

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-037-14

(UNFAIR LABOR PRACTICE)

ILWU LOCAL 8,	)	
	)	
Complainant,	)	
	)	ORDER ON REQUEST FOR
v.	)	REHEARING OR RECONSIDERATION
	)	(ON REMAND)
PORT OF PORTLAND,	)	
	)	
Respondent.	)	

Kevin Keaney, Attorney at Law, Portland, Oregon, represented Complainant.

Randolph C. Foster and John B. Dudrey, Attorneys at Law, Stoel Rives LLP, Portland, Oregon, represented Respondent.

---

On December 16, 2016, ILWU Local 8 (Union) filed a motion seeking rehearing or reconsideration of this Board’s December 8, 2016, order on remand dismissing the Union’s complaint against the Port of Portland (Port). *See* Case No. UP-037-14, 26 PECBR 818 (2016) (Order on Remand). The Port submitted a timely response to the Union’s motion.<sup>1</sup> For the reasons set forth below, we deny the Union’s request for rehearing or reconsideration.

The Union contends that this Board should grant rehearing, or in the alternative, reconsideration, because we declined to consider evidence that is “conclusive” as to matters at issue in the case and that was “unavailable” when this Board dismissed the Union’s initial complaint. Before we address the substance of the Union’s request, we address two preliminary matters. First, we note that the Union’s petition cites to a revised version of OAR 115-010-0100

---

<sup>1</sup>On January 7, 2017, the Union submitted a letter requesting “leave to respond” to several assertions in the Port’s January 6, 2017, Response to ILWU’s Petition for Rehearing or Reconsideration. The Union’s letter included arguments that addressed the Port’s response. We construe the Union’s request for “leave to respond” as a *de facto* reply. A reply is not permitted unless first authorized by a Board Agent. *See* OAR 115-010-0045(4). Here, the Union did not request (and was not granted) such authorization. Additionally, this Board does not feel that a reply to the Port’s filing would be necessary to resolve the Union’s request for rehearing or reconsideration. Therefore, we will not consider the Union’s reply.

that is not effective until February 1, 2017. Until that date, the Board will continue to apply the current rule.<sup>2</sup> Second, the Union has asked for rehearing in this case, but a rehearing presupposes that a hearing was held in the first instance. Here, the complaint was dismissed without a hearing because the Board's initial investigation demonstrated that no question of fact or law existed that warranted a hearing. Thus, a request for rehearing is inapt.

We now turn to the Union's remaining request—namely, that we reconsider our previous decision to dismiss the complaint and instead allow the case to proceed to a hearing. In our order on remand dismissing the complaint, we also declined to receive additional evidence offered by the Union, noting that

“[the Union] had multiple opportunities during this Board's initial investigative process to allege facts in support of the position that it now takes. Yet, Local 8 failed to do so until after this Board dismissed not one, but two separate complaints involving what are essentially the same facts and issues. The time to participate in our investigative process has long passed.” 26 PECBR at 821 n 3.

In requesting reconsideration of our decision, the Union offers no new legal argument or factual dispute in support of its request. Rather, it merely reasserts its earlier argument that we should have reopened the record to accept additional evidence that it believed was relevant to the case. We see no reason to reconsider our decision on this matter. The Union's argument is premised on its claim that the evidence was unavailable at the time that the case was dismissed. However, even assuming that the Union is correct that the evidence's unavailability would be sufficient justification to reopen the record, we do not agree that the evidence was unavailable when the complaint was first dismissed. Rather, the evidence was only unavailable in the particular format that the Union now seeks to submit.

Specifically, the Union asks us to consider a partial transcript of an arbitration proceeding among the Union and International Container Terminal Services, Inc. and the Pacific Maritime Association. (The Port was not a party to the arbitration.) The transcript includes the testimony of a Union member and official about alleged events that occurred before February 2014. Additionally, the Union submitted a related declaration from that same Union member. But the real import of the documents submitted is not the actual documents, but the substance of the statements made by the witness. The matters that the employee describes all occurred before February 2014, ten months before the complaint was filed. The fact that these statements were not collected in the form of a transcript by the time we dismissed the complaint does not mean that the information was unavailable at that time. Moreover, the witness in this case was a Union member and officer, so this is not a case where the information was held by an individual to which the Union had no access, such as a Port official or an unrelated third party. The Union has not provided a sufficient explanation as to why the employee could not have provided the same information at an earlier date (*i.e.*, during the investigative stage of this case). Accordingly, we do not agree that the evidence was “unavailable” when the complaint was initially dismissed, and we deny the Union's request for reconsideration.


---

<sup>2</sup>Because the Union's petition fails to meet the standards under either rule, our ruling would be the same regardless of which version of our rules applied.

ORDER

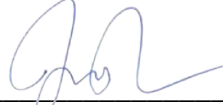
The Union's request for rehearing or reconsideration is denied.

DATED January 17, 2017.




---

Adam L. Rhynard, Chair



---

Jason M. Weyand, Member



---

Lisa M. Umscheid, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-001-17

(AMENDMENT OF CERTIFICATION)

SANDY POLICE	)	
ASSOCIATION/CLACKAMAS COUNTY	)	
PEACE OFFICERS ASSOCIATION,	)	
	)	
	)	
Petitioner,	)	ORDER AMENDING
	)	CERTIFICATION OR
	)	RECOGNITION
v.	)	OF EXCLUSIVE BARGAINING
	)	REPRESENTATIVE
CITY OF SANDY,	)	
	)	
Respondent.	)	
_____	)	

On January 5, 2017, the Clackamas County Peace Officers Association (CCPOA) filed a petition under OAR 115-025-0008 seeking to amend the City of Sandy’s recognition of the Sandy Police Association (Association) to reflect the Association’s affiliation with the CCPOA.

CCPOA President Stephen Steinberg submitted a declaration stating the following: (1) on May 6, 2016, the Association’s members held a meeting to collectively discuss affiliation; (2) the purpose of that meeting was adequately noticed consistent with the Association’s bylaws; (3) there was an opportunity for member reflection before the vote, which was conducted in neutral conditions by secret ballot consistent with the Association’s bylaws; (4) on May 20, 2016, the members of the Association voted to affiliate with the CCPOA; and (5) this affiliation became effective January 1, 2017.

No objections were filed to this petition.

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

ORDER

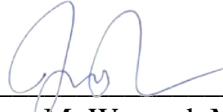
The City's recognition of the Association as the exclusive representative of a bargaining unit of police officers is amended to reflect the affiliation with the CCPOA.

DATED January 30, 2017.



---

Adam L. Rhynard, Chair



---

Jason M. Weyand, Member



---

Lisa M. Umscheid, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-006-16

(UNFAIR LABOR PRACTICE)

AFSCME LOCAL 189,	)	
	)	
Complainant,	)	
	)	
v.	)	FINDINGS AND ORDER ON
	)	COMPLAINANT’S PETITION FOR
CITY OF PORTLAND,	)	REPRESENTATION COSTS
	)	
Respondent.	)	

---

On December 23, 2016, this Board issued an order holding that the City of Portland (City) violated ORS 243.672(1)(e) by engaging in surface bargaining with the American Federation of State, County and Municipal Employees, Local 189 (AFSCME). AFSCME filed a timely petition for representation costs, and the City filed timely objections to that petition.

Pursuant to ORS 243.676(2)(d) and former OAR 115-035-0055<sup>1</sup>, this Board finds that:

1. AFSCME is the prevailing party.
2. This case required one day of hearing.
3. AFSCME requests an award based on total costs of \$10,601.25, which includes 64.25 hours of attorney time at the rate of \$165 per hour.
4. The City does not dispute the reasonableness of the hours or rate claimed by AFSCME. The City asks only that the Board not issue an award that is greater than the standard award issued under the former rules that were in effect at the time this case was decided. AFSCME, however, has not asked the Board to depart from that former standard. Because there is no dispute, we apply the former standard.
5. AFSCME’s claimed time and hourly rate are both essentially equal to the average amounts that this Board uses to determine the reasonableness of representation costs. *See Oregon School Employees’ Association v. North Clackamas School District*, Case No. UP-017-13,

<sup>1</sup>Effective February 1, 2017, OAR 115-035-0055 was amended to change how this Board awards representation costs. We apply the rule that was in effect at the time that the petition was filed.

26 PECBR 129, 130 (2014) (Rep. Cost Order) (cases generally require an average of 45 to 50 hours per day of hearing and the average rate is between \$165 and \$170 per hour). As a result, we will use AFSCME's claimed total costs as the basis for our award.

6. An average award is generally one-third of the reasonable representation costs of the prevailing party, subject to the \$5,000 cap in *former* OAR 115-035-0055(1)(a). Performing that calculation here, and considering the purposes and polices of the Public Employee Collective Bargaining Act, our awards in prior cases, and the reasonable costs of services rendered in this case, we order representation costs in the amount of \$3,533.75.

ORDER

The City shall remit \$3,533.75 to AFSCME within 30 days of the date of this Order.

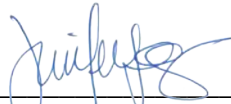
DATED March 21, 2017.



\_\_\_\_\_  
Adam L. Rhynard, Chair



\_\_\_\_\_  
Lisa M. Umscheid, Member



\_\_\_\_\_  
Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-020-15

(UNFAIR LABOR PRACTICE)

TRI-COUNTY METROPOLITAN )  
 TRANSPORTATION DISTRICT OF )  
 OREGON, )  
 )  
 Complainant, )  
 )  
 v. )  
 )  
 AMALGAMATED TRANSIT UNION, )  
 DIVISION 757, )  
 )  
 Respondent. )

FINDINGS AND ORDER  
ON PETITIONS FOR  
REPRESENTATION COSTS

On December 20, 2016, this Board issued an order holding that the Amalgamated Transit Union, Division 757 (Union) violated ORS 243.672(2)(b) and (d) when it did not respond to an information request from the Tri-County Metropolitan Transportation District of Oregon (District). The order also, however, held that the Union did not violate ORS 243.672(2)(b), (d), and (e), as alleged by the District.

Pursuant to ORS 243.676(2)(d), (3)(b), and *former* OAR 115-035-0055<sup>1</sup>, this Board finds that:

1. The District and the Union filed timely petitions for representation costs. The Union filed timely objections to the District’s petition.
2. This case required two days of hearing.
3. Both the Union and the District are prevailing parties. Only a prevailing party in an unfair labor practice case is entitled to representation costs. ORS 243.676(2)(d), (3)(b); *Former* OAR 115-035-0055(1). In situations “[w]here one charge (or more) in a complaint is upheld while one charge (or more) in a complaint is dismissed, each party may be regarded as a prevailing party and may file a petition for representation costs for the portion of the case upon which it prevailed.” *Former* OAR 115-035-0055(1)(b)(A). For these purposes, separate charges must: (1) be “based on

---

<sup>1</sup>Effective February 1, 2017, OAR 115-035-0055 was amended to change how this Board awards representation costs. We apply the rule that was in effect at the time that the petitions were filed.

clearly distinct and independent operative facts; i.e., the charges could have been plead[ed] and litigated without material reliance on the allegations of the other(s)”; and (2) concern “the enforcement of rights independent of the other(s).” *Id.* A charge is separate only if it meets both parts of this test. *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 24 PECBR 720, 721 (2012) (Rep. Cost Order).

Here, the District prevailed on its claim that the Union’s failure to respond to an information request violated ORS 243.672(2)(b) and (d). The Union prevailed, however, on the District’s allegations that Union violated: (1) ORS 243.672(2)(b) and (e) by attempting to repudiate a grievance settlement agreement; (2) ORS 243.672(d) by sending a letter announcing that Union officers had limited authority to settle grievances; and (3) ORS 243.672(2)(b) and (d) by refusing to proceed with striking arbitrator names for grievance arbitrations. The proved violation and each dismissed charge could have been pleaded and litigated without material reliance on the allegations of the others. Additionally, each of the four charges concerned the enforcement of independent rights under the Public Employee Collective Bargaining Act (PECBA). Consequently, we conclude (and the parties do not dispute) that the proved violation and the enumerated dismissed charges are separate within the meaning of *former* OAR 115-035-0055(1)(b)(A).

We next determine the percentage of the case on which each party prevailed. Although the Union prevailed on three charges, whereas the District prevailed on one, we do not determine the percentage based solely on “dividing the number of claims on which a party prevailed by the total number of issues.” *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 853, 854 (2007) (Rep. Cost Order). Rather, we also consider the relative importance and complexity of each issue, as well as the amount of time devoted to each issue. Here, although the charge proved by the District concerns a significant PECBA right, so too do the dismissed charges. Moreover, the dismissed charges were more complex, thereby demanding more time be devoted to those charges. Consequently, we conclude that the Union prevailed on 85 percent of the case, and that the District prevailed on 15 percent of the case. Our practice is to subtract those percentages to determine a single prevailing party. *Id.* Accordingly, we conclude that the Union is a “70-percent” prevailing party.

4. The Union requests an award of \$5,000, which is the maximum that we award in the absence of a civil penalty. *See former* OAR 115-035-0055(1)(a). The Union’s request is based on 136.3 hours of attorney time, billed at rates between \$195 and \$225 per hour.

The Union’s hours (136.3 for a two-day hearing) are slightly higher than those that we typically use to calculate 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 number of hours used for representation costs is 45 to 50 hours per day of hearing). The Union’s charged rates are also slightly higher than those that we generally use for representation costs. *See id.* (the average rate used for representation costs is between \$165 and \$170 per hour). However, the affidavit submitted by the District in support of its request for representation costs reflects both a higher number of hours billed and a higher hourly rate. Under these circumstances, we conclude that the Union’s requested rates and hours are reasonable.

5. An average award is generally one-third of the reasonable representation costs of the prevailing party, subject to the \$5,000 cap in *former* OAR 115-035-0055(1)(a). As noted above, the Union is a “70-percent” prevailing party, meaning that we adjust its reasonable costs by that percentage, and then award one-third of that adjusted amount. Performing that calculation here, and considering the purposes and policies of the PECBA, our awards in prior cases, and the reasonable costs of services rendered in this case, we order representation costs in the amount of \$5,000.

ORDER

The District shall remit \$5,000 to the Union within 30 days of the date of this Order.

DATED March 22, 2017.



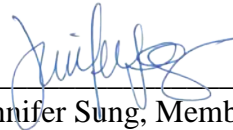
---

Adam L. Rhynard, Chair



---

Lisa M. Umscheid, Member



---

Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-005-16 and UP-010-16

(UNFAIR LABOR PRACTICES)

BROOKINGS-HARBOR EDUCATION )  
ASSOCIATION/OEA/NEA, )

Complainant, )

v. )

BROOKINGS-HARBOR SCHOOL )  
DISTRICT 17C, )

Respondent. )

RULINGS,  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER

BROOKINGS-HARBOR SCHOOL )  
DISTRICT 17C, )

Complainant, )

v. )

BROOKINGS-HARBOR EDUCATION )  
ASSOCIATION/OEA/NEA, )

Respondent. )

Margaret S. Olney, Attorney at Law, Bennett Hartman Morris & Kaplan, LLP, Portland, Oregon,  
represented the Brookings-Harbor Education Association/Oregon Education Association.

Rebekah R. Jacobson, Attorney at Law, Garrett Hemann Robertson, P.C., Salem, Oregon,  
represented Brookings-Harbor School District 17C.

On February 16, 2017, Administrative Law Judge (ALJ) Julie D. Reading issued a recommended order in this matter.<sup>1</sup> The parties had 14 days from the date of service to file objections. OAR 115-010-0090(1). No objections were filed, which means that the Board adopts the attached recommended order as the final order in the matter. OAR 115-010-0090(4).

In these circumstances, the Board's rules allow us to limit the precedential value of the final order. OAR 115-010-0090(5). The Board does so in this case with respect to that portion of the order that dismisses the ORS 243.672(1)(c) and (1)(a) "because of" claims (on page 27). That portion of the order is binding on, and has precedential value for, only the named parties in this case.

ORDER

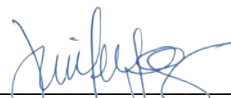
1. The District will cease and desist from violating ORS 243.672(1)(a) and (1)(e).

2. The parties will bargain their own make-whole remedy for the ORS 243.672(1)(e) violation. The parties have 60 days from the date of this Order to reach an agreement. If the parties do not reach an agreement within 60 days, each party shall submit to the Board the last proposal that it made to the other party within seven days of the conclusion of bargaining. The Board will either select one of the parties' last offers or craft its own remedy.

DATED March 27, 2017.

  
\_\_\_\_\_  
Adam L. Rhynard, Chair

  
\_\_\_\_\_  
Lisa M. Umscheid, Member

  
\_\_\_\_\_  
Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

\_\_\_\_\_  
<sup>1</sup>The ALJ issued a prior recommended order, which was withdrawn and replaced by the February 16, 2017, recommended order.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-005-16 and UP-010-16

(UNFAIR LABOR PRACTICES)

BROOKINGS-HARBOR EDUCATION	)	
ASSOCIATION/OEA/NEA,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
BROOKINGS-HARBOR SCHOOL	)	
DISTRICT 17C,	)	RECOMMENDED RULINGS,
	)	FINDINGS OF FACT,
Respondent.	)	CONCLUSIONS OF LAW,
	)	AND PROPOSED ORDER
_____	)	
BROOKINGS-HARBOR SCHOOL	)	ON RECONSIDERATION
DISTRICT 17C,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
BROOKINGS-HARBOR EDUCATION	)	
ASSOCIATION/OEA/NEA,	)	
	)	
Respondent.	)	
_____	)	

A hearing was held before Administrative Law Judge (ALJ) Julie D. Reading on September 12 and 13, 2016, in Brookings, Oregon and by telephone on September 22, 2016. The record closed on October 13, 2016, following receipt of the parties' post-hearing briefs. On January 30, 2016, the ALJ issued recommended rulings, findings of fact, conclusions of law and a proposed order (recommended order). On February 10, 2017, the Brookings-Harbor Education Association requested reconsideration of the recommended order and an extension for the time to file objections to the Employment Relations Board (the Board). The Brookings-Harbor School District had no objection to either request. The Board agreed to the extension, and the ALJ took the

reconsideration matter under advisement. This is the recommended rulings, findings of fact, conclusions of law and proposed order on reconsideration.

Margaret S. Olney, Attorney at Law, Bennett Hartman Morris & Kaplan, LLP, Portland, Oregon, represented the Brookings-Harbor Education Association/Oregon Education Association.

Rebekah R. Jacobson, Attorney at Law, Garrett Hemann Robertson, P.C., Salem, Oregon, represented Brookings-Harbor School District 17C.

---

On February 8, 2016, the Brookings-Harbor Education Association (Association or BHEA) filed a complaint alleging that the Brookings-Harbor School District 17C (District) violated ORS 243.672(1)(a), (b), (c), and (e) of the Public Employee Collective Bargaining Act (PECBA). The Board assigned it case number UP-005-16. Specifically, the Association alleged that the District violated ORS 243.672(1)(e) by unilaterally changing working conditions without bargaining, and also by bargaining in bad faith when it issued \$90 settlement checks, despite no actual settlement. The Association also charged that the District violated ORS 243.672(1)(a) and (c) by interfering and coercing employees in and because of protected activity by demonstrating a retaliatory attitude through various actions. Additionally, the Association asserted that the District violated ORS 243.672(1)(b) by cancelling a scheduled presentation and attempting to go directly to local leadership and avoid Oregon Education Association UniServ Representative Susan Anderson. Finally, the Association charged that the District violated ORS 243.672(1)(a), (b), and (c) by falsely announcing a negotiated settlement and issuing all employees a check for \$90.

The District filed a timely answer, including the affirmative defenses of waiver and business necessity. The District also requested a civil penalty.

On March 28, 2016, the District filed a complaint alleging that the Association violated ORS 243.672(2)(a), (b), and (d) of the PECBA. This Board assigned it case number UP-010-16. Specifically, the District asserted that Anderson violated ORS 243.672(2)(a) by threatening local leadership with a duty of fair representation claim during bargaining. The District also alleged that the Association presented a regressive proposal in bargaining, thereby bargaining in bad faith and violating ORS 243.672(2)(b). Finally, the District charged that the Association violated a written agreement not to file an unfair labor practice complaint over the District's implementation of a new schedule, thereby violating ORS 243.672(2)(d). The District also requested a civil penalty.

The Association filed a timely answer, asserted its claims in UP-005-16 as affirmative defenses among others, and requested a civil penalty.

The Board consolidated these matters for hearing and decision. In the post-hearing briefing, the Association withdrew its ORS 243.672(1)(b) claim regarding the District's issuance of the \$90 checks as a settlement. Also, it did not address its prior ORS 243.672(1)(a), (c), and (e) claims regarding both bad faith during bargaining and the issuance of the \$90 checks. Therefore, we do not address them here. The remaining issues in the respective cases are as follows:

UP-005-16

1. Did the District violate the duty to bargain in good faith required by ORS 243.672(1)(e) by increasing student contact time and instructional time without bargaining?
2. Did the District violate ORS 243.672(1)(a) and (c) by interfering with and coercing employees in or because of protected activity?
3. Did the District violate ORS 243.672(1)(b) by interfering with the administration of the Association?

UP-010-16

1. Did an Association representative violate ORS 243.672(2)(a) by threatening Association members with a duty of fair representation claim after the Association's local president entered into an agreement with the District?
2. Did the Association violate ORS 243.672(2)(b) by using regressive bargaining tactics?
3. Did the Association violate ORS 243.672(2)(b) and (d) by filing an unfair labor practice charge despite a written agreement not to do so?

With respect to UP-005-16, we conclude that the District violated the duty to bargain in good faith under ORS 243.672(1)(e) because it made a unilateral change in a mandatory subject without bargaining and did not meet its burden of proof on its affirmative defenses. We also conclude that the District interfered with the Association's exercise of rights by cancelling the Association's presentation in violation of ORS 243.672(1)(a), but not (1)(c). Finally, we conclude that the District did not dominate, interfere with or assist in the formation, existence or administration of the Association in violation of ORS 243.672(1)(b).

With respect to UP-010-16, we determine that the Association did not violate 243.672(2)(a) when Anderson discussed the possibility of members filing a duty of fair representation claim against local leadership. We also conclude that the Association did not use regressive bargaining tactics in violation of ORS 243.672(2)(b). Finally, we conclude that the Association did not violate ORS 243.672(2)(b) and (d) by filing an unfair labor practice charge.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties, Agreement, and Bargaining Background

1. The Association is a labor organization within the meaning of ORS 243.650(13). All non-administrative staff in the District are included in the Association's membership of approximately 170 employees. Approximately 110 are certified teaching staff.

2. The District is a public employer within the meaning of ORS 243.650(20). The District is comprised of Kalmiopsis Elementary School, Azalea Middle School, and Brookings-Harbor High School.

3. The parties are subject to a collective bargaining agreement (Agreement) covering the 2014-2017 school years.

4. During bargaining the Agreement, the District requested, and the Association agreed, to add language in Article 4, Section H, which provided that:

“[a]ll positions vacated by the retirement of employees that are going to continue the following year shall be posted internally and externally. In the event that a position is posted and no licensed applicants who are qualified, in the judgment of the District, apply, applications from retired teachers may be accepted and the candidate(s) may be interviewed for certified positions. If the District deems it necessary and the retired employee is willing, **a retired classified employee may be hired for one year only.**” (Ex. JT-1, p. 11, emphasis added.)

5. The District requested this provision in order to hire back an Indian Education Specialist to train her replacement. The District's bargaining team members did not mention any other specific employees at issue during that time. However, the District had been annually hiring back a cafeteria employee named Diana Hyde following her retirement.

6. In the years prior to summer 2015, the Association and the District had a contentious relationship. During the 2014 bargaining of the Agreement, the then current serving superintendent received a no confidence vote from the Association and resigned. For a brief time after that, there were interim superintendents.

7. Due to events that occurred between the Association and the prior superintendent, the Association amended its constitution and by-laws to require that:

“[a] contract, a Memorandum of Understanding (MOU), or a Memorandum of Agreement (MOA) must be ratified by a majority vote. A majority vote consists of those present at a meeting called for that purpose and by email proxy ballot to all members eligible to vote. It is members' responsibility to see that current contact information is available on file with BHEA.” (Ex. C-41, p. 5.)

8. The District has a policy titled “Commercial, Promotional and Corporate Sponsorships and Partnerships.” A subsection titled “Prohibitions” states in relevant part that: “[n]o agreement shall be entered into if the sponsorship or partnership involves or gives the appearance of involving any activity which could result in the following: \*\*\* 4. Promotion of the use of drugs, alcohol, tobacco or firearms; \*\*\*.” (Ex. R-11, p. 4.)

9. The District also has a policy titled “Board-Staff Communications,” which states that:

“[a]ll formal communications or reports to the Board or any Board committee from staff members will be submitted through the superintendent. This procedure will not be construed as denying the right of any employee to address the Board about issues which are neither part of an active administrative procedure, nor disruptive to the operation of the district. In addition, this procedure does not restrict protected labor relations communications of bargaining unit members.” (Ex. R-13, p. 1.)

10. The Association hosted a first annual employee barbeque at the beginning of the 2014 school year. The District contributed to the costs of the event. A local craft brewery supplied a keg of its craft beer and was listed as a sponsor on promotional materials.

11. At the beginning of each school year, the District hosts a new employee orientation program on a Friday. During the following week there is an all-staff in-service program. The Association has historically staffed a booth to distribute information about joining the Association during the new employee orientation. The Association has also traditionally given a presentation after breakfast on the first all-staff in-service day. Administrative staff has typically not attended the Association presentation.

#### Events Regarding the Start of the 2015-2016 School Year

12. After being elected in the spring, Matt Bennett became the Association President on July 1, 2015. His sister-in-law Dawn Bennett became the Association Vice President for Certified Employees. Mike McQueen was elected Secretary.

13. On June 8, 2015, a District payroll specialist contacted Matt Bennett<sup>2</sup> and some other District personnel to state that retired cafeteria employee Hyde wished to return to work for the next school year, but would not be able to do so because of Article 4, Section H in the Agreement. The payroll specialist stated that it would be possible to re-hire Hyde with a Memorandum of Understanding (MOU), and she requested to remain informed regarding whether Hyde could be hired for another year.

14. The Association’s local leadership discussed the matter and determined that the contract language should be adhered to as bargained. Matt Bennett responded to the payroll specialist informing her of such, and he also spoke to Hyde.

15. In July 2015, Sean Gallagher became superintendent of the District. Gallagher was concerned about the performance of District students based on the results of recently obtained performance measure results.

---

<sup>2</sup> Although he had not yet assumed his position as Association President, Matt Bennett was contacted because the prior Association President could not be reached.

16. Shortly after Gallagher and Matt Bennett assumed their respective new roles, they had a brief meeting over lunch where they both expressed their intentions to have a productive and amicable working relationship.

17. Gallagher learned of the Hyde situation shortly after assuming the superintendent role. On July 27, 2015, he saw UniServ Representative Anderson at a District event and asked her if Hyde could be re-hired. Unaware of the Association local leadership's prior communications on the matter, Anderson stated she thought that would probably be permissible. She then relayed this to the local leadership, who explained they had already told the administration that Hyde could not be re-hired.

18. On August 4, 2015, Gallagher sent a memorandum to the Association regarding Hyde. Gallagher asserted that:

“[a]t the time of Ms. Hyde[']s rehire as a PERS retiree to District 17C, there did not exist any language in the Brookings-Harbor Education Association (BHEA) agreement restricting the hiring of a classified PERS retiree as exists in the current BHEA agreement. After consultation with the district's legal counsel, the district's position regarding the employment status of Ms. Hyde is that she will remain employed by District 17C and remain in good standing.” (Ex. R-2, p. 1.)

19. The District scheduled the 2015-2016 school year new employee orientation for August 21, 2015, and the all employee in-service for August 24, 2015. The Association was scheduled to make its annual presentation on the morning of August 24, 2015.

20. On August 7, 2015, Matt Bennett and Dawn Bennett met with Gallagher and District Business Manager Kathy McKee. The parties discussed the annual Association sponsored barbeque. The parties also generally talked about the Union's August 4, 2015 memorandum regarding Hyde. They also discussed the Association's upcoming new employee orientation and traditional presentation at the all-staff in-service. Even though the administrative staff had traditionally left during the presentation, the Association expressed that it would like District administrators to remain present to show solidarity and a better working relationship. Finally, Gallagher told the Association representatives that there would need to be an increase in instructional time due to changes in state law.

21. On August 19, 2015, the Association responded to Gallagher's August 4, 2015 memorandum, re-asserting that the annual hiring of Hyde constituted a breach of the Agreement, but the Association proposed that “Ms. Hyde be allowed to work for the district for the 2015-2016 school year. In April 2016, the District will need to post the position and will not be able to rehire Ms. Hyde for the following year under the current contract language, \* \* \*.” (Ex. R-5, p. 1.) The Association ended the memorandum by stating “[i]f the District continues this breach of contract, BHEA reserves the right to file a grievance according to the contract.” (Ex. R-5, p. 1.) This language was suggested by McQueen based on his experience of being a union member in another state where adding such clauses to correspondence was a common practice.

22. Hyde worked for the District during the 2015-2016 school year and continued that employment in the 2016-2017 school year as well.

23. Kelly Margolis, a teacher in the District's elementary school, has been permitted to work an alternative schedule for several years to accommodate her child care needs. In August 2015, elementary school Principal Helen Chirinian issued a "Kalmiopsis Elementary Agreement of Work Hours for Employee with Extenuating Circumstances for the 2015-2016 School Year" (Margolis Agreement) memorializing the District's permission for the upcoming school year. Chirinian provided a copy to Matt Bennett. The document had been signed by Chirinian and the elementary Vice Principal Krista Connelly, but no other parties.

24. Matt Bennett provided a copy of the Margolis Agreement to Anderson. She has worked with the local leadership and members of the Association for many years. Anderson suggested some changes to the letter, including that the District "will allow a similar arrangement for any employee with extenuating circumstances" and that the Margolis Agreement would be "for the 2015-2016 school year only. The parties may extend it one more year." Matt Bennett presented a copy with revisions to Chirinian and Chirinian said she would pass it along to Gallagher. (Ex. R-7, p. 1.)

25. On Friday, August 21, 2015, Matt Bennett and Dawn Bennett attended the new employee orientation briefly to provide new employees with Association paperwork.<sup>3</sup> The local leadership also showed Gallagher the flyer for the upcoming 2015-2016 school year barbeque. It had not yet been distributed and it listed the craft brewery as a sponsor. Gallagher told Dawn Bennett that the District could not have a brewery as a sponsor and she agreed not to distribute the fliers.

26. Matt Bennett returned home after the orientation. Later, he received a call from the District front office staff that Gallagher wanted to meet with him at 4:00 p.m., and he agreed.

27. Matt Bennett attended the meeting with Gallagher. High School Principal Lisa Dion was also present. At that meeting, Gallagher confronted Matt Bennett on several issues that he had with the local leadership's conduct. Gallagher started with the changes made to the Margolis Agreement. Gallagher was upset that the Association had made changes, and when Matt Bennett explained that they were suggested by Anderson, Gallagher asked "[w]ho is in charge, Susan or you?"<sup>4</sup> (Test. M. Bennett and Gallagher.)

---

<sup>3</sup> Matt Bennett and Dawn Bennett both testified that their interactions with the employees were positive and they felt everything had gone well. Dion and Gallagher testified that there were complaints about the Association's conduct, but they could not provide specifics or sources. Therefore their testimony is too non-specific to be given any weight.

<sup>4</sup> Matt Bennett testified that Gallagher yelled this question while waving papers in his face. Dawn Bennett testified that Matt Bennett was so upset by Gallagher's behavior that he immediately proceeded to her house to talk about what had happened. In contrast, Gallagher and Dion testified that Gallagher's demeanor was calm and measured. However, whether or not Gallagher yelled and waved papers is not dispositive to any of the issues in this case. Therefore, we do not make specific findings on those allegations.

28. After the discussion about the Margolis Agreement, Gallagher expressed that he was upset that a brewery was sponsoring the barbeque and providing a keg in violation of District policy on the promotion of alcohol use. When Matt Bennett explained that he was not aware of that policy, Gallagher said that he should have been because he was on the policy committee. Matt Bennett explained that his wife had become very ill when he was on the committee and he had to discontinue his participation. Gallagher then stated that the administrative staff would not come if there was alcohol. Matt Bennett expressed that he understood Gallagher's concerns with the brewery sponsorship and agreed not to distribute the flyers or accept a donated keg.

29. Gallagher next expressed that the District felt threatened by the Association's language regarding its reservation of a right to file a grievance in the memorandum regarding Hyde. Gallagher stated that because he and the School Board Chair felt the language was threatening, they determined to withdraw the Association's opportunity to make a presentation at the all-staff in-service on the following Monday. Matt Bennett said he would like to call the School Board Chair to talk about the situation and Gallagher told him he could not talk to the School Board members.<sup>5</sup> Matt Bennett said Gallagher could not limit who he talked to, and Gallagher ultimately agreed.

30. The Association was prohibited from making its normal presentation at the all-staff meeting for its 2015-2016 year. However, other scheduled items, such as the Chamber of Commerce, were allowed to proceed. The Association was once again allowed to do a presentation at the beginning of the 2016-2017 school year.

#### Events Regarding Increases of Instructional Time

31. The State of Oregon places requirements on Oregon school districts for providing certain levels of instructional classroom time. These are found in Oregon Administrative Rules (OAR) Chapter 581, Division 22 – Standards for Public Elementary and Secondary Schools and are thus referred to as Division 22 Standards. Pursuant to Division 22 Standards, school districts have the option of using time devoted to recess, staff professional development, parent teacher conferences, and emergency closures as instructional time credits toward the instructional requirements.

32. During the 2014-2015 school year, the District utilized instructional time credits including eight hours of parent teacher conferences and 32 hours of professional development. In early 2015, the Oregon Department of Education (the Department) passed rules that would

---

However, it is clear that Gallagher was upset with Matt Bennett regarding several matters and was, at the very least, confrontational.

<sup>5</sup> We note that Gallagher disputes that he made these statements to Matt Bennett. Gallagher testified that he just told Matt Bennett that he needed to revisit the issue of the Association making a presentation because some people complained about the new employee orientation and that the presentation would occur during District working hours. However, we have determined that Matt Bennett's testimony is credible as Dawn Bennett wrote notes of Gallagher and Matt Bennett's conversation shortly after it occurred, which included statements that the School Board chair wanted the all-staff in-service presentation cancelled because of the alleged complaints and mention of a grievance in the Hyde memorandum.

incrementally increase the number of students required to receive minimum instructional hours. However, these rules did not change the availability of credits allowed or otherwise place the District in a position of being out of compliance if it continued to use instructional time credits. Originally, the Department had proposed rule changes that would impact what districts could use for credits, but those proposals were ultimately not adopted.

33. On August 12, 2015, elementary Principal Helena Chirinian and Vice Principal Krista Connelly sent a letter to all staff, stating in relevant part that **“Beginning Monday, August 31, 2015 all certified staff work hours will be 7:45 a.m. – 3:30 p.m.; please plan accordingly.”** (Ex. R-16, p.1, emphasis in original.) The letter did not say at what time teachers would be expected to open their classroom doors to students.<sup>6</sup>

34. The District held a School Board meeting on August 19, 2015. Before the meeting, Gallagher provided a written report to the Board regarding instructional time in schools. On page 1, Gallagher incorrectly stated that there were Division 22 changes made by the Department including annual instructional hour requirements, allowable credits toward counting instructional time, legal definitions, and maximum instructional hours allowed per day. However, on page 7, Gallagher noted that “[t]he credits that can be used have changed since the October 24, 2014 Board of Education ruling,” but he did not provide specifics. (Ex. R-20, p. 7.)<sup>7</sup>

35. In the written report, Gallagher further correctly noted that school boards can approve credits that can be used to count towards calculating minimum instructional time, including recess, staff professional development, parent teacher conferences, and emergency school closures due to weather and facilities failures. Gallagher provided information showing that without the continued use of such credits, the District, and particularly the elementary school, would be out of compliance with instructional time requirements. He stated that if the School Board did not approve any of the credits, then options would need to be developed, which would likely include increasing instructional time. Gallagher proffered that “[t]his will most likely also require developing a Memorandum of Understanding (MOU) with [the Association] since there exists language in the current agreement that restricts the district’s full ability to increase the - instructional day at the elementary level without a change to agreement language.” (Ex. R-20, p. 8.)

36. After Gallagher gave an oral presentation regarding instructional hours at the August 19, 2015 School Board meeting, the Board tabled the matter.

37. On August 25, 2015, the elementary schedule held a before school-year staff meeting. At that meeting, teachers were notified as part of a PowerPoint presentation that they

---

<sup>6</sup> Chirinian also testified that she had conversations with Matt Bennett about this proposal in early and mid-August, and he was supportive. However, she provided no specifics about the timing or content of the conversations. Therefore, we cannot determine that they constituted notice to the Association.

<sup>7</sup> It is not clear what Gallagher meant by this, but he may have been referring to the fact that the Department did not adopt the initially proposed rules that would have limited the use of credits such as professional development.

were to open their doors to students starting at 7:45 a.m. instead of 8:00 a.m. as they previously had during the 2015-2015 school year.

38. The District held a School Board meeting on September 16, 2015. Gallagher again gave a presentation on instructional hours. He told the School Board that the District needed to find every way possible to increase instructional time for students. The School Board asked for his recommendation about continuing to use optional credits and Gallagher responded that repeatedly doing things the same way and expecting different results was the definition of insanity. The Board asked some clarifying questions and then voted not to use any optional credits and instead directed Gallagher to develop other options.

39. On September 17, 2015, Gallagher sent an email to school principals and other administrators requesting that they start thinking about options to increase instructional time. Within a couple of weeks, both Dion and Chirinian provided suggestions for new schedules.

40. On September 21, 2015, Gallagher met with the Association's full executive local leadership team. The parties discussed the instructional time issue generally, and Gallagher explained that the process of increasing instructional time was ongoing, but no firm decisions had been made.

41. On September 29, 2015, Matt Bennett sent an email to Anderson stating that he needed clarification of what constituted a change in working conditions, because there was a rumor that the District was considering extending the student contact day by 15 minutes per day. Anderson responded by explaining that any change in student contact time of two minutes or more per day must be bargained. There was further exchange between them on the topic. Then Matt Bennett forwarded the exchange to Gallagher on October 2, 2015. At that time, Matt Bennett did not understand the Association's right to bargain changes in working conditions.

42. On October 7, 2015, Gallagher sent an email to Matt Bennett saying he needed to meet with him. When they met, Gallagher presented a memorandum to him, stating that "I am officially notifying you that the district will need to make increase to instructional time starting November 2, 2015." (Ex. R-28.) Gallagher also stated that the District had provided "ample notification" of the 7:45 a.m. elementary start time through the August 12, 2015 memorandum and the August 25, 2015 PowerPoint. Gallagher, however, went on to say that:

"I want you to know that I am continually open to input from BHEA on instructional time changes including the schedule change to Kalmiopsis Elementary School earlier this year. I feel that we have established open dialogue in regards to building schedules in addition to other topics during our regular meetings. The district is dedicated to strategically designing the instructional day in the best interest of providing quality instructional opportunities for students. If BHEA feels that any changes to the instructional &/or work day would constitute bargaining action, I formally request that you notify me in writing as soon as possible so we can move the process forward." (Ex. R-28.)

43. Gallagher's October 7, 2015 memorandum had two attachments – one from Dion and one from Chirinian. The proposal from Chirinian proposed starting the day at 8:00 a.m. and

adding 15 minutes at the end of the day – from 2:00 p.m. to 2:15 p.m. (maintaining the requirement that teachers open their doors at 7:45 a.m. instead of 8:00 a.m.). The proposal from Dion recommended adding five minutes to third period each day at the high school, which would take five minutes from the pass-through time to the lunch period.

44. On October 15, 2015, Dawn Bennett sent a memorandum to Gallagher stating that Matt Bennett was out of town, and therefore she was providing notice of the Association’s demand to bargain the changes in student contact time.

45. Also on October 15, 2015, Gallagher sent a memorandum to the School Board with attachments describing Dion and Chirinian’s proposals for instructional time increases for the 2015-2016 school year.

46. The Association local leadership and Gallagher met on October 19, 2015 to discuss a variety of topics including instructional hours. Matt Bennett told Gallagher during this meeting that he wished to have Anderson involved in bargaining any instructional hour changes.

47. On October 20, 2015, Gallagher sent Matt Bennett an email stating that:

“I learned today that the district can implement the instructional hour changes before negotiations are concluded since it is a compliance issue with conducting normal business. This is how I will present it to the board tomorrow, wanted to make sure that when this came up in the meeting that it didn’t have the appearance of not complying with the request to negotiate, thus we are looking at a start date of Nov 2<sup>nd</sup>. This will alleviate some time pressure on the negotiations process. Call me if you have any questions.” (Ex. R-33, p. 2.)

48. The School Board met on October 21, 2015. At that meeting, it voted to table the instructional time proposals due to the Association’s desire to bargain.

49. On October 23, 2015, Gallagher came to Matt Bennett’s school during his lunch hour. Gallagher told Matt Bennett about a pending disciplinary matter. Gallagher also stated that he needed to implement the instructional time changes before November 2, 2015. Gallagher said he would present a memorandum reflecting that. Matt Bennett believed that he had no choice but to agree because he believed that the District had to take steps to comply with regulations. About 35 minutes later, Gallagher summoned Matt Bennett from his classroom and presented him with a memorandum stating that the Association wished to bargain the proposed changes, but would allow the District to implement on November 2, 2015, and would not file an unfair labor practice. Specifically, in relevant part, it stated:

“From my understanding after our conversation today, BHEA is wanting to bargain on the 15 minute schedule shift at the Kalmiopsis Elementary School changing the work day that requires teachers to have their doors open from 7:45 AM to 8:00 AM to supervise students as they enter the building with class starting at 8:00 AM.”

“From our conversation, you have indicated that BHEA wants to bargain on the instructional time change to be implemented November 2, 2015 that increases student contact time at BHHS by 5” and Kalmiopsis Elementary School by 15”, but is okay with the district starting this implementation on November 2, 2015 to avoid any delays & come into compliance with Oregon law. BHEA agrees not to file a grievance or Unfair Labor Practice (ULP) on the Nov 2<sup>nd</sup> implementation.” (Ex. R-35, p. 2.)

50. Matt Bennett did not know that Anderson and the Association’s legal counsel disputed the District’s assertion that they could implement without bargaining and that there had not been Division 22 changes requiring the District to increase instructional time. After obtaining clarification that the quotation marks in the 5” and 15” represented minutes, Matt Bennett sent an email stating that the Association agreed. That evening, he advised Anderson of that fact via email and attached a copy of the memorandum. Matt Bennett stated:

“Today Mr. Gallagher and I had a short meeting to come to an understanding and agreement as to the 2:15 time change. Susan has been in contact with me stating that there isn’t much to bargain on that part because it is mandatory change to meet state requirements. Sean and I worked together to create the idea of the memo and I endorsed it with BHEA backing in an email so that they may start the change on the 2<sup>nd</sup> of Nov. as stated.” (Ex. R-33, p. 3.)

Anderson responded that “[t]hey cannot begin on November 2 or they will commit an unfair labor practice. I believe their legal counsel has advised them of such.” (Ex. C-20, p.1.) Anderson was on her way to a conference and did not open the attached memorandum.

51. Matt Bennett sent text messages to Gallagher after the email from Anderson. Matt Bennett stated that Anderson had told him that Gallagher could not implement the student contact time increase without committing an unfair labor practice. Specifically, Matt Bennett stated:

“Susan emailed me and said you can’t start on Nov. 2<sup>nd</sup> or it is an unfair labor practice as your legal counsel advised you. I am waiting to talk with her tomorrow if I can get a hold of her. I sent her a copy of the memo, but she is making it sound like it doesn’t matter that I agreed to the change. I will let you know ASAP what I find out.” (Ex. R-36, p. 1.)

Gallagher asked what the intentions of the Association were given the agreement. Matt Bennet replied:

“It is not a BHEA issue and as far as BHEA is concerned, we understand wanting to start Nov. 2<sup>nd</sup> at the new quarter. I am still waiting to hear back from Susan to find out what the issue is. She is the one saying you can’t start on Nov. 2<sup>nd</sup>.” (Ex. R-36, p. 2.)

Gallagher responded by stating:

“Matt, I think that BHEA has the ability to make decisions that are in the best interest of local BHEA, the pursuit of a ULP is not going to help our collaborative goals.” (Ex. R-36, p. 3.)

Matt Bennett replied:

“I agree, but still have to follow the legal aspects and policies. Are you able to check with your legal counsel about the matter and leave it up to the board[?]” (Ex. R-36, p. 3.)

Gallagher replied:

“I will, but a ULP is not a law that someone has to comply with, it is a choice to pursue. I think our plan is sound to move forward with as we agreed to, it honors each sides interest, a ULP forces potential situations that are not in everyone’s best interest.” (Ex. R-36, p. 4.)

Matt Bennett did not immediately reply. On October 26, 2015, Gallagher followed up with Matt Bennett. They agreed to meet before the School Board’s vote on the instructional time increase. At that meeting, Matt Bennett reiterated that the District could not implement according to Anderson. Gallagher told Matt Bennett that he did not need to attend the School Board meeting, even though he had previously encouraged him to attend.

52. After Anderson returned from a conference, she spoke with Matt Bennett and read Gallagher’s memorandum. At that point, she understood that Matt Bennett had initially agreed to waive the Association’s bargaining rights. She told him at that time that it was possible that a member could bring a duty of fair representation (or DFR) claim against the Association based on a relinquishment of the right to bargain before implementation.

53. The School Board met on October 26, 2015. At that meeting, the Board voted to adopt the instructional time recommendations that had been presented to them. The proposals presented to the Board were Dion’s initial proposal for five minutes per day at the high school and Chirinian’s proposal to start the elementary school day at 8:00 a.m. and add 15 minutes at the end of the day – from 2:00 p.m. to 2:15 p.m. (maintaining the requirement that teachers open their doors to students at 7:45 a.m.).

54. On Wednesday, October 28, 2015, Dion held a meeting with high school teachers regarding increasing instructional time. From that meeting, she determined that her staff appreciated the pass-through period before lunch that she had previously proposed eliminating. Staff instead preferred an “Option B” schedule, which added a minute per each of the seven daily periods on Monday, Tuesday, Thursday and Friday. An additional three minutes were added to each period on Wednesdays, totaling approximately 20 extra minutes of instructional time on Wednesdays. This was done to accommodate transportation needs. This added an additional 48 minutes of student contact instructional time. The following day, Dion sent an email to students, teachers and other stakeholders, announcing the new schedule, but the Association was not notified of the additional time added to the high school.

55. The District implemented the new schedules in the high school and elementary school on November 2, 2015 – adding an additional 48 minutes of instructional time to the high school schedule, adding 15 minutes to the end of the day at the elementary school, and continuing to require elementary teachers to open their doors to students at 7:45 a.m.

56. Many Association members were upset by the implementation of the schedule without bargaining, and by Matt Bennett’s agreement to allow pre-bargaining implementation.

57. After the implementation, but prior to bargaining, Matt Bennett resigned from the Association President position due to health issues that were exacerbated by stress. Dawn Bennett assumed the President role.

### Bargaining

58. The parties met for their first bargaining session on November 11, 2015. At that time, the Association team members did not know how much time had been added to the high school’s schedule. Instead they thought that the high school had implemented Dion’s initial proposal of adding five minutes per day by eliminating the lunch pass-through time.

59. At the beginning of the November 11, 2015 session, Anderson mentioned the concern of a duty of fair representation claim possibly being filed against the Association because of Matt Bennett’s initial agreement to allow November 2, 2015 implementation and to not file an unfair labor practice complaint. Specifically, Anderson stated the following in relevant part:

“[The Association] is trying to be reasonable while still protecting the potential DFR problems we have on this side of the table for what these people would have been owed under a hearing from the Employment Relations Board.

\* \* \*

The problem is now they’ve opened themselves up to a lawsuit from all their membership because they didn’t really have the authority to waive those rights.

\* \* \*

There are limitations to what they can do. Yes, we can waive rights, but certain things open us up to a duty of fair rep case, and this is one of them, because if no waiver is given and, let’s just say there was no, we didn’t bargain, there was no bargaining or we came and there was no real bargaining, whatever, and the injured party, which in this case is us but it could be the other side, decides to file a case, the case law is pretty darn clear there’d be a monetary thing attached to that.”  
(Ex. C-25, pp. 1, 2.)

60. In that bargaining session, the Association made an initial proposal to stop the practice of the additional fifteen minutes of supervisory time in the morning at the elementary school by November 16, 2015. The Association’s proposal also included compensation of \$277.83 for the additional time that teachers had already spent supervising students in the morning. The Association also proposed a payment of \$39.69 for the additional fifteen minutes added to the end

of each day. The Association did not make any proposals for the high school due to its misunderstanding about the amount of time that had been added. The District estimates that if it had accepted this proposal, it would have cost approximately \$13,544.

61. After discussion between the parties about a lump sum payment being more simple to implement, the Association presented a second proposal that included for the elementary teachers: (1) a \$150 lump sum payment for additional time that teachers had already spent supervising students, (2) opening their doors at 7:55 a.m. instead of 7:45 a.m. by November 16, 2015, and (3) they would be paid at a base hourly rate for the 5 minutes per day of additional supervisory time. The Association also included in this proposal that the District would provide future notice of any further changes with both local leadership and the currently assigned UniServ Representative. The District estimated its costs for this proposal would be approximately \$8,091.

62. The District countered with an offer for a one-time payment of \$90 to each elementary school certified staff member. The District did not restore any indication that it was willing to provide the non-student contact time to the certified teaching staff by allowing them to open their doors at 8 a.m. again. The District estimated that its costs for this proposal would be approximately \$3,839.

63. The November 11, 2015 bargaining session ended with no agreement and the Association team members told the District team members that they would need to get some guidance from the Association membership before proceeding further.

64. Subsequently, local leadership presented the District's proposal at an Association membership meeting and many members expressed to local leadership that they felt it was inadequate and even insulting given that they already work many hours outside their contracted hours. The Association also learned of the changes at the high school at this meeting.

65. The next bargaining session was December 10, 2015. The Association presented two alternative proposals to the District. The first proposal requested that the District return to the previous schedule the following semester and then add two days to the school year at the teachers' normal salary rate. The District estimated its costs for this proposal would be \$76,950. The second alternative proposal was to continue with the current schedule and pay the elementary teachers an additional \$5.67 per day; pay the high school teachers for six minutes a day at the base hourly rate; and then the following year, add two additional student contact days. The District estimated that its costs for this proposal would be \$43,469.

66. At that bargaining session, the District provided a proposal in the format of a memorandum of agreement between the parties. Under that proposal, all certified teaching staff (not just those at the elementary school) would receive a \$90 lump sum payment. Although the District had not made any changes to the middle school schedule for 2015-2016, there had been previous increases in student contact time without compensation.

67. The parties did not reach any agreements on December 10, 2015. The District allowed for District counsel Paul Dakopolos to try to find some dates within the 90-day negotiation period. Anderson offered some dates in both December and January after the 90-day negotiation

period. Dakopolos responded that the dates in January would be outside the 90-day period. Anderson pointed out that the deadline was irrelevant because the District had already implemented. The District offered January 4, 2016 as a date, but Anderson was bargaining in another school district. Following that, Anderson and Dakopolos left messages for each other, but never made direct contact. No further bargaining occurred.

