerning mandatory subjects of bargaining." ORS 243.650(4). Here, the City (via the mayor's liaison and the Department's chief) and the Union (via its president) met and conferred on multiple occasions on matters that included wages, workload, and job security, among others. Moreover, the parties exchanged different proposals and concepts on those subjects, and both ultimately yielded in their initial positions resulting in a bargained compromise. That course of conduct qualifies as collective bargaining, regardless of whether either party might attach a different label to those actions.[11]

Even if, however, we were to look at the facts in a light more favorable to the Union and through the lens of the Union's legal theory, we would still dismiss the claim because we would conclude that the Union waived its right to dispute those changes. "A union may waive its right to bargain over a unilateral change in working conditions, either expressly or by inaction." *Washington County Police Officers' Association v. Washington County*, Case No. UP-15-08, 23 PECBR 449, 481 (2009). Here, there was no express waiver of the Union's right to bargain over the budget-related changes, but rather a waiver by inaction, which may be implied under certain limited circumstances. *See Washington County*, 23 PECBR at 481 ("[w]hen a union does not expressly waive its right to negotiate, we examine the circumstances to determine if a waiver

[11]To be clear, the City has maintained throughout this proceeding that it bargained a deal with the Union, and that such a deal should be viewed through the legal lens of "waiver" or "estoppel." Although those other legal theories might also lead us to the same conclusion (dismissal of the claim), we believe that our analysis is the most fitting.

may be implied.").[12] For example, when a union has sufficient notice about a proposed change in employment relations, it must timely request to bargain over the proposed change and "diligently pursue[] bargaining over" that change. *Id.*; *see also Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 362 n 8 (2008) ("[i]n a unilateral change situation, the employer's obligation to bargain usually does not attach unless the union first demands to bargain"). Here, there is no dispute that the Union had actual notice of the proposed changes in this case. The Union was actively involved in multiple meetings where the specific potential changes were discussed throughout May and the following months. The Union discussed its concerns over the possible changes with City representatives, its own members, and representatives of the media on several occasions.

Because the Union had notice of the proposed changes, a failure to demand bargaining may constitute a waiver of the right to bargain. Of course, there are exceptions to this rule, including that a bargaining demand need not be made when the notice of a change amounts to nothing more than a *fait accompli*. *See Teamsters Union Local No. 57 v. City of Brookings*, Case No. UP-141- 93, 16 PECBR 267, 274 (1995) (citing *International Association of Fire Fighters, Local 1489 v. City of Roseburg*, Case No. UP-9-87, 10 PECBR 504 (1988)). In this situation, however, the City's announcement of the budget-related changes was not a *fait accompli*, as even in the absence of a demand to bargain, the City on numerous dates actively solicited and considered the Union's input on how best to respond to the budget shortfall. The City even significantly modified its original approach in response to the Union's input. Thus, there was no excuse for the Union's failure to file a demand to bargain in a reasonable time after it had notice of the potential changes.

According to the Union, it had no right to demand bargaining until after the "budget process" was completed. Even assuming that assertion is correct, the Union still never demanded to bargain over the changes even after the council voted to approve the budget that consolidated the companies and expanded the use of RRVs and quints. Moreover, it cannot be said that the Union diligently pursued bargaining over these changes. Consequently, even if we agreed with the premise of the Union's theory, we would conclude that the City has established its affirmative defense of waiver because at no point did the Union demand to bargain or diligently pursue bargaining over these changes.

We also conclude that the City established its affirmative defense of waiver with respect to the other unilateral changes arising out of the budget reduction: (1) moving Safety Chief and Chief Investigator assignments to management; (2) eliminating the Training Academy Specialist positions; (3) eliminating one Inspector position; (4) eliminating the Hazardous Materials Coordinator position; (5) eliminating the Dive Team; and (6) eliminating three Investigator positions, including standby and overtime wages.

This panoply of changes was announced hand-in-step with the consolidation and RRV/quints expansions and were approved by the council at the same time. Again, the record does

[12]The more clear-cut waiver by inaction occurs when an employer provides a labor organization with written notice of proposed changes under the provisions of ORS 243.698, and the labor organization does not demand to bargain those changes within 14 days. By operation of the statute, the labor organization's inaction constitutes a waiver of the right to bargain those changes and the employer may proceed. ORS 243.698(3).

not establish that the Union made a demand to bargain the decision or the impact of these other changes. Consequently, we hold that the City proved its affirmative defense of waiver with respect to these other six enumerated changes.

3. The City violated ORS 243.672(1)(e) when it promoted a lower-ranked candidate to Senior Inspector over a higher-ranked one.

We next address the Union's allegation that the City made a unilateral change in its internal promotional process in violation ORS 243.672(1)(e). Specifically, the Union asserts that the Bureau made a unilateral change without bargaining when it chose employee Schimel over Jones for the Senior Inspector position. According to the Union, the established practice is to select candidates from eligibility lists in ranked order; therefore, the Bureau made a unilateral change when it promoted Schimel (a lower-ranked candidate) instead of Jones (a higher-ranked candidate).

The City responds that this issue concerns a permissive subject of bargaining. Further, the City argues that the Bureau has previously passed over next-ranked candidates in favor of lower-ranked ones, thereby defeating any claim that the City's past practice was to always promote by ranked order.

For the following reasons, we agree with the Union.

We begin with whether the promotion of a lower-ranked candidate concerns "promotion," a mandatory subject of bargaining. *See Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, 26 PECBR 225, 251 (2014) (citing *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)). We conclude that it does, as the change concerns "a raise in position or rank." *See City of Milwaukie*, 22 PECBR at 178 (defining "promotion" as "a raise in position or rank and holding that "promotion" constitutes a mandatory subject of bargaining).

In arguing to the contrary, the City cites *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-91-93, 14 PECBR 832, 868-69 (1993) (*AOCE*). That case, however, is inapt because it used the Board's pre-1995 approach of determining whether a *proposal*, rather than a *subject*, was mandatory for bargaining. That approach has long since been disavowed.[13] *See, e.g.*, *Tri-Met*, 26 PECBR at 250; *Springfield Police Association v. City of Springfield*, Case No. UP-28-96, 16 PECBR 712, 718-21 (1996). Under our subject-based approach, we have consistently held that the subject of promotion is mandatory for bargaining and that it is distinct from the permissive subject of minimum qualifications for a position—*i.e.*, the knowledge, skills, and abilities necessary to perform the work. *See Tri-Met*, 26 PECBR at 251. Here, Jones possessed the minimum qualifications for the position; otherwise, she would not have been allowed to test or be placed on the eligibility list. Rather, Jones was qualified

[13]Moreover, the *proposal* found permissive in *AOCE* was more akin to a proposal concerning the minimum qualifications for a position, rather than a *proposal* concerning how bargaining unit members might take advantage of a promotional opportunity.

in her attempt to promote to Senior Inspector, a higher position or rank. Accordingly, the City's unilateral change in how a bargaining unit member (here, Jones) might take advantage of this raise in position or rank concerns a mandatory subject of bargaining.

We turn to whether the City changed the past practice by promoting Schimel over Jones for the Senior Inspector position. The record establishes that, since 2008, the chief's interview has been "pass or fail."[14] In other words, once a promotional candidate qualifies for a position such as Senior Inspector by way of passing the civil service exam and being ranked on the promotional list, the chief's interview is limited to "passing or failing" that candidate for promotion. This post-2008 practice stems, in part, from an August 2008 grievance resolution that so cabined the chief's authority. Specifically, that resolution applied "to all promotional recruitments for sworn personnel that take place after the establishment of an eligible list and before appointment to the higher classification * * *." Under that resolution, the chief's interview is "Pass or Fail."

Here, Jones passed both portions of the exam for the Senior Inspector position and was placed on the eligible list. She was then given a pre-hire or chief's interview for the position and *passed*. At the time of the promotion decision, Jones was at the top of the eligible list. Yet, the City passed her over in favor of Schimel, who was ranked lower on the eligible list. According to the chief, that decision was made based on the chief's subjective determination that Schimel was the better candidate, notwithstanding the ranked list based on objective performance in the exam process.

That action, however, is inconsistent with the past practice for promotional decisions since at least 2008. We disagree with the City's position that the past practice was one of "variability" that permitted the chief to essentially re-rank the list based on whatever subjective factors the chief might elect to use after the candidate passed the chief's interview. Such an assertion not only goes against the "pass or fail" limitation of the 2008 agreement, but the promotional practices regarding sworn personnel since that time. Indeed, the record establishes that after 2008, only two candidates, at most, had been passed over for a promotional opportunity. The record does not establish, however, whether those two individuals passed or failed the chief's interview. In other words, it is just as likely, if not more likely, that those individuals were passed over because they failed the chief's interview. Indeed, the record supports that off-duty incidents formed the basis for determination that put fitness for promotion into question. The record does not establish, as the City asserts, that the past practice (before the Jones decision) for promotions was that the chief could select any individual on the eligible list regardless of where that individual was ranked, or that the chief could make such a selection based on a subjective assessment that someone lower-ranked was "better" or "more qualified" than an individual ranked higher on the eligibility list.

In sum, we conclude that, since at least 2008, the relevant past practice consisted of promoting the highest-ranking candidate on the eligibility list, so long as that individual "passed" the chief's (or prehire) interview. Here, Jones was the highest-ranked individual remaining on the eligible list and passed the chief's interview. Consequently, when the City changed course and promoted a lower-ranked candidate, it changed the past practice in violation of ORS 243.672(1)(e).

[14]Although the practice before 2008 was less consistent, it was still quite rare for an employee to be passed over in favor of an employee who ranked lower on the promotional eligibility list.

4. The City violated ORS 243.672(1)(e) by unilaterally using an unranked eligibility list to promote candidates to Battalion Chief in 2013.

We turn to the Union's allegation that the City made a unilateral change to the promotional process by using an unranked (or equally ranked) list for Battalion Chief recruitments in 2013. We explained above that the subject of the alleged change, promotion, is mandatory for bargaining. Moreover, the established practice for promoting to a Battalion Chief is for the Bureau to take promotional candidates' combined score from the assessment center and oral panel interview and rank candidates according to that score. The ranking is maintained on a published eligibility list that remains valid for approximately two years. As promotional vacancies occur during a list's effective period, the Fire Chief typically interviews top candidates and promotes in ranked order. The longstanding past practice, therefore, is to use a ranked list.

The City avers, however, that it changed this past practice in 2011 via amending its HRAR 3.02.[15] According to the City, that amendment authorized the Bureau to use either a ranked or equally ranked (where all passing candidates receive the same rank) when making a decision as to who should next be promoted to Battalion Chief.

We disagree with the City's argument. The 2011 amendments to HRAR 3.02 do not expressly state whether the Bureau may or may not use a ranked list or an equally ranked list. Rather, the rule identifies two types of lists: ranked and equally ranked. By its terms, the amended rule merely deleted a provision that required Human Resources to certify to the appointing authority the names of candidates standing highest on the eligible list. The amendment does not authorize or require the Bureau to disregard its longstanding practice of using a ranked list for Battalion Chief promotions. Indeed, after the passage of the 2011 amendment, the Bureau has continued (until this dispute) to use a ranked list for Battalion Chief promotions. In sum, we conclude that the 2011 HRAR amendment did not abolish the longstanding past practice of using a ranked list for Battalion Chief promotions or set a new *status quo* for such promotions. Consequently, because the City unilaterally changed that past practice in 2013, it violated ORS 243.672(1)(e).

5. The City did not violate ORS 243.672(1)(g) or (h) regarding the RRV MOU.

The Union has alleged two separate violations with respect to the draft MOUs adopting an RRV program – one under 243.672(1)(g) and another under ORS 243.672(1)(h).

We first address the allegation that the City violated ORS 243.672(1)(g) by breaching the terms of a 2012 RRV MOU. ORS 243.672(1)(g) makes it an unfair labor practice for a public employer or its designated representative to "[v]iolate the provisions of any written contract with respect to employment relations." Here, the Union asserts that the parties signed a 2012 MOU that defined the working conditions of bargaining unit employees assigned to a pilot RRV program. Putting aside the City's assertion that the agreement was never signed by both parties, the MOU was limited to the duration of the RRV pilot program, and terminated with the funding of that

[15]As set forth above, the Union also permitted the City to use an unranked list for a 2011 Battalion Chief promotion on a one-time trial basis. That one-time allowance did not establish a new past practice.

program in June 2013. The Union's allegation, however, is rooted in the City's conduct *after the agreement expired*. As noted, however, the MOU was no longer in effect at the time that the Union alleges that the breach occurred. Accordingly, any decision by this Board will not "have a practical effect on or concerning the rights of the parties." *Medford Education Association v. Medford School District 549C*, Case No. UP-047-13, 26 PECBR 143, 152 (2014). In such circumstances, we deem the matter moot and dismiss the allegation, which we do here with respect to the (1)(g) claim.[16]

The Union also alleges that the City violated ORS 243.672(1)(h) when the City, in 2014, refused to sign the expired agreement. The Union's demand that the City sign the expired MOU arose when the City asserted, in conjunction with this proceeding, that it had never signed the MOU (as a defense to the above-discussed (1)(g) claim). Again, any decision by this Board that directed the City to sign an expired agreement would not "have a practical effect on or concerning the rights of the parties." *Id.* Accordingly, we also conclude that this claim is moot.

Remedy

Because we have determined that the Department violated ORS 243.672(1)(e) we will issue a cease and desist order. ORS 243.676(2)(b). We also order the following affirmative relief to effectuate the Public Employee Collective Bargaining Act (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 past practice that existed before the unlawful change. *International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, 25 PECBR 871, 890 (2013). We see no reason not to order our "usual remedy" in this case. Accordingly, the City is directed to return to using the past promotional practices described above with respect to Senior Inspector and Battalion Chief positions.[17] The City is also directed to make Louisa Jones whole for any harm resulting from the City's unlawful conduct. This traditional make-whole remedy includes any back pay and benefits, plus interest at the rate of 9 percent per annum, which Jones would have received if not for the City's unlawful conduct.

