

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-039-16

(UNFAIR LABOR PRACTICE)

LINCOLN COUNTY EMPLOYEES	)	
ASSOCIATION (LCEA),	)	
	)	
Complainant,	)	
v.	)	FINDINGS AND ORDER FOR
	)	REPRESENTATION COSTS
LINCOLN COUNTY,	)	
	)	
Respondent.	)	
_____	)	

On August 30, 2017, this Board issued an order holding that Lincoln County (County) violated ORS 243.672(1)(e) by refusing to produce certain information requested by Lincoln County Employees Association (LCEA). 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) and OAR 115-035-0055, this Board finds that:

1. LCEA 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). Here, LCEA prevailed in establishing that the County violated ORS 243.672(1)(e).

2. This case required one day of hearing.

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

//
//
//

ORDER

The County shall remit \$3,000 to LCEA within 30 days of the date of this Order.

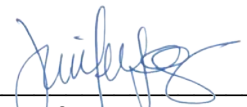
DATED January 2, 2018.



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. RC-010-17 / UC-016-17

(REPRESENTATION)

YAMHILL COUNTY JUVENILE	)	
DETENTION WORKERS ASSOCIATION,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
YAMHILL COUNTY,	)	ORDER CERTIFYING
	)	EXCLUSIVE REPRESENTATIVE
and	)	
	)	
OREGON AFSCME COUNCIL 75,	)	
LOCAL 1422,	)	
	)	
Respondents.	)	
_____	)	

On October 23, 2017, the Yamhill County Juvenile Detention Workers Association filed a petition to represent employees in a bargaining unit (described below), which was then represented by Oregon AFSCME Council 75, Local 1422.¹ Thereafter, the parties entered into a Consent Election Agreement for a representation election conducted by this Board.

On December 5, 2017, pursuant to the parties' Consent Election Agreement, this Board sent ballots to eligible voters. Nine valid ballots were returned by the deadline of December 19, 2017, which constitutes the date of the election. *See* OAR 115-025-0060(4)(c). A tally of ballots was held on December 20, 2017, and the majority of valid votes counted were cast for the Yamhill County Juvenile Detention Workers Association.

Also on December 20, 2017, a tally of ballots was provided to the parties. Objections to the conduct of the election (or conduct affecting the results of the election) were due within ten days of

¹Because of some initial confusion regarding the nature of the bargaining unit and the petitioner, both representation and unit clarification petitions were filed. Having ultimately determined that a representation petition is appropriate, we dismiss the unit clarification petition and grant the representation petition, as set forth in this order.

furnishing the ballot tally to the parties (i.e., by January 2, 2018). OAR 115-025-0060(9). No objections were filed. Accordingly, it is certified that:

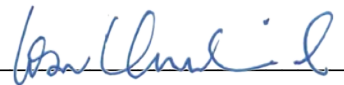
YAMHILL COUNTY JUVENILE DETENTION WORKERS ASSOCIATION

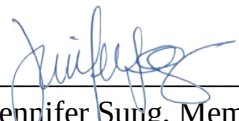
is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

“Juvenile Corrections Specialists and Juvenile Corrections Technicians.”

DATED: January 3, 2018.


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-26-17

(UNFAIR LABOR PRACTICE)

ASSOCIATION OF ENGINEERING
EMPLOYEES OF OREGON,

Complainant,

v.

STATE OF OREGON, OREGON
DEPARTMENT OF TRANSPORTATION,

Respondent.

CONSENT ORDER

Jason M. Weyand, Tedesco Law Group, Portland, Oregon, represented the Complainant.

Brena Moyer Lopez, Senior Assistant Attorney General, Oregon Department of Justice, represented the Respondent.

STATEMENT OF THE CASE

On August 14, 2017, the Association of Engineering Employees of Oregon (AEE) filed an unfair labor practice complaint against the State of Oregon, Oregon Department of Transportation (ODOT), alleging that ODOT had violated ORS 243.672(1)(a) by refusing to provide an AEE-represented employee with a union representative in a meeting with his supervisors that he reasonably believed could lead to discipline.

Subsequently, AEE and ODOT have agreed to resolve this matter by entering into this Consent Order, subject to approval by the Board. The parties agree to waive the reading of their rights under the Administrative Procedures Act (ORS 183.413) and waive further proceedings in this matter, including the right to a hearing before the Board or its agents and the right to judicial review of this Consent Order. The signatories below warrant that they are authorized to enter into this Consent Order on behalf of their principals, and that the facts agreed to below are accurate.

STIPULATED FACTS

1. AEE is a labor organization as defined in ORS 243.650(13).

2. ODOT, and the State generally, is a public employer as defined in ORS 243.650(20).
3. The Employment Relations Board has jurisdiction over the subject matter in this dispute.
4. RH is employed by ODOT as a Rail Compliance Specialist in its Rail and Public Transit Division. RH is represented by AEE.
5. JJ is the Rail Safety Manager at ODOT. JJ supervises RH, and is excluded from the AEE bargaining unit as a supervisory or managerial employee.
6. On February 21, 2017, JJ required RH to attend a meeting with him and another ODOT supervisor to discuss workplace concerns. RH reasonably believed that this meeting could lead to discipline, and requested to have an AEE representative present at the meeting. RH's request for Union representation was denied.

STIPULATED CONCLUSIONS OF LAW

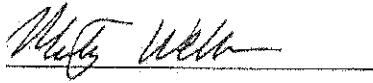
1. The Board has jurisdiction over this matter.
2. ODOT violated ORS 243.672(1)(a) when it refused to allow an AEE representative to attend the February 21, 2017 meeting with RH and his supervisors that RH reasonably believed could lead to discipline.

STIPULATED ORDER

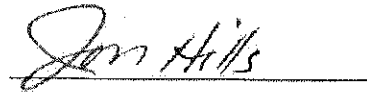
1. ODOT will cease and desist violating ORS 243.672(1)(a) by denying RH or any other bargaining unit employees union representation;
2. ODOT will post the attached written notice of the violation in bulletin boards in each ODOT facility with AEE-represented employees for 30 days;
3. ODOT will provide all managers and supervisors overseeing AEE-represented employees at least one hour of training on the right to union representation under the Public Employees Collective Bargaining Act; and
4. Each party will bear its own representation costs.

SIGNATURES OF THE PARTIES:

FOR ABE:



FOR ODOT:



BOARD SIGNATURES:

This Consent Order is adopted and approved by the Board this January 5, 2018.


Adam L. Rhynard, Chair
Lisa M. Umscheid, Member
Jennifer Sung, Member



NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-026-17, *Association of Oregon Engineering Employees v. State of Oregon, Oregon Department of Transportation*, 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 State of Oregon, Oregon Department of Transportation (ODOT) violated ORS 243.672(1)(a) by refusing to provide a union representative to a bargaining unit member during a meeting with his supervisors that the employee reasonably believed could lead to discipline. To remedy this violation, the Employment Relations Board ordered ODOT to:

1. Cease and desist from violating ORS 243.672(1)(a) by denying the employee or any other bargaining unit employees union representation;
2. Post this notice for 30 days on bulletin boards in each ODOT facility with AEE-represented employees; and
3. ODOT will provide all managers and supervisors overseeing AEE-represented employees at least one hour of training on the right to union representation under the Public Employee Collective Bargaining Act.

EMPLOYER

Dated _____, 2018

By: _____

Title: _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This notice must remain posted for 30 consecutive days from the date of posting in each employer facility in which bargaining unit personnel are employed. This notice must not be altered, defaced, or covered by any other materials. Any questions concerning this notice or compliance with its provisions may be directed to the Employment Relations Board, 528 Cottage Street N.E., Suite 400, Salem, Oregon, 97301-3807, phone 503-378-3807.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-034-17

(UNFAIR LABOR PRACTICE)

TREASURE VALLEY EDUCATION	)	
ASSOCIATION,	)	
	)	
Complainant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
TREASURE VALLEY COMMUNITY	)	AND ORDER
COLLEGE,	)	
	)	
Respondent.	)	
	)	

Noah Warman, Attorney at Law, McKanna Bishop Joffe LLP, Portland, Oregon, represented Complainant Treasure Valley Education Association.

Nancy Hungerford, Attorney at Law, The Hungerford Law Firm, Oregon City, Oregon, represented Respondent Treasure Valley Community College.

On December 1, 2017, the Treasure Valley Education Association (Association) filed a complaint alleging that Treasure Valley Community College (College) violated ORS 243.672(1)(e) and (f) by not paying raises that the parties labeled “Cost of Living Adjustments” or “COLAs” to certain Association-represented employees once the parties’ collective bargaining agreement expired. The College requested that the Board expedite the complaint, and the Association did not oppose that request. The parties further agreed to submit the dispute directly to the Board based solely on the pleadings, accompanied by legal arguments.¹ The Board agreed to expedite the matter, and the case was submitted to the Board on January 2, 2018, upon receipt of the parties’ legal arguments.

¹The parties were offered the opportunity to stipulate to additional facts, but they opted not to do so.

The issue is whether the College violated ORS 243.672(1)(e) or (f) by not paying the COLAs to eligible Association-represented employees after the parties' collective bargaining agreement expired.

For the following reasons, we conclude that the College violated ORS 243.672(1)(e) and (f) when it declined to pay the COLAs to eligible employees after the collective bargaining agreement expired.

FINDINGS OF FACT

1. The Association is a labor organization within the meaning of ORS 243.650(13) and is the exclusive representative of approximately 39 employees of the College.

2. The College is a public employer within the meaning of ORS 243.650(20).

3. The College and the Association were parties to a collective bargaining agreement (CBA) from July 1, 2012 through June 30, 2017.

4. Article 18 of the CBA sets forth the salary paid to Association-represented employees. Section B of the article contains a 15-step "Salary Step Schedule Index" that establishes the minimum and maximum base salaries, which are based on the employees' education and years of service. Section B also provides the following terms:

"1. Cost of Living Adjustment (COLA) Increase:

i. There will be a 2.5% COLA increase each year for each member who has reached their maximum step level or above. All other members shall not receive a COLA.

"2. The 4.5% increase between steps will be maintained."

5. Article 18, Section D, provides the criteria for the initial placement of new employees on the Salary Step Schedule Index. Section E provides that Association-represented employees shall receive a one-step increase each year up to their maximum degree level. Each step provides for a 4.5 percent increase.

6. Section I, the "Modifications" section of Article 18, states that "[a]ny changes, modifications, or addendums to this Article shall be mutually agreed upon by the College and the Association. Such agreement shall be reduced to writing and signed by the College and two (2) officers of the Association."

7. The step increases and COLAs set forth in the CBA were paid by the College on July 1 of 2012, 2013, 2014, 2015, and 2016.

8. As of September 1, 2017, approximately 13 Association-represented employees had reached their maximum step on the salary scale.

9. In February 2017, the parties entered into negotiations for a successor agreement. The Association's bargaining team included Dennis Gill, their Bargaining Team Chair, and Brett

Nair, an OEA Community College Council consultant. The College's bargaining team included Nancy Hungerford of The Hungerford Law Firm and Ann Marie Kelso, the College's Director of Legal and Human Resources.

10. The parties mutually exchanged initial proposals on February 17, 2017. As of November 14, 2017, the parties had tentatively agreed on approximately five of the 20 articles in the agreement.

11. During a September 25, 2017, bargaining session, Kelso informed the Association's bargaining team that the College would continue to pay the step increases to Association-represented employees, but would not pay the 2.5 percent COLA to employees who had reached their maximum pay step. Hungerford asserted that the College had the legal right not to pay the COLA increases and she referenced a decision of this Board in making that assertion.

12. In a September 25, 2017, email, the Association's Gill objected to the College's position on the COLA. Gill stated that failing to pay the COLA would violate both the CBA and the Public Employee Collective Bargaining Act (PECBA) by failing to maintain the status quo.

13. On October 19, 2017, Nair sent an email on behalf of the Association to Hungerford and Kelso. Nair reiterated the Association's position that the status quo doctrine required the College to continue to pay the COLAs. Nair asked the College for legal authority that would justify the College's position.

14. On October 20, 2017, Hungerford responded that she would be glad to furnish Nair with the legal basis for the College's position. She added that her opinion was partly based on the legislative history of Senate Bill 750, which she "was involved with."

15. To date, the College has continued to abide by the expired CBA's "Salary Step Schedule Index," but has not paid any of the COLAs to eligible employees during the status quo period.

CONCLUSIONS OF LAW

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

2. The College violated ORS 243.672(1)(e) when it declined to pay the 2.5 percent "COLA Increases" provided for in Article 18, Section B.1 (hereinafter "COLAs") to eligible Association-represented employees after the parties' CBA expired.

The complaint alleges that the College violated ORS 243.672(1)(e) by not continuing to pay the COLAs to eligible Association-represented employees once the parties' 2012-2017 CBA expired. Under ORS 243.672(1)(e), an employer is required to bargain in good faith with the labor organization that represents its employees. That duty includes the obligation to maintain the status quo with respect to mandatory subjects of bargaining. *Independent Association of Linn-Benton Community College Classified Employees v. Linn-Benton Community College*, Case No. UP-029-13 at 5, 26 PECBR 51, 55 (2014).

Under ORS 243.712(2)(d), the employer’s duty to maintain the status quo continues even after the expiration of a collective bargaining agreement and during negotiations for a successor agreement (often referred to as the “hiatus period”). In “status-quo” cases, we first identify the status quo and determine whether the employer has changed it. If so, we then determine whether the change concerns a mandatory or permissive subject of bargaining. We may further need to determine whether the employer exhausted its duty to bargain or satisfied any affirmative defenses. We do not necessarily apply these steps mechanically or in a prearranged order and may proceed to a particular step if it would dispose of the matter. *See Linn-Benton Community College*, UP-029-13 at 5, 26 PECBR at 55.

We begin with identifying the status quo. The status quo can be established by an expired collective bargaining agreement, policy, work rule, past practice, or statute. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-39-10 at 20, 25 PECBR 325, 344 (2012).

Determining whether the COLAs in the parties’ contract in this case are part of the status quo turns, in part, on ORS 243.712(2)(d), which addresses the status quo for strike-permitted employees. ORS 243.712(2)(d) was enacted in 1995 as part of Senate Bill 750, the first major amendments to the Public Employee Collective Bargaining Act. In ORS 243.712(2)(d), the legislature expressly addressed insurance premium increases, and “[m]erit step and longevity step pay increases,” during the hiatus period. ORS 243.712(2)(d) provides, in part:

“After a collective bargaining agreement has expired, and prior to agreement on a successor contract, the status quo with respect to employment relations shall be preserved until completion of impasse procedures except that no public employer shall be required to increase contributions for insurance premiums unless the expiring collective bargaining agreement provides otherwise. Merit step and longevity step pay increases shall be part of the status quo *unless the expiring collective bargaining agreement expressly provides otherwise.*” (Emphasis added.)

Here, the Association contends that the College is required to pay the COLAs because they are, in essence, longevity step pay increases within the meaning of ORS 243.712(2)(d), and therefore part of the status quo. Alternatively, the Association contends that even if the COLAs are not longevity step pay increases, they are part of the status quo because the CBA provides that the COLAs will be paid “each year” without any express limitation to the term of the agreement or certain dates. The College disputes both contentions, and defends its decision not to pay the COLAs on the ground that such payments are not part of the status quo because the contract does not provide that they will be continued after expiration of the contract’s term. For the reasons explained below, we agree with the Association that the COLAs at issue are longevity step pay increases for the purposes of ORS 243.712(2)(d).²

To analyze the Association’s argument, we review our previous consideration of the meaning of “longevity step.” In *Linn-Benton Community College*, we explained that the phrase

²As a result, we do not address whether the COLAs would be part of the status quo if they were something other than longevity step pay increases.

“longevity step” is not defined in ORS 243.712(2)(d), and we turned to its definition as a term of common usage in labor relations. *Linn-Benton Community College*, UP-029-13 at 6, 26 PECBR at 56. We explained that “longevity step increases link pay increases to an employee’s length of service or seniority.” *Id.* (citing Harold S. Roberts, *Roberts’ Dictionary of Industrial Relations*, 435 (4th ed 1994)). Ultimately, we concluded that the pay increase at issue was not a longevity step pay increase. We reasoned that the contract in that case was “devoid of any language establishing that employees receive an automatic yearly step increase, or that a step increase is automatically granted upon being employed for a specified length of time.” *Linn-Benton Community College*, UP-029-13 at 6, 26 PECBR at 56.

We next apply our definition of “longevity step” from *Linn-Benton Community College* to the parties’ contract in this case. We interpret labor contracts in the same manner in which we interpret other contracts. See *Portland Fire Fighters’ Assn v. City of Portland*, 181 Or App 85, 91, 45 P3d 162, *rev den*, 334 Or 491, 52 P3d 1056 (2002). To determine whether the COLA pay increases described by the contract are “longevity step pay increases,” as the Association contends, we must examine “the text of the disputed provision in the context of the document as a whole. If the provision is clear, the analysis ends.” *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04 at 10, 21 PECBR 20, 29 (2005) (citing *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997)).

Here, the parties have not submitted into the record the contract as a whole. They have provided only Article 18. Our analysis, thus, is limited to the text of that single contract article. For the reasons explained below, we conclude that the text of Article 18 expressly makes longevity of employment a prerequisite to the COLAs at issue in this case.

Specifically, Section B of Article 18, entitled “Salary Step Schedule,” includes two components. First, it states that the “salary step schedule for Association members shall be as follows,” and sets forth in chart form the Salary Step Schedule Index. The Salary Step Schedule Index is comprised of 15 steps and accompanying salaries, initial placement levels, and maximum levels (based on degrees earned). Employees who have not reached their maximum step receive a one-step increase automatically each year, up to the maximum step that corresponds with their academic degree.³

Second, the “Salary Step Schedule” section (Article 18, Section B) also sets forth, directly after the “Salary Step Schedule Index,” the following terms:

- “1. Cost of Living Adjustment (COLA) Increase:
 - i. There will be a 2.5% COLA increase each year for each member who has reached their maximum step level or above. All other members shall not receive a COLA.
- “2. The 4.5% increase between steps will be maintained.”

Both the express text and the context of Article 18 describe a two-part step system. Employees first move up the Salary Step Schedule Index on an annual basis, until they reach the

³Specifically, Article 18(E)(1) provides that all “members shall receive a one (1) step increase each year up to their maximum degree level.”

maximum step that corresponds with their academic degree. Each step represents a 4.5 percent pay increase. After reaching their maximum step on the Salary Step Schedule Index, employees receive only the 2.5 percent COLA increase.

Thus, Article 18 expressly makes longevity a prerequisite to a COLA increase. Specifically, Article 18 provides that Association-represented employees receive a 2.5 percent annual COLA increase only *after* they have reached their maximum step. Further, employees move up the steps on the Salary Step Schedule Index automatically on July 1 of each year—thus linking receipt of a COLA to longevity of employment. In other words, an employee is entitled to a COLA increase only after serving sufficient years to reach the maximum step for the employee’s degree level. At that point, the employee ceases to receive the annual 4.5 percent pay increase (required by the Salary Step Schedule Index) and instead receives an annual 2.5 percent increase (which the parties labeled a “COLA”).

Because longevity of employment is an express prerequisite to a COLA under this contract, and the COLAs are automatically granted to eligible employees, these COLAs are “automatically granted upon [an employee] being employed for a specified length of time.” See *Linn-Benton Community College* at 6, 26 PECBR at 56. Thus, under *Linn-Benton Community College*, these parties agreed to a longevity step pay increase within the meaning of ORS 243.712(2)(d), unless there is some other indicator that Article 18 describes an actual cost-of-living adjustment (and not a longevity step pay increase).

The College contends that Article 18 plainly provides only for a cost-of-living adjustment, as that term is used in labor relations. We disagree. A cost-of-living adjustment is an “increase or decrease in wages based on the fluctuation of the Consumer Price Index or any local measure of changes in prices.” See, e.g., *Roberts’ Dictionary of Industrial Relations* at 154. Here, however, the only indicator in the text of Article 18 that the 2.5 percent pay increase is a proxy for the fluctuation in prices—that is, a “cost-of-living adjustment”—is the mere use of the label “COLA.”

Under the unusual circumstances of this case, we conclude that the use of that label, on its own, is not dispositive (as the College argues). Notably, the parties agreed to a five-year contract term. Despite that unusually long term, they did not include a COLA formula (for example, a specific consumer price index with agreed minimum and maximum rates of increase) that would attempt to approximate inflation in the distant, future years of the contract.⁴ That omission weighs against concluding that the label, on its own, renders this pay increase a cost-of-living adjustment.

Moreover, only employees who have reached their maximum step receive the COLA pay adjustment; those who are still advancing through the annual steps in the Salary Step Schedule Index do not receive the COLA. That allocation of the cost-of-living adjustment to only some, but not all, Association-represented employees also weighs against concluding that the COLA label makes this pay increase a true cost-of-living adjustment. Rather, as set forth above, it supports our conclusion that this particular COLA increase was linked to an employee’s length of service or seniority.

⁴The parties did set the COLA pay increase at 1.5% for the first year, and 2.5% for the second through fifth years of the contract. Our point, however, is that the parties did not attempt to describe a formula that might have approximated inflation for the *later* years in the contract term.

We also note that two further components of Article 18 support our conclusion. First, in one instance, Article 18 describes the 2.5 percent COLA pay increase as a “COLA raise.” A true cost-of-living adjustment, however, maintains flat compensation, protecting an employee’s pay from eroding because of inflation. It is not a “raise” in the sense of an *increase* in purchasing power. Second, the language regarding the COLA pay increase is part of the subsection (Article 18(B)) that describes the Salary Step Schedule Index—which itself describes longevity step pay. The COLA pay increase is not provided for in a separate subsection of Article 18.

These two components—the phrase “COLA raise” and the placement of the COLA language in Article 18(B), which describes longevity-based steps—do not, in and of themselves, establish that the parties bargained something other than a cost-of-living adjustment. Nonetheless, the parties’ choice of contract language and structure supports our conclusion that the 2.5 percent pay increase granted to employees who have reached their maximum salary step is, in fact, accurately viewed as a longevity step pay increase.

Under these circumstances, we conclude that the COLA increase in this agreement fits within the meaning of a “longevity step pay increase[]” under ORS 243.712(2)(d). Pursuant to ORS 243.712(2)(d), a longevity step pay increase is “part of the status quo unless the expiring collective bargaining agreement *expressly* provides otherwise.” (Emphasis added.) Here, it is undisputed that the parties did not expressly provide otherwise. As a result, the COLAs were part of the status quo, and the College violated ORS 243.672(1)(e) by unilaterally changing that status quo when it declined to pay the COLA increases to employees who had reached their maximum salary step.

3. The College violated ORS 243.672(1)(f) when it declined to pay the 2.5 percent “COLA Increases” to eligible Association-represented employees after the parties’ CBA expired.

The Association also alleges that the College violated ORS 243.672(1)(f). That statute makes it an unfair labor practice for an employer to “[r]efuse or fail to comply with any provision of ORS 243.650 to 243.782.”

The College failed to comply with ORS 243.712(2)(d) when it declined to pay the COLAs, which, as explained above, we conclude are “longevity step pay increases” under the unusual circumstances of this case. The COLAs are therefore part of the status quo, and the College is required to pay them because the expired contract does not expressly provide otherwise. The College’s failure to do so violated ORS 243.712(2)(d) and, by extension, ORS 243.672(1)(f).

Remedy

Because we have determined that the College violated ORS 243.672(1)(e) and (f), we will issue a cease and desist order. ORS 243.676(2)(b). We also order the following affirmative relief to effectuate PECBA. ORS 243.676(2)(c). The usual remedy for a unilateral change violation, besides a cease and desist order, is requiring the employer to restore the status quo that existed before the unlawful change. *International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-049-12 at 20, 25 PECBR 871, 890 (2013). We see no reason not to order our “usual remedy” in this case. Accordingly, the College is directed to make whole those employees who were entitled to a 2.5 percent COLA pay increase during the hiatus period.

This traditional make-whole remedy includes back pay, plus interest at the rate of 9 percent per annum, which these employees would have received if not for the College's unlawful conduct.

The Association also requests that we order the College to post 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 in light of the lack of clarity in the law with respect to whether a raise labeled a cost-of-living adjustment can constitute a longevity step pay increase for purposes of ORS 243.712(2)(d), we conclude that a posting of a notice is not warranted.

Finally, the Association asks that the College reimburse the Association's \$300 filing fee, which we may order if the College's answer was "frivolous or filed in bad faith." ORS 243.672(3). Although we have ultimately concluded that the College violated ORS 243.672(1)(e) and (f), the record does not establish that the College's answer was frivolous or filed in bad faith. Therefore, we deny the request for reimbursement of the Association's filing fee.

ORDER

1. The College shall cease and desist from violating ORS 243.672(1)(e) and (f).
2. Within 60 days from the date of this Order, the College shall make whole all employees who were entitled to be paid, during the hiatus period, a 2.5 percent COLA increase pursuant to Article 18 of the CBA, plus interest at the rate of 9 percent per annum.

DATED: January 16, 2018.



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-012-17

(REPRESENTATION)

FEDERATION OF OREGON PAROLE
AND PROBATION OFFICERS,

Petitioner,

v.

JEFFERSON COUNTY,

Respondent.

ORDER CERTIFYING
EXCLUSIVE REPRESENTATIVE

On December 29, 2017, Federation of Oregon Parole and Probation Officers filed a petition under ORS 243.682(2)(a) to certify (without an election) a new bargaining unit of employees of Jefferson County. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards requesting that the Federation of Oregon Parole and Probation Officers represent the designated bargaining unit.

Objections to the proposed bargaining unit or a request for an election were due within 14 days of the posting of a notice of the petition (*i.e.*, by January 25, 2018). No objections were filed. Accordingly, it is certified that:

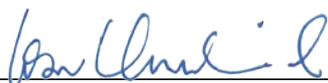
FEDERATION OF OREGON PAROLE AND PROBATION OFFICERS

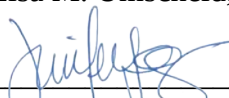
is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

“all full-time Adult Parole and Probation Officers of Jefferson County excluding confidential employees and supervisory employees.”

DATED: January 29, 2018.


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-011-17

(REPRESENTATION)

LINCOLN COUNTY PROFESSIONAL	)	
FIREFIGHTERS, IAFF,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER CERTIFYING
	)	EXCLUSIVE REPRESENTATIVE
DEPOE BAY RURAL FIRE DISTRICT,	)	
	)	
and	)	
	)	
NEWPORT PROFESSIONAL	)	
FIREFIGHTERS, IAFF, LOCAL 4619,	)	
	)	
Respondents.	)	
	)	

On November 21, 2017, the Lincoln County Professional Firefighters, IAFF, filed a petition to represent employees in a bargaining unit (described below), who were then represented by Newport Professional Firefighters, IAFF, Local 4619.

On January 5, 2018, this Board sent ballots to eligible voters. Six valid ballots were returned by the deadline of January 19, 2018, which constitutes the date of the election. *See* OAR 115-025-0060(4)(c). A tally of ballots was held on January 22, 2018, and the majority of valid votes counted were cast for the Lincoln County Professional Firefighters, IAFF. The tally of ballots was provided to the parties on January 22, 2018.

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 February 1, 2018). OAR 115-025-0060(9). No objections were filed. Accordingly, it is certified that:

LINCOLN COUNTY PROFESSIONAL FIREFIGHTERS, IAFF

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

“All full time, paid fire district employees working for the district except for temporary, seasonal, supervisory, clerical, stipend volunteer, volunteer, and confidential employees.”

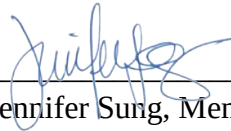
DATED: February 12, 2018.



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-001-18

(REPRESENTATION)

PROFESSIONAL FIRE FIGHTERS	)	
ASSOCIATION OF CLACKAMAS	)	
COUNTY, IAFF, LOCAL 1159,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER CERTIFYING
	)	EXCLUSIVE REPRESENTATIVE
SILVERTON FIRE DISTRICT,	)	
	)	
Respondent.	)	
_____	)	

On January 22, 2018, the Professional Fire Fighters Association of Clackamas County, IAFF, Local 1159, filed a petition under ORS 243.682(2)(a) to certify (without an election) a new bargaining unit of employees of Silverton Fire District. The petition was amended on January 26, 2018. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards requesting that the Professional Fire Fighters Association of Clackamas County, IAFF, Local 1159, represent the designated bargaining unit.

Objections to the proposed bargaining unit or a request for an election were due within 14 days of the posting of a notice of the petition (i.e., by February 15, 2018). No objections were filed. Accordingly, it is certified that:

PROFESSIONAL FIRE FIGHTERS ASSOCIATION OF
CLACKAMAS COUNTY, IAFF, LOCAL 1159

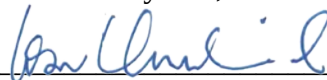
is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

“Lieutenant Fire Prevention, Lieutenant Recruiting and Retention, and Fire Fighter Mechanic.”

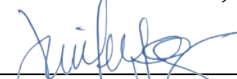
DATED: February 16, 2018.



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-002-18

(REPRESENTATION)

NORTH LINCOLN PROFESSIONAL	)	
FIRE FIGHTERS, IAFF,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER CERTIFYING
	)	EXCLUSIVE REPRESENTATIVE
NORTH LINCOLN FIRE & RESCUE,	)	
	)	
Respondent.	)	
_____	)	

On January 30, 2018, the North Lincoln Professional Fire Fighters, IAFF, filed a petition under ORS 243.682(2)(a) to certify (without an election) a new bargaining unit of employees of North Lincoln Fire & Rescue. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards requesting that North Lincoln Professional Fire Fighters, IAFF, represent the designated bargaining unit.

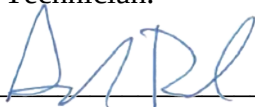
Objections to the proposed bargaining unit or a request for an election were due within fourteen days of the posting of a notice of the petition (i.e., by February 20, 2018). No objections were filed. Accordingly, it is certified that:

NORTH LINCOLN PROFESSIONAL FIRE FIGHTERS, IAFF

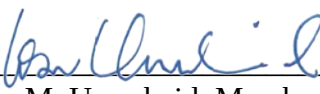
is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

“Firefighter, Lieutenant, Captain, Fire Prevention/Public Education Officer,
Deputy Fire Marshal, and Maintenance Technician.”

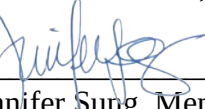
DATED: February 23, 2018.



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,	)	
	)	
v.	)	FINDINGS AND ORDER FOR
	)	REPRESENTATION COSTS
MULTNOMAH COUNTY SCHOOL	)	
DISTRICT NO. 1J (OPERATING AS,	)	
PORTLAND PUBLIC SCHOOLS),	)	
	)	
Respondent.	)	

On September 15, 2017, this Board issued an order holding 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 during its negotiations with Portland Association of Teachers/OEA/NEA (PAT). On December 22, 2017, this Board issued an order on reconsideration that adhered to the prior order, as supplemented by the reconsideration order. 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) and OAR 115-035-0055, this Board finds that:

1. PAT 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). Here, PAT prevailed in establishing that the District violated ORS 243.672(1)(e).

2. This case required one day of hearing.

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

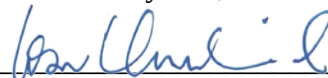
ORDER

The District shall remit \$3,000 to PAT within 30 days of the date of this Order.

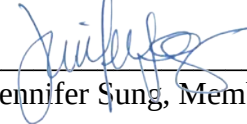
DATED: February 27, 2018.



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-002-17

(UNIT CLARIFICATION)

SEIU LOCAL 503, OPEU,	)	
	)	
Petitioner,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
PORTLAND STATE UNIVERSITY,	)	CONCLUSIONS OF LAW,
	)	AND ORDER
Respondent.	)	
_____	)	

Shirin Khosravi, Staff Attorney, SEIU Local 503, OPEU, Salem, Oregon, represented the Petitioner.

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

On February 13, 2018, Administrative Law Judge Martin Kehoe issued a recommended order in this matter. The parties had 14 days from the date of service of the 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 this matter. OAR 115-010-0090(4), (5).

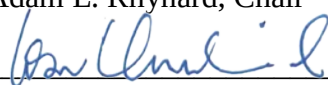
ORDER

The petition for unit clarification is dismissed.

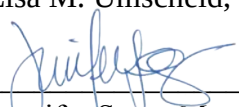
DATED: March 9, 2018.



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-002-17

(PETITION TO CLARIFY PUBLIC EMPLOYEE STATUS)

SEIU LOCAL 503, OPEU,	)	
	)	
Petitioner,	)	
	)	
v.	)	RECOMMENDED RULINGS,
	)	FINDINGS OF FACT,
PORTLAND STATE UNIVERSITY,	)	CONCLUSIONS OF LAW, AND
	)	PROPOSED ORDER
Respondent.	)	
	)	

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on September 22, 2017 at Portland State University in Portland, Oregon. The record closed on November 10, 2017, upon receipt of the parties' post-hearing briefs.

Shirin Khosravi, Staff Attorney, SEIU Local 503, OPEU, Salem, Oregon, represented the Petitioner.

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

On March 10, 2017, the Petitioner, SEIU Local 503, OPEU (SEIU), filed a unit clarification petition with the Employment Relations Board (Board). The petition asserts that the "Campus Police Sergeants" employed by the Respondent, Portland State University (PSU), should be included in one of SEIU's bargaining units because, according to SEIU, the Campus Police Sergeants' current duties and authorities do not meet the definition of "supervisory employee" found at ORS 243.650(23) and thus are not excluded by the recognition clause of the applicable collective bargaining agreement (CBA). In PSU's objections, which were filed with the Board on March 15, 2017, PSU contends that the Campus Police Sergeants are in fact statutory "supervisors" and should therefore be excluded from the bargaining unit at issue. As set forth below, we conclude that the Campus Police Sergeants are "supervisors" within the meaning of the statute and accordingly dismiss SEIU's petition.

The parties agree that the instant petition only addresses the status of the “Campus Police Sergeant” position, which, as explained below, is affiliated with the “Campus Police” division of PSU’s Campus Public Safety Office. As of the date of the hearing, there are only two regular Campus Police Sergeants: Joseph Schilling and Willie Halliburton. Another employee, Gregory Marks, has served as a Campus Police Sergeant in an “acting” capacity since September 15, 2017. The parties further agree that PSU’s “Administrative Sergeant” position is not at issue in this case. That position – which is also known as “Campus Public Safety Sergeant,” “Clery Coordinator,” and “Records Sergeant” – is part of the “Campus Public Safety” division of the Campus Public Safety Office. As of the date of the hearing, the only employee in that position is Robert McCleary.

RULINGS

All rulings by the ALJ were reviewed and are correct.

FINDINGS OF FACT

Background

1. PSU is a “public employer” within the meaning of ORS 243.650(20). One of PSU’s various departments is its Campus Public Safety Office, which is currently separated into two divisions: (1) Campus Police and (2) Campus Public Safety. As indicated, the employees at issue in this case – PSU’s Campus Police Sergeants – are generally affiliated with the Campus Police division.

2. SEIU is a “labor organization” within the meaning of ORS 243.650(13). It represents two separate bargaining units of PSU employees. Each of those units is governed by a different CBA with PSU. One of SEIU’s units is the “Police Unit,” which exclusively includes employees in the Campus Public Safety Office’s Campus Police division. Specifically, according to Article 2, Section 1 of the Police Unit CBA – the CBA’s “recognition clause” – SEIU is “the exclusive bargaining representative for all Portland State University sworn police officers, excluding employees currently represented by other labor organizations or unclassified, exempt, supervisory, managerial and confidential employees as defined by law or as determined by the Employment Relations Board.” (Exh. P-1 at 1.) The other SEIU bargaining unit with Campus Public Safety Office employees in it is the “Public Safety Unit,” which is part of a larger SEIU bargaining unit that includes employees from the Campus Public Safety division as well as other PSU employees. Accordingly, Campus Police Officers and Campus Public Safety Officers are not covered by the same CBA.

3. PSU’s Campus Public Safety Office is led by a Campus Police Chief. Previously, the same position was called the Director of Campus Public Safety. In practice, the two job titles are used interchangeably. As of the date of the hearing, the Campus Police Chief position was filled by Devinci Elmore in an “interim” or “acting” capacity. Elmore has served in that role since August 1, 2017. Before that, Elmore was PSU’s Campus Police Lieutenant since November 1, 2016. Phillip Zerzan served as the Director/Chief from May 11, 2011 until he resigned and left PSU on July 31, 2017.

4. Organizationally, beneath the Chief, each of the Campus Public Safety Office's two divisions is overseen by a distinct Lieutenant position, with one Lieutenant for each division. At the time of hearing, Joseph Schilling was serving as Acting/Interim Campus Police Lieutenant for the Campus Police division. As indicated, however, Schilling is also currently a Campus Police Sergeant. Ranked below the Campus Police Lieutenant are the petitioned-for Campus Police Sergeants. There are two regular Campus Police Sergeants currently: Willie Halliburton and Joseph Schilling. Gregory Marks serves as an Acting Campus Police Sergeant. Beneath those Campus Police Sergeants in the chain of command are several "sworn" Campus Police Officers. One of those Campus Police Officers is a Campus Police Detective, which is a Campus Police Officer with a detective work assignment. Campus Police Detective is not a separate classification or position.

5. The Campus Public Safety division is overseen by Craig Whitten, whose position is Campus Public Safety Lieutenant. Beneath him in the chain of command are his division's "non-sworn" Campus Public Safety Officers, Campus Dispatchers, Administrative Sergeant, and Access Control Unit. Although the Campus Public Safety Officers are generally considered part of the Campus Public Safety division, their work is nevertheless overseen by the Campus Police Sergeants of the other division.

6. The position of Campus Public Safety Sergeant was created on January 25, 2012. Later, on December 11, 2014, PSU's Board of Trustees approved the creation of the aforementioned Campus Police division. The Campus Police Sergeant position was first "deployed" on July 1, 2015. The Campus Police Sergeants have all of the responsibilities that the Campus Public Safety Sergeants used to have prior to the new position's deployment, plus some additional responsibilities.¹ The Campus Police Sergeants also share some responsibilities with their immediate superior, the Campus Police Lieutenant.

7. Joseph Schilling started working as a Campus Public Safety Sergeant on January 25, 2012, the date that position was created. He then became a Campus Police Sergeant when that position was created on July 1, 2015 and remains one to date. However, while still a regular Campus Police Sergeant, Schilling also worked as an Acting Campus Police Lieutenant from February 1, 2016 to November 1, 2016, the day Elmore started as the Campus Police Lieutenant. At that point, Schilling was exclusively a Campus Police Sergeant again. Nevertheless, he has continued to perform some of the work that he started performing while an Acting Campus Police Lieutenant, including scheduling Officers' work and assigning overtime, for example. Subsequently, Schilling was out on Family and Medical Leave Act leave from May 22, 2017 to June 27, 2017, at which point he returned to work on a temporary light duty assignment. Schilling later became Acting Campus Police Lieutenant again on August 1, 2017 – the same day

¹The record consistently indicates that the Campus Police Sergeants and Campus Public Safety Sergeants have overlapping duties and a shared history. Therefore, it generally follows that, where the record shows that a Campus Public Safety Sergeant took a particular action or had a certain role, that evidence can fairly be applied to our analysis of the Campus Police Sergeant position. However, the evidence that specifically addresses the Campus Police Sergeant position will naturally be given greater weight. We also note that, in practice, some of the duties that have been identified are only being performed by one of the Campus Police Sergeants at a time. Broadly, our aim is to accurately determine the boundaries of the position at issue, and not to define the narrow experience of a particular incumbent.

Elmore became Acting Chief – and remained in that dual role (Campus Police Sergeant plus Acting Campus Police Lieutenant) as of the date of the hearing. Willie Halliburton has been a Campus Police Sergeant without interruption since October 1, 2015.

8. Schilling and Halliburton both work the day shift, with Halliburton’s shift starting and ending a couple hours after Schilling’s does. That said, the two can adjust or “flex” their own schedules in order to meet the operational needs of the Campus Public Safety Office.

Duties and Responsibilities

Assign and Direct

9. Campus Police Sergeants are in charge of scheduling the work of the Campus Police Officers as well as that of the Campus Public Safety Officers. That responsibility includes choosing when Officers’ shifts start and end, approving or denying Officers’ time off requests, assigning overtime work, and adjusting schedules as needed.

10. The Officers’ schedule is maintained in an Excel spreadsheet. Initially, the schedule is filled out all at once and addresses an entire year. However, it is often adjusted around six months before a particular day arrives, then adjusted further after that. On a typical day, Schilling spends 15 to 20 minutes working on the schedule. On a day when Shilling makes the initial schedule for a year, it takes five or six hours of work.

11. When scheduling Officers’ work, Campus Police Sergeants are responsible for making sure that every shift and significant events are appropriately covered. That can involve extending an Officer’s shift beyond his or her normal hours as a substitute. Alternatively, it could mean mandating that an Officer come in for a different shift or day, or either approving or denying Officers’ requests for shift trades, for example. In addition, Campus Police Sergeants are expected to “[m]onitor overtime expenditures.” (Exh. R-50 at 4.)

12. Campus Police Sergeants are expected to use their own judgment when scheduling or assigning overtime work and can do so without a superior’s involvement. Nonetheless, a Campus Police Sergeant may choose to consult with a superior before changing a schedule, and that has occurred. Moreover, Article 20 of the Police Unit CBA provides general guidelines for Campus Police Officers’ work schedules. For example, it states, “Shifts will be assigned on a seniority bid system.” (Exh. P-1 at 26.) A policy likewise requires that at least one Officer be on duty each shift. Beyond that, a Campus Police Sergeant may consider whether a particular arrangement is “fiscally responsible.” (Exh. R-21 at 1.)

13. In practice, whenever Campus Police Sergeants decide that they need someone to work overtime, they first look for volunteers. However, frequently there are not enough volunteers to cover the overtime hours needed. When that occurs, Campus Police Sergeants must mandate overtime. That happens more than once a month. Campus Police Sergeants usually try to rotate which Officers are mandated overtime using a list of the Officers’ names.

14. Officers occasionally call in and ask for time off when they are sick or have personal matters to attend to. As indicated above, Campus Police Sergeants are responsible for either granting or denying those requests. In practice, a Campus Police Sergeant is unlikely to deny an Officer's request for time off if he or she is sick, but will exercise more discretion for other kinds of time off requests.

15. In addition to setting the overall schedule, Campus Police Sergeants regularly assign Officers work and direct their work throughout the day. That can involve deciding how, when, and which Officers are deployed. And when the Campus Police Officers make those decisions, they are expected to and often do exercise discretion and use their own judgment. Nonetheless, after a Campus Police Sergeant deploys Officers, or gives any sort of assignment or direction, the Chief can always modify the Campus Police Sergeant's decision.

16. The assignments and directions Campus Police Sergeants give their subordinates come in many forms. Among other things, Campus Police Sergeants take control of scenes, direct field units, direct Officers to perform "supplemental field investigations," direct Officers to turn in field reports, make sure Officers are available for certain events (including a fire drill, for example), and schedule and provide training. (Exh. R-50 at 4.) According to a policy manual, "The Patrol Sergeant has the final responsibility for the coordination, control and termination of a vehicle pursuit and shall be in overall command." (Exh. R-51 at 5.)

17. The Campus Police Sergeant position description states, in part:

"The Police Sergeant may at times be the highest ranking law enforcement/public safety official on campus. As such, the incumbent is expected to make emergency command decisions without the benefit of consultation from a higher authority. Due to the potential decision making nature of the position, the Sergeant must be prepared to provide immediate direction to the community by making decisions for the University that may marginally relate to law enforcement/public safety until such time as higher-level authority arrives on scene." (Exh. R-50 at 3.)

18. Campus Police Sergeants can reassign an investigation from a regular Campus Police Officer to the Campus Police Detective, and that has occurred. A Campus Police Sergeant can decide to do so if he or she determined that a particular case would be too involved or time consuming for an Officer. The decision might be based on the Campus Police Sergeant's personal knowledge of an Officer's skill level or experience, or be based on a discussion with the Detective.

19. PSU is frequently the site of "special events." For such events, additional planning may have to be done ahead of time, including the creation of an "operations plan." (Exh. R-35 at 1.) In short, operations plans identify the personnel needed for the special event and specify what their duties and the "rules of engagement" will be. (Exh. R-35 at 2.) Sometimes, operations plans are prepared by a Campus Police Sergeant. Yet, even when that happens, it is possible that a Lieutenant is still in charge of the "overall direction" during the actual event. (Exh. R-35 at 1.) Further, a given operations plan might be based on a prior plan.

Outside of his or her early involvement in an operations plan, a Campus Police Sergeant may also provide additional direction to Officers at the ground level during an event.

20. On November 11, 2016, Schilling authorized his subordinates to wear “mourning bands” after a police officer in Pennsylvania was killed in the line of duty. (Exh. R-22.) Schilling came up with the idea for this memorial on his own, but he did consult with the Chief/Director before authorizing the bands. As a Campus Police Sergeant, Schilling does not have the authority to authorize mourning bands independently.

21. Campus Police Sergeants are generally in charge of directing and providing training. One aspect of that responsibility is making sure that the Campus Public Safety Office complies with its Department of Public Safety Standards and Training (DPSST) certification requirements. That includes directing newly hired Campus Police Officers to attend the DPSST police academy and deciding when they will do so. Schilling once decided to delay a new Campus Police Officer’s entry into the DPSST academy. Schilling made that decision on his own, although Zerzan was informed of the decision.²

22. A Campus Police Sergeant also oversees and coordinates the Campus Public Safety Office’s Field Training Experience Program (FTEP), which begins after a new Officer completes the DPSST police academy. At the outset of the FTEP, each new Officer is assigned a Field Training Officer (FTO). That FTO will be responsible for providing the new Officer on-the-job training. Each FTO is an experienced Campus Police Officer who has been selected to act as an FTO by a Campus Police Sergeant. Afterward, a Campus Police Sergeant is responsible for training and directing the FTOs.

23. Schilling is the current “FTO Coordinator.” Once, Zerzan recommended to Schilling that a particular Campus Police Officer be chosen to be an FTO. Schilling ultimately disagreed with that recommendation and did not select Zerzan’s pick.

24. The Police Unit CBA provides that, while a Campus Police Officer is serving as an FTO, he or she receives a 7.5% pay increase. This has been referred to as “premium pay” or “coaches’ pay,” as FTOs have also been called “Field Training Coaches.”

25. A Campus Police Officer can lose his or her FTO designation if a Campus Police Sergeant decides that the Officer has performance issues. To date, Schilling has taken away an FTO designation at least two times. However, prior to making such a decision, Schilling has always had a discussion with the Chief. That said, a Campus Police Sergeant has the authority to make such a decision on his or her own.

²When asked about this occurrence during the hearing, Schilling testified that he could not recall whether he made a decision or recommendation about it. In contrast, Zerzan testified that Schilling made the decision to delay the Officer’s entry on his own. Both witnesses agreed that the Officer’s entry was in fact delayed.

26. The FTEP includes five consecutive phases of training. The FTO is responsible for reviewing, correcting, and documenting a new Officer's performance during each of those phases. The FTO also corrects and critiques his or her Officer's behavior throughout the FTEP, and does not have to consult with a Campus Police Sergeant before doing so.

27. A Campus Police Sergeant is responsible for determining whether a new Officer has passed each phase of the FTEP and whether the Officer's passage to the next phase should be delayed. Further, a Campus Police Sergeant is expected to exercise his or her own judgment when doing so. In practice, though, these decisions are always made in conjunction with the Officer's FTO. Schilling has delayed at least one Officer's passage from one FTEP phase to another.

28. During the FTEP, FTOs are expected to enter "daily observation reports" (DORs) into "ADORE," the computer software that is used to detail a new Campus Police Officer's progress through the various phases of the FTEP. The DORs are subsequently reviewed by a Campus Police Sergeant, who can then take steps to address any areas of concern. One thing a Campus Police Sergeant can do at that point is tell the FTO to make a report in his or her Officer's file and specify to the FTO what should be included in the report.

29. FTOs are responsible for rating their Officers in around 30 different categories through ADORE. One of those categories tracks how well the new Officer takes critique from his or her FTO. For each of the categories, an FTO rates the Officer from 1 to 4. A score of 1 signifies that the Officer does not perform the activity, a 2 means that the Officer "kind of" performs the activity, a 3 means that the Officer performs the activity "to standard," and a 4 means that the Officer "excels" at the activity. The FTO does not consult with a Campus Police Sergeant when making these determinations. Eventually, three people "sign off" on the ratings: (1) the new Officer, (2) the FTO, and (3) the Campus Police Sergeant acting as the FTO Coordinator. Essentially, each of those signatures means that the signer has read the ratings.

30. In practice, if Schilling saw a string of low ratings for a new Officer in ADORE, he would talk to the Officer's FTO about it. However, theoretically, an Officer could still be advanced with those scores if the FTO told the Campus Police Sergeant that he or she was comfortable with them. A Campus Police Sergeant could also direct the FTO to address the issues with the Officer.

31. Once a new Officer passes the fifth and final phase of the FTEP, that Officer works "independently of an FTO" but remains a probationary employee. (Exh. R-42.) After that, a Campus Police Sergeant eventually decides whether the Officer should become a "regular status" employee. (Exh. R-31.) Once a regular employee, the Officer is subject to the Police Unit CBA's "just cause" provision. For his part, Zerzan never disagreed with a Campus Police Sergeant's recommendation regarding an Officer's probationary status.

32. Beyond their DPSST and FTEP duties, Campus Police Sergeants oversee, perform, and determine the timing of other kinds of training. That includes training related to "diversity and creating a respectful work environment," for example. (Exh. R-50 at 4.) They are also expected to "[e]nsure assigned staff are trained and certified in the proper use of all

equipment and technology before issuing.” (Exh. R-50 at 4.) A Campus Police Sergeant can schedule an Officer to attend training on the Officer’s “regular day off,” or relay that “[d]ays off will be cancelled and no vacation allowed” for a particular training day. (Exh. R-13.)

33. Schilling trains Officers how to work on a bicycle, which can be used during a patrol assignment. However, according to policy, Officers are never required to ride a bicycle while on patrol and only ever do so on a voluntary basis. That particular policy is the result of a recommendation from Schilling.

34. Campus Police Sergeants regularly monitor Officers’ work. They do so by observing Officers in person, by conducting independent investigations, by fielding complaints, by listening to the radio, by reviewing reports, and by watching footage from body-worn cameras. When Campus Police Sergeants review work, they are responsible for identifying and investigating policy violations. If a Campus Police Sergeant determines that an Officer has violated policy, the Campus Police Sergeant is expected to give corrective training and/or issue or recommend discipline. Sergeants are also expected to “[e]nsure consistent level of performance across shift.” (Exh. R-50 at 4.)

35. When Campus Police Sergeants listen to the radio, it commonly includes listening to the Campus Public Safety Office’s frequency as well as that of the Portland Police Bureau’s Central Precinct, which is outside of PSU’s chain of command. A Campus Police Sergeant can deploy Officers or increase or decrease a response based on the alerts he or she hears on the radio. Campus Police Sergeants are also responsible for prioritizing responses to those alerts.

36. Much like a Campus Police Sergeant, the Chief monitors the radio when he or she is in the office. Moreover, the Chief may also give direction based on what he or she hears while doing so. However, “dispatch,” which is responsible for what is broadcast over the radio, does not deploy Officers as a Campus Police Sergeant does. Instead, it largely relays information about ongoing events.

37. Campus Police Sergeants can also deploy Officers after receiving a direct call regarding a non-emergency. For example, a Campus Police Sergeant could receive a call asking for an Officer to escort a terminated PSU employee out of campus, for crowd control support, or for coverage at the front desk of a PSU library during extended hours. Such a call could come from a superior, but that is not always the case. When receiving a non-emergency call, a Campus Police Sergeant can decide when the response will happen and which Officers will be used.

38. As noted, Officers wear body-worn cameras. Campus Police Sergeants are responsible for reviewing the footage from those cameras, classifying that footage, identifying performance issues, looking for general problems that can be improved upon, and ensuring compliance with PSU’s body-worn camera policy. If a Campus Police Sergeant sees a performance issue in the footage, he or she is expected to address it with the Officer. That could involve discussing the issue with the Officer in a sit-down meeting, reviewing the footage with the Officer, providing corrective instruction or remedial training, and/or initiating a “personnel complaint.” Alternatively, the Campus Police Sergeant could start a disciplinary investigation about the issue, and can do so on his or her own without asking a superior for permission. That

said, he or she might talk to a superior about the matter first. If the Campus Police Sergeant deems an issue to be “egregious,” if multiple violations are observed, or if an Officer does not comply with the Campus Police Sergeant’s corrective instruction, the Campus Police Sergeant could issue or recommend discipline.

39. Unlike a Campus Police Sergeant, an Officer will normally only review body-worn camera footage that he or she was personally involved in. The one exception to that involves Officer Gregory Marks, who specifically looks for use of force issues for other Officers. That is because use of force is one of Marks’ areas of expertise and Marks is responsible for use of force training. Campus Police Sergeants provide a broader review. Further, as indicated, a Campus Police Sergeant’s review can result in discipline or a disciplinary recommendation, while Marks cannot formally initiate or recommend discipline. Whenever Marks sees an inappropriate use of force that deserves a critique, he writes then sends a memo about it to the Campus Police Lieutenant. In such a memo, Marks’ recommendation will always be remedial training, and Marks will eventually be the person who provides that training.

Discipline

40. Campus Police Sergeants have the authority to discipline an Officer or recommend to a superior that an Officer be disciplined. Moreover, the Campus Police Sergeants are expected to exercise that authority “when appropriate and within the parameters of chain of command.” (Exh. R-50 at 4.) In the past, Schilling has issued discipline and has recommended discipline that was later accepted. However, he is less likely to do so after his recommendation that an Officer be terminated was rejected by Zerzan in November 2016.

41. Article 15, Section 1(A) of the Police Unit CBA states, “The principles of progressive discipline will be used when appropriate. Disciplinary action shall be imposed only for just cause. Disciplinary action or measures will include only the following: 1. Written reprimands; 2. Suspension without pay; and 3. Dismissal.” (Exh. P-1 at 16.) Article 15, Section 1(B) states, “The Union and the University agree that this is not a simple three (3) step linear process for progressive discipline and that there may be cases where there are multiple attempts at economic sanctions determined by the severity and potential consequences of the violation.” (Exh. P-1 at 16.) After that, the CBA states, “The following are considered counseling and are not considered disciplinary in nature: 1. Verbal Coaching/Counseling 2. Issuance of a Letter of Instruction 3. Required training as appropriate.” (Exh. P-1 at 16.)

42. A Campus Police Sergeant has the authority to send an Officer home early, put an Officer on administrative leave, or recommend that the Officer go on administrative leave. Moreover, a Campus Police Sergeant can do so independently, using his or her own judgment. One reason a Campus Police Sergeant could send an Officer home is if the Campus Police Sergeant determined that the Officer was “not fit to serve.” As indicated above, if an Officer is sent home, it would be up to a Campus Police Sergeant to determine whether another Officer needed to replace the missing Officer, and whether an Officer needed to be held over or called in.

43. In reality, a Campus Police Sergeant is very unlikely to ever put an Officer on administrative leave without consulting with a superior first. Further, if a Campus Police Sergeant recommends to the Chief that an Officer be put on administrative leave, the Chief will

check with the Campus Public Safety Office's "HR partners" before accepting or rejecting the recommendation. So far, only one Campus Police Sergeant has put an Officer on administrative leave.

44. Campus Police Sergeants have the authority to initiate disciplinary investigations regarding possible policy violations. Moreover, they can initiate those investigations without the prior approval of a superior, and that has occurred. However, the Campus Police Sergeants may opt to inform a superior that an investigation is occurring. As part of this investigatory responsibility, Campus Police Sergeants have the authority to direct staff to meet with them without first consulting with a superior. That has also occurred.

45. As the name implies, a central reason for conducting a disciplinary investigation is for the Campus Police Sergeant to determine whether discipline or a related action is appropriate. Accordingly, Officers who are called in to investigatory meetings by Campus Police Sergeants "have the right to union representation" during the same. (Exh. R-15 at 2.) That right is enshrined in Article 15, Section 1(D) of the Police Unit CBA.

46. At the end of a disciplinary investigation, a Campus Police Sergeant can draft a report. That report, which the Campus Police Sergeant eventually turns in to his or her superiors, can and is expected to include a summary of the Sergeant's findings, reference the applicable portions of a CBA, and include a recommendation regarding whether discipline is appropriate. A report might also recommend a "work plan" in lieu of discipline.

Adjust Grievances

47. Article 16 of the Police Unit CBA establishes a formal grievance and arbitration procedure in which a grievance can be settled at any one of the procedure's three Steps. In general, at Step 1 of the procedure, a grievance should be filed with the grievant's "immediate excluded supervisor." (Exh. P-1 at 20.) For the Campus Police Officers, that Step 1 "supervisor" is a Campus Police Sergeant. After that, Step 2 is handled by the Chief, Step 3 is handled by PSU's Vice President of Finance and Administration, and Step 3 is arbitration. However, the CBA also mandates that certain types of grievances are filed initially at Step 2 with the Chief or at Step 3 with the Vice President of Finance and Administration.

48. Although Campus Police Sergeants have the authority to adjust certain kinds of grievances at Step 1, only one formal grievance has ever been filed since the Police Unit CBA has been in effect, and that single grievance was filed just one day before the hearing for this case. Moreover, the grievance was filed directly "with Acting Lieutenant Schilling," and Schilling has never adjusted a Police Unit grievance.

Hire

49. The Campus Police Sergeant position description states that a Campus Police Sergeant "[m]akes decisions regarding hiring." (Exh. R-50 at 4.) Previously, Campus Police Sergeant Halliburton has participated in "hiring selection committees" that are made up of PSU staff and PSU students. Halliburton does not participate in interviews, however. Instead, the

hiring selection committees simply listen to interviews and then make recommendations. When that happens, every committee member's recommendations are given the same weight. Separately, Halliburton once sat in the room when people who were applying to be Officers were taking a test in order to make sure that the applicants were not cheating.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The petitioned-for sergeants are "supervisory employees" within the meaning of ORS 243.650(23) and thus are not appropriately included in SEIU's Police Unit.

Standards of Decision

Under the Public Employee Collective Bargaining Act (PECBA), which governs Oregon public sector labor relations, "[p]ublic employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." ORS 243.662. However, under ORS 243.650(19), "supervisory employees" are not "public employees" and cannot be appropriately included in a bargaining unit. *Office and Professional Employees International Union, Local #11 v. City of Hillsboro*, RC-4-99 at 6-7, 18 PECBR 269, 274-75 (1999). Beyond that, Article 2, Section 1 of the parties' Police Unit CBA specifically bars statutory supervisors from SEIU's bargaining unit, as noted earlier.

To determine supervisory status, this Board assesses whether an employee meets the specific criteria set out in ORS 243.650(23), which defines a "supervisory employee" as:

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

The supervisory status issue therefore requires the resolution of three questions, each of which must be answered in the affirmative for an employee to be deemed a supervisory employee: (1) Does the employee have the authority to take action or to effectively recommend action be taken in any one of the 12 listed activities? (2) Does the exercise of that authority require the use of independent judgment? and (3) Does the employee hold the authority in the interest of management? *City of Portland v. Portland Police Commanding Officers Association*, Case No. UC-017-13 at 22-23, 25 PECBR 996, 1017-18 (2014) (citing *Deschutes County Sheriff's Association v. Deschutes County*, Case No. UC-62-94, 16 PECBR 328, 339 (1996)).

For an employee to effectively recommend actions, their position must be given substantial credence more often than not. *Oregon AFSCME, Council 75 v. Benton County*, C-210-82 at 14, 7 PECBR 5973, 5986 (1983). Evidence of an effective recommendation can be found by a lack of any independent review or investigation of the recommendation by a higher level supervisor. *City of Portland*, UC-017-13 at 23, 25 PECBR at 1018, (citing *American Federation of State, County and Municipal Employees, Council 75 v. Lane County Sheriff's Office*, Case No. C-281-79, 5 PECBR 4507, 4517 (1981)). When determining whether an individual exercises independent judgment, we occasionally consider related factors such as whether superiors reinvestigate matters handled by the individual and whether the individual merely follows a recipe provided in a management cookbook. *Department of Administrative Services v. Oregon State Police Officers Association*, UC-35-95 at 15, 16 PECBR 846, 860 (1996) (citing *International Association of Firefighters, AFL-CIO, Local No. 314 v. City of Salem*, Case No. C-96-83 at 1, 7 PECBR 6163 (1983)); *Lane County Sheriff's Office*, C-281-79 at 11, 5 PECBR at 4517.

As this is a representation case, no party bears a burden of proof. OAR 115-010-0070(5)(a). Nevertheless, because a “supervisory employee” is a statutory exclusion from the otherwise broadly defined term “public employee,” there must be sufficient evidence establishing that the statutory exclusion applies before we will conclude that an otherwise “public employee” is a “supervisory employee.” Mere inferences and conclusory statements regarding supervisory authority are insufficient to render an employee a statutory “supervisor.” Accordingly, in the absence of detailed, specific evidence establishing that a putative “supervisor” has authority under the statutory indicia, we will conclude that the employee is a “public employee” covered by the PECBA and not a “supervisory employee” under ORS 243.650(23). *City of Portland*, UC-017-13 at 23, 25 PECBR at 1018.

Discussion

Here, SEIU contends that none of the petitioned-for Campus Police Sergeants meet any of the criteria outlined in ORS 243.650(23). PSU, on the other hand, contends that the Campus Police Sergeants assign, direct, adjust grievances, reward, promote, and discipline within the meaning of the PECBA. PSU does not address the other activities listed in the statutory definition in detail. Moreover, the record contains little if any evidence that addresses them. Regarding the final element of the “supervisor” test, no contention has been made that the Campus Police Sergeants do not exercise their authority “in the interest of management,” and given the record before us and the Campus Police Sergeants’ apparent relationship with their subordinates, we see no reason to conclude otherwise. See *Hillsboro Sergeant's Association v. City of Hillsboro, Oregon*, CC-009-14 at 6, 26 PECBR 491, 496 (2015).

Hire

The Campus Police Sergeant position description suggests without elaboration that a Campus Police Sergeant “[m]akes decisions regarding hiring.” (Exh. R-50 at 4.) Moreover, Halliburton has participated in “hiring selection committees” and has sat in while applicants were taking a test. However, none of those facts demonstrate that the Campus Police Sergeants truly “hire” within the meaning of PECBA. For this criterion, the most that can be said is that

Campus Police Sergeants make one recommendation among others of a group. Accordingly, we cannot conclude that “independent judgment” is ever utilized. On top of that, it is unclear how those recommendations are weighed or handled once submitted, so we cannot properly analyze whether the recommendations are “effective.” In fact, it is even unclear *who* handles the recommendations. See *City of Portland*, UC-017-13 at 24, 25 PECBR at 1019; *City of Union v. Laborers’ International Union of North America, Local 121*, UC-9-08 at 15-16, 22 PECBR 872, 886-87 (2008); *Department of Administrative Services*, UC-35-95 at 16-17, 16 PECBR at 861-63; *Deschutes County*, UC-62-94 at 13, 16 PECBR at 340. Lastly, nothing in our precedent suggests that monitoring job applicants to make sure that they do not cheat on a test is evidence of “hiring.”

Promote and Reward

As for the statutory criteria of “promote” and “reward,” we acknowledge that a Campus Police Sergeant is responsible for selecting which Officers get to act as FTOs, and that being an FTO comes with a 7.5% pay increase. However, we conclude that that is not a “promotion” or a “reward” as those terms were intended in the statute. Instead, we view that responsibility as a type of assignment, much like the assignment of overtime work, which also comes with a contractually guaranteed pay bump. Fundamentally, whether or not an Officer is an FTO, he or she is still an Officer. See *City of Hillsboro, Oregon*, CC-009-14 at 5, 26 PECBR at 495 (assigning officers to “specialty, premium-pay assignments” deemed evidence of authority to “assign”).

We likewise do not view approving an Officer’s transition from probationary to non-probationary employee to be a true “promotion” or “reward” either. Although it appears that a probationary employee is not guaranteed regular status with the passage of time, we view the progression to that status as a fairly natural occurrence. The fact that a non-probationary employee benefits from the CBA’s just cause provision while a probationary employee does not, though notable, is not particularly compelling. We also have very little evidence that addresses how a Campus Police Sergeant decides whether to advance a probationary employee or not, and therefore we cannot determine that “independent judgment” is utilized. On top of that, the language of the CBA seems to give SEIU some voice in the matter.

Finally, the ability to recommend an “award” alluded to by Sergeant Halliburton during the hearing certainly does not satisfy our “supervisor” test when there is no other evidence describing what that award consists of, and when nothing in the record explains why or how often such an award would be granted or recommended. Moreover, evidently, the Chief always gives out the award. See *City of Portland*, UC-017-13 at 30-31, 25 PECBR at 1025-26. Accordingly, we cannot conclude that Campus Police Sergeants “promote” or “reward” within the meaning of the PECBA.

Assign and Direct

After a careful review of the record, we conclude that sufficient evidence demonstrates that Campus Police Sergeants regularly “assign” and “direct” and frequently exercise independent judgment when doing so. Significantly, Campus Police Sergeants are in charge of

scheduling Officers' work, which often involves picking Officers' shifts, mandating overtime, and handling a variety of time off requests. They also decide how and when Officers are deployed during a shift, and are free to decide which Officers are deployed. Further, Campus Police Sergeants frequently provide training, choose who will act as an FTO, and provide a variety of direction to their Officers within a given assignment, as outlined above. As SEIU acknowledges in its brief, Campus Police Officers "assign daily tasks." It likewise appears that Officers must obey the Campus Police Sergeants' lawful orders or risk being disciplined. In short, Campus Police Sergeants have meaningful, independent control over an Officer's place, time, and work. *See City of Hillsboro, Oregon*, CC-009-14 at 5, 26 PECBR at 495; *City of Portland*, UC-017-13 at 25-26, 25 PECBR at 1020-21; *Teamsters Local 206 v. City of Reedsport*, UC-46-98 at 9, 18 PECBR 189, 197 (1999); *Deschutes County*, UC-62-94 at 15-16, 16 PECBR at 342-43.

The fact that some elements of scheduling are restricted by a CBA or "standardized guidelines" is not dispositive in this instance. (Exh. R-50 at 7.) Although policy might set a minimum manning standard, for example, that does not stop a Campus Police Sergeant from deploying additional officers to a scene when he or she deems that appropriate, determining that a planned event needs a larger presence, or determining which Officers should go to a particular scene or perform a particular task. They are also free to use their own judgment when considering whether to grant a time off request, particularly if the request involves overtime or does not involve sick time. Although Campus Police Sergeants seem to follow a pattern when deciding who gets overtime, there is no obvious rule that dictates all of the circumstances under which overtime will be needed, how many units will be needed for every event, or how responses should be prioritized. In other words, their scheduling does not appear to be a "routine or clerical" matter. *See City of Hillsboro, Oregon*, CC-009-14 at 5, 26 PECBR at 495; *City of Portland*, UC-017-13 at 27, 25 PECBR at 1022; *Deschutes County*, UC-62-94 at 15, 16 PECBR at 342. Separately, a Campus Police Sergeant has a considerable amount of discretion when determining whether to allow a new Officer to pass through the phases of the FTEP, and can even decide to overlook a string of low ADORE scores. As noted, when determining whether to reassign an investigation, a Campus Police Sergeant can independently decide whether an investigation will become too involved or time-consuming for an Officer and can opt to rely his or her own knowledge of an Officer's skill level or experience. *See City of Hillsboro, Oregon*, CC-009-14 at 5-6, 26 PECBR at 495-96.

The mere possibility that the Chief could override a Campus Police Sergeant's assignment or direction likewise does not dissuade us here, especially when we are presented with so little evidence that that has occurred despite the Campus Public Safety Office's paramilitary organizational structure. Nor does the possibility that a particular Campus Police Sergeant might choose to discuss something with a superior before making a final decision. The record provides examples of numerous occasions during which a Campus Police Sergeant can assign or direct work without doing so. And again, there may be times that a Campus Police Sergeant is "the highest law enforcement/public safety official on campus" and "is expected to make emergency command decisions without the benefit of consultation from a higher authority." (Exh. R-50 at 3.) *See City of Reedsport*, UC-46-98 at 9, 18 PECBR at 197. We also note that, at least with choosing who will act as an FTO, even the Chief's recommendation has effectively been overridden by a Campus Police Sergeant.

Adjust Grievances

The record plainly indicates that, at least on paper, the Campus Police Sergeants have some authority to adjust certain kinds of grievances at Step 1. Moreover, we know that one grievance has been filed. However, that single grievance was filed after the instant petition was filed with the Board, and we do not know how the grievance was handled afterward or precisely what role, if any, a Campus Police Sergeant played in that. Those circumstances certainly do not demonstrate “independent judgment” as the statute requires. Accordingly, on this limited record, we must conclude that the Campus Police Officers have not been shown to be able to “adjust grievances” within the meaning of ORS 243.650(23). See *City of Portland*, UC-017-13 at 31, 25 PECBR at 1026; *Department of Administrative Services*, UC-35-95 at 16, 16 PECBR at 861; *Washington County Professional Fire Fighters, Local 1660 v. Tualatin Valley Fire and Rescue District and City of Beaverton*, UC-17-94 at 3, 15 PECBR 427, 429 (1994) (policies and practices in existence at the time the petition was filed are relevant for the Board’s consideration); *International Association of Firefighters, AFL-CIO, Local No. 314 v. City of Salem*, C-96-83 at 7, 7 PECBR 6163, 6169 (1983).

Discipline

In assessing claimed disciplinary authority, this Board has often considered five elements of the discipline process to decide supervisory status: (1) how the process is initiated, (2) who investigates the conduct in question, (3) who defines and determines culpability, (4) how and by whom the type and severity of discipline is determined, and (5) who imposes the discipline and in what manner. *Department of Administrative Services*, UC-35-95 at 18, 16 PECBR at 863 (citing *Oregon State Police Officers Association v. Oregon State Police Department*, Case No. UC-20-89 at 34-39, 12 PECBR 570, 603-08 (1990)). In this case, the overall record indicates that Campus Police Sergeants are occasionally involved in every one of those elements.

As outlined above, Campus Police Sergeants generally have the authority to discipline Officers, recommend that they be disciplined, initiate investigations that can eventually result in discipline, and do all of those things independently. The evidence also repeatedly suggests that they have actually issued discipline and recommended discipline that was later accepted. Further, Campus Police Sergeants are evidently responsible for conducting disciplinary investigations themselves, for questioning Officers about their actions, and for monitoring Officer’s work in person and through reports and footage from body-worn cameras in order to find policy violations. At the end of an investigation, or at any point in which a Campus Police Sergeant determines an Officer has violated policy, the Campus Police Sergeant is expected to determine whether discipline is appropriate and what form that discipline should take, depending on how severe the Campus Police Sergeant deems a violation. Under those circumstances, we must conclude that Campus Police Sergeants can “discipline” within the meaning of the PECBA.

Regarding the “independent judgment” element of the test, we conclude that the possibility that some of a Campus Police Sergeant’s decisions are made in consultation with or at the direction of superiors does not detract from their otherwise meaningful authority to make such decisions on their own. Neither does the single rejection discussed below. And importantly, although progressive discipline is expected, as noted, the Police Unit CBA states that it is not a

“simple three (3) step linear process” and suggests that “the severity and potential consequences of the violation” should be considered. (Exh. P-1 at 16.) Further, no policy clearly dictates when a particular type of discipline, if any, is appropriate for a particular action, or whether something like a work plan is preferable. *See Department of Administrative Services*, UC-35-95 at 19, 16 PECBR at 864; *Benton County*, C-210-82 at 15, 7 PECBR at 5987.

At hearing, Schilling testified that he no longer believes that he has the authority to discipline Officers or recommend they be disciplined. That belief appears to be partially the result of Zerzan rejecting Schilling’s recommendation that a particular Officer be terminated in November 2016. Schilling also testified that, during a related meeting, he heard Zerzan indicate that Schilling should let the Campus Police Lieutenant handle all discipline going forward. Although we certainly find Schilling to be a credible witness as a general matter (along with PSU’s other witnesses), we ultimately reach a different conclusion regarding the extent of his position’s disciplinary authority.

For one thing, the testimony of Zerzan and Elmore regarding this issue squarely contradicts that of Halliburton. Perhaps more importantly though, Zerzan, the alleged source of the alleged restriction, is no longer Schilling’s superior at PSU. Instead, Elmore is, and Elmore (the Acting Chief) credibly and unequivocally testified that he expects his Campus Police Sergeants to issue and recommend discipline using their own judgment. Additionally, Elmore testified that he has personally asked Halliburton for a disciplinary recommendation and has also asked for more meaningful investigatory reports. We further note that Schilling conceded that he previously recommended discipline. Plus, the instance alluded to above was the only time Zerzan ever rejected a Campus Police Sergeant’s disciplinary recommendation. *See Department of Administrative Services*, UC-35-95 at 20, 16 PECBR at 865 fn 18 (review of the *pattern* of decision-making is more beneficial than dissection of a single case).

////

////

////

////

Conclusion

We conclude that that all three elements of the “supervisor” test have been satisfied. In particular, we conclude that the Campus Police Sergeants can assign, direct, and discipline as those terms are used in the PECBA. We reject the parties’ other contentions. Given the foregoing, we also conclude that the petitioned-for employees are “supervisory employees” as defined by ORS 243.650(23) and that their position should be excluded from SEIU’s bargaining unit.

PROPOSED ORDER

The petition for unit clarification is dismissed.

SIGNED AND ISSUED on February 13, 2018.



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. 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. RC-003-17

(REPRESENTATION)

OREGON AFSCME COUNCIL 75,	)	
	)	
Petitioner,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
STATE OF OREGON, OREGON JUDICIAL	)	AND ORDER
DEPARTMENT – YAMHILL COUNTY,	)	
	)	
Respondent.	)	
	)	

On January 11, 2018, the Board heard oral argument on Respondent’s objections and Petitioner’s cross-objections to a recommended order issued by Administrative Law Judge (ALJ) Julie D. Reading on October 24, 2017, after a hearing held on June 13 and 14, 2017, in Salem, Oregon.¹ The record closed on July 14, 2017, following receipt of the parties’ post-hearing briefs.

Jennifer Chapman, Legal Counsel, Oregon AFSCME Council 75, Salem, Oregon, represented Petitioner.²

Sylvia Van Dyke, Senior Assistant Attorney General, and Jonathan Groux, Senior Assistant Attorney General, Oregon Department of Justice, Salem, Oregon, represented Respondent.

On April 10, 2017, Oregon AFSCME Council 75 (AFSCME) filed this petition seeking to certify a bargaining unit without an election, under ORS 243.682(2) and OAR 115-025-0000(4). The petition proposes the formation of a new bargaining unit comprised of all unelected employees

¹The Oregon AFL-CIO, Association of Engineering Employees of Oregon, Oregon School Employees Association, Teamsters Local 223, and Service Employees International Union, Local 503, submitted a joint *amicus* brief to the Board in support of the ultimate conclusion of the Recommended Order that the proposed unit is an appropriate unit.

²On February 5, 2018, Giles Gibson, Legal Counsel, Oregon AFSCME Council 75, Salem, Oregon, assumed representation of Petitioner.

of the Oregon Judicial Department (Department) in the Twenty-Fifth Judicial District, Yamhill County Circuit Court, excluding supervisory, confidential, or managerial employees.³ The Department filed timely objections to the petition.

The issue is whether the petition proposes an appropriate bargaining unit under ORS 243.682(2) and OAR 115-025-0050.

We conclude that the proposed unit is an appropriate bargaining unit.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties and Department Structure

1. AFSCME is a labor organization within the meaning of ORS 243.650(13).
2. The Department is a public employer within the meaning of ORS 243.650(20).

3. Before 1983, counties paid to operate Oregon trial courts (which included circuit courts and district courts), and trial court employees were employed by each county. In 1983, the Legislature consolidated all of the trial courts, the tax court, and the appellate courts, into a single, unified court system within the Judicial Department, which provided state funding for the courts, and centralized their administrative operations.⁴ As a result of that consolidation, trial court employees became employees of the State of Oregon. Later, in 1998, the Legislature merged the district courts into the circuit courts.⁵ County governments continue to own the courthouse facilities that house the circuit courts.

4. The Legislature explained its reasons for consolidating the courts in ORS 1.001:

“The Legislative Assembly hereby declares that, as a matter of statewide concern, it is in the best interests of the people of this state that the judicial branch of state

³The proposed bargaining unit description in AFSCME’s petition expressly excludes supervisory and confidential employees, but not managerial employees. The Department objects to that omission, and AFSCME does not object to adding an express exclusion of managerial employees from the unit description. Because there is no dispute regarding the managerial status of any employees, and adding an express managerial exclusion will not affect the outcome of the petition, we modify the proposed unit description accordingly.

⁴See Or Laws 1981, ch 1 (Spec Sess); Or Laws 1981, ch 3 (Spec Sess). The 1981 legislation regarding state funding of the courts generally did not become effective until January 1, 1983. Or Laws 1981, ch 3, § 5 (Spec Sess).

⁵See Or Laws 1995, ch 658 (effective January 15, 1998, per sections 129 and 150).

government, including the appellate, tax and circuit courts, be funded and operated at the state level. The Legislative Assembly finds that state funding and operation of the judicial branch can provide for best statewide allocation of governmental resources according to the actual needs of the people and of the judicial branch by establishing an accountable, equitably funded and uniformly administered system of justice for all the people of this state.”

5. In 1983, the Legislature exempted state court officers and employees from ORS Chapter 240 (the State Personnel Relations Law).⁶ At the same time, the Legislature expressly provided that state court officers and employees are fully subject to the Public Employee Collective Bargaining Act (PECBA).⁷

6. The Chief Justice of the Oregon Supreme Court is the presiding judge of the Supreme Court, and also acts as the Department’s administrative head. As the administrative head, the Chief Justice is authorized to make rules and issue orders, set staffing levels, assign or reassign court staff, establish budgets, establish procedures for closing courts in emergencies, and take any other actions consistent with the administrative authority granted by ORS 1.002. The Chief Justice is also authorized to “represent the judicial department with the certified or recognized exclusive representatives of all appropriate bargaining units of officers and employees of the courts of this state who are state officers or employees.” ORS 243.696(2).

7. By statute, the Chief Justice may delegate any administrative functions to the State Court Administrator. ORS 1.002(9); ORS 243.696(2). Presently, the State Court Administrator assists the Chief Justice by establishing and managing statewide administrative programs, policies, and procedures for the Department. The Office of the State Court Administrator provides centralized business and infrastructure services for the entire state court system, principally through the functions of eleven divisions and programs including Executive Services; Appellate Court Services; Business and Fiscal Services; Court Language Access Services; Enterprise Technology Services; Human Resource Services; Juvenile and Family Court Programs; Legal Counsel; Communication, Education, and Court Management; Security and Emergency Preparedness; and the Internal Audit Office.

8. There is a circuit court located in each of Oregon’s 36 counties. When the circuit courts were consolidated under the Department, they were organized into 27 judicial districts with most, but not all, districts consisting of a single county. ORS 3.012(1). Circuit court judges are elected by the voters in their respective districts. The Chief Justice appoints a presiding judge for each judicial district subject to the approval of the majority of judges in that district. The presiding

⁶See Or Laws 1983, ch 763, § 27 (codified at ORS 8.170).

⁷See Or Laws 1983, ch 763, § 27a (codified at ORS 8.270). ORS 8.270 states, in full:

“All officers and employees of the courts of this state who are referred to in ORS 8.170 and 8.235 are subject to collective bargaining to the extent provided in ORS 243.650 to 243.782, and ORS 8.170 and 8.235 shall not be construed to reduce or eliminate any collective bargaining rights those officers and employees may have under ORS 243.650 to 243.782.”

judges are the administrative heads for their respective districts, and they are responsible and accountable to the Chief Justice in the exercise of their administrative authority and supervision over their respective courts. ORS 1.002(8). Each presiding judge appoints a trial court administrator for the judicial district. ORS 8.195.⁸

9. There are approximately 1,200 Department employees, the vast majority of whom work in the circuit courts. The number of employees in a given circuit court ranges from five to 300 employees.

10. The Chief Justice is responsible for establishing and maintaining the Department's budgeting, accounting, and fiscal plan. ORS 1.008(2). The Department receives its funding from the Legislature as an approved lump sum based on a comprehensive budget request submitted by the Chief Justice. When calculating the Department's budget request, the Budget and Finance Division accounts for all personnel costs, including circuit court employees' compensation. The Budget and Finance Division can easily calculate the circuit courts' personnel costs, in part because payroll is centralized and classification compensation rates are statewide.

11. The Department allocates funds to the circuit courts on an essentially pro rata basis. Each judicial district receives funds allotted for personnel services and supplies, but each district's trial court administrator and presiding judge have latitude to spend those funds as needed.

12. The Department recently implemented Oregon eCourt, which is an integrated technology system that includes components for case management; public access services such as ePayment, eFiling, and case searching; centralized financial management; and document management (among others). Oregon eCourt has made the business processes, forms, and data entry practices that are used throughout the various courts more streamlined and uniform. The eCourt system has also further integrated the courts by, for example, enabling employees to access documents or accept payments for a case in a different circuit court. However, there are still minor variations among the circuit courts' forms and procedures.

13. There are a number of Department committees and workgroups through which judges, administrators, or other employees from various courts meet to develop or advise on Department policies or practices (such as the development of Oregon eCourt). Some examples include the Court Re-engineering and Efficiencies Workgroup, Peer Information Exchanges, Process Improvement Teams, a classification advisory committee, an advisory policy committee, and a local forms committee. The Department also regularly conducts trial court administrator meetings.

14. The Twenty-Fifth Judicial District, Yamhill County Circuit Court (Yamhill County Circuit Court), has four judges. The courthouse is located in McMinnville, Oregon.

⁸Some judicial districts contain more than one county circuit court, and there is only one presiding judge and one trial court administrator per judicial district. However, witnesses typically used the term "circuit court," not the term "judicial district," when explaining how the circuit courts are administered. As a result, we generally follow the witnesses' practice of using the term "circuit court."

Circuit Court Rules and Operations

15. The Chief Justice approves and promulgates the Uniform Trial Court Rules (UTCs), which are statewide rules that apply in each of the circuit courts.

16. The UTCs govern the broadest matters in the court system such as standards for pleadings and documents, decorum in proceedings, case management, and calendaring. They also address the proper procedures in small claims court, complex litigation, contempt proceedings, juvenile court proceedings, domestic relations proceedings, criminal cases, civil cases, and trials.

17. Each circuit court also has its own set of additional local rules for civil and criminal proceedings, known as Supplementary Local Rules (SLRs). The SLRs must be consistent with the UTCs and approved by the Chief Justice. The SLRs often reflect differences between the circuit courts, such as variations in court size, the mix of typical cases, the availability of other community resources, local population and culture, and judicial preferences, which may require different or more detailed procedures.

18. All circuit courts are generally open during standard business hours, and each court's hours of operation must be approved by the State Court Administrator or Chief Justice. There are some variations in circuit court operating hours. For example, some circuit courts open later than 8:00 a.m., some close earlier than 5:00 p.m., some are closed for lunch, and some operate night courts. Variations in circuit court operating hours may reflect differences in county input, community needs, local resources, or discretionary responses to budget cuts. Additionally, each circuit court's administration⁹ can decide whether to close a courthouse due to inclement weather without approval from the Department. Individual judges also have the discretion to continue hearings (which require the presence of certain court employees) after hours or during court closures. The Department has implemented statewide closures on some occasions. For example, due to budget reductions, the Department closed all courts on Fridays for a period of time.

19. There are variations in how the circuit courts schedule matters. For example, some courts assign one judge to every stage of a case, while others schedule individual motions or matters based on judge availability. Some courts schedule multiple trials at the same time in anticipation of settlements, but others do not. Some courts restrict settlement options once a case is set for trial, and others permit or encourage settlement mid-trial. Differences in scheduling practices can result in different responsibilities or levels of discretion for certain court employees. For example, in courts where cases are assigned to a single judge, attorneys can contact the assigned judge's judicial assistant for any issues, and some judicial assistants have greater authority to make a scheduling decision without first receiving the approval of the judge.

20. The Department's Security and Emergency Preparedness office provides security trainings to all Department employees, sets minimum safety requirements for all of the courts, and sometimes provides funding or other resources to meet an individual court's particular security

⁹For ease of reference, we use the term "circuit court administration" to refer collectively to the presiding judge and trial court administrator for a given judicial district. The extent to which the presiding judge for a given judicial district delegates administrative authority to the trial court administrator or participates in personnel administration decisions may vary.

needs. However, the circuit courts' courthouses are provided by the counties and under the jurisdiction of the county sheriffs' offices. Additionally, a court may adopt security standards that exceed the Department's minimum standards. As a result, the circuit courts have varying security protocols. For example, in some courthouses, the entrances for members of the public are secured by multiple guards using x-ray machines and metal detectors to screen every individual, and in other courthouses, it is possible for the public to enter without such screening.

21. Since the unified court system was established, or at least in recent years, the Department generally has sought to limit or reduce the variation among the circuit courts' rules and practices, particularly through the introduction of Oregon eCourt. The Department's current administration predicts that some differences among the circuit courts' rules and practices will necessarily persist, but that the level of uniformity will continue to increase in the future.

Department Personnel Rules and Administration

22. The Chief Justice is responsible for establishing and maintaining a personnel plan for all Department officers (other than judges) and employees. ORS 1.008(1). The Department has promulgated the Judicial Department Personnel Rules (JDPRs), which are approved by the Chief Justice, and apply to all Department employees (except for elected officials and the State Court Administrator).

23. The JDPRs are a comprehensive set of personnel policies and procedures. The JDPRs address matters including classification, compensation, hiring, trial service, performance standards, grievances, disciplinary actions and appeals, layoffs, assignment of work, leaves (including the types of available leaves and accrual rates), holidays, and personnel records. Presiding judges and trial court administrators do not have authority to adopt personnel policies or take personnel actions that conflict with the JDPRs.

24. Although the JDPRs are comprehensive, the Department has also sought to give reasonable flexibility to the presiding judges and trial court administrators in personnel matters. Some personnel rules expressly provide circuit court administrations with various policy options, and others leave substantial room for the exercise of discretion. For example, each circuit court administration may decide whether to provide their employees with performance evaluations; whether to compensate their employees for overtime by cash payment or compensatory time; whether to grant or deny their employees annual salary increases; and whether to adopt a Flexible Employee Recognition Plan.¹⁰ Additionally, each circuit court administration has substantial discretion over their employees' schedules, *e.g.*, they decide whether to allow employees to have part-time or flexible work schedules. Each circuit court administration also has discretion over various leave issues, including the standards or criteria by which leave requests will be granted or denied; the order in which their employees may use various types of leave; whether their

¹⁰A Flexible Employee Recognition Plan permits a circuit court administration to recognize outstanding employee performance with gift cards or sponsored social events. If a court administration decides to adopt such a plan, they must choose from a set of plan options provided by the State Court Administrator, and the plan must be approved by the State Court Administrator.

employees may use sick leave to care for certain persons who do not meet the standard definition for qualified family members; and whether their employees may receive donations of paid leave.¹¹

25. Circuit court administrations have the authority to reorganize their respective court staffs' work assignments. A circuit court administration also has discretion, for example, to decide whether to deal with a budget shortage by laying off employees or other means (such as reducing some employees to part-time status or leaving vacancies open). However, if a circuit court administration determines that a layoff is necessary, they must submit the layoff plan for approval by the State Court Administrator, and they must follow the JDPRs' layoff rules, which include, for example, layoff order and notice requirements, as well as employee displacement (bumping) rights.

26. When a circuit court administration decides to fill a court staff vacancy, they may choose from a variety of recruitment methods (including, for example, open competitive recruitment or limited recruitment within the Department), some of which require approval from the State Court Administrator's Human Resource Services Division (HR Services). The JDPRs set forth criteria and procedures for each type of recruitment method. For example, if hiring through open competitive recruitment, the circuit court administration must work with HR Services and the Business and Fiscal Services Division to develop an announcement that is tailored to meet the court's specific needs, but also meets certain Departmental standards. The circuit court administration reviews applications, conducts interviews, and ultimately decides which candidate to hire.

27. There are statewide classification and compensation plans for all Department employees that are developed by HR Services. Each classification has an associated compensation range. The compensation range for each classification is the same statewide; compensation rates do not vary based on the court or geographic location of the employee or regional cost-of-living differences.

28. Generally, employees in the same type of position perform similar duties in a similar manner, regardless of which court they are employed in. For example, all cashiers must process payments, communicate with members of the public, and input data in eCourt, while working in an office setting. There are not, however, Department-wide position descriptions; position descriptions vary and are tailored to the requirements of each court. Circuit court staff position descriptions are typically written by the trial court administrators.

29. Circuit court staff positions may vary due to differences among the courts, particularly differences in size. Generally, employees in larger courts typically have narrower and more specialized duties, while employees in smaller courts typically have broader or more combined duties. For example, a Yamhill County Circuit Court employee's position once combined the duties of a judicial assistant and a juvenile court clerk. A position's duties also may vary among the courts due to court-specific operational choices. For example, in courts where cases are assigned to a single judge, the judicial assistants tend to have more responsibility for answering questions from attorneys and case scheduling.

¹¹Although trial court administrators generally have the discretion to determine whether and when employees in their respective courts may take leave, the Department has on at least one occasion imposed statewide vacation blackout days, when it was rolling out Oregon eCourt.

30. A position is placed in a particular classification based on its assigned job duties, authorities, and responsibilities. The JDPRs include rules regarding classification and reclassification, and provide a process by which an employee can initiate review of their classification. The classification review process ends with the State Court Administrator. If the State Court Administrator determines that a circuit court employee is misclassified, the circuit court administration must either promote them to the proper classification or remove the job duties that do not conform to their existing classification.

31. Supervisors in the circuit courts must consult with HR Services before issuing any discipline other than a written reprimand (and many voluntarily consult HR Services regarding written reprimands). The JDPRs include procedural requirements for investigating and issuing discipline.

32. The JDPRs provide a disciplinary appeal process by which employees can dispute more serious discipline (such as suspensions and dismissals). Disciplinary appeals are heard by a seven-member appeals board, appointed by the Chief Justice, and consisting of a court of appeals judge, a trial court judge, a trial court administrator, a supervisory employee, and three non-supervisory employees.

33. The JDPRs provide a different process, referred to as a “grievance” process, by which employees can challenge written reprimands and alleged violations of certain personnel rules or policies. The final authority in the grievance process is the HR Services Director or the State Court Administrator.

34. All Department employees participate in the Public Employee Benefit Board package (which includes medical, dental, and life insurance) and the Public Employees Retirement System.

35. HR Services maintains all Department employees’ personnel files.

36. HR Services processes all Department employees’ Workers’ Compensation claims.

37. The Department may transfer circuit court employees from one court to another (voluntarily or involuntarily). If a current circuit court employee voluntarily applies for a position in another court, they may be entitled to an interview under the JDPRs (unless an exception applies), but they do not have other transfer rights.

38. If a circuit court employee transfers to another court (or the State Court Administrator’s office) for any reason, they maintain their existing seniority, leave balances, and other accrued benefits.

39. Department policy permits job rotations, either to meet Department needs, or to give an employee a work opportunity. Through a job rotation, a circuit court employee could work temporarily in a different circuit court.¹²

¹²The record does not indicate how often such job rotations occur or whether there have been any job rotations involving Yamhill County Circuit Court employees.

40. The Department has the authority to assign a circuit court employee to work in another circuit court. Typically, however, that occurs only if both of the affected circuit court administrations agree to the assignment. For example, because Yamhill County Circuit Court was the first to adopt Oregon eCourt, some Yamhill employees were sent to other courts to help them transition to eCourt. On another occasion, when the Yamhill County Circuit Court decided to adopt an individual calendaring system, some Yamhill employees visited Benton County Circuit Court for a day to see how they ran their system.

41. Generally, employees in one circuit court are not assigned to cover for employees in another (*e.g.*, in the event of absences due to illness). There have been some exceptions.¹³ For example, when several employees in the Clatsop County Circuit Court became ill all at once due to a flu outbreak, employees from the Tillamook County Circuit Court provided coverage.

42. Judges occasionally hear cases from other circuit courts. This may occur when, for example, judges have a conflict or the only judge in a circuit court takes leave. Currently, when judges hear cases from other courts, they typically do so via videoconferencing (instead of traveling to the other court). Recently, a Washington County Circuit Court judge traveled to Yamhill County to hear a case (because all of the Yamhill County Circuit Court judges recused themselves due to unusual circumstances), and he chose to bring his own judicial assistant.

43. The Department does not conduct Department-wide court staff meetings.¹⁴

44. Occasionally, the Department brings together some employees from different circuit courts to participate in workgroups, such as the Peer Information Exchanges. For example, the Department recently convened a meeting of clerks from around the state to assess the procedures for civil commitment hearings and identify best practices or areas for improvement.

45. The Department (through its Communication, Education, and Court Management Division) offers a variety of optional training programs that are available to supervisors and employees statewide.¹⁵ For example, it conducts new employee orientations and Clerk College, where clerks can take classes on a variety of topics, such as how to process certain types of cases. If a circuit court decides to send an employee to a Department training, the costs may be paid by the circuit court, a division of the Office of the State Court Administrator, or both. Occasionally, employees from one circuit court have been sent to another for training when it was not readily available in their own district.

Yamhill County Circuit Court

46. The Yamhill County Circuit Court presiding judge generally has delegated the administrative authority over the court staff to the trial court administrator.

¹³None of the exceptions described in the record involved Yamhill County Circuit Court employees.

¹⁴Yamhill County Circuit Court employees testified consistently that they have never attended a statewide staff meeting, and their testimony is unrebutted.

¹⁵The Department sometimes provides mandatory trainings, such as when it introduced Oregon eCourt.

47. Judicial assistants and courtroom clerks work with the judges on the second floor of the courthouse, and they are jointly supervised by the judges and the trial court administrator. Other employees, including cashiers and clerks, generally work on the first floor, and they are supervised by the trial court administrator and the court operations supervisor.

48. There are several examples of employees who have held multiple positions within the Yamhill County Circuit Court. One employee has served as a civil, criminal, and juvenile clerk. Another employee has served as a court clerk, judicial assistant, and general court clerk. And another employee has served as a collections clerk, court clerk, drug court coordinator, and judicial assistant.

49. The Yamhill County Circuit Court administration has reorganized work assignments a number of times. For example, at one time, each in-court clerk worked for one judge consistently, and at another time, they were in a pool and rotated.

50. Although it is possible for circuit court employees to transfer to other circuit courts, inter-circuit transfers involving Yamhill County Circuit Court employees are not common.¹⁶

51. Yamhill County Circuit Court employees often provide coverage for one another, such as when an employee is on leave. Employees also often assist one another voluntarily when workloads become difficult.

52. Yamhill County Circuit Court periodically conducts staff meetings, which involve only Yamhill staff.

53. Yamhill County Circuit Court employees typically do not know and would not recognize most of the employees in other courts.¹⁷

54. Yamhill County Circuit Court employees do not regularly interact with employees from other circuit courts. Such interactions occur only occasionally, such as when employees participate in centralized trainings or Peer Information Exchanges. Typically, employees attend such trainings only rarely. For example, one 12-year employee could recall attending only one centralized training. Additionally, the amount of interaction with employees from other courts during such trainings typically is very limited.¹⁸

55. Employees in the Yamhill County Circuit Court have been dissatisfied with certain policies and practices adopted by the trial court administrator or presiding judge. In some cases,

¹⁶The record does not establish exactly how frequently employees transfer to or from Yamhill County Circuit Court (or between circuit courts generally). However, an employee testified that she is aware of only two or three employees who have transferred between Yamhill and another circuit court in the past 12 years, and her testimony is un rebutted.

¹⁷Several Yamhill County Circuit Court employees testified that they generally would not recognize employees from other courts, and their testimony is un rebutted.

¹⁸Several Yamhill County Circuit Court employees testified consistently that their interaction with employees from other courts is infrequent and limited, and their testimony is un rebutted.

the trial court administrator has denied employees' leave requests based on unwritten standards, including, for example, her preference that employees accumulate substantial sick and vacation leave balances before using leave.

56. The Yamhill County Circuit Court administration has the discretion to require part-time employees to switch to full-time or resign, and has exercised that discretion.

57. The Yamhill administration has adopted a policy generally eliminating employees' ability to work "adjusted work hours," also known as "flex time." Previously, when flex time was permitted, employees could adjust their regular schedule for a particular workday or workweek (for example, an employee could arrive at work 15 minutes early and leave work 15 minutes early on a certain day).

58. The Yamhill County Circuit Court administration has the discretion to deny employees' requests for flexible work schedules, and has exercised that discretion. For example, they denied an employee's request for a flexible schedule (with an earlier start and end time) to accommodate her childcare issues. In another case, a judicial assistant asked if she could work on a flexible schedule because her daughter had been seriously injured and would require a lot of long-term care. Initially, she was told that she could keep her judicial assistant position and adopt a flexible schedule when she returned from her leave of absence. However, upon her return to work, she was told that was no longer an option. The administration said she could either continue working as a judicial assistant without a flexible schedule, or move to a clerk position with more flexibility.

59. The Yamhill County Circuit Courthouse does not have its own parking structure. Employees may use a nearby public parking garage, but due to safety concerns, many employees prefer to park on the street instead of the garage. Recently, however, the presiding judge issued an order prohibiting courthouse employees from parking on the streets directly adjacent to the courthouse, in an effort to make those spots available for members of the public.

60. On one occasion, a Yamhill County Circuit Court employee anonymously reported to HR Services that the Yamhill administration was going to close the courthouse the day after Thanksgiving and require all of the employees to take leave. The State Court Administrator intervened, and the courthouse remained open.

Collective Bargaining History

61. There have been previous efforts to organize all of the Department's employees in a statewide, wall-to-wall bargaining unit, but those efforts have not been successful. AFSCME has attempted to organize the Department on a wall-to-wall basis at least three times, approximately 30 years ago, 14 years ago, and six years ago. The Service Employees International Union also has attempted to organize the Department on a wall-to-wall basis more than once.

62. In the opinions of AFSCME representatives who were involved in previous efforts to organize the Department on a wall-to-wall basis, those efforts failed because employees' concerns and priorities varied greatly from court to court, due to regional differences in culture and economic conditions (such as cost of living), as well as differences in the employees' court-

specific working conditions, the sizes of their courts, and their relationships with their court administrators and judges.

Petition

63. On April 10, 2017, AFSCME filed this petition to certify a new bargaining unit without an election.

64. On April 11, 2017, the Board's Election Coordinator asked the Department to provide a list of all affected employees to determine if the petition is supported by a showing of interest of 50 percent or more of employees in the proposed bargaining unit, as required by OAR 115-025-0010(5)(b).

65. After receiving the list of employees, the Election Coordinator determined that a majority of employees in the proposed unit signed valid authorization cards. On April 24, 2017, the Election Coordinator issued a Notice of Sufficient Showing of Interest.

66. On April 25, 2017, the Election Coordinator served the Notice of Sufficient Showing of Interest on the parties, and directed the Department to post a Notice of Petition for Certification without an Election, in accordance with OAR 115-025-0030(3).

67. On May 12, 2017, the Department filed timely objections to the petition. No employees filed objections or a request for an election.¹⁹

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The proposed bargaining unit is an appropriate bargaining unit.

AFSCME proposes to form a new bargaining unit comprised of all unelected employees of the Department employed in the Yamhill County Circuit Court, excluding employees defined as managerial, supervisory, or confidential by PECBA. The ultimate issue is whether the proposed unit is appropriate under ORS 243.682(1)(a) and OAR 115-025-0050.

AFSCME contends that the statutory unit determination factors—including employees' community of interest; wages, hours, and working conditions; the desire of the employees; and the history of collective bargaining—warrant finding a unit comprised solely of Yamhill County Circuit Court employees appropriate. The Department contends that the proposed unit is inappropriate, and that only a wall-to-wall unit of all Department employees would be appropriate.

¹⁹In its objections to the ALJ's Recommended Order, the Department requests that we make additional factual findings regarding the alleged impact that approval of the proposed unit would have on court operations. The Department further contends that it proved that various negative consequences *would* occur. As a factual matter, we do not agree that the record proves that the various consequences anticipated by the Department would occur if this Board finds that the petitioned-for unit is appropriate. We address the Department's concerns and explain our reasoning in more detail below, in the discussion of our conclusions of law.

Although AFSCME agrees that a wall-to-wall unit would be appropriate, even preferable, AFSCME maintains that the proposed unit is also an appropriate unit. For the reasons discussed below, we agree that the proposed unit is an appropriate unit.

Standards for Decision

PECBA defines an “appropriate bargaining unit” broadly as any “unit designated by [this] Board or voluntarily recognized by the public employer to be appropriate for collective bargaining.” ORS 243.650(1). “[A] bargaining unit may consist of all of the employees of the employer, or any department, division, section or area, or any part or combination thereof, if found to be appropriate by the Board.” OAR 115-025-0050(1).

PECBA also expressly provides that we may determine a unit to be appropriate in a particular case “even though some other unit might also be appropriate.” ORS 243.682(1)(a). Therefore, PECBA does not require that a petition set forth the most appropriate unit, only *an* appropriate unit. *Id.*; *see also Oregon AFSCME Council 75 v. Douglas County*, Case No. CC-004-14 at 31, 26 PECBR 358, 388 (2015).

When determining whether a unit is appropriate for collective bargaining, we must “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.” ORS 243.682(1)(a); *see also Douglas County*, CC-004-14 at 30-31, 26 PECBR at 387-88; *OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251 (2001). Those statutory factors are not exclusive; we may also weigh other non-statutory factors, including our administrative preference for certifying the largest possible appropriate unit. *Douglas County*, CC-004-14 at 31, 26 PECBR at 388. Moreover, when making an appropriate unit determination, we have “discretion to decide how much weight to give each factor” in any particular case. *OPEU*, 173 Or App at 436; *see also OSEA v. Deschutes County*, 40 Or App 371, 376, 595 P2d 501 (1979). Thus, “our analysis of the propriety of a proposed unit is necessarily fact-driven, with the outcome depending on the specific facts and circumstances of the workplace and workforce at issue.” *Douglas County*, CC-004-14 at 31, 26 PECBR at 388.

Community of Interest, Wages, Hours, and Other Working Conditions

We begin by examining the community of interest, wages, hours, and working conditions of the proposed unit. “Community of interest” has long been understood to depend on factors such as similarities of duties, skills, and benefits; interchange or transfer of employees; promotional ladders; and common supervisors. *Douglas County*, CC-004-14 at 31, 26 PECBR at 388.

A threshold requirement for an appropriate unit is that the petitioned-for employees share a community of interest with each other. *See, e.g., Oregon AFSCME Council 75 v. Washington County*, Case No. RC-30-03 at 12, 20 PECBR 745, 756 (2004); *Oregon AFSCME, Council 75 v. City of Corvallis*, Case No. RC-41-03 at 11, 20 PECBR 684, 694 (2004). Additionally, where there is a contention that the proposed bargaining unit is inappropriate because it excludes certain employees, we consider whether the petitioned-for employees share a sufficiently distinct community of interest such that the proposed unit may be deemed appropriate. *See, e.g., Washington County*, RC-30-03 at 12, 20 PECBR at 756. A proposed unit of employees may have

a sufficiently distinct community of interest to constitute *an* appropriate unit, even if they also share a community of interest with excluded employees. *See, e.g., id.* at 12-13, 20 PECBR at 756-57; *City of Corvallis*, RC-41-03 at 11-16, 20 PECBR at 694-99.

In this case, there is no dispute that the Yamhill County Circuit Court employees share a community of interest with each other. Nor is there any dispute that they also share a community of interest with other Department employees, particularly other circuit court staff. All Department employees are supervised at the highest levels by the Chief Justice and the Office of the State Court Administrator; they are subject to the JDPRs and statewide compensation and classification plans; they receive the same employment benefits; and they have similar job duties, work hours, and workplaces (offices and courtrooms). The question is whether the Yamhill County Circuit Court employees have a community of interest that is sufficiently distinct so that those employees alone constitute an appropriate bargaining unit.

The Yamhill County Circuit Court employees all work in a single building, the Yamhill County Circuit Courthouse. Moreover, the employees interact frequently and are highly familiar with each other. There is also frequent interchange among the employees, as many are cross-trained or have sufficient experience to work in multiple positions, and it is common for the employees to cover for each other. It also appears relatively common for Yamhill County Circuit Court employees to transfer to different positions within Yamhill County Circuit Court. In contrast, Yamhill County Circuit Court employees generally do not know employees who work in other courts. They interact with other courts' employees only occasionally, and when they do, such as during trainings or information exchanges, the interaction is relatively brief and limited. Generally, Yamhill County Circuit Court employees do not provide or receive coverage from other courts' employees. Employees have transferred between Yamhill County Circuit Court and other courts (or the Office of the State Court Administrator), but the record indicates that such transfers are relatively infrequent.

Under the Department's administrative structure and personnel rules, each circuit court's presiding judge and trial court administrator have administrative and supervisory authority only over the employees in their respective courts. And, although the presiding judges and trial court administrators are required to follow Department policies and the JDPRs, they have discretion over a variety of matters that significantly impact their employees' day-to-day working conditions. The Yamhill County Circuit Court presiding judge and trial court administrator have, within their discretion, adopted a number of personnel policies and practices that acutely affect the petitioned-for employees, and only those employees. For example, the Yamhill administration has adopted policies or practices restricting the use of accrued leave time, eliminating adjusted work hours or "flex-time," and limiting flexible or part-time work schedules.

Because of the Yamhill County Circuit Court employees' extensive interaction and interchange with each other, their relative isolation from other court employees, and their court-specific administration and working conditions, the Yamhill employees' community of interest is significantly stronger than, and distinct from, their community of interest with other Department employees.

Desires of Employees

AFSCME has submitted a sufficient showing of interest to establish that a majority of the Yamhill County Circuit Court employees wish to form the proposed bargaining unit.

History of Collective Bargaining

There have been multiple efforts by AFSCME and at least one other union to organize all Department employees in a statewide, wall-to-wall bargaining unit, but none of those efforts have been successful. AFSCME's previous attempts to organize Department employees on a wall-to-wall basis occurred approximately 30 years ago, 14 years ago, and six years ago.

The Department objects to our finding of facts regarding the collective bargaining history as incomplete because, according to the Department, there is nothing in the record that shows that Yamhill County Circuit Court employees in particular (1) previously attempted to obtain labor representation, (2) voted or signed authorization cards for representation in the previous attempts to organize the entire Department, or (3) will be more greatly affected than other Department employees if unable to organize as a single bargaining unit. The Department further contends that, due to the absence of such evidence, the collective bargaining history does not support a conclusion that the proposed unit is appropriate.

In making an appropriate unit determination, we have never required or asked for evidence showing how particular employees voted or whether particular employees signed authorization cards, as we conduct secret-ballot elections and maintain the confidentiality of authorization cards to ensure employee free choice and minimize coercive conduct. Similarly, we have not required evidence establishing that an inability to organize as the proposed unit will have a greater impact on the petitioned-for employees than other employees.

Moreover, the evidence establishing that employees have (repeatedly) rejected the wall-to-wall unit preferred by this Board is relevant to the question of whether the smaller proposed unit is appropriate, regardless of whether the petitioned-for employees specifically supported any of those prior efforts. As discussed further below, that evidence indicates that there are impediments to organizing the Department on a wall-to-wall basis, such that our continued insistence on our preferred unit may impinge too greatly on “the most basic right guaranteed to employees” by PECBA, “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.” *International Union of Operating Engineers, Local No. 701 v. Grant County Road Department*, Case No. C-254-83 at 8, 8 PECBR 6735, 6742 (1984) (quoting *DSL Employees Association v. Division of State Lands, et al.*, Case No. C-72-83, 7 PECBR 6118 (1983) and ORS 243.662 (emphasis in *Grant County*)). See also, e.g., *Laborers International Union of North America, Local 320 v. City of Keizer*, Case No. RC-37-99 at 10, 18 PECBR 476, 485 (2000) (considering evidence that wall-to-wall unit had been rejected).

Preference for Larger Units; Avoidance of Undue Fragmentation

Next, we consider our longstanding preference for certifying “the largest possible appropriate unit.” *Douglas County*, CC-004-14 at 34, 26 PECBR at 391. This preference is rooted in avoiding undue fragmentation of the workforce into excessive bargaining units, as such a result is contrary to many of the policies underlying PECBA. *Id.*; ORS 243.656(2)-(4). Specifically, “[o]ur nonfragmentation policy * * * promotes workplace stability, and prevents the undue burden which would fall on public employers if they had to engage in bargaining sessions for the many splinter groups on a round-robin basis.” *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 at 11, 21 PECBR 873, 883 (2007) (quotation marks and citation omitted). Additionally, this Board has posited that “an increase in the number of bargaining units increases the number of potential labor disputes and work stoppages.” *Id.*²⁰ Finally, because larger bargaining units tend to have more bargaining power than smaller units, creating (or preserving) larger units better serves the PECBA policy of creating “greater equality of bargaining power between public employers and public employees.” *Id.* (quoting ORS 243.656(3)).²¹

Application of our larger-unit preference and nonfragmentation policy, however, “should not unreasonably take precedence over the representation rights of employees.” *International Union of Operating Engineers, Local 701 v. Deschutes County Public Works*, Case No. RC-4-88 at 14, 10 PECBR 906, 919 (1988). “[T]hese policies are not ‘rules’ that must be strictly adhered to in all cases.” *Grant County*, C-254-83 at 8, 8 PECBR at 6742. Thus, we do not “blindly apply” the preference but rather weigh it, along with the statutory factors, to determine the appropriateness of a particular unit under the circumstances of the case. *Douglas County*, CC-004-14 at 34, 26 PECBR at 391.

The Department argues that certifying the proposed unit, which consists of just the Twenty-Fifth Judicial District, would create a bargaining unit that is too small and would unduly fragment the Department’s workforce. The Department notes that, if a district-by-district approach is endorsed by this Board, it could potentially have to bargain with approximately 27 different bargaining units (one for each judicial district).

²⁰Although this Board’s larger-unit preference is based, in part, on the logical assumption that fragmenting a single employer’s workforce into multiple bargaining units increases the risk of labor disputes or work stoppages, we exercise some caution in applying this preference because we are not aware of empirical evidence establishing that public employers with multiple bargaining units actually experience more labor disputes and work stoppages than public employers with fewer and larger (or wall-to-wall) bargaining units.

²¹As discussed further below, we give the larger-unit preference less weight in cases involving unrepresented employees. We do so in part because one of the justifications for the preference—that larger units tend to have greater bargaining power—is less applicable in such cases. Specifically, represented employees, even those in small bargaining units, generally have more bargaining power than individual, unrepresented employees, who by definition do not have the legal right to collectively bargain with their employers.

We agree with the Department that allowing a straight district-by-district approach in that manner would result in undue fragmentation. That, however, is not the necessary result of finding the petitioned-for unit appropriate, and our decision in this case should not be interpreted as allowing such fragmentation. Nothing in PECBA, or this Board's rules and case law, require this Board to continue approving district-based bargaining units just because this Board has approved one. *See, e.g., Oregon Public Employees Union v. State of Oregon Corrections Department and Executive Department and American Federation of State, County and Municipal Employees*, Case No. UP-91-90 at 13-14, 12 PECBR 876, 888-89 (1991) (finding new facility-based units would not be appropriate, even though the Board had previously approved facility-based units).

At this point, granting this petition will result in only one bargaining unit. The record does not include evidence that AFSCME or any other labor organization is attempting to organize additional District-based units or any other bargaining unit. It may well be that the petitioned-for unit is the only one that the Department ever needs to collectively bargain with. If other Department employees wish to organize, they have various options other than petitioning to form another district-based unit. For example, they could petition to form a larger unit comprised of all circuit court employees in a particular region, or they could petition to accrete to the existing unit of Yamhill County Circuit Court employees. Indeed, this Board could, if the unit determination factors warranted, require an additional proposed unit to accrete to the existing unit, instead of creating another separate unit.²²

The Department also argues that the proposed unit is too fragmentary, in light of the Department's highly centralized and uniform operations. We recognize that the Department has many centralized systems and statewide rules and intends to continue on that trajectory. We also recognize, however, that the petitioned-for unit is consistent with the Department's organizational structure, which continues to vest significant authority and discretion in individual circuit court administrations, and permits some variation in local policies and practices to accommodate differences among the circuit courts.²³ Under these circumstances, we do not believe that approving the proposed unit will unduly fragment the Department's workforce.²⁴

²²Even if this Board permitted two different bargaining units to be created, the parties potentially could address fragmentation concerns by agreeing to merge the units or engaging in coalition bargaining. *See, e.g., Department of Corrections*, UP-91-90 at 5, 12 PECBR at 880; *City of Corvallis*, RC-41-03 at 16 n 5, 20 PECBR at 699 n 5; *Oregon School Employees Association v. South Coast ESD, Region #7*, Case No. RC-10-00 at 8 n 3, 19 PECBR 58, 65 n 3 (2001).

²³The proposed unit, which is comprised of all employees of a particular judicial district, follows existing physical and administrative divisions within the Department. The proposed unit will include all employees who work in a particular courthouse, in a particular county. Moreover, it will include all employees who are within a statutorily created division of administrative authority. ORS 1.002(8); ORS 8.195. As discussed in more detail above, each circuit court administration is responsible for managing their respective court's operations and employees. Although the circuit court administrations must follow the Department's personnel rules and policies, they retain significant authority and discretion over a variety of personnel matters (including, for example, overtime, scheduling, and leaves) that acutely impact their court's employees (and only those employees).

²⁴Although we do not agree with the Department that approval of the proposed unit will result in
(Continued . . .)

After weighing all of the unit determination factors, including our preference for larger units, we ultimately conclude that the proposed unit is an appropriate one. The petitioned-for employees have a strong and sufficiently distinct community of interest, and they share certain localized working conditions.²⁵ We also give more weight to their desire to be represented, in light of past attempts to organize a wall-to-wall unit. *See, e.g., Douglas County*, CC-004-14 at 34, 26 PECBR at 391; *City of Keizer*, RC-37-99 at 10, 18 PECBR at 485 (“Even though a wall-to-wall unit might be appropriate (and would generally be preferred), if that unit is rejected, application of the statutory factors may lead us to conclude that some smaller bargaining unit is also appropriate.”).²⁶

“Where, as here, the statutory directives for determining appropriate bargaining units dictate one result—approval of the unit—but conflict with Board-created policy preferences (for large units and against fragmentation), adherence to the statute is the better course of action. In other circumstances, where our preferences work to further the policies of the PECBA, such preferences will still be applied. Each unit determination case is governed by its own peculiar facts.” *Oregon School Employees Association v. South Coast ESD, Region #7*, Case No. RC-10-00 at 8, 19 PECBR 58, 65 (2001).

In reaching this conclusion, we have given great consideration to the Department’s concerns regarding the potential impact that approving the proposed unit could have on the Department’s operations. Specifically, the Department is concerned that approving the proposed unit could (1) force it to create two sets of rules (one for represented employees, and one for unrepresented employees), and thereby conflict with the Department’s establishment of uniform, statewide personnel rules and policies, and (2) potentially interfere with court operations,

(Continued . . .)

undue fragmentation at this point, we do agree that a wall-to-wall bargaining unit would be much more preferable, especially in light of the Department’s efforts to increase uniformity in court operations and thereby improve the court’s efficiency and accessibility. That a wall-to-wall unit would be *preferable*, however, does not mean that it is the *only* appropriate unit.

²⁵The Department contends that the petitioned-for employees’ community of interest is not *sufficiently* distinct to warrant creation of a separate unit, and cites cases in which units with arguably more clearly distinct communities of interest have been deemed inappropriate. However, as discussed above, unit determination cases are fact-specific and all of the factors must be considered in relation to each other. Thus, an appropriate unit’s community of interest may be more or less distinct, depending on the facts of the case and the other unit determination factors. *See, e.g., International Union of Operating Engineers, Local 701 v. Deschutes County Public Works*, Case No. RC-4-88 at 12, 10 PECBR 906, 917 (1988). In this case, after considering all of the facts and unit determination factors together, we find that the petitioned-for employees’ community of interest is distinct enough to support creation of a separate unit.

²⁶In the dissent’s opinion, the collective bargaining history does not weigh in favor of finding this unit appropriate because the prior attempts to organize larger units were not recent. In this context, we find the evidence of multiple organizing attempts (by two different unions), including one as recent as six years ago, to be sufficient to weigh against continued adherence to our larger-unit preference, and in favor of permitting the employees to organize a smaller yet appropriate unit of their own choosing.

including, for example, by impairing the Department’s ability to ensure all employees use eCourt or have employees stay late to accommodate a particular hearing.