68. On January 20, 2016, the School Board voted to approve the District’s last offer of \$90 for all teaching staff.

69. On January 25, 2016, the District issued a press release stating that the District had made its final offer to provide each member of the certified staff with \$90. In that press release issued on December 10, 2010, the District stated that:

“Superintendent Sean Gallagher, who joined the school district on July 1, found after his arrival that the district was in danger of non-compliance with the new state minimum standards for instructional time initiated in the previous school year. Worse yet, in a state that already falls below the national average for the amount of time that students are required to be in class each year, Brookings-Harbor also lagged behind most schools in the state.”

“Immediate changes were needed to bring the schools into compliance with the minimum standards and to provide the best environment for student success. Instructional time minimums are connected to state funding, and non-compliant districts also run the risk of having funds withheld by the state.” (Ex. C-34, p. 1.)

70. Shortly thereafter, the District issued each member of the certified teaching staff a check for \$90 less applicable taxes. The attached check stub described the payment as a “negotiation settlement.” Many employees cashed the checks.

#### DISCUSSION – UP-005-16

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The District violated the duty to bargain in good faith required by ORS 243.672(1)(e) by increasing student contact time and instructional time without first bargaining.

#### STANDARDS OF DECISION

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer to “[r]efuse to bargain collectively in good faith with the exclusive representative.” A public employer may violate its duty to bargain in good faith under ORS 243.672(1)(e) if it does not complete its

bargaining obligation before making a change in the *status quo* concerning a subject that is mandatory for bargaining.

To determine whether an employer has made an unlawful unilateral change, we first identify the *status quo* and then determine if the employer changed it. If the employer changed the *status quo*, we then decide whether the change concerns a mandatory subject of bargaining. If the change concerns a mandatory subject, we determine if the employer completed its bargaining obligation. If, upon completion of this analysis, we conclude that the employer was required to bargain a change but failed to do so, we then consider any affirmative defenses raised by the employer. *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, 636 (2012) (citing *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008)). However, we need not apply our analysis in a mechanical manner and we may proceed to a particular step if that step will be dispositive of the issue. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-24-09, 24 PECBR 730, 761 (2012).

## ANALYSIS

The facts pertinent to the (1)(e) claim are as follows. On October 7, 2015, Gallagher provided Matt Bennett with a memorandum stating that “I am officially notifying you that the district will need to make increases to instructional time starting November 2, 2015.” (Ex. R-28, p.1.) On October 15, 2015, the Association provided notice that it demanded to bargain over the increases. Then on October 23, 2015, Gallagher presented Matt Bennett with a memorandum stating that:

“From my understanding after our conversation today, BHEA is wanting to bargain on the 15 minute schedule shift at the Kalmiopsis Elementary School changing the work day that requires teachers to have their doors open from 7:45 AM to 8:00 AM to supervise students as they enter the building with class starting at 8:00 AM.”

“From our conversation, you have indicated that BHEA wants to bargain on the instructional time change to be implemented November 2, 2015 that increases student contact time at [Brookings-Harbor High School] by 5” and at Kalmiopsis Elementary School by 15”, but is okay with the district starting this implementation on November 2, 2015 to avoid any delays & come into compliance with Oregon law. BHEA agrees not to file a grievance or Unfair Labor Practice (ULP) on the Nov 2<sup>nd</sup> implementation.” (Ex. R-35, p. 2.)

Gallagher requested that Matt Bennett review the memorandum and then state whether he agreed with the language. Shortly thereafter, Matt Bennett sent Gallagher an email stating the Association agreed with it as long as the quotation marks in the 5” and 15” represented minutes. Later that day, however, Matt Bennett followed up with a text message to Gallagher, stating that Anderson had told him that the District could not implement before bargaining without committing an unfair labor practice. Gallagher attempted to obtain further clarification regarding the Association’s position, but Matt Bennett was not able to elaborate given his lack of comprehension regarding Anderson’s assertion.

The School Board met on October 26, 2015. At that meeting, the School Board elected to adopt the instructional time recommendation presented to them. Specifically, they adopted: (1) Dion’s proposal for five minutes per day, taking away from a daily pre-lunch pass-through time and (2) Chirinian’s proposal to start the school day at 8:00 a.m., with classroom doors opening at 7:45 a.m., and adding 15 minutes at the end of the day – from 2:00 p.m. to 2:15 p.m. Subsequently, on November 2, 2015, the District implemented the elementary school schedule passed by the School Board, but instead of the original proposal of adding 25 minutes at the high school passed by the School Board, it added 48 minutes to the schedule.

The Association argues that these actions constituted bad faith bargaining under ORS 243.672(1)(e) because they constituted a unilateral change in a mandatory bargaining subject. The District concedes that it made a pre-bargaining change in the *status quo* concerning a mandatory subject – specifically that they increased student contact time. Therefore, we do not address those elements here. Instead, the District asserts three separate affirmative defenses. First, the District asserts that on October 23, 2015, Matt Bennett agreed to allow the pre-bargaining November 2, 2015 implementation and to not file an unfair labor practice. Second, the District asserts that the Association did not make a timely demand to bargain. Third, the District argues that it had to implement the schedule changes as a business necessity. We address each of these below.

#### A. Gallagher Memorandum Regarding November 2, 2015 Implementation

We first address the issue of the memorandum drafted by Gallagher, and initially agreed to by Matt Bennett, stating that the Association was willing to allow pre-bargaining implementation of increased instructional time by November 2, 2015, and would not file an unfair labor practice complaint. The District characterizes it as a final written agreement upon which the District was entitled to rely. The Association argues that: (1) it was not a valid binding contract because there was no consideration from the District; (2) Gallagher bullied Matt Bennett into signing it by presenting it when Matt Bennett did not have the assistance of Anderson or his executive team; and (3) Matt Bennett’s texts later that day relating Anderson’s position stating that the District could not implement served as a rescission of any arguable valid agreement. Waiver of bargaining rights is an affirmative defense. The party asserting it has the burden of proof.

We have previously concluded that a party may waive its right to bargain by (1) “clear and unmistakable” contract language, (2) a bargaining history that shows the party consciously yielded its right to bargain, or (3) the party’s action or inaction. *Tri-County Metropolitan Transportation District*, 24 PECBR 730. *Lebanon Community School District*, 22 PECBR 323. *Assn. of Oregon Correction Emp. v. State of Oregon*, 353 Or 170, 182-85, 295 P3d 38 (2013). Typically, our cases dealing with contract language rely on existing language in collective bargaining agreements. We have determined in those cases that there are two separate defenses with respect to contract language. The first defense asserts that the contract language affirmatively permits the employer to take the action that it did. In those cases, we interpret the contract language to determine if it does allow the action. The second defense is that the contract does not expressly allow the action, but rather it waives the labor organization’s right to bargain over the matter. *Id.* at 366. In that case, we apply the “clear and unmistakable” standard.

The District did not specify which category it believes Matt Bennett's initial agreement with Gallagher's memorandum falls into. It is difficult to determine as this was not existing collective bargaining language as in most of our cases. It arguably could be both categories as the language in Gallagher's memorandum both authorized the District to make the unilateral change and it also waived the Association's right to bargain. However, we conclude that a clear and unmistakable waiver is more appropriate than a contractual analysis here. As explained below, neither of the parties' actions indicated that they saw Matt Bennett's initial agreement to Gallagher's memorandum as a finalized agreement. Further, as pointed out by the Association, there was no consideration on the part of the Association. Consideration is a necessary component of a contract. However, it is not necessary to establish a waiver, as waivers can also be accomplished by action or inaction, and there would be no consideration in those cases. Therefore, we conclude it is most appropriate to analyze this case using the clear and unmistakable standard.

For the reasons stated below, we conclude that both the memorandum's terms and the parties' overall communications and actions weigh against construing it as a clear and unmistakable waiver. First, there was no waiver with respect to the increase of instructional time at the high school. Specifically, the memorandum written by Gallagher stated that the Association agreed to the November 2, 2015 implementation of an additional five minutes per day at the high school. However, the District ultimately adopted a schedule of an additional 48 minutes per week, almost double the actual amount of time stated in the memorandum. As such, with respect to the actual implementation of an additional 48 minutes per week at the high school, the Association did not waive its right to bargain or file a grievance or unfair labor practice complaint.

Second, looking at the conduct of the parties, the memorandum was a part of an ongoing communication and process that ultimately did not result in a final contract or a clear and unmistakable waiver. Here, the District is not relying on an agreement drafted by both parties in bargaining that was finalized with a signature. Rather, it was a part of ongoing communications. Specifically, Gallagher drafted a memorandum and then submitted it to Matt Bennett on October 23, 2015. Shortly thereafter, Matt Bennett responded with an email stating that the Association agreed to it (as long as Gallagher's use of quotation marks represented minutes).

While this process does not mean there was no initial agreement at that time, it does make the subsequent communications and actions of the parties relevant to showing that there was not a clear and unmistakable waiver. Specifically, just hours after stating that he agreed with the contents of Gallagher's memorandum, Matt Bennett sent text messages to Gallagher telling him that Anderson said that the District could not lawfully implement the new schedule on November 2, 2015. Even though he could not articulate the legal reasons accurately, Matt Bennett told Gallagher that according to Anderson, the District would commit an unfair labor practice if it did so. Gallagher responded that he thought the issue had already been resolved by agreement, but he also continued to seek further clarification from Matt Bennett regarding Anderson's position. Gallagher even initiated a meeting with Matt Bennett before the School Board meeting to discuss the issue. At that meeting, Matt Bennett reiterated that he understood from Anderson that it would be an unfair labor practice for the District to implement the instructional changes without bargaining first. Gallagher then told Matt Bennett that he did not need to attend the School Board meeting. Matt Bennett did not attend and the School Board voted to increase the instructional time.

The School District voted to implement an additional 25 minutes per week at the high school. However, after that, Dion held a meeting with her teaching staff and determined to implement a schedule of 48 minutes per week. Not only did this invalidate any waiver on the Association's part as far as the high school schedule implementation, it further shows that the District itself did not consider the terms in the October 23, 2015 memorandum to be representative of a definitive final agreement.

Additionally, we note that Gallagher stated in his October 7, 2015 memorandum "I learned today that the district can implement the instructional hour changes before negotiations are concluded since it is a compliance issue with conducting normal business." (Ex. R-33, p. 2.) And in the October 23, 2015 memorandum, he stated that the November 2, 2015 implementation would allow the District to "come into compliance with Oregon law." (Ex. R-35, p. 2.) Matt Bennett also testified that Gallagher told him that it would be necessary for the District to implement in order to comply with Oregon law on instructional time. (Test. M. Bennett.) However, Gallagher did not clearly communicate to Matt Bennett that the District was only out of compliance due to its own decision not to use available credits. While it is ultimately the responsibility of the Association local leadership to know its own rights and responsibilities, it is also reasonable for a labor organization to rely on the representation of its employers. The fact that Gallagher's statements were misleading to Matt Bennett undermines the Association's ability to make a clear and unmistakable waiver.

In summary, there was no final clear and unmistakable agreement on the Association's part to waive. First, the District implemented more contact time at the high school than it stated it would, thus, there was no waiver of the time implemented at the high school. Second, although Matt Bennett initially agreed with Gallagher's memorandum, there was a subsequent series of communications and actions by both parties that undermined the finality of the agreement and showed that there was no clear and unmistakable waiver on the part of the Association.

#### B. Business Necessity

The District argues that it had a business necessity to implement the schedule changes before November 2, 2016 because any further delay would have created substantial operational issues for the District. There are two elements an employer must prove to establish a business necessity defense. The first element is that the employer has to establish that it bargained in good faith with the union as much as the circumstances allowed before it unilaterally implemented a change in working conditions. Next, the employer has to establish that there was an actual business emergency that justified the unilateral implementation. *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-03-02, 19 PECBR 590, 603 (2002).

We address the second element first, as it is dispositive. The District has failed to show that there was a business emergency that justified unilateral implementation because any arguable urgency was both avoidable and largely due to the District's own making. We have previously concluded that these two conditions foreclose successful use of the defense. Specifically, in *International Association of Fire Fighters, Local 2854 v. Tualatin Fire Protection District*, Case No. C-13-82, 6 PECBR 5224, 5236 (1982), the employer unilaterally decided to reduce hours

rather than abide by the collective bargaining agreement's layoff procedure. We rejected the business necessity/impossibility defense, concluding that other lawful options were available such as a layoff. Additionally, we determined that the District had not established financial impossibility because its operating contingency fund could have covered the costs. *Id.* at 5238. Similarly, here, the District had the alternative of continuing to use instructional time credits such as parent teacher conferences and professional development time. Therefore, there was no emergency.

The District's failure to avail itself of an alternative also shows that the District created its own emergency, which we have also found to be a basis to reject a business necessity defense. Specifically, in *AFSCME, Local 173, Council 75 v. Polk County Board of Commission, Henry Dougherty, Lyn Hardy & Ben McGill, Polk County, Oregon*, Case No. C-126-82, 6 PECBR 5437, 5443 (1982), we held that there was no business necessity when an employer created its own emergency. We observed that the asserted financial emergency was self-inflicted because the employer prepared and submitted to the voters a levy based on a budget that did not fully fund compensation for existing employees. *See also Teamsters, Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337, 357-358 (2003) (an employer's failure to take action on problems in a timely manner led to a crisis, and therefore, it could not rely on a business necessity defense). Here, the District self-inflicted the emergency by failing to continue to approve the use of certain credits until bargaining could be completed. Accordingly, the District has not met its burden to prove the affirmative defense of business necessity.

#### C. Timeliness of bargaining request.

##### Timeliness of Request to Bargain 7:45 a.m. Elementary Classroom Door Open Time

The District argues that the Association did not make a timely request to bargain the requirement that elementary school teachers to open their doors at 7:45 instead of 8:00 a.m. Under ORS 243.698(2), an employer must give the exclusive representative 14 days notice of any changes in working conditions that trigger an obligation to bargain, and under subsection (3), the union must demand bargaining within 14 days of receiving this notice. The District announced that elementary teachers would need to report at 7:45 a.m. in an August 12, 2015 letter, and then announced they would need to open their classroom doors at that time in an August 25, 2015 PowerPoint presentation. The District argues that these communications constituted notices to the Association. Therefore, it argues that the Association's October 19, 2015 demand to bargain this change was untimely.

Despite the District taking this hard position regarding its notice and the Association's timing in this litigation, it previously had a more flexible approach. While Gallagher did write in his October 7, 2015 memorandum that the District had provided "ample notification" of the change on August 12 and 25, 2015, he went on to write that:

"I want you to know that I am continually open to input from BHEA on instructional time changes including the schedule change to Kalmiopsis Elementary School earlier this year. I feel that we have established open dialogue in regards to building schedules in addition to other topics during our regular meetings. The district is dedicated to strategically designing the instructional day in the best

interest of providing quality instructional opportunities for students. If BHEA feels that any changes to the instructional &/or work day would constitute bargaining action, I formally request that you notify me in writing as soon as possible so we can move the process forward.” (Ex. R-28.)

The Association thereafter gave notice of its desire to bargain the 7:45 a.m. start time at the elementary school along with the other instructional time increases. Gallagher acknowledged this in his October 23, 2015 memorandum, and the parties went on to bargain the changes in their November and December bargaining sessions. The District’s participation in such bargaining effectively waived any such argument, or at the very least, rendered any such argument moot. Accordingly, we decline to conclude that the Association’s request to bargain this particular change was untimely.

Further, we determine that the Association was not given sufficient notice of the proposed change. Sufficient notice must be given to the exclusive representative in adequate advance of the anticipated implementation date to allow a reasonable period for bargaining. *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 357, 358 (2003). Here, the District provided employees with notice that they would be required to open their classroom doors at 7:45 a.m. on August 25, 2015. School started just six days later on August 31, 2016. Further, the local leadership was not directly notified of the change, and it was clear the decision had already been made. Thus, it was essentially a *fait accompli*. In *IAFF v. City of Roseburg*, Case No. UP-9-87, 10 PECBR 504 (1988), we concluded that there is no requirement that a union demand to bargain when the employer has already made a unilateral change.

#### Timeliness of Other Instructional Time Increases

The District also argues that the Association’s notice to bargain was untimely because the Association received notice of instructional hour increases as early as Gallagher’s August 7, 2015 meeting with local leadership and his August 19, 2015 presentation to the School Board. However, the District’s arguments are not compelling. First, the District itself designated the October 7, 2015 memorandum as the official notice, with Gallagher stating that “I am officially notifying you that the district will need to make increase to instructional time starting November 2, 2015.” (Ex.R-28, p.1) Therefore, to make a claim that the notice actually occurred earlier for the purposes of arguing this appeal is disingenuous. Second, while Gallagher did raise the possibility of an increase in instructional time to the local leadership, these discussions were too general to constitute a notice of a change in working conditions. *City of Vale*, 20 PECBR 357. Third, just as with the elementary school teacher requirement to open the doors at 7:45 a.m., the District engaged in bargaining with the Association regarding instructional time increases at the elementary and high school. Again, the District’s participation in bargaining would render any timeliness argument waived or at least moot. Accordingly, the District has not met its burden to establish the affirmative defense of untimely demand to bargain.

#### Summary

Having determined that the District has failed to meet its burden with respect to its affirmative defenses, we are left with the stipulated conclusion that the District made unilateral

change in a mandatory bargaining subject of bargaining. Accordingly, the District violated its duty to bargain in good faith under ORS 243.672(1)(e).

3. The District violated ORS 243.672(1)(a) and (c) by interfering with and coercing employees in or because of protected activity.

### STANDARDS OF DECISION

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.” Subsection (1)(a) contains two separate violations, commonly referred to as the “because of” prong and the “in the exercise” prong. *Portland Association of Teachers and Denise Poole v. Multnomah School District No. 1*, Case No. UP-72-96, 17 PECBR 470 (1997), *rev'd and rem'd*, 171 Or App 616, 16 P3d 1189 (2000), *decision on remand*, 19 PECBR 284, 294-95 (2001) (footnote omitted).

To determine if an employer violated the “because of” prong 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 PECBA, the employer’s actions are unlawful. The requisite elements of a *prima facie* case that a union must plead in a “because of” claim include: (1) the employee(s) engaged in protected activity; (2) the employer took some employment-related action against the employee; and (3) there was a sufficient connection between the protected activity and the employer’s action to suggest a causal relationship. *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 624 (2000).

Although similar to a “because of” analysis, when we analyze an employer’s actions under the “in the exercise” prong 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). *Amalgamated Transit Union Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-42/50-12, 25 PECBR 640 (2013). 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. *Id.*

ORS 243.672(1)(c) makes it an unfair labor practice for a public employer to “[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization.” Our test for determining a violation of subsection (1)(c) is similar to the one we use in determining a violation of the “because of” prong of subsection (1)(a). A complainant proves a violation of subsection (1)(c) by showing protected activity, employer action, and a causal connection between the two.

*International Longshore and Warehouse Union, Local 28 v. Port of Portland*, Case No. UP-35-10, 25 PECBR 285, 298-299 (2012).

## ANALYSIS

The Association argues that Gallagher interfered with, restrained, or coerced employees both in and because of the exercise of protected rights. Specifically, the Association argues that he did so by chastising Matt Bennett at the August 21, 2015 meeting, by prohibiting the local leadership from making a presentation at the all-staff in-service, and by trying to interfere with the relationship between local leadership and Anderson. The District asserts that the August 21, 2015 meeting between Matt Bennett, Dion, and Gallagher was cordial. The District further argues that the Association was not permitted to present at the all-staff in-service because there had been complaints about the Association presenting during paid District time. The District also argues that Gallagher's actions were not intended to, and did not have the effect of, interfering with the relationship between local leadership and Anderson.

### ORS 243.672(1)(a)

Based on the facts in this case, we dismiss the Association's ORS 243.672(1)(a) claims regarding Gallagher's confrontation of Matt Bennett and the alleged interference with the relationship between Anderson and local leadership. First, while Gallagher may have been confrontational with Matt Bennett, the sometimes adversarial relationship between labor organizations and management will occasionally involve argumentative discussions, and there is no evidence of Gallagher threatening to take any actions against Matt Bennett because of protected activities. For example, we have noted in analyzing in a bad faith bargaining claim that "[s]tridency, shouting and sarcasm are not uncommon in labor-management negotiations --from either side of the bargaining table." *Lane Unified Bargaining Council v. McKenzie School District # 68*, Case No. UP-14-85, 8 PECBR 8160, 8198 (1985). Therefore, while Gallagher may have confronted Matt Bennett over the Association's exercise of rights, such a conversation on its own does not equate to interference, restraint, or coercion.

Second, we dismiss the Association's claims with respect to alleged interference with the relationship between Anderson and local leadership. The Association claims that the interference was achieved in multiple ways, including Gallagher asking Matt Bennett whether he or Anderson was "in charge," not giving Matt Bennett the chance to confer with Anderson over the October 23, 2015 memorandum, and refusing to send notices of proposed changes to both local leadership and Anderson. We conclude that these actions do not rise to the level of an unfair labor practice. It is the labor organization's responsibility to maintain its own interpersonal relationships and open lines of communication. Further, the testimony of both Anderson and local leadership members indicates that they have maintained a good working relationship. Thus, there was no actual interference. Additionally, given that Matt Bennett sometimes would state that it was Anderson who was recommending a contractual change or disputing the District's actions (rather than himself or local leadership), it was appropriate for Gallagher to try to obtain clarification on who was the primary decision maker.

Accordingly, we conclude that there was not any interference, restraint, or coercion with respect to the allegations regarding Gallagher's confrontation of Matt Bennett and alleged interference with his relationship with Anderson. However, the facts regarding Gallagher's last minute cancellation of the Association's previously planned all-staff in-service does warrant further discussion and analysis under each prong of ORS 243.672(1)(a). We discuss below.

ORS 243.672(1)(c) and "because of" claim under ORS 243.672(1)(a)

The Association has met the first, but not the second, element for a "because of" violation of (1)(a) and a (1)(c) violation. As stated above, those elements include (1) protected activity, (2) employment-related action against an employee, and (3) a causal connection. We conclude that the Union has established that it was engaging in protected activity. Specifically, the Association reserved the right to file a grievance regarding Hyde, and added language to the Margolis Agreement to further strengthen the Association's position for other Association members. These were both well within the Association's proper role as the employees' representative and were an exercise of the Association's rights. *See Teamsters Local 206 v. City of Coquille*, Case No. UP-66-03, 20 PECBR 767 (2004). Gallagher then told Matt Bennett that he and the School Board Chair had decided to cancel the Association's presentation at the all-staff in-service because of language regarding the right to file a grievance in the Hyde memorandum.

However, looking to the second element, we conclude that the Association has failed to meet the second requisite element of both a (1)(a) "because of" and a (1)(c) claim of employment-related action against an employee. *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616 (2000). Here, Gallagher was confrontational with Matt Bennett at the August 21, 2015 meeting, but he did not take any employment action related against him such as discipline, demotion, or reassignment. Nor did Gallagher threaten to do so. Second, although Gallagher also cancelled the Association's presentation at the all-staff in-service and the Association's exercise of rights, which was also not an employment related action against Matt Bennett or anyone else. Therefore, the Association's "because of" claim fails.<sup>8</sup>

"In the exercise of" claim under ORS 243.672(1)(a)

Although we have not found a "because of" or a (1)(c) violation, we conclude that the District's cancellation of the Association's presentation at the all-staff in-service would have chilled employees and local leadership in the exercise of rights, thereby violating ORS 243.672(1)(a). As established above, Gallagher chastised Matt Bennett for exercising the Association members' protected rights. Gallagher then cancelled the Association's previously planned presentation at the all-staff in-service due to the reference to a possible grievance filing in the Hyde memorandum.

---

<sup>8</sup> We note that in *Eagle Point Education Association v. Jackson County School District*, Case No. UP-61-09, 24 PECBR 943, 976-77 (2012) Board Member Gamson stated in his concurrence that the element of an employment related action (such as discipline, demotion, termination, reassignment, etc.) was not statutory and there are a number of employer actions that could be considered coercive, interfering or restraining that do not qualify as employment actions. Therefore, he recommended abolishing that element. However, this Board has not explicitly abandoned this previously established element of a "because of" claim.

An employer violates the “in” prong of ORS 243.672(1)(a) if the natural and probable effect of its actions would be to chill employees in exercising their right to engage in protected activity. Here, we recognize that, as the all-staff in-service was paid time, the District had a right to control the agenda and the Association’s presentation itself was not an exercise of PECBA guaranteed rights. However, we have previously concluded that actions that might otherwise be lawful can violate (1)(a) depending on the timing and circumstances. *Portland State University Chapter American Association of University Professors v. Portland State University*, Case No. UP-13-14, 26 PECBR 438, 450 (2015). In this case, the all-staff in-service has traditionally been a time that the local leadership has been able to communicate with members and provide paperwork and other administrative information. The District denied the Association this opportunity as a consequence for the Association exercising PECBA guaranteed rights. This could understandably chill the local leadership from continuing to exercise their rights. Additionally, as it had been the tradition for the Association to give a presentation, its members would expect that it would occur and would understandably question why it did not. If, upon learning that it was due to the Association’s exercise of rights, it would further chill their activity. Accordingly, we determine that the District violated the “in the exercise” prong of ORS 243.672(1)(a).

4. The District did not violate ORS 243.672(1)(b) by interfering with the administration of the Association.

#### STANDARDS OF DECISION

ORS 243.672(1)(b) makes it an unfair labor practice for a public employer to “[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization.” Whereas ORS 243.672 subsection (1)(a) protects the rights of employees, subsection (1)(b) is concerned with the rights of the union itself. *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 22 PECBR 752, 794 (2008). To establish a subsection (1)(b) violation, a complainant must prove that the employer took actions which impeded or impaired it in the performance of its statutory responsibilities. To establish this violation, a complaining labor organization must provide evidence to support the conclusion that some actual interference with its existence or administration occurred as a result of the employer’s actions. *Id.*

The Association asserts that the District interfered with its administration in two distinct ways. First, the Association argues that because Gallagher cancelled the Association’s all-staff in-service presentation, the Association had to spend significantly more time signing up new members by visiting their homes and schools. Second, the Association argues that the District attempted to interfere with the relationship between local leaders and Anderson. Specifically, the Association alleges that Gallagher was attempting to circumvent Anderson by presenting Matt Bennett with the October 23, 2015 memorandum at a time when he had no opportunity to consult with her. The Association also charges that the District continued to interfere during bargaining by refusing the Association’s bargaining proposal requiring the District to give notice of proposed changes to both local leadership and Anderson. Finally, the Association points to the District’s filing of an unfair labor practice complaint claiming that Anderson threatened Matt Bennett with a lawsuit due to his initial agreement to allow the District to implement.

With respect to Gallagher's cancellation of the Association's presentation at the all-staff in-service, we acknowledge that this did require the Association to spend additional time signing up new members. However, as stated above, the time at the all-staff in-service was the District's employee paid time. The District is not required to provide this time to the Association absent a showing that other personal activities are also permitted during this time. *See Service Employees International Union, Local 503, Oregon Public Employees Association v. State of Oregon, Judicial Department*, Case No. UP-52/62/-03, 21 PECBR 98 (2005). The Association has made no such showing. Therefore, rather than constituting interference, the District's cancellation of the Association's presentation could more accurately be considered withdrawing prior support. Accordingly, we conclude there was no violation of ORS 243.672(1)(b).

As far as the allegations pertaining to Anderson, we conclude that the Association has failed to show that there was actual interference with its existence or administration due to the employer's actions. The testimony of Matt Bennett, Dawn Bennett, and Anderson establishes that they maintained a good working relationship before, during, and after bargaining. The Association also failed to provide evidence of damage to its administration or existence from the District's actions. Accordingly, we conclude that the claim fails because there has been no actual interference with the Association's administration.

#### DISCUSSION – UP-010-16

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. An Association representative did not violate ORS 243.672(2)(a) by threatening Association members with potential lawsuits after the Association's local president entered into an agreement with the District.

#### STANDARDS OF DECISION

Under ORS 243.672(2)(a), it is an unfair labor practice for a labor organization to "[i]nterfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed in ORS 243.650 to 243.782." When one believes that their rights under these provisions have been violated, ORS 243.672(3) provides that "[a]n injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice."

#### ANALYSIS

The District asserts that Anderson violated ORS 243.672(2)(a) when, during bargaining, she raised a concern about a duty of fair representation claim being filed against the Association because of Matt Bennett's initial agreement to waive bargaining the instructional time increases until after implementation. The District has interpreted Anderson's statements as "threats" against the Association's local elected leadership. The District asserts that in doing so, Anderson disrupted:

“the harmonious relationship between BHEA and the District – preventing the District from resolving matters related to labor relations at the lowest possible level because BHEA leadership is afraid a duty of fair representation lawsuit will be filed if they agree to anything without the sign off of the UniServ Consultant.” (District Post-Hearing Brief, p. 40.)

In response, the Association argues in response that the District has no standing to bring this claim because it is not an “injured party” under ORS 243.672(3). The Association also argues that Anderson was not threatening local leadership, but simply raising the concern of a duty of fair representation claim. Finally, to the extent it could be construed as a threat, the Association argues it is “an internal union issue, and none of the District’s business.” (Association Closing Brief, p. 51.)

The Association’s position is well taken. The District has not shown that it was an injured party under ORS 243.672(2)(a). Therefore, it has no standing. In *Jefferson County v. Oregon Public Employees Union*, Case No. UP-16-99, 18 PECBR 285, 290 (1999), this Board stated that:

“[t]he 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.**” (Quoting *Oregon City Federation of Teachers, et al v. Oregon City Education Association, et al*, 36 Or App 27, 584, P2d 303 (1978)). (Emphasis added.)

In *Jefferson County*, a union staff member attempted to convince an employee to participate in a strike and the employee felt intimidated by the conversation. The employer filed an unfair labor practice on behalf of the employee. We determined the employer did not have standing because it failed to prove it had suffered any direct and substantial injury. *Id.* Similarly, here we have the employer asserting a claim against Association staff on behalf of Association members and leadership. As such, we find no evidence of direct and substantial injury to the District.

Further, even if we were to determine the District had standing, the District has failed to show that (1) Anderson’s comments were actually threatening to local leadership, and (2) that the relationship between the Association and District were harmonious, and therefore subject to damage by Anderson. First, the testimony of Anderson, Matt Bennett, and Dawn Bennett indicate that they were all working well together in bargaining the instructional time increases and there was no conflict that would lead to anyone making threats. The evidence instead shows that Anderson had previously advised Matt Bennett of the possibility of a duty of fair representation claim, but she never threatened to sue him or encouraged members to sue him. (Test. M. Bennett). This testimony is consistent with Anderson’s language during the first bargaining session, which was not reflective of a threat, but rather an attempt to explain the situation the Association was currently facing. Specifically, she said:

“[the Association] is trying to be reasonable while still protecting the potential DFR problems we have on this side of the table for what these people would have been owed under a hearing from the Employment Relations Board.

\* \* \*

The problem is now they’ve opened themselves up to a lawsuit from all their membership because they didn’t really have the authority to waive those rights.

\* \* \*

There are limitations to what they can do. Yes, we can waive rights, but certain things open us up to a duty of fair rep case, and this is one of them, because if no waiver is given and, let’s just say there was no, we didn’t bargain, there was no bargaining or we came and there was no real bargaining, whatever, and the injured party, which in this case is us but it could be the other side, decides to file a case, the case law is pretty darn clear there’d be a monetary thing attached to that.” (Ex. C-25, pgs. 1, 2.)

Additionally, despite the District’s contrary assertion, the events between August 2015 and November 2015 are not reflective of a harmonious relationship between the Association and the District that was subject to damage. Specifically, Matt Bennett testified that after the August 21, 2015 meeting where Gallagher confronted him, he no longer trusted Gallagher, and the leadership team did not feel that any one of them should meet with him alone. Additionally, many members were angry at the District due to the increased instructional and student contact time. Finally, contrary to the District’s assertion, there is no evidence that Anderson ever told Matt Bennett that he was required to check with her before making agreements. Rather, Anderson explained to Matt Bennett that he had a duty to the membership under the Association constitution and by-laws and could not waive rights without member approval. Thus, the District cannot support its claim that the Association leadership became afraid to agree to anything without Anderson’s approval.

Given the above, the District has failed to show that it has suffered a substantial injury and accordingly, it has no standing. Further, even to the extent it could be found to have standing, there is no evidence that Anderson threatened Matt Bennett or any of the local leadership or damaged an otherwise the harmonious relationship between local leadership and the District. Accordingly, we dismiss this claim.

3. The Association did not violate ORS 243.672(2)(b) by using regressive bargaining tactics.

### STANDARDS OF DECISION

The District asserts that the Association engaged in bad faith bargaining by presenting regressive proposals. Bad faith bargaining is a term which refers to a party’s unwillingness to bargain in good faith toward the goal of reaching an agreement. *Oregon School Employees Association v. Clatskanie School District*, Case No. UP-9-04, 21 PECBR 599, 602-604 (2007). As articulated in *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No.

UP-14-85, 8 PECBR 8160, 8196-202 (1985), we consider in reviewing the totality of circumstances in a bad faith bargaining claim (including a claim based on an allegation of regressive proposals) include: (1) whether dilatory tactics were used, (2) the content of proposals, (3) the behavior of the negotiators, (4) the nature and number of concessions, (5) whether a party failed to explain its bargaining positions, and (6) the course of negotiations. *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757*, Case No. UP-001-13, 26 PECBR 322, 342-343 (2014).

## ANALYSIS

The District asserts that the Association bargained in bad faith by returning to the second round of bargaining with higher cost proposals. Specifically, the District focuses on the costs associated with compensating certified staff for additional instructional and student contact time. Thus, the District alleges regressive bargaining, but does not allege that any of the other factors are at issue.

The Association asserts that the facts in this case do not support a bad faith bargaining claim under the totality of the circumstances and we agree. First, the District does not assert that any factors other than more expensive proposals were at issue. Therefore, we have no basis to determine that there was a totality due to dilatory tactics, poor negotiator behaviors, a lack of concessions, a failure to explain bargaining positions, or any other activities with the overall course of negotiations. *See Dallas Police Employees Association v. City of Dallas*, Case No. UP-33-08, 23 PECBR 365 (2009) and *Southern Oregon Bargaining Council/Rogue River Education Association/OEA/NEA v. Rogue River School District*, Case No. UP-62-09, 23 PECBR 767, 787 (2010) (absent other indicia of bad faith, a regressive proposal alone is insufficient to prove bad faith bargaining).

Second, the circumstances in this case show that the Association bargaining team had valid reasons for returning with proposals that would require the District to expend more. When the bargaining started, the Association team members thought that only 25 minutes per week had been added to the high school schedule, not realizing that it was 48 minutes. The Association learned of the additional time before returning for the second session.

Additionally, many of the elementary school teachers were upset about having had to add an additional 15 minutes of supervisory time at the beginning of the day, because it interfered with their ability to properly prepare for the school day. Therefore, in the first bargaining session, the Association members were primarily seeking to have that preparatory time returned to the elementary school teachers by November 16, 2015 (within five days). When the District seemed unwilling to consider that option, the Association began looking at other alternatives that were more expensive, but only because they did not return the preparatory time to the teachers.

In sum, while the Association's proposals in the second bargaining session may have reflected potential greater costs for the District, the Association had valid reasons for its approach and it did not rise to the level of bad faith bargaining under the totality. Therefore, we dismiss this claim.

4. The Association did not violate ORS 243.672(2)(b) and (d) by filing an unfair labor practice charge despite an initial agreement not to do so.

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. It is also an unfair labor practice under ORS 243.672(2)(d) for a labor organization to violate the provisions of any written contract with respect to employment relations. ORS 243.672(2)(d) is an analogue to ORS 243.672(1)(g), which prohibits employers from violating contracts with labor organizations.

As discussed above, Matt Bennett did initially send an email stating that he agreed to the terms outlined in Gallagher's memorandum. These terms included the Association allowing the District to implement the schedule changes by November 2, 2015, and not filing an unfair labor practice complaint. However, in that memorandum, the District stated it would only be adding five minutes per day to the high school schedule. Therefore, the Association never agreed not to file an unfair labor practice complaint over the implementation of the 48 minutes at the high school that was ultimately adopted.

Additionally, although Matt Bennett initially agreed to the terms, later that day, he followed up with more communication, telling Gallagher that Anderson stated the District could not implement without committing an unfair labor practice. Again, while he was not able to provide clear reasoning, he still put the District on notice that the November 2, 2015 implementation may constitute an unfair labor practice. Therefore, given the context and overall course of events, we conclude that the Association did not violate ORS 243.672(2)(b) and (d) despite Matt Bennett's initial agreement to Gallagher's memorandum.

### Remedies

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

The Association requested that this Board order the District to post a notice of its misconduct. This Board has identified six factors in determining whether a party should be required to post a notice:

“[t]his Board generally requires the posting of an official notice in situations in which the violation: (1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was perpetrated by a significant number of a Respondent's personnel; (4) affected a significant portion of bargaining unit employees; (5) had a significant potential or actual impact on the functioning of the designated bargaining representative as the representative; or (6) involved a strike, lockout, or discharge.” *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 of these conditions need be fulfilled for this Board to order a posting. *Laborers' Local 483 v. City of Portland*, Case No. UP-15-05, 21 PECBR 891, 908 (2007); *Blue Mountain Faculty*

*Association/Oregon Education Association/NEA and John Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 781-82 (2007). Here, the only factor we find is that it affected a significant portion of employees. However, the Association has failed to meet any of the other elements. Therefore, we do not order a notice posting.

The Association also requests that we make employees whole by restoring the *status quo* before the increased student contact and instructional time. Make whole is our standard remedy in unilateral change cases. However, with increases in student contact time, we have typically ordered the parties to bargain their own make whole remedy, because an increase of one hour of student contact time does not necessarily result in a corresponding one-hour increase in teaching duties. *Three Rivers Education Association, SOBC/OEA/NEA v. Three Rivers School District*, Case No. UP-16-08, 25 PECBR 712 (2013) (on remand), *Salem Education Association v. Salem-Keizer School District 24J*, Case No. UP-132-93, 15 PECBR 302 (1994), *East County Bargaining Council (David Douglas Education Association) v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184 (1986). Additionally, in this case, the District did bargain with the Association, approximately one week after implementation, and we typically order a full make-whole remedy when no bargaining occurred. *Oregon School Employees Association v. Sherman Union High School, District #1 of Sherman County and Dale A. Coles*, Case No. C-218-80, 6 PECBR 4715, 4720 (1981). Accordingly, we conclude that the parties are ordered to return to the table to bargain their own remedy. The parties have 60 days from the date of this Order to reach an agreement. If the parties do not reach an agreement within 60 days, each party shall submit to the Board the last proposal that it made to the other party within seven days of the conclusion of bargaining. The Board will either select one of the parties' last offers or craft its own remedy.

The District requested a civil penalty and fee filing reimbursement in its Answer in UP-005-16 and its Complaint in UP-010-16. This Board may award a civil penalty up to \$1,000 per case, without regard to attorney fees: (1) if the complaint is affirmed and the actions taken were done so repetitively, knowing that the actions taken were unfair labor practices, and the party took the actions disregarding this knowledge, or that the actions constituting the unfair labor practice were egregious; or (2) the complaint has been dismissed and it was frivolously filed, or filed with the intent to harass the other person, or both. ORS 243.672(4). Further, under ORS 243.672(3), this Board may, in its discretion, order filing fee reimbursement to the prevailing party where the complaint or answer is found to have been frivolous or filed in bad faith. As the District did not prevail in any of its UP-010-16 claims and the Association was successful in all but one of its UP-005-16 claims. Therefore, no civil penalty will be awarded to the District.

The Association requested a civil penalty in its Answer in UP-010-16. The Association asserted that the District's claims were frivolous for two primary reasons. First, the Association asserted that the District's (2)(b) and (2)(d) claims were frivolous because they were essentially the affirmative defenses asserted in UP-005-16. Second, the Association asserts that the (2)(a) claim was frivolous because the District had no standing to bring it, and appeared to be an attempt to drive a wedge between Anderson and local leadership.

A claim is frivolous only if every argument asserted in its support is one which a reasonable lawyer would know is not well-grounded in fact or law, or warranted by a reasonable argument

for an extension of the law. *SEIU Local 503, OPEU, v. State of Oregon, Department of Transportation*, Case No, UP-11-09, 23 PECBR 939, 960 (2010).

Although the District's (2)(b) and (2)(d) claims in UP-010-16 were based on similar facts and assertions as the District's affirmative defenses in UP-05-16, and we did not find these arguments compelling, they were still well-grounded in law and fact. Therefore, they were not frivolous. ORS 243.672(4) and ORS 243.672(3) require that the complaint or answer be frivolous and do not appear to apply to a single claim within a pleading. Accordingly, we decline to analyze whether the (2)(a) claim was frivolous and to award a civil penalty to the Association.

### PROPOSED ORDER

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

4. The parties will bargain their own make-whole remedy pursuant to the ORS 243.672(1)(e) violation. The parties have 60 days from the date of this Order to reach an agreement. If the parties do not reach an agreement within 60 days, each party shall submit to the Board the last proposal that it made to the other party within seven days of the conclusion of bargaining. The Board will either select one of the parties' last offers or craft its own remedy.

SIGNED AND ISSUED on February 16, 2017.

---

Julie D. Reading  
Administrative Law Judge

NOTE: The Employment Relations Board's rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The "date of filing objections" means the date objections are received by this Board; "the date of service" of a recommended order means the date this Board mails or personally serves it on the parties.) A party that files objections to a recommended order with this Board must simultaneously serve a copy of the objections on all parties of record in the case and file with this Board, proof of such service. The objections may be emailed, mailed, faxed or hand-delivered to this Board. 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 115-010-0090; and 115-070-0055.)

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-004-17

(UNIT CLARIFICATION)

TEAMSTERS LOCAL UNION NO. 223,	)	
	)	
Petitioner,	)	
	)	ORDER CLARIFYING
v.	)	BARGAINING UNIT
	)	
DOUGLAS COUNTY,	)	
	)	
Respondent.	)	
_____	)	

Pursuant to ORS 243.682(2) and OAR 115-025-0005(7), Teamsters Local Union No. 223 filed an April 4, 2017, petition for unit clarification without an election (*i.e.*, a card-check petition). The petition seeks to add currently unrepresented employees in the classification of Transfer Site Attendant to the existing bargaining unit of full-time regular hourly employees in the Operations and Maintenance Division of the Douglas County Public Works Department and shop employees in the Fleet Services Department.

The petition on its face proposes an appropriate clarification of the bargaining unit and contains a sufficient showing of interest. No objections to the petition were filed.

When a labor organization files a facially appropriate unit clarification petition, and the employer does not object, we generally grant the petition. *Oregon State Police Officers' Association v. State of Oregon, Department of State Police*, Case No. UC-001-13, 25 PECBR 412, 413 (2013). Accordingly, consistent with that approach, we will grant the requested clarification.

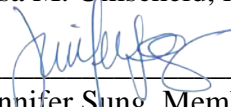
ORDER

The bargaining unit is clarified to include the classification of Transfer Site Attendant.

DATED: April 27, 2017.

  
 \_\_\_\_\_  
 Adam L. Rhynard, Chair

  
 \_\_\_\_\_  
 Lisa M. Umscheid, Member

  
 \_\_\_\_\_  
 Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD  
OF THE  
STATE OF OREGON

CERTAIN EMPLOYEES OF ROGUE VALLEY SEWER SERVICES,	)	
Petitioner,	)	Case No. DC-001-17
v.	)	CERTIFICATION OF ELECTION RESULTS (PETITION FOR DECERTIFICATION)
ROGUE VALLEY SEWER SERVICES and TEAMSTERS LOCAL 223,	)	Mail Ballot
Respondents.	)	
_____	)	

On April 11, 1995, in Case Number RC-4-95, this Board certified Teamsters Local Union No. 223 (Teamsters) as the exclusive representative of a bargaining unit of all regular employees (with certain exclusions) of Bear Creek Valley Sanitary Authority. In June 2003, the name of Bear Creek Valley Sanitary Authority was changed to Rogue Valley Sewer Services (RVSS).

On March 2, 2017, certain employees of RVSS filed a petition under OAR 115-025-0000(5) seeking to decertify Teamsters as the exclusive representative of the bargaining unit.

On April 17, 2017, pursuant to the parties' Consent Election Agreement, this Board sent ballots to eligible voters. All ballots were returned by the deadline of May 1, 2017. A tally of ballots was held on May 2, 2017, and the majority of valid votes counted were cast for continued representation by Teamsters.

No objections were filed to the conduct of the election. Accordingly, it is certified that:

TEAMSTERS LOCAL UNION NO. 223

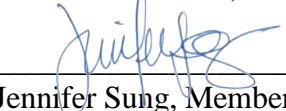
is the exclusive representative of the following bargaining unit of Rogue Valley Sewer Services employees:

All regular employees of RVSS, excluding supervisory and confidential employees, casual employees, employees who are scheduled to work less than 20 hours per week, and temporary employees (employees who work less than 120 days per calendar year).

DATED May 15, 2017.

  
\_\_\_\_\_  
Adam L. Rhynard, Chair

  
\_\_\_\_\_  
Lisa M. Umscheid, Member

  
\_\_\_\_\_  
Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-027-16

(UNFAIR LABOR PRACTICE)

OREGON SCHOOL EMPLOYEES	)	
ASSOCIATION,	)	
	)	
Complainant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW, AND
SOUTH COAST EDUCATION SERVICE	)	ORDER
DISTRICT,	)	
	)	
Respondent.	)	
_____	)	

Margaret Kirschnick and Sarah Drescher, Attorneys at Law, Tedesco Law Group, Portland, Oregon, represented the Complainant.

Hank Stebbins, Attorney at Law, Garrett Hemann Robertson P.C., Salem, Oregon, represented the Respondent.

On April 25, 2017, Administrative Law Judge Martin Kehoe issued a recommended order in this matter. The parties had 14 days from the date of service to file objections. OAR 115-010-0090(1). No objections were filed, which means that the Board adopts the attached recommended order as the final order in the matter. OAR 115-010-0090(4), (5).

//  
//  
//  
//

ORDER

1. The District shall cease and desist from refusing to bargain in good faith with the Oregon School Employees Association in violation of ORS 243.672(1)(e).

2. The remaining claims are dismissed.

DATED May 17, 2017.



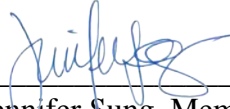
---

Adam L. Rhynard, Chair



---

Lisa M. Umscheid, Member



---

Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-027-16

(UNFAIR LABOR PRACTICE)

OREGON SCHOOL EMPLOYEES	)	
ASSOCIATION,	)	
	)	
Complainant,	)	
	)	RECOMMENDED RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW, AND
SOUTH COAST EDUCATION SERVICE	)	PROPOSED ORDER
DISTRICT,	)	
	)	
Respondent.	)	
_____	)	

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on November 30 and December 1, 2016 in Coos Bay, Oregon. The record closed on January 20, 2017 upon receipt of the parties' post-hearing briefs.

Margaret Kirschnick and Sarah Drescher, Attorneys at Law, Tedesco Law Group, Portland, Oregon, represented the Complainant.

Hank Stebbins, Attorney at Law, Garrett Hemann Robertson P.C., Salem, Oregon, represented the Respondent.

On August 19, 2016, the Complainant, Oregon School Employees Association (OSEA), filed an unfair labor practice complaint with the Employment Relations Board (Board) against the Respondent, South Coast Education Service District (District, ESD, or SCESD). That complaint was later amended on November 28, 2016. The issues as framed in the amended complaint and the notice of hearing and pre-hearing order are: Did the District violate ORS 243.672(1)(e) by (1) refusing to bargain with the OSEA over safety issues that have a direct and substantial effect on the on-the-job safety of employees, (2) unilaterally implementing changes that have a direct and substantial effect on the on-the-job safety of employees and that impact employee discipline and job security without bargaining, or (3) refusing to provide information to the OSEA? As set forth

below, we conclude that the District did violate ORS 243.672(1)(e) as alleged, but reject the allegation that the District refused to provide information.

### RULINGS

As detailed below, OSEA Chapter 114 represents the District's part-time instructional assistants (IAs) and OSEA Chapter 119 represents the District's full-time IAs. The District contends that the original complaint did not specifically address OSEA Chapter 114, and that accordingly this case should be limited to OSEA Chapter 119. The OSEA claims that it filed on behalf of all of its IA members. Prior to the hearing, the ALJ granted the OSEA's motion to amend its complaint to clarify that it applied to both units. We conclude that the ALJ was correct to do so. In our view, the initial complaint makes no meaningful distinction between the two bargaining units. The fact that it only directly refers to one unit's collective bargaining agreement (CBA) is ultimately not compelling in light of the rest of the filing and its attachments.

### FINDINGS OF FACT

#### Background

1. The District is and has been a "public employer" within the meaning of ORS 243.650(20). It provides a variety of special education services for the ten school districts in its region. That area includes several schools including Blossom Gulch Elementary School (Blossom Gulch), which serves students in kindergarten through the third grade, and Sunset Middle School (Sunset), which has grades four through seven. The District is one of 19 education service districts in the state.

2. The OSEA is and has been a "labor organization" within the meaning of ORS 243.650(13). It is the exclusive representative of all of the IAs employed at all of the District's different locations. That includes IAs who work part time as well as those who work full time. OSEA Chapter 114 represents the part-time IAs in one bargaining unit. OSEA Chapter 119 represents the full-time IAs in another.

3. The two IA units negotiate separately with the District for their CBAs but otherwise use the same field representative. Presently, that field representative is Tyler Whitmire. Meanwhile, Ronald Nance is OSEA Chapter 119's current local president and Danielle Espinoza is OSEA Chapter 119's current secretary-treasurer. OSEA Chapter 114 has never had any active union officers.

4. OSEA Chapter 114 has a CBA with the District that runs from July 1, 2014 through June 30, 2017. OSEA Chapter 119 has a CBA with the District that runs from July 1, 2015 through June 30, 2017. Neither CBA includes a section that is specifically devoted to employee safety.

5. Both IA CBAs contain a "Management Rights" section that gives the District the right to "[d]etermine the services, supplies and equipment necessary to continue its operations and to determine the methods, schedules and standards of operation, the means, methods and processes

of carrying on the work including automation thereof or changes therein, the institution of new and/or improved methods or changes therein.” (Exh. C-1 at 8, Exh. C-2 at 5.)

6. Both CBAs also contain a section titled “Discipline/Dismissal” that states: “When an employee has violated a rule or engaged in conduct meriting disciplinary action, the District may impose discipline on the employee which it deems proper, following a fair investigation and so long as the penalty imposed is as consistent with those in other like cases as possible.” (Exh. C-1 at 13, Exh. C-2 at 8.)

7. Article 16.5 of the part-time IAs CBA, titled “Complete Agreement,” states:

“This agreement constitutes the sole and entire existing Agreement between the parties and supersedes all prior practices, whether oral or written and expresses all obligations of and restrictions imposed upon the District and the Association. This Agreement is subject to amendment, alteration or additions only by a subsequent written agreement between and executed by the District and the Association. The waiver of any breach, term or condition of the Agreement by either party shall not constitute a precedent in the future enforcement of all its terms and conditions.” (Exh. C-2 at 18.)