With respect to the Battalion Chief positions, we order the parties to promptly confer to determine if any employee was affected by the unilateral change. If so, the parties are directed to bargain in good faith for a period of 60 days to determine an appropriate remedy regarding any affected employee. If the parties are unable to reach an agreement after 60 days of good-faith bargaining, each party shall submit to the Board the last offer made to the other party and shall do so within seven days of the conclusion of bargaining. At that point, the Board will consider both final offers and choose one, or craft an alternative remedy that best effectuates the PECBA.

[16]We also note that one of the Union's initial concerns with the RRV program was that the City initially staffed the RRVs on a 40-hour workweek schedule. Most of the terms in the draft RRV MOUs concerned the details associated with converting employees from a 24/48 compression schedule; however, in September 2012, the City changed RRV personnel back to a 24/48 compressed schedule.

[17]The parties can, of course, collectively bargain a different practice in the future.

ORDER

1. The City violated ORS 243.672(1)(e) by unilaterally changing the promotional past practice regarding the Senior Inspector and Battalion Chief positions.

2. The City is to cease and desist from violating ORS 243.672(1)(e). The City is also ordered to return to the past practices that existed before the unilateral change.

3. With respect to the Senior Inspector violation, the City shall promote Louisa Jones to the position and make her whole for not being promoted in October 2013, including back pay and benefits, plus interest at the rate of 9 percent per annum.

4. With respect to the Battalion Chief position, the parties are to promptly confer to determine if any employee was affected by the unilateral change. If so, the parties are directed to bargain in good faith for a period of 60 days to determine an appropriate remedy regarding any affected employee. If the parties are unable to reach an agreement after 60 days of good-faith bargaining, each party shall submit its final offer to the Board and shall do so within seven days of the conclusion of bargaining. The Board will select one of the offers or craft its own remedy.

5. The Union's other claims are dismissed.

DATED this 2 day of December, 2015.

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, Specially Concurring:

I join with my colleagues in the order above with one exception—I strongly disagree with my colleagues' conclusion that the City fulfilled its obligation to bargain over the budget-related changes because the Union and the City agreed to a "deal" on those changes. Therefore, I do not

agree with my colleagues' factual findings or legal conclusion related to the alleged deal between the parties. I do, however, agree with their alternative conclusion that the Union waived its right to bargain over these changes through its inaction. Thus, I would reach the same result, but for different reasons.

As a preliminary matter, I disagree with my colleagues' conclusion that the City and Union were engaged in collective bargaining when they had informal discussions regarding the Mayor's proposed budget cuts. To the contrary, I agree with Chief Janssens, Mr. Siegel, and Mr. Ferschweiler, who all unequivocally testified that they were not engaged in collective bargaining on behalf of the City or the Union. Further, Ferschweiler and Siegel testified that they had no authority to bargain over these issues independently even if they desired to do so. Based on the circumstances surrounding these discussions, including among other things the shared understanding of the parties and the manner in which the parties conducted themselves, I would find that no collective bargaining occurred. This position is also consistent with the manner in which the City litigated this case, as the City never once asserted that it had engaged in collective bargaining with the Union, let alone completed its bargaining obligation.

Even assuming for the sake of argument that the City and the Union had engaged in collective bargaining, I would still conclude that any such bargaining had not yielded an agreement between the parties. Distilled to its essence, the City is alleging that an enforceable oral agreement was made during the budget-related conversations. When one party alleges that an oral agreement was reached, we apply the objective theory of contracts to determine whether such a deal was in fact agreed to by the parties. *See North Clackamas Education Association v. North Clackamas School District*, Case No. UP-51-04, 21 PECBR 629, 655-57 (2007) (applying the objective theory of contracts to a claim that an employer violated ORS 243.672(1)(h)). To be bound by a putative oral agreement, we must find that a party's acceptance of the terms be "positive, unconditional, unequivocal, and unambiguous, and must not change, add to, or qualify the terms of the offer." *Id.* at 657, citing *Wagner v. Rainier Mfg. Co.*, 230 Or 531, 538, 371 P2d 274 (1962).

Viewed under these standards, there is insufficient evidence to support my colleagues' conclusion that a deal was reached. I do not doubt that the City representatives earnestly believed that the Union had agreed to generally support the Mayor's modified approach to the budget cuts. But to conclude that an oral agreement was reached, we need more than the City's subjective belief. Rather, we need tangible, persuasive evidence of facts that make it objectively reasonable to conclude that such a deal agreed to by both parties. This evidence must also be detailed enough to identify with clarity what terms the parties agreed to. I do not see such evidence in this case. To the contrary, based on the evidence before us, what I find to be more likely is that the Union agreed generally that the modified approach—including the application for the SAFER Grant and some of the "innovations" sought by the Mayor—was preferable to the closing of stations and cutting of positions, and the Union agreed to work with the City to help obtain the SAFER Grant and would be willing to explore the innovations sought by the Mayor. But I do not see persuasive evidence that demonstrates that the Union entered into a final, enforceable agreement with the City that was sufficient to satisfy the City's bargaining obligation or to otherwise waive the Union's right to bargain over the specific aspects of the budget-related changes.

In reaching the opposite conclusion, my colleagues relied on the testimony of Siegel and Janssens, finding it more specific and detailed than Mr. Ferschweiler's testimony. Siegel and Janssens' testimony may have been slightly more detailed in some respects, but their testimony also was at times inconsistent on key points. For example, Janssens testified that the deal was reached on May 16, at a meeting she was present for. Siegel disagreed, testifying that the agreement was reached at least a week later during a one-on-one meeting with Ferschweiler. Further, the testimony provided by Siegel and Janssens was also fairly vague on key issues and lacked enough meaningful details to establish that both parties had come to a sufficiently well-defined agreement to support the conclusion that a deal had been reached.

Conversely, Mr. Ferschweiler testified consistently that no agreement was reached, other than an agreement to work together to try and find a solution to avoid the most painful impacts of the budget cuts. Mr. Ferschweiler's testimony that no deal was reached was consistent with the public actions of the Union during the relevant time period, which included the filing of a grievance over the budget cuts under the Existing Conditions provisions of Article 13 of the CBA, as well as statements to the press that were critical of the innovations included in the Mayor's budget cuts. On the other hand, the City never once asserted that a "deal" had been reached in response to the grievance or the Union's criticisms that were published in media articles. This argument did not appear until after the complaint in this case had been filed, seven months after the alleged deal was entered into. It is difficult to believe that, if the City truly believed at the time that an enforceable deal had been reached through collective bargaining, it would not have said so.

For these reasons, I do not agree that any "deal" was reached, or that the City fulfilled its obligation to bargain over the budget related changes at issue in this case. Accordingly, I do not join in the factual findings or legal conclusion related to the alleged deal between the parties.

Jason M. Weyand, Member

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-039-14

(UNFAIR LABOR PRACTICE)

MEDFORD SCHOOL DISTRICT 549C,	)	
	)	
Complainant,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND ORDER
MEDFORD EDUCATION ASSOCIATION,	)	
	)	
Respondent.	)	

Kelly D. Noor, Attorney at Law, Garrett Hemann Robertson PC, Salem, Oregon, represented Medford School District.

Aruna A. Masih, Attorney at Law, Bennett, Hartman, Morris & Kaplan LLP, Portland, Oregon, represented Medford Education Association.

On November 19, 2015, 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). 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 is dismissed.

DATED this 14 day of December 2015.

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-039-14

(UNFAIR LABOR PRACTICE)

MEDFORD SCHOOL DISTRICT 549C,	)	
	)	
Complainant,	)	RECOMMENDED RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND PROPOSED ORDER
MEDFORD EDUCATION ASSOCIATION,	)	
	)	
Respondent.	)	

A hearing was held before Administrative Law Judge (ALJ) B. Carlton Grew on June 2, 2015, in Medford, Oregon. The record closed on July 27, 2015, following receipt of the parties' post-hearing briefs.

Kelly D. Noor, Attorney at Law, Garrett Hemann Robertson PC, Salem, Oregon, represented Medford School District.

Aruna A. Masih, Attorney at Law, Bennett, Hartman, Morris & Kaplan LLP, Portland, Oregon, represented Medford Education Association.

On December 1, 2014, the Medford School District (District) filed an unfair labor practice complaint against the Medford Education Association (Association or MEA). The complaint, as amended on March 13, 2015, alleges that the Association violated ORS 243.672(2)(a) and (b) by mischaracterizing a decision of the Employment Relations Board (ERB) in a communication with its members, in making a novel proposal during mediation in bad faith, and by leaving the mediation before District representatives had the opportunity to respond to the Association's last proposal. The Association filed a timely answer to the Amended Complaint.

The issues presented for hearing are:

1. Did the Association deliberately provide its members, and others, with false information about the District's conduct? If so, did the Association violate ORS 243.672(2)(a), and in so doing, injure the District?

2. Did the Association fail to bargain in good faith with the District during the November 19, 2014 mediation by submitting an offer in bad faith, misinforming members and others about District proposals and the mediation, and violating mediation confidentiality agreements? If so, did the Association violate ORS 243.672(2)(b)?

3. If the District prevails in this action, what are the appropriate remedies?

DECISION

For the reasons set forth below, we conclude that the Association did not violate ORS 243.672(2)(a) and (b).

RULINGS

During the hearing, a manager for the District testified about an interaction she had had with a bargaining unit member about information he or she had received from the Association. When asked for the name of the unit member on cross-examination, the witness refused to provide that information. The Association objected to the refusal to answer and urged that the District be sanctioned by striking the testimony of the witness in its entirety. As a sanction for the failure to answer the question, the ALJ acted within his discretion in striking the testimony of the witness regarding the interaction with the unit member, and thus declaring it not part of the evidentiary record. OAR 115-10-0060(2); *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 (2002).

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

FINDINGS OF FACT

1. The District is a public employer within the meaning of ORS 243.650(20) and employs approximately 600 teachers and licensed specialist employees represented by the Association. The Association is a labor organization within the meaning of ORS 243.650(13). The District and Association were parties to a collective bargaining agreement that was effective from July 1, 2010 to June 30, 2013.

2. In the fall of 2011, during difficult financial times for the District, the parties negotiated a Memorandum of Understanding (MOA). The parties agreed to a wage and benefits freeze for Association bargaining unit employees and a reduction in teacher work days until the District received additional funding. The MOA included a formula for the restoration of wages, benefits, and work days based upon the amount of additional funds received by the District in future years.

3. The District received additional funds in 2012 and 2013. The parties disagreed regarding the application of the MOA to the 2013 funds. After negotiations between the parties did not resolve the issue, the Association filed an Unfair Labor Practice complaint (ULP) against

the District on August 13, 2014, *Medford Education Association v. Medford School District 549C*, Case Number UP-047-13, 26 PECBR 143 (*Medford EA-I*); *Supplemental Order*, 26 PECBR 272 (*Medford EA-II*) (2014). (MOA ULP). The Association complaint alleged that the District had violated the MOA, and, therefore, ORS 243.672(1)(g).

4. On January 16, 2014, the MOA ULP proceeded to hearing and written argument before an ERB ALJ.

5. At the time of the January 2014 hearing, the parties were engaged in negotiating a successor collective bargaining agreement. The parties disagreed on bargaining unit member compensation and work days, among other things. Unable to resolve their differences, the District unilaterally implemented its final offer and, in February 2014, the Association unit went on strike. The strike was settled by a new collective bargaining agreement in March, 2014, but the parties did not settle the Association's MOA ULP.

6. On April 22, 2014, the ALJ issued a Recommended Order in the MOA ULP.

7. In her Recommended Order, the ALJ reasoned that the relevant section of the MOA was ambiguous on its face. She therefore reviewed the MOA as a whole, and some extrinsic evidence (how school funding is allocated and distributed and, to correct a "misreference to a seemingly non-existent provision," a prior draft of the MOA). (Exh. C-3 at 9.) The ALJ concluded that the District had violated the MOA, and therefore ORS 243.672(1)(g), in its allocation of additional funds. In her proposed order, the ALJ required the District to: (1) "cease and desist from violating ORS 243.672(1)(g) by failing to restore teacher work days as required under the MOA," and (2) "restore four work days to the 2013-14 school year, or provide the Association's members with the financial equivalent." (Exh. C-3 at 16.) The ALJ did not require the District to increase wages or benefits to Association unit members.

8. The ALJ declined to order that a notice be posted, holding that of the list of relevant factors, the District's violation met only the condition that it affected a significant number of bargaining unit employees.[1]

9. The ALJ's Recommended Order did not state that the District had violated its duty of good faith, and did not state that the District had not acted in good faith.

10. The District did not file objections to the ALJ's recommended order. The Association objected to the ALJ's failure to conclude that additional funds received by the District should be used for wage and benefit increases.

[1]The factors used by this Board in determining whether to order the posting of a notice are when the violation: "(1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was perpetrated by a significant number of a Respondent's personnel; (4) affected a significant portion of bargaining unit employes; (5) had a significant potential or actual impact on the functioning of the designated bargaining representative as the representative; or (6) involved a strike, lockout, or discharge." *Oregon School Employees Association, Chapter 35, v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601 (1983).

11. At oral argument before this Board, and a subsequent motion to re-open the record to present evidence regarding a recently ratified collective bargaining agreement, the District argued that the MOA ULP was moot because of the terms of that successor agreement.

12. On August 13, 2014, the Board issued a final order in the MOA ULP. It held that the matter was not moot. It also agreed with, and adopted, the ALJ's reasoning and conclusion, to which the District had not objected, concluding that "considering the MOA as a whole, along with the extrinsic evidence, * * * the District violated ORS 243.672(l)(g) as alleged." *Medford Education Association*, 26 PECBR 143, 152, *Medford EA-I*, (2014). The Board also agreed with the Association's objection and held that the MOA provided that additional funds were to be applied to wages and benefits, and that the District had violated ORS 243.672(1)(g) when it failed to do so. The Board's order provided in part:

> "1. The District violated ORS 243.672(l)(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 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 the bargaining. The Board will either select one of the parties' last offers or craft its own remedy." *Medford Education Association*, 26 PECBR at 155, *Medford EA-I*, (2014).