Although we are approving the proposed unit as appropriate for collective bargaining, we emphasize that nothing in this order or PECBA requires the Department to agree to any particular contract term; rather, PECBA requires only that the Department, and the union, collectively bargain in good faith. See ORS 243.650(4) (“The obligation to meet and negotiate does not compel either party to agree to a proposal or require the making of a concession.”).²⁷ Moreover, under PECBA, the Department is required to bargain over only mandatory subjects of bargaining—not statutorily permissive subjects or other “subjects that the Employment Relations Board determines to have a greater impact on management’s prerogative than on employee wages, hours, or other terms and conditions of employment.” ORS 243.650(7)(c). Additionally, PECBA does not exempt employees from performing their job duties or complying with work rules (whether the employees organize court-by-court or wall-to-wall). Thus, after considering the Department’s concerns and the record in this case, we do not conclude that approving this unit would be inimical to the standardized and efficient adjudication of cases.²⁸

The Department also argues that only a wall-to-wall unit is consistent with the Legislature’s intent in consolidating the circuit courts, particularly, its intent to create a “uniformly administered system of justice.” ORS 1.001. We have not found, however, a statutory directive establishing that the Legislature intended to prohibit Department employees from organizing in anything but a single, wall-to-wall bargaining unit. In ORS 243.696(2), the Legislature designated the Chief Justice as the Department’s representative in collective bargaining negotiations with the “exclusive representatives of *all appropriate bargaining units*.” (Emphasis added.) That statutory language indicates at least the possibility of multiple appropriate bargaining units in the Department.

Additionally, the Legislature did not exempt the Department from any of PECBA’s requirements, or create any special unit determination standards for the Department. Rather, in ORS 8.270, the Legislature expressly provided that the Department is “subject to collective bargaining to the extent provided in ORS 243.650 * * * to 243.782,” and that the statutes exempting Department officers and employees from the State Personnel Relations Law “shall not be construed to reduce or eliminate any collective bargaining rights those officers and employees may have under” PECBA.²⁹ Therefore, although it is clear that the Legislature intended to create

²⁷PECBA also does not preclude the Department from extending any negotiated changes in employment conditions to its unrepresented employees.

²⁸See also *Circuit Court. v. AFSCME*, 295 Or 542, 551, 669 P2d 314, 320 (1983) (“The courts’ ability to adjudicate cases is in no way reduced by the obligation to bargain with [employees] concerning employment conditions.”). Indeed, one of the legislative purposes of PECBA is to safeguard public services “by encouraging practices fundamental to the peaceful adjustment of [employment] disputes,” and “by establishing greater equality of bargaining power between public employers and public employees.” ORS 243.656(3).

²⁹The Department also argues that a determination that the proposed unit is appropriate “may contravene provisions of the Oregon Constitution about separation of powers.” However, in *Circuit Court*, 295 Or at 551, and *Lent v. ERB*, 63 Or App 400, 406, 664 P2d 1110, 1114 (1983), the Supreme Court and Court of Appeals held that the application of PECBA to court employees did *not* violate the separation of powers requirement, and we see no basis for concluding otherwise here.

a uniformly administered system of justice, we do not believe that our decision is in conflict with that intent.

Finally, we address the dissent's argument that we should give our larger-unit preference more weight in this case because the State is the employer. We agree that this Board's "large-unit preference is particularly applicable to cases involving the State." *Department of Corrections*, UP-91-90 at 13, 12 PECBR at 888. At the same time, however, we generally give this preference less weight in cases involving unrepresented employees. *See, e.g., Douglas County*, CC-004-14 at 34, 26 PECBR at 391; *City of Keizer*, RC-37-99 at 10, 18 PECBR at 485; *Deschutes County Public Works*, RC-4-88 at 14, 10 PECBR at 919. We also note that, even with respect to the State, we have not applied this preference to eliminate or prohibit bargaining units that comprise only part of an agency, much less an entire branch of government. Ultimately, our administratively created larger-unit preference is just that—a preference—not a statutory requirement. Thus, in this case, that preference does not mean that the smaller proposed unit is *inappropriate*, particularly considering that unrepresented employees are petitioning to form a new bargaining unit.

Conclusion

In sum, under the circumstances of this case, we find that the statutory unit determination factors—community of interest; wages, hours, and other working conditions; history of collective bargaining; and the desires of the employees—support a finding that the proposed unit is appropriate, even in light of our administrative preference for larger units. Because the Election Coordinator has already determined that the petition is supported by a sufficient showing of interest, we order that AFSCME be certified as the exclusive representative of the proposed unit.

ORDER

1. An appropriate bargaining unit is: All unelected employees in the Twenty-Fifth Judicial District, Yamhill County Circuit Court, excluding employees defined as managerial, supervisory, or confidential by statute.

2. A majority of eligible employees in the petitioned-for bargaining unit signed valid authorization cards requesting that AFSCME represent the unit. Accordingly, it is certified that:

//

//

//

//

OREGON AFSCME COUNCIL 75

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

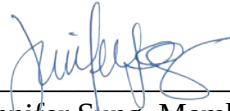
“All unelected employees in the Twenty-Fifth Judicial District, Yamhill County Circuit Court, excluding employees defined as managerial, supervisory, or confidential by statute.”

DATED: March 14, 2018.



Adam L. Rhynard, Chair

*Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

*Member Umscheid Dissenting

It is well-settled that the Board has the discretion to decide how much weight to give the statutory factors in ORS 243.682(1) and the administrative preferences used to assess whether a proposed bargaining unit is appropriate. I respectfully dissent because I would exercise our discretion differently and conclude that the petitioned-for unit is not an appropriate unit.

I write separately to explain my disagreement with four aspects of the majority opinion. First, I would conclude that the well-established preference in State cases for the largest possible appropriate unit, when considered together with the statutory factors, tips the balance against finding the petitioned-for unit appropriate. Second, I would weigh more heavily in the analysis the risk of additional significant fragmentation in this workforce. Third, I would conclude that the employees in the Yamhill County Circuit Court do not have a clearly distinct community of interest, including significantly different wages, hours or other working conditions, to support finding a departmental unit appropriate. Fourth, I would conclude that the absence of any recent attempt to organize a larger unit in the Oregon Judicial Department (Department) weighs against finding the petitioned-for unit appropriate.

The Preference for the Largest Possible Unit in State Cases

The History of the Preference in State Cases

Most fundamentally, I would weigh more heavily in the analysis the preference for the largest possible appropriate bargaining unit in State cases. The Board has described our preference

for the largest possible unit as “particularly significant” in State cases. *Association of State Professional Employees v. Department of Revenue and Oregon Public Employees Union*, Case No. RC-55-95 at 8, 16 PECBR 615, 622 (1996).

The preference in State cases is grounded in what the Board has described as the “unique history” of State employee organizing and bargaining, including the fragmentation that existed even before PECBA was enacted. See *Oregon Nurses Association v. Oregon State Board of Higher Education*, Case No. C-94-83 at 5, 8 PECBR 6658, 6662, *recons*, 8 PECBR 6716 (1984). In particular, in the late 1960s and very early 1970s, some State employees were represented by labor organizations, including employees in the State Tax Commission (the predecessor to the Department of Revenue), the Bureau of Labor, the Highway Department and the Department of Motor Vehicles (later merged to become the Department of Transportation), and the Oregon State Penitentiary.³⁰

By the early 1970s, the State bargained on a coalition basis with some 50 to 55 separate bargaining units pursuant to *former* ORS 243.696.³¹ By 1979, six years after the enactment of PECBA, the State workforce had fragmented to include “some 86 bargaining units. Some of those units covered less than an entire agency, but very few agencies included more than one bargaining unit.” *Oregon Education Association v. Children’s Services Division, State of Oregon and Oregon*

³⁰For descriptions of early organization of parts of the State workforce, see *Oregon State Employees Association v. Oregon State Bureau of Labor*, Case No. C-474, 1 PECBR 262 (1975); *Department of Revenue*, RC-55-95 at 7, 16 PECBR at 621; *Association of Oregon Correction Employees v. State of Oregon, Department of Corrections and AFSCME*, Case No. UC-36-97 at 5, 17 PECBR 730, 734 (1998), *aff’d without opinion*, 161 Or App 667, 984 P2d 959 (1999); and *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 at 4, 21 PECBR 873, 876 (2007).

³¹See *Oregon Education Association v. Children’s Services Division, State of Oregon and Oregon Public Employees Union*, Case No. C-62-83 at 2-3, 7 PECBR 6304, *modified on recons*, 7 PECBR 6404, 6406 (1984), quoting *former* ORS 243.696, which provided:

“(1) Notwithstanding any other provision of this chapter, whenever two or more labor organizations are certified to represent state employees in like classifications, the State of Oregon and the certified labor organization shall meet jointly at reasonable times and bargain in good faith for the purpose of establishing the compensation plan and other economic benefits, and those employment relations matters which require legislative action or are the subject of Personnel Division rule-making authority. Nothing in this subsection shall prevent a labor organization which has met in such joint sessions and which represents the majority of employees in a classification from entering into an agreement with the state employer governing the compensation or other benefits of such employees when, after a reasonable time, the representative of the majority of employees in the classification and the representative of the minority of employees in the classification have not agreed as to the provisions of a proposed agreement.

“(2) This section shall not apply to any subject which affects only a single agency, institution or other subordinate unit of the state.”

Public Employes Union, Case No. C-62-83 at 4, 7 PECBR 6307, 6307, *modified on recons*, 7 PECBR 6404 (1984).

During this period, a preference for the largest possible unit in State cases developed in Board case law. By 1980, the Board described the policy “against unnecessary fragmentation of the employer’s workforce as long-standing” and as having been “repeatedly strengthened in recent years.” *General Teamsters, Local 324 v. Corrections Division Release Center and Oregon State Employes Association and Oregon Public Employees, Council 75, American Federation of State, County and Municipal Employees, AFL-CIO*, Case No. C-198-79 at 5-6, 5 PECBR 2937, 2941-42 (1980).

Fragmentation eased over the second decade after the enactment of PECBA, in part because the State and several labor organizations voluntarily consolidated bargaining units. The State and the Oregon Public Employees Union (OPEU) entered into the first statewide collective bargaining agreement in 1981, in which the parties recognized a single statewide bargaining unit comprised of all State employees represented by OPEU. The agreement contained a 90-day period during which agency-level units were recognized for the purpose of providing an opportunity for fair share petitions and elections.³² Upon the expiration of that 90-day period, OPEU represented approximately 17,000 State classified employees in one unit.³³

The State and OPEU agreed to the same statewide bargaining unit in their 1983-1985 collective bargaining agreement (again with an initial 90-day period for agency-based fair share petitions and elections).³⁴ By 1983, the State workforce consisted of employees working in approximately 1,140 classifications, organized in 25 bargaining units, and represented by 10 labor organizations.³⁵ Five years later, OPEU represented what the Board described as a “‘collector’ bargaining unit for strike-permitted state employees,” consisting of employees in 44 separate agencies.³⁶

³²*Solidarity v. Public Utility Commissioner and Oregon Public Employes Union*, Case No. C-143-83 at 7, 7 PECBR 6414, 6420 (1984).

³³*In the Matter of the Petition By the Oregon Public Employes Union for a Ruling Concerning ORS 243.650(9), 243.712 and 243.722*, Case No. C-107-83 at 1-2, 7 PECBR 5859, 5859-60 (1983), *aff’d*, 72 Or App 371, 695 P2d 967 (1985). In one case, the number of employees represented by OPEU under the 1981-83 contract was described as “approximately 20,000.” *Revenue Hearing Officers Association v. Oregon Department of Revenue and Oregon Public Employes Union Local 503*, Case No. C-155-83 at 2, 7 PECBR 6086, 6087 (1983).

³⁴*Solidarity*, C-143-83 at 4 and n 3, 7 PECBR at 6417 and n 3.

³⁵*Association of Engineering Employes of Oregon v. Department of Transportation, Highway Division, State of Oregon and Oregon Public Employes Union, Local 502, SEIU*, Case Nos. C-69/70/71-83 at 3, 7 PECBR 6108, 6110 (1983), *aff’d*, 72 Or App 371, 695 P2d 961 (1985).

³⁶*OPEU v. Executive Department*, Case No. UC-59-87 at 14-16, 10 PECBR 456, 469-71 (1988). The Board explained that in “the past, ‘divisions’ of the State were certified as appropriate bargaining units. Barring some compelling reason (such as craft unit considerations), this Board probably no longer would find a proposed ‘division’ unit to be appropriate for bargaining.” *Id.* at 16 n 8, 10 PECBR at 471 n 8.

In 1990, in another large component of State operations (the statewide corrections system), the State entered into another voluntary recognition agreement consolidating units. This time, in April 1990, AFSCME and the State agreed to combine certain units of corrections employees represented by AFSCME into two multi-institution units—one for strike-prohibited employees and one for strike-permitted employees. AFSCME and the State also agreed that as new institutions opened, they would be “added to the redefined units as appropriate.”³⁷

Throughout the 1980s and 1990s, the Board ruled on multiple petitions proposing small units of State employees. The Board denied some, but granted others. For example, the Board dismissed a petition where the petitioned-for small unit of 15 employees had no clearly distinct community of interest and no other compelling reasons justified a separate unit. *See AFSCME Council 75, AFL-CIO v. Department of Human Resources, Community Services Division*, Case No. C-122-84 at 5, 8 PECBR 7918, 7922 (1985) (dismissing petition proposing unit of 15 unrepresented employees where remaining approximately 9,700 employees in the agency were either represented or subject to pending representation petitions). The Board applied the same standard, requiring a clearly distinct community of interest or other compelling reasons, to dismiss petitions seeking to “carve out” smaller units from larger units. *See, e.g., Oregon Nurses Association v. Oregon State Board of Higher Education*, Case No. C-94-83 at 6, 8 PECBR 6658, 6663, *recons*, 8 PECBR 6716 (1984) (dismissing petition proposing unit of registered nurses at campuses of state colleges and universities, and noting that the Board’s preference concerning State employees “has been for units that are at least agency-wide or craft-wide, barring compelling circumstances to sever a group from an agency-wide unit”).³⁸

In other cases, the Board granted petitions, rejecting the State’s arguments. In several cases, the Board reasoned that the Board’s administrative preferences should not be applied to the OPEU statewide unit because “the ‘one big unit’ created in November of 1981 is, under the criteria set forth in ORS 243.682(1), in no way more ‘appropriate’ than are its component parts. This fact has been recognized by OPEU and the State.” *Division of State Lands Employees Association v. Division of State Lands, State of Oregon and Oregon Public Employees Union*, Case No. C-72-83 at 13, 7 PECBR 6118, 6130 (1983); *see also Solidarity*, C-143-83 at 6, 7 PECBR at 6419 (same).³⁹

³⁷*Oregon Public Employees Union v. State of Oregon, Corrections Department and Executive Department and American Federation of State, County and Municipal Employees*, Case No. UP-91-90 at 5, 12 PECBR 876, 880 (1991), *aff’d*, 115 Or App 593, 839 P2d 276 (1992), *rev dismissed*, 316 Or 262, 850 P2d 971 (1993). Several years later, in 1992, after an election, AOCE became the certified bargaining representative at Oregon State Penitentiary of a “mixed” unit. *Department of Corrections*, UC-36-97 at 7, 17 PECBR at 736.

³⁸*See also Department of Revenue*, C-155-83, 7 PECBR 6086 (dismissing petition proposing unit of full-time hearings officers at the Department of Revenue); *Association of Public Employees v. Oregon State System of Higher Education and Oregon Public Employees Union, Local 503, SEIU*, Case No. RC-113-87, 10 PECBR 883 (1988) (dismissing petition proposing unit of 37 classified employees in the Controller’s Division and Internal Audit Division at Oregon State University); *Department of Revenue*, RC-55-95, 16 PECBR 615 (dismissing petition proposing unit of 235 employees in enumerated classifications).

³⁹In other cases, the Board granted petitions where the petitioned-for unit was comprised of
(Continued . . .)

The preference for the largest possible appropriate bargaining unit in State cases remains vital; it has not been disavowed over the course of its more than 40-year development. As recently as 2007 and again in 2016, the Board reaffirmed the preference in the context of State cases. 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 at 11, 21 PECBR 873, 883 (2007) (describing the preference as “the well-established preference for larger bargaining units in cases involving the State”); *Oregon Liquor Control Commission Peace Officers Association v. American Federation of State, County, and Municipal Employees, Council 75, Local 2505, and Oregon Liquor Control Commission*, Case No. RC-002-15 at 17, 26 PECBR 589, 609 (2016) (non-precedential order).⁴⁰

Applying the Preference for the Largest Possible Unit in This Case

I summarize the history of the preference for the largest possible unit in State cases to emphasize its significance in the development of orderly labor relations in State government. Historically, the Board applied the preference to avoid creating or exacerbating fragmentation in the executive branch, which was highly fragmented in the early years after the enactment of PECBA. In my view, in light of that history, the significant weight that we afford to the preference

(Continued . . .)

employees who had a clearly distinct community of interest, such as teachers or guards. See *Oregon Education Association*, C-62-83, 7 PECBR at 6412 (on reconsideration) (granting petition in what the Board called “basically a craft severance case” where certified teachers at Hillcrest and MacLaren and related facilities had a clearly distinct community of interest); *State of Oregon, Mental Health Division, Fairview Training Center v. American Federation of State County and Municipal Employees, Council 75*, Case No. C-1-84, 8 PECBR 6666 (1984) (redesignating unit, despite “strong preference for wall-to-wall bargaining units,” into guard unit and non-guard unit).

⁴⁰One Board questioned whether the preference was being applied too reflexively, but shortly thereafter the same Board reaffirmed the preference. Specifically, in 1998, the Board observed that “the ‘bigger is better’ axiom has taken on a life of its own.” *Association of Oregon Correction Employees v. State of Oregon, Department of Corrections and AFSCME*, Case No. UC-36-97 at 16, 17 PECBR 730, 745 (1998), *aff’d without opinion*, 161 Or App 667, 984 P2d 959 (1999). In a footnote, however, the Board explained that the comment did “not mean we are about to abandon our preference for larger units. However, we are particularly concerned about its automatic application under circumstances that virtually eliminate employee choice.” *Id.*, UC-36-97 at 16 n 14, 17 PECBR at 745 n 14. The Board also stated its concern in *Association of Oregon Correction Employees v. State of Oregon, Department of Corrections and AFSCME*, Case No. UC-35-97 at 8, 17 PECBR 721, 728 (1998), *aff’d without opinion*, 161 Or App 667, 984 P2d 959 (1999).

However, shortly thereafter, the same Board described the preference as a “preference for the broadest possible units in State government.” *Association of Oregon Correction Employees v. State of Oregon, Department of Corrections and AFSCME Council 75*, Case No. UP-23-98 at 7 n 5, 18 PECBR 564, 570 n 5 (2000). See also *Laborers’ International Union of North America, Local 320 v. City of Keizer*, Case No. RC-37-99 at 8, 18 PECBR 476, 483 (2000) (explaining that the Board’s earlier questions about the viability of the preference for larger units “were intended as a gentle reminder that our preference for large units is an administratively-created factor,” and noting that to “function properly, the preference must be applied in a way that supports, rather than supplants, the statutory unit determination factors.”).

in State cases should not be confined to petitions seeking to “carve out” new units from larger units. Further, although in some local government cases the Board may have given less weight to the preference when analyzing petitions involving unrepresented employees,⁴¹ the preference should be given its full weight in State cases such as this one—where we are considering a petition to form a small unit in an otherwise unrepresented component of State government that provides a statewide service.

Giving significant weight to the preference for the largest possible unit in this particular case would not supplant the statutory factors, an outcome that the Board has cautioned that we should avoid. In this case, some of the statutory factors weigh in favor of granting the petition, such as the clear community of interest among the employees who work in the Yamhill County Circuit Court, including shared wages, hours, and working conditions, as well as the desire of the employees for representation. On the other hand, the lack of a clearly distinct community of interest, including the lack of significantly different wages, hours, and working conditions, and the absence of recent attempts to organize a larger unit in the judicial branch should, in my view, weigh against finding this unit appropriate. Because some statutory factors weigh in favor of granting the petition and some weigh against, applying the administrative preference does not supplant the statutory factors, but merely functions to tip the balance—here, against creating a small unit.

Further, the PECBA policies that underlie the preference in State cases also support a conclusion that the petitioned-for unit is not appropriate. Specifically:

“Larger bargaining units further several important policies identified by the legislature. One such policy is to establish ‘greater equality of bargaining power between public employers and employees.’ ORS 243.656(3). Larger units tend to better equalize bargaining power. ‘[F]ragmentation into multiple units serves to destroy rather than preserve parity which this Legislation seeks to establish.’ *Association of Public Employees*, 10 PECBR at 889. Another legislative policy is to protect the public from impairment or interruption of necessary public services. ORS 243.656(3). The preference against fragmentation is based in part on a recognition that an increase in the number of bargaining units increases the number of potential labor disputes and work stoppages. Our nonfragmentation policy also helps public employers. It promotes workplace stability, and prevents the undue burden which would fall on public employers if they had ‘to engage in bargaining sessions for the many splinter groups on a round-robin basis.’” *Oregon Workers Union*, RC-26-05 at 11, 21 PECBR at 883 (quoting *Association of Public Employees v. Oregon State System of Higher Education and Oregon Public Employees Union, Local 503, SEIU*, Case No. RC-113-87 at 6-7, 10 PECBR 883, 888-89 (1988)).

I would conclude that our preference for the largest possible unit and these PECBA policies counsel against finding a single-courthouse bargaining unit appropriate. The risk that we may be

⁴¹See, e.g., *Oregon AFSCME Council 75 v. Douglas County*, Case No. CC-004-14 at 34, 26 PECBR 358, 391 (2015); *City of Keizer*, RC-37-99 at 10, 18 PECBR at 485; *International Union of Operating Engineers, Local 701 v. Deschutes County Public Works*, Case No. RC-4-88 at 14, 10 PECBR 906, 919 (1988).

setting the stage for unequal bargaining power is particularly pertinent. The employees in the proposed unit work for an operationally integrated State employer that provides a single statewide service—the unified state court system. This employer, unlike many executive branch agencies, provides one service at multiple locations throughout the state, in part through use of a uniform, statewide electronic platform (eCourt). Consequently, the employees in the proposed unit perform essentially the same duties using essentially the same skills as the unrepresented employees who work in separate, but nearby, facilities (here, courthouses). Under these circumstances, the risk of unequal bargaining power weighs strongly against finding this unit appropriate. *See Department of Revenue*, RC-55-95 at 8, 16 PECBR at 622 (“[l]ittle incentive may exist to resolve differences because the threat of strike by a small bargaining unit is of no consequence”).

Possible Additional Fragmentation

I also disagree with the majority’s assessment of the risk of future additional fragmentation in this workplace. The majority concludes that the organization of an unmanageable number of additional units, as feared by the employer, is unlikely to occur. The majority’s prediction may ultimately be correct. Nonetheless, the Board has previously declined to approve a small unit when it could not “have some confidence that, if we certified the proposed unit, potential future units would be relatively limited.” *Oregon AFSCME Council 75 v. Washington County*, Case No. CC-008-12 at 11, 25 PECBR 466, 476 (2013) (dismissing petition). Lacking confidence that potential future units in the Department would be relatively limited, I disagree that the petitioned-for unit is appropriate. *See, e.g., City of Keizer*, RC-37-99 at 9, 18 PECBR at 484 (approving departmental unit where employer would, in the future, potentially need to bargain with a third unit).

Analysis of the Proposed Departmental Unit

I also differ with the majority’s assessment that the employees in the Yamhill County Circuit Court have a strong and clearly distinct community of interest (including significantly different wages, hours, and other working conditions) from the remaining, non-Yamhill County workforce.⁴² I agree that there are some local differences from courthouse to courthouse—as can be expected in any public agency where employees perform their work in multiple locations and work under different supervisors. I disagree, however, that the Yamhill County Circuit Court employees’ community of interest, wages, hours, and other working conditions are sufficiently distinct so that the Yamhill County employees constitute an appropriate bargaining unit.

I disagree with the majority’s assessment of the reach and significance of the differences that do exist. AFSCME, for example, relies on the elimination of “flex” time. The record indicates that Yamhill County Circuit Court employees could previously “flex” their work

⁴²The Board has concluded that a departmental bargaining unit is appropriate when “(1) employees in the proposed bargaining unit have working conditions that are significantly different from those of other personnel employed by the employer; (2) the department in which the employees work is self-contained and clearly separate from other employer operations; (3) the employees desire a separate bargaining unit; and (4) designation of the unit would not lead to undue fragmentation.” *City of Keizer*, RC-37-99 at 9, 18 PECBR at 484. The Board has relied on these factors as relevant to the analysis; they do not, however, comprise a rigid four-part test. *Douglas County*, CC-004-14 at 34, 26 PECBR at 391.

hours within a work week—*e.g.*, an employee who voluntarily took only a 30-minute lunch break several days during the week could, as a matter of informal practice in the courthouse, “flex” his or her schedule and leave before 5:00 p.m. that Friday. In September 2015, the Yamhill County administration ended that practice. Presently, local administration will consider permitting flexed hours after the first year of an employee’s employment only when an employee has a personal hardship. This change may be significant to the particular employees who flexed their work time in this way. In my view, the evidence about cessation of this practice does not rise to the level of evidence of significantly different hours (or other working conditions) in Yamhill County Circuit Court, absent some evidence that this type of “flexing” is a common and accepted practice throughout the rest of the Department.

Similarly, the record indicates that the Yamhill County Circuit Court administration has also limited or ended several employees’ flexible or part-time schedules. I would conclude that the evidence of these examples of particular management decisions—although they significantly affect the particular employees involved—is not evidence of hours or other working conditions significantly different from those in other circuit courts, unless there is some evidence that other circuit courts manage flexible or part-time schedules differently than Yamhill County Circuit Court.⁴³ That evidence is missing in this record.

It is accurate, as the majority points out, that local court administrators have some discretion in certain aspects of personnel administration. In my view, the existence of local discretion is not necessarily tantamount to a clearly distinct community of interest or to significantly different wages, hours, or other working conditions, however. The record indicates that management’s discretion is often constrained by the Judicial Department Personnel Rules (JDPRs). For example, the Yamhill County Circuit Court administrators had the discretion to adopt a Flexible Employee Recognition Plan, and did so, but the record also shows that local management relied on plans adopted by other courts in formulating the Yamhill County Circuit Court plan. Further, the plan conformed to the detailed requirements in the JDPRs and was approved by the State Court Administrator.

Similarly, as the majority finds, local managers have some discretion with respect to employee compensation, but that discretion does not equate to a different pay plan or compensation system. Under the JDPRs, all employees are placed in one of 30 salary ranges depending upon classification; each salary range has 11 steps. Local managers then grant or deny annual step increases on each employee’s salary eligibility date. If a manager denies an annual increase, the manager is required by the JDPRs to give the affected employee a written notice that describes the conduct or performance reason the annual increase has been denied. In other words, managers may deny an annual salary increase based on lack of merit. Rather than concluding that this system

⁴³The record also indicates that Yamhill County Circuit Court administration informed judicial assistants and clerks that their requests for leave, if their vacation or sick leave balances were below 40 hours, would receive a second-level management review (in addition to the first-level management review) before being granted. This management review is the type of ongoing management of employee leave usage that does not, on its own, create a working condition that differs significantly from the working conditions in other circuit courts, in the absence of evidence that employees’ leave requests were routinely or even frequently denied on the basis of inadequate paid leave balances.

creates differences in wages across courthouses, I would assess this system as a unified, statewide compensation system.⁴⁴

Further, even assuming that some local management practices in Yamhill County Circuit Court differ from the practices in other circuit courts, any resulting differences are heavily outweighed by the substantial uniformity of work, duties, wages, hours, and other working conditions across the statewide trial court system. The classifications, salary ranges, insurance benefits and retirement benefits are the same for all employees in all trial courts. All trial court employees statewide perform court administration work of various types. Although the Yamhill County courthouse itself is *physically* separate from other courthouses, the Yamhill County Circuit Court employees perform some of their work in a uniform electronic environment (eCourt) common across the entire organization. All employees work generally during standard business hours (with some working night court hours on certain days). The statewide, highly detailed personnel code—including a for-cause disciplinary standard—adopted by the Chief Justice and administered by statewide administrators, applies to all employees. Indeed, the very purpose of that code is, according to its foreword, “to ensure all employees enjoy the same rights and terms and conditions of employment.”

I would not interpret the local differences in wages, hours, and working conditions in the Yamhill County Circuit Court, when viewed in context with these far more substantial similarities with unrepresented employees, as significant for the purpose of assessing whether this small unit is an appropriate unit for collective bargaining. See, e.g., *Revenue Hearing Officers Association v. Oregon Department of Revenue and Oregon Public Employees Union Local 503*, Case No. C-155-83 at 6, 7 PECBR 6086, 6091 (1983) (“no significant *collective bargaining distinction* exists between Revenue hearing officers and other personnel represented in the OPEU unit”) (emphasis added).

A recent Board case illustrates the type of governmental structure and resulting differences in working conditions that could, in my view, more appropriately support a departmental unit if the particular facts of the case made the unit appropriate. Specifically, in *Oregon AFSCME Council 75 v. Douglas County*, Case No. CC-004-14, 26 PECBR 358 (2015), the Board concluded that a departmental unit of employees who reported to the elected county assessor was an appropriate unit. In rejecting the employer’s arguments, the Board explained, “Our decision here is based on the County’s *unique structure* and the *wide-ranging ability of the elected Assessor to determine employee working conditions*, as demonstrated by the Assessor’s Office Guidelines.” *Douglas County*, CC-004-14 at 34, 26 PECBR at 391 (emphasis added).

⁴⁴In another example, local managers have discretion pursuant to JDPR 4.03(5)(a) to grant one-step special salary adjustments. Managers may exercise this discretion only to implement the uniform statewide standard in the JDPRs. Specifically, a manager may grant a special salary adjustment only “for truly exemplary performance or for uniquely compelling circumstances,” and must submit for inclusion in the employee’s official personnel file “written justification that clearly demonstrates how this expenditure is in the best interest of OJD.” In my view, this uniform standard that constrains the exercise of discretion—which applies to all local court managers, not just the managers in Yamhill County Circuit Court—tends to show that employees throughout the trial courts are subject to the same (not a different) standard with respect to special salary adjustments.

Specifically, with respect to structure, the Assessor did not report to another county elected official, such as the elected Board of Commissioners. In other words, the petitioned-for employees all worked under the highest elected official who had direct authority over their work and, as described below, wide-ranging discretionary control over their working conditions.

In addition, the Assessor had broad discretion over the petitioned-for employees' working conditions. The Assessor's Office employees were subject to the county's formal personnel rules, but the Assessor was permitted not to (and in fact did not) adopt the county personnel rule governing discipline, which provided that employees could not be disciplined except for cause. Moreover, the Assessor adopted highly intrusive "guidelines" covering employees in the Assessor's Office, including a number of unusually restrictive working conditions. The guidelines prohibited employees from flexing their hours and taking leave time during busy seasons, and included a "presumption" that sick leave use on a Thursday and Friday meant that the employee was sick on the weekend, triggering a mandatory doctor's note. The guidelines also included extremely detailed personal conduct requirements (including the "strong" suggestion that employees not engage in whispered conversations and not keep house plants, photos, personal memorabilia and personal cell phones at their work desks). The Assessor also adopted a detailed dress code with highly restrictive requirements and prohibitions, including restrictions on the color and cut of clothing.

This case is different from *Douglas County* in two significant ways. First, the Assessor in Douglas County was an elected public official who reported only to the public. In contrast, the local managers in Yamhill County Circuit Court all ultimately report to the Chief Justice. Similarly, the presiding judge in Yamhill County is not the highest-level elected official with respect to administrative authority over the workplace. The presiding judge is "responsible and accountable to the Chief Justice" with respect to the exercise of "administrative authority and supervision" over the Yamhill County Circuit Court. ORS 1.002(8).

Second, unlike the Assessor in *Douglas County*, the local court administrators in Yamhill County have not closely regulated the minutia of employees' working conditions to the same degree as the Assessor in *Douglas County*. Although the Yamhill County administration has implemented several practices that reduce employee scheduling autonomy and flexibility, the local differences in Yamhill County Circuit Court fall far short of the significance of the local differences in *Douglas County*.

History of Collective Bargaining

Finally, I disagree with the majority's conclusion that the previous attempts to organize a wall-to-wall unit in the Oregon Judicial Department weigh in favor of finding this unit appropriate. In some cases, dismissal of a petition where there is evidence of previous unsuccessful organizing attempts "would effectively preclude the[] public employees from exercising their statutory right to seek representation." See *City of Keizer*, RC-37-99 at 10, 18 PECBR at 485. Given the record here, this is not such a case.

Specifically, the Board has weighed past organizing attempts more heavily in the analysis when there has been an indication of reasonably *recent* unsuccessful attempts. See, e.g., *Douglas County*, CC-004-14, 26 PECBR 358 (petition granted after two unsuccessful organizing attempts,

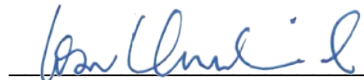
including one approximately one year earlier); *Oregon School Employees Association v. South Coast ESD, Region #7*, Case No. RC-10-00 at 4, 19 PECBR 58, 61, *adh'd to on recons*, 19 PECBR 282 (2001) (two unsuccessful organizing attempts in previous three years); *City of Keizer*, RC-37-99 at 4, 18 PECBR at 479 (unsuccessful wall-to-wall organizing attempt three years earlier); *International Union of Operating Engineers, Local 701 v. Deschutes County Public Works*, Case No. RC-4-88 at 12, 10 PECBR 906, 917 (1988) (multiple unsuccessful organizing attempts, including one approximately one year earlier, leading the Board to conclude that “the history of collective bargaining and the strong desires of the employees for representation do present compelling reasons for the designation of a separate unit”).

Although the Board has never expressed any requirement that unsuccessful organizing attempts must have occurred within a specific time period, evidence of recent unsuccessful organizing attempts tends to show that, if the petition is not granted, the employees seeking representation could effectively be precluded from obtaining it. Here, we do not have that type of record. The evidence indicates that the most recent organizing attempt was six years ago. The absence of more recent attempts to organize the Department should weigh against finding this unit appropriate because these employees will not effectively lose their right to representation if the Board dismisses the petition.

Moreover, there is no evidence of any attempt in this case to organize the employer on any basis other than a wall-to-wall basis. There is, for example, no information from which the Board could conclude that the employees attempted to organize an entire region of the state (such as all of the state west of the Cascades). Although it is true that AFSCME did not organize the very smallest unit possible, such as only the courtroom staff or only the operations staff, it chose the next smallest unit possible—a single judicial district. Lacking evidence that there was an attempt to organize a larger unit that could potentially be appropriate, I would not weigh the history of unsuccessful organizing attempts in favor of the proposed unit as the majority does.

Conclusion

In *Oregon Nurses Association*, the Board wrote that “we often find we must treat the State as *sui generis* in representation cases because of its unique history” of employee organization and bargaining. *Oregon Nurses Association*, C-94-83 at 5, 8 PECBR at 6716. This is such a case. The petition concerns an entire branch of State government, which is not yet organized, and which provides to all regions of the state one operationally integrated public service—a unified court system—in part through the use of a statewide electronic platform (eCourt). Given the record in this particular case, including for the reasons explained above, I would not find the petitioned-for unit appropriate.



*Lisa M. Umscheid, Member

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. DC-001-18

(REPRESENTATION)

CERTAIN EMPLOYEES OF	)	
CENTRAL OREGON	)	
INTERGOVERNMENTAL COUNCIL,	)	
	)	
Petitioner,	)	CERTIFICATION OF
v.	)	ELECTION RESULTS
	)	
CENTRAL OREGON	)	(PETITION FOR DECERTIFICATION)
INTERGOVERNMENTAL COUNCIL,	)	
	)	
and	)	
	)	
AMALGAMATED TRANSIT UNION	)	
LOCAL 757,	)	
Respondents.	)	
	)	

On November 7, 2012, in Case Number CR-002-12, this Board certified Amalgamated Transit Union Local 757 (ATU) as the exclusive representative of a bargaining unit of all regular employees (with certain exclusions) of Central Oregon Intergovernmental Council (COIC).

On January 16, 2018, certain employees of COIC filed a petition under OAR 115-025-0000(5) seeking to decertify ATU as the exclusive representative of the bargaining unit. The petition was amended on January 17, 2018.

On February 21, 2018, pursuant to the parties' Consent Election Agreement, this Board sent ballots to eligible voters. A tally of ballots was held on March 8, 2018, and the majority of valid votes counted were cast for continued representation by ATU. The tally of the ballots was provided to the parties on March 8, 2018.

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 March 19, 2018). OAR 115-025-0060(9). No objections were filed. Accordingly, pursuant to OAR 115-025-0060(10), it is certified that:

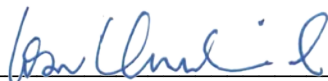
AMALGAMATED TRANSIT UNION LOCAL 757

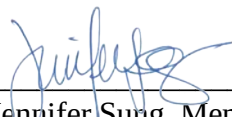
is the exclusive representative of the following bargaining unit of Central Oregon Intergovernmental Council employees:

All full-time, part-time and on-call drivers, including Dial-a-Ride and commuter service, and all dispatchers, call-takers, customer service, schedulers, reservationists, vehicle washers, and program assistant-transportation, excluding managerial, confidential and supervisory employees.

DATED March 20, 2018.


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-003-18

(AMENDMENT OF RECOGNITION)

GREATER ALBANY EDUCATION	)	
ASSOCIATION / OREGON EDUCATION	)	
ASSOCIATION,	)	
	)	
Petitioner,	)	
	)	ORDER AMENDING
v.	)	CERTIFICATION/RECOGNITION OF
	)	EXCLUSIVE BARGAINING
GREATER ALBANY PUBLIC SCHOOL	)	REPRESENTATIVE
DISTRICT 8J,	)	
	)	
Respondent.	)	
	)	

Currently, the Greater Albany Public School District 8J (District) recognizes the Greater Albany Education Association (Association), as affiliated with the Mid-Valley Bargaining Council (Council), as the exclusive bargaining representative of certain District employees. The Association is also affiliated with the Oregon Education Association (OEA).

On March 7, 2018, the Association filed a petition under OAR 115-025-0008 to reflect the Association's disaffiliation with the Council. The Association submitted documents establishing the following:

The Association voted to disaffiliate from the Council. The Council concurred with the Association's vote to disaffiliate, and a motion passed to remove the Association as an affiliate of the Council.

Additionally, the District Board adopted a resolution recognizing the Association (unaffiliated) as the exclusive bargaining agent for the existing bargaining unit. The resolution further stated the parties' existing collective bargaining agreement remained in effect.

Objections to the petition were due by March 26, 2018. No objections were filed. We conclude that the Association's disaffiliation with the Council was conducted in compliance with at least minimal due process requirements. *See* OAR 115-025-0008.

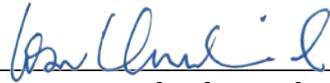
ORDER

The petition is granted. The Association, no longer affiliated with the Council, is recognized as the exclusive representative of the existing District bargaining unit.

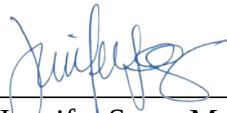
DATED: March 28, 2018.



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-034-17

(UNFAIR LABOR PRACTICE)

TREASURE VALLEY EDUCATION	)	
ASSOCIATION,	)	
	)	
Complainant,	)	
	)	
v.	)	FINDINGS AND ORDER FOR
	)	REPRESENTATION COSTS
TREASURE VALLEY COMMUNITY	)	
COLLEGE,	)	
	)	
Respondent.	)	

On January 16, 2018, this Board issued an order holding that Treasure Valley Community College (College) violated ORS 243.672(1)(e) and (f) when it declined to pay certain COLAs to eligible employees represented by the Treasure Valley Education Association (Association) after the parties' collective bargaining agreement had expired. 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) 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).

2. This case was submitted on the pleadings, without the need for an evidentiary hearing.

3. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). Because this case was submitted on the pleadings, it is analogous to a case presented on stipulated facts, as both types of cases do not involve factual disputes and do not require evidentiary hearings. The representation costs award for a case presented on stipulated facts is \$1,000. OAR 115-035-0055(1)(b)(B).

ORDER

The College shall remit \$1,000 to the Association within 30 days of the date of this Order.

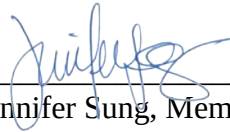
DATED: April 3, 2018.



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-006-17

(UNIT CLARIFICATION)

OREGON AFSCME COUNCIL 75,	)	
LOCAL NO. 88,	)	
	)	
Petitioner,	)	
	)	
v.	)	INTERIM ORDER
	)	
MULTNOMAH COUNTY,	)	
	)	
Respondent.	)	

On March 22, 2018, the Board heard oral argument on Petitioner's objections to an amended recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew on January 10, 2018, after a hearing held on August 24 and 25, 2017, in Portland, Oregon. The record closed on October 5, 2017, following receipt of the parties' post-hearing briefs.

Giles Gibson, Legal Counsel, Oregon AFSCME Council 75, Local No. 88, Portland, Oregon, represented Petitioner.

Kathryn A. Short, Deputy County Attorney, Multnomah County, Portland, Oregon, represented Respondent.

On April 28, 2017, Oregon AFSCME Council 75, Local No. 88 (AFSCME) filed a Petition requesting that its general employees bargaining unit be clarified to include certain "temporary" and "on-call" workers that had previously been excluded from the AFSCME-represented bargaining unit. AFSCME filed an Amended Petition on May 17, 2017. Multnomah County (County) filed a timely objection, asserting that the petitioned-for employees should not be included in the AFSCME unit because (1) the on-call workers were casual workers who lacked a community of interest with the AFSCME unit employees, and (2) the temporary workers lacked a reasonable expectation of continued employment and lacked a community of interest with the AFSCME unit employees.

As modified at hearing on August 24, 2017, the issue in this case is whether the existing AFSCME unit should be clarified to include:

All temporary and on-call employees excluded from the classified service as such by [Multnomah County Code (MCC)] Section 9.100(F) who work more than an average of four hours per week per calendar quarter, but not

On-call employees who work an average of four hours or less per week per calendar quarter, and not

Temporary and on-call employees in job classifications which are included in other bargaining units, or are historically excluded from this General Employees Unit.

For the reasons discussed below, we conclude that there is insufficient evidence in the record to resolve the issue presented. Accordingly, we vacate the amended recommended order and reopen the record so that the ALJ may conduct further investigation, pursuant to ORS 243.682(1)(b), OAR 115-010-0070(5)(a), and OAR 115-060-0040(3).¹ In doing so, we note that this Board has both the responsibility and the discretion to develop a full factual record in representation cases, which include unit clarification cases. *Id.*; see also, *Clackamas County Peace Officers' Association, Local 843 v. City of Sandy*, Case No. C-186-77 at 2, 4 PECBR 2200, 2201 (1979); *Graphic Arts International Union, Local 213B v. State Printer and Department of General Services*, Case No. C-56-77 at 2, 3 PECBR 1885, 1886 (1978). "Representation, clarification and unit redesignation hearings are investigatory," not adversarial, and "[t]heir purpose is to develop a full factual record." OAR 115-010-0070(5)(a). Further, the Board and its agents are expressly authorized to "examine witnesses, require the production of documents and call witnesses not called by the parties." *Id.*

In the following discussion, we provide some guidance to the parties regarding the aspects of the record that we believe should be developed further, based on the evidence submitted thus far. The ALJ may provide additional guidance and make specific inquiries to help the parties develop a full factual record. This order should not be read as requiring the development of a lengthy or complex record, and we encourage the parties to identify the most efficient and least burdensome ways to address the outstanding factual issues. Additionally, the parties may supplement the record through a variety of means, including alternatives to in-person witness testimony such as telephonic testimony, factual stipulations, joint or unopposed submission of exhibits, and affidavits.

DISCUSSION

AFSCME has historically represented a bargaining unit comprised of "all employees in the County classified service as set forth in [Multnomah County Code] Chapter 9 except those specifically excluded." In relevant part, the bargaining unit has historically excluded "temporary"

¹AFSCME filed objections to the amended recommended order. However, by operation of the Board's rule that determines the date of filing, OAR 115-010-0010(10), AFSCME's objections were filed on January 25, 2018, one day after the January 24 filing deadline, as determined by OAR 115-010-0090. On February 7, 2018, AFSCME filed a motion to extend the time for filing objections to January 25, and the County took no position regarding that motion. Because we are vacating the amended recommended order and reopening the record, the issue of whether AFSCME filed timely objections is moot, and it is unnecessary to rule on AFSCME's motion.

and “on-call” employees, as those terms are defined in County Code Chapter 9. AFSCME’s petition proposes to add to the existing bargaining unit those temporary and on-call employees who both work in AFSCME-represented classifications and work an average of more than four hours per week per calendar quarter.

Generally, this Board considers it inappropriate to add temporary and on-call employees to a bargaining unit of regular employees if the petitioned-for employees have only a “tenuous employment relationship” with the employer. Employees categorized by an employer as “temporary” or “on-call,” however, do not necessarily have a tenuous employment relationship with the employer, as measured by this Board’s standards. If we find that such employees have more than a tenuous employment relationship, then we determine whether it is appropriate to include them in a bargaining unit with other regular employees by considering both statutory and administrative unit determination factors, including community of interest; wages, hours and other working conditions of the employees involved; the history of collective bargaining; the desires of the employees; and this Board’s larger unit preference. *See Service Employees International Union Local 503, Oregon Public Employees Union v. Marion County*, Case No. UC-11-10 at 34-35, 24 PECBR 521, 554-55, *nunc pro tunc*, 24 PECBR 557 (2012) (*Marion II*). We also determine whether the petitioned-for employees constitute a “logically defined group of employees.” *Id.*, UC-11-10 at 35, 24 PECBR at 555.

On-Call Employees

In *Marion II*, the Board adopted the National Labor Relations Board’s (NLRB) standard for determining whether employees who work part-time, intermittent, or irregular schedules are “casual” (i.e., having only a tenuous employment relationship) or “regular.” UC-11-10 at 32-34, 24 PECBR at 552-54. Casual employees are “those individuals who, on the date of eligibility for the election, have averaged less than four weekly hours of work in the quarter (13 weeks) preceding the election eligibility date.” *Id.*, UC-11-10 at 33, 24 PECBR at 553.²

Based on the parties’ briefs and representations at oral argument, there is no dispute that we should apply the test adopted in *Marion II* to the County’s on-call employees, for the purpose of determining which on-call employees have a sufficient employment relationship to be eligible for inclusion in the existing bargaining unit. However, as discussed above, our inquiry does not end there, and we must still apply the statutory and administrative unit determination factors to determine whether it is appropriate to add those on-call employees to the existing bargaining unit. After considering the record at this stage, and the size of the County’s workforce and the number of different departments, we find that there is insufficient evidence regarding some of those factors, particular the community of interest and working conditions factors.

²We note that AFSCME has indicated that it is willing to modify its proposed unit description to conform to the standard adopted in *Marion II*, that is, to include employees who work “an average of four or more hours per week per calendar quarter,” and that it would not object to the Board exercising its authority to modify the proposed unit description accordingly.

For example, the record provides little or no evidence regarding on-call employees in the following departments: District Attorney, County Assets, County Human Services, County Management, Elections (part of Community Services), Sheriff's Office, and Non-Departmental. As a result, we do not know whether, or the extent to which, on-call employees and existing bargaining unit employees in those departments perform the same job duties or share common supervision. Similarly, we do not know whether there is interchange between them, or the nature of any such interchange.³

Temporary Employees

Also in *Marion II*, this Board noted that there are two different NLRB standards that may be used for determining whether temporary employees have a sufficient employment relationship to be included in a bargaining unit of regular employees: a reasonable expectation of employment test and a date certain test. UC-11-10 at 32-33, 24 PECBR at 552-53. Based on the record in that case, however, the Board determined that it was not necessary to decide whether to use one test or the other, or both, to determine the nature of a temporary employee's employment relationship under the Public Employee Collective Bargaining Act, and it has not had occasion to do so since then. *Id.*⁴

In this case, there is insufficient evidence in the record to determine whether the County's temporary employees *categorically* have "only a tenuous" employment relationship with the County, under either or both of the NLRB tests.⁵ Additionally, even assuming that some or all of the temporary employees have a more than tenuous employment relationship with the County,

³This interim order should not be construed as establishing a standard that requires department-specific evidence in all representation cases, regardless of circumstance. In this case, there are several departments for which there is little or no evidence, including the Elections department, which employs a significant number of on-call employees. Nor is there sufficient evidence to establish that department-specific evidence is not necessary, such as testimony or stipulations establishing that the existing evidence regarding on-call employees in certain departments is generalizable or that there are not significant departmental variations in how the County employs on-call employees.

⁴We are not, at this time, deciding which test we should use to determine the employment status of temporary employees, in part because neither party has asked us to do so; the parties may submit additional briefing on that issue if they so choose.

⁵In some cases, the nature of the employment relationship for a group of temporary employees may be determined categorically, *i.e.*, this Board will determine whether the evidence establishes that temporary employees, *as a group*, do or do not have a tenuous employment relationship, for the purpose of determining whether a proposed unit is appropriate. *See, e.g., Laborers' International Union of North America, Local 483 v. City of Portland*, Case No. UC-011-13 at 15-16, 25 PECBR 953, 967-68 (2014); *Marion II*, UC-11-10 at 33, 24 PECBR at 553. In other cases, it may be both necessary and feasible to make individualized determinations, such as when the status of certain individuals is outcome determinative in a representation case. Under some circumstances, a categorical determination about the employment status of temporary employees (in the context of an appropriate unit determination) will not necessarily preclude the parties from disputing the status of certain individuals at a later stage of the case (such as through the process for challenging the list of eligible employees provided for in OAR 115-025-0065(5)).

there is insufficient evidence to assess whether the community of interest and working conditions factors weigh in favor of adding those employees to the existing bargaining unit.

For example, there is only unspecific hearsay testimony regarding the County's temporary appointment letters and the statements made therein to temporary employees regarding their employment tenure. Further, it is unclear whether there are any significant departmental variations in those statements. Similarly, the County submitted some County-wide information regarding the percentage of temporary employees who are hired into regular positions, but it is unclear whether there is any significant departmental variation in the frequency or nature of such interchange. There is also no County-wide or department-specific information regarding how frequently temporary employees are employed beyond the expected termination dates listed in their original appointment letters, or how frequently they are appointed to different temporary positions, on-call positions, or limited duration positions (in addition to regular positions).⁶ Similarly, it is unclear whether any of the employees classified by the County as "temporary" in this record are actually bargaining unit or on-call employees who have been given a temporary appointment. We also note that there is little or no information regarding temporary workers in several departments (District Attorney, County Assets, County Management, Community Services, Library, Sheriff's Office, and Non-Departmental), and it is unclear whether the evidence in the record is generalizable to those departments.

Therefore, because the record is not sufficiently developed so as to allow this Board to appropriately act on the petition, we vacate the January 10, 2018, amended recommended order, and remand the matter to the ALJ for the reopening of the record consistent with this interim order and the issuing of a new recommended order.

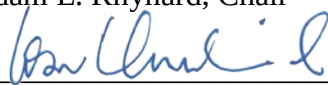
INTERIM ORDER

The amended recommended order issued January 10, 2018, is vacated and the matter is remanded to the ALJ to reopen the record in accordance with this order. Once a sufficiently full record is developed, the ALJ will issue a recommended order, which the parties may object to under OAR 115-010-0090.

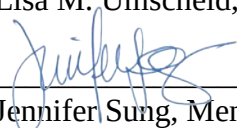
DATED: April 13, 2018.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

⁶There is some evidence of interchange between temporary, on-call, and bargaining unit employees, but we are unable to determine or even estimate how frequently such interchange occurs, or whether there is any significant departmental variation.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-007-17

(REPRESENTATION)

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

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

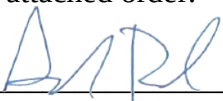
Stephen E. Dingle, Lane County Counsel, Eugene, Oregon, represented the Respondent.

On March 21, 2018, Administrative Law Judge Martin Kehoe issued a recommended order in this matter. The parties had 14 days from the date of service of the 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 this matter. OAR 115-010-0090(4), (5).

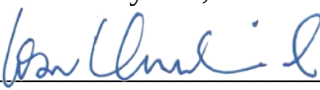
ORDER

The petition to certify a new bargaining unit is granted. Oregon AFSCME Council 75 is certified as the exclusive representative of the petitioned-for bargaining unit ("all primary care doctors permanently employed by Lane County, excluding employees defined as supervisory or confidential by state statute"), as set forth in the attached order.

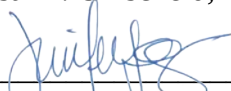
DATED: April 25, 2018.



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-007-17

(PETITION TO CERTIFY A NEW BARGAINING UNIT)

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

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on November 20 and 21, 2017 in Eugene, Oregon. The record closed on December 14, 2017, upon receipt of the parties' post-hearing briefs.

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

Stephen E. Dingle, Lane County Counsel, Eugene, Oregon, represented the Respondent.

On July 26, 2017, the Petitioner, Oregon AFSCME Council 75 (AFSCME), filed a petition with the Employment Relations Board (Board) to certify a new bargaining unit via the Board's "card check" process instead of an election. The petitioned-for unit specifically includes "[a]ll primary care doctors permanently employed by Lane County excluding employees defined as supervisory or confidential by state statute." AFSCME does not seek to include Lane County's psychiatrists in the proposed unit, but does seek to include Lane County's naturopathic doctors. Moreover, AFSCME does not seek to include the primary care doctors who worked in the Lane County Behavioral Health Services clinic at the time of the hearing. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards.

The Respondent, Lane County, filed timely objections to the petition on August 25, 2017. In essence, Lane County contends that, because the proposed unit does not include psychiatrists, the unit is not an "appropriate bargaining unit" within the meaning of Oregon's Public Employee

Collective Bargaining Act, and that the petition should therefore be dismissed. As set forth below, we reject Lane County's objections and certify the proposed unit.

RULINGS

All rulings by the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. Lane County is a "public employer" within the meaning of ORS 243.650(20).
2. All of the Lane County employees involved in this case work for Lane County's Health and Human Services (HHS) Department, which in turn includes Lane County Behavioral Health Services, Community Health Centers of Lane County (CHCLC or CHC), and other divisions. HSS operates out of several different buildings. That includes four CHCLC primary care clinics – Brookside, Charnelton, Delta Oaks, and RiverStone – and one main Lane County Behavioral Health Services building that has a small primary care clinic embedded in it. That clinic is sometimes called "LCBH Primary Care" (Exh. P-6) or the "LCBH Clinic" (Exh. R-1). Although the four main primary care clinics do not have any psychiatrists in them, they also provide some behavioral health services.
3. AFSCME is a "labor organization" within the meaning of ORS 243.650(13).
4. Most Lane County employees are already included in one of seven different bargaining units. The largest of those is an AFSCME "general unit," which has about 590 members. The second largest is an AFSCME "nurses unit," which has about 100 members. The psychiatrists and the primary care doctors are unrepresented.
5. For purposes of this case, the term "primary care doctors," which is used in the petition's proposed unit description, includes naturopathic doctors and any other type of doctor or physician who is not employed as a psychiatrist. That includes internal medicine, family practice, and pediatric doctors, for example. As of the date of the hearing, Lane County had just one naturopathic doctor, Dr. Timothy Walter.
6. Lane County's HHS Department is headed by Karen Gaffney, the "Director" of HHS. (Exh. R-21.) Dr. Patrick Luedtke, who reports to Gaffney, is Lane County's "County Health Officer." (Exh. R-21.) Dr. Luedtke's other job titles include "Sr. Health Officer" and Chief Medical Officer. (Exh. P-3.) Dr. Luedtke supervises Dr. Richard Kincade, who supervises all of the primary care doctors, and Dr. Phillip Williams, who supervises all of the psychiatrists. Dr. Kincade is a "Manager" (Exh. R-1) and the "CHCLC Medical Director" (Exh. R-21). Dr. Phillip Williams' job title is "Associate Health Officer Mental Health." (Exh. R-21.) In addition, Dr. Phillip Williams is a practicing psychiatrist for Lane County. Ron Hjelm, whose job title is "CHCLC Manager," manages the primary care clinics but does not manage any of the psychiatrists. (Exh. R-21.) Each work location also has its own "site supervisor." (Exh. P-3.)

7. All but two of Lane County's primary care doctors work in the four main CHCLC primary care clinics noted above. All six of Lane County's psychiatrists (including Dr. Phillip Williams, who supervises the five other psychiatrists) work in the Lane County Behavioral Health Services building. None of those psychiatrists are included in AFSCME's proposed bargaining unit. Neither are the two primary care doctors who work in the Lane County Behavioral Health Services building. That includes Dr. Christine Jensen-Fox, who has a supervisory "Program Manager" position, and Dr. Glen Geoffrey Gordon, who is considered a "contract doctor." (Exh. R-1.) The proposed unit likewise excludes Dr. Miriam Gage, who is also a "Program Manager." (Exh. R-1.)¹

8. Where possible, Lane County coordinates and integrates its behavioral health services with its primary care services in order to better serve its patients. This has been referred to as the "integrated behavioral health" model. However, Lane County's transition to a fully integrated system is not yet complete. Two of the reasons for that are a shortage of psychiatrists and differences of opinion among providers. Additionally, for many years, psychiatrists and primary care doctors have used different health records systems. Now, everyone uses the same electronic health records program, NextGen. Through that program, a primary care doctor can access the health records of a psychiatrist's patient, and vice versa. During interviews for new doctors, Lane County looks to see whether an applicant supports its integrated approach.

9. Except for a naturopathic doctor, each of Lane County's doctors must have an MD (medical doctor) or a DO (doctor of osteopathy) degree and must have completed a residency for his or her specialization. A naturopathic doctor receives a different kind of medical degree and does not need to complete a residency. All of Lane County's doctors must be properly certified and licensed for their given specializations.

10. Broadly speaking, primary care doctors and psychiatrists similarly assess and evaluate a patient's medical status, determine a corresponding treatment plan, then make sure that that plan is implemented. Beyond that, some primary care doctors can give limited psychiatric treatment via a waiver. Nevertheless, each doctor's work is largely limited to his or her area of specialization. Ordinarily, primary care doctors cannot do the work of psychiatrists and psychiatrists do not provide primary care. Likewise, doctors generally do not switch back and forth between being a primary care doctor and a psychiatrist, and a primary care doctor will never cover for a psychiatrist who is absent, or vice versa.

11. If a psychiatrist wanted to change careers and work as a primary care doctor, he or she would have to complete a primary care residency before doing so. Similarly, a primary care doctor who wanted to switch to psychiatry would have to complete a psychiatry residency first. A naturopathic doctor would have to complete a new medical degree and a residency. It is possible

¹AFSCME's petition and post-hearing brief suggest that the proposed bargaining unit will include nine employees, but the list of affected employees that Lane County provided the Board on August 3, 2017 includes just eight people. According to Lane County's post-hearing brief, that list specifically excludes Dr. Gage and Dr. Jensen-Fox because of "their classification as program managers which effectively makes them supervisory employees." The list does not name Dr. Gordon, who was discussed in testimony, and according to Exh. R-1, only works 40% of a full-time schedule.

for an MD or a DO to complete a dual residency after medical school, but that is not the norm. Moreover, that kind of doctor would not be able to bill for both types of patients during the same day.

12. Primary care doctors and psychiatrists generally see different types of patients. Nevertheless, there is some overlap, particularly with patients who are considered “severely and persistently mentally ill” (SPMI). When appropriate, a primary care doctor can attempt to refer a patient to a psychiatrist, and indeed, a small percentage of patients is shared among the two groups.² However, in practice, it is more common for a primary care doctor to refer a patient to a psychologist or a counselor who works in his or her primary care clinic. Additionally, the fact that a primary care doctor has referred a patient to a psychiatrist does not necessarily mean that the patient will end up being seen by a psychiatrist. Further, even if a psychiatrist does pick up a referred client, the psychiatrist does not take over responsibility for all aspects of the patient’s health.

13. Primary care doctors and psychiatrists often work with the same kinds of support staff, but it is very uncommon for a specific staff member to work with a primary care doctor and a psychiatrist. For example, a psychiatrist’s nurse practitioner is unlikely to ever work with a primary care doctor as well, and a primary care nurse practitioner is unlikely to ever work with a psychiatrist. Nonetheless, that could happen in theory, and some Lane County employees are cross-trained.

14. From 11:30 a.m. to noon on Mondays, Tuesdays, Thursdays, and Fridays, any primary care doctor can call an on-call psychiatrist and have a discussion about behavioral health-related matters. That could involve a primary care doctor seeking a psychiatrist’s advice regarding medication management, for example. These telephone conversations are known as “curbside consultations.” This service has been around for at least two years. However, not every primary care doctor uses it. Moreover, some primary care doctors have to see patients during the time allotted for the calls. Separately, a primary care doctor who uses this service will not necessarily be reaching a psychiatrist who shares a patient with him or her. Indeed, typically, the two will not have a patient in common. The psychiatrists rotate who will be available for the curbside consultation line.

15. Primary care doctors occasionally attend “all provider meetings.” Psychiatrists almost never attend those, but they may be discussed by those who do attend. All provider meetings used to occur once a month, but now they only occur once every two or three months.

²The top of Exh. R-16 states that “58% of patients seen by CHC psychiatrists are also seen by CHC primary care physicians.” However, testimony suggests that that percentage actually involves the patients seen by psychiatrists and those primary care doctors who work in the Lane County Behavioral Health Services building and are not part of AFSCME’s proposed unit. Beyond that, the record does not reveal what time period the exhibit covers, or who drafted the exhibit or when. That said, Exh. R-16 does not appear to be a record that was created or maintained in the usual and ordinary course of business, but instead appears to have been drafted specifically for use in this case. We share similar concerns about Exh. R-17, which ultimately concludes that 78% of the various doctors’ duties are the same.

16. Every doctor's schedule is managed by his or her staff. The number of hours, the specific hours of the day, and the particular days of the week that a doctor works can vary greatly from one doctor to the next. Many doctors do not work full time.³

17. Each primary care doctor is supposed to have 1,500 patients at a time, but the actual number on a given primary care doctor's patient panel" varies, with some having as few as 800 patients. Dr. Loeffler, a part-time internal medicine doctor, has between 900 and 1,100 patients. Dr. Walter, a part-time naturopathic physician, has between 900 and 1,100 patients. Dr. Carroll, a pediatrician, would have 2,000 patients if she were working full time. In contrast, the maximum number of patients that a psychiatrist can have assigned to him or her at a time is 250 patients. Dr. Phillip Williams, for example, has around 180 patients, while Dr. Choi has around 210, Dr. Velez has around 175, and Dr. Anna Williams has around 150.

18. A primary care doctor regularly sees between 12 and 22 patients a day, and a typical appointment for a primary care doctor is 15 or 30 minutes long. A 90-minute appointment may occur on occasion, but that is very uncommon. On the other hand, the vast majority of a psychiatrist's patients are SPMI, and the appointments with those patients are 90-minutes long. Nevertheless, a psychiatrist can sometimes have a 15-minute appointment with a different kind of patient. The goal for psychiatrists is to see 10 patients a day.

19. Every doctor who works for Lane County has a unique employment contract that he or she negotiated with the employer. For some of the contracts, the negotiations were significant. Historically, Lane County has only negotiated three items with a new doctor: (1) salary, (2) how much vacation time the doctor starts with, and (3) moving expenses. Primary care doctors and psychiatrists have the same benefits as other unrepresented employees. Both groups of doctors qualify for the same federal loan repayment program.

20. Primary care doctors and psychiatrists are on a comparable salary plan. However, a new doctor can negotiate which pay step he or she starts at. In practice, psychiatrists are paid more than primary care doctors. Additionally, a psychiatrist who works with children is paid more than other psychiatrists. All of the doctors receive the same on-call pay. Lane County does not offer cash signing bonuses.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The proposed bargaining unit is an "appropriate bargaining unit."

Standards of Decision

The ultimate issue in this case is whether or not the unit proposed in AFSCME's petition is an "appropriate bargaining unit." In making that determination, the Board "shall consider such

³Exh. R-1 provides an overview of the doctors' schedules. It also seems to clarify which employees or positions are considered "Permanent." By its terms, the proposed bargaining unit only includes "permanently employed" primary care doctors.

factors as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees.” ORS 243.682(1)(a). Traditionally, 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 at 14, 23 PECBR 484, 497 (2010); *Oregon School Employees Association v. South Coast ESD, Region #7*, Case No. RC-10-00 at 6, 19 PECBR 58, 63 (2001). However, the list of statutory factors in ORS 243.682(1)(a) is nonexclusive, and 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. *OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251, 253 (2001); *Laborers’ International Union of North America, Local 320 v. City of Keizer*, Case No. RC-37-99 at 5-8, 18 PECBR 476, 480-83 (2000).

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, 843 P2d 437, 439 (1992)); *Association of Public Employees v. Oregon State System of Higher Education and Oregon Public Employees Union, Local 503 SEIU*, Case No. RC-113-87 at 6, 10 PECBR 883, 888 (1988) (citing *International Union of Operating Engineers, Local No. 701 v. Grant County Road Department*, Case No. C-254-83 at 7, 8 PECBR 6735, 6741 (1984)). ORS 243.682(1)(a) empowers us to find a unit appropriate “even though some other unit might be appropriate.” Likewise, “a bargaining unit may consist of all of the employees of the employer, or any department, division, section or area, or any part or combination thereof, if found to be appropriate by the Board.” OAR 115-025-0050(1). In short, 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 at 17, 6 PECBR 4766, 4782 (1981). Finally, neither side has a burden of proof for this type of case. OAR 115-010-0070(5)(a).

Discussion

Regarding whether there is a “community of interest” among the employees of the proposed unit, there is no true “interchange” within the group, or a common promotional ladder. Moreover, the naturopathic doctor and the other primary care doctors inevitably went to different types of medical schools and had different residency requirements. At the same time though, it is clear that all of the petitioned-for doctors share a variety of duties and skills. In addition, all of those primary care doctors similarly work under the immediate supervision of Dr. Kincade and work in Lane County’s primary care clinics providing primary care. They also share the exact same employment benefits, as all unrepresented employees currently do. As for the other statutory factors, it appears that all of the petitioned-for employees are similarly paid and have a comparable wage scale. They also have similar kinds of patients, see a similar number of patients for a comparable length of time per appointment, and work with the very same support staff as one another.

Ordinarily, the foregoing circumstances would amount to a strong community of interest and an appropriate bargaining unit. In this case however, Lane County contends that the psychiatrists cannot legally be separated from the petitioned-for group. On that subject, we acknowledge that there is a lot of meaningful overlap between the two groups at issue. It is also clear that, were the psychiatrists interested in bargaining, the two would have some similar bargaining interests. Nevertheless, after careful review of the evidence presented, we ultimately conclude that the overlap is not overwhelming enough for us to dismiss AFSCME's petition. See *Teamsters Local Union 670, Public Employees Division, International Brotherhood of Teamsters v. Linn County Parks & Recreation Department, Linn County*, Case No. C-40-80 at 4-8, 5 PECBR 3081, 3084-88 (1980) (no fragmentary units unless a proposed group of employees has a clearly distinct community of interest or there are other compelling reasons to do so); *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), *enfd. sub nom. Kindred Nursing Centers East, LLC v. National Labor Relations Board*, 727 F.3d 552 (6th Cir. 2013).

As noted, primary care doctors and psychiatrists are on similar pay scales. However, psychiatrists are generally paid more than primary care doctors are. Likewise, the two groups both seem to work regular, predictable schedules each week, but psychiatrists see far fewer patients and tend to have lengthier appointments with them. Beyond that, they see their patients for very different reasons, under different circumstances. Although a primary care doctor can refer a patient to a psychiatrist, it appears to be more likely that a petitioned-for primary care doctor will refer a patient to other kinds of mental health professionals who are in the same clinics. The two groups do occasionally share clients and use similar records systems, but presumably many others do as well.

Continuing, although psychiatrists may work in the same building as certain primary care doctors, and may consult with those primary care doctors in person on occasion, none of those primary care doctors are included in the proposed unit. The psychiatrists and the petitioned-for primary care doctors work in separate buildings. Whatever contact the psychiatrists have with the petitioned-for employees seems to be brief and irregular. The possibility that they may occasionally interact at a work meeting or speak at an offsite party is not particularly significant. Perhaps the most meaningful interaction between the two groups of doctors is the curbside consultation service. However, even that service is only available for a short time on certain weekdays, and not all primary doctors can use it, given their schedules. The record also does not contain a lot of detail about the kinds of conversations that may occur during a call.

Psychiatrists go to similar medical schools and have similar residency requirements as most of the primary care doctors do. But as with the petitioned-for employees, there is no real "interchange" or shared promotional ladder between the two groups. Again, a primary care doctor of any kind cannot simply switch or promote to being a psychiatrist, or vice versa. Moreover, one type of doctor cannot cover for any other type when someone is absent. Fundamentally, psychiatrists do not regularly provide primary care, and the primary care doctors do not regularly provide psychiatric services.

Dr. Luedtke supervises all of Lane County's medical staff. To that extent, the primary care doctors and the psychiatrists certainly have "common supervision." However, Dr. Luedtke only supervises either group indirectly, as the primary care doctors' immediate supervisor is Dr.

Kincade and the psychiatrists' immediate supervisor is Dr. Phillip Williams. On top of that, the two groups have different site supervisors and divisions, and the petitioned-for employees uniquely work under the management of Ron Hjelm. Relatedly, while it is theoretically possible that a psychiatrist and a petitioned-for primary care doctor will work with the same support staff, the two groups are much more likely to work exclusively with their own dedicated staff.

Turning to some of Lane County's specific concerns, we fail to see how certifying the proposed unit will negatively affect Lane County's patients, integration aspirations, state or federal funding, or recruitment as Lane County suggests. It is not as if organized employees cannot work with those who are not. To the contrary, the record shows that all of Lane County's doctors, who have always been unrepresented, already work closely with a variety of represented employees, including AFSCME-represented nurses for example. And going forward, nothing precludes Lane County from addressing its various issues during negotiations. As stated in ORS 243.656(3), "protection by law of the right of public employees to organize and negotiate collectively safeguards employees and the public from injury, impairment and interruptions of necessary services, and removes certain recognized sources of strife and unrest."

Lane County separately contends that certifying the proposed unit would be inconsistent with the Board's preference for having the largest possible bargaining units and would unnecessarily fragment the workforce. Certainly, those concerns do give us some pause here. However, in this case, Lane County already works with seven other bargaining units of various sizes and multiple labor organizations. Put differently, no "wall-to-wall" unit is possible here. This is also not a case in which a labor organization is attempting to carve out a group from an existing bargaining unit. Again, all of the County's doctors are and always have been unrepresented. Further, certifying this proposed unit could actually reduce the number of contracts that Lane County will have to negotiate, as Lane County already negotiates individual employment contracts with its doctors. *See Oregon AFSCME Council 75 v. Douglas County*, Case No. CC-004-14 at 34, 26 PECBR 358, 391 (2015); *AFSCME, Council 75 v. State of Oregon, Department of Corrections and Association of Oregon Correctional Employees*, Case No. UC-37-97 at 10, 17 PECBR 767, 776 (1998).

We also cannot so easily overlook the "desires of the employees" criterion of ORS 243.682(1)(a). Here, a majority of the proposed unit has demonstrated a desire to be represented by AFSCME in the specific unit proposed. Additionally, there is no evidence indicating that the psychiatrists wish to be a part of this proposed unit, and nothing in this Order stops the psychiatrists from becoming a part of the primary care doctors' unit in the future. *See City of Keizer*, RC-37-99 at 7, 18 PECBR at 482; *International Union of Operating Engineers, Local 701 v. Deschutes County Public Works*, Case No. RC-4-88 at 12-13, 10 PECBR 906, 917-18 (1988).

Conclusion

The community of interest; wages, hours, and other working conditions; history of collective bargaining; and desires of the petitioned-for primary care doctors support a conclusion that the proposed bargaining unit is appropriate. Although a larger unit that includes the

psychiatrists might also be appropriate, we conclude that that is not dispositive under the specific facts and circumstances presented in this case.

PROPOSED ORDER

The petition to certify a new bargaining unit is granted.

SIGNED AND ISSUED on March 21, 2018.



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. 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-033-16

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,	)	
LOCAL 88,	)	
	)	
Complainant,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND ORDER
MULTNOMAH COUNTY,	)	
	)	
Respondent.	)	

Giles Gibson, Legal Counsel, Oregon AFSCME Council 75, Local 88, Portland, Oregon, represented Complainant.

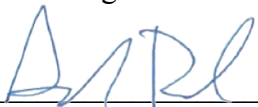
Kathryn A. Short, Deputy County Attorney, Office of Multnomah County Attorney, Portland, Oregon, represented Respondent.

On March 30, 2018, Administrative Law Judge B. Carlton Grew issued a recommended order in this matter. The parties had 14 days from the date of service of the 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 this matter. OAR 115-010-0090(4), (5).

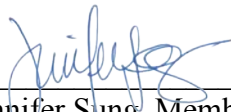
ORDER

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

DATED: April 26, 2018.


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-033-16

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,	)	
LOCAL 88,	)	
	)	
Complainant,	)	RECOMMENDED RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND PROPOSED ORDER
MULTNOMAH COUNTY,	)	
	)	
Respondent.	)	

A hearing was held before an Administrative Law Judge (ALJ), B. Carlton Grew on May 23, 2017, at AFSCME's offices in Portland, Oregon. The record closed on November 14, 2017, following submission of the parties' post-hearing briefs.

Giles Gibson, Attorney at Law, Oregon AFSCME Council 75, Local 88, Portland, Oregon, represented Complainant.

Kathryn A. Short, Deputy County Attorney, Multnomah County Attorney, Portland, Oregon, represented Respondent.

On November 1, 2016, Oregon AFSCME Council 75, Local 88 (AFSCME or Union) filed a Complaint alleging that Multnomah County (County or Employer) violated ORS 243.672(1)(a) and (c). AFSCME alleged that the County violated the statute through a manager's extra scrutiny and criticism of the work of a union steward involved in a grievance against him, and revocation of the steward's teleworking status. The County filed a timely Answer.

The issues in this case are: In April or May, 2016, did the County violate ORS 243.672(1)(a) and (c) when: County Manager Joe Easton conducted a review of Melissa Fogel's casework; raised specific questions and concerns regarding Fogel's casework; and told County Manager Jane Doe¹ that Fogel needed further supervisory oversight and coaching, was not

¹A pseudonym. Several other County employees will be identified by initials.

a candidate for teleworking, should not be teleworking, and therefore was no longer authorized to telework?²

We conclude that the County violated ORS 243.672(1)(a) and (c) through a manager's extra scrutiny and criticism of the work of a union steward involved in a grievance against him, and revocation of the steward's teleworking status.

RULINGS

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

FINDINGS OF FACT

The Parties

1. AFSCME is a labor organization within the meaning of ORS 243.650(13). It represents a bargaining unit of County employees, including employees working in the County Department of Human Services.
2. The County is a public employer within the meaning of ORS 243.650(20).
3. AFSCME and the County are parties to a collective bargaining agreement governing July 1, 2014 through June 30, 2017 (Agreement). There have been numerous prior collective bargaining agreements between the parties.

The Aging, Disability and Veterans Services Division of the Department of County Human Services

4. Melissa Fogel works as a Case Manager Senior (CMS) in the Aging, Disability and Veterans Services Division (ADVSD) of the Department of County Human Services (Human Services). Her supervisor is Jane Doe.
5. ADVSD provides information and assistance to seniors, people with disabilities, and caregivers, including assessment of client needs for assistance and connecting those clients to providers of that particular assistance.
6. When a person (client) is referred to the County ADVSD as potentially in need of ADVSD services, a CMS, such as Fogel, conducts an initial assessment of those needs. Fogel meets with the client, their family, guardian, doctors and others to develop an accurate understanding of the client's strengths, needs, choices and risks. The assessment is to determine the client's ability to perform personal functional activities essential for health and safety. Such activities include eating, dressing, grooming, bathing, personal hygiene, mobility (ambulation and transfer), elimination (toileting, bowel and bladder management), cognition, and behavior. Based

²The Complaint contained a second issue, whether Manager Jane Doe's report to Fogel describing Easton's actions was itself a violation of ORS 243.672(1)(a) and (c). Complainant does not argue that issue in its post-hearing brief, and we do not consider it.

on the assessment, Fogel will recommend the least restrictive environment for the client, which could be staying in their own home with services, or placement in adult foster care or a nursing home.

7. The work of a CMS is stressful, with a high volume of cases. These workers must be organized, able to multitask, thorough, and accurate. Once a CMS determines that a client is eligible for services, the client remains eligible until the client has a change in circumstances. If a CMS decides a client is eligible for services, the clients are then overseen by a Case Manager 2 (CM2).

8. During the events at issue, the County ADVSD was headed by Peggy Brey, a Division Director within Human Services. The ADVSD has six sections, including Long Term Care. Since July 2014, that section has been headed by Senior Manager Joe Easton. He directly supervises seven employees, including Jane Doe, most of whom are Program Managers in charge of a County Long Term Care branch. Easton indirectly supervises 275 employees, including Fogel.

9. On November 26, 2013, Doe's supervisor prior to Easton issued Doe a Letter of Performance Expectations that stated that improvement in her performance "must be immediate and on-going." (Exh. R-3 at 3.)

10. Prior to working as a Long Term Care Senior Manager, Easton was the Program Manager at the County's Southeast branch for six years. In that capacity, Easton supervised the Centralized Screening Unit, which assigns cases to intake workers to determine clients' eligibility for services. Easton's job duties included quality assurance review, which he did through preparing Long Term Care reports. These reports are a timeline of the work done by intake workers with clients (such as date of initial contact, date of assessment, and decision date) as well as the outcomes for clients, (such as approved or denied services, or withdrawal of application).

11. Easton also conducts quality assurance reviews in his current position. When conducting those reviews, Easton reviews the reports against the following two guidelines: (1) a CMS should initiate contact with a new client within three business days after the case was assigned to them; and (2) the CMS should complete their assessment within seven business days. When case management logs are not up to date, Easton reviews the Oregon Access database, which contains all case-related data. After his review, Easton informs branch managers of the results. Easton has been reviewing Long Term Care reports since 2011.

12. In October 2014, Fogel entered into a written, seven page agreement with the County allowing her to telework from home one day each week, on Wednesday.

13. Fogel teleworked regularly each week until the summer of 2015. At that time, her intake unit became short-staffed and Fogel's caseload increased. The extra workload continued until September 2015, when CM2 Mona McCarthy was assigned to join the unit by temporarily working out of class. McCarthy's regular position was in County Human Services' Developmental Disabilities Services Division (DDSD) in the Lincoln Building in downtown Portland.

14. On September 17, 2015, Easton issued Doe a written reprimand, which stated in part:

“As a Program Manager, you are aware that your job requires you to provide coverage at your branch and provide support to your staff.

Teleworking is a privilege given to staff and is primarily used to give staff administrative time after having a number of client interactions. It is not the same as being in the office. * * *

* * * . Staff have complained about being overwhelmed and June and July were very busy months. You should not discount your employees’ complaints and should absolutely not have Melissa [Fogel] be only one of two intake workers in the branch.” * * * .^[3]

* * * * *

“In the future, you are expected to:

* * *

Provide adequate supervisory coverage as well as line staff coverage.

* * * * *

Use good judgment in requesting and approving time off, flex schedules and telework.” (Exh. R-2 at 3-4.)

15. On February 24, 2016, Easton ran a report titled “Long Term Care (LONG TERM CARE) Overdue Referrals,” for quality assurance review of his employees and services they provided.

16. On March 10, 2016, Doe emailed Easton requesting renewal of telework agreements for three of her employees including Fogel. On March 15, Easton responded to Doe, asking her to “hold off on approving until we have a chance to discuss in greater detail.” (Exh. R-12 at 2.)

17. On March 17, 2016, Easton met with Doe, along with HR Manager Chris Robasky and Division Director Brey. In that meeting, Easton told Doe that she was not meeting the expectations outlined in the September 17, 2015 written reprimand. Easton also explained the next steps of discipline, as well as what to expect in Doe’s upcoming performance review.

18. After the meeting, Easton and Doe discussed renewal of the three telework agreements. Easton asked Doe whether she thought Fogel met the eligibility requirements of the County’s Telework Policy, which states in part:

³The County acknowledges, in its post-hearing brief that the “point of Easton’s statement about Fogel was not to criticize Fogel’s performance, but to provide [Doe] with a concrete example about supporting an employee in an untenable circumstance.” County post-hearing brief at 5.

“The employee shall have demonstrated, to the supervisor’s satisfaction, his/her capability to work productively without direct supervision. Indicators include consistent high performance, excellent attendance, a positive attitude toward assigned work, self motivation, and no relevant discipline problems in the employee’s work history.” (Exh. C-2 at 2.)

Doe replied that she did not think Fogel met the eligibility requirements. Easton did not direct, or suggest, that Doe take any action based on that conclusion, and Doe did not take any action.

19. On March 21, 2016, Doe met with Brey and Easton, at Doe’s request. Doe told the two that if she wasn’t going to meet the expectations in her June performance review, she would resign. Doe asked that any discipline be held in abeyance until June, and Easton and Brey agreed to do so.

20. Fogel had attended an AFSCME steward training program in February 2016. On April 7, Fogel began representing CM2 McCarthy with a potential grievance. By this time, McCarthy had returned to her regular position at DDS in the County Lincoln building.

21. McCarthy’s potential grievance concerned the County’s denial of a lateral transfer to a vacant CM2 position at the County’s East branch. McCarthy was interviewed for the vacancy by a panel that included Jane Doe, acting as the hiring manager. On April 5, Doe notified McCarthy that Easton had instructed Doe not to offer McCarthy the position because of McCarthy’s sick leave usage. In investigating the matter, Fogel interviewed Doe and consulted with AFSCME representatives. In mid-April, the County began recruiting to fill two other CM2 vacancies in ADVSD, at East and another branch. McCarthy applied for both positions.

22. On April 5, 2016, Easton and Doe discussed Fogel and two other employees that Doe supervised. Easton asked specific questions about the timeliness of some of the employees’ work and the adequacy of their case narratives. The focus of Easton’s conversation with Doe was Doe’s performance as a supervisor, previously discussed with her on March 17 and 21, 2016, rather than the individual employees’ performance.

23. On April 20, another Union steward, BS, signed and filed the McCarthy grievance. He emailed it to Easton with twenty pages of supporting documents as a single PDF attachment. The grievance alleged that the County had violated the parties’ Agreement by denying McCarthy’s transfer to East “based solely on use of authorized sick leave/usage” and requested as a remedy that she be “allow[ed] transfer to East branch as Case Manager 2.” (Exh. C-3 at 1.) Fogel’s name did not appear on the first page (the grievance form), but her role in investigating and preparing the grievance was apparent from some of the supporting documents.

24. McCarthy’s claim that Doe had told her that Easton would not allow Doe to select McCarthy for the transfer because of McCarthy’s sick leave usage appears in an April 18, McCarthy email to Fogel. That email responds to one Fogel had sent McCarthy earlier the same day asking for the reason that Doe had given her. That email also stated, “[w]e will work on filing the grievance tomorrow or Wed at the latest.” (Exh. C-3 at 8.)

25. Under the parties' Agreement, the County was required to respond to the McCarthy grievance in writing within fifteen days, May 5.

26. On April 21, 2016, Fogel emailed Doe asking "to start doing it [teleworking] again" "in hopes that I can be not so far behind." (Exh. C-13 at 2.) She also asked to change her telework day to Thursday or Friday, when she wouldn't be interrupted by meetings. A day or two later, Doe verbally approved changing Fogel's telework day to Thursday.

27. On April 25, County Labor Relations Manager Cessa Diaz and AFSCME Council Representative Eben Pullman agreed to extend the deadline for the McCarthy grievance response to May 13.

28. Also on April 25, Fogel emailed Pullman and BS stating that the County planned to interview top applicants for the East CM2 vacancy that McCarthy sought through the grievance. Fogel suggested asking the County to delay filling the position until the grievance was resolved.

29. Aaron Skelton, supervisor of the East CM2 unit, was the hiring manager for the East CM2 vacancy. Skelton and Doe both learned of the McCarthy grievance shortly after it was filed. In late April or early May, Skelton told Doe that County Human Resources had told him that the East CM2 vacancy would probably be offered to McCarthy in order to resolve the grievance, and that Skelton should hold the position for her.

30. On May 4, Fogel emailed Pullman and BS reporting that the interviews for both of the pending CM2 vacancies had been completed that day, and suggesting again that the County should delay the hiring process until McCarthy's grievance was addressed.

31. On May 5, BS emailed Fogel and Pullman that he had talked with Doe about the McCarthy grievance on May 4, and that it sounded like there would be a resolution in McCarthy's favor.

32. On or before May 6, County managers told Easton about the proposed settlement of the McCarthy grievance, and Easton agreed to it.⁴

33. On May 6, Diaz called Pullman and asked whether McCarthy and the Union would continue prosecuting the grievance if McCarthy were offered one of the two then-pending CM2 vacancies she had applied for. Pullman phoned Fogel and told her the proposal. Doe then called McCarthy to discuss the proposal.

34. Later on May 6, Fogel sent an email to Pullman stating that McCarthy would not pursue the grievance if she were offered either of the two pending vacancies. The grievance was ultimately resolved on that basis.

⁴The actual date that Easton learned of, and okayed, the grievance settlement is not in the record. We infer that this took place on or before May 6 because we assume Easton would not have been asked to agree to the settlement *after* it was offered to the Union.

35. On May 10, 2016, Easton met with Doe after the Long Term Services and Support (LTSS) meeting. Easton raised and discussed fourteen questions about Fogel's cases and expressed concern that Fogel had not been current on the County's long term care log and in her case narration. Doe had concluded that Fogel's narration in these cases could have been more current, but the delays had not raised significant concerns about the quality of Fogel's work.⁵

36. Easton also asked Doe about McCarthy's earlier out-of-class work as an intake worker at the East branch. Easton did not ask about any intake workers except Fogel and McCarthy.

37. County Human Resources had instructed branch managers to review telework agreements annually. At the May 10 meeting, Doe and Easton discussed the telework agreements for the second time since March. Fogel and two other East intake workers, AO and DK, had telework agreements. Easton approved continued teleworking for AO and DK, but said that Fogel was not meeting the telework policy's requirements of keeping current in her work, working well independently and with little oversight, and maintaining good attendance. Easton concluded that Fogel should not be permitted to continue teleworking. Doe told Easton that Fogel was current on the LTC log and her narratives as of May 10. Easton responded that Fogel had not been current in the past, and that he believed Doe needed to provide Fogel with more oversight.

38. On May 11, Doe called Fogel into her office and told her that Easton had met with Doe the prior evening, and that Easton said the following: he had conducted a review of Fogel's cases; he had specific questions about Fogel's work in fourteen of them; he had concluded Fogel needed additional supervision and coaching; Fogel had not met the requirements for teleworking; and Fogel was no longer authorized to telework. No other ADVSD employees' telework privileges had been terminated in a similar manner. Doe gave Fogel the fourteen case questions Easton had raised, and asked Fogel to respond to Doe, who would then respond to Easton. Fogel did so that afternoon. All of Easton's questions concerned cases Fogel had worked on around February 2016.

39. Later on May 11, Doe sent Fogel a draft email to Easton listing his fourteen case questions and revised versions of Fogel's responses to them. Doe later told Fogel that she had sent a further-revised set of the responses to Easton shortly after, but did not provide Fogel a copy.

40. In reviewing Easton's fourteen case questions, Fogel concluded they did not support Easton's conclusions that she needed additional supervision and should not be teleworking. None of the questions actually revealed poor performance by Fogel. In addition, the answers to eight of the fourteen were apparent in the case files, where Easton could have found them himself relatively easily.

⁵Easton testified that the purpose of the meeting was primarily to discuss Doe's performance, and to explain that Doe's upcoming personnel review would be negative. Easton's account was contradicted by Doe, whose account of the timing of discussions about her performance was corroborated by Doe's emails following up on the May 10 meeting and others. In particular, Doe followed up with an email after a meeting in which Easton disclosed that her next performance review would likely be negative, but that meeting was late in June, not May 10.

41. For example, regarding “Client 2,” Easton had asked whether a Contract Registered Nurse referral had been made and, “if not, why not?” (Exh. C-16 at 1). Client 2’s file contained multiple references to the client’s receipt of hospice services, which made the client ineligible for contract nursing services. For this reason, it would not have been appropriate to refer Client 2 to nursing services.

42. Only two of Easton’s fourteen questions raised actual errors. One error resulted from Fogel’s reliance on an inaccurate County program eligibility grid. The substance of the second error is not clear from the record.

43. Fogel and Easton did not communicate directly about any of Easton’s fourteen questions. Doe told Fogel that Easton had made a recommendation regarding “Client 14.” Easton recommended that Client 14 be “short-certed,” i.e., that her initial service plan be limited to six months rather than the usual twelve. However, Fogel had short-certed Client 14 from the beginning.

44. A few days after May 11, Fogel met with Doe again. Fogel told Doe that she believed that Easton had retaliated against her for her union activity by reviewing her cases and terminating her teleworking. Fogel asked Doe how her work performance compared with that of other intake workers. Doe told Fogel that County managers often used overdue reports from the County LTC Log database to review and compare the status of intake worker’s caseloads. Doe also told her that the current LTC Log overdue reports showed that Fogel’s case work compared well with others, and that many other intake workers, including many who were teleworking, had more overdue cases than Fogel did.

45. Also a few days after May 11, Doe discussed the responses to the fourteen questions with Easton by telephone. Doe understood that Easton found all the answers acceptable, but that Easton or the County quality unit would follow up with State Department of Human Services about the rules applicable to Client 14.

46. Fogel asked other stewards and intake workers about managerial scrutiny. Fogel learned of no other intake workers’ cases that had been scrutinized at the level that Easton had conducted of her cases, and that no other intake worker’s teleworking had been revoked.

47. On May 16, 2016, Doe emailed Easton and said: “I will hold off on [Fogel]’s [telework agreement] and continue to monitor her ability to keep current with narrating and updating the Intake Log.” (Exh. R-13 at 1.)

48. Also on May 16, Easton emailed Doe regarding Client 14’s case. Easton wrote, “On [Client 14]. We received a bit of clarity from APD on transferring and elimination.” (Exh. C-31.) The email then continues with a long quotation of the guidance that the State had provided, and an excerpt from Client 14’s assessment. Easton concluded, “I will follow up with the supervisor at [the County] Mid [branch] and ask for a 6-month re-cert to see how the consumer is doing.” (Exh. C-31.)

49. Between May 11 and May 18, Doe and Easton talked by telephone. They discussed that Easton had asked the State for a policy clarification about Client 14's situation. Doe told Easton that Fogel suspected that his actions were in retaliation for union activity and that Fogel was upset by this. Doe asked Easton to talk with Fogel and reassure her.⁶

50. On May 18, a County quality assurance employee attended the East branch's intake unit meeting. At the meeting, Fogel asked why Easton was scrutinizing her cases.

51. Between May 18 and May 26, Doe and Easton attended a management retreat. Doe talked with Easton about Fogel's concerns about retaliation. Doe told Easton that Fogel had discussed the issue with Doe several times, and that Fogel was very upset about the level of scrutiny of her cases. Doe asked Easton again to talk with Fogel and reassure her.

52. On May 24, Union Council Representative Pullman emailed County Labor Relations Manager Diaz to acknowledge that the County had offered McCarthy the East CM2 vacancy and McCarthy had accepted it, and that the McCarthy grievance was therefore resolved.

53. On May 26, Doe met with Fogel and Pullman to discuss Easton's actions. Doe said that she agreed that it appeared that Easton retaliated against Fogel for her union activity.

54. In late June 2016, Easton told Doe that she was not meeting expectations. Doe responded with a lengthy email on June 23, which she copied to ADVSD Director Peggy Brey. Doe stated, in part,

"In May, you brought me your concerns about [Fogel's] cases. I met with her the next day, reviewed them with her, and sent you the response, which you indicated you were satisfied with (we also followed up by staffing the transfer/toileting case with Sarah at our May Intake meeting.)" (Exh. C-31 at 2.)

55. On July 13, 2016, Doe emailed Easton stating: "* * * I have been working closely with [Fogel] the past two months and believe she is meeting all the telework conditions and that telework will allow her to stay current with her work." (Exh. R-13 at 2.) Easton responded "If you feel she meets the telework conditions then it is your decision." (Exh. R-13 at 2.)

CONCLUSIONS OF LAW

AFSCME alleges that the County violated ORS 243.672(1)(a) and (c) when: County Manager Joe Easton conducted a review of Fogel's casework; raised specific questions and concerns regarding Fogel's casework; and told County Manager [Jane] Doe that Fogel needed further supervisory oversight and coaching, was not a candidate for teleworking, should not be teleworking, and therefore was no longer authorized to telework. We conclude that the County violated ORS 243.672(1)(a) and (c) by engaging in the actions just described.

⁶At hearing, Easton denied communicating with State officials about any of the issues raised in his fourteen questions about Fogel's cases. He also denied that Doe told him about Fogel's concerns about retaliation. We credit Doe's testimony and the email evidence to the contrary.

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The County violated ORS 243.672(1)(a) through a manager's extra scrutiny and criticism of the work of a union steward involved in a grievance against him, and revoking the steward's teleworking status.

DISCUSSION

Standards of Decision

ORS 243.672(1)(a) makes it unlawful for a public employer to interfere with, restrain, or coerce employees because of, or in 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, referred to as the "because of" prong and the "in the exercise" prong.

To determine whether an employer violated the "because of" prong, we examine the employer's reason for the disputed action. If the employer acted "because of" an employee's exercise of rights protected by the Public Employee Collective Bargaining Act (PECBA), the employer's actions are unlawful. 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, 16 P3d 1189 (2000).

In order to show a violation of the "because of" prong of subsection (1)(a), it is not necessary to demonstrate that an employer acted with hostility or anti-union animus. Nor must a complainant prove that the employer was motivated by an intent to restrain or interfere with protected rights. A complainant need only show that the employer took the disputed action because an employee exercised a protected right. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-39-10 at 15, 25 PECBR 325, 339 (2012).

Under an "in the exercise" claim, the employer's motive is irrelevant. This Board focuses 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 of Oregon*, Case No. UP-42/50-12 at 29, 25 PECBR 640, 668 (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. *Amalgamated Transit Union Division 757*, Case No. UP-42/50-12 at 29, 25 PECBR at 668.

Analysis: “Because of”

In this case, County Manager Easton conducted a review of Fogel’s casework (and her work unit) in February 2016. However, he raised issues arising out of that review with Doe, only, about Doe’s supervision, not Fogel’s work. After that date, Fogel assisted in a grievance, filed April 20, challenging a decision made by Easton. Following that filing, in May, Easton raised specific questions and concerns regarding Fogel’s casework, and told Fogel’s direct supervisor that Fogel needed further supervisory oversight and coaching, was not a candidate for teleworking, should not be teleworking, and therefore was no longer authorized to telework.

The County does not dispute that Fogel was engaged in protected activity when she represented McCarthy in her grievance of the County’s actions through its manager Easton. See *AFSCME Local 189 v. City Of Portland*, Case No. UP-7-07, 22 PECBR 752 (2008).

The conduct of Easton is properly considered a course of conduct, a series of related actions all reflecting the same motive after the grievance was filed. The evidence shows that, while Fogel’s work was of some importance to Easton prior to the April 20 McCarthy grievance, Easton took several steps to involve himself more deeply in Fogel’s supervision after that date. Before the April 20 grievance, the weight of the evidence is that Easton’s focus was primarily, if not exclusively, on Doe’s work as a supervisor, not Fogel’s work as an employee. Indeed, on March 17, 2016, Easton and Doe discussed Fogel’s teleworking, Doe stated Fogel probably did not meet the criteria at that time, and, despite this, no action was taken to revoke Fogel’s teleworking agreement.

After the April 20 grievance filing, Easton took a comprehensive, highly critical approach to Fogel’s work. On May 10, he raised fourteen specific questions and concerns regarding Fogel’s casework prior to March 2016 with Fogel’s supervisor, Doe. He also told Doe that Fogel needed further supervisory oversight, was not a candidate for teleworking, should not be teleworking, and therefore was no longer authorized to telework. While Easton purportedly relied on, in part, the issues presented by the fourteen questions he raised, the answers to those questions revealed no significant issues with Fogel’s work, particularly since they were out of date as to her then-current work. One issue raised in Fogel’s response, Client 14, was arcane enough that ultimately Easton had to consult with the State Department of Human Services to determine the correct answer. A second issue involved use of an erroneous eligibility grid.

County Labor Relations Manager Diaz provided the County’s settlement proposal-inquiry to Pullman on or before May 6. Easton had been told of the proposal and had approved it, and it can fairly be presumed that he had done so before the offer was conveyed to Pullman, and thus on or before May 6. The proposal offered to settle the grievance by providing McCarthy the remedy the grievance had requested, and reversed Easton’s prior decision not to allow McCarthy to transfer into a County ADVSD branch office.

Easton testified that he was unaware of Fogel's involvement in the grievance because he merely looked at the first page before sending it on to the appropriate manager. First, even if that were true, Easton had other opportunities to review the document, which was in his possession. Indeed, Easton also forwarded the grievance to at least one other person on May 1. Second, Easton's evident interest in detail regarding quality reviews is inconsistent with the cursory commitment to detail and interest reflected by not inspecting a grievance challenging one of his own decisions. Third, since the grievance involved Easton, and its settlement essentially reversed Easton's decision, one might expect that Easton would have reviewed and discussed the grievance at some point well before he approved its settlement. No witnesses corroborated Easton's testimony regarding his lack of knowledge of or lack of involvement in the grievance.

Easton's credibility was also undermined by his testimony that he never consulted State officials regarding the Client 14 issue. That testimony was contradicted by Doe's testimony regarding the Client 14 question, and the May 15, 2016, email in which Easton had forwarded her the State's feedback on the Client 14 issue.

Easton's credibility was also undermined by his testimony⁷ that his reason for meeting with Doe on May 10, 2016, was to tell her that her next performance evaluation would be negative. Doe's testimony was that Easton didn't tell her about the performance evaluation until late June. Doe's testimony on this point was corroborated by the facts that, on June 23, Doe wrote Easton and ADVSD Director Brey responding to Easton's notice on June 21 that her evaluation would be negative. (Finding of Fact 54.) That email also mentions that the Easton/Doe May 10, meeting had concerned Easton's concerns about Fogel's cases; that Doe reviewed those cases with Fogel and responded to Easton the next day; and that Easton had responded that he was satisfied with the responses. (Finding of Fact 54.)

Easton's credibility issues lend support to the Union's claim. The record does not reveal, nor does the County suggest, any reason for Easton to deny the dates of his actions regarding Fogel except an effort to conceal the motive for those actions.

The conclusion that Easton acted to retaliate against Fogel is supported by his timing in acting so promptly after the grievance was filed; by Fogel's good work record; Fogel's history of declining to telework when she believed the workload required her actual presence in the office; the unusual depth of the review Easton conducted of her cases; that in Doe's May 10, meeting with Easton, he raised concerns about Fogel and McCarthy, and did not mention any other intake workers; and no other ADVSD employees' telework privileges had been terminated in a similar manner.

Although Easton had become aware of issues with Fogel's teleworking no later than March 17, 2016, it wasn't until May 11, that he directed Doe to end Fogel's ability to telework. While Easton had conducted an extensive review of the three CMSs in February and March 2016, it wasn't until May 10, that Easton gave Doe his fourteen questions about Fogel, just twenty-one days after the McCarthy grievance was filed. In addition, Easton promoted an inaccurate timeline of events which obscured their apparent connection to the McCarthy grievance, and denied that he

⁷The ALJ, after considering the demeanor of the witnesses, also concluded that Doe was the more credible on these issues.

took reasonable notice of the substance of the grievance which would have identified Fogel. These assertions by Easton, which we have rejected in favor of stronger evidence to the contrary, suggest a motive to conceal the connection between Easton's actions regarding Fogel and her work on the grievance.⁸ We conclude that (1) Fogel engaged in protected activity, representing a co-worker in a grievance against the County; (2) a County Manager, Easton, took employment-related action against the employee, namely extra scrutiny and criticism of the work of a union steward involved in a grievance against him, and revocation of the steward's teleworking status. We also conclude that (3) there was a sufficient connection between the protected activity and the employer's action to suggest a causal relationship.

Accordingly, we conclude that the County violated the "because of" prong of ORS 243.672(1)(a).

Analysis: "in the exercise"

Having concluded that the County violated the "because of" portion of subsection (1)(a), we turn to whether the County also committed a derivative violation of the "in the exercise" prong of the statute. This Board has held that a "because of" violation will almost always restrain, coerce, or interfere with employees "in the exercise" of their protected rights. *AFSCME Local 189, UP-7-07, 22 PECBR 752*. Here, engaging in close scrutiny of a steward's work after she exercised protected rights, in investigating and assisting in filing a grievance, and revoking her teleworking agreement in retaliation for that Union work would naturally and probably chill Fogel and other employees from exercising those protected rights in the future. Specifically, if undeterred, the County's conduct would naturally and probably deter bargaining unit members from engaging in grievance investigation and initiation about workplace concerns. We conclude that the County committed a derivative violation of the "in the exercise" prong of subsection (1)(a).

We need not consider whether the actions at issue constitute an independent violation of the "in the exercise clause." We have determined that the County committed a "because of" and an "in the exercise of" violation of subsection (1)(a), and it would add nothing to the remedy to find a third violation. See *AFSCME Local 189, UP-7-07, 22 PECBR 752*; *Lebanon Education Association/OEA v. Lebanon Community School District, Case No. UP-4-06, 22 PECBR 323 (2008)*.

We turn to the Union's claim that the County's conduct violated ORS 243.672(1)(c).

3. The County violated ORS 243.672(1)(c) through a manager's extra scrutiny and criticism of the work of a union steward involved in a grievance against him, and revoking the steward's teleworking status.

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." Analysis of a potential

⁸The County does not explain why this Board should conclude that Easton is more credible than Doe where their recollections differ in these important respects.

violation of subsection (1)(c) is similar to our analysis under 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 at 14-15, 25 PECBR 285, 298-299 (2012). In *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03 at 45, 20 PECBR 733, 777 (2004), this Board explained,

“Like most (1)(a) interference complaints, subsection (1)(c) discrimination charges turn on a question of causation. In a typical case, an employer violates (1)(c), as well as (1)(a), when it treats an employee disparately because of the employee’s union activity. In such cases, a (1)(c) violation is established by the same but for causation analysis employed under (1)(a). However, the exercise of protected rights is not a necessary element of a (1)(c) case; neither is a showing of actual encouragement or discouragement with regard to the exercise of such rights. It is sufficient that Complainant prove discrimination which is intended to affect the exercise of protected rights, and which does so or would have the natural or probable affect [*sic*] of doing so. The element of unlawful purpose (sometimes referred to loosely as intent, motive or animus) may be established by an actual showing of employer animus or may be inferred from the circumstances surrounding the discriminatory conduct. The latter usually follows from a finding that the employer conduct was ‘inherently destructive’ of protected rights.” 20 PECBR at 743-744, quoting *Haphey and Bondietti v. Linn County*, Case No UP-115-87 at 20-1, 11 PECBR 631, 650-51 (1989), (footnotes and emphasis omitted).

Analysis: ORS 243.672 (1)(c), discrimination

Our analysis of the facts regarding the Union’s subsection 1(a) claim leads to the conclusion that the County also violated subsection 1(c). First, as noted above, the County does not dispute that Fogel was engaged in protected activity when she represented McCarthy in her grievance of the County’s actions through its manager Easton.

Second, the County engaged in employer action when it when its Manager Easton conducted this particular review of Fogel’s casework; raised specific questions and concerns regarding Fogel’s casework; and told County Manager Doe that Fogel needed further supervisory oversight and coaching, was not a candidate for teleworking, should not be teleworking, and therefore was no longer authorized to telework. Adverse conduct by a manager in response to a bargaining unit member’s lawful, ordinary activity in investigating and supporting a grievance is conduct inherently destructive of protected rights. We have determined that the timing of Easton’s actions, and his apparent attempts to conceal that timing, lead us to conclude that there was a causal connection between Fogel’s protected activity and the employer action taken by Easton against her. Therefore, we conclude that the Union established that the County violated ORS 243.672(1)(c).

We have concluded that the County violated ORS 243.672(1)(a) and (c) when a County manager engaged in extra scrutiny and criticism of the work of a union steward involved in a grievance against him, and revocation of the steward's teleworking status. By statute, we must order the County to cease and desist from these violations. ORS 243.676(2)(b).

PROPOSED ORDER

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

SIGNED AND ISSUED 30 March, 2018.



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. Email filings should be directed to 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-037-16

(UNFAIR LABOR PRACTICE)

OREGON SCHOOL EMPLOYEES	)	
ASSOCIATION (OSEA),	)	
	)	
Complainant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
ASHLAND SCHOOL DISTRICT,	)	AND ORDER
	)	
Respondent.	)	

On February 22, 2018, the Board heard oral argument on Complainant's objections to a December 8, 2017 recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew, after a hearing held on May 2 and 3, 2017, in Ashland, Oregon. The record closed on August 17, 2017, following receipt of the parties' post-hearing briefs, and resubmission of Respondent's brief.

Katelyn S. Oldham, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented Complainant at hearing. Jason Weyand, Partner, Tedesco Law Group, Portland, Oregon, represented Complainant at oral argument.

Nancy Hungerford, Attorney at Law, The Hungerford Law Firm, Oregon City, Oregon, represented Respondent.

On December 2, 2016, the Oregon School Employees Association (OSEA or Association) filed a complaint alleging that the Ashland School District (District) violated ORS 243.672(1)(a), (b), (c), and (e). The Association alleged that the District violated the statute by sending emails to bargaining unit members about bargaining that contained false statements, a new proposal, and that denigrated Association staff and leadership. The Association also alleged that the District reduced the hours and changed the mix of duties of the Association president to reduce her pay in retaliation for the Association's bargaining positions. The District filed a timely answer.

The issues in this case are:

1. Did the District chill Association members “in the exercise” of rights in violation of ORS 243.672(1)(a) by sending direct email communications to members that: (1) contained content to chill speech and collective action; (2) contained regressive proposals and constituted direct dealing; and (3) attempted to create a negative impression and weaken support of some Association members with other members?

2. Did the District chill Association members “in the exercise” of rights in violation of ORS 243.672(1)(a) by reducing the working hours of the Association president?¹

3. Did the District interfere with the administration and existence of the Association in violation of ORS 243.672(1)(b) by: (1) chilling speech and collective action of Association members and leadership; (2) applying undue, coercive pressure on the Association by implying the local leadership was not representing them; (3) attempting to create a negative impression of the Association; and (4) weakening support for the Association during mediation?

4. Did the District discriminate against the Association members to discourage membership in violation of ORS 243.672(1)(c) by sending direct email communications to members that: (1) contained content to chill speech and collective action; (2) contained regressive proposals and constituted direct dealing; and (3) attempted to create a negative impression and weaken support of some Association members with other members?

5. Did the District refuse to bargain in good faith in violation of ORS 243.672(1)(e) by: (1) making a regressive proposal contingent on a previous tentative agreement; and (2) directly dealing with Association members?

We conclude that the Association failed to carry its burden to prove that the District violated ORS 243.672(1)(a), (b), (c), or (e). We dismiss the complaint.

RULINGS

The rulings of the ALJ were reviewed and are correct.

¹The Association objected to the issue statements to the extent that they omitted claims under the “because of” prong of ORS 243.672(1)(a). We do not revise the issue statements because the Association did not object at hearing when the ALJ obtained the parties’ agreement to the issue statements. Moreover, we also note that claims under ORS 243.672(1)(c) are substantially identical to claims under the “because of” prong of ORS 243.672(1)(a), and we address below the Association’s claims under ORS 243.672(1)(c). Finally, at oral argument, the Association acknowledged that our disposition of the (1)(c) claim would effectively satisfy the issue raised by any (1)(a) “because of” claim.

In addition, the Association also objected that the ALJ’s issue statements on all its claims were too narrow. Although we have not altered the ALJ’s issue statements, our discussion below on the Association’s claims takes into account those arguments that it contends were not fully considered.

FINDINGS OF FACT

The Parties and Background

1. The Association is a labor organization within the meaning of ORS 243.650(13). It represents a bargaining unit of approximately 160 classified District employees, including clerical workers, food service workers, educational assistants, custodial and maintenance workers, and bus drivers.

2. The District is a public employer within the meaning of ORS 243.650(20).

3. The Association and the District are parties to a collective bargaining agreement in effect from July 2015 through June 2018 (the 2015-18 Agreement). There have been numerous prior collective bargaining agreements between the parties since at least the 1980s.

4. The District has a Transportation Department, which includes 13 bus drivers. During the events at issue here, the Transportation Department was headed by Transportation Supervisor Stacey Delgado, who directly supervised the bus drivers.

5. Cindy Drought had served as the OSEA field representative assigned to the Association since 2008. In May 2015, Drought changed to an OSEA position in which she was no longer the field representative for the Association. She was replaced in May 2015 by Ahrien Johnson, who remained the field representative at the time of hearing.

6. During the last quarter of 2015, Association president Callie Mercer and Association executive board member Vickie Bates announced that they had decided not to seek reelection as Association executives, but to remain on the bargaining team. Mercer had been a member of Association leadership since 1988, a role her mother had filled years before. Mercer had held every position in Association leadership and had frequently been a member of the bargaining team. At the time of her decision not to run, Mercer had been Association president for 12 years. Bates had been active in the Association since the early 2000s.

7. Mercer and Bates told Johnson that their reasons for leaving were personal, but they testified that their actual reason was that they did not like Johnson and his style. At hearing, Mercer and Bates stated that Johnson handled things differently than ever before, that they did not have a good relationship with him, and that they could not work with him anymore.

8. Tammy Burnett, a bus driver, was elected Association president in May 2016 for a term beginning June 1, 2016.

9. When Burnett became Association president, she undertook several initiatives, including initiating an audit of the chapter's finances and governance practices, and holding more frequent and regular membership meetings.

10. After Burnett became Association president, Mercer declined to turn over all Association records in her possession, despite numerous requests. Mercer also declined or was unable to produce various documentation requested by the auditor.

11. Jay Hummel was the Superintendent of the District until June 30, 2016. Beginning in June 2016, his replacement, Suzanne Cusick, began shadowing him. Cusick also had some familiarity with the District and its employees from teaching in the District in the 1990s. She had subsequently kept in touch with some District employees while working as an administrator in school districts in Hillsboro, Oregon and Longview, Washington.

The Re-Opener Provision and the Parties' Different Understandings of the Contractual Status of the Transportation Work Rules

12. The 2015-18 Agreement included the following re-opener language in the "Duration of Agreement" article:

"During the 2015-16 fiscal year, the parties agree to re-open negotiations on compensation, the Transportation Work Rules, and one (1) non-economic article of each party's choice."

There are no other references in the 2015-18 Agreement to the Transportation Work Rules.

13. The Transportation Work Rules are a set of procedures that govern the work of bus drivers. (The drivers have also been subject to the provisions of a "Driver's Handbook/Pupil Transportation Handbook.") The Transportation Work Rules address a variety of terms and conditions of employment for drivers, including route bidding and trip assignment procedures; wages for trip cancellations; wages for wait time; and the definition of wait time.

14. The parties disagree about whether the Transportation Work Rules have or have not been included as contractual provisions in their collective bargaining agreements going back to the 1990s. Throughout the 2015-16 re-opener bargaining, Association officials believed, based on the parties' bargaining history, that their prior collective bargaining agreements included the Transportation Work Rules. Until sometime after April 2016, longtime Association President Callie Mercer shared this belief.

15. The record does not establish that District staff ever included the Transportation Work Rules in the collective bargaining agreement ratification packets provided to the District school board, which has ultimate authority to ratify collective bargaining agreements and interim agreements for the District. Former Superintendent Hummel told Cusick when she joined the District that he had conducted a lot of historical research and that he could not find any evidence that the Board had ever ratified a contract with OSEA in which the Transportation Work Rules were actually in the contract. Hummel felt that was a significant concern that Cusick should be aware of as they moved further into bargaining.²

²The Association objected to many of the findings of fact in the Recommended Order about the status of the Transportation Work Rules from the 1990s until the present. The Association also objected to

(Continued . . .)

16. The Association and the District began to develop the Transportation Work Rules in the 1980s, and those efforts were guided by and resulted in various memoranda of understanding between the parties. The Transportation Work Rules appear to have been codified by 1992.

17. In more recent years, the parties' collective bargaining agreements have included a Transportation Work Rules committee in a list of standing labor management committees. For example, Article 17 of the 2004-05 collective bargaining agreement listed the Transportation Work Rules committee in a list of standing labor-management committees, and provided that the committee was "established as needed for the purpose of recommending, for the District's approval, changes in the work rules for the transportation department." The Transportation Work Rules committee was also listed as one of the standing labor-management committees in the 2007-11 collective bargaining agreement.

18. The parties' bargaining over the 2007-11 collective bargaining agreement, later extended to 2012, involved challenging issues and forced them up against a self-imposed deadline of the end of the school year. As part of an effort to reach an agreement quickly, the parties removed Transportation Work Rules language from the Standing Committees section, and agreed to address the Transportation Work Rules separately. However, the memorandum of agreement that extended the agreement to 2012 included the following:

"Transportation Work Rules

"Supplemental Assignments —Transportation Department

"Supplemental Assignments in the Transportation Department, which may include, but not be limited to, Office/Standby and Special Needs Scheduler, shall be assignments subject to bid. When two or more bus drivers who have applied for a supplemental assignment are equally competent to fill the position as determined by the District, District-wide seniority will be the basis for assignment. After the initial bid, which shall occur in June 2011, the supplemental assignment shall not be open for bid again until the incumbent vacates the assignment."

The memorandum of agreement contained no other reference to the Transportation Work Rules.

(Continued . . .)

the omission of additional facts from the Recommended Order that, in its view, would support a finding that the Transportation Work Rules were, as a matter of historical fact, part of the parties' collective bargaining agreements. We do not address these objections because it is undisputed that the parties agreed to re-open bargaining regarding the Transportation Work Rules as part of their fiscal year 2015-16 re-opener bargaining and, subsequently, they actually engaged in that bargaining. The historical status of the Transportation Work Rules as either contractual or extra-contractual is, therefore, immaterial to the Association's claims because, once the subject of the rules was opened, either party was free to make proposals regarding that subject. Moreover, our disposition of the Association's claims is not dependent on whether the Transportation Work Rules were incorporated into prior agreements.

19. The Duration of Agreement clause in the 2012-15 agreement stated: “During the 2013-14 fiscal year, the parties agree to re-open negotiations on compensation, the Transportation Work Rules, and one (1) non-economic article of each party’s choice.” The agreement contained no other reference to the Transportation Work Rules.

20. For that agreement, field representative Drought created a cover sheet for the Transportation Work Rules entitled, “Addendum to: OSEA Collective Bargaining Agreement.” Drought distributed the proposed agreement, cover sheet, and Transportation Work Rules to Association unit members in the Association agreement ratification packet. Drought did not give a copy of the Association ratification packet to the District. Drought did not obtain a copy of the District school board ratification packet for the 2012-15 agreement, and it is not part of the record in this case.

21. The record contains little evidence regarding the negotiation and ratification of the 2015-18 Agreement. With respect to the Transportation Work Rules, it appears that the parties agreed only to “re-open negotiations” on those rules “during the 2015-16 fiscal year.” There is no evidence in the record regarding the contents of the parties’ respective ratification packets.

The Re-Opener Bargaining

22. In April 2016, after Johnson began working as the Association’s OSEA field representative but before Burnett was elected Association president, the parties began bargaining pursuant to the re-opener provision in the 2015-18 Agreement.

23. The parties agreed to ground rules governing the re-opener bargaining. Those rules stated, in part:

“Agreement on any single negotiating item is tentative and contingent upon final ratification of all items by each party’s constituents. When tentative agreement is reached between the negotiating teams on the entire contract, the respective teams agree to recommend and support ratification of the tentative contract agreement in its entirety to their constituents.”

24. The parties used interest-based bargaining for most of the regular, pre-mediation bargaining period.

25. At the start of bargaining, the Association bargaining team included former Association president Mercer, Shawn Grimmesey, former Association executive board member Vickie Bates, new Association president Burnett, and OSEA field representative Johnson. The District bargaining team included then-Superintendent Hummel, HR Director Patty Michiels, Principal Debra Pew, and District school board members Deneice Zeve and Eva Skuratowicz. State Conciliator Janet Gillman facilitated the bargaining.