8. Article 16.7 of the full-time IAs CBA, also titled “Complete Agreement,” states:

“The parties acknowledge that, during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the District and the Association, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement.” (Exh. C-1 at 32.)

9. Part-time and full-time IAs are assigned to the same classrooms, perform the same work together with the same students, have the same responsibilities, and share the same job description. The main difference between the two groups is the number of hours worked. Specifically, full-time IAs work “25 hours per week or more” (Exh. C-1 at 5), while part-time IAs work “less than 25 hours per week” (Exh. C-2 at 3).

10. Through its Adaptive Life Skills (ALS) Program, the District provides specially designed instruction and other services for students who have some kind of mental or physical disability. Much of that work is done in the District’s six ALS classrooms. Generally, each ALS classroom is directed by a single special education teacher who gives instructions to the IAs who

are assigned to his or her room. Some IAs are specifically assigned to a particular student and are tasked with following that student closely throughout the entire school day. Those IAs have been called “one-on-one IAs.” Sunset’s ALS classroom generally has between 9 and 12 students and around 6 IAs. Some of those IAs are part time and some are full time.

11. Before someone is hired as an IA, the District warns him or her that IAs sometimes work with aggressive students. During a pre-hire interview in 1998, the District asked one applicant a question that specifically suggested that, as an IA, she might have to deal with “a profoundly developmentally disabled child who exhibits severe aggressive behaviors.” (Exh. R-1.)

12. The IA job description provides, in part, that an IA has the “[a]bility to handle unpleasant situations,” “[a]dheres to safety standards,” and “needs to be competent in conflict resolution.” (Exh. R-8 at 5, 6.) It also states, “All requirements are subject to possible modification to reasonably accommodate an individual with a disability or disabilities.” (Exh. R-8 at 6.)

13. In practice, IAs frequently work with aggressive, misbehaving students. Sometimes those students hurt themselves, staff, and/or other students. IAs are expected to help mitigate and track aggressive behaviors. The way IAs deal with those behaviors is different with each student and is based on a range of considerations. As stated in one District policy, “Special circumstances may require behavioral interventions that are specialized to the needs of individuals.” (Exh. R-55.) What an IA can and cannot do has changed over time to reflect evolving “best practices” and legislative changes. (Exh. R-55.) IAs are much less likely to use chemical restraints (i.e., medication) or seclusion now, for example. One common way IAs track students’ aggressive behaviors is through detailed daily tallies.

14. Since 2003 or 2004, IAs have regularly been given Oregon Intervention System (OIS) training, which includes training regarding the use of personal protective equipment (PPE) and how to recognize and then diffuse aggressive behaviors. Other trainings are also routinely offered throughout the school year.

15. The District’s written PPE policies, which have existed in some form since 1996, do not specifically address BitePRO brand bite-resistant sweatshirts, shin guards, or vests/chest protectors. Moreover, they do not specify whether or not IAs will be disciplined for not wearing assigned PPE.

16. Currently, in a section titled “Hand Protection,” one District PPE policy states: “Each employee shall be directed to wear the appropriate protective equipment each time they change incontinent pads, mix disinfectant chemicals, feed, perform medical procedures or cleanup bio-wastes or contaminated surfaces.” (Exh. R-53 at 2.) In a subsequent section titled “Eye-Face Protection,” it states: “Each employee shall be directed to wear goggles, safety glasses, face shield or other approved eye-face protection when changing incontinent pads, tube feedings, medical procedures performed in the program or when working with student behavior situations that result or have resulted in the past in the projection of bodily fluids.” After that, it provides: “Each program shall be equipped with goggles, safety glasses, or face shields as appropriate to the employees assigned to the program.” (Exh. R-53 at 3.)

17. A separate District policy titled “Safety Program” states that District employees are responsible for “[u]sing safety equipment furnished for the employee’s protection” and then provides: “The ESD will furnish the following safety equipment or appliances: (1) Automotive seat belts; (2) Eye protection; (3) Ear protection; (4) Other items when the work situation dictates as required by policy, regulation or law.” (Exh. R-45 at 8.) Elsewhere, it provides:

“Protective equipment is furnished by the ESD when the employee is exposed to job hazards in his/her work area. This equipment includes seat belts, eye protection, hearing protection, respiratory equipment, safety shoes, gloves and hard hats. Supervisors may authorize additional items when the work situation dictates as required by policy, regulation or law. When furnished for a specific job task, the use of the protective equipment is mandatory unless the supervisor in charge decides the use of the protective device creates a greater hazard than when working without it.” (Exh. R-45 at 9.)

18. Prior to May 6, 2016, the District gave IAs PPE including face shields, gloves, goggles, and medical gowns as circumstances required. IAs used the face shields for biohazards, while brushing students’ teeth, and to stop certain students from grabbing IAs’ eyeglasses. IAs used the gloves for feeding students. The medical gowns were worn while brushing teeth and while changing diapers. Separately, IAs have also had to utilize a variety of “belt shirts” and other kinds of physical restraints while working with ALS students.

19. Every ALS student has his or her own “individualized education plan” (IEP). In short, IEPs let IAs and teachers know exactly how to best work with that particular student. Each IEP takes into consideration a given student’s personal medical information, his or her size and weight, the staff available at the time, and any notable safety concerns.

20. Every IEP is generated by a unique group of individuals, referred to as an “IEP team,” that consists of a student’s parent(s), teacher(s), and service providers along with several others. Routinely, each IEP team determines as a group where its student will be placed and whether he or she can be removed from a particular classroom. A central goal for an IEP team is to put the student in his or her “least restrictive environment,” which generally means an environment that is as close to a successful general education classroom experience with same-aged peers as circumstances allow. (Exh. R-13 at 2.)

21. IEPs are adjusted and updated as often as necessary. Such a change can only happen after a formal IEP team meeting in which the team determines that the change is the best choice for the student. Any decision to remove a student from school altogether will also necessarily involve the student’s school district. In some cases, an IEP team may ask an IA for his or her input about a student’s progress.

22. One particular District student, referred to as “S” here to protect her identity, attended Blossom Gulch’s ALS classroom for kindergarten and remained there through the third grade (2014-2015). She then went to Sunset’s ALS classroom for fourth (2015-2016) and fifth (2016-2017) grade. S is a “primarily non-verbal” girl “with an Autism Spectrum Disorder” (Exh. C-11 at 1).

23. S often tries to run away from designated areas and classroom staff. She also frequently engages in violent, aggressive behavior directed toward herself, classroom staff, and her fellow students. Some of those behaviors have included choking, hitting, kicking, pinching, punching, pushing, and scratching. On top of that, S has stripped, peed on the floor, knocked over and thrown furniture, and dumped out drawers. For all of those reasons, any IA who works with S needs to be capable of keeping up with her at all times and must constantly be on guard. That can be emotionally and physically demanding. S has sometimes had one or two IAs specifically assigned to her.

24. S has grown larger and more aggressive over time. During her 2015-2016 school year, S was stronger and more violent than the other students in her class at Sunset. At that time, she weighed somewhere between 120 and 130 pounds and was around 5 feet tall. Several of the IAs who worked closely with S during that year believe that S actually intended to hurt others while other students they work with only do so accidentally.

### Timeline of Events

25. On November 13, 2014, the Oregon Occupation Safety and Health Division, referred to here as “OSHA,” received a complaint alleging that employees in Sunset’s ALS classroom had been injured “due to the violent and physical aggression of one of the students in the classroom” and that the employees who work there did not feel safe because the employer had not addressed that issue. (Exh. C-26 at 25.) The student described in that complaint, though unnamed in this record, is a boy and not S.

26. According to an OSHA report, OSHA’s investigation into the 2014 complaint revealed:

“In the classroom at Sunset School there was a student that would become angry and cause classroom disruption by biting, kicking, hitting, grabbing employees and throwing objects. The student would also tip over chairs, desks, file cabinets and items in his path. The classroom had to be evacuated for the safety of the other students. The employees had their clothes ripped, buttons torn off, had bruising from being grabbed or hit and even in one case a bus driver was kicked in the knee causing her to seek medical help.” (Exh. C-26 at 35.)

The same OSHA report also observed that there was “almost a daily incident report on the same student. There were some days there were 2 incidents involving this student.” (Exh. C-26 at 35.) After that, it noted, “Since the beginning of September 2014 the student has become increasingly violent.” (Exh. C-26 at 35.)

27. At some point after November 6, 2014, a day in which the aforementioned male student purportedly kicked a bus driver and ripped an instructor’s blouse, the student started spending half of each school day at Sunset and the other half of the day in a different classroom called McKenzie House. “Since the move there have been very few incidents.” (Exh. C-26 at 36.)

28. On December 1, 2014, the District issued a formal “safety plan” for dealing with S’s tendency to run away from staff and designated areas. It was generated by S’s IEP team and Kathleen Stauff, a District administrator responsible for the District’s ALS program.

29. On March 12, 2015, OSHA issued the District a citation with a \$250 penalty for failing to provide a safe work environment in Sunset’s ALS classroom. Among other things, the citation concluded that there had been daily incidents involving physical contact with employees and that no measures had been taken to protect them “other than exercising OIS training.” (Exh. C-26 at 5.) The citation was the end result of the November 2014 OSHA complaint and was not linked to S, who started attending Sunset in the fall of 2015.

30. On September 15, 2015, S punched a Sunset special education teacher named Edward Mason in the back of his head with a fist while Mason was sitting down at a desk, facing away from S, and working with other students. That hit gave Mason a concussion. He went to the doctor for the injury.

31. On November 10, 2015, the District gave a new BitePRO sweatshirt to Joanna Johnson, who had recently become S’s one-on-one IA full time the month before. When Johnson received the sweatshirt, she signed an equipment loan agreement form that stated that the borrower “shall indemnify and hold harmless SCESD, its agents, and employees from and against all claims, suits, actions, damages, or causes arising from personal injury, loss of life, and/or damage to property resulting directly or indirectly from the use of SCESD equipment.” (Exh. R-5 at 1.) At the time, the District did not inform Johnson whether she would be disciplined if she did not wear the sweatshirt.

32. On February 23, 2016 at Sunset, S rammed into an IA named Tracie Fisher at full force using a net swing, injuring Fisher’s right knee. Fisher went to the emergency room the next day. The injury ultimately led to Fisher taking time off and being assigned to light duty. S’s regular one-on-one IA was absent the day of the incident.

33. On March 1, 2016, Whitmire started working as a field representative for both of the OSEA’s IA units. Before that, Whitmire was already a field representative for the OSEA but was assigned to a different region.

34. On March 30, 2016 at Sunset, S pinched the arms and breasts of an IA named Sherri Lester. Later that same day, in a Sunset computer room, S also ran into and struck Lester with both hands, injuring Lester. S subsequently threw herself on the ground. Once on the ground, S kicked her legs and made contact with Johnson, leaving a noticeable raised bump on Johnson’s left knee. Johnson did not seek medical treatment for her injury, but Lester did. Lester never returned to the classroom that school year.

35. S’s March 30, 2016 behaviors made an IA perform a “room clear,” which is when staff temporarily remove everyone from a class except for the misbehaving student to make sure nobody gets hurt. During the 2015-2016 schoolyear, IAs had to perform similar room clears two or three times a week because of S.

36. On April 7, 2016, OSHA received a complaint alleging that teachers at Sunset had been injured by S and that, despite the District's awareness of the issue, no corrective action had been taken to correct S's behavior.

37. On April 18, 2016, S scratched a special education teacher named Kevin Gowrylow on the neck, drawing blood. Afterward, Gowrylow cleaned the scratch and applied a bandage.

38. In an April 22, 2016 response to the April 2016 OSHA complaint involving S, District Superintendent Tenneal Wetherell informed OSHA that, in order to protect classroom staff from S, the District would develop a "staff response plan," "train all staff on how to adjust their response/interactions based on exhibited student behavior," and have staff use BitePRO sweatshirts, chest protectors, and shin guards. (Exh. C-27 at 6.) The response further suggested that the District would implement those changes by April 29, 2016, and that S's one-on-one IA was already using a BitePRO sweatshirt to protect her from S's pinching.

39. Later in April 2016, Whitmire and Wetherell had a meeting at Whitmire's request. During that meeting, the two discussed the injuries in Sunset's ALS classroom and the April 2016 OSHA complaint. Subsequently, at 11:33 a.m. on April 26, 2016, Whitmire sent Wetherell an email that included draft contract language addressing safety and stipends for IAs who perform certain "extra duties." (Exh. C-5 at 4.) His email also warned Wetherell that IA access to IEPs "may become an issue in the near future" and referenced two Oregon statutes that deal with employee safety. (Exh. C-5 at 1.)

40. At 6:42 p.m. on April 26, 2016, Stauff sent Whitmire an email stating that she had purchased "additional personal equipment" for the IAs and had written a new staff response plan for helping the IAs respond to S when she exhibits aggressive behavior. (Exh. C-5 at 7.) After that, Stauff indicated that she would like to meet with the IAs on April 28, 2016 to give them the new equipment, go over the District's expectations for wearing it, and review the staff response plan for S. In addition, she provided that she would like to have Whitmire present at that time in order to help the IAs understand that, if they did not wear the equipment or follow the plan, the District would start the progressive discipline process with them.

41. At 8:00 p.m. on April 26, 2016, Whitmire responded to Stauff that he would not be able to make the proposed April 28, 2016, 2016 meeting, as he would be on the road at the time. The email also noted that Whitmire needed to make sure that what Stauff's email outlined did not constitute a mandatory subject of bargaining. It then asked for (1) "the job descriptions for the employees," (2) "a record showing that the required trainings had been completed for working with these students and for using this equipment," and (3) "[a] list of all the employees with their contact information." (Exh. C-5 at 7.) Whitmire intended for this email to cover both IA units, but it did not explicitly state that.

42. At 9:15 a.m. on April 27, 2016, Wetherell sent Whitmire an email that included a copy of the IA job description as requested and indicated that Wetherell had already given Whitmire a copy of it. It further explained, "In my mind, the response plan is no different than implementing student plans/behavior plans. The protective equipment should be no different than

gloves, face shields etc. The students have not changed the PPE have based on potential hazards.” (Exh. C-5 at 7.)

43. At 10:18 a.m. on April 27, 2016, Whitmire responded to Wetherell and asked her to prioritize providing the IAs’ names and contact information as requested. Stauff replied to Whitmire at 10:38 a.m. the same day with a list of the names and telephone numbers of the classified staff in Sunset’s ALS classroom. Her list included part-time and full-time IAs.

44. At 11:16 a.m. on April 27, 2016, Wetherell sent Whitmire an email that included some prior “OIS training dates for Sunset staff” and other information. (Exh. C-5 at 9.) The email specifically included information for the teacher, the full-time IAs, and the part-time IAs at Sunset. It also included a timeline related to a student safety plan that had purportedly been shown to all of Sunset’s ALS classroom staff.

45. At 11:00 a.m. on May 2, 2016, Wetherell sent Whitmire an email that included the dates that certain Sunset employees’ first aid training would expire. As before, it included information on part-time and full-time employees.

46. At 11:11 a.m. on May 2, 2016, Whitmire sent Wetherell an email indicating that he had reached out to everyone in the classroom, had advised them to follow their obligations to follow instruction related to safety, and had informed them of the District’s requirement to provide a safe working environment. Separately, the email shared that Whitmire had heard that more than one person was concerned about his or her personal safety because of S. It also stated that there needed to be a frank discussion “about a safety stipend linked to violent behavior in classrooms,” offered language about and a template for such stipends, and suggested that stronger safety language could be addressed via a memorandum of understanding. (Exh. C-5 at 11.) The email did not distinguish between part-time and full-time IAs.

47. At 11:26 a.m. on May 2, 2016, Wetherell responded to Whitmire that she was very concerned about giving stipends to staff. She wrote:

“We are very clear about the position we are hiring for and what type of students we have in class. While this student’s behavior is challenging it is not unusual - it is the work of the ALS classrooms and the ESD. Nothing has changed within the student population or job expectations working in the classroom for the twelve years I have been here. As a result, a stipend wouldn’t make sense.”

(Exh. R-10 at 4.)

After that, the email invited Whitmire to chat with Wetherell about the matter at the next “union problem solving meeting.” (Exh. R-10 at 4.) That particular meeting, which was originally scheduled for May 11, 2016, never took place, as it was cancelled by the District.

48. On May 3, 2016, Whitmire wrote an email to Wetherell and asked her for the response she had provided to OSHA regarding the April 7, 2016 OSHA complaint involving S. The same email also clarified that the OSEA was “not suggesting a stipend for everyone in the room but just for those who may be exposed to the debilitating violence on a regular basis.” (Exh.

C-5 at 17.) It then suggested that they “could reduce the number of stipends by removing the student from the other employees.” (Exh. C-5 at 17.) Whitmire eventually got a copy of the District’s response to OSHA, but he does not remember when or who gave it to him.

49. During a May 6, 2016 meeting with several Sunset IAs, Stauff distributed the new staff response plan for S and the new PPE along with corresponding equipment loan agreement forms. She also provided some training regarding the use of that new PPE. The PPE distributed consisted of BitePRO sweatshirts, padded vests, and shin guards. It was the first time that any of Sunset’s IAs had been given shin guards or padded vests.

50. Whitmire did not attend the May 6, 2016 meeting, was not told ahead of time when it would take place, and was not given a chance to review any of the provided documents in advance of the meeting. Nance, however, did attend.

51. The staff response plan distributed on May 6, 2016 notes some of S’s common aggressive behaviors, details how staff should be communicating and interacting with S, and provides a series of expectations that staff are expected to follow. Among other things, those expectations include wearing the distributed shin guards, sweatshirt, and vest while working with S. The staff response plan ends with a “staff acknowledgement” page stating that those who signed it have been provided training on the plan and understand that a failure to wear the assigned PPE and follow the plan may result in disciplinary action. (Exh. C-11 at 4.) The plan was created by Stauff and Johnson.

52. The equipment loan agreements provided on May 6, 2016 state that the borrower “shall indemnify and hold harmless SCESD, its agents, and employees from and against all claims, suits, actions, damages, or causes arising from personal injury, loss of life, and/or damage to property resulting directly or indirectly from the use of SCESD equipment.” (Exh. R-5 at 2.) That borrower language parallels the language in Johnson’s November 10, 2015 agreement.

53. On May 10, 2016, OSHA sent Wetherell a letter stating that, at that time, no further action was planned regarding the April 2016 OSHA complaint. On the same day, Gowrylow (again, a teacher, not an IA) accidentally ran into a raised ramp extension while walking backwards with S, injuring his neck and a shoulder. As a result of that injury, Gowrylow went to the hospital.

54. On May 25, 2016, S broke a glass window in the Sunset ALS classroom. Shortly after that, outside the classroom, S tried to bite Johnson and then choked her with both hands until Johnson could not breathe and her face turned purple. S also head-butted, hit, kicked, punched, pushed, and scratched Johnson during the same incident. Afterward, Johnson went to the emergency room but left the hospital before she was treated. Johnson returned to work the following day, then went to a chiropractor for treatment the day after that. The May 25, 2016 incident was not the first time that S had choked staff or students.

55. At 2:25 p.m. on May 26, 2016, Whitmire wrote the District an email asking for an up-to-date list of part-time District employees that included their names, building addresses, classifications, home phones, home addresses, and emails. At 2:29 p.m. that day, District employee Michelle Silva wrote back that she was forwarding Whitmire’s request to the District’s human

resources department. Then, at 3:28 p.m., Brandie Monroe, the District's Human Resources Operations Director, sent Whitmire an email that included the information that he requested earlier that day.

56. At 11:52 a.m. on May 27, 2016, Whitmire sent an email to Wetherell stating that he had received an anonymous phone call from an OSEA member who told him that another IA had been injured. The email also asserted that one injured member had refused to file a report or identify herself because of fear of retaliation, and that the May 25, 2016 choking incident was witnessed by a teacher, two cooks, and a janitor. It then asked for the incident reports and contact information affiliated with those witnesses and the injured employee.

57. At 1:32 p.m. on May 27, 2016, Wetherell wrote to Whitmire and indicated that she was aware of the injury and needed to do some research about Whitmire's request. She wrote, "It feels a little out of your scope in terms of confidentiality and I don't want to make a mistake on my employee and student's behalf." (Exh. R-10 at 2.) She also indicated that she would be working with her lawyer on the matter and that she needed more time to figure things out.

58. At 3:25 p.m. on May 27, 2016, Whitmire sent Wetherell an email suggesting that, under ORS 243.650(7)(g), the OSEA had the right to bargain over safety issues that have a direct and substantial effect on the on-the-job safety of employees. He then requested bargaining over the matter and asked Wetherell for her availability. Whitmire also wrote that, in order to engage in meaningful bargaining, he needed the information that he had previously requested. After that, he asked for the contact information for other employees who had been injured by S in the past academic year. Whitmire intended for this email to cover both part-time and full-time IAs. However, that was not explicitly stated in its wording.

59. At 4:05 p.m. on May 27, 2016, Wetherell sent an email back to Whitmire stating that she would be getting the District's bargaining team and negotiator together to find dates. Later, at 6:49 a.m. on May 31, 2016, Wetherell sent Whitmire a separate email reiterating that she would be working to get dates. That email also asked Whitmire what specifically the OSEA wanted to bargain with the District. At 10:28 a.m. that day, Whitmire replied that they needed "to create safety articles for the CBA that will provide guidelines for how to ensure safety in the workplace." (Exh. C-5 at 23.)

60. On June 8, 2016, Whitmire filed a complaint with OSHA over the May 25, 2016 choking incident.

61. On June 9, 2016, Whitmire sent Wetherell an email that repeated his prior information requests and clarified,

"Bargaining over this issue includes, but is not limited to: practices and procedures to ensure the safety of our members on the job, such as proper training for members on physical restraints, protocols for reporting and follow-up action; an establishing

process for addressing student behavior to prevent it from happening, including notification to parents, discipline, removal from classroom, individualized training/protocols/procedures for handling this student and methods/practices for prevention; emergency measures, including safety buttons/notifications from classroom; follow-up investigation and complaint procedures for bringing this issue to the school board.” (Exh. C-5 at 24.)

62. On June 15, 2016, Wetherell sent Whitmire a letter that, among other things, concluded that there had not been a change in working conditions and that the issues addressed in the OSEA’s demand to bargain were already covered by Article 4 of OSEA Chapter 119’s CBA, which contains its management rights section. At the end of the letter, Wetherell invited Whitmire to provide a written response detailing the conditions that he believed had been altered.

63. On June 20, 2016, Wetherell sent OSHA a letter noting that a staff member had shared that the provided BitePRO sweatshirt “helped with potential bruising and breaking of the skin but did not eliminate it completely.” (Exh. R-12 at 3.) It also suggested that S’s May 25, 2016 incident was “a result of her handicapping condition” and that students are rarely disciplined in such cases. (Exh. R-12 at 3.) Additionally, the letter explained that, although S’s parent initially wanted to keep S out of school after the May 25, 2016 choking incident, the same parent later decided against that and as a result S was returned to class.

64. In a July 11, 2016 letter to Wetherell, Whitmire argued that the District’s reliance on Article 4 was misplaced and outlined what Whitmire considered to be several significant changes including: (1) “[t]he introduction of a dangerously violent student in the workplace who is causing injuries to employees;” (2) “the District’s decision not to remove the dangerously violent student to a more appropriate setting, not to implement a behavioral support plan that complies with District policy, and not to conduct a behavioral intervention that complies with District policy;” and (3) “requiring staff to wear bite-proof sweatshirts, chest torso protectors, and shin guards,” providing staff training, and creating of a staff response plan. (Exh. C-7 at 2.) He also argued that the District’s refusal to provide the OSEA with requested information was a separate violation of Oregon’s Public Employee Collective Bargaining Act (PECBA), and that the records were also discoverable under state public records law. After that, he wrote, “Please consider this letter a public records request for the information described above.” (Exh. C-7 at 3.) The July 11, 2016 letter does not specifically note that Whitmire was demanding bargaining on behalf of both units, but that was what he intended. At the time, Whitmire assumed that the CBA language at issue was identical in both CBAs.

65. On July 13, 2016, Wetherell sent Whitmire an email stating that she had received his request for “Public Records” and would be working on getting the requested information together for him. It also indicated that Whitmire would be receiving that information by July 22, 2016. (Exh. C-5 at 25.)

66. In a July 21, 2016 letter to Whitmire, Wetherell noted that Whitmire’s July 11, 2016 letter had not changed the District’s position that it was under no obligation to create additional contract articles when there had been no changes in working conditions. The letter also included a number of lightly redacted incident reports, a witness list for the May 26, 2016 incident, and

“contact information for involved classified instructional staff” (which the letter subsequently described as “your unit’s contact information”). (Exh. C-8 at 2.) Wetherell then explained that she did not have the contact information for the janitor and the cooks, as they technically worked for the Coos Bay School District, a different employer. At the end of the letter, Wetherell shared that she was willing to have a meeting with Whitmire but clarified that it would not be a bargaining session. The documents included with the July 21, 2016 letter included contact information for part-time IAs that had already been provided on May 26, 2016, as well as contact information for all of the OSEA members in Sunset’s ALS classroom that had already been provided on April 27, 2016.

67. At 1:31 p.m. on July 22, 2016, Whitmire sent Wetherell an email asking if Wetherell’s July 21, 2016 letter included all of the incident reports for all of the District’s injuries that had occurred that academic year. Whitmire also wrote that, since Wetherell had redacted employees’ names, it was impossible for him to know if all the relevant employees had been included or whether to contact them. Subsequently, at 1:33 p.m. that day, Whitmire sent a separate email to Wetherell stating that he and Nance could meet with Wetherell on August 8, 2016 from 3 to 5 p.m. and would “try and get another Chapter officer” to join them. (Exh. C-5 at 26.)

68. On July 24, 2016, Wetherell wrote to Whitmire and stated that she was going to be out of the state on vacation until August 2, 2016.

69. On August 3, 2016, Wetherell sent Whitmire an email titled “Forgot to attach” that included a copy of an injury report for Mason’s September 15, 2015 injury. (Exh. R-17 at 1.)

70. The August 8, 2016 meeting occurred as scheduled. At the beginning of the meeting, Wetherell once again made it clear that the meeting should not be considered a bargaining session. After that, Whitmire suggested that the District should include a classified employee on the District’s “behavior team,” which reviews incident reports, assesses what changes need to be made, and provides training. Wetherell agreed to that idea, but clarified that the OSEA member who participated would not be able to provide the OSEA with any details about the behavior team’s meetings, as those details include confidential student information. The discussions that occurred during the August 8, 2016 meeting were not tailored to either the part-time or the full-time IAs. No OSEA Chapter 114 members attended the meeting, but Nance and Espinoza of OSEA Chapter 119 did.

71. On August 15, 2016, OSHA sent the District a letter stating that no further action was planned regarding the June 2016 OSHA complaint at the time.

72. On August 19, 2016, the OSEA filed the instant unfair labor practice complaint.

#### CONCLUSIONS OF LAW

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

2. The District violated ORS 243.672(1)(e) by (1) refusing to bargain with the OSEA over safety issues that have a direct and substantial effect on the one-the-job safety of employees and (2) unilaterally implementing changes that have a direct and substantial effect on the one-the-job safety of employees and that impact employee discipline and job security without bargaining.

### Standards of Decision

At its core, the complaint alleges that the District violated ORS 243.672(1)(e), the provision of the PECBA that prohibits a public employer or its designated representative from refusing to “bargain collectively in good faith” with the exclusive representative of its employees. The burden of proof for such an allegation is on the complainant. OAR 115-010-0070(5)(b). Under the PECBA, the employer’s duty to bargain is limited to changes to employment conditions that are deemed “mandatory subjects of bargaining.” For other, “permissive” subjects, the 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 employer may nevertheless be required to bargain regarding that impact. *Three Rivers Ed. Assoc. v. Three Rivers Sch. Dist.*, 254 Or App 570, 574, 294 P.3d 547 (2013).

If the subject in dispute is specifically included in the definition of “employment relations” under ORS 243.650(7)(a), then the subject is *per se* 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), and (f) are generally permissive. ORS 243.650(7)(g), which addresses “safety issues” and is partially relied upon by the OSEA, is detailed below. To determine the status of subjects the PECBA does not expressly 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). Generally, whether an employer’s policy is reasonable has nothing to do with its negotiability. *Federation of Oregon Parole and Probation Officers v. Washington County*, Case No. UP-70-99, 19 PECBR 411, 427 (2001).

Both a “flat refusal” to bargain over a mandatory subject of bargaining and a unilateral (i.e., unbargained) change over a mandatory subject constitute *per se* violations of the obligation to bargain in good faith. *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). Whenever an unlawful unilateral change is alleged, as here, 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 policies or work rules. In other cases, the *status quo* can simply be the product of an employer’s pattern of behavior. *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*, Case No. 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

In its post-hearing brief, the OSEA contends that the District unlawfully unilaterally changed the *status quo* on May 6, 2016 when it (1) introduced BitePRO sweatshirts, chest protectors, and shin guards; (2) required IAs to wear that new PPE subject to discipline; and (3) required IAs to follow a staff response plan subject to discipline. It also argues that S's aggressive behaviors during the 2015-2016 school year were an additional change. In its own post-hearing brief, the District contends that its actions maintained rather than changed working conditions, that the subjects of this case are not mandatory bargaining subjects, that S's behaviors were not a change in the *status quo*, and that the OSEA did not properly demand to bargain.

On the issue of whether S's aggressive behaviors during her 2015-2016 school year were an unlawful change to the *status quo*, we would first note that they were technically carried out by S, a student, and not by the District itself. Furthermore, the underlying decisions to place and keep S at Sunset were ultimately the determinations of a full team of individuals, some of whom are not District employees. As outlined above, the statutory obligation to bargain in good faith specifically prohibits *an employer* from unilaterally altering conditions of employment that are mandatory subjects for bargaining. Along with that, it does not appear that S's behaviors during the one year were in fact a legally significant change for her. The complaint suggests S "began injuring" others in her 2015-2016 school year, but according to reports and testimony in the record, S routinely drew blood, grabbed, head butted, pulled hair, pinched, ran away, and scratched before she started at Sunset. Likewise, S's May 2016 choking incident, although certainly unfortunate, was not the first time she had choked someone. It is also difficult to meaningfully distinguish her actions from several other ALS students' similarly aggressive, occasionally injurious behaviors before and during the same school year. Although notable, the fact that a few of Sunset's IAs personally believe that S's intent differentiates her from all other ALS students is not especially compelling evidence here, particularly in light of S's disability. Under those circumstances, we cannot conclude that S's 2015-2016 behaviors, standing alone, constituted an unlawful change to the parties' *status quo*.

As the OSEA states in its post-hearing brief, ALS students often exhibit mal-adaptive behaviors, and those behaviors can include acts of aggression. It is also clear that, from time to time, some IAs are faced with working with large and aggressive students and enduring a range of violent behaviors. In particular, we note the male Sunset student addressed in the November 2014 OSHA complaint who, much like S, allegedly grew "increasingly violent" over time and was responsible for "daily incidents involving physical contact" and the cause of multiple employee injuries. (Exh. C-26 at 35, 5.) As with S, the evidence specifically speaks of his "violent behavior and physical aggression" and references instances of "biting, kicking, hitting, grabbing employees and throwing objects." (Exh. C-26 at 25, 35.) According to one witness, that student, even more so than S, was the cause of regular "room clears," which for him occurred "at least daily if not multiple times daily." We also note that the boy in the 2014 OSHA complaint was approximately 5 ½ feet tall and weighed approximately 150 pounds, and another ALS student was described as

being over 6 feet tall. As indicated, in her 2015-2016 school year, S was about 5 feet tall and weighed around 120 or 130 pounds.

Regarding whether the District changed the *status quo* by introducing BitePRO sweatshirts, vests, and shin guards, we would grant that the District has previously distributed a variety of PPE to IAs. In addition, one IA was provided a BitePRO sweatshirt (along with a matching equipment loan agreement) several months before the May 6, 2016 meeting. To that extent, the fact that the District provided PPE, in and of itself, is not a significant change. However, the record contains no evidence that the District has ever given out vests or shin guards. Additionally, the PPE that has historically been distributed to IAs has almost always included largely hygiene or sanitation related items like face shields, gloves, goggles, and medical gowns. In contrast, the new PPE, like a kind of armor, is uniquely intended to defend against violent and aggressive behavior, particularly biting, kicking, and pinching. And while IAs have had to use belt shirts and other restraint equipment while working with certain students, it seems that those were not worn by the IAs themselves. Moreover, it generally appears that the older items were typically worn one at a time for short periods and by select employees as needed for a single activity. The newest PPE, on the other hand, is apparently expected to be worn by “all staff” in Sunset’s ALS classroom (not just S’s one-on-one IAs), presumably all together, at once, and at all times while S is in attendance. (Exh. C-28 at 6.) When combined, all of those considerations bring the new PPE quite a bit outside of the IAs’ prior day-to-day experience, and therefore amounts to a substantial change to the *status quo* for PECBA purposes. See *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-53-00, 19 PECBR 656, 665, *supplemental orders*, 19 PECBR 804 and 19 PECBR 848, *on recons*, 19 PECBR 895 (2002), *aff’d*, 187 Or App 92, 67 P3d 951 (2003) (a union’s acceptance of minor changes in the past does not waive the right to bargain over major changes of far greater magnitude).

Importantly, it also appears that the discipline language used in conjunction with the other May 6, 2016 changes had never been used before that date. Neither of the parties’ CBAs directly connects wearing equipment or following a new safety plan to discipline. Instead, they simply confirm that the District generally has the right to discipline employees who violate a rule. The District’s written PPE policies and various student plans are largely silent on those topics as well. Likewise, there is no evidence that specifically shows that IAs have ever been disciplined in relation to PPE usage or for not following a safety plan. Perhaps the best evidence we have that squarely addresses this matter is brief testimony that simply asserts without elaboration that historically all District employees have always been subject to progressive discipline when they do not comply with what they are directed or expected to do. That evidence is not enough. For something to constitute a binding past practice, the practice must be shown to be clear and consistent, occur repetitively over a long period of time, and be acceptable to both parties. *Oregon School Employees Association, Chapter 84 v. Redmond School District 2J*, Case No C-237-80, 6 PECBR 4726, 4735-38 (1981). Nothing in the record meets that standard. Consequently, we conclude that the District also changed the *status quo* when, apparently for the first time, it expressly linked discipline to its new PPE and staff response plan.

The changes implemented on May 6, 2016 are not expressly identified as mandatory by ORS 243.650(7)(a). However, they do explicitly involve newly articulated grounds by which IAs may be disciplined. Naturally, that discipline could lead to dismissal or termination, which directly

affect job security. *International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-16-00, 19 PECBR 533, 543-48 (2001). Over time, this Board has consistently indicated that employee discipline and job security are generally “conditions of employment” under the terms of ORS 243.650(7) and therefore are mandatory subjects of bargaining. *District Council of Trade Unions, et al. v. City of Portland*, Case No. UP-023-14, 26 PECBR 525, 538 (2015); *Federation of Oregon Parole and Probation Officers v. State of Oregon, Department of Corrections*, Case No. UP-117-89, 12 PECBR 816, 823 (1991), *aff’d*, 114 Or App 214 (1992), *on remand*, 14 PECBR 693 (1993); *Oregon Public Employees Union, Local 503, SEIU, AFL-CIO, CLC v. State of Oregon, Executive Department*, Case No. UP-64-87, 10 PECBR 51, 79 (1987); *AFSCME Council 75, Local 350 v. Clackamas County*, Case No. C-101-83, 7 PECBR 5839, 5843 (1983), *aff’d*, 69 Or App 488, 687 P2d 1102 (1984). We find little in this record that would ultimately lead us to a different conclusion here, especially when the threatened, previously nonexistent discipline is now directly tied to a substantial new work rule. To that extent, we must agree with the complaint and conclude that the change “impacts” a mandatory subject and thus should have been bargained in good faith before implementation. By failing to do so, the District violated ORS 243.672(1)(e).

As we noted earlier, the OSEA also argues that the District’s changes were mandatory subjects because they have a direct and substantial effect on the IAs’ on-the-job safety. We agree. In its entirety, ORS 243.650(7)(g) reads:

“For all other employee bargaining except school district bargaining and except as provided in paragraph (f) of this subsection, ‘employment relations’ excludes staffing levels and safety issues (except those staffing levels and safety issues that have a direct and substantial effect on the on-the-job safety of public employees), scheduling of services provided to the public, determination of the minimum qualifications necessary for any position, criteria for evaluation or performance appraisal, assignment of duties, workload when the effect on duties is insubstantial, reasonable dress, grooming and at-work personal conduct requirements respecting smoking, gum chewing, and similar matters of personal conduct at work, and any other subject proposed that is permissive under paragraphs (b), (c), and (d) of this subsection.”

As the District correctly notes in its post-hearing brief, that subsection, by its plain terms, does not apply to “school district bargaining.” For that reason, when considering this particular type of public employer and whether or not a topic is included in “employment relations,” one might instead look to the language of ORS 243.650(7)(e), which does apply to school districts. *See State of Oregon, Department of Administrative Services*, 25 PECBR at 535; *Washington County*, 19 PECBR at 425. That subsection specifically provides:

“For school district bargaining, ‘employment relations’ excludes class size, the school or educational calendar, standards of performance or criteria for evaluation of teachers, the school curriculum, reasonable dress, grooming and at-work personal conduct requirements respecting smoking, gum chewing and similar matters of personal conduct, the standards and procedures for student discipline, the time between student classes, the selection, agendas and decisions of 21st

Century Schools Councils established under ORS 329.704, requirements for expressing milk under ORS 653.077, and any other subject proposed that is permissive under paragraphs (b), (c), and (d) of this subsection.”

That language does not reference the parenthetical exception provided by ORS 243.650(7)(g) and relied upon by the OSEA. Furthermore, we are not aware of any prior Board order or other legal precedent that clearly extends that particular exception to school district cases. It also follows that, had the legislature intended to include “an exception to the exception” for on-the-job safety issues for school district bargaining, it might have done so explicitly as it did in ORS 243.650(7)(f), the subsection that specifically addresses certain strike-prohibited employees. *See State of Oregon, Department of Administrative Services*, 25 PECBR at 535 n 3. Nevertheless, as it stands, the statute also does not specifically characterize safety matters as either mandatory or permissive for this employer. In that vacuum, we are left with the standard balancing test mandated by ORS 243.650(7)(c), which simply states: “After June 6, 1995, ‘employment relations’ does not include subjects that have a greater impact on management’s prerogative than on employee wages, hours, or other terms and conditions of employment.” After carefully considering the individual factual circumstances and interests presented in this case, we conclude that the subject at issue leans mandatory, even for the underlying “decision” itself. *See Oregon Public Employees Union v. State of Oregon, Executive Department*, Case No. UP-71-93, 14 PECBR 746, 773-75 (1993); *International Association of Firefighters, Local 314 v. City of Salem and Darrell Dearborn, Personnel Director*, Case No. C-61-83, 7 PECBR 5819, 5828 (1983), *aff’d*, 68 Or App 793, 684 P2d 605 (1984), *rev den*, 298 Or 150 (1984); *International Association of Firefighters, Local 1308 v. City of The Dalles*, Case No. C-25-76, 2 PECBR 759, 768-69 (1976) (regarding “decision” versus “impact”).

The District separately asserts that the terms of its CBAs give it the right to implement its May 6, 2016 changes. On that subject, this Board has long held that any contractual waiver of the right to bargain over a mandatory subject will be found only in “clear and unmistakable language.” Generally worded management rights clauses or “zipper” clauses will ordinarily not be construed as waivers of statutory bargaining rights. *Washington County*, 19 PECBR at 428, citing *Oregon School Employees Association v. Crook County School District*, Case No. UP-66-93, 15 PECBR 30, 35-6 (1994); *see Johnson-Bateman Company*, 295 NLRB 180, 184 (1989). In this instance, the contractual provisions on which the District rests its contention here – the CBAs’ Management Rights, Discipline/Dismissal, and Complete Agreement sections – do not address the linking of discipline, PPE, and staff response plans in express terms, and say even less about how that sort of decision would *impact* anything. Thus, they do not meet the Board’s standard. We likewise have no meaningful bargaining history for either unit in evidence that addresses those subjects or any of the District’s related PPE policies head on. *See Oregon School Employees Association v. Bandon School District #54*, Case Nos. UP-26/44-00, 19 PECBR 609, 623-24 (2002). Accordingly, we cannot conclude that the OSEA has consciously yielded its right to bargain such changes.

As we stated above, the District also contends that the OSEA did not properly demand to bargain. In support of that contention, the District highlights that Whitmire’s June 9, 2016 email (which ostensibly clarified his original May 27, 2016 demand to bargain) used the phrase “Bargaining over this issue includes, but is not limited to” before listing what we consider to be

several related topics. (Exh. C-5 at 24.) According to the District, the “not limited to” language would open negotiations to “an unlimited number of subjects.” In our view, that interpretation is too formalistic. We understand Whitmire’s demand to encompass only those topics that were specifically listed or were obviously and directly related to them. We also understand it to cover all of the District’s IAs. To do otherwise would presume an intention largely divorced from the text and the facts of this case. In context, it is fairly clear that Whitmire (who notably is not an attorney) was concerned with the changes announced in Stauff’s April 26, 2016 email, all of which concerned a new approach to handling S and applied equally to both bargaining units. Moreover, however we interpret the demand, it does not change the fact that the District went ahead and simply implemented that new approach without bargaining, thereby presenting a *fait accompli*. See *Lebanon Community School District*, 22 PECBR at 362. A unilateral change involving a mandatory subject is just as much an unfair labor practice as a refusal to bargain. *State of Oregon, Department of Administrative Services*, 25 PECBR at 534.

### Remedy

Because the District violated ORS 243.672(1)(e), we are required to enter a standard cease and desist order. The OSEA urges that, in addition, the District should be required to post a notice to its employees via email as. 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 unit’s functioning; or (6) involved a strike, lockout, or discharge. *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, 19 PECBR 684, 685 (2002); *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). In short, we are not persuaded that any of those criteria have been met here, as all of the unlawful changes appear to have been limited to a single ALS classroom. We decline, therefore, to order the District to post a notice.

3. The District did not violate ORS 243.672(1)(e) by refusing to provide information to the OSEA.

The complaint alleges that the District unlawfully refused to provide information. Now, in its post-hearing brief, the OSEA specifically contends that the District violated the PECBA when it provided requested information about who had been injured by S pursuant to public records law and not pursuant to the PEBCA. It also takes exception with the fact that the District redacted some of the employees’ names in the documents provided. Otherwise, the brief does not plainly identify what information is still missing or was unlawfully delayed. In sum, we are not convinced that those facts amount to a PECBA violation in this instance.

To be sure, a significant part of the ORS 243.672(1)(e) duty to bargain in good faith is the duty to supply relevant information upon request. In such cases, relevance is ordinarily determined by the liberal “discovery-type standard” adopted in *NLRB v. Acme Industrial Co.*, 385 US 432, 435, 87 S Ct 565, 567 (1967). *Benton County Deputy Sheriff’s Association v. Benton County*, Case No. UP-24-06, 21 PECBR 822, 833 (2007); *Oregon State Employees Association v. Children’s*

*Services Division, Department of Human Resources, State of Oregon, Case No. C-32-76, 2 PECBR 900, 906 (1976).* Under that standard, the duty to supply information arises so long as the information sought is of “probable or potential relevance” to a contractual or collective bargaining matter. *Association of Oregon Corrections Employes v. State of Oregon, Department of Corrections, Case No. UP-7-98, 18 PECBR 64, 70 (1999); Washington County School District No. 48 v. Beaverton Education Association & Paul Nelson, Case No. C-169-79, 5 PECBR 4398, 4405 (1981).*

Whitmire undoubtedly made good faith demands for relevant information, for the bulk of the information he requested was clearly of “probable or potential relevance” to legitimate collective bargaining needs, specifically determining whether the proposed changes constituted a mandatory subject of bargaining and researching contract proposals. To that extent, the OSEA was generally entitled to the requested information. However, this Board has recognized that, in appropriate cases, an employer may furnish relevant information to a labor organization in a form different from that sought by the union. Additionally, there may be alternatives to complete disclosure. *Oregon AFSCME Local 3851 v. State of Oregon, Real Estate Agency, Case No. UP-42-03, 21 PECBR 129, 133 (2005); Lincoln City Police Employees’ Association v. City of Lincoln City, Case No. UP-32-98, 18 PECBR 203, 212-13 (1999); Oregon School Employees Association, Chapter 68 v. Colton School District 53, Case No. C-124-81, 6 PECBR 5027, 5031-33 (1982).*

In this case, the District certainly did not simply ignore or reject Whitmire’s requests. In fact, as we read the facts, it substantially complied with Whitmire’s request and did so within a reasonable amount of time. Although the District may have ultimately left in several redactions in some of its documents, we are satisfied that the range of information that was provided ultimately gave Whitmire all that he needed to appropriately investigate his articulated concerns with minimal additional effort. There is also no indication that Wetherell’s confidentiality concerns were disingenuous or merely a cover-up to delay or frustrate Whitmire’s requests. Finally, one cannot overlook that Whitmire’s July 11, 2016 request letter to Wetherell plainly states: “Please consider this letter a public records request for the information described above,” or the fact that Whitmire

////

////

////

////

////

////

////

never corrected Wetherell's July 13, 2016 characterization of his July 11, 2016 request as a "Public Records" request. (Exh. C-7 at 3, Exh. C-5 at 25.)

PROPOSED ORDER

1. The District shall cease and desist from refusing to bargain in good faith with the OSEA in violation of ORS 243.672(1)(e).
2. The remaining claims are dismissed.

SIGNED AND ISSUED on April 25, 2017.



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 proof of such service with this Board. The objections must be mailed, emailed, faxed, or hand-delivered to this Board. To file by email, please attach the filing as a PDF and send it to [ERB.filings@oregon.gov](mailto:ERB.filings@oregon.gov). 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(10) and (11); 115-010-0090; 115-035-0040; and 115-070-0055.)

EMPLOYMENT RELATIONS BOARD  
OF THE  
STATE OF OREGON

UNIVERSITY OF OREGON POLICE ASSOCIATION,	)	
	)	
Petitioner,	)	Case No. RC-001-17
	)	
v.	)	CERTIFICATION OF
	)	ELECTION RESULTS
UNIVERSITY OF OREGON,	)	(PETITION TO CHANGE
	)	EXCLUSIVE REPRESENTATIVE)
Respondent,	)	
	)	
and	)	Mail Ballot
	)	
SEIU LOCAL 503,	)	
	)	
Incumbent.	)	
	)	

---

On April 5, 2017, the University of Oregon Police Association (Association) filed a petition under OAR 115-025-0000(2) seeking to become the exclusive representative for a bargaining unit of University of Oregon Police Department police officers, who were then represented by SEIU Local 503.<sup>1</sup> On April 12, 2017, SEIU Local 503 disclaimed interest in representing the members of the bargaining unit.

Before entering into a Consent Election Agreement, the University of Oregon and the Association disputed whether the contract bar, which generally prohibits holding an election during the term of a lawful collective bargaining agreement, applied in this case notwithstanding SEIU Local 503’s disclaimer of interest. *See* ORS 243.692; OAR 115-025-0015(2). If the contract bar were applicable in this case, the election date would have to post-date the June 30, 2017 expiration of the contract between SEIU Local 503 and the University. The contract bar does not apply, however, if: (a) unusual circumstances exist under which the contract is no longer a stabilizing force; and (b) an election should be held to restore stability to the representation of employees in the unit. *See* ORS 243.692(2); OAR 115-025-0015(2)(d).

The Board determined that, in light of the unusual circumstances of this case, the contract bar should not be given effect. In doing so, the Board identified the unusual circumstances as including SEIU Local 503’s written and unqualified disclaimer of interest in continued representation of the bargaining unit, and the cessation of bargaining between SEIU Local 503 and the University. Under such circumstances, the Board concluded that the existing contract

---

<sup>1</sup>In April 2013, the Oregon University System, University of Oregon, had voluntarily recognized SEIU Local 503 as the exclusive representative for those employees.

was no longer a stabilizing force and that an election should be held to restore stability to the representation of employees in the unit. *See* ORS 243.692(2); OAR 115-025-0015(2)(d). The Board incorporates that determination into this order.<sup>2</sup>

On May 22, 2017, pursuant to the parties' Consent Election Agreement, this Board sent ballots to eligible voters. Sixteen ballots were returned by the deadline of June 5, 2017, which constitutes the date of the election. *See* OAR 115-025-0060(4)(c). A tally of ballots was held on June 6, 2017, and the majority of valid votes counted were cast for representation by the University of Oregon Police Association. The tally of the ballots was provided to the parties on June 6, 2017.

Objections to the conduct of the election (or conduct affecting the results of the election) were due within ten days of furnishing the ballot tally to the parties (*i.e.*, by June 16, 2017). OAR 115-025-0060(9). No objections were filed. Accordingly, it is certified that:

UNIVERSITY OF OREGON POLICE ASSOCIATION

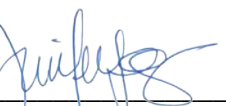
is the exclusive representative of the following bargaining unit of the University of Oregon:

“All University of Oregon sworn police officers and campus dispatchers, excluding unclassified, exempt, supervisory, managerial and confidential employees as defined by law or as determined by the Employment Relations Board.”

DATED June 20, 2017.

  
\_\_\_\_\_  
Adam L. Rhynard, Chair

  
\_\_\_\_\_  
Lisa M. Umscheid, Member

  
\_\_\_\_\_  
Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

---

<sup>2</sup>The Board further notes that it has “expressly adopted the [National Labor Relations Board’s (NLRB’s)] contract bar exceptions.” *Yamhill County v. SEIU Local 503, OPEU and Yamhill County Employees Association*, Case No. RM-24-02, 20 PECBR 198, 205 (2003) (citing *Faculty Members of Oregon College of Education v. Oregon College of Education Federation of Teachers/AFT and Oregon College of Education*, Case No. C-162-77, 3 PECBR 2007, 2015 n 2 (1978)). One of the NLRB’s longstanding contract bar exceptions applies when the incumbent has disclaimed interest. *See, e.g., American Sunroof*, 243 NLRB 1128 (1979) (a contract does not bar an election when the contracting union has properly disclaimed interest in the employees covered by the contract), citing *Manitowoc Shipbuilding, Inc. and The Manitowoc Company, Inc.*, 191 NLRB 786 (1971) and *National By-Products Company*, 122 NLRB 334 (1958).

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. CU-002-16

(PETITION FOR CERTIFICATION WITHOUT ELECTION)

AMALGAMATED TRANSIT UNION,	)	
DIVISION 757,	)	
	)	
Petitioner,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW, AND
TRI-COUNTY METROPOLITAN	)	ORDER CLARIFYING
TRANSPORTATION DISTRICT OF	)	BARGAINING UNIT
OREGON,	)	
	)	
Respondent.	)	
_____	)	

Whitney Stark and Gene Mechanic, Attorneys at Law, Mechanic Law, Portland, Oregon, represented the Petitioner.

Adam S. Collier, Attorney at Law, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Portland, Oregon, represented the Respondent.