13. The Board Order did not state that the District had violated its duty of good faith, and did not state that the District had not acted in good faith. The Board did not address the notice posting issue except to state that the parties could bargain over that issue.

14. During the second half of August 2014, the Association described the Board's decision as follows in a newsletter to its members:

> "On August 13, 2014, we received [ERB's] final order regarding the Unfair Labor Practice charge we filed against the District for violating the terms of our MOA on compensation and the restoration of days. The Board found in our favor and has given the District and the Association sixty days (60) from the date of its order to bargain in good faith a remedy where *additional funds* will be applied per the old Appendix A Formula. We are excited that we won and that we have another opportunity to work together again with only something to gain and not to lose. Wish our bargaining team the best as they collaboratively work out an agreement with the district." (Exh. R-2 at 1, italics in original.)

15. During the ensuing 60 day remedy bargaining period, the parties first exchanged written proposals without meeting. On October 9, 2014, the parties met but did not reach agreement. On October 17 and 20, the parties provided their final offers in this process to the Board. The District's final offer was for approximately $49,000 to be distributed to bargaining unit members. The Association's final offer was for approximately $729,000 to be so distributed.

16. After receiving the parties' final offers, the ERB Board Chair urged the parties to consider a final mediation session with the State Conciliator acting as mediator. The parties agreed to that mediation session.

17. The mediation was held on November 19, 2014, at the District offices in Medford.

18. The Association bargaining team, which included experienced OEA UniServ Jane Bilodeau, appeared at the session in person, as did two District officials. District counsel participated by telephone. The mediator and the Association and District representatives were stationed in separate rooms, some distance apart.

19. From approximately 4:30 to 5:00 p.m., the parties first met jointly with the mediator to review the process and the mediation confidentiality agreement. That agreement provided, in part:

> "The undersigned parties hereby acknowledge having agreed to mediation services provided by Janet Gillman, State Conciliator. The parties further agree to the following rules for the dispute involving the Medford School District 549c and Medford Education Association, Mediation Case No. UL-IO-l4L (ERB ULP Order 047-13 Remedy Bargaining) in the mediation held on November 19, 2014.
>
> "MEDIATION: Mediation is a voluntary settlement negotiation and the role of the mediator is to assist the parties in reaching a mutually acceptable resolution of their dispute. The mediator is not a judge and has no authority to force a settlement on the patties. All parties acknowledge that should they reach a settlement as a result of these mediation sessions, they do so as their own free and voluntary act.
>
> "CONSULTING WITH ATTORNEYS: Each party is encouraged to consult with an attorney and/or their union or management representative regarding their legal rights and obligations throughout the mediation process. The parties acknowledge that the mediator does not represent the parties, is not giving legal advice to them, nor acting as their legal counsel in any manner.
>
> "MEDIATOR IMMUNITY: All parties acknowledge that the mediator is acting on behalf of the State Conciliation Service, which has been selected by the parties to provide the mediation services. The mediator shall be immune from civil liability for or resulting from any act or omission done or made while engaged in efforts to assist or facilitate a settlement, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another.

> "CAUCUSES: The mediator may hold sessions with only one party. These 'caucuses' are designed to improve the mediator and the party's understanding of their position. Information gained by the mediator through a caucus is confidential unless the party agrees otherwise.
>
> "CONFIDENTIALITY: Mediation communications are confidential to the extent provided in agency rules OAR 115-040-0040 to 115-040-0044, a copy of which is available from the ERB offices. Except to the extent provided in those rules, the mediator may not disclose or be compelled to disclose mediation communications and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all parties and the mediator agree in writing." (Exh. JT-2, underlining omitted.)

20. Following the joint session, the parties adjourned to separate rooms for discussions with the mediator. The mediator first met with the District team from approximately 5:00 to 5:45 p.m., and with the Association team from approximately 5:45 to 6:30 p.m.[2] Through the mediator, the parties agreed that the District would present the first proposal, and the District began work on that proposal between 6:30 and 7:15 p.m. That process took longer than the Association representatives expected, and they used that time to outline Association responses to District offers they believed were most likely.

21. At approximately 8:00 p.m., the mediator brought a District proposal to the Association representatives. The District proposal contained three different scenarios. The scenario with the highest wages and benefits to Association unit members would provide them with approximately $133,000, approximately $84,000 more than its pre-mediation final offer.

22. The Association representatives responded relatively quickly with an offer: (1) reducing the $729,000 figure in its pre-mediation final offer by $49,000, and (2) requesting that the District formally apologize to the Association members through a statement to be negotiated by the parties.

23. The Association representatives believed that an apology was warranted because of District representatives' conduct in previous negotiations and the Association's perception that the District representatives' conduct had necessitated the Association's strike. The Association representatives believed that, in light of the strike and other events, the focus of the apology was obvious. The Association representatives had not discussed, or requested, such an apology in the previous bargaining. The Association representatives did not raise the apology issue in order to derail the mediation, but its inclusion reflected their anger with the District.

[2]Witnesses for the parties disagreed with each other about the timing of many events during the mediation, and the times above are approximate. We specifically find, however, that the District was not tasked with supplying the first proposal until after the mediator had met with both parties together and individually. We conclude that those meetings ended no earlier than 6:00 p.m., and most likely at approximately 6:30 p.m.

24. The mediator brought the Association proposal to the District representatives. They were surprised by the request for an apology, did not understand the reason for the apology, or what, exactly, they were being asked to apologize for. They questioned the seriousness of the offer because of the inclusion of what they believed was a vague and unjustified request for an apology.

25. After some additional, brief discussions with the mediator, both parties came to the understanding through those discussions that the other party had nothing to offer beyond the offer previously made, and that the other party had chosen to end its participation in the mediation. Both parties expected additional negotiations and were surprised that the other party had ended them. Both parties blamed the other party for the failure of the mediation, both at the time and at this hearing.

26. On November 20, the next day, the District bargaining team discussed the mediation with District executives the morning after the mediation, and, later, the District Board in executive session. The content of these communications is not in the record.

27. Also on November 20, the Association bargaining team met to prepare an email update for their members. This was the procedure they had followed throughout bargaining. The team agreed upon a general outline, one member agreed to draft the document, and OEA UniServ Bilodeau was assigned to, and did, review the text before its distribution.[3]

28. The emailed update was sent out at 10:18 p.m. on November 20. It was provided only to bargaining unit members, former unit members affected by the dispute, and Association staff. It stated:

> "Medford Education Association
> Update to members regarding November 19, 2014 Mediation
> NO AGREEMENT REACHED IN ULP MEDIATION!
> <u>Review of what led to mediation:</u>
> - Your Association and the District agreed to a Memorandum of Agreement (MOA) during the 2011-2013 contract that provided for restoration of days and additional salary if the District received additional monies. Additional funds were received and the District refused to restore days or give salary per the MOA.
> - Your Association filed an Unfair Labor Practice (ULP) and the Employment Relations Board (ERB) ruled against the District and found them guilty of violating the rules of good faith.
> - ERB asked the Parties (Association and District) to have Janet Gilman, State Mediator, help reach an acceptable resolution to the violation.
>
> <u>Your bargaining team met the District's team yesterday afternoon/evening in an attempt to reach a resolution on the Unfair Labor Practice.</u>
> <u>The rules of this mediation does not [*sic*] allow us to share specific proposals but we can provide an overview of what happened:</u>

[3]The Association witnesses disagree about who actually wrote which portion of the email. They agree, however, that Bilodeau wrote or reviewed the final draft and provided it to another team member who sent it out.

- First, Mediator Gilman gave the rules of this particular mediation process and the Parties signed an agreement to the rules.
- Then, the mediator met separately with each group to get an understanding of each party's rationale for its respective position.
- The mediator asked the District to give an offer first. It took over three hours for them to construct its offer.
- Your team reviewed it and determined it was not something that you deserved.
- We immediately provided an offer back to the District.
- Within a few minutes, the mediator returned and said that the District was done and had nothing further to offer.

Now what? ERB will now finalize on its own what the resolution will be. There is no specific timetable for the final decision but we are hoping it is soon. We will announce that decision when we receive it.

Your bargaining team appreciates all your continued support and remains hopeful that ERB will provide appropriate justice." (Exh. C-19, underlining in original.)

29. Because the Association bargaining team had provided more detailed information about the MOA ULP in prior emails, the November 20 email's description of prior events ("[R]eview of what led to mediation") was intended to be a quick summary.

30. Approximately 53 percent of the recipients opened the email, but it is unknown who did so or whether anyone forwarded the email. No unit members approached members of the Association bargaining team with questions, concerns, or complaints about the email.

31. No District representatives contacted the Association with any concerns about the email. The Association learned of the District's concerns through a copy of this Complaint.

32. The record contains one instance of a bargaining unit member expressing concerns about the November 20 email to District representatives. In that instance, a bargaining unit member provided a copy of the email to his spouse, a District executive. Nevertheless, District managers were concerned about the content of the email.

33. One District executive believed that Association unit members acted differently after the mediation, by engaging in increased water-cooler conversations and an increase in members wearing Association t-shirts on the day following the mediation. There is no evidence that this Association unit member conduct was because of the specific content of the Association email as opposed to the failure of the mediation generally.

34. On December 1, 2014, the ERB Board issued a Supplemental Order in the MOA ULP. *Medford Education Association,* 26 PECBR 272, *Medford EA-II,* (2014). Because of the events between the signing of the MOA and the Supplemental Order, this Board held that it was, as a practical matter, impossible to restore the parties to the position they would have been in had the District not violated the MOA. Therefore, this Board held that an equitable remedy was appropriate.

35. The Board's remedy began with the Association's final offer of approximately $729,000 and then subtracted the retroactive pay increase of approximately $384,000 implemented by the District to yield a total of approximately $345,000 (plus interest at nine percent per annum from June 10, 2013 to August 13, 2014) to be provided to Association unit members. The date range for the interest calculation was based on the date the District "approved the school calendar without the restored work days (thereby violating the MOA)" and the date the Board issued its order on the merits of the case. *Medford Education Association*, 26 PECBR, at 274, n 3, *Medford EA-II*, (2014).

36. This Board declined to require the District to post a notice. It noted that only one posting criteria, that the conduct affected a large number of bargaining unit employees, had been met. It also noted that the disputed language "was far from clear." *Medford Education Association*, 26 PECBR at 274, *Medford EA-II*, (2014). This Board declined to impose a civil penalty, stating that the District's conduct was neither repetitive nor egregious.

37. Also on December 1, the District filed the Complaint in this action.

CONCLUSIONS OF LAW

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

2. The District was not injured by the information that the Association provided its members, and therefore the District has failed to state a claim against the Association for a violation of ORS 243.672(2)(a).

The District contends that it was injured when Association officials made the following statements to Association unit members and staff: (1) "The District refused to restore days or give salary per the MOA" and (2) "The Employment Relations Board (ERB) ruled against the District and found them guilty of violating the rules of good faith."

Legal Standards: ORS 243.672(2)(a)

ORS 243.672(2)(a) provides that it is an unfair labor practice for a public employee or labor organization to "[i]nterfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS 243.650 to 243.782." This section is the labor organization analog to ORS 243.672(1)(a), which prohibits like conduct by public employers. We analyze (2)(a) claims using a similar standard to that applied in (1)(a) claims. *Jefferson County v. Oregon Public Employees Union*, Case No. UP-16-99, 18 PECBR 285, 290 (1999).

ORS 243.672(4) provides that an unfair labor practice complaint be brought by an "injured party." In *Jefferson County, supra*, this Board relied on an Oregon Court of Appeals addressing the meaning of this term, *Oregon City Fed. of Teachers v. OCEA*, 36 Or App 27, 584 P2d 303 (1978). The Court reviewed what a party must plead and prove to be an "injured party" for purposes of an unfair labor practice complaint:

> "An unfair labor practice complaint may be brought by an injured party." ORS 243.672(3). The type of injury which must be pleaded and proved in order to establish standing to bring such a complaint is essentially the same as is required of litigants in other contests. The petitioner must show that he has suffered or will suffer a substantial injury as a consequence of the alleged unfair labor practice.
>
> "Citing ORS 243.672(4), ERB ruled that the Federation did not have standing, as a minority union, to challenge the Association's conduct with respect to fair share payments. This ruling was correct because the Federation neither pleaded nor proved that it had suffered any direct injury from the conduct complained of. Thus, the Federation's sole capacity in this proceeding is as representative of the named individual petitioners. ORS 243.782." 36 Or App at 32-33. (Emphasis added, footnotes omitted.)

Applying those standards in *Jefferson County*, this Board held that the employer had "neither alleged nor proved that it had suffered any direct and substantial injury" from the union's conduct, and thus did not have standing to file the (2)(a) complaint." *Jefferson County*, 18 PECBR at 291.[4]

Accordingly, we must determine whether the District suffered a direct and substantial injury from the emailed statements it cites. The District argues that the Association's communications to its members injured it in the following ways:

> "In this case, the Association sent a communication to its member[s] that contained a number of false statements. This communication falsely stated that the ERB 'ruled against the District and found them guilty of violating the rules of good faith.' The published statement has interfered with, restrained or coerced individual members published statements [*sic*] which injure the District, because the nature of the statements cause reputational damage and have a negative impact on the District's ability to engage in collective bargaining with respect to employee relationships. The District thus has standing [as an injured party] to file a ULP against the Association. This has injured the District and establishes standing to file a ULP.
>
> "The breakdown of trust caused by the Association could damage every aspect of labor relations, from investigations and grievances to negotiations. It also damages the day-to-day relationships between individual employees and their supervisors, as is demonstrated by the actions of employees in bringing the publication to their supervisors." (District Post-Hearing Brief at 3.)