26. On April 21, 2016, Mercer wrote to the Association bargaining team about the Transportation Work Rules:

“This is a bargaining issue (as the transportation work rules are part of the contract) and we already talked about having [Transportation Director] Stacy [Delgado] come to one of our meetings to get her input. * * * * *

“If you want to work with just the transportation department in regards to these work rules then we need to talk about having them removed from the contract and then just transpo [sic] can do what they may with them.”

27. At a bargaining session on May 3, 2016, the parties discussed “should we even have transportation work rules in the CBA as an addendum?” Transportation Supervisor Delgado stated that she would like the Transportation Work Rules to be “work expectations within her department.” After caucusing, the parties “agreed there should be work rules. The questions are: Should work rules be in contract? What needs to be changed within work rules?” The bargaining minutes for this session also state that a “riff,” meaning rift, “between [Association] factions was cited as a reason to not have others in the room.”

28. The next bargaining session was scheduled for May 19. Before the meeting, the facilitator alerted the parties that she would be unable to attend on that date. The District team was willing to meet without the facilitator, as was Mercer. When field representative Johnson stated that the team would not meet without the facilitator, Mercer emailed the Association bargaining team on May 17 and wrote,

“So the decision to not continue with bargaining is just decided without hearing input from the classified side? Or even listening to our input? We have sent a couple of e-mails out the [sic] morning seeking input and the next thing I see our meeting May 19th is cancelled.

“As stated in our ground rules we can continue if both sides agree. It is in our best interest to continue with bargaining.

“I believe the OSEA side needs to determine are we going to finalize this agreement prior to the close of the school year? I see no way for us to finish what needs to be done in one 4 hour session. I also do not see available time with trying to close the school year in finding a viable date and time for all of us to meet. I also believe other agreements are contingent upon what we agree to financially. This feels like holding the district hostage.

“I am willing to meet on Thursday and I believe as long as we have a quorum we can continue. Is anyone else with me?”

29. That same day, Johnson replied to Mercer and the rest of the team. He wrote that the ground rules stated that both sides had to agree to meet, and that “[w]e, the Union do not agree to meet this Thursday. Therefore it will clearly be an ULP if the District meets with anyone on the Union’s Team.” Johnson acknowledged that it was Mercer’s and others’ goal to settle the contract by the end of the school year, but if that did not happen, the parties would ratify at the beginning of the next school year.

30. Also on May 17, Mercer replied to Johnson and the rest of the bargaining team. Mercer wrote, in part:

“Our team is split on whether or not to meet Thursday and I believe with a bit of understanding the reasons why we should meet we could have a successful outcome.

“I am so angry. Our membership needs to understand why we are making things difficult and why they might not see their pay increase in July. Who is going to explain this?? A letter also needs to go out telling our membership who to call if they have a question or concern. It is evaluation time and I am not representing our staff. I am done with OSEA and would pull my dues if I could. You can count on me to make things very difficult.”

Despite the disagreement, Mercer chose to remain on the bargaining team.

31. The parties created a work group of Association and District employees to review the Transportation Work Rules. On June 6, the work group presented a partial draft of the rules, with language in disagreement highlighted. The top page of the draft stated:

“District: proposed that these rules are standards for the transportation department and not be included within the collective bargaining agreement but instead be published as ‘department expectations.’

“OSEA: proposed that these rules were already in the collective bargaining agreement and not be removed.”

32. During a June 8, 2016, bargaining session, the District offered what it described as a compromise. It stated:

- “1. Include the wording that the transportation subcommittee is currently working on (with them finishing the work). This would be the black and red colored wording, not the blue wording.
2. Add no more detail to the transportation work rules.
3. Follow the rules as written (both sides)
4. Only open compensation and benefits next year. No transportation work rules opened.
5. The transportation department can work collaboratively to set up routines and procedures that enhance the working climate and efficiency of the dept. We believe ‘interest based’ problem solving and collaborative climate in all departments is a goal.”

During an Association caucus over the proposal, members of the Association bargaining team had a loud, angry dispute.

33. A few days after June 8, the executive board of the Association removed Mercer and Bates from the Association bargaining team. The reason given for the removal was that “[i]n early June, a concern regarding bargaining was brought to the Executive Committee. * * * [W]e unanimously agreed we lacked confidence that you were acting in the best interest of the bargaining unit or representing all members of the unit.” Mercer and Bates were hurt and angered by this action and the lack of a specific explanation for it.

34. Effective July 1, 2016, District Superintendent Hummel resigned. As planned, the District appointed Suzanne Cusick to be Interim Superintendent (Cusick or Superintendent).

35. On August 11, 2016, the parties met for bargaining. The parties discussed the previous agreement on salary of 2.5% for 2016-17 and 2.25% for 2017-18. Bargaining notes stated the following: “Consensus: The tentative agreement is in the notes and there is NO signature on it. Thus, we are not implementing agreed parts yet.”

36. In addition, the Association team addressed the District’s proposed June 8 “compromise.” Association representatives stated that the proposal was not in the spirit of collaborative or interest-based bargaining but was very “positional” and that the Association wanted to “move past this roadblock.” District representatives agreed to withdraw the proposal.

37. Also during the August 11 session, Johnson stated the Association position on the Transportation Work Rules as follows:

- “• OSEA believes these rules are in there once they are bargained, and are now part of the contract, according to law.
- “• Ahrien [Johnson] explained that these rules have been part of this discussion for over 10 years and have firmly believed they have **ALWAYS** been part of bargaining and part of the department.
- “• They feel if they are NOT in the contract, these work rules can be changed at will: Ex: Supervisor doesn’t want to pay us for wait time in between trips, which had been done previously.
- “• If District takes this position, we can move to arbitration and mediation.
- “• We have no desire to negotiate this part of the contract.
- “• Ahrien pointed out that on Page 5 - Article 5: ‘All work rules are part of the contract’. He further pointed out that if you understood bargaining law, compensation/work conditions are items that can be bargained.” (Emphasis in original.)

38. The District team replied in part:

- “• We have searched and can’t find the rules as an attachment in prior CBAs.
- “• No notes from previous years can be found that indicate consensus on including work rules within the CBA.”

39. The parties concluded the bargaining session by agreeing to consult their legal counsel.

40. On August 19, the Association team sent their members a “Bargaining Update.” It stated that the parties had reached a tentative agreement pending “the conclusion of bargaining and ratification” with respect to compensation and classification review. It also stated, in part:

“• We have not reached an agreement regarding the Transportation Work Rules.

“At this time the District is not willing to continue ‘good faith’ bargaining regarding mandatory subject of bargaining pursuant to the Public Employee Collective Bargaining Act (PECBA) with the Union. The Union is in the process of filing an Unfair Labor Practice (ULP) charge against the District with ERB. We are hopeful to reach [] a successful resolution soon.”

41. On August 22 and 23, attorneys for the parties exchanged emails about the Transportation Work Rules. Katelyn Oldham, attorney for the Association, wrote to Nancy Hungerford, attorney for the District, stating, in part:

“I * * * am hoping that we can sort out an issue that has arisen in bargaining between our clients. It involves your client’s refusal to bargain work rules which have been a part of the collective bargaining agreement between the parties for many years. We’re not sure why your client has suddenly decided that it will no longer bargain these rules or view them as a part of the contract, but it is obviously concerning. * * * The parties are nearing the end of their 150 days and this appears to be an issue that is impeding resolution of the contract.”

42. The same day, Hungerford replied by telephone and confirming email. Her email stated, in part:

“First, the District is not refusing to bargain over the topic of transportation work rules. However, the District’s position is that it does not agree to place the transportation work rules in the collective bargaining agreement (CBA). And thus, whether or not the transportation work rules were ever included in the CBA (which the District’s review of contract history does not indicate), the fact is that this topic was specifically listed as open for bargaining this year, and each party has the right to make proposals or counterproposals on this subject.

“The District’s proposal and position is that transportation work rules not be included in the CBA. At the same time, the District Board and Superintendent are aware that if the District should desire to change any of the existing status quo regarding a mandatory subject (and that would be the case with most transportation work rules), it would need to notify the

Association and the Association would have 14 days to demand to bargain over the change. If the Association so notified the District, then the District would not implement any change but would schedule bargaining sessions with the Association under the expedited bargaining provisions of PECBA. The District would not implement the proposed change unless and until it had either reached agreement with the Association or had bargained for 90 days under the expedited process.

“At the present time, the District does not have any plans to change existing transportation work rules. But the District believes that it needs to maintain flexibility, while still understanding the need to do expedited bargaining before any change could be implemented.

“If it is helpful to reaching agreement, I believe the District would be open to putting language in the CBA about the process that would have to be followed to change the transportation work rules from the status quo, and/or language establishing a process by which unit members in transportation and/or the Association would annually have a chance to suggest changes they would like to see in work rules.”

43. On September 12, the parties met again to bargain. This was their last regular bargaining session. District representatives made a proposal regarding the Transportation Work Rules. The proposal was to be included in Article 9 (“Working Conditions”) of the agreement. It provided:

“District transportation employees shall have access to a copy of current work rules on-line or by requesting a copy from the Transportation Supervisor. Transportation work rules may be included in the agenda for the annual driver meeting prior to the start of school[.]

“If the District should desire to change any of the existing status quo on mandatory work rules, the District will notify the Association and the Association will have 14 days to demand to bargain over the change. If the Association so notified the District, then the District would not implement any change but would schedule collaborative interest-based sessions with the Association under the expedited bargaining provisions of PECBA. The District would not implement the proposed change unless and until it had either reached agreement with the Association or had bargained for 90 days under the expedited process.

“Transportation employees and/or the Association will each spring have the opportunity to suggest changes in transportation work rules, and those suggestions will be considered by the District before the start of the next school year.”

44. The Association did not agree to the District proposal. The parties, having failed to reach agreement on the reopened issues of compensation and Transportation Work Rules, proceeded to mediation.

Mediation and the Parties' Communications to Employees

45. On September 16, Superintendent Cusick sent an "Update on Bargaining" email to all District staff. In a section titled "Where we are stuck," Cusick stated,

"OSEA wants to add the transportation work rules into the body of the collective bargaining agreement (in other words to put it into the body of the contract between the district and OSEA). The district is in support of the transportation work rules but simply feels that they are not to be put into the body of the agreement. The district feels no other employee group (secretarial, EA, tech, food service, custodial, etc.) has such specific details in the contract. We also feel writing them into the agreement will make them inflexible, requiring us to wait for bargaining of a new contract to address changes, no matter who the changes may benefit."

46. Later in September, the Association team sent members a paragraph by paragraph response to Cusick's September 16 update. It stated, in part, that although the parties had agreed on the salary increase, "the district is refusing to implement the increase unless the union relents on removing the transportation work rules from the contract. The district is withholding the increase as a bargaining tactic." It also stated, "OSEA wants to KEEP the transportation work rules as an addendum to the collective bargaining agreement, as they have been since at least 1992. * * * The district proposal takes away the rights of the employees and gives the district all the power to make and approve all future changes."

47. On September 23, Association representatives provided an update to their members. The update stated, in part:

"Your OSEA bargaining team met with the district for two days last week. We hoped we would be able to reach a settlement on the remaining issue. To our surprise, the district came in offering a brand new proposal: to remove the transportation work rules from the collective bargaining agreement (CBA).

"* * * * *

"We believe the district is not respecting the collective bargaining agreement, which will impact all employee groups, not just transportation."

48. On September 28, former Association officer and bargaining team member Bates emailed all classified staff and the Association bargaining team. Bates wrote:

“I too have been a member of the bargaining committee with Callie for over 6 years and am very sad to see this adversarial demeanor coming from the union. We have spent many long hours working collaboratively with the district to come up with the contract we have today. The basic issue is that the district SUPPORTS the transportation work rules, just does not support putting them in the contract. No other work group has work rules in the contract and having them in the contract has meant an inordinate amount of hours spent EVERY year during bargaining on these rules.

“The bargaining team ended the year last year split on the issue of the transportation work rules, at which time upon Tammy’s recommendation, the two members of the bargaining team that were opposed to putting the transportation work rules in the contract, were removed from the bargaining committee. Wow... how is that united, or even ethical. Stand united... Solidarity?? This is not a rally for the auto workers union. We are a small district in a small town in Oregon. This whole thing is heading down a bad road and I for one hope it is stopped soon.

“Transportation and the district spent MANY hours last year and over the past SEVERAL years to come up with what we all feel are good work rules that have been put in to play. We simply feel they and other work rules do not belong in the contract. I like and agree with what Tess said, ‘it is all too contentious and stressful and I’ve got way to much of that going on in my day to day work life’. I ask that you all take a moment and think about whether or not this issue is really one worth this kind of contention. We need to reach a resolution and get back to working side by side for our kids in the Ashland School District.”

49. On October 3, the Association held a special chapter meeting to discuss bargaining.
50. On November 10, the Association leadership communicated to its members, stating that the “Ashland administration * * * are not treating classified employees in the Transportation Department fairly or respectfully and if they succeed, we are concerned that they will try this with other classified employee classifications.”
51. On November 14, Bates sent an email to Association unit members. She wrote, in part:

“As part of the bargaining committee for last year I have to agree with the district that the Transportation work rules are not part of the contract and should not be. I have put many hours into researching this issue and it has consumed countless hours of time during bargaining. I am very concerned with the new executive board and the liberties they are taking in representing all of us. The first couple of weeks that the new board took over they removed the two bargaining members that did not agree with keeping the transportation rules in the contract. There was no conversation

with us, simply ‘per Tammy’s recommendation’ we were removed. When asked why, we were only told ‘as a group we have decided not to say’. How can they have so much power to represent ALL of us and make these decisions on their own. We were given NO help from our state OSEA representative either.”

52. On November 17, 2016, the parties held a mediation session. The District presented a package proposal to resolve all matters in dispute. The proposal included added language about Transportation Work Rules in Article 19 (“Standing Committees”). The District included the September 12 bargaining proposal, but added the following text:

“Each April, Transportation employees and/or the Association will have the opportunity to suggest changes in transportation work rules. A committee that includes two employees appointed by the Association, the Transportation Supervisor and up to two other employees appointed by the Supervisor shall meet during the month of May to review those suggestions and make recommendations for changes. The Committee’s recommendations will be considered by the District before a final revision of the Transportation Handbook is produced and made available to all Transportation employees before the start of the next school year.”

53. Regarding compensation, the District proposal provided for a 2.5% increase retroactive to July 1, 2016, with retroactive payment of that increase before the end of December 2016, and a 2.25% COLA for 2017-18, which would remain open for renegotiation, with one additional article, at the Association’s option.

54. The District also proposed a separate agreement, independent of tentative agreements on other issues, to protect approximately three employees who planned to retire in 2017. Those employees would be disadvantaged if the 2.5% COLA for July through December 2016 was not actually paid to them during 2016. The Association agreed to that proposal, as follows:

“The Board and Association agree that although they have not concluded bargaining the issues in the reopener that began in April 2016, the parties have agreed on the following and direct the District to implement no later than December 23, 2016 in a separate paycheck.

“For any member of the unit who notifies the District Superintendent by December 15, 2016 of intent to retire in 2017, the District will calculate and pay an amount equivalent to 2.5% of the gross salary paid in the July 2016 through December 2016 paychecks. This shall satisfy any back pay obligation the District has for these individuals for the July 2016 through December 2016 period. This amount will be included in the amount of salary in 2016 reported to PERS.”

55. The parties did not reach any other agreements at the November 17 mediation session.

56. On the evening of November 17, Association president Burnett sent an email to bargaining unit members, stating in part:

“Dear Ashland Classified:

“Imagine the District wanting to reduce your personal leave days from three (3) to one (1). They would notify us of their intent to do that, we would send a ‘demand to bargain,’ we would meet for ninety (90) days, not reach an agreement because we would not be willing to reduce those days due to the negative impact to you, and then the District could simply do it anyway.

“Currently, this scenario could not happen because personal leave is a right under the contract. Any changes proposed from either the Union or the District would have to be negotiated. It is the same for the Transportation Work Rules.

“In either of these scenarios, if these benefits were taken out of the contract, we could not submit a proposal under negotiations, and the District could ignore our suggestions.

“That is why this fight is so important to all members. If accepted contractual language (the Transportation Work Rules) is allowed to be removed from the contract, we are setting a precedent and the District can try to do the same thing to other language in the contract (like personal leave).”

57. At some point between June 8 and November 17, Mercer sent Cusick a statement that she prepared after reviewing previous collective bargaining agreements. Mercer stated her reasons for concluding that the transportation work rules had never been part of the collective bargaining agreement. Mercer also expressed various points of disagreement with the current bargaining committee, including her view that too much time was being spent on the transportation issues.

58. Drought prepared a statement addressed to the District, after Drought conducted a similar review of previous contracts and bargaining history. Drought stated her reasons for concluding that the Transportation Work Rules were part of the collective bargaining agreement. The Association provided a copy of Drought’s statement at or before the November 17 mediation session.

The Parties' Communications Beginning November 18, 2016

59. On November 18, Cusick sent an email, addressed to all Ashland School District Staff. Cusick wrote, in part:

- “ Attached are three components proposed by the District in OSEA Mediation yesterday. The District Team has tentatively agreed to and signed the first two components as a package. It is not true that we refused to sign the compensation article as was stated in another email. OSEA states they will consult with their membership on these articles before agreeing to sign them. I would encourage all OSEA members to contact your team to make sure you are included in their decision.
- “ Here is a summary of the three components.
- “1. Article 19: Standing Committees
- “a. This Article proposes that a Transportation Committee be added to the list of committees under Article 19 of the collective bargaining agreement. Please read the attachment to understand fully our intent. The purpose of this standing committee is to listen to, work with and resolve issues within our Transportation Department. We've always been dedicated to collaboratively working with our employees.
- “2. Article 14: Compensation Package
- “a. For the 2016-2017 school year, the classified salary schedule shall be increased by 2.5% and eligible employees shall receive the normal step advancement. (See further information in the attachment.)
- “b. District and OSEA commit to continuation of classification, placement, and the compensation review process. (See further information in the attachment.)
- “c. For the 2017-2018 school year, the classified salary schedule shall be increased by 2.25%. (See further information in the attachment.)
- “ The third component was presented by the District to the OSEA team and has been tentatively agreed to and signed by both parties. This part of the agreement protects employees who intend to retire in 2017 by ensuring the equivalent of 2.5% of gross salary will be included the 2016 salary reported to PERS. Implementing this part of the agreement is contingent on acceptance by OSEA of agreement on Article 19 and Article 14.
- “ The disagreements that still exist are as follows:
- “• The OSEA Bargaining Team believes Transportation Work Rules (Transportation Handbook) already exist in the Collective Bargaining Agreement (CBA). The District team, former OSEA President Callie Mercer and other OSEA members do not believe they ever were voted

upon or ratified by OSEA Members. We do know the Ashland School Board of Directors never voted on including them in the CBA. There are three Addendums referenced in the current contract, Transportation Work Rules or Handbook is not one of them. While Transportation Work Rules have been discussed for many years often as a re-opener, they have never been ratified by a vote of the membership or voted on by the School Board.

- “• Including a Transportation Handbook in the contract is not good for either party due to the inflexibility it creates. No Handbooks are included in the CBA for any other employee group.
- “• We are NOT going to take away any negotiated employee rights such as personal leave. Promoting this kind of misinformation creates fear, anxiety and a hostile work environment.
- “ In the past under prior OSEA leadership the District and OSEA maintained a collaborative relationship that resulted in contracts being negotiated in a timely manner as well as fair, consistent, and equitable treatment of all members. Classified employees are valued and respected by all of us and we are hopeful for a signed agreement in the coming days.”³

60. On November 22, the Association circulated a letter from Association attorney Michael Tedesco. It stated, in part:

“As the legal representative of OSEA for nearly 30 years, my conclusion is that **there is no question that the transportation work rules are part of the labor agreement.** In the past, the parties have spent a considerable amount of time bargaining numerous aspects of these rules with the District. **For the District to take the position that the ‘Transportation Work Rules’ are not part of the contract is, frankly, absurd.** There is a four-year history of bargaining over these rules. The District’s position ignores this reality and seeks to construct an alternative narrative that rejects what is apparent to all who lived through this process.

“In this year’s reopener, the District and OSEA have agreed to all issues except the proper placement of the ‘Transportation Work Rules.’ The District’s position on this matter was formally put in proposal form at the last possible minute in bargaining. This was after all the other issues for bargaining had been agreed to. **I believe that the District has violated the law by bargaining in bad faith.** I understand from the bargaining team that the District persisted in its preposterous position in the mediation that was held last Thursday. Continuing to bargain the transportation work rules does

³Drought and a bargaining unit member testified that they interpreted Cusick’s assertion about bargaining under the former leadership as not factually accurate, *i.e.*, that under the former leadership, bargaining had not always been collaborative and had not always resulted in contracts being negotiated in a timely manner.

not prohibit the District from increasing the wage scale by the previously agreed upon 2.5% for the remaining members of the bargaining unit.” (Emphases in original.)

61. On November 29, 2016, Cusick sent an email to District administrators and classified staff. The email stated, in part:

“A proposal was submitted by the District bargaining team on November 17, 2016 during the mediation process to protect the interests of members who may retire in 2017. A concern was reported to the District by classified staff who plan to retire in 2017 that they would be harmed if the negotiated 2.5% gross salary increase is not included in their 2016 earnings. We value all classified employees and are grateful to report that the Board has agreed to sign off on this portion of the collective bargaining agreement (CBA) so that the interests of these members are protected.

“The District cannot provide the 2.5% of salary for the retiring classified employees unless the Association is willing to sign off on that provision of the CBA as a separate agreement. If Association members agree on this proposal at the OSEA Chapter meeting on December 1, 2016, we will be able to move forward so that the interests of classified employees planning to retire in 2017 are protected. The District will calculate and pay an amount equivalent to 2.5% of the gross salary paid in July 2016 through December 2016 paychecks. The payment will be in a separate check. Classified employees who will retire in 2017 must notify the Superintendent no later than December 15, 2016 of your intent to retire. This gives us sufficient time to calculate your back pay for the period from July 2016 through December 2016. This shall satisfy any back pay obligation the District has for these individuals for the July 2016 through December 2016 period. This amount will be included in the amount of salary in 2016 reported to PERS.

“The unresolved issue for bargaining and mediation remains the Transportation Work Rules affecting approximately 15 classified employees. The Board remains resolute that Transportation Work Rules not be added to the CBA. Just because the parties have bargained over the work rules doesn’t mean that they are part of the CBA. That requires Board action because the law, ORS 332.075(3) prohibits the Board from delegating the power to any other entity to sign a collective bargaining agreement. The Board has never taken such action.

“It is important to note that the District’s proposal submitted in mediation on November 17, 2016 includes a middle ground by which we are willing to put a PROCESS in the CBA as to how members and the Association have input and involvement in the modification of the work rules from year to year. It is important for members to realize that putting Transportation Work

Rules into a CBA does not allow for the flexibility for its members and the District to resolve differences. It is also important to note that no other work rules or handbooks for other classified members are part of the CBA.

“The District has provided a proposal that includes a middle ground. If the Association has any other thoughts about how to resolve the disagreement, they should provide those to the District’s bargaining team.”

62. On November 30, former Association officer and bargaining team member Bates responded to Tedesco’s letter in an email that she sent to all classified employees. She wrote, in part:

“I have a couple comments on the letter from the OSEA legal representative. The comment where it states, ‘*rejects what is apparent to all who lived through this process*’ in my opinion is not accurate. There were members of the past several OSEA bargaining committees, myself included, that did not agree that Transportation Work Rules should be dealt with in the contract.

“My other disagreement from this letter is the statement ‘*I believe that the District has violated the law by bargaining in bad faith*’. As a part of that bargaining committee I can tell you that ***we all as a group set the agenda for the next meeting*** and we all agree on what is discussed in each meeting. In my opinion ***I DO NOT feel any part of last years bargaining was done in bad faith.***

“I do believe this whole process that the OSEA board has pursued will harm us all in future bargaining and we need to all be aware of this. I feel the district has offered up a fair resolution, and we as a group should be able to vote on accepting this proposal and moving on.” (Emphases in original.)

63. On November 30, Cusick sent an email to all classified employees, as well as certified employees and all administrators. She wrote, in part:

“The purpose of this email is to provide some clarification regarding the letter sent by OSEA attorney Michael Tedesco and forwarded by your Association president on Monday [November 28, 2016]. It appears Mr. Tedesco was not provided with all the information needed to make an accurate assessment of the current situation with contract bargaining and mediation.

“While Transportation Work Rules have in fact been discussed for many years during bargaining and in the re-opener process, the work rules have never been included in a collective bargaining agreement approved by the Board of Directors either in the CBA or as an appendix. There is no direct reference in the CBA to Transportation Work Rules other than Article 23

which states ‘During the 2015-2016 fiscal year, the parties agree to re-open negotiations on compensation, the Transportation Work Rules, and one (1) non-economic article of each party’s choice.’ The three appendices attached to the CBA that have been approved by the Board and the Association include Employees Grandfathered for Supplemental Retirement, the Grievance Process Flow Chart and the Salary Schedule. There is not an appendix that includes Transportation Work Rules.

“It is true that a considerable amount of time has been spent discussing numerous aspects of the Transportation Work Rules. Just because the parties have bargained over the work rules doesn’t mean that they are part of the CBA. That requires Board action because the law ORS 332.075(3) prohibits the Board from delegating the power to any other entity to sign a collective bargaining agreement. The Board has never taken such action.

“The Board remains resolute that Transportation Work Rules not be added to the CBA. It is important to note that we were prepared to make our formal proposal early in the morning of the November 17 mediation session not at the last minute as stated by Mr. Tedesco. We were told that the OSEA team needed more time and was not ready to review a proposal. That is why the District proposal was not submitted until approximately 3:00 PM. It is also important to note that the District’s proposal includes a middle ground by which we are willing to put a PROCESS in the CBA as to how members and the Association have input and involvement in the modification of the work rules from year to year. This process includes adding the Transportation Committee as a Standing Committee per the CBA. (Please see Article 19 in the attachment.) It is important for members to realize that putting Transportation Work Rules into a CBA does not allow for the flexibility for its members in resolving differences that currently exists. It is also important to note that no other work rules or handbooks for any other classified staff are part of the CBA.

“It is true as Mr. Tedesco states that continuing to bargain over Transportation Work Rules does not prohibit the District from implementing the agreed upon 2.5% salary increase for all classified employees. However, the District has provided a proposal in mediation with a middle ground with no response from OSEA. As a result, the District is not willing to provide salary increases for the remainder of the unit without a complete and total agreement.

“It is unfortunate that with current OSEA Chapter and field representative leadership that the Ashland School District finds itself with such dissension. This is a new and sad commentary on the bargaining process for our District. Former local OSEA Chapter leadership and many current classified employees who have worked here for many years have always found a way to resolve differences amicably and in the best interests of all involved. It is

our hope that the current OSEA leadership will find a pathway to reach resolution as quickly as possible[.]

“As I have stated often, we value each and every one of you. In the past under prior OSEA Chapter leadership the District and OSEA maintained a collaborative relationship that resulted in contracts being negotiated in a timely manner as well as fair, consistent, and equitable treatment of all members.”

64. Also on November 30, an Association unit member who planned to retire in 2017 sent an email to all Association members and to Cusick. She wrote, in part:

“* * * As our Superintendent, Suzanne Cusick, mentions in her most recent email,

“‘Former local OSEA Chapter leadership and many current classified employees who have worked here for many years have always found a way to resolve differences amicably and in the best interests of all involved.’

“I believe I am a member of this group she is referencing to seeing as this is my 25th year of working for the Ashland School District. I’ve never experienced anything like this contention and division that we are experiencing now in our Classified ranks with this ongoing bargaining issue. The solutions proposed are rational and practical for all to move forward. To our current OSEA leadership, many of us will applaud you and recognize you for being able to step back and take the high ground and help us move forward with the proposed solution now. We as a group, should be able to vote on this issue [accepting the District’s last proposal] and see if this helps us come to resolution. We all have important work to do which is made difficult in this environment.”

65. After these emails were distributed, some Association unit members expressed support for settling the contract immediately by accepting the District’s last offer. Some unit members believed that the unit should not defer a pay raise for the entire unit of 160 employees because of a bargaining dispute affecting 13 employees.

66. At some point shortly after Cusick sent her three emails to District employees, an Association member started a petition to recall Burnett as Association president. The petition did not result in a recall.

67. On December 1, after the school board ratified the separate imminent retiree agreement, the Association had a membership meeting. The meeting was attended by about 25 to 35 of the unit’s members, including members who planned to retire in 2017. The meeting was, by far, the most contentious Association meeting any witness could recall.

68. On December 6, the parties met for another mediation session. The District submitted another proposal regarding the Transportation Work Rules. It added a procedure under which an employee contending that the Transportation Work Rules had been violated could use the school board's complaint procedure, which consisted of submitting a complaint first to the transportation supervisor, then to the superintendent or designee, and, finally, if not resolved, to the school board. The District adhered to its salary package, proposing (1) a salary increases of 2.5% for 2016-17, retroactive to July 1, 2016, and (2) a salary increase of 2.25% for 2017-18, with the Association able to reopen on that salary increase in the spring of 2017, if desired.

69. At this mediation, the Association proposed a set of Transportation Work Rules to be included in the collective bargaining agreement.

70. On December 8, Association President Burnett emailed unit members. She stated that the mediation session had not been successful, that the District was not willing to settle the compensation issue separately, and wrote:

“We are not willing to sacrifice the children in this district or the bus drivers by abandoning our protections in the contract * * * If the Transportation Work Rules are taken out of the contract, we cannot initiate bargaining proposals regarding them and filing grievances if the District violates the work rules will be much more challenging.”

71. There is no evidence that the parties have held any further mediation sessions or bargaining sessions.

Reduced Hours and Wages for Association President Burnett

72. Association president Burnett is a bus driver for the District. In the spring of 2015, she successfully bid on the position of bus driver for special needs students, posted as a six hour per day (.75 FTE) position. Burnett also successfully bid on the duty of “special needs scheduler” for one half hour per day. Special needs bus drivers’ waiting time is compensated at a lower rate than driving time.

73. The number, transportation needs, and locations of special education students, homeless students, and students who are foster children often change. The District must transport some of those students outside of district boundaries if the parents choose to have these students remain in their former schools after moving.

74. The District employs three special needs bus drivers: Terri Baker, Burnett, and Shannon McKellar. The drivers are supervised by manager Stacey Delgado. As special needs scheduler, Burnett prepares needed changes in bus routes and submits them to Delgado for her approval. Delgado’s goal is to keep each driver scheduled to work their budgeted FTE hours, 30 hours per week for Baker and Burnett, and 25 hours per week for McKellar.

75. In October 2016, the approximate hours of the bus drivers were as follows: Burnett, 37.75; McKellar, 26.25; and Baker, 34.

76. In late fall 2016, McKellar was transporting a special needs student from a location in Medford to a program located outside District boundaries. In November, the student returned to the District and no longer needed out-of-district transportation. Simply dropping this student from McKellar's schedule would reduce her 25 hour workweek by approximately 2 hours per day. Delgado revised the special needs routes to keep McKellar near 25 hours per week, effective the week of November 28. The revision included shifting portions of routes away from Burnett. The schedule Delgado adopted adjusted McKellar's time from 26.25 driving hours per week (before the student moved) to 28.25 driving hours and .75 wait hours per week. Burnett's work time was reduced from 37.75 all driving hours (no wait hours) to 33.25 driving hours and 3.0 wait hours per week. (There was no change to Burnett's 2.5 special needs scheduling hours per week.)

77. The decline in Burnett's total working hours was short lived; her hours increased to the prior level in a matter of weeks. However, those hours continued to include up to three waiting hours per week.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The District did not violate ORS 243.672(1)(a) when the Superintendent sent emails to District employees on November 18, 29, and 30, 2016.

The Association alleges that the District violated ORS 243.672(1)(a) when the Superintendent sent three emails—dated November 18, 29, and 30, 2016—directly to bargaining unit members. Specifically, the Association contends that the emails chilled bargaining unit members' speech and collective action because they created a negative impression of current chapter leadership and of the OSEA field representative and weakened support for the Association. In addition, the Association contends that the Superintendent's November 18, 2016, email—which stated that the District's agreement to accelerate payment to near-retirees was contingent on the Association's agreement on the Transportation Work Rules—constituted an unlawful threat.

ORS 243.672(1)(a) makes it unlawful for a public employer to interfere with, restrain, or coerce employees "in" or "because of" the exercise of rights guaranteed in ORS 243.662. ORS 243.662 guarantees public employees "the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations."

Under the "in the exercise" prong of section (1)(a), we determine whether the employer's conduct, when viewed objectively, has the natural and probable effect of deterring employees from engaging in PECBA-protected activity.⁴ *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case Nos. UP-42/50-12 at 28, 25 PECBR 640, 667 (2013); *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623-24, 16 P3d 1189 (2000). When we analyze an employer's actions under the "in the exercise" prong of section (1)(a), the employer's motive is irrelevant. In addition, it is not necessary for the union to

⁴As noted above in footnote 1, we limit our analysis under ORS 243.672(1)(a) to the "in the exercise" prong and address the Association's motive-based allegation below under ORS 243.672(1)(c).

prove either anti-union animus or actual restraint, interference or coercion. *Oregon School Employees Association v. Aumsville School District No. 11*, Case No. UP-90-91 at 6, 13 PECBR 509, 514 (1992). The test is objective, based on a review of the totality of the circumstances, rather than subjective, based on the opinion of the employees. *Id.* (citing *Spray Education Association and Short v. Spray School District No. 1*, Case No. UP-91-87, 11 PECBR 201 (1989)).

An employer's conduct may independently violate the "in the exercise" prong, even when no "because of" claim is alleged or proved. See *Clackamas County Employees' Assn. v. Clackamas County*, 243 Or App 34, 40, 259 P3d 932 (2011). An independent "in the exercise" claim usually arises in the context of employer threats "of reprisal for union activity." *Eagle Point Education Association/OEA/NEA v. Jackson County School District No. 9*, Case No. UP-61-09 at 27, 24 PECBR 943, 969 (2012) (quoting *Oregon Public Employes Union and Termine v. Malheur County, Commissioner Cox, Commissioner Hammack and Sheriff Mallea*, Case No. UP-47-87, 10 PECBR 514, 521 (1988)). Such threats generally are either directly coercive or threatening statements, or situations where there is nothing directly threatening or coercive, but where "the employer's action, objectively viewed, 'would chill union members generally in their exercise of protected rights.'" *Id.* (quoting *Portland Assn. Teachers*, 171 Or App at 624).

We turn first to the Association's argument that the Superintendent's emails, when objectively viewed, would chill bargaining unit members generally in the exercise of their protected rights. The Association contends that the Superintendent, by contrasting the current Association leadership and field representative with the previous leadership and field representative, amplified and accelerated the discord in the bargaining unit. Stated differently, the Association contends that the Superintendent's emails would probably and naturally chill employees because the emails took advantage of existing discord within the bargaining unit. The Association cites the following portions of the Superintendent's November 30 email as "particularly chilling":

"It is unfortunate that with current OSEA Chapter and field representative leadership that the Ashland School District finds itself with such dissension. This is a new and sad commentary on the bargaining process for our District. Former local OSEA Chapter leadership and many current classified employees who have worked here for many years have always found a way to resolve differences amicably and in the best interests of all involved.

"* * * In the past under prior OSEA Chapter leadership the District and OSEA maintained a collaborative relationship that resulted in contracts being negotiated in a timely manner as well as fair, consistent, and equitable treatment for all its members."

As a threshold matter, we note that some (although by no means all) of the statements in the Superintendent's emails can be described as statements of fact. For example, the Superintendent's summary in the November 18 email of bargaining proposals are factual statements of the parties' bargaining positions. Similarly, the Superintendent's statement in the November 29 email that the unresolved bargaining issue (the Transportation Work Rules) affected

“approximately 15 classified employees” is factually accurate. We have previously explained that the “‘natural and probable effect’ of distributing factual information does not typically tend to coerce or intimidate employees,” *Aumsville School District No. 11*, UP-90-91 at 8, 13 PECBR at 516 (citing *Oregon Association of Classified Employees, Briggs and Ramsay v. Douglas School District No. 4*, Case No. UP-82-89, 12 PECBR 547 (1990)), and we adhere to that conclusion in this case with respect to the factual aspects of the Superintendent’s emails.⁵

That conclusion, however, does not end our analysis because many statements in the emails are not mere statements of fact. The Association contends that the emails denigrated the current Association leadership and field representative by contrasting their bargaining efforts with the previous, purportedly more “collaborative” leaders and field representative. The Association argues that the Superintendent aligned the District with Mercer and Bates, and contends that such alignment would naturally and probably chill employees in the exercise of their PECBA-protected rights by undermining employees’ confidence in the Association.

We disagree with the Association. We apply an objective test, and consider the totality of the particular circumstances. Here, the parties were engaged in ongoing collective bargaining. Both parties were disseminating communications that advocated, occasionally with forceful language, their particular positions. The Association did so through bargaining updates and the letter from attorney Tedesco. The District did so through the Superintendent’s emails. The Superintendent’s emails fall within the permissible range of advocacy that it is often part of the collective bargaining process. Viewed objectively, and taking the totality of the circumstances into account, we conclude that the natural and probable effect of the three emails would not be to chill employees in the exercise of their PECBA-protected rights.

Next, we turn to the Association’s argument that the Superintendent’s November 18, 2016, email constituted a threat, and therefore violated ORS 243.672(1)(a). In that email, the Superintendent stated that the District’s proposal to accelerate the payment of the compensation increase for the near-retirees “is contingent on acceptance by OSEA of agreement on Article 19 and Article 14.” The Association contends that the Superintendent’s use of the phrase “is contingent” was tantamount to a threat that, unless the employees convinced the Association leadership to accept the District’s proposals on the Transportation Work Rules, the near-term retirees would not receive a compensation increase in calendar year 2016 (thus potentially reducing the amount of their PERS pensions). The District asserts that the Superintendent’s email contained a typographical error—*e.g.*, that the email was intended to say “the agreement is *not* contingent” on the Association’s acceptance of other agreements.

In *Clackamas County*, the Oregon Court of Appeals contrasted our decisions in *Oregon Public Employees Union v. Jefferson County*, Case No. UP-20-99, 18 PECBR 310 (1999)

⁵The parties dispute the accuracy of the Superintendent’s statements about the Transportation Work Rules. The record indicates that the parties had different opinions about whether, as a matter of historical fact, the rules had ever been ratified by both parties and therefore were part of the collective bargaining agreements. Regardless of both parties’ views about the accuracy of the statements, the Association has not demonstrated that these statements would naturally and probably chill employees in exercising their protected rights.

(*OPEU I*), and *Oregon Public Employees Union v. Jefferson County*, Case No. UP-19-99, 18 PECBR 245 (1999) (*OPEU II*), to illustrate what statements can constitute unlawful threats under the “in the exercise” prong.⁶ The court found persuasive the Board’s reasoning that “statements that an employer makes that indicate an unwillingness to negotiate with members of a bargaining unit are likely to chill employees from engaging in protected activities,” whereas “harsh language alone” does not constitute an unfair labor practice. *Clackamas County*, 243 Or App at 42. That distinction is not the only guidepost we use in analyzing a section (1)(a) claim, but it is a helpful distinction in this case.

Here, even assuming that the Superintendent’s use of the phrase “is contingent” was intentional (and not a typographical error), the use of that phrase did not, given the totality of circumstances in this case, communicate the District’s unwillingness to continue negotiations. In fact, the overall thrust of the email was advocacy in favor of the parties continuing to negotiate. The email suggests that bargaining unit members contact the Association bargaining team “to make sure you are included in their decision,” and concludes with the statement, “Classified employees are valued and respected by all of us and we are hopeful for a signed agreement in the coming days.”

We understand the Association to be arguing that these statements, rather than expressing the District’s willingness to bargain, would in fact naturally and probably chill bargaining unit members by resulting in employees encouraging the Association to quickly (and presumably less advantageously for Transportation Department employees) conclude the negotiations. We disagree. The Superintendent’s statements, objectively taken, do not communicate an unwillingness to bargain, or otherwise contain language that would reasonably and likely chill Association-represented members in exercising their rights to form, join, and participate in the activities of the Association. Notably, based on this record, it appears that no employees even noticed or made an issue of the phrase “is contingent.”

We conclude that the Superintendent’s statements in the three emails, objectively viewed and taking all the circumstances into account, would not chill Association-represented employees in exercising their “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

⁶In *OPEU I*, we concluded that the employer violated the “in the exercise” prong of section (1)(a) when a county commissioner said that he wanted to “get rid of” OPEU, wanted the bargaining unit to be represented by a different union, wanted OPEU staff members to be removed from the bargaining team, and that he would not bargain with three members of the union’s bargaining team. *OPEU I*, UP-20-99 at 7, 18 PECBR at 316.

In contrast, in *OPEU II*, we concluded that the District did not violate the “in the exercise” prong of section (1)(a). In *OPEU II*, bargaining unit members picketed the private business of the same county commissioner. In conversation outside his private business, a picketer remarked that the commissioner was making money because his business was operating. The commissioner said words to the effect of “if one more person says that to me, I’m going to kill them” or “when someone says that, I want to kill.” *OPEU II*, UP-19-99 at 9, 18 PECBR at 253 (reasoning that the commissioner “did not address his ‘threat’ to anyone in particular” and the statement “did not concern the exercise of any protected rights, nor could the statement be reasonably construed to relate to the exercise of protected rights”).

employer on matters concerning employment relations.” See ORS 243.662. Consequently, we conclude that the District did not violate the “in the exercise” prong of section (1)(a).

3. The District did not violate ORS 243.672(1)(a) when it reduced Burnett’s work hours in November 2016.

The Association also alleges that the District violated ORS 243.672(1)(a) when it reduced the work hours of Association President Burnett in November 2016. Effective November 28, 2016, the District reduced Burnett’s work hours from 37.75 driving hours per week to 33.25 driving hours per week, plus three “waiting” hours per week, which were paid at a lower hourly rate. (Burnett also worked as a special needs scheduler for 2.5 hours per week; those hours were not affected by the change in her driving and waiting hours.)

The Association alleges that the District violated the “in the exercise” prong of ORS 243.672(1)(a) by reducing Burnett’s work hours. As previously explained, under an “in the exercise” claim, the employer’s motive is not controlling. Instead, we determine “whether, objectively viewed, the action that the employer took under the particular circumstances would chill union members generally in their exercise of protected rights.” *Portland Assn. Teachers*, 171 Or App at 624.

The record demonstrates that the “particular circumstances” that resulted in Burnett’s changed work schedule arose from a change in a particular student’s transportation needs. Specifically, in late fall 2016, McKellar had been driving a special needs student from a location in Medford to a program located outside District boundaries. In November, that student returned to the District and no longer needed out-of-district transportation. The change in that student’s transportation needs resulted in McKellar losing approximately two driving hours per day. Without adjustment to the special needs drivers’ schedules, McKellar’s work week would have dropped in November 2016 to below her 25-hour work week.

To maintain McKellar’s minimum work schedule, Delgado revised the work schedule. Given that there are only three special needs bus drivers at the District, Delgado’s revision resulted in shifting hours away from Burnett. At the time that Delgado revised the schedule, Burnett was working more than the 30-hour work week that she had successfully bid for. Delgado adjusted McKellar’s time to 28.25 driving hours and .75 waiting hours per week. Burnett’s hours were reduced from 37.75 driving hours (and no waiting hours) to 33.25 driving hours and three waiting hours per week. After the adjustment, both McKellar and Burnett worked at least the weekly hours minimum that they had bid for and been granted. Burnett’s hours increased back to their pre-revision level within a few weeks.⁷

Here, the evidence in the record is uncontroverted that special needs bus drivers’ driving assignments and hours changed frequently (at least monthly). Burnett’s driving hours changed in November 2016 because a special needs student’s transportation needs changed. We do not believe that such a change, one based on the District’s legitimate operational needs, would objectively

⁷Although this increase occurred after the Association filed this complaint, the Association did not establish that the increase was motivated by that filing (as opposed to legitimate operational reasons).

chill Association-represented employees in exercising their rights under ORS 243.662. Therefore, we conclude that the District did not violate ORS 243.672(1)(a).

4. The District did not violate ORS 243.672(1)(b) when the Superintendent sent emails to District employees on November 18, 29, and 30, 2016.

The Association alleges that the Superintendent's three emails, dated November 18, 29, and 30, 2016, violated ORS 243.672(1)(b). The Association alleges that the emails were intended to (and did) exacerbate the divisions within the bargaining unit and thereby interfered with the existence or administration of the Association. The Association also alleges that the emails misrepresented the District's bargaining proposals, and constituted impermissible direct dealing with bargaining unit members.

A public employer violates ORS 243.672(1)(b) when it dominates, interferes with, or assists in the formation, existence, or administration of a labor organization. *Oregon School Employees Association v. Medford School District #549C*, Case No. UP-77-11 at 17, 25 PECBR 506, 522 (2013). A complainant must demonstrate interference that directly affects the labor organization itself. As we have previously explained:

“To establish a subsection (1)(b) violation, ‘a complainant must prove that an employer took actions [that] impede or impair a labor organization in the performance of its statutory responsibilities. In establishing this violation[,] a complaining labor organization must provide evidence to support the conclusion that *some actual interference* with its existence or administration occurred as a result of the employer’s actions.’” *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07 at 43, 22 PECBR 752, 794 (2008) (emphasis in original) (quoting *Junction City Police Association v. Junction City*, Case No. UP-18-89 at 10, 11 PECBR 780, 789 (1989)).

Section (1)(b) protects the rights of the labor organization, as opposed to the rights of bargaining unit members themselves. *Douglas School District No. 4*, UP-82-89 at 17-18, 12 PECBR at 563-64.

With that framework in mind, we turn to the Association's claim that the Superintendent's emails violated section (1)(b). We begin with the proposition, which we do not understand the Association to contest, that PECBA does not unconditionally bar public employers from communicating with bargaining unit members about employment relations during collective bargaining.⁸ That does not mean, however, that any employer communications during bargaining

⁸Such a prohibition was once part of PECBA, but was repealed in 1995. Specifically, former ORS 243.672(1)(i) was repealed by Senate Bill 750, effective August 1, 1995. See 1995 Or Laws Ch 286, Sections 2 and 35. That now-repealed section of PECBA made it an unfair labor practice for an employer to communicate directly or indirectly with bargaining unit employees about employment relations during the period of negotiations. The Board found violations of ORS 243.672(1)(i) when the complainant presented proof of “(1) oral or written communication by a management representative (2) to a bargaining unit member who is not a designated representative of the union (3) concerning a matter of employment

(Continued . . .)

are permissible under PECBA. With respect to (1)(b), we look to see whether those communications constitute dominating, interfering with, or assisting in the formation, existence, or administration of a labor organization. We have found that where the employer communications amount to direct dealing with employees (and bypassing the exclusive representative), such communications interfere with the existence and administration of a labor organization. *See, e.g., 911 Professional Communications Employees Association v. City of Salem*, Case No. UP-62-00 at 18-19, 19 PECBR 871, 888-89 (2002); *AFSCME, Local 2909 v. City of Albany*, Case No. UP-26-98 at 13-14, 18 PECBR 26, 38-39 (1999). Likewise, in the context of an ongoing internal union election, we have found a (1)(b) violation when a supervisor told an employee that one union candidate was “evil” and that he should tell another bargaining unit member to vote for the opponent). *Oregon AFSCME Council 75, Local #3493, v. State of Oregon, Department of Corrections, Santiam Correctional Institution*, Case No. UP-51-05 at 28, 22 PECBR 372, 399 (2008) (*Santiam*). Similarly, we found a (1)(b) violation when a city council member urged employees to decertify their exclusive representative. *American Federation of State, County and Municipal Employees, Council 75, Local #2043 v. City of Lebanon*, Case No. UP-14-11, 24 PECBR 996 (2012), *rev’d and rem’d on other grounds*, 265 Or App 288, 336 P3d 519 (2014), *rev’d and rem’d on other grounds*, 360 Or 809, 388 P3d 1028 (2017).

Here, the Association contends that three emails sent by the Superintendent interfered with the Association’s existence or administration. We first analyze whether, taken individually, each email constitutes an unfair labor practice. The first email, sent on November 18, 2016, summarized the status of the parties’ bargaining on three components (the compensation for classified staff, the timing of payment of the 2016 pay increase for near-retirees, and the Transportation Work Rules). The email described the District’s belief that the Transportation Work Rules were never ratified as part of the contract and should not be included in the contract. The email concluded with the following statement:

“In the past under prior OSEA leadership the District and OSEA maintained a collaborative relationship that resulted in contracts being negotiated in a timely manner as well as fair, consistent, and equitable treatment of all members. Classified employees are valued and respected by all of us and we are hopeful for a signed agreement in the coming days.”

The November 18 email accurately summarized the status of bargaining and accurately described the District’s belief about the status of the Transportation Work Rules. We conclude that such statements do not interfere with the existence or administration of the union as proscribed by section (1)(b). Although the email also acknowledged a collaborative relationship with past Association leadership, we do not find that such an acknowledgment runs afoul of ORS 243.672(1)(b) or is analogous to (1)(b) violations under this Board’s precedent.

The Association also contends that the Superintendent, in the November 18 email, inaccurately described the agreement to accelerate payment to the near-retirees as “contingent” on the Association’s agreement on the other articles. The Association characterizes

(Continued . . .)

relations (4) during a period of negotiations.” *Mid-Valley Bargaining Council/Hillcrest-MacLaren Education Association/OEA v. State of Oregon, Department of Administrative Services and State of Oregon, Department of Education*, Case No. UP-102-94 at 9, 16 PECBR 314, 322 (1996).

that phrase—“[i]mplementing this part of the agreement is contingent”—as a new, regressive proposal that constituted direct dealing and, as a result, interfered with the Association.

We disagree with the Association’s characterization of the phrase in the email. Simply put, the record does not establish that the District’s email was an attempt to bypass the Association and engage in bargaining with the Association-represented employees. Moreover, the record does not establish that any bargaining unit member interpreted the phrase “is contingent” as a new proposal. In fact, both parties ratified the stand-alone agreement related to the near-retirees (without the District changing the agreement’s terms in any way after the November 18 email), and the District paid the near-retirees in 2016, as agreed. Therefore, we do not conclude that the Superintendent’s use of the phrase “is contingent” rose to the level of impermissible direct dealing in violation of section (1)(b).

We also disagree with the Association’s assertion that the inaccurate description interfered with the Union’s existence or administration. We have previously concluded that insignificant and immaterial inaccuracies in employer communications will generally not, without more, violate section (1)(b). See *Oregon Public Employees Union v. Jefferson County*, Case No. UP-9-99 at 13, 18 PECBR 128, 140 (1999) (a technical inaccuracy, subsequently explained accurately in other communications, did not violate section (1)(b), even though the employer’s conduct “may have confused unit members,” but where there was no evidence of actual interference with the existence or administration of the labor organization “as an entity”).

We turn to the second email, dated November 29, 2016, which contained the subject line, “Agreement regarding 2017 retirees.” The bulk of the email described the agreement to pay near-retirees their 2016 compensation increase before the end of 2016, and provided instructions for those employees who would be retiring. It also reasserted the District’s position that the Transportation Work Rules were not part of the contract, citing, as one reason, ORS 332.075(3), which prohibits school boards from delegating to superintendents the authority to enter into collective bargaining agreements. The email noted that the remaining unresolved bargaining issue—the handling of the Transportation Work Rules—affected “approximately 15 classified employees.” The email closed with the statement, “The District has provided a proposal that includes a middle ground. If the Association has any other thoughts about how to resolve the disagreement, they should provide those to the District’s bargaining team.”

Like the November 18 email, a substantial portion of the November 29 email describes the proposal to accelerate payment of the compensation increase to near-retirees. Although the reference to the small size of the work group affected by the Transportation Work Rules can be viewed as implying that an important issue for a subset of the bargaining unit was obstructing the negotiations on the more important issue (compensation) for the majority of bargaining unit employees, it could also be viewed as merely recounting the status of the negotiations and the nature of the proposals. Moreover, by reporting on the parties’ tentative agreement that the District would pay near-retirees the negotiated pay increase for 2016 even though all issues were not yet resolved, the Superintendent implicitly acknowledged the Association’s success—obtaining an early payment of the negotiated 2016 compensation increase for some bargaining unit members. In any event, on this record, we do not conclude that this portion of the email interfered with the Association’s existence or administration.

We also disagree with the Association's assertion that this sentence in the email—"If the Association has any other thoughts about how to resolve the disagreement, they should provide those to the District's bargaining team"—interfered with the Association's existence or administration. In advancing that argument, the Association characterizes the phrase as "direct dealing." The objectionable sentence, however, asks the Association, not the employees, to provide any new ideas to the District's bargaining team. Under these circumstances, we do not find that the sentence constitutes bypassing the Association and directly dealing with the Association-represented employees. Consequently, we conclude that the Association has not established, based on this email, that the District violated section (1)(b).

We next address the November 30 email, which the Superintendent sent to all staff, with the subject line, "Clarification regarding letter from OSEA attorney." This email was sent in response to a letter that had been sent to all bargaining unit members from an attorney representing OSEA. The letter described the District's position that the Transportation Work Rules were not part of the contract as "frankly, absurd." It also stated the Association's opinion that the District was bargaining in bad faith.

In the District's November 30 email, the Superintendent reiterated and expanded on the District's position that the Transportation Work Rules were not (and, in the District's view, should not be) part of the contract. The email also stated:

"It is unfortunate that with current OSEA Chapter and field representative leadership that the Ashland School District finds itself with such dissension. This is a new and sad commentary on the bargaining process for our District. Former local OSEA Chapter leadership and many current classified employees who have worked here for many years have always found a way to resolve differences amicably and in the best interests of all involved. It is our hope that the current OSEA leadership will find a pathway to reach resolution as quickly as possible."

The email further stated that "under prior OSEA Chapter leadership," the parties maintained a collaborative relationship that resulted in "timely" contracts and "fair, consistent, and equitable treatment of all members." The email also twice described the District's November 17 proposal about the Transportation Work Rules as a "middle ground."

In reviewing the totality of the email, we first note that the email primarily consists of the District describing its bargaining position. The Association has not established that such a description interfered with its existence or administration or sufficiently demonstrated how the email did so. We also find it notable that the District did not send the email without prompting, but rather did so in response to the Association's email that characterized its own bargaining position (as well as characterizing the District's bargaining tactics as unlawful). This type of back-and-forth exchange is not uncommon in labor relations, and we conclude that the statements in this email do not exceed the bounds of permissible exchange in a way that interferes with the Association's existence or administration.

Some of the statements about the new and past Association leadership, however, do give us pause, particularly given that there was a well-known existing rift in the bargaining unit. The Association argues that the Superintendent's comments, which invite comparisons between the prior and new leadership, further fomented discord among bargaining unit members such that it interfered with the Association's existence or administration. The Association points out that, after the Superintendent's November emails, an unsuccessful petition to recall Burnett as president was circulated and Association officers were required to devote time and effort to responding to a flurry of communications from disgruntled bargaining unit members. The Association also points to evidence that some employees subjectively interpreted the Superintendent's emails as attempts to take advantage of the existing rift in the bargaining unit.

The Superintendent's choice to highlight divisions in the Association during bargaining, in light of the existing rift within the union and the ongoing disagreement about the historical status of the Transportation Work Rules, presents a closer question than the other statements and emails. After taking all of the circumstances into account, however, we do not conclude that these statements violate section (1)(b). To begin, the statements did not exhort employees to take action adverse to the Association or go so far as to say that the employees should take any action as a result of the rift, which we have previously found violative of (1)(b). See *Santiam*, UP-51-05 at 28, 22 PECBR at 399; *City of Lebanon*, UP-14-11 at 10-11, 24 PECBR 1005-06. Further, the statements in the email did not reveal information new to bargaining unit members—the rift within the bargaining unit was well-known in the unit because of pre-November emails among bargaining unit members themselves. Under all these circumstances, we find these statements did not actually interfere with the existence or administration of the Association within the meaning of ORS 243.672(1)(b).

We likewise conclude that the three emails, taken together, did not interfere with the Association's existence or administration in violation of section (1)(b). We assess the emails by considering all the circumstances during the period in which they were sent, including the fact that they were communications sent by email (as opposed to in-person remarks), the fact that bargaining unit members and the Association's attorney also distributed communications during this period (adding to an overall environment of spirited debate about the status and progress of bargaining), and the overall message conveyed by the Superintendent's emails, which included substantial factual information about bargaining, the parties' proposals, and the stand-alone agreement related to the near-retirees. Although there is some cumulative import to the emails,⁹ on this record, we conclude that the emails did not result in actual interference with the existence or administration of the Association. See *AFSCME Local 189*, UP-7-07 at 43, 22 PECBR at 794. We also conclude that the emails are not sufficiently analogous to employer communications that this Board has previously found proscribed by section (1)(b). Therefore, we dismiss this claim.

⁹We note, for example, that the dissent draws inferences from the content and context of the Superintendent's emails, and we agree that it is possible to draw those inferences. We believe, however, that our conclusion is more consistent with the overall circumstances in this case, and more in accord with the evidence in the record.

5. The District did not violate ORS 243.672(1)(c) when the Superintendent sent emails to District employees on November 18, 29, and 30, 2016, or when the District reduced Burnett's work hours.

We turn to the Association's allegation that the District violated ORS 243.672(1)(c) by (1) sending three previously discussed November emails (from the Superintendent) to employees, and (2) reducing Burnett's hours in November 2016 (as discussed above).

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." To prove a violation of subsection (1)(c), a complainant must prove protected activity, employer action, and a causal connection between the two. *Santiam*, UP-51-05 at 25, 22 PECBR at 396. We examine the reason for the employer's conduct and "will find a violation of this statutory provision only if the employer acted with a discriminatory motive, intending to undermine employees' exercise of PECBA-protected rights." *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-62-05 at 34, 22 PECBR 911, 944, *recons*, 23 PECBR 34 (2009), *aff'd*, 250 Or App 681, 282 P3d 2 (2012).

We turn first to the Superintendent's emails. The Association contends that the three emails were intended to discourage membership in the Association. The Association has not convincingly demonstrated, however, that the District acted with such an intent. Rather, on balance, as described above, the emails largely appeared motivated by the District's desire to provide its perspective on the ongoing status of the parties' negotiations (and to dispute some of the Association's perspective on those same negotiations, which had been communicated to the District's employees). Therefore, we conclude that the evidence in this case does not show that the District sent the emails to the employees for the purpose of discouraging membership in the Association.

The Association also alleges that the Superintendent's November 18, 2016, email—with its statement that the agreement on the accelerated payments for near-retirees "is contingent" on the Association's agreement to the other articles—constituted direct dealing with the bargaining unit members (and, presumably, thereby discouraged membership in the Association). For the reasons explained above with respect to the Association's other claims, the record does not support a conclusion that the Superintendent acted with any discriminatory motive in using the phrase "is contingent" in the November 18 email.

The Association also alleges that the Superintendent's emails, taken together, denigrated the Association leaders and field representative and constituted unlawful discrimination. The record does not establish, however, a motive to discriminate against Association employees for purposes of discouraging membership in the Association. Rather, as previously explained, the emails were part of bargaining-related advocacy, which *both* parties engaged in throughout fall 2016.

Finally, the Association alleges that the District's reduction in Burnett's work hours in November 2016 violated ORS 243.672(1)(c). As previously discussed, Manager Delgado credibly testified that she reduced Burnett's driving hours because a special needs student, transported by

driver McKellar, no longer needed that transportation in November 2016. Omitting that student from the special needs transportation schedule, without a shift in driving hours among the three special needs drivers, would have resulted in McKellar's work hours dipping below the minimum work hours for her shift. To avoid that result, Delgado adjusted the drivers' hours, and that adjustment included shifting portions of routes away from Burnett. The reduction in Burnett's hours was short-lived, and her hours increased within several weeks.

The Association did not dispute the reason explained by Delgado, or offer any credible evidence establishing that Delgado's explanation was not the real reason for the schedule change.¹⁰ Accordingly, we conclude that the Association failed to meet its burden to demonstrate that the District acted with an unlawful motive when Burnett's hours were reduced in November 2016.¹¹

6. The District did not refuse to bargain in good faith with the Association in violation of ORS 243.672(1)(e).

The Association contends that the District violated ORS 243.672(1)(e) by making (from the Association's perspective) an overly harsh proposal on September 12, 2016—to exclude the Transportation Work Rules from the collective bargaining agreement—too late in the bargaining process. The Association also alleges that the Superintendent's November 18, 2016, email violated (1)(e) because it contained a regressive proposal that was communicated directly to bargaining unit members. Finally, the Association alleges that all three of the Superintendent's November emails to employees constituted direct dealing with bargaining unit employees in violation of (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." ORS 243.672(1)(e). We consider a number of factors to determine whether the totality of a party's conduct demonstrates an unwillingness to reach agreement, including (1) whether dilatory tactics were used; (2) the contents of the proposals; (3) the behavior of the party's negotiator; (4) the nature and number of concessions made; (5) the failure to explain a bargaining position; and (6) the course of negotiations. *Medford School District #549C*, UP-77-11 at 12, 25 PECBR at 517 (citing *Dallas Police Employees Association v. City of Dallas*, Case No. UP-33-08, 23 PECBR 365, 378 (2009)). Proposals that are "predictably unacceptable" to the union may be evidence of bad faith bargaining if the proposals are "so outrageous that it can be concluded that the employer had no genuine intent to reach agreement." *International Union of Operating Engineers, Local 701 v. Wheeler County*, Case No. UP-010-15

¹⁰In a section (1)(c) claim and a "because of" section (1)(a) claim, a complainant may demonstrate that the employer's stated reason for the action was pretext. Further, in those cases in which an employer acted with both a lawful and an unlawful reason, we apply a mixed motive analysis, determining whether "the employer would not have taken the disputed action but for the unlawful motive." *Tri-County Metropolitan Transportation District of Oregon*, UP-42/50-12 at 29, 25 PECBR at 668 (quoting *Oregon School Employees Association v. Cove School District # 15*, Case No. UP-39-06 at 10, 22 PECBR 212, 221 (2007)). In this case, the record does not establish either pretext or a mixed motive.

¹¹To the extent that the Association alleges that the District violated ORS 243.672(1)(c) with respect to field representative Johnson, we also dismiss that claim. Johnson is an employee of the Association, not of the District.

at 19, 26 PECBR 687, 706, *nunc pro tunc*, 26 PECBR 753 (2016) (quoting *Oregon AFSCME Council 75, et al. v. State of Oregon, Executive Department*, Case No. UP-99-85 at 16, 9 PECBR 9085, 9100 (1986)).

We turn first to the Association's contention that the District's September 12, 2016, proposal was made too late in the bargaining process. The parties began bargaining in March 2016 using facilitated interest-based bargaining. They agreed that the 150-day bargaining period began on May 3, 2016 (and thus would conclude on September 30, 2016). They continued interest-based bargaining, meeting on multiple dates throughout the spring and summer of 2016 until they ceased facilitated, interest-based bargaining at the end of September 2016, ultimately going into mediation on November 17.

The District made the objected-to proposal on September 12. In that proposal, the District proposed that (1) employees have access to the rules online or by requesting a copy from the transportation supervisor, (2) the District, if it sought to change any of the "existing status quo on mandatory work rules," would notify the Association and bargain with the Association if the Association submitted a demand to bargain within 14 days, and (3) employees and the Association could suggest changes to the rules each spring.

The record indicates that as early as June 8, 2016, in a bargaining subcommittee meeting to discuss the Transportation Work Rules, the District took the position that the rules "not be included within the collective bargaining agreement but instead be published as 'department expectations.'" The District reiterated that view on August 11, 2016. The bargaining minutes from that August 11 session indicate that the District communicated that it believed that the Transportation Work Rules were not part of the collective bargaining agreement and "are standards only for the department." At the August 11 session, the parties vigorously disagreed about whether the rules were or were not in the 2015-18 Agreement. The session ended with both parties agreeing to consult their attorneys on the question. The Association informed its membership on August 16 that it believed the District was not bargaining in good faith and that it intended to file an unfair labor practice charge.

We do not conclude, on this record, that the District made its September 12 proposal so late in the bargaining process that it failed to bargain in good faith. The record shows that the parties' disagreement about whether the rules were or should be in the collective bargaining agreement developed over time, as the parties used the interest-based bargaining process. The District appears to have communicated its view that the rules should be independent from the collective bargaining agreement on at least June 8 and August 11. The District's September 12 proposal, therefore, was not the first time that the District articulated its view (even if less than perfectly formed) that it wanted to bargain an agreement to place the rules outside the contract. Although the District made the objected-to proposal near the end of the 150-day period, which expired on September 30, 2016, it is significant that the parties were using interest-based bargaining for the entire 150-day period, and had discussed their interests with respect to the Transportation Work Rules on multiple occasions earlier than September 12.

In addition, the content of the District's September 12, 2016, proposal was not so harsh that we can conclude that the District was bargaining in bad faith. It is true that the Association contended both that the Transportation Work Rules were part of the collective bargaining agreement and that the rules should remain in the agreement. The District, however, explained its position and why it believed that the rules should not be part of the agreement at that time. The District further informed the Association that it did not have plans to change those rules, but wanted to maintain flexibility and was willing to engage in expedited bargaining "before any change could be implemented." Nor did the District refuse to alter its position after September 12. The District subsequently proposed a standing Transportation Committee and, later, a process for employees to appeal alleged violations of the Transportation Work Rules. On this record, we cannot conclude that the District's September 12 proposal was so "outrageous" that it indicates that the District was attempting to avoid agreement. *See State of Oregon, Executive Department, UP-99-85* at 16, 9 PECBR at 9100.¹²

Next, we address the Association's argument that the District communicated a new proposal directly to bargaining unit members in the Superintendent's November 18, 2016, email. Under ORS 243.672(1)(e), an employer may not bypass the exclusive representative "to negotiate and seek changes in mandatory subjects directly with employees." *911 Professional Communications Employees Association, UP-62-00* at 20, 19 PECBR at 890.

Here, the Association contends that the District bypassed the Association when the Superintendent sent classified employees an email that communicated that the agreement to pay near-retirees the negotiated compensation increase in 2016 was "contingent" on the Association's agreement on the other open articles. As explained above, the District contends that the Superintendent's email contained a typographical error and the email was intended to say "the agreement is *not* contingent" on the Association's agreement to other open articles.

The Association has not established that the Superintendent intended this paragraph to change the tentative agreement that the Association and the District had already reached with respect to the near-retirees. The record also does not establish that Association members interpreted or reacted to this paragraph as a new proposal made directly to bargaining unit members. Moreover, by December 1, 2016, both the Association and the school board had ratified the tentative agreement regarding the near-retirees. Thus, to the extent that the Superintendent's email was unclear about the stand-alone nature of the near-retiree agreement, that lack of clarity was resolved by December 1, just 12 days after the Superintendent sent her email. Given these facts, we conclude that the District did not violate ORS 243.672(1)(e) when the Superintendent sent her November 18, 2016, email to bargaining unit members.

Finally, we address the Association's argument that the Superintendent's three November emails to employees constituted unlawful direct dealing. In dismissing the (1)(b) claim above, we

¹²Further, we note that the District's September 12 proposal was ultimately followed by a concession by the District that benefited the bargaining unit. Specifically, the District's school board agreed to pay the near-retirees in 2016 the agreed compensation increase, despite the parties' agreement in their ground rules that agreement on any single item was tentative and contingent upon final ratification of all items by the Association membership and the school board. This conduct by the District tends to undermine any conclusion that the District was attempting to avoid agreement.

explained why the District's actions did not amount to direct dealing. In dismissing this (1)(e) claim, we reiterate that the Superintendent did not invite employees to bypass the Association and communicate directly with the District. Further, the District participated in mediation after the November emails, negotiating with the Association's bargaining team. We conclude, therefore, that the record does not support a conclusion that the District negotiated directly with represented employees in violation of ORS 243.672(1)(e) when the Superintendent sent the November 18, 29, and 30, 2016, emails to bargaining unit employees.

ORDER

The complaint is dismissed.

DATED: May 3, 2018.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member

*Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

*Member Sung, Concurring in Part, Dissenting in Part:

I respectfully dissent from the majority's analysis and conclusions of law regarding ORS 243.672(1)(b), because I would find that the Superintendent's November 2016 emails to District employees unlawfully interfered with the administration of the Association.¹³ I agree with the majority that factually accurate communications by an employer about bargaining and labor relations are lawful, and that "insignificant and immaterial inaccuracies in employer communications will generally not, without more, violate section (1)(b)." It is also well-established that labor and management have wide latitude to criticize each other in the context of bargaining. In this case, however, the Superintendent's emails—which she sent to all bargaining unit employees—combined material factual inaccuracies with statements that criticized the Association Chapter's elected officers while expressly favoring the former officers who were actively opposing them. Read as a whole and in context, the Superintendent's emails unfairly undermined the current leaders. Unsurprisingly, shortly after the Superintendent sent these emails, some employees started a petition to recall the current Chapter president. Because the Superintendent did not expressly advise employees to change their elected Association leaders or refuse to deal with the current leaders, I agree with the majority that this case presents a "close

¹³I also dissent in part from the findings of fact because the majority declines to make various findings that I consider relevant to the question of whether the Superintendent's emails contained significant and material factual inaccuracies, including findings regarding the historical status of the Transportation Work Rules and the District's conduct during the 2016 re-opener negotiations. I otherwise concur with the findings of fact.

question.” Nonetheless, after considering the totality of circumstances, I conclude that the District superintendent’s emails crossed the line from lawful direct communications to unlawful interference. I explain my reasoning in more detail below.

The Superintendent’s November 2016 emails contained several statements that favored the Association Chapter’s former elected officers over the current leaders. For example, one email expressly stated that the former leaders were “collaborative” and “always” able to “resolve differences amicably and in the best interests of all involved,” and implied that the current leaders were obstructionist and self-interested. That negative implication was reinforced by its context, including another statement that attributed the “dissension” in the District to the “current OSEA Chapter and field representative leadership,” and described it as a “new and sad commentary on the bargaining process.” When read in their entirety, the emails suggest that the current Chapter leaders were personally and solely to blame for the lack of a contract settlement—not the District’s proposal to remove the Transportation Work Rules from the contract or the parties’ reasonable and good faith disagreement over that proposal. Further, the emails sent the message to District employees that their former elected leadership had done a better job of representing them than their current leadership.

Because the emails expressly favored one set of elected union leaders over another, I find that they differ in character from the criticism or disparaging statements that were deemed lawful in our prior cases. Instead, the emails are more like the statements deemed unlawful in *Oregon AFSCME Council 75, Local #3493, v. State of Oregon, Department of Corrections, Santiam Correctional Institution*, Case No. UP-51-05 at 28, 22 PECBR 372, 399 (2008) (*Santiam*) (supervisor told an employee that one union candidate was “evil” and that he should tell another bargaining unit member to vote for the opponent). Although the emails at issue in this case did not go so far as to expressly direct an employee to vote for a particular candidate, they did attempt to influence employees’ views of the relative merits of the Chapter’s elected leaders. As a result, I believe that the emails in this case warrant closer scrutiny. After considering all of the circumstances in this case, I find that several additional aspects of the emails, and the context in which they were sent, cause them to cross the line from lawful direct communications to unlawful interference with the Association.

First, the Superintendent was writing in her official capacity and using the District email system. She did not merely make an offhand or isolated remark to an individual. She was not at the bargaining table, or in the middle of a heated discussion with Association representatives. She was not speaking only to the Association leaders and trying to persuade them to change their bargaining position. Rather, she was speaking directly to *all* of the bargaining unit employees, and trying to persuade *them* that the Association should accept the District’s proposal regarding the Transportation Work Rules. Although that, in itself, is a permissible goal, the Superintendent went beyond criticizing the Association’s bargaining position to suggesting that the Association’s elected officers were the problem, and that the former officers could do better.

Second, although the statements at issue are best characterized as the Superintendent’s subjective opinions, the Superintendent presented those opinions as if they were objective statements of fact. So presented, and coming from the District’s highest-ranking administrator, those subjective assertions were more likely to be perceived by District employees as credible,

factual statements.¹⁴ Moreover, to the extent that the factual accuracy of those assertions can be objectively tested, the record establishes that they were *not* accurate. For example, two witnesses credibly testified that contracts were not always settled in a timely and collaborative manner under the prior Chapter leadership, contrary to the Superintendent's assertions.

Third, the statements regarding the Chapter leadership were coupled with material factual inaccuracies and omissions regarding the status of the Transportation Work Rules and the course of the 2016 re-opener bargaining. To start, the Superintendent's emails repeatedly asserted that the Transportation Work Rules were never part of the contract. However, the record contains substantial evidence showing that, for many years, the District engaged in objective conduct indicating agreement that those rules were an addendum to CBA, and as such, binding and grievable like any other provision of the CBA.¹⁵ That evidence includes: (1) the 1993-1999 CBA, which expressly referred to the Transportation Work Rules as an "addendum" in the table of contents; (2) the parties' 2011 memorandum of understanding, which extended the provisions of the 2010-2011 CBA through June 2012 and treated a modification to the Transportation Work Rules like all of the other contract modifications addressed therein; (3) unrebutted testimony and joint bargaining minutes establishing that in 2012, the parties bargained to divide the Transportation Work Rules into two parts, a Transportation Work Rules "Addendum to CBA" that would remain "part of [the] contract," and a "Pupil Transportation Handbook" that would be removed from the contract; (4) the District's admission that the parties' historically bargained over the Transportation Work Rules in successor contract bargaining; and (5) a series of "term of agreement" provisions that re-opened the contract so that the parties could engage in mid-term bargaining regarding those rules.¹⁶

¹⁴Due to the inherently unequal nature of the employment relationship, an employer's statements regarding elected union officers are likely to have an undue influence on employees, even when there is no subjective intent to interfere. However, employers are not objective, neutral assessors of union leaders; employers' opinions regarding union leaders are shaped by their own interests, which may, at times, conflict with those of the employees.

¹⁵"Objective conduct rather than subjective intent determines whether there was a 'meeting of the minds' and thus the formation of an agreement." *Lane Unified Bargaining Council v. Crow-Applegate-Lorane School District*, Case No. UP-28-97 at 9, 17 PECBR 328, 336 (1997) (citing *Redmond School Dist. v. Redmond Education Assn.*, Case No. C-5-78 at 6, 4 PECBR 2086, 2091 (1978), *aff'd*, 42 Or App 523, 600 P2d 943, *rev den*, 288 Or 173 (1979)). See also *International Association of Fire Fighters, Local No. 2285 v. Douglas County Fire District No. 2*, Case No. UP-40-88 at 12, 11 PECBR 806, 817 (1989) (although members rejected part of tentative agreement, because the union did not disclose that fact to employer, union was bound by objective indication that entire agreement was ratified).

¹⁶If the parties did not mutually agree that the Transportation Work Rules were part of the contract, it would not have been necessary to reopen the contract to engage in mid-term bargaining about them. Indeed, the District argued that the Transportation Work Rules should be removed from (or not added to) the contract so that it would have the flexibility to change them through the expedited mid-term bargaining process.

Additionally, un rebutted testimony and joint bargaining records establish that, for the first several months of the 2016 re-opener bargaining, the District continued to agree that the Transportation Work Rules were already part of the contract; the issue that the District raised for bargaining was whether some or all of those rules should “stay” in or be “removed” from the contract, not whether they should be “added” to the contract.¹⁷ The District did not inform the Association that it had concluded that those rules were never part of the contract until the parties’ August 11, 2016, bargaining session. The Superintendent’s emails, however, omit the facts that the District had previously agreed that the Transportation Work Rules were part of the contract, and that it had changed its position mid-course.

The Superintendent also asserted in one of the emails that the Transportation Work Rules “had never been ratified by a vote of the [Chapter] membership.” However, the record in this case establishes that the Chapter membership ratified those rules in 2012. The record also establishes that the Association had informed the District of that fact (among others) in a written statement that was provided to the District before the Superintendent sent the email at issue.

All of these factual inaccuracies and omissions were material and significant for several reasons (even assuming that the District’s reasons for concluding that the Transportation Work Rules were not legally part of the contract were correct¹⁸). The factually inaccurate statements directly contradicted, and thus unfairly undermined the credibility of, the current Chapter leaders. Additionally, although the District had been proposing to remove some or all of the Transportation Work Rules from the contract all along, the District’s shift to claiming that those rules were never part of the contract created a new point of disagreement and was extremely disruptive to bargaining. Yet, instead of taking at least some responsibility for causing that dissension and disruption, the Superintendent suggested that the Chapter leaders were solely to blame. Moreover, by claiming that the Transportation Work Rules were never part of the contract, the District changed the bargaining dynamic from one in which the District was proposing to take away vested

¹⁷For example, interest based bargaining notes (taken by the neutral facilitator) included the following statements: “Should [transportation] work rules *stay* in contract or not?” and “options[:] *maintain in CBA* with no changes.” (Emphases added.) Similarly, joint bargaining minutes included the following statements: “Brought up: should we even have transportation work rules in the CBA as an addendum? * * * This was the understanding from the last bargaining session as to why it was on the list to bargain: *It was felt by some that the reason it was an opener was to address having them at all in the CBA.* * * * Agreed to a framing questions [sic] [:] #1 Should work rules *stay in contract*?” (Emphases added.)

¹⁸Based on the record in this case, it appears that the District concluded that the Transportation Work Rules were not part of the contract primarily because it could not find evidence that those rules had ever been included in the school board ratification packets. In the District’s view, those omissions meant that the rules could not be part of the contract (regardless of the parties’ objective conduct in bargaining), because ORS 332.075(3) prohibits a school board from authorizing a superintendent or other designee to enter into a collective bargaining agreement. The issue of whether the District’s conclusion was correct is not squarely presented in this case, and it is not decided in this order. Likewise, this case does not present the issues of whether the District tentatively agreed to “an entire package” that included the Transportation Work Rules but failed “to present the entire package to the board for ratification,” and if so, whether such conduct violated ORS 243.672(1)(e). *Crow-Applegate-Lorane School District*, UP-28-97 at 9, 17 PECBR at 336.

contractual rights, to one in which the District was merely refusing to “add” new rights. The parties’ bargaining communications make clear that *both* parties believed the difference between the District proposing to take away vested rights and declining to add new rights was significant and would affect how District employees and others assessed the reasonableness of the parties’ respective positions.

Fourth, although the next Chapter officer election was not yet imminent, there was a political contest occurring between the current and former elected leaders.¹⁹ That active political contest was, in many ways, akin to a pending union election. And, as this case demonstrates, a petition to recall elected officers could be initiated at any time. Further, there is no dispute that the Superintendent was well aware of the Chapter’s internal political contest at the time that she sent the emails at issue. The Superintendent’s emails improperly interfered in that political contest by expressly favoring the former leaders while unfairly undermining the current leaders.

Fifth, I believe there is sufficient evidence that the Superintendent’s emails “resulted in some actual interference” with the administration of the Association. Witnesses testified credibly that each email caused an unusually large number of employees to contact the Chapter leaders to question them or express dissatisfaction, often quoting or reflecting statements made by the Superintendent. Further, some employees initiated or supported a petition to recall the current Chapter leaders shortly after the Superintendent sent the emails at issue. The petition contended that the Chapter president should be recalled because she was “pushing her own agenda” (which was one of the inferences that could be drawn from the Superintendent’s emails). This evidence is sufficient to establish that the Superintendent’s emails “seriously undermined the [Association’s] ability to perform its duties as exclusive representative,” and “interfered with a core [Association] activity: the election of its officers.” *Santiam*, UP-51-05 at 28, 22 PECBR at 399. Even though there was no election immediately pending at that time, the recall petition threatened to unseat a democratically elected Chapter officer.

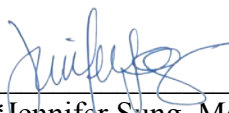
Additionally, the Superintendent’s statements “undermine[d] * * * the [Association’s] independence or perceived independence from the employer.” *Id.*, UP-51-05 at 29, 22 PECBR at 400. In this case, a bargaining unit employee credibly testified that she believed the Superintendent’s emails contained misleading statements about the current Chapter leaders, that they sparked or increased some employees’ dissatisfaction with the current Chapter leaders, and that those emails prompted them to initiate the recall petition. Even though the recall petition was not successful, the Chapter leaders presumably will be up for reelection soon, and there remains a real danger that employees will “be less willing to trust the [Association] to protect their interests against the employer” because they believe that the District has influenced, or will influence in the near future, employees’ choice of elected union officers. *Id.* “Maximum equality cannot be achieved when an employer interferes with union members’ ability to freely select their union

¹⁹During the relevant time period, the former Chapter leaders were actively opposing the current leaders. Although the former leaders did not run for re-election to their officer positions in May 2016, they remained members of the Association bargaining team during the 2016 re-opener negotiations, until they were removed by a vote of the Chapter executive board in June. As the negotiations continued, the former leaders publicly opposed the bargaining position of the current leadership and attempted to influence the course of bargaining.

officers.” *Id.*; *see also* ORS 243.656(5) (public employees are entitled to representation by a labor union “of their own choice”).

Finally, I note that the Superintendent’s statements regarding the Chapter leaders, in the context of direct communications to bargaining unit employees, served no legitimate purpose. The Superintendent could have aggressively advocated for the District’s bargaining position, and even criticized the Association’s position, without expressly favoring the Chapter’s former leaders or making factually inaccurate statements that further undermined the current leaders. While I agree that there are substantial policy reasons to give both parties wide latitude in their bargaining communications, I also believe that it is reasonable to require high-ranking administrators to exercise more care when directly communicating with large numbers of bargaining unit employees, because of the great potential for undue interference. Thus, although an employer’s criticisms of union leaders and factually inaccurate statements do not violate PECBA *per se*, I believe that the need to protect employees’ ability to freely select their officers justifies drawing a stricter line against such statements than that drawn by the majority. As discussed above, PECBA’s policies are better served when employees select their union leaders free from employer interference, or even the perception of employer interference.

For all of these reasons, I respectfully dissent from the majority’s conclusion, analysis, and order regarding ORS 243.672(1)(b). I concur with the conclusions of law and order with respect to the other claims.



*Jennifer Sung, Member

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-003-17

(REPRESENTATION)

OREGON AFSCME COUNCIL 75,

Petitioner,

v.

STATE OF OREGON, OREGON JUDICIAL
DEPARTMENT – YAMHILL COUNTY,

Respondent.

RULING ON MOTION TO STAY

On March 14, 2018, this Board issued an Order that certified Oregon AFSCME Council 75 (AFSCME) as the exclusive representative of a bargaining unit comprised of “all unelected employees in the Twenty-Fifth Judicial District, Yamhill County Circuit Court, excluding employees defined as managerial, supervisory, or confidential by statute.” On March 28, 2018, the Board received a motion to stay that Order from Respondent, State of Oregon, Oregon Judicial Department—Yamhill County (Department). On April 11, 2018, the Board received AFSCME’s opposition to the Department’s motion. On April 30, 2018, the Board received the Department’s petition for judicial review. For the following reasons, we deny the Department’s motion to stay.

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

“(a) The filing of the petition shall not stay enforcement of the agency order, but the agency may do so upon a showing of:

“(A) Irreparable injury to the petitioner; and

“(B) A colorable claim of error in the order.

“(b) When a petitioner makes the showing required by paragraph (a) of this subsection, the agency shall grant the stay unless the agency determines that substantial public harm will result if the order is stayed. If the agency denies the

stay, the denial shall be in writing and shall specifically state the substantial public harm that would result from the granting of the stay.”¹

We begin with the Department’s asserted “colorable claim of error” in our Order. ORS 183.482(3)(a). A colorable claim of error is one “that is substantial and nonfrivolous, or seemingly valid, genuine, or plausible.” *Bergerson v. Salem-Keizer School District*, 185 Or App 649, 660, 60 P3d 1126 (2003). The standard to determine whether a claim of error is colorable is not high. *Portland Fire Fighters’ Association, Local 43, IAFF v. City Of Portland*, Case No. UP-14-07 at 2, 23 PECBR 704, 705 (2010) (Ruling on Motion to Stay). An argument is sufficient to establish such a claim unless it is “frivolous or clearly without any support in the law.” *Id.* (quoting *Chemeketa Community College Education Association v. Chemeketa Community College and Chemeketa Community College Classified Employees Association*, Case No. UC-9-99 at 2, 18 PECBR 718, 719 (2000) (Ruling on Motion to Stay)).

To assess the Department’s claim of error, we review our Order and the legal standards under which it was issued. The legislature has defined “appropriate bargaining unit” as “the unit designated by the Employment Relations Board * * * to be appropriate for bargaining.” ORS 243.650(1). When this Board receives a petition involving a question of representation, we are to “designate the appropriate bargaining unit, and in making [our] 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.” ORS 243.682(1)(a). We “may determine a unit to be the appropriate unit in a particular case even though some other unit might also be appropriate.” *Id.*

Here, there is no dispute that this Board designated the petitioned-for unit as “appropriate for bargaining” (ORS 243.650(1)), and that we did so after considering the statutory factors set forth in ORS 243.682(1)(a). Consequently, the unit is an “appropriate bargaining unit” within the meaning of ORS 243.650(1). Under such circumstances, the legislature has directed this agency to “certify the labor organization as the exclusive representative” of the petitioned-for unit. ORS 243.682(2).²

In its motion to stay our Order, the Department asserts that we “improperly applied [the] statutory factors” in ORS 243.682(1)(a). *How* this Board applies those statutory factors, however, is a discretionary function of this Board.

“Under ORS 243.682(1), the power to determine whether a group of employees is appropriate for a bargaining unit is vested in ERB, and the statute presumes ERB to have expertise. So long as the record taken as a whole, shows that the Board has applied the statutory criteria in making its determination and has supported it with

¹Because, as set forth below, we conclude that the Department has not made the showing required by ORS 183.482(3)(a), we do not decide whether substantial public harm would result by granting the stay.

²Because this petition was submitted under the card check provisions of ORS 243.682(2), we are directed to certify the unit once we deem it appropriate for bargaining, rather than conducting an election (unless a petition for election has been filed).

adequate findings, we will defer to their expertise. The weight to be given the various criteria in a given case is for ERB, not this court.”

U of O Chapter, AFT v. U of O, 92 Or App 614, 617-18, 759 P2d 1112 (1988) (quoting *OSEA v. Deschutes County*, 40 Or App 371, 595 P2d 501 (1979)). See also *OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251 (2001) (“When ERB considers the criteria listed in ORS 243.682(1), it has discretion to decide how much weight to give to each factor in making an appropriate unit determination.”); *Welches School Dist. v. Welches Education Assn.*, 116 Or App 564, 569, 842 P2d 437 (1992) (rejecting assertion that this Board did not properly consider the statutory factors by explaining that the Board “did consider the criteria listed in ORS 243.682(1), and it may determine how much weight to give each factor”).

In short, this Board has the discretion to determine how it applies the statutory factors (as well as other administratively-created preferences, such as our preference for the largest possible appropriate unit). Where, as here, we have “considered and assigned weight to [the statutory] criteria,” we have the authority to do so, “free of judicial intervention.” *U of O*, 92 Or App at 620.

Nonetheless, we also recognize that the standard for determining whether a movant has demonstrated a colorable claim of error is not high. We do not need to decide whether the Department met that standard in this case, because we resolve the motion based on the second question under ORS 183.482(3)—whether the motion establishes that the Department will suffer irreparable injury if the Order is not stayed pending appeal.

The term “irreparable injury” is not defined in statute, but the court has held that an injury is irreparable if the party cannot receive reasonable or complete redress in a court of law. *Arlington Sch. Dist. No. 3 v. Arlington Educ. Ass’n*, 184 Or App 97, 101-02, 55 P3d 546 (2002), citing *Winslow v. Fleischner, et al*, 110 Or 554, 563, 223 P2d 922 (1924); accord *Bergerson*, 185 Or App at 660. The determination of whether “an injury is irreparable depends not upon the magnitude of the injury, but upon the completeness of the remedy in law.” *Arlington Educ. Ass’n*, 184 Or App at 102. Moreover, a “showing” of irreparable injury requires “proof” in the form of “evidence that satisfies a burden of production or persuasion placed upon the proponent of a fact”; “[p]roof must not leave the existence of the fact at issue to speculation.” *Id.* “Therefore, as pertinent here, a ‘showing’ must at least demonstrate that irreparable injury *probably* would result if a stay is denied.” *Id.* (emphasis in original); see also *Portland Fire Fighters’ Association, Local 43, IAFF v. City of Portland*, Case No. UP-13-10 at 2, 24 PECBR 809, 810 (2012) (Ruling on Motion to Stay) (“[S]peculative claims or allegations of possible harm are not sufficient to make a showing of irreparable injury.” (citing *Central Education Association and Vilches v. Central School District 13J*, Case No. UP-74-95 at 3, 17 PECBR 250, 252 (1997) (Ruling on Petition for Enforcement and Motion to Stay))).

Here, the Department asserts that it will be irreparably harmed by being compelled to collectively bargain with the designated appropriate unit. We have previously concluded that a party is *not* irreparably harmed by bargaining in good faith with a certified exclusive representative. See, e.g., *City of Portland*, UP-14-07 at 5, 23 PECBR at 708; *Chemeketa Community College*, UC-9-99 at 2, 18 PECBR at 719; *International Association of Firefighters, Local 3340 v. State of Oregon*, Case No. UP-131-92 at 1-2, 14 PECBR 441-42 (1993) (Ruling on Motion to Stay); *Tualatin Valley Bargaining Council v. Tigard School District*, Case No.

UP-42-89 at 2, 11 PECBR 777, 778 (1989) (Ruling on Motion to Stay). Although those cases involved scenarios where an exclusive representative was already established, we are not persuaded by the Department's petition that our conclusion should be different in a case (such as this) of initial representation. We reach that conclusion for several reasons.

First, to grant a stay in this case, we would have to find, apparently for the first time since the enactment of the Public Employee Collective Bargaining Act (PECBA) in 1973, that a public employer would probably be irreparably harmed merely by the act of collectively bargaining with a certified representative of its employees. We do not believe that such a conclusion would be consistent with the statutory scheme of PECBA, which is premised on legislative findings that, among other things, "[r]ecognition by public employers of the right of public employees to organize and full acceptance of the principle and procedure of collective negotiation between public employers and public employee organizations can alleviate various forms of strife and unrest." ORS 243.656(2). As this Board explained in *Tigard School District*, "having a duty to bargain, in and of itself," does not constitute "irreparable injury." UP-42-89 at 1, 11 PECBR at 777.

Second, the Department has not identified, and we have not located, any case in which this Board has stayed a representation certification order. The absence of any precedent for issuing a stay in a representation certification case is, in our view, significant. Moreover, the granting of a stay in a representation case would be at odds with the legislature's desire for the expeditious resolution of representation matters. Specifically, the legislature has directed this Board to "develop guidelines and procedures for the designation by employees of a bargaining representative" that must include "[p]rocedures for *expedited resolution of any dispute about the scope of the appropriate bargaining unit*." ORS 243.682(2)(b)(E) (emphasis added). If we were to agree with the Department's position that a public employer is irreparably harmed by collectively bargaining when the employer contends that the certified bargaining unit is inappropriate, then disputed representation matters would almost automatically qualify for a stay pending judicial appeal. Ultimately, representation matters would be delayed for the time required by an appeal, leaving public employees, their certified exclusive representative, and public employers with "unresolved disputes in the public service," which the legislature has declared "are injurious to the public, the governmental agencies, and public employees." ORS 243.656(2). We do not believe that such an approach is consistent with the directive that this Board provide for "expedited resolution of any dispute about the scope of the appropriate bargaining unit." ORS 243.682(2)(b)(E).

Finally, we address the particular harms that the Department contends will be caused by collective bargaining during the appeal process. Specifically, the Department argues that the pending appeal might impede bargaining or void any agreement that is reached. Similarly, the Department contends that bargaining might produce an agreement that is inconsistent with its uniform statewide administration. We, however, find those contentions are "too speculative to amount to irreparable harm." *Tigard School District*, UP-42-89 at 2, 11 PECBR at 778.

The Department also asserts that it will be irreparably harmed because it does not currently have "any infrastructure or in-house expertise in place for collective bargaining." This assertion assumes that the mere cost or administrative effort of obtaining assistance to undertake collective

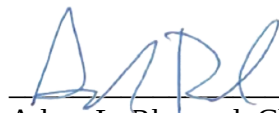
bargaining with the certified unit constitutes irreparable harm.³ The Department has not made the requisite showing that any actions it might choose to take to collectively bargain with the certified unit will irreparably injure the Department. In PECBA, the legislature imposed on public employers and labor organizations a duty to collectively bargain, and “[a]ny time and expense involved in having Respondent’s agents participate in that mandated process do not amount to irreparable injury.” *Id.* at 1, 11 PECBR at 777.

In sum, we conclude that the Department has not made the necessary showing to warrant a stay of our Order. Consequently, we deny the Department’s motion.

RULING

The Department’s motion to stay our order pending judicial review is denied.

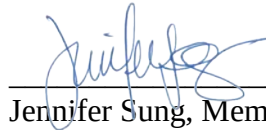
DATED: May 4, 2018.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Ruling may be appealed pursuant to ORS 183.482(3)(d).

³As noted in our Order, ORS 243.696(2) contemplates collective bargaining by the Department’s existing administrators. Specifically, the statute designates the “Chief Justice of the Supreme Court” as the Department’s representative “in collective bargaining negotiations with the certified or recognized exclusive representatives of all appropriate bargaining units of officers and employees of this state who are state officers or employees.” *Id.* The statute further allows the Chief Justice to “delegate such collective bargaining responsibility to the state court administrator.” *Id.*

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-005-18

(UNIT CLARIFICATION)

DOUGLAS EDUCATION SERVICE	)	
DISTRICT ASSOCIATION/OREGON	)	
EDUCATION ASSOCIATION,	)	
	)	
Petitioner,	)	
	)	ORDER AMENDING
v.	)	RECOGNITION OF
	)	EXCLUSIVE BARGAINING
DOUGLAS EDUCATION SERVICE	)	REPRESENTATIVE
DISTRICT,	)	
	)	
Respondent.	)	
	)	

On April 23, 2018, Douglas Education Service District Association (DESDA) filed a petition under OAR 115-025-0008 to amend the recognition of DESDA as the exclusive representative of employees at the Douglas Education Service District (District). Specifically, DESDA sought to amend the recognition to reflect its affiliation with Oregon Education Association (OEA).¹ Barbara Diamond, on behalf of DESDA, submitted information establishing the following:

On March 21, 2018, DESDA leadership officially notified all bargaining unit members that a formal vote would be taken as to whether DESDA should affiliate with OEA. DESDA provided a written information packet about the affiliation and about OEA to all bargaining unit members. A question and answer meeting was held on April 2, 2018, to allow bargaining unit members to ask questions and to deliberate.

Ballots were sent out by email on April 2, 2018. The email notified all bargaining unit members that their paper ballots were due by 5 p.m. on April 9. Bargaining unit members were permitted to turn in their ballots in person or by mail. All members were notified that the ballots needed to be returned

¹DESDA's recognition has previously been amended, including most recently in *Douglas Education Service District Association v. Douglas Education Service District and Oregon School Employees Association*, Case No. UC-009-17, 27 PECBR 89 (2017).

in an envelope with a signature and name on the back. A reminder was emailed on April 6, 2018.

The official ballots contained a single question: "Shall DESDA affiliate with the Oregon Education Association?" with boxes for "yes" and "no." Only envelopes with proper signatures were counted at each polling station. Over 90 percent of ballots cast were in favor of the affiliation with OEA. Two ballots were not counted because the outside envelopes were not signed.

There were no objections to this petition.

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

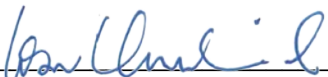
ORDER

The District's recognition of DESDA is amended to reflect DESDA's affiliation with OEA.

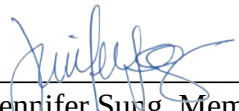
DATED: May 14, 2018.



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-004-18

(REPRESENTATION)

TEAMSTERS LOCAL 206,

Petitioner,

v.

CURRY COUNTY,

Respondent.

ORDER CERTIFYING
EXCLUSIVE REPRESENTATIVE

On April 26, 2018, Teamsters Local 206 filed a petition under ORS 243.682(2)(a) to certify (without an election) a new bargaining unit of employees of Curry County. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards requesting that Teamsters Local 206 represent the designated bargaining unit.

Objections to the proposed bargaining unit or a request for an election were due within 14 days of the posting of a notice of the petition (*i.e.*, by May 17, 2018). No objections were filed. Accordingly, it is certified that:

TEAMSTERS LOCAL 206

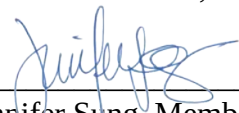
is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

“Curry County Road Department, including all employees in the following classifications: Engineers; Mechanics; Road Crew (including Herbicide Applicators); and Secretaries.”

DATED: May 18, 2018.


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-011-17

(UNFAIR LABOR PRACTICE)

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

On March 8, 2018, this Board heard oral argument on Complainant's objections and Respondent's cross-objections to a December 27, 2017, recommended order issued by Administrative Law Judge (ALJ) Julie D. Reading, after an August 7, 2017, hearing in Eugene, Oregon.¹ The record closed on September 15, 2017, following receipt of the parties' post-hearing briefs.

Rhonda J. Fenrich, Attorney at Law, Fenrich & Gallagher, P.C., Eugene, Oregon, represented Complainant.

Lisa Vickery, Attorney at Law, Fisher & Phillips, Portland, Oregon, represented Respondent.

On April 11, 2017, the Eugene Police Employees' Association (Association) filed a complaint alleging that the City of Eugene (City) had violated ORS 243.672(1)(e). Specifically, the Association alleged that the City unilaterally changed the schedules of Police Department Evidence Specialists, and then refused to bargain over that change, even though scheduling is a mandatory subject of bargaining.² The City filed a timely answer asserting affirmative defenses,

¹The Board also received and considered an *amicus curiae* brief submitted by the Oregon Public Employer Labor Relations Association, in support of the Respondent.

²The Association also initially asserted a similar claim under ORS 243.672(1)(a), but subsequently withdrew that claim.

including waiver.³ At hearing, the City conceded that it unilaterally changed the schedules of the Evidence Specialists, as alleged, and that the change concerned a mandatory subject of bargaining. The City averred, however, that it did not violate ORS 243.672(1)(e) because the Association waived its right to bargain over that change.

The issue is whether the Association waived its right to bargain over the City's unilateral change to the schedules of the Evidence Specialists? If so, then the City did not violate ORS 243.672(1)(e); if not, then the City did violate ORS 243.672(1)(e).

We conclude that the Association did not waive its right to bargain over the City's unilateral change, which admittedly concerned a mandatory subject of bargaining. Consequently, we conclude that the City violated ORS 243.672(1)(e).

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties and Collective Bargaining Agreement

1. The Association is a labor organization within the meaning of ORS 243.650(13). It is the exclusive representative of certain employees working in the City's Police Department.

2. The City is a public employer within the meaning of ORS 243.650(20). The City Police Department has several divisions including Traffic, Patrol, Evidence, and Communications.

3. The Association and the City have been parties to numerous successive collective bargaining agreements, including a July 2002 through June 2005 Agreement (2002-2005 Agreement), a July 2005 through June 2008 Agreement (2005-2008 Agreement), a July 2008 through June 2011 Agreement (2008-2011 Agreement), a July 2013 through June 2016 Agreement (2013-2016 Agreement), and a July 2016 through June 2019 (2016-2019 Agreement).

4. The 2016-2019 Agreement contains the following provisions that are relevant to this dispute:

Article 4 – Management Rights

“The City shall retain the exclusive right to exercise the customary functions of management, including, but not limited to, directing the activities of the Department; determining the levels of service and methods of operation, including

³The City initially asserted an exhaustion affirmative defense, claiming that because the dispute in this case concerns collective bargaining agreement language, it should be addressed first through grievance and arbitration. However, the City withdrew this defense at hearing. Therefore, we do not consider this issue or the related issue of whether the Association properly pleaded the claim under ORS 243.672(1)(e) instead of ORS 243.672(1)(g).

subcontracting and the introduction of new equipment; the right to hire, lay off, transfer, and promote; to discipline or discharge for cause; to determine work schedules and assign work; and any other such rights not specifically referred to in this agreement. Management rights, except where abridged by specific provisions of this agreement, or State Public Employee Collective Bargaining Law, are not subject to the grievance procedure.”

Article 5.1 – Police Service Effectiveness

“The delivery of essential municipal services in the most efficient and effective manner is of paramount importance and interest to both the City and the Association. Maximized service to the community is recognized to be a mutual desire of both parties within their respective roles and responsibilities. Work procedures, schedules, and assignments for improving services shall be established and revised from time to time, in accordance with management rights under this agreement, so long as no other right guaranteed under this agreement or the continuing duty to bargain under Oregon law is violated. The parties agree to confer at mutually convenient times to discuss means of increasing departmental effectiveness.”

Article 11.10 –Seniority

“Employees will be allowed to indicate shift assignment preferences in an annual shift bid which, absent extraordinary circumstances or mutual agreement of the City and the Association, shall take place by November of each calendar year. Those preferences will be reviewed in seniority order except when the Department determines that special skills, as defined in Article 17.1.e, require otherwise. The Department will consider indications of preference along with seniority and the efficiency and effectiveness of police services in making final assignments. Employees may be required to rotate between such sign-ups.”

Article 17.14 –Hours, Overtime

“Notice of shift changes will normally be given fifteen (15) days in advance. The City may decide in any situation that it deems an emergency to reschedule shift changes with less than fifteen (15) days of notice. The City may also determine the need for a directed patrol response to a specific crime problem which would require a temporary shift change of up to five (5) days in duration and no greater than four (4) hours of difference in normal starting time. Twenty-four (24) hours of notice will be given in the case of short-term directed patrol responses. Any shift change without the required notice as provided herein shall be subject to a penalty of four (4) hours pay at the overtime rate (one-and-one-half [1.5] times the regular rate) in addition to regular pay for all hours worked for the first work day.

“If an employee is ill or injured either on or off the job and is being placed on a light duty job which necessitates a change in the employee’s schedule or if an employee is involved in a traumatic incident and is being assigned to a different schedule because of the incident, the City is not required to give the fifteen (15) days notice.

“Except for directed patrol responses as outlined above, the City will give fifteen (15) days notice to employees for changing their schedules within a shift on a short-term or long-term basis, including hours changes and changes in days off. If the City fails to give fifteen (15) days notice, the employee will receive a two (2) hour overtime penalty. However, an employee may voluntarily waive the notice requirement.

“The fifteen (15)-day notice requirement does not apply to employees working on a case or investigative assignment in which the working hours must be changed, in the supervisor’s judgment, to successfully complete the assignment.”

5. The Article 17.14 language above has existed and remained consistent in the parties’ agreements since the 2002-2005 Agreement or even earlier.

Prior Schedule Changes and Grievances

6. The City has occasionally made shift changes in the Patrol and Traffic Enforcement Divisions to an individual employee’s schedule on a temporary basis. When it has done so with less than 15 days’ notice, it has paid the four hour overtime penalty rate.

7. The City’s Communication Center provides the City’s Emergency 911 services. The Communications Center is chronically understaffed and its employees sometimes have their shifts and schedules changed by the City; this is referred to as “shift balancing.” Shift balancing can occur between one and four times per year depending on the City’s needs.

8. The City has maintained that Communication Center shift balancing is done in accordance with Article 17.14 and has paid the overtime penalty when appropriate. Typically, the practice between the parties has been as follows: (1) with respect to probationary employees and schedule changes that are temporary, the City has been able to unilaterally change schedules with no input from the Association; (2) the City seeks and often obtains voluntary schedule changes from employees when shift balancing occurs; and (3) in cases where shift balancing occurred and where the employees were not probationary and did not voluntarily move, the employer, the employee, and union representatives have met and discussed the change.⁴

⁴The City disputes these facts. The Association presented the testimony of AA, a former union president and Communications Specialist. AA testified that the prior examples of schedule changes relied on by the City to show unilateral action were voluntary, temporary, or involved probationary employees, and that other types of schedule changes were discussed by the parties. Although the City disputes that those conversations constituted bargaining, the City did not provide any direct rebuttal. The City presented the testimony of CA, the Communications Center Manager. She testified that she adjusted schedules and was not aware of any such discussions with the Union, but allowed that they could have occurred without her involvement.

9. In 2008, the City did not poll a Communications Center employee for her shift preferences before drafting another employee to the late night shift to cover shortages. The employee grieved, and the City denied the grievance at Step 1. Thereafter, the parties settled the grievance.

10. In 2013, the City performed a shift balance in the Communications Center, changing the schedules of some employees in some ways, but keeping those employees on the same schedule framework comprised of four ten-hour shifts per week (referred to as “4/10s”). The Association grieved the change as a violation of the contract, with the City asserting that the Association had waived the right to grieve pursuant to Article 17.14. After taking it to Step 4, the grievance became part of the bargaining process and was withdrawn by the Association.

Bargaining of 2013-2016 Agreement

11. When the parties commenced bargaining in 2013 for the 2013-2016 Agreement, the City sought to change Article 17.14’s language to what it perceived to best reflect its interpretation and current practice. Specifically, on June 13, 2013, the City proposed to change the language in the first paragraph to read:

“It is recognized that the City may, from time to time, find that changes in the individual or operational work schedules are in the best interest of governmental operations. It is agreed that the City may make such changes, provided that except in the case of emergency, the City shall notify the Association and any affected employee fifteen (15) calendar days prior to implementation of such changes. Temporary work schedule changes for the purpose of meeting statutory requirements shall not be subject to the provisions of this Section. A change of schedule that occurs when an employee is placed on or removed from Administrative Leave shall not be subject to the 15 day rule as described in this section. Emergency shall be defined as any unforeseeable circumstances or situation requiring the presence of law enforcement personnel for the protection of life or property or to conduct City business.” (Underlining omitted.)

12. The parties discussed Article 17.14 during the June 13, 2016, bargaining session. The City’s bargaining team members asserted that their proposal better reflected what constituted past and current practice. The Association’s bargaining team members disagreed. Later that day, the Association provided a proposal that it contended best reflected the parties’ past and current practices. Specifically, it said:

“Once an employee bids his or her shift, the City will not modify those shifts except in a situation that the City deems an emergency to reschedule shift changes. The City may also determine the need for a directed patrol response to a specific crime problem which would require a temporary shift change of up to five (5) days in duration and no greater than four (4) hours of difference in normal starting time. Twenty-four (24) hours of notice will be given in the case of short-term directed patrol responses. Any shift change without the required notice as provided herein shall be subject to a penalty of four (4) hours pay at the overtime rate

(one-and-one-half [1.5] times the regular rate) in addition to regular pay for all hours worked for the first work day.” (Mark-up omitted.)

13. The parties continued to negotiate throughout the rest of 2013 and into summer 2014. Article 17.14 remained a contested issue among other provisions. In January of 2014, the City provided the Association with another proposal that stated:

“It is recognized that the City may, from time to time, find that changes in individual or operational work schedules are in the best interest of governmental operations. It is agreed that the City may make such changes, provided that except in the case of emergency, the City shall notify the Association and any affected employee fifteen (15) calendar days prior to implementation of such changes. Emergency shall be defined as any unforeseeable circumstances or situation requiring the presence of law enforcement personnel for the protection of life or property or to conduct City business. The City may also determine the need for a directed patrol response to a specific crime problem which would require a temporary shift change of up to five (5) days in duration and no greater than four (4) hours of difference in normal starting time. Twenty-four (24) hours of notice will be given in the case of short-term directed patrol responses. Any shift change without the required notice as provided herein shall be subject to a penalty of four (4) hours pay at the overtime rate (one-and-one-half [1.5] times the regular rate) in addition to regular pay for all hours worked for the first work day.” (Mark-up omitted.)

14. In summer 2014, the parties began discussing the possibility of the Association withdrawing the 2013 grievance, and keeping the Article 17.14 language the same.

15. The parties were not able to reach agreement on multiple provisions, even after mediation. They submitted their respective Last Best Offers (LBOs) to one another in mid-October 2014. After that, they reached an agreement that the Association would withdraw the grievance in exchange for receiving paid lunch breaks, and Article 17.14’s language would remain the same. Association Counsel wrote “I suggest we leave as current contract language and we agree to discuss when a shift change is warranted in a labor management setting.” Counsel for the City stated that the City needed “labor peace” and that “[i]n acknowledgment of the Association’s withdrawal of the Communications Center grievance, the City’s proposal on Article 17.14 is current contract language.”

Evidence Specialists

16. Evidence Specialists work in the Evidence Control Unit (EC Unit). The EC Unit has five employees who manage all of the evidence and property seized by the City Police Department. It is open five days a week from 8:00 a.m. to 4:30 p.m. Evidence Specialists are represented by the Association.

17. Job postings for Evidence Specialists state that work hours “are usually eight-hour (five days a week) or ten-hour (four days a week) shifts, day or modified swing and may include some weekend hours and call outs.”

18. Before 2011, all Evidence Specialists worked five days a week, eight hours a day (5/8s). In June 2011, two employees (MB and MR) requested that their schedules be changed to four days a week, ten hours a day (4/10s). The request was granted for a one-year evaluation period, but during that time MB and MR were sometimes required to work 5/8s to provide coverage when another Evidence Specialist was on leave. The City consulted with the Association regarding these changes, but the record does not contain any memorandum of understanding or other written agreement documenting their discussions.

19. The 4/10 schedule was extended beyond the one year evaluation period for MB and MR. Further, while newly hired EC Unit employees were started on a 5/8 schedule during their probationary period, they were moved to a 4/10 schedule once permanent. MB remained on a 4/10 schedule until he retired.

20. On December 13, 2016, Sergeant Caryn Barab notified all Evidence Specialists that the City intended to change their 4/10 schedules to 5/8s. The Association sent a letter to Lieutenant David Natt, stating that it reserved the right to bargain any changes to the existing 4/10 schedules for Evidence Specialists.

21. On February 22, 2017, the Association provided the City with a formal demand to bargain the Evidence Specialists’ schedule change. The City did not agree to bargain, but stated that it was willing to enter into informal discussions regarding how the change would be implemented. The City temporarily rescinded the prior announcement to Evidence Specialists to complete these discussions.

22. Some informal discussions were completed, but the parties did not reach a resolution. The Association formally demanded to bargain over the change, and, on March 23, 2017, Barab sent an email to all Evidence Specialists and other affected individuals stating:

“We will be invoking article 17.14 of the contract and implementing a 5-8 schedule for all Evidence Specialists at the Evidence Control Unit. Effective April 17th, 2017, you will be working Monday through Friday from 0800-1630 with a half hour unpaid lunch.”

23. Thereafter, the Association filed a timely complaint concerning the City’s change, alleging a violation of ORS 243.672(1)(e).

CONCLUSIONS OF LAW

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

2. The City violated ORS 243.672(1)(e) by unilaterally changing the Evidence Specialists' schedules.

DISCUSSION

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. *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177, 295 P3d 38 (2013) (*AOCE II*). When reviewing an allegation of an unlawful unilateral change, we consider (1) whether an employer made a change to the status quo; (2) whether the change concerned a mandatory subject of bargaining; and (3) whether the employer exhausted its duty to bargain. *Id.* (citing *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03 at 8, 20 PECBR 890, 897 (2005) (*AOCE I*)). When asserted, we also consider an employer’s affirmative defense of waiver: namely, that a party may waive its right to bargain by (1) “clear and unmistakable” contract language, (2) a bargaining history that a party consciously yielded its right to bargain, or (3) the party’s action or inaction. *AOCE II*, 353 Or at 177.

Analysis

Here, as noted above, the City concedes that it unilaterally changed a mandatory subject of bargaining (the work schedules of the Evidence Specialists). The outcome of the complaint, then, turns on whether the City has established its affirmative defense of waiver. The City argues that it has established all three forms of waiver—(1) contract language; (2) bargaining history; and (3) inaction. We address each assertion, in turn.

Waiver by Clear and Unmistakable Contract Language

As noted above, when we consider the affirmative defense of contractual waiver, the purported contract terms must be “clear and unmistakable.” *Id.* Here, the City asserts that, through the 2016-2019 Agreement’s Articles 4, 5.1, and 17.14, the Association clearly and unmistakably waived its right to challenge schedule changes.

We begin with the management rights clause (Article 4), which states in relevant part that “[t]he City shall retain the exclusive right to exercise the customary functions of management, including, * * * to determine work schedules and assign work; and any other such rights not specifically referred to in this agreement.” The City concedes that “[g]enerally worded management rights clauses * * * will ordinarily not be construed as waivers of statutory bargaining rights.” *Oregon School Employees Association v. South Coast Education Service District*, Case No. UP-027-16 at 19, 27 PECBR 48, 67 (2007) (internal citations omitted). The City asserts, however, that the management rights clause here is distinguishable from the management rights

clause founding wanting in *AOCE II* (and is not merely a “generally worded” management rights clause). For the reasons explained below, we disagree.

The City asserts that the management rights clause at issue here differs in several important respects from the clause at issue in *AOCE II*. In *AOCE II*, the parties’ management rights clause provided, in part, “The Employer retains all rights to direct the work of its employees, including, but not limited to, the right * * * to schedule work[.]” *AOCE II*, 353 Or at 185 (emphasis omitted). The Court quoted with approval this Board’s analysis of that language:

“It is unclear * * * whether the language applies to scheduling services to the public, or instead to individual employee work hours. The language might also apply to the employer’s decision about when during the day to schedule a particular task, rather than the hours a particular employee works. * * * One point is clear * * * [T]he provision does not expressly give the DOC the right to unilaterally change the start/stop times and days off of employees. Such ambiguity and lack of specificity preclude us from finding a ‘clear and unmistakable’ waiver of bargaining over these subjects.” *AOCE II*, 353 Or at 186 (quoting *AOCE I*, UP-33-03 at 8-9, 20 PECBR at 897-98).

The City points out that the clause here refers to management’s right “to determine work schedules and assign work”—language more precise than that at issue in *AOCE II*. We agree that the combination of the phrases “determine work schedules” and “assign work” do more precisely describe *employees’* work (as opposed to describing the scheduling of services to the public).

Despite this difference in the clauses, we nonetheless conclude that the management rights clause here does not clearly and unmistakably waive the Association’s statutory right to bargain for the following reasons. First, in interpreting a generically worded management rights clause, this Board has long interpreted phrases such as “inherent rights of management” or “customary functions of management” as “term[s] of art in in labor-management relations. * * * Use of [such phrases] indicates that the parties intended the management rights clause to apply only to permissive subjects for bargaining.” *AOCE II*, 353 Or at 186-87 (quoting *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03 at 16, *order on remand*, 23 PECBR 222, 237 (2009)). Moreover, the management rights clause in this case, like the clause found wanting (as a waiver) in *AOCE II*, includes use of the word “retain” to describe the scope of rights reserved to management. The use of the word “retain” in a management rights clause bolsters the conclusion that the clause is limited to permissive subjects of bargaining because a “party cannot retain * * * something that it never had in the first place.” *AOCE II*, 353 Or at 187. Consistent with our precedent, we conclude that Article 4 can be read as limited to management retaining rights concerning permissive subjects of bargaining, and because the change at issue in this case concerns a mandatory subject of bargaining, Article 4 does not constitute a clear and unmistakable waiver by the Association regarding that change.

Additionally, the management rights clause at issue here expressly provides that “[m]anagement rights, except where abridged by specific provisions of this agreement, or *State Public Employee Collective Bargaining Law*, are not subject to the grievance procedure.” (Emphasis added.) The Public Employee Collective Bargaining Act (PECBA) is, of course, the

source of the Association’s statutory right to bargain changes to mandatory subjects of bargaining. The clause at issue in *AOCE II* provided that management retained the right to schedule work “except as modified or circumscribed by the terms of this Agreement”—but, significantly, not “except as modified or circumscribed by” PECBA. In that respect, the clause at issue here can be said to give management *fewer* rights than the clause at issue in *AOCE II*—because it appears to except from management’s rights those rights “abridged” by PECBA. That difference from the clause at issue in *AOCE II* further bolsters our conclusion that the clause here does not clearly and unmistakably waive the Association’s statutory bargaining rights with respect to the change in an entire unit’s work schedules from 4/10s to 5/8s.

We turn to Article 5.1, a provision under the Police Service Effectiveness section, which states that

“The delivery of essential municipal services in the most efficient and effective manner is of paramount importance and interest to both the City and the Association. Maximized service to the community is recognized to be a mutual desire of both parties within their respective roles and responsibilities. Work procedures, schedules, and assignments for improving services shall be established and revised from time to time, *in accordance with management rights under this agreement, so long as no other right guaranteed under this agreement or the continuing duty to bargain under Oregon law is violated.* The parties agree to confer at mutually convenient times to discuss means of increasing departmental effectiveness.” (Emphases added.)