On October 14, 2016, pursuant to *former* OAR 115-025-0005(4), Amalgamated Transit Union, Division 757 (ATU) filed a petition to clarify the bargaining unit by adding to the existing unit currently unrepresented employees identified in the petition as “on-street customer service representatives.” On October 17, 2016, pursuant to ORS 243.682(2) and *former* OAR 115-025-0005(1)(b), ATU amended the petition to clarify the unit without an election (*i.e.*, a card-check petition).

The Board determined that a majority of eligible employees signed valid authorization cards requesting that ATU represent them.

On November 4, 2016, Tri-County Metropolitan Transportation District of Oregon (TriMet) filed timely objections to the petition. TriMet objected to the appropriateness of the proposed unit.

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on January 19, 2017, in Tualatin, Oregon. The record closed on February 24, 2017. On May 30, 2017, ALJ Kehoe issued a recommended order, concluding that the objections to the proposed bargaining unit were without merit. ALJ Kehoe found that the official name of the classification described in the petition is Field Outreach & Community Relations Representative.

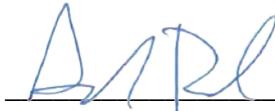
The parties had 14 days from the date of service of the recommended order to file objections. OAR 115-010-0090(1). No objections were filed, which means that the Board adopts the attached recommended order as the final order in the matter. OAR 115-010-0090(4), (5).

ORDER

1. A majority of employees in the Field Outreach & Community Relations Representative classification has signed valid authorization documents to be included in the existing bargaining unit, the petitioned-for unit is an appropriate bargaining unit, and no other labor organization is certified or recognized as the exclusive representative of the employees.

2. The bargaining unit is clarified to include the classification of Field Outreach & Community Relations Representative.

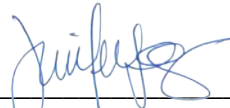
DATED: June 22, 2017.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. CU-002-16

(PETITION FOR CERTIFICATION WITHOUT ELECTION)

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

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on January 19, 2017 in Tualatin, Oregon. The record closed on February 24, 2017, upon electronic receipt of the parties’ post-hearing briefs.

Whitney Stark and Gene Mechanic, Attorneys at Law, Mechanic Law, Portland, Oregon, represented the Petitioner.

Adam S. Collier, Attorney at Law, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Portland, Oregon, represented the Respondent.

On October 14, 2016, the Petitioner, Amalgamated Transit Union, Division 757 (ATU), filed a unit clarification petition with the Employment Relations Board (Board). That petition was later amended on October 17, 2016 and became a certification without election petition. The petition seeks to include the “on-street customer service representatives” employed by the Respondent, the Tri-County Metropolitan Transportation District of Oregon (TriMet), in ATU’s existing bargaining unit. The formal name for their position is “Field Outreach & Community Relations Representative.” TriMet filed timely objections to the petition on November 4, 2016, essentially contending that the petitioned-for employees do not share a sufficient community of

interest with the unit because they work part time and do not have a set work schedule. As set forth below, we conclude that the objections are without merit.

### RULINGS

All rulings by the ALJ were reviewed and are correct.

### FINDINGS OF FACT

1. TriMet is and has been a “public employer” within the meaning of ORS 243.650(20). It operates a public mass transit system with buses and trains seven days a week in the Oregon counties of Clackamas, Multnomah, and Washington. TriMet currently has approximately 2,900 employees in total.

2. ATU is and has been a “labor organization” within the meaning of ORS 243.650(13). It is the exclusive representative of about 2,500 TriMet employees in a large and diverse bargaining unit that includes over 100 different classifications. Some relevant examples of those classifications include TriMet’s bus and rail operators, bus and rail operator trainers, controllers, customer experience agents (formerly known as trip planners), customer service representatives, dispatchers, fare inspectors, road supervisors, schedule writer 1s and 2s, and station agents. At this time, ATU is the only labor organization that represents TriMet employees. Shirley Block is ATU’s current president.

3. TriMet and ATU are parties to a collective bargaining agreement (CBA) titled “Working and Wage Agreement” that is effective from December 1, 2012 to November 30, 2016. (Exh. U-1 at 1.) At the time of the hearing for this case, the two were in negotiations for a new CBA.

4. As indicated, the instant petition seeks to include TriMet’s “on-street customer service representatives” in ATU’s single bargaining unit. Those same employees have also been called “field outreach and community relations representatives” and “field outreach representatives” (FORs). Although the petition formally seeks to include eight employees in the unit, there were just seven FORs in total at the time of hearing and on the date the underlying petition was filed with the Board.

5. TriMet’s public affairs division is currently overseen by Bernard Bottomly, the division’s executive director. He reports directly to TriMet’s general manager. In total, Bottomly oversees six departments within public affairs. One of those departments is customer service, which has also been called the customer experience department. It includes TriMet’s call center as well as the petitioned-for FORs.

6. The public affairs division of TriMet has about 75 employees in total. Of those 75 employees, approximately 13 are already in ATU’s bargaining unit. That group of 13 includes just 3 classifications. Two of those three classifications, TriMet’s customer experience agent and customer service representative classifications, work in the call center. The third represented classification is customer information specialist. The other 62 or so employees in public affairs are

not in a bargaining unit. That larger group includes FORs, geographic information system technicians, government affairs specialists, research analysts, graphic artists, web designers, information managers, managers of departments, and support staff. FORs have never been represented by a labor organization.

7. Currently, FORs are immediately supervised by Jon Bell. He manages the trip planning department and the customer service department, which includes TriMet's customer experience agents, who, as indicated, are included in the ATU unit.

8. FORs' work schedules are assigned by the manager and the assistant manager of the customer service department. Each schedule covers one week at a time and is distributed to the FORs a week or two before that schedule starts. The specific days and hours that a particular FOR will be assigned to work can change every week. FORs never formally bid or sign up for a particular schedule. However, FORs do provide their superiors with some input before schedules are assigned. Generally, within the first week or two of each month, FORs are sent a calendar for the next month that lists all of that month's scheduled events. FORs review that calendar then let their superiors know when they are going to be unavailable or will need time off. That could include scheduled doctor's appointments, for example. Management accommodates FORs' schedule requests as much as possible, and usually does. Nevertheless, FORs are generally expected to be "highly flexible" and "on call" to swiftly respond to unscheduled events. To that extent, an FOR's schedule is always understood to be a "draft."

9. Each one-week schedule assigns specific days and hours for each FOR. The days assigned can include Saturdays and Sundays and may not all be in a row. Additionally, because FORs can work during any part of the day, the hours assigned an FOR include when a particular day's shift starts and ends. Those times can vary daily. Further, the precise number of hours FORs work varies from one week to the next based on the employer's needs. Other than days and hours, each FOR schedule also summarizes which duties, location(s), and/or events each FOR will be assigned for a given day or part of a day. Yet, at any time during a shift, an FOR can always be pulled away from an assignment and deployed to a new assignment as circumstances require. Unless an FOR has a disability, he or she can also be called in to work on short notice.

10. FORs regularly work eight hours a day for four days a week as scheduled. However, it is not uncommon for an FOR to work beyond the precise hours that have been assigned. In practice, though, if TriMet wants an FOR to stay on, it will ask the FOR about that in advance. Moreover, FORs can choose to sign up for a fifth day (beyond the traditional four-day workweek) if they choose to do so and that day is available.

11. FORs have always been part-time employees. In practice, FORs usually work between 30 and 36 hours a week, with 30 hours being the standard baseline. The only other TriMet employees who only work part time are TriMet's "mini-run" bus operators, who are already included in ATU's bargaining unit and, according to the CBA, generally "shall not be scheduled or assigned for more than thirty (30) hours per week." (Exh. U-1 at 23.). All of the other operators work full time.

12. FORs are often specifically assigned to particular light rail lines, platforms, kiosks, concerts, and sporting events. Sometimes they are deployed to assist with scheduled service disruptions or route changes or with unscheduled outages due to fires, downed powerlines, or protests, for example. Separately, FORs regularly stop by an office that is used as a “home base” at either the beginning or the end of a shift. That office is in TriMet’s Center Street “operations center” in Portland. Literature, materials, and safety equipment are stored there.

13. The bulk of an FOR’s workday is spent providing customer service out in the field. Among other things, that can include handing out and explaining maps and TriMet system schedules, alerting customers of planned route and schedule changes, and making sure customers are safe and that crowds are well managed. In general, FORs function as “ambassadors” for TriMet. To help with that, FORs wear vests that identify them as TriMet employees.

14. In addition to their other duties, FORs regularly check on TriMet vending machines and validators and verify that they are working properly. If a machine is not working properly, FORs are expected to use an app on their phones that will send out a TriMet technician. FORs also assist customers with TriMet machines.

15. FORs regularly work alongside bargaining unit employees – including customer service representatives (who normally work in an office), fare inspectors, and road supervisors – providing comparable customer service in the field at the same locations. The work they all perform could include, for example, unloading and loading customers from trains and busses and directing people between locations. To be clear, however, beyond FORs, no other TriMet employees are primarily responsible for providing face-to-face communication and customer service in the field.

16. When operators are injured and cannot do their regular job full time, TriMet may find them alternate, “light duty” work. That sometimes involves working on TriMet platforms and checking TriMet’s “Park and Rides.” It can also mean providing customer service and being assigned to special events and service disruptions. Notably, FORs “[p]rovide leadership and on-the-job training” to light duty staff. (Exh. U-2 at 2.)

17. TriMet occasionally uses unpaid “Ask Me” volunteers to provide additional customer service to the public during special events and emergencies. Routinely, some of that work is performed on TriMet platforms and alongside FORs. Ask Me volunteers may be family members of TriMet employees. However, the majority of Ask Me volunteers are people who otherwise work for TriMet in a different capacity and have simply volunteered to do a different type of work. Some of those employee volunteers are in ATU’s bargaining unit and some are not.

18. FORs receive a variety of employment benefits including free transit passes, a pension plan, and health insurance, for example. Employees in ATU’s bargaining unit also get some form of those, as well as other benefits.

19. Unlike FORs, all of TriMet’s bus and rail operators (including mini-run operators) sign up for their schedules every three months in order of seniority for fixed three-month schedules. However, if an operator concludes a particular day’s run late, that operator could be required to

come in and start a shift a bit later the next day. That is due to an “hours of service” rule that makes operators take a certain amount of time off between their shifts.

20. Full-time bus operators who are listed on an “extra board” can be used to fill in for another operator when he or she calls in sick or gets terminated, for example. Like the operators’ regular schedule signup, extra board work is generally awarded in order of seniority. Extra board operators get each day’s assignments one day in advance. Depending on the circumstances, extra board operators can have different assignments and hours every single day. Operators ordinarily sign up for the extra board voluntarily, but sometimes they are forced to do the extra work.

21. Mini-run operators perform the same kinds of work as regular, full-time operators, but only do so part time. Some mini-run operators work four days a week while others work five days a week. All mini-run operators work a minimum of 25 hours a week. They cannot sign up for the extra board.

22. All bus operators start out their careers as mini-run operators. Then, at some point after that, each mini-run operator is given the option to either become a full-time operator or remain part time. Mini-run operators can always opt to remain part-time employees, and many have done so. The length of time an operator has to stay part time varies depending on TriMet’s needs. Currently, it takes about eight months to be given the option to go full time.

23. Schedule writer 1s’ schedules often vary based on changing departmental needs. In practice, however, schedule writer 1s spend about 80% of their worktime out in the field and the rest of it in an office. That usually equates to four days in the field and one day in the office each week. The work they perform in the field often involves talking to TriMet customers and operators in person, responding to customers’ concerns, and compiling schedule-related information. Due to some recent layoffs as a result of budget cuts, TriMet employed no schedule writer 1s at the time of hearing.

24. Schedule writer 2s do not have a formal schedule signup. Instead, their schedules are informally negotiated with their department’s manager. Moreover, schedule writer 2s’ schedules generally remain the same for years at a time. However, they may change their schedules slightly depending on the circumstances. Schedule writer 2s wear “TriMet garb” (including a TriMet hat) that helps customers identify them. Part of a schedule writer 2’s job while working in the field is responding to customers’ questions and concerns. At the time of hearing, TriMet employed four schedule writer 2s.

25. Station agents’ schedules change from day to day during each week, but each day’s schedule is the same each week. To explain, that means that every Monday’s schedule is the same and every Tuesday’s schedule is the same, and so on. However, a Monday’s schedule could be different from a Tuesday’s schedule. Station agents know their schedules three weeks in advance of a schedule change. They participate in two main signups a year, but also do additional, “special” signups whenever a station agent joins or leaves their department.

26. TriMet employs two kinds of trainers: bus operator trainers and rail operator trainers. Trainers generally do not sign up for a fixed schedule with specific hours. Instead, trainers

select then work with a specific team. Bus operator trainers can specifically be part of a new hire team, a classroom team, or a garage team. In short, trainers' schedules and assignments reflect what a particular team's needs are each day and are arranged with managers. Trainers try to get their daily work done in one uninterrupted eight-hour shift, but they may end up working a "split shift" and work part of a shift in the morning and part of one at night if necessary.

27. Fare inspectors mainly check to make sure customers have paid their fares, but they also provide customer service. That includes letting customers know how TriMet's fare system works. Fare inspectors sign up for schedules twice a year. Most of them work a fixed schedule of 6 a.m. to 2 p.m., but they may work other hours if their department is shorthanded. Sometimes, fare inspectors may also have to go to court. That could include fare inspectors who normally work at night, when court is closed. Those fare inspectors who do go to court usually get paid overtime for doing so instead of adjusting their normal schedules. Some fare inspectors are specially assigned to work during special events and unplanned service disruptions. When that happens, the fare inspectors' primary job is providing customer service and "pathfinding," which means giving TriMet customers advice about how to get between locations. Fare inspectors are part of TriMet's finance division. They wear white TriMet shirts.

28. Road supervisors sign up for a schedule and select which type of shift they want twice a year, and may do so more often if someone enters or leaves the department. All road supervisors sign up for their schedules at the same time. Broadly speaking, road supervisors work one of three types of shifts in the field: a district shift, a code supervisor shift, or an extra/auxiliary shift. On a district shift, a road supervisor responds to accidents and disruptions that occur in a particular geographical area. On a code supervisor shift, a road supervisor helps with whatever scheduled and unscheduled disruptions occur while he or she is on duty. An extra/auxiliary road supervisor functions like an extra board operator but for road supervisors. While working in the field during unscheduled disruptions, a central duty for all road supervisors is providing customer service. Like fare inspectors, road supervisors wear white TriMet shirts.

29. Road supervisors on district and code shifts have an assigned weekly schedule that stays the same for several months at a time, and within that weekly schedule, the hours can vary from one particular day to the next, just like the station agents' schedules. However, for large events, road supervisors may be assigned additional work that is outside of their normally scheduled hours. Extra/auxiliary road supervisors get their assignments the day before the work begins. Those assignments can change every single day. Sometimes, road supervisors are forced to work as extras.

30. TriMet's controllers normally sign up for shifts twice a year unless there is a change in staffing. Further, controllers typically know what their shifts will be three weeks before those shifts start. Their hours are the same every single day and are very unlikely to change over time. As a rule, they are required to have 15 hours off between shifts. The same is true for those controllers who work as extra/auxiliary controllers.

31. TriMet's dispatchers sign up for weekly schedules in which each particular day of the week is consistent from one week to the next like station agents' and district and code shift

road supervisors' schedules. As with road supervisors and controllers, dispatchers can either sign up for a specific regular shift or opt to work as an extra/auxiliary.

### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The petitioned-for FORs may appropriately be included in ATU's existing bargaining unit.

#### Standards of Decision

The parties agree that the fundamental issue in this case is whether the FORs can appropriately be included in the existing bargaining unit already represented by ATU. On that issue, TriMet centrally contends that the FORs do not share a "community of interest" with the employees in ATU's unit, and that the instant petition should therefore be dismissed. That "community of interest" terminology emanates from ORS 243.682(1), which generally guides these kinds of cases and in relevant part provides:

"If a question of representation exists, the Employment Relations Board shall: (a) Upon application of a public employer, public employee or a labor organization, designate the appropriate bargaining unit, and in making its determination shall consider such factors as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees. The board may determine a unit to be the appropriate unit in a particular case even though some other unit might also be appropriate."

In determining what constitutes an appropriate bargaining unit, we are obligated to take each of the above-referenced considerations into account. However, importantly, the list of statutory factors in ORS 243.682(1)(a) is nonexclusive. *OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251 (2001). This Board has adopted and applied other factors in determining appropriate bargaining units. The most prominent of those factors is our well-established preference, in most situations, for establishing the largest possible appropriate unit. *Laborers' International Union of North America, Local 320 v. City of Keizer*, Case No. RC-37-99, 18 PECBR 476, 480-83 (2000). Moreover, historically, the phrase "community of interest" has included such factors as similarity of duties, skills, and benefits; interchange and transfer of employees; promotional ladders and opportunities; and common supervision and worksites. *Klamath Community College Faculty Association, OEA/NEA v. Klamath Community College*, Case No. CC-03-09, 23 PECBR 484, 497 (2010); *Oregon School Employees Association v. South Coast ESD, Region #7*, Case No. RC-10-00, 19 PECBR 58, 63 (2001).

We also note that this Board has been delegated broad discretion to decide how much weight to give each relevant factor in any particular case. *Dept. of Admin. Services*, 173 Or App at 436 (citing *Welches School Dist. v. Welches Education Assn/OEA/NEA*, 116 Or App 564, 569, 842 P2d 437 (1992)); *Association of Public Employees v. Oregon State System of Higher Education and Oregon Public Employees Union, Local 503*, Case No. RC-113-87, 10 PECBR 883, 888 (1988) (citing *International Union of Operating Engineers, Local 701 v. Grant County Road Department*, Case No. C-254-83, 8 PECBR 6735 (1984)). Each unit determination case is governed by its own peculiar facts. *South Coast ESD, Region #7*, 19 PECBR at 65; *Mid-Valley*

*Bargaining Council (OFA/NEA) v. Greater Albany Public School District 8-J*, Case No. C-17-81, 6 PECBR 4766, 4782 (1981). Further, neither side has a burden of proof for this type of case. OAR 115-010-0070(5)(a).

## Discussion

After carefully reviewing and weighing the foregoing factors, we conclude that the FORs are appropriately included in ATU's bargaining unit. We do so, in part, because the record shows that the petitioned-for FORs have a strong community of interest with ATU's existing bargaining unit. For one thing, FORs frequently perform work that is very similar to what some unit employees do, and often do so right alongside them in the exact same locations while wearing matching TriMet-branded clothing. As outlined above, that comparable work includes providing a wide variety of customer service, which is FORs' "primary duty." And as Bottomly testified, at some level, all of TriMet's employees are responsible for providing good customer service when approached. Beyond that, FORs also "[s]erve as a resource to fare enforcement staff during fare inspection efforts" and "[s]upport bus operators, rail operators, security staff and field supervisors by relaying or clarifying information that will help them support [TriMet's] customers." (Exh. U-2 at 1, 2.). In addition, FORs "[p]rovide leadership and on-the-job training" to Ask Me volunteers, who can include unit employees, and light duty staff, which includes injured operators. (Exh. U-2 at 2.) All of those circumstances show us that there are some common working conditions and "significant job-related contacts" between the FORs and bargaining unit employees. *See Oregon Workers Union v. State of Oregon, Department of Transportation and Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. RC-26-05, 21 PECBR 873, 887 (2007). Relatedly, the FORs' "home base" is also TriMet's "operations center."

Continuing, although the evidentiary record lacks a clear side-by-side comparison of the employment benefits provided to FORs and ATU's members, we do know that FORs receive a variety of benefits, and that some of those benefits – including health insurance and a pension plan, for example – are also guaranteed to bargaining unit employees. Likewise, although the record lacks a straightforward overview of all of the promotional or transfer opportunities available to FORs, unrebutted testimony shows us that one FOR, Alan Shotwell, has recently been hired to work as a customer experience agent, which is a bargaining unit position. It further shows that the same FOR was also previously in ATU's unit as an operator. While that testimony is arguably limited to just the one employee, the apparently smooth "interchange" it illustrates is nonetheless compelling. *See Ashland Police Association v. City of Ashland and International Brotherhood of Electrical Workers, Local 659*, Case No. UC-22-06, 22 PECBR 1, 10 (2007). We must also reiterate that FORs are directly supervised by Bell, who supervises represented customer experience agents as well. Less directly, Bottomly, who oversees the FORs' customer service department, similarly oversees the departments affiliated with the represented customer information specialists, customer experience agents, and customer service representatives. The fact that the majority of Bottomly's particular division is currently unrepresented does not outweigh the other circumstances and commonalities presented here.

On the statutory subjects of "wages" and "hours," it is clear that FORs are not paid the same as everyone in ATU's unit. However, a review of the parties' CBA shows that every bargaining unit classification already has its own individual pay schedule. To that extent, a

potential difference in wages between the two groups at issue here is less concerning and administratively burdensome than it might be in another case. To some extent, the same is also true regarding FORs' unique scheduling system. Generally speaking, nothing should prohibit TriMet from negotiating provisions to maintain FORs' current flexibility as part of the normal collective bargaining process. *See Klamath Community College*, 23 PECBR at 499-502; *Oregon Public Employees Union, SEIU, Local 503 v. Executive Department, State of Oregon*, Case No. UC-59-87, 10 PECBR 456, 470 (1988); *Greater Albany Public School District 8-J*, 6 PECBR at 4782. Moreover, as outlined above, a handful of bargaining unit classifications already have their own ways of selecting schedules and follow position-specific needs and work rules. In our view, the differences from one unit position to another are often just as marked and distinct as the differences between FORs and a given unit position are. One notable contrast is the difference between a schedule writer 2's schedule (which essentially stays the same for years) and an extra board bus operator's schedule (which often varies and is given out just one day in advance). *See Western Oregon University Federation of Teachers, Local 2278, AFT, AFL-CIO v. Oregon University System, Western Oregon University*, Case No. UC-17-09, 23 PECBR 427, 439 (2009).

In its post-hearing brief, TriMet cites just one Board case in particular for support, *AFSCME Council 75 v. Multnomah County Juvenile Justice Division*, Case Nos. RC-36-92/UC-47-92, 14 PECBR 202 (1992). Therein, we refused to clarify an existing bargaining unit of workers in a county juvenile detention facility by adding then-unrepresented "on-call juvenile groupworkers" to it, and instead created "two separate bargaining units." 14 PECBR at 209. However, in that case, our analysis largely focused on the fact that continued employment for those unrepresented employees was uncertain, unlike the "regular juvenile groupworkers" who were not on call and were already in the existing unit. *See Service Employees International Union Local 503, Oregon Public Employees Union v. Marion County*, Case Nos. UC-32/33-04, 21 PECBR 327, 342, *petition for reconsideration and motion to amend denied*, 21 PECBR 482 (2006), *AWOP*, 215 Or App 501, 170 P3d 8 (2007) (summarizing the rationale of the cited case and discussing "casual employees"). We have nothing to indicate that that is true here. Accordingly, TriMet's reliance on *Multnomah County Juvenile Justice Division* is misplaced.

While one might loosely describe FORs' workhours as "irregular" and even argue that the FORs are similarly "on call," it can hardly be said that FORs "have no guarantee of regular work hours or continued employment" and "primarily serve as substitutes" like the on-call employees in the cited case. 14 PECBR at 207. Although FORs' daily schedules can vary greatly in one sense, the number of hours they ultimately work remains relatively constant over time, landing somewhere between 30 and 36 hours a week. Further, there are no "regular" FORs in the unit to compare to those who are on call, and as Shotwell explained, not all FORs are actually on call. More significantly, some of ATU's classifications are already similarly forced to perform extra work on occasion and come in on short notice. Again, each case is governed by its own facts. *South Coast ESD, Region #7*, 19 PECBR at 65; *Greater Albany Public School District 8-J*, 6 PECBR at 4782. It is also important to us that a majority of FORs have formally indicated that they specifically desire to be represented by ATU as part of its single unit, and that TriMet (unlike the employer in the *Multnomah County Juvenile Justice Division* case) has not proposed that we establish a separate, standalone unit for FORs.

Finally, TriMet correctly and quite appropriately highlights that FORs are the only TriMet employees whose job title exclusively includes part-time workers. Yet, significantly, when deciding whether to add part-time employees to an existing bargaining unit, we have often rejected suggestions that we base our decision primarily on the number of hours worked. *See Klamath Community College*, 23 PECBR at 501; *Associated Academic Professionals (AAP), AFT, AFL-CIO v. Eastern Oregon University*, Case No. RC-23-02, 20 PECBR 108, 122 (2002); *Portland Community College Faculty Federation, Local 2277 of AFT, AFT-Oregon, AFL-CIO, NOLC v. Portland Community College*, Case No. UC-13-00, 19 PECBR 129, 144 (2001); *Lane Community College Employees Federation, Local 2417, AFT, AFL-CIO v. Lane Community College*, Case No. UC-19-97, 17 PECBR 423, 427-29 (1997); *AFSCME Council 75 v. City of Salem*, Case No. UC-55-91, 13 PECBR 433, 441 (1992); *Greater Albany Public School District 8-J*, 6 PECBR at 4775. We see no reason to stray from that longstanding general trend in this particular case, especially when ATU’s unit includes mini-run operators, all of whom, like FORs, only work part time. Along with that, FORs occasionally work 36 hours a week, which is just a few hours short of a standard full-time workweek and is longer than a mini-run operator’s baseline of 25 hours. Our conclusion is also consistent with this Board’s stated preference for “wall-to-wall” bargaining units where appropriate. *See City of Keizer*, 18 PECBR at 480-83. As indicated above, ATU’s unit already includes a broad spectrum of classifications.

PROPOSED ORDER

The bargaining unit is clarified to include the petitioned-for position of “Field Outreach & Community Relations Representative.”

SIGNED AND ISSUED on May 30, 2017.



\_\_\_\_\_  
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 proof of such service with this Board. The objections must be mailed, emailed, faxed, or hand-delivered to this Board. To file by email, please attach the filing as a PDF and send it to [ERB.filings@oregon.gov](mailto:ERB.filings@oregon.gov). 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(10) and (11); 115-010-0090; 115-035-0040; and 115-070-0055.)

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-005-16 and UP-010-16

(UNFAIR LABOR PRACTICES)

BROOKINGS-HARBOR EDUCATION )  
ASSOCIATION/OEA/NEA, )  
 )  
Complainant, )  
 )  
v. )  
 )  
BROOKINGS-HARBOR SCHOOL )  
DISTRICT 17C, )  
 )  
Respondent. )  
\_\_\_\_\_ )  
 )  
BROOKINGS-HARBOR SCHOOL )  
DISTRICT 17C, )  
 )  
Complainant, )  
 )  
v. )  
 )  
BROOKINGS-HARBOR EDUCATION )  
ASSOCIATION/OEA/NEA, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINDINGS AND ORDER FOR  
REPRESENTATION COSTS

On March 27, 2017, this Board issued an order holding that the Brookings-Harbor School District 17C (District) violated ORS 243.672(1)(a) and (e) of the Public Employee Collective Bargaining Act, but did not violate ORS 243.672(1)(b) and (c), as alleged by the Brookings-Harbor Education Association/OEA/NEA (Association) in UP-005-16. The Board also held that the Association did not violate ORS 243.672(2)(a), (b), and (d), as alleged by the District in UP-010-16. The appeal period under ORS 183.482 has run without either party filing an appeal. Consequently, the Board now issues this order for representation costs. OAR 115-035-0055(2)(a).

Pursuant to ORS 243.676(2)(d), (3)(b), and OAR 115-035-0055<sup>1</sup>, this Board finds that:

1. The Association is the prevailing party. Only a prevailing party in an unfair labor practice case is entitled to representation costs. ORS 243.676(2)(d), (3)(b); OAR 115-035-0055(1)(a). The prevailing party is “the party in whose favor a Board Order is issued.” OAR 115-035-0055(1)(d). “Where one charge (or more) in a complaint is upheld while one charge (or more) in a complaint is dismissed,” the Board determines which party is the “‘prevailing party’ based on the charge or charges that the Board determines to be the primary or most significant in the case.” *Id.* In this case, the primary charge is the Association’s ORS 243.672(1)(e) charge that the District violated the duty to bargain in good faith by unilaterally changing working conditions without bargaining. The (1)(e) charge is primary because the District’s unilateral change to working conditions related to most of the remaining issues in the case, and that unilateral change affected a large number of bargaining unit employees.

2. This case required two days of hearing.

3. The representation costs award for a case that requires more than one day of hearing is \$5,000. OAR 115-035-0055(1)(b)(D).<sup>2</sup>

ORDER

The District shall remit \$5,000 to the Association within 30 days of the date of this Order.

DATED: June 23, 2017.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

---

<sup>1</sup>OAR 115-035-0055 was amended, effective February 1, 2017. Because the Board issued the unfair labor practice order in this case on March 27, 2017, the Board applies the rule as amended.

<sup>2</sup>Because the Board consolidated the two unfair labor practice cases for hearing and issued only one order, we issue only one representation costs award. OAR 115-035-0055(1)(d); *Eugene Police Employees’ Association v. City of Eugene*, Case Nos. UP-38/41-08, 24 PECBR 305, 306 (2011) (Rep. Cost Order).

EMPLOYMENT RELATIONS BOARD  
OF THE  
STATE OF OREGON

OREGON PUBLIC SAFETY ASSOCIATION, ) ) Petitioner, ) ) v. ) ) DEPARTMENT OF PUBLIC SAFETY ) STANDARDS AND TRAINING, ) ) and ) ) OREGON AFSCME COUNCIL 75, ) LOCAL 3955, ) Respondents. ) _____ ) )	Case No. RC-005-17  CERTIFICATION OF ELECTION RESULTS (PETITION TO CHANGE EXCLUSIVE REPRESENTATIVE)  Mail Ballot
--	---

On April 24, 2017, the Oregon Public Safety Association filed a petition to represent employees in a bargaining unit (described below), then represented by Oregon AFSCME Council 75, Local 3955. Thereafter, the parties entered into a Consent Election Agreement for a representation election conducted by this Board.

On May 19, 2017, pursuant to the parties' Consent Election Agreement, this Board sent ballots to eligible voters. Seventy-one valid ballots were returned by the deadline of June 13, 2017, which constitutes the date of the election. *See* OAR 115-025-0060(4)(c). A tally of ballots was held on June 14, 2017, and the majority of valid votes counted were cast for the Oregon Public Safety Association. The tally of ballots was provided to the parties on June 14, 2017.

Objections to the conduct of the election (or conduct affecting the results of the election) were due within ten days of furnishing the ballot tally to the parties (*i.e.*, by June 26, 2017). OAR 115-025-0060(9). No objections were filed. Accordingly, it is certified that:

OREGON PUBLIC SAFETY ASSOCIATION

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

“All classified employees of the State of Oregon, Department of Public Safety Standards and Training, excluding managerial, supervisory, confidential, temporary, and part-time employees working less than thirty-two (32) hours per month and part-time employees in the classification of Public Safety Training Specialist 1 (C1347) or successor classifications who provide instruction, working less than three hundred (300) hours per calendar quarter.”

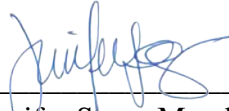
DATED: June 27, 2017.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-009-17

(AMENDMENT OF RECOGNITION)

DOUGLAS EDUCATION SERVICE	)	
DISTRICT ASSOCIATION,	)	
	)	
Petitioner,	)	
	)	ORDER AMENDING
v.	)	RECOGNITION OF
	)	EXCLUSIVE BARGAINING
DOUGLAS EDUCATION SERVICE	)	REPRESENTATIVE
DISTRICT,	)	
	)	
and	)	
	)	
OREGON SCHOOL EMPLOYEES	)	
ASSOCIATION,	)	
	)	
Respondents.	)	
	)	

---

On June 4, 2003, Douglas Education Service District Association (DESDA) and Oregon School Employees Association (OSEA) filed a petition to amend the recognition of DESDA as the exclusive bargaining representative of employees at the Douglas Education Service District (District). *See Douglas Education Service District Association/Oregon School Employees Association v. Douglas Education Service District*, Case No. UC-29-03, 20 PECBR 378 (2003). Specifically, DESDA and OSEA petitioned to have the District’s recognition amended to reflect DESDA’s *affiliation* with OSEA. On July 24, 2003, this Board ordered that the District’s recognition be amended to reflect DESDA’s affiliation with OSEA. *Id.*

On June 14, 2017, DESDA filed a petition under OAR 115-025-0008 seeking to amend the District’s recognition to reflect a *disaffiliation* with OSEA. Rita Snyder, DESDA President, submitted documents establishing the following:

In April 2017, after DESDA indicated a desire to disaffiliate from OSEA, the parties agreed on a disaffiliation process, consistent with a 2003 Affiliation Agreement. This agreement required a 30 percent showing of interest for disaffiliation, which, if sufficient, would result in an election. DESDA collected a showing of interest supporting disaffiliation that met the 30 percent threshold.

On May 3, 2017, DESDA and OSEA held a joint informational meeting on the disaffiliation vote, at which each made a presentation. A neutral third-party administered a ballot election on the disaffiliation. On May 5, 2017, ballots were sent to the current membership (100 members). 68 ballots were returned by the May 25, 2017, deadline, with 61 votes to disaffiliate and 7 votes to remain affiliated.

There were no objections to this petition.

We conclude that the disaffiliation vote was conducted in compliance with at least minimal due process requirements and that a majority of votes cast by the bargaining unit members supported DESDA’s disaffiliation with OSEA.

ORDER

The District’s recognition of DESDA/OSEA is amended to reflect DESDA’s disaffiliation with OSEA.

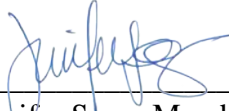
DATED July 7, 2017.



\_\_\_\_\_  
Adam L. Rhynard, Chair



\_\_\_\_\_  
Lisa M. Umscheid, Member



\_\_\_\_\_  
Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

GERVAIS POLICE OFFICER'S	)	
ASSOCIATION,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. RC-004-17
	)	
CITY OF GERVAIS,	)	CERTIFICATION OF
	)	ELECTION RESULTS
and	)	(PETITION TO CHANGE
	)	EXCLUSIVE REPRESENTATIVE)
LABORERS' INTERNATIONAL UNION	)	
OF NORTH AMERICA, LOCAL 483 LAW	)	
ENFORCEMENT PROFESSIONAL	)	
ASSOCIATION,	)	
	)	
Respondents.	)	
	)	

---

On April 17, 2017, the Gervais Police Officer's Association filed a petition to represent employees in a bargaining unit (described below), who were then represented by Laborers' International Union of North America, Local 483 Law Enforcement Professional Association (Laborers' Local 483). The petition also sought to add the position of Sergeant to the bargaining unit.

On April 18, 2017, Laborers' Local 483 disclaimed interest in representing the bargaining unit.

On May 4, 2017, the City of Gervais (City) filed objections to the petition. The objections concerned the addition of the Sergeant position to the bargaining unit, but not the change of exclusive representative. Thereafter, the Gervais Police Officer's Association amended its petition to withdraw the addition of the Sergeant position to the bargaining unit. The City subsequently withdrew its objections to the petition, and the parties entered into a Consent Election Agreement.

On June 29, 2017, pursuant to that agreement, this Board sent ballots to eligible voters. Four ballots were returned by the deadline of July 13, 2017, which constitutes the date of the election. See OAR 115-025-0060(4)(c). A tally of ballots was held on July 14, 2017, and the

majority of valid votes counted were cast for representation by the Gervais Police Officer's Association. The tally of the ballots was provided to the parties on July 14, 2017.

Objections to the conduct of the election (or conduct affecting the results of the election) were due within ten days of furnishing the ballot tally to the parties (*i.e.*, by July 24, 2017). OAR 115-025-0060(9). No objections were filed. Accordingly, it is certified that:

GERVAIS POLICE OFFICER'S ASSOCIATION

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

“All strike-prohibited employees, excluding supervisory and confidential employees of the City of Gervais Police Department.”

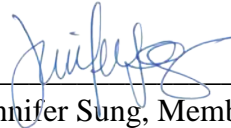
DATED: July 26, 2017.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD  
OF THE  
STATE OF OREGON

BROOKINGS POLICE ASSOCIATION,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. RC-006-17
	)	
CITY OF BROOKINGS,	)	CERTIFICATION OF
	)	ELECTION RESULTS
and	)	(PETITION TO CHANGE
	)	EXCLUSIVE REPRESENTATIVE)
TEAMSTERS LOCAL UNION NO. 223,	)	
	)	
Respondents.	)	
	)	

---

On April 27, 2017, the Brookings Police Association filed a petition to represent employees in a bargaining unit (described below), who were then represented by Teamsters Local Union No. 223.

On June 28, 2017, this Board sent ballots to eligible voters. Fifteen valid ballots were returned by the deadline of July 12, 2017, which constitutes the date of the election. *See* OAR 115-025-0060(4)(c). A tally of ballots was held on July 13, 2017, and the majority of valid votes counted were cast for the Brookings Police Association. The tally of ballots was provided to the parties on July 13, 2017.

Objections to the conduct of the election (or conduct affecting the results of the election) were due within ten days of furnishing the ballot tally to the parties (*i.e.*, by July 24, 2017). OAR 115-025-0060(9). No objections were filed. Accordingly, it is certified that:

BROOKINGS POLICE ASSOCIATION

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

“All full-time Police Officers, all full-time Detectives, all Communications Officers full and part-time, excluding confidential and supervisory employees, specifically the Police Chief, Sergeants, less than full-time police department employees, and temporary employees (not to exceed more than 180 calendar days in a calendar year.)”

DATED: July 26, 2017.



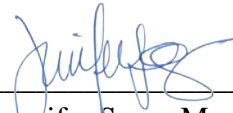
---

Adam L. Rhynard, Chair



---

Lisa M. Umscheid, Member



---

Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-027-16

(UNFAIR LABOR PRACTICE)

OREGON SCHOOL EMPLOYEES	)	
ASSOCIATION,	)	
	)	
Complainant,	)	
	)	FINDINGS AND ORDER FOR
v.	)	REPRESENTATION COSTS
	)	
SOUTH COAST EDUCATION SERVICE	)	
DISTRICT,	)	
	)	
Respondent.	)	
_____	)	

On May 17, 2017, this Board issued an order holding that the South Coast Education Service District (District) violated ORS 243.672(1)(e) when it (1) refused to bargain with the Oregon School Employees Association (Association) and (2) unilaterally implemented changes that had a direct and substantial effect on the on-the-job safety of employees and that had an impact on employee discipline and job security. The Board dismissed the Association’s claim that the District refused to provide information to the Association in violation of ORS 243.672(1)(e).

The appeal period under ORS 183.482 has run without either party filing an appeal. Consequently, this Board now issues this order for representation costs. OAR 115-035-0055(2)(a).

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

1. The Association is the prevailing party. Only a prevailing party in an unfair labor practice case is entitled to representation costs. ORS 243.676(2)(d), (3)(b); OAR 115-035-0055(1)(a). The prevailing party is “the party in whose favor a Board Order is issued.” OAR 115-035-0055(1)(d). “Where one charge (or more) in a complaint is upheld while one charge (or more) in a complaint is dismissed,” the Board determines which party is the “prevailing party’ based on the charge or charges that the Board determines to be the primary or most significant in the case.” *Id.* In this case, the primary charges are the Association’s ORS 243.672(1)(e) charges alleging that the District (1) refused to bargain and (2) unilaterally implemented changes to working conditions without bargaining. These (1)(e) charges are primary because a substantial majority of the evidence and argument related to those charges. Moreover,

the dismissed (1)(e) charge alleging that the District did not respond to an information request arose directly out of the conduct in the (1)(e) charges that the Board upheld, and is therefore secondary to those charges.

2. This case required two days of hearing.

3. The representation costs award for a case that requires more than one day of hearing is \$5,000. OAR 115-035-0055(1)(b)(D).

ORDER

The District shall remit \$5,000 to the Association within 30 days of the date of this Order.

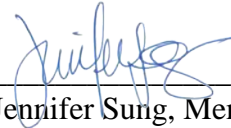
DATED: July 31, 2017.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-005-17

(UNIT CLARIFICATION)

OREGON STATE POLICE OFFICERS	)	
ASSOCIATION,	)	
	)	
Petitioner,	)	
	)	CERTIFICATION OF
v.	)	ELECTION RESULTS
	)	(PETITION TO TRANSFER
OREGON STATE POLICE,	)	EMPLOYEES)
	)	
and	)	
	)	
	)	
OREGON AFSCME COUNCIL 75,	)	
LOCAL 896,	)	
	)	
Respondents.	)	
	)	

---

On April 21, 2017, the Oregon State Police Officers Association (Association) filed a petition to transfer employees working in the position of Evidence Technician from a bargaining unit represented by Oregon AFSCME Council 75, Local 896 (AFSCME), to a bargaining unit represented by the Association, pursuant to OAR 115-025-0005(6).

On May 22, 2017, the Oregon State Police and the Department of Administrative Services (State) filed objections to the petition. The objections concerned the appropriateness of adding strike-permitted Evidence Technicians to the Association’s strike-prohibited unit. AFSCME did not file any objections. Subsequently, on June 30, 2017, the State withdrew its objections to the petition, and the parties entered into a Consent Election Agreement for a self-determination election pursuant to OAR 115-025-0005(6)(c).

On July 31, 2017, pursuant to that agreement, this Board sent ballots to eligible voters. Fourteen ballots were returned by the deadline of August 14, 2017, which constitutes the date of the election. See OAR 115-025-0060(4)(c). A tally of ballots was held on August 15, 2017, and the majority of valid votes counted were cast for representation by the Association. The tally of the ballots was provided to the parties on August 15, 2017.

Objections to the conduct of the election (or conduct affecting the results of the election) were due within ten days of furnishing the ballot tally to the parties (*i.e.*, by August 25, 2017). OAR 115-025-0060(9). No objections were filed.

Accordingly, it is certified that employees of the Oregon State Police in the position of Evidence Technician are transferred from the bargaining unit represented by Oregon AFSCME Council 75, Local 896, to the bargaining unit represented by the Oregon State Police Officers Association.

DATED: August 28, 2017.



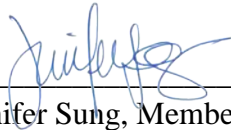
---

Adam L. Rhynard, Chair



---

Lisa M. Umscheid, Member



---

Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-011-17

(UNIT CLARIFICATION)

PROFESSIONAL AND TECHNICAL	)	
EMPLOYEES, LOCAL 17,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER ADDING
	)	UNREPRESENTED POSITION
CITY OF PORTLAND,	)	BY ELECTION
	)	
Respondent.	)	
_____	)	

On July 3, 2017, Professional and Technical Employees, Local 17 (Local 17) filed a unit clarification petition under OAR 115-025-0005(4) to add an unrepresented position of “Noise Control Officer” to the existing bargaining unit that Local 17 represents with respect to the City of Portland. Thereafter, the parties entered into a Consent Election Agreement, and this Board conducted a representation election in accord with that agreement.

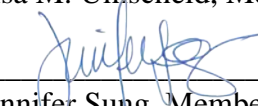
The ballot tally was conducted and provided to the parties on August 17, 2017. The election results were in favor of the Noise Control Officer position being added to the bargaining unit represented by Local 17. Objections to the conduct of the election (or conduct affecting the results of the election) were due within ten days of furnishing the ballot tally to the parties (*i.e.*, by August 28, 2017). OAR 115-025-0060(9). No objections were filed.

Accordingly, it is certified that the position of “Noise Control Officer” is added to the bargaining unit represented by Professional and Technical Employees, Local 17.

DATED: August 29, 2017.

  
\_\_\_\_\_  
Adam L. Rhynard, Chair

  
\_\_\_\_\_  
Lisa M. Umscheid, Member

  
\_\_\_\_\_  
Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-039-16

(UNFAIR LABOR PRACTICE)

LINCOLN COUNTY EMPLOYEES	)	
ASSOCIATION (LCEA),	)	
	)	
Complainant,	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
LINCOLN COUNTY,	)	AND ORDER
	)	
Respondent.	)	
_____	)	

Kevin Keaney, Attorney at Law, Portland, Oregon, represented Complainant.

Kristin H. Yuille, Assistant County Attorney, Office of Lincoln County Legal Counsel, Newport, Oregon, represented Respondent.

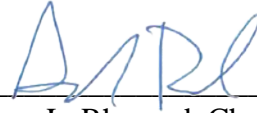
On July 18, 2017, Administrative Law Judge B. Carlton Grew issued a recommended order in this matter. The parties had 14 days from the date of service to file objections. OAR 115-010-0090(1). No objections were filed, which means that the Board adopts the attached recommended order as the final order in the matter. OAR 115-010-0090(4), (5).<sup>1</sup>

<sup>1</sup>When the Board adopts a recommended order pursuant to OAR 115-010-0090(4), the Board’s final order is precedential unless the Board determines to make some or all of the final order non-precedential. Member Umscheid respectfully disagrees that the final order in this case should be precedential. *See, e.g., Union-Baker ESD Association v. Union-Baker Education Service District*, Case No. UP-2-05 at 9, 21 PECBR 286, 294 (2006) (“[b]ecause the basic purpose of the information duty in this context is to allow a union to evaluate the merits of an actual or potential grievance, a necessary component of a union’s threshold showing of relevance is an assertion that some action by the employer has, or at least may have, violated a term of the collective bargaining agreement,” quoting *Jackson County Sheriff Employees Association v. Jackson County and Jackson County Sheriff’s Office*, Case No. UP-66-92 at 3, 14 PECBR 270, 270B (1992)); *see also Oregon School Employees Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81 at 5, 6 PECBR 5027, 5031 (1982) (describing “threshold test” as whether a request has “probable or potential relevance to a contractual matter”).

ORDER

The County will cease and desist from violating ORS 243.672(1)(e), and will provide the Lincoln County Employees Association with the metadata reflecting date of creation and dates of modification of the September 6, 2016, Reed work plan document.

DATED August 30, 2017.



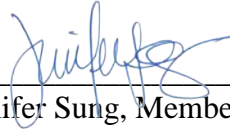
---

Adam L. Rhynard, Chair



---

Lisa M. Umscheid, Member



---

Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-039-16

(UNFAIR LABOR PRACTICE)

LINCOLN COUNTY EMPLOYEES	)	
ASSOCIATION (LCEA)	)	
	)	
Complainant,	)	RECOMMENDED RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND PROPOSED ORDER
LINCOLN COUNTY,	)	
	)	
Respondent.	)	
_____	)	

A hearing was held before Administrative Law Judge (ALJ) B. Carlton Grew on March 23, 2017, at the offices of Lincoln County in Newport, Oregon. The record closed on April 21, 2017, following receipt of the parties' post-hearing briefs.

Kevin Keaney, Attorney at Law, Portland, Oregon, represented Complainant.

Kristin H. Yuille, Assistant County Attorney, Office of Lincoln County Legal Counsel, Newport, Oregon, represented Respondent.

On December 5, 2016, Complainant Lincoln County Employees Association (LCEA or Association), filed a Complaint alleging that Lincoln County (County) had failed to provide documents requested by the Association, and therefore violated ORS 243.672(1)(e). On February 27, 2017, the County filed its Answer, asserting in part that the material sought by the Association was protected from disclosure by attorney-client privilege.

The issue is:

Did the County violate ORS 243.672(1)(e) by refusing to produce information requested by the Association in September, 2016?

We conclude that the County failed to comply with its duty to provide information.

## RULINGS

### Post-Hearing evidence

After hearing, and after the parties' post-hearing briefs were filed, the County sought to introduce evidence of the disposition of the grievance filed on behalf of Justin Reed on September 6, 2016. The Association objected, arguing that the evidentiary record was closed and that the ultimate disposition of the grievance after the hearing in this case is irrelevant.

This Board is reluctant to reopen a record for submission of additional evidence and will only do so if the evidence offered is (1) material to the issues presented, (2) was unavailable at the time of the hearing, or (3) there is some other "good and substantial reason" why the evidence was not offered at hearing. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District Of Oregon*, Case No. UP-016-11, 24 PECBR 488, 489, on recon of 24 PECBR 412 (2011), citing *Cascade Bargaining Council v. Bend-LaPine School District No. 1*, Case No. UP-33-97, 17 PECBR 609, 610 (1998). See also *Teamsters Local 223 v. City of Medford*, Case No. UP-53-10, 24 PECBR 225 (2011) (Order on Reconsideration).

The evidence was not available at hearing because the events it reflects had not yet occurred. However, the disposition of a related grievance is not material to the issues presented, which involve allegations of an independent unfair labor practice. In *Service Employees International Union Local 503, Oregon Public Employees Union v. University Of Oregon*, Case No. UP-009-15, 26 PECBR 724, 730 (May-August, 2016), this Board held:

"The University argues that the Union's claims are moot because: (1) the parties have settled the grievances; and (2) the University has now provided the Union with all responsive documents. A refusal to provide required information under the PECBA is not rendered moot by the disposition of a related grievance under the parties' collective bargaining agreement, or by ultimately providing the information. *Marion County Law Enforcement Association v. Marion County and Marion County Sheriff's Office*, Case No. UP-58-92, 14 PECBR 220, 227 (1992). Therefore, we reject the University's mootness defense."

Since the claim in this case is not moot based on the resolution of the related grievance, the fact of the resolution has no evidentiary value. The ALJ properly declined to reopen the record to receive this evidence.

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

## FINDINGS OF FACT

### The Parties

1. The County is a public employer as defined by ORS 243.650(20). The Association is a labor organization within the meaning of ORS 243.650(13), and the exclusive representative of a bargaining unit of County employees.

### August 2016 events regarding Justin Reed

2. Justin Reed is an Association unit member employed in the County Assessor's Office. His supervisor is Deputy Assessor Shawn Wylie, who reports to the Assessor. In August and September 2016, Joe Davidson was the interim Assessor.

3. On August 29, 2016,<sup>1</sup> Reed met with Wylie and Davidson about Reed's work performance. Reed was significantly behind on his assessments. The parties dispute what happened at the meeting. Reed contends that he asked for and was denied an Association representative; that Davidson yelled at him; and that Reed raised questions about whether certain office practices regarding property evaluations complied with state law. Davidson and Wylie deny refusing Reed representation; that Davidson yelled at Mr. Reed; and that Reed stated that the Assessor's Office practices failed to comply with state law.<sup>2</sup>

4. County officials assert that on August 30, Davidson contacted the County Personnel Department for assistance in addressing Reed's situation. On September 1, Davidson and Wylie met with then-acting Personnel Director Sheahan Griffiths to discuss Reed. County officials assert that on September 2, Griffiths contacted County Counsel Wayne Belmont for advice in addressing Davidson's concerns.

5. County officials assert that they decided to issue Reed a work improvement plan (work plan or WIP), and that Davidson and Wylie requested a template for a work plan from Griffiths. Griffiths asserts that she prepared a work plan with Belmont's assistance on Friday, September 2, and sent it to Wylie that same day.

6. Monday, September 5, was Labor Day, a holiday for County employees.

7. On September 6, at 12:12 pm, Association Grievance Officer David Wood submitted a grievance for Reed by email. The grievance alleged, in part, that Davidson and Wylie violated Article 2 of the collective bargaining agreement through their conduct at the August 29 meeting. The grievance was submitted to Wylie, Davidson, and Griffiths, among others.

---

<sup>1</sup>All dates in this Recommended Order are in 2016, unless stated otherwise.