We conclude that the District has failed to establish any injury. It presented admissible evidence that one bargaining unit employee brought the Association email to the attention of his spouse, a District executive. The District presented no other admissible evidence of any other

[4]In another case arising out of the same overall Jefferson County labor dispute, the Court of Appeals concluded that secondary picketing (at the private retail business of a County Commissioner) constituted a substantial injury under ORS 243.672(2)(g). *Jefferson County v. OPEU*, 174 Or App 12, 25-26, 23 P3d 401 (2001).

effects of the information except for the speculative concerns of District managers. The relationship between District and Association was a difficult one, and the fact that the parties had participated in unsuccessful bargaining followed by a strike appears to have had a far greater impact on the relationship between the parties.

The District argues that this Board should apply the same standards to a labor organization's direct communication with bargaining unit members as we do to an employer's direct communications with bargaining unit members, and hold that inaccurate or false communications between a labor organization and its bargaining unit members should be subject to per se liability, and not require the employer to present direct proof of injury. *See Oregon AFSCME Council 75, Local #3943 v. State of Oregon, Department of Corrections, Santiam Correction Institution*, Case No. UP-51-05, 22 PECBR 372, 398 (2008). We decline to do so. An employer and labor organization act in very different roles in collective bargaining regarding bargaining unit employees. The labor organization is the representative of unit members in a labor dispute and unfair labor practice litigation, while the employer is not their representative and is often their adversary. A labor organization has a duty of fair representation to its members, which the employer does not share, and has no standing to enforce. Nor would it be appropriate to impose complementary per se liability on an employer for the accuracy of its bargaining team reports to the employer's executives.

Because the District has not established any injury, we will dismiss its ORS 243.672(2)(a) claim.

3. The Association did not fail to bargain in good faith with the District during the November 19, 2014 mediation and did not violate ORS 243.672(2)(b).

The District argues that the Association violated its duty to bargain in good faith under ORS 243.672(2)(b) by submitting an offer in bad faith, misinforming members and others about District proposals and the mediation, and violating mediation confidentiality agreements.

Legal Standards: ORS 243.672(2)(b)

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. The statute mirrors ORS 243.672(1)(e), which makes it an unfair labor practice for a public employer to refuse to collectively bargain in good faith with a labor organization. This Board recently addressed the standards under ORS 243.672(2)(b) in *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, 26 PECBR 322 (2014), and we track that decision here.

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).[5] 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.

The District argues that the Association violated its duty to bargain in good faith by: (1) submitting an offer raising the new issue of an apology and then leaving the mediation; (2) misinforming unit members and affected former unit members about the history of District proposals and the events of the mediation; and (3) violating mediation confidentiality agreements. We address each allegation in turn, and then look to the totality of the Association's bargaining conduct, to determine whether its conduct demonstrated that the Association had no intention of reaching an agreement. *See TriMet*, 26 PECBR at 343*; Medford School District #549C*, 25 PECBR at 516. As we proceed, it is important to note that that this dispute arose during a supplemental mediation, at the request of this Board, in a final attempt to resolve the dispute between the parties through negotiation. Accordingly, cases predicated on the normal PECBA bargaining and mediation process are not directly applicable. *See, e.g., Dallas Police Employees Association v. City of Dallas*, Case No. UP-33-08, 23 PECBR 365, 378 n 7 (2009) (submitting a new proposal in the statutory final offer and mediation stages is a per se violation of the duty to bargain in good faith.)

Apology and hasty exit

The District argues that the fact that the Association raised a new, unexplained apology issue and then promptly left the mediation demonstrates its bad faith. We have determined, however, that both parties left the mediation because they understood, through communications with the mediator, that the mediation had ended. Accordingly, the remaining issue is whether raising the new issue of an apology indicates bad faith by the Association.

It is undisputed that the Association counteroffer contained a new demand for an apology, but there is no evidence that the Association intended the apology to be confusing or unexplained (insulting, perhaps, but not confusing). Rather, from the Association perspective, the apology was justified by, and sought for, the District's previous conduct in the course of the overall labor dispute. While new, the apology had no financial impact, was combined with a significant reduction in the Association's monetary demands, and was made in the course of a special

[5]This Board has recognized that certain types of actions are 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. *TriMet*, 26 PECBR at 343, n 16; *Medford School District #549C*, 25 PECBR at 515. The District urges that we hold communications between officials and members of a labor organization to the same standard under subsection 2(b). We decline to do so, for the same reasons that we did not impose such liability under subsection 2(a). In addition, we believe that our longstanding totality-of-conduct approach is the better tool to assess whether the Association violated ORS 243.672(2)(b).

mediation at the request of this Board. While this request for an apology could be viewed as self-righteous posturing, such conduct is not unusual in serious labor disputes such as the one between these parties. There is no evidence that Association representatives refused to answer, or would have refused to answer, District questions seeking clarification of what the Association intended by the proposal. In addition, the Association bargaining team expected the mediation to continue after the proposal. We conclude that the request for an apology was not a sham proposal or, on its own, an offer made in bad faith.

Misinformation about mediation proposals

The Association reported the following about the mediation proposals of the parties:

> "The rules of this mediation does not [sic] allow us to share specific proposals but we can provide an overview of what happened:
> First, Mediator Gilman gave the rules of this particular mediation process and the Parties signed an agreement to the rules.
> Then, the mediator met separately with each group to get an understanding of each Party's rationale for its respective position.
> The mediator asked the District to give an offer first. It took over three hours for them to construct its offer.
> Your team reviewed it and determined it was not something that you deserved.
> We immediately provided an offer back to the District.
> Within a few minutes, the mediator returned and said that the District was done and had nothing further to offer." (Finding of Fact 28.)

The District disputes that it ended the mediation after receiving the Association offer. We have determined that both parties understood the other to have ended the process. The Association statement was therefore inaccurate, but not intentionally so.

The District disputes that it took three hours to provide its first offer in mediation. The evidence at hearing supports that the District took less than two hours for that process, as the Association's own chronology suggests, and that Association representatives knew or should have known the timing. We conclude that the three hour time frame stated in the email was incorrect.

Breach of mediation confidentiality

The District argues that the following statements in the email violated the mediation confidentiality agreement:

> "[1] The mediator asked the District to give an offer first. * * * [2] [after the Association's counter offer,] the mediator returned and said that the District was done and had nothing further to offer." (Finding of Fact 28.)

The District argues,

> "[Item 1] * * * is concerning because the Association quotes the mediator in an apparent breach of the confidentiality provisions * * *. The Association violated the confidentiality agreements regarding mediation when it published this statement to its membership which had statements that quoted or attributed a comment to the mediator that were related to the offer. As set forth above, the parties were prohibited from sharing 'mediation communications' by written agreement in Exhibit JT-2, and the parties further agreed verbally that details of proposals were confidential. In general, attributing comments or quoting the mediator gives the impression that the Association is, indeed, releasing confidential mediation statements by the mediator. It is especially concerning when the 'quotes' or statements from the mediator are inaccurate, and when the statements were not heard first hand by the Association members. The evidence indicates that the District took about 30 minutes to develop its offer once there was a determination that it would provide the initial offer. [Item 2] * * * has the same concerns * * *. It is another quote from the mediator, and it is inaccurate. Quoting the mediator in this manner is a clear breach of the confidentiality agreement. The District was not privy to the conversation between the mediator and the Association team; however, the statement that was attributed to the mediator was not what the District provided to the mediator. This highlights the inherent dangers of quoting the mediator regarding the statements of others." (District Post-Hearing Brief at 22.)

The mediation agreement itself has only one paragraph regarding confidentiality. It states:

> "CONFIDENTIALITY: Mediation communications are confidential to the extent provided in agency rules OAR 115-040-0040 to 115-040-0044, a copy of which is available from the ERB offices. Except to the extent provided in those rules, the mediator may not disclose or be compelled to disclose mediation communications and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all parties and the mediator agree in writing." (Finding of Fact 19.)

The text of the agreement refers only to disclosures by the mediator. The District does not explain how the Association violated that agreement. In addition, as the Association argues, the statements were process-oriented and did not describe District or mediator proposals. Finally, the information was communicated by Association representatives to the members of the bargaining unit and past affected members. It was not a communication to the public, and there is no evidence that, prior to this proceeding, that the communication was publicly available. We conclude that the Association did not violate the mediation agreement.

Application of Standards

We turn to the standards for bad faith bargaining set out above, reviewing 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. Applying the specific criteria above, we

conclude that: (1) dilatory tactics were not used; (2) the contents of the proposal, specifically the request for an apology, was a genuine offer combined with a monetary offer and not intended to end the supplemental mediation; (3) the behavior of the party's negotiator is not at issue; (4) the Association made a significant financial concession of $49,000; (5) even if the Association proposal for an apology required explanation, the District never asked for one; and (6) the course of negotiations reflects that the Association promptly provided a counter offer to the District offer, and only left the mediation after the mediator communicated that the mediation had ended. Finally, while the Association bargaining team email to Association bargaining unit members and affected former members contained inaccuracies, those inaccuracies were not sufficient to support a determination that the Association bargained in bad faith. We conclude that the District has not established that the Association violated ORS 243.672(2)(b), and we will dismiss this claim, and therefore the Amended Complaint.

PROPOSED ORDER

1. The Complaint is dismissed.

SIGNED AND ISSUED on November 19, 2015.

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. The objections must be mailed, faxed or hand-delivered to this Board – not sent electronically. 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. This Board does not accept electronic filing of objections (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-022-14

(UNFAIR LABOR PRACTICE)

911 PROFESSIONAL COMMUNICATIONS EMPLOYEES' ASSOCIATION,	)	
Complainant,	)	FINDINGS AND ORDER
v.	)	ON COMPLAINANT'S PETITION
	)	FOR REPRESENTATION COSTS
CITY OF SALEM,	)	
Respondent.	)	

On October 5, 2015, this Board issued an order adopting a recommended order, which held that the City of Salem (City) violated ORS 243.672(1)(e). *See* 26 PECBR 518 (2015). The 911 Professional Communications Employees' Association (Association) timely filed a petition for representation costs. Pursuant to ORS 243.676(2)(d) and OAR 115-035-0055, this Board finds that:

1. The Association is the prevailing party. *See* OAR 115-035-0055(1)(b).

2. This case required one day of hearing.

3. The Association requests an award of $2,300, based on 9.2 hours of attorney time. The Association is charged a per member per month retainer, which is estimated to produce an hourly rate of $250.

4. The Association's hourly rate is greater than the average hourly rate used for representation costs. *See Oregon School Employees Association v. North Clackamas School District*, Case No. UP-017-13, 26 PECBR 129, 130 (2014) (Rep. Cost Order) (the average rate for representation costs is between $165 and $170 per hour). We will adjust our award according.

5. The Association's time claimed is considerably less than what this Board considers an average amount of time for a one day hearing. *See id.* (cases generally require an average of 45 to 50 hours per day of hearing).

6. 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). Reasonable representation costs are costs that are calculated using the Board's criteria of hourly rate and number of hours.

7. 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 Association in the amount of $521.33.

ORDER

The City will remit $521.33 to the Association within 30 days of the date of this Order.

DATED this 14 day of December 2015.

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. MA-014-14

(MANAGEMENT SERVICE APPEAL)

JILL A. MILLER, Appellant, v. STATE OF OREGON, OREGON RACING COMMISSION, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On November 2, 2015, the Board heard oral argument on the parties' objections to an October 2, 2015, recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew. The ALJ bifurcated the matter and held a hearing in Portland, Oregon on August 26, 2014, and May 11 and 12, 2015. The record closed on June 12, 2015, with the receipt of the parties' post-hearing briefs.

William J. Macke, William J. Macke & Associates, Portland, Oregon, represented Appellant.

Neil Taylor, Assistant Attorney General, Labor and Employment Section, Oregon Department of Justice, Salem, Oregon, represented Respondent.

On August 1, 2014, Appellant filed this appeal alleging that the State of Oregon, Oregon Racing Commission (Commission) had violated ORS 240.570(3) and (5), ORS 240.555, and ORS 183.415(1) by dismissing her from state service. The ALJ bifurcated the hearing, holding the first phase on the issues of timeliness and jurisdiction, and the second phase on due process claims and the merits. After the first phase of hearing, the ALJ issued a recommended order, which was subsequently withdrawn at the request of the Board. The ALJ's recommended order issued on October 2, 2015, contained his determinations on the issues in both phases of the hearing.

The issues are:

1. Is Appellant's appeal timely?

2. If the appeal is timely, does the Board have jurisdiction over the appeal?

3. If the appeal is timely and if the Board has jurisdiction, did the Commission: (a) provide Appellant with sufficient procedural due process; and (b) dismiss her from state service consistent with ORS 240.570(3), ORS 240.570(5) and ORS 240.555?

We conclude that Appellant's appeal was untimely. Therefore, we dismiss the appeal.[1]

RULINGS

The relevant rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT[2]

The Parties

1. The Commission is a state agency that regulates all aspects of the pari-mutuel industry. The Commission also encourages and supports the industry in promoting live racing by attracting businesses to Oregon that are involved in races conducted at horse and greyhound tracks, off-track sites, and multi-jurisdictional simulcasting and interactive wagering totalizator hubs that conduct business online through a closed loop subscriber system. The Commission oversees approximately 3,700 active licensees.

2. The Commission's Account Wagering Hub unit regulates businesses (Hubs) that conduct pari-mutuel wagering on races that they simulcast and other races that they carry in their respective wagering venues through a subscriber service. The unit also administers and regulates account wagering, an integral part of the Hub system. Account wagering is a form of pari-mutuel wagering in which an individual deposits money into an account with a Hub licensee and uses the funds available in that account to pay for pari-mutuel wagering conducted by the Hub. Accounts can be established by Oregon residents and non-residents, subject to their compliance with account wagering rules. Oregon is one of only two states that provide regulation to this industry.

3. The supervisor of the Commission's Account Wagering Hub unit oversees nine "Advanced Deposit Wagering" companies (also called ADWs or Hubs). The ADW companies

[1]Our conclusion negates any need to address the other issues raised in the appeal.