Here, the scope of the article is specifically tethered to the management rights clause, which we have already concluded does not clearly and unmistakably waive the Association’s right to bargain a change in a mandatory subject of bargaining and which expressly refers to rights abridged by PECBA, and therefore is not applicable to the subject of the change at issue in this case. Moreover, the article expressly preserves the “continuing duty to bargain under Oregon law,” which would include the mandatory subject at issue in this case. Therefore, we disagree with the City’s position that this Article provides a clear and unmistakable waiver of the Association’s statutory right to bargain over the change.

Finally, we address Article 17.14, which states that

“Notice of shift changes will normally be given fifteen (15) days in advance. The City may decide in any situation that it deems an emergency to reschedule shift changes with less than fifteen (15) days of notice. The City may also determine the need for a directed patrol response to a specific crime problem which would require a temporary shift change of up to five (5) days in duration and no greater than four (4) hours of difference in normal starting time. Twenty-four (24) hours of notice will be given in the case of short-term directed patrol responses. Any shift change without the required notice as provided herein shall be subject to a penalty of four (4) hours pay at the overtime rate (one-and-one-half [1.5] times the regular rate) in addition to regular pay for all hours worked for the first work day.

“If an employee is ill or injured either on or off the job and is being placed on a light duty job which necessitates a change in the employee’s schedule or if an employee is involved in a traumatic incident and is being assigned to a different schedule because of the incident, the City is not required to give the fifteen (15) days notice.

“Except for directed patrol responses as outlined above, the City will give fifteen (15) days notice to employees for changing their schedules within a shift on a short-term or long-term basis, including hours changes and changes in days off. If the City fails to give fifteen (15) days notice, the employee will receive a two (2) hour overtime penalty. However, an employee may voluntarily waive the notice requirement.

“The fifteen (15)-day notice requirement does not apply to employees working on a case or investigative assignment in which the working hours must be changed, in the supervisor’s judgment, to successfully complete the assignment.”

We begin by reiterating that a contractual waiver of a statutory right must be “clear and unmistakable.” In *AOCE II*, the Court explained that the “general rule in Oregon is that, although waivers of constitutional and statutory rights may be expressed through contract terms, those terms must clearly indicate an ‘intention to renounce a known privilege or power.’” *Id.* at 183 (quoting *Johnson v. Swaim*, 343 Or 423, 431, 172 P3d 645 (2007)). The Court further explained that, “[u]nder Oregon law, a waiver is the intentional relinquishment of a known right.” *Id.* (internal quotations omitted). These exacting standards from Oregon common law guide our decision here. *See also AOCE II*, 353 Or at 183 (“‘To make out a case of waiver of a legal right there must be a clear, unequivocal, and decisive act of the party showing such a purpose * * *.’” (quoting *Waterway Terminals v. P.S. Lord*, 242 Or 1, 27, 406 P2d 556 (1965))).

Applying this high standard, we begin with the City’s contention that it has established a clear and unmistakable contractual waiver by way of the provision that “the City will give fifteen (15) days notice to employees for changing their schedules within a shift on a short-term or long-term basis, including hours changes and changes in days off.” The City contends that the reference to “long-term” changes to “schedules within a shift,” which can include “hours changes and changes in days off,” unambiguously waives the Association’s right to bargain over the at-issue changes.

The City seeks to buttress its contention by way of bargaining history and past practice. Specifically, the City relies on the recent negotiations over the article, in which the City proposed language to give it the right to unilaterally change “individual or operational work schedules.” The Association proposed language that would preclude the City from making schedule changes. Ultimately, both parties withdrew their respective proposals, leaving Article 17.14 unchanged. Additionally, the evidence indicates that the parties never resolved their difference of opinion about whether the article (in its existing form) did, or did not, waive the Association’s right to bargain over schedule changes. With respect to past practice, the City points to 2011, when it

changed the work schedules of two employees in the Evidence Control Unit from 5/8s to 4/10s. It was un rebutted, however, that the Association agreed to that change.⁵

The Association counters that the language of Article 17.14 is insufficient to establish a clear and unmistakable waiver of its right to bargain over the change from working 4/10s to 5/8s. The Association further asserts that the language relied on by the City was intended to apply only to a limited range of schedule changes—namely those regarding work schedules within a shift framework. In other words, asserts the Association, Article 17.14 concerns changes within a 4/10s or 5/8s shift framework, but does not apply to changing the shift framework itself (*i.e.*, a switch from 4/10s to 5/8s). Moreover, the language was not intended, argues the Association, to encompass wholesale changes in the types of schedules that an entire work group have historically worked—*i.e.*, a change from Evidence Specialists working 4/10s to 5/8s. In any event, the Association argues, the article does not provide a clear and unmistakable waiver of the statutory right to bargain over the change that the City made here.

Whatever may be said of the article, we conclude that the City did not meet its burden to prove that the unambiguous language of the text itself clearly and unmistakably waives the Association’s right to bargain over the City’s change to the work schedules of all employees in the Evidence Control Unit. Specifically, the clause does not expressly give the City the unilateral authority to change the Evidence Specialists’ schedule from 4/10s to 5/8s or state that the Association waives its right to bargain over such a change.⁶ Moreover, even considering the language of the article in light of the bargaining history and past practice relied on by the City, we conclude that the City has not established that the Association clearly and unmistakably waived its right to bargain over the disputed change. As set forth above, that history and practice shows that the parties were unable to agree on the meaning and scope of Article 17.14, and that any similar prior schedule changes had been approved by the Association. In these circumstances, we conclude that the City did not establish that Article 17.14 constitutes a clear and unmistakable waiver of the Association’s statutory right to bargain over this change to the Evidence Specialists’ work schedules.

Waiver by Bargaining History

The City also asserts that the parties’ bargaining history establishes that the Association waived its right to bargain over the disputed change. We disagree. To prevail on this defense, the

⁵The record contains an email from the work group’s manager at the time, in which the manager indicated that if “it is decided that a 4/10 schedule could work we’ll discuss it as a Unit, [and] approach the union and management with an agreed upon work plan for their approvals,” noting also that an “MOU will be drafted based upon the work plan created.” Regardless of how that email is interpreted, the record contains un rebutted testimony that the Association agreed to the change. In addition, the City’s evidence about numerous other changes that it made to work schedules did not effectively counter the Association’s contention that other changes to work schedules involved temporary or probationary employees or occurred only with the Association’s approval.

⁶By making this observation, we do not require that waiver language, to be enforceable as a clear and unmistakable waiver, must use the word “waive” or “waiver,” or must itemize particular types of personnel actions. Nevertheless, the language must be functionally equivalent—*i.e.*, it must actually amount to a clear and unmistakable waiver of the right to bargain over the subject of the change, however phrased.

City must prove that the parties' bargaining history establishes that the Association consciously yielded its right to bargain over a change from a 4/10s schedule to a 5/8s schedule for an entire work group. See *Oregon School Employees Association v. Bandon School District #54*, Case No. UP-26/44-00 at 16, 19 PECBR 609, 624 (2002); *AFSCME, Council 75, Local #1393 v. Umatilla County Board of Commissioners, Vanelsberg, Roadmaster*, Case No. C-183-82 at 4 n 2, 8 PECBR 6767, 6770 n 2 (1985) (Order on Recons).

In this case, the language of Article 17.14 is longstanding over multiple collective bargaining agreements, and neither party presented evidence of what occurred in the bargaining sessions that led to the drafting and ratification of that article.

However, during the parties' most recent negotiations that resulted in the same language being carried forward, both parties proposed new language. During those negotiations, the Association bargaining team expressly asserted at the table that it had *not* (through Article 17) waived its right to bargain schedule changes. The City proposed new language that would give it greater authority to change employee work schedules, whereas the Association proposed language intended to cabin that authority. When neither party yielded, the Association proposed leaving the language as is, with an "agree[ment] to discuss when a shift change is warranted in a labor management setting," and the City responded that it needed "labor peace" on Article 17. The parties then agreed to carry forward the longstanding language of Article 17.14.

We conclude that this bargaining history does not establish that the Association consciously yielded its right to bargain over the disputed change. Rather, the bargaining history establishes that the parties agreed to disagree over the scope of the City's authority with respect to scheduling. Thus, at most, the bargaining history shows that both parties had differing interpretations of the language and agreed to let that ambiguity persist. Under these circumstances and on this record, we conclude that the City has not established that the Association consciously yielded its right to bargain over the at-issue changes.

Waiver by Inaction

Finally, we address the City's affirmative defense that the Association waived its right to bargain the disputed change through inaction. This Board has held that a waiver can be construed from a failure to demand bargaining in a timely fashion in response to sufficient notice of a proposed change. See *Tualatin Valley Bargaining Council/Hillsboro Education Association v. Hillsboro Union High School District 3J*, Case No. UP-125-92 at 9, 14 PECBR 541, 549 (1993). Here, with respect to the City's change to the Evidence Specialists' schedule, the record establishes that the Association promptly protested the change and demanded to bargain.⁷ We do not understand the City to argue otherwise. Rather, the City argues that the Association's past acquiescence under earlier collective bargaining agreements regarding other schedule changes

⁷The record also does not establish that the City announced a proposed change and gave the Association a reasonable amount of time to demand bargaining over the change; rather, the City announced the change as a *fait accompli*, which negates an obligation to demand bargaining. See *Teamsters Union Local No. 57 v. City of Brookings*, Case No. UP-141-93 at 8, 16 PECBR 267, 274 (1995) (citing *International Association of Fire Fighters, Local 1489 v. City of Roseburg*, Case No. UP-9-87, 10 PECBR 504 (1988)).

constitutes inaction with respect to this change. Specifically, the City asserts that it has a lengthy history of changing employee schedules without bargaining and that the Association has acquiesced.

We addressed this argument above under the City's arguments concerning "past practice." To reiterate, the Association provided compelling evidence that the identified past changes have been limited to probationary employees, temporary changes, and those made with the consent of the Association and employees. The Association also provided evidence that any schedule changes outside of these circumstances were discussed with the Association, and that the Association filed grievances in those instances where it believed that the City violated the article. Finally, the Association provided evidence that previous unilateral changes did not involve wholesale changes of the shift framework (4/10s to 5/8s) of an entire work group. The City did not effectively refute the evidence provided by the Association.

In sum, for the foregoing reasons, we agree with the Association that the City has not established its affirmative defense that the Association waived its right to bargain over the City's unilateral change to the Evidence Specialists' schedule. Accordingly, we find that the City violated ORS 243.672(1)(e).

Remedy

We turn to the remedy. Because the City violated ORS 243.672(1)(e), we order the City to cease and desist in that action. ORS 243.676(2)(b). We are also obligated to "take such affirmative action * * * as necessary to effectuate the purposes of" PECBA. ORS 243.676(2)(c). The usual remedy for a unilateral change violation, in addition to a cease-and-desist order, is requiring the employer to restore the past practice that existed before the unlawful change. *International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-049-12 at 20, 25 PECBR 871, 890 (2013). The City has not argued that our usual remedy is inappropriate in this case, and we see no reason not to order it. Accordingly, the City is directed to return the Evidence Specialists to their prior 4/10s schedule until it has completed its bargaining obligation.

ORDER

1. The City violated ORS 243.672(1)(e) when it unilaterally changed the schedules of the Evidence Specialists.

////

////

////

////

2. The City is directed to cease and desist in its violation of ORS 243.672(1)(e). The City is further directed to return to the *status quo ante* until it has fulfilled its obligation to bargain in good faith with the Association over the disputed change.

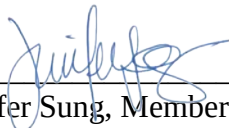
DATED: May 21, 2018.



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-002-18

(UNFAIR LABOR PRACTICE)

M.T.,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	DISMISSAL ORDER
UNITED FOOD AND COMMERCIAL	)	
WORKERS UNION, LOCAL 555, AND	)	
BAY AREA HOSPITAL,	)	
	)	
Respondents.	)	

M.T., Coquille, Oregon, appeared *pro se*.

John Bishop, General Counsel, represented Respondent United Food and Commercial Workers Union, Local 555.

Trevor Caldwell, Bullard Law, represented Respondent Bay Area Hospital.

On February 15, 2018, Complainant filed an unfair labor practice complaint against United Food and Commercial Workers Union, Local 555 (UFCW) and Bay Area Hospital (Hospital). The case was assigned to Administrative Law Judge (ALJ) Julie D. Reading.

In her complaint, Complainant alleged that her employment was terminated by the Hospital in violation of ORS 243.672(1)(g), and that UFCW's handling of a grievance over that termination violated ORS 243.672(2)(a). ALJ Reading investigated the complaint to determine if an issue of fact or law existed that warranted a hearing, as required by OAR 115-035-0005. By letter dated April 27, 2018, ALJ Reading issued Complainant an Order to Show Cause, informing Complainant of several bases for potential dismissal of her complaint. In that letter, ALJ Reading directed Complainant to respond by May 11, 2018, to: (1) show cause why the complaint should not be dismissed; (2) file an amended complaint to make the allegations more definite; or (3) withdraw the complaint. Complainant did not respond. On June 1, 2018, ALJ Reading again contacted Complainant and asked her to respond by June 8, 2018, regarding the previous letter. Complainant did not respond.

Because Complainant has failed to comply with the ALJ's order and has not pursued her complaint, we find that 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.

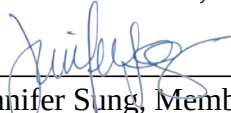
DATED: June 19, 2018.



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-006-18

(REPRESENTATION)

UNITED ACADEMICS OF OREGON	)	
STATE UNIVERSITY, AAUP/AFT, AFL-CIO,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER CERTIFYING
	)	EXCLUSIVE REPRESENTATIVE
OREGON STATE UNIVERSITY,	)	
	)	
Respondent.	)	
	)	

On June 5, 2018, United Academics of Oregon State University, AAUP/AFT, AFL-CIO filed a petition under ORS 243.682(2)(a) to certify (without an election) a new bargaining unit of faculty employees (described below) of Oregon State University. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards requesting that United Academics of Oregon State University, AAUP/AFT, AFL-CIO represent the designated bargaining unit.

On June 8, 2018, the Board’s Election Coordinator caused a notice of the petition to be posted by June 11, 2018. OAR 115-025-0030(3); OAR 115-025-0065. Pursuant to the terms of the notice posting, OAR 115-025-0030(3)(d), OAR 115-025-0065(7), and OAR 115-025-0075(1), objections to the proposed bargaining unit or a request for an election were due within 14 days of the date of the notice posting (*i.e.*, by June 25, 2018). Respondent Oregon State University did not object to the petition.¹ On June 25, 2018, the Board received a petition for an election under ORS 243.682(3)(a) and OAR 115-025-0075; however, that petition was not supported by the 30-percent showing of interest required by ORS 243.682(3)(b) and OAR 115-025-0075(1).²

¹The Board did receive a timely filed and properly served objection from an Oregon State University faculty member. That filing, however, objected generally to a “faculty union at Oregon State University” and to the inclusion of “tenured/tenure-track faculty” in the bargaining unit. The Public Employee Collective Bargaining Act expressly authorizes faculty bargaining units (tenured and otherwise) at public universities. *See, e.g.*, ORS 243.650(16), (23), ORS 243.682(1), and ORS 243.778. The objection does not set forth any other legal basis for not certifying the bargaining unit. Therefore, the objection does not present an issue of fact or law that warrants a hearing.

²The showing of interest provided with the petition purported to be “signatures [that] were collected electronically (via Qualtrics software).” Our rules do not authorize a showing of interest to be provided in this format. In any event, even if we were to accept the showing of interest submitted, the number of signatures did not meet the statutory requirement necessary for this Board to conduct an election.

Accordingly, it is certified that:

UNITED ACADEMICS OF OREGON STATE UNIVERSITY, AAUP/AFT, AFL-CIO

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

“All faculty employed by Oregon State University with rank (including those on Academic Wage Appointments), as well as PostDoctoral Scholars and PostDoctoral Fellows, but excluding: (1) confidential employees; (2) faculty employed as a president, vice president, provost, vice provost, dean, associate dean, assistant dean, head or equivalent position; (3) faculty employed in an administrative position without a reasonable expectation of teaching, research or other scholarly accomplishments; (4) unclassified employees with No Rank; (5) faculty who are not considered supervisory under ORS 243.650(23)(c)(C), but supervise other faculty with rank (including those on Academic Wage Appointments), PostDoctoral Scholars, and/or PostDoctoral Fellows.”

DATED: June 27, 2018.



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-008-18

(REPRESENTATION)

OREGON TECH AMERICAN	)	
ASSOCIATION OF UNIVERSITY	)	
PROFESSORS (OREGON TECH AAUP),	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER CERTIFYING
	)	EXCLUSIVE REPRESENTATIVE
OREGON INSTITUTE OF TECHNOLOGY,	)	
	)	
Respondent.	)	
	)	

On June 5, 2018, Oregon Tech American Association of University Professors (Oregon Tech AAUP) filed a petition under ORS 243.682(2)(a) to certify (without an election) a new bargaining unit of faculty employees (described below) of Oregon Institute of Technology. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards requesting that Oregon Tech American Association of University Professors (Oregon Tech AAUP) represent the designated bargaining unit.

On June 8, 2018, the Board's Election Coordinator caused a notice of the petition to be posted by June 11, 2018. OAR 115-025-0030(3); OAR 115-025-0065. Pursuant to the terms of the notice posting, OAR 115-025-0030(3)(d), OAR 115-025-0065(7), and OAR 115-025-0075(1), objections to the proposed bargaining unit or a request for an election were due within 14 days of the date of the notice posting (*i.e.*, by June 25, 2018). There were no objections to the petition or a request for an election.

Accordingly, it is certified that:

OREGON TECH AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS
(OREGON TECH AAUP)

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

"All full time faculty, instructors, and librarians working at .5 FTE or above at the Oregon Institute of Technology, but excluding employees in the following groups: (1) faculty employed as a president, vice president, provost, vice provost, dean, associate dean, assistant dean, head or equivalent position; (2) faculty employed in

an administrative position without a reasonable expectation of teaching, research or other scholarly accomplishments; (3) classified staff; (4) confidential employees; and (5) faculty chairs.”

DATED: June 27, 2018.



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-005-18

(REPRESENTATION)

LANE PROFESSIONAL	)	
FIREFIGHTERS LOCAL #851,	)	
INTERNATIONAL ASSOCIATION OF	)	
FIREFIGHTERS (IAFF),	)	
	)	CERTIFICATION OF
Petitioner,	)	ELECTION RESULTS
v.	)	
	)	(PETITION TO CERTIFY NEW
JUNCTION CITY RURAL FIRE	)	BARGAINING UNIT)
PROTECTION DISTRICT,	)	
	)	
Respondent.	)	
_____	)	

On May 11, 2018, the Lane Professional Firefighters Local #851, IAFF, filed a petition under ORS 243.682(2)(a) to certify (without an election) a new bargaining unit comprised of “All full time, paid firefighters working for the [Junction City Rural Fire Protection] District except for supervisory and confidential employees.” The petition was amended on May 17, 2018. Notice of the petition was posted on May 29, 2018, in accord with OAR 115-025-0030(3).

On May 29, 2018, members of the proposed bargaining unit timely filed a petition for an election in lieu of the card check process pursuant to ORS 243.682(3) and OAR 115-025-0075. This Board determined that the election petition was accompanied by the required showing of interest from at least 30 percent of the employees in the bargaining unit. *See* OAR 115-025-0075(1). On June 14, 2018, pursuant to the parties’ Consent Election Agreement, this Board sent ballots to eligible voters. The deadline for the return of ballots was June 28, 2018, which constitutes the date of the election. *See* OAR 115-025-0060(4)(c). A tally of ballots was held on June 29, 2018, and the majority of valid votes counted were cast for No Representation. The tally of ballots was provided to the parties on June 29, 2018.

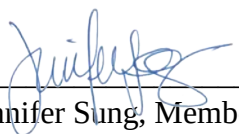
//
//
//

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 9, 2018). OAR 115-025-0060(9). No objections were filed. Accordingly, it is certified that no labor organization is the exclusive representative for the proposed bargaining unit.

DATED: July 10, 2018.


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-003-16

(UNFAIR LABOR PRACTICE)

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

On March 29, 2018, the Board heard oral argument on Complainant's objections and Respondent's cross-objections to a recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe on November 22, 2017, after a hearing held on November 2, 3, and 4, 2016, in Tualatin, Oregon, and on December 19, 2016, and January 23, 2017, in Portland, Oregon. The record closed on April 18, 2017, upon receipt of the parties' post-hearing briefs.

Gene Mechanic and Whitney Stark, Attorneys at Law, Mechanic Law Firm, Portland, Oregon, represented Complainant.

Jeffrey P. Chicoine and Kellen Noorwood, Attorneys at Law, Miller Nash Graham & Dunn LLP, Portland, Oregon, represented Respondent.

On February 5, 2016, the Complainant, Amalgamated Transit Union, Division 757 (ATU) filed an unfair labor practice complaint with the Employment Relations Board (Board) against the Respondent, Tri-County Metropolitan Transportation District of Oregon (TriMet). ATU amended the complaint several times; the operative complaint is the fourth amended complaint filed on October 24, 2016. TriMet filed timely answers. Subsequently, ATU formally withdrew two issues from consideration. As characterized by the ALJ and agreed to by the parties, the complaint, in its final form, presents the following issues:¹

¹We address the issues in a different sequence than the parties' stipulated statement of issues, particularly because ATU's ORS 243.672(1)(a) and (1)(b) claims require us to consider all of the issues presented in the case in the aggregate.

1. Did TriMet violate ORS 243.672(1)(g) by unilaterally changing retiree health benefits in violation of Article 1, Section 9, Paragraph 1(c)(2) and (6) of the parties' collective bargaining agreement (CBA)?

2. Did TriMet violate ORS 243.672(1)(g) by refusing to provide ATU officers with identification badges that provide full access to employee worksites in violation of Article 1, Section 2, Paragraph 3 of the parties' CBA?

3. Did TriMet violate ORS 243.672(1)(g) by refusing to provide ATU officers' dependents with TriMet transportation passes in violation of Article 1, Section 2, Paragraph 3 and Article 1, Section 18 of the parties' CBA?

4. Did TriMet violate ORS 243.672(1)(e) by refusing to provide ATU officers' dependents with TriMet transportation passes?

5. Did TriMet violate ORS 243.672(1)(g) by refusing to buy back sick leave from former ATU officers in violation of Article 1, Section 2, Paragraph 3 of the parties' CBA?

6. Did TriMet violate ORS 243.672(1)(e) by refusing to buy back sick leave from former ATU officers?

7. Did TriMet violate ORS 243.672(1)(g) by refusing to provide paid time off to newly hired union employees to attend ATU orientation in violation of Article 1, Section 2, Paragraphs 2 and 3 of the parties' CBA?

8. Did TriMet violate ORS 243.672(1)(e) by refusing to provide paid time off to newly hired union employees to attend ATU orientation?

9. Did TriMet violate ORS 243.672(1)(e) by refusing to produce requested documents and seek recovery of costs with respect to grievances?

10. Did TriMet violate ORS 243.672(1)(a) by engaging in a systemic pattern of unilaterally changing the benefits of ATU members and officers, by charging for the production of information related to collective bargaining and labor relations, and by creating and publishing a blog that interfered with an ATU election?

11. Did TriMet violate ORS 243.672(1)(b) by engaging in a systemic pattern of unilaterally changing the benefits of ATU members and officers, by charging for the production of information related to collective bargaining and labor relations, and by creating and publishing a blog that interfered with an ATU election?

We conclude that TriMet violated ORS 243.672(1)(e) by unilaterally deciding to cease scheduling newly hired employees to attend ATU orientation sessions on paid work time. We dismiss the remaining claims.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties

1. TriMet is a public employer within the meaning of ORS 243.650(20). It operates a public mass transit system in Oregon and has thousands of employees.

2. ATU is a labor organization within the meaning of ORS 243.650(13). It is the exclusive representative of approximately 3,000 TriMet employees in a large and diverse bargaining unit. At this time, ATU is the only labor organization that represents any TriMet employees. ATU also represents a large number of employees working for at least 23 other employers, both public and private, located in either Oregon or Washington. In total, ATU has approximately 5,500 members. To become a full “member in good standing” of ATU, an employee must complete an application and pay ATU an initiation fee. To remain a member in good standing, an employee must pay union dues.

3. ATU has three lead officers who serve as ATU representatives on a full-time basis: (1) President–Business Representative, (2) Vice President–Assistant Business Representative, and (3) Financial Secretary–Treasurer/Recording Secretary. All three of those positions are elected by ATU-represented employees and also serve as members of ATU’s executive board. The executive board also includes a number of other elected union officers. The lead officers and other executive board members may work for TriMet or a different employer, depending on the individual. While in a lead officer position, the ATU officer is responsible for representing all of the employees in ATU’s various units, not just those who work for TriMet.

4. Shirley Block has been serving as ATU’s current President–Business Representative since July 1, 2015. Jonathan Hunt is currently ATU’s Vice President–Assistant Business Representative.² Mary Longoria is ATU’s current Financial Secretary–Treasurer/Recording Secretary. All three of those officers were employed by TriMet when they were elected to serve as full-time officers of ATU.

5. At the time of the hearing, TriMet and ATU were parties to a collective bargaining agreement (CBA), effective from December 1, 2012 to November 30, 2016. Previously, they were parties to a series of successor CBAs, including agreements that were effective from December 1, 2009 to November 30, 2012; December 1, 2003 to November 30, 2009; and December 1, 1998 to November 30, 2003. The parties commonly refer to their CBA as the “Working and Wage Agreement.”

²At the time of the hearing, Hunt had been serving as the Vice President–Assistant Business Representative for approximately three and a half years. Before then, he served as ATU’s President–Business Representative for approximately six years. For four years or so before that, Hunt served as ATU’s Vice President–Assistant Business Representative.

Changes to Retiree Health Benefits

6. During the negotiations that ultimately resulted in the parties' 2012-2016 CBA, one of TriMet's main goals was to reduce its overall "OPEB liability," which was approaching a billion dollars at the time, by adjusting active employee and retiree healthcare benefit costs. "OPEB" is an accounting concept and an acronym for "other post-employment benefits." Another goal of TriMet's was to bring its active employee union health plans in sync with its active employee non-union health plans, including having the same premium contributions.

7. The various healthcare plans at issue in this case include "PPO," "HMO," and "HDHP/HSA" plans offered by different providers, including United Healthcare (UHC), Regence, and Kaiser Permanente (Kaiser). "PPO" refers to "preferred provider organization," and "HMO" refers to "health maintenance organization." "HDHP" refers to a "high deductible health plan," and "HSA" refers to a "health spending account." Broadly speaking, a PPO plan may have higher monthly premiums than an HMO plan, but a PPO plan may also give covered individuals more options and flexibility. A PPO plan may have different levels of "coinsurance." For example, under a PPO plan with 80/20 coinsurance, the insurance company pays for 80% of medical charges by preferred providers and the individual pays for the remaining 20% of those costs. The question of what percentage of a given plan's monthly premium the employer will pay (versus the individual employee) is a separate matter. So are the specifics of what kind of medical coverage is provided by a given plan. In ordinary usage, the term "plan design" can refer to the level of coinsurance, for example. "Benefit level," on the other hand, typically refers to something like the number of chiropractic visits covered by a plan.

8. All things being equal, people generally can be expected to choose the most generous plan with the "richest" benefits offered to them. Nevertheless, which type of plan (*e.g.*, HMO or PPO, 80/20 or 90/10 coinsurance) is best for a particular individual depends on a wide variety of factors, including but not limited to that person's unique healthcare needs and a given plan's benefit levels--*i.e.*, what precisely is covered, not just the percentage of costs paid by the insurer.

9. TriMet provides Medicare Advantage plans for its retirees when they become eligible for Medicare. Medicare Advantage plans, in short, are supplemental to regular Medicare coverage, filling in the gaps that Medicare does not cover. Generally, an individual becomes Medicare eligible by turning 65 or otherwise qualifying for Social Security Disability Insurance.

10. Before the parties started negotiations for the 2012-2016 CBA, Medicare-eligible retirees could choose between a Kaiser HMO Medicare Advantage plan and a UHC HMO Medicare Advantage plan. An HMO ordinarily is limited to a particular geographical area. Individuals who live outside of an HMO's geographical coverage area may have difficulty getting coverage and may have to pay extra for out-of-network benefits. For that reason, the Kaiser and UHC HMO plans that TriMet offered to retirees before the 2012-2016 negotiations were not always feasible options for those who happened to live a great distance from a Kaiser or UHC facility, and those retirees presumably would have chosen a PPO plan (which typically offer nationwide coverage), if given the choice.

11. TriMet made the opening proposal for the negotiations for the 2012-2016 CBA on November 30, 2012. Among other things, TriMet's proposal sought to make the "insurance plans

offered to association members be the same Regence and Kaiser plans (with the same employee deductibles, co-pays, and out-of-pocket expenses) as offered to non-union employees as of November 30, 2012.” Next, in April 2013, the parties met and discussed ground rules for negotiations, but no other negotiations took place at that time. After that, ATU declined to meet with TriMet for several months due to a dispute regarding public meetings law.

12. At the parties’ next face-to-face bargaining session, on September 5, 2013, TriMet’s Executive Director of Labor Relations & Human Resources, Randy Stedman, gave ATU a set of additional proposals, some of which involved medical coverage. Among other things, TriMet proposed the adoption of a UHC PPO Medicare Advantage plan for eligible retirees based on the “core” active employee plan design proposed, which at that point was an 80/20 PPO plan. The same health insurance-related proposals were frequently discussed and repeated in various ways during the parties’ subsequent negotiations. Those negotiations ended at some point after May 22, 2014, when TriMet gave its final offer. Eventually, the parties’ proposals were incorporated into a tentative agreement (TA) that the parties signed on September 30, 2014, and ratified in October 2014, which is also when the TA went into effect. The TA subsequently was incorporated into the parties’ 2012-2016 CBA.

13. The parties’ 2014 TA and the 2012-2016 CBA provide different health insurance benefits for three different “tiers” of retirees. The first tier includes individuals who retired before February 1, 1992. The second tier includes individuals who retired on or after February 1, 1992, and were hired before the 2014 TA was ratified in October 2014. Within that second tier, there are two subgroups of retirees: (1) those who are not Medicare eligible and (2) those who are Medicare eligible. The third tier of retirees includes retirees who were hired after the TA was ratified.³

14. In relevant part, the 2014 TA specifically provided:

“Healthcare-Active Employees (See attached contract language):

- TriMet will offer the following health, dental and vision insurance plan; TriMet’s contribution shall be capped:
 - Regence 80/20 (the current non-union PPO plan). TriMet will contribute 95% of the premium; employees will contribute 5% of the premium.
 - Regence 90/10 (the current union PPO plan). TriMet will contribute the same employer contribution dollar amount as provided for under the 80/20 plan, meaning the employer shall make the same contribution to the 90/10 plan as it would make to the 80/20 plan.
 - Regence HDHP with HSA (the current non-union HDHP plan). TriMet will contribute the same employer contribution dollar amount as provided for under the 80/20 plan noted above,

³The parties agree that the second subgroup of the second tier—*i.e.*, the retirees who are Medicare eligible—is the only group of retirees at issue in this case for this particular topic. Specifically, the parties dispute whether the CBA requires TriMet to offer a 90/10 PPO plan to the Medicare-eligible retirees in the second tier.

- meaning the employer shall make the same contribution to the HDHP with HSA as it would make to the 80/20 plan.
 - o Kaiser \$10 co-pay (the current non-union HMO plan). TriMet will contribute 95% of the premium; employees will contribute 5% of the premium.
- Mini Run Operators will be eligible for the same healthcare benefits as regular employees. Except for healthcare, benefits for Mini Run Operators will be status quo. For example, the 30-day employment requirement for Article 1, Section 9, Par. 1(e) shall remain.
- TriMet and the ATU agree to labor-management meetings to make recommendations to TriMet on health insurance plan design, benefit levels, and the possible utilization of a private exchange for plan year 2016; three representatives from each side.

“Healthcare-Retirees (See attached contract language):

- Retirees hired prior to February 1, 1992: Status Quo. Grandfathered,
- Retirees hired on or after February 1, 1992 through ratification of this agreement:
 - o Until age 65, they receive the same benefits as active employees.
 - o At age 65, they are eligible for 1) Medicare, Medicare Part B reimbursement, plus Kaiser Senior Advantage or UHC supplemental coverage, or 2) Medicare Part B reimbursement and an equivalent stipend of \$417.36 (single) or \$828.47 (single + 1). The stipend will be deposited into an RHRA VEBA.
 - o The monthly stipend calculated in the first year elected shall thereafter be increased annually by CPI-U Portland. At the time the stipend is first elected as an option, that election shall be maintained.
 - o Through 12/31/15, the UHC HMO plan will be maintained. Beginning 01/01/2016, TriMet shall implement the UHC PPO plan as originally proposed or its substantial equivalent and terminate the UHC HMO plan.⁴
- Retirees hired on or after the first day following ratification:
 - o Pre-65, the retiree shall receive an \$800/mo. stipend with which to purchase healthcare from one of the offered plans, or be deposited into an RHRA VEBA for any eligible use. The \$800/mo. stipend shall increase annually by CPI-U Portland.
 - o Post-65, the retiree no longer shall be eligible for any TriMet insurance benefit.”

15. In relevant part, Section 9 of the 2012-2016 CBA states:

⁴The parties originally intended for TriMet to start offering a UHC HMO plan to retirees on January 1, 2015, but they did not ratify the TA in time, so they agreed to a January 1, 2016, start date instead.

“SECTION 9 – HEALTH AND WELFARE BENEFITS

“Par. 1. Medical, Prescription Drug, Dental and Vision

- a. Subject to Par. 1(b)-(f) of this section, the District shall contribute ninety five percent (95%) of the cost for each tier of coverage in the primary 80/20 PPO or \$10 HMO co-pay medical plan and the prescription drug, dental and vision care plans for each tier of coverage (single, single + 1, single + children, family). S/he also may elect to participate in either a 90/10 PPO plan or a high deductible healthcare plan with health savings account (HSA). In that case, the District shall pay the same employer dollar contribution amount as it would have paid had the employee elected the primary 80/20 PPO plan. If the employee elects the 90/10 PPO plan, then the employee shall pay the difference between the District’s contribution amount and the total premium amount. If the employee elects the high deductible healthcare plan with HSA, then the District shall contribute the difference between its contribution amount and the total premium amount to an HSA in the employee’s name. The District retains the right to change providers at its discretion so long as the level of benefits is not adversely affected.⁵

Unless made pursuant to any health care law, regulation, or unilateral change by the Provider without the consent and approval of the District, the plan design of benefits provided shall not change during the term of this Agreement unless both the District and the Union agree to do so in writing.

- b. For those retired employees who left the service of the District prior to February 1, 1992, the District shall pay the full cost of providing these retirees and their dependents with medical, prescription drug, vision benefits and dental (retiree and spouse only), not including orthodonture available under the health and welfare plan in place at the time.
- c. Employees who retired on or after February 1, 1992 and hired on or before October 24, 2014, and who retire on or after that date shall receive the same health benefits until age 65 that is available to active employees and their spouses, excluding orthodonture and dental coverage for dependent children.
1. All retirees and their spouses, surviving spouses, and dependents must enroll in and maintain Medicare parts A & B insurance coverage as soon as they become Medicare eligible due to age or disability. If an employee does not qualify as having ‘current employment status’ under the Medicare Secondary Payer rules (a ‘non-active employee’) and the non-active employee or his or her dependent becomes Medicare-eligible due to disability, that non-active employee or dependent must enroll in Medicare parts A & B insurance coverage as soon as s/he becomes

⁵Section 9, Paragraph (1)(a) applies to TriMet’s active employees.

eligible. The following Par. 1(c)(2)-(6) of this Section apply exclusively to the individuals described in this Par. 1(c)(1).

2. At the first available opportunity, non-active employees, retirees, spouses, surviving spouses and dependents who become Medicare eligible must enroll in a District designated Medicare Advantage plan unless they are a retiree or surviving spouse electing a stipend under Par. 2(i) below. **These plans currently are Kaiser Permanente Senior Advantage and United Healthcare Care (HMO). Effective January 1, 2016, the UHC HMO plan will change to the UHC PPO plan or its substantial equivalent. These plans, when combined with Medicare and Medicare Part B are intended to provide substantially similar coverage as the active employee healthcare plan designs.** Having enrolled in Medicare and Medicare Advantage plan upon providing written confirmation of these enrollments, the District will reimburse the non-active employee, retiree, spouse, surviving spouse or dependent the actual cost of the Medicare Part B monthly premium.⁶ Retirees who become Medicare eligible after July 1, 2000 and who enroll in Medicare as set forth above will be reimbursed to that date of enrollment.
 - i. Instead of electing coverage under a Medicare Advantage and a dental plan, a retiree or surviving spouse may elect to receive reimbursement for the actual cost of the Medicare Part B premium and a stipend contributed by the District to the retiree's health reimbursement account (RHRA). Once the Medicare Part B/stipend election is made, the retiree must continue with that election and has no right to revert back to enrolling in a Medicare Advantage Plan and dental plan. The amount of the monthly stipend for 2015 shall be \$417.36 (single) and \$828.47 (single + spouse), which is the average of the PPO and HMO Medicare Advantage plans, including dental. The stipend shall be increased by CPI-U Portland at the beginning of each benefit year.
 - ii. Notwithstanding the foregoing, a non-active employee who is eligible for Medicare due to disability and who has coverage (as described in paragraph 1.a.) as a spouse (or domestic partner) of an active employee above may elect not to enroll in Medicare and a Medicare Advantage plan. If such an election is made, the non-active employee shall not be entitled to the reimbursement or monthly stipend described in paragraphs 1c2 and 1c2(i) above.
3. If a Medicare eligible non-active employee, retiree, spouse, surviving spouse or dependent resides outside the service coverage area of the available Medicare Advantage Plans, the District will continue to offer the active plan that provides out-of-area coverage. The District will

⁶Here, Medicare Part B refers to the Medicare Advantage plans that are being offered.

reimburse the non-active employee, retiree, spouse, surviving spouse, or dependent the actual cost of the Medicare Part B monthly premium. At the first available opportunity after Medicare Advantage plan becomes available to non-active employees, retirees, spouses, surviving spouses, or dependents currently residing outside the service coverage area, the non-active employee, retiree, spouse, surviving spouse, or dependent must enroll in the Medicare Advantage plans.

4. For those non-active employees, retirees, spouses, surviving spouses, or dependents who were Medicare eligible before July 1, 2000 (excluding the grandfathered group who retired prior to February 1, 1992 and those identified in item 3 above), and who opted to remain on the active, non-Medicare Advantage plan, pursuant to the August 28, 2000 Agreement, they must enroll in a provided Medicare Advantage Plan, currently Kaiser Permanente Senior Advantage (HMO) and United Healthcare (HMO).
5. The reimbursement of the actual cost of the Medicare Part B monthly premium will be included as an adjustment in the retiree's monthly pension check or the non-active employee's disability check, or, if none, by other direct payment. This adjustment will not be subject to the cost of living increases provided to the pension portion of the check.
6. **If a retiree is eligible, it is understood and agreed that the benefit levels combining Medicare with the provided Medicare Advantage plans will provide reasonably the same benefit levels provided to active employees. Should Medicare decrease any benefit levels, the District will adjust the retiree health plans to ensure reasonably the same benefits enjoyed by active members."**

(Emphases added.)

16. For the 2015 benefit year, active TriMet employees in the union were offered a Regence 80/20 PPO plan, a Regence 90/10 PPO plan, a Regence HDHP/HSA plan, or a Kaiser HMO plan. Retirees who were Medicare eligible could choose either a Kaiser HMO plan or a UHC HMO plan.

17. For the 2016 benefit year, active TriMet employees in the union were offered a Regence 80/20 PPO plan, a Regence 90/10 PPO plan, or a Regence HDHP/HSA plan, and if an active employee was not eligible for Medicare, he or she was also offered a Kaiser HMO plan. Medicare-eligible retirees could choose either a Kaiser HMO plan or a UHC 80/20 PPO plan. The Medicare-eligible retirees were not offered a 90/10 PPO plan for 2016, although the active employees were.

18. During the negotiations leading to the 2012-2016 CBA, neither party ever proposed or requested a 90/10 PPO plan for Medicare-eligible retirees. The only PPO plan for Medicare-eligible retirees that was ever proposed was an 80/20 PPO plan, and TriMet proposed that plan on several occasions. ATU never expressly opposed moving Medicare-eligible retirees

away from an HMO to a PPO plan generally, or to an 80/20 PPO plan in particular. Moreover, when TriMet's Benefits Manager, Heidi Vass, alluded to an 80/20 PPO plan in emails she sent to ATU in April 2015 and during post-bargaining meetings with ATU officers, ATU did not protest or question that plan.

19. A particular insurance company may not offer a desired plan design. For example, as of the last day of the hearing, UHC did not offer a standard 90/10 PPO plan for TriMet's Medicare-eligible population. Accordingly, such a plan would have to be custom designed.

TriMet ID Badge Access and Transportation Passes for Dependents

20. Throughout the relevant time period, the parties' CBAs have included Article 1, Section 2, Paragraph 3, titled "Representative Rights," which provides:

"The District agrees that the officers and members of the Union shall be granted leaves of absence on Union business as authorized by the Union, when so requested. It is further agreed that any member of this Union who now holds office, or shall be appointed or elected to any office in said Union, which requires his/her absence from the District's employ, shall upon his/her retirement from said office be placed in his/her former position with full seniority rights, rates of pay, vacation and retirement pay rights. Union business is further defined to mean employment directly and solely by the Union, or the International Union of which it is a division."

21. Throughout the relevant time period, the parties' CBAs have also included Article 1, Section 12, titled "Continuous Service Definition." Paragraph 2(b)(6) of that Section provides, in relevant part, that "[c]ontinuity of service shall not be broken and seniority shall not terminate * * * [b]y leave of absence of any duration to serve as an official of the Union."

22. Article 1, Section 18, Paragraph 1 of the 2012-2016 CBA, which has also been in the parties' previous contracts for many years, provides:

"Free transportation on all lines of the District shall be furnished to all active employees, their spouses and dependents up to age 19 and to 24 for those dependents who are living at home and attending school full-time, members of the Union, and to all retired employees and their spouses, members of the Union retired under the provisions of Sections 10 and 12, above. Limited exceptions to the provisions of this Paragraph may be granted by mutual consent of the Director of Labor Relations or his/her designee, and the Business Representative. Parents of the employee or spouse who are living at the employee's house will be eligible for free transportation on all lines of the District as long as employee keeps a current affidavit on file with the District's Human Resources Division attesting to parents living with the employee."

23. At the time of this case, all of ATU's three lead officers were previously employed by TriMet and granted leaves of absence from TriMet so they could serve as full-time ATU representatives. While serving as full-time ATU officers, they are not under TriMet's managerial control; TriMet cannot direct their work as ATU officers or terminate them from their ATU

positions. TriMet generally does not furnish the ATU officers with the means or equipment necessary for them to perform their ATU work. And, as indicated above, the ATU lead officers are responsible for representing employees who work for a number of different employers, not just TriMet. TriMet does not consider the three full-time ATU officers to be active employees of TriMet. Instead, TriMet views them as full-time employees of ATU. The full-time ATU officers no longer have access to TriMet's intranet, as active TriMet employees do.

24. Generally, when other ATU Executive Board members (aside from the three lead officers) are elected, they do not become full-time ATU employees, and they continue to perform their normal job duties for their respective employers.

25. TriMet issues "Active Employee" ID badges to all full-time and part-time active TriMet employees. Each Active Employee badge serves as identification, allows access to secured TriMet areas, and provides TriMet transit privileges, *i.e.*, free transportation on TriMet's bus and rail lines. TriMet also issues TriMet ID badges to retirees and the spouses, domestic partners, and qualified dependents of active TriMet employees. Those badges similarly serve as identification and provide TriMet transit privileges, but they do not provide access to TriMet facilities. Such badges are also referred to as "transportation passes." Before a dependent of an active TriMet employee can receive a transportation pass, the active employee must meet the requirements provided in TriMet's "HR Manual." Separately, TriMet gives ATU officers their own ID badges (which are called either ATU or contractor ID badges) that provide ATU officers full transit privileges and general access to TriMet's facilities, as explained below. All of the various TriMet ID badges are the size of a driver's license and contain a machine-readable "chip."

26. If someone has a TriMet ID badge with transit privileges, that person can ride on TriMet's various buses and trains without paying for a ticket. Under normal circumstances, a year's worth of TriMet bus passes, for example, can cost an adult \$1,200 and an "honored citizen" or a youth \$336.

27. TriMet routinely audits the access that it grants via its ID badges. Generally, the level of access that a particular ID badge grants an individual is based on "business need" as determined by management personnel and can change as that individual's position or work changes. For some TriMet employees, their access to a particular area is purposefully limited to certain hours of the day. It is also possible for TriMet to temporarily add, remove, or alter the access granted by a particular ID badge. ID badges are supposed to be deactivated or disabled when employees stop working for TriMet.

28. Some parts of TriMet's numerous facilities are designated as "critical" or "high security" areas, to protect sensitive information or equipment and prevent unauthorized access that could create a risk of harm to employees or passengers. Those areas include TriMet's command centers, "money rooms," and server rooms, for example. Almost every TriMet employee's access is restricted to some degree, except for TriMet's various Executive Directors and TriMet General Manager Neil McFarlane.

29. Historically, and as a general policy, TriMet has issued all ATU officers ID badges that provide broad access to TriMet's facilities, enabling the ATU officers to meet with represented employees or conduct other union-related business with ease. However, certain bargaining unit

employees work in restricted areas that are generally off limits to ATU officers and other TriMet employees.

30. If an ATU officer needs to get into a secured location or use a particular door that their badge does not open, or if the officer's badge is simply not working, they can call TriMet's Safety & Security Department and ask for a door to be opened. The Safety & Security Department can be called at any time (24 hours a day, 7 days a week), and the telephone number is noted on each ID badge. The Safety & Security Department can also "troubleshoot" with the individual or issue a new badge upon request. Alternatively, the ATU officer can call an ATU-represented employee who works in a secured location and ask that person to come out and meet in an accessible area, like a conference room or a station agent's office. The employee can also lead the officer through a door. That said, each of those alternatives is likely to take more time and be more inconvenient than using an ID badge with proper or full access.

31. Whenever someone attempts to use an ID badge on a locked door, an electronic record of that attempt is made. That record will show either that the ID badge successfully opened a particular door (signified at the door by a green light) or that access was denied (signified at the door by a red light). However, no record is made if someone tries to use an ID badge that is "dead," because a dead card does not activate the card reader at all. TriMet's Safety & Security Department also maintains ID badge records, which show when each badge was activated.

32. Under TriMet's ID Badge policy, individuals are not supposed to have more than one ID badge at a time. If two ID badges are put together, they can conflict with each other and access might be denied incorrectly. Additionally, individuals are supposed to turn in ID badges that have been replaced, so that they do not mistakenly use the incorrect badge. As a rule, whenever someone's new ID badge is activated, their prior ID badge is deactivated. Therefore, when a record shows that an ID badge was activated on a certain date, that means their prior ID badge was deactivated on that same date.

33. Under TriMet's ID Badge policy, when someone transitions from being an active TriMet employee to a full-time ATU officer, they are supposed to surrender their Active Employee ID badge to TriMet and receive an ATU ID badge. In practice, however, that policy has not been consistently followed or enforced.

34. On January 7, 2010, at 8:39 a.m., an ATU executive board member named Bruce Duncan sent an email to Jonathan Hunt, who at the time was ATU's President-Business Representative. In that email, Duncan complained that his badge no longer opened the doors of a TriMet command center. At the time, Duncan was seeking access to the command center to participate in a "sign-up" for ATU-represented supervisors. At 10:53 a.m. the same day, Hunt emailed Shelly Lomax⁷ of TriMet, explained that ATU's executive board members needed access to their members, and asked Lomax to have the members' ID badges updated. Lomax responded by email at 12:22 p.m. and clarified that the command center at issue was "Safety Sensitive." After that, Lomax wrote:

⁷Lomax became the Director of Safety & Security in 2006. Subsequently, she became the Director of Operation Support, and later, the Executive Director of Operations. In 2013, she became the Executive Director of Transportation. At some point in 2016, she became the Chief of Staff for Operations Management.

“I let Bruce know that if there is a sign-up going on all he needs to do is send me a quick email that he needs access for the sign-up and we will activate the badge for that purpose. By the same token, if there is an issue where the union and the employee need to connect I am certain we can facilitate that. Places like OCC, or the money room for that matter, are not ones we allow open access to.”

35. On February 17, 2012, Stedman wrote a letter to Hunt, who was ATU’s President–Business Representative at that time. Stedman stated, in part:

“As you know, at least since September 2000 TriMet has paid the healthcare premiums of ATU elected officers who were active TriMet employees prior to their election, but who assumed full-time ATU duties upon election to office. Such officers are recorded on TriMet’s payroll system as employees on an ATU leave of absence. Although these ATU officers retain a formal relationship with TriMet while in office, and have a right to reinstatement once their term of office ends, such officers perform no work in the interest or on behalf of TriMet while they hold elected office with ATU. Moreover, these ATU officials neither office at TriMet nor are under the supervision, direction, or control of any TriMet manager. In short, for statutory purposes, ATU’s elected officers on leave are employees of ATU while they serve in their official capacities. *See Dinicola v. State*, 246 Or. App. 526 (2011).

“A question has arisen whether under PECBA or the State of Oregon’s Constitution, TriMet is permitted to pay the healthcare premiums of TriMet employees on leave of absence as full-time elected ATU officers. We regret to inform you that under prevailing [Employment Relations Board (ERB)] precedent, it is a violation of both the Oregon Constitution and of PECBA for TriMet to do so. *See City of Portland*, 8 PECBR 8115 (1985).

“Paying healthcare benefits of elected ATU officers is contrary to public policy and violates PECBA because doing so constitutes impermissible assistance in the ‘formation, existence, or administration’ of the union under ORS 243.672(1)(b). *City of Portland*, 8 PECBR at 8121. Therefore, TriMet paying the healthcare premiums of ATU elected officers is a prohibited subject of bargaining. Any agreement by TriMet to do so is unenforceable. *Id.* at 8121-2. Moreover, TriMet paying the healthcare premiums violates the Oregon Constitution because public funds must be expended for a public purpose. *See Carruthers v. Port of Astoria*, 249 Or. 392 (1968). Consequently, TriMet cannot expend funds to support the private employment of elected officers by ATU while they are on leave from TriMet.

“I have attached a courtesy copy of the *City of Portland* declaratory ruling. We believe this is the controlling authority on the question presented. Unless ATU is able to present contrary controlling authority by March 15, 2012, TriMet will begin invoicing ATU for health care premiums of elected officials in the same manner it does for other ATU employees enrolled in TriMet’s health care plans effective April 1, 2012.”

36. In May 2012, ATU filed an unfair labor practice complaint against TriMet with the Board in Case No. UP-028-12. One count of that complaint dealt with TriMet no longer paying “health insurance premiums or providing voluntary term life insurance benefits for full-time ATU officers who were TriMet employees prior to their election to an officer position with ATU but who assumed full-time ATU duties upon election to office.” In October 2012, ATU withdrew its May 2012 complaint against TriMet. Since that time, TriMet has not paid for health insurance for TriMet’s full-time elected officers. Instead, the costs of those individuals’ plans are entirely paid for by ATU.

37. Hunt got married at some point in 2015, and in late November 2015, he asked TriMet for free transportation passes for his new wife and dependents. Hunt’s children from a prior marriage retained or received dependent transportation passes while he was on leave from TriMet to serve as an ATU officer, *i.e.*, for approximately 14 years. Likewise, former ATU President–Business Representative Bruce Hansen’s dependents retained or received their passes while he was on a union business leave of absence from TriMet.⁸ When Hunt made his request for transportation passes in 2015, he had already been issued an ATU ID badge.

38. On December 13, 2015, TriMet Executive Director of Safety & Security Harry Saporta sent an email to Stedman that stated:

“Johnathan Hunt is requesting transit privileges for his wife and two dependent children. Do transit privileges extend to ATU Executive Board immediate family members? I asked Shelly Lomax as she was responsible for the issuance of employee and dependent badges in the past. Her recollection is that privileges were extended to them when TriMet paid for their benefits. This is the only time that I recall that an Executive Board member has requested privileges for dependents. Article 1, Section 18 - Free Transportation of the Contract states that free transportation is provided to ATU members, but is silent regarding dependents, with the exception being active employees. In that case, transit privileges are extended to dependents.”

39. On December 14, 2015, at 12:37 p.m., Stedman sent an email to Saporta and Lomax, stating that it would be an unfair labor practice under ORS 243.672(1)(b) for TriMet to provide free transportation passes to ATU employees’ dependents, and that it might also be illegal under PECBA for TriMet to provide transportation passes to the ATU officers themselves. Stedman then wrote that, if something is illegal in the CBA or in a separate MOU, it is void even if the parties agreed to it. He also indicated that there may be an argument that TriMet can pay for the transportation passes of ATU’s three officers “because it gives them access to the workplace of the members whom they represent in order to view their working conditions.”

⁸The record does not indicate when any of those dependent transportation passes were issued. At hearing, Hunt testified that he believed that Mike Savage, TriMet’s former Labor Relations Director, had previously issued free passes to Hunt’s dependents under the “limited exceptions” language of Article 1, Section 18, Paragraph 1. However, there is no other evidence of such an agreement in the record, and during the hearing, Stedman, TriMet’s Executive Director of Labor Relations & Human Resources since November 2011, testified that he was unaware of any exception ever being granted. Savage did not testify, and neither did Longoria or Bruce Hansen, ATU’s former President-Business Representative. It is also unclear whether Block or Longoria have ever similarly requested dependent passes while serving as a full-time ATU officer.

40. On December 14, 2015, at 3:09 p.m., Amanda Frye of TriMet's Safety & Security Department wrote an email to Hunt. In that email, Frye stated that she had received a voicemail from him regarding badges for his family. Frye then explained that, from what she understood, ATU family members were not eligible for transportation passes. She also wrote that if Hunt had any questions about that, he should contact TriMet Labor Relations.

41. On December 17, 2015, at 12:50 p.m., Hunt sent an email to Block that stated:

"Shirley, please see the attached Labor contracts for the last 20 plus we have had the same language regarding bus pass. ATU family members have received dependent pass. There has been no change to the language. When ATU officers are on leave from Trimet they are to receive the same benefits as active member. I sure hope this is just a misunderstanding. If not it clearly looks like anti union movement at its finest."

As indicated elsewhere, at that time that Hunt sent that email, Block had become ATU's President-Business Representative and Hunt had become ATU's Vice President-Assistant Business Representative.

42. On December 17, 2015, at 2:46 p.m., Block sent an email to Stedman. In that email, Block asked Stedman to let her know why Hunt could not get ID cards that would let his two children ride TriMet.

43. On December 18, 2015, Stedman sent a three-page letter responding to Block in which he stated, "The short answer is that TriMet cannot provide Mr. Hunt's dependent children, or any of his dependents, with free transportation because it would be an unfair labor practice to do so." Stedman further wrote:

"ORS 243.672(1)(b) has been interpreted as meaning it is a prohibited subject of bargaining and an unlawful assistance of a union for an employer to pay the cost of a union officer's fringe benefits. *See City of Portland*, 8 PECBR 8115 (1985). In fact, it was on the basis of *City of Portland* that TriMet informed the ATU in 2012 that it no longer would pay the cost of healthcare or group life insurance benefits for the ATU's officers, lobbyists, or their dependents, notwithstanding an alleged agreement between the parties, which the ATU asserted was an agreement that TriMet would pay the premiums. To the extent that there ever was such an agreement, it was illegal and, therefore, unenforceable. *See Article 1, Section 1, Par. 2.*⁹

⁹Article 1, Section 1, Paragraph 2 of the 2012-2016 CBA states:

"If any term or provision of this Agreement or the application thereof to any person or circumstance shall to any extent be determined by final judgment or ruling of a court or state administrative body to be illegal, invalid, or unenforceable for any reason whatsoever, the remainder of this Agreement and the application of its terms and provisions shall not be affected thereby, and shall be valid and enforceable to the fullest extent permitted by law."

“As Mr. Hunt knows well, TriMet filed a declaratory judgment action in March 2012 on the issue whether paying ATU officers’ healthcare and group life insurance benefits constituted a violation under ORS 243.672(1)(b). Later, the ATU filed an unfair labor practice charge over the matter, UP-28-12, but withdrew its complaint in October 2012. Mr. Hunt was ATU’s President at that time. TriMet’s payment of his healthcare premiums and his coverage under TriMet’s group life insurance was at issue in the charge, along with those of others. TriMet has not paid for the cost of such benefits since then, although ATU officers are still eligible to participate in the healthcare plans without TriMet paying for premiums.

“Providing free transportation to the ATU Officers’ dependents constitutes an unlawful assistance of a union under ORS 243.672(1)(b) because it is direct employer support of a union office in the form of a financial benefit. It is also likely prohibited by the Oregon State Constitution and Public Finance Statutes because public funds cannot be expended for anything other than a public purpose. *See City of Portland* at 8124-25. Accordingly, any proposal to do so would be a prohibited subject of bargaining, and any agreement to do so would be unenforceable for the same reasons as was paying healthcare premiums or extending coverage under TriMet’s group life insurance program for the ATU officers, employees, and lobbyists.

“Regarding Article 1, Section 18, Par. 1, Mr. Hunt is not an active employee, so he does not qualify for active employee benefits (which includes free transportation). On or about August 5, 2002, Mr. Hunt took a leave of absence from TriMet to become an officer of the Union. He currently serves as the Union’s Vice President. Since August 5, 2002, Mr. Hunt has performed no work, service, or labor for TriMet. Instead, he is an employee of the ATU. Likewise, Mr. Hunt is not a retiree, and so TriMet cannot provide him or his dependents with free transportation as a retiree.

“We believe it is lawful, however, for TriMet to provide the ATU officers themselves with transportation privileges without committing a 1(b) violation. We believe that is the case because it is necessary for the ATU officers to see first-hand the working conditions of the members that they represent, and thus is a form of lawful employer-union ‘cooperation’ instead of unlawful financial assistance. *See City of Portland, supra*. However, this reasoning would not extend to ATU officers’ dependents, or to any other ATU employee or their dependents – unless those employees are also TriMet retirees. Any such retirees (and their eligible dependents) may qualify for free transportation on that independent basis pursuant to Article 1, Section 18.

“In reviewing your question regarding free transportation for ATU officers’ dependents, it has come to our attention that you and Mary Longoria still have active employee badges. Harry Saporta will be contacting you to provide you with the proper badges. These badges will provide access to the facilities and serve as a pass for transportation services. However, your active employee badges will need to be turned in to Safety & Security, and access with those badges will be disabled.”

44. On December 21, 2015, Saporta sent separate letters to Block and Longoria. In both of those letters, Saporta wrote:

“It has come to TriMet’s attention that you have an Active Employee badge. In accordance with TriMet’s Human Resources Manual, Section 428.1 – Security Identification Badges, Active Employee identification badges must be returned when employment with TriMet ceases. When you ended your employment with TriMet, the badge should have been returned to the Security office and a TriMet business photo identification badge indicating your affiliation with ATU should have been issued in exchange. The Active Employee badge will be disabled effective December 31, 2015.

“Enclosed is the new identification badge. It will provide access to TriMet facilities and serve as a pass for transportation services.

“At your earliest convenience, please return the disabled Active Employee [badge]. I have enclosed a stamped, self-addressed envelope to assist you in returning the badge.”

Neither Block nor Longoria responded to Saporta’s December 21, 2015, letters.

45. On January 5, 2016, Block filed Grievance 9106, which asserts that TriMet denied an unnamed ATU officer an “active employee ID card” on December 21, 2016, in violation of Article 1, Section 18, Paragraph 1 of the CBA.

46. On January 6, 2016, Stedman responded to Grievance 9106. In that letter, Stedman indicated that TriMet would not hear the grievance because it was not “arbitrable” for the reasons previously stated in his December 18, 2015, letter to Block. After that, Stedman wrote:

“First, even if the contract between ATU and TriMet did provide the benefits that accrue from being issued an active employee ID badge or the meaning you allege, it would be an illegal agreement regarding a prohibited subject of bargaining. *See City of Portland*, 8 PECBR 8115 (1985); it also would violate Oregon’s Constitution because it would be an expenditure of funds for other than a public purpose. *See Carruthers v. Port of Astoria*, 249 OR 329 (1968). Likewise, it would constitute a 1(b) violation for unlawful assistance of the ATU under PECBA. *See* ORS 243.672(1)(b).

“Second, the grievance isn’t timely. I realize you may not be aware of this since you are new to your office, but the issue of ATU officer’s ineligibility for TriMet active employee benefits arose in 2012 when we discontinued ATU officers from TriMet’s benefits at TriMet’s cost. The ATU failed to file a grievance within the required time period, but instead filed a ULP on May 8, 2012, which it later withdrew.

“ATU officers are not active TriMet employees and, therefore, are not eligible for any benefits that are available to active employees, including those that accrue by virtue of having an active employee ID badge. We reiterate, however, that the ATU

officers themselves are eligible for free transportation, as stated in our December 18, 2015 correspondence, for purposes of assessing the working conditions of the members you represent during business hours. As indicated, TriMet is providing you with appropriate ID badges for that purpose.

“We also would point out that ATU officers working for the ATU full time are on ‘Union business.’ Under Article 1, Section 2, Par. 3, Union business ‘mean[s] employment directly and solely by the Union, or the International Union of which it is a division.’ There is no joint employer relationship while ATU officers hold ATU office. Such officers are employed solely by the ATU, and are not active employees of TriMet. Although ATU officers do have a right to reinstatement once their terms of office end, such officers perform no work in the interest or on behalf of TriMet while they hold elected office with ATU. Moreover, ATU officers neither office at TriMet nor are under the supervision, direction, or control of any TriMet manager. In short, for statutory purposes, ATU’s elected officers on Union business are solely employees of ATU while they serve in their official capacities. *See, e.g., Dinicola v. State*, 246 Or. App. 526 (2011).”

47. On January 15, 2016, Saporta once again wrote separate but nearly identical letters to Block and Longoria.¹⁰ Each of those letters stated:

“On December, 21st, I wrote to you explaining that you still had an active Active Employee badge in your possession. I am writing to you again as it was not clear that you received this letter.

“TriMet’s Human Resources Manual, Section 428.1 – Security Identification Badges states that, Active Employee identification badges must be returned when employment with TriMet ceases. When you ended your employment with TriMet, the badge should have been returned to the Security office and a TriMet business photo identification badge indicating your affiliation with ATU should have been issued in exchange. The Active Employee badge was disabled effective December 31, 2015.

“Enclosed is the new identification badge. It will provide access to TriMet facilities and serve as a pass for transportation services.

“At your earliest convenience, please return the disabled Active Employee. I have enclosed a stamped, self-addressed envelope to assist you in returning the badge.”

Neither Block nor Longoria wrote back to Saporta about these letters. Additionally, no one from ATU contacted Saporta about having trouble with accessing TriMet facilities with their ID badges. However, ATU filed the complaint in this case on February 5, 2016.

¹⁰The parties agree that Saporta’s January 15 letters to Block and Longoria incorrectly list the year 2015, instead of 2016. Because Hunt did not have an active employee ID badge at the time, it was not necessary for Saporta to send him a similar letter.

48. On March 23, 2016, TriMet emailed out a memorandum that outlined updates to TriMet's HR policies, including changes to TriMet Policy 5.1, which deals with "Security ID Badging/Accesses."¹¹ Specifically, TriMet updated Policy 5.1 to include the following new language:

"An employee elected as an ATU officer as President, Vice President, and Secretary/Treasurer is placed on a leave of absence from the District's employ for union business for the term of office pursuant to Article 1, Section 1, Par. 3 of the Working and Wage Agreement and will be issued a special ATU contractor ID badge. This badge replaces the standard active employee photo ID badge and should be exchanged for ATU contractor ID badge, which serves as identification, allows access to TriMet facilities to conduct union business, and provides TriMet transit privileges only for the union officer (no dependents)."

Before the March 2016 change, that section of TriMet's HR policy did not specifically reference ATU or address what should happen when an active employee becomes a full-time ATU officer. It also did not directly address transit privileges for ATU officers and their dependents. TriMet notified ATU of the March 2016 change pursuant to a settlement agreement related to an unfair labor practice charge in Case No. UP-053-11 (which is discussed in more detail below).

49. In April or May 2016, the ATU lead officers (Block, Hunt, and Longoria), met with some members of TriMet's Board of Directors to discuss some of ATU's concerns, including the ATU officers' access to TriMet facilities. On June 1, 2016, those TriMet Board members sent a letter to Block, Hunt, and Longoria titled "Meeting Follow-Up." The letter stated, in relevant part:

"First, let us respond to the issue of your ID badges and facilities access. Staff have double checked the ATU officer access badges you were provided. We have confirmed that they offer you broad access to places your employees report, as well as access to our vehicles in operation. We have attached a report that shows the authorized areas. However, when these ATU officer ID badges were issued, your employee ID was deactivated, so make sure you use the officer IDs. If you experience any technical glitches in the use of these ATU officer ID badges, please don't hesitate to contact Harry Saporta, Executive Director of Safety, Security, and Environmental Services."

Sick Leave Buy Back

50. As noted above, throughout the relevant time period, the parties' CBAs have included Article 1, Section 2, Paragraph 3, titled "Representative Rights," which governs the rights of TriMet employees who take a leave of absence to serve as an ATU officer.

51. In 1988, ATU filed a grievance on behalf of grievant Ronald Heintzman, who at that time was on a leave of absence from TriMet and serving full-time as ATU's Business Representative. The 1988 grievance disputed TriMet's refusal to make pension contributions for Heintzman while he was on the union business leave of absence. In 1989, the parties settled that grievance by entering into a side letter agreement in which TriMet agreed to make pension

¹¹TriMet Policy 5.1 essentially replaced TriMet's "HR 428," which is also referenced in the record.

contributions for Heintzman during his leave of absence. In 1990, ATU filed another grievance claiming that TriMet was not complying with the 1989 side letter. In an arbitration opinion and award dated August 7, 1991, an arbitrator found that TriMet had violated the 1989 side letter. In reaching that decision, the arbitrator interpreted the representative rights clause, stating:

“[W]hat that provision guarantees is that the employee will be placed in his former position upon his retirement from Union office. By definition, in order for that to occur, the employee must have continued during his or her absence to accrue seniority, vacation credits and retirement pay rights. Thus, the provision clearly requires the Grievant to accumulate the same PERS credits as other officers while he serves as the Union’s Business Representative just as though he had never taken a leave of absence.”

52. In 1998, the parties agreed to a new provision in the CBA, Article 1, Section 9, Paragraph 5(d), which provides that retiring employees’ unused sick leave will be converted to pension benefits at the rate of \$0.25 per hour of accrued sick leave, if various conditions are met.

53. It appears that the sick-leave conversion provision, Article 1, Section 9, Paragraph 5(d), has remained in the parties’ successor CBAs throughout the relevant time period. The 2012-2016 CBA, Article 1, Section 9, Paragraph 5, titled “Sick Pay,” includes the following relevant provisions:

“b. Employees covered by this Agreement will accumulate sick leave beginning with the completion of the employee’s probationary period at the rate of eight (8) hours for each 160 accumulated straight-time pay hours to the maximum accumulated sick leave. For purposes of this provision, straight time pay hours shall include, in addition to straight time pay hours worked, spread-time hours worked (the combination of straight-time and spread-overtime may not exceed 8 hours per day), time paid for vacations, holidays, jury duty, funeral leave, and military service, as well as days off up to fifty-six (56) hours due to authorized leave of absence. Absence due to illness will not be deemed an authorized leave of absence for this purpose.

“* * *

“d. Upon reaching the earliest date when an employee could elect to retire and receive pension benefits, or upon suffering a permanent disability, an employee who has completed at least ten (10) years of continuous service as provided under Paragraph 2(a) of the Pension Plan and Permanent Disability Agreement between the parties, effective December 1, 1998, will have all unused accumulated sick leave up to the maximum accumulated sick leave converted to provide additional monthly pension benefits, computed at the rate of \$0.25 per hour for each such hour of unused, accrued sick leave.

“When an employee whose employment with the District terminates before reaching the earliest date when an employee could elect to retire and receive pension benefits, and who has completed at least ten (10) years of continuous service as provided under Paragraph 2(a) of the Pension Plan and Permanent

Disability Agreement, the employee will be paid, within two weeks of the date of termination, 50 percent of any unused, accumulated sick leave up to the maximum accumulated sick leave.

“e. Every December the District will pay fifty percent (50%) of any unused accumulated sick leave eligible for payoff in the employee’s sick bank that has accumulated in excess of the maximum accumulated sick leave.”

54. On March 4, 2002, the parties signed a side letter agreement titled “Clarification of Representative Rights Clause.” That side letter agreement quoted in full the CBA’s representative rights clause, Article 1, Section 2, Paragraph 3, and then stated that the August 7, 1991, arbitration award “reaffirmed the meaning of the foregoing representative’s rights clause, finding that an employee on leave of absence as an Association representative [*sic*] be treated as though he had never taken a leave of absence.” The agreement further stated, “When Tri-Met employees take a leave of absence to serve as full-time Association representatives, their Tri-Met sick leave bank is frozen and they cease earning sick leave. Instead, they begin earning and accruing sick leave from the Association while serving as a full-time representative.” Next, the agreement noted that the parties’ 1998-2003 CBA included a new provision for conversion of unused sick leave to pension benefits and stated:

“A Tri-Met employee returning to Tri-Met or retiring after Association leave would be harmed in that he would not have accrued sick leave for the period he was on leave. As a result, he would not be treated as though he had never taken a leave of absence. Therefore, prior to applying for retirement benefits under the [CBA and pension agreement], a member who served as a full-time [ATU] officer will be allowed to buy back sick leave hours for the period of time he served as a full-time [ATU] officer.”

The agreement then specified how the sick leave buy back would occur. For example, the parties agreed that ATU would buy back the officer’s unused sick leave at the hourly rate in effect during the buy back period, and that ATU would provide TriMet with an annual accounting of each eligible officer’s sick leave accrual and usage.

55. On July 26, 2007, the parties signed a separate side letter agreement that stated:

“TriMet and the Union agree to bring forward the side letter agreement allowing full-time ATU officers the ability to buy back sick leave when returning to employment with TriMet or retiring. The agreement will be applicable until the expiration of the existing agreement on November 30, 2009.”

Sam Schwarz, who was ATU’s Vice President–Assistant Business Representative at that time, originally signed the 2007 side letter agreement for ATU. Hunt, who was ATU’s President–Business Representative at that time, signed the same agreement on July 27, 2007.

56. By the terms of the 2007 side letter agreement, the sick leave buy back agreement expired on November 30, 2009. Nevertheless, when Schwarz retired from his ATU officer position, TriMet permitted ATU to buy back the sick leave hours that Schwarz had accrued while

he was on leave from TriMet and serving as an ATU officer. Specifically, on December 3, 2010, ATU paid \$9,400.95 to TriMet to buy back the sick leave.

57. The parties' 2009-2012 CBA was the result of an interest arbitration award issued on July 12, 2012.

58. Article 1, Section 19, Paragraph 10 of the parties' 2009-2012 CBA states:

"Prior to the conclusion of these negotiations, the parties shall provide each other with any and all side letters, Memoranda of Understanding, or Supplemental Agreements which remain active and in effect. Any side letters, Memoranda of Understanding, or Supplemental Agreements not specifically identified by either party will be considered null and void."

In the 2012-2016 CBA, that provision was renumbered as Paragraph 9 in Article 1, Section 19.

59. On November 30, 2012, TriMet sent ATU a memorandum stating:

"In compliance with Article 1, Section 19, Par. 10, attached to this memorandum is a table of side letters, MOUs, and supplemental agreements that the District desires to remain active and in effect under the successor agreement. The District has proposed that some of these agreements be incorporated into the main body of the contract, either through substantive or housekeeping proposals. To the extent that the proposals are not agreed to or awarded through arbitration, the District desires them to remain active and in effect pursuant to Article 1, Section 19, Par. 10."

In the table attached to the memorandum, TriMet listed various side letters, including a June 14, 2005, side letter agreement regarding meal and break periods. ATU did not bring any side letter agreements forward during negotiations for the 2012-2016 CBA, and thus did not bring forward the sick leave buy back agreement referenced above.

60. On June 30, 2015, Longoria sent an email to TriMet indicating that ATU was sending it a check for around \$11,000 to buy back the accrued sick leave hours of outgoing ATU President-Business Representative Bruce Hansen, who presumably was returning to his regular employment with TriMet.¹² Before responding to Longoria, TriMet Director of Financial Services Lori Baker exchanged emails and spoke with Stedman, and on July 22, 2015, Baker wrote back to Longoria, stating that there was no more sick leave buy back and that she was therefore returning Hansen's check.

61. On January 12, 2016, Stedman responded to a January 8, 2016, letter from Block. According to Stedman's summary of Block's letter, Block alleged that TriMet was acting with improper anti-union animus through a variety of actions, including not paying ATU officer's health insurance premiums, not providing transportation passes to Hunt's dependents, disabling ATU officers' active employee ID badges, refusing to permit ATU to buy back Hansen's sick

¹²As explained in more detail below, Block was elected to replace Hansen as the ATU President-Business Representative on June 23, 2015. The election for that office was rerun on April 30, 2016, and Block won again.

leave, and charging for the costs of responding to information requests. Also according to Stedman's summary, Block stated that she had not learned that TriMet was not paying the premiums for ATU officers' health insurance until January 6, 2016. In his response, Stedman stated, in part: "Your attribution of anti-Union animus is completely untrue. Instead, in all but one of the issues you raise, the ATU is demanding that TriMet engage in unlawful behavior in order to provide ATU officers with personal financial gain."

62. On February 10, 2016, Block wrote a letter to Brad Avakian, the Commissioner of the Oregon Bureau of Labor and Industries, stating:

"In May of 2005 the then Labor Commissioner at the time, Dan Gardner, determined that TriMet was in violation of Oregon law for not providing adequate meal and break periods. In lieu of issuing a determination at that time, Commissioner Gardner deferred ruling on the matter after the parties announced they had reached an agreement over the issue.

"TriMet and the Union prepared and signed a Side Letter Agreement over the meal and break period. In accordance with the parties' collective bargaining agreement, the Side Letter was valid only during the term of an agreement. The side letter was not renewed by the parties when the collective bargaining agreement expired on November 30, 2012.

"The Union offered TriMet to meet and negotiate a new meal and break period agreement within the next 60 days, subject to final approval by the TriMet membership. The Union believes the best outcome is a negotiated agreement between the parties. Should the parties be unable to negotiate a new agreement, however, the Union will be requesting the Oregon Bureau of Labor and Industries to issue a ruling and order on the meal and break issue."

63. On February 12, 2016, Stedman sent a letter to Block about her February 10, 2016, letter to Avakian. Stedman disputed Block's assertion that ATU had offered to negotiate a new meal and break period agreement. He also wrote:

"[T]he 2005 Side Letter has not expired, so bargaining would be inappropriate. Article 1, Section 19, Par. 9 (previously Par. 10) of the collective bargaining agreement between TriMet and the ATU states that, 'Prior to the conclusion of these negotiations, the parties shall provide each other with any and all side letters...which remain active and in effect.' TriMet brought forward the 2005 Side Letter in the first transmittal of its bargaining proposals on November 30, 2012. Thus, the 2005 Side Letter is active under the existing 2012-2016 contract, which expires on November 30, 2016. The 2005 Side Letter is posted internally, and we have acted in conformance with that agreement continuously since it was implemented. If the ATU wishes to bargain this matter in successor contract negotiations, it should offer a proposal at that time."

Stedman also asserted that the 2005 side letter had been upheld by the Board in *Tri-County Metropolitan Transportation District of Oregon (TriMet) v. Amalgamated Transit Union, Division 757*, Case No. UP-55-05, 22 PECBR 506 (2008).

64. On February 15, 2016, Block sent a letter to General Manager McFarlane in which she stated:

“This is to inform you that the parties failed to renew the Side Letter Agreement on rest and meal break periods. As such the agreement expired when the current Working and Wage Agreement became effective December 1, 2012 pursuant to Article 1, Section 19, Paragraph 9 of the Working and Wage Agreement.”

“* * * * *

“We received on February 12, 2016 a letter from your Labor Relations Director, Randy Stedman, regarding this issue. The Union disagrees with all points Mr. Stedman made in his letter, except for the fact that both parties agree that the rest and meal period Side Letter Agreement was not brought forward and signed by the parties at the beginning of the current Working and Wage Agreement, as Mr. Stedman claims was first signed in 2005.”

65. Stedman responded to Block’s February 15, 2016, letter to McFarlane with another letter to Block later that same day. Stedman responded to Block’s assertions much as he had in his February 12, 2016, letter to Block. At the end of the February 15 letter, Stedman wrote: “Unless the ATU agrees to comply with the terms of the 2005 Side Letter for the duration of the current contract, TriMet intends to file an unfair labor practice charge against ATU within the next few days and ask ERB to reaffirm its decision in UP-55-05.”

66. On February 19, 2016, Block sent a letter to every ATU member in which she explained:

“The Working and Wage Agreement provides that Side Letters, Memoranda of Understanding or Supplemental Agreements shall be signed and brought forward in any newly negotiated collective bargaining agreement between the parties, and if not, shall be deemed to have expired. The parties did not sign nor bring forward the Side Letter on meal and rest break periods during the most recently negotiated 2012 to 2016 Working and Wage Agreement and as a result is considered expired.”

Union Orientation Sessions

67. The parties’ CBA does not explicitly address union orientation meetings for newly hired employees. However, Article 1, Section 2, Paragraph 2(b) of the 2012-2016 CBA states:

“All persons hereafter employed by the District to perform the duties of employees covered by this Agreement shall be furnished with an application for membership in the Union at the time of such employment, and shall be advised of the requirement that they shall become members of the Union within thirty-one (31) days after the date of this Agreement or thirty-one (31) days from the beginning of employment with the District, whichever is later.”

68. Article 1, Section 2, Paragraph 2(e) of the 2012-2016 CBA states:

“The District shall forward monthly to the Secretary of the Union the names of all persons entering or leaving the service in all departments covered by this Agreement. The Union shall furnish monthly to the District a list of its members joining or withdrawing from the Union during the month. The District shall deduct monthly from the compensation of the employees, members and nonmembers of the Union, the monthly dues or ‘in lieu of dues payment’ prescribed and established by the membership of the Union and applicable law.”

69. Generally, when TriMet hires new employees in bargaining unit positions, those new hires participate in an introductory training program that lasts from two to six weeks, depending on the position. TriMet conducts two variations of its training program for bargaining unit employees, one for operators and one for maintenance employees. For many years, TriMet scheduled an ATU orientation session during each of its introductory training programs. In the 1990s, ATU representatives conducted the ATU orientation for new hires in the TriMet training program at a TriMet facility during normal work hours. At some point, the location of the ATU orientation changed to the ATU office (or “union hall”), which is not on TriMet property. As a result, for a number of years before March 4, 2016, both the operator and the maintenance training programs included a scheduled stop at ATU’s offsite office for an orientation session conducted by ATU representatives. Those orientation sessions, which typically lasted around one to two hours, occurred during the employees’ regular work hours. TriMet paid the new hires a range of one to three hours at their regular wage rate to attend the ATU orientation sessions (in some cases, this paid time included the time employees spent traveling to and from the ATU office). Historically, TriMet bussed employees to and from the offsite ATU orientations in TriMet vehicles. At some point, in or around 2014, the operator training program stopped bussing the employees and made them responsible for traveling to the ATU office using their own vehicles. As discussed further below, TriMet ceased scheduling the ATU orientation session as part of its new hire training program and ceased paying employees for any time spent attending an ATU orientation session on March 4, 2016.

70. During the offsite union orientation sessions, ATU representatives provided the new hires with a general overview of how the union works and how the union could help them. That included, for example, explanations of employees’ Weingarten rights and how to reach stewards. Additionally, ATU informed the new hires about the CBA’s “union security clause” and each employee’s right to choose to join the union as a member or not join the union and instead be a “fair share” employee or a “religious objector.” ATU provided the new hires with “welcome packets” that included a membership application, the latest CBA, information about employee benefits (including an employee assistance program and a child and elder care reimbursement program), and ATU’s bylaws and constitution. ATU also provided advice on how to deal with the public and stay safe, and allowed the new hires to ask ATU questions and get answers in a group setting.

71. Typically, the new hires who attended the offsite union orientation sessions filled out a form for ATU that included spaces for an employee’s name, home address, employer, employee number, email address, and telephone number. In addition, TriMet regularly gave ATU lists that showed which employees would be at each session. On the occasions that employees were responsible for transporting themselves to and from the ATU orientation session, TriMet paid

the employees without determining whether they actually showed up on time and attended the complete session. TriMet's training supervisors were only generally aware of what ATU covered in its orientation sessions. TriMet managers or non-bargaining unit training supervisors attended the offsite ATU orientation sessions on a few occasions.

72. At some point before February 2016, employees in TriMet's Labor Relations department, including Christine Stevens, who was TriMet's Senior Manager of Labor Relations at the time, attended a seminar put on by the Local Government Personnel Institute. During the seminar, Pierre Robert, a labor relations lawyer, argued that paid union orientation sessions were impermissible and unlawful assistance to the union under ORS 243.670, which was enacted in 2013. Stevens later relayed Robert's concept to Stedman, who then sought the advice of outside counsel regarding whether paying employees to attend the ATU union orientation sessions violated ORS 243.670 or ORS 243.672(1)(b). Based on that advice and Stedman's own legal analysis, TriMet decided that it would no longer pay its new employees to attend the offsite union orientation sessions.

73. On February 4, 2016, ATU President–Business Representative Block had a lunch meeting with TriMet General Manager McFarlane. During that meeting, Block asked McFarlane for more time for the offsite union orientation sessions because, at that time, the groups of new hires that were attending the ATU orientation sessions were getting larger, and there was not enough time to address all of the new employees' questions. McFarlane responded that he would take Block's request back to his team and get back to her about it.

74. On February 5, 2016, Stevens sent a letter to Block that stated:

“We have been advised by legal counsel that the practice of allowing newly hired union employees to go to the ATU offices on District paid time for purposes of orienting them to their membership in ATU violates ORS 243.670. As you may know, changes to Oregon law in 2013 make this practice unlawful. See Oregon Laws, Chapter 663 (2013). This activity is an expenditure of public money for a non-public purpose, and so it also may violate the Oregon Constitution. See *City of Portland*, 8 PECBR 8155 (1985); *Carruthers v. Port of Astoria*, 249 Or 329, 438 P2d 725 (1968).

“Please consider this as notice that effective March 4, 2016, [30 days] the District no longer will provide paid or unpaid release time for new hires to go to the ATU offices for purposes of orientation. This does not affect lawful purposes for which TriMet's employees may go to ATU's offices on paid time. And, of course, any TriMet employee may go to ATU's offices on their own time outside of their normal working hours.”

That same day, ATU filed the unfair labor practice complaint in this case.

75. Since March 4, 2016, TriMet has ceased scheduling and paying employees to attend ATU orientation sessions. Since at least November 2015, and continuing after March 2016, the materials that TriMet routinely provides to new hires have included a two-page ATU pamphlet about unions, a map with ATU's office address and phone number, and a form that employees can use to provide their contact information to ATU. Also, at some point during the hiring process,

TriMet typically makes a general presentation to prospective employees about employment with TriMet, during which it explains that employees in bargaining unit positions are represented by ATU. TriMet also provides basic information about ATU's membership initiation fees and dues. TriMet has not provided prospective employees or new hires with ATU membership applications or information about each employee's right to be a non-member fee payer or religious objector.

76. TriMet automatically deducts monthly dues and fair share fees from its employees' paychecks and then sends those charges to ATU. Fair share fees and membership dues are the same amount. By default, TriMet's accounting department designates all new bargaining unit employees as regular dues paying members of ATU, as opposed to non-members who pay fair share fees (or religious objectors). If TriMet receives notification from ATU or an employee that a particular employee is not joining the union as a member, TriMet's accounting department changes that employee's payroll designation to fair share fee payer. TriMet does not deduct the ATU initiation fee from an employee unless and until TriMet receives that employee's membership enrollment form from ATU.

77. TriMet does not regularly provide ATU with a list of the new hires in the ATU bargaining unit. Historically, and continuing since TriMet ceased scheduling employees to attend the union orientation sessions on work time, TriMet has provided ATU with a monthly "dues report." Since March 2016, ATU has tried to identify new hires by comparing the monthly dues reports to determine whether there are new names that were not in the prior month's report. Generally, a new employee's name does not appear on the monthly dues report until approximately two months after their hire date. Sometimes, the dues report includes the new hires' addresses, email addresses, and telephone numbers, but that does not happen consistently. Generally, if TriMet becomes aware of changes in employees' addresses and phone numbers, it includes that information in the next dues report.

78. Since March 2016, some new hires have contacted ATU or gone to ATU's office independently. For example, one new employee testified that TriMet gave the new hires in her training program ATU's contact number. She telephoned ATU, and ATU mailed her a packet that included an application and an ATU handbook. Because she had questions about how to fill out the application, she contacted ATU again, and they invited her to meet with someone at the ATU office. She eventually met with Hunt for approximately one hour. During that meeting, Hunt helped her fill out the application, answered her questions, and gave her information about Weingarten rights and contact information for her union representatives.

79. Since March 2016, ATU has attempted to orient new hires by a variety of alternative means. For example, in or about August 2016, the TriMet training department informed the new hires who were participating in the training program at that time that they could speak with ATU representatives at a nearby Subway restaurant during their lunch break, on a voluntary basis. ATU has found it difficult to schedule meetings for groups of new employees outside of the initial training program because TriMet operates on a 24-hour schedule, and after employees complete their initial training, they work different shifts at different locations, and they are often in transit (*e.g.*, driving a bus route). On one occasion, ATU held an open house for new employees at ATU's office. However, it was not well attended, because many of the employees were in transit at the time. ATU has also found it difficult to locate and meet with each new hire individually, in part due to the nature of TriMet's operations and ATU's lack of information (for example, ATU

may not know each employee's scheduled hours or the specific times that they will not be in transit).

80. As noted above, some TriMet Directors and ATU officers met to discuss various ATU concerns in April or May 2016, and the TriMet Directors sent a follow-up letter to ATU on June 1, 2016. Regarding the orientations, they stated:

“Employee Orientation: TriMet management understands that orientation to the ATU is helpful to our employees. We note this issue is a litigation matter pending before ERB in an ATU unfair labor practice charge. However, if the ATU desires to enter into settlement discussions on this count of its ULP complaint, TriMet management is ready to do so. We understand the ATU has developed an after-hours gathering as a workaround for lengthy orientation sessions. That said, TriMet would be open to the type of orientation found in many other Oregon labor contracts. Such an arrangement would of course need to be lawful, but could provide a good introduction by the ATU to TriMet's new employees.”

81. At some point in mid-August 2016, Block and Stedman spoke on the telephone and discussed TriMet's new union orientation policy. During that discussion, Stedman offered to let ATU speak with TriMet's new employees during regular work hours at a TriMet facility for around 10 to 15 minutes, because Stedman had seen that some AFSCME contracts allotted that amount of time for union presentations. Block responded that Stedman's offer was a “joke,” because she felt that 15 minutes was not enough time to provide all of the necessary information and answer all of the employees' questions, particularly when each group included approximately 20 new hires. Around the same period of time, Lomax casually suggested to Block that TriMet could put something in its standard training materials binder related to ATU. ATU did not accept that offer either.

82. On October 19, 2016, Britney Colton, TriMet's Director of Labor & Employee Relations, wrote a letter to Block, ostensibly in response to ATU's third amended complaint in this case.¹³ Colton wrote, in part:

“TriMet does not have any blank copies of an application for Union membership, and does not believe that the Union has ever requested that TriMet distribute these applications. However, if you provide us a supply of blank copies, we will gladly furnish them to new hires during orientation.

“And, please let us know if you would like TriMet to inform new hires during orientation that they must choose among becoming a dues-paying union member, paying fair share fees, or objecting based on religious tenets to the payment of union dues or fees. TriMet is also glad to provide such information, although TriMet does not believe it has ever been asked to do this previously.”

¹³At the time of the hearing, Colton had been serving as TriMet's Director of Labor & Employee Relations since August 2016. Before that, she was Senior Deputy General Counsel at TriMet, working exclusively on labor and employment matters, and before that, she was Deputy General Counsel. In total, Colton has been at TriMet for over ten years.

83. On October 24, 2016, Hunt responded to Colton and rejected TriMet's offer to distribute union membership applications to new employees. Hunt stated, "Such activity without union authorization constitutes interference with union administration, and, as such, ATU-757 is not authorizing this action." Hunt also indicated that ATU expected to be receiving in the near future a ruling from this Board addressing TriMet's cancellation of the new-employee orientations.

84. Hunt estimated that TriMet hired approximately 208 new employees during the period from March 2016 to November 2016.

85. TriMet uses monies from its general fund to pay bargaining unit employees' wages, including wages for time spent attending ATU's offsite orientation sessions. TriMet's largest source of funding is an employer payroll tax. The next largest source of funding is passenger fares, which amounts to about 24% of TriMet's funds.

TriMet Charging for Information Requests

86. On July 23, 2012, the parties reached a "partial settlement" of Case No. UP-053-11, a complaint that ATU filed against TriMet with the Board on August 5, 2011. In relevant part, that settlement states:

- "a. TriMet acknowledges that ATU information requests are only required to be of probable or potential relevance to a grievance or contract administrative issue. An actual grievance does not need to be pending.
- "b. ATU acknowledges that if the probable or potential relevance of an information request is not evident from the request itself, TriMet is entitled to know from ATU the relevance to an actual, probable or potential grievance or contract administration issue.
- "c. Neither party will take more than 30 days in providing information for a request, unless the parties agree otherwise on a case-by-case basis.
- "d. If TriMet believes that a statute prohibits disclosure of the information requested without an employee release, TriMet will inform ATU of the law that applies and which information is of concern. If the parties are unable to reach an immediate resolution, the parties agree to confer on the matter."

87. Generally, when ATU files a grievance, it makes an initial information request. For years, ATU typically has used a broadly worded "boilerplate" letter for that initial information request, and then made a more specific information request when the parties got closer to arbitration in the grievance process.

88. On July 22, 2015, Block sent an information request letter to TriMet that asked for a copy of an ergonomics report for "Type 5 light rail vehicles." As explained elsewhere, Block had just won an election for ATU's President-Business Representative on June 23, 2015, and thus was fairly new to the office at the time.

89. On July 23, 2015, Stevens sent a letter to Block in response to her July 22 information request. Stevens wrote, in part:

“In accordance with the parties’ July 23, 2012 settlement agreement related to UP-053-11 regarding information requests, please state with specificity the relevancy of this information request to any actual, pending, or potential grievance or contract administration issue. If this request i[s] not related to any such matter, contact TriMet’s public records division and request the information through the normal procedures for a public records request.”

90. On August 11, 2015, Block wrote back to Stevens and explained that the July 22, 2015, information request concerned a TriMet employee’s workers’ compensation claim.

91. On August 20, 2015, Stevens sent Block her own information request. Stevens asked ATU for (1) the name, title, address, telephone number, and email address of the Benefits Coordinator hired by the ATU pursuant to Article 1, Section 9, Paragraph 2 of the 2012-2016 CBA; (2) a copy of the current contract between the Benefits Coordinator and ATU; and (3) copies of the checks paid to the Benefits Coordinator from November 1, 2012 through the date the information request was sent.

92. ATU pays a Benefits Coordinator whose job duties include advising employees on the employment benefits provided by TriMet. Pursuant to Article 1, Section 9, Paragraph 2 of the 2012-2016 CBA, TriMet pays ATU \$18,000 a year to fund that position. Stevens sent her August 20, 2015, information request because TriMet’s audit division wanted to find out how ATU was spending that money for the Benefits Coordinator, and to ensure that the money was actually being spent on its intended purpose. This particular inquiry was one of a number of audits that TriMet has periodically conducted since the mid-2000s.

93. On August 25, 2015, Block sent a letter back to Stevens that stated:

“This is regarding your request for ATU Benefits Coordinator dated August 20, 2015. Staff estimates that it will take a minimum of 0.25 hours to complete this request. The ATU will require prepayment in the amount of \$33.86 (affected employees fully burdened hourly rate x 0.25 hours). If the labor takes less time than is included in the prepayment amount, ATU will promptly refund the amount of overpayment to you. If it is determined that additional labor is required, we will contact you for prepayment for the additional labor before proceeding. The ATU reserves the right to charge for legal review at the affected employee’s fully burdened hourly rate and standard copying charges may apply; payment must be made before release of the documents.

“If you would like ATU to proceed with this information/documentation search, please forward a check in the amount of \$33.86 to Mary Longoria’s attention to ensure proper receipt and prevent delays in processing. If you need further information, please contact my office.”

94. The “fully burdened rate” is essentially the hourly cost to employ the staff needed to produce the requested information, including wages and employee benefits. The fully burdened

rate can differ depending on which employees are tasked with producing the requested information by the responding party.

95. Before Block's August 25, 2015, letter to Stevens, neither party had ever charged the other for work related to information requests. ATU did not give TriMet notice that it intended to charge TriMet for the costs of responding to the information request before Block sent the August 25 letter. Block testified that she did not intend to change the parties' general practice when she sent that letter. She explained that she had asked TriMet to pay for the costs for several reasons: because she was new to the office of President-Business Representative; she did not know why TriMet was requesting information about the Benefits Coordinator; the information that TriMet sought did not relate to any pending grievance; and no one from TriMet had contacted her to explain the purpose of the request. Since August 2015, TriMet has made additional requests for information, and ATU has not charged TriMet for any of the requested records.

96. On September 2, 2015, Stedman sent Block a letter explaining that TriMet had requested information about the Benefits Coordinator because it was auditing the funds that TriMet pays ATU, and that TriMet had periodically conducted similar audits in the past. Stedman also included a copy of a similar letter that TriMet had sent in 2011 to Hunt, when he was ATU's President-Business Representative. Ultimately, TriMet did not pay the \$33.86 charge or receive the requested documents from ATU; instead, ATU permitted TriMet's audit department to inspect the financial records at ATU's office.

97. On September 14, 2015, Stedman sent a letter to Block that stated:

"As you know, TriMet is authorized under the Public Employee Collective Bargaining Act (PECBA) and decisions of the Oregon Employment Relations Board to recover its costs of making records information available related to collective bargaining and labor relations matters. We are providing you courtesy notice that, effective with requests submitted on or after September 15, 2015, TriMet intends to recover its costs according to the attached schedule and request form.

"Although the ATU did not provide TriMet similar notice, implementation of this policy to recover the costs of making records information available, appears to be reciprocal with the ATU's position, as expressed in your letter dated August 25, 2015, relating to our information request for records about the Benefits Coordinator."

98. As indicated in that September 14 letter, Stedman attached a formal information request form printed on TriMet letterhead. That form stated:

Fees: TriMet is authorized under the Public Employee Collective Bargaining Act and decisions of the Oregon Employment Relations Board to recover its costs of making records information available. Effective September 15, 2015, TriMet will recover its costs according to the schedule below, including for locating, retrieving, and compiling requested records, reviewing, redacting, and segregating exempt material, supervising inspection of records, and duplicating, certifying, and mailing records. Fees for search time may be charged regardless of whether TriMet is able

to locate the requested records or if the records located are subsequently determined to be exempt from disclosure. There will be no fee waivers.”

(Emphasis in original.)

99. Block responded to Stedman’s September 14 letter on September 23, 2015, in a letter addressed to General Manager McFarlane and copied to Stedman. Block wrote:

“It appears that the above-referenced letter is another illustration of your administration’s anti-union agenda. The Union views the action TriMet plans to take as an attempt to hinder the Union’s ability to represent its members in a timely and effective manner and will act accordingly.

“In his letter, Stedman erroneously claims that the Union initiated a change to the parties’ practice. Your staff has repeatedly raised the settlement agreement surrounding Oregon ERB case ULP 053-11 in determining what information can be obtained with or without reproduction costs.

“If Stedman believed the Union’s response to TriMet’s request was out of compliance with ULP 053-11 settlement agreement, then he should have so stated. Instead, he used this merely as a ruse to push your anti-union agenda.

“The Union believes that it is time for TriMet to rid itself of its anti-union views and agenda and/or the leadership at TriMet that continues to push it.”

100. Stedman responded to Block by letter on September 28, 2015, stating:

“I am responding to your September 23, 2015, letter regarding information requests under PECBA and our letter dated September 14, 2015, on the same topic. Your letter makes reference to a July 23, 2012, partial settlement of ULP 053-11, which is peculiar. Nothing in our letter of September 14 mentions or even relates to compliance with that settlement agreement.”

101. On October 1, 2015, Block sent another letter to General Manager McFarlane. After referencing her September 23 letter, she stated:

“The Union’s request to TriMet was based on the ULP 053-11 settlement agreement. Randy Stedman responded on September 28, 2015, claiming that his letter of September 14, 2015 does not make any reference to the ULP 053-11 and the settlement agreement related thereto. You should ask yourself why.

“Perhaps Mr. Stedman is unaware of what his subordinate staff does, but in a July 23, 2015 letter to Shirley Block, TriMet Senior Labor Relations manager Christine Stevens refers to the ULP-053-11 settlement agreement in making the determination whether a Union request for information is a grievance or contract administration issue, or a normal public records request.

“Mr. Stedman acted surprised and confused by the reference to the ULP 053-11 settlement agreement and its applicability to a TriMet request for information. Apparently Mr. Stedman doesn’t apply the settlement agreement to TriMet information requests.

“Should TriMet carry out its anti-union campaign by charging the Union for grievances and contract information, the Union will file with the Oregon Employment Relations Board.”

102. On October 5, 2015, Stedman responded to Block’s October 1 letter. At the outset, Stedman referenced some personnel changes that ATU had recently gone through and stated, “Now we understand that [ATU] has hired multiple internal ‘legal consultants’ none of whom are members of the Oregon State Bar. Apparently, turnover has mortally wounded all logic.” Stedman then wrote that the partial settlement agreement for Case No. UP-053-11 did not address “the parties recovering their costs for the production of information under PECBA. Instead, the partial settlement regarding information requests related to document relevancy, the time within which to respond, and the handling of statutory prohibitions against production.” (Emphasis in original.) Stedman also wrote, “Pursuant to *AFSCME v. City of Portland*, UP-46-08 (2012), the ATU was perfectly within its legal rights to demand recovery of costs for producing documents under PECBA. * * * TriMet gave the ATU prior notice of its change in policy, whereas the ATU did not. Other than that, we see no difference between the ATU’s lawful actions and TriMet’s.”¹⁴

103. On October 7, 2015, Block sent another letter to General Manager McFarlane, stating:

“We received another anti-union themed letter from your union buster, Randy Stedman, and we take this to mean that you continue to support his actions. Mr. Stedman wastes considerable time talking about nothing, which is norm for the day. The Union places no importance or relevance on anything spewed from Mr. Stedman’s mouth, as all of it is simply a continuation of your anti-union agenda.

“Let us be clear and talk very slowly so Mr. Stedman understands. TriMet, through Stedman, announced that effective September 15, 2015, it was changing how it responded to requests for information related to grievances and labor relations. That represents a change to the parties’ practice and as such represents a mandatory subject of bargaining. Mr. Stedman refused to bargain over the change.

“Mr. Stedman claims the ATU refused to give notice of its change in policy. As usual, Mr. Stedman is confused. The ATU did not change any policy and did not give or fail to give any notice. Mr. Stedman is using this false claim to continue pushing your fully supported anti-union agenda.

“And Mr. Stedman’s characterization of the ATU, its personnel and activities, is laughable. Even if we had all of the ‘legal consultants’ as Mr. Stedman incorrectly

¹⁴We summarize the case cited by Stedman, *American Federation of State, County and Municipal Employees, Council 75, Local 189 v. City of Portland*, Case No. UP-46-08, 24 PECBR 1008 (2012), when we address ATU’s information request claim in our Conclusions of Law, below.

claims, I would take their legal prowess over his any day of the week. I suggest you and Mr. Stedman spend more time looking at your own organization and your Stedman initiated problems, and if you do so, Mr. Stedman would have less time pursuing your anti-union agenda and more time to address the many problems within TriMet.

“Should TriMet continue to violate the parties’ practice in regard to grievance and labor relations information requests, the Union will file a complaint with ERB alleging that TriMet changed the practice and refused to bargain. And please continue to endorse Mr. Stedman’s threats to the Union and see where that takes you.”

104. McFarlane asked Stedman to respond to Block’s October 7 letter, and he did so later the same day. Stedman wrote:

“I am responding to your October 7, 2015, letter regarding information requests under PECBA. On September 14, 2015, TriMet gave you notice of its intent to implement a policy regarding recovery of costs under PECBA, which mirrors its policy for non-PECBA requests. Even if there had been a unilateral change, pursuant to *AFSCME v. City of Portland*, the case we provided you on October 5, 2015, ERB has ruled that recovering the costs of producing information is not a mandatory subject of bargaining. And, even if it were a mandatory subject of bargaining, the ATU failed to demand to bargain within 14 days, as required by statute, ORS 243.698(3).”

105. As summarized above (in the findings of fact regarding the sick leave buy back), Block sent a letter to TriMet regarding a variety of concerns on January 8, 2016, and Stedman sent Block a response letter on January 12, 2016. Regarding ATU’s concern about TriMet charging to respond to information requests, Stedman asserted that Block was “complaining about an action where TriMet followed the ATU’s lead.”

106. On June 23, 2016, Block sent an information request to Stevens regarding Grievance 9014, which dealt with an alleged chiropractic benefit change. ATU specifically requested the following items:

- “1. all communications between TriMet and Regence related to Regence’s implementation of CareCore National, LLC
- “2. all communication from Regence to TriMet related to its implementation of the new Regence Physical Medicine Program and/or CareCore National, LLC
- “3. all summary plan documents for Regence and/or CareCore National, LLC from January 1, 2013 to the present
- “4. all communications within TriMet related in any way to Regence’s implementation of CareCore National, LLC

“5. all documents relating to any cost or benefit analysis prepared by TriMet or at its request regarding Regence and/or CareCore National, LLC”

107. Also on June 23, 2016, Block wrote to Stevens “to follow up” on ATU’s November 5, 2015, information request regarding Grievance 9061, which addressed allegedly reduced retiree benefits. In the November 5, 2015 request, ATU had requested “that TriMet provide every document the employer considered when making the decision being grieved.” Block renewed that request and asked TriMet to provide additional documents, including:

- “1. Summary plan documents for all the healthcare plans provided to active employees, including the 80/20 PPO, the 90/10 PPO
- “2. Summary plan documents for all health care plans provided to non-active employees, including the Kaiser Permanente Senior Advantage and the United Healthcare HMO and United Healthcare PPO
- “3. All notices related to health care plans, including notification of plan changes and open enrollment forms
- “4. All correspondence, including emails, between TriMet and United Healthcare and TriMet and Kaiser Permanente related in any way to the health care plans provided to non-active employees
- “5. All communications within TriMet related in any way to the health care plans provided to non-active employees
- “6. All documents relating to any cost or benefit analysis prepared by TriMet or at its request regarding the health care plans provided to non-active employees”

The June 23, 2016, request for Grievance 9061 did not limit the request’s scope to a particular time period.

108. On July 1, 2016, at 11:29 a.m., Stevens emailed Heidi Vass (TriMet Benefits Manager), and asked Vass to estimate how much time it would take her and her staff to respond to certain ATU information requests. Vass responded by email at 1:59 p.m. the same day, indicating that the Grievance 9014 information request would take 40 hours of work, and that the Grievance 9061 information request would take 60 hours of work. Vass also asked for clarification about the extent to which she should respond to ATU’s request for “every document the employer considered” in making the retiree benefits decision at issue in Grievance 9061.

109. On July 5, 2016, Stevens sent Block a letter about ATU’s Grievance 9061 information request and another letter about ATU’s Grievance 9014 information request. In each letter, Stevens provided the estimated minimum amount of time it would take for TriMet to gather the requested information (in accordance with Vass’ July 1, 2016, email), and stated how much ATU would have to pre-pay TriMet to complete the necessary work, based on the affected employees’ fully burdened rate. For Grievance 9061, Stevens asked ATU for a “prepayment” of \$5,450.40. For Grievance 9014, Stevens asked ATU for a prepayment of \$3,633.60.

110. On August 2, 2016, Block wrote to Stevens about another ATU grievance, Grievance 9219, which dealt with an alleged seniority violation. Block wrote:

“We wish to request a Step 1 hearing regarding the above-captioned grievance. A copy of the grievance was faxed on 8-02-16 and a copy is enclosed.

“This letter is also a request for documents. Please provide the Union with every document the employer considered when making the decision that is being grieved. The requested documents include, but are not limited to, reports, memoranda, records, letters, e-mails and audio/video tapes. If you are unable to provide these documents, please contact the Union office.”

This particular letter is a typical example of the letter that ATU has sent to TriMet whenever it has combined an information request with a step one grievance hearing request, during the prior 10 years. During that 10-year period, ATU has filed over 1,900 grievances with TriMet.

111. On August 3, 2016, Stevens sent Block a written response to the Grievance 9219 information request, stating:

“TriMet objects to such boilerplate requests to the extent they seek information protected from discovery under various privileges and doctrines, including the attorney-client privilege, work-product doctrine, and the internal communication doctrine as recognized by ERB to be applicable to both union and management in cases such as *AFSCME Local 328 v. OHSU*, UP-47-99 18 PECBR 804, 811 (2000); *Lane County Public Works Assn. v. Lane County*, UP-36-90, 13 PECBR 187, 201-02 (1991); *OSEA v. Colton School Dist.*, No. C-124-81, 6 PECBR 5027, 5031-5032 (1982).

“TriMet also objects to such boilerplate requests because they are vague, and overly broad, and seek information that is not potentially relevant to this grievance. It seeks a broad category of information without restriction as to the content, source or type of record, or limitation in time. To respond to such a request would require the expenditure of substantial time and public resources.

“As you know, effective September 15, 2015, TriMet implemented a policy of recovering its costs in responding to information requests arising under PECBA. Under its policy, TriMet provides the requesting party a written estimate of its costs to provide the information requested. Recovery of costs is not waived for PECBA requests.

“TriMet is willing to discuss with ATU a more focused request that is more reasonable in scope and relevant to the underlying grievance. After such a discussion, TriMet will be able to provide a good faith estimate of the costs of responding to the information sought, should that be necessary.”

On August 9, 2016, Block again wrote to Stevens regarding Grievance 9219, reiterating ATU’s August 2, 2016, request for a step one grievance hearing and information request.

112. On August 24, 2016, Stevens wrote to Block regarding ATU's information request for Grievance 9235, which addressed an allegedly unjust warning letter. Stevens objected to "such boilerplate requests" and asked for payment, just as Stevens had done in her August 3, 2016 response to the Grievance 9219 information request.

113. On September 1, 2016, Block apparently sent several letters to Stevens that responded to TriMet's objections to several different grievance-related information requests. For example, in her letter regarding Grievance 9219, Block stated, in part:

"I write in response to your August 3, 2016 letter regarding the above referenced grievance. In your response, you object to ATU's requests for information regarding this grievance. As it has for years and routinely does for all of its grievances, ATU made a request for all documents that TriMet relied on in making the decision being grieved. For years, TriMet has responded to this request without objection or need for further clarification. TriMet has therefore made a unilateral change to the parties' past practice and ATU demands to bargain.

"Further, none of the objections you assert provide a valid basis to withhold responsive documents. To the extent TriMet has questions or needs ATU to limit the document request, we can do so only if you can specifically identify your concern. For example, you stated that the request sought documents 'without restriction as to the content, source or type of records, or limitation in time.' No such restrictions are necessary here as ATU seeks all non-privileged documents related to the decision. If you are concerned that documents are, for example, outside of a relevant time scope, please identify how and which documents. Without more information about the difficulty in obtaining information, we are unable to amend our request. Accordingly, I resubmit our requests for documents.

"Additionally, your response regarding paying the costs for these documents is insufficient. In ERB's recent decision, *AFSCME v. City of Portland*, Case No. UP-46-08 (Aug. 4, 2016), it made clear that if TriMet insists on recovering costs for providing responsive information it has a significant burden. First, the cost requested by TriMet cannot be *de minimis*. Second, TriMet bears the burden of establishing an unduly burdensome financial impact and it has not done so here. Third, 'an unconditional demand that the requesting party pay all costs is inconsistent with the obligation to bargain in good faith.' Finally if the parties dispute whether the cost of complying information is unduly burdensome, TriMet must bargain in good faith regarding who shall bear costs. Here, since TriMet has not met its burden of establishing that the request is unduly burdensome, it must produce responsive documents."

114. On September 8, 2016, Colton (TriMet's Director of Labor & Employee Relations) sent a letter to Block that responded collectively to Block's September 1 letters. Colton stated that the parties had a pending unfair labor practice case concerning information requests, specifically Case No. UP-022-16, and that TriMet would be deferring to the unfair labor practice process for resolution of such information request disputes. After noting that, for the grievances referenced in ATU's September 1 correspondence, ATU had requested every document that TriMet considered when making the decisions that were being grieved, Colton contended that the Employment

Relations Board had considered an “identical ATU boilerplate information request” in *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-56-09, 25 PECBR 152 (2012), and found ATU’s request overly broad. Colton also contended that neither TriMet nor ATU had charged for information requests before August 2015, and that ATU had changed that status quo by indicating in Block’s August 25, 2015, letter that ATU would charge for the costs of responding to TriMet’s information request. Colton then stated that “TriMet agreed to this proposed change by the ATU, responding with a letter dated September 14, 2015, stating that it, too, would begin charging for information requests to ensure reciprocity of treatment.” Colton then explained why TriMet believed its responses to ATU’s various information requests complied with its duty to bargain in good faith, and asked ATU to narrow the scope of its requests.

115. On September 26, 2016, Block sent three letters to Colton. One of those letters responded to Colton’s September 8 letter, discussed above. Block contended that TriMet was violating *American Federation of State, County and Municipal Employees Council 75 v. City of Portland*, Case No. UP-046-08, 26 PECBR 785 (2016) (Order on Remand), by demanding that ATU pay TriMet for all non-*de minimis* costs for producing the requested information. Block also disputed Stevens’ assertion that ATU had changed the *status quo* regarding charging for information requests, stating that ATU had “merely requested payment for documents related to ATU’s Benefits Coordinator, which was not related to any active grievance.” Block also contended that TriMet had a misguided view of ERB’s decision in *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-56-09, 25 PECBR 152 (2012). Specifically, Block contended that when ATU made “boilerplate” information requests for grievances involving “employee disciplines, seniority, or other straightforward and routine matters,” TriMet should understand what information ATU was seeking, and that those documents would be readily available.

116. Block’s second September 26, 2016, letter responded to TriMet’s objections to ATU’s Grievance 9014 information request, stating in relevant part:

“ATU believes that TriMet’s demand for payment of \$3,633.60 for production of the requested information fails to meet its obligation to respond to information requests in good faith. However, without waiv[ing] the union’s right to legally challenge TriMet’s demand or seek additional documents later, I am narrowing the earlier request to currently seek the following: All communications between TriMet and Regence related to the decision to implement Regence’s CareCore National program of pre-authorization.

“We believe that TriMet’s cost of providing this information does not warrant any charge to ATU. The requested information should be readily available. Additionally, the information can be produced electronically, which should avoid any costs for photocopying.”

117. Block’s third September 26, 2016, letter responded similarly to TriMet’s objections to the Grievance 9061 information request. Block stated ATU’s position that TriMet’s demand for payment of \$5,450.40 for production of the requested information failed to meet its obligation to respond to information requests in good faith. After expressly reserving ATU’s rights to challenge the charge and seek additional information later, Block narrowed the Grievance 9061 information

request and limited it to certain years. Block then contended that TriMet's cost of providing the requested information did not warrant any charge to ATU, because all of the information was "readily available and limited to two years"; "[a]ny cost analysis should also be readily available"; and the information could be produced electronically. Block also wrote, "[I]f TriMet seeks to charge for these records, please let me know so we can bargain over those proposed changes."

118. On September 29, 2016, Colton emailed Block about the Grievance 9219 information request. Colton indicated that TriMet would provide ATU with the grievant's personnel file without charge, because TriMet normally gives active employees copies of their personnel files at no charge. She also wrote that TriMet would provide the "ERCS" file (an employee activity log) and grievance file at no charge, because the costs of producing those files were *de minimis*.

119. On October 4, 2016, Colton wrote to Block about several grievances. In relevant part, Colton stated: "The District currently provides copies of personnel files to active employees at no charge. In extension of that practice, we will provide copies of the personnel files of the actively employed grievants in the above-referenced cases at no charge." Colton then stated, "We will also supply the grievance files to you at no charge because that cost is *de minimis*."

120. On October 5, 2016, Colton responded to the September 26 letter in which Block had narrowed ATU's Grievance 9014 information request. Colton asked ATU for a total payment of \$191.10 for two hours of estimated work to respond to the narrowed request. Ultimately, ATU did not pay the \$191.10 charge and stopped pursuing the information request.

121. The same day, Colton also responded to the September 26 letter in which Block had narrowed the Grievance 9061 information request. That request involved six items, and Colton specifically addressed each one. For two of the items, Colton requested payment for approximately one hour of staff time (two hours total), at the rate of \$95.55 per hour. For the remaining items, Colton indicated that the requested information either was available at that time or would be available when finalized.

122. On October 11, 2016, Colton sent Block a letter enclosing a flash drive that contained the requested information for 22 separate grievances, including at least some of the documents related to Grievance 9061. Colton asked ATU to pay \$13.50 for the cost of that flash drive. ATU ultimately paid that amount.

123. On October 12, 2016, Block wrote a letter to Colton, stating:

"In response to your October 5, 2016 letter regarding grievance #9061, ATU requests that you produce all of [the] documents that you identified are available by Friday[,] October 14, 2016. Although ATU objects to the charges for the records and does not waive its right to legally challenge TriMet's demand for payment, we have included a check for payment of the amount requested."

Block enclosed two checks for \$95.55 each, as requested by TriMet. Afterward, Block received the requested documents.

TriMet's Fact Check Webpage

124. ATU conducted an initial election for its three lead officer positions on June 23, 2015. Block was elected President-Business Representative, unseating incumbent Bruce Hansen. Hunt and Longoria were reelected Vice President–Assistant Business Representative and Financial Secretary–Treasurer/Recording Secretary, respectively. Block, Hunt, and Longoria ran as part of the same “ticket” in the election, and all of their new terms started on July 1, 2015. At some point, complaints about the conduct of the June 23, 2015, election were filed with the U.S. Department of Labor (DOL).¹⁵

125. Around January 29, 2016, TriMet started to develop a “Fact Check” page on TriMet’s public website that would share TriMet’s positions on a range of contentious issues related to the upcoming contract negotiations with ATU. Since as early as 2013, TriMet has created other public Fact Check webpages for a variety of matters, not all of which have dealt with labor relations or ATU. During the negotiations for the parties’ 2012-2016 CBA, TriMet simply posted the bargaining correspondence and proposals without providing any context or commentary. In December 2015 or January 2016, TriMet decided to make the Fact Check page regarding ATU contract negotiations more like TriMet’s other Fact Check pages, essentially by adding commentary to provide “context” and then linking to the related documents, instead of merely posting the bargaining documents. TriMet’s Executive Directors, General Manager Neil McFarlane, and Chief Operating Officer participated in that decision regarding how to post information about TriMet’s labor contract negotiations and disputes on the public TriMet website. In early January 2016, TriMet started preparing a Fact Check post regarding an issue related to Oregon’s sick leave law, but TriMet never published that post because the parties resolved that issue.

126. On February 10, 2016, Block sent a letter out to ATU members challenging TriMet’s “‘block run’ experiment program.” A copy of the same letter was sent to General Manager McFarlane on March 10, 2016. On March 18, 2016, Block sent another, related letter to the ATU members. When Stedman (TriMet’s Executive Director of Labor Relations & Human Resources) received copies of those letters, he determined that they contained what he viewed as false statements, and that he needed to clarify the block run matter for the public on the Fact Check webpage.

127. On or around February 16, 2016, ATU and the DOL reached an agreement whereby ATU agreed to conduct a new election for its President–Business Representative and Vice President–Assistant Business Representative positions on or before April 30, 2016, which would render the results of ATU’s June 23, 2015, election void. ATU also agreed that, in the interim, the affairs of ATU would be conducted by the officers who were elected in the challenged June 23, 2015, election. No plans were made to rerun the election for ATU’s Financial Secretary–Treasurer/Recording Secretary position, which was held by Longoria.