<sup>2</sup>That communications took place between County officials, and between the parties, is relevant to this proceeding. However, many of the details of those communications are not relevant. Whether the County properly withheld evidence from the Association that might reflect the dates and other details of some communications is the subject of this unfair labor practice proceeding. Therefore, we report several contentions of the parties without resolving contradictions or making independent determinations of fact.

8. The grievance stated, in part:

“Action at Issue: During the meeting LCEA Member Justin Reed was denied union representation despite asking twice. Mr. Reed was also asked to sign appraisals that he feels were improperly done per ORS and OARS. During the meeting Mr. Davidson was aggressive in stance and language, raising his voice, slamming his cup on the table, accusing Mr. Reed of ‘sabotaging the roll’ and issuing a threat of retribution. \* \* \*.

“Contract Article at Issue:

1. Denying the member his Weingarten Rights to representation.
2. Violating Article 2 of the CBA with behavior that is abusive, intimidating and an abuse of authority.
3. Requiring Mr. Reed to ‘sign-off on’ items that Mr. Reed believes to be in violation of OARS and OARS. These are potential County violations of ORS 659A.200 et seq.

Remedy:

1. Stop denying LCEA representation requests.
2. Refrain from Article 2 violating behavior.
3. Ensure job requirements confirm to applicable Federal, State and local laws.” (Exh. C-1-2.)

9. Article 2 of the parties’ relevant collective bargaining agreement provides:

“The provisions of this contract shall be applied equally to all employees in the bargaining unit without discrimination, except in cases of bona fide occupational qualification, as to age, sex, marital status, race, color, creed, religion, national origin, association or political affiliation, disability, or veteran status. For conduct that is not covered by the definition of ‘discrimination’ under local, state, or federal law, the County agrees to receive, investigate and take appropriate corrective steps where the County agrees that the conduct is unacceptable. Conduct that would fall under this section includes behavior that is offensive, abusive, intimidating, malicious or insulting, including the abuse of one’s authority in unfair sanctions that are intended to embarrass or humiliate the employee in front of the public or his or her peers. It is further understood that if an employee is found to have engaged in this kind of conduct he or she could be subject to disciplinary action up to, and including termination.” (Exh. C-8.)

10. Also on September 6, between 2 and 2:30 pm, Wylie gave Reed a work plan.

11. On September 7, Association Grievance Officer Wood sent an information request to Griffiths, seeking “the location, contents, and meta-data<sup>3</sup> of the file used to create [the work plan]. We need to get the file creation date, last modified date and any interim versions that exist.” (Exhibit C-2.)

12. The Association sought the information in order to evaluate whether the work plan was retaliation against Reed for the September 6 grievance. (Exhibit R-2 at 2.)

13. On October 3, Wood asked Griffiths for an update on the information request. Griffiths responded that the “above referenced file [the work plan] was created on 9/2/2016. The balance of your request is subject to attorney client privilege.” (Ex. C-5-1.)

14. On October 10, Michael Hereford became the permanent Personnel Director. Shortly after that, Hereford met with Association representatives and reiterated the County’s October 3 position on the September 7, information request.

15. On December 5, 2016, the Association filed this Complaint, which included a copy of the information request. The text of the Complaint described the request as follows: “The information request sought information on the creation, location, contents, and metadata of the WIP issued to Mr. Reed.”

16. At the time of hearing, the Reed grievance was between steps 3 and 4 of the parties’ dispute resolution process.

### CONCLUSIONS OF LAW

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

2. The County violated ORS 243.672(1)(e) by refusing to produce information requested by the Association in September 2016.

The Association filed an information request with the County, seeking “the location, contents, and meta-data of the file used to create [the work plan]. We need to get the file creation date, last modified date and any interim versions that exist.” Finding of Fact 11. The County

---

<sup>3</sup>Metadata is “data that provides information about other data.” “Metadata.” *Merriam-Webster Unabridged Dictionary*, <https://www.merriam-webster.com/dictionary/meta%20data> (accessed July 10, 2017). Metadata can be a valuable asset in evaluating the authenticity and actual dates of creation and modification of documents. *See Lacasse v. Owen*, 278 Or App 24, 373 P3d 1178 (Or Ct App 2016). In this case, the metadata at issue is the information about the electronic work improvement plan document which accompanies the visible text of that electronic document. The parties in this case have not described all of the metadata associated with the work plan document. The Association argues, however, that “The timing of the work plan’s file creation, as revealed in the metadata, will show the relationship between the filing of the grievance and the creation of the work plan. It will show whether the work plan was created after the filing of the grievance, in which case the retaliatory nature of the work plan will be clear and undisputed.” Association Post-Hearing Brief at 5. Therefore, this Board’s analysis of whether the County should have provided the work plan document metadata to the Association addresses only metadata regarding the dates and times of the document’s creation and revisions.

informed the Association that the creation date of the work plan was September 2, 2016. The County refused to provide any additional information on the grounds that it was protected from disclosure by attorney-client privilege.

While the request for information could be construed as seeking additional information, such as drafts of Reed's work plan, the Association describes the information sought simply as metadata in its post-hearing brief, and we confine our analysis and ruling to that issue. In this case, the metadata at issue is the data associated with the electronic version of the work plan that reveals its date of creation and dates of modification, including the date of its final modification. We turn to this Board's analysis of the duty to provide information.

### Standards for decision

This Board set out the standards for evaluating the refusal to provide information in *Ashland Police Association v. City Of Ashland*, Case No. UP-50-05, 21 PECBR 512 (2006), and we follow that analysis here.

The duty to bargain in good faith continues during the term of a collective bargaining agreement, and the duty to bargain includes the duty to exchange information. ORS 243.650(4); *Oregon School Employees Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81, 6 PECBR 5027, 5030 (1982). In contract administration, the duty to supply information arises "so long as the information sought is of probable or potential relevance to a grievance or other contractual matter." *City Of Ashland*, 21 PECBR at 516, quoting *Washington County School District No. 48 v. Beaverton Education Association & Paul Nelson*, Case No. C-169-79, 5 PECBR 4398, 4405 (1981). The bargaining process works best when the parties have the information they need in order to carry out their functions. Therefore, this Board "begins with the premise of full disclosure." *City Of Ashland*, 21 PECBR at 516, citing *AOCE v. State of Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 70 (1999).

In determining whether a public employer has a duty to produce requested information, we apply a test set out in *Oregon School Employees Association, Chapter 68 v. Colton School District 53*, 6 PECBR at 5032-5033 ("Colton Test"): (1) the reason given for the request; (2) the ease or difficulty with which the information can be produced; (3) the kinds of information requested; and (4) the history of labor relations between the parties.

In its post-hearing brief, the County argues that the Association was not entitled to the work plan document metadata because the material sought was unrelated to Reed's grievance; the County communicated the creation date of the work plan to the Association and that date was prior to the grievance filing; the collective bargaining agreement does not provide for grievances based on claims of retaliation; a work plan is not subject to a grievance; and that the metadata is protected by attorney-client privilege. We will address each of these objections in the relevant categories below.

1. **The reason given for the request:** The Association argues that the Association needed the information to help determine the relationship between Reed's grievance filing and the work plan imposed less than two hours later. The Association argues that the information is

“clearly of probable or potential relevance to a potential grievance or complaint brought to redress retaliation.” Association Post-Hearing Brief at 5. If the work plan document’s metadata showed a creation or modification date and time after the grievance was filed, that fact would be of probable or potential relevance to whether the work plan was retaliatory.

The County argues that the information sought is irrelevant because:

“The grievance and the [work plan/WIP] are two separate matters. The merits of the grievance can be addressed by and through the parties’ collective bargaining agreement \* \* \*. The County in good faith provided the date the WIP was created, which was relevant to their assertion the WIP was retaliatory for Mr. Reed filing a grievance. Although they assert the WIP may be retaliatory, they do not assert that it is unfounded and in fact, both Mr. Reed and Mr. Wood testified that they did not grieve the WIP as ‘it was not disciplinary or investigatory’ \* \* \*. There is no basis for establishing the WIP is retaliatory, and no basis to establish relevance of the information request. Mr. Reed testified he did not complete his work and did have outstanding reappraisals \* \* \*. The document in question-the WIP-has been presented and signed by Mr. Reed.” County Post-Hearing Brief at 4-5.

In *Oregon AFSCME Local 3581 v. State of Oregon, Real Estate Agency*, Case No. UP-42-03, 21 PECBR 129 (2005), the union requested a copy of notes taken at a confidential meeting. Bargaining unit members were concerned that the employer was soliciting complaints about them. The agency responded that it was not obligated to provide a confidential document because it “was not relevant to a ‘specific grievance or contract matter’ and does not involve an ‘identifiable grievance.’” This Board rejected that reasoning, holding that “All the union needs to establish is that the subject of the request has potential value in aiding it in the performance of its statutory duties of representation of bargaining unit members.” 21 PECBR at 134, quoting *Oregon State Police Officers’ Association v. State of Oregon*, Case No. UP-24-88, 11 PECBR 718, 727 (1989).

Accordingly, this Board held that the union’s request for the confidential document had potential value in aiding in the performance of its statutory duty to represent its bargaining members, and ordered the employer to provide the union with the requested document.

In this case, the County argues that the premises of the grievance are not supported by the underlying collective bargaining agreement, and it is not required to provide information sought by the Association for a grievance in which it expected to prevail. The County also argues that providing a statement to the Association regarding the document creation date satisfies any obligation under the PECBA.

We are not persuaded by the County’s arguments. First, it is not the role of this Board to evaluate and opine on the merits of a grievance related to a request for information. The Association has established that the subject of the request has potential value in aiding it in the performance of its statutory duties of representation of bargaining unit members. *Real Estate Agency*, 21 PECBR at 134-5.

Second, under the circumstances of this case, we see no reason why the Association is required to rely on a limited representation by the County when actual, more detailed, electronic documentation is readily available. The Association is entitled to obtain evidence to test the accuracy of the County's representation. The County argues that separately providing the date of creation of the work plan accommodated the Association's request. We note that, at the very least, the dates of drafts and final version were as relevant to the request. We also note that the County, if it was confused about the breadth of the request, never inquired about it or explain specifically why the work plan document metadata itself was privileged.

2. **The Ease or Difficulty with Which the Data can be Produced:** The work plan document's metadata is within the direction and control of the County, and can be provided with a minimum amount of effort and delay.

3. **The Kind of Information Requested:** The County argues that the work plan document's metadata is protected from disclosure by attorney-client privilege.<sup>4</sup>

This Board has long held that the party asserting confidentiality has the burden of proof. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 71 (1999), citing *John Doe Agency v. John Doe Corp.*, 493 US 146, 156, 110 S Ct 471, 107 LE2d 462 (1989). See also *Beaverton Police Association v. City of Beaverton*, Case No. UP-60-03, 20 PECBR 924 (2005). In addition, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. Thus, "when a union is entitled to information concerning that which an employer legitimately claims a partial confidentiality interest, the employer must bargain toward an accommodation which addresses the union's information needs and the employer's justified interests." *City of Portland*, 21 PECBR at 905, quoting *Association of Oregon Correction Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 71 (1999), citing *Pennsylvania Power & Light Co.*, 301 NLRB 138, 136 LRRM 1225 (1991).

Attorney-client privilege is governed by the Oregon Evidence Code Rule 503, which states:

"(1) As used in this section, unless the context requires otherwise:

(a) 'Client' means a person, public officer, corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal service from the lawyer.

(b) 'Confidential communication' means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

---

<sup>4</sup>While the County refers to other rulings by this Board and other entities regarding other sources of confidentiality for documents, it does not assert any other ground besides attorney-client privilege for the confidentiality of the document at issue here.

(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer." (Oregon Evidence Code Rule 503, Lawyer-Client Privilege (ORS 40.225) (Emphasis omitted.)

The County argues that any interim drafts of the work plan were prepared with consultation by County Counsel Belmont, and focuses its arguments on the privilege status of those drafts. It also argues that it accommodated the Association's request by reporting the date the work plan was created. As noted above, the issue of whether the Association's request included, and whether the Association would be entitled to, actual interim drafts of the work plan is not before us, because the Association has not taken this position in this litigation. The only issue here is whether the metadata of the work plan document is privileged. That metadata is, on this record, simply a collection of facts about the work plan document such as date of creation and dates of modification. The County makes no specific argument about the privileged status of these facts. There is no evidence that the metadata would include confidential communications between the client or the client's representative and the client's lawyer or a representative of the lawyer. Indeed, there is no evidence that the metadata would reveal any relationship whatsoever between the County and its Counsel regarding the work plan.

**4. The history of the parties' labor-management relations:** There is no evidence in the record that anything about the parties' labor-management relationship bears upon the County's release of the work plan metadata to the Association.

#### CONCLUSION

The Association has established that it is entitled to the requested work plan document metadata. We will order the County to cease and desist from violating ORS 243.672(1)(e), and to provide the Association with the metadata reflecting date of creation and dates of modification of the September 6, 2016, Reed work plan document.

///

///

PROPOSED ORDER

The County will cease and desist from violating ORS 243.672(1)(e), and will provide the Association with the metadata reflecting date of creation and dates of modification of the September 6, 2016, Reed work plan document.

SIGNED AND ISSUED 18 July 2017.



---

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 proof of such service with this Board. The objections must be mailed, emailed, faxed, or hand-delivered to this Board. To file by email, please attach the filing as a PDF and send it to [ERB.filings@oregon.gov](mailto:ERB.filings@oregon.gov). 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(10) and (11); 115-010-0090; 115-035-0040; and 115-070-0055.)

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-022-16

(UNFAIR LABOR PRACTICE)

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

On July 27, 2017, the Board heard oral argument on Respondent’s objections to a recommended order issued by Administrative Law Judge (ALJ) Julie D. Reading on May 2, 2017, after a hearing held on January 30, 2017, in Tualatin, Oregon. The record closed on March 29, 2017, following receipt of documentation clarifying statements contained in the Complainant’s post-hearing brief.

Henry J. Kaplan, Attorney at Law, Bennett, Hartman, Morris & Kaplan LLP, Oregon, represented complainant.

Jeffrey P. Chicoine, Attorney at Law, Miller Nash Graham & Dunn, Portland, Oregon, represented Respondent.

On July 29, 2016, the Amalgamated Transit Union, Division 757 (Union) filed a complaint alleging that the Tri-County Metropolitan Transportation District of Oregon (District) violated ORS 243.672(1)(g) and (1)(e). Specifically, the Union alleged that the District violated ORS 243.672(1)(g) by refusing to process, discuss, or adjust two grievances. One grievance related to employee M.N.’s termination (M.N. Grievance) and another related to the District’s funding of shuttle services operated by a third party (Shuttle Grievance). The Union also alleged that the

District violated ORS 243.672(1)(e) by refusing to provide information relevant to the filed grievances. The Union requested a civil penalty and reimbursement of its filing fee.

The District filed a timely answer, including the affirmative defense that the grievances are not substantively arbitrable. The District also requested a civil penalty in relation to the Union's ORS 243.672(1)(e) allegations.

At the start of the hearing, the parties announced that they had reached an agreement with respect to the ORS 243.672(1)(e) allegations. Accordingly, the only issue to be resolved in this case is:

Did the District violate ORS 243.672(1)(g) by declining to process the Shuttle Grievance and the M.N. Grievance?

We conclude that the District violated ORS 243.672(1)(g) by declining to process and arbitrate the grievances.

### RULINGS

The rulings of the ALJ were reviewed and are correct.

### FINDINGS OF FACT

#### The Parties and Agreement

1. The Union is a labor organization within the meaning of ORS 243.650(13).
2. The District is a public employer within the meaning of ORS 243.650(20).
3. The Union and the District are parties to a Working and Wage Agreement (Agreement), which became effective on December 1, 2012, and expired on November 30, 2016. There have been numerous prior collective bargaining agreements between the parties.
4. Article 1, Section 3 of the Agreement is entitled, "Adjustment of Grievances and Arbitration." This arbitration clause states, in relevant part:

"Par. 1. It is hereby agreed that the properly accredited officers of the District shall meet with the properly accredited officers of the Union on all grievances relating to any alleged violation of any provision of this Agreement or concerning the suspension, discharge, or other discipline of any employee covered by this Agreement (except during the employee's probationary period). All such grievances when filed by the Union or an employee shall be processed through the procedures set out in Sections 3 and 4 of this Article. \* \* \*

“Par. 2. Should there be any dispute, complaint, or grievance of any employee or the Union, herein collectively referred to as grievances, it must be presented by the employee or the Union to the appropriate Department Director within thirty (30) days following either the occurrence out of which the grievance arose or from the first date the grievance could reasonably be assumed to have been known to the employee, whichever is later. Failure to present the grievance within thirty (30) days will be deemed a waiver of the grievance.”

5. The remainder of Article 1, Section 3 establishes the multi-step grievance procedure, which ends in binding arbitration.

6. In other sections of the Agreement, the parties expressly excluded three types of matters from the grievance procedure: (1) termination of probationary employees, (2) judgment of the qualification of retirees for employment as “Mini-run Operators,” and (3) approval of maintenance worker shift trade requests.

### The M.N. Grievance

7. Article 1, Section 13 of the Agreement is entitled, “Seniority Provisions.” Paragraph 1 states:

“Any employee promoted to a clerical, supervisory, or other official position by the District shall retain seniority in the last position or classification worked prior to promotion. Any employee promoted to a non-union position shall retain said seniority for five (5) years from the date of their promotion.”

8. Some supervisory employees have been returned to their prior bargaining unit positions after being removed from supervisory roles.

9. M.N. was hired as a maintenance helper in July 1996. In October 2001, he was promoted to an assistant supervisor position, but remained in the bargaining unit. In May 2002, he was promoted out of the bargaining unit to the position of maintenance supervisor.

10. At the time M.N. was promoted to maintenance supervisor, the parties’ 1998-2003 Agreement was in effect. Article 1, Section 13 of that Agreement provided, “[a]ny employee promoted to a clerical, supervisory, or other official position by the District shall retain seniority in the last position or classification worked prior to promotion.” Unlike the current Agreement, the 1998-2003 Agreement did not limit the length of time that a promoted employee would retain seniority. Accordingly, the current Agreement’s five-year limit on the retention of seniority was not in effect when M.N. was promoted to a non-union position.

11. On November 19, 2015, the District terminated M.N.’s employment for performance reasons that did not rise to the level of misconduct.

12. On December 15, 2015, M.N. wrote a letter to the maintenance manager, stating that because there was no five-year limit on seniority retention when he was promoted to maintenance supervisor, he was entitled to return to a bargaining unit position.

13. The maintenance manager responded on January 15, 2016, stating that, under the current Agreement's language, he had no right to return to a bargaining unit position because he had been promoted more than five years ago.

14. On February 15, 2016, M.N. filed and signed the M.N. Grievance (#9134) asserting that the maintenance manager denied his right to return to a bargaining unit position.

15. On February 16, 2016, Union President Shirley Block wrote a letter to Christine Stevens, the District's Senior Manager of Labor Relations. In that letter, Block requested a "Step 1" hearing on the M.N. Grievance and requested all documentation relied on by the District in denying M.N.'s request to return to a bargaining unit position.

16. On February 23, 2016, Bus Maintenance Manager Robert Brooks responded to Block, stating that the District would not process the M.N. grievance because M.N. was not a bargaining unit member and had no right to file a grievance.

#### The Shuttle Grievance

17. Article 2, Section 1 of the Agreement relates to "Operators" in the "Operations Division/Transportation Department." Paragraph 9 of that section states:

"All vehicles on the lines of the District shall be run by Operators should they be operated; and any other type of transportation service with the exception of elderly and disabled (paratransit) service; vehicles traveling between offices, shops, or garages of the District; supply and service trucks of the Maintenance, Facilities Maintenance, and Stores Department, and delivery trips and necessary pull-ins."

18. Through many previous contracts, Article 2, Section 1, Paragraph 9 has contained language regarding "[a]ll vehicles on the lines of the District" being operated by bargaining unit members. The parties have long agreed to exclude paratransit services, meaning those specifically for the elderly and people with disabilities, from the "lines of the District" provision.

19. In the 1988-1992 Agreement and the 1992-1995 Agreement, Article 2, Section 1, Paragraph 9 stated:

"All vehicles on the lines of the District shall be run by Operators, with the exception of vehicles traveling between offices, shops, or garages of the District; supply and service trucks of the Maintenance, Building and Grounds, and Stores Departments and delivery trips and necessary pull-ins."

20. Between approximately 1989 and 1993, the District contracted out various services, including transportation services provided by taxi cabs, mini-buses, shuttles, and trolleys. The District funded those contracts from its general fund rather than grants. The Union filed several grievances, each asserting that the use of contractors to operate transportation services violated the “lines of the District” provision. The District did not dispute the arbitrability of those grievances.

21. In relation to the parties’ 1998-2003 Agreement, the parties negotiated a side letter permitting the District to contract out certain services on a trial basis until it could be determined whether they should become permanent and operated by the District.

22. In 1998, the Federal Transit Administration (FTA) began providing Job Access and Reverse Commute (JARC) grants to local transportation districts. The purpose of that federal program is to provide services for those living in urban areas who commute to underserved and hard-to-serve areas, such as suburban or rural locations. *See former 49 USC § 5316 (repealed 2012).*<sup>1</sup> In some cases, the FTA disburses federal JARC funds to recipients designated to receive them for a geographic area. The District is the regional applicant for and the designated recipient of JARC funds in the Portland region. Typically, the District receives JARC grant funds and then allocates portions of the grant funds to multiple sub-recipients. Those sub-recipients usually are non-profit organizations, but may also be other private contractors or public entities.<sup>2</sup>

23. The District oversees and administers a competitive process for awarding JARC grant funds to sub-recipients. Generally, the District publicizes the availability of JARC funds, and entities submit applications proposing particular projects or services. The applications are reviewed by an advisory committee comprised of a variety of representatives, including community members, nonprofit organizations, public social service agencies, employers, and municipalities. The committee makes recommendations to the District regarding which projects should receive federal JARC funds. The District is ultimately responsible for deciding which projects receive funds and contracting with the sub-recipients, but the District generally has accepted the committee’s recommendations.

24. JARC-funded projects must be consistent with a regional transportation service plan that is developed by the District through a public process. Generally, JARC-funded projects address transportation needs that are not met by the District’s “fixed route” services (that is, traditional train and bus services that make stops only according to set schedules and routes). For

---

<sup>1</sup>In 2016, the JARC program expired, but similar funding is provided under the Urbanized Area Formula Grants program. *See 49 USC § 5307.* Because there are no differences between the Section 5316 and Section 5307 grants that are material to this case, we adopt the parties’ practice of referring to those grants collectively as “JARC grants.”

<sup>2</sup>We decline to find, as the District requests, that all grant-funded shuttle operators have been non-profit organizations except for one community college. The record establishes that there has been at least one shuttle operator, Ecoshuttle, that a District witness referred to as a “contractor” and does not appear to be a non-profit entity. Additionally, the record does not clearly identify all shuttle operators for all years, which precludes us from making such a comprehensive finding.

example, some JARC-funded projects are shuttles that transport commuters from District bus or train stops to workplaces located beyond the District’s fixed route line or during time periods when the District does not provide service. In some cases, these shuttles provide “deviated fixed route service,” meaning that individuals can ask to be picked up or dropped off at a particular location that is not on the shuttle’s regular route. In at least some cases, a third-party shuttle has been developed to meet a demand for transportation service after the District considered but decided against addressing that demand with District-operated service.<sup>3</sup>

25. To comply with federal JARC grant requirements, the District sometimes makes “in-kind” contributions to JARC-funded projects. In-kind contributions do not necessarily go to the JARC grant sub-recipient. For example, the District may make an in-kind contribution by providing additional services in a different geographic area, so long as those services are also consistent with the JARC regional plan and program purposes.<sup>4</sup>

26. The District enters into contracts with JARC grant sub-recipients. In those contracts, the sub-recipient agrees to provide certain services under specified conditions, to comply with various requirements (including federal regulations), and to permit oversight and auditing by the District in exchange for receiving funds. For example, the District may require a sub-recipient that operates a shuttle service to use paid drivers, drug test drivers, and submit monthly expenditure reports. Depending on their contract with the District, the various shuttle-service sub-recipients may use paid drivers, volunteer drivers, or a combination of both.

27. The District receives other federal and state funds that it distributes to sub-recipients through similar processes, including from the federal program for “grants for the enhanced mobility of seniors and individuals with disabilities,” 49 USC § 5310, and the state Elderly and Disabled Special Transportation Fund, ORS 391.800.

28. The District has distributed funds from the JARC program and other federal and state programs to the non-profit organization Ride Connection for the operation of various shuttles, including: (1) the Grove Link Shuttle (starting on July 1, 2014); (2) the Tualatin Shuttle (starting on July 1, 2014); and (3) the North Hillsboro Shuttle (starting on October 1, 2015).

29. The District has provided the following in-kind matching funds to those shuttles: (1) Grove Link – two matches of \$96,000 and \$26,321; (2) Tualatin – two matches of \$112,956.50 and \$5,849.99; and (3) North Hillsboro – \$70,000.

---

<sup>3</sup>Although the District asserts that it lacks authority to use JARC funds for its own operations, the record does not affirmatively establish that assertion.

<sup>4</sup>We decline to find, as the District requests, that it never gives money or in-kind contributions directly to federal grant sub-recipients. Although the District’s witnesses testified that the District did not give such contributions, that testimony was qualified as pertaining only to those projects within the witnesses’ personal knowledge and recollection, and is therefore insufficient to support the absolute finding that the District requests.

30. On November 18, 2015, the Union filed the Shuttle Grievance (#9069) alleging that the District violated the Agreement by funding and contracting with Ride Connection to provide shuttle services, specifically identifying the Grove Link Shuttle, the Tualatin Shuttle, and the North Hillsboro Shuttle.

31. On November 19, 2015, Union President Shirley Block sent a letter to District Labor Relations Manager Christine Stevens requesting a hearing of the Shuttle Grievance and production of related documents.

32. On December 23, 2015, Randy Stedman, the District's Labor Relations and Human Resources Executive Director, responded to Block. Stedman wrote that the District was declining to process the Shuttle Grievance because (1) the claim was untimely, and therefore the Union had waived its right to grieve; and (2) the grievance did not involve "employment relations" as that term is defined under the Public Employee Collective Bargaining Act (PECBA). In explaining the District's position, Stedman stated that the District had served as a JARC grant recipient and "pass-through" agency for several years, that the District is not an employer with respect to federally funded shuttle services operated by sub-recipients like Ride Connection, and that the sub-recipients do not use District personnel, facilities, or equipment.

33. On January 5, 2016, Block wrote to Stevens, requesting a Step 2 hearing on the Shuttle Grievance. On March 30, 2016, Block wrote again, revising the Shuttle Grievance to add a violation of the "lines of the District" provision, Article 2, Section 1, Paragraph 9. Block again requested a hearing.

34. On April 7, 2016, Stedman responded to Block on behalf of Stevens. Stedman stated that the additional citation to the "lines of the District" provision did not change the District's position that the grievance was untimely and did not involve employment relations as defined by PECBA.

35. On April 12, 2016, Stevens responded to Block, stating that the District "will not hear this grievance or participate in grievance arbitration on the matter because it does not involve employment relations under PECBA."<sup>5</sup>

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The District violated ORS 243.672(1)(g) by declining to process the Shuttle Grievance and the M.N. Grievance.

---

<sup>5</sup>The District, in its objections to the recommended order, requests that we make a large number of additional factual findings. We have included those requested findings that we agree are both relevant and substantiated.

## DISCUSSION

ORS 243.672(1)(g) provides, in part, that it is an unfair labor practice for a public employer to “[v]iolate the provisions of any written contract with respect to employment relations, including an agreement to arbitrate \* \* \*.” A refusal to process a grievance is, in essence, a refusal to arbitrate. Further, the policies of PECBA strongly favor settling labor disputes through arbitration. *Marion County Law Enforcement Association v. Marion County*, Case No. UP-24-08 at 15, 23 PECBR 671, 685 (2010).<sup>6</sup> In the labor context, unlike the commercial context, “arbitration is the substitute for industrial strife” and “part and parcel of the collective bargaining process itself.” *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 US 574, 578, 80 S Ct 1347, 1351 (1960).

Consistent with those policies, where the parties’ collective bargaining agreement (CBA) includes an agreement to arbitrate grievances, but one party contends that a particular grievance dispute is not covered by the arbitration clause, “ERB must order arbitration unless it can say with *positive assurance* that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” *Portland Fire Fighters’ Assn., v. City of Portland*, 181 Or App 85, 96, 45 P3d 162, *rev den*, 334 Or 491, 52 P3d 1056, 2057 (2002) (reversing and remanding Case No. UP-58-99, 18 PECBR 723 (2000) (emphasis in original; quotation marks omitted)).<sup>7</sup>

We refer to this legal standard as the “positive assurance test,” which was first articulated by the Supreme Court in *Warrior & Gulf*, 363 US at 582-83, and adopted by this Board in *Luoto and Long Creek Education Assn. v. Long Creek School District, No. 17*, Case No. UP-16-86, 9 PECBR 9314, *aff’d*, 89 Or App 34, 747 P2d 370 (1987), *rev den*, 305 Or 576, 753 P2d 1382 (1988). “The positive assurance test creates a ‘presumption of arbitrability’ that can be overcome only by an express exclusion of the grievance from arbitration or by other most forceful evidence of a purpose to exclude the claim from arbitration.” *Oregon School Employees Association v. Camas Valley School District 21J*, Case No. UP-59-86 at 10, 9 PECBR 9367, 9376 (1987).<sup>8</sup>

---

<sup>6</sup>To further the Board’s goal of making its orders more accessible to the public, we are adopting the following practices: The Board’s original orders will be the Board’s official reporter. When citing Board orders, we will identify the relevant page number(s) of the original Board order after the case number. For the time being, the Board will also provide a parallel citation to applicable secondary reporters by outside entities, such as the Public Employee Collective Bargaining Reporter (PECBR). We strongly encourage parties to cite to the Board’s original orders when feasible, but we will accept citations to secondary reporters. Additionally, the Board is in the process of making more of its orders available in a searchable format on the ERB website, and copies of Board orders that are not on the website are available upon request.

<sup>7</sup>See also *Portland Fire Fighters’ Association v. City of Portland*, Case No. UP-58-99, 20 PECBR 48A (2002) (Order on Remand).

<sup>8</sup>The parties agree that the positive assurance test is the correct legal standard to apply in this case.

“[I]n deciding whether arbitration must be ordered, [this Board] does not rule on the merits of the underlying claim[.]” *Id.* Instead, “[t]he emphasis in applying the positive assurance test is [on] whether the *arbitration clause* is or is not susceptible to an interpretation that covers the dispute.” *Long Creek*, UP-16-86 at 16, 9 PECBR at 9329 (emphasis in original). As this Board explained in *Long Creek*, a “beneficial effect” of the positive assurance test is that it *prevents* adjudicators from “examin[ing] contract provisions, other than those dealing with arbitration, to determine if a contested provision could support the grievant’s contentions” and then basing the arbitrability decision on their assessment of the grievance’s merits. UP-16-86 at 16-17, 9 PECBR at 9329-30.

When applying the positive assurance test, we interpret the scope of a CBA’s arbitration clause using general principles of contract interpretation. *Portland Fire Fighters’ Assn.*, 181 Or App at 91. Our interpretative task in arbitrability cases, however, is different from that in other types of contract interpretation disputes, as we are required to determine *only* whether the arbitration clause is susceptible to an interpretation that covers the underlying grievance. If so, or if there is any ambiguity, then we must order arbitration. *See id.* at 96.

Below, we apply the positive assurance test to the parties’ disputes regarding the arbitrability of the Shuttle and M.N. grievances.

### The Shuttle Grievance

In the Shuttle Grievance, the Union alleges that the District has violated the “lines of the District” provision of the Agreement by funding and contracting with Ride Connection to operate certain shuttles without Union operators. The Agreement’s arbitration clause covers “all grievances relating to any alleged violation of any provision of this Agreement or concerning the suspension, discharge, or other discipline of any employee covered by this Agreement (except during the employee’s probationary period).” The Agreement expressly excludes three issues from arbitration; however, none of those exclusions apply to the Shuttle Grievance, and the District does not contend otherwise.

In light of the arbitration clause’s clearly broad scope, and the absence of any applicable express exclusion, the Agreement is unambiguous that grievances alleging violations of the “lines of the District” provision are arbitrable.<sup>9</sup> Generally, when express contract language is unambiguous, our analysis ends, and we do not review extrinsic evidence to interpret the contract. *AFSCME Council 75 v. City of Salem*, 113 Or App 21, 25, 830 P2d 603, 605 (1992) (declining to review bargaining history where arbitration clause unambiguously covered the grievance dispute).

The District contends, however, that we should review extrinsic evidence to determine *if* the arbitration clause is ambiguous, citing *Portland Fire Fighters’ Assn.*, 181 Or App at 94. Even

---

<sup>9</sup>The fact that the Agreement contains three clear and specific exclusions demonstrates that the parties know how to exclude subjects from arbitration when they mutually agree to do so, and therefore bolsters our conclusion that the Shuttle Grievance is arbitrable.

assuming that we may review extrinsic evidence to determine whether seemingly clear contract language is actually ambiguous, we decline to do so in this case because the District concedes that none of its proffered extrinsic evidence relates directly to the arbitration clause. Instead, the proffered evidence relates to the “lines of the District” provision, which goes to the merits of the underlying grievance, not the scope of the arbitration clause.<sup>10</sup>

The District also asserts that it has only a limited, grantor-grantee type relationship with Ride Connection, and that as a result, its relationship to the shuttles is too far outside the scope of “employment relations” to be arbitrable under the Agreement.<sup>11</sup> The District acknowledges that it is essentially arguing that the grievance is not arbitrable because the shuttles are not “lines of the District,” and that this argument anticipates the merits of the underlying grievance. Although the positive assurance test requires this Board to decide arbitrability without considering the merits of the underlying grievance, the District contends that in this case, the merits and arbitrability issues overlap.

To address the District’s argument, we first review the guidance provided by the Supreme Court in *Warrior & Gulf*, the case in which it announced the positive assurance standard. In that case, the Court addressed a similar argument under similar circumstances: The union filed a grievance challenging the employer’s contracting out of certain work, and the employer refused to arbitrate. 363 US at 575-77. Although the parties’ arbitration clause was broad, their agreement also expressly excluded “matters which are strictly a function of management,” and the employer argued that exclusion applied to the contracting out grievance. *Id.* at 577. In rejecting that argument, the Court explained:

“In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.” *Id.* at 584-85.

---

<sup>10</sup>The District does not contend that there is extrinsic evidence of a mutual agreement to exclude disputes regarding the “lines of the District” provision from arbitration.

<sup>11</sup>In briefing and argument before this Board, the District did not argue that the shuttles were outside the scope of “labor relations” as defined by PECBA (as it did in its responses to the Union’s grievance), but instead argued that the shuttle “work” is “not covered” by the parties’ Agreement. In both iterations, the District’s argument relies on the same legal and factual contentions, so we treat them as the same argument.

Based on this guidance, we review the District’s evidence regarding the shuttles at issue, but only to the extent necessary to determine whether it is “the most forceful evidence” of a purpose to exclude the Shuttle Grievance from arbitration. In doing so, we keep in mind the Court’s caution against interpreting the substantive provisions of the Agreement through the “back door” of the arbitrability issue, and reiterate that any assessment of the merits of the underlying grievance is improper and irrelevant under the positive assurance test. Thus, we do not attempt to interpret the meaning or scope of the “lines of the District” provision, and we do not view the evidence that relates only to the interpretation of that provision (such as its bargaining history) as relevant to this case.<sup>12</sup>

After reviewing the District’s evidence regarding the Ride Connection shuttles, we conclude that it is not “the most forceful evidence” of a purpose to exclude the Shuttle Grievance from arbitration. This is not a case involving work that is wholly unrelated to the District’s own operations and the work of the Union’s bargaining unit members. There is no dispute that the shuttles at issue provide transportation services within the District’s service region and connect to District lines. In at least some cases, the District has considered establishing District service to meet the needs that are instead being served by these third-party shuttles. Thus, the shuttles are not so completely different from the District’s own operations and so unrelated to the work performed by bargaining unit members that we can conclusively find, on this record, that they are outside the realm of labor relations contemplated by PECBA.

The District nonetheless contends that the grievance is not arbitrable because it, as the local agency designated to receive federal JARC and Section 5310 funds, is merely a conduit for the distribution of those funds to third parties like Ride Connection, pursuant to the provisions of federal transportation law. The District, however, did not establish through “the most forceful evidence” that its role is, in fact, so limited. We do not need to determine the exact extent of the District’s involvement in or control over the shuttles to conclude that the District’s evidence is

---

<sup>12</sup>Although the District agrees that this Board must apply the positive assurance test, in arguing that this Board should determine the merits issue to determine arbitrability, the District relies almost exclusively on authority applying the “arguably arbitrable” standard that this Board abandoned in *Long Creek*, UP-16-86 at 11, 9 PECBR at 9324. See *International Brotherhood of Electrical Workers, Local 48 v. City of Portland*, Case No. C-142-79, 5 PECBR 2680 (1980); *Teamsters Local 670 v. Yamhill County, Yamhill County Board of Commissioners, and Sheriff of Yamhill County*, Case No. C-178-78, 4 PECBR 2268 (1979); and *Portland Teachers v. School Dist.*, 27 Or App 247, 555 P2d 943 (1976). The District also relies on *Portland Assn. of Teachers v. School Dist. No. 1*, 51 Or App 321, 625 P2d 1336 (1981). Although the court quoted the *Warrior & Gulf* positive assurance standard in that opinion, it affirmed orders in which this Board applied the “arguably arbitrable” standard (see *Portland Association of Teachers v. School District No. 1, Multnomah County*, Case No. C-145-78, 5 PECBR 2846, amended on recons, 5 PECBR 2887 (1980), and *Portland Association of Teachers and Dunlop v. Portland School District No. 1, Multnomah County*, Case No. C-199-79, 5 PECBR 2945 (1980)). In *Long Creek*, this Board explained that its analysis in those cases was erroneous because, “[u]nder the guise of determining arbitrability, this Board in fact decided the underlying dispute.” UP-16-86 at 17, 9 PECBR at 9330. See also UP-16-86 at 14 and n 8, and 17 n 14; 9 PECBR at 9327 and n 8, and 9330 n 14.

insufficient to overcome the strong presumption of arbitrability, especially given the breadth of the arbitration clause and the absence of any express exclusion that is even arguably applicable.<sup>13</sup>

Finally, the District argues that the Shuttle Grievance is not arbitrable because the funding programs at issue preclude an arbitrator from awarding a viable remedy. Even if the District is correct, that is not a basis for refusing to arbitrate. “It is not our job, in deciding the initial question of arbitrability, to address the validity of a requested remedy.” *Service Employees International Union, Local 503, Oregon Public Employees Union v. City of Hermiston*, Case No. UP-57-01 at 10, 19 PECBR 860, 869 (2002) (citing *Joseph Education Assn. v. Joseph Sch. Dist. No. 6*, Case No. UP-46-98, 18 PECBR 532 (2000), *aff’d*, 180 Or App 461, 43 P3d 1187 (2002)).

### The M.N. Grievance

The District argues that the M.N. Grievance is not covered by the Agreement’s arbitration clause because M.N. was not an employee covered by the Agreement when he filed the grievance and he therefore lacked standing to file it. The District asserts that M.N. was not an employee both because he had been terminated by the time he filed the grievance, and because, at the time of his termination, he had been a supervisor outside of the bargaining unit for over twelve years. We disagree, for the following reasons.<sup>14</sup>

First, there is no dispute that the *subject* of the M.N. Grievance clearly falls within the broad scope of the Agreement’s arbitration clause, which covers “any alleged violation of any provision of this Agreement or concerning the suspension, discharge, or other discipline of any employee covered by this Agreement (except during the employee’s probationary period).” Regardless of M.N.’s employee status, the grievance alleges a violation of the Agreement’s seniority retention provision, and the District does not contend that any express exclusion from arbitration applies.

Second, we reject the District’s contention that M.N. lacked standing to file a grievance under the arbitration clause because, technically, he was no longer an “employee” after he was discharged. Examining the arbitration clause as a whole, it is clear that the parties intended for grievances disputing discharges to be arbitrable, notwithstanding the technicality that a discharged grievant is no longer an “employee.” If we accepted the District’s interpretation of the arbitration

---

<sup>13</sup>The District also submitted evidence purportedly showing that the Union has been aware of the shuttles at issue for a long time. At oral argument, the District clarified that it submitted this evidence not to show that the grievance is untimely, but to show that the parties mutually understood that such shuttles are not “lines of the District.” Either way, that evidence goes to the merits of the grievance, not its arbitrability. We have long held that “procedural questions, such as timeliness, will be left to the arbitrator.” *Teamsters Local 670 v. City of Ontario*, Case No. UP-40-08 at 8, 23 PECBR 210, 217 (2009). And, as discussed above, when applying the positive assurance test, we interpret only the arbitration clause, not substantive provisions like the “lines of the District” provision.

<sup>14</sup>The District did not object to this portion of the Recommended Order, and we consider any potential objections unpreserved and waived.

clause, an employee could not grieve their own discharge unless they somehow filed the grievance before they were discharged, which makes no sense in the context of the Agreement and labor relations generally.

Third, we cannot say with positive assurance that M.N. lacked standing to file a grievance because he was not a *bargaining unit* employee at the time he was discharged. The arbitration clause permits grievances to be filed “by the Union or *an* employee.” Art. 1, Sec. 3, Par. 1 (emphasis added). The arbitration clause does not expressly require that the employee be a *bargaining unit* employee. The parties do not dispute that M.N. was *an* employee of the District. There is also no dispute that the Agreement gives employees certain rights that apply only after they leave the bargaining unit. In this context, it is plausible to interpret the arbitration clause as permitting non-bargaining unit employees like M.N. to file grievances where, as here, the *subject* of the grievance is clearly within the scope of the arbitration clause. *See Portland Fire Fighters’ Assn.*, 181 Or App at 93 (city committed unfair labor practice by refusing to arbitrate retiree benefits grievance).

In arguing that M.N. lacked standing to file a grievance because he was no longer a bargaining unit member, the District relies on *McMinnville Education Association and Mid-Valley Bargaining Council v. McMinnville School District #40*, Case No. UP-78-94, 16 PECBR 107 (1995). In that case, this Board determined that the grievances at issue were not arbitrable because they were filed by retirees who were no longer members of the bargaining unit. That case, however, has been abrogated by *Portland Fire Fighters’ Assn.*, 181 Or App 85, and subsequent orders by this Board, *see, e.g., Lincoln County Education Association v. Lincoln County School District*, Case No. UP-27-02 at 15-18, 20 PECBR 571, 585-88 (2004); *City of Hermiston*, UP-57-01 at 9-10 and 10 n 4, 19 PECBR at 868-69 and 869 n 4. In *Portland Fire Fighters’ Assn.*, the city argued that a grievance regarding retiree benefits was not substantively arbitrable because various references to “employees” and “members of the bargaining unit” meant that only grievances concerning current employees were arbitrable. 181 Or App at 92. Relying on *McMinnville Education Association*, this Board agreed with the city. *See id.* at 88, 91. The Court of Appeals, however, reversed and remanded. After finding that the arbitration clause could plausibly be interpreted as covering a retiree benefits grievance and was therefore ambiguous, the court explained that “the ambiguity as to the arbitration provision’s coverage demonstrates an absence of positive assurance that the dispute is not arbitrable, and, thus, it is arbitrable.” *Id.* at 93-95. As explained above, the arbitration clause in this case is similarly ambiguous with respect to non-bargaining unit employees, and therefore the M.N. Grievance is arbitrable.

Fourth, even if M.N. lacked standing to file the grievance, the arbitration clause expressly permits grievances to be filed either by individual employees “*or the Union.*” Art. 1, Sec. 3, Par. 2 (emphasis added). Although M.N. completed and submitted the Union grievance form himself, the Union immediately requested a hearing on that grievance, and the Union is the one pursuing arbitration of that grievance by bringing this case to the Board. Because the Union clearly would have had standing to file the M.N. Grievance, and the arbitration clause does not expressly preclude the Union from curing any potential standing issue by pursuing the grievance itself, we cannot say with positive assurance that the grievance is not substantively arbitrable.

In sum, because we cannot say with positive assurance that the Shuttle and M.N. grievances are not arbitrable, we conclude that the District committed an unfair labor practice by refusing to process them in accord with the parties' arbitration agreement.

### Remedy

The Union requests that this Board order the District to (1) cease and desist, (2) post a notice, (3) pay a civil penalty, and (4) reimburse the Union's filing fee and representation costs. Because we have determined that the District violated ORS 243.672(1)(g) in refusing to arbitrate, we are required to enter a cease and desist order. *See* ORS 243.676(2)(b). Representation costs will be decided in a separate order, pursuant to OAR 115-035-0055.

Regarding the request for notice posting, this Board considers six factors to determine whether that remedy is appropriate:

“This Board generally requires the posting of an official notice in situations in which the violation: (1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was perpetrated by a significant number of a Respondent's personnel; (4) affected a significant portion of bargaining unit employees; (5) had a significant potential or actual impact on the functioning of the designated bargaining representative as the representative; or (6) involved a strike, lockout, or discharge.” *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82 at 12, 6 PECBR 5590, 5601, *aff'd without opinion*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536, 678 P2d 738 (1984).

This “list of factors is to be read in the disjunctive.” *Laborers' Local 483 v. City of Portland*, Case No. UP-15-05 at 18, 21 PECBR 891, 908 (2007). Here, however, we do not find that any of those factors support the posting of a notice, because there is insufficient evidence that the District's actions were calculated, flagrant, or had a significant impact on the bargaining unit representative's functioning or a significant portion of the bargaining unit members.

Regarding the Union's request for a civil penalty, PECBA authorizes this Board to award a civil penalty if it determines that the person who committed the unfair labor practice has done so “repetitively” and knowingly, or that “the action constituting the unfair labor practice was egregious[.]” ORS 243.676(4)(a). The Union asks us to infer that the District's refusals to arbitrate the two grievances were, when viewed together, tactical, dilatory, and in retaliation for the exercise of protected rights. The Union, however, does not point to any conduct or evidence of such bad faith other than those refusals to arbitrate. Under the circumstances presented here, we do not find that the District's actions were, in and by themselves, sufficiently repetitive or egregious to warrant a civil penalty. *See Lincoln County*, UP-27-02 at 24, 20 PECBR at 594 (declining to award civil penalty for unlawful refusal to arbitrate three related grievances).

Finally, we also deny the Union's request for reimbursement of its filing fee. PECBA gives this Board “discretion” to “order fee reimbursement to the prevailing party in any case in which the complaint or answer is found to have been frivolous or filed in bad faith.” ORS 243.672(3).

That standard is “difficult to meet,” *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04 at 22, 21 PECBR 206, 227 (2005), and it was not met here.

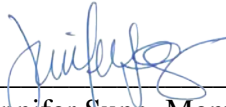
ORDER

1. The District shall cease and desist from violating ORS 243.672(1)(g).
2. The District shall process the M.N. Grievance and the Shuttle Grievance as provided in the Agreement’s Adjustment of Grievances and Arbitration provision.

DATED September 8, 2017.

  
\_\_\_\_\_  
Adam L. Rhynard, Chair

  
\_\_\_\_\_  
Lisa M. Umscheid, Member

  
\_\_\_\_\_  
Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-009-16

(UNIT CLARIFICATION)

CITY OF OREGON CITY,	)	
	)	
Petitioner,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
OREGON CITY POLICE OFFICERS'	)	AND ORDER
ASSOCIATION,	)	
	)	
Respondent.	)	

---

On July 12, 2017, Petitioner City of Oregon City (City) filed objections to a recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew on June 29, 2017, after a hearing was held on January 24, 2017, in Oregon City, Oregon. The record closed on March 17, 2017, following receipt of the parties' post-hearing briefs. Following the City's objections, the parties waived oral argument and declined to submit any memoranda in lieu of oral argument. The matter was deemed submitted to the Board on July 31, the first business day after the deadline passed for the parties to state whether a memorandum in lieu of oral argument would be submitted.

Daniel L. Rowan, Bullard Law, Portland, Oregon, represented Petitioner at hearing. Kathy Peck, Peck Rubanoff Hatfield, P.C., Lake Oswego, Oregon, represented Petitioner on Board review.

Daryl Garrettson, Fenrich & Gallagher, P.C., Eugene, Oregon, represented Respondent.

This case requires us to determine whether, pursuant to *former* OAR 115-025-0000(1)(e), two municipal court positions at the City should be removed from the bargaining unit represented by the Oregon City Police Officers' Association (Association).<sup>1</sup> OAR 115-025-0000(1)(e) permits a public employer to seek redesignation of a unit to remove positions based on the criteria in

---

<sup>1</sup>The Board amended its rules, including OAR 115-025-0000(1)(e), effective February 1, 2017. The City, however, filed its petition and amended petition on August 2, 2016, and August 10, 2016, respectively. Therefore, we apply the former rules, and all references in this order are to the former rules.

ORS 243.682(1)(a)—*i.e.*, community of interest, wages, hours and other working conditions, the history of collective bargaining, and the desires of employees. The issue is:

Pursuant to OAR 115-025-0000(1)(e), are the positions of Court Services/Collections Clerk and Court Records Specialist<sup>2</sup> part of an appropriate bargaining unit represented by the Association?<sup>3</sup>

We conclude that the positions of Court Services/Collections Clerk and Court Records Specialist are appropriately included in the Association unit, and therefore dismiss the petition.

### RULINGS

#### City's request at hearing to amend petition

At hearing, the City sought to amend its petition (for the second time) to exclude from the bargaining unit a third position, the Senior Court Clerk. The Association objected, arguing that this at-hearing request to amend was untimely and that the position was not included in the position-specific provision of the collective bargaining agreement that prompted the City's petition.

For two reasons, the ALJ correctly denied the at-hearing request to amend. First, although unit clarification cases are investigatory, and no party has the burden of proof, a petitioner has the burden to file a valid petition that reasonably defines the scope of the controversy. *See, e.g., former* OAR 115-025-0010; OAR 115-025-0023. Here, the City had filed a petition and an amended petition, and did not identify the Senior Court Clerk in either petition. The position was not named (and not objected to for that absence) in the issue statement for the hearing in this case. The City did not seek to add the third position until the hearing itself. A request at hearing to amend the petition was untimely, and properly denied on that basis.

---

<sup>2</sup>The position identified in one section of the collective bargaining agreement as “Municipal Court Specialist” has different titles in different exhibits, such as “Court Records Specialist” (position description) and “Municipal Court Secretary” (Appendix A). Witnesses also referred to the position with different titles. There is, however, no dispute that the position, whether identified as municipal court specialist, court records specialist, municipal court secretary, or some combination thereof, is the same position. For clarity, we use the term “Court Records Specialist” throughout this order.

<sup>3</sup>Although the City filed both a petition and an amended petition, in its post-hearing brief, the City stated that it had no objection to the Board not addressing the original petition, so long as the Board addressed the issue in the amended petition of whether the municipal court employees should be removed from the bargaining unit under OAR 115-025-0000(1)(e) because those employees should not be included in the unit under the criteria set forth in ORS 243.682(1)(a). Consistent with the City's suggestion, we consider and rule only on the OAR 115-025-0000(1)(e) issue in the amended petition.