[2]Because we conclude that the appeal is not timely, we include only those findings of fact most pertinent to that conclusion.

provide opportunities for people in the United States and elsewhere to place more than $2.4 billion in bets on horse and greyhound races. For historical reasons, Oregon is a key regulator of this industry and receives substantial revenue resulting from that regulation.

4. Appellant held the position of Supervisor/Manager of Mutuels and Account Wagering HUBS at the time of her termination on January 23, 2014.[3] She reported directly to the Commission Executive Director Jack McGrail.

5. Because the Commission believed that Appellant was terminated from an executive service position, the Commission included no appeal rights regarding the termination in her dismissal letter. Further, someone from the Commission told Appellant that she had "no recourse" to appeal the termination decision.

6. Appellant filed her appeal with this Board on August 1, 2014, 190 days after the effective date of her termination. Appellant attributes the delay in filing the appeal to the Commission's failure to apprise her of her alleged statutory appeal rights.

CONCLUSIONS OF LAW

1. Appellant's appeal is not timely and will be dismissed.

Under ORS 240.560(1),

> "[a] regular employee who is reduced, dismissed, suspended or demoted, shall have the right to appeal to the Employment Relations Board not later than 30 days after the effective date of the reduction, dismissal, suspension or demotion. The appeal must be in writing. The appeal is timely if it is received by the board or postmarked, if mailed postpaid and properly addressed, not later than 30 days after the effective date of the reduction, dismissal, suspension or demotion."

Here, there is no dispute that Appellant's appeal was filed more than 30 days after the effective date of her termination. Appellant argues, however, that because the Commission never informed her of appeal rights to this Board, either orally or via her termination letter, her late filing should be excused.

In *Lamb v. Cleveland*, 28 Or App 343, 346, 559 P2d 1325 (1977), the court rejected such an assertion, reasoning that, under the State Personnel Relations Law, there is "no statutory duty to inform a discharged employee of the proper appeal procedure." The court added that neither the

[3]The parties dispute the proper classification of this position, with Appellant asserting that she was in a management service position, and the Commission asserting that Appellant's position was in the executive service. Because we conclude that the appeal was not timely filed, we do not resolve this classification dispute.

failure to give advice nor the "giving of inadequate advice" warranted this Board "from requiring timely statutory notice in order to invoke its jurisdiction for appeal." *Id.* (footnote omitted).[4]

Appellant does not dispute that *Lamb* is "on all fours" with this matter. She claims, however, that *Lamb* "predates the current [version of] ORS 183.415(1), which requires state agencies to notify employees of their rights." We disagree with Appellant's argument that the language in ORS 183.415(1) effectively overrules *Lamb* and creates a "good cause" exemption that excuses her late filing.

The current version of ORS 183.415(1) reads: "[t]he Legislative Assembly finds that persons affected by actions taken by state agencies have a right to be informed of their rights and remedies with respect to the actions." ORS 183.415(1). The statute then continues by setting forth notice requirements in "a contested case." Appellant does not assert that the Commission's decision to terminate her constitutes a "contested case." Rather, in this context, the "contested case" provisions apply to the notice and procedures provided by this Board once we have received an appeal.

Nevertheless, Appellant asserts that ORS 183.415(1), a provision in the Oregon Administrative Procedures Act (APA), required the Commission to notify her of her right to appeal her dismissal to this Board. Because Appellant was not so notified, she states that she was unaware that she could file an appeal with this Board. Consequently, according to Appellant, the lack of appropriate notice means that she had "good cause" for filing her appeal beyond the 30-day requirement.

The flaw in Appellant's argument is that it is premised on the assertion that the statute imposes a new statutory duty on the Commission—that is, the affirmative obligation to inform a discharged employee of appeal rights to this Board. But that is not so. Rather, the statute includes non-operational legislative findings, followed by a series of prescriptive requirements that, in the context of a contested case before this Board, we must follow. Those requirements do not include an affirmative obligation that disciplinary action by a state agency *must* include a notice of appeal rights to this Board.[5] Those requirements also do not state a "good cause" exception to an untimely filing of an appeal under ORS 240.560(1).

We also disagree with the suggestion that the Commission's letter terminating Appellant's employment is an "[o]rder" within the meaning of the APA, such that the letter needed to comply with all of the APA's provisions that apply to an agency "order." ORS 183.310(6)(a) defines the term "order" as "any agency action expressed orally or in writing directed to a named person or

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[4]We note that, as a practical matter, the issue of whether a state agency must give management service employees notice of their appeal rights has not arisen in recent years because, in this Board's experience, discipline and termination letters to management service employees routinely include a description of the employees' appeal rights.

[5]As we said in *Shepard-Lamb v. Adult and Family Services Division*, Case No. MA-29-94 at 4 (October 1994), the better practice is to include a notice of appeal. Even though the Commission believed that Appellant had no appeal rights, a notice stating that she may have appeal rights likely resolves any lack of notice issue.

named persons, *other than employees, officers or members of an agency*." (Emphasis added.) The "action" of the Commission at issue here was a termination directed to its own employee (Appellant). Thus, the action is expressly excluded from the statutory definition of an "order," within the meaning of the APA. Consequently, we do not find that Appellant had "good cause" for her late filing, under such a reading of the APA.

In sum, we conclude that the aforementioned provisions in the APA did not effectively overrule *Lamb* and its progeny to create a "good cause" exception that would excuse Appellant's late filing. Because we are bound by the conclusion in *Lamb*, we disagree with Appellant's assertion that her untimely filing may be disregarded. The appeal will be dismissed.

ORDER

The appeal is dismissed.

DATED this 16 day of December, 2015.

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. MA-013-14

(MANAGEMENT SERVICE DISCIPLINE)

ELIZABETH CASTILLO-MIDDEL, Appellant, v. STATE OF OREGON, DEPARTMENT OF HUMAN SERVICES, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On December 1, 2015, this Board heard oral argument on both parties' objections to an October 1, 2015, recommended order issued by Administrative Law Judge (ALJ) Julie Reading, after a hearing held on May 21-22, 2015, in Salem, Oregon and on June 9, 2015, by telephone. The record closed on July 17, 2015, following receipt of the parties' post-hearing briefs.

Kevin Lafky, Attorney at Law, Lafky and Lafky, Salem, Oregon, represented Appellant.

Neil Taylor, Assistant Attorney General, Labor and Employment Section, Oregon Department of Justice, Salem, Oregon, represented Respondent.

On June 25, 2014, Appellant filed this timely appeal of a decision by the State of Oregon, Department of Human Services (Department), to issue her a reprimand letter. The Department alleges that Appellant exhibited a lack of professional judgment and responsibility in handling two matters related to persons in the Department's custody. Appellant asserts that her actions were within her authority and were consistent with the Department's policies and practices. She also asserts that she was targeted by the Department because she successfully settled a previous disciplinary action and filed a hostile work environment complaint.

The issue is:

Did the Department violate ORS 240.570(3) when it reprimanded Appellant for an inability to fully and faithfully perform the duties of her position satisfactorily?

We conclude that the Department failed to prove that one of the two charges was reasonable. However, one charge is reasonable and it substantiated the reprimand.

RULINGS

The parties filed post-hearing briefs on July 17, 2015. Appellant filed a 38-page brief, which exceeds the page limitation of OAR 115-010-0077. Appellant did not have permission, or an agreement with the Department, to submit excessive pages. The Department moved to strike the final eight pages from the brief. Appellant requested that the Department be allowed to submit eight additional pages of briefing. However, the Department did not want to avail itself of that option. Appellant then proposed that 20 different lines on various pages be deleted from the Appellant's post-hearing brief in lieu of the deletion of the last eight pages.

The ALJ determined that eight pages of the brief would be struck as follows: (1) Page 3, Line 11 through Page 10, Line 4 (section titled Background Information); and (2) Page 37, Line 5 through Page 38, Line 10 (section titled Conclusion). The ALJ based this decision on several factors: (1) further briefing from the Department would not be useful; (2) it would be unduly burdensome and confusing to parse out several small pieces as proposed by the Appellant; and (3) deleting the last eight pages would remove Appellant's legal arguments, which contain the most helpful information for the ALJ.

We determine that the ALJ acted within her discretion. The remaining rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties and Background

1. The Department is an Oregon state agency that provides social services to children and others in need of assistance. The Department defines core values that employees are expected to exhibit. These core values include stewardship, integrity, responsibility, respect, professionalism, innovation, and service equity.

2. To provide protective services for children, the Department administers the Child Protective Services Program, also known as the Child Welfare Program. As part of that program, the Department will receive legal custody of a child if a court determines that the child is not safe while residing in the home of a biological or legal parent because of abuse or neglect.

3. Department caseworkers and their supervisors are responsible for working with the family. In making decisions for the family's needs, they work with employees and volunteers from Court Appointed Special Advocates (CASA) in determining the best interest of children in the Department's custody. They also work with foster parents, the children's attorneys, the parents' attorneys, the children's counselors, and the parents' counselors.

4. The Department also works directly with the parents of children who are brought into the Department's custody. These parents are often very upset about losing custody and direct a great deal of hostility at Department staff.

5. The Department maintains paper files for cases. Additionally, it maintains a statewide database called ORKids where caseworkers and supervisors can add and refer to notes and updates in the cases.

6. When children are first placed in the Department's custody, caseworkers and supervisors follow the Oregon Safety Model to establish a permanency plan that is designed to safely work toward the goal of restoring children to their homes, although that goal is not always achievable. Permanency plan development requires the input of the family and others who have direct relationships with the children.

7. Once a permanency plan is established, caseworkers and supervisors have tools to change it as circumstances warrant. One such tool is a Family Decision Meeting (FDM). An FDM is used when a family member's input is needed in making case planning decisions. Supervisors attend FDMs whenever possible. Supervisors also ensure that a caseworker, facilitator, or other child welfare staff person who is an expert in child safety attends the meetings. Further, supervisors review and approve the decisions made during FDMs.

8. To maintain the parent-child bond while attempting to rehabilitate the parents and to comply with court-ordered visitations, caseworkers and supervisors facilitate visits between these children and their parents to the extent possible by establishing a visitation plan, which is considered a part of the permanency plan.

9. Caseworkers and supervisors also follow the Oregon Safety Model. It requires that, in first establishing a visitation plan, the following people must be involved: parents, child substitute caregivers, the child, and other relevant people (*e.g.*, the child's attorney, CASA, therapist or relatives). The supervisor's role in developing a visitation plan is to review the case plan, including visitation and contact plans, consult with the caseworker when issues or concerns arise, ensure that supervised visits are used only when necessary, and support the caseworker's efforts for frequent contact between the child, parents, and siblings.

10. Once the visitation plan is in place, caseworkers and supervisors have the authority to suspend and reinstate visits. Unlike the initial plans, there are no specific procedures or policies that caseworkers and supervisors must follow in order to suspend or reinstate visits. However, because maintaining the parent-child bond is an important goal, the only circumstances in which

the Department will suspend visits are when a parent presents a clear danger to a child or when a parent misses three consecutive visits. Therefore, even if parents attend visits when clearly under the influence of drugs or alcohol, their visits will not be suspended. In situations such as those or other possible risks, the Department has authority to increase the levels of supervision to help protect the child. The rule suspending visits after three are missed is enforced because there are other families that want to use the available visiting times.

11. Appellant has worked for the Department since 2000. She started as a Child Protective Services caseworker. In 2007, she was promoted to a supervisor. In January 2014, Appellant started working in Lincoln County. Her placement in Lincoln County followed a previous discipline that was later withdrawn pursuant to a settlement agreement.

12. Supervisors supervise five to six caseworkers and are responsible for personnel management, including: interviewing, selecting new staff, promoting staff, recommending salary increases, reassigning staff, completing performance appraisals, responding to grievances, rewarding excellent performance, and taking disciplinary action.

13. When Appellant started working in Lincoln County, many of the caseworkers under her supervision were newly hired caseworkers with little experience. Each caseworker has approximately 17 to 22 cases, many involving multiple children. With such a high caseload, it is often difficult for caseworkers and supervisors to complete their work within 40 hours each week. Often they are not able to return phone calls in a timely manner.

14. The Department placed caseworker Tracy Bohne under Appellant's supervision in Lincoln County. Supervisor Angela Cazares had previously supervised Bohne. Appellant perceived that Bohne continued to discuss her cases with Cazares, thereby undermining Appellant's ability to work with Bohne.

15. Fridays are court days in Lincoln County and supervisors are expected to attend court hearings. As such, they are typically not available for other duties such as attending FDMs.

The "DC" Case

16. "DC" is a young child who was placed in the Department's protective custody in January 2013, due to drug addiction and domestic violence occurring in the home with her father "DC Father" and her mother "DC Mother."[1]

17. The Department placed DC into foster care with her grandmother, (DC Grandmother), and established a plan for supervised visitations between DC and DC Father. Bohne was assigned as the caseworker.

[1]Initials are used for individuals in the Department's custody. Family members and other involved persons are referred to by their relationship with the individual.

18. DC Father was known to direct anger and hostility toward Department staff. He blamed them for ending his relationship with DC Mother. Sometimes when he called the Lincoln County office, he would yell at the receptionist, LucyAnn Gibson. However, at other times, he was calm and polite toward her. Further, Bohne told Appellant that he had stormed out of court on one occasion.

19. DC Father was inconsistent about attending the scheduled supervised visits. He often arrived very late or not at all. DC was often demonstrably upset by DC Father's failure to attend the scheduled visits. Due to this behavior, DC Father's visits were suspended and reinstated by Bohne on a few occasions before February 2014.

20. DC Mother gave birth to an infant (DC Sister) while in drug treatment in Benton County. The Department's Benton County office began facilitating visits with DC Father and DC Sister.

21. On February 14, 2014, Bohne scheduled an FDM for DC's family to occur on Friday, February 21, 2014. The purpose of the meeting was to determine what would be necessary to return DC to her mother's care.