¹⁵The substance of those complaints is not included in the record, and it is unclear when the complaints were filed or by whom. However, there is no dispute that some complaints were made.

128. As explained above, TriMet brought forward a side letter agreement regarding meal and rest break periods on November 30, 2012. However, on February 19, 2016, Block sent a letter to every ATU member, stating: “The parties did not sign nor bring forward the Side Letter on meal and rest break period during the most recently negotiated 2012 to 2016 Working and Wage Agreement and as a result [it] is considered expired.” When Stedman received a copy of that letter, he decided to start working on a Fact Check post regarding the parties’ meal and rest break dispute.

129. On February 25, 2016, Mary Fetsch of TriMet Media Relations sent Stedman draft language regarding meal and rest breaks for the Fact Check webpage. On March 9, 2016, Stedman emailed Fetsch regarding content for the block run portion of the Fact Check webpage. Among other things, Stedman stated that “the ATU membership does not have to vote on side letters” pursuant to *Tri-County Metropolitan Transportation District of Oregon (TRIMET) v. Amalgamated Transit Union, Division 757*, Case No. UP-55-05, 22 PECBR 506 (2008).

130. On March 10, 2016, ATU sent a letter to McFarlane stating that the block run program was implemented without approval from ATU’s members and that “the overwhelming majority” of those members wanted the block runs to go away.

131. It appears that TriMet published its first Fact Check post regarding the parties’ meal and rest break dispute in late February or early March. Apparently, at that time, the Fact Check webpage included two statements alleging that ATU was “attempt[ing] to divert attention from an investigation and compliance agreement with the U.S. Department of Labor voiding the most recent election for President and Vice President and requiring the ATU to hold another election for those offices by April 30.”¹⁶

132. On March 17, 2016, Stedman wrote another email to Fetsch, stating:

“I received a call from DOL asking that we not mention any candidates in the ATU election on our web sites or communication. I don’t think we have, but wanted to make sure. The ATU had alerted them (and complained) about our new contract page. DOL has no problem with our page, which they have reviewed. They just wanted to make sure we don’t mention candidate names.”

133. On March 18, 2016, Whitney Stark, an attorney for ATU, sent an email to the DOL, asking it to prevent TriMet from improperly using its resources to influence the outcome of the ATU’s supervised election. Stark’s letter then explained that TriMet had published blog posts commenting on the pending election, and that ATU was concerned that those comments could affect the outcome of the election and necessitate yet another election. That same day, ATU sent a letter to its members contending that TriMet was illegally refusing to end block runs and indicating that ATU would be filing an unfair labor practice complaint with the Board regarding that issue. ATU also encouraged members to be involved, stating, for example, “Let’s put an end to this anti-union, anti-worker atmosphere being pushed at TriMet by Neil McFarlane and Randy Stedman!”

¹⁶The record includes a copy of the Fact Check webpage that includes all of the relevant posts, which are quoted extensively below. However, the record does not make clear when TriMet published each particular post.

134. On March 23, 2016, Fetsch sent Stedman draft language for the Fact Check webpage that would address TriMet's February 2016 decision to cease scheduling and paying employees to attend union orientations. At some point around that time, TriMet received input about that issue from elected officials, including Oregon State Senator Michael Dembrow, who was a sponsor of the 2013 legislation that is codified as ORS 243.670. TriMet had also discussed its new policy with (now retired) Oregon AFSCME Council 75 Executive Director Ken Allen in late February 2016.

135. TriMet made its final post to the Fact Check webpage on or around April 4, 2016. TriMet did not specifically inform its employees of the Fact Check page's existence at or before that time. However, the Fact Check page was posted on TriMet's public website and, as a result, it was accessible to everyone, including TriMet's employees. TriMet posted a link to TriMet's public website on its internal intranet, which TriMet employees use to access employment-related information from TriMet.¹⁷ According to Stedman, TriMet published statements on the Fact Check webpage regarding its disputes with ATU because it considered those disputes to be matters of public interest, and TriMet wanted to be transparent.

136. At the top of the Fact Check webpage, TriMet asserted, "[ATU] is sending out false information to its members and the public that is meant to confuse, cause dissent and mislead. **We set the record straight.**" (Emphasis in original.)

137. In the Fact Check section titled "Meal & Breaks Side Letter," TriMet stated:

"The Amalgamated Transit Union (ATU) has sent a letter to its membership with false claims that the long-established 2005 meal and break period agreement is no longer in effect. The agreement ensures that bus and MAX operators have adequate break times built into schedules. **We set the record straight.**

"TriMet has filed an Unfair Labor Practice (ULP) complaint against the ATU and asks the Oregon Employment Relations Board (ERB) to rule, once again, that the 2005 Side Letter is still active and enforceable. The needless controversy is an attempt to divert attention from an investigation and compliance agreement with the U.S. Department of Labor voiding the most recent election for President and Vice President and requiring the ATU to hold another election for those offices by April 30."

(Emphasis in original.)

138. In the Fact Check section titled "Four-Day Operator & Packaging Pilot Program," TriMet stated, in relevant part:

"The Packaging Program MOA was negotiated by a Joint Labor Management Team 'to make Bus Operator assignments better and to provide adequate rest time between assignments.' It builds on an earlier program from 2007 that created a

¹⁷The parties dispute whether the link to TriMet's public website (that TriMet posted on its intranet) led directly to the Fact Check page. We do not resolve that factual dispute, because it is not material to our decision.

3-Day Part-Time and 4-Day Full-Time schedule that was agreed to by then-ATU President, and current Vice President, Jon Hunt.”

TriMet subsequently stated:

“President Block attended a Nov. 2, 2015 labor-management meeting where improvements were made and the parties agreed to extend the Packaging Pilot for Spring 2016. Ms. Block also reviewed in advance a communication to bus operators on those improvements.”

139. In the Fact Section titled “New Employee Union Orientation Meetings,” TriMet stated:

“As of March 4, 2016, TriMet has stopped paying new union employees to attend a two-hour member orientation at ATU offices. The ATU is claiming that we are discouraging new employees to meet with union representatives. **We set the record straight.**”

“CLAIM[:] ATU claims that TriMet is not allowing union employees to attend union orientation.

“FACT[:] **False.** TriMet employees can go to union orientation sessions at the ATU offices on personal, unpaid time, but TriMet is not paying them for this time because we believe it violates the law to do so. As of March 4, 2016, TriMet ended a past practice that paid new employees to go to the ATU offices for a two-hour union membership orientation. We made the change after legal counsel advised us that paying new employees to attend a union orientation session was unlawful.

“We believe using public money to benefit the ATU, which is a private entity, is an unfair labor practice under ORS 243.672(1)(b). That provision prohibits an employer from ‘assist[ing] in the formation, existence or administration of any employee organization.’ We believe our position in this matter is consistent with Oregon Employment Relations Board (ERB) precedent. *See City of Portland*, 8 PECBR 8155 (1985); *see also Carruthers v. Port of Astoria*, 249 OR 329 (1968). In addition, ORS 243.670(2) states that a public employer may not ‘use public funds to support actions to assist, promote or deter union organizing.’

“CLAIM[:] The ATU claims that TriMet unilaterally made the change to discourage new union employees to attend orientation meetings at the ATU offices.

“FACT[:] **False.** Members are welcome to go to the ATU union hall on their personal time, and the ATU may also make orientation presentations to new employees of reasonable duration during TriMet’s new employee orientation on its premises. Many labor contracts contain such a provision. This change also does not affect other lawful purposes for which TriMet employees go to ATU’s offices on paid time, such as contract negotiations or labor management meetings.”

(Emphases in original.)

140. In the Fact Check section titled “Additional Background,” TriMet stated:

“The needless controversy regarding union orientation is another example of the ATU making false claims against the agency and an attempt to divert attention from an investigation and compliance agreement with the U.S. Department of Labor (USDOL) voiding the most recent election for President and Vice President and requiring the ATU to hold another election for those offices by April 30.

“Additionally, the most recent contract expires on Nov. 30, 2016. State statute prevents TriMet’s union employees from striking. TriMet and the ATU are bound by binding interest arbitration if the parties are unable to reach a negotiated agreement. That means an outside arbitrator selects only one proposal and there is no vote to ratify. With the contract end approaching and no ability to strike, ATU leadership instead is focusing on a negative public relations campaign to pressure TriMet to make concessions in the next labor contract.

“TriMet remains committed to providing employees and retirees with fair benefits, while being fair to taxpayers and riders.”

141. On April 30, 2016, ATU conducted the agreed-to rerun election. As before, Block and Hunt won their respective races for President–Business Representative and Vice President–Assistant Business Representative, and they have continued to serve in those roles since then.

142. As noted above, some members of the TriMet Board of Directors sent a letter to ATU on June 1, 2016, to follow up on a prior meeting regarding various ATU concerns. Regarding the Fact Check webpage, they stated:

“Finally, we have looked into some of the communication issues you raised over the Fact Check section on the TriMet.org/newcontract web page. This website was designed to communicate openly and clearly with all of our stakeholders. We are a public agency and transparency regarding our labor contract is important. We have asked that management use straightforward and fact-based language -- and we certainly expect that will be reciprocated by the ATU in its communications, such as the NW Labor Press.”

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. TriMet did not fail to offer retiree health benefits required by Article 1, Section 9, Paragraph 1(c)(2) or (6) of the parties’ CBA, and therefore, TriMet did not violate ORS 243.672(1)(g).¹⁸

¹⁸ATU did not object to the Recommended Order’s Conclusions of Law that addressed ATU’s claims regarding retiree health benefits and the ATU officers’ access badges, and we consider any potential objections to those conclusions unpreserved and waived.

Under ORS 243.672(1)(g), it is an unfair labor practice for a public employer or its designated representative to “[v]iolate the provisions of any written contract with respect to employment relations.” ATU claims that TriMet violated Article 1, Section 9, Paragraph 1(c)(2) and (6) of the parties’ 2012-2016 CBA, and therefore ORS 243.672(1)(g), by failing to offer TriMet’s Medicare-eligible retirees a 90/10 PPO Medicare Advantage plan option starting in 2016.¹⁹ For the reasons explained below, we conclude that the CBA does not require TriMet to offer the retirees a 90/10 PPO option, and therefore, TriMet did not violate subsection (1)(g).

Because a party violates subsection (1)(g) by violating a written contract, we start by reviewing the standards for contract interpretation. “We interpret labor agreements in the same manner and using the same rules of construction as do courts.” *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04 at 10, 21 PECBR 20, 29 (2005).

“We first examine the text of the disputed provision in the context of the document as a whole. If the provision is clear, the analysis ends. If the provision is ambiguous, we proceed to the second step which is to examine extrinsic evidence of the contracting parties’ intent. Finally, if the provision remains ambiguous after applying the second step, we resort to the use of appropriate maxims of contract construction.”

Id. (citing *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997)).

Next, we apply those contract interpretation rules to the parties’ dispute regarding Article 1, Section 9, Paragraph 1(c)(2) and (6) of the 2012-2016 CBA. Paragraph (1)(c)(2) and (6) provide, in relevant part:

“(2) At the first available opportunity, non-active employees, retirees, spouses, surviving spouses and dependents who become Medicare eligible must enroll in a District designated Medicare Advantage plan unless they are a retiree or surviving spouse electing a stipend under Par. 2(i) below. These plans currently are Kaiser Permanente Senior Advantage and United Healthcare Care (HMO). Effective January 1, 2016, the UHC HMO plan will change to the UHC PPO plan or its substantial equivalent. These plans, when combined with Medicare and Medicare Part B are intended to provide substantially similar coverage as the active employee healthcare plan designs. * * *

“* * * * *

“(6) If a retiree is eligible, it is understood and agreed that the benefit levels combining Medicare with the provided Medicare Advantage plans will provide reasonably the same benefit levels provided to active employees. Should Medicare decrease any benefit levels, the District will adjust the retiree health plans to ensure reasonably the same benefits enjoyed by active members.”

¹⁹As noted above, the parties agree that the dispute pertains only to those retirees who are covered by Article 1, Section 9, Paragraph 1(c) of the CBA and are Medicare-eligible.

To understand the parties' contract interpretation dispute, it is helpful to first review what is *not* disputed: (1) in 2015, TriMet offered Medicare-eligible retirees a choice between two Medicare Advantage plans, a Kaiser HMO plan and a UHC HMO plan; (2) the CBA required TriMet to change the UHC HMO plan option to "the UHC PPO plan or its substantial equivalent," effective January 1, 2016; (3) in 2016, TriMet changed the retirees' UHC HMO plan to a UHC PPO plan with 80/20 coinsurance; and (4) in 2015 and 2016, TriMet offered *active* employees various plan options, including two different Regence PPO plans, one with 80/20 coinsurance and one with 90/10 coinsurance. The parties' dispute concerns only the *type* of UHC PPO plan that TriMet started to offer the Medicare-eligible retirees in 2016. TriMet contends that it has complied with the CBA by offering a UHC PPO plan with 80/20 coinsurance, while ATU contends that TriMet must also offer a UHC PPO plan with 90/10 coinsurance.

The provisions of Article 1, Section 9, Paragraph 1(c)(2) and (6) do not specifically require TriMet to offer Medicare-eligible retirees a UHC PPO plan with 90/10 coinsurance. ATU bases its position on the Paragraph 1(c)(2) statement that expresses the parties' intent to offer the retirees Medicare Advantage plans that "provide substantially similar coverage as the active employee healthcare plan designs." In ATU's view, because Article 1, Section 9, Paragraph 1(a) requires TriMet to offer active employees a choice of 80/20 and 90/10 PPO plans (among others), and Paragraph 1(c)(2) requires TriMet to offer retirees coverage that is "substantially similar" to the active employees' plans, Paragraph 1(c)(2) effectively requires TriMet to offer retirees a choice of 80/20 and 90/10 PPO plans. In other words, ATU contends that the retirees' 80/20 PPO plan does not provide coverage that is substantially similar to the active employees' 80/20 and 90/10 PPO plans. ATU also contends that its interpretation of Paragraph 1(c)(2) is supported by Paragraph 1(c)(6), which requires TriMet to "adjust the retiree health plans * * * to ensure reasonably the same benefits enjoyed by active employees" if "Medicare decrease[s] any benefit levels." That is, ATU contends that TriMet must offer retirees a 90/10 PPO plan to ensure they receive "reasonably the same benefits enjoyed by active employees."

Regarding the question of whether TriMet is required to offer retirees both 80/20 and 90/10 PPO plans, the text of the disputed provisions is ambiguous. It is unclear whether the term "coverage" refers to, for example, the level of coinsurance (as ATU contends), or the sorts of procedures and prescriptions that are "covered" by a given insurance plan, or a plan's out-of-pocket maximums or copays. The term "benefit levels" is similarly ambiguous. We also decline to find that the text clearly supports ATU's interpretation, because the parties could have explicitly required TriMet to offer active employees and Medicare-eligible retirees the "same" plan options, but they did not. Instead, the parties used the less precise terms "substantially similar" and "reasonably the same."

Considering the retiree benefit provisions in context does not resolve the ambiguity. Although Article 1, Section 9, Paragraph 1(a) requires TriMet to offer active employees both 80/20 and 90/10 PPO plans, that provision also refers to the 80/20 PPO plan as "the primary" plan. Thus, it is plausible that when the parties used the term, "the UHC PPO plan," in the disputed retiree benefits provision (Paragraph 1(c)(2)), they intended to refer only to the primary 80/20 PPO plan, which is what TriMet has offered.

Because the text of the disputed retiree health benefit provisions is ambiguous, we turn to the extrinsic evidence of the parties' intent. TriMet contends that the bargaining history supports its interpretation of the contract, not ATU's. We agree. That is, the extrinsic evidence shows that

the parties specifically agreed that TriMet would change the retirees' UHC HMO plan to a UHC PPO plan with 80/20 coinsurance, and it fails to show that they intended to require TriMet to offer an *additional* 90/10 PPO plan.

To start, we consider the parties' signed TA from 2014, which was the basis for the disputed contract provisions. In relevant part, the TA provides that, for Medicare-eligible retirees, "[t]hrough 12/31/15, the UHC HMO plan will be maintained. Beginning 01/01/2016, TriMet shall implement the UHC PPO plan as originally proposed or its substantial equivalent and terminate the UHC HMO plan." Although the TA does not specifically indicate which plan is "the UHC PPO plan as originally proposed," other exhibits and testimony make clear that the parties were referring to a UHC PPO plan with 80/20 coinsurance. For example, during the relevant negotiations, TriMet consistently and repeatedly "proposed" (and ATU never rejected) an 80/20 PPO plan for Medicare-eligible retirees. We also note that both the CBA and TA refer to a singular UHC PPO plan, which supports TriMet's position that the parties agreed that TriMet would offer only an 80/20 UHC PPO plan (not both 80/20 and 90/10 plans). Moreover, there is no evidence that either party ever proposed or even openly discussed offering the retirees an additional 90/10 PPO plan option. Nor is there any evidence establishing that, by requiring TriMet to offer active and retired employees "substantially similar coverage" or "reasonably the same benefits," the parties intended to require TriMet to offer the retirees the same menu of plan options, including both 80/20 and 90/10 coinsurance options.

Thus, on this record, we find that ATU failed to establish that TriMet violated the CBA, or by extension, ORS 243.672(1)(g), by not offering retirees a 90/10 PPO plan option. Accordingly, we dismiss this claim.

3. TriMet did not violate Article 1, Section 2, Paragraph 3 of the parties' CBA by failing to provide ATU officers with identification badges that provide full access to employee worksites, and therefore, TriMet did not violate ORS 243.672(1)(g).

ATU contends that TriMet violated the parties' CBA, and by extension subsection (1)(g), by failing to provide ATU officers with identification badges that give them a sufficient level of access to TriMet facilities. ATU does not argue that any provision of the parties' CBA expressly and specifically addresses the type of ID badges or the level of access that TriMet must grant to ATU officers. ATU bases this subsection (1)(g) claim on the representative rights clause, Article 1, Section 2, Paragraph 3, which states:

"The District agrees that the officers and members of the Union shall be granted leaves of absence on Union business as authorized by the Union, when so requested. It is further agreed that any member of this Union who now holds office, or shall be appointed or elected to any office in said Union, which requires his/her absence from the District's employ, shall upon his/her retirement from said office be placed in his/her former position with full seniority rights, rates of pay, vacation and retirement pay rights. Union business is further defined to mean employment directly and solely by the Union, or the International Union of which it is a division.

ATU also points to Article 1, Section 12, Paragraph 2(b)(6) of the parties' CBA, but that paragraph also does not mention ID badges or access, or otherwise directly address this issue. It provides only that "[c]ontinuity of service shall not be broken and seniority shall not terminate

* * * [b]y leave of absence of any duration to serve as an official of the Union.” ATU essentially contends that those provisions, taken together, impliedly require TriMet to give the ATU officers, who are TriMet employees on union business leave, access that equals or exceeds that which they enjoyed as active TriMet employees.²⁰

The contract language, however, does not clearly support ATU’s interpretation, and ATU offers no extrinsic evidence of the parties’ intent. Nonetheless, even assuming that ATU’s interpretation of the contract is correct, ATU has failed to establish that TriMet has, in fact, overly restricted the ATU officers’ access to TriMet facilities. To the contrary, the record shows that TriMet has issued the officers ATU ID badges that provide them with access that equals, and potentially exceeds, the access that they had as active employees (or the access that TriMet typically grants to active TriMet employees).²¹ Specifically, the ATU ID badges (when working properly) are supposed to give officers access to nearly every bargaining unit employee. Typically, active employees’ access is limited to the “business need” of their particular jobs. To the extent that TriMet has imposed limits on the ATU officers’ access, those limits are reasonably tailored to prevent access to dangerous or sensitive parts of TriMet’s facilities, and there is no evidence establishing that the ATU officers previously had unrestricted access to those areas.

Although there have been some occasions on which an officer’s ID badge did not work properly, the record indicates that TriMet has been relatively responsive when ATU has brought such issues to TriMet’s attention. Further, ATU did not prove that TriMet caused those issues (as opposed to user error or a common technical glitch). We also note that nothing in the record suggests that TriMet has violated the disputed contract provisions in some other manner, such as by denying an employee a union business leave of absence, or refusing to reinstate an employee to their former position when they return from leave. Because ATU has failed to establish the factual premise for this subsection (1)(g) claim, we dismiss it.

4. TriMet did not violate ORS 243.672(1)(g) by refusing to provide ATU officers’ dependents with TriMet transportation passes, because it did not violate Article 1, Section 2, Paragraph 3 or Article 1, Section 18 of the parties’ CBA.

ATU contends that TriMet violated the CBA, and therefore subsection (1)(g), by refusing to issue dependent transportation passes to ATU Vice President Hunt and deciding that it would no longer issue such passes to any full-time ATU officers. ATU bases its position on two different contract provisions. For the reasons discussed below, we find that ATU failed to establish that TriMet violated either provision.

First, ATU relies on the representative rights clause, Article 1, Section 2, Paragraph 3, which requires TriMet to grant employees leaves of absence to serve as union officers. ATU does

²⁰To the extent that ATU argues that the CBA requires TriMet to provide the officers with full or unrestricted access to TriMet facilities, we conclude that interpretation is not supported by the text of the disputed contract provisions.

²¹At some point after the officers went on union business leave, TriMet replaced their active employee ID badges with ATU badges. ATU does not claim that TriMet violated the CBA merely by replacing the officers’ employee badges with ATU badges; ATU contends only that the level of access granted by the ATU badges is insufficient.

not argue that the representative rights clause specifically requires TriMet to issue dependent transportation passes to employees who are on union business leaves of absence. Rather, ATU argues that provision impliedly requires TriMet to treat employees on union leaves the same as employees on other types of leaves, and ATU asserts that TriMet permits employees on other types of leaves to retain their dependent transportation passes. However, even assuming that ATU's contract interpretation is correct, ATU has failed to establish that TriMet issues dependent transportation passes to employees while they are on comparable leaves of absence for reasons other than union business. ATU did not identify any contract provision or TriMet policy to that effect. Some witnesses testified that they believed that some employees on leaves of absence have retained their dependent transportation passes, but that testimony was indirect, vague, and conclusory. There is no specific or direct evidence establishing that TriMet has issued new dependent transportation passes to employees while they were on leaves of absence comparable to Hunt's. Thus, on this record, we do not find that ATU proved that TriMet violated Article 1, Section 2, Paragraph 3.

Second, ATU relies on Article 1, Section 18, which states:

"Free transportation on all lines of the District shall be furnished to all active employees, their spouses and dependents up to age 19 and to 24 for those dependents who are living at home and attending school full-time, members of the Union, and to all retired employees and their spouses, members of the union retired under the provisions of Sections 10 and 12, above. Limited exceptions to the provisions of this Paragraph may be granted by mutual consent of the Director of Labor Relations or his/her designee, and the Business Representative. Parents of the employee or spouse who are living at the employee's house will be eligible for free transportation on all lines of the District as long as employee keeps a current affidavit on file with the District's Human Resources Division attesting to parents living with the employee."

ATU does not contend that the ATU officers are entitled to dependent transportation passes as active employees. Rather, ATU contends that ATU officers have been granted dependent transportation passes for many years pursuant to the "limited exception" provision. ATU further contends that, because the parties had a longstanding practice of granting those passes by mutual agreement, that agreement became a benefit provided to ATU officers pursuant to Section 18. The disputed text, however, expressly requires that any limited exception be granted "by mutual consent." Even assuming that TriMet's Director of Labor Relations (or their designee) consented to granting dependent passes to ATU officers for many years, the contract does not prohibit TriMet from withdrawing its consent after a period of time. There is no extrinsic evidence establishing that the parties intended such a limitation on the withdrawal of consent, or that the parties specifically agreed to make any limited exception granted to ATU officers a more permanent requirement. Thus, although Article 18 *permits* TriMet to consent to issuing dependent transportation passes to ATU officers, Article 18 does not *require* TriMet to do so.

Because ATU did not establish that TriMet violated any provision of the CBA by declining to issue dependent passes to ATU officers, we dismiss this subsection (1)(g) claim.

5. TriMet did not violate ORS 243.672(1)(e) by unilaterally ceasing to provide ATU officers' dependents with TriMet transportation passes.

ATU alternatively claims that TriMet unilaterally changed employment conditions in violation of ORS 243.672(1)(e) when it denied ATU Vice President Hunt's request for dependent transportation passes. An employer commits a *per se* violation of the duty to bargain in good faith by unilaterally changing the *status quo* regarding a mandatory subject of bargaining. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-06 at 7, 22 PECBR 159, 165 (2007). "A working condition can become the *status quo* in a number of ways, including through past practice, work rule, or policy." *Id.* In this case, the practice at issue is TriMet's granting of dependent transportation passes to full-time ATU officers who are on leaves of absence from TriMet. As discussed above, ATU contends that TriMet granted such passes to some ATU officers under the "limited exception" provision of Article 1, Section 18 of the CBA, which generally provides that TriMet will grant such passes to the dependents of active employees, but does not address employees on leaves of absence. TriMet does not dispute that it unilaterally changed the *status quo* by declining to issue dependent transportation passes to Hunt; TriMet argues only that the change did not involve a mandatory subject of bargaining because the practice is prohibited by law.

ORS 243.650(4) identifies two specific categories of subjects for bargaining, mandatory and permissive. Additionally, a subject is prohibited for bargaining if it "would require either party to do an illegal act or perform an act [that] is contrary to any other statutory or constitutional provision." *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).²²

TriMet contends that the practice at issue is unlawful under this Board's holdings in a declaratory ruling case, *Petition for a Declaratory Ruling filed by the City of Portland*, Case No. DR-4-85, 8 PECBR 8115 (1985).²³ In that case, this Board held that proposals by which the City would compensate a full-time association officer were prohibited subjects of bargaining because such compensation would constitute unlawful assistance to a labor organization in violation of PECBA, ORS 243.672(1)(b). *City of Portland*, DR-4-85 at 10, 8 PECBR at 8124. The Board also construed the State Constitution and Public Finance Statutes as prohibiting a public employer from expending funds to support an individual's private employment. *Id.* TriMet contends that this case

²²ATU contends that the practice is mandatory for bargaining because it involves or impacts the subject of leaves of absence. Although there is no dispute that the subject of leaves of absence is mandatory, "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.'" *Portland Association of Teachers/OEA/NEA v. Multnomah County School District No. 1J*, Case No. UP-024-17 at 8, 27 PECBR 149, 153 (2017) (citing *Service Employees Int'l Union Local 503 v. DAS*, 183 Or App 594, 598, 54 P3d 1043 (2002)).

²³We do not revisit *City of Portland* because neither party has argued that it was wrongly decided.

is indistinguishable from *City of Portland* because there is no dispute that the ATU officers, while on union business leaves from TriMet, are full-time employees of a private employer.²⁴ ATU argues that this case is nonetheless distinguishable because the cost of providing the passes is relatively small. The record establishes, however, that the passes are a significant financial benefit. Because we agree that, under the circumstances of this case, the issuance of dependent transportation passes to ATU Vice President Hunt is a prohibited subject of bargaining under *City of Portland*, we dismiss this subsection (1)(e) claim.²⁵

6. TriMet did not violate Article 1, Section 2, Paragraph 3 of the parties' CBA by refusing to permit ATU to buy back the sick leave of a former ATU officer, and therefore, TriMet did not violate ORS 243.672(1)(g).

ATU contends that TriMet violated the representative rights clause, Article 1, Section 2, Paragraph 3, of the CBA, and therefore subsection (1)(g), by refusing to permit ATU to "buy back" the unused sick leave accrued by an ATU officer while he was on a leave of absence from TriMet. When ATU buys back sick leave for an officer who is returning to work at TriMet, ATU pays TriMet for the amount of unused sick leave that the returning officer accrued while on leave, and TriMet adds that amount to the returning officer's sick leave bank. Subsequently, the returning officer may convert a portion of their unused sick leave into retirement benefits, as permitted by Article 1, Section 9, Paragraph 5(d) of the CBA. ATU argues that TriMet must permit sick leave buy back to comply with the portion of the representative rights clause that provides that any employee who takes a leave of absence to hold any office in ATU "shall upon his/her retirement from said office be placed in his/her former position with full seniority rights, rates of pay, vacation and retirement pay rights."

TriMet disputes ATU's interpretation of the representative rights clause, and contends that the parties agreed to sick leave buy back only in a side letter agreement, which expired before the incident at issue. The following is undisputed: In 2002, the parties entered into a side letter agreement titled "Clarification of Representative Rights Clause," which set forth the specific terms under which sick leave buy back would occur. In 2007, the parties agreed (in a separate document) to bring forward that side letter agreement, but provided that the side letter would expire on November 30, 2009. The parties allowed the side letter agreement to expire in 2009. Thus, the sick leave buy back agreement was null and void in 2015, when ATU sought to buy back the sick leave of its outgoing President-Business Representative.

ATU concedes that the parties allowed the sick leave buy back agreement to expire in 2009, but it contends that that agreement was superfluous, because the representative rights clause itself requires TriMet to permit sick leave buy back. Specifically, ATU contends that TriMet must allow

²⁴Article 1, Section 2, Paragraph 3 of the CBA expressly defines "[u]nion business * * * to mean employment directly and solely by the Union." We also note that ATU officers represent employees in multiple bargaining units, in both the public and private sectors, and in Washington.

²⁵We note that ATU has not established that TriMet discriminated against any ATU officer by denying them dependent transportation passes. For example, there is no evidence that TriMet issues dependent transportation passes to employees while they were on comparable leaves of absence, or that TriMet has a generally applicable policy under which all employees on comparable leaves of absence would be entitled to dependent transportation passes. *See also* discussion above (addressing ATU's claim that denying the transportation passes violated the representative rights clause of the parties' CBA).

an ATU officer to buy back their sick leave in order to place them in their “former position with full * * * retirement pay rights,” as required by the representative rights clause. Sick leave accrual affects employees’ retirement pay rights because the parties’ CBA (Article 1, Section 9, Paragraph 5(d)) permits employees to convert a certain amount of unused sick leave to pension benefits. The plain language of the representative rights clause, however, does not unambiguously require TriMet to permit sick leave buy back, and ATU relies on extrinsic evidence to support its interpretation.

In particular, ATU relies on a 1991 arbitration award in which the arbitrator stated that the representative rights clause “guarantees * * * that the employee will be placed in his former position upon his retirement from Union office,” and “[b]y definition, in order for that to occur, the employee must have continued during his or her absence to accrue seniority, vacation credits and retirement pay rights,” including pension credits. ATU argues that the same is true for sick leave: in order for a returning officer to be placed in their former position with full retirement pay rights, the officer must have continued during their absence to accrue sick leave, or else they will not be able to convert their unused sick leave to pension benefits. In other words, without sick leave buy back, a returning officer is disadvantaged, because they will receive less pension benefits than they would have if they had not taken a union leave of absence.

After reviewing the contract language in context and the bargaining history, we conclude that the term “retirement pay rights,” as used in the representative rights clause, does not encompass the right to convert a portion of unused sick leave to pension benefits, as ATU contends.

The representative rights clause predates the parties’ 1998 agreement to permit conversion of sick leave to pension benefits. The representative rights clause expressly and specifically provides that an employee returning from union business leave shall be placed in their former position with “full seniority rights, rates of pay, vacation and retirement pay rights,” but *not* sick leave rights. That omission indicates that the parties did not originally intend for a union officer to continue accruing sick leave while on a leave of absence. When the parties subsequently agreed to permit sick leave conversion, they placed the relevant provision in Article 1, Section 9, Paragraph 5 of the CBA, which governs “Sick Pay.” They did not place it in Section 10, which governs “Retirement Pay,” or the parties’ separate Pension Plan and Permanent Disability Agreement. That placement choice suggests that the parties thought of the right to convert sick leave to pension benefits as a “sick pay right,” not a “retirement pay right.” Moreover, the practice of buying back sick leave affects not only returning officers’ retirement pay rights, but also their sick leave rights. For example, upon returning to active TriMet employment, a former officer potentially could use their sick leave or cash some of it out (instead of converting it to pension benefits).

After the parties agreed to permit sick leave conversion, they addressed the sick leave rights of employees on union business leave by creating a separate side letter agreement. Although the parties characterized that side letter agreement as “clarifying” the representative rights clause, they negotiated various detailed terms by which sick leave buy back could occur. In other words, the side letter agreement was not entirely superfluous to the representative rights clause, as ATU contends.

Although the 1991 arbitration award clarified that the representative rights clause requires employees on union leaves of absence to continue accruing pension credits, that award also predates the parties' 1998 agreement to permit sick leave conversion. Thus, that award does not address the question of whether employees on union leaves also must continue accruing sick leave.

Under these circumstances, we do not find that the representative rights clause, in and by itself, requires TriMet to permit ATU to buy back its officers' sick leave. Because the applicable side letter agreement expired in 2009, TriMet did not violate the CBA when it declined to permit ATU to buy back sick leave in 2015. Accordingly, we dismiss this subsection (1)(g) claim.

7. TriMet did not violate ORS 243.672(1)(e) by refusing to permit ATU to buy back the sick leave of ATU officers.

ATU claims, in the alternative, that TriMet made an unlawful unilateral change when it refused to permit ATU to "buy back" the unused sick leave accrued by an ATU officer while he was on a leave of absence from TriMet. As noted above, an employer commits a *per se* violation of the duty to bargain in good faith by unilaterally changing the *status quo* regarding a mandatory subject of bargaining. *Department of Corrections*, UP-33-06 at 7, 22 PECBR at 165. "A working condition can become the *status quo* in a number of ways, including through past practice, work rule, or policy." *Id.* ATU contends that the *status quo* is based on the parties' past practice regarding sick leave buy back, and it therefore has the burden of proving that the practice is "clearly established." *Id.* "To be clearly established, a practice must be clear and consistent, occur repetitively over a long period of time, and be acceptable to both parties." *Id.*

In this case, ATU has not met its burden to prove that the sick leave buy back practice was clearly established. As discussed above, the parties entered into a side letter agreement regarding sick leave buy back in 2002, but that agreement expired with the parties' CBA on November 30, 2009. All but one of the instances in which TriMet permitted sick leave buy back occurred while that side letter agreement was in effect. By allowing the agreement to expire and declining to renew it, the parties objectively signaled that the sick leave buy back was no longer mutually acceptable.²⁶ Although TriMet permitted ATU to buy back the sick leave of an outgoing officer in 2010, that occurred during the hiatus period following the expiration of the 2003-2009 CBA (*i.e.*, after November 30, 2009, but before the parties reached a new agreement through interest arbitration on July 12, 2012). Because TriMet was obligated to maintain the *status quo* during the hiatus period,²⁷ that single occurrence does not unambiguously show that TriMet continued to find the practice to be "acceptable" after the side letter agreement expired. Under those circumstances, that single occurrence is insufficient to prove that the parties had mutually agreed to a practice independent from the expired side letter agreement. Because there was no clearly established past

²⁶Even if ATU intended to continue the sick leave buy back practice after the side letter agreement expired, there is no evidence that ATU communicated that intent to TriMet. In collective bargaining, "the objective manifestations of the parties' intent * * * controls, rather than subjective intentions or unspoken understandings and assumptions." *City of Portland v. The District Council of Trade Unions, and Gustafson Chief Spokesperson*, Case Nos. UP-58/76-87 at 10, 10 PECBR 109, 118 (1987).

²⁷See *Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11 at 10, 25 PECBR 525, 534, *adh'd to on recons*, 25 PECBR 764 (2013).

practice, TriMet did not unilaterally change the *status quo* when it declined to permit ATU to buy back sick leave, and we dismiss this subsection (1)(e) claim.

8. TriMet did not violate Article 1, Section 2, Paragraphs 2 or 3 of the parties' CBA by refusing to schedule newly hired union employees to attend ATU orientations on paid work time, and therefore, it did not violate ORS 243.672(1)(g).

There is no dispute that, in February 2016, TriMet unilaterally ceased scheduling newly hired employees to attend ATU orientation sessions on paid work time. ATU contends that TriMet, by terminating those orientation sessions, violated Article 1, Section 2, Paragraph 2(b) of the CBA, referred to as the "union security clause." That clause provides:

"All persons hereafter employed by the District to perform the duties of employees covered by this Agreement shall be furnished with an application for membership in the Union at the time of such employment, and shall be advised of the requirement that they shall become members of the Union within thirty-one (31) days after the date of this Agreement or thirty-one (31) days from the beginning of employment with the District, whichever is later."

ATU concedes that the union security clause does not expressly or specifically require TriMet to permit new hires to attend ATU orientations on paid work time. ATU contends that the union security clause impliedly requires TriMet to continue the orientations, because they are the only agreed-upon means by which the parties have implemented the clause's mandate that employees "be furnished with an application for membership in the Union" and "advised of the requirement that they shall become Union members" (or non-member fair share fee payers or religious objectors). In other words, because TriMet stopped sending employees to the ATU orientations before the parties agreed to an alternative means for furnishing employees with membership applications and advising them of their rights, TriMet is not complying with the union security clause.

We do not agree that the union security clause compels TriMet to continue the orientations. The clause does not address how employees shall be furnished with membership applications. It does not specify which party is responsible for supplying the applications. Although the employees historically have been supplied with ATU membership applications and advised of their rights through the ATU orientations, nothing in the CBA indicates that those orientations are the only means by which the parties could implement the union security clause. Nor does the CBA expressly require the parties to mutually agree on how to implement the union security clause. Thus, to adopt ATU's position, we would have to add terms to the parties' CBA, which we cannot do. Because ATU did not establish that the union security clause requires TriMet to permit employees to attend ATU orientations on paid work time, we dismiss this subsection (1)(g) claim.

9. TriMet violated ORS 243.672(1)(e) by unilaterally terminating the practice of scheduling newly hired bargaining unit employees to attend ATU orientations on paid work time.

ATU contends that TriMet made an unlawful unilateral change when it ceased scheduling new hires to attend ATU orientations on paid work time. As discussed above, an employer violates subsection (1)(e) by unilaterally changing the *status quo* regarding a mandatory subject of bargaining, and the *status quo* can be based on a clearly established past practice. *Department of*

Corrections, UP-33-06 at 7, 22 PECBR at 165. We find, and TriMet does not dispute, that the parties had a clearly established practice by which TriMet’s training department scheduled newly hired bargaining unit employees to attend ATU orientation sessions on paid work time. The record also shows, and TriMet does not dispute, that TriMet unilaterally decided to terminate that practice without giving ATU sufficient notice and a meaningful opportunity to bargain.²⁸ TriMet nonetheless contends that the unilateral change was lawful because the paid orientations do not involve a mandatory subject of bargaining. TriMet primarily contends that the paid orientations are unlawful and therefore a prohibited subject of bargaining. TriMet argues in the alternative that the orientations are a permissive subject of bargaining. As explained below, we conclude that the paid orientations are not prohibited by law, and that they are a mandatory subject of bargaining.

We start by addressing TriMet’s argument that the orientations are prohibited. TriMet first contends that the paid orientations are prohibited by ORS 243.670(2)(a). Relying on this Board’s decision in *City of Portland*, TriMet also argues that the orientations violate ORS 243.672(1)(b) and constitute an unlawful use of public funds. We address each argument in turn.

ORS 243.670

In 2013, the legislature enacted the “Public Employer Accountability Act,” which amended PECBA by adding the provisions codified at ORS 243.670 and 243.672(1)(i). *See* 2013 Or Laws ch 663. ORS 243.670(2)(a) prohibits a public employer from using public funds “to assist, promote or deter union organizing.”²⁹ TriMet contends that paying employees to attend the ATU orientations violates that prohibition, at least under the circumstances of this case. We disagree, for the following reasons.

When interpreting a statute, we begin by examining its text and context. *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). In full, ORS 243.670(2)(a) provides: “A public employer may not [u]se public funds to support actions to assist, promote or deter union organizing.” ORS 243.670(1)(a) defines the term, “assist, promote, or deter union organizing,” as:

“any attempt by a public employer to influence the decision of any or all of its employees or the employees of its subcontractors regarding:

“(A) Whether to support or oppose a labor organization that represents or seeks to represent those employees; or

“(B) Whether to become a member of any labor organization.”

That statutory definition expressly limits the scope of subsection (2)(a), such that it prohibits only *attempts to influence* employees’ decisions regarding union organizing and membership. In this case, there is no evidence that TriMet scheduled employees to attend the ATU orientations on paid work time in an attempt to influence any employee’s decision regarding whether to support ATU or become an ATU member. Therefore, there is no basis for finding that TriMet violated, or would

²⁸TriMet raised the affirmative defense of waiver in its answer, but did not pursue it. As a result, we do not address that issue.

²⁹ORS 243.672(1)(i) makes it an unfair labor practice for an employer to violate ORS 243.670(2).

violate, subsection (2)(a) by using public funds to pay employees for time spent attending the orientations.

Examining subsection (2)(a) in context confirms our conclusion that it does not prohibit the paid orientations. In ORS 243.670(4), the statute expressly exempts several activities from the subsection (2)(a) prohibition:

“[ORS 243.670] does not apply to an activity performed, or to an expense incurred, in connection with:

- “(a) Addressing a grievance or negotiating or administering a collective bargaining agreement.
- “(b) Allowing a labor organization or its representatives access to the public employer’s facilities or property.
- “(c) Performing an activity required by federal or state law or by a collective bargaining agreement.
- “(d) Negotiating, entering into or carrying out an agreement with a labor organization.
- “(e) Paying wages to a represented employee while the employee is performing duties if the payment is permitted under a collective bargaining agreement.”

ORS 243.670(4); 2013 Or Laws ch 663. As explained below, we find that TriMet’s activity of scheduling employees to attend the ATU orientations on paid work time, and the related expenses, fall within at least three of those express exemptions.

First, we conclude that the orientations fall within the exemption for “an activity performed,” or “an expense incurred, in connection with * * * administering a collective bargaining agreement.” ORS 243.670(4)(a). The statute does not define the term “administering a collective bargaining agreement.” “To determine the meaning of words that are not otherwise defined in a statute, we look first to their ‘plain, natural, and ordinary’ meaning.” *Gordon v. Rosenblum*, 361 Or 352, 361, 393 P3d 1122, 1127 (2017) (citations omitted). “Words that are legal terms of art are exceptions to that rule; we give those words their established legal meaning.” *Id.* To determine the plain meaning of words, we often consult the appropriate dictionary. *Id.*

Reading subsection (4)(a) in context, we conclude that the term “administering a collective bargaining agreement” refers to “contract administration,” which is a legal term of art under PECBA and in labor relations. *Roberts’ Dictionary of Industrial Relations* defines “contract administration” as “[t]he day-to-day activity to carry out the intent and substance of the terms and conditions of employment as provided in the collective bargaining agreement.” Harold S. Roberts, *Roberts’ Dictionary of Industrial Relations* at 148 (4th ed 1994). When a union is certified or recognized as the exclusive representative of a bargaining unit, it is responsible for both “negotiations and contract administration” on behalf of all bargaining unit employees, regardless of their union membership status. ORS 243.650(18); *see also* ORS 243.672(2)(a); *Carlson v.*

AFSCME, 73 Or App 755, 758, 700 P2d 260 (1985). This Board has held that contract administration encompasses any “contractual matter,” including a union’s “effort to monitor and police the terms of the collective bargaining agreement.” See, e.g., *Oregon School Employees Association, Chapter 68 v. Colton School District* 53, Case No. C-124-81 at 4-5, 6 PECBR 5027, 5030-31 (1982); *Washington County School District No. 48 v. Beaverton Education Association and Nelson*, Case No. C-169-79 at 8, 5 PECBR 4398, 4405 (1981). “The grievance procedure,” which labor and management engage in to resolve contractual disputes, “has a central role in contract administration” and “has been justly called the heart of the collective agreement.” *Roberts’ Dictionary*, at 148 (internal quotation marks and citation omitted). In the context of labor relations, a “collective bargaining agreement” is more than “a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise,” it is “an effort to erect a system of industrial self-government.” *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 US 574, 579-80, 80 S Ct 1347, 1351 (1960). Thus, administration of a collective bargaining agreement is an ongoing activity that necessarily involves both labor and management.

Moreover, subsection (4)(a) expressly exempts any activity performed or expense incurred “in connection with” administering a collective bargaining agreement. ORS 243.670(4)(a) (emphasis added). Thus, the statutory exemption is not limited to contract administration itself, but also encompasses any activities and expenses that are “connected to” contract administration. *Gordon*, 361 Or at 365-66 (construing the term “in connection with” as broadening the scope of ORS 646.607(1) to encompass both the enumerated actions and “conduct * * * ‘in connection with’ those actions”).

Here, all of the employees who attend the ATU orientations are in the ATU bargaining unit, which means that ATU is their “exclusive representative” for the purposes of collective bargaining under PECBA. ORS 243.650(8) (defining “exclusive representative”). At the orientations, ATU provides information about the parties’ collective bargaining agreement, which governs all bargaining unit employees’ terms and conditions of employment. ATU distributes copies of the CBA, explains the employees’ negotiated rights and benefits, and provides forms for accessing benefits such as the employee assistance and child and elder care reimbursement programs. ATU also provides employees with information about their right to representation and the grievance procedure, as well as information that they need to exercise their rights under the CBA and PECBA, such as how to reach their union stewards. Further, ATU implements the union security clause of the CBA by informing employees that they have the right to join or not join the union, providing them with union membership applications, and explaining how they can become fee-paying non-members or religious objectors. In sum, by scheduling employees to attend the orientations on paid work time, TriMet is providing them with the opportunity to obtain information about their collective bargaining agreement and the labor organization responsible for negotiating and administering that agreement on their behalf. Both TriMet and ATU have a legitimate interest in facilitating contract administration by providing employees with such information, in this manner. Thus, we have no trouble concluding that such activity is performed “in connection with * * * administering” [the parties’] collective bargaining agreement,” and therefore within the intended scope of subsection (4)(a).

Second, we find that the orientations fall within the exemption for activities performed and expenses incurred “in connection with [p]erforming an activity required * * * by a collective bargaining agreement,” under ORS 243.670(4)(c). As discussed above, Article 1, Section 2,

Paragraph 2(b) of the parties' CBA provides that bargaining unit employees "shall be furnished with an application for membership in the Union * * * and shall be advised of the requirement that they shall become members of the Union" (or fee-paying non-members or religious objectors) at the start of their employment with TriMet. Although the contract does not specify how the parties must fulfill those requirements, those contractual requirements nevertheless exist. Because furnishing membership applications and informing employees regarding the union security clause are activities "required by a collective bargaining agreement," and the parties jointly fulfill those requirements through the ATU orientations, those orientations are an activity "connected with" the performance of an activity required by the CBA.

Third, we find that the orientations fall within the subsection (4)(d) exemption for activities connected with "carrying out an agreement with a labor organization." Here, the orientations are the means by which the parties have "carried out" the union security clause of the parties' CBA. TriMet contends that the subsection (4)(c) and (4)(d) exemptions do not apply because the contract does not *require* the orientations in particular. However, nothing in the CBA (or PECBA) prohibits the parties from choosing to implement the union security clause through the orientations. Because they have chosen to do so, the orientations are connected with carrying out the parties' agreement.

Notably, TriMet concedes that ORS 243.670(2)(a) does not prohibit public employers from paying employees to attend union orientations that are shorter in length (*e.g.*, approximately 15 minutes), and that take place on the public employer's premises. In effect, TriMet argues that the statute prohibits it from paying employees to attend the ATU orientations only because those orientations involve more paid time (approximately one to three hours, including travel time) and take place at the ATU office instead of a TriMet facility. TriMet, however, does not explain how the duration or location of the orientations causes that activity to cross the line from lawful to unlawful. Nothing in the statute expressly states that factors such as duration, location, or dollar amount, in and by themselves, can convert otherwise lawful activities and expenses into violations of subsection (2)(a). Even assuming that an excessive duration or inappropriate location could indicate that an employer was attempting to influence employee's decisions in violation of subsection (2)(a), in this case, there is no evidence that the duration and location of the ATU orientations were excessively long or costly such that TriMet violated ORS 243.670 by scheduling and paying employees to attend them.

For all of the reasons discussed above, we conclude that ORS 243.670(2)(a) does not prohibit TriMet from continuing its practice of scheduling and compensating employees to attend union orientations conducted at the ATU office.

ORS 243.672(1)(b) & Use of Public Funds

Next, we turn to TriMet's argument that the paid orientations constitute unlawful assistance under ORS 243.672(1)(b) and unlawful use of public funds under Oregon law, as construed by this Board in *City of Portland*, DR-4-85, 8 PECBR 8115.³⁰ In that case, this Board concluded that certain proposals, which would require the city to pay the compensation of a city employee who

³⁰TriMet raised the section (1)(b) and public funds issues together, and for both, it relied exclusively on this Board's analysis in *City of Portland*, arguing only that this case is indistinguishable. As noted above, we do not revisit *City of Portland* because neither party has argued that it was wrongly decided.

was on a leave of absence to serve as a union representative, were prohibited for bargaining. The Board's conclusion that those proposals involved the unlawful use of public funds for private purposes turned on "the fact that the City would be required to partially underwrite the work of another employer's employee." *Id.* at 9-10, 8 PECBR at 8123-24. Because of that fact, the Board found that the proposals conflicted with the State Constitution and Public Finance Statutes, which it construed as "prohibit[ing] a public employer such as the City from expending funds to support [] an individual's private employment." *Id.* at 10, 8 PECBR at 8124. Similarly, the Board concluded that the proposals were unlawful assistance under PECBA, ORS 243.672(1)(b), because they "require[d] that salary or benefits continue to be paid to an employee who takes leave to become an Association employee." *Id.* at 10-11, 8 PECBR at 8124-25. Importantly, the Board distinguished prior cases in which the Board had approved of contract provisions that required public employers to "grant [employees] limited paid release time to attend negotiation sessions or to process grievances" on the ground that "[t]he employees granted such leave do not become union employees by reason of their involvement in these activities." *Id.* at 10-11, 8 PECBR at 8124-25.

In its argument that the paid orientations constitute an unlawful use of public funds, TriMet only asserts that this case is analogous to *City of Portland*. We disagree. Here, unlike in *City of Portland*, TriMet is merely compensating *its own* employees when it pays employees for the time that they spend at the ATU orientations. Thus, the single fact that made the proposals at issue in *City of Portland* prohibited--the fact that the city would be "underwrit[ing] the work of *another* employer's employee"--is not present here. *Id.* at 10, 8 PECBR at 8124 (emphasis added). Because this case is materially distinguishable from *City of Portland*, the holding of that case is not controlling here.

TriMet identifies no other basis for concluding that compensating its own employees for time spent at the ATU orientations serves something "other than a public purpose," and we see none. *Id.* (quoting *Carruthers v. Port of Astoria*, 249 Or 329, 438 P 2d 725 (1968)). Moreover, we conclude that TriMet paying its own employees to attend orientation sessions where those employees learn about their terms and conditions of employment, as well as the role and responsibilities of the employees' exclusive representative, serves public purposes. To begin, these orientations serve the same public purpose as other types of employee orientation: they provide TriMet employees with important information about the terms and conditions of their public employment--specifically, among other things, the negotiated rights in their labor agreement.³¹ Additionally, by ensuring that bargaining unit employees have a basic understanding of their collective bargaining agreement and the labor organization that serves as their exclusive representative, the orientations serve the public purposes of PECBA that are identified in ORS 243.656. Providing such basic information allows employees to meaningfully exercise

³¹For example, we presume that TriMet could lawfully use public funds to schedule new employees to attend, on paid work time, a health benefit orientation session at which the various health insurance providers supplied information about the employees' plan options. In *City of Portland*, DR-4-85 at 10 n 9, 8 PECBR at 8124 n 9, this Board noted that ORS 294.100(1) provides that "It is unlawful for any public official to expend any money in excess of the amounts, or for any other or different purpose than provided by law." Chapter 294 is titled "County and Municipal Financial Administration." TriMet does not establish that ORS 294.100(1) applies to TriMet officers or the general funds at issue, but even assuming that it does, TriMet does not contend that it is not authorized to compensate its own employees for orientation activities (whether related to their collective bargaining agreement or other aspects of their employment).

their contractual or statutory rights, including their “right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations.” ORS 243.662. Thus, paying employees for time that they spend at the disputed orientations is a lawful use of public funds.³²

For similar reasons, we conclude that the paid orientations are not prohibited under ORS 243.672(1)(b). 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.” TriMet contends that the practice of scheduling employees to attend the ATU orientations on paid work time is prohibited “assistance” in the existence or administration of ATU.

When determining whether employer conduct is prohibited by subsection (1)(b), this Board has long distinguished between “lawful cooperation between an employer and the exclusive representative of employees,” and “unlawful assistance by an employer to a labor organization.” *Eugene Education Association v. Eugene School District 4J and Miller*, Case No. C-93-79 at 5, 5 PECBR 3004, 3008 (1980) (citing *Oregon School Employees Association v. School District No. 9 of Jackson County*, Case No. C-204-78, 4 PECBR 2352 (1979)). Further, this Board has consistently concluded that subsection (1)(b) does not prohibit a public employer from compensating its employees for time spent on “matters directly related to the collective bargaining relationship between the employer and the exclusive representative.” *Id.* Applying that principle, we have concluded that an employer does not violate subsection (1)(b) by, for example, providing employees paid release time to serve on a union bargaining committee, engage in grievance processing, or conduct union meetings. *See, e.g., id.*; *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-91-93 at 29-30, 14 PECBR 832, 860-61 (1993), *aff’d without opinion*, 133 Or App 602, 892 P2d 1030 (1995) (AOCE). “Discussions of ‘internal [union] matters’ also are directly related to the bargaining relationship where they concern the formation, existence and administration of the labor organization--matters recognized by the PECBA as critical to employee representation. ORS 243.662; ORS 243.672(1)(b).” AOCE , UP-91-93 at 30, 14 PECBR at 861.

Here, as set forth above, the orientations primarily provide new employees with fundamental information regarding their terms and conditions of employment, the role that an exclusive representative plays regarding those terms and conditions of employment, and other benefits available to employees as a result of being part of a represented workforce. Those types of information are directly related to the collective bargaining relationship between TriMet and ATU. Further, providing new employees with such information is “reasonably necessary for the [Union] to effectively act as the exclusive representative of [TriMet] employees.” *Id.*; *see also*

³²TriMet does not contend, and we do not find, that any of the content of the ATU orientations was unlawful or coercive. Indeed, TriMet concedes that it is lawful for TriMet itself to inform employees that ATU is their collective bargaining representative and that they have the right to become ATU members; to provide contact information for ATU; and to distribute ATU enrollment forms. It is equally lawful for TriMet to permit ATU to provide that information and distribute enrollment forms to employees directly. Similarly, TriMet concedes that public employers may lawfully use public funds to pay employees for time spent at union orientations that are shorter in duration and take place at employer facilities. However, we see no basis for concluding that the duration and location of the ATU orientations negates their public purposes.

Springfield Education Association v. Springfield School District No. 19, Case No. C-278 at 4, 1 PECBR 347, 350 (1975) (“Provisions which require cooperation of the public employer with the exclusive representative in the discharge of the duty of fair representation under [PECBA] are clearly for the benefit of both the public employer and [its] employees, and cannot be found to be improper assistance.”). To the extent that the orientations instruct employees how to become ATU members, fee payers, or religious objectors, they concern both the “administration of the labor organization” and ATU’s duty of fair representation. *Id.* Thus, we find that the orientations are directly related to the collective bargaining relationship between TriMet and ATU.

Although TriMet pays its employees to attend these orientation sessions, there is nothing inherently impermissible in a public employer paying its employees for workplace orientations, trainings, and other similar matters. Such informational sessions, including union-related orientations, are commonplace among public employers. Moreover, the wages that TriMet pays its employees for the time that they spend at the orientations (approximately one to three hours per employee once during the employee’s employment) are not “of such magnitude” that they “undermine the employees’ ability to freely choose or replace their exclusive representative.” *Id.* at 30 n 14, 14 PECBR at 861 n 14. Because the ATU orientations are, “in whole or substantial part, directly related to the parties’ collective bargaining relationship” and do not “constitute, or threaten, domination” of ATU by TriMet, scheduling employees to attend the orientations on paid work time does not constitute unlawful assistance within the meaning of subsection (1)(b). *Id.* at 30 and n 14, 14 PECBR at 861 and n 14.³³

Scope of Bargaining

Finally, we address TriMet’s alternative argument that the paid orientations involve a permissive, as opposed to mandatory, subject of bargaining.

“When determining whether a subject is mandatory for bargaining, we follow a two-step process. First, we identify the subject of the proposal. Second, we examine whether that subject is mandatory for bargaining. To answer the second question, we first determine whether the subject is specifically designated as mandatory or permissive under the statute, or whether we have addressed the status of the subject in a previous Board decision. *Springfield Police Association v. City of Springfield*, Case No. UP-28-96 [at 10, 16 PECBR 712, 721 (1996), *aff’d without opinion*, 147 Or App 729 (1997)]. If the subject in dispute is specifically included in the definition of ‘employment relations’ under ORS 243.650(7)(a), then the subject is mandatory for bargaining. *Portland Fire Fighters Assoc. v. City of Portland*, 305 Or 275, 282-83, 751 P2d 770 (1988). Under ORS 243.650(7)(a), employment relations ‘includes, but is not limited to, matters concerning direct or indirect

³³TriMet asserts that the paid attendance at the ATU orientations is akin to paid leave for conferences of union “affiliates,” which this Board held would constitute unlawful assistance in *Clackamas Intermediate Education District Education Association v. Clackamas Intermediate Education District*, Case No. C-141-77 at 8, 3 PECBR 1848, 1855 (1978). However, as this Board explained in *Eugene SD*, the *Clackamas IED* proposal did not directly relate to the bargaining relationship because it required paid release time for conferences conducted by the association’s “affiliates,” and thus involved “activity at an organizational level higher than that of one local [a]ssociation.” C-93-79 at 6, 5 PECBR at 3009. Here, the orientations are conducted by the employees’ local union. Therefore, *Clackamas IED* is inapposite.

monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment.”

Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services, Case No. UP-043-11 at 11, 25 PECBR 525, 535, *adh’d to on recons*, 25 PECBR 764 (2013).

If the subject does not fall into one of the expressly mandatory categories, we determine whether it is specifically excluded from the definition of employment relations (and therefore permissive) under ORS 243.650(7)(b), (d), or (g) (or in the case of school district bargaining, subsection (7)(e)). *Department of Administrative Services*, UP-043-11 at 12, 25 PECBR at 536. If the subject is not permissive under any of those statutory provisions, we review our prior cases to determine if we have previously decided whether the subject was mandatory, permissive, or prohibited. *Id.* Finally, if none of the foregoing steps are dispositive, we apply the balancing test in ORS 243.650(7)(c). Under that balancing test, a subject is permissive if we determine that it has “a greater impact on management’s prerogative than on employee wages, hours, or other terms and conditions of employment.” *Id.*

Accordingly, we begin by determining the subject of the practice at issue. TriMet contends that the practice involves the subject of “assignment of duties,” which is one of the categories that is designated as permissive by ORS 243.650(7)(g). We disagree. This Board has previously defined “assignment of duties” as the assignment of “tasks ordinarily performed by employees in the classification of the employee who is given an assignment.” *Oregon Public Employees Union, Local 503, v. State of Oregon, Executive Department*, Case No. UP-64-87 at 21 n 4, 10 PECBR 51, 71 n 4 (1987). The paid orientations do not involve the assignment of ordinary, in-classification job tasks to employees. Rather, they are bargaining unit-wide informational sessions that are designed to educate employees regarding their terms and conditions of employment.

We conclude that the subject at issue is paid orientation sessions where employees learn about their terms and conditions of employment and the roles and responsibilities of the employees’ exclusive representative. For ease of reference, we refer to this subject as “paid union orientations.” The mandatory or permissive status of that subject is not addressed by the express terms of ORS 243.650(7) or any precedent that we know of. Therefore, we apply the balancing test of ORS 243.650(7)(c) to determine whether the subject is mandatory or permissive.

As noted above, a subject is permissive under that test if we determine that it has “a greater impact on management’s prerogative than on employee wages, hours, or other terms and conditions of employment.” *Id.* TriMet contends that the “substantial commitment of employee time and wages to the [orientation] meetings” has an “effect on management prerogatives.” However, TriMet does not specify which management prerogatives are affected, or explain how they are affected. Essentially, TriMet contends only that the cumulative cost of the orientations is substantial. The cost of a bargaining subject matter, however, is not a management prerogative, as this Board has long defined that term.³⁴

³⁴We interpret the term “management prerogative” by referring to this Board’s precedent because ORS 243.650(7)(c) “codifies this Board’s ‘balancing test,’” *City of Springfield*, UP-28-96 at 7 n 3, 16 PECBR at 718 n 3.

This Board first adopted the concept of management prerogative to limit the scope of public employers' bargaining duty; we held that employers may, but cannot be required to, bargain over a permissive subject, and we defined a permissive subject as one that is "inherently a prerogative of management" or "within the proprietary function of management, or delegated as an exclusive management prerogative by constitutional or statutory law or state administrative rule." *Springfield School District*, C-278 at 4, 1 PECBR at 350. This Board derived the management prerogative concept from private sector case law and industries, while recognizing that "[i]n the public sector, these elements of management prerogatives may arise in a different fashion than in the private sector, i.e. through statute or through public policy." *Id.* at 349. In other words, when we speak of "management prerogatives" in the context of the balancing test, we are concerned with the public employer's right to make policy or operational decisions in running its enterprise. For example, in *Springfield* we determined that "educational policy" was a management prerogative of the school district, and, as a result, that curriculum content was a permissive subject of bargaining. However, we have consistently held that the costs of such management prerogative decisions must be bargained to the extent they involve employee compensation or other conditions of employment. See, e.g., *Oregon Public Employees Union, Local 503, v. State of Oregon, Executive Department*, Case No. UP-64-87 at 20 n 3, 10 PECBR 51, 70 n 3 (1987) (subject of intra-unit transfers is permissive, but effects of transfers, such as moving expenses, are mandatory).

Moreover, when we apply the balancing test, PECBA requires us to do so on a subject-matter basis, independent of the particular terms of the *status quo* practice or bargaining proposal at issue. *City of Springfield*, UP-28-96 at 8-9, 16 PECBR at 719-20. It necessarily follows that, for the purpose of the balancing test, a subject's impact on any given prerogative (or employment condition) is the same regardless of the particular practice or proposal at issue.³⁵ Accordingly, it is incorrect to weigh the costs that TriMet has purportedly incurred over the past two years, as those costs are the effect to the *status quo* practice, rather than the impact of having to bargain over the subject itself. Therefore, when we apply the subsection (7)(c) balancing test, neither the cost of compensating employees nor the cost previously incurred by TriMet by way of the past practice is a management prerogative that we weigh.

We turn to applying the balancing test to the subject of paid union orientations. On the one hand, TriMet has not identified any management prerogative that is impacted by paid union orientations. On the other hand, the impact on employee terms and conditions is substantial. The question of whether the orientations will occur on paid work time directly impacts the employees' wages and hours. Additionally, the orientations impact employees' access to critical information regarding their collective bargaining agreement, their exclusive representative, and PECBA rights. Without the orientation sessions, employees are likely to be less informed about their contractual and statutory rights and basic terms and conditions of their particular employment. The orientations also facilitate communication between employees and their representative by, for example, providing employees with steward contact information. "[E]mployees have an interest in being able to communicate with each other and with representatives" of their union. *Department*

³⁵For example, assume that the parties here were engaged in bargaining over the orientation sessions. Assume further that ATU's position was to retain the current practice and that TriMet's position was that there be no orientations at all. In determining whether the subject was mandatory or permissive, we would weigh the impact on management's prerogative independent of both proposals--thus, the purported impact on TriMet's management prerogative would be the same if the costs were nothing, a substantial sum, or anything in between.

of *Administrative Services*, UP-043-11 at 18, 25 PECBR at 542. Consequently, we find that the subject of the orientations has a greater impact on employee terms and conditions of employment than on any management prerogative. Therefore, the subject is mandatory for bargaining.

Our review of this Board's precedents confirms our conclusion that the subject of paid union orientations is mandatory. We have long held that subjects that "assist the incumbent labor organization in its duty of fair representation are within the scope of mandatory bargaining." *South Lane School District No. 45J*, 1 PECBR at 474. As explained above, the incumbent labor organization bears the statutory obligation to fairly represent bargaining unit employees both in bargaining and contract enforcement. See ORS 243.672(2)(a). Accordingly, we have recognized that the exclusive representative commonly plays a vital role in presenting grievances on behalf of its employees. We have also recognized that the duty of fair representation significantly impacts the represented employees' wages, hours, and other terms and conditions of employment, and provides a benefit to the employer. See *Springfield School District*, 1 PECBR at 350. Here, the orientation sessions educate employees about the terms of their collective bargaining agreement, how that agreement is negotiated and enforced, and ATU's roles and responsibilities in those processes. Without such information, employees cannot, for example, notify ATU of potential contract violations or identify future bargaining priorities. Therefore, we conclude that the paid union orientations assist the exclusive representative in performing its duty to fairly represent employees.

The subject at issue here, paid time for employees to attend orientations where they learn about their terms and conditions of employment and the roles and responsibilities of their exclusive representative, is not meaningfully distinguishable from other subjects involving the use of paid time or other employer resources for union-related activities that we have found mandatory for bargaining, including: (1) reasonable paid time for employees to attend grievance sessions or participate in contract negotiations (*AFSCME, Local 173 v. Polk County*, Case No. UP-100-88, 11 PECBR 536 (1989); *Eugene School District 4J*, C-93-79 at 5, 5 PECBR at 3008); (2) use of employer property for union-related communications, including employer-owned equipment, facilities, and bulletin boards (*Springfield School District*, C-278, 1 PECBR 347) and e-mail systems (*Department of Administrative Services*, UP-043-11, 25 PECBR 525); and (3) paid time to conduct union meetings regarding "employer-union relations" and "internal Association matters" (*AOCE*, UP-91-93 at 30, 14 PECBR at 861). If anything, the paid orientations more strongly impact individual employee rights and conditions of employment because the employees who attend receive important employment-related information about working in a represented workplace.

The dissent would find, after applying the subsection (7)(c) balancing test, that the subject of the orientations is permissive. Before we address the substance of the dissent's analysis, we note that none of the arguments advanced by the dissent were asserted by TriMet. TriMet's entire argument applying the balancing test to the orientations is contained in a single sentence: "And if a balancing test were applied, given the substantial commitment of employee time and wages to these meetings over the past two years, the effect on management prerogatives clearly outweighs the impact on 'employee wages, hours, or other terms and conditions of employment.'" (Quoting ORS 243.650(7)(c).)

Although TriMet did not specify the management prerogative at stake, the dissent contends that the management prerogative to assign employees is affected.³⁶ Even considering the paid orientations' possible impact on that prerogative, we conclude that the subject is mandatory. In every case cited by the dissent for the proposition that we must consider the impact on "management's right to assign and direct the workforce," the Board has done so and concluded that paid time for union- or collective bargaining-related activities is mandatory for bargaining. The dissent seeks to distinguish those precedents by arguing that the orientations are an "intra-union activity," not an activity "'directly related and central' to the two-party collective bargaining process." However, we unanimously concluded in our subsection (1)(b) analysis that the orientations are "directly related to the collective bargaining relationship between the employer and the exclusive representative." Unlike the dissent, we reach the same conclusion for the purposes of the scope of bargaining balancing test. That is, we find that orientations where represented employees learn about their collective bargaining rights, their collective bargaining agreement, and the roles and responsibilities of their collective bargaining representative, are "directly related and central" to the collective bargaining process. The dissent also contends that "learning about union-related rights * * * is sufficiently attenuated from exercising them" to distinguish this case from the relevant precedents. We disagree. As we noted above, an employee is highly unlikely to exercise their rights if the employee does not know what those rights are or how to exercise them in the first place. Thus, we conclude that the orientations are integral to, not attenuated from, the employees' exercise of their collective bargaining rights.

We also disagree with the dissent's characterization of the orientation sessions as solely "an intra-union activity." The type of orientation at issue addresses matters that affect all bargaining unit employees *including non-members*, such as the terms of the collective bargaining agreement; how to access negotiated-for benefits; the right to representation in disciplinary investigations and grievances; and the right to be a member, non-member, or religious objector. In any case, the dissent recognizes that intra-union activities may be mandatory for bargaining, including "paid leave time for union officers and representatives to conduct union meetings," as this Board held in *AOCE*, UP-91-93 at 30, 14 PECBR at 861. The dissent argues that the paid orientations are distinguished from the "paid meeting-related leave" at issue in *AOCE* because the meetings in that case were "continuing," whereas an orientation is "a singular event." Nothing in our case law indicates that the relative frequency of a subject matter makes a subject mandatory or

³⁶Neither TriMet nor the dissent explain precisely how *bargaining* about the subject of paid orientations impacts the prerogative to assign duties, or how that impact is so substantial that it outweighs the impacts on the employees' terms and conditions of employment. Because the subject of paid orientations does not involve the assignment of duties, any impact on the prerogative to assign duties appears minimal, if present at all. To the extent that the dissent concludes that the orientations substantially impact TriMet's management prerogative to assign duties because, under the *status quo*, the ATU orientations have involved one to three hours of paid time per new employee, the dissent incorrectly considers the effects of the particular past practice at issue, rather than on the subject itself, regardless of practice or proposal.

permissive, and we see no basis for such a proposition. Comparably infrequent subjects such as one-time bonuses or compensation for jury duty are mandatory.³⁷

The dissent also suggests that employees are learning *only* “about their union-related rights” at the type of orientations at issue. That observation is true only in the most general sense--a represented employee who is receiving information about their wages, hours, and other terms of conditions of employment is learning about union-related rights because the union negotiated those terms and conditions of employment with the employer. Using that same logic, one could also suggest that employees are exercising only union-related rights when they are released on paid time to engage in collective bargaining. In any event, as described above, the Board has already held that paid release time to engage in union-related activities constitutes a mandatory subject of bargaining.

Finally, there is a contradiction in how the dissent measures the orientations’ impact on employees versus management. When measuring the impact on employees, the dissent considers only how one individual employee attending one orientation is affected.³⁸ But when measuring the impact on the employer, the dissent considers the aggregate impact of all new employees attending the orientations on an “ongoing and recurring basis”--*not* merely the effect of one employee attending one orientation. That is, in our view, an inapt comparison.³⁹ A proper comparison would assess the orientations’ aggregate impact on individual employees with their aggregate impact on the employer. Based on that comparison, we conclude that the orientations’ impact on employee terms and conditions of employment is far greater than the impact on any management prerogative.

³⁷The dissent also argues that the subject of paid orientations is not analogous to subjects involving the use of employer facilities or equipment for union-related activities. The analogy is apt because all of those subjects assist the incumbent labor organization in its duty of fair representation and facilitate workplace communications between employees and their exclusive representative. As set forth above, the Board has repeatedly concluded that such subjects are mandatory for bargaining, and there can be little doubt that the subject of the orientations fits squarely within that longstanding precedent.

³⁸Additionally, the dissent considers only the most immediate impact of the orientations, *i.e.*, the wages paid to the employee for the time spent at the orientation. Although that impact alone could support the conclusion that the subject of paid union orientations is mandatory for bargaining, *see Polk County*, UP-100-88 at 6, 11 PECBR at 541, we also note that the dissent ignores the orientations’ other impacts on employee terms and conditions of employment, as discussed above.

³⁹In support of its approach, the dissent cites a quotation from *Polk County*, UP-100-88 at 6-7, 11 PECBR at 541-42: “this Board consistently has balanced the effects of a proposal on the employer against the effects on individual employees, not on the bargaining unit employees as a group.” However, when that quotation is viewed in context, it is clear that the Board was explaining that we evaluate the impact of a subject on individual employees as opposed to the *union*. *Id.* at 7, 11 PECBR at 542 (“This Board, in other words, views such proposals as being concerned primarily with individual employee benefits, rather than union rights.”). That is, the Board was not suggesting that we must weigh a subject’s impact on a single employee against its aggregate impact on the employer. Moreover, when this Board has applied the balancing test to subjects involving union-related activity, this Board has weighed the impact of that activity on employees’ *collective* terms and conditions of employment. *See, e.g., Eugene School District*, C-93-79 at 5, 5 PECBR at 3008; *Oregon School Employees Association v. School District No. 9 of Jackson County*, Case No. C-204-78 at 5, 4 PECBR 2352, 2356 (1979) (concluding subject of paid time for negotiations is mandatory in part because “[t]he outcome of negotiations obviously have an important effect on teacher conditions of employment”).

To summarize, we conclude that the practice of scheduling employees to attend union orientations on paid work time is lawful and mandatory for bargaining. Because TriMet terminated that practice without exhausting its duty to bargain in good faith, TriMet made a unilateral change to the *status quo* concerning a mandatory subject of bargaining, which is a *per se* violation of ORS 243.672(1)(e).

10. TriMet did not violate ORS 243.672(1)(e) by refusing to produce requested documents and seeking to recover the costs of responding to grievance-related information requests.

The duty to bargain in good faith includes the obligation to provide certain information upon request. *Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon, Department of Forestry*, Case No. UP-19-05 at 8, 22 PECBR 33, 40 (2007). A party's response to an information request may be an unfair labor practice under ORS 243.672(1)(e), depending on the totality of the circumstances. *American Federation of State, County and Municipal Employees Council 75, Local 189 v. City of Portland*, Case No. UP-046-08 at 5, 26 PECBR 785, 789 (Order on Remand), *adh'd to on recons of remand*, 26 PECBR 796 (2016) (hereinafter "*AFSCME v. Portland*"). When determining whether a party's response to an information request violates (1)(e), "this Board generally looks to: (1) the reason given for the request; (2) the ease or difficulty in producing the data; (3) the kind of information requested; and (4) the history of labor-management relations regarding information requests." *Id.* at 6, 26 PECBR at 790 (citing *Colton School District 53*, Case No. C-124-81 at 5, 6 PECBR 5027, 5031 (1982)). When the parties' information request dispute involves the issue of costs, we use the same "totality framework," applying principles established in analogous cases decided under the National Labor Relations Act. *AFSCME v. Portland*, UP-046-08 at 16-17, 26 PECBR at 790-91. For example, a party that objects to responding to an information request based on costs bears the burden of establishing "an unduly burdensome financial impact." *Id.* at 17, 26 PECBR at 791. Further, "[a]n unconditional demand that the requesting party pay all costs is inconsistent with the obligation to bargain in good faith." *Id.*

In this case, ATU contends that TriMet violated its duty to bargain in good faith by adopting, and continuing to implement, a policy under which it unconditionally demands prepayment for the costs of responding to all information requests, even where the costs are not unduly burdensome (*i.e.*, *de minimis*). TriMet first announced this policy by letter dated September 14, 2015. In that letter, TriMet stated that it would charge for search time regardless of whether documents were located and produced, and that there would be "no fee waivers." When taken at face value and viewed out of context, TriMet's policy appears inconsistent with the good faith bargaining principles discussed in *AFSCME v. Portland*. However, we must consider the September 2015 letter under the totality of the circumstances.

Here, the circumstances include the somewhat unusual fact that, at the time that TriMet sent the September 2015 letter, it had a reasonable, good faith belief that its decision to charge for costs was lawful based on this Board's original decision in the *AFSCME v. Portland* case, Case No. UP-046-08, 24 PECBR 1008 (2012), *adh'd to on recons*, 25 PECBR 85 (2012), *rev'd and*

rem'd, 276 Or App 174, 366 P3d 787 (2016).⁴⁰ TriMet's September 2015 letter also largely mirrored ATU's August 2015 letter, in which ATU demanded prepayment for the estimated costs of responding to a TriMet information request. Moreover, the record does not establish that TriMet strictly adhered to the policy it announced in September 2015. Rather, in the specific examples provided, ATU made "boilerplate" or relatively broad information requests related to grievances or other contractual matters, and TriMet initially responded by estimating the costs to search for and produce the information, and indicating that it would begin that work upon payment. Although TriMet's flat demands for prepayment were inconsistent with its duty to bargain in good faith, TriMet also invited ATU to discuss ways to reduce the projected costs by clarifying or narrowing the scope of the information requests, indicating a willingness to bargain. When ATU narrowed or clarified its requests, TriMet substantially reduced its cost projections, and, for some requests, TriMet produced a portion or all of the records at no charge, either because the costs were *de minimis* or because TriMet does not charge others to produce such records.

In other instances, after the parties bargained to narrow the request's scope and TriMet revised its cost estimate, ATU either paid the reduced charge or declined to pursue the request. ATU generally contends that TriMet did not meet its burden to prove that the costs charged in those instances were overly burdensome. However, on this record, we find that TriMet met its burden.⁴¹ Moreover, it does not appear that ATU ever attempted to bargain with TriMet over who would bear the disputed costs. *Cf. AFSCME v. Portland*, UP-046-08 at 17, 26 PECBR at 791 ("If the parties dispute whether the costs to comply with the information request are unduly burdensome, the parties must bargain in good faith as to who shall bear such costs." (internal quotation marks and citations omitted)). Nor do we find that TriMet clearly signaled an unwillingness to bargain over that issue under the totality of circumstances. Although TriMet

⁴⁰In our totality analysis, we consider the fact that the parties previously did not charge each other for the costs of responding to information requests, but note that a party's decision to start charging for costs does not, in and by itself, give rise to a subsection (1)(e) violation. *See generally, AFSCME v. City of Portland*, UP-046-08, 26 PECBR 785 (Order on Remand) and 26 PECBR 796 (Order on Reconsideration of Remand). Additionally, in this case, TriMet decided to start charging for costs after ATU attempted to charge TriMet for costs. ATU argues that TriMet should have reversed course after ATU denied that it had changed the parties' practice in subsequent correspondence. However, ATU did not explain the basis for that denial in its correspondence with TriMet. Although ATU explained its denial at the hearing in this case, there is no evidence that ATU communicated that explanation directly to TriMet when the dispute arose. Under these circumstances, we decline to find that TriMet's decision to charge for costs, or its adherence to that decision, is evidence of bad faith.

Separately, we note that neither party made a formal bargaining proposal on the subject of information requests (including costs or charges). Whether that subject is mandatory or permissive for bargaining, in the context of contract negotiations, remains an open question. *Id.*, Order on Remand at 5, 26 PECBR at 789.

⁴¹For example, the parties' course of dealing for the Grievance 9061 information request shows that after ATU objected to TriMet's cost estimate and payment request, the parties bargained to narrow the scope of the request. Eventually, TriMet provided some documents at no charge and substantially reduced the charges for the remaining documents. When ATU paid those charges, it only generally objected to the charges, and it did not try to bargain further. At hearing, TriMet specifically explained the bases for its initial cost estimates and the reduced charges. Although ATU continues to contend that the costs were not actually unduly burdensome, it did not rebut TriMet's testimony, and it does not specifically explain why, in its view, the reduced charges that it paid were not justified.

initially made flat demands for payment, TriMet moved from its initial positions in other ways (such as by not charging for *de minimis* costs), which indicated openness to bargaining.

After viewing TriMet's information request responses under the totality of the circumstances, we conclude that ATU has not established that those responses violated the duty to bargain in good faith. Therefore, we dismiss this subsection (1)(e) claim.

11. TriMet did not violate ORS 243.672(1)(a) by changing the benefits of ATU members and officers, by charging for the production of information related to collective bargaining and labor relations, by creating and publishing its Fact Check webpage, or by the totality of its conduct.

ATU contends that each of TriMet's actions discussed above, either separately or in their totality, violated ORS 243.672(1)(a). Below, we discuss the legal standards for subsection (1)(a) claims, and then we address each action, first separately, and then in the aggregate.

ORS 243.672(1)(a) Legal Standards

ORS 243.672(1)(a) makes it an unfair labor practice for a public employer or its designated representative to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." ORS 243.662 guarantees public employees "the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." Subsection (1)(a) has two prongs, commonly referred to as the "because of" and "in" prongs, and ATU contends that TriMet's actions violated both.

To determine if an employer interfered with, restrained, or coerced employees "because of" the exercise of protected rights, we examine the employer's motives or reasons for the employer's action. *International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-049-12 at 18, 25 PECBR 871, 888 (2013). If an employer takes action "because of" employees' exercise of protected rights, the employer's actions are unlawful. It is not necessary for a complainant to prove that the employer acted with hostility or anti-union animus, or prove that the employer was subjectively motivated by an intent to restrain or interfere with protected rights. *Id.*

We determine the employer's reason for acting by examining the record as a whole. *Portland Assn. of Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 626, 16 P3d 1189, 1195 (2000). After we make that factual determination, we decide whether the reasons were lawful or unlawful. *Id.* at 639. If all of the employer's reasons were lawful, the "because of" claim must be dismissed. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 741 (2004). If the reasons were unlawful or a lawful reason was a pretext for unlawful conduct, we will find a "because of" violation of subsection (1)(a). If we find the employer acted for both lawful and unlawful reasons, we apply a mixed motive analysis and determine whether the employer would not have taken the disputed action but for the unlawful motive. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-39-10 at 15-16, 25 PECBR 325, 339-40 (2012) (*Tri-County*).

When we analyze whether an employer's actions restrained, interfered with, or coerced employees "in" the exercise of their protected rights, "the employer's motive is irrelevant." *Id.* at 15, 25 PECBR at 339. "We focus only on the effects 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" prong of subsection (1)(a). *Id.* A violation of the "in" prong of subsection (1)(a) may be either derivative or independent. An employer who commits a "because of" violation also generally commits a derivative "in" violation because an action taken in response to employees' exercise of protected rights has the natural and probable effect of chilling the exercise of those rights. *Tri-County*, UP-39-10 at 15, 25 PECBR at 339. An independent violation is typically "based on an employer's threat or implied threat of interference with employees' exercise of protected rights." *Tigard Police Officers' Association v. City of Tigard*, Case No. UP-59-10 at 11, 24 PECBR 927, 937 (2012).

Next, we apply these standards to each action at issue in this case, and the totality of those actions.

Retiree Health Benefits

We first consider whether TriMet did not offer Medicare-eligible retirees a PPO plan with 90/10 coinsurance "because of" the exercise of protected rights. The record establishes that TriMet offered the retirees all of the plans that it believed in good faith were required by the parties' 2012-2016 CBA. For purposes of the subsection (1)(a) "because of" claim analysis, TriMet's good faith belief was a lawful reason to act. Further, ATU has not established that TriMet's lawful reason was pretext, or that it acted for an additional unlawful reason.

ATU generally contends that TriMet took all of the actions at issue in this case because employees elected Block, Hunt, and Longoria as ATU's lead officers in June 2015. However, the parties bargained the retiree benefit provisions of the 2012-2016 CBA long before that date (and, as discussed above, the parties never specifically bargained over a 90/10 PPO plan). The CBA required TriMet to begin offering retirees a PPO Medicare Advantage plan at the start of 2016, and TriMet complied with that requirement by offering the 80/20 PPO plan (and not offering a 90/10 PPO plan). Further, there is no evidence that TriMet intended to offer retirees a 90/10 PPO plan before the June 2015 election, but decided not to do so after that election. Thus, it appears that the timing of Block's election and TriMet's action was merely coincidental. *Cf., e.g., Spray Education Association and Walt v. Spray School District No. 1*, Case No. UP-91-87 at 19-20, 11 PECBR 201, 219-21 (1989) (finding that timing of school board's decision, under the circumstances, did not demonstrate that the district acted because of employee's protected activity).

Turning to the "in" prong of subsection (1)(a), we do not see how TriMet's failure to offer retirees a 90/10 PPO plan option under the circumstances of this case would have the natural and probable effect of deterring employees from engaging in PECBA-protected activity. There is no evidence that this retiree health benefits issue has ever been meaningfully linked to any particular protected activity (including the 2015 election, for example). Thus, we see no basis for concluding that a reasonable employee would be chilled by TriMet's decision not to offer a 90/10 PPO plan. *See City of Tigard*, UP-59-10 at 11, 24 PECBR at 937 ("[I]n order for a reasonable employee to be chilled in the exercise of protected activity, that employee must see some relationship between

the protected activity and the employer's actions or statements.” (internal quotation marks and citation omitted)).

Transportation Passes for Dependents

ATU claims that TriMet ceased providing free transportation passes for the dependents of ATU's full-time officers “because” employees engaged in protected activity. The record establishes that TriMet made that change because it conducted a legal analysis and concluded in good faith that issuing the passes would be unlawful. That is a lawful reason to act. *Graduate Teaching Fellows Federation Local 3544, AFT, AFL-CIO, v. Oregon University System (University of Oregon)*, Case No. UP-18-00 at 16, 19 PECBR 496, 511 (2001).⁴² ATU questions why TriMet decided to cease issuing passes in 2015, when the legal basis for its decision was a case decided in 1985. The record, however, establishes that when Hunt requested new passes in 2015, the managers involved had not personally issued such passes in the past, were not aware of any prior practice, and had a reasonable basis for questioning the legality of issuing the passes once the practice came to their attention. In other words, TriMet conducted the legal analysis in 2015 because Hunt's request brought the issue to TriMet's attention at that time.

Ultimately, ATU did not establish that TriMet's legitimate reason was pretext, or that TriMet acted with mixed motives. We again note that ATU asserts, but provided insufficient evidence to prove, that TriMet has issued dependent transportation passes to similarly situated employees on comparable types of leaves of absences. It is ATU's burden to prove that TriMet acted because of employees' protected activity, and on this record, we find that ATU did not do so.⁴³

We turn to the “in” prong of subsection (1)(a). ATU contends that TriMet's action would deter a reasonable employee from taking a leave of absence to serve as an ATU officer, because they would have to give up a significant employment benefit. However (even putting aside our conclusion that TriMet is prohibited by law from providing ATU officers with free dependent transportation passes), we do not agree that TriMet's decision *not to remove* that financial disincentive constitutes employer interference with, restraint, or coercion of employees in the exercise of protected rights. To the extent that PECBA permits employers to remove such disincentives, it does not impose an affirmative duty on employers to do so. This is not a case in which the employer is creating or exacerbating a deterrent to the exercise of protected rights. We also note that ATU could mitigate the disincentive at issue by purchasing the officers' dependent transportation passes itself (as it has done with respect to their health insurance benefits). Under

⁴²ATU contends that, by permitting TriMet to stop issuing the passes based on its belief that doing so is unlawful, we open the door to an employer making any unilateral change by merely claiming that the *status quo* is unlawful. ATU's argument incorrectly conflates the legal standards for subsections (1)(a) and (1)(e). As discussed above, an employer that unilaterally changes the *status quo* based on its belief that the practice is unlawful bears the risk of being incorrect; if the employer's legal analysis is wrong (*i.e.*, the subject is mandatory, not prohibited), then the unilateral change violates subsection (1)(e). In the subsection (1)(a) analysis, however, a good faith belief that a certain practice is unlawful may be a lawful *motive* for terminating that practice, even if that belief turns out to be legally incorrect.

⁴³ATU contends that the timing and pattern of TriMet's actions, when viewed in their totality, establish that TriMet acted because of employees' exercise of protected rights. We address that argument below, when we consider all of TriMet's actions in the aggregate.

these circumstances, we conclude that TriMet's refusal to issue new dependent transportation passes to Hunt did not violate the "in" prong.

Sick Leave Buy Back

ATU claims that TriMet declined to permit ATU to buy back sick leave for its outgoing president "because of" employees' exercise of protected rights, namely, the election of the current leadership in June 2015. The record establishes that TriMet took this action because TriMet concluded that the side letter agreement providing for sick leave buy back expired on November 30, 2009. By electing not to bring forward that side letter agreement in the negotiations for the 2009-2012 CBA, TriMet indicated--as far back as 2009--that it no longer desired to continue that practice. On this record, we see no basis for finding that TriMet declined ATU's request to buy back Hansen's sick leave because of the June 2015 election.

For reasons similar to those articulated above (in our discussion of the dependent transportation passes and retiree health benefits), we also do not find that TriMet violated the "in" prong of subsection (1)(a). Particularly in light of the fact that ATU allowed the sick leave buy back agreement to expire, we do not agree that the natural and probable effect of TriMet's refusal to continue that practice is to chill employees' exercise of protected rights.

Charging for Information Requests

ATU also claims that TriMet began charging for information requests because employees elected Block, Hunt, and Longoria in the June 2015 election. ATU has not, however, proved that was TriMet's motive. To the contrary, the record indicates that TriMet started charging for costs because TriMet interpreted ATU's August 25, 2015, letter, in which ATU asked TriMet to pay for the costs of responding to an information request, as changing the parties' practice.

ATU contends that TriMet's stated reason for its action was pretext, and that TriMet was unlawfully retaliating against ATU. For proof of pretext, ATU relies on the fact that ATU denied that it had changed the parties' practice, and that TriMet persisted in charging for costs despite that denial. However, when ATU denied that it had changed the parties' practice in its correspondence to TriMet, it did not explain why it had charged for costs in its August 25 letter or why it did not view that as a change to the parties' practice.⁴⁴ Further, the parties' correspondence shows that both were engaged in aggressive advocacy and taking hard positions regarding how to handle information requests. We do not find that TriMet's refusal to reverse course under those circumstances proves that TriMet was acting with an unlawful retaliatory motive.

Regarding the "in" prong of subsection (1)(a), ATU argues that TriMet's policy of charging to respond to information requests raises the costs of pursuing grievances, which has the natural and probable effect of deterring members from doing so. However, there are many types of costs that a union potentially could incur in processing grievances, such as the costs of legal representation and arbitration, and it is rarely apparent at the start of the grievance process what the costs actually will be. Moreover, the record shows that TriMet has provided some responses to grievance-related information requests at no charge, notwithstanding its initial statement that there

⁴⁴As noted above, ATU explained its reasoning at the hearing in this case, but there is no evidence that ATU provided those explanations directly to TriMet when this issue arose.

would be “no fee waivers.” TriMet’s information request charges do not amount to a repudiation of the grievance procedure. *Compare Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-62-05 at 33-34, 22 PECBR 911, 943-44 (2009) (grievance processing delays do not violate the “in” prong), *with Coos County Board of Commissioners and AFSCME Local 2936 v. Coos County District Attorney and State of Oregon*, Case No. UP-32-01 at 15, 20 PECBR 87, 101 (2002) (employer’s repudiation of grievance resolution violates “in” prong). We also note that there is no evidence that TriMet is charging for costs that it is not actually incurring. Viewing TriMet’s actions under the totality of the circumstances, we do not agree that the natural and probable effect of those actions is to deter reasonable employees from pursuing grievances.

Fact Check Webpage

ATU primarily contends that TriMet’s statements on its Fact Check webpage are evidence of TriMet’s motive for the *other* actions at issue in this case. Specifically, ATU argues that the Fact Check statements prove that TriMet took those other actions because employees elected Block, Hunt, and Longoria in June 2015, in violation of the “because of” prong of subsection (1)(a). We address that contention below, when we consider TriMet’s conduct in totality.

ATU also asserts that some of TriMet’s Fact Check statements violate the “in” prong of subsection (1)(a). Specifically, ATU argues that TriMet’s public criticism of ATU officers has the natural and probable effect of deterring reasonable employees from running for union office or exercising their voting rights. However, an employer’s critical remarks about a labor organization generally do not, without more, violate subsection (1)(a). *See, e.g., American Federation of State, County and Municipal Employees, Council 75, Local 2043 v. City of Lebanon*, Case No. UP-14-11 at 7-8, 24 PECBR 996, 1002-03 (2012), *rev’d and rem’d on other grounds*, 360 Or 809, 388 P3d 1028 (2017). ATU does not contend that the Fact Check statements involved actual or implied coercion, threats, or promises. Nor does ATU contend that the circumstances and timing of TriMet’s statements cause them to have the “quality of a reprisal” for protected activity. *Cf. Portland State University Chapter American Association of University Professors v. Portland State University*, Case No. UP-013-14 at 13-14, 26 PECBR 438, 450-51 (2015).

ATU contends that TriMet went too far by asserting that ATU was challenging certain TriMet actions merely “to divert attention” from ATU’s election settlement with DOL--without evidence of such ulterior motives. We agree that TriMet’s assertions about ATU’s motives were speculative and inflammatory. However, ATU had made similar assertions regarding TriMet’s motives in public communications. Although we do not condone such statements (by either party), they “fall within the permissible range of advocacy that is often part of the collective bargaining process.” *Oregon School Employees Association (OSEA) v. Ashland School District*, Case No. UP-037-16 at 25, ___ PECBR ___, ___ (2018). Ultimately, when we view TriMet’s statements objectively and under all of the circumstances, we do not find that their natural and probable effect is to chill employees in the exercise of protected rights.⁴⁵ To the extent that ATU also asserts a

⁴⁵Notably, the record establishes that TriMet’s intended audience for the Fact Check webpage was the general public, not TriMet employees, and there is no evidence that TriMet ever specifically directed any TriMet employees to view the Fact Check webpage. Although ATU alleges that TriMet included a link to the Fact Check webpage on the TriMet intranet system that employees routinely access, ATU did not provide sufficient evidence to prove that allegation (which TriMet disputes).

“because of” claim, it has not established that the Fact Check statements coerced, restrained, or interfered with employees’ exercise of protected rights, even assuming that TriMet would not have made the Fact Check statements but for employees’ protected activity. In the absence of any actual or objectively likely impact on employees’ exercise of protected rights, we conclude that TriMet did not violate either the “because of” or “in” prongs of subsection (1)(a).

Union Orientation Sessions

ATU likewise contends that TriMet terminated the union orientation sessions because employees elected Block, Hunt, and Longoria and because of Block’s strong advocacy as ATU’s President, and therefore violated the “because of” prong of subsection (1)(a). However, the record establishes that TriMet was prompted to review the legality of the orientation sessions by a legal seminar, in which the speaker suggested that such orientations may be prohibited by ORS 243.670. The record further establishes that TriMet terminated the orientations because of that legal review. TriMet’s belief that its conduct was unlawful was a lawful *motive* for acting, even though we have concluded, in this order, that TriMet’s legal conclusion was incorrect. *See Oregon University System*, UP-18-00 at 16, 19 PECBR at 511. ATU alleged, but did not prove, that TriMet relied on that legal analysis in bad faith. As discussed further below (when we consider TriMet’s actions in the aggregate), ATU also failed to prove that TriMet’s legal belief was pretext, or that TriMet acted with mixed motives.

We turn to the “in” prong of subsection (1)(a). ATU contends that the natural and probable effect of terminating the orientations is to chill employees in the exercise of protected rights. We disagree. We concluded above that TriMet lawfully cooperated with ATU by providing employees the opportunity to attend the orientations on paid work time, and that, at those orientations, employees obtained a variety of information about their collective bargaining agreement and union-related rights (including their right to join or not join a union). However, it does not automatically follow that an employer *interferes* with the exercise of those rights simply by *not* providing employees the opportunity to obtain such information on paid work time. In other words, even though TriMet’s action negatively affected employees, not all negative impacts are coercive “chilling” effects prohibited by subsection (1)(a). Although TriMet stopped making it easier for employees to obtain important information about their collective bargaining agreement and representative, there is no evidence that TriMet actively discouraged or prevented employees from doing so. There may be circumstances under which an employer’s termination of union orientations could violate the “in” prong, but those circumstances are not present here. For example, we do not find that the circumstances and timing give TriMet’s otherwise lawful action the character of a reprisal for employees’ protected activity. *Cf. Portland State University*, UP-013-14 at 14, 26 PECBR at 451 (university announcement made to employees two days before scheduled strike vote); *Klamath County Education Association v. Klamath County School District*, Case No. C-28-78 at 10, 5 PECBR 2991, 3000 (1980) (onerous directive issued to teachers on day of scheduled strike vote).⁴⁶

⁴⁶We address the *manner* in which TriMet terminated the union orientations in our conclusion that TriMet made an unlawful unilateral change in violation of subsection (1)(e).

ID Badge Access

ATU also contends that TriMet violated the “in” and “because of” prongs of subsection (1)(a) by issuing ATU officers faulty ID badges and thereby improperly limiting their access to TriMet employees. However, as discussed above, ATU failed to demonstrate by a preponderance of the evidence that TriMet in fact improperly limited the ATU officers’ access. Because ATU did not prove the factual premise for this claim, we need not address it further.

Totality of Conduct

ATU asks us to consider the above actions in their totality. We agree that a pattern of actions, or the aggregate effect of various discrete actions, could under some circumstances establish a subsection (1)(a) “because of” or “in” violation, even if each action, standing alone, does not. Nonetheless, in this case, viewing TriMet’s actions in the aggregate does not lead us to conclude that either type of violation occurred.

We first address ATU’s contention that the timing and pattern of TriMet’s actions, coupled with TriMet’s Fact Check statements regarding ATU, prove that TriMet took the actions at issue because employees elected Block, Hunt, and Longoria as the lead ATU officers in June 2015, and because Block, in particular, has strongly advocated for TriMet’s employees since taking office. Specifically, ATU points out that shortly after the June 2015 election, TriMet engaged in the following series of actions: TriMet refused to permit ATU to buy back its outgoing officer’s sick leave; refused to provide a current ATU officer dependent transportation passes; implemented a new policy of charging for information requests; unilaterally stopped sending employees to the ATU orientations; and then published the Fact Check webpage that criticized ATU and accused ATU of pursuing issues only to divert attention from its agreement with DOL to partially rerun the officer election.⁴⁷

As discussed above, TriMet has provided credible and sufficient evidence showing that it took each of those actions for lawful reasons. ATU has not met its burden to prove that those lawful reasons were pretext, or that TriMet acted with mixed motives and would not have taken the actions but for the unlawful motive. ATU argues that we should find the required causal link between employees’ protected activity and TriMet’s actions based on the fact that TriMet took all of the actions at issue shortly after the 2015 election. Although we may draw a causal inference from the timing of an action, and that inference is sufficient to establish a *prima facie* case for a subsection (1)(a) “because of” claim, that inference alone is insufficient to satisfy ATU’s ultimate burden of proof, in light of the credible and un rebutted evidence of TriMet’s lawful motives.

ATU contends that TriMet’s statements about ATU on the Fact Check webpage prove that TriMet acted because of improper motives. Although TriMet’s statements show that TriMet strenuously disagreed with ATU, believed that ATU was misrepresenting facts, and questioned ATU’s motives, those statements do not prove that TriMet was taking actions to punish employees for electing Block.

⁴⁷In its memorandum in aid of oral argument, ATU does not ask us to consider the retiree health benefits or access badge issues when analyzing TriMet’s conduct in its totality. However, our ultimate conclusion would be the same, even if we included those issues.

We also decline to find a causal connection between the June 2015 election and TriMet's subsequent actions because ATU has not demonstrated that Block, Hunt, and Longoria's leadership materially differs from the prior leadership of Hansen, Hunt, and Longoria. Indeed, Hunt and Longoria were reelected into the same offices that they had already held for some time, representing no change at all. Block was the only new officer, and neither ATU nor the evidence identifies any reason why TriMet would respond differently to Block than to her predecessors. ATU repeatedly asserts that Block engaged in "strong advocacy" when she took office, but ATU has not established that Block's advocacy was significantly stronger than the advocacy of her predecessors. Rather, the record indicates that Block's tenure and advocacy during the relevant time period largely resembled that of her predecessors, who were also involved in grievances, information requests, contract negotiations, and unfair labor practice litigation before this Board.

We turn to the "in" prong of subsection (1)(a). As noted above, an independent "in" violation typically involves a threat or implied threat, or some other form of coercion. ATU, however, does not contend that TriMet expressly or impliedly threatened employees. Although an action or statement "that might otherwise be lawful can nevertheless violate (1)(a) depending on the timing and circumstances," even viewing TriMet's actions in their totality, we do not find that those actions have "the quality of a reprisal" against employees for the exercise of protected activity. *Portland State University*, UP-013-14 at 13-14, 26 PECBR at 450-51. And, to the extent that TriMet's actions had a cumulative impact on employees, we do not find, under the circumstances of this case, that any such impact was impermissibly coercive.

In sum, we conclude that TriMet's actions, either separately or in the aggregate, did not violate either the "in" or "because of" prongs of subsection (1)(a). Accordingly, we dismiss this claim.

12. TriMet did not violate ORS 243.672(1)(b) by changing the benefits of ATU members and officers, by charging for the production of information related to collective bargaining and labor relations, or by creating and publishing its Fact Check webpage.

ATU contends that each of TriMet's actions discussed above, either separately or in their totality, violated ORS 243.672(1)(b). Below, we discuss the legal standards for subsection (1)(b) claims, and then we address each action, first separately and then in the aggregate.

ORS 243.672(1)(b): Legal Standards

Under ORS 243.672(1)(b), it is an unfair labor practice for a public employer or its designated representative to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization." In order to prevail on a subsection (1)(b) claim, a labor organization "must demonstrate that the employer's actions actually, directly, and adversely affected the labor organization's ability to serve as exclusive representative." *Oregon AFSCME Council 75, Local #3943, v. State of Oregon, Department of Corrections, Santiam Correctional Institution*, Case No. UP-51-05 at 26, 22 PECBR 372, 397 (2008) (*Santiam*). Additionally, an employer generally does not violate subsection (1)(b) when it has legitimate and lawful reasons for its actions. *Id.* at 28 n 17, 22 PECBR at 399 n 17. However, some actions by an employer "are so inimical to the core values" of PECBA that they violate subsection (1)(b), "even if there is no proof" of direct adverse impact. *Id.* at 27, 22 PECBR at 398.

Retiree Health Benefits

We conclude that TriMet did not violate ORS 243.672(1)(b) when it declined to offer retirees a PPO plan with 90/10 coinsurance. As discussed above, TriMet was complying with the parties' CBA and thus had legitimate, lawful reasons for that action. Further, there is no claim that TriMet undermined the union's role in negotiations by, for example, refusing to deal with the union or bypassing the union and dealing directly with employees. *Cf. Santiam*, UP-51-05 at 27-28, 22 PECBR at 398-99.

Transportation Passes for Dependents

ATU contends that TriMet violated ORS 243.672(1)(b) when it declined to issue free dependent transportation passes to ATU Vice President Hunt. However, we concluded above that, under this Board's precedent and the circumstances of this case, TriMet would violate subsection (1)(b) if it did issue free dependent transportation passes to a full-time ATU officer. Accordingly, we must dismiss this claim.

Sick Leave Buy Back

ATU similarly contends that TriMet violated ORS 243.672(1)(b) when it declined to accept ATU's payment to buy back the sick leave of ATU's outgoing officer. However, as discussed above, TriMet was not obligated to continue that practice because the relevant side letter agreement had expired, and there was no binding past practice. And, even assuming that the sick leave buy back is lawful cooperation (not unlawful assistance) under subsection (1)(b), such cooperation is voluntary under PECBA, not required. Under these circumstances, we decline to find that TriMet unlawfully interfered with ATU by declining to accept ATU's payment to buy back the sick leave of an ATU outgoing officer.

Charging for Information Requests

For similar reasons, we conclude that TriMet did not violate subsection (1)(b) by charging for the costs of responding to the union's information requests. Although an employer may lawfully cooperate with a union by *not* charging for its information request costs, an employer also may lawfully bargain in good faith over allocation of those costs. Here, despite TriMet's broadly worded policy statements (in its September 14, 2015, letter to ATU), the record shows that TriMet has bargained in good faith with ATU regarding cost-related issues on a case-by-case basis. Further, the record does not establish that TriMet has charged for costs for the illegitimate purpose of interfering with the administration or existence of ATU; for example, there is no evidence that TriMet has charged unreasonable amounts or sought payments for costs that it did not actually incur.

Fact Check Webpage

ATU contends that in February and March 2016, TriMet unlawfully interfered with the April 2016 ATU officer election by asserting on its Fact Check webpage that ATU was raising certain issues only to "divert attention" from that election. ATU argues that those statements impugned the officers' motives for advocating for ATU's members, and may have caused members to lose confidence in the election process. However, both labor and management

generally have wide latitude to criticize each other, and such criticism, without more, does not violate subsection (1)(b). Here, TriMet did not encourage employees to vote for or against a particular candidate. *Cf. Santiam*, UP-51-05 at 29, 22 PECBR at 400. ATU did not identify or establish other factors that could cause the statements to go beyond lawful criticism to unlawful interference. Viewing TriMet's statements under the totality of the circumstances, we find that they fall within the range of permissible advocacy.

Union Orientations

ATU contends that TriMet unlawfully interfered with the administration and existence of ATU by terminating the union orientation sessions. For reasons similar to those explained in our subsection (1)(a) analysis, we conclude that terminating the orientations did not violate subsection (1)(b). We concluded above that TriMet may lawfully cooperate with ATU by providing employees the opportunity to attend union orientations on paid work time. It does not automatically follow, however, that TriMet unlawfully interfered with ATU by ceasing that form of cooperation. We found that TriMet terminated the orientations in an unlawful manner--by unilaterally changing an established past practice, but the impact of that conduct is addressed by our conclusion that TriMet violated subsection (1)(e). We see no other basis for finding that TriMet's conduct violated subsection (1)(b) under the circumstances of this case.

ID Badge Access

ATU contends that TriMet interfered with ATU officers' ability to represent TriMet employees by issuing them malfunctioning or overly restricted ID Badges, in violation of subsection (1)(b). However, as discussed above, the record shows that TriMet issued ATU officers ID Badges that provide general access to TriMet facilities (excepting only certain safety-sensitive areas), and that any access problems ATU officers have experienced were likely caused by common technical issues or user error. Because ATU did not prove the factual premise of this claim, there is no subsection (1)(b) violation.

Totality of Conduct

ATU also contends that the cumulative effect of TriMet's actions actually interfered with ATU's administration. However, an employer's action, taken for legitimate and lawful reasons, is not unlawful interference even if it has a negative impact on the union. *See, e.g., Santiam*, UP-51-05 at 28 n 17, 22 PECBR at 399 n 17 (collecting cases); *911 Professional Communications Employees Association v. City of Salem*, Case No. UP-62-00 at 15-16, 19 PECBR 871, 885-86 (2002). ATU contends that examining TriMet's conduct in its totality shows that TriMet was engaged in a "concerted effort" to interfere with ATU's ability to represent TriMet employees. However, we do not agree that the timing and pattern of TriMet's actions is sufficient to prove, in light of the record as a whole, that TriMet acted with an unlawful purpose to interfere with ATU's existence or administration. Rather, the record shows that TriMet took each action for lawful reasons. *See supra* (discussion of subsection (1)(a) claim).

In sum, we conclude that TriMet's actions, viewed separately or in their totality, did not violate subsection (1)(b). Therefore, we dismiss this claim.⁴⁸

Remedy

Because TriMet violated ORS 243.672(1)(e), we will order TriMet to cease and desist that conduct. ORS 243.676(2)(b). We are also obligated to "take such affirmative action * * * as necessary to effectuate the purposes of" of the Public Employee Collective Bargaining Act. ORS 243.676(2)(c). The usual remedy for a unilateral change violation, in addition to a cease-and-desist order, is requiring the employer to restore the past practice that existed before the unlawful change. *Klamath County Fire District #1*, UP-049-12 at 20, 25 PECBR at 890. TriMet has not argued that our usual remedy is inappropriate in this case, and we see no reason not to order it. Accordingly, we will direct TriMet to resume scheduling newly hired employees to attend ATU orientations on paid work time, until it has completed its bargaining obligation.

We also must order an additional make-whole remedy when a return to the *status quo* alone would not address whatever injuries employees have sustained as a result of the unfair labor practice. *See, e.g., OSEA v. Klamath County School Dist.*, Case No. UP-18-92 at 8-9, 14 PECBR 1, 8-9 (1992); *Hillcrest/MacLaren Education Association v. State of Oregon, Executive Department and Hillcrest/MacLaren Schools*, Case No. UP-99-91 at 42-42, 13 PECBR 866, 906-07 (1992). In this case, the record establishes that TriMet's unlawful unilateral change caused a substantial number of employees to miss the opportunity to attend an ATU orientation on paid work time. Therefore, an appropriate affirmative remedy is for TriMet to provide that opportunity to any affected employees who remain employed at TriMet.

We will also order TriMet to post a notice of its wrongdoing, as requested by ATU. We generally order such a posting if we determine that a party's violation of PECBA (1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was committed by a significant number of the respondent's personnel; (4) affected a significant number of bargaining unit employees; (5) significantly (or potentially) impacted the designated bargaining representative's functioning; or (6) involved a strike, lockout, or discharge. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82 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, we find that notice posting is warranted because TriMet's action affected a significant number of bargaining unit employees.

Additionally, we will require TriMet to post the notice in both traditional, physical locations and on the TriMet intranet. We require an employer to electronically notify employees of its wrongdoing when evidence indicates that electronic communication is the customary and preferred method that the employer uses to communicate with employees. *Southwestern Oregon*

⁴⁸In TriMet's cross-objections, it objected to the recommended order to the extent that the order did not reach alternative bases for various legal conclusions. In its memorandum in aid of oral argument, TriMet continued to offer its alternative arguments, but it did not contend that we must reach those issues or explain why we should exercise our discretion to do so under the circumstances of this case. As a result, we decline to address TriMet's alternative arguments except when necessary for our decision.

Community College Federation of Teachers, Local 3190, American Federation of Teachers v. Southwestern Oregon Community College, Case No. UP-032-14 at 9, 26 PECBR 254, 262 (2014). Here, the record establishes that the TriMet intranet is a common method of communication between TriMet and bargaining unit employees.

Both parties request a civil penalty, pursuant to ORS 243.676(4)(a). Although we have concluded that TriMet violated ORS 243.672(1)(e), we do not find that it acted repetitively with knowledge that its actions were unlawful, or that the violation was egregious. Similarly, although we have dismissed ATU's remaining claims, we do not find that the complaint was frivolously filed or filed with the intent to harass. Accordingly, we deny both parties' civil penalty requests.

ORDER

1. TriMet shall cease and desist from violating ORS 243.672(1)(e).
2. TriMet shall schedule newly hired employees to attend ATU orientations on paid work time, until it has completed its bargaining obligation.
3. TriMet shall remedy the unilateral change by scheduling affected employees who are still employed by TriMet to attend ATU orientations on paid work time.
4. TriMet shall post the attached notice for 30 days in prominent places where bargaining unit personnel are employed and on the TriMet intranet.

DATED: July 18, 2018.



Adam L. Rhynard, Chair

*Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

*Member Umscheid, Concurring in Part, Dissenting in Part:

I respectfully dissent from the majority's conclusion of law that TriMet violated ORS 243.672(1)(e) by ceasing to schedule new bargaining unit employees to attend union orientations on paid time. Because I would conclude that TriMet did not violate subsection (1)(e), I also dissent from the remedy in this case. I would dismiss the complaint.

I agree with the majority that ORS 243.670 does not prohibit TriMet from scheduling and paying its new employees to attend union orientations at ATU's office. I also agree with the majority that TriMet did not violate ORS 243.672(1)(b), or unlawfully use public funds, with respect to the paid union orientations. I disagree, however, with the majority's conclusion that the subject of paid union orientations is a mandatory subject of bargaining. I would conclude that the subject is permissive.

The subject of union orientations on paid work time is not expressly addressed by ORS 243.650(7) or by any previous Board decision. Thus, ORS 243.650(7)(c) applies. That subsection provides:

“After June 6, 1995, ‘employment relations’ does not include subjects that the Employment Relations Board determines to have a greater impact on management’s prerogative than on employee wages, hours, or other terms and conditions of employment.”

The purpose of the balancing test is to “determine whether a subject that is not listed in subsection 7(a) is a condition of employment,” *Eugene Police Employees’ Assoc. v. City of Eugene*, 157 Or App 341, 354, 972 P2d 1191 (1998), *rev den*, 328 Or 418, 987 P2d 511 (1999), and therefore is a mandatory subject of bargaining. By applying the balancing test, the Board determines whether a subject is “of like character” to those subjects expressly listed in subsection 7(a). *Springfield Police Association v. City of Springfield*, Case No. UP-28-96 at 9, 16 PECBR 712, 720 (1996), *aff’d without opinion*, 147 Or App 729, 939 P2d 173 (1997) (quoting *Springfield Education Assn. v. School Dist.*, 290 Or 217, 233, 621 P2d 547 (1980)).

I would conclude that scheduling and paying employees to attend union orientations has a greater impact on management’s prerogative to assign and direct the work force than on employee wages, hours, or other terms and conditions of employment. TriMet argued that paid union orientations involved the subject of “assignment of employees,” an enumerated permissive subject listed in ORS 243.650(7)(g).⁴⁹ In the alternative, relying on the balancing test, TriMet also argued that, “in light of the substantial commitment of employee time” and wages to paid union orientations, the effect of these orientations fell more heavily on management’s prerogative than on employee wages, hours, or other terms and conditions of employment. Although TriMet did not expressly link its identification of the subject as “assignment of employees” (advanced with respect to its subsection 7(g) argument) to its alternative argument (contending that the subject is permissive under the subsection 7(c) balancing test), I interpret TriMet to be asserting that what is at stake here, from management’s perspective, is both the assignment of employees and the cost of the orientations.

Although the Board has not previously determined whether the subject of paid union orientations is a mandatory subject, the Board has considered other types of paid time for employees to engage in union-related or collective bargaining-related activities. In cases involving union-related leave time, the Board has weighed the impact on management’s right to assign and

⁴⁹I agree with the majority that the subject of paid union orientations is not “assignment of duties” within the meaning of subsection 7(g), and that the scope of bargaining question should be resolved by applying the balancing test in subsection 7(c).

direct the work force. *See, e.g., Oregon School Employees Association v. School District No. 9 of Jackson County*, Case No. C-204-78 at 4-5, 4 PECBR 2352, 2355-56 (1979) (proposals for paid time for bargaining team members to participate in table negotiations and attend grievance hearings are a mandatory subject of bargaining because negotiations and grievance hearings “are directly related and central” to the collective bargaining relationship, and although the proposals affect educational policy because they “would limit the employer’s right to assign and direct the work” of employees, “the effect on employee terms and conditions of employment outweighs the effect on education policy”); *Eugene Education Association v. Eugene School District 4J and Miller*, Case No. C-93-79 at 5, 5 PECBR 3004, 3008 (1980) (proposals granting up to 30 days of paid leave per year for employees acting as union representatives to serve on the bargaining team and resolve grievances and disputes are mandatory because “their effect on educational policy is outweighed by their effect on employee terms and conditions of employment, in that the proposals have an effect on employee pay which is greater than the effect of the proposals on the employer’s right to assign and direct the work force”); *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-91-93 at 30, 14 PECBR 832, 862 (1993), *aff’d without opinion*, 133 Or App 602, 892 P2d 1030, *rev den*, 321 Or 268, 895 P2d 1362 (1995) (AOCE) (proposal permitting union officers or representatives to conduct union meetings no more than ten hours per month on paid time is a mandatory subject because although the “proposal would obviously interfere with the employer’s right to assign duties during the employee’s shift,” after balancing that effect against the “effect on the employee, who will be able to fulfill the duties of the Association officer without loss of pay or other benefits,” the subject is more akin to vacations and sick leave, and thus mandatory).

Scheduling new employees to attend paid union orientations has an impact on management’s prerogative to assign and direct employees. Management has a prerogative to assign and direct employees to perform the public services the employer provides (such as, here, the wide range of public transportation-related services provided by TriMet). When employees are attending a union orientation, they are not performing those services. As the Board has recognized in other cases, employee absence from duty affects management’s prerogative to assign and direct employees. *See AOCE*, UP-91-93 at 31, 14 PECBR at 862 (proposal for paid leave for union officers to conduct union meetings “obviously would interfere with the employer’s right to assign duties during the employee’s shift”); *School District No. 9 of Jackson County*, C-204-78 at 5, 4 PECBR at 2356 (proposal affected educational policy, a management prerogative, because “it would limit the employer’s right to assign and direct the work of its employees”).

Certainly, paid union orientations also have an impact on employee wages and hours. Because such orientations are paid, employees are not required to work extra hours to make up the time, and they do not suffer a loss in pay for attending. Those effects, however, occur only once during each employee’s tenure (and, correspondingly, only once for each cohort of new hires), and the appropriate evaluation is of the effect on the employees themselves, not the effect on the union. *See, e.g., AFSCME, Local 173 v. Polk County*, Case No. UP-100-88 at 6-7, 11 PECBR 536, 541-42 (1989) (in deciding the mandatory or permissive nature of union-related leave proposals, “this Board consistently has balanced the effects of a proposal on the employer against the effects on individual employees, not on the bargaining unit employees as a group”). In contrast, paid union orientations affect management’s prerogative on a recurring and ongoing basis with each new employee orientation. This impact on management’s prerogative is greater than the impact on employee wages, hours, or other terms and conditions of employment.