Additionally, although this case presented a question regarding whether the contract bar of ORS 243.692 and OAR 115-025-0015(2) prevents consideration of the petition, we need not decide that question because the petition is being dismissed for the reasons set forth below.

In addition, it is not unreasonable to hold a party to the express terms of its agreement. Therefore, we conclude that the ALJ correctly followed the terms of that agreement in denying leave to amend to include the Senior Court Clerk.

Exhibit not on pre-hearing exhibit list

At hearing, the Association moved to introduce Exhibit R-3, a document that the Association did not include in its exhibit list and did not previously exchange with the City. The purpose of the proposed evidence was to rebut the City's contention that the inclusion of the municipal court staff in Appendix A of the 2016-2019 collective bargaining agreement was an error. The Association argues that it had good cause to present the exhibit because it was surprised by the City's contention that the municipal court positions were included in Appendix A by mistake. The document was an email exchange of the salary schedule between City counsel Akin Blitz and Association counsel Garrettson, among others. The ALJ correctly accepted the exhibit for the reasons it was offered.<sup>4</sup>

Hearsay testimony of Parno regarding conversations with municipal court judge and prosecutor

At hearing, the City sought to establish that the presence of municipal court staff in the Association bargaining unit constituted a conflict of interest. It offered the testimony of Finance Director Wyatt Parno regarding conversations with a former municipal judge who had become a municipal prosecutor, without offering the prosecutor as a witness himself.

In proceedings before this Board, "[e]vidence of a type commonly relied on by reasonably prudent persons in conduct of their serious affairs shall be admissible." OAR 115-010-0050(1). Under this standard, the ALJ correctly ruled that Parno's testimony about his conversations with the city prosecutor was admissible. However, as the ALJ noted, hearsay testimony admitted into evidence is nonetheless subject to the factfinder's evaluation of the weight of that hearsay evidence.<sup>5</sup> See *Reguero v. Teacher Standards and Practices*, 312 Or 402, 417, 822 P2d 1171 (1991).

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

---

<sup>4</sup>We note, however, that this evidence is no longer relevant to the legal issue in this case. As noted above, the City informed this Board in its post-hearing brief that a ruling on its amended petition would make a decision on its original petition, filed pursuant to *former* OAR 115-025-0005(3), unnecessary. Once the City asserted that a decision on its original petition was unnecessary, evidence regarding which positions were included in Appendix A was no longer material.

<sup>5</sup>The Association presented evidence, also through hearsay, that the current municipal court judge was opposed to the removal of court staff from the Association bargaining unit against their will.

## FINDINGS OF FACT

### The parties

1. The City is a public employer as defined by ORS 243.650(20). The Association is a labor organization within the meaning of ORS 243.650(13), and the exclusive representative of a strike-prohibited bargaining unit of roughly 50 police department and municipal court employees. The American Federation of State, County and Municipal Employees (AFSCME) represents a wall-to-wall unit of employees, excluding “employees in the police” (2013-2016 collective bargaining agreement) or “Police Department employees” (tentative agreement for successor agreement).<sup>6</sup> There are no other bargaining units of City employees.<sup>7</sup>

### Municipal court staff

2. At the time of hearing, there were three non-supervisory municipal court staff, with one employee in each of the following positions: Senior Court Clerk, Court Services/Collection Clerk and Court Records Specialist (we will refer generally to these positions as “Court staff”). There is also a Municipal Court Manager, a supervisory position, and a Municipal Court Judge, who are not in the bargaining unit. The petitioned-for employees, the Court Services/Collection Clerk and Court Records Specialist, wish to remain in the Association bargaining unit.

### Supervision

3. The Municipal Court Manager is the direct supervisor of the three current Court staff. The Municipal Court Manager reports to the Finance Director, who in turn reports to the City Manager. The Municipal Court Manager completes performance evaluations for Court staff, which are reviewed by the Finance Director.

4. The Municipal Court Judge, Laraine McNiece at the time of hearing, is appointed by the City Commission. The judge does not have supervisory authority over Court staff regarding their terms and conditions of employment, including discipline, training, and compensation.

5. Before 2012, Court staff were supervised by the Finance Director. In 2012, the City restructured the finance department and hired current Finance Director Wyatt Parno. Parno continued to supervise Court staff.

6. When Court staff have a work-related problem, they usually talk with the Municipal Court Manager to resolve the issue informally. On occasion, Association officials have asked the Police Chief to assist with Court staff issues, although the Police Chief has no authority to supervise or manage the Court staff. The Police Chief prefers not to interfere in the domain of

---

<sup>6</sup>There are other exclusions that are not relevant to this case.

<sup>7</sup>AFSCME is not a party to this case, and has advised Association officials that it is not seeking to place the petitioned-for employees in the AFSCME unit.

another department manager. However, the Police Chief also believes it is helpful to work collaboratively with the Association to address issues it brings to his attention.

#### Interchange, transfer, and promotion

7. The current Senior Court Clerk, Wanda Shell, has been promoted through all three represented Court staff positions: Court Services/Collection Clerk, Court Records Specialist, and Senior Court Clerk. The Court Records Specialist, Rena Coultas, was previously a Court Services/Collection Clerk, for a total of 23 years as a court employee. There is no record that any Court staff have ever transferred or promoted to a position within the police department or elsewhere within the city. Given the job duties of the Court staff, their work skills are likely transferable to Police Office Specialist—Code Enforcement, and there are Office Specialists 1, 2 & 3 in other city departments.

#### Physical location and worker interactions

8. The municipal court and the police department share a building, identified only by its address in the record. No other city departments have employees in the building. All employees working in the building that are eligible to be part of a bargaining unit are part of the Association bargaining unit. Court staff sit behind a counter to the right as one enters the main door of the building. The reception area for the police department is to the left. The rest of the police department is located behind a secured door adjacent to the police reception area and in modular units adjacent to the police/court building. The municipal courtroom is located through a door located beyond the court reception area. Other Court staff workspaces are located behind a secured door behind the counter.

9. Court staff share a secured parking area with the police department, which they reach by walking through the police area to the building's back door.

10. Neither Court staff nor police conduct business at each other's counter. Court staff frequently and routinely enter the police area, as part of their normal duties and necessary paths through the building. Police enter the Court staff area to give them necessary information.

11. Court staff do not normally go to other city buildings, other than to drop off collections once a week with the receptionist at city hall. City employees who are not Court staff or police staff rarely visit the police/court building.

12. Court staff schedule municipal court dates several times a month. The Court Records Specialist maintains a scheduling white board for court dates in the police section of the building. The Court Records Specialist obtains the schedules of officers and sets municipal court trials consistent with officers' schedules. Officers often come to the court section of the building to tell the Court Records Specialist when they are on vacation or have other time off so that the Court Records Specialist will not schedule court during that time off, or to seek changes in previously set dates.

13. One area handled by the municipal court is traffic tickets. In these cases, officers appear by affidavit by submitting an affidavit to the Court Records Specialist.

14. In addition to the above interactions, Court staff often interact with non-sworn police employees when taking and delivering mail. Court staff and police staff share a lunch room and coffee machine. Court staff rarely interact with employees who are not part of the Association unit or their supervisors.

### Duties

15. In general, Court staff are responsible for maintaining court records, organizing the court calendar, setting the court's docket, issuing subpoenas, coordinating juries, setting up the courtrooms, and helping the judge with court processes. Court staff also coordinate procedures with probationary or community service agencies after a trial, and monitor compliance with probation. Court staff have access to confidential information that police do not have access to and are required to keep that information secure and confidential.

16. The Senior Court Clerk position was created in June 2015, but was first filled in October 2016. The employee is required to possess significant knowledge of current court policies, practices and procedures. The employee is also required to possess considerable knowledge of rules and regulations governing criminal cases tried in municipal court, and principles and practices of confidential records management and file maintenance. The Senior Court Clerk must also possess the communication and interpersonal skills necessary to interact with the court, the police department and the public.

17. The duties of Senior Court Clerk include:

Assists court administration with technical and administrative functions; makes release decisions regarding incarcerated persons, coordinates release dates and video arraignments with the jail; processes criminal cases; monitors probation clients for compliance; sets hearings as needed; and maintains record management of criminal files.

The position also schedules bailiffs depending on court needs; conducts record checks and provides information to requesting agencies; compiles crime reports, other related reports and statistics and provides them to appropriate agencies; acts as back-up to court manager when manager is unavailable or absent; and assists in training new employees.

The position also coordinates with jail staff, police employees, city and private attorneys, community corrections, judge, and public as needed; reviews questions from public and forwards as necessary; supports the relationship between the city and public by demonstrating courteous and cooperative behavior when interacting with citizens, visitors, and city staff; promotes city goals and priorities; and complies with all city policies and procedures.

18. The Court Records Specialist must possess considerable knowledge of modern office practices and procedures; considerable knowledge of business English, math, spelling, punctuation and legal terminology; knowledge of basic data processing applications and systems;

ability to learn court procedures rules and regulations; ability to operate word and data processing equipment; ability to accurately type at 50 words per minute; and ability to work harmoniously with supervisors, coworkers, members of the legal profession, other governmental agencies, law enforcement personnel, and the general public.

19. The duties of the Court Records Specialist include the following:

Serves as receptionist for the court; maintains court case records, and coordinates with the police department, city and private attorneys, judge, Division of Motor Vehicles, and others; collects monies for fines, fees and bail; provides receipts and credit payments for fines and bail; and issues collections notices for overdue accounts.

The position also handles incoming telephone and correspondence from general public, defendants, and attorneys; composes routine replies to correspondence with or without dictation; refers public to appropriate staff for assistance; requests computerized driving, motor vehicle registration, and criminal history records through a computer terminal; acts as docket clerk calendaring court caseload, issuing subpoenas and trial notices; and coordinates jury panels.

The position also processes new incoming cases and ensures that contents of certain documents are accurate and that cases are filed properly; monitors probation clients; schedules community service and hearings for failure to comply with probation; compiles crime reports, other related reports, and statistics and provides them to appropriate agencies; completes Oregon State Bureau Fingerprint Disposition cards when case is concluded and forwards to the Oregon State Bureau of Identification and local law enforcement agencies; serves as court bailiff, as directed by the clerk; and coordinates juries.

20. The Court Services/Collections Clerk position performs more general clerical functions than the other court positions, and the employee must learn specific functions of the court on the job.

21. The duties of the Court Services/Collections Clerk include the following:

Answers telephones and assists the general public at the front counter; receives cash payments and issues receipts; reconciles daily cash register transactions; receives payments by mail, prepares receipts and credits payments on accounts; performs a variety of data entry functions; ensures current and accurate data is posted to appropriate accounts; monitors deferred payment files for collections process; initiates collection notices for unpaid and overdue accounts, performs routine data entry on files that are ready for the collection process, and reviews all collection data to ensure accuracy of information; prepares and mails routine collections and suspension notices; and maintains and updates filing system.

#### Skills, training, and certifications

22. Court staff are certified by the Department of Public Safety Standards and Training (DPSST) to have access to the Law Enforcement Data System (LEDS). The Court Records Specialist is a LEDS representative certified by DPSST who teaches other Association-represented

employees how to use LEDS. LEDS was first introduced to the Court Records Specialist by other Association-represented employees. Court staff have also attended training with police employees for first aid, contamination protocols, and active shooter response.

#### Wages and benefits

23. Court staff currently receive wages and benefits as provided in the current labor agreement with the Association, at least during the pendency of this proceeding. The starting monthly salaries for the positions in the 2016-2017 fiscal year are as follows: Senior Court Clerk, \$3,645; Court Records Specialist, \$3,312; and Court Services/Collections Clerk, \$2,744. All employees in the Association receive the insurance and other benefits as provided in the Association labor contract. Court staff and unsworn police employees receive different holiday and pension compensation than the sworn officers.

#### Hours of work

24. Court staff work standard business hours only. The City may close the municipal court and suspend the work of Court staff during inclement weather.

#### History of Court staff in the police unit

25. In 1974, the City recognized the Association as the collective bargaining representative for “all employees of the City of Oregon City Police Department who are employed as police officers or police related functions including sergeants and dispatchers \* \* \*.” Between 1975 and 1981, the parties agreed to list the bargaining unit positions and their salary schedules in “Appendix A,” a format the parties have followed ever since. In 1981, the parties agreed to a recognition clause describing the Association unit as “all permanent, full-time personnel in the classifications listed in Appendix ‘A’” in their collective bargaining agreements. Also in 1981, the parties added municipal “Court Clerk” to Appendix A for the first time. The number of municipal court clerk positions and titles were changed over time, and those changes were reflected in Appendix A of subsequent collective bargaining agreements and reflected the consent of the parties.

26. The recognition clause of the agreement in effect from July 1, 2013 through June 30, 2016 stated:

“The City recognizes the Association as the sole and exclusive bargaining agent for all full-time or regular part-time employees working fifteen (15) hours or more per week for the City, excluding temporary, supervisory and confidential employees but including Police Officers, Senior Police Officers, and Police Sergeants.”

27. Appendix A of the 2013-2016 agreement listed the covered positions: Police Officer, Senior Police Officer, Police Sergeant, Community Services Officer, Police Records Specialist, Court Records Specialist, Court Services/Collection Clerk, Parking Enforcement Officer, Office Specialist—Code Enforcement, and Code Compliance Officer. The Senior Court Clerk position first appears in the Appendix A salary schedule for fiscal year 2015-2016. The City

created the Senior Court Clerk position in June 2015, but did not fill it until October 2016, as explained below.

28. The parties began negotiations for the 2016-2019 agreement in early 2016. At that time, there were only two bargaining unit Court staff, Wanda Shell and Rena Coultas. Both employees held the position of Court Records Specialist. Shell had been promoted from Court Services/Collections Clerk in May 2014. In October 2016, the City promoted Shell to the position of Senior Court Clerk. Coultas and Shell have been members of the Association bargaining unit since they started working for the City. Court Records Specialist Rena Coultas had worked for the City municipal court for more than 23 years at the time of hearing. The parties have always treated Municipal Court Manager Merri Ebbighausen as a statutory supervisor who is not part of the Association unit.

29. During bargaining for the 2016-2019 agreement, the City proposed to remove Court staff from the Association bargaining unit. The Association responded that it was unwilling to exclude Court staff by agreement. The parties negotiated a written tentative agreement, signed June 14, 2016, stating that the City could submit the issue to ERB. That language was included in the final, ratified collective bargaining agreement and appears below.

30. The Union ratified the tentative agreement on June 22, 2016. The City Commission ratified the tentative agreement on July 20, 2016.

31. The final agreement states that its term is July 1, 2016 through June 30, 2019.

32. The recognition clause for the 2016-2019 agreement states:

“The City recognizes the Association as the sole and exclusive bargaining agent for all full-time or regular part-time employees working fifteen (15) hours or more per week for the City, excluding temporary, supervisory and confidential employees but including Police Officers, Senior Police Officers, Police Sergeants, Community Services Officers, Property Officer, Police Records Specialist, Senior Records Specialist, Parking Enforcement Officers, and Code Enforcement and Code Compliance Officers (except those enforcing building, fire and other codes and regulations not ordinarily and customarily enforced by a municipal police department).

“As of July 1, 2016, the City shall have the right to petition the Oregon Employment Relations Board (ERB) and initiate proceedings to remove the Court Services/Collections Clerk and the [Court Records Specialist] from the bargaining unit on bases which include lack of community of interest, conflict of interest, appearances to the Court and community that Court staff answer to police supervisors, and objections raised by the City Attorney [and] the Municipal Court Judge. This agreement shall not constitute a contract bar to any such petition and ERB proceeding.”

### Issues arising from Court staff and police staff being in the same bargaining unit

33. In 2013, Finance Director Parno had discussions with Court staff about providing better service to the public. Parno began to discuss the possibility of combining supervision and management of Court staff with police to improve service and efficiency.

34. In the summer and fall of 2013, a former Municipal Court Judge and then-Prosecuting Attorney Ron Gray raised concerns about comingling of police and Court staff duties, common police and Court staff supervision, Court staff collecting fees for the police department, and an appearance of a conflict of interest for Court staff.

35. Parno discussed Gray's concerns with then-City Manager David Frasher. Parno also shared the information he had collected with the Human Resources Director Jim Loeffler, and then-Police Chief Mike Conrad.

36. Conrad expressed concern to Loeffler regarding the comingling of court and police staff, and expressed his opinion that Court staff should not be in the Association bargaining unit. Loeffler discussed removing Court staff from the bargaining unit with Frasher, Parno, and subsequent Police Chief Band.

37. The City officials' concerns were inspired not only by Parno's plan to combine the police and court supervision, but also the police traffic diversion program. In that program, people submitted money to the court to attend a traffic school run by police. The concern of City officials was also inspired in part by a situation in the city of Coburg, Oregon. Coburg's police attempted to use strict traffic supervision of nearby Interstate 5 to generate large sums for Coburg's budget.

38. In fall 2013, an attorney for the City told City labor counsel Akin Blitz that the City wished to remove the court positions from the Association bargaining unit because of the appearance of a potential conflict of interest. Blitz replied that the City would have to wait until bargaining for a successor contract to raise the issue because the positions were covered by the then-current Association contract.

### The Oregon City Police Department

39. The Oregon City Police Department operates 24 hours per day and 365 days per year. The department responds to emergency calls, and enforces state criminal law and non-criminal provisions of the City Code. There are approximately 56 City employees working in the police department.

40. The police department consists of both sworn (DPSST-certified police officers and command staff) and non-sworn positions. Within the police department, there are approximately 30 sworn strike-prohibited employees and approximately 15 non-sworn strike-permitted employees.<sup>8</sup> The department is divided into an operations division and a support division, headed by the Operations Captain and the Support Captain, respectively.

---

<sup>8</sup>The Association unit, as a whole, is strike-prohibited, regardless of the status of unit employees individually.

## Supervision

41. The Police Chief directly supervises the Operations Captain and the Support Captain. All of the personnel under the Operations Captain are sworn officers. The Support Captain oversees both sworn and non-sworn personnel. No police department employee has supervisory authority over any of the municipal court staff.

## Interchange, transfer, and promotion

42. Promotion and transfer of positions within the police department generally follows the chain of command. There is no direct promotion or transfer between non-sworn and sworn personnel, although non-sworn personnel may have some advantages if they choose to become DPSST-certified and pursue a career as a sworn officer.

## Physical location and worker interaction

43. The physical location of the police department employees is described in the court employee section above. Sworn police officers often work out of the office, as do several unsworn staff. Interactions between police employees and court employees are also described above. Like court staff, police employees rarely go to other city buildings, except, occasionally, the fire station.

## Duties: Sworn Officers (Police Officer, Senior Police Officer, and Police Sergeant)

44. The duties of sworn officers are as follows:

“This is full performance law enforcement and crime prevention work. Employees occupying positions of this class are responsible for the protection of life and property through enforcing statutes and laws; rendering emergency assistance to the public in a wide variety of situations; performing standard crime and accident prevention duties; serving arrest warrants; dispatching police services; issuing citations for violation of city ordinance and state statutes; identifying and recovering stolen property; investigation of traffic accidents and initial investigation of crimes; deciding whether to arrest or not, as well as when to use force or firearms. Work involves an element of personal danger and incumbents are responsible for enforcing statutes and laws with minimal supervision.”

Some sworn officers have specialized assignments, such as detective, traffic officer, and school officer.

## Non-sworn personnel

45. The City’s non-sworn police positions are the Police Senior Record Specialist, Property Officer, Community Outreach Coordinator, Community Service Officer, Parking Enforcement Officer, Office Specialist—Code Enforcement, and Code Compliance Officer.

46. The Police Senior Record Specialist provides technical assistance to coworkers, oversees daily operations of the police records unit, and performs directly related work as required. The employee is also responsible for developing, implementing, and overseeing the entry and storage of the data to the records management system. The employee also responds to records requests from the public and generates statistical reports related to police activities. The employee enters police reports, files and processes traffic citations, and performs a number of other clerical tasks as requested by officers. The employee also serves as the receptionist for the police department. The Police Senior Records Specialist's other duties include processing insurance requests, completing juvenile expungement orders, maintaining required LEDS records and validations for the police department, and maintaining an officer subpoena log.

47. The Property Officer receives, inventories, stores, controls, and preserves evidence and property connected with criminal activities and lost and found property. The employee also maintains inventory systems and ensures that the chain of evidence is preserved.

48. The Community Outreach Coordinator is responsible for work planning, implementing, coordinating, and administering a comprehensive community outreach program for the police department. The coordinator serves as a liaison between the public and the department, facilitates community meetings and other means of communication, and coordinates opportunities for residents, businesses, and community groups to become more involved and informed about the police department.

49. The Community Service Officer performs community-service work that does not require the enforcement authority of a sworn police officer, intakes information on crimes or incidents that are of a non-emergency nature, and provides customer information on laws and basic mediation and counseling or referral to families, the homeless, people with disabilities, and the elderly.

50. The Parking Enforcement Officer enforces parking ordinances by patrolling timed parking spaces and city streets.

51. The Office Specialist—Code Enforcement performs clerical functions related to the code enforcement mission of the police department. There is no separate job description for the office specialist assigned to code enforcement, and the City uses the job description entitled "Office Specialist II" for this position.

52. The Code Compliance Officer assists businesses and residents with enforcement of laws, regulations, and codes designed to abate nuisances, protect zoning, support public safety, preserve property maintenance, sanitation, and health, and enforces some traffic regulations.

### Skills and training

53. Sworn police officers must be certified by DPSST. To obtain DPSST certification as a police officer, officers must undergo specific training in law enforcement practices and techniques at the DPSST Police Academy. Officers must complete continuing education requirements and comply with ethical standards to maintain certification.

54. The skills and training of non-sworn personnel vary by position. The Senior Police Records Specialist position requires in-depth knowledge of the department's record-keeping system and other internal processes that ensure the proper storage, security, and accessibility of department information, and five years' experience in law enforcement records management. The Senior Police Records Specialist is also responsible for training other police records specialists in all aspects of police records functions. The Police Records Specialist position requires similar skills at a less advanced level, including knowledge of data entry, transcription equipment, computers, and filing.

55. The Property Officer position requires specialized knowledge in the applicable laws governing evidence and property, and in the methods and procedures for storing property in the possession of the police department. The position requires two years' experience with document control, record management, and file maintenance. Police department experience is preferred, but not mandatory for the position.

56. The Office Specialist—Code Enforcement employee is required to have the standard abilities of a clerical employee as well as the ability to learn the specific processes and procedures of the code enforcement unit.

57. The Community Outreach Coordinator is required to have in-depth knowledge of community outreach programs and services, the ability to use mass media techniques, an associate's degree in criminal justice, sociology, or a related field, law enforcement experience, community policing experience, LEDS certification, completion of a basic mediation course, and other skills and abilities that relate to the duties of the position.

58. The Community Service Officer position requires knowledge of, and skill at, accessing, researching, and entering information into law enforcement computerized databases, and working knowledge of departmental rules, regulations, and operating procedures related to the entry and storage of information. The employee must also have the ability to rapidly assess critical situations involving the public and remain calm in emergencies or threatening situations. The position also requires two years' experience in a police department or a social service or social work background.

59. The Code Compliance Officer position requires a working knowledge of codes, regulations, and laws governing building and land use, basic knowledge of the permitting process, and other specialized knowledge of the policies and practices of the police department. The position requires a high school diploma and a year of experience in administrative support or customer service, preferably in law enforcement, planning, or building.

60. The Parking Enforcement Officer is required to have a basic knowledge of codes, regulations, and laws governing vehicle parking and basic knowledge of the process for serving parking citations. The position requires a high school diploma and a year of experience involving customer service.

### Wages and benefits

61. Sworn personnel receive higher base wages than non-sworn personnel and Court staff. The starting monthly salaries for police department bargaining unit positions are as follows: Police Sergeant, \$6,804; Senior Police Officer, \$5,145; Police Officer, \$5,084; Community Outreach Coordinator, \$3,700; Senior Police Record Specialist, \$3,645; Code Compliance Officer, \$3,477; Community Services Officer, \$3,426; Property Officer, \$3,426; Police Records Specialist, \$3,312; Office Specialist—Code Enforcement Officer, \$3,149; and Parking Enforcement Officer, \$2,840. Some pay incentives are available only to sworn personnel. These include an on call/page differential, certification premiums, field training officer premium, canine premium, and the school resource officer premium. Other premiums are available only to non-sworn personnel, such as longevity pay and records shift differential pay. All represented employees in the police department receive the same insurance benefits. Sworn officers eligible for Public Employees Retirement System Tier 1 benefits may retire at a younger age than non-sworn Tier 1 staff and their benefit may be calculated differently.

### Hours of work

62. The City's standard hours of work policy does not apply to the police department. The police department is a 24-hour operation with sworn officers working at all times on three different shifts—day, swing, and graveyard. The police department does not close during inclement weather. Sworn officers typically work a substantial amount of overtime throughout the year based on operational needs.

63. Non-sworn personnel in the police department generally work normal business hours, but may work outside those hours because of operational needs of the department. Property officers may travel to a crime scene to assist with the gathering and custody of evidence. One Community Service Officer performs computer forensic work and occasionally does so outside of standard business hours. The Community Outreach Coordinator routinely meets with the public in the evenings. The Senior Records Specialist and Police Records Specialists may also be required to work early morning, late evening, and weekend shifts.

### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. Pursuant to OAR 115-025-0000(1)(e), the positions of Court Services/Collections Clerk and Court Records Specialist are part of an appropriate bargaining unit represented by the Association.<sup>9</sup>

### Standards for decision

The City seeks to remove two strike-permitted municipal court positions from a mixed bargaining unit of strike-permitted and strike-prohibited police department and municipal court

---

<sup>9</sup>OAR 115-025-0000(1)(e) was renumbered OAR 115-025-0000(6) in the revised rules, effective February 1, 2017.

employees. Pursuant to OAR 115-025-0000(1)(e), an employer may file a petition for unit clarification by redesignation “contending that the existing bargaining unit includes an employee or employees who should not be included in such bargaining unit under the criteria set forth in ORS 243.682(1)(a).” ORS 243.682(1)(a) requires that we consider such factors as the “community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees.” This Board has defined community of interest factors to include similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, and common supervision. *See, e.g., Klamath Community College Faculty Association, OEA/NEA v. Klamath Community College*, Case No. CC-03-09 at 13-14, 23 PECBR 484, 496-97 (2010); *Oregon School Employees Association v. South Coast ESD, Region #7*, Case No. RC-10-00 at 6, 19 PECBR 58, 63 (2001).

This Board has held that the “should not be included” language in OAR 115-025-0000(1)(e) “requires us to find that employees have a clearly distinct community of interest to justify their redesignation out of the unit.” *Executive Department, State of Oregon v. Oregon Public Employees Union*, Case No. UC-7-89 at 11, 12 PECBR 59, 69 (1990). In addition, “to prevail in such a case the petitioning employer must show that the unit is not an appropriate unit. Put another way, the employer must prove that certain included employees have a community of interest that is clearly distinct from the other unit employees.” *State of Oregon, Executive Department v. AFSCME Local 2623 and Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections and AFSCME Local 2623*, Case Nos. UC-84/85-91/RC-31-92 at 11-12, 14 PECBR 35, 45-46 (1992).

Although the City seeks to remove some, but not all, strike-permitted employees from the Association unit, their strike-permitted status remains an important factor in the case, and we therefore follow the analysis set out in *Josephine County v. Josephine County Sheriff’s Association*, Case No. UC-01-12, 25 PECBR 189 (2012). In that case, this Board identified six factors that affect the decision regarding redesignation petitions proposing to split bargaining units that contain both strike-prohibited and strike-permitted employees. Those factors are whether (1) all of the employees are organized with some common supervision and compensation patterns; (2) the community of interest among the employees is a stronger factor than the loss of the strike-permitted employees’ right to strike; (3) fragmentation is avoided; (4) strike-prohibited employees constitute the larger percentage of persons in the unit; (5) the unit has historically been mixed; and (6) regarding a consent unit, the employer shows a significant change in circumstances. *Josephine County*, Case No. UC-01-12 at 14, 25 PECBR at 202, citing *State of Oregon, Oregon State Penitentiary v. American Federation of State, County, and Municipal Employees and State of Oregon, Oregon Women’s Correctional Center v. American Federation of State, County, and Municipal Employees*, Case Nos. UC-19/20-87 at 10, 10 PECBR 144, 153 (1987).

Finally, in making a decision on a redesignation petition:

“[W]e are charged with considering all of the criteria in ORS 243.682(1)(a). Based on this charge, one of the six factors this Board considers regarding a petition for redesignation of a mixed unit is the percentage of strike-permitted employees in the unit. Another factor is whether the bargaining unit employees’ community of interest is stronger than the loss of an employee’s right to strike. However, an employee’s strike-permitted status in a strike-prohibited bargaining unit is not

controlling on our determination, just as the desires of the employees are not controlling. These factors are only part of the identified criteria that we consider in determining whether to remove the employees from their current unit.” *Josephine County*, Case No. UC-01-12 at 14, 25 PECBR at 204.

We now apply the six factors to determine if the two petitioned-for strike-permitted employees have a clearly distinct community of interest from the mixed Association unit of strike-prohibited and strike-permitted bargaining unit employees.

### Analysis

#### 1. Supervision and compensation patterns

The three strike-permitted municipal court staff and the strike-prohibited and strike-permitted police department employees in the Association bargaining unit generally do not work under common supervision. The Police Chief is the head of the police department, and the Operations Captain supervises the strike-prohibited sworn employees, while the Support Captain supervises the strike-permitted unsworn police employees. The Municipal Court Manager, who reports to the Finance Director, supervises both petitioned-for positions as well as the Senior Court Clerk.

The City argued that the lack of common supervision puts the Police Chief in a difficult position if he should ever have to resolve a grievance. Multiple chains of authority across bargaining units are common, however. The City’s other bargaining unit is such a unit, and its collective bargaining agreement grievance process uses generic titles for managers such as “direct supervisor” and “department director.” The issue that the City identifies is an artifact of the parties’ failure to have the grievance process in the collective bargaining agreement refer to police supervisors instead of more general language. There is no evidence that the City has sought to change that language. The hiring of the new Finance Director in 2012 was now four years ago, without any evidence of tangible negative effects. We conclude that the multiple chains of authority do not support the petition.

At present, the petitioned-for Court staff and the rest of the Association bargaining unit have common compensation patterns.<sup>10</sup> Wages under the parties’ agreement are established by classification based on a salary schedule. Sworn, strike-prohibited employees of the police department have higher salaries than unsworn police staff or Court staff, ranging from \$5,084 to \$6,804 per month in the 2016-2017 fiscal year. However, the salaries of unsworn police staff and Court staff are comparable. The monthly starting salaries of Court staff are Senior Court Clerk, \$3,645; Court Records Specialist, \$3,312; and Court Services/Collections Clerk, \$2,744. The starting salaries of unsworn police staff are Community Outreach Coordinator, \$3,700; Senior Police Record Specialist, \$3,645; Code Compliance Officer, \$3,477; Community Services Officer,

---

<sup>10</sup>The City argues that Court staff salaries are inflated due to their presence in the strike-prohibited Association unit, and sought to introduce evidence of allegedly comparable positions in other jurisdictions. This Board has never relied on a comparability analysis regarding allegedly similar jobs with other employers in determining the appropriate bargaining unit status of employees, and we decline to do so here.

\$3,426; Property Officer, \$3,426; Police Records Specialist, \$3,312; Office Specialist—Code Enforcement Officer, \$3,149; and Parking Enforcement Officer, \$2,840.

2. Community of interest v. loss of right to strike

The duties and skills of the police department members of the bargaining unit generally differ from the petitioned-for Court staff. The municipal court staff duties and skills have little in common with the sworn police officers or unsworn employees who perform code enforcement or community outreach. However, the duties and skills of the petitioned-for Court staff and the Police Records Specialist are similar. The duties and skills of the petitioned-for Court staff are very similar to that of the Senior Court Clerk, who is also part of Court staff. The benefits of the non-sworn police employees and municipal court employees are substantially the same. There have been no instances of transfer or promotion of employees between the two departments, but the promotion path of the two petitioned-for employees includes the Senior Court Clerk position, which will remain in the Association unit. The same pattern holds for the supervision of these employees.

We note that the police and court employees work out of a single, largely secured building and have frequent interactions with each other, and limited interactions with City employees in other locations. Police and court employees share a common interest in the proper administration of state and municipal law, but the adjudicatory function of the municipal court is clearly distinct from the police law enforcement function. However, we note again that the Senior Court Clerk position would remain in the Association unit regardless of our decision in this case.

The loss of the right to strike is of less consequence than the community of interest between the petitioned-for employees and the Senior Court Clerk. Court staff is barred from striking because of their membership in the Association unit, but “this is not a situation in which employees stand to lose the right to strike, since they have not had the right to strike throughout the bargaining unit’s \* \* \* existence,” in this case at least 33 years. *See Josephine County*, Case No. UC-01-12 at 18, 25 PECBR at 206. In addition, the petitioned-for employees wish to remain in the Association unit. Here, then, the desires of the strike-permitted employees to remain in the current bargaining unit override our concern that these employees will be deprived of their right to strike. *See Oregon State Penitentiary*, Case Nos. UC-19/20-87 at 12, 10 PECBR at 155.

3. Avoiding fragmentation

In a redesignation petition in which an employer seeks to remove strike-permitted employees from a mixed unit, we attempt to avoid undue fragmentation. Here, the City has alternatively asserted that granting its petition would and would not unduly fragment the workforce. Because of the ambiguity and uncertainty on the fragmentation issue (and because the other factors warrant dismissing the petition), we need not decide whether granting the petition would result in undue fragmentation.

4. Percentage of strike-prohibited employees

The effect of the loss of these two employees from the Association bargaining unit has no meaningful impact on the percentage of strike-prohibited employees in that bargaining unit. At present, the Association unit has 15 strike-permitted employees out of a bargaining unit of approximately 50.

5. History of collective bargaining

The current Association bargaining unit has existed in essentially the same form since 1984, with the consent of both parties until the City filed this petition. New Court staff positions have been added to the unit with the consent of both parties. There is no evidence of instability in labor-management relations.

6. Significant change in circumstances

The City argues that there have been three significant changes in circumstances since it consented to the current bargaining unit structure in 1984.

First, the City points to the passage of Senate Bill 750 in 1995, which it argues “substantially changed the nature of collective bargaining for strike-prohibited units by changing the statutory criteria for deciding interest arbitrations and changing to a ‘winner-take-all model.’” The difficulty with this argument is that the City has lived with the impact of Senate Bill 750 for more than 20 years, for multiple collective bargaining agreements, during which time it has never sought to change the composition of the Association unit. The effects of 1995’s Senate Bill 750 are too long ago to constitute a significant change supporting a petition for redesignation in 2016.

Second, the City argues that “the change in supervision of the Court staff in 2012” was another “significant change.” The City refers to the hiring of the new Finance Director in 2012. Although the new Finance Director was perceived as a more active supervisor than his predecessor, Court staff had been supervised before 2012 by the previous Finance Director. This particular change is not a significant change in circumstances that warrants redesignation.

Third, the City states that its 2013 discovery that a proposed combination of police and court functions led a Municipal Court Judge and other officials to suggest that such a combination would raise issues of conflict of interest. The City points to the City of Coburg’s attempts to use strict traffic supervision of nearby Interstate 5 to generate large sums for Coburg’s budget. The City also points to statements by a prior Police Chief that having Court staff in the Association bargaining unit also presented such a conflict. The City, however, has failed to establish the existence of any actual conflict of interest, and we see none.

The City also argues that the bargaining unit status of Court staff also creates a public perception of a conflict of interest. The City did not present any actual evidence of such a perception. The fact that the municipal court shares a building with the police department, the frequent movement of Court and police staff between the departments, and the resultant familiarity of police and Court staff would appear to be more noticeable to citizens who visit the court or

police than the employees' bargaining unit status. In addition, the City's discovery of this alleged police/court conflict of interest after 32 years is not itself a change in circumstances—these issues were as applicable in 1981 as they were when this petition was filed.

Finally, even if we accepted the City's arguments regarding changes in circumstances, and their effects, the petition would not alleviate those effects because the Senior Court Clerk would remain in the Association unit. We conclude that there has been no relevant change in circumstances since the City's 1981 consent, and subsequent consents, to remove the Court staff positions from the Association's bargaining unit.

Conclusion

Whatever the merit of a redesignation petition seeking to separate all Court staff from the Association bargaining unit, this petition would leave one of only three Court staff in the Association unit. For the reasons discussed above, we conclude that the two petitioned-for Court staff do not have a clearly distinct community of interest from the rest of the Association unit. Therefore, we will dismiss the petition.

ORDER

The petition is dismissed. The Court Services/Collection Clerk and Court Records Specialist in the City municipal court remain part of the Association bargaining unit.

DATED September 14, 2017.



---

Adam L. Rhynard, Chair



---

Lisa M. Umscheid, Member



---

Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-024-17

(UNFAIR LABOR PRACTICE)

PORTLAND ASSOCIATION OF	)	
TEACHERS/OEA/NEA,	)	
	)	
Complainant,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND ORDER
MULTNOMAH COUNTY SCHOOL	)	
DISTRICT NO. 1J (OPERATING AS,	)	
PORTLAND PUBLIC SCHOOLS),	)	
	)	
Respondent.	)	

Elizabeth Joffe and Noah Barish, Attorneys at Law, McKanna Bishop Joffe LLP, Portland, Oregon, represented Complainant.

Jeffrey P. Chicoine and Ivan Resendiz Gutierrez, Attorneys at Law, Miller Nash Graham & Dunn LLP, Portland, Oregon, represented Respondent.

On July 13, 2017, Portland Association of Teachers/OEA/NEA (PAT) filed a complaint alleging that Multnomah County School District No. 1J, operating as Portland Public Schools (District), violated ORS 243.672(1)(e) by pursuing an unlawful subject of bargaining. PAT requested that the complaint be expedited under OAR 115-035-0060, and on July 18, PAT filed an affidavit as required by that rule.<sup>1</sup>

The Board exercised its discretion to expedite the complaint. Thereafter, the District filed a motion requesting that the complaint not be expedited. After receiving PAT’s response, the Board adhered to its decision to expedite the complaint.

The District filed a timely answer. Pursuant to the terms of a prehearing order, the parties submitted prehearing briefs on August 18, 2017. On August 23, this Board conducted a hearing in Tualatin, Oregon. At the end of the hearing, both parties provided the Board with closing oral arguments. The Board further allowed the parties to file any post-hearing briefs by August 30, which both parties did. The District, in its post-hearing brief, announced that it was now

<sup>1</sup>On July 20, PAT filed an amended affidavit.

withdrawing the proposal that prompted PAT's complaint. The District asserted that such a withdrawal rendered this matter moot.

The Board allowed PAT an opportunity to respond to the District's withdrawal of the proposal and the argument that the matter was moot. PAT disagreed that the matter was moot and submitted a response to the mootness assertion on September 6. The record closed on September 6, upon receipt of PAT's response.<sup>2</sup>

The issues are:

1. Should the complaint be dismissed as moot?

2. Did the District violate ORS 243.672(1)(e) by unlawfully pursuing a prohibited subject of bargaining when it continued to pursue a proposal that excluded substitute teachers from the application of ORS 332.507?<sup>3</sup>

For the reasons set forth below, we conclude that the complaint should not be dismissed as moot, and that the District violated ORS 243.672(1)(e).

### RULINGS

The parties stipulated to the receipt of all exhibits, with the following exceptions: C-5, C-8, and R-12 through R-16. The Board reserved decision on the receipt of those exhibits until the issuance of this order.

The District objected to the receipt of Exhibits C-5 and C-8 on the grounds of hearsay and relevancy. Those documents are separate emails in which PAT counsel outlined PAT's position regarding the applicability of ORS 332.507 to substitute teachers. Under OAR 115-010-0050(1), "[e]vidence of a type commonly relied on by reasonably prudent persons in conduct of their serious affairs shall be admissible," subject to the exclusion of "[i]rrelevant, immaterial or unduly repetitious evidence," OAR 115-010-0050(2). Here, the evidence was not offered for the truth of the matter asserted and, therefore, does not constitute hearsay. In any event, hearsay is admissible in this Board's hearings, so long as it is otherwise admissible. In that respect, we disagree with the District's assertion that the emails are irrelevant. The emails, at a minimum, demonstrate PAT's position regarding the applicability of ORS 332.507 to substitute teachers, as well as PAT's efforts to communicate that position to the District. Consequently, C-5 and C-8 are received.

PAT objected to the receipt of Exhibits R-12 through R-16. Exhibits R-12 through R-14 were offered in support of the District's defense to a claim that has now been withdrawn. Because

---

<sup>2</sup>On September 14, 2017, the District submitted substantial additional legislative history. Because the District submitted the material without prior leave to do so or the consent of PAT, we have not considered the information at this time.

<sup>3</sup>PAT also alleged that the District's proposal violated ORS 243.672(1)(e) by unlawfully pursuing a prohibited subject of bargaining with respect to the Oregon Sick Leave Law (discussed below). However, at hearing, the District agreed to withdraw the contested language, and PAT agreed to withdraw that claim.

those exhibits are no longer relevant or material to the issue before us, those exhibits are not received.

Exhibits R-15 and R-16 are excerpts of legislative history that the District has provided in support of its defense. Although PAT may be correct that those documents are not technically “evidence,” the District has provided those documents for ease of this Board’s reference in assessing the merits of the case. The exhibits are received for that purpose.

## FINDINGS OF FACT

### The Parties

1. PAT is a labor organization within the meaning of ORS 243.650(13) and is the exclusive representative of all substitute teachers employed by the District.

2. The District is a public employer within the meaning of ORS 243.650(20).

3. The District and PAT have been parties to a series of collective bargaining agreements regarding substitute teachers, the most recent one of which contained a June 30, 2016, expiration date. The parties agreed to extend the terms of that agreement through December 30, 2016.

4. Substitute teachers, like all other teachers, must be licensed under Oregon law. When the District hires a substitute teacher, the District places the substitute on a list. Typically, when the need for a substitute teacher arises, the District makes the assignment available through its electronic systems to all qualified substitutes on the list. The first qualified substitute to select the assignment receives the assignment. A substitute generally has the discretion to decide whether to select a particular assignment. Substitutes may work simultaneously for multiple school districts.

5. In the District, a substitute-teacher assignment can be up to 60 workdays. The District treats assignments that are longer than 60 workdays (up to two years) as temporary-teacher assignments.<sup>4</sup> If a substitute teacher’s assignment is extended past 60 workdays, the District converts the substitute into a temporary teacher for the purposes of determining which collective bargaining agreement applies and calculating their employment benefits, including paid sick leave. If a substitute teacher works more than 60 workdays through two or more separate assignments, they remain a substitute (they are not converted to a temporary teacher). A substitute teacher may work only sporadically throughout the school year. It is also possible for a substitute teacher to work nearly the same number of workdays in a school year as a full-time teacher, if they work a sufficient number of assignments.

---

<sup>4</sup>PAT is also the exclusive representative of a separate bargaining unit comprised of full-time, part-time, and temporary teachers and other academically licensed personnel employed by the District. The District does not contend that ORS 332.507 is inapplicable to the employees represented in that bargaining unit; PAT does not assert that the sick-leave provision of that unit’s collective bargaining agreement conflicts with ORS 332.507.

## Oregon Sick Leave Law

6. In 2015, the Oregon Sick Leave Law was enacted with an effective date of January 1, 2016. *See* 2015 Or Laws ch 537 § 2. The law requires certain employers to provide a minimum amount of paid sick leave to certain employees.

7. Thereafter, the District and PAT signed a memorandum that applied some mandates of the Oregon Sick Leave Law to substitute teachers. Specifically, the memorandum stated that District substitute teachers who worked during the 2015-2016 school year “may be eligible for sick leave payment pursuant to the Oregon Sick Leave Law.” The memorandum further stated that “employees accrue sick leave time on the basis of one hour for every thirty hours worked subsequent to January 1, 2016.” The memorandum directed substitute teachers on how to file requests for sick leave payments for the 2015-2016 school year.

## ORS 332.507

8. ORS 332.507 requires public school districts to provide a minimum of paid sick leave for their employees. ORS 332.507 preceded the passage of the Oregon Sick Leave Law.

9. ORS 332.507(2) states that “[e]ach district shall allow each school employee at least 10 days’ sick leave at full pay for each school year or one day per month employed, whichever is greater.”

10. ORS 332.507(1)(a) states that “[s]chool employee’ includes all employees of a public school district or an education service district.”

11. ORS 332.507(1)(b) states that “[s]ick leave’ means absence from duty because of a school employee’s illness or injury or as otherwise provided for by law or by provisions of a collective bargaining agreement. In case of conflict with a rule adopted to interpret a law, the collective bargaining agreement to which the parties agree shall govern.”

## Bargaining over Sick Leave for Substitute Teachers

12. On November 9, 2016, the parties held their first bargaining session for a successor agreement. The parties discussed ground rules, but did not exchange contract proposals on that date.

13. John Berkey, a UniServe Consultant for the Oregon Education Association, served as PAT’s chief spokesperson.

14. Laird Cusack, the District’s Senior Director of Employee and Labor Relations, served as the District’s chief spokesperson.

15. At the November 9 bargaining session, Berkey raised the issue of paid sick leave, stating that he had recently become aware of ORS 332.507 when looking into how the Oregon Sick Leave Law would affect substitute teachers. Berkey stated PAT’s position that ORS 332.507,

not the Oregon Sick Leave Law, set the statutory floor for paid sick leave for substitute teachers. Berkey indicated that he had obtained a legal opinion supporting that position. Berkey further stated that PAT intended to submit a proposal that substitute teachers be afforded sick leave in accordance with ORS 332.507.

16. On November 22, both parties exchanged initial proposals. PAT did not include a sick-leave proposal. The District provided a paid-sick-leave proposal intended to comply with the Oregon Sick Leave Law (*i.e.*, one hour of paid sick leave for every 30 hours worked). Berkey reiterated PAT's position that a paid-sick-leave proposal would need to comply with ORS 332.507. Cusack asked PAT to provide the District with any legal authority supporting PAT's position.

17. On November 29, PAT counsel emailed District counsel with PAT's position and reasoning that ORS 332.507 applied to substitute teachers, and that any paid-sick-leave proposal would need to comport with the requirements of that statute.

18. On November 29, the parties also met for a bargaining session. Berkey informed the District team that PAT counsel had emailed District counsel regarding ORS 332.507. The District did not have time to review PAT's submission before the session.

19. On January 10, 2017, PAT provided a sick-leave proposal intended to comply with ORS 332.507, and that included a sick-leave accrual formula for substitute teachers that was prorated based on days worked (and a different formula to provide sick-leave credit for prior years worked). The District responded that it was still assessing its position as to whether ORS 332.507 applied to substitute teachers.

20. In the following weeks, on multiple occasions both at and away from the bargaining table, Berkey asked District representatives if the District had consulted with its counsel regarding ORS 332.507 or reached any conclusions. The District continued to inform PAT that it was still assessing its position.

21. After additional bargaining sessions on February 14 and March 13, 2017, the parties met on March 24, 2017, and discussed paid sick leave. The parties did not exchange new written proposals, but they discussed the District's concern that administering PAT's proposal would be difficult because the accrual formula was based on days worked. Although the District made clear that it was not agreeing to PAT's proposal, the parties entertained ways to address that concern, including by converting PAT's proposed accrual formula to one based on hours worked instead of days worked.

22. In April 2017, PAT again asked the District whether it had received an opinion or information from its legal counsel regarding ORS 332.507 and substitute teachers. When the District responded that it had yet to receive anything from its counsel, PAT asked its counsel to contact District counsel again. PAT counsel spoke with District counsel and, on April 24, 2017, re-sent the November 29, 2016, email regarding the applicability of ORS 332.507 to substitute teachers (along with some additional statements in support of PAT's position).

23. After bargaining sessions on May 10 and 25, 2017, the parties met again on June 1, 2017. In that June 1 session, PAT again asked the District whether it had a sick-leave proposal that complied with ORS 332.507. The District's chief spokesperson, Cusack, stated that he did not yet have enough information about ORS 332.507 to make a sick-leave proposal.

24. On June 29, 2017, the parties held their final bargaining session to date. At that session, the District presented a sick-leave proposal that was substantially the same as its November 22, 2016, proposal. In doing so, the District explained that it had concluded that substitute teachers were excluded from the coverage of ORS 332.507. When PAT asked the District to explain its position, the District did not provide PAT with its rationale or other information, but only reiterated its position that ORS 332.507 did not apply to substitute teachers, and that its proposal reflected that position.

### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. We decline the District's request to dismiss the complaint as moot.

In its August 30, 2017, post-hearing brief, the District stated that it was withdrawing the proposal that prompted PAT's complaint. In that brief, the District also asserted that it would continue to bargain over paid sick leave (but was not obligated to make a proposal on ORS 332.507 or any other statutory obligation). The District also stated that "there is nothing in the record to suggest that the District will make another bargaining proposal similar to the withdrawn proposal." The District, however, maintained that ORS 332.507 does not apply to substitute teachers. Based on these assertions in its post-hearing brief, the District argues that the dispute is moot and the complaint should be dismissed. PAT maintains that the matter is not moot. For the following reasons, we decline the District's request to dismiss the complaint.

"Mootness" is a term of art that applies only to the courts and not to administrative agencies. *Wallace v. State ex rel PERS*, 249 Or App 214, 220-21, 275 P3d 997, *rev den*, 352 Or 342 (2012); *Thunderbird Hotels, LLC v. City of Portland*, 218 Or App 548, 556-57, 180 P3d 87 (2008). As such, the District's reliance on *Association of Oregon Corrections Employees v. DOC*, 266 Or App 496, 503-10, 337 P3d 998 (2014), and the standards for when a court might consider a case moot is misplaced. This Board has admittedly at times employed the courts' mootness jurisprudence to determine whether a dispute before the Board is moot. *See, e.g., Jefferson County v. Oregon Public Employees Union*, Case No. UP-18-99 at 10, 20 PECBR 217, 226 (2003) (Order on Remand), citing *Brumnett v. PSRB*, 315 Or 402, 405-06, 848 P2d 1194 (1993). With this order, we clarify and adhere to court precedent that mootness (as used by the courts) does not apply to proceedings before this Board.

Nevertheless, the courts have indicated that an agency (such as this Board) might have its own statutory authority to dismiss matters as moot. *See Just v. City of Lebanon*, 193 Or App 132, 137-47, 88 P3d 312 (2004), *rev dismissed*, 342 Or 117, 149 P3d 139 (2006) (constitutional justiciability principles that are applicable to courts, including principles relating to mootness and standing, do not apply to Land Use Board of Appeals (LUBA); when LUBA dismisses an appeal

on mootness grounds, it does so pursuant to statutory provisions relating to its own decision-making authority). The statutory provisions governing this dispute (the Public Employee Collective Bargaining Act (PECBA)) do not expressly reference “mootness,” although this Board is authorized to dismiss a complaint if no issue of fact or law warrants a hearing. ORS 243.676(1)(b). Likewise, ORS 243.766(3) directs this Board to “[c]onduct proceedings on complaints of unfair labor practices by employers, employees and labor organizations and take such actions with respect thereto as it deems necessary and proper.” It may well be that a concept of “mootness” fits within these statutory directives, and that we are authorized to dismiss a complaint on grounds akin to mootness. In this case, we need not decide all the contours that would shape that statutory authority; here, it is sufficient to decide that we deem it necessary and proper not to dismiss the complaint as requested by the District. We reach that decision for the following reasons.