22. On February 17, Bohne sent Appellant (and others) an email that documented the day and time of the February 21 FDM. The email asked anyone that would not be attending to contact Bohne. Appellant did not recall receiving the email. Bohne also spoke with Appellant and documented that Appellant stated that she would be attending the meeting. However, Appellant did not attend the meeting or alert Bohne that she (Appellant) would not be attending.

23. On February 21, 2014, the FDM commenced with the following individuals present in-person or by telephone: Bohne, DC Father, DC Mother, DC Sister, DC Grandmother, DC Grandfather, DC Attorney, DC Mother's Attorney, DC Mother's Counselor, DC Father's Attorney, CASA Program Manager Carol James, CASA Advocate Bonnie Sloan, and some other observers.

24. From the beginning of the meeting, DC Father was not participating. Then, after approximately five minutes, he stood up so forcefully as to cause his chair to fly backward and yelled "you're a fucking bitch!" He then stormed out of the room, slamming the door on his way out. When he reached the reception area, he punched the wall.

25. Later that day, Bohne told Appellant about DC Father's outburst, and Appellant agreed to suspend his supervised visits.[2] Bohne informed several parties of this decision by email,

[2]Appellant testified that Bohne did not inform her of what took place in the FDM, and that Bohne only wanted to suspend the visits until DC Father made contact with the office. Bohne testified that she told Appellant about DC Father's outburst at the FDM. We find Bohne's testimony more reliable, because if her goal was to get the visits suspended, it follows that she would have relayed information about DC Father's extreme behavior, rather than downplaying it. Moreover, the incident would have been fresh in

stating that Appellant had confirmed that the visits should be stopped. Specifically, Bohne sent the email to DC Grandmother, DC Attorney, DC Father's Attorney, Sloan, Lincoln County Social Service Assistant (SSA) Debbie Perkins, and others. DC Grandmother and DC Attorney expressed agreement with the decision. DC Father's Attorney requested that the visits continue, asserting that there had never been any concerns with DC Father's behavior during the visits. Bohne neglected to notify anyone in Benton County at that time that visits with DC Sister were to be stopped there as well.

26. Between February 21 and February 25, 2014, DC Father unsuccessfully attempted to reach Bohne several times. On February 25, 2014, at approximately 11:30 a.m., DC Father phoned the Lincoln County offices and reached Gibson. He asked to speak with Bohne. Gibson told him that Bohne was not available. DC Father began yelling that he wanted to speak with someone immediately. Gibson went to find someone who could speak with him. She located supervisors Cazares and Julie Davis, but they were leaving and stated that they could not take the call. Gibson returned to the phone and told DC Father that he would need to leave a message for Bohne. DC Father became extremely upset, yelling "[t]his is unacceptable! I'm going to be there in 30 minutes, and if there is no one there to talk to me, I'm going to fuck somebody up!" Gibson asked him to calm down and asked if he would like to be transferred to Bohne's voicemail. He responded "fuck you!" and hung up. Gibson perceived this threat to be sufficiently serious that she called a non-emergency police line and filed a report. Gibson also entered a case note into the casefile database on that date, detailing the incident.

27. On February 26, 2014, Bohne sent an email to numerous individuals, including Appellant, to "update everyone about what [] happened over the last week with [the DC] case." That email documented both the February 21 FDM outburst and the February 25 incident. Appellant did not read this email.

28. On February 26, 2014, DC Father attended a supervised visit with DC Sister in Benton County because the Benton County SSA and caseworker had not been included on Bohne's February 21, 2014, email about suspending DC Father's visits.

29. Bohne learned of the Benton County visit and, later that day, drafted an email recapping the situation to the involved parties and confirming that visits were to be stopped in both Lincoln and Benton counties.

30. On March 2, 2014, DC Father attempted to reach Bohne, but Bohne was out of the office. Gibson told Appellant that DC Father wanted to talk to someone, but that he had been unsuccessful in reaching Bohne. Appellant took his call.

31. Appellant arranged to meet with DC Father the following day. Bohne was out of the office that day as well. DC Father arrived for the meeting as scheduled. Appellant told DC Father that he needed to engage in rehabilitation services and needed to be consistent in his visits.

Bohne's mind at the time that she spoke with Appellant, making it more likely that she would have informed Appellant about the outburst.

Based on the discussion with DC Father, she determined that it would be appropriate to resume visits with the maximum level of supervision. Appellant did not consult Bohne, the file or ORKids before making this decision.[3] Appellant subsequently acknowledged that she should have discussed the matter with Bohne before making that decision. Appellant also acknowledged that, had she read the February 21, 2014, email that documented DC Father's recent behavior, she would have approached the matter differently.[4]

32. Appellant coordinated with Perkins and decided to allow for two visits a week based on Perkins's availability. Appellant approved visits with intensive supervision, which would mean that both an SSA and a CASA advocate would supervise. The Oregon Safety Model describes this as follows: "[t]his highest level of supervision is only appropriate on high risk cases or when there are significant child well-being issues. Examples might be: threat of abduction, threat of coercion of testimony, fearful child."

33. Appellant informed Bohne of her decision. Bohne sent an email to DC Attorney, DC Father's Attorney, DC Grandmother, Sloan, and a Benton County caseworker, informing them of the reinstatement. DC Attorney responded "I would have preferred that we see some walk with that talk, like actually doing the treatment and passing the [urinalyses]. But I guess we will see." On March 3, 2014, Appellant responded to DC Attorney: "[h]e is going to have a visit tomorrow. I am not sure if [it] is going to continue. I said, he would get a visit tomorrow. We will re-assess his situation as he is living and staying in Salem."

34. DC Father had a successful visit with DC on March 4, 2014. DC Father did not attend any further visits after that. Accordingly, on March 13, 2014, Appellant suspended the visits again.

35. In May 2014, DC Father's counselor recommended to Bohne that DC Father's visits be reinstated because he had not shown any aggressive behavior during his supervised visits. Bohne agreed to reinstate visits, even though DC Father had drug delivery charges pending and had met with DC while apparently under the influence of heroin. At the first visit with DC after this reinstatement, DC Father arrived several hours late and appeared to be under the influence of marijuana or heroin. He missed three visits in a row shortly thereafter and his visits were suspended again.

[3]By not consulting Bohne, the case file or ORKids, Appellant made a decision without complete information. She did not know about DC Father's recent behavior with Gibson. Further, Appellant failed to accurately recall what Bohne told her, resulting in making a decision based on inaccurate and incomplete information.

[4]Appellant may have ultimately arrived at the same conclusion (to reinstate visitation rights), but she acknowledged that she would have undertaken a different process that included Bohne in making that decision.

The WS Case[5]

36. WS is a young disabled adult in the custody of the Department. He resides in a home for the developmentally disabled (DD Home). WS Father has a history of violence and a no-contact order with the family.

37. On Friday, March 28, 2014, WS Father called the DD Home and stated that he was coming to visit WS. The DD Home staff phoned the Lincoln County office staff to get guidance on how to respond.

38. As Appellant was returning from morning court sessions, Gibson approached her and told her that Ron McCall from the DD Home was trying to reach her. Appellant consulted the file and phoned McCall. Appellant told McCall that WS Father was not to visit and that he (McCall) should phone the police if WS Father showed up at the DD Home. Appellant also phoned WS Father and told him not to visit, and that he needed to get visits established through the Department. Appellant then called McCall again to tell him that she had told WS Father not to visit. Appellant then returned to court for afternoon sessions.

39. WS CASA Advocate Tim Osborn was also informed of WS Father's intent to visit. He attempted to contact the caseworker, but she was out of the office. Osborn contacted James for direction. James instructed him to call the caseworker's supervisor, who was Appellant, and also to phone WS Father and tell him that he would need to be cleared by the Department before he could visit. Osborn contacted WS Father, told him not to visit, and called Appellant, leaving a message on her voicemail requesting a call back.

40. At some point, Gibson also informed Cazares of the situation. Cazares researched the background of the case and determined that WS Father might present a danger. Cazares told Gibson to tell McCall and Osborn to call the police if WS Father arrived at the home. Cazares also told Gibson to communicate to WS Father that he could meet Cazares at the Lincoln County office if he wanted contact with his son.

41. WS Father arrived at the Lincoln County office in the afternoon. He was agitated, but Cazares met with him in the lobby and was able to calm him. WS Father eventually left after providing his contact information.

[5]The testimonies of Appellant, Cazares, and Gibson all vary as to the events on March 28, 2014, regarding the WS case. The accounts are even further confused by prior written accounts by these witnesses that contradict their testimony to some degree. The facts, as found here, attempt to reconcile the discrepancies to the extent possible. However, the central fact at issue here is not disputed–which is that Appellant did not return a phone call, as described below.

42. Late that afternoon, both Appellant and James were attending court sessions. After court adjourned, they were walking out together and James told Appellant that she (Appellant) had a message from Osborn. James intended to convey a sense of urgency. However, neither Appellant, nor her husband, who was also present and who is a law enforcement officer with decades of investigative experience, sensed that urgency.

43. When Appellant heard Osborn's message after returning on Monday, she marked it as addressed because she had already contacted McCall and WS Father, and considered the issue resolved.

Disciplinary Process

44. Starting in March 2014, Program Manager Mary Moller, who supervises Appellant, began a disciplinary investigation into Appellant's actions in the DC and WS cases. Specifically, Moller was investigating Appellant's reinstatement of DC Father's visits and her failure to return Osborn's call on the WS matter.

45. Moller obtained information on these cases from employees such as Bohne and Cazares. However, she did not contact Appellant about these matters. Moller forwarded the information that she received to District Manager Marco Benavides and Human Resource Analyst Keith Jeskey for disciplinary consideration.

46. On March 11, 2014, Moller sent an email to Jeskey and Benavides that said:

> "I'm waiting to get back other information on a different case related to safety decisions made by [Appellant]. I want to remind you of my concern about [Appellant's] safety judgment. Historically, there is a case that [Appellant] worked years ago [where] a child died. Safety decision-making for [Appellant was] a question then as well. Thank you."

47. The case that Moller referred to was not a case where a child on Appellant's caseload died. Rather, Appellant's involvement in the case began only after the child had died.

48. On April 22, 2014, Benavides recommended a fact-finding hearing into Appellant's handling of the WS and DC cases. Benavides conducted the fact-finding hearing on May 14, 2014. Consistent with Department practice, Appellant was not informed in advance of the issues that would be presented at the fact-finding hearing. Appellant was permitted to bring a personal attorney.

49. Appellant was surprised that issues related to the WS and DC cases were the subject of the fact-finding hearing. She did not immediately remember the specific details of her actions during those cases. On May 23, 2014, she provided additional information to Jeskey and Benavides about what she recalled from the WS case.

50. On June 6, 2014, Appellant filed a complaint of misconduct against Benavides, alleging harassment, intimidation, retaliation, hostile workplace, physical and emotional injury, and failure to meet the professional standards of a program manager.

51. On June 17, 2014, Benavides issued a written reprimand to Appellant. Benavides charged Appellant with a lack of sound professional judgment. The letter stated that Appellant had violated the Department's core value of responsibility. Specifically, Benavides charged:

> "During the May 14, 2014, investigatory meeting you stated you did not notify the caseworker or the CASA Program Manager that you had notified [WS Father] and informed him that he could not visit his son based on the no-contact order.
>
> "During the May 14, 2014, investigatory meeting you stated that you did not review the visitation plan, consult with the caseworker or consult with the SSA when you reinstated client [DC Father's] visitations with his children. You stated you were aware he has been aggressive and threatening in family meetings and child safety meetings. You stated you should have contacted the caseworker prior to authorizing the visits. Subsequently the father showed up late and under the influence for his assigned visit and you then suspended visits after. Your failure to review and weigh all available information was potentially harmful to children in DHS care, again a concern for the agency."

52. Benavides did not cite any specific procedures or policies that Appellant had violated by reinstating DC Father's visits or failing to return Osborne's phone call.

CONCLUSIONS OF LAW

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

2. The Department's written reprimand did not violate ORS 240.570(3).

ORS 240.570(3) provides that a "management service employee may be disciplined by reprimand, salary reduction, suspension or demotion or removed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." Here, the Department disciplined Appellant by reprimand, the lowest level of discipline identified in the statute. The Department has the burden of proving that its discipline did not violate ORS 240.570(3). OAR 115-045-0030(6); *Ahlstrom v. State of Oregon, Department of Corrections*, Case No. MA-17-99 at 14 (October 2001). The Department meets its burden of proof if this Board determines, under all of the circumstances, that the Department's actions were objectively reasonable. *Brown v. Oregon College of Education*, 52 Or App 251, 260, 628 P2d 410 (1981).

A reasonable employer disciplines employees in good faith and for cause, imposes sanctions that are proportionate to the offense, considers the employee's length of service and service record, and applies the principles of progressive discipline, except where the offense is serious enough to warrant summary dismissal. *Nash v. Department of Human Services*, Case No. MA-008-14 at 23 (December 2014). A reasonable employer also clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met. *Stark v. Mental Health Division, Oregon State Hospital*, Case No. MA-17-86 at 35 (January 1989).

A management service employee, such as Appellant, may be held to high standards of behavior, so long as those standards are not arbitrary or unreasonable. *Stoudamire v. State of Oregon, Department of Human Services*, Case No. MA-4-03 at 7 (November 2003). In addition, the Department need not prove all of the charges on which it relied in disciplining a management service employee, so long as the proven charge warrants the discipline imposed. *See, e.g., Patrick v. Department of Agriculture*, Case No. MA-2-91 (June 1991). Further, we may consider any damage to the trust in the relationship between a management service employee and the employer. *See Reynolds v. Department of Transportation,* Case No. 1430 at 10 (October 1984).

Finally, a reprimand is the mildest discipline recognized under ORS 240.570(3). This Board has stated that an employer generally imposes a reprimand to inform the employee that particular behavior is unacceptable and to obtain a correction of that behavior. Because a reprimand does not have an economic impact on an employee, its primary purpose is a form of notice. *Hill v. State of Oregon, Department of Transportation*, Case No. MA-7-02 at 13 (November 2002).