The Board has concluded that other types of paid union-related leave are mandatory subjects of bargaining, but those cases are distinguishable. For example, in *School District No. 9 of Jackson County*, the Board concluded that paid leave time for employees to engage in table bargaining and grievance hearings was a mandatory subject. The Board reasoned that “negotiations are directly related and central to the collective bargaining relationship[.]” and the “outcome of negotiations obviously have an important” effect on employee conditions of employment. *School District No. 9 of Jackson County*, C-204-78 at 5, 4 PECBR at 2356. Similarly, the Board reasoned that grievance hearings “are directly related and central to the collective bargaining process.” *Id.* Balancing the effect on the employer’s right to “assign and direct the work” of its employees, the Board concluded that paid leave for bargaining and grievance hearings has a greater impact on employee terms and conditions of employment than on management’s prerogative.

The subject of paid union orientations differs from paid release time for bargaining and grievance hearings, however. The employees engaged in those activities are engaged in two-party processes involving the public employer and directly affecting the content and interpretation of the labor agreement. In contrast, employees attending paid union orientations are not engaged in an activity “directly related and central” to the two-party collective bargaining process. Instead, they are involved in an intra-union activity. As the majority correctly recognizes, those employees are learning about their union-related rights. But learning about union-related rights is not the same as exercising them in the collective bargaining process. Learning about rights is sufficiently attenuated from exercising them (as occurs in table bargaining and grievance resolution) to make *School District No. 9 of Jackson County* distinguishable, in my view.

The subject of paid union orientations is more similar to the subject of paid leave time for union officers and representatives to conduct union meetings, which the Board has concluded is a mandatory subject of bargaining. That type of leave, however, is also distinguishable from paid union orientations. In *AOCE*, the Board analyzed paid time for a union officer to attend quarterly membership meetings and occasional executive board meetings. *AOCE*, UP-91-93 at 30, 14 PECBR at 861. Balancing the impact of paid union officer leave for meetings, the Board reasoned that it “obviously would interfere with the employer’s right to assign duties during the employee’s shift.” *Id.*, UP-91-93 at 31, 14 PECBR at 862. The Board reasoned, however, that paid union leave to attend meetings also had an effect “on the employee, who will be able to fulfill the duties of Association officer without loss of pay or other benefits.” *Id.* Thus, the Board concluded that the subject was “akin to that of ‘vacations’ and ‘sick leave,’ two subjects enumerated in ORS 243.650(7), and we find the proposal to be mandatory.” *Id.*

Paid union orientations are not akin to paid vacation or sick leave in the same way that paid meeting-related leave for union officers or representatives is akin to those job benefits. A union orientation is a one-time event, typically time-limited, offered (at least in this case) to all new union-represented employees. Although paid time to attend a union orientation has an impact on those new employees, that impact is a singular event; it is not continuing, such that the nature of paid time to attend union orientations can truly be viewed as akin to vacation or sick leave.

Finally, in this case, I would not analogize the subject of paid orientations to subjects involving a union’s use of the employer’s facilities or communication systems. For example, in *Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11, 25 PECBR 525, *adh’d to on recons*, 25 PECBR 764 (2013), in a split decision, the Board majority concluded that the union’s access to

the employer's email system for union-related communications is a mandatory subject. The subject at issue here, paid union orientations, certainly involves the union's communications with the employees it represents. The similarity between this case and *Department of Administrative Services* ends there, however. Here, it is undisputed that these orientations occurred off-site at ATU's office. The subject in this case is more akin to an employer-permitted one-time brief absence from duty than to union use of employer facilities or equipment. The Board's cases involving union use of employer facilities or equipment to communicate with employees, therefore, are less meaningful to the analysis in this case.

In summary, I would conclude that the practice of scheduling employees to attend union orientations on paid work time is a permissive subject of bargaining. Because TriMet did not make a unilateral change to the *status quo* concerning a mandatory subject of bargaining, it did not violate ORS 243.672(1)(e).



*Lisa M. Umscheid, Member



NOTICE TO EMPLOYEES
POSTED BY ORDER OF
THE STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-003-16, *Amalgamated Transit Union, Division 757, v. Tri-County Metropolitan Transportation District of Oregon*, 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 Tri-County Metropolitan Transportation District of Oregon (TriMet) violated ORS 243.672(1)(e) by unilaterally ceasing to schedule newly hired employees to attend, on paid work time, orientations conducted by their collective bargaining representative, Amalgamated Transit Union, Division 757 (ATU).

To remedy this violation, the Employment Relations Board ordered TriMet to:

1. Cease and desist from violating ORS 243.672(1)(e).
2. Schedule newly hired employees to attend ATU orientations on paid work time, until TriMet has completed its bargaining obligation.
3. Remedy the unilateral change by scheduling affected employees who are still employed by TriMet to attend ATU orientations on paid work time.
4. Post this notice for 30 days in prominent places where bargaining unit personnel are employed and on the TriMet intranet.

Dated: _____, 2018

By: _____

Title: _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This notice must remain posted for 30 consecutive days from the date of posting in each employer facility in which bargaining unit personnel are employed. This notice must not be altered, defaced, or covered by any other materials. This notice must also be electronically distributed to all bargaining unit personnel. Any questions concerning this notice or compliance with its provisions may be directed to the Employment Relations Board, 528 Cottage Street N.E., Suite 400, Salem, Oregon, 97301-3807.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-020-16

(UNFAIR LABOR PRACTICE)

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

On May 31, 2018, this Board heard oral argument on Complainant's objections and Respondent's cross-objections to a March 1, 2018, recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew, after a hearing held on August 8 and 10, 2017, in Portland, Oregon. The record closed on November 3, 2017, following submission of the parties' post-hearing briefs.

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

Whitney Stark, Attorney at Law, Mechanic Law Firm, Portland, Oregon, represented Respondent.

On June 29, 2016, the Tri-County Metropolitan Transportation District of Oregon (TriMet or District) filed a complaint alleging that the Amalgamated Transit Union, Local 757 (ATU or Union) violated ORS 243.672(2)(b) and (d). After lengthy efforts to settle the dispute, TriMet filed an amended complaint on May 16, 2017, alleging only that ATU violated ORS 243.672(2)(d) by refusing to approve seniority lists affecting journey workers hired by TriMet outside of the parties' apprenticeship program. That refusal, TriMet alleged, violated the parties' 2012-2016 collective bargaining agreement (Agreement or 2012-2016 Agreement). ATU filed a timely answer.

The issue is: Did ATU violate ORS 243.672(2)(d) by refusing to approve classification seniority lists issued by TriMet after ratification of the 2012-2016 Agreement?¹

We conclude that TriMet failed to carry its burden to prove that ATU's refusal to approve the seniority lists violated ORS 243.672(2)(d), and we dismiss the amended complaint.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties

1. ATU is a labor organization within the meaning of ORS 243.650(13). It represents a bargaining unit of TriMet employees, including journey-level workers and apprentices in classifications such as bus mechanic, light rail vehicle (LRV) mechanic, and signals maintainer.

2. TriMet is a public employer within the meaning of ORS 243.650(20).

The Contractual Helper/Service Worker, Apprentice, and Journey Worker Training and Promotion System Before the 2012-2016 Agreement

3. At the time of the events at issue in this case, TriMet and ATU were parties to a collective bargaining agreement in effect from December 1, 2012 through November 30, 2016. There have been numerous prior collective bargaining agreements between the parties beginning more than 40 years ago.

4. The 2012-2016 Agreement, and its recent predecessors, do not include seniority as a defined term. For purposes of this order, there are two types of seniority in this bargaining unit. "Seniority in TriMet" is seniority as commonly understood—employees accumulate seniority in TriMet from their first day of work. "Seniority in classification" is seniority in a particular classification, such as seniority in the journey worker LRV mechanic classification. Seniority in classification is used to determine, among other things, individual employee priority for shifts, work locations, days off, and vacations relative to other employees in that classification.

5. The Agreement uses the term seniority in more than 50 places, including a section of the contract devoted to it, Article 6, Section 13. Seniority is discussed regarding union representative leave, continuity of service, layoff, and modified return to work from medical leave, among other subjects. Aside from changes in the Maintenance Department article of the Agreement, detailed below, references to seniority in the Agreement have not been changed from recent predecessor agreements or those changes are not material to the issues in this case.

¹In its answer, ATU alleged that the amended complaint was barred by the principles of waiver, estoppel, unclean hands, and deferral to arbitration. ATU did not pursue those defenses in its post-hearing brief, and we do not consider them.

6. Before the 2012-2016 Agreement, Article 3, “Operators Division/Maintenance Department,” Section 2, “Filling of Positions,” stated:

“Par. 1. When a position is open in any classification in the Maintenance Department, except for Supervisor, a notice shall be posted on all department bulletin boards for not less than five (5) days before the position is filled and any employee in the Maintenance Department may make application to their Supervisor in writing before the notice expires. The position will be filled according to established seniority in the classification called for, qualifications considered. Employees trying out in a new position shall have a reasonable period to qualify: this to be determined by the Director of Maintenance and/or his/her designees, and the Officers of the Union and/or their designees.

“* * * * *

“Par. 3. It is understood that when a new position is created requiring special skill and training, and no employee in the Division can qualify, the District shall have the right to employ such qualified people.

“Par. 4. [1] Employees filling the position of one receiving a higher rate of pay shall receive the higher rate providing they are capable of performing the work of the higher classification, and the change is made for a period of three (3) days or more. [2] They shall then receive the higher rate when filling this position in the future. [3] Seniority in classification shall not begin until the employee has bid for and qualified in a regularly posted position in that classification.”

No other provision of the 2012-2016 Agreement or any prior, recent agreements, addressed the establishment of classification seniority.

7. The parties agree that, before the 2012-2016 Agreement, Article 3, Section 2, Paragraph 4 remained the same for many years.² The apprentice and seniority system referenced in that provision has operated for over 40 years. During the relevant period, there have been seven TriMet journey worker classifications, each with its own apprenticeship program: bus mechanic, light rail vehicle (LRV) mechanic, signals maintainer, overhead traction electrification maintainer, traction substation technician, field technician, and power maintainer. Apprenticeship programs are generally limited to 10 to 20 employees per class, and the programs ordinarily take two to four years to complete depending on the classification. Each apprentice costs TriMet an average of \$300,000 to train.

²There is no evidence regarding the original bargaining for this provision, and the record does not indicate whether the parties ever changed it before the 2012-2016 Agreement.

8. Before the 2012-2016 Agreement, the almost exclusive path for an employee to become a journey worker was to begin as a service worker,³ next become an apprentice, and only then become a journey worker. Correspondingly, before ratification of the 2012-2016 Agreement, TriMet had to obtain virtually all of its apprentices from within the ranks of eligible service workers, and virtually all of its journey workers from graduates of the TriMet apprentice programs.

9. Service workers are entry-level, front line employees who get buses ready for runs or provide service on transit platforms. To become an apprentice, service workers take a mechanical aptitude test called the Bennett Test, wait for an opening in an apprentice program, and then bid into one of TriMet's apprentice programs based on their seniority from their date of hire by TriMet. Service workers may wait from one to six years for an opportunity to enter an apprentice program.

10. Apprentices who graduate from TriMet apprentice programs are qualified for journey positions in their apprenticed classifications. TriMet conducts "sign-ups" at which journey workers who have completed a TriMet apprentice program, including new graduates, are eligible to bid for posted journey worker positions in their classification. If a newly graduated journey worker successfully bids for a position, their classification seniority begins to accrue on the date that they begin working in that classification.

11. The sign-ups for journey worker positions generally take place twice a year, during the spring and fall (the Agreement requires at least one sign-up per year). At the sign-up, which is overseen by an ATU officer, the order in which journey workers bid for posted positions is based on classification seniority. The bidding order for a particular sign-up follows a seniority list that is approved by ATU and posted by TriMet. The journey worker with the most classification seniority signs up for a position first, followed by employees with less seniority in turn. Generally, journey workers must be present and actually sign up on the designated date.

12. The parties' creation and use of seniority lists for sign-ups is addressed in Article 3, Section 3, Paragraph 1 of the Agreement. That provision has not changed during the relevant period. It states:

"a. A sign-up for Maintenance Department shifts shall be held at the request of the Union. However, not less than one (1) general sign-up will be held per year. Position schedules shall be posted prior to a sign-up and seniority lists by classification as approved by the District and the Union shall also be posted. A sign-up shall be posted for not less than seven (7) days.

"b. Prior to the Union calling for additional sign-ups, the Union agrees to meet and confer with representatives of the District within five (5) days."

13. The journey worker jobs posted for sign-ups vary in location, start and stop time, supervisor, and work performed. TriMet physically maintains the seniority lists used for sign-ups, but an ATU representative reviews the seniority lists before each sign-up.

³Before April 1989, service workers were called helpers. The name change did not change their relationship to the apprenticeship process. For clarity, we use the term service workers in this order.

14. Seven days before posting a seniority list for a sign-up, TriMet provides ATU with lists of positions available for the sign-up, and seniority lists of journey workers in each relevant classification. TriMet provides the seniority lists to the Union during in-person meetings, as well as by fax and email. In most cases, TriMet and ATU officials meet to discuss any errors or other changes to the lists and select a date for the sign-ups. The parties sometimes modify the seniority lists through those communications.

15. If two or more qualified journey workers have the same classification seniority, the journey worker who has the earliest date of hire with TriMet (*i.e.*, greatest seniority with TriMet) is listed first.

16. When there are more qualified journey workers than posted positions, TriMet may retain the excess workers by hiring them as temporary workers until the next sign-up. Pursuant to longstanding contractual language, temporary employees do not accrue classification seniority.

17. TriMet may also post an additional sign-up, called a “white posting,” before the next regular posting. Journey workers who successfully bid on a position through a white posting establish classification seniority beginning on the date they begin working in that job.

Handling of Classification Seniority Issues Before the 2012-2016 Agreement

18. Exceptions to the standard rule for determining classification seniority occur with some frequency because of a variety of circumstances. For example, classification seniority variations occur when apprentices graduate later than the rest of the class they entered with, when employees change jobs and return to their original position, when they are injured, or when other unusual circumstances arise.

19. Typically, when a seniority dispute arises, an ATU officer is made aware, and they either put the issue up for a vote or decide on their own how to resolve it. An ATU officer oversees the sign-up in person, allowing ATU to stop a sign-up and make changes based on any seniority problems that arise. At the time of hearing, Jon Hunt, now ATU Vice President, had over sixteen years of experience as an ATU officer and had been involved in over 40 seniority decisions.

20. In one instance, non-journey maintenance employee TB⁴ moved to a non-bargaining unit position at TriMet, and later took a position in the ATU bargaining unit. ATU decided where her seniority ranking would be in the positions she had worked. TriMet provided no input into the decision and made no objections.

21. In another example, a plant maintenance mechanic at TriMet, TK, entered the apprentice program after several other employees, but graduated and began working as a journey worker before those employees completed the program. Despite this, ATU assigned the other employees in that apprentice class greater classification seniority than TK. ATU assigned those other employees seniority dates not based on the dates they graduated from the apprenticeship program and first signed up for a job, but based on when TK graduated from the apprenticeship

⁴Because the names of individual workers are not necessary to evaluate the issues in this case, we use their initials.

program. This seniority arrangement was communicated to TriMet, and included on the seniority lists, and TriMet agreed to it.

22. Some graduates of an apprentice program are put in a hardship status, or “hard-shipped,” and are given a seniority date different from the date that they first sign up for a job after completing their apprentice program. The seniority date given to such employees is the date they would have received but for the reason they were hard-shipped, giving them greater seniority than employees who had already graduated and were working in a journey worker position.

23. An apprentice who is injured or does not pass an apprenticeship test may not finish the apprenticeship with the people who entered the program at the same time. However, when that occurs, ATU ensures that the apprentice “hold[s] their position in the class, their seniority position, and when they get healthy or when they can return and finish up they go back to that seniority spot.”

24. For example, journey worker NC did not complete his apprenticeship program with the class he entered, but graduated with the next apprentice class. Although he graduated and bid on a job with the later apprentice class, he was given the same seniority date as his original entering class. An ATU official interrupted the sign-up to change NC’s seniority by assigning him a seniority date different from when he was bidding on his first job. ATU communicated this change to TriMet, which did not object or change his seniority date.

25. In other circumstances, ATU has determined an employee’s seniority based on when they enter a class/program. For example, GR, a bargaining unit mini-run operator (a part-time bus operator), changed jobs to a TriMet non-union position. She returned to a bargaining unit bus operator position nearly 10 years later. ATU then assigned GR seniority based on when her mini-run class became full-time operators, which allowed her to work as a full-time operator position instead of returning her to the mini-run position she had been in when she changed jobs. In another situation, when a journey worker mechanic was injured and worked as a service worker for over five years and then became healthy and returned to her journey worker position, ATU gave her seniority as if she had remained a journey worker despite her injury. TriMet did not dispute where ATU ranked her seniority.

Outside Journey Workers Before the 2012-2016 Agreement

26. TriMet has suffered from a shortage of journey workers for several years, which has impaired TriMet’s ability to meet its operational needs. The shortage, which has grown more acute in recent years, is caused by the extended period of time required for apprentices to graduate and become journey workers, the growth TriMet has experienced, and increasing employee retirements and resignations.

27. Until the 2012-2016 Agreement, the parties’ collective bargaining agreements did not authorize TriMet to hire journey workers directly from outside the TriMet service worker/apprenticeship system. Accordingly, from time to time, TriMet sought separate agreements with ATU permitting such hiring.

28. In 1987, TriMet hired journey worker JM from the outside. JM was placed on the classification seniority list ahead of apprentice MG who had enrolled in the apprentice program 35 days before. The record does not reveal who made that decision.

29. In 1999, the parties negotiated a side letter to the 1998-2003 collective bargaining agreement (1999 Side Letter) authorizing TriMet to hire up to eight LRV mechanics and four overhead track electrification mechanics from outside the apprenticeship programs. The 1999 Side Letter required that such outside hires would “establish classification seniority behind any employee who is enrolled in an apprenticeship program on or before one year after the date of contract ratification.” Because the parties ratified the 1998-2003 collective bargaining agreement on March 24, 1999, the classification seniority of outside journey workers was less than employees enrolled in an apprenticeship program on or before March 24, 2000.

30. On March 24, 2000, there were three groups of apprentices enrolled in LRV apprenticeship programs: LRV apprentices enrolled (1) on July 19, 1998; (2) on March 7, 1999; and (3) on March 19, 2000. Under the 1999 Side Letter, because all three groups enrolled in LRV apprenticeship programs before March 24, 2000, all of these apprentices would have established classification seniority ahead of outside journey workers hired in the interim. Instead, ATU determined that a group of six outside journey workers hired on October 31, 1999, February 7, 2000, and February 14, 2000, established classification seniority as LRV mechanics after groups (1) and (2), but before group (3). ATU made that decision through a vote of the LRV journey workers and apprentices.

Negotiations for the 2012-2016 Agreement

31. In September 2013, the parties began negotiations for the 2012-2016 Agreement. The negotiations concluded in September 2014, after 37 bargaining sessions and 8 mediation sessions. Acquiring the right to hire outside journey workers was a bargaining priority for TriMet because of its chronic shortage of journey workers.

32. On October 16, 2013, during the same period as negotiations for the Agreement, TriMet Executive Director of Labor Relations and Human Resources Randy Stedman asked ATU to permit TriMet to hire nine journey workers from outside TriMet—two bus mechanics and seven LRV mechanics. Stedman suggested the same terms as those in the 1999 Side Letter, including making the agreement a one-time-only process, with outside journey workers to be paid at a provisional rate equal to the top step of the apprentice rate.

33. Then-ATU President Bruce Hansen responded with 10 conditions for accepting TriMet’s request. The conditions included TriMet’s withdrawal of its then-pending contract proposal to hire provisional journey workers from the outside (see below), and agreement that the seniority of outside hires would continue “to fall to the bottom of the seniority list every time a current apprentice comes out of the apprenticeship program.” TriMet rejected ATU’s offer.

34. Early in bargaining, TriMet submitted a proposal allowing it to directly hire *provisional* journey workers from outside TriMet. These provisional journey workers would be in a separate job classification from regular journey workers. ATU officials raised concerns about

the seniority of such workers relative to apprentices and their training. Although TriMet did not explicitly address that issue in its proposal, Stedman told ATU negotiators that the provisional journey workers would establish classification seniority behind apprentices who were already enrolled in the relevant apprenticeship programs at the time the provisional journey workers were hired. ATU ultimately rejected the provisional journey worker proposal, and TriMet withdrew it before submission of its final offer on May 22, 2014.

35. Over the course of the negotiations, TriMet also made proposals to hire *apprentices* from outside TriMet, and thus outside the helper/service worker classification. It included an outside apprentice proposal in its final offer, on May 22, 2014. In that final offer, TriMet proposed linking the number of *outside apprentices* TriMet could hire each year to attrition among apprentices and journey workers in the same classification. TriMet's final offer also addressed how to handle *classification seniority for apprentices* hired from outside TriMet (instead of promoted from service worker):

“Any apprentice hired from the outside will establish classification seniority behind any apprentices currently in the respective apprenticeship program as of the date the apprentice is hired.”

36. ATU did not accept TriMet's final offer, and negotiations continued. In September 2014, newly hired TriMet Executive Director of Maintenance Sam Marra told TriMet officials that he was concerned that TriMet lacked enough journey workers to complete critical maintenance. Accordingly, on September 16, TriMet submitted a new mediation proposal to hire apprentices and journey workers directly from outside TriMet:⁵

“The District shall have discretion to hire from the outside up to 1/2 of all apprentices annually in each apprenticeship program (rather than 1/2 half of the aggregate number).

“The District shall have discretion to hire up to 5 journey workers annually from the outside to fill positions in any discipline.”

37. TriMet's mediation proposal did not address the classification seniority of outside journey workers or apprentices. ATU responded the same day with a “what if” proposal that included the language in TriMet's proposal and added the following:

“All newly hired apprentices, whether from within or outside the bargaining unit, shall meet the minimum qualifications established by the District, after consultation with the Union. The District shall have discretion to hire from the outside up to 1/2 of all apprentices annually in each apprentice program (rather than 1/2 half of the aggregate number).

⁵The September 16 mediation proposal was TriMet's first contract proposal regarding hiring *regular* journey workers directly from outside TriMet and its apprenticeship programs; its previous, withdrawn proposal concerned hiring *provisional* journey workers in a new classification, who would be paid the top apprentice step wage.

“The District shall have discretion to hire up to 5 journey workers annually from the outside to fill positions in any discipline.

“All journey level workers will be raised to \$30.42.

“Subject to the following contract provisions ‘New Jobs and Classifications’ and Article 3, Section 2, Paragraph 3, apprentices who drop from an existing apprenticeship program shall forfeit their right to enter a different program for eighteen month unless there is a hardship established by the JATC.

“All journey level workers will be required to fulfill a seven year pay back prior to moving to a different discipline unless there is a hardship established by the JATC.

“Longevity increases for journey level workers will be increased for those workers who have attained 3, 8 or 15 years by an additional \$.10 per hour in addition to the current longevity step. Those with more than 20 years shall receive an additional \$.30 per hour in addition to the current longevity step.” (Emphasis omitted.)

ATU’s counter-proposal also did not address the classification seniority of the outside journey workers or apprentices.

38. Still later on September 16, TriMet responded to ATU’s “what if” proposal, agreeing to increase the hourly wage of all journey workers by \$.50 per hour. TriMet also agreed that apprentices would be required to meet minimum qualifications established by the District, and work seven years in a discipline before moving to another discipline, absent a hardship. ATU did not accept this proposal.

39. The parties resumed mediation on September 30, 2014, and reached a tentative agreement. TriMet agreed to increase the wages of all journey workers and apprentices by \$1.00 per hour, in addition to the negotiated COLA increases. ATU agreed that TriMet could hire up to five outside journey workers annually, and outside apprentices up to a number equal to one half of the apprentices in each program annually. TriMet calculated that the outside hiring agreements cost TriMet approximately \$750,000 per year, plus inflation.

40. There were no joint sessions between the bargaining teams during the September 2014 mediation. There were, however, side bar discussions in which small groups of ATU and TriMet officials met face-to-face. In one of those discussions, ATU officer Kevin Kinoshita suggested that the people at the bargaining table had not fully understood what the concerns were with direct hires, such as concerns about state certification and what would occur if an apprentice missed days in the program. The parties agreed to defer discussions about how the outside journey worker provision, including seniority, would be implemented. TriMet’s chief spokesperson stated that the parties had already had extensive conversations about direct hires, and stated that TriMet would be flexible.

41. The parties added provisions regarding the hiring of outside apprentices to Article 3, Section 21, Paragraphs 2 and 4, as follows:

“Notwithstanding any other provision of this Agreement, the District shall have the right to hire from the outside up to 1/2 of all apprentices annually in each apprenticeship program within the District. All newly hired apprentices, whether hired from within or outside the bargaining unit, shall meet the minimum qualifications established by the District.

“* * * * *

“Any apprentice hired from the outside will establish classification seniority behind any apprentice currently in the respective apprenticeship program as of the date such apprentice is hired.”

The parties also agreed to add the following sentence to the end of preexisting Article 3, Section 2, Paragraph 4:

“However, employees hired directly from the outside into an apprentice program may receive a seniority date in the Helper/Service Worker classification equal to their entrance into that apprentice program.”

42. Regarding the outside journey workers, the parties agreed to add the following language to Article 3, Section 1, Paragraph 10 of the Agreement:

“Notwithstanding any other provision of this Agreement, the District shall have the right to hire up to five (5) journey workers annually from outside the District to fill positions in any apprentice discipline within the District.”

43. ATU officials were aware that the parties had negotiated contract language to place outside apprentices behind apprentices already enrolled in a TriMet apprenticeship program, but did not add language placing outside journey workers behind apprentices enrolled in those programs.⁶

44. On October 22, 2014, TriMet’s Board of Directors ratified the Agreement. ATU prepared a summary of the tentative agreement for its members; that summary did not specifically address outside journey worker or outside apprentice classification seniority. On October 24, 2014, ATU membership ratified the Agreement.

⁶At hearing, ATU officials were asked why they negotiated contract language to place outside apprentices behind apprentices already enrolled in a TriMet apprenticeship program, but did not secure contract language placing outside journey workers behind existing apprentices enrolled in those programs. It appears that some ATU officials didn’t think it was necessary to do so for the outside journey workers, in light of what they believed was the parties’ history of handling journey worker classification seniority disputes, the parties’ bargaining table discussions regarding TriMet’s provisional journey worker proposal, and the parties’ agreement to negotiate the implementation details for the outside journey worker provision after the Agreement was ratified.

Post-Ratification Implementation Discussions

45. In November 2014, representatives of ATU and TriMet held discussions about implementing the new outside hire provisions. Marra led the discussions for TriMet's team, which included managers of the maintenance departments and staff members from the labor relations and human resources divisions. ATU was represented in the implementation discussions by ATU Executive Board members Kevin Kinoshita and Joe Ruffin.

46. TriMet representatives intended to negotiate a memorandum of agreement with ATU regarding implementation of the new outside journey worker provision, and had the authority to modify the Agreement. TriMet Director of Maintenance Bob Seeley believed that if the parties did not reach a different agreement, Article 3, Section 2, Paragraph 4, sentence 3 would control the establishment of classification seniority for all journey workers as a general rule, regardless of whether they were inside or outside hires. Sentence 3 provides, "Seniority in classification shall not begin until the employee has bid for and qualified in a regularly posted position in that classification." ATU officials did not believe that sentence 3 was a general seniority rule that would apply to the outside journey workers hired pursuant to the new contract provision.

47. In mid-December 2014, TriMet gave ATU an initial proposal for implementing the new outside journey worker provision. It stated, in part:

"An external applicant directly hired into a journey worker classification will establish classification seniority behind any apprentice promoted to journey worker who was an apprentice in the respective classification on October 24, 2014; and when all such apprentices have been promoted to journey worker or have otherwise left the respective apprenticeship program, then an external applicant directly hired into a journey worker classification will establish classification seniority as of the date the employee begins his/her journey worker assignment."

TriMet considered this proposal to be a modification of the Agreement's language.

48. On March 6, April 9, and May 6, 2015, representatives of TriMet and ATU met but did not reach agreement on the implementation of the new outside journey worker provisions.

49. On April 9, 2015, ATU submitted a proposal that outside journey workers' classification seniority would be established behind current apprentices at the time the outside workers were hired, *and* behind all current service workers who were eligible to join an apprentice program. TriMet objected to this proposal, believing that the number of employees that new hires would fall behind in seniority was so large that it would negate the purpose of the outside hire provision.

50. On May 6, 2015, TriMet rejected ATU's proposal and notified ATU that unless the parties agreed on terms specifically governing the classification seniority of outside journey workers, it would rely on the existing contract language in Article 3, Section 2, Paragraph 4, sentence 3.

51. The parties initially agreed to meet again on June 4, 2015. On May 28, 2015, Marra sent then-ATU President Hansen a letter to confirm ATU's availability on June 4. Marra also stated that if no agreement was reached at the June 4 meeting, TriMet would proceed to hire outside journey workers with the understanding that they would attain classification seniority when they qualified and started working in a journey worker position, under Article 3, Section 2, Paragraph 4, sentence 3.

52. On June 4, then-ATU President Hansen cancelled the June 4 meeting. On June 15, TriMet Director of Labor Relations Evelyn Minor-Lawrence sent a letter to ATU, stating in part:

"As expressed in Sam Marra's May 28, 2015 letter, the District intends to move forward with hiring candidates from outside the District. Seniority will be assigned in reliance upon long standing contract language found in Article 3, Section 2, Paragraph 4. If ATU wishes to resume discussions on the issue of seniority of journey workers hired from outside the District, please let us know."

53. ATU did not request additional discussions or make any additional proposals. TriMet proceeded to hire outside journey workers and assign them classification seniority based on its interpretation of Article 3, Section 2, Paragraph 4, sentence 3 of the Agreement.

Hiring of Outside Journey Workers

54. In August 2015, TriMet began hiring outside journey workers. However, TriMet did not place all of them in the journey bidding pool, or conduct a white posting for all of them. Instead, TriMet placed some of them in expedited apprenticeship programs of varying length depending on the journey workers' disciplines, to establish their journeywork qualifications. At the time of the hearing, TriMet had hired 10 outside journey workers under the new provision.⁷ Most of those outside journey workers graduated from the expedited apprentice programs and signed up for regularly posted positions at the next regular sign-up.⁸

55. TriMet hired JD on August 6, 2015. Because JD had previously worked for TriMet as a journey worker, he was deemed qualified when hired and was permitted to bid for an LRV mechanic position at the next regular posted sign-up on September 13, 2015.

56. TriMet hired JM on August 23, 2015. Because JM had previously worked for TriMet as a journey worker, he was deemed qualified and able to bid when hired. However, he did not bid for, and begin working in, an LRV mechanic journey worker position until the February 28, 2016, sign-up.

⁷AM, an outside journey worker, was hired and resigned, then reapplied and was hired again. As a result, he appears as two hires on the list of 10 outside journey workers TriMet hired.

⁸Despite the fact that eight of the 10 outside journey workers were actually hired into expedited apprentice programs and not immediately placed in journey worker bidding pools, both parties treat all of the 10 workers hired as if they did not serve as inside TriMet apprentices. We infer that the parties agreed that the outside hires' individualized, expedited TriMet apprentice programs were more akin to new employee on-the-job training.

57. CI graduated from expedited apprenticeship as a journey worker mechanic on February 12, 2015, but was unable to sign up at the next posting on February 28, 2015, because there were not enough available positions. CI successfully bid for a position in a white posting on May 8, 2015.

58. JL and WT graduated from their expedited apprentice programs and qualified for journey worker positions on April 12 and April 27, 2016, respectively. Both successfully bid for jobs as journey worker power substation maintainers at the next sign-up on September 11, 2016.

59. AM graduated from the expedited apprentice program on May 4, 2015, but resigned later that month. He reapplied for the same position on November 16, 2016, and successfully bid for a journey worker power substation maintainer position at the next regular sign-up on February 26, 2017.

60. BA qualified for journey worker signals maintainer on October 19, 2016, but resigned before the next regularly posted sign-up.

61. RT and TD graduated from their expedited apprentice programs on September 9, 2016. RT successfully bid for a journey worker mechanic position at the next regularly posted sign-up on September 11, 2016. TD successfully bid for a journey worker mechanic position through a white posting on October 16, 2016.

ATU's Refusal to Approve Seniority Lists Including Outside Journey Workers

62. ATU refused to approve any seniority list that placed outside journey workers hired under the 2012-2016 Agreement ahead of inside journey workers who were already TriMet apprentices at the time the outside journey workers were hired (which the parties refer to as "existing" or "current" apprentices).

63. On May 9, 2016, ATU objected to a seniority list created by TriMet that contained the name of a journey worker hired from the outside under the Agreement. TriMet listed outside journey workers as less senior than other journey workers, but more senior than apprentices. Then-ATU Vice President Hunt sent TriMet a letter stating that the parties had "a long-standing past practice that Journey Level Mechanics who have either graduated or who have been promoted to Journey Level status, are inserted behind the current apprenticeship in seniority." Hunt specifically objected to outside hire CI's placement on the classification seniority list above apprentices who had graduated from their apprentice programs after CI had graduated from the expedited apprenticeship program and successfully bid for a journey worker position. Hunt wrote, "[CI's] name will be inserted after the current apprenticeship on the seniority roster."

64. On June 13, 2016, Stedman responded to Hunt. Stedman stated that the language in Article 3, Section 1, Paragraph 10 granting TriMet the right to hire five journey workers annually from the outside was brand new language for which there was no past practice. Stedman also stated that Article 3, Section 2, Paragraph 4 controlled classification seniority and that any contrary past practice was irrelevant. Stedman also stated that, in May 2015, TriMet informed ATU that it

planned to hire outside journey workers and apply Article 3, Section 2, Paragraph 4 to establish their seniority.

65. On June 21, 2016, ATU President Shirley Block responded by letter, stating in part:

“As you should be aware, a grievance over Article 3, Section 1, Par. 10 is pending arbitration. The language you referred to was not negotiated, was not approved by the membership and is an issue that will be addressed in the arbitration. I suggest you save your arguments, which the Union absolutely rejects, for the arbitrator. You can also argue all of the other issues you raised, which again the union wholeheartedly rejects.”

66. On August 10, 2016, ATU filed a grievance objecting to the placement of outside journey workers ahead of apprentices on journey worker classification seniority lists. The grievance identified Article 3, Section 2, Paragraph 4 on the “contract references” line of the standard grievance form. ATU Executive Board member Kinoshita, who wrote the grievance, cited that contract provision because he understood that grievances were not valid without a citation to the Agreement. ATU later filed additional grievances on the same issue.

67. On May 2, 2017, TriMet Director of Labor and Employee Relations Britney Colton wrote to ATU seeking its approval of seniority lists from the December 7, 2016, sign-up. Those lists included outside journey workers. On May 8, 2017, Hunt responded that all outside hires should go behind existing apprentices in seniority, that seniority “is the province of the Union,” and that ATU would not approve the seniority lists attached to Colton’s letter.

68. Hunt explained his reasoning and ATU’s position further at hearing. He stated that ATU refused to approve the May 2 Colton letter seniority lists because ATU believed outside journey workers should be placed behind existing apprentices on seniority lists. Asked what provision of the Agreement he was relying on, Hunt said, “I was relying on my 22 years of past experience, sixteen of it as a full-time officer dealing with these exact same matters.”

69. ATU officials believe that only seniority lists approved by ATU are valid. At hearing, Hunt took the position that “seniority is the province of the Union,” and consequently ATU may make exceptions regarding the calculation of classification seniority without negotiating with TriMet, but that TriMet could not make such exceptions without the approval of ATU.

70. The record contains only one example in which TriMet disagreed with ATU’s request to grant an employee (AT) greater classification seniority than another employee (DC). The seniority dispute dated back to 2011, but TriMet’s refusal took place in March 2017, well after this dispute about seniority and outside journey workers had begun. The employee filed a grievance in April 2017 over the matter, which was unresolved at the time of hearing.

Negotiations for the Successor to the 2012-2016 Agreement

71. At the time of hearing, the parties were negotiating a successor agreement to the 2012-2016 Agreement. On April 14, 2017, ATU submitted a proposal to add the following language to Article 3, Section 1, Paragraph 10 (which permits TriMet to hire five journey workers annually from the outside): “All outside hires will go behind any existing apprentices in the outside hire’s classification seniority.”

72. Also on April 14, ATU proposed that “[t]he authority to assign, maintain, and/or change seniority of members lies solely with the Union.” TriMet rejected both proposed changes in contract language. ATU sought those changes because it was “tired of the current fight” and was trying “to minimize the ongoing current argument.”

CONCLUSIONS OF LAW

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

2. The Union did not violate ORS 243.672(2)(d) by refusing to approve the classification seniority lists that included outside journey workers.

Before the 2012-2016 Agreement, TriMet drew its journey workers exclusively from the ranks of TriMet’s own apprentice programs (except on a few occasions, when the Union agreed to situation-specific hiring of outside journey workers). Under the 2012-2016 Agreement, the parties agreed for the first time that TriMet could hire “up to five (5) journey workers annually from outside the District.” The parties also agreed to defer negotiations over how to implement that provision, including how to assign the outside journey workers’ classification seniority. Before the parties resolved their disagreements over implementation issues, TriMet moved forward to exercise its new contractual right by hiring outside journey workers and placing them on classification seniority lists based on the classification seniority standard in Article 3, Section 2, Paragraph 4 of the Agreement. The 2012-2016 Agreement requires both TriMet and ATU to approve classification seniority lists, but does not specify an express standard governing that approval. ATU declined to approve seniority lists that granted the newly hired outside journey workers greater seniority than existing apprentices at their dates of hire. TriMet contends that ATU violated the Agreement, and therefore ORS 243.672(2)(d), by that refusal.

To assess TriMet’s claim, we must determine whether ATU had a contractual duty to approve the disputed seniority lists and, if so, the scope of that duty. As the complainant, TriMet bears the burden to prove that the Union violated the Agreement and, as a result, ORS 243.672(2)(d). OAR 115-010-0070(5)(b); *see also Oregon School Employees Association, Chapter 37 v. Reynolds School District 7 and Ellingboe*, Case No. C-12-82 at 9, 6 PECBR 5465, 5473 (1982) (in a claim alleging a violation of ORS 243.672(1)(g) based on an alleged violation of ambiguous contract language, the complainant union bore the burden to prove the meaning of the contract language at issue).

ORS 243.672(2)(d) makes it an unfair labor practice 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. We use the same principles of contract interpretation in both types of cases.

When we interpret contracts, our goal is to discern the parties' intent. To do so, we apply the three-part analysis described in *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04 at 10, 21 PECBR 20, 29 (2005) (citing *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997)). We first examine the text of the disputed contract language in the context of the contract as a whole, and if the language is clear, the analysis ends. Unambiguous contracts are enforced according to their terms. *Portland Fire Fighters' Assn. v. City of Portland*, 181 Or App 85, 91, 45 P3d 162 (2001), *rev den*, 334 Or 491, 52 P3d 1056 (2002). Contract language is ambiguous if it can be given more than one plausible interpretation. *Id.* If the provision is ambiguous, we proceed to the second step and examine extrinsic evidence of the parties' intent. Finally, if the provision remains ambiguous after applying the second step, we proceed to the third step and apply appropriate maxims of contract construction. *See Yogman*, 325 Or at 364.

TriMet contends that ATU violated Article 3, Section 3, Paragraph 1 of the parties' Agreement when it refused to approve the disputed seniority lists. That provision states:

"A sign-up for Maintenance Department shifts shall be held at the request of the Union. However, not less than one (1) general sign-up will be held per year. Position schedules shall be posted prior to a sign-up *and seniority lists by classification as approved by the District and the Union shall also be posted.* A sign-up shall be posted for not less than seven (7) days." (Emphasis added.)

This paragraph requires that a posted classification seniority list be "be approved by the District and the Union," but there is no pertinent contract language that expressly states when or how ATU must grant (or may withhold) that approval. There is no contract language that determines ATU's contractual obligation if it does not approve a particular list, and the Agreement does not address what occurs if there is no joint approval of a seniority list. In other words, Article 3, Section 3, Paragraph 1 is silent on the question of ATU's contractual duty with respect to approving seniority lists.

TriMet argues that Article 3, Section 3, Paragraph 1 impliedly requires ATU to approve a seniority list that complies with contractual seniority standards. Further, TriMet argues that Article 3, Section 2, Paragraph 4 contains a seniority standard that applies to both inside and outside journey workers. It is the only provision in the Agreement that addresses classification seniority. That provision states:

"Employees filling the position of one receiving a higher rate of pay shall receive the higher rate providing they are capable of performing the work of the higher classification, and the change is made for a period of three (3) days or more. They shall then receive the higher rate when filling this position in the future. *Seniority in classification shall not begin until the employee has bid for and qualified in a regularly posted position in that classification.* However, employees hired directly

from the outside into an apprentice program may receive a seniority date in the Helper/Service Worker classification equal to their entrance into that apprentice program.” (Emphasis added.)

ATU contends that it may withhold its approval of a seniority list when it has a good faith disagreement, and ATU does not agree that the third sentence of Article 3, Section 2, Paragraph 4 applies to outside journey workers. Assuming for the purpose of this order that Article 3, Section 3, Paragraph 1 impliedly requires both parties to approve seniority lists that comply with contractual seniority standards, we turn to the parties’ dispute over the third sentence in Article 3, Section 2, Paragraph 4.

The third sentence is ambiguous with respect to whether it applies to the new outside journey workers.⁹ TriMet contends that this sentence means that journey workers’ classification seniority is established when an employee “qualifies in” and “bids for” a posted journey-level position—in other words, that journey workers are assigned classification seniority when they both (a) complete a relevant apprentice program (“qualify in”) *and* (b) sign up (“bid for”) at a posting for a journey position in the particular classification. Further, TriMet argues that this third sentence applies both to *TriMet* journey workers and to the *new* outside journey workers because the contract does not distinguish between the two types of workers. Therefore, because the disputed seniority lists assigned classification seniority for both TriMet journey workers and outside journey workers in accordance with this “qualifies in” and “bids for” standard, the Union was contractually required to approve the seniority lists. Stated differently, the merit of TriMet’s interpretation turns on whether the “qualifies in” and “bids for” standard applies to the *new* outside journey workers, or, as ATU contends, it does not.

Because the third sentence is ambiguous with respect to whether it applies to all journey workers, including the new outside journey workers, we turn to the second step of contract interpretation, and consider extrinsic evidence. Here, the most compelling extrinsic evidence is that the parties agreed to separately negotiate how outside journey workers would be placed and treated for classification seniority purposes. Specifically, the evidence demonstrates that the parties agreed that TriMet would have the right to hire up to five outside journey workers per year, with the details of that agreement, including the classification seniority of those journey workers, to be negotiated after the contract was ratified. Indeed, TriMet specifically admits that the parties deferred the issue of the outside journey workers’ classification seniority. Consequently, because TriMet and ATU expressly agreed to subsequently negotiate the classification seniority of the new outside journey workers, and then failed to reach agreement, TriMet has not established that ATU violated the parties’ agreement when it declined to approve posted classification seniority lists involving the new outside journey workers.¹⁰

⁹In its briefing, TriMet argued that Article 3, Section 2, Paragraph 4 was clear and unambiguous; at oral argument, it conceded that the third sentence is ambiguous.

¹⁰Because we conclude that TriMet failed to prove that the parties mutually intended to apply Article 3, Section 2, Paragraph 4 to the newly hired outside journey workers, it is unnecessary for us to address ATU’s argument that this provision applies only to temporary workers.

We note that the evidence of the parties' bargaining history is equally unsupportive of the Union's argument that it reasonably understood that the new outside journey workers would have seniority behind apprentices. If the parties had a mutual understanding about the classification seniority of outside journey workers, it is more likely that the evidence would establish as much.¹¹

In short, the record establishes that the parties agreed to subsequently negotiate the classification seniority of the new outside journey workers. They did that, in part, so that the remainder of the Agreement could be ratified by both parties and so that the details of the classification seniority of those workers would not otherwise hold up ratifying the Agreement. Consistent with that understanding, the parties subsequently bargained over the classification seniority of the new outside journey workers. After several months of negotiating, TriMet informed ATU that it would proceed based on its interpretation that Article 3, Section 2, Paragraph 4 applied, and ATU countered by declining to approve the posted classification seniority lists. Whatever may be said of both parties' approach to the problem, the record does not establish that ATU violated the parties' agreement (which is the only issue directly before this Board) because that very agreement contemplated subsequent negotiations over this classification dispute.

In reaching this conclusion, we are not persuaded by TriMet's past practice argument that, in the absence of a negotiated exception to Article 3, Section 2, Paragraph 4 for the new outside journey workers, the "qualifies in" and "bids for" standard in that provision automatically applies to determine the new outside journey workers' classification seniority. *See, e.g., Oregon School Employees Association v. Lincoln County School District*, Case No. UP-10-92 at 9, 14 PECBR 503, 511 (1993) ("consistent and lengthy past practice, unchanged by recent contract negotiations, provides convincing evidence that the parties did not intend to change the system"). TriMet asserts that the parties have relied on the third sentence of Article 3, Section 2, Paragraph 4

¹¹On this point, the Union relies on comments by TriMet's chief spokesperson during mediation in December 2014. During a sidebar discussion about the outside journey worker proposal, TriMet's chief spokesperson remarked that the parties had already extensively discussed outside hires, and that TriMet would be flexible about how outside hiring would work. The Union understood this comment as a reference to the parties' previous bargaining over provisional journey workers. During those earlier discussions in September 2013, TriMet's chief spokesperson stated that TriMet would not "take away" apprentices' seniority. (TriMet subsequently withdrew its provisional journey worker proposal before it submitted its final offer on May 22, 2014, and did not make a proposal regarding hiring outside journey workers into the *existing* classification until September 2014, four months later.) The parties then agreed to defer their discussions about details, including seniority, until after ratification.

TriMet's statements during the mediation sidebar discussion do not support a conclusion that both parties understood that outside journey workers would have classification seniority behind apprentices, as the Union contends. The comments by TriMet's chief spokesperson were a reference to an earlier, withdrawn proposal on a related but significantly different approach to solving TriMet's need for outside journey workers. The comments are too nonspecific to support a conclusion that the parties mutually intended that the outside journey workers would fall behind apprentices in classification seniority. Moreover, the parties reached agreement about classification seniority for the new outside *apprentices*, and included a provision in the Agreement documenting that understanding (in Article 3, Section 21, Paragraph 4). If the parties had reached agreement regarding the new outside journey workers, we would expect similar codification of such an agreement.

for decades to determine journey worker classification seniority, and its new right to hire outside journey workers into the *existing* journey worker classification is subject to this past practice. It points to the testimony of two witnesses, who testified that journey worker classification seniority has been determined for decades by the standard in Article 3, Section 2, Paragraph 4.

TriMet's argument, however, relies on the parties' past practice with respect to journey workers who graduated from *TriMet* apprentice programs. TriMet's new contractual right to hire journey workers from the outside represents a deviation in practice from the parties' historic in-house training of TriMet journey workers. Although it is accurate that the outside workers were hired into the same job classification as the TriMet journey workers, we cannot say that the parties were simply continuing an existing system with the introduction of the new outside hires. *Cf. Lincoln County School District*, UP-10-92 at 9, 14 PECBR at 511 (a past practice unchanged by recent contract negotiations is "evidence that the parties did not intend to change *the system*") (emphasis added). We are not persuaded, therefore, that the parties' past implementation of Article 3, Section 2, Paragraph 4 with respect to TriMet journey workers applies to the new outside journey workers simply because the outside workers were hired into an existing classification.¹²

We also note that the record does not support the Union's contention that the parties' past practice gave it the sole discretion to make seniority decisions with respect to outside journey workers. The Union relies on the evidence that it routinely made changes to seniority lists, and that it has adjusted, without dispute from TriMet, workers' seniority dates in various situations, including when workers' apprenticeship completion dates are delayed because of injury and when apprentices graduate later than the rest of an apprentice class for various reasons. Just as any past practice with respect to *TriMet* journey workers does not support TriMet's argument, it also does not support the Union's argument. Even assuming that TriMet regularly did defer to the Union on seniority calculations for TriMet journey workers, the issue here is how outside journey workers who graduated from *non-TriMet* apprentice programs would have their classification seniority determined. Moreover, here, the contract language expressly requires both parties to approve seniority lists, and it is possible that TriMet simply chose not to dispute the adjustments or choices made by the Union.

Finally, we turn to TriMet's theory that the Union violated the covenant of good faith and fair dealing when it did not approve the disputed seniority lists. This Board has long held that there is an implied covenant of good faith and fair dealing in all collective bargaining agreements. *Mapleton Education Association v. Mapleton School District 32*, Case No. UP-142-93 at 17-20, 15 PECBR 476, 492-95 (1994). Under Oregon contract law, the purpose of the covenant of good faith and fair dealing is to "effectuate the reasonable contractual expectations of the parties." *Best v. U.S. National Bank*, 303 Or 557, 563, 739 P2d 554 (1987). The implied covenant of good faith and fair dealing, however, "may not be understood as modifying or inserting terms that are not present in the contract." *Grants Pass Imaging & Diagnostic Ctr. v. Marchini*, 270 Or App 127,

¹²Further, TriMet's argument is undermined by the parties' previous conduct before the 2012-2016 Agreement with respect to hiring outside journey workers. That evidence shows that the parties negotiated specific seniority standards for outside journey workers when TriMet sought to hire them.

139, 346 P3d 644 (2014) (citing *Safeco Ins. Co. v. Masood*, 264 Or App 173, 178, 330 P3d 61, *rev den*, 356 Or 638, 342 P3d 1024 (2014)). Instead, Oregon law “imposes a duty of good faith and fair dealing in contracts to facilitate performance and enforcement in a manner that is *consistent with the terms of the contract*.” *Whistler v. Hyder*, 129 Or App 344, 348, 879 P2d 214, *rev den*, 320 Or 453, 887 P2d 792 (1994) (emphasis added).

TriMet contends that the Union withheld its approval of the seniority lists in bad faith. Specifically, TriMet contends that the Union seeks to obtain what it failed to secure in bargaining—*i.e.*, the placement of outside journey workers behind apprentices in seniority. Oregon law is clear that we cannot rely on the implied covenant of good faith and fair dealing to insert a missing contract term. *See Grants Pass Imaging*, 207 Or App at 139. To prove a violation of the duty of good faith, therefore, TriMet must rely on an existing contractual source for ATU’s duty. Here, we have concluded that the parties failed to reach agreement on the relevant term—namely, the applicable standard for determining classification seniority. To accept TriMet’s argument, we would need to insert that missing contract term into the parties’ agreement. Because we may not do so, we disagree that ATU violated the implied covenant of good faith and fair dealing and, consequently, the Agreement.

TriMet also argues that the Union’s refusal to approve the seniority lists placed TriMet in an untenable position because TriMet is contractually required to post seniority lists for sign-ups at least once each year, but it cannot do so unless the lists are mutually approved. TriMet’s argument merely states the consequence of the Union’s refusal to approve the list. The underlying legal question remains whether the Union declined to approve the disputed lists when it was contractually obligated to approve them. For the reasons explained above, we cannot rely on the covenant of good faith and fair dealing to supply the source of that contractual obligation where it is otherwise missing from the Agreement.

//

//

//

//

//

//

//

Because TriMet did not carry its burden to prove that the Union violated the contract when it refused to approve the disputed classification seniority lists, we dismiss the amended complaint.¹³

ORDER

The amended complaint is dismissed.

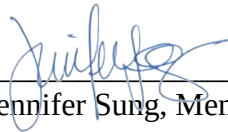
DATED: July 24, 2018.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

¹³We also note that, because the 2012-2016 Agreement does not cover the classification seniority standard for outside journey workers, and TriMet sought to use a particular standard (the “qualifies in” and “bids for” standard used for TriMet journey workers), ORS 243.698 applied to that proposed change when it was sought during the term of the 2012-2016 Agreement. ORS 243.698 requires expedited bargaining, when demanded, over “anticipated changes that impose a duty to bargain” during the term of an agreement. As we have previously explained, the expedited bargaining process required by ORS 243.698 applies only in “special circumstances,” including when a proposed mid-term change concerns “a condition of employment that is a mandatory subject of bargaining not covered by the existing agreement.” *Laborers’ International Union of North America, Local 483 v. City of Portland, Bureau of Human Resources*, Case No. UP-027-12 at 16, 25 PEGBR 810, 825 (2013) (quoting *In the Matter of the Joint Petition for Declaratory Ruling Filed by Medford School District 549C and Oregon School Employees Association Chapter 15*, Case No. DR-2-04, 20 PEGBR 721, 724 (2004)). That was the case here. Some of the disputes involving the seniority lists occurred during the term of the 2012-2016 Agreement, and ORS 243.698 applied to those disputes. Here, neither party alleged any claim arising from the parties’ conduct in relation to ORS 243.698.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-037-16

(UNFAIR LABOR PRACTICE)

OREGON SCHOOL EMPLOYEES	)	
ASSOCIATION (OSEA),	)	
	)	
Complainant,	)	
	)	FINDINGS AND ORDER FOR
v.	)	REPRESENTATION COSTS
	)	
ASHLAND SCHOOL DISTRICT,	)	
	)	
Respondent.	)	

On May 3, 2018, this Board issued an order dismissing a complaint filed by the Oregon School Employees Association (the Association), in which the Association alleged that Ashland School District (the District) violated ORS 243.672(1)(a), (b), (c), and (e) as a result of the District's conduct during collective bargaining. 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(3)(b) and OAR 115-035-0055, this Board finds that:

1. The District 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).

2. This case required two days of hearing.

3. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). 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).

//

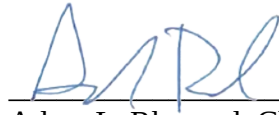
//

//

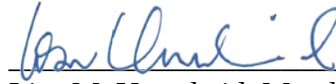
ORDER

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

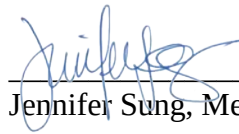
DATED: July 25, 2018.

A handwritten signature in blue ink, appearing to read 'A. Rhynard', written over a horizontal line.

Adam L. Rhynard, Chair

A handwritten signature in blue ink, appearing to read 'Lisa M. Umscheid', written over a horizontal line.

Lisa M. Umscheid, Member

A handwritten signature in blue ink, appearing to read 'Jennifer Sung', written over a horizontal line.

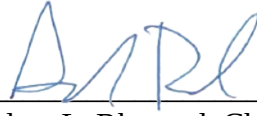
Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

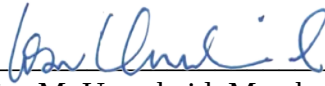
ORDER

The County shall remit \$3,000 to AFSCME within 30 days of the date of this Order.

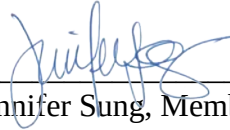
DATED: July 25, 2018.



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-011-17

(UNFAIR LABOR PRACTICE)

EUGENE POLICE EMPLOYEES' ASSOCIATION,	)	
	)	
	)	
Complainant,	)	
	)	
v.	)	FINDINGS AND ORDER FOR
	)	REPRESENTATION COSTS
CITY OF EUGENE,	)	
	)	
Respondent.	)	
	)	

On May 21, 2018, this Board issued an order holding that the City of Eugene (City) violated ORS 243.672(1)(e) when it unilaterally changed the schedules of Police Department Evidence Specialists represented by the Eugene Police Employees' Association (Association). 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) 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).
2. This case required one day of hearing.
3. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). The representation costs award for a case requiring one day of hearing is \$3,000. OAR 115-035-0055(1)(b)(C).

//

//

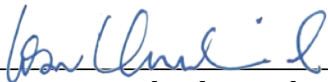
ORDER

The City shall remit \$3,000 to the Association within 30 days of the date of this order.

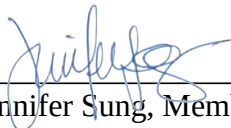
DATED: July 26, 2018.



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-033-16

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,	)	
LOCAL 88,	)	
	)	
Complainant,	)	
	)	AMENDED FINDINGS AND ORDER
v.	)	FOR REPRESENTATION COSTS
	)	
MULTNOMAH COUNTY,	)	
	)	
Respondent.	)	

This Board issued the original representation costs order in this case on July 25, 2018. In that order, we found that the case required one day of hearing and based the representation costs award on that finding. On July 26, 2018, Oregon AFSCME Council 75, Local 88 (AFSCME) filed a motion to inform us that the case required two days of hearing and request a corrected award. Multnomah County (County) did not oppose AFSCME's motion. Having confirmed that the case required two days of hearing, we grant AFSCME's motion and issue this amended order.

On April 26, 2018, this Board issued an order holding that the County violated ORS 243.672(1)(a) and (c) through a manager's extra scrutiny and criticism of the work of a union steward involved in a grievance against him, and revocation of the steward's teleworking status. 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) and OAR 115-035-0055, this Board finds that:

1. AFSCME 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).

2. This case required two days of hearing, which occurred on May 23 and September 15, 2017.

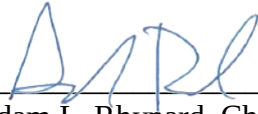
3. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). The representation costs award for a case that required two days of hearing is \$5,000. OAR 115-035-0055(1)(b)(D).

ORDER

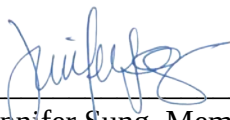
1. The Findings and Order for Representation Costs issued by this Board on July 25, 2018, is withdrawn and superseded by this Order.

2. The County shall remit \$5,000 to AFSCME within 30 days of the date of this Order.

DATED: July 27, 2018.


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-015-18

(UNFAIR LABOR PRACTICE)

INTERNATIONAL ASSOCIATION OF	)	
FIRE FIGHTERS, LOCAL 1159,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
CITY OF LAKE OSWEGO,	)	CONCLUSIONS OF LAW,
	)	AND ORDER
	)	
Respondent.	)	
	)	

Jason Weyand and Haley Rosenthal, Attorneys, Tedesco Law Group, Portland, Oregon, represented Complainant.

Kathy Peck, Attorney, Peck, Rubanoff & Hatfield, PC, Lake Oswego, Oregon, represented Respondent.

On June 11, 2018, International Association of Fire Fighters, Local 1159 (Association) filed a complaint alleging that the City of Lake Oswego (City) violated ORS 243.672(1)(e) and (f). Specifically, the Association alleged that the City submitted a Last Best Offer (LBO) that did not meet the requirements of ORS 243.746(3), in violation of ORS 243.672(1)(e) and (f). The Association also alleged that the City engaged in the following actions in violation of ORS 243.672(1)(e): (1) the City amended its LBO after it was submitted; (2) the City submitted an unlawful LBO to interest arbitration; (3) the City failed to reveal its bargaining position; (4) the City engaged in bad-faith bargaining through the totality of its conduct; and (5) the City unilaterally implemented changes on sick leave calculations during the hiatus period. In addition to specific remedies for the violations, the Association sought a civil penalty and notice posting.

The Association asked that the complaint be expedited under OAR 115-035-0060, and submitted an affidavit in support of the request, as required by that rule. On June 18, the Association moved to amend its complaint and submitted the proposed amended complaint along with the motion. The City did not object to the motion or the filing of the amended complaint. The City also agreed to expedite the complaint.

The Board exercised its discretion to expedite the complaint. The Board also granted the motion to file the amended complaint.

The City filed a timely answer, which asserted the following affirmative defenses: business necessity and statute of limitations.¹ The City's answer also asserted a "counterclaim" that the Association violated ORS 243.672(2)(b) by including a prohibited subject of bargaining in its LBO. The City also requested a civil penalty based on the counterclaim, asserting that the Association's conduct was "egregious."

Pursuant to the terms of a prehearing order, the parties submitted prehearing briefs on July 6, 2018. On that date, the parties also provided the Board with 10 enumerated stipulated facts and a joint statement of issues, which was slightly modified at hearing. On July 13, 2018, this Board conducted a hearing. At the end of the hearing, both parties provided the Board with closing oral arguments.

The issues, as agreed to by the parties regarding the Association's complaint, are:

1. Whether the City violated ORS 243.672(1)(f) and (1)(e) by submitting an LBO that did not meet the requirements of ORS 243.746(3).
2. Whether the City violated ORS 243.672(1)(e) by amending its LBO after submission.
3. Whether the City violated ORS 243.672(1)(e) by submitting an unlawful LBO to arbitration.
4. Whether the City violated ORS 243.672(1)(e) by failing to honestly and fully disclose its position in bargaining.
5. Whether the City's conduct, viewed in light of the totality of the circumstances, violated ORS 243.672(1)(e).
6. Whether the City violated ORS 243.672(1)(e) by unilaterally—and secretly—implementing a change in working conditions before the conclusion of successor negotiations.
7. If the City violated ORS 243.672(1)(e) and (1)(f) as described above, what is the appropriate remedy?
8. Is the Association entitled to a civil penalty?

¹The City's answer included an additional affirmative defense ("specifically relevant authorization to make the change"), which was withdrawn at hearing.

The issues, as agreed to by the parties regarding the City's answer and counterclaim, are:

1. Whether any or all of the claims alleged by the Association are barred by the City's affirmative defenses?
2. Whether the Association violated ORS 243.672(2)(b) by including a prohibited subject in the LBO submitted to the arbitrator?
3. If the Association violated ORS 243.672(2)(b), what is the appropriate remedy?
4. Is the City entitled to a civil penalty?

For the reasons set forth below, we conclude that the City violated ORS 243.672(1)(e) by failing to adequately bargain the impact on employment relations of the City's decision to change its method of calculating unused sick leave in response to Employer Announcement 88, as described below. We dismiss the remaining claims and the City's counterclaims.

FINDINGS OF FACT

The Parties

1. The Association is a labor organization within the meaning of ORS 243.650(13) and is the exclusive representative of a bargaining unit of the following City employees: all full-time employees in the classifications of Firefighter, Fire Driver-Engineer, Fire Lieutenant, Deputy Fire Marshal, and EMS Coordinator, but excluding all seasonal, casual and irregular part-time, volunteer intern, supervisory, or confidential employees and workers of the City.
2. The City is a public employer within the meaning of ORS 243.650(20).
3. The Association and the City were parties to a collective bargaining agreement that was effective from July 1, 2014 through June 30, 2017 (Contract).
4. Retirement benefits for eligible bargaining unit members are provided through Oregon's Public Employee Retirement System (PERS). Under PERS, retiree benefits for Tier 1 and Tier 2 members may be increased by PERS based on a portion of employees' accumulated unused sick leave at the time of retirement. The City and the Association agreed—through Article 15.9 of the Contract—that, “as provided by ORS 237.153 and regulations established by the Oregon Public Employee Retirement System, fifty percent (50%) of an employee's accumulated sick leave shall be applied in the form of increased retirement benefits.”²
5. The amount of “credited” sick leave that may be used by PERS to calculate eligible employees' retirement benefits is capped at eight hours per month of service under ORS 238.350(2)(a).

²The parties' Contract did not reflect that the cited chapter (ORS 237.153) had been renumbered to ORS 238.350; both parties' final offers and LBOs updated the citation.

6. For the purpose of calculating the accumulated unused sick leave for Association members who work 24-hour shifts, going back to at least 2003, the City converted the hours of sick leave used by these Association members to the equivalent percentage of a normal eight (8) hour work shift rather than deducting a full 24 hours. For example, if Employee A used 24 hours of sick leave because they were ill and needed to miss one full shift, the City would deduct eight (8) hours of sick leave in the unused sick leave calculation to be reported to PERS. If the employee only needed 12 hours of sick leave, or 50% of their shift, the City would deduct 4 hours for PERS reporting purposes (50% of 8 hours). At retirement, the City calculated the actual number of sick leave hours used divided by 24 and multiplied the amount by eight (8) hours. That amount was then subtracted from the accrual of eight (8) hours of PERS sick leave per month of service and the difference was reported to PERS for the computation of the retirement benefits for Tier 1 and Tier 2 employees. That practice continued until the City made the change in PERS sick leave reporting that is the subject of this proceeding.

7. On February 21, 2017, the parties met and signed ground rules for successor negotiations.

8. On March 13, 2017, Assistant City Manager Megan Phelan sent an email to Dan Carpenter, a shop steward for the Association, which stated in part that the City

“had a chance to review our process and consult with PERS on sick leave reporting when an IAFF member retires. We’re confident that we have been doing it incorrectly. What we currently do is if a shift fire employee takes a shift off (24 hours) as sick leave, * * * we reduce the employee’s sick leave balance by 8. Instead, we are required to deduct the full 24 hours. This is despite the fact that when shift personnel accrue 16 hours of sick leave per month, PERS states that the maximum sick leave accrual that can be reported is 8 hour[s] of sick leave per month. * * *

“In light of that information, I wanted to put you on notice that effective April 1, 2017[,] we will begin to subtract actual sick leave used for all active employees. Meaning, if a firefighter takes 24 hours of sick leave, the full 24 hours will be deducted.”

9. In that email, Phelan attached a document from PERS titled “Employer Advisory 88, Accumulated Unused Sick Leave” (EA88).

10. On March 15, 2017, Association President Karl Koenig responded that

“[a]ny change in sick leave accruals or computation at retirement would violate the [Public Employee Collective Bargaining Act (PECBA),] as it is a mandatory subject of bargaining and impacts mandatory subjects of bargaining.

“The current formula as described in your March 13 email is a practice that was bargained in good faith between both parties over 30 years ago.

“Please consider this our demand to bargain per the PECBA. Until the parties have completed the entire PECBA dispute resolution process, including a possible interest arbitration, the City must maintain the status quo and refrain from implementing the changes. Any change in current practice would be an unlawful unilateral change to mandatory subjects of bargaining and the Local would be forced to seek legal recourse through an unfair labor practice complaint.”

11. On March 23, 2017, Phelan responded to Koenig as follows: “I got your message this morning. Sorry for the delay. I’m emailing to confirm I received your response. Have a good rest of your week and we’ll see you on the 6th.”

12. In successor contract negotiations, the parties negotiated about the issue raised by Phelan’s March 13, 2017, email, and Koenig’s March 15, 2017, response.

13. Under the parties’ ground rules, the 150-day period under PECBA began running April 6, 2017.

14. In successor bargaining, the parties met on numerous occasions and discussed EA88 during the course of bargaining. The parties also exchanged proposals on sick leave and vacation that were intended to address the impact of changed sick leave calculations for PERS reporting purposes.

15. On May 3, 2017, the Association offered a sick leave proposal that specified the “effective date” on which the City could change how it calculated used sick leave in response to EA88. The Association included an EA88 “effective date” in each of its subsequent proposals on this issue. The City did not, at any point, refuse to bargain over the EA88 effective date or assert that the Association’s proposals on that issue were permissive or prohibited for bargaining.

16. On July 12, 2017, City Human Resources Analyst Patrick Foiles emailed City Payroll Administrator Lucas Pakes requesting that Pakes calculate what Association Member Ron Baker’s “PERS sick leave number would be if reported [that day].” Baker was copied on the email.

17. On July 17, 2017, Pakes replied to Baker stating: “At this time we are not able to provide your PERS Sick leave balance. With contract negotiations open and the pending determination on the PERS Sick leave calculations we want to avoid creating any confusion as well as providing you with an invalid PERS Sick leave amount.”

18. On November 1, 2017, Phelan sent an email to Carpenter responding to a question from Carpenter about what the City would do if a bargaining unit member retired before negotiations were settled:

“This email is in response to your question to me last month about what the City would do if we have an IAFF member retire prior to negotiations being settle[d]. As I mentioned when you posed the question, that is a tough question that would need some consideration. I appreciate your patience.

“The City has determined that if an IAFF employee were to retire prior to any tentative agreement with IAFF on the matter that we will use April 1, 2017[,] as the date. This is consistent with my notice to the union on March 13, 2017, that effective April 1, 2017[,] we will begin to subtract actual sick leave used for all active employees. A copy of that email is below for your reference.

“As stated before, the City remains willing to bargain of the effects of the change needed to comply with these legal obligations regarding the reporting of sick leave to PERS.”

19. On November 10, Koenig sent an email to Phelan, responding to her November 1, 2017, email. In a letter attached to that email, Koenig asserted, in part, that the Association had responded to Phelan’s March 13, 2017, email with “a demand to bargain the impact.” Koenig also wrote, in relevant part, “That letter remains our position regarding our rights to bargain the impact of any changes to mandatory subjects of bargaining proposed by employer for any reason. * * * Any unilateral change as proposed in your email violates the PECBA and our rights to bargain the impact prior to any change.”

20. On November 20, 2017, Phelan and Koenig talked by telephone. Koenig reiterated the Association’s position that the parties must conclude their bargaining before the City changed its method of calculating unused sick leave for PERS reporting. Phelan told Koenig that the City would wait until November 30, 2017, the date of the parties’ first scheduled mediation session. Phelan further stated that, given that employee Baker was retiring effective November 30, 2017, if the parties did not reach agreement on November 30, the City would change its calculation method effective April 1, 2017, for that retiree.

21. The parties bargained for over 150 days and commenced mediation under ORS 243.712 on November 30, 2017.

22. In the afternoon of November 30, 2017, the City presented a “what-if” package to the Association. In that mediation package, the City’s proposal on Article 15, the sick leave article, included: “Will implement EA88 12/1/17.” In mediation discussions, the City also indicated that the implementation of EA88 could be pushed down the road to December or January.

23. The parties did not reach agreement on the successor contract during the November 30 session.

24. In December 2017, the Association’s Koenig and the City’s chief negotiator, Jim Mooney, continued collective bargaining negotiations to try to reach an agreement. Those negotiations included some movements from the City on the effective date of an EA88 implementation. At no point did Mooney refuse to bargain effective dates or assert that the Association’s proposals on that issue were permissive or prohibited for bargaining.

25. On January 5, 2018, the City declared impasse.

26. On January 11 and 12, 2018, respectively, the City and Association submitted their final offers and cost summaries. An interest arbitration hearing was scheduled to be heard by an

arbitrator on June 19-20, 2018. That hearing has been postponed to August 13-14, 2018, pending the outcome of this case.

27. In its January 11, 2018, final offer, the City did not provide a particular proposal or effective date regarding changes in response to EA88. The City's final offer retained the current contract language in Article 15.9, titled "Sick Leave and PERS," with the exception that the City corrected the statutory cite in the article. Thus, the City's final offer on Article 15.9 read: "Upon retirement of an employee, and as provided by ORS 238.350 and regulations established by the Oregon Public Employee Retirement System, fifty percent (50%) of an employee's accumulated sick leave shall be applied in the form of increased retirement benefits."

28. In Articles 13.1 and 15.1, the City's final offer reduced the employees' sick leave accrual by four hours per month, increased the employees' vacation accrual by four hours per month, and removed the cap on sick leave accrual for Tier 1 and Tier 2 employees. The City's final offer maintained a cap of 2,920 accrued sick leave hours for OPSRP employees (who are ineligible to have their unused sick leave used by PERS in the calculation of their retirement benefits). The City's final offer provided a July 1, 2017, effective date for these provisions.

29. In its January 12, 2018, final offer, the Association included proposals for Articles 15.12 and 15.13. Proposed Article 15.12 stated: "Effective July 1, 2018, the City may subtract twenty-four (24) hours of PERS sick leave credit for every twenty-four (24) hours of sick leave taken. Section 15.1 reduces the sick leave accrual hours from 16 to 10, as a result of the City's decision to implement [EA] 88."

30. Proposed Article 15.13 stated:

"To make bargaining unit members whole for the change described in 15.12, effective July 1, 2018, Tier 1, Tier 2, and OPSRP employees shall have an EA88 conversion allowance of 72 hours of sick leave to 72 hours of vacation leave annually. This 72 hours of leave will not be subject to the current Telestaff vacation code restrictions. On June 30, 2019, and on June 30th of every year thereafter, the remaining balance of the 72 hours of [conversion] allowance will be paid out at straight time into the employee's Post Employment Health Plan ('PEHP') account." (Emphasis omitted.)

The Association also added this language to Article 13.1, with an effective date of July 1, 2018.

31. In its January 12, 2018, final offer, the Association also proposed to eliminate the sick leave cap of 2,920 hours for all employees.

32. Other than correcting a statutory cite, the Association's January 12, 2018, final offer proposed no changes to Article 15.9, titled "Sick Leave and PERS."

33. On June 5, 2018, the Association and City each submitted an LBO.

34. The text of each party's LBO, with respect to the issues pertinent to this matter, remained the same as their final offers.

35. On June 5, 2018, Kathy Peck, Attorney for the City, sent an email to Koenig. The email to Koenig forwarded the correspondence between Phelan and Koenig from November 2017 regarding EA88.

36. On June 6, 2018, Haley Rosenthal, Attorney for the Association, emailed Peck regarding the email to Koenig and asked whether Peck intended to argue at the interest arbitration for retroactive application of the change in calculating unused sick leave for purposes of reporting to PERS, pursuant to EA88.

37. On June 6, 2018, Peck responded to Rosenthal that the City “put the Union on notice that it would begin deducting actual sick leave usage, i.e. 24 hours for every 24-hour shift, rather than 8 hours, starting on April 1, 2017.” Peck further stated in the email to Rosenthal:

“However, if what you are suggesting is that the City proposed that it would not follow PERS regulations and deduct actual sick leave actually used from PERS reports on employees who retired after April 1, 2017, that is incorrect. That position is contrary to the notice provided to [Koenig] in the attached emails.”

38. On June 13, 2018, the Association filed the complaint in this matter. The Association amended the complaint on June 18, 2018, and the City filed its answer and counterclaim on that same date. In the counterclaim, the City raised for the first time its position that the Association’s LBO contained a prohibited subject of bargaining—specifically, the Association’s proposed Article 15.12.

39. On June 18, 2018, Phelan emailed Koenig and asked him whether the Association would be willing to remove proposed Article 15.12 of the LBO. That was the first time that the City requested that the Association remove that proposal.

40. When Association-represented employee Baker retired on November 30, 2017, the City deducted actual sick leave used by employee Baker between April 1, 2017 and November 30, 2017, for purposes of reporting that information to PERS. The Association did not ask the City about which calculation method it used, and the City did not inform the Association or Baker of that action until June 13, 2018, when the City sent Baker (at his request) a copy of his PERS sick leave balance.

41. Subsequently, Association-represented employee Brian Hicks retired, and the City deducted actual sick leave that he used between April 1, 2017 and his retirement date for purposes of reporting that information to PERS. The record does not establish that the City informed the Association or Hicks of that action.³

42. The parties did not bargain about the impact on mandatory subjects of bargaining of a change in the City’s method of calculating unused sick leave to report to PERS with respect to the two bargaining unit employees who retired after April 1, 2017 (Baker and Hicks).

³The City did provide testimony at hearing that it had deducted actual sick leave that Hicks used between April 1, 2017 and his retirement date for purposes of reporting that information to PERS.

43. From July 2017 through at least June 2018, Baker and several other Association-represented employees asked the City to provide their respective PERS sick leave balances. The City declined to provide those employees with that information, stating that the City could not calculate their PERS sick leave balances because those calculations depended on a matter that was being discussed in successor bargaining.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The City's LBO sufficiently complied with ORS 243.746(3); therefore, the City did not violate ORS 243.672(1)(f) and (1)(e) by submitting it.

We first address the Association's claim under ORS 243.672(1)(f), which makes it an unfair labor practice for a public employer to "[r]efuse or fail to comply with any provision of ORS 243.650 to 243.782." Here, the Association asserts that the City's LBO failed to comply with the provisions of ORS 243.746(3), which states in relevant part that:

"Not less than 14 calendar days prior to the date of the [interest arbitration] hearing, each party shall submit to the other party a written last best offer package on all unresolved mandatory subjects, and neither party may change the last best offer package unless pursuant to stipulation of the parties or as otherwise provided in this subsection."

According to the Association, the City violated ORS 243.746(3) because its LBO did not include a proposal that gave "an effective date for sick leave calculations at retirement." We disagree that ORS 243.746(3) imposes such a requirement on the City. Here, as detailed in our findings of fact, the City opted in its LBO to retain current contract language regarding sick leave and PERS. The City further opted to increase the vacation hour accrual rate, decrease the sick leave accrual rate, and eliminate the sick leave accrual cap for Tier 1 and Tier 2 employees (the employees who are eligible to have a portion of their unused sick leave used in PERS's calculation of their retirement benefits). Nothing in PECBA required the City to include in its LBO, which addressed numerous other unresolved matters, a particular proposal and effective date regarding EA88. Rather, it was lawful for the City to adhere to its position to retain current contract language.

In arguing for a different result, the Association relies on *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case Nos. UP-42/50-12, 25 PECBR 640 (2013), where the Board found that the employer committed a *per se* violation of ORS 243.672(1)(e) when it substantively changed its LBO at an interest arbitration hearing. That case is inapt. First, no interest arbitration has occurred in this case. Second, this record does not establish (as discussed below) that the City has changed its LBO to date. Any claim that the City will be changing the terms of its LBO at the scheduled interest arbitration hearing is premature. Therefore, we dismiss the Association's claim under ORS 243.672(1)(f).

We likewise dismiss the Association's claim under ORS 243.672(1)(e), which makes it an unfair labor practice for a public employer to "[r]efuse to bargain collectively in good faith with

the exclusive representative” of its employees. The Association asserts that it is a *per se* violation of ORS 243.672(1)(e) for a public employer to submit an LBO that does not comply with ORS 243.746(3). We have already concluded, however, that the City’s LBO did not violate ORS 243.746(3). Therefore, we dismiss this claim.

3. The City did not amend its LBO after submitting it to the arbitrator and did not, therefore, violate ORS 243.672(1)(e).

The Association next asserts that the City violated ORS 243.672(1)(e) “by amending its LBO after submission through the assertion that it was proposing a retroactive effective date for the sick leave calculation changes.” According to the Association, this amendment “added a new substantive provision to the LBO that was not included in the City’s Final Offer or earlier proposals.” The difficulty with the the Association’s argument is that the record does not establish that the City amended its LBO after submission; to the contrary, the City’s LBO remains unchanged.

The Association argues that the City effectively amended its proposal by clarifying that it contains an EA88 effective date of April 1, 2017. We do not agree that the City, by using that date in the reports for Baker and Hicks, modified its bargaining proposal. The City’s proposal has been, throughout bargaining, not to specify an EA88 implementation date in the CBA. Although the City has been willing to bargain over the Association’s proposals that specify EA88 implementation dates, and even offered alternative dates, the City did not amend its LBO after submission, as alleged by the Association.

As with the (1)(f) claim, if the City takes actions at the pending arbitration hearing that amount to adding a new substantive provision to the LBO, the Association can bring that action to the arbitrator’s attention as incompatible with PECBA, as well as file an unfair labor practice complaint with this Board. At this point, however, we are not persuaded that the City has amended its LBO. Therefore, we dismiss this claim.⁴

4. The City’s bargaining conduct in successor negotiations did not violate ORS 243.672(1)(e).

The Association next claims that the City violated ORS 243.672(1)(e) “by failing to honestly and fully disclose its position in bargaining” and through the totality of its conduct during successor bargaining. As set forth above, ORS 243.672(1)(e) prohibits a public employer from refusing to bargain collectively in good faith with the exclusive representative. In *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05 at 95-96, 21 PECBR 673, 767-68 (2007), the Board observed that “[t]he duty to bargain in good faith requires a party to honestly and candidly explain its bargaining position and proposals.” The Board further stated that “a party violates ORS 243.672(1)(e) if it deliberately misrepresents its bargaining position and its intentions on an issue under negotiations.” *Id.*

⁴We also dismiss the Association’s (1)(e) claim that the City submitted an unlawful LBO to arbitration, which is premised on the same arguments as this unlawful amendment claim.

Here, the Association argues that the City deliberately misrepresented its position on the effective date of the change on PERS sick leave calculations. According to the Association, the City “hid” its position on that issue until two weeks before the interest arbitration. We disagree. The record establishes that the City informed the Association in March 2017 that it intended to conform its PERS reporting to EA88, effective April 1, 2017. Although the parties also agreed to bargain that issue as part of successor bargaining, and the City was open to considering other dates as the effective date of its reporting change, the record does not establish that the City “deliberately misrepresented its bargaining position and its intentions” on that issue. *Id.* Rather, the record establishes that the City preferred an April 1, 2017, implementation date regarding EA88 reporting, but also that the City was open to negotiating that date as part of an overall package compromise. We do not find such actions to be indicative of collectively bargaining in bad faith.

Moreover, as set forth above, the City’s final offer and LBO did not add an “effective date” for implementing EA88 or add a different or new contract term regarding that issue. Rather, the City’s final offer and LBO were consistent in that regard and not misrepresentative of the City’s bargaining position. Therefore, we dismiss this claim.

We likewise conclude that the Association has not established that the totality of the City’s bargaining conduct during successor negotiations amounted to bad-faith bargaining. In these claims, we examine the totality of the bargaining conduct to determine whether the employer demonstrated a willingness to reach an agreement that is the result of good-faith negotiations. *Oregon School Employees Association v. Medford School District #549C*, Case No. UP-77-11 at 12, 25 PECBR 506, 517 (2013). In applying the totality-of-conduct standard to allegations of surface bargaining, we examine multiple factors, including: (1) whether dilatory tactics were used; (2) the contents of the proposals; (3) the behavior of the party’s negotiator; (4) the nature and number of concessions made; (5) a failure to explain a bargaining position; and (6) the course of negotiations. *Id.* We also consider other factors that might be relevant in any given case. *Id.* Here, the record does not establish that the City used dilatory tactics or failed to explain its bargaining position. Moreover, the record shows that the parties reached agreement on almost all articles and engaged in fairly commonplace back-and-forth negotiations in an earnest attempt to reach an overall package agreement. Additionally, as set forth above, the record establishes that the City was willing to make concessions regarding the date that it would change its method of calculating unused sick leave for purposes of its reporting to PERS. Although the parties were unable to ultimately achieve consensus, the record does not establish that the City was unwilling to reach an agreement that was the result of good-faith negotiations. Consequently, we dismiss this claim.

5. The City violated ORS 243.672(1)(e) by not completing its bargaining obligations regarding the impact on Association-represented employees Baker and Hicks, once those employees announced their retirements, of the City’s change in its method of calculating unused sick leave for PERS reporting.

A public employer commits a *per se* violation of ORS 243.672(1)(e) if it makes a unilateral change in the *status quo* concerning a mandatory subject of bargaining without first completing its bargaining obligation under PECBA. *See Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177, 295 P3d 38 (2013) (upholding the Board’s authority to adopt the *per se* analysis in unilateral change cases and citing *Wasco County v. AFSCME*, 46 Or App 859, 613 P2d 1067 (1980)). Even if the changed employment matter does not concern a mandatory bargaining subject

of bargaining, the employer is still required to bargain with the exclusive representative concerning the impacts of the change, so long as the impact on any mandatory subject is more than *de minimis*.⁵ *Portland Fire Fighters' Assoc., Local 43 v. City of Portland*, 245 Or App 255, 264-65, 263 P3d 1040 (2011). An employer, therefore, violates ORS 243.672(1)(e) if it unilaterally implements a decision that changes or derivatively impacts a mandatory subject of bargaining before completing its bargaining obligation. *Id.* at 255.

Here, the Association alleges, and we agree, that the City violated ORS 243.672(1)(e) when it unilaterally changed how it calculated sick leave accrual for PERS purposes regarding two Association-represented employees, without completing impact bargaining with the Association. Specifically, the City acknowledges that it changed the established practice on that subject with respect to those employees. It is also undisputed that the parties were still engaged in successor negotiations at that time, including negotiations on that subject. Moreover, putting aside whether the City was required by EA88 to report sick leave accrual to PERS in a particular manner, the City was nevertheless obligated to engage in and complete impact bargaining with the Association, as the change directly effected employment relations, including retirement benefits and leave benefits. Here, the record establishes that the City did not engage in any impact bargaining over this change, as it did not even provide the Association (or the affected employees) with notice that it had enacted that change with respect to those employees.⁶ Consequently, we conclude that the City violated ORS 243.672(1)(e).

In reaching that conclusion, we disagree with the City's assertion that it has established the affirmative defenses of business necessity and statute of limitations. We first address the City's "business necessity" defense.⁷ To establish a "business necessity" defense, the City must prove that: (1) a business emergency existed; (2) it bargained in good faith as much as the circumstances allowed before implementing a change in working conditions; and (3) the change was narrowly tailored to address the business necessity. *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02 at 16, 19 PECBR 590, 605 (2002) (Interim Order). Here, the City asserts a business necessity that it was legally obligated by EA88 to change its sick leave accrual reporting to PERS when each of the Association-represented employees retired. As set forth above, even assuming that the City had to comply with EA88 with respect to its reports to PERS on the two retired employees, PECBA still requires the City to engage in impact bargaining with the Association. In other words, we conclude that the City did not bargain as much as the circumstances allowed before making its calculations with respect to Baker and Hicks. In fact, no impact bargaining took place in that regard.

⁵There is no assertion here that the impact is *de minimis* or insubstantial.

⁶The City contends that it notified the Association on November 20, 2017, that it would use the April 1, 2017, implementation date to calculate Baker's unused sick leave for the City's report to PERS. We note, however, as discussed below, that the City's subsequent conduct at and after the mediation resulted in the Association reasonably believing that the implementation date for the City's change in the reporting calculation was still a subject of discussion.

⁷The City did not assert, at the time that it changed its practice with respect to Baker and Hicks, that a business necessity required it to do so without engaging in impact bargaining. Indeed, the City did not notify the Association of that action.

We turn to the City's affirmative defense that the Association's claim is barred by the statute of limitations. Unfair labor practice complaints are subject to a 180-day statute of limitations under ORS 243.672(3), which provides that "[a]n injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice." ORS 243.672(3), however, incorporates a "discovery rule," meaning that "the limitation period begins to run when a public employee, labor organization, or public employer knows or reasonably should know that an unfair labor practice has occurred." *Rogue River Education Assoc. v. Rogue River School*, 244 Or App 181, 189, 260 P3d 619 (2011). "[T]he determination of whether and when an injured party reasonably should have known of an unfair labor practice presents a factual question that requires case-specific analysis." *Id.* at 190.

Here, the complaint was filed on June 11, 2018, meaning that it was untimely if the Association knew or reasonably should have known that the City had refused to engage in impact bargaining with respect to the two Association-represented employees before December 13, 2017 (*i.e.*, by December 12, 2017, or earlier). The record establishes that Baker, who retired on November 30, 2017, was the first Association-represented employee that the Association knew of who had his PERS sick leave accrual calculation changed upon retirement. The record further establishes that the Association did not actually know of the City's action with respect to Baker until June 2018. It necessarily follows that the Association was not aware until that time that the City had not engaged in impact bargaining with regard to that action.

The question remains, however, whether the Association reasonably should have known by December 12, 2017 (181 days before the complaint was filed), that the City had not engaged in impact bargaining with respect to Baker's changed PERS sick leave accrual calculation. The City asserts that the Association reasonably should have known of that action because it had put the Association on notice in March 2017 that it would implement the change effective April 1, 2017. The City further argues that on November 20, 2017, Phelan notified the Association that if the parties did not reach an agreement on November 30, 2017, then the City would use April 1, 2017, as an effective implementation date regarding EA88. Thus, when the parties did not reach an agreement on November 30, 2017, that date, the City asserts, is the "very latest" that the Association reasonably should have known of the alleged unfair labor practice.

As a factual matter, we disagree that the Association reasonably should have known that the City had not engaged in impact bargaining by November 30, 2017 (as the City asserts), or by December 12, 2017 (as the statute would require for the claim to be untimely). We reach this conclusion for several reasons. First, it is undisputed that the City did not affirmatively tell the Association or the affected employees that it had altered its practice with respect to PERS sick leave accrual until June 2018 when Baker specifically asked for the calculation that the City used. Second, until June 2018, the City continued responding to all other Association-represented employees' requests for their PERS sick leave balances by declining to provide that information. The City explained its denials on the ground that the parties were still negotiating that issue. Third, through early January 2018 (when it declared impasse), the City continued to bargain with the Association about when the City would effectively change its method of calculating unused sick leave to report to PERS.

Under these circumstances, we conclude that it was reasonable for the Association to believe that the City had not changed its method of calculating unused sick leave for PERS

reporting with respect to Baker (or any other employee who had retired during the interim). Moreover, because the City was still engaged in bargaining with the Association about when to implement EA88, it was reasonable for the Association to believe that the City had not yet implemented any change on that issue, and that the City would not implement it until the parties completed impact bargaining. Consequently, we hold that the City has not established its affirmative defense that this claim was untimely filed.

6. The Association did not violate ORS 243.672(2)(b) by including a prohibited subject in the LBO submitted to the arbitrator, over the City's objection, as alleged in the City's counterclaim.

The City's counterclaim asserts that the Association violated ORS 243.672(2)(b) because the Association's LBO included the following provision: "Effective July 1, 2018, the City may subtract twenty-four (24) hours of PERS sick leave credit for every twenty-four (24) hours of sick leave taken. Section 15.1 reduces the sick leave accrual hours from 16 to 10, as a result of the City's decision to implement [EA] 88." According to the City, the proposal constitutes a prohibited subject of bargaining because "it would require the City to delay its compliance with the legally required method for computing and reporting unused sick leave to PERS." By including this proposal in its LBO, the City asserts, the Association violated ORS 243.672(2)(b). For the following reasons, we disagree with the City's assertion.

A subject or proposal that is prohibited by law is considered a prohibited subject of bargaining, 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), *aff'd without opinion* 288 Or App 167, 403 P3d 821 (2017), *rev den*, 362 Or 665, 415 P3d 578 (2018); *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). A party violates ORS 243.672(1)(e) or (2)(b) if it insists, even short of impasse, on a proposal that is directly contrary to statute, and it does so over the other party's objection. *See Tri-County Metropolitan Transportation District of Oregon*, UP-42/50-12 at 22, 25 PECBR at 661; *Eugene Education Association v. Eugene School District*, Case No. UP-32-87 at 27, 32, 9 PECBR 9455, 9481, 9486 (1987). An unfair labor practice concerning the unlawful pursuit of a prohibited subject of bargaining does not ripen until the objecting party gives notice of its objection and refuses to bargain over the offending language, and the proposing party elects not to modify the proposal to satisfy that objection. *Portland Association of Teachers/OEA/NEA v. Multnomah County School District No. 1J (Operating as Portland Public Schools)*, Case No. UP-024-17 at 6 (Order on Reconsideration); *see also Portland Association of Teachers v. Multnomah County School District No. 1*, Case No. UP-10-96 at 3, 16 PECBR 429, 430-31 (1996) (Order on Reconsideration).⁸

⁸In its prehearing memorandum, the City recognized that pursuing a prohibited subject of bargaining violates PECBA only if done over the other party's objection. At oral argument, the City acknowledged that an objection over a permissive subject of bargaining was a prerequisite to finding an unfair labor practice based on unlawful pursuit, but argued that such a requirement was less clear under the Board's case law with respect to a prohibited subject of bargaining. However, we applied this same standard recently in a prohibited subject dispute. *Multnomah County School District*, UP-024-17 at 6 (Order on Reconsideration). We also have longstanding precedent that this Board does not "treat[] prohibited subjects differently than it treats permissive subjects for purposes of (1)(e) and (2)(b) violations." *Eugene School District*, UP-32-87 at 27, 32, 9 PECBR at 9481, 9486.

Here, the Association asserts, and the evidence establishes, that before the Association filed its June 5, 2018, LBO, the City never identified the Association's proposal as unlawful or otherwise objected to the proposal. The Association further notes, and the evidence establishes, that this same proposal was included in its January 12, 2018, final offer, with no objection from the City. Additionally, the Association has, since May 3, 2017, offered similar proposals (with prospective dates for changing the date that the City would change its calculation method for reporting unused sick leave to PERS) numerous times without objection by the City. Indeed, the City itself has offered prospective dates regarding when any change would be implemented.⁹

The City did not object to the Association's proposal for a prospective EA88 effective date until June 18, 2018, approximately 14 months after the Association first proposed a prospective EA88 effective date, and two weeks after the Association submitted its LBO. Because the City failed to timely object to the Association's proposal, the City waived its right to contest the inclusion of that proposal in the Association's LBO.¹⁰ Therefore, the Association did not violate ORS 243.672(2)(b) when it included that proposal in its LBO.

Remedy

We turn to the remedy for the City's impact-bargaining violation. Because the City violated ORS 243.672(1)(e), we order the City to cease and desist from that action. ORS 243.676(2)(b). We also order affirmative action necessary to effectuate the purposes of PECBA. ORS 243.676(2)(c). In these circumstances, the City is directed to bargain with the Association over the impacts of the changed method of calculating unused sick leave for PERS reporting with respect to the two retired employees (Baker and Hicks) and any other similarly situated Association-represented employee who may have retired during the relevant period or who does so before completion of the dispute resolution process.

The Association requests that we order the City to post and email a notice of the (1)(e) violation. 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

⁹The City asserts that the Association should have been put on notice of some type of implied objection because the City's prior practice "was unlawful" and "the City was required to immediately begin" a change in the disputed practice. As set forth above, however, the City's actions were not so unequivocal. Not only did the City entertain numerous proposals from the Association with some type of prospective date, but the City similarly offered prospective dates regarding EA88 implementation.

¹⁰We further note that, based on the facts established at hearing, if the City were to raise this new issue (*i.e.*, its contention that the Association's proposed EA88 effective date is prohibited) in the currently scheduled interest arbitration proceeding, such action would be inconsistent with this Board's longstanding prohibition against raising new issues at such a late stage. *See, e.g., Tri-County Metropolitan Transportation District of Oregon*, UP-42/50-12 at 18-21 & n 10, 25 PECBR at 657-60 & n 10 (noting "a 'new issue' [is] one that is not reasonably comprehended with prior discussions or bargaining positions, or that does not logically evolve from such discussions or positions" (quotation marks and citation omitted)), and cases cited therein. With respect to the matter before us, the Association did not claim that the City violated subsection (1)(e) by objecting to the Association's proposal as prohibited after the Association submitted its LBO.

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). Here, we do not find any of our typical criteria satisfied. Therefore, we do not order a posting.

We also decline the Association's request that we impose a \$1,000 civil penalty on the City.¹¹ 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. Here, the record does not establish the circumstances that would warrant a civil penalty.

ORDER

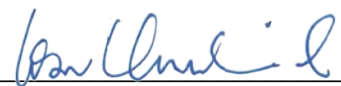
1. The City violated ORS 243.672(1)(e) by not completing its bargaining obligations regarding the impact of the City's decision to change its method of calculating unused sick leave in response to EA88 on Association-represented employees who retired after April 1, 2017.

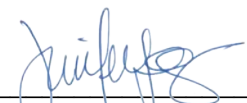
2. The City shall cease and desist violating ORS 243.672(1)(e) and shall collectively bargain in good faith with the Association over the impact of the City's decision to change its method of calculating unused sick leave in response to EA88 on Association-represented employees who retired after April 1, 2017.

3. The remaining claims, including the City's counterclaim, are dismissed.

DATED: July 30, 2018


Adam L. Rhynard, Chair


Lisa M. Umscheid, Member


Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

¹¹Because we have found a (1)(e) violation, and not dismissed the complaint, we do not impose a civil penalty on the Association. ORS 243.676(4)(a)(B).

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-008-18

(UNIT CLARIFICATION)

CITY OF INDEPENDENCE,	)	
	)	
Petitioner,	)	
	)	ORDER REVOKING
v.	)	RECOGNITION OF
	)	EXCLUSIVE BARGAINING
OFFICE EMPLOYEES ASSOCIATION,	)	REPRESENTATIVE
	)	
Respondent.	)	
_____	)	

On July 20, 2018, the City of Independence filed a petition under OAR 115-025-0009 seeking to revoke its recognition of the Office Employees Association as the exclusive bargaining representative for employees who regularly work 80 hours or more per month in the classifications of Accountant I, Accountant II, and Court Clerk.¹ This Board will order revocation of a recognition only if (1) no collective bargaining agreement is in effect, and (2) the labor organization disclaims further interest in representing the bargaining unit or the labor organization is defunct. OAR 115-025-0009. Here, the petition was accompanied by evidence satisfying both criteria.

The Board also directed that a notice of the petition be posted in work areas giving maximum access to the affected employees. See OAR 115-025-0030(1). That notice informed any interested person that objections to the petition needed to be filed with this Board by August 7, 2018. No objections were filed. We find that the petition satisfies the criteria for revocation of recognition.

//

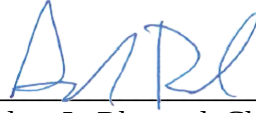
//

¹The recognition clause of the most recently expired collective bargaining agreement also excludes supervisory, confidential, seasonal, temporary, and casual employees, and employees regularly working less than 80 hours per month.

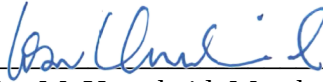
ORDER

The petition is granted. The City of Independence's recognition of the Office Employees Association as the exclusive representative of the above-identified employees is revoked.

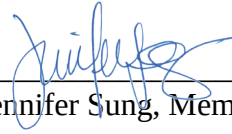
DATED: August 8, 2018.



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-014-17

(UNIT CLARIFICATION)

INTERNATIONAL BROTHERHOOD OF	)	
TEAMSTERS, LOCAL 223,	)	
	)	
Petitioner,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND ORDER
CITY OF MEDFORD,	)	
	)	
Respondent.	)	
	)	

Margaret Kirschnick, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented Petitioner.

Diana Moffat, Local Government Law Group, Eugene, Oregon, represented Respondent.

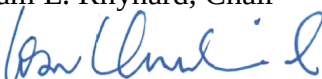
On July 20, 2018, Administrative Law Judge Julie D. Reading issued a recommended order in this matter. The parties had 14 days from the date of service of the order to file objections. OAR 115-010-0090(1). No objections were filed, which means that the Board adopts the attached recommended order as the final order in this matter. OAR 115-010-0090(4), (5).

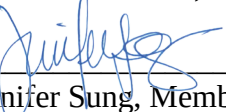
ORDER

The bargaining unit is clarified to include the Fleet Services Coordinator position in the petitioner's bargaining unit.

DATED: August 10, 2018.


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-014-17

(UNIT CLARIFICATION)

INTERNATIONAL BROTHERHOOD OF	)	
TEAMSTERS, LOCAL 223	)	
	)	
Petitioner,	)	RECOMMENDED RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND PROPOSED ORDER
CITY OF MEDFORD,	)	
	)	
Respondent.	)	
	)	

A hearing was held before Administrative Law Judge (ALJ) Julie D. Reading on February 8, 2018, in Medford, Oregon. The record closed on April 9, 2018, following receipt of the parties' post-hearing briefs.

Margaret Kirschnick, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented Petitioner.

Diana Moffat, Local Government Law Group, Eugene, Oregon, represented Respondent.

On October 18, 2017, the International Brotherhood of Teamsters, Local 223 (Petitioner) filed a unit clarification petition (Petition) to determine whether the City of Medford (City) should include the newly created Fleet Services Coordinator position in the bargaining unit. The City filed timely objections.

The issues are:

1. Is the Fleet Services Coordinator statutorily excluded from the existing unit as a supervisory employee?
2. Is the Fleet Services Coordinator included in the bargaining unit based on the collective bargaining agreement?

We conclude that the Fleet Services Coordinator is not a supervisor and is therefore included in the bargaining unit by statute. The parties' collective bargaining agreement does not otherwise compel exclusion from the unit.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties

1. Petitioner is a labor organization within the meaning of ORS 243.650(13).
2. The City is a public employer within the meaning of ORS 243.650(20).
3. The City's Public Works Department is in charge of managing the City's utilities – such as sewer, street lighting, traffic signals, and storm drains. Within the Public Works Department is Fleet Services, which services all motorized vehicles and equipment utilized by the City as well as some external agencies.
4. The City started contracting with external agencies in 2007, which has increased the workload. At the time of the hearing, mechanical work was being performed by five Fleet Services Mechanics. They are all certified mechanics. However, they have varying strengths and weaknesses in different skill areas depending on their experience.
5. The Department of Public Works is overseen by the Director of Public Works. The Deputy Director of Public Works in Charge of Operations reports to the Director, and the Support Services Manager of Public Works reports to the Deputy Director. The Support Services Manager supervises Fleet Services.
6. Non-supervisory employees in the Public Works Department are represented by Petitioner. The parties' employment relationship is governed by the Employment Relations Agreement between the City of Medford, Oregon and Teamsters Local Union No. 223 Representing Medford Municipal Mechanics (Agreement). The Agreement's effective dates were July 1, 2014 through June 30, 2018.
7. The Agreement's recognition clause states:

"2.1 Recognition - The City recognizes Teamsters Local Union No. 223 as the exclusive bargaining agent for all non-excluded employees in covered classifications in the Public Works Department. **Classifications in the bargaining unit include Auto Service Worker, Fleet Services Mechanic and Fleet Services Mechanic, Senior.**

2.2 Excluded Employees - Part-time, temporary, supervisory and confidential employees are excluded from the bargaining unit. Part-time employees are those who work less than forty (40) hours per week. Temporary employees are those who

are hired for a limited period of time not to exceed six (6) consecutive months from date of employment in a twelve (12) month period.

2.3 New Classifications - The City has the exclusive right to develop new classifications within the current organizational scope of this bargaining unit and adopt wage scales for those classifications. The City shall forward the new position classification specification and hourly wage schedule to the Union for its review. If the Union disagrees with the proposed wage scale for this new classification, the Union may reopen this Agreement for negotiations of only that new hourly wage scale for that new classification under the scope of this Agreement.” (Exh. R-1 at 5, emphasis added.)

8. At some point after the negotiation and ratification of the Agreement, the Auto Services Worker position was eliminated. Additionally, in 2016, the individual serving as the Fleet Services Mechanic Senior left the position and was not replaced.

9. The City had summarized Fleet Services Mechanic Senior’s job description as follows:

“[u]nder general supervision of the Support Services Manager, the Fleet Services Mechanic Senior is responsible for performing maintenance and repairs of fleet vehicles and equipment, including cars, construction equipment, emergency apparatus, light, medium and heavy trucks and all other equipment for the City of Medford Fleet Services Division. This position is distinguished from the Fleet Services Mechanic by its responsibility for performing lead work and fleet shop administrative tasks. May supervise other assigned staff.” (Exh. P-6 at 1.)

10. The Fleet Services Mechanic Senior had spent the majority of his time generating work orders; providing and maintaining accurate maintenance records; estimating the labor, material and equipment necessary to complete assignments; directing and instructing other employees; and providing administrative duties as necessary for efficient operations. The remaining amount of time was spent directly working on vehicles. A mechanic certification was required for the position.

11. Shortly, after the Fleet Services Mechanic Senior position was vacated, the City created the Fleet Services Coordinator position. The City created it because the increased workload from external agencies required someone in a position to frequently interact with the customers and coordinate mechanical tasks.

12. The Fleet Services Coordinator position assumed most of the duties of the Fleet Services Mechanic Senior position with the exception of direct mechanical work. In place of mechanical work, some duties previously performed by the Support Services Manager were assigned to the Fleet Services Coordinator position.

13. Fleet Services Coordinator’s job description summary is: “[u]nder general supervision of the Support Services Manager, the Fleet Services [C]oordinator is responsible for coordinating, prioritizing, and scheduling the service and repair of fleet vehicles and equipment,

including cars, construction equipment, emergency apparatus, light, medium and heavy trucks and all other equipment for the City of Medford Fleet Services Division.” (Exh. R-3 at 1.)

14. The Fleet Services Coordinator’s primary duties are to essentially maintain a schedule of needed maintenance and inspections, keep necessary supplies stocked, accept repair requests, and then dispatch Fleet Services Mechanics to perform the needed work – determining prioritization and considering the relative strengths of the mechanics. The Fleet Services Coordinator also makes ongoing entries into City databases of vehicles, equipment, gas cards, and purchase orders. As such, the Fleet Services Coordinator’s duties could otherwise be described as scheduling, planning, coordinating, and assigning repair work; coordinating state and federal mandated inspections; establishing and maintaining maintenance records; authorizing the purchase of parts, equipment and supplies; reviewing completed work orders to ensure accuracy; reporting mechanic performance to the manager; and other duties as assigned.

15. If the Fleet Services Coordinator does not know the amount of time a certain repair job will take for a Fleet Services Mechanic, he or she can look it up in a book called a flat rate manual.

16. As with the Fleet Services Mechanic Senior, the Fleet Services Coordinator reports to the Support Services Manager.

17. The Fleet Services Coordinator has the authority to approve some overtime as needed. This authority is exercised when a mechanic needs some additional time to complete a repair or maintenance task at the end of the day. This amount averages six hours per month for all mechanics in toto.

18. To request vacation leave use, a Fleet Services Mechanic initially makes a request to the Fleet Services Coordinator, who reviews it for scheduling. The Fleet Services Coordinator then submits it to the Deputy Director for final approval with a recommendation.

19. Since the creation of the Fleet Services Coordinator position, no Fleet Services Mechanics have required discipline. However, it is anticipated that the Fleet Services Coordinator would generally be the first one to receive information and gather facts relating to a disciplinary issue. He or she would then report that to the Support Services Manager, who would report it up the chain of command. The actual discipline would be handed down by the Deputy Director. However, the Deputy Director may receive input from either the Fleet Services Coordinator or the Support Services Manager in making his or her disciplinary decision.

20. While the Fleet Services Coordinator cannot issue performance evaluations, he or she can use a computer program called “Quick Chats,” which is an employee performance information system. It allows employees to be tracked by supervisors up the chain of command and human resources. With Quick Chats, the Fleet Services Coordinator is able to make notes about employees’ performance. The Fleet Services Coordinator did not initially have access to Quick Chats when starting in July 2017. That access was provided approximately 90 days before the hearing in this case, which was after the filing of the Amended Petition.

21. The Fleet Services Coordinator has input into employee evaluations through Quick Chats and other means but does not complete them. They are completed by the Support Services Manager.

22. Previously when a grievance was filed by a Fleet Services Mechanic, it went to the Director.¹ Additionally, the Support Services Manager believes that the Fleet Services Coordinator would have authority to allow a union steward to use on-duty time in processing a grievance.

23. The Fleet Services Coordinator cannot lay-off, transfer, demote or promote any of the Fleet Services Mechanics.

24. The Fleet Services Coordinator determines the training needs of the Fleet Services Mechanics. Prior to that position, the Fleet Services Mechanic Senior provided input on training, but did not have decision making authority.

25. Unlike the Fleet Services Mechanic Senior, the Fleet Services Coordinator can authorize in-house work warranty repairs.

26. At the time of the hearing in this case, there had not been any Fleet Services Mechanics hired since the Fleet Services Coordinator position was created. However, it is anticipated that the Fleet Services Coordinator's role in the hiring process will be that he or she will participate in interviews as a panel member and provide input. The Fleet Service Mechanic Senior's role was to create a practical test for mechanics – essentially by breaking something and seeing if the applicant could fix it. The Fleet Services Coordinator in position at the time of the hearing could not administer such a test and he is not a certified mechanic.

Procedural History

27. The City excluded the Fleet Services Coordinator from the bargaining unit. The City amended the Rules and Regulations Handbook for Non-represented Employees of the City of Medford to include the Fleet Services Coordinator as a non-represented confidential-professional employee, but did not include the position under supervisory personnel.

28. On September 18, 2017, the Petitioner filed a unit clarification, requesting that this Board clarify that the Fleet Services Coordinator was in the bargaining unit.

29. Following the Election Coordinator's direction to amend the Oregon Administrative Rule under which the Petition was filed, the Petitioner filed an Amended Petition on October 18, 2017.

30. On November 8, 2017, the City filed objections asserting that the Fleet Services Coordinator is a supervisory employee, and therefore excluded from representation under ORS 243.650(23).

CONCLUSIONS OF LAW

¹The record was conflicting and unclear on how many grievances have been previously filed by Fleet Services Mechanics and how they were handled.

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The Fleet Services Coordinator is not a supervisor who is excluded from the bargaining unit by statute.

DISCUSSION

The issue in this case is whether the newly created position of Fleet Services Coordinator is in the bargaining unit. By statute, supervisors are not included in public employee bargaining units. To determine supervisory status, this Board assesses whether an employee meets the specific criteria set out in ORS 243.650(23), which defines a “supervisory employee” as:

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

Applying that definition, this Board has held that an employee’s supervisory status is established not by demonstrating the employee’s level of expertise or degree of responsibility, but by showing that the employee exercises “independent judgment” or “independent authority” in critical personnel matters. *American Federation of State, County and Municipal Employees, Local 1085 v. State of Oregon Department of Justice*, Case No. CC-003-10 at 31, 24 PECBR 893, 923 (2012).

Determining supervisory employee status requires the resolution of three questions, each of which must be answered in the affirmative for an employee to be deemed a supervisory employee: (1) does the employee have the authority to take action (or to effectively recommend action be taken) in any² of the 12 listed activities; (2) does the exercise of that authority require the use of independent judgment; and (3) does the employee hold the authority in the interest of management. *City of Portland v. Portland Police Commanding Officers Association*, Case No. UC-017-13 at 22, 25 PECBR 996, 1017 (2014) (citing *Deschutes County Sheriff’s Association v. Deschutes County*, Case No. UC-62-94 at 12, 16 PECBR 328, 339 (1996)).

Hire/Fire/Lay-off/Recall

²In 1995, the legislature amended ORS 243.650(23) to eliminate the following sentence: “[h]owever, the exercise of any function of authority enumerated in this subsection shall not necessarily require the conclusion that the individual so exercising that function is a supervisor * * *.” The deletion of this sentence meant that the enumerated supervisory functions should be read in the disjunctive, which is how the National Labor Relations Act (NLRA) had been interpreted by the National Labor Relations Board (NLRB) and federal courts. The result is that, if an otherwise “public employee” has authority under one of the twelve statutory criteria, the employee is a “supervisory employee” and not covered by the PECBA. *City of Portland*, UC-017-13 at 22, 25 PECBR at 1017.

The Fleet Services Coordinator does not have independent authority with respect to hiring. His or her authority is limited to participation on an interview panel. We have previously held that participation as a member of a hiring panel – when the employee’s individual vote carries the same weight as other members of the panel – does not establish that a potential supervisor has the authority to effectively recommend the hiring of employees. *City of Portland*, UC-017-13 at 24, 25 PECBR at 1019. Further, the Fleet Services Coordinator does not have the authority to fire, lay-off, or recall employees. As such, the Fleet Services Coordinator position does not have independent authority with hiring, firing, lay-offs, or recalls.

Reward/Discipline/Suspend

The Fleet Services Coordinator does not have independent authority with respect to the ability to reward, discipline, or suspend. Given that customers and mechanics have frequent contact with the Fleet Services Coordinator, he or she would often be the first individual to observe performance, learn of a disciplinary issue, and would likely take on a fact finding role. The Fleet Services Coordinator may make a note in Quick Chats or otherwise communicate about the disciplinary issue with the Support Services Manager, who would report it up the chain of command. Ultimately, the actual discipline would be handed down by the Deputy Director.

Additionally, the City does not argue that the Fleet Services Coordinator’s use of the Quick Chats program is discipline. Accordingly, we do not analyze that question.

Transfer/Promote/Demote

The Fleet Services Coordinator does not have the ability to transfer, promote, or demote the Fleet Services Mechanics.

Assign

The City’s argument in favor of supporting supervisory status is that the Fleet Services Coordinator:

“schedules, plans, coordinates, and assigns repair and maintenance work amongst the Fleet Service’s Mechanics. The person in this position is responsible for deciding if overtime is necessary, without approval from a higher-level manager. The Fleet Services Coordinator is also responsible for determining work assignments for the Fleet Services Mechanics and how they work together as a team.” (Respondent’s Closing Brief, p. 5.)

The Petitioner responds that the statute does not contemplate this meaning of assign, quoting *American Federation of State, County and Municipal Employees, Local 1085*, UC-003-10 at 33, 24 PECBR at 925. In that case, we stated that:

“[u]nder the NLRA, an individual does not exercise the independent judgment expected of a supervisor if the individual bases assignment decisions on factors such as the employees’ skill and expertise, compatibility, and need to get particular projects accomplished. See *Quadrex Environmental Company, Inc.*, 308 NLRB 101 (1992) (individuals are not supervisors where the assignment of work

‘demonstrates nothing more than the knowledge expected of experienced persons regarding which employees can perform particular tasks.’); *Hexacomb Corporation and Western Temporary Services, Inc.*, 313 NLRB 983, 984 (1994) (foremen did not exercise independent judgment indicative of supervisory status ‘when they shift employees around within their respective lines to get projects accomplished.’); and *Brown & Root, Inc.*, 314 NLRB 19, 21(1994) (an individual who makes assignments based on compatibility of employees and the skills needed to do particular jobs does not exercise independent judgment required of a supervisor).”

Two years later, in *City of Portland*, UC-017-13 at 26, 25 PECBR at 1021, we further examined the meaning of “assign” and more specifically defined it with respect to supervisory status. In that case, we referenced a more recent NLRB decision and adopted its reasoning. We quoted the following passage from *Oakwood Healthcare, Inc., and International Union, United Automobile Aerospace and Agriculture Implement Workers of America, AFL-CIO*, 348 NLRB 686, 688-89 (2006):

“‘The ordinary meaning of the term ‘assign’ is ‘to appoint to a post or duty.’ *Webster’s Third New International Dictionary* 132 (1981). Because this function shares with other [Section] 2(11) functions--i.e., hire, transfer, suspension, layoff, recall, promotion, discharge, reward, or discipline -- the common trait of affecting a term or condition of employment, we construe the term ‘assign’ to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment. * * *

“The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as ‘assign’ within our construction. However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to ‘assign.’ * * * In sum, to ‘assign’ for purposes of Section 2(11) refers to the * * * designation of significant overall duties to an employee, not to the * * * instruction that the employee perform a discrete task.”

Since then we have concisely defined “assign” to mean “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Hillsboro Sergeant’s Association v. City of Hillsboro, Oregon*, Case No. CC-009-14 at 26, 26 PECBR 491, 495 (2015) (quoting *City of Portland*, UC-017-13 at 26, 25 PECBR at 1021 (quoting *Oakwood Healthcare, Inc., and International Union, United Automobile Aerospace and Agriculture Implement Workers of America, AFL-CIO*, 348 NLRB 686, 689 (2006))).

The Fleet Services Coordinator does not determine the Fleet Service Mechanics’ general shifts, home base location, or overall duties. Rather, the Fleet Service Coordinator dispatches the Fleet Services Mechanics to complete discrete tasks – i.e., maintenance and repair of specific equipment and vehicles – and he or she determines the orders in which they will perform them.

These decisions are based on factors such as the employees' skill and expertise, compatibility, and need to get particular projects accomplished.

The Fleet Services Coordinator does have authority to grant some degree of overtime. However, this is a small amount, totaling just about six hours a month for all of the Fleet Service Mechanics. This is only provided in order to allow them to finish jobs at the end of a shift which are nearly complete. This is distinct from a situation where a supervisor would determine the overall operational needs of a department or agency and assign overtime to individuals as a management strategy. As such, we conclude that the Fleet Services Coordinator does not "assign" as meant by the statute.

Direct

Along with "assign," we also examined the meaning of "to direct" in *City of Portland*, UC-017-13 at 1, 25 PECBR at 996. We concluded that a determination that an employee has a "responsibility to direct" requires that a putative supervisor must be accountable (such that some adverse consequence may befall the supervisor) if the employees that they allegedly direct fail to adequately perform their duties. As with the meaning of "assign," we also relied on *Oakwood Healthcare, Inc.*, 348 NLRB at 691-92, in our analysis. In that case, the NLRB concluded that:

"Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Id.* at 691-692.

In this case, there is no evidence in the record that the Fleet Services Coordinator is at risk of suffering adverse consequences if a Fleet Services Mechanic fails to satisfactorily complete his or her duties. Accordingly, we can conclude that he or she does not have authority "to direct" as meant by ORS 243.650(23).

Adjust Grievances

There is no evidence in the record to suggest that the Fleet Services Coordinator would have the ability to adjust grievances of the Fleet Services Mechanics. At hearing, there was limited testimony about a grievance that was previously filed. In that case, it was filed with the Director of Public Services. Otherwise, the record was unclear about grievance filing in Fleet Services.

Performance Evaluations

Although an employee's role in evaluating other employees is not one of the criteria listed in ORS 243.650(23), the ability to do so may directly affect the hiring and disciplinary process, and "we consider it to the extent it constitutes evidence that [the employee] effectively recommends personnel action." *Laborers' International of North America, Local 483, Law Enforcement Professional Association v. City of Gervais*, Case No. UC-16-08 at 19, 23 PECBR 143, 161 (2009) (quoting *City of Union v. Laborers' International Union of North America, Local 121*, Case No. UC-09-08, 22 PECBR 872, 886 (2008) citing *Deschutes County Sheriff's Association v. Deschutes County*, Case No. UC-62-94, 16 PECBR 328, 341 (1996)).