Under ORS 243.676(2), if this Board finds, after a hearing, that a respondent “has engaged in or is engaging in any unfair labor practice charged in the complaint, [we] shall” (1) state our findings of fact, (2) issue a cease-and-desist order, and (3) take such affirmative action to effectuate the purposes of PECBA. The statutory language (“*has engaged in*”) contemplates that an unfair labor practice has occurred and potentially ceased. Thus, the mere fact that the District is now withdrawing its proposal and no longer unlawfully pursuing a prohibited subject of bargaining does not automatically warrant dismissal of the complaint. Indeed, we have in a variety of contexts rejected similar claims of “mootness” as that raised by the District. *See, e.g., Service Employees International Union Local 503, Oregon Public Employees Union v. University Of Oregon*, Case No. UP-009-15 at 7, 26 PECBR 724, 730 (2016), *appeal pending* (a refusal to provide required information as required by ORS 243.672(1)(e) is not rendered moot by the disposition of a related grievance under the parties’ collective bargaining agreement, or by ultimately providing the information); and *SEIU Local 503, OPEU v. State of Oregon, Department of Transportation*, Case No. UP-11-09 at 21, 23 PECBR 939, 959 (2010) (a claim under ORS 243.672(1)(a) does not become moot by the employer ceasing the behavior or taking other remedial action).

Additionally, the manner and timing of the District’s withdrawal of the at-issue proposal do not persuade us that it would be necessary and proper to dismiss the complaint. Specifically, the District has refrained from withdrawing its proposal at the bargaining table, despite PAT’s protests, for over eight months. Moreover, the District’s withdrawal of the proposal was made in its post-hearing brief after the close of the evidentiary record, rather than at the bargaining table where the scope of the withdrawal and the District’s position regarding the applicability of ORS 332.507 to substitute teachers could more readily and meaningfully be assessed. Under such circumstances, we decline the District’s request to dismiss the complaint.

3. The District violated ORS 243.672(1)(e) when it pursued a bargaining proposal that conflicted with ORS 332.507.

Under ORS 243.672(1)(e), it is an unfair labor practice for a public employer to “[r]efuse to bargain collectively in good faith with the exclusive representative” of its employees. Here, PAT asserts that the District violated this provision by proposing and adhering to a proposal on sick leave for substitute teachers that conflicted with ORS 332.507. As such, PAT asserts that the proposal constitutes a prohibited subject of bargaining, and that the District’s pursuit of that

unlawful subject violated ORS 243.672(1)(e). For the following reasons, we agree with PAT's assertion.

ORS 243.650(4) identifies two specific categories of subjects for bargaining (mandatory and permissive). Moreover, a subject or proposal that is prohibited by law is considered a prohibited subject of bargaining, regardless of whether it might otherwise be described as "mandatory" or "permissive." *Service Employees Int'l Union Local 503 v. DAS*, 183 Or App 594, 598, 54 P3d 1043 (2002). A contractual term is prohibited if it is "specifically contrary to statute or would require a party to act contrary to statute." *Clackamas County Employees' Association v. Clackamas County and Clackamas County Housing Authority*, Case No. UP-032-15 at 6, 26 PECBR 798, 803 (2016), *appeal pending*; *see also Eugene Police Employee Association v. City of Eugene*, Case No. UP-5-97 at 6, 17 PECBR 299, 304 (1997), *aff'd*, 157 Or App 341, 972 P2d 1191 (1998), *rev den*, 328 Or 418, 987 P2d 511 (1999); *Springfield Education Association v. Springfield School District No. 19*, Case No. C-278 at 4, 1 PECBR 347, 350 (1975), *order on remand*, 3 PECBR 1950 (1978), *aff'd as modified*, 290 Or 217, 621 P2d 547 (1980) (A prohibited subject is one that "would require either party to do an illegal act or perform an act [that] is contrary to any other statutory or constitutional provision.").

Consequently, provisions of a collective bargaining agreement (or other written agreement) that involve prohibited subjects are unenforceable, even if agreed to by the parties. *See Portland State University Chapter of the American Association of University Professors v. Portland State University*, Case No. UP-36-05 at 16, 22 PECBR 302, 317, *recons*, 22 PECBR 503 (2008), *aff'd*, 352 Or 697, 291 P3d 658 (2012). Moreover, a party violates ORS 243.672(1)(e) if it insists, even short of impasse, on a proposal that is directly contrary to statute. *See Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case Nos. UP-42/50-12 at 22, 25 PECBR 640, 661 (2013).

Here, PAT asserts that the District's sick-leave proposal for substitute teachers is directly contrary to ORS 332.507 because the proposal excludes all substitute teachers from the paid-sick-leave mandates of that statute. PAT also asserts that the District's proposal is directly contrary to ORS 332.507 because it permits the District to provide less paid sick leave to substitute teachers than the statute requires.

The District responds that its proposal is lawful because ORS 332.507 does not apply to substitute teachers. In its post-hearing brief, the District admits that its "sick leave proposal would be insufficient to comply with the mandate of ORS 332.507," but nevertheless avers that its proposal and bargaining actions were not unlawful.

We disagree with the District's contention (at the bargaining table and in this proceeding) that ORS 332.507 categorically excludes all substitute teachers. To assess the District's argument, we apply the methodology set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), as subsequently modified by *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). We first review the text and context of the statute. We may then review any relevant legislative history offered by the parties. If we are unable to determine the legislature's intent, we then apply maxims of statutory construction. *Id.* The objective of statutory interpretation

is to “pursue the intention of the legislature if possible.” *Gaines*, 346 Or at 165; *see also* ORS 174.020(1)(a).

The first step in determining the legislature’s intent is to examine the statutory text and context. *Gaines*, 346 Or at 171. Context includes other provisions of the same and related statutes, *Multnomah County Corrections v. Multnomah County*, 257 Or App 713, 720-21, 308 P3d 230 (2013), as well as the enactment history and any statutory predecessors, *Long v. Farmers Ins. Co.*, 360 Or 791, 797, 388 P3d 312 (2017). We construe statutes to give effect to all relevant provisions and not to insert what has been omitted or to omit what has been inserted. *AFSCME, Local 2043 v. City of Lebanon*, 360 Or 809, 821, 388 P3d 1028 (2017); *see also* ORS 174.010.

Here, the text of ORS 332.507(2) states that “[e]ach district shall allow each school employee at least 10 days’ sick leave at full pay for each school year or one day per month employed, whichever is greater.” ORS 332.507(1)(a) states that “[s]chool employee’ *includes all employees* of a public school district or an education service district.” (Emphasis added.)

Thus, by its terms, ORS 332.507 applies to “all employees of a public school district.” The District does not dispute that substitute teachers are District employees or that the District is a public school district. The District nevertheless maintains that the statute does not apply to substitute teachers because the legislature did not have any such intention. Or, in the words of the District, “substitute teachers are not the type of employees included in the statute.”

The difficulty with the District’s argument is that it is at odds with the plain text of the statute, which is the best evidence of legislative intent. *See Gaines*, 346 Or at 171 (words used by legislature to give expression to its wishes are best evidence of legislative intent). The statute prescribes that “school employee” includes “all employees” of the District. “The plain and unambiguous meaning of the word ‘all’ is ‘every.’” *Rash v. McKinstry Co.*, 331 Or 665, 672, 20 P3d 197 (2001) (citing *Webster’s Third New Int’l Dictionary*, 55 (unabridged ed 1993)). Given the District’s concession that “substitute teachers” are employees of the District, it is difficult, if not impossible, to conclude that “substitute teachers” are not “school employees” within the meaning of ORS 332.507. At a minimum, agreeing with the District’s assertion would require some extraordinary or overwhelming other indicia of legislative intent.

The District asserts that such intent may be found in the statutory context (including related statutes and predecessors) and legislative history. PAT, likewise, argues that the statutory context supports its construction of ORS 332.507. None of the statutory context or proffered legislative history, however, directly addresses whether “substitute teachers” are “school employees” or not. Rather, the statutory context shows that the definition of “school employee” has changed as follows.

Since at least 1953, ORS 332.507’s predecessor statutes have provided for some form of paid sick leave for public school district teachers. *Former* ORS 342.595 (1953) (requiring paid sick leave for “teachers,” defined as “any person for whom a certificate is required as a basis for employment in a public school”).<sup>5</sup> In 1957, the legislature enacted a related statute that provided

---

<sup>5</sup>Before 1992, Oregon teachers were required to hold “certificates” instead of “licenses.” *See former* ORS 342.120, *et seq* (1989); 1991 Or Laws, ch 662, § 8.

paid sick leave to “all permanent, full-time employees of a public school district except employees covered by ORS 342.595.” *Former* ORS 342.596(1)(a) (1957). In 1963, *former* ORS 342.596(1)(a) (1963) (which applied to non-teachers) expanded the term “employees” to include all “regular employees,” rather than just “permanent, full-time employees.” In 1977, the legislature merged the “teacher statute” and the “non-teacher statute” into a single statute that applied to “all employees” of a public school district. *Former* ORS 342.596 (1977), 1977 Or Laws, ch 880, § 6. In 1993, the statute was renumbered to its current designation (ORS 332.507).

Based on this statutory history, the District argues that “it is not clear whether a substitute teacher employed by the District is a ‘school employee’ under ORS 332.507.” That lack of clarity in the statutory predecessors, however, does not advance the District’s larger argument.<sup>6</sup> Here, the plain text of the current statute states that “school employee” *includes all* employees of the District. The District does not dispute that substitute teachers are employees of the District. Nothing in the statute’s development persuades us that the legislature intended something other than this plain meaning. Indeed, the *expansion* of the term “school employee” over the years to include “all employees” could indicate a legislative intent to broaden the definition as much as possible. If the legislature had intended, as the District argues, to exempt substitute teachers from the provisions of ORS 332.507, it is unlikely that the legislature would have used the term “all employees” or failed to expressly exempt substitute teachers from that sweeping term.<sup>7</sup>

For the foregoing reasons, we conclude that the statutory phrase “school employees” does not categorically exclude all District substitute teachers. The District nevertheless proposed and continued to pursue a proposal that excluded substitute teachers from the coverage of ORS 332.507, and did so over PAT’s protest. Specifically, on November 22, 2016, the District proposed in relevant part that substitute teachers would “accrue paid sick leave at a rate of one (1) hour per thirty (30) hours worked \* \* \*.” That same proposal capped the usage of accrued sick time at 40 hours. PAT responded by asserting that the proposal did not comply with ORS 332.507. For the following seven months, PAT persistently maintained that ORS 332.507 applied to substitute teachers and that any paid-sick-leave proposal regarding substitute teachers could not

---

<sup>6</sup>The same is true with respect to the legislative history proffered by the District, none of which speaks directly to excluding substitute teachers from the phrase “all employees.” “[A] party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it.” *Gaines*, 346 Or at 172. That is so because “[t]he formal requirements of lawmaking produce the best source from which to discern the legislature’s intent, for it is not the intent of the individual legislators that governs, but the intent of the legislature as formally enacted into law.” *Id.* at 171. Here, the legislative history submitted by the District falls short of accomplishing the “difficult task” of overcoming the “seemingly plain and unambiguous text” that “school employee” includes “all employees” of the District.

<sup>7</sup>The context of ORS 332.507 lends some support to this conclusion because the legislature has expressly excluded substitute teachers from related statutory provisions in the past. As noted above, one of ORS 332.507’s predecessors, ORS 342.595, required paid sick leave for public school teachers as of 1953. In 1955, the legislature amended ORS 342.210 to add definitions of “substitute” and “temporary” teachers, and also added ORS 342.252, which provided, “[s]ubstitute and temporary teachers shall not be subject to the provisions of ORS 342.230 to 342.330 or 342.635.” 1955 Or Laws, ch 281, § 3. Although ORS 342.595 existed at the time of those amendments to chapter 342, the legislature did not include ORS 342.595 in the list of provisions that would no longer be applicable to substitutes.

exclude those teachers from the statute's provisions. During those seven months, PAT also repeatedly asked the District for its position (and any supporting authority) as to whether ORS 332.507 includes or excludes substitute teachers.

On June 29, 2017, the District submitted a new proposal that was substantially similar to its prior proposal. When PAT responded that this proposal also did not appear to comply with ORS 332.507, the District responded that it had concluded that the statute does not apply to substitute teachers. When pressed by PAT for any further explanation, the District adhered to its position. The District did not thereafter cease pursuing its proposal that excluded substitute teachers from the requirements of ORS 332.507. The District's proposal was "specifically contrary" to ORS 332.507 because it presupposed (and the District so stated at the bargaining table) that all substitute teachers are categorically excluded from the statute's mandate. Moreover, the District has also conceded that "compliance with the District's sick leave proposal would be insufficient to comply with the mandate of ORS 332.507." Because the District's proposal was, as a result, specifically contrary to ORS 332.507, we conclude that the District unlawfully pursued a prohibited subject of bargaining.

We turn to the District's next argument—that ORS 332.507 "is not drafted so as to provide sick leave benefits to substitute [teachers]." To the extent that the District argues that the statute was not intended to provide sick-leave benefits to any substitute teachers, who are (as set forth above) District employees, we reject that argument for the same reasons articulated above—*i.e.*, that the plain meaning of the statute provides for certain paid-sick-leave benefits to all District employees, which includes substitute teachers.

The District next argues that it is not (and cannot be) required to bargain a contractual term that incorporates ORS 332.507 into the parties' agreement. The District is correct that the statutory "obligation to meet and negotiate does not compel either party to agree to a proposal or require the making of a concession." *See* ORS 243.650(4). Thus, although sick leave is a mandatory subject of bargaining that must be bargained upon request, PECBA does not require a party to enshrine other statutory obligations as specific contract articles in a collective bargaining agreement.<sup>8</sup> However, should a party choose to pursue a proposal (or counterproposal) concerning certain terms and conditions of employment, that proposal cannot conflict with a statute. Thus, the issue is not whether the District must agree to incorporate statutory requirements into a collective bargaining agreement, but whether the District may insist on a sick-leave proposal that conflicts with a statute.<sup>9</sup> It may not. On that point, the District concedes that if ORS 332.507 applies to substitute teachers (as we conclude it does), its pursued proposal is insufficient to comply with that statute.

---

<sup>8</sup>This does not mean that a party is relieved from its obligation to bargain in good faith when presented with a demand to bargain about how to implement a statute that affects employment relations.

<sup>9</sup>The District analogized this situation to other employment statutes, arguing that there is no requirement to incorporate statutory provisions such as workers' compensation, anti-discrimination, or family/medical leave into a collective bargaining agreement. The closer analogy, however, would be the District pursuing proposals in those areas that categorically excluded some of the District's employees from those statutes, even though the statutes required coverage for the proposed-excluded employees.

Finally, the District argues that ORS 332.507 is less than clear about how to apply its mandates to substitute teachers, and that the statute leaves open many unanswered questions. The District further argues that bargaining over *how* to apply ORS 332.507 to substitute teachers would be more complex than how to apply that statute to other District employees. The District may or may not be correct on that point. However, the parties have already demonstrated their ability to satisfactorily bargain mutually agreeable terms that apply ORS 332.507 to other District employees who are not traditional, full-time employees. Moreover, pushing complicated issues through the crucible of collective bargaining often results in creative, agreeable solutions in circumstances that initially looked daunting or even hopeless. Indeed, the District has at times indicated in this proceeding that not enough bargaining has yet occurred regarding paid sick leave for substitute teachers. In any event, any difficulty regarding the issue does not allow the District to pursue a proposal that conflicts with ORS 332.507.

In sum, we conclude that the District violated ORS 243.672(1)(e) when it persisted in pursuing a proposal that (1) excluded all substitute teachers from the application of ORS 332.507 and (2) was otherwise admittedly insufficient to comply with ORS 332.507. Because the District 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 [PECBA].” ORS 243.676(2)(c). In this case, the District is ordered to withdraw its June 29, 2017, sick-leave proposal. Any future District proposals shall not exclude substitute teachers from the coverage of ORS 332.507 or otherwise be contrary to that statute.

PAT also requests that we order the District to post and email a notice of its wrongdoing. We generally order such a posting if we determine that a party’s PECBA violation (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 at 12, 6 PECBR 5590, 5601, *aff’d without opinion*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536, 678 P2d 738 (1984). Not all of these criteria need to be satisfied to warrant posting of a notice. *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02 at 2, 19 PECBR 684, 685 (2002). Under the circumstances of this case, particularly considering the novelty of the issue and that no unlawful terms were imposed on employees, we conclude that a posting (and emailing) of a notice is not warranted.

We also decline PAT’s request that we impose a \$1,000 civil penalty on the District. We may award a civil penalty when the action constituting an unfair labor practice was egregious or the party committing an unfair labor practice did so knowingly and repetitively. ORS 243.676(4)(a)(A); OAR 115-035-0075. PAT asserts that the District acted with full knowledge that its conduct violated the law. We disagree. As set forth above, the issue involving the applicability of ORS 332.507 to substitute teachers, as well as *how* to do so in a bargaining proposal, was novel to *both* parties, despite the pertinent statutory language being in place for approximately 40 years. Under these circumstances, we conclude that a civil penalty is not warranted.

Finally, PAT asks that the District reimburse PAT's \$300 filing fee, which we may order if the District's answer was "frivolous or filed in bad faith." ORS 243.672(3). Although we have ultimately concluded that the District violated ORS 243.672(1)(e), the record does not establish that the District's answer was frivolous or filed in bad faith. Therefore, we deny the request for reimbursement of PAT's filing fee.

ORDER

1. The District shall cease and desist from violating ORS 243.672(1)(e).
2. The District shall withdraw its June 29, 2017, sick-leave proposal. The District shall not pursue proposals that exclude substitute teachers from the coverage of ORS 332.507 or are otherwise contrary to that statute.

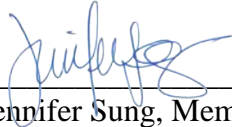
DATED: September 15, 2017.



\_\_\_\_\_  
Adam L. Rhynard, Chair



\_\_\_\_\_  
Lisa M. Umscheid, Member



\_\_\_\_\_  
Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-008-17

(REPRESENTATION)

AMALGAMATED TRANSIT UNION, )  
 DIVISION 757, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 HOOD RIVER COUNTY )  
 TRANSPORTATION DISTRICT, dba )  
 COLUMBIA AREA TRANSIT (CAT), )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

ORDER CERTIFYING  
EXCLUSIVE REPRESENTATIVE

On August 18, 2017, the Amalgamated Transit Union, Division 757, filed a petition under ORS 243.682(2)(a) to certify (without an election) a new bargaining unit of employees of the Hood River County Transportation District, dba Columbia Area Transit (CAT). A majority of eligible members in the proposed bargaining unit signed valid authorization cards requesting that Amalgamated Transit Union, Division 757, represent the designated bargaining unit.


Objections to the proposed bargaining unit or a request for an election were due within fourteen days of the posting of a notice of the petition (*i.e.*, by September 19, 2017). No objections were filed. Accordingly, it is certified that:

AMALGAMATED TRANSIT UNION, DIVISION 757

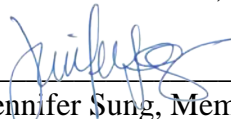
is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

“All full-time and part-time Columbia Area Transit (CAT) bus drivers.”

DATED: September 20, 2017.

  
 \_\_\_\_\_  
 Adam L. Rhynard, Chair

  
 \_\_\_\_\_  
 Lisa M. Umscheid, Member

  
 \_\_\_\_\_  
 Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-015-17

(UNIT CLARIFICATION)

TEAMSTERS LOCAL 223,	)	
	)	
	)	
Petitioner,	)	
v.	)	ORDER REVOKING
	)	CERTIFICATION
ROGUE VALLEY SEWER SERVICES,	)	
	)	
Respondent.	)	
<hr/>		

On April 11, 1995, in Case No. RC-4-95, this Board certified Teamsters Local 223 (Teamsters) as the exclusive representative of a bargaining unit of all regular employees (with certain exclusions) of Bear Creek Valley Sanitary Authority. In June 2003, the name of Bear Creek Valley Sanitary Authority was changed to Rogue Valley Sewer Services (RVSS). This bargaining unit was described as:

“All regular employees of Rogue Valley Sewer Services, excluding supervisory and confidential employees, casual employees, employees who are scheduled to work less than 20 hours per week, and temporary employees (employees who work less than 120 days per calendar year).”

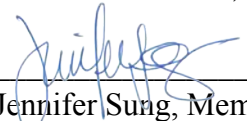
On September 22, 2017, Teamsters filed a petition under OAR 115-025-0009 seeking to revoke the certification of this bargaining unit. The petition included a disclaimer of interest from Teamsters in further representing the bargaining unit. The petition also showed that no collective bargaining agreement was in effect. *See* OAR 115-025-0009. No objections to the petition were filed.

The petition for revocation is granted. The certification of TEAMSTERS LOCAL 223 as the exclusive representative for employees of Rogue Valley Sewer Services is revoked, effective this date.

DATED: October 12, 2017.

  
\_\_\_\_\_  
Adam L. Rhynard, Chair

  
\_\_\_\_\_  
Lisa M. Umscheid, Member

  
\_\_\_\_\_  
Jennifer Sung, Member

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-012-17

(UNIT CLARIFICATION)

CITY OF SEASIDE,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER REDESIGNATING
	)	BARGAINING UNIT
SEASIDE EMPLOYEES' ASSOCIATION,	)	
	)	
Respondent.	)	
_____	)	

On July 18, 2017, the City of Seaside (City) filed a petition under OAR 115-025-0000(6) to remove certain employees from the existing bargaining unit represented by Seaside Employees' Association (SEA). Specifically, the City seeks to remove firefighter positions, which are strike-prohibited, from the SEA bargaining unit, which is otherwise strike-permitted.

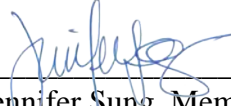
SEA did not object to the petition. However, the Seaside Police Association (SPA) filed a petition to intervene in the matter, as well as a petition to represent the aforementioned firefighter positions. The matter was transferred to an Administrative Law Judge. Thereafter, the parties reached an agreement on the placement of the firefighter positions, and there are no objections regarding this petition.

Accordingly, the City's petition is granted, and the firefighter positions are removed from the bargaining unit represented by SEA.

DATED November 15, 2017.

  
 \_\_\_\_\_  
 Adam L. Rhynard, Chair

  
 \_\_\_\_\_  
 Lisa M. Umscheid, Member

  
 \_\_\_\_\_  
 Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-001-17

(UNFAIR LABOR PRACTICE)

S.R.,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	DISMISSAL ORDER
AFSCME Local 328,	)	
	)	
Respondent.	)	
_____	)	

S.R., Portland, Oregon, appeared *pro se*.

Jennifer K. Chapman, Legal Counsel, Oregon AFSCME, represented Respondent.

On September 1, 2017, Complainant filed an unfair labor practice complaint against AFSCME Local 328 (AFSCME). The case was assigned to Administrative Law Judge (ALJ) Julie D. Reading.

In her complaint, Complainant alleged that her employer, Oregon Health Sciences University (OHSU), initiated termination proceedings against her, and that she was represented by AFSCME during that process. On March 3, 2017, Complainant signed a settlement agreement in which she agreed to voluntarily resign in exchange for compensation and other consideration from OHSU. Complainant claims that AFSCME violated its duty of fair representation by declining to pursue a grievance on her behalf, by pressuring her to enter into the settlement agreement, and by failing to negotiate an adequate settlement.

ALJ Reading investigated the complaint to determine if an issue of fact or law exists that warrants a hearing, as required by OAR 115-035-0005. By letter dated October 12, 2017, ALJ Reading issued Complainant an Order to Show Cause, informing Complainant of several bases for dismissal of her complaint: 1) her complaint appeared to be untimely; 2) her claim appeared to be contractually barred by her settlement agreement because she waived her right to pursue any actions against OHSU or AFSCME, including a duty of fair representation claim; 3) Complainant was incorrect that the AFSCME-OHSU collective bargaining agreement entitled her to more compensation than she received as part of her settlement agreement; and 4) Complainant failed to identify which provisions of the Public Employee Collective Bargaining Act (PECBA) that

AFSCME allegedly violated, as required by this Board's rules. ALJ Reading gave Complainant until October 20, 2017, to withdraw the complaint or provide reasons why the complaint should not be dismissed despite its untimeliness and pleading deficiencies.

Complainant responded to the Order to Show Cause on October 20, 2017. She provided more detail regarding her factual allegations and submitted additional documentary evidence, including a copy of electronic communications between Complainant and the AFSCME representative who assisted her during the settlement negotiations. After reviewing Complainant's response, ALJ Reading recommended to this Board that we dismiss her complaint without a hearing.

In considering whether Complainant'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 at 2, 21 PECBR 867, 868 (2007).

We have considered the complaint and the submissions of the parties. We summarize the alleged or undisputed facts as follows:

1. On February 7, 2017, OHSU issued Complainant a pre-discharge letter, alleging a serious basis for discharge.
2. On or about February 16, 2017, OHSU notified Complainant that her employment would be terminated.
3. On February 21, 2017, Complainant informed her AFSCME representative that she wished to pursue a grievance disputing her termination.
4. AFSCME declined to pursue a grievance on Complainant's behalf, and instead engaged in settlement negotiations with OHSU.<sup>1</sup>
5. The AFSCME representative communicated OHSU's final offer to Complainant on February 21, 2017.
6. On February 24, 2017, Complainant responded to the AFSCME representative, stating that she would "take" the offer and wanted to "move on." Complainant thanked the AFSCME representative.

---

<sup>1</sup>At this stage of the case, AFSCME has not yet been given the opportunity to file an answer indicating whether it admits or denies Complainant's allegation that AFSCME declined to pursue a grievance, and we are not making such a finding of fact based on the record of an evidentiary hearing. Rather, we are assuming that all of Complainant's specific factual allegations, including this allegation, are true, solely for the purpose of determining whether this case should be dismissed without a hearing.

7. On March 3, 2017, Complainant contacted the AFSCME representative and asked to meet so that she could sign the separation agreement, again stating that she was “ready to move on.”

8. OHSU, AFSCME, and Complainant are parties to a “Separation Agreement and General Release” (Separation Agreement). Complainant signed the Separation Agreement on March 3, 2017. In the Separation Agreement, OHSU agreed to provide Complainant with 16 weeks of severance pay and other benefits, including extended health coverage, in exchange for Complainant’s voluntary resignation and a release of liability.

9. The Separation Agreement included a general release, in which Complainant agreed to release OHSU and AFSCME from any and all liability relating to Complainant’s employment or association with OHSU or the termination thereof.

10. The Separation Agreement also required Complainant and AFSCME to “withdraw any and all grievances filed against OHSU on behalf of” Complainant.

11. On March 13 and 15, 2017, Complainant and the AFSCME representative exchanged text messages regarding when Complainant could pick up her settlement check.

12. Some months later, Complainant determined that the AFSCME-OHSU collective bargaining agreement provides for certain severance benefits. To be eligible for those benefits, an employee must be “involuntarily terminated due to program closure, position elimination or reorganization,” and meet other requirements. Believing that those benefits applied to her, Complainant filed this unfair labor practice complaint, asserting that the Separation Agreement provided less benefits than the severance benefits outlined in the collective bargaining agreement.

### DISCUSSION

We dismiss the complaint on two grounds: (1) failure to state a cause of action, and (2) contractual waiver.

Complainant claims that AFSCME violated ORS 243.672(2)(a), which is the provision of PECBA that requires the exclusive representative of a group of employees to represent all employees in the bargaining unit fairly. *Griffin v. Service Employees International Union Local 503, Oregon Public Employees Union and State of Oregon, Employment Department*, Case No. FR-02-09 at 24, 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 at 10-11, 7 PECBR 6545, 6554-55 (1984) (citing *Ford Motor Co. v. Huffman*, 345 U.S. 330, 31 LRRM 2548 (1953)); *see also Conger v. Jackson County and Oregon Public Employees Union*, Case No. UP-22-98 at 10, 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 County Community College; Brown, Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-05 at 12, 21 PECBR 563, 574 (2006). A union’s action is arbitrary if it lacks a rational

basis. *Id.* A union’s conduct is discriminatory if there is “substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives.” *Id.* at 13; 21 PECBR at 575. A union’s conduct is in bad faith if it intentionally acts against a member’s interest and does so for an improper reason. *Id.*

In order to proceed to a hearing, Complainant must allege facts that, if proven, would establish that AFSCME acted arbitrarily, discriminatorily, or in bad faith. If such factual allegations are not in the complaint, the complaint will be dismissed without a hearing for failure to state a claim for relief. *Putvinskas v. Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO, and Southwestern Oregon Community College*, Case No. UP-71-99 at 12, 18 PECBR 882, 893 (2000). As we explain below, we dismiss this case because, even assuming that the facts alleged in the complaint are true, those facts do not establish that AFSCME acted arbitrarily, discriminatorily, or in bad faith.

Complainant’s primary claim is that AFSCME violated its duty of fair representation by negotiating an inadequate settlement agreement. That claim is premised on an allegation that Complainant received less severance pay than was contractually required under the collective bargaining agreement. Complainant, however, is relying on a severance pay provision that applies only to employees who are terminated due to a program closure, reorganization, or position elimination. That provision did not apply to Complainant because the grounds for her proposed termination were not program closure, reorganization, or position elimination. Thus, the premise of Complainant’s claim against AFSCME is incorrect, and there is no issue of fact or law warranting a hearing on this claim.

Complainant also claims that AFSCME violated its duty of fair representation by negotiating a settlement agreement instead of pursuing a grievance on her behalf. Generally, it is lawful for a union to try to settle a potential grievance instead of litigating it. As explained above, such conduct would violate ORS 243.672(2)(a) only if AFSCME acted with improper or discriminatory motives, or without a rational basis. Complainant has not alleged any facts that, if true, would establish that AFSCME’s conduct in pursuing a voluntary settlement agreement lacked a rational basis. And, because none of Complainant’s specific factual allegations tend to show that AFSCME acted with a discriminatory intent or otherwise improper motive, there is no basis for finding that AFSCME engaged in unlawful discrimination or acted in bad faith. *Block v. Amalgamated Transit Union, Division 757*, Case No. FR-001-15 at 5, 26 PECBR 486 (2015).<sup>2</sup>

Complainant also claims that AFSCME unfairly pressured her into entering to the Separation Agreement. However, none of the allegations about AFSCME’s conduct in the course of settlement negotiations would, even if proven, establish that AFSCME acted discriminatorily, in bad faith, or arbitrarily. For example, Complainant claims that she felt pressured to agree to the settlement because AFSCME (allegedly) decided not to pursue a grievance on her behalf. But, as discussed above, there are no factual allegations that, if proven, would establish that AFSCME

---

<sup>2</sup>Even if Complainant intended to allege that AFSCME stated that it would not pursue her grievance to arbitration if she declined to sign the Separation Agreement, her complaint would present no issue of fact or law that warrants a hearing, because a union has substantial discretion in negotiating grievance settlements, and may refuse to take a grievance to arbitration if the grievant rejects a reasonable settlement offer. *Martin v. Portland Association of Teachers and Portland School District #1*, Case No. UP-28-01 at 6, 19 PECBR 513, 518 (2001).

made that decision for unlawful reasons or acted arbitrarily. Complainant also alleges that she felt pressured to decide whether to accept OHSU's settlement offer quickly, but Complainant's own evidence establishes that she took approximately three days to consider OHSU's February 21 final offer before she accepted it, that another week passed before she actually signed the Separation Agreement, and that she repeatedly expressed her decision to accept OHSU's settlement offer and voluntarily resign. Although we understand that Complainant is arguing that she faced difficult pressure when deciding whether to accept OHSU's settlement offer, that pressure does not, in itself, mean that AFSCME's alleged conduct was unlawful.<sup>3</sup>


We also dismiss this complaint because Complainant, by agreeing to the terms of the Separation Agreement, contractually waived her right to pursue any claims against OHSU or AFSCME arising from her employment with OHSU (or termination of that employment), which includes a duty of fair representation claim against AFSCME. Although Complainant claims that AFSCME pressured her into entering into the Separation Agreement, as explained above, her factual allegations, even if proven, would not establish that AFSCME's actions were discriminatory, in bad faith, or arbitrary. As a result, there is no basis for disregarding the contractual waiver.

For all of the reasons stated above, there is no issue of fact or law that merits a hearing, and we dismiss the complaint. *See* ORS 243.676(1)(b).

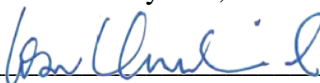
ORDER

The complaint is dismissed.

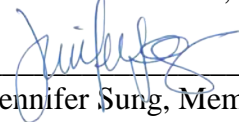
DATED: November 20, 2017.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

---

<sup>3</sup>We also note that Complainant's claims that AFSCME unlawfully declined to pursue a grievance and unlawfully pressured her to enter into the Separation Agreement are untimely, and could be dismissed on that ground. Under ORS 243.672(3), a complaint must be filed "not later than 180 days following the occurrence of an unfair labor practice." ORS 243.672(3) incorporates a discovery rule, which means that the 180-day limitation period begins to run when the complainant knows or reasonably should know that an unfair labor practice has occurred. *Rogue River Education Assoc. v. Rogue River School*, 244 Or App 181, 189, 260 P3d 619 (2011). In this case, Complainant knew, or reasonably should have known, that AFSCME had declined to file a grievance or pressured her to sign the Separation Agreement by the date that she signed that agreement, March 3, 2017, at the latest. Therefore, Complainant needed to file her claim by August 30, 2017. Complainant, however, filed her complaint on September 1, 2017, which means that it was untimely filed.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. DR-003-17

(DECLARATORY RULING)

IN THE MATTER OF THE PETITION	)	
FOR DECLARATORY RULING FILED	)	RULING ON REQUEST FOR
BY THE COUNTY OF JEFFERSON,	)	DECLARATORY RULING
STATE OF OREGON	)	
_____	)	

Pierre Robert, Senior Labor Law Attorney, Local Government Personnel Institute, Salem, Oregon, represented Petitioner.

David A. Snyder, Attorney at Law, Law Offices of David A. Snyder, LLC, Portland, Oregon, submitted a letter to the Board on behalf of the Jefferson County Law Enforcement Association.

The Board has considered the petition submitted by the County of Jefferson, State of Oregon (County), seeking a declaratory ruling pursuant to OAR 137-002-0010 *et seq.* We have also considered the response submitted by the Jefferson County Law Enforcement Association (Association). For the reasons explained below, the Board declines to issue a ruling on the questions presented in the petition.

Broadly speaking, this petition arises out of a grievance filed by the Association, which asserts that the County has violated the health insurance and “maintenance of standards” clauses in the parties’ collective bargaining agreement (Articles 11 and 16) by “reduc[ing] prescription drug benefits.” The County contends that the grievance is not subject to the parties’ grievance and arbitration procedure based on another contractual provision (Article 3). In light of this contractual disagreement, the County seeks a declaratory ruling that (1) Article 3 provides “the procedure by which the Association may address its concerns, to the exclusion of the Article 13 grievance procedure”; (2) the County may refuse to submit the Association’s grievance to binding arbitration without violating the Public Employee Collective Bargaining Act (PECBA); and (3) the Association violates PECBA if it persists in pursuing the grievance. The Association asks us to decline the County’s request, asserting, among other contentions, that a declaratory ruling is not the best vehicle to resolve the issues raised in the petition.


As a general matter, the Board encourages labor organizations and public employers to seek resolution of disputes through use of the non-adversarial declaratory ruling procedures where appropriate. However, the Board has also expressed reservations about the propriety and utility of accepting a declaratory ruling petition in certain circumstances that are present in this case. Specifically, this Board has expressed its reluctance to accept a declaratory ruling petition on matters that only involve interpreting parties’ collective bargaining agreements. *See In the*

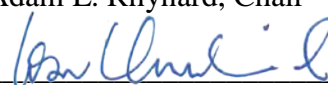
*Matter of the Petition for Declaratory Ruling filed by The Oregon School Employees Association*, Case No. DR-4-97 at 6, 17 PECBR 403, 408 (1997); *see also In the Matter of the City of Medford's Petition for a Declaratory Ruling*, Case No. DR-1-99, 18 PECBR 76 (1999). Because the rules in declaratory ruling cases require us to base our decision solely on the facts alleged in the petition (or stipulated “alternative” facts) and prohibit us from considering other evidence, *see* OAR 137-002-0040(2), declaratory ruling petitions are best suited for cases that would not benefit from an evidentiary hearing. Contract interpretation cases, however, often involve factual disputes regarding the intended meaning of contract language. Further, interpretation of disputed contract language often requires consideration of extrinsic evidence, including bargaining history and past practice. Thus, in the absence of allegations or stipulations that would obviate the need for an evidentiary hearing, the typical contract interpretation case is better suited for resolution through a contested case proceeding (which the parties may seek to have processed on an expedited basis, pursuant to OAR 115-035-0060).<sup>1</sup> Although some contractual disputes may be properly suited for resolution through a declaratory ruling, we do not find that this case warrants a departure from our general approach.<sup>2</sup>

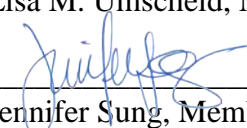
Moreover, the Board has been cautious about issuing a declaratory ruling where the other affected party has not joined in the petition or agreed to be bound by a ruling on the petition. *See, e.g., The Oregon School Employees Association*, DR-4-97 at 6, 17 PECBR at 408. Here, the Association has asked that we deny the petition and stated that it will not join or intervene in the petition, and therefore it will not be bound by any ruling on the petition.

There may be situations in which issuance of a declaratory ruling is appropriate, even though an interested party declines to join or intervene, or the petition seeks a ruling on a question involving or arising from contract interpretation. In this particular case, however, both factors weigh against accepting the petition. Under these circumstances, we decline to issue a declaratory ruling in this matter. *See* OAR 137-002-0020(3).

DATED: December 11, 2017.

  
\_\_\_\_\_  
Adam L. Rhynard, Chair

  
\_\_\_\_\_  
Lisa M. Umscheid, Member

  
\_\_\_\_\_  
Jennifer Sung, Member

---

<sup>1</sup>Previously, this Board noted that there is a question as to whether this Board may make declaratory rulings on questions based *solely* on a collective bargaining agreement, as distinguished from questions based on statutes or rules. *See The Oregon School Employees Association*, DR-4-97 at 6, 17 PECBR at 408. Because PECBA makes it an unfair labor practice to violate the provisions of any written contract with respect to employment relations, it would appear that this Board has the authority to issue a declaratory ruling as to whether a set of alleged facts constitutes breach of a collective bargaining agreement, therefore violating ORS 243.672(1)(g) or (2)(d). Thus, our concerns about issuing declaratory rulings in contract interpretation cases are based primarily on the practical considerations discussed above.

<sup>2</sup>Other cases in which an evidentiary record is helpful—such as cases that present credibility questions—are also less suited to resolution through a declaratory ruling proceeding.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-013-16

(UNIT CLARIFICATION)

OREGON AFSCME COUNCIL 75,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	RULINGS,
LANE COUNTY,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
and	)	AND ORDER
	)	
ADMINISTRATIVE PROFESSIONAL	)	
ASSOCIATION OF LANE COUNTY,	)	
	)	
Respondents.	)	

---

On October 23, 2017, the Board heard oral argument on Petitioner’s objections to a recommended order issued by Administrative Law Judge (ALJ) Julie D. Reading on July 28, 2017, after a hearing held on May 17, 2017. The record closed on June 30, 2017, upon receipt of the parties’ post-hearing briefs.

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

Andrea M. Nagles, Lane County Office of Legal Counsel, Eugene, Oregon, represented Respondent Lane County at hearing. The County did not appear at oral argument.

Seth Davis, Attorney at Law, Fenrich & Gallagher, P.C., Eugene, Oregon, represented Respondent Administrative Professional Association of Lane County.

---

On December 16, 2016, Oregon AFSCME Council 75 (AFSCME) filed a unit clarification petition pursuant to OAR 115-025-0005(3). AFSCME sought to clarify that two Lead Electrician positions in the classification of Maintenance Specialist-Lead are in AFSCME’s bargaining unit under the express terms of AFSCME’s collective bargaining agreement.<sup>1</sup> The Administrative

---

<sup>1</sup>The precise name of the classification at issue is “Maintenance Specialist, Lead.” For readability, in this order we refer to the classification as “Maintenance Specialist-Lead.”

Professional Association of Lane County (Admin Pro) objected to the petition, asserting that the petitioned-for positions are included in its bargaining unit. Lane County (County) took a neutral position and did not present evidence or briefing at hearing or appear at oral argument.

The issue is whether the petitioned-for Lead Electrician positions in the classification of Maintenance Specialist-Lead, currently held by employees Frederic Rosenburg and Travis Silke, are in the AFSCME bargaining unit.

We conclude that the petitioned-for positions are in the AFSCME bargaining unit.

### RULINGS

AFSCME objected to the designation of Admin Pro as the “incumbent” in the caption of the pleadings. The ALJ overruled the objection.

Admin Pro should be designated as a respondent. It is factually and legally incorrect to describe Admin Pro as the incumbent. The two employees in the petitioned-for positions were represented by AFSCME from their hire until they were placed in the Admin Pro bargaining unit over AFSCME’s prompt objection. It is not, therefore, factually accurate to describe Admin Pro as the “incumbent.”

Moreover, the legal issue in this case is whether the petitioned-for positions are *already* represented by AFSCME pursuant to the terms of the AFSCME collective bargaining agreement. *See Marion County v. Marion County Employees Association Local 294, SEIU Local 503*, Case No. UC-12-02 at 2, 19 PECBR 781, 782 (2002) (in a subsection (3) petition, the Board decides only whether the positions are already in the unit). Thus, it is inaccurate as a legal matter to describe Admin Pro as the incumbent because the determination of which union is, in fact, the incumbent union with respect to these employees is the very issue in this case. For both these reasons, we designate Admin Pro as a respondent in this order.

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

### FINDINGS OF FACT

1. AFSCME is a labor organization within the meaning of ORS 243.650(13). In addition to the bargaining unit at issue in this case, AFSCME also represents a separate bargaining unit of nurses employed by the County.
2. Admin Pro is also a labor organization within the meaning of ORS 243.650(13).
3. The County is a public employer within the meaning of ORS 243.650(20). In addition to bargaining units represented by AFSCME and Admin Pro, there are also bargaining units of County employees represented by the following labor organizations: Federation of Parole and Probation Officers (representing parole and probation officers), Prosecuting Attorneys Association (representing deputy district attorneys), Lane County Peace Officers Association (representing strike-prohibited deputy sheriff and corrections employees and juvenile detention workers), and Public Works Association Local 626 (representing Public Works Department mechanics and road workers).

## History of AFSCME and Admin Pro's Representation of Lane County Employees

4. AFSCME has represented employees at Lane County since at least the early 1970s.<sup>2</sup>

5. In AFSCME's agreements with the County from 1975 to 1987, the recognition clause provided that AFSCME represented employees in enumerated County departments in expressly listed classifications.<sup>3</sup>

6. For at least some of the AFSCME agreements in effect before 1987, the list of classifications included in AFSCME's bargaining unit included electrician or lead electrician.<sup>4</sup>

7. The AFSCME agreement in effect from 1984 to 1987 was the last agreement in which AFSCME's bargaining unit was described by specific departments and classifications.<sup>5</sup>

8. In the AFSCME agreement in effect from July 1, 1987 to June 30, 1990, for the first time, the recognition clause described AFSCME's unit as "all" employees, except those specifically excluded. The pertinent language in the recognition clause described AFSCME's unit as

"all temporary, probationary and non-probationary employees in permanent positions exclusive of persons employed in the District Attorney's Office, those employed in a confidential or supervisory capacity, extra help employees (subject to Section 1(B) below), those employees employed in classifications represented in other bargaining units, those employees employed in classifications listed in **APPENDIX A** or successor classifications, and all employees employed on June 30, 1987 in classifications listed in **APPENDIX B** or successor

---

<sup>2</sup>Although the record does not establish precisely when or how AFSCME became the exclusive representative of a unit of County employees (*i.e.*, through voluntary recognition or certification), the record does contain collective bargaining agreements between the County and AFSCME going back to 1975.

<sup>3</sup>For example, the recognition clause in the 1975 to 1977 agreement provided that AFSCME Locals 1724B and 2831 were the exclusive representative of "all" permanent employees "who are currently employed in the Departments of Assessment and Taxation; Community Health and Social Services; Courts, Elections and Records Administration; Environmental Management; Management Support Services; Public Safety; Regional Information Systems and Transportation[.]"

<sup>4</sup>At the hearing in this case, AFSCME presented uncontroverted testimony of AFSCME Council Representative Jim Steiner that AFSCME's collective bargaining agreements with the County long ago listed electricians, including lead electricians, and other skilled trades as represented classifications. We credit Steiner's testimony. *See also Teamsters Local 57 v. Lane County Department of Public Works and AFSCME Local 2831*, Case No. C-199-82 at 3-4, 7 PECBR 5763, 5765-66 (1983) (AFSCME 1982-1984 collective bargaining agreement listed "Electrician" as an AFSCME-represented classification).

<sup>5</sup>In the 1984 to 1987 agreement, the recognition clause provided that AFSCME represented "all probationary and nonprobationary employees in positions classified as indicated in Schedule A" and employed in the following enumerated departments: "Assessment and Taxation, Community Health and Social Services, Finance and Management Services, Juvenile, Public Safety, Public Works, Regional Information Systems."

classifications, who do not voluntarily join the UNION. Nothing in this Agreement shall be construed to interfere with the rights of employees under the Public Employee Collective Bargaining Act.” (Emphasis in original.)

9. The recognition clause in the AFSCME-County agreements in effect from July 1987 through 2014 remained substantially the same.<sup>6</sup>

10. On October 27, 1987, after a representation election between Admin Pro (under a former name) and Teamsters Local 57, the Board certified Admin Pro as the exclusive representative of all employees “in the Lane County Department of Public Works employed in Administrative, Technical and Professional Staff positions,” excluding supervisory and confidential employees.

11. In February 2009, AFSCME filed a unit clarification petition pursuant to OAR 115-025-0005(3) to include 15 employees at the Lane Events Center in its bargaining unit. The County objected to the petition. Admin Pro did not intervene or appear. The record in that case established that in the early 1990s, Lane Events Center employees and their work were contracted out to an independent entity, Lane County Fairgrounds. Before then, the employees were not represented by any labor organization. In 2008, the employees became Lane County employees again when the County assumed full control of the Lane Events Center and Fairgrounds. The Board concluded that the express terms of the recognition clause of the AFSCME collective bargaining agreement included the employees at the Lane Events Center, and clarified AFSCME’s bargaining unit to include the positions. Those positions included the position of Facility Maintenance Worker, whose job included performing “difficult and responsible types of maintenance work,” including “electrical work, repair of complex systems and equipment and facilities preventative maintenance[.]”<sup>7</sup>

12. The Lane Events Center and Facilities Maintenance were previously divisions within the Management Services Department. AFSCME historically represented all of the employees within the Management Services Department. At some time after the 2009 unit clarification, the County disbanded the Management Services Department and moved its divisions to different departments, including the Public Works Department. After that reorganization, the AFSCME-represented employees remained within the AFSCME bargaining unit, including those who were transferred to the Public Works Department. The Lane Events Center is presently part of the Public Works Department.

13. In 2012, Lane County reorganized again, and moved some Public Works Department employees represented by Admin Pro into other departments. In response, Admin Pro filed a petition under OAR 115-025-0008, which permits an amendment of certification or recognition “when no question of representation exists.” Admin Pro obtained an amendment to its certification, reflecting a change in its name from “Administrative Professional Association of

---

<sup>6</sup>From 1990 to 2014, the record contains the recognition article for only one AFSCME agreement—the agreement in effect from 2003 to 2005. AFSCME presented uncontroverted testimony by Steiner that the language in the recognition clause remained substantially the same from 1990 through 2014, and we credit that testimony.

<sup>7</sup>See *Oregon AFSCME Council 75, Local 2831 v. Lane County*, Case No. UC-04-09 at 5, 23 PECBR 416, 420 (2009).

Lane County Public Works” to its current name, “Administrative Professional Association of Lane County.” *See Administrative Professional Association of Lane County v. Lane County*, Case No. UC-002-12, 24 PECBR 657, as further amended by nunc pro tunc order, 24 PECBR 767 (2012). In support of its petition, Admin Pro submitted an affidavit explaining that the County had undertaken a reorganization that would cause some Admin Pro members to be moved to departments other than the Public Works Department, and that the name change was necessary to assure that those bargaining unit members would remain part of Admin Pro whether they were working within the Public Works Department or elsewhere in the County. *Id.* at 2, 24 PECBR at 658.

14. Admin Pro has never represented employees at the Lane Events Center. Admin Pro has represented a Lead Electrician position that performs work related to the maintenance and repair of traffic signals and controllers.

#### Current Bargaining Agreements

15. The AFSCME agreement in effect from 2014 to 2017 (AFSCME Agreement) contains a recognition clause in Article 1. It states:

##### “Section 1 - Recognition:

“For the purposes of collective bargaining with respect to wages, hours, benefits, and other employment relations matters, the **COUNTY** recognizes the **American Federation of State County and Municipal Employees Council 75, Local 2831 (hereinafter the “union”)** **UNION** as the sole and exclusive representative of all temporary, probationary, and non-probationary employees in permanent positions exclusive of those employed in a confidential or supervisory capacity, extra help employees (subject to Section 1 (B) below), those employees employed in classifications represented in other bargaining units, and those employees employed in classifications listed in **Appendix A** or successor classifications. Nothing in this Agreement shall be construed to interfere with the rights of employees under the Public Employee Collective Bargaining Act.” (Emphasis in original.)

16. Appendix D of the AFSCME Agreement, which lists classifications represented by AFSCME, includes the classifications of Maintenance Specialists 1, 2, and 3. Appendix D does not include the classification of Maintenance Specialist-Lead.

17. Admin Pro and the County are parties to a collective bargaining agreement in effect from 2016 to 2019 (Admin Pro Agreement).

18. The Admin Pro Agreement contains a recognition clause in Article 1. It states:

##### “Section 1 – Recognition:

“For the purposes of collective bargaining with respect to wages, hours, benefits and other employment relations matters, the **COUNTY** recognizes the **UNION** as the sole and exclusive representative of all employees, employed in positions

classified as indicated in Schedule B or their successors, exclusive of persons so employed and classified but in a confidential or supervisory capacity, and persons so employed on June 30, 1987 who have not voluntarily joined the **UNION**.

“Section 2 – Recognition Questions:

“Should the **COUNTY** and the **UNION** not agree with respect to the inclusion in or exclusion from the bargaining unit of a new or existing classification, the **UNION** may file a petition with the Employment Relations Board pursuant to the appropriate sub-section(s) of the Oregon Administrative Rules, Chapter 115, Division 25, Section 115-25-005. The applicable statutory considerations shall apply.” (Emphasis in original.)

19. Schedule B of the Admin Pro Agreement, which lists the classifications in Admin Pro’s bargaining unit, includes Maintenance Specialist-Lead. Next to that classification, it identifies the working title of one position in the classification as Lead Electrician. Schedule B states that a State of Oregon Electrician’s License is a special skill of this classification, but does not specify the level of licensure required.