DC Case

The salient facts are undisputed. DC was placed into the Department's custody because her parents were abusing substances and DC Father was violent toward DC Mother. After DC came into the Department's custody, DC Father exhibited erratic and often hostile behavior. He also frequently failed to arrive for visits with DC, which upset DC a great deal. Therefore, he frequently had visits suspended and reinstated. Despite his unreliable attendance and actions toward staff, he had not acted inappropriately with DC or directed violence toward DC in any visits.

DC Father's behavior in the FDM meeting (described in detail above), however, was alarming and sufficient to create a concern, especially given that DC Sister, an infant, was present. Bohne discussed DC Father's conduct with Appellant and both agreed to suspend visits.[6] DC Father then tried to reach Bohne, but was unsuccessful. In his frustration, he made threatening statements to Gibson sufficient to cause her to contact police. This incident was documented in

[6]At the time that the decision to suspend visits was made, Benton County was not so notified. Consequently, DC Father had a visit with DC Sister. During that visit, DC Father did not exhibit any angry or dangerous behavior.

ORKids. On February 26, Bohne sent Appellant (and others) an email documenting DC Father's recent behavior and explaining that his visitation rights had been suspended.

On March 3, Appellant met with DC Father and decided to reinstate visits, but with intensive supervision. Appellant did not, however, consult with the case notes, ORKids, or Bohne before deciding to do so. Appellant also neglected to read Bohne's February 26 email that detailed DC Father's troubling actions on February 21 and 25. Appellant acknowledged that had she reviewed that information, it would have made a difference in how she handled the reinstatement of DC Father's visitation rights. Appellant did not provide a sufficient explanation for why she failed to review the available material or talk with Bohne before reinstating the visitation rights.[7]

Under these circumstances, we conclude that the Department proved that Appellant failed to avail herself of available, relevant information before making the decision to reinstate the visitation rights.[8] It was not unreasonable or arbitrary of the Department to expect as much from Appellant. We also disagree with Appellant's argument that such an expectation needed to be codified in a formal policy in order for the Department to reprimand Appellant. In short, as a management service employee with significant responsibilities and experience, the Department could reasonably expect that Appellant would read pertinent information on the case and talk with the caseworker before making the decision that she did.

Having proved this charge, we consider whether the discipline imposed (a reprimand) was warranted. As set forth above, a reasonable employer imposes discipline proportionate to the nature of the offense. This was, to be sure, a minor offense, and, concomitantly, the Department imposed the minimum discipline allowed by statute. Moreover, the primary purpose of a reprimand is a form of notice so that the employee can modify behavior in future situations. *See Hill* at 13. We find that appropriate in this case. Accordingly, we conclude that the discipline was consistent with the actions of an objectively reasonable employer, and we will not disturb it.[9]

WS Case

We turn to the Department's charge that Appellant failed to return CASA Advocate Osborn's phone call after WS Father had stated an intention to visit WS. Similar to the DC matter, the Department charges that in failing to return Osborn's call, Appellant showed a lack of

[7]Appellant testified that she was unaware of DC Father's actions when she made the decision to reinstate visits. Had Appellant availed herself of the available resources, however, she would have been so aware.

[8]We reject the Department's attempt at hearing to expand the charges to include allegations beyond those set forth in the letter of reprimand.

[9]We agree with the conclusion and reasoning of the ALJ that the record did not establish that the Department imposed the discipline to retaliate against Appellant for filing a complaint against Benavides. We also have concerns about some of the erroneous information circulated by Department personnel in the investigation and discipline of Appellant.

professional judgment because she jeopardized WS's mental and physical well-being and compromised the Department's relationship with community partners. Appellant admits that she did not return Osborn's call. Appellant argues, however, that the lack of a return phone call did not amount to failing an objectively reasonable professional expectation. For the following reasons, we agree with Appellant.

As described above, when James, Appellant, and Appellant's husband were walking outside of the courthouse, James told Appellant that she (Appellant) had a phone call from Osborn. Although James attempted to convey that the matter was urgent, neither Appellant nor her husband sensed that urgency. Under these circumstances, we conclude that the Department has not established that Appellant failed to return a phone call that she understood to be of an urgent nature.

Moreover, Appellant aptly addressed the matter that prompted Osborn's call. Given that the matter had been addressed, it was reasonable for Appellant to determine that it was not essential to return Osborn's call. This is particularly true on this record, which established that caseworkers and supervisors are overwhelmed with cases and are frequently unable to return phone calls. Thus, it is not uncommon for calls such as those made by Osborn to go unreturned. Consequently, we conclude that the Department has not proved this charge—*i.e.*, that Appellant violated an objectively reasonable professional expectation by not returning a single phone call by Osborn.[10]

ORDER

The June 17, 2014, reprimand letter is to be withdrawn and then reissued without the reference to the WS case.

DATED this 17 day of December 2015.

Kathryn A. Logan, Chair

*Jason M. Weyand, Member

Adam L. Rhynard, Member

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

This Order may be appealed pursuant to ORS 183.482.

[10]We also note that Benavides's wavering testimony about the basis for this charge reflects a lack of substance to the allegation.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-015-14

(MANAGEMENT SERVICE DISCIPLINE)

MICHAEL S. PALMER, Appellant, v. STATE OF OREGON, DEPARTMENT OF CORRECTIONS, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Appellant filed objections to an August 6, 2015, recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe, after a hearing was held before ALJ Julie Reading on April 30 and May 1, 2015, at the Snake River Correctional Institution in Ontario, Oregon.[1] The record closed on June 15, 2015, upon receipt of the parties' post-hearing briefs. The parties waived oral argument and submitted the matter on written argument in lieu of oral argument.

Shawnee Perdue, Wieland Perdue PLLC, Boise, Idaho, represented Appellant at the hearing and filed objections to the recommended order. Subsequently, Appellant appeared *pro se*.

Brena Moyer-Lopez, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented the Respondent.

On August 21, 2014, Appellant filed a management service discipline appeal with this Board contesting actions taken by the State of Oregon, Department of Corrections (DOC).

The issue is: Did DOC discipline Appellant in accordance with ORS 240.570(3) when it issued Appellant a written reprimand and removed him from DOC's Tactical Emergency Response Team (TERT)?

[1]The matter was transferred to ALJ Kehoe in a periodic reassignment of cases.

For the reasons set forth below, we conclude that DOC's action was consistent with the statute and we will dismiss the appeal.

RULINGS

The rulings of the ALJs were reviewed and are correct.

FINDINGS OF FACT[2]

1. DOC maintains a prison facility in Ontario, Oregon called the Snake River Correctional Institution (SRCI). At that site, correctional officers generally report to sergeants, who report to lieutenants, who report to captains, who report to assistant superintendents, who report to Superintendent Mark Nooth. The facility's correctional officers, corporals and sergeants are represented by a union, the American Federation of State, County and Municipal Employees. The lieutenants and their superiors are unrepresented and are commonly referred to as "managers" and "supervisors."

2. Some DOC employees are selected to temporarily "work out of class" and perform the duties of higher-ranking employees while maintaining their prior pay rates. Work-out-of-class positions are considered developmental positions.

3. DOC can also assign employees to its TERT, which performs specialized work related to inmate disturbances and hostage rescues. Any full-time DOC employee can apply and potentially be assigned to the TERT. Employees who are selected and serve as members of the TERT receive a four percent pay differential. TERT duties are performed in addition to an employee's regular duties.

4. Appellant has worked at SRCI since he was hired as a correctional officer on July 10, 2000. Appellant later joined DOC's TERT in June 2005 and eventually became an assistant squad leader for the group. From June 8, 2008 to June 14, 2009, Appellant served as a work-out-of-class sergeant. On April 21, 2013, he was promoted to sergeant. On May 26, 2013, Appellant became a work-out-of-class lieutenant. On February 16, 2014, he was promoted to lieutenant and began a six-month trial service period.

5. In 2003, SRCI was involved in a class action lawsuit filed by 20 of the facility's female employees. The lawsuit, which was settled, alleged gender discrimination and sexual harassment. Since that time, the facility's administrators have been particularly sensitive to those issues and have implemented a number of "respectful-workplace" policies and procedures.

6. In May 2014, one of Appellant's subordinate sergeants told Appellant that one of the sergeant's subordinates, Officer EE, was being disrespectful and not completing assigned

[2]Appellant objected to several findings of fact in the recommended order, but failed to cite to any specific evidence in the record that would support those objections. Nonetheless, we have reviewed the record with Appellant's objections in mind, and we conclude that the ALJ's findings of fact are accurate.

shakedowns in spite of a warning that the sergeant had given him the day before.[3] Subsequently, Appellant spoke with EE about DOC's expectations of him and put a "verbal notation" about the occurrence in EE's personnel file. DOC does not consider such notations to be a form of discipline.

7. At the time, Appellant was having a secret extramarital affair with EE's ex-wife, Officer JE, who was also one of Appellant's indirect reports. (JE's supervisor, a sergeant, reported to Appellant.) Because of Appellant's rank and the nature of the work at the facility, Appellant could be required to personally oversee JE's duties at any time. In practice, Appellant occasionally supervised JE while she worked a graveyard shift. Additionally, Appellant was giving her advice and guidance about interviewing and promotions.

8. In early May 2014, Captain Gilberto Rodriguez overheard some coworkers saying that Appellant was having an extramarital affair with an unnamed subordinate correctional officer. A few days later, Rodriguez shared that rumor with Assistant Superintendent of Security Judy Gilmore. Rodriguez also met with Appellant, told him about the rumor, and warned him that being involved and having sex with someone at work could be bad for Appellant's career as a manager, as managers need to be above reproach at all times. In response, Appellant said that he was "not involved in any kind of relationship." Shortly after speaking with Rodriguez, Appellant went to his immediate superior, Captain Randy Gilbertson, and told him that there may be a rumor about Appellant having a relationship with JE, and that the rumor was untrue.

9. On May 19, 2014, DOC received a public hotline complaint call from a former correctional officer who had resigned in April 2014. Among several related allegations, the caller alleged that Appellant was having sex with JE at work while the two worked a graveyard shift, and that JE received special privileges and was relieved from posts. The caller also alleged that JE had been sending inappropriate messages and naked pictures to Appellant's DOC-issued cellphone.

10. The complaint was forwarded to DOC's Human Resources Division (HR), and HR Managers Lori Holcomb and Jana Wilson were tasked with conducting an investigation. The two set out by requesting Appellant's phone records, text messages, and emails. The phone records that they received shortly thereafter showed that Appellant and JE had shared four different phone calls between February 25 and March 5, 2014. They did not immediately receive records of Appellant's text messages or emails.

11. Holcomb and Wilson interviewed Appellant on May 29, 2014. At the beginning of the interview, Appellant was presented with the allegations from the hotline complaint. In response, Appellant said he was "astonished" and asked, "[a]re they saying I had sex with her?" He was also asked if he had engaged in a sexual relationship with JE while at work, and Appellant replied, "no, not at any time." Appellant then went on to indicate that he had sent JE a few text messages to occasionally ask her how she was doing. He also said that he had only spoken with JE on his DOC cellphone to give her advice about interviewing for a work-out-of-class sergeant position, and claimed that he could not recall exchanging any personal emails with her. At the

[3]In this Order, we will refer to certain individuals by initials rather than their full names.

conclusion of the interview, Wilson advised Appellant to keep the investigation confidential while it was ongoing and said that he could only discuss it with her, Holcomb, or Gilmore.

12. Shortly after the interview, Appellant spoke with Gilbertson and Rodriguez about the hotline complaint allegations, the HR investigation, and what had transpired during the interview. In addition, Appellant confessed that he had a personal relationship with JE and had used his work cellphone for personal use. Appellant then asked Gilbertson if he could call JE. Gilbertson replied that he would not advise calling her if there was a conflict, but could not tell Appellant not to call her if it was a healthy relationship. He also told Appellant to be truthful throughout the investigation. Rodriguez told Appellant to report his relationship with JE to Gilmore and to clarify the answers that he had given during his interview. At the time, Appellant appeared to be nervous, upset, and worried.

13. Next, at approximately 3:30 p.m. that day, Appellant went to Gilmore's office and disclosed that he had a personal relationship with JE outside of work and had exchanged "maybe two or three emails" with her. In response, Gilmore told him that she had to "protect the agency" and would have to report his comments to HR. Additionally, she directed Appellant to submit a timeline by June 1, 2014, and to indicate when the relationship started and ended, what Appellant did with JE, how often they were together, whether the two went on dates, whether they also went out with other people or double-dated, and whether they spoke on the phone. Appellant said that he would comply. During the meeting with Gilmore, Appellant was emotional, nervous, and remorseful.

14. On May 30, 2014, Appellant went to JE's house and spoke with JE about the hotline complaint allegations and his interview, warned her that she might be interviewed as well, and told her not to lie or cover up their relationship.

15. Gilmore checked her email inbox on June 2, 2014, and had received nothing from Appellant. She then sent Appellant an email and repeated her request for a timeline. (The email did not repeat the additional instructions outlined above.) Appellant's subsequent response claimed that he had misunderstood her due date. It also indicated that he had first spoken with JE on January 29, 2014, during an active shooter training, and that the two had met and agreed to stop seeing each other on May 19, 2014.

16. Holcomb and Wilson also interviewed JE on June 2. During the interview, JE admitted that she and Appellant were engaged in a sexual relationship, but asserted that, while at work, the two had never had physical contact and had never been alone in a room with the door closed. JE further admitted that the two had exchanged text messages, but claimed that the messages were not sexual in nature. In addition, she clarified that she was not coerced into the relationship and was never promised anything. She separately revealed that Appellant had gone to her house on May 30th and had spoken with her about the investigation.

17. Shortly after the June 2 interview ended, JE left Holcomb a voicemail message stating that she wanted to change a prior answer to say that she actually could not recall whether there were any text messages of a sexual nature.