The Fleet Services Coordinator does not complete performance evaluations for the Fleet Services Mechanics. He or she provides input on their performance through Quick Chats and other means, but the Support Services Manager ultimately has responsibility for completing the Fleet Service Mechanic's performance evaluations.

Summary

Based on the above, we conclude that the Fleet Services Coordinator is not excluded from the bargaining unit as a supervisor. There is no evidence that the Fleet Services Coordinator exercises independent judgment or independent authority in hiring, transferring, suspending, laying off, recalling, promoting, discharging, assigning, rewarding, or disciplining other employees, or the responsibly to direct them, or to adjust their grievances.

3. The Fleet Services Coordinator is included in the bargaining unit based on the Agreement.

The Petitioner argues that “[b]y its terms the recognition clause automatically incorporates all new classifications within the Fleet Services Department that are not excluded. The FSC position is not ‘part-time, temporary, supervisory [or] confidential.’ Therefore the FSC position is included in the bargaining unit under the express terms of the collective bargaining agreement.” (Petitioner’s Closing Brief, p. 17).

The parties’ Agreement states:

“2.1 Recognition - The City recognizes Teamsters Local Union No. 223 as the exclusive bargaining agent for all non-excluded employees in covered classifications in the Public Works Department. Classifications in the bargaining unit include Auto Service Worker, Fleet Services Mechanic and Fleet Services Mechanic Senior.

2.2 Excluded Employees - Part-time, temporary, supervisory and confidential employees are excluded from the bargaining unit. Part-time employees are those who work less than forty (40) hours per week. Temporary employees are those who are hired for a limited period of time not to exceed six (6) consecutive months from date of employment in a twelve (12) month period.

2.3 New Classifications - The City has the exclusive right to develop new classifications within the current organizational scope of this bargaining unit and adopt wage scales for those classifications. The City shall forward the new position classification specification and hourly wage schedule to the Union for its review. If the Union disagrees with the proposed wage scale for this new classification, the Union may reopen this Agreement for negotiations of only that new hourly wage scale for that new classification under the scope of this Agreement.” (Exh. R-1 at 5.)

The Agreement includes specific positions in the bargaining unit, of which the Fleet Services Coordinator is not included because it did not exist when the Agreement was negotiated. This language allows the City to create new classifications within the bargaining unit, but the City

intended to create one outside of it. Although we have determined that it is statutorily included in the unit, this does not mean the City acted in violation of the Agreement. However, as we have concluded that the Fleet Services Coordinator is not supervisory, it would be included by the language of the Agreement.

PROPOSED ORDER

The Fleet Services Coordinator is included in the Petitioner's bargaining unit.

SIGNED AND ISSUED on July 20, 2018.



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 proof of such service with this Board. The objections must be mailed, emailed, faxed, or hand-delivered to this Board. Email filings should be directed to 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. RC-010-18

(REPRESENTATION)

AMALGAMATED TRANSIT UNION	)	
DIVISION 757,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER CERTIFYING
	)	EXCLUSIVE REPRESENTATIVE
SUNSET EMPIRE TRANSPORTATION	)	
DISTRICT (SETD),	)	
	)	
Respondent.	)	
	)	

On August 1, 2018, Amalgamated Transit Union Division 757 (ATU) filed a petition under ORS 243.682(2)(a) to certify (without an election) a new bargaining unit of employees (described below) of Sunset Empire Transportation District (SETD). A majority of eligible employees in the proposed bargaining unit signed valid authorization cards requesting that ATU represent the designated bargaining unit.

On August 1, 2018, the Board's Election Coordinator caused a notice of the petition to be posted by August 3, 2018. OAR 115-025-0030(3); OAR 115-025-0065. Pursuant to the terms of the notice posting, OAR 115-025-0030(3)(d), OAR 115-025-0065(7), and OAR 115-025-0075(1), objections to the proposed bargaining unit or a request for an election were due within 14 days of the date of the notice posting (*i.e.*, by August 17, 2018). There were no objections to the petition or a request for an election.

Accordingly, it is certified that:

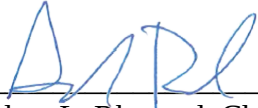
AMALGAMATED TRANSIT UNION DIVISION 757

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

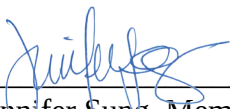
"All regular full-time and regular part-time hourly employees in the classifications of Driver and Mechanic employed by Sunset Empire Transportation District at its facility located at 465 NE Skipanon Drive in Warrenton, OR, excluding all other

employees, including the classifications of Transportation Options Coordinator, Customer Service Representative, Operations Assistant, Accounting/Payroll Clerk, confidential employees, managerial employees, and supervisors as defined by ORS 243.650(23).”

DATED: August 20, 2018.


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-030-17

(UNFAIR LABOR PRACTICE)

DENNIS DUFFEY,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
LABORERS' INTERNATIONAL UNION	)	AND ORDER
OF NORTH AMERICA, LOCAL 483,	)	
	)	
Respondent.	)	
_____	)	

Ben Straka, Policy Analyst, Freedom Foundation, Salem, Oregon, and Bruce Bischof, Attorney at Law, Management Law, Bend, Oregon, represented the Complainant.

Barbara J. Diamond, Attorney at Law, Diamond Law, Portland, Oregon, and David A. Rosenfeld and Caroline N. Cohen, Attorneys at Law, Weinberg, Roger & Rosenfeld, Alameda, California, represented the Respondent.

On July 31, 2018, 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).

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. The order is binding on, and has precedential value for, only the named parties in this case.

ORDER

1. Respondent shall cease and desist from violating ORS 243.672(2)(a) by creating postcards, distributing them to bargaining unit members, and instructing those members to send those postcards to Complainant's home address.

2. The remaining two charges of the complaint are dismissed.

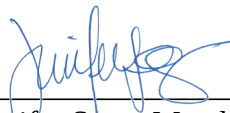
DATED: August 22, 2018.



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-030-17

(UNFAIR LABOR PRACTICE)

DENNIS DUFFEY,	)	
	)	
Complainant,	)	
	)	
v.	)	RECOMMENDED RULINGS,
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW, AND
LABORERS' INTERNATIONAL UNION	)	PROPOSED ORDER
OF NORTH AMERICA, LOCAL 483,	)	
	)	
Respondent.	)	
	)	

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on March 14 and 15, 2018, in Salem, Oregon. The record closed on April 19, 2018, upon receipt of the parties' post-hearing briefs.

Ben Straka, Policy Analyst, Freedom Foundation, Salem, Oregon, and Bruce Bischof, Attorney at Law, Management Law, Bend, Oregon, represented the Complainant.

Barbara J. Diamond, Attorney at Law, Diamond Law, Portland, Oregon, and David A. Rosenfeld and Caroline N. Cohen, Attorneys at Law, Weinberg, Roger & Rosenfeld, Alameda, California, represented the Respondent.

On October 19, 2017, the Complainant, Dennis Duffey, filed an unfair labor practice complaint with the Employment Relations Board (Board) against the Respondent, Laborers' International Union of North America, Local 483 (LIUNA). The complaint alleges that LIUNA violated ORS 243.672(2)(a) by (1) sending an email to bargaining unit members that accused Duffey of attempting to circulate an anti-union petition; (2) contacting the City of Portland (Duffey's employer) and telling Portland's management to stop Duffey from petitioning for deauthorization; and (3) creating postcards, distributing them to bargaining unit members, and instructing those members to send the postcards to Duffey's home address. As set forth below, we conclude that LIUNA violated ORS 243.672(2)(a) by creating postcards, distributing them to bargaining unit members, and instructing those members to send the postcards to Duffey's home address, but reject Duffey's other two allegations.

RULINGS

All rulings made by the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. Dennis Duffey is a wastewater operator for the City of Portland in its Bureau of Environmental Services, and is a “public employee” as defined in ORS 243.650(19). Duffey’s position is included in one of a number of bargaining units represented by LIUNA, which is a “labor organization” as defined in ORS 243.650(13). There are around 550 to 600 employees in Duffey’s unit.

2. The current collective bargaining agreement (CBA) between LIUNA and the City of Portland includes a “fair share agreement.” The same was true of their earlier CBAs. Historically, these fair share agreements have meant that any LIUNA-represented employee could opt out of being a full dues-paying union member, but would still have to pay a fair share fee to cover the costs of certain collective bargaining activities such as negotiating CBAs and processing grievances. An employee who pays the fair share fee is occasionally called an “agency fee payer.” (Exh. R-7.)

3. In or around 2014, Duffey first decided that he wanted to petition for “deauthorization.” In short, if a deauthorization petition is properly filed with the Board, the Board will conduct an election to determine whether to rescind an existing fair share agreement, which would let employees opt out of paying a union any dues or fees whatsoever, thereby reducing the funds a union can spend on collective bargaining activities. Moreover, a deauthorization petition must be filed within 90 days after a CBA containing the fair share agreement is signed, and must be filed with the signatures of at least 30% of the employees in the applicable bargaining unit. Those signatures are often called a “showing of interest.” A deauthorization petition is different than a petition to “decertify” a union, which would instead trigger a vote to determine whether the employees in the union’s bargaining unit will continue to be represented at all.¹

4. On or around February 13, 2015, Duffey changed his membership status from full union member to agency fee payer. Later, on or around March 2, 2016, Duffey switched back to being a full member.

5. Around June 19, 2017, Duffey once again became interested in collecting signatures to trigger a deauthorization vote. That was because he disapproved of the latest tentative agreement (TA) that had just been reached by LIUNA and the City of Portland. At the time, Duffey was a member of LIUNA’s bargaining team and the TA had not yet been ratified. Soon after that, Duffey created fliers with a check-off sheet or “slip” that employees could sign to signal their support for a deauthorization vote. He later handed out those fliers and posted a copy in the breakroom of his main worksite, a City of Portland Bureau of Environmental Services wastewater

¹See ORS 243.650(10); OAR-115-025-0000(5); OAR 115-030-0000; *Hewey St. John, Jr. et al. v. Oregon School Employees Association, Local 119 and Kathy Mosher, President*, Case No. UP-70-90 at 2, 12 PECBR 409, 410 (1990). We also note that this complaint was filed with the Board before the U.S. Supreme Court’s opinion in *Janus v. AFSCME, Council 31*, 85 U. S. ___, 138 S. Ct. 2448 (2018).

treatment plant. The fliers did not provide Duffey's name or his email or home addresses. Eventually, Duffey received around six signed slips. He created this initial flier without the assistance of the Freedom Foundation.

6. While in the wastewater treatment plant's breakroom, Duffey and his colleagues occasionally use coarse, strong, or vulgar language. Duffey personally does not find the language used in that room to be offensive and has never complained about it. The breakroom is generally not open to the public.

7. At 11:29 a.m. on June 20, 2017, Duffey emailed an informal complaint to the Office of Labor-Management Standards of the U.S. Department of Labor. In that complaint, Duffey asserted that LIUNA was "cooking the books" and falsifying an "LM-2 report." (Exh. R-36 at 2.) By doing so, Duffey effectively accused Farrell Richartz of misconduct, as Richartz is currently LIUNA's Secretary-Treasurer and accordingly is responsible for LIUNA's finances. In addition, Richartz is LIUNA's Business Manager. When Duffey submitted this Department of Labor complaint, Duffey was still a member of LIUNA's bargaining team. Nevertheless, Duffey did not discuss his complaint with Richartz before submitting it. At 12:58 p.m. on June 20, 2017, a representative from the Department of Labor forwarded Duffey's email to Richartz. Ultimately, the Department of Labor did not find any misconduct.

8. At around 6:00 a.m. on June 21, 2017, Duffey met Richartz at a City of Portland worksite known as "Tabor Yard." The two were there in order to meet with the rest of LIUNA's bargaining team and urge Parks Department employees to support the recently negotiated TA, although as indicated above, Duffey personally did not support that agreement. When Richartz and Duffey first saw each other that morning, the two argued with raised voices about Duffey's Department of Labor complaint. During the argument, Richartz asked Duffey, "What the f*** are you doing?" and warned Duffey that he had better watch who he talked to and what he said. Richartz also gave Duffey paperwork to help explain LIUNA's spending and reporting. During the same argument, Duffey told Richartz that he was going to knock Richartz's "f***ing head off" if Richartz did not get out of his face. Richartz did not take that threat literally. In contrast, Duffey felt afraid during and after his exchange with Richartz at Tabor Yard. Moreover, Duffey resigned from his position on the bargaining team shortly after the incident, but that was not until after he contacted the Freedom Foundation (as indicated below). He had not yet started actively collecting showing of interest cards by the date of the exchange.

9. On June 22, 2017, Duffey sent an email to the Freedom Foundation. In that email, Duffey asked for input about his brief experience with the Department of Labor and about rescinding his bargaining unit's fair share agreement "once the contract is signed." (Exh. R-45 at 1.) Duffey also wrote, "After We rescind the Fair share agreement and we get to the point of 30% paying dues then we will ask for decertification vote." (Exh. R-45 at 1.) Following that initial email, Duffey exchanged several related emails with Ben Straka, a policy analyst for the Freedom Foundation. Straka is not an attorney.

10. In Straka's first email to Duffey, which he sent on July 17, 2017, Straka agreed to "provide support for the deauthorization/decertification efforts." (Exh. R-45 at 6.) Among other things, that eventually included assisting Duffey in the drafting of new mailers and helping Duffey

throughout the life of this case with the Board. Moreover, on August 14, 2017, Straka asked the City of Portland for “[t]he names of all City of Portland employees who are represented by Laborers’ Local 483, excluding Seasonal Maintenance Workers and Recreation Employees.” (Exh. R-12.) After that, Straka was given the list of the names requested.

11. On August 30, 2017, LIUNA and the City of Portland ratified the TA. Subsequently, in early September 2017, Duffey, some other bargaining unit employees, and two agents of the Freedom Foundation handed out packets of documents encouraging LIUNA-represented employees to help deauthorize their fair share agreement. Each packet included a copy of Duffey’s signature slip flier (noted above), informational materials, and a sheet instructing employees to mail an included showing of interest card to Duffey that included his name and home address.

12. On September 11, 2017, Ben Nelson, LIUNA’s Lead Organizer, sent out an email to some stewards and supportive union members in the Bureau of Environmental Services titled “meeting to discuss anti-union effort at BES.” (Exh. R-17.) It stated, in part:

“I’m writing to see if folks can get together this week to discuss the recent anti-union material in the workplace at BES. There have been some anti-union fliers in the work areas for the past couple of weeks, but it has gotten more serious with the most recent letter from Dennis Duffey. There is a strong reason to believe that Dennis is working with the ‘Freedom Foundation’. If you aren’t familiar with this organization it would be worth taking a few minutes to look at their website. Their primary goal is to attack and weaken public sector unions. We are reaching out to Local 483 member leaders in each Bureau as I expect Dennis and the Freedom Foundation may soon expand their contacts beyond BES.” (Exh. R-17.)

13. On or around September 12, 2017, LIUNA distributed fliers of its own addressing the Freedom Foundation’s deauthorization efforts and its attempt to obtain bargaining unit employees’ contact information. LIUNA’s fliers did not include Duffey’s name or address.

14. At 11:48 a.m. on September 12, 2017, Richartz sent an email to Suzanne Kahn, the City of Portland’s Maintenance Director. In the email, Richartz stated:

“Hi Suzanne, in regard to the anti-union activity, please be aware that Dennis Duffey, who is a City of Portland employee at BES, may attempt to gain access to PBOT employees. He is not a representative of Laborers’ Local 483 and should not be allowed any non-public access. In particular he has participated in union activities in the past including sharing flyers with employees in the Kerby parking lot at beginning/end of shift. I am concerned that he will attempt to do this for non-union activities. Please alert the appropriate staff regarding any such activities.” (Exh. R-16 at 2.)

15. At 12:45 p.m. on September 12, 2017, Kahn forwarded Richartz’s 11:48 a.m. email to the “PBOT MO Leadership Team,” Patrick Ward, and Kenneth Carter. (Exh. R-16 at 1.) In that email, Kahn wrote:

“Please see Farrell’s message below.

“Corey – Please instruct Dispatch not to allow Dennis Duffey access to Maintenance but to call on the Leadership team to talk with him.

“Patrick – If Mr. Duffey is on City property e.g. employee parking lot, can or should we ask him to leave?” (Exh. R-16 at 1.)

At 1:28 p.m. that day, Kahn wrote back to Richartz, stating, “I’ve also alerted Daniel Puha on Nights.” (Exh. R-16 at 1.) At 1:29 p.m., Richartz replied, “Thank you.” (Exh. R-16 at 2.)

16. Later, at 4:45 p.m. on September 12, 2017, Richartz sent out an email to all LIUNA members (including Duffey) via their personal email addresses. Its subject was “Union Busting Alert!” (Exh. C-1 at 1) and it stated:

“Your union is under attack. While there are threats on the horizon with the Supreme Court threatening to make ‘right to work’ the law of the land, we must also be on guard for attacks closer to home.

“On Monday, you received an email from the City of Portland telling you that the so-called ‘Freedom Foundation’ is requesting your personal information. This group is a billionaire-funded organization that seeks to destroy unions. At the same time, Dennis Duffey, a wastewater operator at the Bureau of Environmental Services, is attempting to circulate an anti-union petition.

“We must stand strong together and protect the many gains that our union has fought for over decades: your wages, your benefits and retirement, your grievance procedures and your just cause protections.

“Attached is a document with more information about the Freedom Foundation. We will be visiting workplaces in the coming days - call us at 503-239-5676 to arrange a meeting with your work group.

“Laborers’ Local 483 is a member driven local. The strength of our members together is what has made us strong - and is what will defeat attempts to destroy our union.

“Now is the time to get involved! Join us at our next membership meeting: Tuesday, September 19 at 5:30 pm at the Musicians Hall at 325 NE 20th Avenue in Portland.” (Exh. R-18 at 1-2.)

17. At 9:21 a.m. on September 13, 2017, Richartz sent Maintenance Director Kahn an email titled “anti-union activists.” (Exh. R-20 at 1.) The email states:

“FYI, these 2 people (almost certainly from the ‘Freedom Foundation’ anti-union organization) were approaching workers and distributing anti-union literature on

Graham Street this morning, behind Fleet, as people reported for their shift. Holland Reini reported this to the radio room. Tom and I will be at PBOT this afternoon to further inform our members about the current situation.” (Exh. R-20 at 1.)

The same email included a photo titled “union busters at PBOT 9 13 17.jpg” of two individuals standing against a wall. (Exh. R-20 at 1.) The email does not reference Duffey.

18. On September 14, 2017, Lead Organizer Nelson created a memorandum containing a variety of “talking points” about Duffey’s deauthorization campaign and about the Freedom Foundation. Those talking points were then distributed to the multiple LIUNA organizers who would go on to visit employees’ homes and worksites. However, nobody connected to LIUNA ever went to Duffey’s house. The talking points memorandum mentioned Duffey by name, but did not include Duffey’s address. This particular effort continued for around three weeks to a month. Also on September 14, 2017, Straka sent the City of Portland a public records request essentially seeking emails “between any @portlandoregon.gov email domain and any @liuna483.org email domain.” (Exh. C-2.)

19. In mid-September 2017, LIUNA made a number of postcards and then distributed those postcards to employees at their worksites via LIUNA organizers and stewards and interested unit members. LIUNA’s ultimate objective with this “card campaign” was for LIUNA to get Duffey to “back off” and quit his deauthorization campaign, which LIUNA viewed as an attack on the union and an attempt to destabilize it. LIUNA also felt that it was particularly important to let people know that the Freedom Foundation was behind Duffey’s efforts.

20. The text printed on all of LIUNA’s postcards was drafted by Nelson and Richartz, using feedback from LIUNA members. LIUNA also had its attorney, David A. Rosenfeld, review and approve the postcards’ contents before the cards were provided to employees. The cards’ overall formatting was ultimately approved by Richartz. The idea to send postcards to Duffey originally came from an unnamed LIUNA member who works for the Bureau of Transportation.

21. Every LIUNA postcard that was distributed was pre-stamped by LIUNA and included Duffey’s full name as the recipient; Duffey’s home address as the destination; LIUNA’s Portland address as the return address; and a circular, colored LIUNA logo in the upper-right corner. Additionally, each postcard states:

“HANDS OFF MY UNION!!

“I AM STANDING WITH MY COWORKERS TO DEFEND MY WORKING CONDITIONS. I WILL FIGHT ANY ATTEMPT BY YOU OR THE FREEDOM FOUNDATION TO WEAKEN MY UNION, RETIREMENT, HEALTH CARE, AND JOB SECURITY.” (Exh. R-39 at 1.)

After that text, each postcard had a blank signature line for the sender’s name and then a space with three blank lines below that for additional comments.

22. Not everyone filled out their cards on the spot right when they received them. Moreover, LIUNA typically did not review or mail the postcards after employees received them and filled them out. Instead, most cards were simply left with employees, and then the cards were written on and mailed by the employees on their own. In fact, very few cards that were filled out were collected by LIUNA and then mailed. Of those few, Nelson only saw “a handful” and all of those had what he viewed as “positive messages.”

23. Nelson personally believed that it was fair to send Duffey cards at his home, as Duffey had been asking for deauthorization showing of interest cards to be sent there. He also thought that members should be given a chance to share their views about their own organization. Further, when Nelson distributed the blank postcards, he expected LIUNA supporters to identify positive things about being in a union in the comments section. He did not expect them to include language referring to physical violence. For his own part, Richartz felt that it was just as likely that someone would write something positive about the union as it was that someone would write something negative and directed at Duffey. When a LIUNA representative named Wesley Buchholz gave employees cards, he suggested that they send a message of solidarity and specifically discouraged them from using the cards to threaten violence. Nelson and Richartz were unaware of the threatening postcard comments (addressed below) until after Duffey had filed the instant unfair labor practice complaint with the Board, which occurred on October 19, 2017.

24. In the end, Duffey received 48 of these LIUNA postcards at his home. The vast majority of the cards included the sender’s name and comments, but occasionally some spaces were left blank and some plainly false names were used. All of the cards were sent by LIUNA-represented employees except for one employee whose card identified a different unit. As shown below, some of the postcards Duffey received included threatening comments, but the majority of the cards received did not. Some of the cards contained insults and profanity. The last card was received by the end of October 2017.²

25. The comments on the postcards that were postmarked September 15, 2017 stated: “SHAME ON YOU FOR SUPPORTING KOCH BROTHERS HOPE YOU LOSE YOUR UNION JOB.” (Exh. C-3 at 6); “We have all that we have because of unions. We need them to protect us.” (Exh. R-39 at 1); “YOU ARE WRONG” (Exh. R-39 at 2); and “18 Years Park & Rec I support my union by paying dues I highly value my union.” (Exh. R-39 at 3).

26. On September 18, 2017, a reporter for the Willamette Week named Anna Williams interviewed Duffey about his deauthorization campaign. That interview was subsequently followed by two other interviews, both of which occurred before September 27, 2017, the date the Willamette Week and Williams published an article about Duffey, as indicated below.

27. The comments on the postcards that were postmarked September 18, 2017 stated: “I ENJOY PAYING MY DUES, BRO!!! SO GO TAKE A HIKE!!!” (Exh. C-3 at 15); “I STAND WITH MY UNION. UNION BRAKERS [sic] MOVE ON.” (Exh. R-39 at 5); “I stand w/ my

²All of the postcards received by Duffey are included in Exhs. C-3 and R-39. We have not included all of those cards’ comments in our Findings of Fact. Nelson testified that postcards shown in Exh. R-39 at 44-48 were not from LIUNA stewards or officers, and that they were simply “rank-and-file members.” Richartz provided similar testimony. We credit their statements on this matter.

Union!” (Exh. R-39 at 6); “I support my union.” (Exh. R-39 at 7); “I have such respect for my 483. I have need[ed] a UNION so many times in my life and never had one till now so take a hike with your ignorance!” (Exh. R-39 at 8).

28. The comments on the postcards that were postmarked September 19, 2017, stated: “Quit crying Dennis” (Exh. C-3 at 11) and “IF YOU DON’T WANT TO PAY UNION DUES, then DON’T BE IN A UNION! YOU BIG STUPID HEAD!!” (Exh. C-3 at 16).

29. The comments on the postcards that were postmarked September 20, 2017 stated: “Bang! you are gone!” (Exh. C-3 at 2); “Watch your Back” followed by a drawing of a crosshair symbol (Exh. C-3 at 3); “We know where U live” (Exh. C-3 at 4); “Leave us the F*** ALONE!” (Exh. C-3 at 5); “Dennis you’re a douche” followed by a drawing of a smiley face (Exh. C-3 at 8); “hoffa?” (Exh. C-3 at 10); “so sorry for your loss Brother, Back off Im union all the way” (Exh. C-3 at 13); “Get a new hobby! Leave my Family Alone!” (Exh. C-3 at 14). Additionally, in the “Bang! you are gone!” postcard, the word “FIGHT” was underlined and starred.

30. At 12:02 p.m. on Monday, September 25, 2017, Wastewater Treatment Manager for Operations Mike Ciolli sent an email titled “Dennis Duffey activity” to Lynn Sandretzky, a manager with the Bureau of Environmental Services. (Exh. R-26 at 1.) Around that time, Duffey was approached by his manager, Bill Sterling, who told Duffey, “You sure caused a stir with this deauthorization,” told Duffey that the Bureau of Transportation was intimidated, and cautioned Duffey to not use City time or resources to conduct his deauthorization campaign. At 12:33 p.m. on September 25, 2017, Ciolli sent Sandretzky another email. That email states, in part: “An article is coming out Weds in the Willamette Week. Dennis was interviewed regarding some indiscretions on the part of some union executives that he found out about.” (Exh. R-26 at 1.)

31. On September 27, 2017, Willamette Week published Williams’ article about Duffey. In short, the article addressed Duffey’s frustrations with LIUNA, noted his work with the Freedom Foundation, and stated that Duffey had received almost 30 postcards in his home mailbox. In the article, Duffey specifically accused LIUNA of extortion. After the article was published, Duffey wrote an entry in a public online comments section of the Willamette Week’s website. In it, he wrote: “For those who have engaged in sending fan Mail to my house, I say thank you. Get involved, make a difference in the next contract.” (Exh. R-11 at 3.)

32. The comments on the postcards that were postmarked October 2, 2017 state: “We are GUNNING FOR U. Back off, get a life.” (Exh. C-3 at 1) and “Give back your recent Bargained pay increase” (Exh. C-3 at 12). In the “GUNNING FOR U” postcard, the word “Kill” was written above the preprinted word “FIGHT,” which was also underlined. (Exh. C-3 at 1.) In the other October 2, 2017 postcard, the whole sentence with the word “FIGHT” in it was underlined.

33. Some of the postcards Duffey received do not have a discernable postmark date on them. Their comments include: “ONLY AN IGNORANT MONSTER WOULD TRY TO STEAL PEOPLE’S UNIONS AWAY FROM THEM!! IF YOU DONT PAY DUES, HOW DOES OUR UNION SURVIVE?!? HANDS OFF!!” (Exh. C-3 at 7) and “You idiot. They will contract us all out! Do you not like having a job? Think before you act!!!” (Exh. C-3 at 9).

34. On November 6, 2017, every employee in LIUNA's bargaining unit (including Duffey) received an email at his or her City of Portland email address from OptOutToday.com, which the email explained "is a project of the Freedom Foundation." (Exh. R-27 at 3.) In sum, the email, titled "Deauthorize Laborers' 483," sought to encourage employees to submit showing of interest cards to support deauthorization. (Exh. R-27 at 1.) Afterward, Senior Deputy City Attorney Heidi Brown sent a pair of emails to Jill Gibson of the Gibson Law Firm, LLC, who was representing the Freedom Foundation. In her emails, Brown argued that the November 6, 2017 email was an inappropriate use of City of Portland email.

35. On February 26, 2018, Duffey terminated his membership in LIUNA once again. As of the date of the hearing, he remained a fair share employee paying fair share fees.

36. As a result of the LIUNA postcards he had received in the mail and his heated exchange with Richartz in the yard, Duffey feared for his life. He remained in such fear until the date of the hearing. Because of his fear, Duffey started carrying a gun to his home mailbox. In addition, Duffey has stopped trying to collect signatures for deauthorization and has determined that he no longer wants to play a major role in the deauthorization campaign. However, Duffey has not asked the Freedom Foundation to stop its part of the campaign, and as of the date of the hearing, Duffey still supported deauthorization.

37. Duffey ultimately received around 45 to 50 showing of interest signatures, which was short of the number required to trigger a deauthorization vote. Some of those signatures were mailed to him at his home address, while others were handed to Duffey in person or left in his locker. The last showing of interest card Duffey received was dated November 23, 2017. The two Freedom Foundation agents who campaigned for deauthorization in person were unable to collect any cards or signatures.

38. Duffey has never filed a complaint with the police or the City of Portland about LIUNA's postcards. Moreover, Duffey has not filed an internal complaint with LIUNA about any union-related matter via any one of LIUNA's three constitutions, and did not contact any LIUNA officials about the cards outside of his unfair labor practice complaint. Duffey likewise did not try to directly contact anyone who sent him a postcard. Finally, he was never disciplined by LIUNA or by the City of Portland for his deauthorization campaign.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. LIUNA did not violate ORS 243.672(2)(a) by sending an email to bargaining unit members that accused Duffey of attempting to circulate an anti-union petition.

Standards of Decision

All three of the central issues in this case involve ORS 243.672(2)(a), which provides that it is an unfair labor practice for a labor organization or its designated representative to "[i]nterfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS 243.650 to 243.782." That range of statutes covers the entirety of Oregon's Public Employee

Collective Bargaining Act (PECBA). Of those statutes, ORS 243.650(10) provides a right to petition for deauthorization of a fair share agreement, and it follows that that right naturally extends to the gathering of signatures in support of such a petition. See *John Burkhart v. Oregon Public Employees Union, SEIU, Local 503, AFL-CIO, CLC*, Case No. UP-4-92 at 10, 14 PECBR 150, 159 (1992). As in any unfair labor practice case, the basic burden of proof here is on the complainant to prove its claims by a preponderance of the evidence. ORS 183.450(2); OAR 115-010-0070(5)(b).

Importantly, ORS 243.672(2)(a) mirrors ORS 243.672(1)(a), which applies to analogous charges filed by a union or an employee against a public employer. Accordingly, the same tests that are used to analyze an ORS 243.672(2)(a) claim are also used to analyze an ORS 243.672(1)(a) claim. *Julie Taylor v. AFSCME Council 75, Local 3508*, Case No. UP-110-92 at 3, 14 PECBR 210, 212 (1992); *Patricia Williams v. Chemeketa Community College Classified Employees Association*, Case No. UP-34-90 at 22, 12 PECBR 789, 810 (1991). Specifically, ORS 243.672(1)(a) states, “It is an unfair labor practice for a public employer or its designated representative to * * * [i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 643.662.” That statute in turn provides, “Public employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations.”

The language of ORS 243.672(1)(a), like that of ORS 243.672(2)(a), provides two distinct prongs, one of which prohibits restraint, interference, or coercion “because of” the exercise of protected rights. Stated differently, the “because of” prong prohibits the respondent from basing its actions on an employee’s protected activity. Thus, to determine if a respondent violated the “because of” prong, we ordinarily examine the respondent’s motives or reasons for the disputed action. However, it is not necessary for a complainant to prove that the respondent was subjectively motivated by an intent to restrain or interfere with protected rights. *Portland Assn. of Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189, 1195 (2000); *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06 at 29, 22 PECBR 323, 351 (2008).

When presented with “because of” claims, we typically examine the record to determine what motivated the respondent to act. That is a fact determination based on the record as a whole. *Portland Assn. of Teachers*, 171 Or App at 626, 16 P3d at 1196. Our role, broadly, is to decide which party’s explanation of the respondent’s reasons we believe. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan District of Oregon*, Case No. UP-48-97 at 8, 17 PECBR 780, 787 (1998). We then decide whether the reasons were lawful or unlawful. *Portland Assn. of Teachers*, 171 Or App at 639, 16 P3d at 1204. Generally speaking, if all of the respondent’s reasons are lawful, the alleged “because of” claim must be dismissed. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03 at 9, 20 PECBR 733, 741 (2004).

The other prong of ORS 243.672(1)(a) and (2)(a) prohibits actions that restrain, interfere with, or coerce employees “in the exercise” of their protected rights. When we analyze a respondent’s actions under that prong, we focus on the likely consequences or effects of the respondent’s actions on employees. A respondent commits an “in the exercise” violation if the

respondent's conduct, when viewed objectively under the totality of the circumstances, has the natural and probable effect of deterring employees in engaging in activity protected by the PECBA. *Portland Assn. of Teachers*, 171 Or App at 623, 16 P3d at 1195; *Service Employees International Union Local 503, Oregon Public Employees Union v. City of Tigard*, Case No. UP-040-13 at 8, 26 PECBR 131, 138 (2014). Put simply, our test for this prong is: Would a reasonable person be chilled from exercising PECBA rights by the respondent's conduct? *Oregon Public Employees Union v. Jefferson County*, Case No. UP-55-98 at 14, 18 PECBR 109, 122 (1999), recons, 18 PECBR 199 (1999).

For an "in the exercise" claim, neither motive nor the extent to which employees actually were coerced is controlling. Accordingly, it requires no causal connection between the respondent's action and the exercise of protected rights as with the other prong. However, we have also recognized that a derivative "in the exercise" violation naturally occurs when an employer violates the "because of" prong of the statute. *Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11 at 28, 25 PECBR 525, 552, recons, 25 PECBR 764 (2013); *Oregon Public Employees Union and Juanita Termine v. Malheur County, Commissioner Don B. Cox, Commissioner W.L. Hammack, and Sheriff Ronald K. Mallea*, Case No. UP-47-87 at 7-8, 10 PECBR 514, 520-21 (1988).

A union may commit an unfair labor practice if an individual's unlawful actions are "authorized or knowingly condoned by the union." That standard allows us to determine whether individuals were "designated representatives" of a union as that term is used in ORS 243.672(2)(a). See *Williams*, Case No. UP-34-90 at 18-19, 12 PECBR at 806-07 (citing *Clackamas Community College v. Clackamas Community College Education Association and Virginia Weber*, Case No. C-123-77, 3 PECBR 1807, *aff'd per curiam*, 36 Or App 2, 583 P2d 36 (1978)³). Previously, the Board has stated that an agency relationship exists where there is either "actual" or "apparent authority" to act on a party's behalf. In short, apparent authority is created by some conduct of the principal which, when reasonably interpreted, causes a third party to believe that the principal consents to have the apparent agent act for the principal on that matter. Actual authority is created when a principal expressly confers it on an agent. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-016-11 at 24, 24 PECBR 412, 435 (2011) (citing *Tri-County Metropolitan Transportation District of Oregon (TriMet) v. Amalgamated Transit Union, Division 757*, Case No. UP-55-05 at 41, 22 PECBR 506, 546 (2008)); *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 355 (6th Cir. 1983).

Discussion

Duffey's complaint alleges that LIUNA violated ORS 243.672(2)(a) by sending an email to bargaining unit members that accused Duffey of attempting to circulate an anti-union petition. That allegation refers to the email Richartz sent to everyone in Duffey's bargaining unit on September 12, 2017, titled "Union Busting Alert!" (Exh. C-1.) In that email, Richartz does assert

³In affirming the *Clackamas Community College* case without opinion, the Court of Appeals cited ORS 662.070. That statute states, "No officer or member of any association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of this state for the unlawful acts of individual officers, members or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

that Duffey was “attempting to circulate an anti-union petition” as alleged. (Exh. C-1.) As outlined above, under the PECBA, attempting to file a petition for deauthorization is a protected activity. As Business Manager and Secretary-Treasurer, Richartz is also certainly a “designated representative” of LIUNA. Moreover, it is plain that Richartz sent this email because Duffey was trying to file a deauthorization petition, and that Richartz did not want that petition to succeed. Nevertheless, we ultimately conclude that the email does not “[i]nterfere with, restrain or coerce any employee,” as ORS 243.672(2)(a) requires and therefore reject this claim.

A central reason for rejecting this claim is that the complained-of term, “anti-union,” is largely informational in nature. Previously, this Board has held that distribution of factual information does not have the natural and probable effect of interfering with or restraining the exercise of protected rights. See *Lane County Public Works Association, Local 626 v. Lane County*, Case No. UP-15-03 at 12, 20 PECBR 596, 607 (2004); *Jefferson County*, Case No. UP-55-98 at 15-20, 18 PECBR at 123-127 (citing *Oregon Association of Classified Employees, Randy Briggs and Dick Ramsay v. Douglas School District No. 4*, Case No. UP-82-89 at 18, 12 PECBR 547, 564 (1990)); *Klamath County Education Association v. Klamath County School District*, Case No. C-28-78 at 10, 5 PECBR 2991, 3000 (1980). To characterize a deauthorization petition as “anti-union” is not inherently misleading and does not require a logical leap. Naturally, a union may suffer financially if employees are freed from paying dues or fees, and reduced funding can mean reduced effectiveness and bargaining power. In addition, deauthorization is only one step away from decertification, which effectively nullifies a union’s right to represent people at all – a plainly “anti-union” result. See *Tool and Die Makers Lodge No. 113, International Association of Machinists and Aerospace Workers, AFL-CIO (Midwest American Dental Division of American Hospital Supply Corporation)*, 207 NLRB 795, 797 (1973). Indeed, in his June 22, 2017 email, Duffey noted his related, long-term goal of asking for a “decertification vote.” (Exh. R-45 at 1.) Likewise, Straka agreed to “provide support for the deauthorization/decertification efforts.” (Exh. R-45 at 6.)

The email that includes the “anti-union” term also contains no threat or punishment, and the terms used within it are not particularly charged, harassing, intimidating. Further, the email merely describes the *petition* as “anti-union,” rather than an individual. And as his own brief correctly points out, Duffey’s personal, subjective impressions do not drive this analysis. See *Portland Assn. of Teachers*, 171 Or App at 623, 16 P3d at 1195; *Spray Education Association and Walt Short v. Spray School District No. 1*, Case No. UP-91-87 at 18, 11 PECBR 201, 218 (1988). Beyond that, simply having a name publicly linked to a petition, though notable, is not particularly compelling when the person named has already distributed deauthorization materials with his or her name in them, as Duffey did with his informational packets. The email’s use of exclamation points merely presses for urgency. The email does use words like “attack” and “threat,” for example, but the way those words are used is well within the realm of what a reasonable person would expect during a campaign, particularly one that involves a deauthorization petition.

Significantly, policy considerations provide that when faced with an existential threat, a union need not simply sit idly by and remain silent, and may lawfully take certain reasonable steps to defend and protect itself. See *Burkhart*, Case No. UP-4-92 at 6, 14 PECBR at 155; *Williams*, Case No. UP-34-90 at 18-25, 12 PECBR at 806-11. As LIUNA notes, in *Burkhart*, Case No. UP-4-92, 14 PECBR 150, for example, we dismissed a complaint alleging that a union violated

ORS 243.672(2)(a) by suspending a member from the union for 60 days for circulating a decertification petition. In another case, *Taylor*, Case No. UP-110-92, 14 PECBR 210, we dismissed a similar complaint that involved three union officers threatening to sue an employee, as well as a union letter stating that the same employee had violated the union constitution and that penalties could be imposed on her. Simply put, a deauthorization petition, like a decertification petition, is a serious, existential threat for a union, and the language of the email at issue here falls well short of the responses noted above and is well within the boundaries of acceptable behavior.

3. Duffey failed to demonstrate that LIUNA violated ORS 243.672(2)(a) by contacting the City of Portland about Duffey's activities.

Discussion

For this second issue, the complaint specifically alleges that Richartz "contacted members of City management asking them to shut down Duffey's efforts to gather signatures." That claim refers to Richartz's September 12, 2017 email to Suzanne Kahn, the City of Portland's Maintenance Director. Once again, that email states:

"Hi Suzanne, in regard to the anti-union activity, please be aware that Dennis Duffey, who is a City of Portland employee at BES, may attempt to gain access to PBOT employees. He is not a representative of Laborers' Local 483 and should not be allowed any non-public access. In particular he has participated in union activities in the past including sharing flyers with employees in the Kerby parking lot at beginning/end of shift. I am concerned that he will attempt to do this for non-union activities. Please alert the appropriate staff regarding any such activities." (Exh. R-16 at 2.)

That email was plainly written by a designated representative of LIUNA, Richartz, as a direct response to Duffey's deauthorization efforts. To that extent, it can be said that LIUNA sent the email because of Duffey's protected activity. However, as with the prior issue, we ultimately conclude that this email is a lawful one and reject the claim.

For one thing, Richartz's September 12, 2017 email does not actually tell anyone to "stop Duffey from petitioning" as the claim alleges. Instead, it tells the employer about a possible policy violation, and thus is also a largely informational message. Although Duffey may have had a certain level of special "non-public" access in the past, that access was limited to certain "union activities" and Duffey was no longer participating in those. By the time the email was sent, Duffey had in fact resigned from his position with LIUNA and ceased being "a representative of Laborers' Local 483" as the email states. While the PECBA may indeed protect a particular right, that right is often legitimately regulated by some work rule, another law, or even a contract term. *See Service Employees International Union, Local 503, Oregon Public Employees Union v. State of Oregon, Judicial Department*, Case No. UP-3-04 at 10, 20 PECBR 864, 873 (2005) ("A rule prohibiting union-related speech and distribution of materials in working areas during work time is presumptively valid."). In this case, the use of City of Portland facilities is at least "governed by Human Resources Administrative Rule 4.09" (Exh. R-38 at 2) and Duffey is prohibited from "[i]nappropriate or unauthorized personal use of City resources" (Exh. R-37 at 2) under Human

Resources Administrative Rule 5.01. It follows that an employee cannot be unlawfully chilled from exercising a protected right if he or she is otherwise barred from doing so.

Furthermore, the record does not show that Duffey ever learned of the September 12, 2017 email during events of this case. Duffey was not copied in the email, for example. Logically, an employee cannot be chilled or coerced by something without having some knowledge of it. See *Teamsters Local 223 v. Tillamook County Emergency Communications District*, Case No. UP-46-95 at 8, 16 PECBR 397, 404 (1996) (“In order for a reasonable employee to be chilled in the exercise of protected activity, that employee must see some relationship between the protected activity and the employer’s actions or statements.”). Duffey’s testimony does indicate that he was approached by his manager Bill Sterling about his campaign at some point – and by that manager alone, according to Duffey – but there is no evidence explaining precisely why that that happened. Put differently, we have no persuasive evidence linking Richartz with Sterling. There is also no evidence showing that Duffey was disciplined for any of his actions, and in our view, simply reminding someone of preexisting work rules as Sterling did for Duffey is not coercive or threatening in and of itself. The other significant email in the record from Richartz to Kahn, sent on September 13, 2017, does not reference Duffey. Instead, it appears to address two Freedom Foundation agents who are not covered by the PECBA.

Duffey’s complaint otherwise alleges that Richartz “accused Duffey of using city resources to print and email information to print and email information related to his signature-gathering efforts.” However, that particular allegation is not supported by any of the evidence presented and therefore fails for want of proof. Again, the burden of proof lies with the complainant. ORS 183.450(2); OAR 115-010-0070(5)(b). We further note that Duffey does not meaningfully explore the complaint’s second issue in his post-hearing brief.

4. LIUNA violated ORS 243.672(2)(a) by creating postcards, distributing them to bargaining unit members, and instructing those members to send the postcards to Duffey’s home address.

Discussion

For this final issue, we must first address whether or not the postcard commenters were “designated representatives” of LIUNA within the meaning of ORS 243.672(2)(a), as no individuals were named as respondents in the complaint. *Williams*, Case No. UP-34-90 at 18, 12 PECBR at 806 fn 5. On that subject, the evidence is split. Nevertheless, under the circumstances presented, we ultimately conclude that the commenters were authorized as “designated representatives” and that LIUNA should be held accountable for their remarks.

In *Williams*, Case No. UP-34-90 at 18-19, 12 PECBR at 806-07, for example, we concluded that an individual was not a “designated representative” because he was not a union officer at the time and had held no position in the union for approximately three years, and because no evidence was presented that any union officer sanctioned his actions. Similarly, in this case, the evidence indicates that none of the commenters were union officials or stewards, and that no LIUNA officials ever formally condoned or sanctioned the complained-of comments. In fact, many of the signed cards were not even seen by Nelson or Richartz until this complaint was filed. In addition,

it does not appear that any commenters were paid by or otherwise received any benefit from LIUNA or the City of Portland for their participation in the card campaign. One card was even from someone from a different unit than Duffey's.

At the same time however, almost none of the foregoing considerations would be obvious to the person receiving the postcards. Commenters occasionally wrote messages with "we" in them and did not specify their positions in their cards. Further, LIUNA's bargaining unit is quite large and has employees at a variety of worksites. Thus, an employee in that unit cannot reasonably be expected to know the names of every union official or active member. On top of that, each card was pre-stamped with a similar-looking postage stamp, displayed a sizeable LIUNA logo, shared the same preprinted message of union support, and arrived at Duffey's house within a short time of one another. Moreover, all of the postcards received appeared to have come from Portland and listed LIUNA's headquarters as the return address, further signaling an authorized, concerted effort.

LIUNA officials also clearly participated and engaged in the act to a meaningful degree. As outlined above, LIUNA's leadership carefully designed the preprinted language on the postcards, got approval from their lawyer, distributed the cards to employees, provided Duffey's name and address, gave general instructions, and actively solicited comments. By simply passing its pre-stamped LIUNA postcards out to members to send on their own, LIUNA knowingly abandoned any chance it had of censoring or repudiating their comments. We also cannot say that the comments received were of a nature that the union might not well expect from its members. According to Richartz's testimony, it was just as likely that his members would write a positive comment about the union as they would write something negative and directed at Duffey. *Compare Baker School District No. 5J v. Baker Education Association and Don Shore*, Case No. C-47-78 at 9, 5 PECBR 3057, 3065 (1980); *Clackamas Community College*, Case No. C-123-77 at 6, 3 PECBR at 1812; *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1243-44 (4th Cir. 1976).

LIUNA's reason for creating and distributing the cards is clear. As stated, LIUNA's central aim was for Duffey, personally, to "back off" and quit his deauthorization campaign. That is plainly an attempt to "[i]nterfere with, restrain or coerce" Duffey because of his exercise of a protected right. *Compare Oregon Public Employees Union v. Jefferson County*, Case No. UP-19-99 at 8, 18 PECBR 245, 252 (1999) (wherein general statement about killing someone was not made in response to protected activity). Likewise, after looking at LIUNA's card campaign through an objective lens and considering the totality of the circumstances, we conclude that the natural and probable effect of that campaign would be to deter someone from continuing to wage his or her own campaign. In short, several of the comments received land outside of what a union is allowed to do to defend itself from an existential threat.

Not every comment a union makes in response to protected activity amounts to a violation, and "harsh language alone does not constitute an unfair labor practice." *Clackamas County Employees' Ass'n v. Clackamas County*, 243 Ore. App. 34, 42, 259 P.3d 932, 937 (2010); see *Taylor*, Case No. UP-110-92 at 3, 14 PECBR at 212 (involving "somewhat nebulous threats of legal action without merit"); *Williams*, Case No. UP-34-90 at 19, 12 PECBR at 807 (involving "expressions of strong opinions in a continuing disagreement about the merits of affiliation" and characterizing remarks as "gibberish" and "garbage"); *Clatsop County Oregon v. AFSCME Local*

2746, *Council 75, and Joseph Brunick*, Case No. C-139-81 at 6-7, 6 PECBR 4987, 92-93 (1981) (involving a “threat/promise” to “make waves”). We are also not concerned about run-of-the-mill profanity, vulgarity, or coarseness. However, the PECBA simply does not protect threats of physical violence. See *Wy’East Education Association/East County Bargaining Council/ Oregon Education Association, et al. v. Oregon Trail School District No. 46*, Case No. UP-16-06 at 33, 22 PECBR 668, 698-701 (2008) (aggressive picket-line shouting at administrators is protected activity so long as there is no violence or credible threats of violence); *Lane County Peace Officers Association v. Lane County Sheriff’s Office*, Case No. UP-32-02 at 21, 20 PECBR 444, 464 (2003) (union official’s direction to union members to engage in picket-line violence not protected); *Jefferson County*, Case No. UP-19-99 at 8, 18 PECBR at 252 (considering a threat to kill).

LIUNA characterizing Duffey’s efforts as “WRONG” (Exh. R-38 at 2) or even “anti-union” (Exh. C-1 at 1) is generally appropriate during a deauthorization campaign, as those messages address the merits of the dispute. So is the normal, nebulous use of the word “FIGHT” like that which is used in the postcards’ preprinted language. (Exh. R-39 at 1.) We recognize employees as mature individuals who are generally capable of recognizing campaign propaganda for what it is and discounting it. However, we find a number of comments objectionable, particularly when considered as part of a larger group of cards. Those include: “Bang! you are gone!” (Exh. C-3 at 3); “Watch your Back” combined with a drawing of a crosshair (Exh. C-3 at 3); “We know where U live” (Exh. C-3 at 4); and “We are GUNNING FOR U. Back off, get a life.” (Exh. C-3 at 1). We acknowledge that a death threat that lists the author’s name may not be the most credible threat. Nonetheless, there is no guarantee that the proper name has been used. We also cannot discount the large number of cards Duffey received or the fact that they were sent to his private residence. As the Board stated in *Monroe Elementary Education Association v. Monroe School District No. 25J*, Case No. UP-49/56-90 at 15, 13 PECBR 54, 68 (1991), “we must consider the probable effect of all the comments, the context in which they were made, and when and to whom they were made” (emphasis in original). More importantly, even a less than certain death threat can reasonably be construed as threatening and chill someone. See *Battle Creek Health System*, 341 NLRB 882, 894 (2004) (threats of violence deemed neither hyperbole nor banter); *Cox Fire Protection, Inc.*, 308 NLRB 793 (1992) (regardless of whether it was intended as a serious threat, statement was unlawful because it clearly indicated desire to retaliate against protected activity).

The seriousness of Duffey fearing for his life and abandoning his efforts is certainly not lost on us. However, the subjective impressions of employees – whether they felt threatened by what the union said or did – does not determine whether the union violated the law. Further, actual restraint, interference, or coercion need not be proven. The standard is a hypothetical “reasonable person,” not Duffey. *Taylor*, Case No. UP-110-92 at 2, 14 PECBR at 211 (citing *Spray School District No. 1*, Case No. UP-91-87 at 18, 11 PECBR at 218); *Malheur County*, Case No. UP-47-87 at 8, 10 PECBR at 521; *Klamath County School District*, Case No. C-28-78 at 9, 5 PECBR at 2999. Our factual findings regarding Duffey’s response to LIUNA’s actions are simply used to illustrate the full chain of events. Thus, we are unmoved by the fact that Duffey once described some of the postcards as “fan Mail” or the fact that he also used violent language during the dispute at Tabor Yard, for example. (Exh. R-11 at 3.) He also made his violent comment under very different circumstances and was obviously not speaking literally at the time. The possibility that Duffey may have accused LIUNA leaders of crimes or being incompetent, or that Duffey violated some

union rule, do not justify the threatening comments he received either.

Finally, we reject LIUNA's implication that Duffey was required to file a complaint with LIUNA or the City of Portland before pursuing this unfair labor practice complaint. That requirement is not found in our statute and would be inappropriate under the circumstances presented here. *Carlson v. AFSCME*, 73 Or App 755, 764, 700 P2d 260, 266, *rev den* 300 Or 322, 710 P2d 147 (1985). The case LIUNA relies upon in support of its position on this issue, *Eugene Mengucci v. Fairview Training Center*, Case Nos. C-187/188-83, 8 PECBR 6722 (1984), is notable but it specifically addressed a duty of fair representation claim and a contractual grievance procedure agreed to by the union and the employer, and is therefore distinguishable. A union also cannot reopen the 90-day window for filing a deauthorization petition provided by ORS 243.650(10) as these facts would have required prior to the U.S. Supreme Court's decision in *Janus v. AFSCME, Council 31*, 85 U. S. ___, 138 S. Ct. 2448 (2018). LIUNA's use of *Robert A. Ralphs v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO*, Case Nos. UP-68/69-91, 14 PECBR 409 (1993) is similarly misplaced.

PROPOSED ORDER

3. LIUNA shall cease and desist from violating ORS 243.672(2)(a) by creating postcards, distributing them to bargaining unit members, and instructing those members to send those postcards to Duffey's home address.

4. The remaining two charges of Duffey's complaint are dismissed.

SIGNED AND ISSUED on July 31, 2018.



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. 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. RC-009-18

(REPRESENTATION)

NEWPORT PROFESSIONAL	)	
FIREFIGHTERS ASSOCIATION,	)	
IAFF LOCAL 4619,	)	
	)	
Petitioner,	)	
v.	)	ORDER CERTIFYING
	)	EXCLUSIVE REPRESENTATIVE
YACHATS RURAL FIRE	)	
PROTECTION DISTRICT,	)	
	)	
Respondent.	)	
	)	

On July 5, 2018, the Newport Professional Firefighters Association, IAFF Local 4619 (Association), filed a petition under ORS 243.682(2)(a) to certify (without an election) a new bargaining unit of “Full-Time Firefighters/EMTs and Full-Time Firefighter/Paramedics” employed by the Yachats Rural Fire Protection District (District). A majority of eligible employees in the proposed bargaining unit signed valid authorization cards requesting that the Association represent the designated bargaining unit.

Notice of the petition was posted with a date of July 9, 2018. OAR 115-025-0030(3); OAR 115-025-0065. Pursuant to the notice posting, OAR 115-025-0030(3)(d), OAR 115-025-0065(7), and OAR 115-025-0075(1), objections to the proposed bargaining unit or a request for an election were due within 14 days of the date of the notice posting (*i.e.*, by July 23, 2018).

On July 19, 2018, certain members of the proposed bargaining unit timely filed a petition for an election in lieu of the card check process pursuant to ORS 243.682(3) and OAR 115-025-0075. This Board determined that the election petition was accompanied by the required showing of interest from at least 30 percent of the employees in the bargaining unit. *See* OAR 115-025-0075(1). On July 27, 2018, pursuant to the parties’ Consent Election Agreement, this Board sent ballots to eligible voters. The deadline for the return of ballots was August 10, 2018, which constituted the date of the election. *See* OAR 115-025-0060(4)(c). On August 13, 2018, a tally of ballots was held, and the results were provided to the parties. The majority of valid votes counted were cast for the Association.

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 23, 2018). OAR 115-025-0060(9). No objections were filed.

Accordingly, it is certified that:

NEWPORT PROFESSIONAL FIREFIGHTERS ASSOCIATION, IAFF LOCAL 4619

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

“Full-Time Firefighters/EMTs and Full-Time Firefighters/Paramedics.”

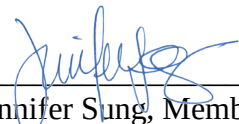
DATED: August 24, 2018.



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-013-17

(UNFAIR LABOR PRACTICE)

CLACKAMAS COUNTY EMPLOYEES' ASSOCIATION,	)	
	)	
	)	
Complainant,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND ORDER
CLACKAMAS COUNTY,	)	
	)	
Respondent.	)	
	)	

On August 16, 2018, the Board heard oral argument on Complainant's objections to a recommended order issued by Administrative Law Judge (ALJ) Julie D. Reading after a hearing held on October 30, 2017, in Oregon City, Oregon. The record closed on December 19, 2017, following receipt of the final post-hearing brief.

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

Christina Thacker, Assistant County Counsel for Clackamas County, Oregon City, Oregon, represented the Respondent at hearing. Jeff Heinrich, Assistant County Counsel for Clackamas County, Oregon City, Oregon, represented the Respondent at oral argument.

On April 26, 2017, the Clackamas County Employees' Association (Association) filed a complaint alleging that Clackamas County (County) violated ORS 243.672(1)(e) when it declined to bargain with the Association in March 2017 regarding the County's use of video evidence in employee discipline. In response to an order to show cause issued by the ALJ, the Association filed an amended complaint on June 14, 2017. The amended complaint alleged that the County violated ORS 243.672(1)(f) in 2010 and 2016 by failing to comply with ORS 243.698(2), which requires employers to provide labor organizations with notice of anticipated changes that trigger a duty to bargain. The amended complaint also alleged that the County violated ORS 243.672(1)(e)

when it made a unilateral change in 2016 to the way that it used video in connection with employee discipline. Finally, the amended complaint alleged that the County failed to timely provide requested information in violation of ORS 243.672(1)(e). The County filed a timely answer and alleged as affirmative defenses the statute of limitations and waiver on all claims, except the (1)(e) claim concerning the information request.

The issues are:¹

1. Has the Association made a timely claim that the County violated ORS 243.672(1)(e) by refusing to bargain the installation of security surveillance cameras and the potential use of footage in employee disciplinary actions?

2. Has the Association made a timely claim that the County violated ORS 243.672(1)(f) by failing to comply with ORS 243.698(2), which requires employers to provide labor organizations with notice of changes that will trigger a duty to bargain?

3. Did the County waive its right to raise the affirmative defenses of timeliness and waiver by agreeing to bargain with the Association in 2016?

4. Did the County fail to timely provide requested information in violation of ORS 243.672(1)(e)?

5. Is the County entitled to a civil penalty?

We conclude that the Association's ORS 243.672(1)(f) claim regarding the 2010 events related to video cameras is time-barred, and therefore dismiss that claim. We conclude that the Association failed to meet its burden to prove that the County violated either ORS 243.672(1)(e) or ORS 243.672(1)(f) with respect to the County's use of video in connection with employee discipline in 2016, and therefore dismiss those claims. We also conclude that the Association failed to meet its burden to prove that the County failed to timely provide requested information in violation of ORS 243.672(1)(e). Finally, we conclude that the County is not entitled to a civil penalty.²

¹The ALJ revised the proposed statement of issues after considering the parties' arguments, and neither party objected to the revised statement of issues in the recommended order. Accordingly, we adopt the revised statement of issues in this order. We note, however, that we interpret the third issue as encompassing the Association's claim that the County violated ORS 243.698(1)(e) and (1)(f) by its alleged actions in 2016.

²In its answer, the County sought the award of a civil penalty. OAR 115-035-0075 requires that a civil-penalty request include a "statement as to why a civil penalty or filing fee reimbursement is appropriate, with a clear and concise statement of the facts alleged in support of the statement." The County did not include such a statement, and therefore, we decline to award a civil penalty.

RULINGS

The Association objected to the ALJ's statements during and after the Association's rebuttal case about a possible continuance of the hearing. Specifically, in its case-in-chief, the Association relied solely on its exhibits and presented no testimony. On rebuttal, it called one witness who testified that the Association believed that it had reached an oral agreement with the County in 2010 that the County would not use video in employee discipline. The County objected that the rebuttal testimony exceeded the scope of the County's case. The ALJ allowed the testimony, but observed that the Association had not previously contended, either before hearing or during its case-in-chief, that there was an oral agreement precluding the County from using video in employee discipline. The ALJ also stated that she would permit a continuance to allow the County to offer additional evidence.

At the conclusion of the Association's rebuttal case, after a break, the Association acknowledged that it had not alleged an oral agreement as a basis for any of its claims. The Association then agreed to strike all testimony presented during its rebuttal case (except testimony necessary to admit Exhibit C-16).

We find no error in the ALJ's statements about a possible continuance. OAR 115-010-0070(4) permits an ALJ to continue a hearing. Here, in response to an objection by the County, the ALJ merely informed the parties how she would rule if the County ultimately sought a continuance to rebut evidence—offered by the Association for the first time during its rebuttal case—of an oral agreement. After a break, the Association acknowledged that its rebuttal testimony went beyond the issues alleged in its complaint, and it voluntarily withdrew the testimony. We conclude that the ALJ's statements were consistent with the authority provided by OAR 115-010-0070(4) and were otherwise proper.

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

FINDINGS OF FACT

The Parties

1. The Association is a labor organization within the meaning of ORS 243.650(13). The Association represents certain employees of the County.

2. The County is a public employer within the meaning of ORS 243.650(20).

Facts Related to Bargaining-Related Claims

3. On October 20, 2010, Mark Stotik, who was at that time the County's Labor and Employee Relations Manager, sent an email to the "Union-Administration Group," which included Association representatives. The email responded to a question that had been raised at a meeting that included labor organization representatives about whether there was a list of video cameras in County building public areas, such as hallways, stairways, elevators, and building exteriors.

Stotik's email also stated that temporary concealed cameras may at times be approved by the County's counsel for issues of theft and employee behavior.

4. Approximately one hour later, the Association's counsel, Kevin Keaney, responded, "I need to know more about this use of cameras, particularly with regard to employee surveillance and their use in discipline." He further explained that he did not recall the issue coming up previously.

5. Approximately 20 minutes later, Stotik responded, "The purpose of the cameras is not for surveillance for disciplinary purposes. If by happenstance something is caught on camera we would look at it."

6. About 40 minutes after Stotik's reply, Keaney responded, "If you are going to use the cameras for discipline, whether under #3 below or more generally, then the issue needs to be bargained.³ My question is are there agreements with any unions with regard to cameras and how they are used with employees? Or has this issue just not been dealt with yet?"

7. The next day, October 21, 2010, Stotik responded in relevant part, "As I mentioned previously, the purpose of the cameras is not to surveil employees for purposes of discipline. However, if a camera would provide evidence, either inculpatory or exculpatory, we would reserve the right to use such evidence." Keaney did not reply or respond.

8. No bargaining occurred, and Stotik subsequently left his employment with the County.

9. In July 2016, the County disciplined employee RA. The County considered video from a known camera in a public area in its decision to discipline RA. However, the County also used other sources of information.

10. The Association submitted an information request about the discipline and the County disclosed that it had used video in determining that discipline was appropriate. The County offered to provide the Association with the video.

11. Keaney responded that there was no agreement in place between the Association and the County that allowed the use of video for disciplinary purposes.

12. The County replied by again offering a copy of the video, but did not address Keaney's assertion about whether there was an agreement.

13. Keaney responded that he would take it by the County's silence that the County was not authorized to use the video for disciplinary purposes.

³Keaney's reference to "#3" corresponded to Stotik's October 20 statement regarding the potential use of temporary concealed cameras for issues related to employee behavior.

14. The County replied to Keaney that Julia Getchell, the County's Assistant Director of the Department of Employee Services and the Chief Negotiator, would respond to Keaney's concerns about the video being used as part of the investigatory process.

15. On August 20, 2016, Keaney sent an email to Getchell stating, in part, that "[w]e have evidence of an agreement with Mark Stotik not to use video for disciplinary purposes" and that the Association was considering filing an unfair labor practice complaint.

16. Getchell searched Stotik's electronic files, archived emails, and paper files, but was unable to locate evidence of such an agreement. Getchell then contacted Keaney, asking if she could meet with him to discuss the Association's concerns before the Association filed an unfair labor practice complaint. Getchell asked Keaney to provide her with copies of any agreements between the County and the Association regarding the use or non-use of video in connection with employee discipline.

17. On August 23, 2016, Keaney and Getchell agreed to meet at some point in the future regarding Keaney's assertion that the County had agreed not to use video in connection with employee discipline.

18. By early December 2016, Getchell told Keaney that the County was willing to engage in bargaining about the use of video in connection with employee discipline. In a December 9, 2016, email to Keaney, Getchell reiterated that the County was willing to bargain with the Association. On December 9, 2016, Getchell and Keaney scheduled a bargaining session for March 6, 2017.

19. On March 5, 2017, Keaney sent an email to Getchell. Keaney wrote that the County had previously assured the Association that video would not be used for disciplinary purposes and "[w]e will share the email confirmation from Mark Stotik with you at the meeting."

20. On March 6, 2017, the parties met. After the meeting, Keaney provided Getchell with the email string between himself and Stotik. The email string did not include the October 21, 2010, follow-up email from Stotik in which Stotik stated that the County reserved the right to use video in employee discipline.

21. With the portion of the string that Keaney had provided, Getchell was able to search Stotik's email archives. She located the October 21, 2010, email from Stotik.

22. On March 21, 2017, Getchell sent an email to Keaney. Getchell wrote, "You shared new information with me on March 6 that changed my opinion of the County's bargaining obligation. You also provided me with an incomplete email string to support your position. Please review Mark's response dated October 21, 2010. That is the basis for my change in direction on this topic." The parties engaged in no further bargaining about the use of video in connection with employee discipline.

Facts Related to the Association's Request for Information

23. On April 26, 2017, the Association filed this unfair labor practice complaint.
24. On May 11, 2017, Keaney asked the County to provide a list of all places and locations where the County had placed surveillance cameras that record the activities of Association members during their workdays.
25. On May 30, 2017, Assistant County Counsel Christina Thacker responded on behalf of the County. By email, Thacker asked for an explanation of why the Association believed such information was potentially relevant to a possible grievance or other contractual matter.
26. On May 30, 2017, Keaney responded by email. He wrote that "[t]here are several concerns," including "[p]otential use of the cameras for disciplinary purposes." Keaney's response did not identify any specific pending or possible grievance or other specific contract administration matter.
27. On June 14, 2017, the Association amended its unfair labor practice complaint to include a claim that the County failed to provide information.
28. On June 15, 2017, Thacker sent an email to Keaney to inform him that the County was working on the Association's request.
29. On July 13, 2017, the County provided the requested information to the Association. By email, Thacker informed Keaney that the County was not able to respond sooner due to the Assistant Human Resources Director position being vacant, scheduling conflicts with the Facilities Manager, and the additional staff necessary to cover the request.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The Association's claim that the County violated ORS 243.672(1)(f) by failing to comply with ORS 243.698(2) in October 2010 is time-barred.

ORS 243.672(1)(f) makes it an unfair labor practice to "[r]efuse or fail to comply with any provision of ORS 243.650 to 243.782." The Association contends that the County violated ORS 243.672(1)(f) by failing to comply with ORS 243.698(2). The County contends that this claim is time-barred. We agree.

Under ORS 243.698, during the term of a collective bargaining agreement, the employer must notify the exclusive representative in writing of anticipated changes that impose a duty to bargain. "Within 14 calendar days after the employer's notification of anticipated changes * * * is sent, the exclusive representative may file a demand to bargain." ORS 243.698(3). "If a demand to bargain is not filed within 14 days of the notice, the exclusive representative waives its right to bargain over the change or the impact of the change identified in the notice." *Id.*

Unfair labor practice complaints are subject to a 180-day statute of limitations under ORS 243.672(3), which provides that “[a]n injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice.” ORS 243.672(3) incorporates a “discovery rule,” meaning that “the limitation period begins to run when a public employee, labor organization, or public employer knows or reasonably should know that an unfair labor practice has occurred.” *Rogue River Education Assoc. v. Rogue River School*, 244 Or App 181, 189, 260 P3d 619 (2011). “[T]he determination of whether and when an injured party reasonably should have known of an unfair labor practice presents a factual question that requires case-specific analysis.” *Id.* at 190.

Here, in October 2010, the County stated in writing to the Association that it expressly reserved its right to use video evidence, whether inculpatory or exculpatory, in a potential disciplinary matter. Thus, any obligation or unfair labor practice concerning the County’s October 2010 announcement and ORS 243.698 was triggered at that time. It is undisputed that the Association had *actual* knowledge in October 2010 regarding the County’s use of video cameras. Yet, the Association did not file its complaint until April 26, 2017—more than six years after the expiration of the 180-day time period established by ORS 243.672(3). The Association’s ORS 243.672(1)(f) claim is therefore untimely, and we dismiss it on that basis.⁴

3. The Association failed to meet its burden to prove that the County violated ORS 243.672(1)(e) when it used video in connection with employee discipline in 2016.

ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer or its designated representative to “[r]efuse to bargain collectively in good faith with the exclusive representative.” Generally, a public employer commits a *per se* violation of its duty to bargain in good faith if it makes a unilateral (*i.e.*, unbargained) change in the *status quo* concerning a subject that is mandatory for bargaining. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-009-13 at 21, 26 PECBR 225, 245 (2014).

In a unilateral change case, this Board takes the following approach in the most appropriate order: (1) identify the *status quo* and determine whether the employer changed it; (2) decide whether the change concerns a mandatory subject for bargaining; (3) examine the record to determine whether the employer completed its bargaining obligation before it decided to make the change; and (4) consider any affirmative defenses raised by the employer (*e.g.*, waiver, emergency, or failure to exhaust contract remedies). *Amalgamated Transit Union, Division 757*, UP-009-13 at 22, 26 PECBR at 246, citing *Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11 at 10-11, 25 PECBR 525, 534-35 (2013). We need not apply our analysis in a mechanical manner, and we may proceed to a particular step if that step will be dispositive. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-24-09 at 32, 24 PECBR 730, 761 (2012).

⁴To the extent that the Association alleges that the County’s conduct in 2010 with respect to the video cameras also violated ORS 243.672(1)(e), any such claim is also time-barred.

Here, the Association’s unilateral change claim turns on identifying the *status quo* and determining whether the County changed it. Both parties agree that the *status quo* was established by October 2010. The County contends that there was no change in 2016. We agree with the County.

As set forth above, the County announced in October 2010 that it reserved the right to use video evidence for disciplinary purposes, even though that was not the primary purpose of the cameras. Thus, when the County merely exercised that reserved right in July 2016, it did not change the *status quo*.

Alternatively, even accepting the Association’s contention that the *status quo* limited the County to reviewing video for disciplinary purposes only when conduct was “caught on camera” by “happenstance,” the Association did not meet its burden to prove a change to this *status quo* in 2016. There is no evidence in the record that the County’s use of video in 2016 in connection with employee discipline deviated from Stotik’s description of how the County intended to use video. There is no evidence that the County deliberately sought to record the affected employee’s conduct by video (*i.e.*, recorded the conduct on video deliberately, rather than by happenstance). Moreover, the record is devoid of evidence that, more generally, the way that the County used video in connection with employee discipline in 2016 differed in any way from the way that the County used video from 2010 through 2016. On this record, we do not conclude that there was a change in the *status quo*, even accepting the *status quo* as the Association describes it. In the absence of evidence of any change, the Association did not meet its burden to prove that the County made a unilateral change in violation of ORS 243.672(1)(e). Therefore, we dismiss this claim.⁵

4. The Association failed to meet its burden to prove that the County violated ORS 243.672(1)(f) when it did not notify the Association, pursuant to ORS 243.698(2), before using video in connection with employee discipline in 2016.

The Association also alleges that the County violated ORS 243.672(1)(f) when it did not comply with ORS 243.698(2), the expedited mid-term bargaining statute, before using video in connection with employee discipline in 2016. For the reasons explained above, we conclude that the Association failed to meet its burden to prove that the County changed the way that it used video in connection with employee discipline in 2016. ORS 243.698(2) requires a public employer to notify the affected labor organization in writing only when there are “*anticipated changes* that impose a duty to bargain.” ORS 243.698(2) (emphasis added). In the absence of evidence of a change, the Association failed to meet its burden to prove a violation of ORS 243.698(2) and, as a

⁵Because we conclude that the Association failed to meet its burden to prove a change to the *status quo* in 2016, it is unnecessary for us to address the Association’s theory that the County, once it agreed in 2016 to begin bargaining, violated ORS 243.672(1)(e) when it declined to continue that bargaining. It is also unnecessary for us to consider the County’s affirmative defenses.

The Association objected to the recommended order’s lack of discussion regarding certain precedent from the National Labor Relations Board regarding waiver of bargaining rights. As indicated at oral argument, because the complaint is being dismissed on grounds other than waiver, this precedent is inapposite.

result, ORS 243.672(1)(f). Therefore, we dismiss this claim, and it is unnecessary for us to reach the County's affirmative defenses.

5. The County's response to the Association's May 11, 2017, request for information did not violate ORS 243.672(1)(e).

The duty to bargain in good faith includes the obligation to provide certain information upon request. *Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon, Department of Forestry*, Case No. UP-19-05 at 18, 22 PECBR 33, 40 (2007). A party's response to an information request may be an unfair labor practice under ORS 243.672(1)(e), depending on the totality of the circumstances. *American Federation of State, County and Municipal Employees Council 75, Local 189 v. City of Portland*, Case No. UP-046-08 at 5, 26 PECBR 785, 789 (Order on Remand), *adh'd to on recons of remand*, 26 PECBR 796 (2016).

When determining whether the timeliness of a party's response to an information request violates ORS 243.672(1)(e), the Board looks to the totality of the circumstances, including the four factors identified in *Oregon School Employees Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81, 6 PECBR 5027 (1982). Those factors are (1) the reason given for the request; (2) the ease or difficulty in producing the data; (3) the kind of information requested; and (4) the history of labor-management relations regarding information requests. *Id.* at 5-6, 6 PECBR at 5031-32. Further, where the requested information must be gathered, a reasonable time for responding to a request "will be determined by considering circumstances such as the accessibility of the data, clerical time necessary to produce the information, the workload priorities of the responding party, and the amount of data requested." *Id.* at 6, 6 PECBR at 5032.

Here, the Association contends that the County violated ORS 243.672(1)(e) when it did not provide until July 13, 2017, a list of video cameras that "show the activities of [Association] members during their work days." The Association requested the list on May 11, 2017. On May 30, 2017, the County asked the Association to explain the "potential relevance to a possible grievance or other contractual matter that [the Association] is investigating." The same day, the Association responded with an emailed list of five concerns that the Association had with the video cameras, but did not identify a specific pending or possible grievance or other contract administration matter. On June 15, 2017, the County acknowledged receipt of the Association's list of concerns, and informed the Association that it was working on the request. On July 13, 2017, the County produced the list, and apologized for the delay since June 15. The County explained that a vacancy in the human resources department and coordination with the facilities manager contributed to the delay.

The Association contends that the mere timing of the County's production of the list violated ORS 243.672(1)(e). We disagree. The County explained the reasons for the length of time it took to provide the list. The County explained that its attorney responsible for the matter was temporarily filling in for the vacant assistant human resources director position. Additionally, the County's attorney experienced scheduling difficulties coordinating with the facilities manager. The Association did not offer any evidence refuting the County's reasons. Further, the Association

did not explain how any of the concerns it had identified in its response to the relevance request from the County required a faster production of the list.

On this record, the first and second *Colton* factors—the reason given for the request, and the ease or difficulty producing the data—weigh in favor of the County. *See, e.g., Service Employees International Union Local 503, Oregon Public Employees Union*, UP-19-05 at 11, 22 PECBR at 43 (no violation of ORS 243.672(1)(e) resulting from allegedly untimely production of information where the employer established, among other facts, “that its personnel also had to respond to other workload priorities during the time in question, including collective bargaining responsibilities”). The Association did not explain why the remaining *Colton* factors or the totality of the circumstances support a finding that the County violated ORS 243.672(1)(e) under the particular circumstances of this case. We therefore conclude that the Association failed to meet its burden, and we dismiss this claim.

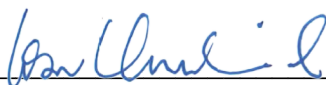
ORDER

The amended complaint is dismissed.

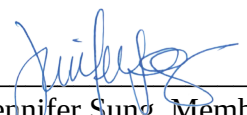
DATED: August 28, 2018.



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-009-18

(UNIT CLARIFICATION)

YAMHILL CARLTON TEACHERS	)	
ASSOCIATION/OREGON EDUCATION	)	
ASSOCIATION,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER AMENDING
	)	CERTIFICATION OF
YAMHILL CARLTON SCHOOL	)	EXCLUSIVE BARGAINING
DISTRICT,	)	REPRESENTATIVE
	)	
Respondent.	)	
	)	

On August 27, 2018, the Yamhill Carlton Teachers Association (Association) filed a petition under OAR 115-025-0008 to amend its certification as the exclusive representative of employees who work in positions requiring licensed teacher personnel (excluding supervisory and confidential employees, classified staff, and substitutes) at Yamhill Carlton School District (District).¹ Specifically, the petition requested that the certification be amended to reflect the Association's affiliation with Oregon Education Association (OEA).

In its petition, the Association established the following:

In August 2017, the Association formally invited all members to meetings to discuss the merits of affiliation. The members in attendance moved for obtaining information from OEA. On September 5, 2017, the Association held a meeting with its members to learn about OEA and the possibility of affiliation. Members at the meetings expressed interest in pursuing affiliation with OEA.

On September 12, 2017, Association President Schulze emailed all members a side-by-side comparison of the Association and OEA. The email also notified members that a vote would follow, with a "yes" vote resulting in affiliation with OEA the following fall of 2018. On September 12, 2017, the Association leadership officially notified all bargaining unit members that a vote would be taken regarding the affiliation of the Association with OEA.

¹See Case Nos. RCM-19/33-93, RC-15-97, and the parties' current collective bargaining agreement.

On September 12, 2017, email notification was sent to all current bargaining unit members regarding the taking of a confidential electronic vote. The electronic ballot contained a single question (with boxes for “yes” and “no”): “Shall [the Association] affiliate with [OEA]?” The total vote was 24 “yes” and 18 “no.”

There were no objections to this petition.

We conclude that the affiliation vote was conducted in compliance with at least minimal due process requirements and that a majority of votes cast by the bargaining unit members supported the Association’s affiliation with OEA. See OAR 115-025-0008.

ORDER

The petition is granted and the Board’s prior certification is amended to reflect the Association’s affiliation with OEA.

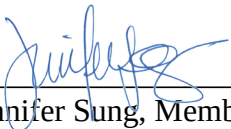
DATED: September 14, 2018.



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-011-18

(REPRESENTATION)

REDMOND FIREFIGHTERS	)	
ASSOCIATION, IAFF LOCAL 3650,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER CERTIFYING
	)	EXCLUSIVE REPRESENTATIVE
REDMOND FIRE AND RESCUE,	)	
	)	
Respondent.	)	
_____	)	

On August 28, 2018, Redmond Firefighters Association, IAFF Local 3650 (Association), filed a petition under ORS 243.682(2)(a) to certify (without an election) a new bargaining unit of certain employees of Redmond Fire and Rescue (described below). A majority of eligible employees in the proposed bargaining unit signed valid authorization cards requesting that the Association represent the designated bargaining unit.

On August 29, 2018, the Board's Election Coordinator caused a notice of the petition to be posted by August 31, 2018. OAR 115-025-0030(3); OAR 115-025-0065. Pursuant to the terms of the notice posting, OAR 115-025-0030(3)(d), OAR 115-025-0065(7), and OAR 115-025-0075(1), objections to the proposed bargaining unit or a request for an election were due within 14 days of the date of the notice posting (*i.e.*, by September 14, 2018). There were no objections to the petition or a request for an election.

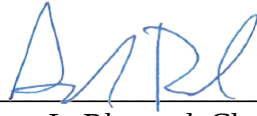
Accordingly, it is certified that:

REDMOND FIREFIGHTERS ASSOCIATION, IAFF LOCAL 3650

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

“All employees of Redmond Fire and Rescue in the Battalion Chief and Training/Volunteer Battalion Chief classifications, excluding supervisory and confidential employees.”

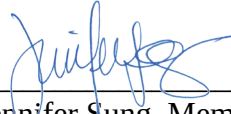
DATED: September 17, 2018.



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-020-16

(UNFAIR LABOR PRACTICE)

TRI-COUNTY METROPOLITAN	)	
TRANSPORTATION DISTRICT OF	)	
OREGON,	)	
	)	
Complainant,	)	
	)	FINDINGS AND ORDER FOR
v.	)	REPRESENTATION COSTS
	)	
AMALGAMATED TRANSIT UNION,	)	
LOCAL 757,	)	
	)	
Respondent.	)	

On July 24, 2018, this Board issued an order holding that Amalgamated Transit Union, Local 757, (ATU) did not violate ORS 243.672(2)(d) by refusing to approve seniority lists affecting journey workers hired by Tri-County Metropolitan Transportation District of Oregon (TriMet) outside of the parties' apprenticeship program. 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(3)(b) and OAR 115-035-0055, this Board finds that:

1. ATU 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).
2. This case required two days of hearing, August 8 and 10, 2017.
3. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). The representation costs award for a case requiring two days of hearing is \$5,000. OAR 115-035-0055(2)(b)(D).

//

//

//

ORDER

TriMet shall remit \$5,000 to ATU within 30 days of the date of this order.

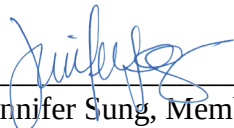
DATED: September 26, 2018.



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-015-18

(UNFAIR LABOR PRACTICE)

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL 1159,

Complainant,

v.

CITY OF LAKE OSWEGO,

Respondent.

FINDINGS AND ORDER FOR
REPRESENTATION COSTS

On July 30, 2018, this Board issued an order holding that the City of Lake Oswego (City) violated ORS 243.672(1)(e) by not completing its bargaining obligations regarding the impact of the City's decision to change its method of calculating unused sick leave for purposes of reporting to the Public Employees Retirement System with respect to Association-represented employees who retired after April 1, 2017. This Board dismissed the remaining five claims alleged by the International Association of Fire Fighters, Local 1159 (Association), which alleged that the City submitted a Last Best Offer (LBO) that did not meet the requirements of ORS 243.746(3), in violation of ORS 243.672(1)(e) and (f), and that the City violated ORS 243.672(1)(e) by: (1) amending its LBO after it was submitted; (2) submitting an unlawful LBO to interest arbitration; (3) failing to reveal its bargaining position; and (4) bargaining in bad faith through the totality of its conduct. This Board also dismissed the City's counterclaim alleging that the Association violated ORS 243.672(2)(b) by including a prohibited subject of bargaining in its LBO.

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

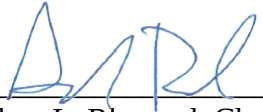
1. The upheld and dismissed charges are equally significant. OAR 115-035-0055(1)(d).

2. When the Board determines that the upheld and dismissed charges are equally significant, neither party is the prevailing party. OAR 115-035-0055(1)(d). 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) and (d).

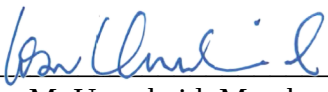
ORDER

Neither party is awarded representation costs.

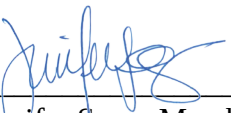
DATED: October 9, 2018.



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-003-16

(UNFAIR LABOR PRACTICE)

AMALGAMATED TRANSIT UNION,
DIVISION 757,

Complainant,

v.

TRI-COUNTY METROPOLITAN
TRANSPORTATION DISTRICT OF
OREGON,

Respondent.

RULING ON MOTION TO STAY

On July 18, 2018, this Board issued an Order concluding that Tri-County Metropolitan Transportation District of Oregon (TriMet) breached its duty to bargain in good faith with Amalgamated Transit Union, Division 757 (ATU), by unilaterally deciding not to schedule newly hired employees to attend union orientation sessions on paid work time. We ordered TriMet to: (1) cease and desist from violating ORS 243.672(1)(e); (2) resume scheduling newly hired employees to attend ATU orientations on paid work time until TriMet has completed its bargaining obligation; (3) make whole any current employees who were hired after TriMet made the unlawful unilateral change by providing them the opportunity to attend ATU orientations on paid work time; and (4) post a notice informing TriMet employees of this Board's decision.

On August 31, 2018, TriMet filed a petition for judicial review. On September 5, 2018, TriMet filed a motion to stay the Order pending appeal, and ATU filed its response opposing TriMet's motion on September 19, 2018. TriMet requested leave to file a reply brief, pursuant to OAR 115-010-0045(4). We granted that request, and TriMet filed its reply on September 28, 2018. For the following reasons, we deny TriMet's motion to stay.

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

“(a) The filing of the petition shall not stay enforcement of the agency order, but the agency may do so upon a showing of:

“(A) Irreparable injury to the petitioner; and

“(B) A colorable claim of error in the order.

“(b) When a petitioner makes the showing required by paragraph (a) of this subsection, the agency shall grant the stay unless the agency determines that substantial public harm will result if the order is stayed. If the agency denies the stay, the denial shall be in writing and shall specifically state the substantial public harm that would result from the granting of the stay.”

Colorable Claim of Error

A colorable claim of error is one “that is substantial and nonfrivolous, or seemingly valid, genuine, or plausible.” *Bergerson v. Salem-Keizer School District*, 185 Or App 649, 660, 60 P3d 1126 (2003). An argument is sufficient to establish such a claim unless it is “frivolous or clearly without any support in the law.” *Portland Fire Fighters’ Association, Local 43, IAFF v. City Of Portland*, Case No. UP-14-07 at 2, 23 PECBR 704, 705 (2010) (Ruling on Motion to Stay) (quotation marks and citation omitted).

TriMet argues that this Board erred in concluding that TriMet had a duty to bargain before ceasing the orientations. Specifically, we concluded that the subject of “paid orientation sessions where employees learn about their terms and conditions of employment and the roles and responsibilities of the employees’ exclusive representative” is mandatory for bargaining. TriMet contends that that subject is either prohibited by law or a permissive subject of bargaining. Although we unanimously concluded that the subject is not prohibited, there was a dissenting opinion on the issue of whether it is permissive. Accordingly, we agree, as does ATU, that TriMet has made the requisite showing of a colorable claim of error.

Irreparable Injury

The term “irreparable injury” is not defined in statute, but the court has stated that an injury is irreparable if the party cannot receive reasonable or complete redress in a court of law. *Arlington Sch. Dist. No. 3 v. Arlington Educ. Assoc.*, 184 Or App 97, 101-102, 55 P3d 546 (2002) (citing *Winslow v. Fleischer, et al*, 110 Or 554, 563, 223 P 922 (1924)); accord *Bergerson*, 185 Or App at 660. The determination of whether “an injury is irreparable depends not upon the magnitude of the injury, but upon the completeness of the remedy in law.” *Arlington Educ. Assoc.*, 184 Or App at 102. Moreover, a “showing” of irreparable injury requires “proof” in the form of “evidence that satisfies a burden of production or persuasion placed upon the proponent of a fact”; “[p]roof must not leave the existence of the fact at issue to speculation.” *Id.* “Therefore, as pertinent here, a ‘showing’ must at least demonstrate that irreparable injury *probably* would result if a stay is denied.” *Id.* (emphasis in original); see also *Portland Fire Fighters’ Association, Local 43, IAFF v. City of Portland*, Case No. UP-13-10 at 2, 24 PECBR 809, 810 (2012) (Ruling on Motion to Stay) (“[S]peculative claims or allegations of possible harm are not sufficient to make a showing of irreparable injury.”).

TriMet asserts that it will suffer irreparable injury if we do not stay two portions of the remedy: (1) the requirement that TriMet restore the *status quo* by resuming the practice of scheduling new hires to attend a union orientation on paid time until TriMet has completed its bargaining obligation; and (2) the requirement that TriMet make whole any current employees who were hired after TriMet made the unilateral change by providing them the opportunity to attend a union orientation on paid time.¹

In support of its motion, TriMet submitted an affidavit describing what compliance with the remedial Order will entail if no stay is granted. TriMet estimates that there are 699 current employees who were hired after March 2016 and are eligible to attend a union orientation pursuant to the Order. TriMet further estimates that each of the affected current employees will need two to three hours of paid time to attend an orientation (including travel time), and that the payroll “cost” associated with that time will total \$41,451 to \$62,176 in wages. Going forward, TriMet estimates that it will hire an average of 27 union employees per month; that each new hire will also need two to three hours to attend an orientation; and that the payroll cost associated with that time will total \$870.48 to \$1,305.72 per month while the case is pending appeal. TriMet does not allege that complying with either portion of the Order will require TriMet to expend additional funds over and above the payroll costs that it would incur even in the absence of the Order.² Nor does TriMet allege that complying with the Order will cause it to incur payroll costs that exceed its payroll budget.

TriMet first argues that the payroll costs it has identified (*i.e.*, the total wages associated with the amount of time that employees will spend attending orientation) constitute irreparable injury. We disagree, for several reasons.

To begin, in calculating its costs, TriMet incorrectly assumes that it will incur costs “until the appeal is resolved.” That assumption is based on a misunderstanding of the nature and scope of our Order. We did not order TriMet to continue paid orientation sessions in perpetuity or until the appeal is resolved; to the contrary, we ordered TriMet to restore and maintain its longstanding practice only until it has completed its bargaining obligation. TriMet is free to propose any changes to its longstanding practice (even cessation of the practice) at any time. TriMet need only bargain in good faith with ATU before making a decision on any proposed change. Moreover, under the circumstances of this case, the expedited bargaining process provided by ORS 243.698 applies, meaning that the parties would need to bargain in good faith over TriMet’s proposed changes for a *maximum* of 90 days. See ORS 243.698(1), (4).³ During that period, the parties could reach a good-faith agreement that would reduce or eliminate the cost of the orientations. If the parties did

¹Because nothing in TriMet’s motion specifically addresses the portions of our Order that require TriMet to cease and desist from violating ORS 243.672(1)(e) and post a notice regarding the Order, it appears that TriMet is not requesting a stay of those portions. In any event, TriMet has not identified any irreparable injury that could result from complying with a cease and desist order or notice posting. As a result, we decline to stay those portions of the Order without further discussion.

²For example, TriMet does not allege that it will need to pay any employees to work extra hours or overtime to cover for the affected employees while they attend orientation.

³The parties could mutually consent to additional bargaining.

not reach an agreement, the parties would proceed to binding interest arbitration, and it is possible that the arbitrator would award TriMet's proposed changes.⁴ If that were to occur, TriMet would stop incurring the asserted costs at that time. Although the outcome of bargaining is unpredictable, the point is this: if the Order is not stayed, TriMet has the option to propose its preferred changes in the expedited bargaining process, which could reduce or eliminate TriMet's predicted costs well before the appeal is resolved.⁵ Thus, TriMet's asserted injury is, at best, speculative. Moreover, under this Board's longstanding precedent, TriMet would not be irreparably harmed merely by engaging in the bargaining required by our Order, and TriMet does not argue otherwise. *See, e.g., Oregon AFSCME Council 75 v. State of Oregon, Oregon Judicial Department–Yamhill County*, Case No. RC-003-17 at 3-4, ___ PECBR ___ (2018) (Ruling on Motion to Stay) (collecting cases).

Further, even if TriMet's predicted payroll costs were not speculative, they still would not constitute irreparable injury. TriMet argues that it will be irreparably injured by paying the wages at issue because TriMet will not be able to recoup the wages paid to employees after the orientations occur. However, we did not direct TriMet to pay any extra wages; rather, we directed TriMet to continue its longstanding practice of providing employees with orientations (on working time) until it has completed its bargaining obligation. TriMet has not asserted (much less proven) that it will incur any expense other than the payroll expense that it would incur even in the absence of our Order. In other words, the issuance of a stay would not save TriMet any payroll costs, because TriMet would still pay the affected employees the same amount of wages for the same number of hours.

Finally, there would be no irreparable injury even if the wage payments at issue were viewed as an extra payroll "cost" akin to a back pay payment. In the absence of exceptional circumstances, "a monetary obligation such as make-whole payments is not an irreparable injury subject to a stay under ORS 183.482(3)(a)(A)." *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06 at 6, 22 PECBR 643, 648 (2008) (Ruling on Motion to Stay). *See also Bergeson*, 185 Or App at 644-45 (rejecting argument that school district would be irreparably harmed because it "ha[d] no assurance that * * * it could ever recover the payments required by [the agency's] order"); *State Teachers Education Association/OEA/NEA, et al. v. Willamette Education Service District, et al.*, Case No. UP-14-99 at 2-3, 19 PECBR 339, 340-41 (2001) (Ruling on Motion to Stay); *Central Education Association and Vilches v. Central School District 13J*, Case No. UP-74-95 at 3, 17 PECBR 250, 252 (1997) (Ruling on Petition for Enforcement and

⁴See ORS 243.698(4); ORS 243.742; *International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-049-12, 25 PECBR 871 (2013).

⁵We note that we issued the Order in this case on July 18, 2018, and TriMet has had the option to propose changes to the *status quo* orientations practice since that date. If TriMet had proposed changes at that time, the 90-day bargaining period under ORS 243.698 would be substantially complete by the date of this ruling. The parties could have reached a good faith agreement by now, and if not, they would at least be close to either reaching agreement or submitting last best offers for resolution through interest arbitration.

Motion to Stay). TriMet has not established that there are any exceptional circumstances in this case.⁶

TriMet next argues that a stay is warranted because it cannot recover the hours that employees spend at the orientations after they occur. TriMet has not, however, established that permitting the eligible employees to spend some work hours at orientation—a practice that TriMet voluntarily engaged in for at least 20 years—would more likely than not result in an irreparable injury. TriMet only asserts that diverting the 699 affected current employees from their assigned work duties (for two to three hours per employee) “would dramatically disrupt TriMet’s staffing and operations.”⁷ That broad assertion, however, is “speculative and unsupported by sufficient evidence.” *Oregon AFSCME Council 75, Local 1329, v. Crook County Road Department*, Case No. UP-045-10 at 4, 25 PECBR 435, 438 (2013) (Ruling on Motion to Stay) (county did not provide sufficiently specific evidence to establish assertion that payment of back pay would impair the county’s ability to fund services). TriMet did not provide any other evidence to prove that its transit or other operations would be disrupted, or that the extent of the predicted disruption would be significant. For example, there is no evidence demonstrating that other employees would be unable to complete any work necessary to maintain services during the affected employees’ temporary absences.⁸ Thus, TriMet has failed to meet its burden to prove that scheduling the affected employees to attend union orientations on paid work time probably would cause irreparably harmful disruption to TriMet’s operations. *See, e.g., Bergeson*, 185 Or App at 664-65 (evidence insufficient to show irreparable injury).

In sum, TriMet has not made the required showing of irreparable injury.⁹ Consequently, we deny TriMet’s motion to stay.

⁶Even if TriMet would be injured merely by paying wages to its employees for their time spent at union orientations, TriMet has not established that such a monetary injury could not be redressed by a damages award. TriMet asserts that it will not be able to recover the amount of wages paid from either the employees or ATU, but it does not cite any legal authority in support of that proposition. Such an “undeveloped and unsupported assertion does not show that TriMet would be irreparably injured if a stay is denied.” *Arlington Educ. Assoc.*, 184 Or App at 103.

⁷TriMet does not assert that its operations would be disrupted in any way by scheduling future new hires (as opposed to the affected current employees) to attend orientations during their initial training period. TriMet presumably does not make that argument because (as the underlying record shows) new hires do not perform regular work duties during their initial training period. Thus, even if TriMet had substantiated its assertion regarding disruption, there would still be no basis for staying the portion of the Order that applies to future new hires.

⁸The Order does not require TriMet to schedule all of the affected current employees to attend an orientation at the same time or at any particular time. The parties may schedule the orientations in a manner that minimizes any potential disruption. Moreover, as part of the parties’ good-faith bargaining, the parties could mutually agree to an alternative arrangement.

⁹Because we conclude that TriMet has not made the requisite showing of irreparable injury, we do not reach ATU’s alternative argument that public harm would result if the Order is stayed.

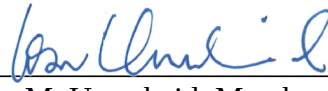
ORDER

TriMet's motion to stay the Order pending judicial review is denied.

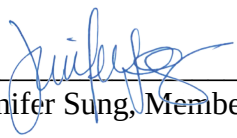
DATED: October 11, 2018.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482(3)(d).

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-002-18

(UNIT CLARIFICATION PETITION)

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

Olivia Wotman, Attorney at Law, Public Safety Labor Group, Portland, Oregon, represented the Petitioner.

Pierre L. Robert, Attorney at Law, Local Government Personnel Institute, Salem, Oregon, represented the Respondent.

On September 18, 2018, Administrative Law Judge Martin Kehoe issued a recommended order in this matter. The parties had 14 days from the date of service of the 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).

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. Accordingly, the order is binding on, and has precedential value for, only the named parties in this case.

ORDER

The bargaining unit represented by the City of Coquille Police Officers Association is clarified to exclude the Sergeant position.

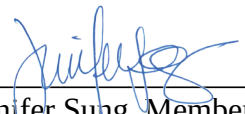
DATED: October 11, 2018.



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-002-18

(UNIT CLARIFICATION PETITION)

CITY OF COQUILLE POLICE OFFICERS	)	
ASSOCIATION,	)	
	)	
Petitioner,	)	RECOMMENDED RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW, AND
	)	PROPOSED ORDER
CITY OF COQUILLE, OREGON,	)	
	)	
Respondent.	)	
_____	)	

A hearing was held before Administrative Law Judge (ALJ) Julie Reading on March 30, 2018 at Coquille City Hall in Coquille, Oregon. The case was subsequently transferred to ALJ Martin Kehoe. The record closed on June 13, 2018, upon receipt of the parties' post-hearing briefs.

Olivia Wotman, Attorney at Law, Public Safety Labor Group, Portland, Oregon, represented the Petitioner.

Pierre L. Robert, Attorney at Law, Local Government Personnel Institute, Salem, Oregon, represented the Respondent.

On January 26, 2018, the Petitioner, the City of Coquille Police Officers Association (Association), filed a unit clarification petition with the Employment Relations Board (Board). The Respondent, the City of Coquille (City), filed timely objections on February 16, 2018. As framed by ALJ Reading, the issue presented by the petition is whether the Sergeant position is included in the Association's bargaining unit by statute and/or agreement. The petition itself specifically implicates (1) OAR 115-025-0005(2), which is selected when a petitioner seeks to clarify whether certain employees are supervisory, confidential, or managerial employees under the definitions provided in ORS 243.650; and (2) OAR 115-025-0005(3), which is selected when a petitioner seeks to clarify whether certain employees are included in an existing bargaining unit based on the express terms of a certification or collective bargaining agreement. As set forth below,

we ultimately conclude that the Sergeant position must be excluded from the unit because the position (1) is supervisory within the meaning of ORS 243.650(23) and (2) is not included in the unit by agreement, and therefore dismiss the petition.

RULINGS

All rulings by ALJ Reading were reviewed and are correct.

FINDINGS OF FACT

Background

1. The City is a “public employer” within the meaning of ORS 243.650(20).
2. The City’s Police Department follows a military-style chain of command. The petitioned-for Sergeant position is ranked immediately above the Police Department’s Officers and falls immediately below the Police Department’s Chief. The Chief reports directly to the City Manager.
3. The Police Department is presently led by Chief Scott Sanders. Sanders started as Chief on June 1, 2016. At that time, the Police Department employed a number of Officers but had no Sergeant. One of those Officers was Orrin Wallace. Later, when the unit clarification petition was filed on January 26, 2018, there were several Officers and one Sergeant (Wallace). As of March 30, 2018, the date of the hearing, there were Officers (including a demoted Wallace) but there was no Sergeant. Prior to Wallace’s tenure as Sergeant, another employee served as Sergeant for a time, but that individual was demoted and then retired. Immediately prior to Sanders’ run as Chief, then-City Manager Ben Marchant acted as Interim Chief for a time.
4. The Association is a “labor organization” within the meaning of ORS 243.650(13).
5. The Association and the City were once parties to a collective bargaining agreement (CBA) that, by its terms, ran from July 1, 2016 through June 30, 2018.
6. Article 1, Section 1 of the parties’ CBA provides, “The employer recognizes the Association as the exclusive bargaining agent for all sworn patrol officers of the City of Coquille Police Department bargaining unit excluding supervisory and confidential employees as defined in the PECBA.” (Exh. C-1 at 4.) The term “PECBA” is an acronym for the Public Employee Collective Bargaining Act, ORS 243.650 to 243.782, which governs Oregon public sector labor relations. Article 1, Section 2 of the CBA provides, in part, “Bargaining unit clarifications may be initiated by either party through the Employment Relations Board.” (Exh. C-1 at 4.)
7. The City and the Police Department maintain separate but related policy manuals. The City’s policy manual applies to all City employees, while the Police Department’s policy manual specifically applies to Police Department employees. When the two manuals are in conflict, the Police Department follows its own manual. Beyond that, the City’s policy manual

provides, “Should there be a conflict between the manual, Collective Bargaining Agreement (CBA) and the law; the CBA and the law will prevail.” (Exh. C-2 at 8.)

8. Orrin Wallace started his employment with the City as an Officer on March 13, 2013. On July 1, 2016, the same day the parties’ CBA went into effect, Chief Sanders promoted Wallace from Officer to Sergeant. At that time, Ben Marchant was serving as City Manager. Moreover, when Wallace was first promoted to Sergeant, the Sergeant position was not considered part of the Association’s bargaining unit and Wallace was not paid extra for his overtime work. In 2015 or 2016, Wallace became the Association’s President. He remained in that role as of the date of the hearing.

9. When Chief Sanders posted the opening for the Sergeant position in the spring of 2016, he attached a memorandum describing the “authority, duties, and responsibilities” of a Sergeant. (Exh. C-5 at 1.) The memorandum, which was unsigned and undated, was created by Chief Mark Daniels, who served as Chief before Chief Janice Blue, who retired around February 2016.

10. During the tenure of City Manager Marchant, the City and the Association started working on a memorandum of understanding (MOU) that, once completed and signed, would modify the parties’ CBA and move the Sergeant position into the Association’s bargaining unit. However, Marchant, who wrote the first draft of the MOU, left his job with the City in September 2016, before the MOU was completed or signed. The next City Manager was Chuck Dufner, who started as Interim City Manager in September 2016 on Marchant’s last day then became full City Manager in October or November 2016. Dufner remained the City Manager as of the date of the hearing.

11. In the early fall of 2016, after Dufner took over as City Manager but before the MOU was signed, Dufner, Chief Sanders, and then-Sergeant Wallace had a discussion in which Wallace said that, if he was in the Association’s unit, he could not unilaterally discipline Officers but could still recommend discipline to Chief Sanders. In addition, Wallace expressed a concern about one bargaining unit employee disciplining another, and either Wallace or Dufner questioned whether such discipline could be grieved to another unit employee. Around the same time, Wallace also informed Dufner that he had not gotten a pay raise when he was promoted to Sergeant.

12. On November 7, 2016, both parties signed the MOU, which in its final form stated:

“Whereas, the City of Coquille has previously held the sergeant position as a non-union administrative position and desires to retain this right this MOU shall not be interpreted as setting precedent and the City at its sole discretion reserves the right to determine the placement of individuals hired or promoted to the rank of sergeant as a union or non-union.

“Whereas, the City of Coquille and the City of Coquille Police Officers Association desire to improve the efficiency and practical functions of the Coquille Police Department are willing to experiment with the new arraignment of the sergeant being a union position, and;

“Whereas, the salary schedule lacks reference to the promotional rank of Police Sergeant within the employment classifications included in the Collective Bargaining Agreement, and;

“Whereas, it is in the best interest of the Coquille Police Department to maintain the position of Police Sergeant as a useful rank and function within the organization, whether vacant or occupied, and;

“Whereas, it is prudent and necessary to include a salary schedule for this position;

“Now therefore, be it resolved, that the City of Coquille and the Coquille Police Officers Association hereby agree that for the purposes of clarification of Article 33 Salaries of the Collective Bargaining Agreement July 1, 2016 – June 30, 2018, the position of Police Sergeant will be included as a position in the union according to the terms of the Collective Bargaining Agreement, and the salary schedule for this position shall be adopted with six steps.” (Exh. R-1 at 2.)

At that point in the MOU, the agreement noted six pay steps for the Sergeant position. Immediately following that, the MOU stated:

“Be it further resolved, that employees who do not demonstrate the capacity to perform adequately in a promotional position during the probationary period shall be allowed to resume their pre-promotional position and duties, and they shall not be subject to the provisions of Article 16 Section 3, except as provided for in Article 21.¹ In addition should the city determine the Sergeant position needs to be an administrative position not in the union, the officer currently holding the union position shall be allowed to resume their pre-promotional position and duties.

“Executed 7, November 2016 effective date of 1, July, 2016.” (Exh. R-1 at 2.)

Beneath that language, City Manager Dufner signed on behalf of the City, while Wallace signed on behalf of the Association as its President. As indicated, July 1, 2016 was the date that Wallace first started working as a Sergeant. As part of the new arrangement, Wallace was given back pay for the overtime that he had worked since that promotional date.

13. In November or December of 2017, Chief Sanders took over all of Wallace’s scheduling responsibilities (which are discussed below) after Wallace unsuccessfully sought to change the Officers’ schedule from a “three on, three off” schedule to a “four on, four off” schedule. Chief Sanders did not intend for that change in the Sergeant’s scheduling responsibilities to become a permanent one at that time, and if the position is staffed in the future, Chief Sanders expects that the Sergeant will be the primary person responsible for scheduling Officers’ work.

¹Article 16, Section 3 of the CBA simply states, “Probationary employees may be discharged without cause and without appeal.” (Exh. C-1 at 10.) Article 21 of the CBA addresses discipline and discharge.

14. On January 23, 2018, an attorney for the City named Pierre L. Robert sent the Association a letter. Therein, Robert notified the Association that the City would be classifying the Sergeant position as an unrepresented position because, upon review, the City had determined that any employee in the Sergeant position was a “supervisory employee” as defined by ORS 243.650(23), and indicated that the City would implement that decision on March 1, 2018. Among other things, the letter also stated:

“[T]o implement this decision - and in accordance with the express terms stated in the last paragraph of the MOU - the City, effective March 1, will allow Sgt. Wallace, at his sole discretion, to resume his pre-promotional position of Patrol Officer at the top salary step and with all benefits accorded to the Patrol Officer position as stated in the CBA and Appendix A thereto. By electing this option, he may remain in the bargaining unit and remain a member of and officer of the CPOA.

“In the alternative, Sgt. Wallace may continue his employment in the Sergeant classification at his current salary with certification pay – but as an exempt employee there will be no possibility of earning overtime pay.” (Exh. R-2 at 2.)

Attached to the end of Robert’s letter was a copy of the language of ORS 243.650(19), ORS 243.650(23), and ORS 243.662 (all of which are explained below), which the body of the letter described as “the key statutes” relevant to the matter. (Exh. R-2 at 1.)

15. After Wallace received Robert’s letter, Wallace stopped performing all of his Sergeant-specific duties. On January 26, 2018, the Association filed the instant unit clarification petition with the Board. On or around February 28, 2018, Wallace sent a letter to the City stating that he did not want to be taken out of the bargaining unit. On March 2, 2018, Chief Sanders told Wallace that he was being demoted from Sergeant to Officer. On March 15, 2018, Wallace’s pay was adjusted. The Sergeant position remained unfilled as of the date of the hearing.

Sergeant Duties

Hire

16. When the Police Department wants to hire a new Officer, the Chief and the Police Department’s Records Clerk post the opening. After that, applicants take a written test and are interviewed by an “oral board.” In short, an oral board is made up of some combination of the Chief, the Records Clerk, a Sergeant, Officers, and volunteers. During an interview, each oral board member takes a turn reading a question from a questionnaire written by the Chief and the Records Clerk. An oral board member cannot ask any questions beyond what is in that questionnaire. After listening to the applicants’ answers, the members have a group discussion and make recommendations to the Chief about who should be hired. Previously, the Record’s Clerk’s recommendations have weighed more heavily than the Sergeant’s. The “final decision” regarding who gets hired belongs to the City Manager based on the Chief’s recommendations. (Exh. C-3 at 24.)

Assign and Direct

17. The Sergeant is expected to “[p]repare, maintain and update shift schedules” for the Officers and (except for the brief period of time the responsibility was taken away, as noted above) ordinarily does so. (Exh. C-5 at 4.) Each schedule covers a single month and states what days an Officer is going to work that month. The Sergeant can also identify when an Officer is going to work a special event such as a parade. When then-Sergeant Wallace was responsible for scheduling, he tried to generate each month’s schedule about three months ahead of the time being scheduled. Sometimes it came out about a month in advance.

18. When deciding how to schedule Officers, the Sergeant must ensure that the Police Department’s mission is accomplished and that the schedule is fair. The Sergeant is also expected to take into account each Officer’s experience and training. Although the Sergeant does not assign specific meal and rest breaks, he or she must “[e]nsure that no more than two officers, to include supervisory personnel, are on mealtime or coffee breaks at the same time.” (Exh. C-5 at 5.) The Sergeant generally does not need to get the Chief’s approval when making the schedule. That said, in practice, if either Chief Sanders or Wallace had a schedule-related question, the two had a discussion about it. Once a schedule is posted, the Chief or the Sergeant can always make changes to it. Officers can also make a change if they make a switch with one another.

19. The Sergeant signs off on Officers’ time off and vacation requests. Article 27, Section 7 of the parties’ CBA states in part: “Requests for vacation shall not be unreasonably denied by the Employer. Whenever there is conflict between at least two employees over vacation scheduling and they are unable to reconcile this conflict among themselves, the vacation request shall be granted to the employee with the most seniority. This conflict resolution process does not apply to vacations already approved.” (Exh. C-1 at 16-17.) The Sergeant also signs Officers’ sick leave slips and notes that time on the monthly calendar.

20. The Sergeant can authorize overtime when necessary. Moreover, the Sergeant can exercise that authority without getting the Chief’s prior approval and that has happened. However, overtime is mostly handled by the Chief. Furthermore, whenever Wallace authorized overtime as Sergeant, he always tried to get Chief Sanders’ permission first. Wallace only authorized overtime on his own (1) if he could not reach Chief Sanders at the time or (2) if he had been left in charge when Chief Sanders was out of town. Assigning overtime can involve calling off-duty Officers back to work.

21. Due to low staffing, the Sergeant often works alone and just one Officer is on duty at a time during a shift. Beyond that, Officers are trained to manage their day-to-day duties on their own. Nonetheless, a Sergeant is still expected to monitor Officers’ daily work performance and provide Officers with direction and guidance. The Police Department’s policy manual provides, “The Sergeant’s work schedule is flexible, in order to facilitate supervision and evaluation of the patrol function.” (Exh. C-4 at 30.)

22. If a Sergeant sees that an Officer is not doing something right, the Sergeant is expected to follow up with the Officer and correct him or her. The Sergeant can also direct an Officer to block a particular road for a certain period of time during an event. During planned

absences, the Chief can leave the Sergeant in charge “as the acting Chief of Police.” (Exh. C-4 at 19.) Wallace has provided some direction related to his role as a canine handler, but that authority is considered separate from Wallace’s Sergeant-specific duties, for Wallace was a canine handler before, during, and after his brief time as a Sergeant.

23. Officers frequently write reports after they take calls. The Sergeant is expected to review those reports “for content and accuracy” (Exh. C-4 at 161) and ensure that the reports have “[c]orrect grammar, spelling and sentence structure” (Exh. C-5 at 5) and “contain the necessary elements of the crime and or information and attachments to ensure likely prosecution” (Exh. C-5 at 5). When Wallace reviewed reports as a Sergeant, he relied on his personal experience with and knowledge of the court system.

24. The Sergeant is expected to train Officers and does so. That can happen when a Sergeant is acting as a Field Training Officer (FTO), for example. Wallace has also served as a “standardized field sobriety test instructor,” but that responsibility is not affiliated with Wallace’s Sergeant duties, for any Officer can be certified to do the same. Separately, while Wallace was Sergeant, Chief Sanders determined whether Officers’ requests for extra training were approved. If Chief Sanders approved the training request, Wallace put the training on the calendar.

25. Every new Officer (i.e., “trainee”) has to complete the Police Department’s Field Training and Evaluation Program (FTEP) before becoming a regular Officer. If the Officer fails the FTEP, he or she is fired. According to Article 16, Section 3 of the CBA, “Probationary employees may be discharged without cause and without appeal.” (Exh. C-1 at 10.) During the FTEP, each Officer is assigned a specific FTO. An FTO can be another Officer, the Sergeant, or the Chief. The FTO is responsible for training his or her Officer, writing down daily observations of the Officer’s work, and rating that work. The FTO also decides if the new Officer can move on from one FTEP phase to the next. However, whether or not the new Officer’s employment will continue is ultimately up to the Chief and the City Manager.

26. The Sergeant completes annual “employee performance reviews” for Officers using standardized forms. In order to complete such a review, the Sergeant continuously evaluates and monitors Officers’ “work habits, performance, and demeanor” and keeps notes on the same. (Exh. C-5 at 5.) In each employee performance review form, the Sergeant gives an Officer a rating from 1 to 5 for job knowledge, work quality, attendance/punctuality, initiative, communication/listening skills, and dependability. A rating of 1 signifies poor performance while a 5 signifies excellent performance. The Sergeant is also expected to include comments for each of those subjects. After that, the Sergeant is expected to include a final recommendation regarding whether or not the reviewed Officer should receive an annual step increase in pay if applicable. Near the end of each review form, the Chief leaves his or her own comments and indicates whether he or she concurs with the Sergeant’s review. The Chief can always tell the Sergeant to add something to a review.

27. The City’s policy manual provides, “Performance evaluations serve as one factor in decisions related to employment, such as training, merit pay increases, job assignments, employee development, promotions, and retention.” (Exh. C-3 at 39.) Similarly, the Police Department’s policy manuals provides, “The Coquille Police Department utilizes a performance

evaluation report to measure performance and to use as a factor in making personnel decisions that relate to merit increases, promotion, reassignment, discipline, demotion and termination.” (Exh. C-4 at 450.)

Discharge and Discipline

28. The Sergeant can recommend discipline to the Chief when necessary and Wallace has done so. However, in practice, every instance of discipline that came up while Wallace was a Sergeant was discussed beforehand with Chief Sanders. Moreover, Chief Sanders did not accept all of Wallace’s recommendations, and the City Manager always has the ultimate say when someone is being fired. Ordinarily, the Chief actually presents the discipline to the Officer. However, a Sergeant may present lower level discipline. When considering whether to recommend discipline, the Sergeant is expected to “[u]tilize progressive discipline when justifiable.” (Exh. C-5 at 6.) Moreover, discipline “should be approached objectively.” (Exh. C-5 at 6.) In practice, the discipline that may be issued can range from a verbal reprimand or warning on the lowest end up to and including discharge.

29. The Sergeant may receive complaints from the public about Officers, and those complaints may involve a potential policy violation or safety issue, for example. Whenever the Sergeant gets a complaint about or otherwise learns of a potential violation, the Sergeant can investigate the matter or talk to the Chief about it and ask how it should be handled. If the Sergeant opts to go to the Chief, the Chief can simply handle the matter on his or her own, call the Officer in for a discussion, or tell the Sergeant to “write it up.” When the Sergeant conducts an investigation, he or she gathers facts in order to help determine whether the Officer should be disciplined. At the end of an investigation, the Sergeant can present his or her findings to the Chief and recommend to the Chief whether an Officer should be disciplined and what level of discipline should be used, if any. If the Chief is presented with a Sergeant’s investigatory findings, the Chief does not conduct his or her own investigation. In practice, many complaints about Officers are made directly to the Chief.

30. In a section titled “Corrective Action and Disciplinary Procedures,” the City’s policy manual provides, in part: “Although one or more corrective action measures may be taken in connection with a particular performance problem, **there is no formal order that will be followed.** Corrective action may include any of a variety of actions depending on the circumstances and severity of the particular situation.” (Exh. C-3 at 40, emphasis in original.) The manual then provides some examples of such corrective action, including “[v]erbal counseling,” “[m]andatory participation in training and/or counseling and/or a fitness for duty evaluation,” “[w]ritten warning,” paid and unpaid “[s]uspension,” and “[t]ermination.” (Exh. C-3 at 40.) After those examples, the manual notes:

“The corrective action process will not always commence with a verbal counseling or include a sequence of steps. Some acts, particularly those that are intentional or serious, warrant more severe action on the first or subsequent offense. Consideration may be given to the seriousness of the offense, [an employee’s] intent and motivation to change the performance, and the environment in which the offense took place.” (Exh. C-3 at 40.)

31. Article 21 of the parties' CBA addresses discipline and discharge. Section 1 of Article 21 states:

"The Employer has the right to discipline for cause; however, discipline shall be imposed in a manner least likely to embarrass the employee before the public or other employees. Any disciplinary action imposed upon an employee may be processed as a grievance through the regular grievance procedure." (Exh. C-1 at 12.)

Section 2 of Article 21 states:

"Any employee who has completed a probationary period shall be disciplined only for just cause. Just cause discipline shall include, but is not limited to, violation of laws, orders or departmental rules and regulations. Forms of discipline, include, but are not limited to, the following: written reprimand, suspension, or discharge.

"Counseling, oral warnings reduced to writing, work improvement plans and other similar corrective measures are not considered discipline and will not be directly placed in an employee's personnel file. Such corrective actions may be maintained in supervisory files or performance evaluations and are not subject to the grievance process.

"Discipline will be progressively applied for repeated offenses, or applied based on the totality of circumstances." (Exh. C-1 at 12.)

Relatedly, the Police Department policy manual states, "Discipline may be initiated for any good cause." (Exh. C-4 at 149.)

32. In October 2017, then-Sergeant Wallace issued a "[w]ritten notification of policy violation" to an Officer. (Exh. C-8 at 1.) Before he did so, Wallace brought the violation to Chief Sanders' attention and had a discussion with Chief Sanders about it. During their discussion, Wallace and Sanders discussed whether the violation was due to a training issue, whether it was a first time or repeat offense, whether it was simple neglect, and whether the problem behavior could be fixed. In the document issued – which Wallace authored – Wallace notified the Officer of an "internal affairs investigation" and summarized the violation. (Exh. C-8 at 1.) At the end of the document, Wallace noted that the Officer was "a newer officer with less than one year of patrol experience," then recommended that the Officer "be given a verbal warning for violating policy and procedure" and that the violation "not go into his file as long as he does not have any more disciplinary actions taken against him within the next 6 months." (Exh. C-8 at 2.)