20. There are three levels of electrician licenses relevant in this case: limited maintenance, general journeyman, and general supervising. A limited maintenance license allows the licensee to repair and maintain existing electrical installations. A general journeyman can perform new installations, and can repair and replace existing installations. However, a general journeyman cannot obtain permits and must work under a general supervising electrician. A general supervising license allows the electrician to design, plan, supervise, and obtain permits for new installations.

Past Disputes Among the Parties

21. In November 2003, AFSCME filed a grievance alleging that the County violated, among other provisions, the recognition article by reclassifying an AFSCME-represented Accounting Analyst position into a non-represented Administrative Services Supervisor position. The parties submitted the grievance to arbitration. The arbitrator concluded that the County violated the agreement. The arbitrator ordered the County to re-establish the bargaining unit position of Accounting Analyst and recall the grievant to that position with back pay.

22. In May 2008, Admin Pro filed a representation petition seeking to certify a new bargaining unit comprised of approximately 100 employees who worked in the Land Management and Transportation Planning Divisions of the Public Works Department and certain employees who worked in the County Information Services Department. The petitioned-for positions were represented by AFSCME. The County did not file objections and remained neutral in the matter. In *Administrative-Professional Association of Lane County Public Works, Inc. v. Lane County and AFSCME Local 2831*, Case No. RC-10-08, 23 PECBR 1 (2009), the Board concluded that the positions in the proposed unit did not have a clearly distinct community of interest and that there was no compelling reason that warranted a separate bargaining unit. The Board dismissed the petition.

23. In April 2009, Admin Pro filed a unit clarification petition to transfer ten information technology positions from AFSCME's bargaining unit to Admin Pro's bargaining unit. The County did not file objections and remained neutral in the matter. In *Administrative-Professional Association of Lane County Public Works, Inc. v. Lane County and AFSCME Local 2831*, Case No. UC-12-09, 24 PECBR 76 (2011), the Board concluded that Admin Pro failed to demonstrate that any of the statutory factors (other than the desires of the employees) supported the petitioned-for transfer. The Board dismissed the petition.

24. On multiple occasions over at least the last five years, including in 2010 and 2012, when an AFSCME-represented employee has temporarily worked outside the bargaining unit (such as in a supervisory position), the County and AFSCME have agreed that work historically performed by AFSCME will return to the AFSCME bargaining unit if the employee moves permanently into a non-bargaining unit position. The County and AFSCME have documented those agreements in memoranda of understanding.

### The Petitioned-For Positions

25. Before 2014, employees Silke and Rosenberg were employed in the Maintenance Specialist 3 classification. The Maintenance Specialist 3 classification is included in AFSCME's bargaining unit. The Maintenance Specialist 3 classification has never been represented by Admin Pro.

26. The classification specifications for Maintenance Specialist 3 define the classification as follows: "To perform building and physical plant mechanical and electrical maintenance work and to perform related duties as assigned." The Maintenance Specialist 3 classification requires a limited maintenance electrician "or higher" license. The specifications also state:

"This is the advanced journey level class in the Maintenance Specialist series. Positions at this level are distinguished from other classes within the series by the level of responsibility assumed and the complexity of duties assigned. Employees perform the most difficult work and responsible types of duties assigned to classes within this series and the performance of skilled work."

27. As minimum qualifications for the Maintenance Specialist 3 classification, an employee must have knowledge of "[m]echanical and electrical systems maintenance, repair and installation procedures[.]" "[l]aws, rules, regulations and code governing the installation and repair of mechanical / electrical fixtures and systems[.]" and "[e]lectrical theory and the application of electrical theory," among other principles and theories. In addition, at a minimum, the employee must have the ability to use "electrical testing equipment and meters to diagnose and repair system and equipment failures[.]" and repair "the electrical portion of lighting, heating, ventilating and air conditioning systems."

28. Rosenberg held a general journeyman electrician license when the County hired him in approximately 2012 as a Maintenance Specialist 3. Rosenberg has been an electrician for approximately 30 years.

29. As a Maintenance Specialist 3, Rosenberg reported each day to the County's Facilities Maintenance Building and performed maintenance work throughout the County's various buildings, as well as electrical work. Rosenberg's electrical work as a Maintenance Specialist 3 included replacement and repair work and work on new installations. Rosenberg's position was part of the Department of County Administration and Operations.

30. While working as a Maintenance Specialist 3, Rosenberg worked only with AFSCME employees. Rosenberg did not delegate or assign work to other employees, and did not participate in the training of other employees. The Maintenance Specialist 3 position is expected to provide technical and functional supervision to employees in the Maintenance Specialist 1 and 2 positions, but Rosenberg was not asked to provide this type of guidance. Rosenberg did not participate in hiring panels.

31. Floyd Baker is an AFSCME-represented Maintenance Specialist 3 who works with Rosenberg in the same shop based in the Facilities Maintenance Building, under the same supervisor. Baker started working for the County over 11 years ago. Approximately six years ago, he began performing lead duties as a Maintenance Specialist 3, providing technical and functional supervision to other employees. In his lead role, Baker monitors incoming work orders, prioritizes the work, and assigns work orders to other employees.

32. Silke held both a general journeyman electrician license and a general supervising electrician license when the County hired him as a Maintenance Specialist 3 in approximately 2010.

33. As a Maintenance Specialist 3, Silke worked at the Lane Events Center. He performed maintenance and electrical work, including work that required a general journeyman license or a general supervising license. Silke was the only electrician on-site at the Lane Events Center, and he worked with only AFSCME-represented employees.

34. There is no evidence in the record about the present duties performed by any Lead Electrician (other than Rosenberg and Silke) in the Maintenance Specialist-Lead classification in the Admin Pro bargaining unit.

#### Events Leading to the Present Petition

35. In June 2014, at the request of management, Silke completed a position description questionnaire to request that his Maintenance Specialist 3 position be reclassified to reflect the level of work Silke believed that he was performing—including work that required a general journeyman electrician license or a general supervising electrician license.

36. On August 22, 2014, the County denied Silke's request. The County determined that the work had not changed so significantly that 50 percent or more of the duties fit within a different classification, which the County requires before reclassifying an existing position.

37. During this period, the County determined that employing journeyman-licensed electricians was more cost effective than contracting such work out to private electrical contractors. In order to ensure that the County could continue to employ electricians who had journeyman licenses in the future, the County decided to create new electrician positions at the

Lane Events Center and in the facilities section of the County Administration Office/Operations. The County made the general journeyman license a minimum qualification (instead of merely a preferred qualification). The County was aware that Silke and Rosenberg each held a journeyman license.

38. The County determined that the new positions, with the higher, journeyman licensing requirements, fell within the existing Maintenance Specialist-Lead classification because that classification's specifications require a journeyman electrician license.

39. The Maintenance Specialist-Lead classification specifications were created on December 12, 2009, and updated on August 22, 2014, and October 13, 2014. The County had never previously classified the electrician work at the Lane Events Center (performed by Silke) or the county-wide facilities-related work (performed by Rosenberg) in the Maintenance Specialist-Lead classification.

40. The specifications for the Maintenance Specialist-Lead classification state that the duties of Lead Electrician may include responsibility for "[p]erforming and/or supervising the maintenance and repair of mechanical and electrical systems," "[i]dentifying maintenance and repair needs," "[i]nspecting completed work pertaining to mechanical and electrical systems," and "[p]roviding technical assistance for electrical projects and equipment."

41. In October 2014, the County opened two Maintenance Specialist-Lead positions, both with a working title of Lead Electrician, in a competitive hiring process. One position was based at the Lane Events Center, which is currently part of the Public Works Department. The other position was based at the Facilities Maintenance Building in the Department of County Administration and Operations. As described in the job announcement, those positions required a journeyman electrician license. The job announcement also stated that possession of a general supervising electrician license was "preferred," and an employee with such a license would receive a five percent pay differential.

42. The job announcement for the Maintenance Specialist-Lead position at the Lane Events Center stated that the employee selected may be responsible for interacting "frequently with vendors and clients to identify and address specific electrical needs," and for routinely "setting up temporary electrical layouts and performing lighting system repairs." The job announcement for the Facilities Maintenance position stated that the employee selected may be responsible for designing "lighting control systems and programming lighting control equipment in order to maximize building energy efficiency" and performing "lead worker duties for employees who possess limited electrical licenses."

43. Silke and Rosenberg successfully applied for the Maintenance Specialist-Lead positions. When they started in that role, the County moved them into Admin Pro's bargaining unit. The County explained that decision as being consistent with the Maintenance Specialist-Lead classification being listed in Schedule B of the Admin Pro Agreement. The County has been transferring their deducted dues to Admin Pro.

44. As a Maintenance Specialist-Lead, Rosenberg continues to work out of the same shop in the Facilities Maintenance Building. He reports to the same supervisor, works only with AFSCME-represented employees, and performs general and preventative maintenance work, as

well as electrical work. In addition to those duties, as a lead worker, Rosenberg also now occasionally delegates some duties to AFSCME-represented employees. On balance, however, Rosenberg's work is substantially the same as the work that he performed as a Maintenance Specialist 3 represented by AFSCME.

45. As a Maintenance Specialist-Lead, Silke continues to work at the Lane Events Center. He reports to the same supervisor, works almost exclusively with AFSCME-represented employees, and continues to perform the work of the sole on-site electrician. He is the only Admin Pro-represented employee at the Lane Events Center.

46. Silke performs most of the duties that he performed when he worked as a Maintenance Specialist 3. Occasionally, when Silke's workload has been too heavy, some of the work Silke previously performed as a Maintenance Specialist 3 has been subcontracted to private electrical contractors, under Silke's direction. Moreover, Silke also performs some new work that is different from the work that he performed as a Maintenance Specialist 3, in part because the County is initiating some construction projects at the Lane Events Center. The work assigned to Silke's position is evolving, although the beginning and pace of that evolution is unclear. At the time of hearing, Silke was working on a facilities assessment and on capital improvement projects. Silke also sporadically performs some traffic signal-related electrical work, although only for a day or so once every few months.

47. Despite the new work and subcontracted work, on balance, Silke's work is substantially the same as the work that he performed as a Maintenance Specialist 3 represented by AFSCME.

48. The County has not replaced Silke and Rosenberg in the Maintenance Specialist 3 positions. At the time of hearing, there was a Maintenance Specialist 3 position open, but there is no evidence in the record indicating when the opening arose or that the County is actively recruiting for that opening.

49. In early 2015, AFSCME filed a grievance challenging Silke and Rosenberg's placement in the Admin Pro bargaining unit. AFSCME and the County reached an agreement to resolve the grievance, but Admin Pro did not concur. The parties discussed a three-way arbitration including AFSCME, Admin Pro, and the County. However, AFSCME ultimately determined that, because of contractual and logistical challenges, it would file a unit clarification petition and withdraw its grievance.

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The petitioned-for Lead Electrician positions in the Maintenance Specialist-Lead classification are in the AFSCME bargaining unit under the express terms of the AFSCME Agreement.

AFSCME's petition, filed pursuant to OAR 115-025-0005(3), seeks a determination that two Lead Electrician positions in the Maintenance Specialist-Lead classification are in AFSCME's bargaining unit. OAR 115-025-0005(3) provides:

“When the issue raised by the clarification petition is whether certain positions are or are not included in a bargaining unit under the express terms of a certification description or collective bargaining agreement, a petition may be filed at any time, except that the petitioning party shall be required to exhaust any grievance in process that may resolve the issue before such a petition shall be deemed timely by the Board.”

Under OAR 115-025-0005(3), the issue is not whether the disputed employees should be *added* to the bargaining unit. Instead, we decide only whether the positions are *already in the unit* based on the language of the certification or the collective bargaining agreement. *Marion County*, UC-12-02 at 2, 19 PECBR at 782. Accordingly, in subsection (3) cases, the focus is “very narrow. Where the parties have an honest disagreement about the scope of the unit based on the interpretation of the certification description or contract recognition language, a subsection (3) petition gives the parties a vehicle to resolve the disagreement.” *Oregon AFSCME Council No. 75 v. Housing Authority of Portland*, Case No. UC-19-92 at 6, 13 PECBR 730, 735 (1992).

In evaluating a petition under subsection (3), the Board “generally will look only to the express language of the certification description or of the collective bargaining agreement in deciding whether the disputed positions are included or excluded.” *Salem Education Association v. Salem School District 24J*, Case Nos. C-262-79, C-2-80, and C-73-80 at 16-17, 6 PECBR 4557, 4572-73 (1981). In subsection (3) cases, the Board will not consider extrinsic evidence of the parties’ prior or contemporaneous understandings to vary the express terms of their agreement. *Washington County Dispatchers Association v. Washington County Consolidated Communications Agency*, Case No. UC-69-90 at 11, 13 PECBR 135, 145 (1991). The Board will, however, consider extrinsic evidence to explain ambiguities, including “latent ambiguities, such as the meaning of terms within an agreement.” *Id.* at 12 n 9, 13 PECBR at 146 n 9.<sup>8</sup>

Further, in subsection (3) cases, the Board has not treated job titles or classifications as dispositive; rather, the Board considers evidence of the work actually performed by the petitioned-for employees. *See Washington County Consolidated Communications Agency*, UC-69-90 at 11, 13 PECBR at 145 (when an employee’s job duties change over time, “the controlling factor” in determining whether the employee’s position is included in a particular bargaining unit “is not the [employer]’s classification of the \* \* \* position, but whether [the employee] performs the functions” of positions in the unit); *Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO v. Southwestern Oregon Community College*, Case No. UC-61-92 at 10, 14 PECBR 668, 677 (1993) (when recognition clause describes a unit “in terms which are broadly descriptive,” such as “all” classified employees, “the duties of new positions, not their titles, are determinative”). Thus, in circumstances of an employer reorganization or retitling of positions, a labor organization continues to represent historically-represented positions so long as there has been no appreciable change in their work. *See Laborers International Union of North America, Local 121 v. City of Redmond*, Case No. UC-40-92 at 6, 14 PECBR 162, 167 (1992); *Oregon AFSCME, Council 75 v. Union County*, Case No. UC-81-87 at 8-9, 10 PECBR 354, 361-62 (1987) (employees remained in unit after

---

<sup>8</sup>When interpreting recognition clauses in subsection (3) cases, we have used the familiar rules of contract construction. *See, e.g., Tualatin Employees’ Association v. City of Tualatin*, Case No. UC-012-12 at 8-9, 25 PECBR 565, 572-73 (2013) (citing *Portland Police Assoc. v. City of Portland*, 248 Or App 109, 113, 273 P3d 192 (2012)).

reorganization where they had “essentially the same” duties and responsibilities and they “carr[ied] out those duties and responsibilities in a similar manner”).

With this framework in mind, we begin our analysis with the recognition clause at issue. The AFSCME Agreement provides that AFSCME

“is the sole and exclusive representative of all temporary, probationary, and non-probationary employees in permanent positions **exclusive of** those employees in a confidential or supervisory capacity, extra help employees (subject to Section 1 (B) below), **those employees employed in classifications represented in other bargaining units**, and those employees employed in classifications listed in Appendix A or successor classifications.” (Emphasis added.)<sup>9</sup>

AFSCME contends that, pursuant to this clause, it represents “all” employees (unless expressly excluded), and that the County’s mere placement of historically AFSCME-represented positions in a classification represented by another union does not, without more, make the employees “employed in classifications represented in other bargaining units.” Conversely, Admin Pro contends that the inclusion of the Maintenance Specialist-Lead classification in the list of Admin Pro-represented classifications in its agreement necessarily means that the petitioned-for positions are in Admin Pro’s unit. In other words, Admin Pro contends that the job titles and classification of the petitioned-for positions should be dispositive.

We agree with AFSCME that the petitioned-for employees’ new job titles and accompanying classification are not dispositive. As discussed above, we consider the work that the employees actually perform to determine whether they are already in the AFSCME bargaining unit under the express terms of AFSCME’s recognition clause. In doing so, we adhere to the principle that positions that have been historically represented by a labor organization remain represented by that labor organization so long as there has been no appreciable change in the work performed by the employees in those positions. *City of Redmond*, UC-40-92 at 6, 14 PECBR at 167.

Applying these principles, we turn next to analyzing the duties of the two petitioned-for positions. In his new Lead Electrician position, Rosenberg performs substantially the same work that he performed while in AFSCME’s bargaining unit. As before, he performs general maintenance and electrical work throughout the County’s facilities. In his new position, Rosenberg reports to the same location, works with the same AFSCME-represented coworkers, and reports to the same supervisor. He performs some new duties—such as participating in occasional hiring panels, and performing some “lead” work—but, on the whole, his work in the Maintenance Specialist-Lead classification is substantially the same as the work he performed as a Maintenance Specialist 3. Therefore, we conclude that the Lead Electrician position assigned to perform work throughout the County is included in the AFSCME bargaining unit.

---

<sup>9</sup>We note that AFSCME’s recognition clause is not a “‘laundry list’ unit description.” See *Southwestern Oregon Community College*, UC-61-92 at 9, 14 PECBR at 676. AFSCME’s unit description broadly encompasses “all temporary, probationary, and non-probationary employees in permanent positions” and does not refer to any list of classifications. Although Appendix D of the AFSCME Agreement is a list of classifications included in AFSCME’s unit, that list is not referred to in the recognition clause and does not operate to automatically exclude positions in unlisted classifications. *Id.*

Similarly, Silke performs much of the same work that he previously performed as a Maintenance Specialist 3. As before, he works only at the Lane Events Center, works only with AFSCME-represented employees, and reports to the same supervisor. In one change, Silke now performs some work on traffic signals, the electrical work historically performed by an Admin Pro-represented Lead Electrician. That work, however, consists of only one or two days' work every few months. This new duty is nominal—there is no evidence that traffic signal-related electrical work is a core duty of Silke's job.

Silke also performs some new duties, including working on facilities assessments and capital improvements, as well as overseeing the electrical work that is subcontracted to private electrical contractors. We are persuaded that some of these changes are the result of the natural evolution of Silke's position as the County has begun to focus on performing more electrical work in-house and undertaking more construction projects. Although more than insignificant, these changes in Silke's duties are not so substantial that we can conclude that his position has appreciably changed. The fact remains that Silke is the only electrician on-site at the Lane Events Center, just as he has been since the County originally hired him as a Maintenance Specialist 3.

Moreover, there is no evidence in the record that the County has actively sought to replace Silke in the Maintenance Specialist 3 position, which supports a conclusion that Silke's job remains essentially the same, despite its new title and placement in the Maintenance Specialist-Lead classification. In these circumstances, we conclude that there has been no appreciable change in the work performed by the Lead Electrician position working at the Lane Events Center. *See City of Redmond*, UC-40-92 at 6, 14 PECBR at 167. Therefore, we conclude that the Lead Electrician position assigned to perform work at the Lane Events Center is included in the AFSCME bargaining unit.

Admin Pro's arguments do not persuade us otherwise. Admin Pro contends that the petitioned-for positions are properly in its bargaining unit because it is the only union that represents a County classification that requires a journeyman electrician license, and it has represented a position with the working title of "Lead Electrician" for over 20 years. These factual contentions, although accurate, do not alter our conclusion. Our task is to construe *AFSCME's* collective bargaining agreement to determine whether the petitioned-for positions are *already* in AFSCME's unit. AFSCME's broad recognition clause (which predates Admin Pro's certification) does not expressly exclude either Lead Electrician positions or positions that require a journeyman electrician license.<sup>10</sup> As explained above, we have concluded that the Lead Electrician positions held by Rosenburg and Silke are, in fact, essentially the same as their previous Maintenance Specialist 3 positions—and it is undisputed that the Maintenance Specialist 3 positions have always been in AFSCME's unit. Simply put, the record does not establish that Rosenburg and Silke, as Lead Electricians, are performing work that has historically been performed by Admin Pro employees. They are, instead, performing work historically performed by AFSCME employees. *See, e.g., Union County*, UC-81-87 at 8, 10 PECBR at 362 (concluding that petitioned-for positions remained in AFSCME unit after workplace reorganization because the employees were not "any less identifiable as the public health group of employees included in the parties' recognition clause than they were when they existed as the Public Health Department").

---

<sup>10</sup>We also note that for at least some of the AFSCME agreements in effect before 1987, the list of classifications included in AFSCME's bargaining unit included "electrician" or "lead electrician."

Admin Pro also argues that it represents lead workers (or at least all lead electricians), the petitioned-for positions are lead positions, and therefore, the petitioned-for positions should be in its unit. Once again, to the extent that Admin Pro contends that job titles alone are dispositive, our cases do not support that argument. *See Washington County Consolidated Communications Agency*, UC-69-90 at 10, 13 PECBR at 145 (the “controlling factor” is not the employer’s classification, but the employee’s duties); *Southwestern Oregon Community College*, UC-61-92 at 10, 14 PECBR at 677. To the extent that Admin Pro contends that we should analyze community of interest factors, we decline to do so; we do not assess community of interest factors in subsection (3) cases. *Clackamas County Employees’ Association v. Clackamas County*, Case No. UC-23-87 at 2, 10 PECBR 481, 482 (1988).

Further, as a factual matter, the labor-management history contravenes Admin Pro’s contention that it represents lead workers or all lead electricians, regardless of their department or particular job duties. Admin Pro was not certified as the exclusive representative of all County lead workers or all County lead electricians.<sup>11</sup> AFSCME itself currently represents lead workers, including Floyd Baker, an electrician performing lead duties in the Maintenance Specialist 3 classification, and the lead juvenile cook position. AFSCME also has historically represented a number of County positions that exercise some functional and technical supervision over other workers.<sup>12</sup> In addition, we note that Admin Pro did not assert that it represented *any* Lane Events Center employees when AFSCME filed a petition in 2009 to clarify that Lane Events Center employees, newly returned to the County workforce, were included in the AFSCME bargaining unit.

Finally, Admin Pro contends that the petitioned-for positions are *new* positions, and that both Rosenberg and Silke applied for and were hired into new positions. To the extent that Admin Pro argues that the creation of new positions means that we should *not* consider the work actually performed by the employees at issue, we reject that argument as contrary to our precedent. *See, e.g., Southwestern Oregon Community College*, UC-61-92 at 10, 14 PECBR at 677. Although the petitioned-for positions are ostensibly new, AFSCME correctly contends that they are, in fact, the same as the Maintenance Specialist 3 positions that have historically been in AFSCME’s unit, and that Rosenberg and Silke perform essentially the same work under similar working conditions as they did when represented by AFSCME.<sup>13</sup>

---

<sup>11</sup>Instead, the record establishes that Admin Pro was certified as the representative of certain employees within the Public Works Department, which did not include the Lane Events Center or Facilities Maintenance at the time of certification. Although, due to reorganizations, Admin Pro-represented employees have moved out of the Public Works Department, and AFSCME-represented employees have moved into that department, the representation has “followed the work,” not the departmental lines.

<sup>12</sup>*See, e.g., Lane County*, UC-12-09 at 60-64, 24 PECBR at 135-39 (describing AFSCME-represented positions of Senior Administrative Analyst, Senior Building Inspector, Senior Document Resource Center Specialist, Senior Justice Court Clerk, Mental Health Specialist 2, and Assistant Veteran Services Coordinator as positions that may exercise technical and functional supervision over other staff).

<sup>13</sup>Nothing in PECBA precludes the County from creating new positions with higher licensing requirements within the AFSCME unit and negotiating compensation for those positions. *See Southwestern Oregon Community College*, UC-61-92 at 9, 14 PECBR at 676.

We conclude that the petitioned-for Lead Electrician positions in the classification of Maintenance Specialist-Lead are included in AFSCME’s bargaining unit. In reaching this conclusion, we are “simply giving effect to the parties’ recognition clause. We do nothing more than determine whether the bargaining unit as defined by the parties’ agreement encompasses the actual work” that the employees in the petitioned-for positions currently perform. *See Washington County Consolidated Communications Agency*, UC-69-90 at 14, 13 PECBR at 148. As set forth above, the positions held by Rosenberg and Silke, despite their current classification and working title, are positions historically treated (and historically agreed by the County and AFSCME) as included in AFSCME’s unit.<sup>14</sup> The mere fact that the positions have been placed in the Maintenance Specialist-Lead classification does not, on its own, remove them from AFSCME’s unit.


ORDER

The AFSCME bargaining unit is clarified to include the positions with the working title Lead Electrician, in the classification of Maintenance Specialist-Lead, currently filled by Frederic Rosenberg and Travis Silke.

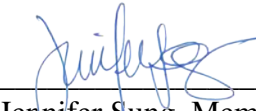
DATED: December 18, 2017.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

---

<sup>14</sup>We note that AFSCME and the County’s course of dealing supports our conclusion. *See, e.g., American Federation of State, County and Municipal Employees, Local 3327 v. State of Oregon, Department of Human Services, Oregon State Hospital, and Oregon Health Sciences University*, Case No. UC-003-11 at 14, 25 PECBR 248, 261 (2012) (considering parties’ conduct to determine intent of recognition clause). Here, in the years before they entered their current collective bargaining agreement, AFSCME and the County entered into multiple memoranda of understanding reflecting their mutual understanding that AFSCME’s unit encompasses work historically performed by AFSCME-represented employees—reinforcing the conclusion that AFSCME’s bargaining unit is not defined merely by title or classification.

STATE OF OREGON

EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL	)	
UNION LOCAL 503, OREGON PUBLIC	)	
EMPLOYEES UNION,	)	
	)	
Complainant,	)	Case No. UP-010-17
	)	
v.	)	
	)	CONSENT ORDER
COOS BAY NORTH BEND WATER BOARD,	)	
	)	
Respondent	)	
<hr/>		

**I. STATEMENT OF THE CASE**

In March of 2017, Complainant SEIU Local 503, OPEU (“SEIU Local 503” or “the Union”) filed an unfair labor practice against Respondent Coos Bay North Bend Water Board (“the Water Board” or “Employer”) alleging violations of 243.672(1)(a), (b), (e), and (g). The parties have agreed to settle this matter by entry of this Consent Order, subject to Board approval. The parties agree to waive all further proceedings in this matter, including 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. SEIU Local 503 is a labor organization within the meaning of ORS 243.650(13).
2. The Water Board is a public employer as defined by ORS 243.650(20).
3. The Union and the Employer have been parties to a series of collective bargaining agreements (“CBAs”), the most recent of which is effective, by its terms from July 1, 2016 through June 30, 2019.
4. Article 3 of the current CBA sets forth the Employer’s duties in regard to withholding appropriate union dues.
5. On or about November 15, 2016, and December 2, 2016, the Water Board refused to provide the Union with requested information pertaining to bargaining unit members including: Names, addresses, dates of hire, phone numbers, notification of new hires and notification when employees leave the bargaining unit due to termination, retirement or any other reason.
6. In or around January 2017, the Water Board contacted bargaining unit members regarding the Union’s request for their names and contact information. Bargaining unit employees were asked to fill out an authorization form, and indicate whether or not wanted to have their information given to the Union. The reason for this contact was to notify the bargaining unit members of the Union request and to provide them with an opportunity to consent or to register their disapproval.
7. On or about March 7, 2017, the Water Board refused to provide the Union with the names and contact information of five bargaining unit members who did not sign an authorization consenting to the release of their information.

8. The Water Board failed to deduct dues or fair share fees for a bargaining unit employee for October, November, December of 2016 and the first pay period in January of 2017.

### **III. STIPULATED CONCLUSIONS OF LAW**

1. The Board has jurisdiction over these parties and this subject matter.
2. Employer violated ORS 243.672(1)(a), (b) and (e) by refusing to provide the Union with the requested information including the names, addresses, dates of hire, and phone numbers of *all* unit employees, without a signed authorization from the employees.
3. Employer violated ORS 243.672(1)(a) by interfering with bargaining unit employees' exercise of protected rights.
4. The Employer violated ORS 243.672(1)(b) by interfering in the communication between bargaining unit employees and the Union by refusing to provide contact information for bargaining unit employees.
5. Employer violated the provisions of ORS 243.672(1)(g) when it failed to pay the Union dues and fair share deductions as required by the collective bargaining agreement.

### **IV. STIPULATED ORDER**

1. The Water Board violated ORS 243.672(1)(a), (b), (e) and (g) for failure to provide the Union with the requested information related to bargaining unit employees including contact information, by interfering with bargaining unit employees' exercise of protected rights, interfering in the communication between bargaining unit employees by

failing to provide employees' contact information and for failure to remit dues and fair share payments to the Union.

2. The Water Board will provide the Union with the requested information related to bargaining unit employees.

3. The Water Board will pay the Union the sum of the dues and fair share deductions and any additional dues or fair share that Employer has failed to account for or withhold, out of its own funds

4. The Water Board will cease and desist from requiring employees to consent to the release of their contact information prior to providing such information to the Union.

5. The Water Board shall reimburse the union for the filing fee.

6. The parties will pay their own representation costs.

7. The Union will waive its request for a civil penalty.

8. A copy of the attached Notice will be posted at all of Employers facilities where bargaining unit employees work within 30 days of the date of the Board's Final Order, and will remain posted for 30 days.

//

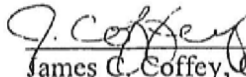
//

//


//

The Water Board shall provide a copy of this order and notice to all Water Board employees and Board members by mail.

FOR THE EMPLOYER

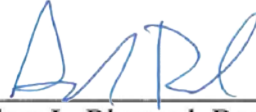
  
James C. Coffey, OSB #740592  
Of Attorney for Respondent  
P.O. Box 1006  
North Bend, OR 97459  
(541)756-2066  
[coffey@stebbinsandcoffey.com](mailto:coffey@stebbinsandcoffey.com)  
Date: Sept. 26, 2017

FOR THE UNION

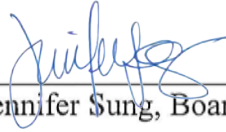
  
Shirin Khosravi, OSB #146232  
Of Attorney for Complainant  
SEIU Local 503, OPEU  
P.O. Box 12159  
Salem, Oregon 97309-0159  
(503) 581-1505 x135  
[khosravi@seiu503.org](mailto:khosravi@seiu503.org)  
Date: Oct. 25, 2017

This Consent Order is hereby approved and adopted this 20 day of December 2017.

FOR THE EMPLOYMENT RELATIONS BOARD



Adam L. Rhynard, Board Chair



Jennifer Sung, Board Member



Lisa M. Umscheid, Board 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-10-17, *Service Employees International Union Local 503, Oregon Public Employees Union v. Coos Bay North Bend Water Board*, 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 following action on the part of the Water Board violated the Public Employee Collective Bargaining Act (PECBA):

The Water Board violated ORS 243.672(1)(a), (b), (e) and (g) for failure to provide the union with the requested information related to bargaining unit employees including contact information, by interfering with bargaining unit employees' exercise of protected rights, interfering in the communication between bargaining unit employees by failing to provide employees' contact information and for failure to remit dues and fair share payments to the Union.

The Employment Relations Board has ordered the Water Board to:

1. Post this notice in the locations listed in the attachments to this notice.
2. Provide the Union with the requested information related to bargaining unit employees.
3. Pay the Union the sum of the dues and fair share deductions and any additional dues or fair share that Employer has failed to account for or withhold, out of its own funds.
4. The Water Board will cease and desist from requiring employees to consent to the release of their contact information prior to providing such information to the Union.

COOS BAY NORTH BEND WATER BOARD

Dated \_\_\_\_\_, 2017 By \_\_\_\_\_  
Employer Representative

\_\_\_\_\_  
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 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 NE, Suite 400, Oregon 97301-3807, phone 378-3807.*

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-024-17

(UNFAIR LABOR PRACTICE)

PORTLAND ASSOCIATION OF	)	
TEACHERS/OEA/NEA,	)	
	)	
Complainant,	)	
	)	
v.	)	ORDER ON RECONSIDERATION
	)	
MULTNOMAH COUNTY SCHOOL	)	
DISTRICT NO. 1J (OPERATING AS,	)	
PORTLAND PUBLIC SCHOOLS),	)	
	)	
Respondent.	)	

Elizabeth Joffe and Noah Barish, Attorneys at Law, McKanna Bishop Joffe LLP, Portland, Oregon, represented Complainant.

Jeffrey P. Chicoine and Ivan Resendiz Gutierrez, Attorneys at Law, Miller Nash Graham & Dunn LLP, Portland, Oregon, represented Respondent.

On September 29, 2017, Multnomah County School District No. 1J, operating as Portland Public Schools (District), requested reconsideration of this Board’s September 15, 2017, order, which held that the District violated ORS 243.672(1)(e) by pursuing an unlawful subject of bargaining during its negotiations with Portland Association of Teachers/OEA/NEA (PAT). Because we had expedited the complaint and issued a final order without a recommended order, we granted the request and held oral arguments on November 7, 2017. *See* OAR 115-010-0100(3)(b). Having considered the District’s request and PAT’s response, we adhere to our prior order, as supplemented by this order.<sup>1</sup>

<sup>1</sup>The District also filed two motions to reopen the record to submit (1) transcripts and recordings of additional legislative history; and (2) a corrected version of a collective bargaining agreement (CBA) from a different public school district that both parties had entered into the record. As with the other legislative history submitted by District, we receive the legislative history not as “evidence” in a technical sense, but for ease of the Board in addressing the merits of this case.

(continued . . .)

In our prior order, we declined the District’s request to dismiss the complaint as moot. In doing so, we explained that “mootness” is a term of art that applies only to the courts and not to administrative agencies. *See Wallace v. State ex rel PERS*, 249 Or App 214, 220-21, 275 P3d 997 (2012); *Thunderbird Hotels, LLC v. City of Portland*, 218 Or App 548, 556-57, 180 P3d 87 (2008). As such, we reasoned that the District’s reliance on *Association of Oregon Corrections Employees v. DOC*, 266 Or App 496, 503-10, 337 P3d 998 (2014), and the standards for when a *court* might consider a Board case moot was misplaced.

We recognized, however, that this Board may have its own statutory authority to dismiss a matter as moot. *See Just v. City of Lebanon*, 193 Or App 132, 137-47, 88 P3d 312 (2004), *rev dismissed*, 342 Or 117, 149 P3d 139 (2006). Turning to our governing statute (the Public Employee Collective Bargaining Act (PECBA)), we observed that it does not expressly reference “mootness,” although a complaint may be dismissed if no issue of fact or law warrants a hearing. ORS 243.676(1)(b). We further observed that ORS 243.766(3) directs this Board to “[c]onduct proceedings on complaints of unfair labor practices by employers, employees and labor organizations and take such actions with respect thereto as it deems necessary and proper.” We noted that a concept of “mootness” fits within these statutory directives, and that we might be authorized to dismiss a complaint on grounds akin to mootness. However, in this case, we deemed it necessary and proper not to dismiss the complaint because (1) PECBA envisions that this Board may adjudicate an unfair labor practice complaint even when the unlawful practice has ceased, and (2) the manner and timing of the District’s withdrawal of the at-issue proposal weigh against dismissal (*i.e.*, the District refrained from withdrawing its proposal at the bargaining table, despite PAT’s protests, for over eight months and then did so in its post-hearing brief only after the close of the evidentiary record).

On reconsideration, the District contends that we erred in not dismissing the complaint as moot. The District asserts that we should adhere to and follow the judicial jurisprudence on when *the courts* consider a Board case moot. The District notes that the Board has previously followed that judicial jurisprudence in addressing claims of mootness.

The District is correct that this Board has previously employed the test of mootness that courts have applied; our prior order indicated as much. Our prior order explained, however, that those Board cases were inconsistent with the above-mentioned court cases that concluded that the judicial jurisprudence regarding mootness does not apply to administrative agencies. On

---

( . . . continued )

We also receive the corrected version of the previously received collective bargaining agreement. “As a general rule, this Board will not grant a motion to reopen a record for submission of additional evidence unless the evidence offered is material to the issues and was unavailable at the time of the hearing, or there is some other good and substantial reason why the evidence was not presented at the hearing.” *AFSCME Council 75 v. Josephine County*, Case No. UP-026-06 at 5-6, 22 PECBR 61, 65-66 (2007), *aff’d*, 234 Or App 553, 228 P3d 673 (2010) (quotation marks omitted). Ultimately, the corrected CBA is not material to our decision, and it was not unavailable at the time of hearing. However, we admit it under the unique circumstances of this case, which include that both parties submitted the original CBA, both were unaware that the CBA had been modified at the time of hearing, the District did not actually possess the modified CBA at the time of the hearing, and the complaint was expedited.

reconsideration, the District nevertheless asks us to effectively disregard court precedent and directly apply the courts' mootness jurisprudence to this case. We are bound, however, by the courts' directive that their mootness jurisprudence does not apply to administrative agencies, such as this Board. Therefore, we adhere to our decision not to dismiss the matter as moot.

The District also asserts that we erred in our ultimate conclusion of law—*i.e.*, that the District violated ORS 243.672(1)(e) when it pursued a bargaining proposal that conflicted with ORS 332.507. Specifically, on reconsideration, the District contends that we erred in four ways: (1) we should have concluded that the legislative history establishes that ORS 332.507 is inapplicable to substitute teachers; (2) we should have concluded that PAT did not object to the District's sick-leave proposal; (3) we should have concluded that the District's actions did not amount to unlawful pursuit of a prohibited subject of bargaining; and (4) we incorrectly determined that the District could not make a lawful proposal based on the Oregon Sick Leave Law, ORS 653.601 *et seq.* We address the District's contentions, in turn.

In our prior order, we held that the District violated ORS 243.672(1)(e) by unlawfully pursuing a contractual term that conflicted with ORS 332.507. In doing so, we reasoned that ORS 332.507 does not categorically exclude all substitute teachers from its coverage, but that the District's sick-leave proposal did just that. We reached that conclusion based on (1) the District's admission that its substitute teachers are employees of the District (a public school district); and (2) the plain language of the statute, which encompasses "*all employees* of a public school district or an education service district." See ORS 332.507(1)(a) (emphasis added).

In its reconsideration request, the District again asserts that ORS 332.507 excludes all substitute teachers from its coverage. The District recognizes that the plain language of the statute encompasses "all" of its employees. The District argues, however, that the legislative history of that statute establishes that the use of the term "all" was a "scrivener's error," and that the legislature intended that term to be "regular." For the following reasons, we disagree with the District's assertions.

We begin by reiterating our analytical framework for construing a statute. The objective of statutory interpretation is to "pursue the intention of the legislature if possible." *State v. Gaines*, 346 Or 160, 165, 206 P3d 1042 (2009). See also ORS 174.020(1)(a) ("In the construction of a statute, a court shall pursue the intention of the legislature if possible."). To achieve that objective, we first review the text and context of the statute. *Gaines*, 346 Or at 171. We may then review any relevant legislative history offered by the parties. *Id.* If we are unable to determine the legislature's intent, we then apply maxims of statutory construction. *Id.*

Our statutory review is guided by the principle that the plain text of a statute is the best evidence of legislative intent. *Id.* Consequently, "a party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it." *Id.* at 172. On reconsideration, the District does not dispute that the plain text of the statute includes "all" employees. The District has also conceded from the outset that substitute teachers are District employees. The District acknowledges, therefore, that it has "a difficult task before it" to overcome that seemingly plain and unambiguous text.

The District maintains that it has accomplished that task with legislative history that proves that the use of the term “all” instead of the term “regular” was a “scrivener’s error.” However, we disagree with the District’s assertion that the legislative history establishes that such an error was made. To explain why the legislative history does not support the District’s assertion, we begin with the contextual background of the statute.

Before the 1977 amendments to ORS 342.596, there were two school employee sick-leave statutes: sick leave for teachers as mandated by ORS 342.595, and sick leave for classified employees as mandated by ORS 342.596.<sup>2</sup> The term “regular” was not used to modify “teacher” in ORS 342.595, whereas ORS 342.596(1)(a) defined “classified employee” as including “all regular employees of a public school district except employees covered by ORS 332.595.” ORS 342.596 also restricted classified employees’ ability to accumulate and transfer sick leave when compared with ORS 342.595 (which applied to teachers).

In 1977, the Oregon School Employees Association (OSEA) supported a bill, Senate Bill 458 (SB 458), to amend ORS 342.596 so that classified employees would have the same ability to accumulate and transfer sick leave as the teachers had under ORS 342.595. The legislative history of that bill (SB 458), the District contends, shows that the currently enacted statute’s use of the term “all” is a scrivener’s error. We turn to that legislative history.

The Senate Education Committee addressed SB 458 in five hearings in 1977, on February 17, March 22, May 17, May 24, and May 25. In relevant part, the original version of SB 458 would have amended the definition of “classified employee” in ORS 342.596(1)(a) by deleting both the term “regular” and the clause excepting “employees covered by ORS 342.595,” *i.e.*, teachers. During the February 17 hearing, John Brown, representing OSEA, proposed an amendment to the bill that would reinsert the word “regular” as a modifier of “employees,” and restore the clause excepting teachers in section (1)(a). In response to a question from the chair of the committee, Brown stated that amendment was being proposed due to a drafting error.

Later in the hearing, John Danielson, a legislative consultant with the Oregon Education Association (OEA), responded to the amendment that would restore the term “regular employees” to the bill. Danielson stated that he did not know if there was a definition for the word “regular,” but stated that the amendment was offered because

“when you get into all employees, then you end up with some of these special work programs such as you heard the other day with the musical instruments and you get into every part-timer and some that are on a very limited service. And I think the regular employee is...give [*sic*] them a status that they are a regular employee of the district rather than just anybody they employ for a particular purpose. So it does eliminate. [*sic*]. And the administrative costs would skyrocket, I think, if you took that terminology out.”

At the March 22 hearing, the Senate Education Committee approved the amendment, while also agreeing to continue working on the bill.

---

<sup>2</sup>As previously indicated, at the time of enactment, the bill was codified as ORS 342.596; in 1993, it was renumbered to ORS 332.507.

At the May 17 hearing, an OEA representative explained that OEA was proposing new amendments that would “consolidate[]” the teacher and classified employee sick-leave statutes. To that end, OEA proposed to modify ORS 342.596(1)(a) to delete the terms “classified” and “regular,” and to delete the clause excepting teachers, so that “school employee” would be defined as “includ[ing] all employees of a public school district.”

Around the same time, the Oregon School Board Association (OSBA) also proposed amendments to SB 458. In relevant part, OSBA proposed repealing the teacher sick-leave statute (ORS 342.595), and amending ORS 342.596(1)(a), so that it would define “school employee” to include “regular employees of a school district.” Thus, it appears that both OSBA and OEA supported consolidating the two statutes, but OEA proposed covering “all school employees,” while OSBA proposed limiting coverage to “regular” employees.

None of the remaining legislative history records shows what the committee members thought of OEA’s and OSBA’s competing proposals for ORS 342.596(1)(a), or what effect the members believed that the inclusion or omission of the term “regular” would have on substitute teachers’ sick-leave rights, if any.<sup>3</sup> It is clear only that the final version of SB 458 consolidated the teacher and classified employee sick-leave statutes, and did so in part by amending ORS 342.596(1)(a) to define “school employe[e]” as “all employees of a public school district or an intermediate education district.” *See Oregon Laws 1977, Ch. 860, Sec. 3.*<sup>4</sup>

In short, the legislative history proffered by the District shows that, at certain points during the legislative process in the Senate, amendments were approved in a committee hearing to retain the phrase “regular employees,” but that the legislation ultimately used the phrase “all employees.” Significantly, the change from “regular” to “all” occurred before the Senate vote and before the bill was even introduced in the House. It does not appear that the House considered passing anything other than a bill that used the phrase “all employees.” Moreover, the legislative history also indicates that, when used, the modifier “regular” would modify *classified* employees, not *teachers*.

Under these circumstances, we disagree with the District’s contention that the legislative history overrides the plain and unambiguous text of the statute. Although it is conceivable that the legislature inadvertently used the term “all” when it meant to use the term “regular,” the legislative

---

<sup>3</sup>Some of the legislative history indicates that one motivating factor for SB 458 was to bring parity to classified employees and teachers with respect to paid sick leave, particularly as to how that leave might be included in pension calculations under the Public Employees Retirement System (PERS). (The legislature had recently changed PERS so that some unused sick leave could be included in the pension benefit calculation for some public employees.) For example, OSBA, in its memorandum to the Senate Education Committee, explained that the intent of its amendments required an understanding of the changes to PERS. OSBA explained that its amendments made the distinction between “the accumulation of sick leave hours for computation of retirement benefits and the requirement that a public employer must accept sick leave for sick leave purposes that were accumulated under another employing school district.”

<sup>4</sup>The SB 458 amendments to ORS 342.596(1)(a) were indicated as follows:

“‘School employe’ includes all [*regular*] employes of a public school district [*except employes covered by ORS 342.595*] **or an intermediate education district.**”

history does not convincingly make that case.<sup>5</sup> That is especially true given that the amendments advanced in the Senate restoring the term “regular” (1) never reached the floor of the Senate and were never introduced or considered in the House, and (2) appeared directed at classified employees, rather than teachers.

Accordingly, we adhere to our prior conclusion, as supplemented by this order, that ORS 332.507 does not categorically exclude all substitute teachers from that statute’s mandates.

We now address the District’s contention that its actions did not amount to an unlawful pursuit of a prohibited subject of bargaining. Citing *Portland Association of Teachers v. Multnomah County School District No. 1*, Case No. UP-10-96 at 3, 16 PECBR 422, *recons*, 16 PECBR 429, 430-31 (1996), the District notes that “for a scope of bargaining dispute to ripen, the objector must identify the offensive language and state its reasoning, and the proponent must elect not to modify the proposal to satisfy such objections.”<sup>6</sup> The District asserts that those conditions were not met, and therefore no unfair labor practice violation occurred in this case.

We agree with the general framework set forth by the District—*i.e.*, that generally an unfair labor practice concerning the unlawful pursuit of a prohibited subject of bargaining will not ripen until a party objects to the offending language, and the proposing party elects not to modify the proposal to satisfy that objection. We disagree, however, with the District’s assertion that those elements were not satisfied in this case.

We first address the District’s assertion that PAT did not identify the offensive language and provide the District with its reasoning. In advancing that assertion, the District focuses on the emails sent by PAT’s counsel to the District’s counsel. Those emails, the District asserts, did not sufficiently communicate that PAT objected to the District’s proposal as unlawful by identifying the offensive language and stating its reasoning.

The emails, however, constitute only part of PAT’s objection to the District’s proposal. Specifically, as detailed in our prior order, the District first advanced its sick-leave proposal on November 22, 2016. In response, PAT, through its bargaining spokesperson (Berkey), stated that a paid-sick-leave proposal would need to comply with ORS 332.507. Both before and after PAT sent its second emailed notice, on April 24, 2017, PAT repeatedly pressed the District to confirm that any sick-leave contractual term could not conflict with ORS 332.507. PAT never wavered from that position. Indeed, it was PAT’s specific objection—communicated both at the table and

---

<sup>5</sup>In any event, although we may use legislative history to resolve an ambiguity in statutory phrasing, we may not use it to rewrite legislation. *Halperin v. Pitts*, 352 Or 482, 494-95, 287 P3d 1069 (2012) (“It is one thing to resort to legislative history to resolve an ambiguity in statutory phrasing, \* \* \* [i]t is another thing entirely, however, to resort to legislative history as a justification for inserting wording in a statute that the legislature, by choice or oversight, did not include. Legislative history may be used to identify or resolve ambiguity in legislation, not to rewrite it.”). See also *Young v. State of Oregon*, 161 Or App 32, 35, 983 P2d 1044, *rev den*, 329 Or 447, 994 P2d 126 (1999) (declining to modify statute to add state “white collar” employees to the list of statutory exclusions, despite contention that the omission from the list of exclusions was an “inadvertent mistake” that would lead to absurd results).

<sup>6</sup>Both parties agree that the mere proposal of prohibited language does not automatically constitute an unfair labor practice.

in PAT's two emails—that prompted the District's inquiry of its own counsel about whether PAT's objection had merit. Moreover, at the final bargaining session before the filing of this complaint, the District unequivocally stated that it had reached a conclusion that substitute teachers were not covered by ORS 332.507, but were, instead, covered only by the Oregon Sick Leave Law. It then submitted a proposal that it concedes did not meet the requirements of ORS 332.507 (and that was substantially the same as its initial proposal that prompted PAT's objections). That response by the District further indicates that the District understood the nature and the basis of PAT's objection to the District's proposal. Considering together the statements at the bargaining table, the emails, and the District's actions, we conclude that PAT sufficiently notified the District that the District's sick-leave proposal was unlawful because it did not comply with ORS 332.507.

In sum, under these circumstances, we disagree with the District's assertion that PAT did not adequately object to the District's sick-leave proposal or that PAT never provided the District with the reason for its objection. Specifically, we are satisfied that the District was aware that PAT objected to the District's sick-leave proposal as unlawful, and that the District was aware of the basis of that objection. Consequently, we consider PAT's actions sufficient to communicate an objection to the District's sick-leave proposal and to state the reasoning behind its objection. *See id.*

The only remaining question then raised by the District's reconsideration petition regarding unlawful pursuit is whether the District "continue[d] to pursue the objected-to proposal notwithstanding the objection." *Id.* On that question, the District does not provide any argument on reconsideration that it ceased pursuing the objected-to proposal, notwithstanding PAT's objection. Moreover, as set forth in our prior order, on the parties' final bargaining session to date (June 29, 2016), the District continued to pursue the sick-leave proposal that formed the basis of PAT's objection. The District stated that it was doing so because it had reached a conclusion that its proposal was lawful. That conclusion was based on the District's stated assertion that ORS 332.507 excluded substitute teachers from its coverage. PAT pressed the District for further explanation, but the District only reiterated that its proposal reflected its position that ORS 332.507 did not apply to substitute teachers. Under these circumstances, we conclude that the District continued to pursue the objected-to proposal. *See id.*

Finally, we address the District's contention on reconsideration that we incorrectly determined that the District could not make a lawful proposal based on the Oregon Sick Leave Law, ORS 653.601 *et seq.* As we understand the District's argument, the District intended to make a sick-leave proposal that complied with the Oregon Sick Leave Law; in so doing, the District was not intending to propose a sick-leave provision that conflicted with ORS 332.507, but rather just one that complied with the Oregon Sick Leave Law. Because "of the overlap of the two laws," the District asserts, a proposal "could have complied with all applicable laws."

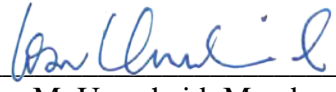
We agree with the District that it could have advanced a proposal that "complied with all applicable laws." We part ways with the District to the extent that it asserts that a proposal that concededly did not satisfy the requirements of ORS 332.507 is pursuable, so long as it satisfies some other statutory provision (here, the Oregon Sick Leave Law).

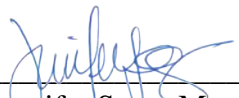
ORDER

1. The District's petition for reconsideration is granted.
2. We adhere to our prior order, as supplemented by this Order.

DATED: December 22, 2017.

  
\_\_\_\_\_  
Adam L. Rhynard, Chair

  
\_\_\_\_\_  
Lisa M. Umscheid, Member

  
\_\_\_\_\_  
Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.



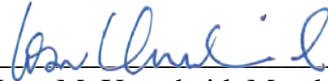
Accordingly, AFSCME's petition is granted, and the bargaining units are merged.

DATED: December 28, 2017.



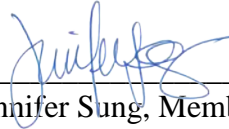
---

Adam L. Rhynard, Chair



---

Lisa M. Umscheid, Member



---

Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.