18. On June 3, 2014, Appellant called JE to talk about her interview and see if she was alright.

19. Around that time, HR's ongoing investigation revealed that Appellant had exchanged over a hundred emails and over a hundred instant messages with JE. An examination of those communications showed that the two had routinely used DOC equipment to have personal conversations, exchange mildly flirtatious banter, and coordinate seeing each other at work, and that Appellant had called JE pet names such as "momma," "baby," and "hon." The investigation also revealed that Appellant had exchanged a large number of text messages with JE via his DOC cellphone, and that many of those messages contained pictures and videos. (HR was unable to view the contents of Appellant's text messages without a subpoena, but was able to view a detailed text message log.)

20. Holcomb and Wilson interviewed Appellant a second time on June 6, 2014. During that interview, Appellant admitted that he had unprofessionally used his DOC cellphone to send personal texts to JE, and that some of those could have had "a sexual nature" or included "references to sex." He also conceded that he had "messed up" by using his work cellphone and instant messages to communicate with JE, and that the pet names he had used were inappropriate for a lieutenant to use with an officer. Appellant claimed, however, that he had not made JE promises of any kind and never coerced, intimidated, or threatened her. When Appellant was asked why the timeline he gave Gilmore was so vague, he said, "just because," and explained that he did not think that the circumstances between the beginning and end of the relationship were important "because nothing had gone on at work." He further explained that he had spoken with Gilbertson because Gilbertson was his immediate superior, and that he had only spoken with Rodriguez indirectly. In addition, Appellant admitted that he had spoken with JE at her house after his first interview, and revealed that he had called JE on June 3, 2014.

21. On June 28, 2014, as a result of the seriousness of the allegations against him, Appellant was reassigned from his security position to an office position. He remained in that administrative role until August 4, 2014. While performing that assignment, Appellant was barred from participating in TERT activities.

22. Around the time that Appellant was reassigned, EE and his union alleged that Appellant's above-referenced verbal notation of EE was retaliatory and motivated by Appellant's relationship with EE's ex-wife. Subsequently, DOC removed the notation from EE's file.

23. At the conclusion of the investigation, Holcomb and Wilson generated a formal investigative report. After reviewing the report, Gilmore, Nooth, and other DOC administrators discussed what charges and discipline were appropriate. When making its determinations, the group considered discipline that had been issued for others at DOC's various locations, Appellant's positive employment history and work performance, the significance of Appellant's supervisory/leadership role, and the SRCI's prior "sexualized environment" and problematic history with sexual discrimination and harassment. They also wanted to make sure that JE was not a victim. Ultimately, it was determined that Appellant would receive a written reprimand and be removed from the TERT, but would not be terminated.

24. On July 28, 2014, Nooth and Gilmore met with Appellant and presented him with the disciplinary document. At that time, the two explained why the action was warranted and expressed their concerns and disappointment. In response, Appellant apologized, said he felt bad and was willing to "take his lumps," and signed the document. It was the first time that Appellant had been disciplined.

25. The written reprimand did not discipline Appellant for having sex at work, for having an off-duty sexual relationship with JE, for the improper use of DOC property, or for sexual harassment. Instead, it charged that Appellant violated DOC's code of ethics and respectful-workplace policy and breached the confidentiality of an ongoing investigation. Additionally, it stated that Appellant was to be removed from the TERT immediately. As a result of that removal, Appellant lost the affiliated four percent pay differential.

26. DOC's code of ethics requires that employees be "honest and truthful" and be "exemplary" in reporting dishonest or unethical conduct and in following the regulations of the department. Those regulations include DOC's code of conduct, which states that an employee's conduct must be above reproach and not impugn the credibility of DOC, its employees, or the corrections profession. The code of conduct also states that employees shall not knowingly commit acts that constitute a violation of the policies, rules, procedures, regulations, directives, or orders of the department. A related policy requires that employees declare potential conflicts of interest in writing to their superiors.

27. DOC's respectful workplace policy prohibits behavior, action, and language that may be perceived by others as discriminatory or harassing. It further states that employees at all levels are expected to interact with coworkers in a businesslike and professional manner at all times, and that supervisors shall act as role models for subordinates.

28. On August 4, 2014, Nooth sent Appellant a letter stating that, due to the issuance of a written reprimand, Appellant was immediately being removed from management promotional trial service and returned to the rank of sergeant.[4] Without the discipline, Appellant's trial service period would have expired on August 15, 2014.

CONCLUSIONS OF LAW

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

2. DOC's disciplinary action was consistent with ORS 240.570(3).

As an initial matter, we must first decide which of DOC's actions are at issue in this case and which statutory standards apply. Appellant contends that both the reprimand and the removal from the TERT were part of a single disciplinary action, as the removal from the TERT also carried a corresponding loss in pay. As such, both actions should be subject to review under ORS 240.570(3). DOC asserts that the only disciplinary action subject to our review under this portion of the statute is the reprimand, as the removal from the TERT involved "merely a removal

[4]The removal from management trial service has not been (and cannot be) appealed to this Board. *See Tucker v. State of Oregon, Department of Human Services*, Case No. MA-06-11 at 2 (September 2011).

of a discrete duty" that cannot be appealed. In the alternative, DOC argues that the removal was a reassignment that is subject to review only under the lower standard of ORS 240.570(2), which requires us to determine whether the reassignment of work was "for the good of the service."

We begin by reviewing the disciplinary document itself, which DOC labeled as a reprimand. The label that an employer gives a disciplinary document, however, is not dispositive of its nature. Rather, we look at the substance of the action taken. Here, the disciplinary letter not only reprimanded Appellant for the alleged misconduct, but also informed Appellant that it was removing him from the TERT. By that action, Appellant suffered a four percent reduction in salary. Further, the removal from the TERT and the reprimand were based on the same facts and reasons. Thus, we find that the reprimand and removal from the TERT were part of a single disciplinary action, and should be considered together under the standards of ORS 240.570(3).

Legal Standards

Appellant contends that DOC violated ORS 240.570(3), which provides in part that a "management service employee may be disciplined by reprimand, salary reduction, suspension or demotion or removed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." As the employer in this case, DOC has the burden of proving that its discipline was consistent with that subsection. *See* OAR 115-045-0030(6); *Ahlstrom v. State of Oregon, Department of Corrections*, Case No. MA-17-99 at 14 (October 2001). In order to meet that burden, DOC must ultimately show that, under all the circumstances of the case, the discipline imposed was "objectively reasonable." *Brown v. Oregon College of Education*, 52 Or App 251, 260, 628 P2d 410, 415 (1981).

Broadly speaking, a reasonable employer is one that disciplines employees in good faith and for cause; imposes sanctions that are proportionate to the offense; considers the employee's length of service and service record; and applies the principles of progressive discipline, except where the offense is sufficiently serious or unmitigated to warrant summary dismissal. *Nash v. State of Oregon, Department of Human Services*, Case No. MA-008-14 at 23 (December 2014). A reasonable employer also defines performance expectations, clearly expresses those expectations to employees, and informs employees when those expectations are not being met. *Stark v. Mental Health Division, Oregon State Hospital*, Case No. MA-17-86 at 35 (January 1989). In addition, it administers discipline in a timely manner. *Flowers v. Parks and Recreation Department*, Case No. MA-13-93 at 16 (March 1994).

We review management service disciplinary appeals using a two-step process. First, we determine if the employer proved the charges that are the basis of the discipline. If the employer proves some or all of the charges, we then apply the reasonable employer standard to determine whether the employer was justified in taking the disciplinary action that it did. *Greenwood v. Oregon Department of Forestry*, Case No. MA-3-04 at 30 (July 2006), *recons denied* (September 2006). The employer need not prove all of the charges on which it relies. *Ahlstrom* at 15. Moreover, this Board may sustain discipline of a management service employee upon proof of only a single charge. *Carter v. State of Oregon, Department of Corrections*, Case No. MA-12-99 at 12 (September 2001).

Discussion

DOC charged that Appellant: (1) violated its code of ethics by being evasive, not forthcoming and inaccurate during the investigation; (2) violated its respectful workplace policy when he called JE "momma," "baby," and "hon" in emails; and (3) failed to comply with reasonable instructions intended to preserve the confidentiality and integrity of DOC's investigation. We conclude that the DOC has sufficiently proved each of those charges.[5]

When Appellant was presented with the hotline complaint allegations on May 29, he gave his interviewers the misleading impression that he had never had a sexual relationship with JE "at any time." Regardless of whether Appellant was specifically asked whether he had had sex with her "at work," a reasonable management service employee should have understood that information about the existence of an off-duty relationship with JE was critical to the investigation being conducted. His failure to disclose his true relationship at the outset of the investigation was at best incomplete and misleading, and at worst, false. Either way, Appellant violated DOC's code of ethics. We also conclude that Appellant violated the code of ethics when, as outlined above, he routinely minimized and mischaracterized his communications with JE and failed to provide a meaningful timeline that was responsive to Gilmore's questions.

Regarding the remaining charges, the record indisputably shows that Appellant called JE "momma," "baby," and "hon" as alleged. The use of such terms is unprofessional and particularly troubling when used by a superior to a subordinate. Appellant has admitted that his phone usage was unprofessional. It is also quite clear that Wilson advised Appellant to keep the details of the investigation confidential, and that, shortly thereafter, Appellant breached that confidentiality.

For these reasons, we find that DOC has proved that Appellant engaged in the conduct for which he was disciplined.

We now turn to whether DOC's discipline is consistent with what would be imposed by an objectively reasonable employer. Before DOC disciplined Appellant, DOC weighed the fact that Appellant was a long-term employee with excellent performance reviews and no prior disciplinary record. Indeed, the record shows that it was largely because of those factors that Appellant was not terminated. Rather, DOC issued a written reprimand with removal from the TERT. We find this discipline to be a reasonably proportionate response to Appellant's actions.

Appellants conduct amounts to a serious breach of confidence and significant errors in judgment, and DOC employed Appellant in a position that requires honesty and trust. Moreover, as a manager (albeit a relatively new one), Appellant reasonably should have known the importance of honesty and full disclosure during the investigation. *See Mabe v. State of Oregon, Department of Corrections*, Case No. MA-09-09 at 29 (July 2010) (recognizing that "Department [of Corrections'] policies explicitly state that employee truthfulness is important").

[5]In his objections, Appellant challenges various findings of facts in the recommended order as unsupported by the evidence. Appellant further objects to the proposed conclusions of law because they were based on incorrect facts. As noted above, we reviewed Appellant's factual objections but concluded that the ALJ's findings were accurate. Appellant did not raise other objections to the proposed conclusions of law.

DOC's concerns about Appellant's relationship and the behavior associated with it were rational. Whether or not Appellant had ever actually given JE special favors or privileges, rumors spread to that effect, and as evidenced by the hotline complaint and EE's grievance, the relationship created the unacceptable appearance of a conflict of interest. This caused others to question his impartiality, thereby eroding Appellant's effectiveness. *See Zaman v. State of Oregon, Department of Human Services*, Case No. MA-21-12 at 13 (April 2013); *Reisner v. Department of Human Resources, Employment Division*, Case No. MA-14-87 at 14 (June 1988). As a manager, Appellant was reasonably obligated to be proactive and inform his superiors of the potential conflict of interest. *See Buehler v. State of Oregon, Oregon Employment Department*, Case No. MA-17-12 at 18 (March 2013).

In his post-hearing brief, Appellant cites *McGee v. State of Oregon, Department of Human Services, Office of Human Resources*, Case No. MA-05-02 (March 2003), *reversed in part and remanded*, 195 Or App 736, 99 P3d 337 (2004), for the proposition "that a Letter of Reprimand and similar discipline is improper when a management employee has an extra-marital off-duty relationship with a subordinate employee where there is no evidence of coercion or improper influence." However, *McGee* is readily distinguishable, as the appellant in *McGee* was disciplined for purely off-duty conduct, and the relationships and actions at issue therein did not violate the employer's policies, adversely affect the appellant's work performance, involve his subordinates, or result in formal complaints.

As for the second charge, Appellant has conceded that his use of pet names was inappropriate. In light of the facility's prior "sexualized environment," in which staff regularly used inappropriate language, it is understandable why DOC was concerned. DOC can reasonably expect its employees to comply with established policies and to maintain appropriate boundaries with coworkers. *See Clinton v. State of Oregon, Oregon Military Department*, Case No. MA-016-11 at 13 (June 2013). We are unmoved by the possibility that Appellant's messages were not shared with others, that Appellant did not intend for his words to be derogatory or insulting, or that JE never complained about sexual harassment. *See Nash* at 23; *Harlow v. State of Oregon, Department of Corrections*, Case No. MA-028-12 at 16 (January 2014).

DOC was also rightly concerned about preserving the integrity of its investigation. In our view, Appellant's failure to respect the investigatory process is a serious issue and shows a lack of judgment and understanding as a manager, especially when the case involves someone who was expected to conduct confidential investigations of his own. *See Garrett v. State of Oregon, Department of Human Services*, Case No. MA-02-11 at 6 (December 2011); *Schafer* at 22. Additionally, a reasonable employer can impose discipline if a manager fails to follow reasonable instructions. *See Fogleman v. State of Oregon, Department of Corrections*, Case No. MA-10-01 at 27 (May 2003); *Helfer v. Children's Services Division*, Case No. MA-1-91 at 24 (February 1992).

On the subject of the reprimand's TERT removal, we also recognize that, in the past, the TERT has had a negative reputation of being an "old boys' club," and that DOC wanted to change that reputation. Appellant's policy violations and secret affair with a subordinate were at odds with that appreciable goal.

Conclusion

For the reasons set forth above, we conclude that DOC acted as a reasonable employer when it reprimanded Appellant and removed him from the TERT. Therefore, DOC did not violate ORS 240.570(3), and we will dismiss the appeal.

ORDER

The appeal is dismissed.

DATED this 18 day of December, 2015.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.