33. In another instance, then-Sergeant Wallace observed an Officer using tobacco on the job, which is a policy violation, and recommended to Chief Sanders that the Officer be disciplined for it. That recommendation was rejected.

34. Then-Sergeant Wallace once recommended that a new Officer he was training as an FTO be terminated. Initially, Chief Sanders rejected that recommendation. After that, Wallace recommended to Chief Sanders that two other Officers and Chief Sanders each take turns training the new Officer. That recommendation was accepted. Later, after each of those three took a turn training the new Officer, Wallace and the two other Officers recommended termination. After considering the opinions of Wallace and the other two Officers, Chief Sanders agreed that the new Officer should be terminated. In the end, the City Manager made the ultimate determination that the new Officer would be terminated. Wallace helped to draft the termination letter.

Adjust Grievances

35. Article 22 of the parties' CBA provides a detailed grievance and arbitration procedure. Step 1 of that procedure provides that employees or the Association "may take up a written grievance with the Police Chief." (Exh. C-1 at 13.) After that, Step 2 of the procedure is handled by the City Manager and Step 3 is arbitration.

36. As indicated above, Officers were disciplined while Wallace was a Sergeant. However, none of that discipline was grieved and Wallace has never adjusted any grievances. Moreover, Wallace believes that he did not have the authority to adjust grievances while a Sergeant.

Other Duties

37. While a Sergeant, Wallace never transferred, suspended, laid off, promoted, or rewarded any Officers or placed an Officer on administrative leave. Wallace also did not believe that he had the authority to do any of those things in that role. Regarding layoffs, the CBA states in part, "In the event the Employer determines a reduction in personnel is necessary for any reason, employees shall be laid off according to the total months of seniority by classification within the bargaining unit." (Exh. C-1 at 11.) Regarding the authority to reward, Wallace once nominated an Officer for employee of the year for 2017, but Chief Sanders rejected that and chose the Records Clerk instead.

38. Wallace never sent anyone home early. However, then-Sergeant Wallace did once try to make that happen and Chief Sanders stopped him from doing so. In that instance, Wallace determined that an Officer's poor vision was a safety issue and that the Officer should not be able to drive a patrol vehicle. Subsequently, Wallace recommended to Chief Sanders that the Officer be sent home until he could see properly with glasses or contacts. In response, Chief Sanders told Wallace to drive the vehicle himself with the Officer in the passenger seat and to continue training the Officer. After Wallace drove the Officer for two or three months after that, the Officer got glasses.

CONCLUSIONS OF LAW

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

2. The petitioned-for Sergeant position is not included in the Association's unit by agreement and is a "supervisory employee" within the meaning of ORS 243.650(23) and thus is not appropriately included in the Association's bargaining unit.

Standards of Decision

Under the PECBA, "[p]ublic employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." ORS 243.662. However, under ORS 243.650(19), "supervisory employees" are not "public employees" and cannot be appropriately included in a bargaining unit. *Office and Professional Employees International Union, Local #11 v. City of Hillsboro*, Case No. RC-4-99 at 6-7, 18 PECBR 269, 274-75 (1999). Beyond that, Article 1, Section 1 of the parties' CBA specifically excludes such statutory supervisors from the Association's bargaining unit, as noted earlier.

To determine supervisory status, this Board assesses whether an employee meets the specific criteria set out in ORS 243.650(23), which defines a "supervisory employee" as:

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

The supervisory status issue therefore requires the resolution of three questions, each of which must be answered in the affirmative for an employee to be deemed a supervisory employee: (1) Does the employee have the authority to take action or to effectively recommend action be taken in any one of the 12 listed activities? (2) Does the exercise of that authority require the use of independent judgment? and (3) Does the employee hold the authority in the interest of management? *City of Portland v. Portland Police Commanding Officers Association*, Case No. UC-017-13 at 22-23, 25 PECBR 996, 1017-18 (2014) (citing *Deschutes County Sheriff's Association v. Deschutes County*, Case No. UC-62-94 at 12-13, 16 PECBR 328, 339-40 (1996)).

For an employee to effectively recommend actions, his or her position must be given substantial credence more often than not. *Oregon AFSCME, Council 75 v. Benton County*, Case No. C-210-82 at 14, 7 PECBR 5973, 5986 (1983). Evidence of an effective recommendation can be found by a lack of any independent review or investigation of the recommendation by a higher level supervisor. *City of Portland*, UC-017-13 at 22-23, 25 PECBR at 1017-18 (citing *American Federation of State, County and Municipal Employees, Council 75 v. Lane County Sheriff's Office*, Case No. C-281-79 at 11, 5 PECBR 4507, 4517 (1981)). When determining whether an individual exercises "independent judgment," we occasionally consider related factors such as whether superiors reinvestigate matters handled by the individual and whether the individual merely follows a recipe provided in a management cookbook. *Department of Administrative Services v. Oregon State Police Officers Association*, Case No. UC-35-95 at 15, 16 PECBR 846, 860 (1996) (citing *International Association of Firefighters, AFL-CIO, Local No. 314 v. City of Salem*, Case

No. C-96-83, 7 PECBR 6163 (1983)); *Lane County Sheriff's Office*, C-281-79 at 11, 5 PECBR at 4517.

As this is a representation case, no party bears a burden of proof. OAR 115-010-0070(5)(a). Nevertheless, because a “supervisory employee” is a statutory exclusion from the otherwise broadly defined term “public employee,” there must be sufficient evidence establishing that the statutory exclusion applies before we will conclude that an otherwise “public employee” is a “supervisory employee.” Mere inferences and conclusory statements regarding supervisory authority are insufficient to render an employee a statutory “supervisor.” Accordingly, in the absence of detailed, specific evidence establishing that a putative “supervisor” has authority under the statutory indicia, we will conclude that the employee is a “public employee” covered by the PECBA and not a “supervisory employee” under ORS 243.650(23). *City of Portland*, UC-017-13 at 23, 25 PECBR at 1018.

Finally, we interpret CBAs and MOUs in the same manner and using the same rules of construction as do courts for traditional contracts. *Oregon School Employees Ass'n v. Rainier School Dist. No. 13*, 311 Or 188, 194, 808 P2d 83, 86 (1991); *Marion County Law Enforcement Association v. Marion County*, 130 Or App 569, 575, 883 P2d 222, 225 (1994). In general, we follow the three-step process for interpreting a contractual provision laid out by the Oregon Supreme Court in *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997). First, the text of the disputed provision is examined in the context of the document as a whole. If it is determined that the provision is clear, the analysis ends. That has been referred to as the “plain meaning” rule. If it is determined that the provision is ambiguous, we proceed to the second step, which is to examine extrinsic evidence of the contracting parties’ intent. If the provision remains ambiguous after the second step, we turn to the final analytical step, in which we use appropriate maxims of contract construction. *Parrott*, 325 Or at 361-64, 937 P2d at 1021-23; *I.A.M. Woodworker Lodge W-261 v. Roseburg Urban Sanitary Authority*, Case No. UP-75-97 at 7-9, 17 PECBR 757, 763-65 (1998). When we interpret *statutes*, however, our goal is to determine and give effect to the legislature’s intent in accordance with ORS 174.020.

Discussion

We first address whether the Sergeant position is included in the unit by agreement. On that subject, Article 1, Section 1 of the parties’ CBA provides, “The employer recognizes the Association as the exclusive bargaining agent for all sworn patrol officers of the City of Coquille Police Department bargaining unit excluding supervisory and confidential employees as defined in the PECBA.” (Exh. C-1 at 4.) In other words, the CBA does not specifically include the Sergeant rank, and in fact excludes it to the extent that it is a statutory supervisor under the test provided above. Accordingly, the Association’s petition cannot prevail by relying on the CBA alone.

The MOU that subsequently modified that CBA states in relevant part that “the City at its sole discretion reserves the right to determine the placement of individuals hired or promoted to the rank of sergeant as a union or non-union.” (Exh. R-1 at 2.) It further states that, effective July 1, 2016, “the position of Police Sergeant will be included as a position in the union.” (Exh. R-1 at 2.) However, significantly, the MOU also characterizes the placement of the Sergeant position in the union as an “experiment.” Beyond that, the MOU states that, “should the city determine the

Sergeant position needs to be an administrative position not in the union, the officer currently holding the union position shall be allowed to resume their pre-promotional position and duties.” (Exh. R-1 at 2.)

In short, we find the foregoing language sufficiently plain and take it to mean that, as of July 1, 2016, the Sergeant position was included in the Association’s bargaining unit, but also that, if the City ever decided that that should be changed, it would have the right to take the position out of that unit. Accordingly, when the City sent its January 23, 2018 letter taking the Sergeant out of the unit, it was acting in accordance with the rights plainly agreed to in the MOU. Likewise, the Sergeant position was properly considered removed from the unit when it effectuated its decision to do so. To that extent, it is clear that the Sergeant position is not currently included in the Association’s unit based on the express terms of the CBA or the MOU within the meaning of OAR 115-025-0005(3).

During the hearing, Wallace (who signed the MOU on behalf of the Association) testified that he believed that the MOU’s language guaranteed that the Sergeant position would remain in the bargaining unit until at least July 30, 2018, as that date was referenced in the MOU and because the language did not indicate that the City could remove the Sergeant from the unit “at any time.” However, we find no such time limitations in the actual terms of the MOU, and to that extent would side with the City’s interpretation. Indeed, the Association’s post-hearing brief concedes that the City was correct that it could choose to pull the Sergeant from the unit. Nevertheless, we do not conclude as the City urges that the Association was barred from seeking to bring the Sergeant position back in to the unit after the City exercised its right to expel the Sergeant at the end of its “experiment.”

Again, the MOU states in part that “the City at its sole discretion reserves the right to determine the placement of individuals hired or promoted to the rank of sergeant as a union or non-union.” (Exh. R-1 at 2.) That use of the term “reserves” suggests that the City retains whatever rights it had prior to the signing of the MOU. On that subject, Article 1, Section 2 of the CBA provided, in part, “Bargaining unit clarifications may be initiated by either party through the Employment Relations Board.” (Exh. C-1 at 4.) Moreover, Article 2, Section 1 of the CBA (like ORS 243.662) provides, “Employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing, for the purpose of representation on matters of employee relations.” (Exh. C-1 at 4.) Even without that contract language, “public employees” and labor organizations had whatever rights were allotted them under the PECBA, one of which is the right to file a unit clarification petition. Put differently, in our view, nothing in the MOU or the CBA bars the Association for petitioning the Board in order to grow its bargaining unit. Labor organizations and public employers frequently define the exact parameters of units without the Board’s involvement, but the employers do not do that on their own.

The City claims that the Association contractually waived its right to petition the Board to clarify the Sergeant position into the bargaining unit “[i]n exchange for valuable consideration,” which according to the City was “both a pay raise and the ability for Wallace to continue earning overtime pay as Sergeant.” However, we must ultimately reject any argument that the Association waived its right to petition for the Sergeant position or that it was barred from doing so via promissory estoppel. For the reasons explained above, the MOU does not unambiguously address

all future unit clarification petitions. It also appears just as likely that Wallace's temporary pay raise actually corresponded with the extra duties required of the higher rank. On top of that, the express language of both OAR 115-025-0005(3) and OAR 115-025-0005(2) states that either type of petition may be filed "at any time," and an employer's organizational structure is fluid and positions can change over time.² See *Tualatin Employees' Association v. City of Tualatin*, Case No. UC-012-12 at 10, 25 PECBR 565, 574 (2013) (citing *Marion County v. Marion County Employees Association Local 294, Local 503*, Case No. UC-12-02 at 2, 19 PECBR 781, 782 (2002)). Furthermore, ORS 243.662, which is quoted above, contains no language regarding a waiver or estoppel. *C.f. City of Oregon City v. Oregon City Police Officers' Association*, Case No. UC-009-16 at 3, 27 PECBR 127, 129 (2017) (involving a clear waiver of the PECBA's contract bar).

In sum, the petitioned-for position must be considered under the Board's traditional "supervisory employee" test. On that subject, the City clarifies in its brief that it does not contend that a Sergeant has the authority to hire, transfer, layoff, recall, promote, reward, or adjust grievances within the meaning of ORS 243.650(23). Accordingly, its brief largely focuses on a Sergeant's purported authority to suspend, discharge, discipline, assign, and direct. On the other hand, the Association contends that the Sergeant exercises no supervisory authority whatsoever. Regarding the final element of the supervisor test, however, no meaningful contention has been made that the Sergeant does not exercise his or her authority "in the interest of management," and given the record before us and the Sergeant's apparent relationship with Officers, we see no reason to conclude otherwise. See *Hillsboro Sergeant's Association v. City of Hillsboro, Oregon*, Case No. CC-009-14 at 6, 26 PECBR 491, 496 (2015).

Hire

As noted above, the Sergeant can participate in the hiring of new Officers as part of an oral board. As part of that group, the Sergeant can ask applicants questions and make a recommendation regarding whether an applicant should be hired. However, we cannot conclude that that recommendation is "effective" as ORS 243.650(23) requires because it is unclear how that recommendation is subsequently handled by the Chief or the City Manager and how often the Sergeant's recommendations have been accepted, if ever. There is also no evidence that meaningfully demonstrates that "independent judgment" is exercised in the role. In addition, we cannot overlook the fact that the Sergeant's role in hiring is essentially no greater than that of any participating subordinate Officer, and is purportedly lesser than that of the Records Clerk. Accordingly, we must conclude that the Sergeant does not "hire" within the meaning of the PECBA. See *City of Portland*, UC-017-13 at 25, PECBR 996, 1019 (citing *City of Union v. Laborers' International Union of North America, Local 121*, Case No. UC-9-08, 22 PECBR 872,

²OAR 115-025-0005(3) specifically 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." The other rule at issue, OAR 115-025-0005(2), provides in relevant part, "When the issue raised by the clarification petition is one of public employee status under ORS 243.650(6), (16), or (23), the petition may be filed at any time..."

887 (2008)); *Sisters Police Association v. City of Sisters*, Case No. RC-46-96 at 9, 17 PECBR 212, 220 (1997).

Suspend, Discharge, and Discipline

The record clearly shows that a Sergeant can recommend discipline to the Chief. That discipline can evidently take the form of a “written reprimand, suspension, or discharge” in addition to other forms. (Exh. C-1 at 12.). Moreover, although a Sergeant is expected to “[u]tilize progressive discipline when justifiable,” in the end, **“there is no formal order that will be followed.”** (Exh. C-5 at 6; Exh. C-3 at 40, emphasis in original.) Instead, discipline should be “applied based on the totality of the circumstances,” and notable evidence was presented showing some of the factors that Wallace has considered. (Exh. C-1 at 12.) We also recognize that the Sergeant can initiate an investigation that may end in discipline, and that Chief Sanders is unlikely to conduct an investigation of his own after being presented with the Sergeant’s investigatory findings. *See Department of Administrative Services*, UC-35-95 at 18, 16 PECBR at 863 (citing *Oregon State Police Officers Association v. Oregon State Police Department*, Case No. UC-20-89 at 34-39, 12 PECBR 570, 603-08 (1990)); *Lane County Sheriff’s Office*, C-281-79 at 11, 5 PECBR at 4517. Despite those factors, however, we must nevertheless conclude that the requisite “independent judgment” and “effectiveness” has not been shown.

Importantly, every instance of discipline that was described in detail in the record appears to have come after a discussion with Chief Sanders, indicating a lack of true independence. It also appears that many if not most of Wallace’s actual recommendations were rejected. Once again, for an employee to effectively recommend actions, his or her position must be given substantial credence more often than not. *Benton County*, C-210-82 at 14, 7 PECBR at 5986. Plus, issuing what ultimately characterizes itself as a mere “Recommendation Action” as Wallace did in October 2017 is not particularly strong evidence of disciplinary authority. (Exh. C-8 at 2.) Neither is a recommendation that was only accepted after an initial rejection and with the added input of two separate Officers, as with the example involving a terminated trainee summarized above. *See Lane County Sheriff’s Office*, C-281-79 at 11, 5 PECBR at 4517 (a subsequent independent investigation reflects a lack of effective recommendation). We further note that all terminations, including those affiliated with the FTEP, also have to be approved by the City Manager after considering the Chief’s recommendation.

Limited evidence vaguely suggests that the Sergeant may discipline on his or her own. However, because we have no clear evidence that a Sergeant ever did that, we cannot firmly conclude that “independent judgment” may be used. Again, simple “conclusory” statements that the Sergeant has a particular authority are insufficient for our analysis. *City of Portland*, 25 PECBR at 1018. Otherwise, to the extent that sending someone home early could theoretically be considered a “suspension,” the only example addressing that authority ultimately illustrated Wallace’s attempt to do so being blocked by the Chief. In addition, the parties’ CBA establishes that “[c]ounseling, oral warnings reduced to writing, work improvement plans and other similar corrective measures are not considered discipline.” (Exh. C-1 at 12.) Finally, we note that the Sergeant reportedly cannot physically serve more serious forms of discipline upon the Officers. Instead, that is handled by the Chief, further signaling a secondary, non-supervisory role.

Assign and Direct

The Sergeant is generally responsible for creating the Officers' schedules. However, the record does not show that the Sergeant exercises meaningful "independent judgment" when performing that particular task. Accordingly, that responsibility does not show that the Sergeant can "assign" or "direct" within the meaning of the statute. Typically, just one Officer is assigned to work each shift, leaving little room for critical decision-making in this area. Further, the Chief and even Officers can make changes to a Sergeant's schedules. Although a Sergeant may have an Officer work during a special event, it appears more likely than not that the Officer who works the event is simply the Officer who was otherwise going to be on duty the day of the event. Moreover, the work that is required of such an assignment seems relatively straightforward and limited. Having an Officer block off a road during a parade, for example, is not compelling evidence. When there are conflicts regarding vacation, those are evidently settled in accordance with seniority. Otherwise, nothing indicates that signing off on sick time is anything other than a clerical activity in this case. We also cannot overlook that the one time the Sergeant tried unsuccessfully to change the Officers' schedule effectively resulted in that Sergeant having his scheduling authority swiftly taken away from him, or that that effort was followed by a demotion.

Outside of scheduling though, the Sergeant is also responsible for monitoring and then correcting work. In particular, that can occur when the Sergeant is reviewing Officers' reports. When doing so, the Sergeant is expected to make sure that the reports are accurate, well written, and contain whatever is needed to prove or disprove a crime. The fact that the Sergeant may often work alone in practice does not change that, and we are unmoved by the fact that for one part of his review, Wallace relied on his experience. Simply put, the kind of review the Sergeant performs when handling reports requires "independent judgement." The same is true of a Sergeant's annual reviews, which as noted require continual observation and detailed, formal ratings. And critically, those reviews come with significant consequences that could feasibly give rise to employee grievances. As noted, annual evaluations are used "as a factor in making personnel decisions that relate to merit increases, promotion, reassignment, discipline, demotion and termination." (Exh.C-4 at 450.) See *City of Union*, UC-9-08 at 15, 22 PECBR at 886 (citing *Deschutes County*, UC-62-94 at 14, 16 PECBR at 341); *City of Forest Grove v. City of Forest Grove Employees Local 3786*, Case No. UC-29-96 at 7, 17 PECBR 171, 177 (1997); *Coquille Police Officers Association v. City of Coquille*, Case No. C-213-80 at 5-6, 5 PECBR 4447, 4451-452 (1981) (in which the Board considered the City's Sergeant position and its authority to evaluate and ultimately found it supervisory); *c.f. American Federation of State, County and Municipal Employees, Local 1085 v. State of Oregon, Department of Justice*, Case No. CC-003-10 at 32, 24 PECBR 893, 924 (2012) (wherein evaluations were not relevant to discipline, hiring, or discharge); *City of Union*, UC-009-08 at 15, 22 PECBR at 886; (wherein evaluations were merely peer reviews and effectively self-evaluations). The Chief's significantly smaller though necessary role in evaluations is not dispositive here.

In addition, we note that a Sergeant is likely to train and review a subordinate one-on-one as an FTO and play a key role in whether a trainee is retained. There are also times when the Sergeant is left entirely in charge of the Police Department and without the assistance of the Chief. During one such occasion, then-Sergeant Wallace called off-duty Officers back in to work, necessitating overtime. See *SEIU, Local 503, OPEU v. Portland State University*, Case No.

UC-002-17 at 15, __ PECBR __, __ (2018). To the extent that that may have been an infrequent occurrence in practice, we note that Wallace was only a Sergeant for a relatively short period of time and we have no evidence addressing any prior Sergeants. Similarly, if Wallace only completed a few evaluations in his time, it appears likely that that was due to his short tenure as Sergeant and the small number of Officers employed at the time more than a lack of authority. Moreover, we analyze not only the *exercise* but also the *delegation* of authority to challenged personnel in determining whether they are supervisors. *City of Forest Grove*, UC-29-96 at 6-7, 17 PECBR at 176-77.

Based on the totality of the circumstances, we conclude that the Sergeant can “direct” within the meaning of the statute. Accordingly, we also conclude that the Sergeant is a “supervisory employee” as defined in ORS 243.650(23) and thus excluded from the unit. As we have indicated in prior cases, demonstrating even one statutory criterion is sufficient to dissolve an individual’s “public employee” status and is therefore dispositive. *See also City of Hillsboro*, CC-009-14 at 5, 26 PECBR at 495; *City of Portland*, UC-017-13 at 22, 25 PECBR at 1017; *City of Chiloquin v. Woodworkers Local Lodge 12, International Association of Machinists and Aerospace Workers*, Case No. UC-74-95 at 7, 16 PECBR 517, 523 (1996) (citing *Walla Walla Union-Bulletin v. NLRB*, 631 F2d 609, 613, 105 LRRM 3065 (9th Cir. 1980)).

Other Duties

There is little to no evidence in the record concerning the remaining indicia of transfer, lay off, recall, promote, reward, and adjusting grievances. What little evidence was produced on those subjects is included above in our Findings of Fact and, as those Findings make plain, does not demonstrate the authority needed to establish the Sergeant as a “supervisory employee.” We would also clarify, however, that the Sergeant’s authority to evaluate employees as part of a performance review does not establish the authority to “reward,” even if such a review can potentially lead to a step increase. *City of Portland*, UC-017-13 at 30, 25 PECBR 996, 1025. Likewise, we do not view the Sergeant’s role in approving an Officer’s transition from a probationary to a non-probationary employee to be a true “promotion” or “reward,” either. *See Portland State University*, UC-002-17 at 14, __ PECBR at __.

////

////

////

Conclusion

We conclude that the petitioned-for Sergeant position is not included in the Association's unit by the CBA or the MOU. We also conclude that the position has the authority to "direct" and satisfies all other requirements of being a "supervisory employee" within the meaning of the PECBA. Accordingly, a Sergeant is not a "public employee" and cannot be included in the Association's bargaining unit.

PROPOSED ORDER

1. The bargaining unit represented by the Association is clarified to exclude the Sergeant position.
2. The petition is dismissed.

SIGNED AND ISSUED on September 18, 2018.



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. 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. UC-010-18

(UNIT CLARIFICATION)

SALEM POLICE EMPLOYEES' UNION,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	DISMISSAL ORDER
CITY OF SALEM,	)	
	)	
and	)	
	)	
OREGON AFSCME COUNCIL 75,	)	
LOCAL 2067,	)	
Respondents.	)	
_____	)	

On September 27, 2018, petitioner Salem Police Employees' Union (SPEU) filed a unit clarification petition under OAR 115-025-0005(6) to move employees currently represented by Oregon AFSCME Council 75, Local 2067, into SPEU's bargaining unit on the ground that the SPEU unit is more appropriate. SPEU's current collective bargaining agreement with the City of Salem runs from July 1, 2017 through June 30, 2020. Under OAR 115-025-0005(6), SPEU's petition must be filed during the open period for its collective bargaining agreement, as determined by OAR 115-025-0015(4). This means that the petition must be filed between April 1, 2020 and May 1, 2020 (60 to 90 days before the end of the contract).

Because the petition appeared premature, the Election Coordinator asked SPEU to provide any reason as to why the petition should not be dismissed. SPEU responded, arguing only that the recent decision by the Supreme Court of the United States in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018), rendered this Board's rules concerning the contract bar and the open period unconstitutional. Because SPEU did not dispute that its petition was untimely under this Board's rules, the Election Coordinator requested that SPEU withdraw its petition. See OAR 115-025-0025(2)(a). SPEU declined to withdraw its petition.

Because this Board determined that the petition was prematurely filed and SPEU declined to withdraw it, we may dismiss it under OAR 115-025-0025(2)(b). In doing so, we disagree with SPEU that *Janus* rendered the applicable rules (which do not concern fair share or other compelled

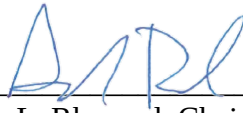
payments from a public employee) unconstitutional. SPEU argues that, under *Janus*, the time restrictions for filing unit clarification petitions (and presumably representation petitions) unconstitutionally infringe on public employees' "First Amendment rights to engage in political speech and freedom of association" and are no longer valid. *Janus*, however, concluded only that it was unconstitutional for a public employee who is not a union member to have any agency fee or other payment to a union deducted from the employee's wages, unless the public employee affirmatively consented to that deduction or payment. See *Janus*, 138 S. Ct. at 2486. *Janus* did not change the underlying system of exclusive representation and has no bearing on the timeliness of filing representation or unit clarification petitions.

The petition is dismissed as untimely. SPEU may refile the petition during the appropriate open period, as set forth above.

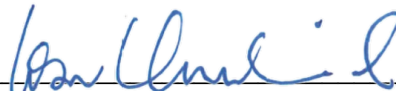
ORDER

The petition is dismissed.

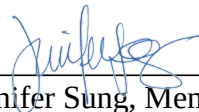
DATED: November 2, 2018.



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-013-17

(UNFAIR LABOR PRACTICE)

CLACKAMAS COUNTY EMPLOYEES' ASSOCIATION,	)	
	)	
	)	
Complainant,	)	
	)	FINDINGS AND ORDER FOR
v.	)	REPRESENTATION COSTS
	)	
CLACKAMAS COUNTY,	)	
	)	
	)	
Respondent.	)	
	)	

On August 28, 2018, this Board issued an order holding that Clackamas County (County) did not violate ORS 243.672(1)(e) or (f) as alleged by the Clackamas County Employees' Association (Association). 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(3)(b) and OAR 115-035-0055, this Board finds that:

1. The County 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).

2. This case required one day of hearing, which was held on October 30, 2017.

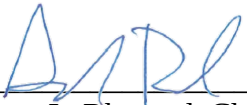
3. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). The representation costs award for a case requiring one day of hearing is \$3,000. OAR 115-035-0055(1)(b)(C).

//
//
//

ORDER

The Association shall remit \$3,000 to the County within 30 days of the date of this order.

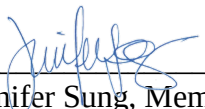
DATED: November 2, 2018.



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-030-17

(UNFAIR LABOR PRACTICE)

DENNIS DUFFEY,	)	
	)	
Complainant,	)	
	)	
v.	)	FINDINGS AND ORDER FOR
	)	REPRESENTATION COSTS
LABORERS' INTERNATIONAL UNION	)	
OF NORTH AMERICA, LOCAL 483,	)	
	)	
Respondent.	)	
	)	

On August 22, 2018, this Board issued an order holding that the Laborers' International Union of North America, Local 483 (LIUNA), violated ORS 243.672(2)(a) by creating and distributing postcards for LIUNA members to send to Dennis Duffey (Complainant).¹ We dismissed the remaining two claims alleged by Complainant, which alleged that LIUNA violated subsection (2)(a) by: (1) sending an email to bargaining unit members accusing Complainant of circulating an anti-union petition, and (2) contacting the City of Portland regarding Complainant's deauthorization petition activities.

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

1. The upheld and dismissed charges are equally significant. OAR 115-035-0055(1)(d).

2. 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) and (d). Because we have determined that the upheld and dismissed charges are equally significant, neither party is the prevailing party, and "no representation costs will be awarded." OAR 115-035-0055(1)(d).

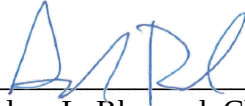
//
//

¹Pursuant to OAR 115-010-0090, the Board adopted the recommended order as the final order in this matter, but limited its precedential value.

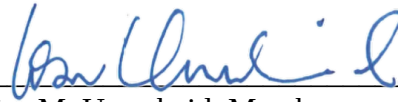
ORDER

Neither party is awarded representation costs.

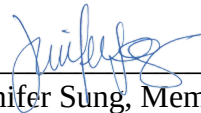
DATED: November 2, 2018.



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-011-18

(UNIT CLARIFICATION)

OREGON AFSCME COUNCIL 75,	)	
LOCAL 1528,	)	
	)	
Petitioner,	)	
	)	ORDER REVOKING
v.	)	CERTIFICATION OF
	)	EXCLUSIVE BARGAINING
DOUGLAS COUNTY,	)	REPRESENTATIVE
	)	
Respondent.	)	
_____	)	

On October 17, 2018, Oregon AFSCME Council 75, Local 1528 (AFSCME), filed a petition under OAR 115-025-0009 seeking to revoke its certification as the exclusive representative of the following bargaining unit of Douglas County employees:

“All full-time and regular part-time employees in the Douglas County Assessor’s Office, excluding managers, supervisors, on-call, temporary, and confidential employees.”¹

The petition included AFSCME’s disclaimer of interest in further representing the bargaining unit. The petition also showed that no collective bargaining agreement is in effect. *See* OAR 115-025-0009. Objections to the petition were due by November 5, 2018. No objections to the petition were filed.

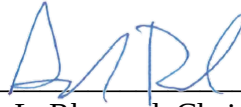
The petition is granted. The certification of AFSCME as the exclusive representative for employees of the Douglas County Assessor’s Office is revoked.

//

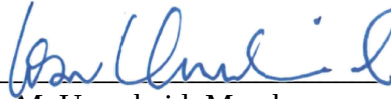
//

¹This Board had previously certified AFSCME as the exclusive representative on February 4, 2015, in Case No. CC-004-14.

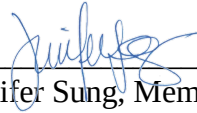
DATED: November 7, 2018.



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-028-17

(UNFAIR LABOR PRACTICE)

LANE COUNTY,	)	
	)	
Complainant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
AMERICAN FEDERATION OF STATE,	)	AND ORDER
COUNTY, AND MUNICIPAL EMPLOYEES,	)	
COUNCIL 75, LOCAL 2831,	)	
	)	
Respondent.	)	

Stephen E. Dingle, Lane County Counsel, Eugene, Oregon, represented Complainant.

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

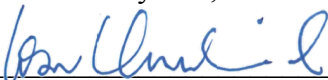
On October 9, 2018, Administrative Law Judge B. Carlton Grew issued a recommended order in this matter. The parties had 14 days from the date of service of the order to file objections. OAR 115-010-0090(1). No objections were filed, which means that the Board adopts the attached recommended order as the final order in this matter. OAR 115-010-0090(4), (5).

ORDER

The amended complaint is dismissed.

DATED: November 8, 2018.


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-028-17

(UNFAIR LABOR PRACTICE)

LANE COUNTY,	)	
	)	
Complainant,	)	
	)	RECOMMENDED RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
AMERICAN FEDERATION OF STATE,	)	AND PROPOSED ORDER
COUNTY, AND MUNICIPAL EMPLOYEES,	)	
COUNCIL 75, LOCAL 2831,	)	
	)	
Respondent.	)	

A hearing was held before an Administrative Law Judge (ALJ) on March 15, 2018, at the offices of the Oregon Office of Administrative Hearings in Eugene, Oregon. The record closed on April 27, 2018, following submission of the parties' post-hearing briefs.

Stephan E. Dingle, Lane County Counsel, Eugene, Oregon, represented Complainant.

Jennifer K. Chapman, Legal Counsel, Oregon AFSCME Council 75, Portland, Oregon, represented Respondent.

On September 15, 2017, Lane County (County or Employer) filed a Complaint alleging that Oregon AFSCME Council 75, Local 2831 (AFSCME or Union) violated ORS 243.672(2)(b) and (d), which it amended on September 27, 2017. The County alleged that the Union violated the statutes by bargaining in bad faith using surface bargaining, violations of the parties Ground Rules and false statements to bargaining unit members. AFSCME filed a timely Answer.

The issues¹ in this case are:

1. Did AFSCME engage in unlawful surface bargaining in violation of ORS 243.672(2)(b)?
2. Did AFSCME engage in unlawful bad faith bargaining through communications with its bargaining unit members and through an attorney suggesting a change in contract language in violation of ORS 243.672(2)(b)?
3. Did AFSCME violate the parties' ground rules and ORS 243.672(2)(d)?

We conclude that the County failed to meet its burden of proof to establish that AFSCME violated ORS 243.672(2)(b) and (d) through surface bargaining, communications with unit member retirees, attorney suggestions regarding contract language, and violations of the parties ground rules.

RULINGS

At the close of Complainant's case, Respondent AFSCME moved to dismiss the Amended Complaint, arguing that the County had failed to meet its burden of proof to show that AFSCME had engaged in bad faith bargaining. The ALJ acted within his discretion in denying the motion. While such motions are rarely granted, it would be imprudent to do so in a document and fact-intensive case such as this one (with nearly 2000 pages of exhibits covering thirteen bargaining sessions and related correspondence).

At hearing, Respondent AFSCME sought to amend its Answer to state a claim for a civil penalty. Respondent contended that the evidence adduced at hearing established that Complainant County had frivolously filed its Complaint. The ALJ denied the request. For reasons explained in the Reasoning and Conclusions of Law, below, we conclude that the ALJ acted within his discretion in denying the request.

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

FINDINGS OF FACT

The Parties

1. AFSCME is a labor organization within the meaning of ORS 243.650(13). It represents two bargaining units of County employees, a general unit with approximately 600

¹A fourth issue, "Can speech protected by statute, the Oregon Constitution, or the United States Constitution give rise to a violation of ORS 243.672(2)(b) and (2)(d)?," was rendered moot when Complainant County abandoned its claim that AFSCME had violated the PECBA by having bargaining unit members urge the County Commissioners to change the County's bargaining positions.

employees and a nurses unit with approximately 100 employees. AFSCME represents slightly less than 50 percent of the County's total work force.²

2. The County is a public employer within the meaning of ORS 243.650(20). There are approximately 1500 County employees in total, including temporary employees.

3. The two AFSCME units³ and the County were parties to separate collective bargaining agreements governing January 7, 2015 through June 30, 2017 (prior Agreements). There have been numerous prior collective bargaining agreements between the parties. The current dispute arises out of the negotiations and strike regarding the parties' 2017-2020 agreements.

4. The parties have been involved in litigation before this Board over bargaining issues several times in the past: *AFSCME v. Lane County*, Case No. UP-038-09, 24 PECBR 197 (2011) (County had not violated ORS 2453.672(1)(e) through bad faith surface bargaining regarding its drug free workplace policy); *AFSCME v. Lane County*, Case No. UP-010-09, 23 PECBR 357 (2009) (Consent Order in which the County acknowledged making an unlawful unilateral change in employee compensatory time during successor negotiations prior to impasse); and *AFSCME v. Lane County*, Case No. UP-022-04, 20 PECBR 987 (2005) (Union failed to meet its burden to prove the existence of a past practice of allowing certain employees to take County vehicles home which the County violated). Some collective bargaining negotiations have also involved implemented contracts and strike notices, including during the 2014-2017 bargaining cycle. While the parties were able to reach agreement for both units on the 2014-2017 agreements after one day of mediation, the agreements were not executed until January, 2015. The record does not contain evidence of any previous strikes by these AFSCME bargaining units against the County.

Preliminary Bargaining over the 2017-2020 Agreements

5. The parties decided to bargain over the new collective bargaining agreements (Agreements) covering the general unit and the nurses' unit in the same process, with parties often meeting over each unit at the same time or different times on the same day. The parties also agreed that the bargaining sessions would be recorded and transcribed. AFSCME sent a summary of each bargaining session to AFSCME unit members. During the bargaining process, both parties formally agreed that the new agreements would have a three-year term as before. The term of the new agreements would be July 2017 through June 2020.

²A newer AFSCME bargaining unit of County primary care physicians is not involved in this litigation.

³In this proceeding, the parties generally discuss bargaining with both units without distinguishing between them. The parties often bargained over both units during the same bargaining session, regarding the same underlying issues. We see no differences between the units which are relevant to our consideration of the issues in this case. Accordingly, we will generally not distinguish between the bargaining regarding the nurses' unit and the general unit.

6. AFSCME's chief negotiator for both the general unit and the nurses' unit was AFSCME Business Representative Jim Steiner. Other members of the general unit team included LaRece Rivera, Pat Dotson, Brad Carpenter, Lori Green, and Nick Alviani. Other representatives for the nurses' unit included Charity Aguirre and Christine Yonkers. The Union team did not include an attorney.

7. The County's chief negotiator was Employee and Labor Relations Manager Inga Wood.⁴ Other members of the County team included Assistant County Counsel Andrea Nagles, County Budget and Financial Planning Manager Christine Moody, Labor Relations Specialist Krysten Mayfair, Mary Miller, and Jocelyn Warren.

8. During and shortly after the 150-day statutory bargaining period, AFSCME and the County met eleven times, and had multiple communications by email, at least, between sessions.

9. The County's bargaining priorities were (1) to provide unit employees a cost of living increase in wages (COLA); (2) require employees to make a monetary contribution to their health insurance plan; (3) use that employee health insurance contribution to create a self-funded wellness clinic and program, with a \$20 credit to each employee who joined the wellness center (all other County bargaining units participated in similar programs); and, (4) revise the collective bargaining agreement to fix a large number of errors in grammar, remove terms specifying gender, and to reflect current County terminology.

10. One of AFSCME's bargaining priorities was to adjust the compensation of all filled unit positions to a level competitive with the market, which the parties called "market adjustments." The parties' 2014-2017 general unit collective bargaining agreement had included market adjustments for 12 classifications. However, the parties disputed whether the County had complied with the market adjustment requirements. Prior to the March 1, 2017 start of bargaining at issue here, AFSCME filed an unfair labor practice complaint with this Board, alleging that the County had not engaged in appropriate dispute resolution regarding position review and reclassification under the 2014-2017 agreement. There is no evidence that this matter was pursued.⁵ Based on AFSCME's belief that the previous market adjustment system had failed, AFSCME decided to pursue market adjustments for all unit employees whose classifications were paid below market wages through bargaining the 2017-2020 Agreement. Other AFSCME priorities were to obtain a COLA for the 2017-2020 agreements, and to grant employees working 1040 hours per year (1040 employees) all the rights and benefits of employees working full-time.

11. Also prior to the start of bargaining, AFSCME filed a grievance over the County's handling of benefits regarding an employee. Resolution of that issue was also relevant to some of AFSCME's bargaining positions.

⁴Inga Wood, (née Inga Aanrud, is identified in the quoted bargaining transcripts as "IA." We will use her current name, Wood, in this Recommended Order).

⁵ERB records apparently do not include this complaint, and it was not submitted as an exhibit.

Bargaining During the Statutory 150-day Period

12. On March 1, 2017, the parties met for their first bargaining session, which they designated as the start of the statutory 150-day period. During this session, the parties agreed to written Ground Rules for the negotiations. The Ground Rules included the following statements: “The parties will negotiate in good faith. The parties shall only negotiate through their designated bargaining representatives. These negotiations will be conducted under the provisions of applicable law.” (Exh. C-7 at 1.) The Ground Rules did not include a definition of “good faith” bargaining, “designated exclusive bargaining representatives,” or “applicable law.” The Ground Rules also provided that each party would provide all of its initial proposals (and list of Articles opened for bargaining) no later than the fourth bargaining session.

13. The parties also discussed scheduling bargaining sessions and which unit employees would be permitted to attend bargaining sessions on work time. The County reviewed, in detail, its list of proposed changes to fix errors in grammar, remove terms specifying gender, and to reflect current County terminology. County officials explained that this meant it would open almost every Article of the prior Agreements for bargaining, as well as their appendices.⁶

14. On March 21, 2017, the parties met for their second bargaining session. The Union provided a general explanation and discussion of proposals it planned to make during the bargaining. Among other items, Steiner told County representatives that AFSCME would propose market adjustments for 90 to 95 percent of the filled AFSCME positions as well as across the board COLAs. Steiner told County negotiators that, while AFSCME had not calculated the cost of the market adjustments, “it’s a significant amount of money that our folks are out of market. So that’s why I am trying to get it done earlier so that you can see what the budget impact will be.” (Exh. C-13 at 4.) AFSCME also discussed its plan to propose that employees working 1040 hours or less per year be granted the same benefits as regular employees.

15. During the March 21 session, the County negotiator Wood (IA) and AFSCME negotiator Steiner (JS) had the following exchange regarding additional training for nurses:

“JS: Okay, good. Next. Under training, under continuing education, striking 40 hours and I’m increasing it to 80.

IA: Is there a specific reason behind that?

JS: Yeah, they need more, m-more training.⁷ And then, um, if you turn the page, we’re increasing the, the, uh, reimbursement amount for nurse practitioners and physician assistants up to 3,000 dollars from \$1,000 to \$3,000. And then we’ve also, um, I’ve added the certification there as well, so it’s li-licenses slash certification. And then I’ve made the same increase, uh, for the senior dental

⁶In addition to opening several articles in the previous agreement to update gender terminology and to correct typographical errors, the County also sought to reopen some articles for substantive changes. AFSCME officials were suspicious of the County’s attempt to open contractual articles just for assertedly non-substantive changes, fearing doing so would be a Trojan Horse for additional, substantive proposals regarding those provisions.

⁷The County’s quotation of this discussion ends with this comment.

hygienists, also the, they're actually, you know expanded practice dental hygienists or provider, so I've done the same for them. And then under section 5, I've added if a nurse working, if, if, if a nurse is working toward an advanced degree or certification, the county agrees to reasonably accommodate the employee's need to attend classes during the work day, by allowing the employee to either take paid leave time, or flex his or her hours. The county agrees to reimburse up to 5,000 dollars annually for tuition to employee that, oops; that advance their nursing degree.

PD: (Inaudible)

IA: So I have a question on that. In your proposal, you say agrees to reimburse them for \$5,000 annually for tuition to em-, to employees that advance their nursing degree, so would that be upon graduation and actually getting the degree? The reimbursement would happen?

JS: Well, it'd be, a-ann, it'd be annually, I don't think they can, I don't think you can do it in one year. So it'd be annually.

IA: And is there, like, successfully like a GPA tied to that? Or just anybody who's taking classes? So what if I'm a nurse and I want to advance my degree and I go to classes

JS: What kind of nurse are you?

IA: I don't know.

IA: Are you an LPN? Are you a two-year RN?

IA: I don't know.

JS 'Cause if you're a four-year RN I don't know that you can advance your four- or your RN

CY: You'd advance it up to an NP.

JS: Yeah, well that, that's, yeah, good luck there." (Exh. C-13 at 55.)

16. At the March 21 session, the County presented additional items it called non-substantive changes. AFSCME stated that it did not agree that all the proposed changes were non-substantive. The County also discussed the addition of a disciplinary option of a reduction in wages.

17. AFSCME's proposed market adjustments were "step-to-step" (vertical adjustment) on the salary schedule, meaning that if an employee was currently on Step 5, and below market level wages, the employee would move to Step 5 on the new, adjusted schedule. At a subsequent negotiation session, the County proposed its own version of market adjustments, which would move an individual employee to a new step on a new salary schedule which was (1) closest to the employee's current step that (2) did not result in a pay *decrease* (horizontal adjustment). The County had agreed to or imposed similar changes for other represented and non-represented employees. AFSCME's market adjustment was significantly more expensive.⁸

18. County representatives told AFSCME representatives that its proposed market adjustment would cost more than \$21 million across the three years of the proposed agreement.

⁸It is not clear how the County's market adjustment proposal would raise employees to market level wages. Some employees would receive as little as an eight cent per hour wage increase under the County's proposal.

AFSCME had difficulty performing its own cost analyses in a timely manner, in part because of the timing of receipt of relevant County data. The parties appear to have used the County's cost calculations as the basis of most of their discussions.

19. On April 6, 2017, the parties met for their third bargaining session. The parties discussed several Union proposals regarding both units. Regarding the market adjustments, Steiner told County negotiators that "we know there's a lot of money on the table here * * * So we figure, * * * when I looked at this and I go this is how far people are out of market, that's a lot of money, so we recognize that, but I think it's time that the County recognized just how far out of [the market wage levels] * * * the general unit has become and also the nurses' unit." (Exh. C-18 at 21.) AFSCME also discussed nurses' need for more training.

20. On April 19, the parties met for their fourth bargaining session. The County rejected the Union proposal to grant 1040 employees all benefits of the Agreements and to allow some additional employees to attend bargaining. The County discussed what it called its non-substantive language changes. AFSCME responded that the County did not need a formal Tentative Agreement (TA) to fix typographical errors simply because doing so changed language used in the prior agreements. The County presented proposals to: (1) revise the language of the preceding agreement to increase continuing education reimbursement for nurses \$1500 annually; (2) provide reimbursement for certifications to both units rather than just for licensing fees; (3) increase call-back pay to two hours for all positions, except home-based positions; (4) increase the boot allowance to \$300 annually, and accept AFSCME's proposal to provide the allowance to additional classifications; (5) provide for two bargaining unit nurses to participate in AFSCME bargaining instead of one; (6) change language related to gender neutral correction to reflect original intent; (7) accept AFSCME personnel files language; (8) add stethoscopes to nurses' reimbursed clothing; (9) accept AFSCME request to change language regarding open positions posted for internal reassignment; (10) change language regarding the use of an electronic system for the transfer/promotion process; and (11) add classifications those granted flexibility in their schedules to engage in continuing education.

21. Also at the April 19 session, AFSCME repeated its arguments that the unit employees had been paid below market wages, and discussed application of the proposed changes to particular positions. AFSCME also repeated that non-substantive changes need not be formal "proposals," and that the County could take the Articles with only such changes off the table.

22. Following a caucus, at the April 19 session, Union chief negotiator Steiner proposed the following:

"Okay. Here's the deal of the day. Let's see, * * * who plays let's make a deal here. Um, we looked at it, uh, at the preamble, and so, what I'll say is, we appreciate, uh, and I, I told my team, Andrea, and I, I do, I appreciate, 'cause some folks think they can just go through and change every word and whatever in a contract and that's just not so. So we absolutely appreciate, uh, what the county has said about that. Um, we still believe that, you know, the numbering system, you know, we understand that, and we're generally fine with changing the numbering system. However, because it's tied to the entire agreement, if we don't reach the way I'm

looking at this, if we don't reach agreement on article 10, then article 10 isn't finished because it would be a proposal by itself. So while we're okay with the number changes, if we're trying to each article, that's problematic. So, I think we can agree that the numbers, we're okay with the numbers, they don't necessarily matter, and just changing the numbers, but they don't have any impact on whether or not we're agreeing to particular articles. If that makes sense to you.

"So, with that being said, the union could agree to, um, our, our proposal to you is, if the county accepts the union's proposals, uh, from three, (inaudible), three, I gotta look, 3/21, whatever it is, article 4 proposals, then the union will go ahead and agree to, uh, the preamble and article 3." (Exh. C-21 at 42.)

23. Also at the April 19 session, the County rejected this Union proposal, stating that it saw its changes to the Preamble and Article 3 as "very minor" and would not exchange them for AFSCME changes to Article 4, "Union Rights." (Exh. C-21 at 43.) AFSCME's proposed changes would add two Union officers to the three employees attending bargaining on paid time (for a total of five) for the nurses' unit and strike the provision regarding the general unit that no more than two bargaining team members be from the same County program.

24. On May 3, 2017, the parties met for their fifth bargaining session. A Union unit member gave a detailed, lengthy presentation of the need for County funding for state-required supervision of employees seeking certification to a higher mental health treator classification. She also described high turnover of mental health workers because of low wages and supervision costs.

25. At that session, AFSCME presented a counterproposal agreeing to spelling and gender-neutral language in agreement Articles 2 and 3, some technical changes regarding nurses, and call back pay and transfer lists for members of the general unit. At that session, the following exchange took place:

"IA: Consider it. And, um, did you have any time to discuss our proposal on the changes when it comes to, um, the transfer lists and things like that. We tried to pare that down and I didn't know, um, if you wanted anybody from IS. Last time we talked about this, um, I think Lorren Blythe and Michelle Swancutt came in and kind of talked about the process when it comes to that. Or do you have any thoughts on the proposals on that?

JS: Uh, you know, I, I think generally my thoughts are we don't really care much about, uh, in exchange of much for that. We haven't, we haven't dealt much with it in the last several years. You've proposed it several times. We haven't moved much off of it. I think small changes, if I'm thinking of the right article, uh, where we talked about not having to notify people if they, if they send us both a, um, generally the things I look at that I thought made sense, and I don't, I'm not saying it doesn't make sense to you, but I don't see a need for the change, nor does the team. But, you know if someone says hey, I don't want to be on the recall list anymore, I don't want to be on that list and they send you notification and we get notification that they're off the list, fine. Take 'em off the list. Uh, things like that I think, you know are things that we can, we can wrap our minds around, but

generally if you got somebody interested in a wholesale change in article 8, I'm not.

IA: See, I think you're mixing two. That was layoff and recall when it comes to that and then there's, um, article 8 is selection and promotion.

JS: That shows you how much I pay attention to article 8.⁹

IA: (Inaudible) so, if we could, I mean, it'd be great to get a counter proposal on that as to the ones you actually think you can agree to, or can agree to so that we can hopefully move the conversation forward.

JS: I can, yeah, I'll look and potentially propose current contract language. Do you have a counter for our, uh, wage, uh compensation proposals today?

IA: we gave you a c-counter proposal last time we met on the one per, one, one, one.

JS: How 'bout the

IA: I do have some information though on costing that I wanted to make some comments on, but um first, I want to go through, are you finished with the general?" (Exh. C-26 at 18-19.)

26. Also at the May 3 session, the County explained its position regarding a Union proposal to designate juvenile corrections nurses as members of the police and firefighter category in the Public Employee Retirement System (PERS). The County also informed AFSCME that its review of the "majority" of AFSCME's economic proposals would add \$9.3 million to the three-year cost of a nurses' agreement and \$33.3 million to the three-year cost of a general unit agreement. County negotiators stated that AFSCME's market adjustment alone would add more than \$21 million in costs to the County. During the County's explanation, the following dialog took place:

"IA: And I will say, so, um, earlier we talked you know about an economic proposal and I will tell you that we've been looking at your proposal on economics, we've costed out the majority of the economics you've provided, except for the six weeks of paid caregiver leave, which is, I which would significantly increase the cost as well, um, and also the long term disability coverage, 'cause we don't have that. Um, for the nurses unit alone, over the three years, I your proposal would cost the county an additional, and so this is above what we currently have for operating costs, an additional 9.3 million dollars.

JS: For this, this is for the general?

IA: Nurses

LR: Nurses

JS: Nurses

IA: Oh, no, general unit, above the current operating cost for the general unit, under, under your proposal, again, not including the six weeks of paid caregiver leave and the STD, which would significantly increase this, it's estimated above current operating costs, it would be, I I uh, 33.3 million dollars.

JS: Which piece? The \$9.3 million?

⁹The County's quotation of this discussion ends with this remark. Union negotiator Steiner frequently used humor, including self-deprecating humor, at the bargaining table. We conclude that this remark was in keeping with Steiner's style.

IA: Huh? No, \$9.3 million is for the nurses.

JS: Oh, 33

IA: \$33 million is for the general unit.

JS: Right on.^[10]

IA: And for an estimated total together, of 42.6 million dollars. Um, I can tell you there's no way this is even in the realm of possibilities for the county to afford this. The county's been working hard to be fiscally responsible and work towards a balance budget without service reductions. In order for us to really consider market adjustments for this unit and potential COLA's, we're gonna need some, to see something significantly different from your side. Uh, you're proposed market adjustments alone, are estimated to be over 21 million dollars.

JS: For both units?

IA: Um, I believe so, yes. Um, and I just, I don't know where (laugh) the county would even come up with the money for that. And I think one of the things, you know, um, you had come in when after you had proposed market adjustments, then you and LaRece came in after that to say, you know that your

JS: Oh, right

IA: Proposal was step for step, when it comes to market adjustments

JS: Right

IA: And that significantly increased the cost.

JS: Yup.

IA: Um, you know, you're ri-, um, wanting to move to the three step system, um, and I know, you know guys, for, for the nurses, you wanted to move, reduce it to three steps" (Exh C-26 at 21-2.)

27. When Union negotiators asked County representatives to state the corresponding cost of the County's proposal, County negotiators refused and told Union officials to file a request for information under the PECBA.

28. According to the County's post-hearing brief, at this bargaining session AFSCME also agreed to correction of a section regarding the Consolidated Omnibus Budget Reconciliation Act of 1985 and 1999 (COBRA) and accepted County language regarding the working hours of grievance meetings.

29. On June 5, 2017, the parties met for their sixth bargaining session, and their discussions included the following. The parties discussed AFSCME's PERS proposal, and its proposal to extend, retroactively, the benefits of 1040 hour per year employees to employees who moved from 520 hours per year to 1040 hours. An AFSCME unit member juvenile counselor gave a detailed presentation about the difficulties of the position and its lower compensation than comparable positions elsewhere. A unit member, environmental health analyst, and pediatrics nurse also made presentations about their work and compensation relative to comparable positions elsewhere. AFSCME agreed to County's proposed changes in the nurses' contract limiting employees to performing work which was consistent with their job classifications.

¹⁰The County's quotation of this discussion ends with this remark.

30. The parties then discussed whose turn it was to make a compensation proposal modifying their last compensation proposal. The following discussion took place:

"JS: Welp, I think that's all we have today on the folks speaking.

IA: Okay. What else ya got?

JS: Well I think last time when we ended, we had given you a proposal. So we were waiting for a proposal back from you folks.

IA: On which? 'Cause there's a couple, I have a list of last and so there's a couple things I think we owe you, but there's a couple I'm waiting for counters on as well from your side. And I think we had given you the last wage proposal, if that's what we're talking about. Um so, and we had had conversations and I kinda talked about, obviously, the cost of the contract and I was hoping to get something from back from you on that since I'd kinda told you how much your proposal was going to be and said that if we're going to look at these markets and look at something that, what you've proposed wasn't even in the realm of any possibility, so I was kind of hoping that today you were going to come back with something a little different.

JS: Did you, well you haven't, you haven't given us anything on our class and comp. You're pro po-, if you're pro-, if you're saying your response to our class and comp and being 21 million dollars out is one, one and one, then that, then we have problem.

IA: Well I told that the 1/1/1 was we had to get a proposal to you by the fourth session and that yes, we'll want to look at class and comp, but I also, we had discussions on that this was a lot of money also the whole step to step was not something that is, that's significantly going to increase the cost. So I was kinda hoping to see something different from yourself on that.

JS: Yeah, I, I don't, I don't bargain against myself, so, I'll need to see counter proposal on our comps before I respond, 'cause I, I'm not gonna, I've already given you a proposal on our comps. I'll see a counter proposal and then I'll respond from there. I don't normally bargain against myself.

IA: Well I don't normally bargain

JS: That's my, my one

IA: Myself either. I think my

JS: Well you're not

IA: Response was the 1/1/1 and the health insurance and then, so.

JS: Well then, like I said, then that, evidently we have problem, 'cause I'm, that, that, to me was more of a COLA. If you're saying that there is no r-, the is no, we're not, the County's not going to give you any, we're not gonna even look at your comps, we're not going to respond to 'em, whatever, but

IA: That's not what I'm saying.

JS: And, and I know your not, but I'm saying if that's, I need something there in order for me to respond to. I can respond to the cost of living adjustments, you know I didn't, I, I think we had three percent on the table, although we're looking a total package, so, you know, I think theoretically, we can, we can move on cost of living, we can move on a lot of things once we start to have more of a idea where the County is on the, on the compensation piece we provided.

IA: Well and I think there's others out there are, I mean, we've there's numerous ones that we've proposed that I haven't seen any counter from you on. Um, and so

JS: Like, like what? What's, give us a list and w-we'll start to look at 'em.

IA: Well we've have

JS: I (inaudible) give a package on the ones that we talked about last time.

IA: We, you've given a package on the ones that you've talked about, but not necessarily

JS: No, I think I gave you one on article 8 or something, or whatever it was.

IA: So, on, let's see, we've asked you about the changing and you've, we've gone back and forth and the whole numbering and the gender reference and some of the spelling errors and potentially later today we'll have proposal that hopefully solves some where we can get to an agreement on that, 'cause I don't want to keep going back and forth on that. But on the preamble we don't have a counter from you on, on recognition we don't have a counter from you on, which is so preamble, article 1, article 2 management rights, we don't have counter from you on. Let's see, um, article 5, discipline and discharge we don't have a counter from you on, article 8 selection and promotion, I show, I think you were saying that you gave us a counter on that one, I show that we gave you two proposals and we haven't received a counter from you on. Um, and correct, you can, obviously if I'm wrong on those

JS: Wh-what dates were your proposals of your

IA: Which one, all of 'em?

JS Yeah, give me (inaudible)

IA: So preamble we proposed on 3/1, recognition we proposed on 3/21, management rights we proposed on 3/21, um, article 5, discipline and discharge we proposed on 3/21 and then a new proposal on 4/19, article 8 selection and promotion we proposed on 3/21 and then again on 4/19. And then I hear what you're saying and I know we don't necessarily agree on wages, you proposed 4/6 and then 4/19 and we counter proposed on 4/19. Um

JS: In writing?

IA: Yep. That was the 1/1/1 and the changes to health insurance.

JS: That was article 10 proposal or article 12?

* * * * *

JS: We'll try to have some for you after lunch." (Exh. C-29 at 32-5.)

31. Also on June 5, the County raised the non-substantive changes. Steiner told Wood that the proposed spelling changes didn't need to be a formal proposal. The parties also discussed changes to the promotion/new hire interview process under Article 8 and the County's proposal to add an economic sanction to its disciplinary options.

32. The County made a formal proposal regarding several provisions of the agreement, including market adjustments for some unit members. The market adjustments were to be what is described as horizontal above, "employees will move to the proposed pay grade at the closest step that does not result in a pay decrease." (Exh. C-29 at 59-60.)

33. Also on June 5, the County proposed market adjustments for about 1/3 of the general unit (using its horizontal method); raised the cap for long term disability benefits to \$10,000 per month; added language regarding nurses working in corrections positions; reverted to federal Department of Labor language defining exempt employees; removed language requiring employees to take Time Management (TM) leave in 15 minute increments; and withdrew its corrections to the chief negotiator's job title.

34. Also on June 5, the parties reached tentative agreements regarding non-substantive changes to the agreement, changing the numbering system from Roman to Arabic, correcting spelling errors, and changing gender references to neutral.

35. On June 16, 2017, the parties met for their seventh bargaining session. The parties discussed the effect of employees transferring to 520 hours per year positions to 1040 hours per year positions in the County's waste management program, with both a manager and employees in the program at the bargaining table. The parties also discussed criminal background checks regarding current employees and promotion and transfer issues. AFSCME agreed to the County's proposed spelling, grammar, and gendered language changes and the parties tentatively agreed to the articles opened by the County which contained only those changes. The County agreed to change language regarding the electronic transfer and promotion process. AFSCME informed the County that its counter to the County's last offer was not yet completed.

36. On June 29, the parties met for their eighth bargaining session. The parties discussed PERS at length. AFSCME offered a counterproposal to the County's last proposal, and the parties engaged in a lengthy discussion of the proposal.

37. During the June 29 bargaining session, the following exchanges¹¹ took place between the County's Wood and AFCME's Steiner:

“IA: Except for the clarification of the step to step is there anything different on your original proposal on wages?

JS: For which one?

IA: For the article on wages. Is there anything different except for your clarification from step to step?

JS: Nope.

IA: Have you moved at all on the percentages or anything? I'm not seeing

JS: No I, no I have, no I have not moved on any of the percentages.

IA: That's what I thought.

JS: Or, or moved the deal, or the deferred comp.

IA: 'Kay.

JS: Uh, and I provided the, I know we did it in a different section so I, um, making sure that you had the current one, I put a union wage scale adjustment proposal for the nurses unit and just put the date and stuff on it, that's all that changed.

IA: There are no changes on the proposed salary schedules?

¹¹This discussion is at the heart of the County's case. The County quotes some of this discussion, ending prior to some important Union responses. Because of the importance of the entire discussion, we quote it at length.

JS: No. No, it's just the same one that you, we already provided, uh, all I did was, I put a header on it and made it part of the package.

IA: So no movement on wages?

JS: No, no. I'm quite frankly, why would we?¹² It's, that's the market. They should be paid at the market. I think it's pretty clear looking at the paper recently you folks believe in the market, so, so do we. Make the move." (Exh. C-36 at 17-18.)

* * * * *

"IA: So, Jim, I, on this, I'm, I guess I'm not really seeing what exactly you are moving on in the wa-, in the economics here 'Cause I'm not

JS: I'm not, I'm not moving a whole lot on the economics, uh

IA: From your original proposal? It looks exactly the same.

JS: From our proposal, I really, I haven't, I haven't seen much movement from this, from the County. And so I, I, quite frankly, haven't moved either. That's our position. So, we're pretty set that we

IA: We moved on the deferred comp, or not deferred comp

JS: I think your deferred comp gave us a one percent if we pay it

IA: Sorry

* * * * *

IA: Sorry, not on the deferred comp, I misspoke, we moved on the, um, LTD. We did put a proposal in there on LTD.

JS: Right, but I think Ms. Nagle'll tell you, she's sitting right next to you there, that we have a current arbitration on that * * * We're still pissed off about that, quite frankly. * * * And so is our bargaining unit. You will see that I've moved off of that in the general unit 'cause * * * nobody's been harmed * * * If I * * * give it away at the table, then I pretty much have to withdraw the arbitration." (Exh. C-36 at 19.)

* * * * *

JS: Under article 10 we still have three percent on the table for, um, cost of living adjustments, but as I said previously, when we, and we recognize that the County did provide a, uh, a proposal that moved some on, on classifications for less than a third of folks, that really isn't significantly enough for us make any modification in the, uh, either our, our, comp work that we've already and provided to you. Um, but what I will say again is and we state consistently that the, the cost of living adjustment can, we're not as hard set on that if we can get to an overall compensation, uh, proposal. So, um, all these things are fluid as far as I'm concerned if we get to a point where we can get agreement on, uh, the class and comp stuff that we've provided as well.

Uh, in talking about deferred comp, in talking to my folks on the, both the bargaining team, and in, and when we have meetings around the County, folks are pretty clear that, I, the County has posted several times, uh, both in the media and, and even folks talk about it that most other bargaining units, whatever, have this two, two percent deferred comp. So, that, that's really what the, the proposal continues to be. Um, but again the way I, the way I've talked to my team that, you know, we'll need to have a, really a comprehensive economic agreement and I think when we do that, uh, any, any one of these items can be fluid. So whether if we get

¹²The County's quotation of this reply ends with this remark.

agreement on our class and comp piece and we, we make the appropriate moves we believe, uh, and then we come to agreement that's probably gonna, uh, impact deferred comp, cost of living adjustments and maybe on some of the others, so. And then I included the same intent language there. And in the nurses that you saw. B is the same as in the, the nurses, we, as you know, we had a grievance, we had an issue with that. Uh, we are addressing that issue through the collective bargaining agreement. We haven't changed the bilingual piece. Uh, the adjunct classification piece. These have come out, uh, for purposes of article 11, or 16 I mean.

And then I've also provided the, um, the wage scale adjustment proposals. There's no changes in it. Uh, they're exactly how they were. I, I, how you had 'em before. I just added a header and the date.

IA: So, can I ask, Jim, you say that each of these are fluid and you're saying that if you get, the union wage scale adjustment, then, or the two percent deferred comp, or things like that, that these are all fluid, but if this is exactly the same as your initial proposal, I'm not seeing any movement of okay, if, we'll go a 2/2/2 or a no deferred comp if we get the wage scale adjustments that, how are we supposed to read what that fluid, fluidity looks like? When you're saying that if we get these, we'll go different on the COLA's or different on this when we're not seeing you move off of your original proposal?

JS: Well, I

IA: I can't read your mind

JS: Well, no, that's fine.

IA: I don't see a proposal that shows

JS: No, I, that's fair.

IA: There's some differences.

JS: Well, where I think

IA: Where, where are we moving where you are seeing that you can move on some of these?

JS: Well, I, you know, I think for, from my perspective is, uh, if, the County, if the County said well if we, if we make you, if you make you whole on the wage adjustment proposal, um, and, and no, would you agree then to no cost of living? If you propose that.

IA: Well then we're bargaining against ourselves.

JS: Well, what would we look at?

IA: We already made a proposal of different COLA's

JS: Right

IA: With wage scale adjustments and you're coming back with your exact same proposal.

JS: Right, ih, eh, and um,

IA: So, we're not going to sit here and bargain against ourselves.

JS: I'm, and my, and my, well, my ex-, well you're not bargaining against yourself now because what I said is while we appreciate there was some movement on a very small portion, that's not enough m-m, that's not enough movement from the County for us to then say, we'd make a whole scale adjustment. I look at this as a package, if I, I mean, am I gonna cost it out at 21 million like you folks are doing?

I'm really looking at a total compensation here. And, you know, it's not that we're saying that we're unwilling to move anywhere. We, we have some room for movement. But, you know, we have to see something that's more significant from that from the County in order for us to make a (inaudible)

IA: And I think we need to see something more significant from the Union

JS: Well I

IA: For us to move forward and get to that place as well. When you come back with a package proposal that looks exactly like your first proposal. That's not you

JS: This isn't a, let me be clear

IA: Really moving towards anything.

* * * * *

JS: * * * Do you need any more explanation on why we're not moving off the compensation? I think we're, we're trying to give the, the County all the opportunity there, w-w-we can, for you folks to recognize that our folks are significantly underpaid for the market and to catch us up. And when we see the County's willing to do that, when we can have the conversations where we move in other places." (Exh. C-36 at 17-24.)

38. Following the discussion above, the parties continued to bargain, covering topics in the County proposals including timing conflicts between an Memorandum of Understanding and contract proposals, bilingual pay, compensation for mental health supervised training. The County also stated that "Article 10 wages, we're sticking with our proposal on there. Um, like we said we have moved on the market [adjustments], you say its fluid, but we need to see where there's some movement anywhere before we're gonna counter on the wages." (Exh. C-36 at 64.)

39. By the close of this bargaining session, AFSCME had agreed to an 80 hour maximum limit on accrued compensatory time; accepted County language allowing employees to opt out of secondary recall to work with notice; and accepted language restricting the use of leave time in connection with the holiday Friday after Thanksgiving.

40. Also on June 29, the County agreed to a memorandum of understanding (MOU) regarding Waste Management Fee Collectors and Article 18; added a provision to reimburse up to one half of mental health worker supervision costs required for certain certifications (capped at \$3,000) and to provide the other half of costs through providing group sessions; proposed market adjustments for about one third of the nurses; agreed to abandon its proposal to remove language changing the designation of employees from permanent to regular; and accepted AFSCME language regarding layoff and recall.

41. On July 10, the parties met for their ninth bargaining session. The parties discussed the County's calculations regarding compensation costs, and how it determined the appropriate comparable employees in other jurisdictions. The parties also discussed confusion over the current state of County and Union proposals. AFSCME rejected the County's proposed changes to Article 8 (selection/promotion).

42. The parties again disputed whose turn it was to make a proposal regarding compensation:

“IA: What else you got for us then?

JS: Uh, am I up or are you up?

IA: You’re up.

JS: And how is that determined?

IA: That we gave you essentially all counter proposals last time and have made movement, made the last movement on economics.

JS: You did?

IA: Mmm hmm.

JS: Oh. Alright. And what was that proposal? 'Cause if I'm not mistaken, I think your other proposal was way back in June. Did you give us a counter an economic on that on the 29th? Was that the one with the sheet?

IA: Yeah.

* * * * *

IA: And I think that we made the movement on that one too that, that we haven't seen movement from the Union for general either. So yeah, 6/29 we gave you a proposal.

JS: Kay well here, here's this here then. This is a package proposal. Do you guy's have them already?” (Exh. C-40 at 7-8.)

Ultimately, AFSCME moved forward with a proposal on the nurses unit, moving closer to County positions on Articles 7 (general provision), 9 (hours of work and overtime), and 10 (wages).

43. AFSCME’s proposal regarding nurses’ unit compensation provided that employees receiving the AFSCME market adjustment (all current unit employees) would not receive a COLA in the first year of the agreement. AFSCME also reduced its COLA proposal to 2 percent for each of the three contract years.

44. Turning to the general unit, AFSCME accepted the County’s proposal regarding Articles 7 (general provisions), 8 (selection/promotion) (current language), 13 (safety), 15 (seniority), all but one section of Article 16 (layoff and recall), and 17 (relationships).

45. In response to AFSCME’s proposal, the County presented a package regarding Article 7 (general provisions), 15 (seniority), 16 (layoff and recall), and 17 (relationships). AFSCME also offered a package regarding Articles 9 (hours of work), 10 (wages), 11 (leave and holidays), 12 (insurance and related), 13 (safety) and 14 (training).

46. The bargaining session ended abruptly when a member of the Union team had to leave to cover for another employee’s family emergency.

47. On July 20, 2017, the parties met for their tenth bargaining session. The parties began by resolving confusion regarding a memorandum of understanding and its potential effect on the status of various grievants. The parties also discussed, in some detail, bilingual testing. The County then presented a package proposal for the nurses’ unit. The County increases its COLA

proposal to 1.5 percent for the three years of the agreement, except for employees receiving a market adjustment in the first year, restored a medical co-pay plan with a \$35 office visit co-pay for both units; reduced monthly contribution rates for two health plans; and provided that the clothing allowance for nurses would include footwear with an increased reimbursement amount. The County presented a similar proposal for the general unit.

48. On July 29, 2017, the parties' statutory 150-day bargaining period, which began on March 1, 2017, expired.

49. On July 31, 2017, the parties met for their eleventh and last regular bargaining session. The parties began with a discussion about the ability of a class of County caseworkers to meet a 7-day deadline for inputting certain case notes into a data system, and then a lengthy discussion about bilingual workers. The parties also discussed, again, a memorandum of understanding relevant to the current agreement and a grievance over the past agreement.

50. The County presented a new proposal regarding Article 9 of the nurses' agreement, and recast a mostly agreed-to memorandum of understanding into Article 18 of the general unit. AFSCME presented proposals regarding Articles 11 (leave and holidays), 16 (layoff and recall), and 17 (relationships and returning to work after a workplace injury).

51. The County agreed to remove language regarding the first day of the work week in calculating double time hours. AFSCME agreed to remove its proposal for six-week paid caregiver leave; remove language increasing the bereavement leave benefit; and to accept the County's language cleaning up Article 17 (relationships). By the end of the morning session, the parties had reached tentative agreement on Articles 7, 15, 16, and 17.

52. After the morning session, the parties initially agreed to proceed after lunch, but AFSCME changed its mind, and requested mediation. The County representatives stated that they were willing to continue negotiations if AFSCME would make some additional movement on its economic proposals. AFSCME declined to do so, and the parties agreed to proceed to mediation.

Communications Between Counsel for AFSCME and the County

53. In early August, 2017, Union chief negotiator Steiner wrote to bargaining unit retirees about a County health care proposal. He stated, in part:

"The County through collective bargaining is attempting to erode the level and value of your retiree health insurance benefit. The County has proposed to add another plan with less benefit called the Prime plus plan, to change the co-pay from \$25 to \$35 and also make employees and retirees pay for a portion of the insurance premium of whichever plan they choose. The County's proposal is a significant reduction in the current level of benefit with additional cost in paying for the premium for current employees and therefore a reduction to retiree's benefits as well as those who will retire in the near future, I have included the County's proposed changes in this correspondence for your review.

“Other than Commissioner Sorenson, none of the current Commissioners were in office when wage increases were minimized to maintain your health benefits. Commissioners aren’t aware that you worked for lower wages for years because of the benefits you received and what you would receive at retirement. It is flat unfair to now try and take that away. It is time to remind the commissioners of the many sacrifices that were made to maintain decent health insurance coverage.” (Exh. C-64 at 7.)

54. On August 10, 2017, County officials learned of Steiner’s letter. County officials believed that the letter was inaccurate regarding the impact of the County’s benefit proposals on unit retirees. That same day, Assistant County Counsel Nagles emailed AFSCME Counsel Jennifer Chapman an information request under PECBA for a copy of that communication.

55. On August 14, Chapman provided Nagles with a slightly redacted version of the communication, with the following comment:

“In any event, the content of the letters that went out is cut and pasted below (with redactions as noted), However, please note that AFSCME disputes whether the County has the right to have, much less request, information about communications between AFSCME and members that AFSCME represents. We’ve produced the content of the letters below on a one-time basis, in large part because we don’t see any value in fighting about the disclosure right now, and in large part because AFSCME remains willing and hopeful that we can reach an agreement at the bargaining table that protects everyone that AFSCME represents. If the County makes a similar request for information of either our members or AFSCME, we reserve the right to challenge the appropriateness of that request.” (Exh. C-64 at 7.)

56. On August 23, Nagles sent Chapman an email, stating in part:

“I’ve had a chance to discuss the below email with our benefits manager and there are a few statements that we wanted to correct. The statement that says the benefit changes “also make employees and retirees pay for a portion of the insurance premium of whichever plan they choose” does not accurately state the County’s proposal or the potential impact to County paid retirees. County paid retirees will not pay for a portion of the insurance premiums under the County’s proposals. The County requests for AFSCME to please clarify the information that was sent to employees and retirees.”¹³ (Exh. C-64 at 5, emphasis omitted.)

57. Chapman responded later that day, as follows:

“The local’s understanding of the County’s insurance proposal and the employee benefits handbook is that retirees are eligible for the same insurance plans as

¹³The County does not identify the specific language that it alleges AFSCME interpreted wrongfully. In its post-hearing brief it cites to allegations in the Complaint which were denied in the Answer, and to the email exchange summarized above.

single-FTE employees. The local also understood the County to be proposing a co-insurance for all eligible plan participants.

“Are you saying that retirees will be exempt from the co-insurance, and that the County is planning to pay 100% of the premiums for retired employees?” (Exh. C-64 at 5.)

58. Also on August 23, Nagles responded, “County paid retirees will be exempt from the contributions and the County will continue to pay 100% of premiums for County paid retirees.” (Exh. C-64 at 4.) Minutes later, Nagles added, “Just so we are in the same page I will add that the health benefit design changes like the \$10 increase for office visits under the Co-Pay plan for active employees will impact coverage provided to County-paid retirees.” (Exh. C-64 at 4.)

59. On August 28, Nagles emailed Chapman, stating, “I know you mentioned you are preparing for arbitration but when you have a moment can you please give an update on whether the below information over the impact of the County’s insurance proposal has been clarified with AFSCME employees and retirees and provide us a copy of that clarifying communication. If you have any additional questions about the impact of the County’s proposal, we are happy to answer.” (Exh. C-64 at 3.)

60. Chapman responded the same day as follows: “Can you send Jim [Steiner] and I a revised proposal that clarifies that the County will continue to pay 100% of the premiums? Once we get that revised proposal, we will send out the clarification ASAP.” (Exh. C-64 at 3.)

61. On August 30, Nagles responded as follows:

“I am attaching a courtesy copy of the County’s last bargaining proposals for both units on insurance. These were presented on 7/20 prior to mediation and we have not received a counterproposal yet from AFSCME. Section 4 of both proposals contain provisions related to retiree health benefits. We have had discussions at the table about the intent and impacts of the County’s proposals. At this point we are not intending on presenting a proposal with any clarifying language to the retiree benefits and if we are to make any proposal changes that would go through Jim [Steiner] and Inga [Wood] and the bargaining teams in mediation. I don’t believe that a revised proposal is necessary in order for AFSCME to clarify with its members and retirees as the County’s representations as to the intent of the proposal and the information we are providing in this email should be sufficient.

“The intent of the County’s proposal on retirees and potential impacts to retired members are as follows:

- “1) No Impact for Retirees on the HDHP
- 2) County paid retirees Will be exempt from the contributions, The County will continue to pay 100% of premiums for County paid retirees.
- 3) Impact of \$10 increase for copay on professional service for retirees on the Co-pay plan

4) Impact of \$250 deductible, and \$500 additional out of pocket for retirees who choose PrimePlus plan.

“If AFSCME has any additional questions on the impacts, I am copying Mary Miller the Counties benefits manager as a contact.” (Exh. C-64 at 2.)

62. Chapman responded the same day,

“I read through the proposals, and I don’t think it is clear that the co-insurance would not apply to the retirees. I also talked to Jim, and he does not remember the discussions during bargaining the same way you’ve outlined in this email. The bargaining team does not remember it that way either. Had the County’s intent been clear, AFSCME would never have sent out the summary that was sent out; AFSCME has no interest in misinforming AFSCME members or retirees.

“All this having been said, we appreciate that you have clarified the County’s intent in these emails. In an act of good faith, AFSCME is willing to update the retirees with the clarifications you’ve requested. Jim is going to have limited availability the next couple of days, but we will try to get that clarification out next Tuesday.” (Exh. C-64 at 1.)

63. Also on August 30, Nagles closed the exchange on this issue as follows:

“Thank you. The County appreciates AFSCME’s willingness to make the correction. The retiree impact information is below, but I know Mary and our team would be happy to answer any additional questions about the County’s insurance proposal as we move forward with mediation.” (Exh. C-64 at 1.)

64. Previous collective bargaining agreements between the parties had provided the same benefits and limitations to both regular unit employees and unit retirees.

Mediation

65. The 15-day statutory mediation period (before a party could declare impasse) beginning on July 31 was to end on August 15, 2017.

66. On August 23, 2017, the parties held their first of two mediation sessions with ERB State Conciliator Janet Gillman acting as a mediator. Each party separately explained its proposals to the mediator, and the mediator separately explained the opposing party’s proposals. The AFSCME bargaining team spent most of the time discussing data provided by the County regarding the County’s calculations of compensation and benefits. The County adhered to its bargaining proposal of July 20, except that it proposed additional wage adjustments to some employees in the general bargaining unit. AFSCME did not modify its last proposal.

67. On September 8, 2017, the parties held their second of two mediation sessions. The parties engaged in the process, although there is no evidence that either party presented any new proposals or reached any agreements.

68. At 4:59 PM on September 8, while the mediator was meeting with the County's bargaining team, AFSCME declared impasse via email. Accordingly, the parties' final offers and cost summaries were due on September 15.

69. Two days after filing for impasse, on Sunday, September 10, Union chief negotiator Steiner emailed Wood and Nagles, among others, to reiterate Union interest in continued bargaining and reaching an agreement. He stated, in part,

"I hope you all are not trying to catch up on work today like I am this Sunday Morning. While going thru emails I was thinking of some of the progress we made on Friday and thought I would take a moment to explain why AFSCME declared impasse, because I did not get a chance to do this before everyone left on Friday. I did try to reach out to Inga with a phone call to explain before but was unable to get through. For AFSCME, the impasse declaration is a procedural step that reflects how long we have already been at the bargaining table, the amount of distance that is left between us, and our members' desire that the contract negotiations wrap up before the holidays. We remain open and interested in a continued dialogue about the various proposals on the table, and we hope that the County is willing to proceed with the upcoming bargaining/ mediation sessions, including the one on September 18. Ideally, preparing final offers can help both of us focus on the finish line and what is really important so that we can ultimately reach a deal we can all live with." (Exhibit R-9.)

70. On September 15, the parties submitted their Final Offers to ERB. On September 21, AFSCME notified the County and ERB that its cost summaries contained a calculation error which overstated the final costs of the AFSCME packages by \$11,389,512. In informing the County of the error, AFSCME asked the County if the corrected, lower cost would prompt the County to change its Final Offers. The County replied that it would not, because even AFSCME's corrected final offers would cost almost 25 million dollars in total and were therefore too expensive.

71. The County's cost summaries stated that its Final Offers included a total projected increase for the three year contract of \$6,499,000 for the general unit, and \$1,349,268 for the nurses unit, for a total of \$7,848,268. AFSCME's corrected cost summaries stated that its final offers included a total projected increase for the three year contract of \$24,880,843 for the general unit and \$6,624,297 for the nurses unit for a total of \$31,505,140.

72. Based on the corrected cost summaries, the parties' final offers were \$23,656,872 apart. Under the admittedly rough and incomplete estimates from the parties near the start of bargaining, they began at least 40 million dollars apart.

73. According to the County's adopted budget for the fiscal year 2017-2018, the total amount of budgeted County expenditures was \$600,919,222 including reserves. The County budgeted for a 4.33 percent or \$27,206,268 decline in revenue because of reducing fund balances due to elimination of the Secure Rural Schools federal payments. However, it expected a decrease in internal costs including health insurance and fleet costs. The total wages for both regular and

temporary employees, a total of 1,515.57 FTE, were budgeted at 98.3 million dollars for the fiscal year, an increase of 1.35 percent from the previous year. The budgeted wages account for 25.1 percent of all County expenditures. In addition, the County also budgeted for hiring short term employees throughout the fiscal year.

74. The County 2017-2018 budget also included an additional \$68.3 million for employer taxes such as social security and Medicare as well as benefit costs caused by medical insurance, retirement, and other employer-paid benefits. Health insurance costs were projected to be flat for the third year in a row due to the County's change to a self-funded model and lower than projected medical claims in FY 15-16. The County's pension benefits were expected to increase 20 percent as a result of an increase in employer rates from PERS. The County believes PERS increases will continue for the next several biennia because of the unfunded liability within the PERS system. Lane County reserved funds in FY 13-14 in anticipation of the increasing PERS rates and will begin to use a portion of those reserves as the increases occur to help decrease the overall impact. The County budgeted for \$170.5 million in all County personnel expenses, or 43.5 percent of the County's total expenditure budget and an increase of 1.54 percent over the 2016-2017 budget. The County's 2017-2018 budget budgeted \$14.5 million for General Fund reserves, an increase from the previous year.

75. With this budget, the County revised "its financial policies related to reserve levels and the Adopted Budget has been built under the new recommendations" and implemented a change in General Fund policy to move towards a reserve which is 20 percent of operating revenues. (Exh. C-67 at 66.) The County budget states, "This change in reserve levels will provide cash flow needed prior to receipt of property tax revenue and safeguard the County's strong bond rating." (Exh. C-67 at 63-64.) The 2017-2018 budget increased the General Fund reserve to approximately 17 percent. Reserves for all funds combined total 140.4 million dollars with an additional amount of 44 million dollars in contingencies.¹⁴

76. Also on September 15, the County filed the original Complaint in this unfair labor practice proceeding, which it amended to correct a technical issue on September 27.

77. On October 2, 2017, AFSCME provided the County and mediator with a written Notice of Intent to Strike beginning at 6:00 a.m. on October 18, 2017. AFSCME leaders selected this date in part because they wanted the labor dispute to be resolved before the November-December holiday season.

78. The parties continued to bargain, with the assistance of the mediator.

¹⁴A substantial portion of the County reserves and contingency funds were dedicated to one use, and could not be spent for non-dedicated purposes. The percentage of County reserves relative to the entire budget is relevant to its bond status, and to County bond or loan interest rates. County officials testified, without contradiction, that a 17 percent reserve was recommended by the Government Financial Officers Association. They also testified that, at the time of hearing, the County had a favorable bond rating, better than the past several years. It is not clear that this rating was obtained through the 2016-2017 budget reserve or the higher 2017-2018 budget reserve.

79. The parties' last pre-strike negotiation began on October 17 and continued until the following morning.

80. At approximately 3:00 am on October 18, the County provided another offer to AFSCME. The County's last bargaining action before the strike was to present this offer.

81. AFSCME received and began consideration of the County's last proposal.

82. At approximately 6:00 am on October 18, County representatives heard employees outside the building engaging in strike-related activity and saw a notice that the strike had begun on an AFSCME social media website. They concluded that AFSCME had rejected their offer and that the strike was therefore beginning.

83. While reviewing the County's last offer, AFSCME negotiators were told by a member of the media that the County had given up on negotiations and that County representatives had left the building. Union representatives concluded that the County had abandoned negotiations and elected to endure the strike. Accordingly, the strike proceeded at the date and time in the notice, 6:00 a.m.¹⁵

84. AFSCME officials did not take the strike decision lightly. In the words of AFSCME's Field Services Director, a strike situation is "incredibly scary" for most bargaining unit members, and "maybe the most important decision" of a bargaining unit member's economic life. (Friedman Testimony.)

CONCLUSIONS OF LAW

The County alleges that AFSCME violated ORS 243.672(2)(b) and (d) by engaging in surface bargaining with the intent to strike when the bargaining ended, and deliberately misinforming former bargaining unit member retirees about a County proposal regarding health insurance benefits. We conclude that the County failed to meet its burden to establish that AFSCME violated ORS 243.672(2)(b) and (d) by engaging in the actions just described.

The issues in this case are:

1. Did AFSCME engage in unlawful surface bargaining in violation of ORS 243.672(2)(b)?
2. Did AFSCME engage in unlawful bad faith bargaining through communications with its bargaining unit members and through an attorney suggesting a change in contract language in violation of ORS 243.672(2)(b)?
3. Did AFSCME violate the parties' ground rules and ORS 243.672(2)(d)?

¹⁵This record shows that representatives of both parties, who were almost certainly very tired, believed that the other party had abandoned negotiations to avert the strike while their party were willing to continue bargaining. Put another way, the County failed to meet its burden of proof to show that AFSCME abandoned negotiations in the hours before the strike in an act of bad faith.

We turn to our analysis.

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The County failed to meet its burden of proof to show that AFSCME violated ORS 243.672(2)(b) and (d) through surface bargaining.

After considering the totality of circumstances in this case, we conclude that the County failed to meet its burden to show that AFSCME “merely went through the motions of bargaining without any intention of reaching an agreement” and engaged in surface bargaining in violation of its duty to bargain in good faith. *Oregon School Employees Association v. Medford School District # 549C*, Case No. UP-77-11 at 15, 25 PECBR 506, 517 (2013), citing *Lane Unified Bargaining Council v. McKenzie School District # 68*, Case No UP-14-85 at 5, 8 PECBR 8160, 8196 (1985).

Standards of Decision

ORS 243.672(2)(b) provides that it is an unfair labor practice for a public employer or its designated representative to “[r]efuse to bargain collectively in good faith with the public employer.” The PECBA defines collective bargaining as:

“the performance of the mutual obligation of a public employer and the representative of its employees to meet at reasonable times and confer in good faith with respect to employment relations for the purpose of negotiations concerning mandatory subjects of bargaining, to meet and confer in good faith in accordance with law with respect to any dispute concerning the interpretation or application of a collective bargaining agreement, and to execute written contracts incorporating agreements that have been reached on behalf of the public employer and the employees in the bargaining unit covered by such negotiations.” ORS 243.650(4).

This Board has stated that 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 at 4-6, 21 PECBR 599, 602-04 (2007).

ORS 243.672(2)(b), regarding bad faith bargaining by a labor organization, is a mirror of ORS 243.672(1)(e), regarding bad faith bargaining by an employer. Subsection (1)(e) claims of surface bargaining are more numerous in this Board’s recent reported decisions. Accordingly, we refer to cases under either 2(b) or 1(e) in evaluating this surface bargaining claim. In doing so, we acknowledge that not all labor organizations are similarly situated under subsections 2(b) and 1(e). Employers and labor organizations bargaining over strike-permitted employees may conclude bargaining with interest arbitration, with one of the party’s last best offer selected as the binding agreement. When strike-permitted employees are involved, an employer’s last act in the bargaining process is to unilaterally implement its final offer, which generally (but not always) ends the parties’ negotiations. A labor organization’s complementary power is to strike, an end to which is generally obtained through additional negotiations.

The County argues that AFSCME violated ORS 243.672(2)(b) by engaging in bad faith “surface” bargaining. This Board has stated, that in considering whether a union engaged in surface bargaining in violation of ORS 243.672(2)(b), the question is whether the employer has established a totality of conduct on the part of the union demonstrating that it was not bargaining with a bona fide intent to reach an agreement if agreement is possible. *Hood River County v. Oregon AFSCME Council 75, Local 1082*, Case No. UP-009-08 at 25, 23 PECBR 583, 607 (2010), quoting *Washington County, Oregon v. Washington County Police Officers Association*, Case Nos. C-34/36/70/74 at 6, 5 PECBR 4411, 4416 (1981).

Standards of Decision: Surface Bargaining

In surface bargaining cases, there is generally no direct evidence that a party is unwilling to negotiate in good faith. *McKenzie School District # 68*, UP-14-85 at 37, 8 PECBR at 8196. Therefore, this Board examines the totality of the circumstances to determine whether the party demonstrated “a ‘willingness’ to reach agreement that is the result of good faith negotiations.” *Blue Mountain Faculty Association, Oregon Education Association/NEA and John Lamiman v. Blue Mountain Community College*, Case No. UP-22-05 at 105, 21 PECBR 673, 777 (2007), quoting *Hood River Employees Local Union No. 2503-2/AFSCME v. Hood River County*, Case No. UP-92-94, 16 PECBR 433, 451-52 (footnote omitted), compliance order 16 PECBR 696 (1996), *AWOP 146 Or App 777, 932 P2d 1216* (1977). Put another way, this Board looks at the totality of the circumstances during the relevant time, and determines whether a party’s cumulative actions indicate a sincere willingness to reach a negotiated agreement or indicate just “going through the motions” of bargaining. *Jackson County, v. SEIU Local 503, OPEU/Jackson County Employees Association*, Case No. UP-027-14, 26 PECBR 501 (2015); *Oregon AFSCME Council 75, Local 2936 v. Coos County*, Case No. UP-15-04 at 33-37, 21 PECBR 360, 392-96 (2006). In surface bargaining cases, we “judge the overall quality of bargaining.” *Lincoln County Employees Association v. Lincoln County and Daniel Glode, District Attorney*, Case No. UP-42-97 at 22, 17 PECBR 683, 704 (1998). See also *McKenzie School District #68*, UP-14-85 at 7, 8 PECBR at 8196; ORS 243.656(5) (parties must enter collective bargaining with a “willingness to resolve” labor disputes).

This Board has identified six factors which aid in determining whether a party’s conduct constitutes unlawful surface bargaining:

“(1) [W]hether dilatory tactics were used; (2) the content of a party’s proposals; (3) the behavior of a party’s negotiator; (4) the nature and number of concessions made; (5) whether a party failed to explain its bargaining positions; and (6) the course of negotiations.” *Coos County*, UP-15-04 at 34, 21 PECBR at 393.

We also consider other relevant circumstances specific to the case at issue:

“For example, we have considered whether a party: (1) committed other unfair labor practices during negotiations; (2) gave inaccurate reasons for a claim asserted in negotiations; and (3) engaged in conditional bargaining. [*Amalgamated Transit Union, Division 757 v.*] *Rogue River Valley Transportation District*, [Case No. UP-80-95 at 28,] 16 PECBR [559] at 587 [recons. 16 PECBR 707 (1996)]. As

noted, however, each case presents its own set of circumstances, and we may consider any factor that contributes to the totality of a party's bargaining conduct." *Medford School District # 549C*, UP-77-11 at 12 n. 7, 25 PECBR at 517 n. 7.

1. Dilatory Tactics.

Dilatory tactics, which tend to unreasonably delay or impede negotiations, indicate bad-faith bargaining. *McKenzie School District # 68*, UP-14-85 at 36, 8 PECBR at 8197.

The County argues that AFSCME engaged in dilatory tactics by "(1) refusing to agree to minor, non-economic changes, (2) failing to provide proposals with meaningful concessions, (3) behavior by the Chief Negotiator showing lack of intent to reach an agreement, and (4) presenting economic proposals AFSCME knew or should have known were inherently unreasonable and failing to make meaningful movement." (County post-hearing brief at 8.) While the County acknowledges that numbers (2), (3), and (4) are relevant to other surface bargaining factors, it contends that these also constitute dilatory tactics. We will, however, as this Board has consistently done for many years, address these issues separately.

Accordingly, regarding alleged dilatory tactics, we evaluate only AFSCME's unwillingness to agree to the "minor, non-economic changes" proposed by the County to update language in the agreement. The record demonstrates that AFSCME representatives were wary of the consequences of opening up so many articles in the agreement for bargaining, and believed that some proposed minor changes were actually substantive. AFSCME ultimately agreed on many, but not all, of the changes. However, the critical fact is that the changes at issue were "minor, non-economic changes." Implicit in the statutory framework regarding bargaining is that the matters in dispute must have some weight, some impact, on the rights and responsibilities to the parties to the negotiations. By definition, the issues the County identifies as "minor, non-economic changes" were not substantively important to the final agreement.¹⁶ There is also no evidence that the parties' disagreement about these changes prevented or interfered with bargaining on other matters. We conclude that, at least on these facts, AFSCME's refusal to agree to minor, non-essential changes in an agreement does not constitute dilatory tactics.¹⁷

¹⁶This is not to suggest that gender-neutral language is not important, but that this particular proposal was not an impediment to resolution of this bargaining process. There is no evidence or argument here that the changes would affect the rights or responsibilities of the parties or any bargaining unit member. Moreover, the changes could have easily been made through a separate memorandum of agreement between the parties. Finally, it is the proponent of the changes, the County, that argues that the changes were de minimus.

¹⁷Minor proposals sometimes build trust between the parties and help establish momentum towards reaching a conclusion. In this case, they appear to have had the opposite effect. It is possible that a party could use relatively unimportant matters to delay bargaining, by repeatedly turning the bargaining back to that matter and spending a disproportionate amount of limited bargaining time discussing it. Union witnesses suggested this took place here, but we need not decide that issue because the Union has not filed such a claim.

2. Content of AFSCME's Proposals.

This Board has previously stated that there can be situations where:

“the terms of an employer’s proposals are so harsh or unreasonable that it can be said that the employer was making proposals which it knew or should have known were predictably unacceptable. In such cases, it can sometimes be concluded from the totality of circumstances that the employer engaged in negotiations with the intent to frustrate the bargaining process, rather than to reach agreement. Still, it must be proven not just that a particular proposal was harsh or unreasonable, but that the proposals were so outrageous that it can be concluded that the employer had no genuine intent to reach agreement and was in fact attempting to avoid agreement.” *International Union of Operating Engineers, Local 701, v. Wheeler County*, Case No. UP-010-15 at 16, 26 PECBR 687, 706 (2016), quoting *Oregon AFSME Council 75, et al. v. State of Oregon, Executive Department*, Case No. UP-99-85, 9 PECBR 9085, 9100 (1986).

The County argues that, based on the history of negotiations between the parties, the experience of AFSCME’s Chief Negotiator and “AFSCME’s knowledge of the County’s budgetary process, focus on fiscal responsibility, and financial limitations,” AFSCME should have known its economic proposals were inherently unacceptable to the County. County post-hearing brief at 10. In any event, the County argues, AFSCME received explicit notice of the “inherently unacceptable nature of its proposals” when Wood provided its calculations of the costs of most of AFSCME’s economic proposals during bargaining on May 3, 2017. (County post-hearing brief at 10-11.) As indicated in the transcript below:

“IA: * * * Um, for the nurses unit alone, over the three years, your proposal would cost the county an additional, and so this is above what we currently have for operating costs, an additional 9.3 million dollars.

* * * * *

IA: Oh, no, no, general unit, above current operating costs for the general unit, under, under your proposal, again, not including the six weeks of paid caregiver leave and the LTD, which would significantly increase this, it’s estimated above current operating costs, it would be, um, 33 million dollars.

* * * * *

IA: Huh? No, \$9.3 million is for the nurses.

IA: 33.3 million is for the general unit.

JS: Right on.

IA: And for an estimated total together, of 42.6 million. Um, I can tell you there’s no way this is even in the realm of possibilities for the county to afford this. The county’s been working hard to be fiscally responsible and work towards a balanced budget without service reductions. In order for us to really consider market adjustments for this unit, and potential COLAs, we’re gonna need some, to see something significantly different from your side. Uh, you proposed market adjustments alone, are estimated to be over 21 million dollars.” (Exh. C-26 at 22.)

Previous contractual increases in compensation had been in the range of \$6 million total over the three-year life of the nurses and general unit's collective bargaining agreements. County officials testified that costs in this range would be "devastating" to the County.¹⁸ (Moody Testimony.) However, it appears that the fiscal impact of the early Union proposals, if adopted in the 2017-2018 fiscal year, and, if completely retroactive, would be \$14.2 million. The County increased its level of reserves to its highest budget percentage ever in the 2017-2018 budget, a \$27.3 million increase from the prior fiscal year.¹⁹ In any event, whatever the various estimates of the cost of Union proposals, there is no evidence that any of them presented an existential threat to the County.

The County argues that AFSCME not only began with these compensation proposals, but adhered to them throughout negotiations despite movement on economic issues from the County. AFSCME argues that it adhered to this position because of the lack of movement from the County, that AFSCME did not believe previous agreements regarding market adjustments were properly followed by the County, and that the issue had also led to the filing of an unfair labor practice complaint.

Much of the parties' bargaining over compensation²⁰ appears to have been predicated on the premise that each side believed that the other should make a dramatic movement on economic issues. In particular, AFSCME was explicitly focused on the issue of market-level compensation for employees in its bargaining unit:

"IA: So no movement on wages?

JS: No, no. I'm quite frankly, why would we? It's, that's the market. They should be paid at the market. I think it's pretty clear looking at the paper recently you folks believe in the market, so, so do we. Make the move." (Finding of Fact 37.)

We acknowledge that the County appears to have overstated the financial impact of AFSCME's economic proposals by comparing the three-year cost of the agreements to one year of the County budget. It is also clear that County acknowledgement and significant movement on this issue was AFSCME's priority, and that this was communicated to the County, with indications that AFSCME was willing to back down from its other economic proposals. Thus, the distance between the parties on economic issues was ultimately less significant than their priorities and tactics.

¹⁸The County describes the financial impact of AFSCME's proposals for a three-year agreement by comparing it to the County's budget for one fiscal year. The County does not argue, however, that all of the financial impact of Union proposals would be borne in the first year of the agreement, and, since much of the dispute concerns wages and other compensation, it appears that much of the impact would be over all three years of the Agreements. The inaccurate comparisons do not aid the persuasiveness of the County's arguments.

¹⁹The use of reserve funds to fund portions of a collective bargaining agreement is not unprecedented. See *Medford School District # 549c*, UP-77-11, 25 PECBR 506 (2013).

²⁰The County movement on market adjustments was to move the affected employees on to another salary schedule at a level that would not represent a reduction in pay.

The County argues that its representatives were confused about AFSCME's priorities and unable to get AFSCME to make significant concessions despite "Herculean efforts." County post-hearing brief at 21. However, those arguments are contradicted by the exchange quoted above, as well as the following:

“JS: Well I, you know, I think for, from my perspective is, uh, if, if the County, if the County said well if we, if we make you, if you make you whole on the wage adjustment proposal, um, and, and no, would you agree then to no cost of living? If you proposed that.

IA: Well then we're bargaining against ourselves.

JS: What would we look at?

JS: We already made a proposal of different COLA's

IA: With wage scale adjustments and you're coming back with your exact same proposal.

JS: Right, ih, eh, and um,

IA: So, we're not going to sit here and bargain against ourselves.

JS: I'm, and my, and my, well, my ex-, well you're not bargaining against yourself now because what I said is while we appreciate there was some movement on a very small portion, that's not enough m-m, that's not enough movement from the County for us to then say, we'd make a whole scale adjustment. I look at this as a package, if I, I mean, am I gonna cost it out at 21 million like you folks are doing? I'm really looking at a total compensation here. And, you know, it's not that we're saying that we're unwilling to move anywhere. We, we have some room for movement. But, you know, we have to see something that's more significant from that from the County in order for us to make a (inaudible)

IA: And I think we need to see something more significant from the Union

JS: Well I

IA: For us to move forward and get to that place as well. When you come back with a package proposal that looks exactly like your first proposal. That's not you

JS: This isn't a, let me be clear

IA: Really moving towards anything.” (Finding of Fact 37.)

We conclude that AFSCME was sufficiently clear about its priorities and gave the County a path to resolution, but that the County, like AFSCME, refused to make significant movement until the other party did so first.

Nevertheless, it appears that AFSCME's economic package was well out of the range of the parties' bargaining in previous years. AFSCME's adherence to that package rendered it more than an opening bid to be followed by proposals more in line with the parties' history.²¹ We conclude that AFSCME's economic package was predictably unacceptable to the County. However, because one factor is not determinative, we continue with the analysis.

²¹We are mindful that public employee bargaining has taken place against a background of declining or stagnant revenue for several years.

3. Behavior of AFSCME's Negotiator.

In examining the conduct of the party's negotiator, this Board focuses on the effect that the negotiator's conduct had on the bargaining process. Where, for instance, a representative makes no proposals, offers no counterproposals, has no apparent authority to negotiate, is non-responsive to inquiries from the other party, and tinkers with contract language away from the bargaining table, such conduct indicates an intention not to bargain or reach agreement. *Medford School District # 549c*, UP-77-11 at 15, 25 PECBR at 520, citing *Hood River County*, UP-92-94 at 21, 16 PECBR at 454. However, this Board has held:

"Professional negotiators employ various bargaining styles. Stridency, shouting and sarcasm are not uncommon in labor-management negotiations--from either side of the bargaining table. Emily Post-approved deportment is not a requirement of good faith bargaining, even though discourteous or otherwise-offensive behavior is not necessarily desirable." *McKenzie School District # 68*, UP-14-85 at 37, 8 PECBR at 8198.

The County argues that several actions of AFSCME chief negotiator Steiner demonstrate AFSCME's bad faith: (1) approaching bargaining with a more adversarial attitude than in prior bargaining; (2) his reluctance to agree to minor, non-substantive language changes; (3) making a proposal conditioning AFSCME's acceptance of the County's minor language changes on the County's agreement to an AFSCME substantive economic proposal, and doing so in what the County representatives perceived as a flippant manner; (4) other comments by Steiner, addressed below.

In reviewing his conduct during negotiations, we note that Steiner was the chief negotiator, but not sole decision maker, for the AFSCME local. He was AFSCME field representative, not an officer of the local union, and multiple members of AFSCME local were present at every bargaining session. There is no evidence that Steiner made all the decisions at issue, either at the table in bargaining or on wider issues such as whether to strike. In fact, references to the wishes of the members was an important part of several Union comments during bargaining.

Adversarial attitude

The County argues that, in general, Steiner was more aggressive than in past bargaining. While that may be the case, the issue before us is the conduct in this bargaining process. We must determine whether the Union negotiator's conduct failed to meet the standards of good faith bargaining, not whether the conduct was less aggressive in the past.

Steiner approach to minor, non-substantive changes

The County argues that Steiner was dismissive and cavalier towards the minor, non-substantive changes in language sought by the County. As this Board discussed above, the fact that the County contends that some changes at issue were minor and non-substantive makes Union treatment of those changes here largely irrelevant to this bad faith bargaining claim.

While County officials were plainly annoyed by the low priority given these minor changes by AFSCME, Union officials were plainly annoyed that the County assigned greater importance to these minor, non-substantive changes than AFSCME believed was appropriate. The County notes that, at one point, AFSCME linked concessions on the minor issues to County concessions on a major issue. The County also points to this statement by Steiner:

“Steiner prefaced the delivery of his proposal by referring to it as the ‘deal of the day,’ then stating “[l]et’s see, let’s see who plays let’s make a deal here.” (County post-hearing brief at 13-14.)

“These actions illustrate Mr. Steiner was playing games and not committed to productive bargaining with the County.” (County post-hearing brief at 14.)

This record does not support a conclusion that the manner in which Steiner communicated AFSCME’s attitude about the County’s multiple references to the minor changes, whether characterized as sarcasm, mocking, or snark, indicates a lack of commitment to good faith bargaining. Similarly, linking Union acceptance of the minor changes to major County concessions on economic issues may have been intended in full seriousness, to gauge the County’s attachment to the proposal, or a device to communicate AFSCME’s desire to move on to other issues. However, none of these few examples of behavior would support a conclusion that AFSCME engaged in significantly discourteous or otherwise-offensive behavior, which itself would not justify a finding of surface bargaining in any event. Further, AFSCME’s wariness of the bargaining consequences of opening up so many contract articles, and its conviction that some of the proposed minor changes were in fact substantive, were credible and raised in bargaining. Finally, AFSCME acceded too many of the changes before the conclusion of regular bargaining.

Other Comments

The County points to other comments by Steiner as being indicative of an attitude of bad faith bargaining. In particular, the County identified the following four:

(1) Asked if he had discussed the County’s proposal on selection promotion under Article 8, Mr. Steiner responded: “That should show you how much I pay attention to Article 8.” (Finding of Fact 25, fifth bargaining session).

(2) Asked about AFSCME’s response to the County’s last wage proposal, Steiner asked whether AFSCME had actually received a written proposal that it had received (sixth bargaining session).

(3) The following exchange occurred between Mr. Steiner and Ms. Wood:

“IA: What else you got for us then?
JS: Uh, am I up or are you up?
IA: You’re up.
JS: And how is that determined?

IA: That we gave you essentially all counter proposals last time and have made movement, made the last movement on economics.

JS: You did?

IA: Mmm hmm.

JS: Oh. Alright. And what was that proposal? 'Cause if I'm not mistaken, I think your other proposal was way back in June. Did you give us a counter an economic on that on the 29th? Was that the one with the sheet?

IA: Yeah.

* * * * *

JS: 'Kay, well here, here's this then. This is a package proposal * * *. ”
(Finding of Fact 42, ninth bargaining session.)

(4) Explaining a Union proposal, Steiner stated the following “Okay, good. Next, under training, under continuing education, striking 40 hours and I’m increasing it to 80.” IA then asked “Is there a specific reason behind that?” JS responded “Yeah, they need more, m-more training.” (Finding of Fact 15.)

(5) Responding to the County’s estimate that AFSCME’s economic proposals for the general unit would cost \$33 million dollars, Mr. Steiner’s response was: “Right on.” (Finding of Fact 26.)

The County argues that the last statement in particular “supports the inference that Mr. Steiner had no intent of having realistic discussions with the County about economics and instead chose a bargaining strategy of engaging in dilatory tactics and proposing economically extravagant items in order to thwart a productive bargaining process.” (County post-hearing brief at 15.)

We conclude that, viewing the 440 pages of negotiation transcript as a whole, and the other evidence of bargaining history, that the behavior of AFSCME’s negotiator was generally consistent with good faith bargaining. The examples cited by the County are brief comments selected from eleven bargaining sessions, and are not typical of AFSCME negotiator’s language at the bargaining table. Nor are they, in themselves, demonstrate instances of bad faith bargaining, and do not reflect a lack of interest in bargaining. The behavior is also consistent with frustration with AFSCME’s ability to convince the County to make considerable movement towards AFSCME’s economic proposals.

We also note that AFSCME’s representatives met eleven times with County representatives both during and shortly after the 150-day bargaining period, twice in mediation, and put in long hours in an attempt to resolve the contract before the strike deadline; were generally cordial throughout the negotiations; exchanged emails with County representatives; responded to County proposals and explained AFSCME’s position. Therefore, we do not find Steiner’s behavior indicative of bad-faith bargaining.

4. Nature and Number of Concessions Made

The obligation to meet and negotiate does not compel either party to agree to a proposal or require the making of a concession. ORS 243.650(4). Thus, this Board “cannot force an employer

to make a ‘concession’ on any specific issue or to adopt any particular position * * *.” *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-37-08 at 22, 23 PECBR 895, 916 (2010). However, “the employer is obliged to make *some* reasonable effort in *some* direction to compose his differences with the union * * *.” *Id.* at 916-17, quoting *McKenzie School District #68*, UP-14-85 at 37, 8 PECBR at 8198 (emphasis in original). The same reasoning applies to labor organizations.

The County argues that while the parties agreed to some minor language changes over the course of negotiations, “the concessions were largely one-sided and made by the County.” County post-hearing brief at 15. The County points to AFSCME’s (1) refusal to abandon most of its step-by-step salary market adjustments, totaling more than \$35 million dollars; (2) its abandonment of its proposals for six weeks of County paid caregiver leave and expansion of County bereavement, which the employer had never included in its cost estimates; (3) its declaration of impasse after receiving some County concessions regarding classifications eligible for market adjustments; and (4) its final offer, which the County characterizes as “unrealistic and lacked meaningful concessions and movement.” (County post-hearing brief at 20.)

Once again, the County points to the June 29 discussion of wages and compensation, stating that “[d]uring the eighth bargaining session, Ms. Wood expressed her concern over AFSCME’s lack of movement and frustration over AFSCME’s failure to identify economic priorities,” (County post-hearing brief at 17.) This portion of the bargaining transcript reflects that discussion:

“IA: Except for the clarification of the step to step is there anything different on your original proposal on wages?

JS: For which one?

IA: For the article on wages. Is there anything different except for your clarification from step to step?

JS: Nope.

IA: Have you moved at all on the percentages or anything? I’m not seeing

JS: No I, no I have, no I have not moved on any of the percentages.

IA: That’s what I thought.

JS: Or, or moved the deal, or the deferred comp.

IA: ‘Kay.

JS: Uh, and I provided the, I know we did it in a different section so I, um, making sure that you had the current one, I put a union wage scale adjustment proposal for the nurses unit and just put the date and stuff on it, that’s all that changed.

IA: There are no changes on the proposed salary schedules?

JS: No. No, it’s just the same one that you, we already provided, uh, all I did was, I put a header on it and made it part of the package.

IA: So no movement on wages?

JS: No, no. I’m quite frankly, why would we? It’s, that’s the market. They should be paid at the market. I think it’s pretty clear looking at the paper recently you folks believe in the market, so, so do we. Make the move.

* * * * *

IA: So, can I ask, Jim, you say that each of these are fluid and you're saying that if you get, say the union wage scale adjustment, then, or the two percent deferred comp, or things like that, that these are all fluid, but if this is exactly the same as your initial proposal, I'm not seeing any movement of okay if, we'll go a 2/2/2 or a no deferred comp if we get the scale adjustments that, how are we supposed to read what the fluid, fluidity looks like? When you're saying if we get these, we'll go different on the COLA's or different on this when we're not seeing you move off of our original proposal?

JS: Well, I

IA: I can't read your mind

JS: Well, no, that's fine.

IA: I don't see a proposal that shows

JS: No, I, that's fair.

IA: There's some differences.

JS: Well, where I think

IA: Where, where are we moving where you are seeing that you can move on some of these?

JS: Well, I, you know, I think for, from my perspective is, uh, if, the County, if the County said well if we, if we make you, if you make you whole on the wage adjustment proposal, um, and, and no, would you agree then to no cost of living? If you propose that.

IA: Well then we're bargaining against ourselves.

JS: Well, what would we look at?

IA: We already made a proposal of different COLA's

JS: Right

IA: With wage scale adjustments and you're coming back with your exact same proposal.

JS: Right, ih, eh, and um,

IA: So, we're not going to sit here and bargain against ourselves." (Finding of Fact 37, eighth bargaining session.)

These exchanges do not support a conclusion that AFSCME was opaque about its motives and priorities. During this bargaining exchange, AFSCME indicated that its priority was bringing wages to market level, as it had before. It also indicated flexibility on other economic issues. The County's response was to ignore the indicated flexibility and shut down that discussion. On this record, it appears that both parties were intransigent. The County justifies its intransigence by arguing that its proposals were reasonable and AFSCME's were not. The analysis of bad faith bargaining, however, is not to determine which side was justified and which side was not justified in its bargaining positions, but whether they were so unreasonable as to constitute bad faith surface bargaining. Parties may engage in good faith, productive negotiations even in the face of unjustified proposals.

In addition, both parties took time to explain their positions. AFSCME spent most of the second and third bargaining session explaining its proposals. We conclude that, while AFSCME adhered to its economic proposals, it indicated its priority (market adjustments) and suggested

County movement on that issue would be rewarded with Union concessions on other economic issues.

The County characterizes AFSCME's significant concessions as late in the bargaining process, and "meaningless in that AFSCME's overall economic proposal continued to be cost prohibitive for the County." County post-hearing brief at 19. This argument is simply another way of stating that AFSCME adhered to its proposals despite their cost and the County's resolute opposition. The AFSCME concessions that the County refers to were made in the parties' ninth bargaining session. We note that the County's prior economic concessions, regarding employee mental health supervision costs, increased payments for long-term disability, and horizontal market wage adjustments, were relatively minor given the difference between the parties. We also note that the bulk of these County concessions were made in the sixth and eighth bargaining sessions.

We conclude that this factor does not indicate that AFSCME was merely going through the motions without any intention of reaching an agreement on the budget shortfall. See *McKenzie School District #68*, UP-14-85 at 35, 8 PECBR at 8196.

5. Failure to Explain Bargaining Position.

Good-faith bargaining requires that a party explain its proposals so that the other side may respond in an intelligent manner. *McKenzie School District #68*, UP-14-85 at 38, 8 PECBR at 8199.

The County argues that AFSCME failed to "identify and verbalize the union's core economic priorities." (County post-hearing brief at 20-21.) We have addressed, and rejected, this argument above. The County also cites two examples to support its contention that AFSCME's failed to sufficiently explain its proposals that represent bad faith. First, it refers to an exchange the parties' second bargaining session, when AFSCME presented an economic proposal seeking an increase in the number of hours of County-paid continuing education training:

"JS: Okay, good. Next, under training, under continuing education, striking 40 hours and I'm increasing it to 80.

IA: Is there a specific reason behind that?

JS: **Yeah, they need more, m-more training.** And then, um, if you turn the page, we're increasing the, the, uh, reimbursement amount for nurse practitioners and physician assistants up to 3,000 dollars from \$1,000 to \$3,000. And then we've also, um, I've added the certification there as well, so it's li-licenses slash certification. And then I've made the same increase, uh, for the senior dental hygienists, also the, they're actually, you know expanded practice dental hygienists or provider, so I've done the same for them. And then under section 5, I've added if a nurse working, if, if, if a nurse is working toward an advanced degree or certification, the county agrees to reasonably accommodate the employee's need to attend classes during the work day, by allowing the employee to either take paid leave time, or flex his or her hours. The county agrees to reimburse up to 5,000

dollars annually for tuition to employee that, oops; that advance their nursing degree.” (Finding of Fact 15, emphasis added.)

The County argues that Steiner’s response was “flippant” and “lacked any detailed explanation for the County to understand the reasoning behind AFSCME’s proposal.” (County post-hearing brief at 20.) Considered on its own, we might agree, but AFSCME presented its rationale behind training at great length during the bargaining process, after the remark in question and including by bringing in bargaining unit members to discuss the issue in detail. County officials did not follow up on Steiner’s “more training” statement, but on the remarks that followed that phrase. On its own, the remark does not fairly represent AFSCME’s approach to the training issue in light of the entire record of bargaining.

The County also argues that, “by its resistance to identify and verbalize the union’s core economic priorities, AFSCME inhibited the parties from being able to have open conversations and successfully resolve their differences at the bargaining table.” (County post-hearing brief at 20.) Although we are doubtful that good faith bargaining requires parties to rank their priorities, AFSCME here did identify its highest economic priority and outlined a path towards agreement. For example, Steiner stated, “Well, I, you know, I think for, from my perspective is, uh, if, the County, if the County said well if we, if we make you, if you make you whole on the wage adjustment proposal, um, and, and no, would you agree then to no cost of living? If you propose that.” Finding of Fact 37. “It’s, that’s the market. They should be paid at the market. I think it’s pretty clear looking at the paper recently you folks believe in the market, so, so do we. Make the move.” (Finding of Fact 37.)

The County also argues that AFSCME acted in bad faith by failing to explain where the County would get the funds for AFSCME’s economic proposals. While explanations or suggestions of that sort can move negotiations along, we see no reason rooted in the obligation to bargain in good faith that would require a union to tell an employer, who is better situated to have a complete understanding of the employers funds, what sources of funds to dip into for what union proposals. In this case, both parties appeared to rely heavily on County resources for cost estimates and other financial matters. Accordingly, AFSCME did not fail to explain its bargaining position.

6. Course of Negotiations.

This Board has held that evidence that an employer never intended to reach a settlement but had planned to implement its proposals from the beginning indicates bad-faith bargaining. *School Employees Local Union 140, SEIU, AFL-CIO, CLE v. School District No. 1, Multnomah County*, Case No. UP-44-02 at 14, 20 PECBR 420, 433 (2003). “A party who rushes through the negotiation process may demonstrate a lack of serious intention to reach agreement.” *Id.*

The County argues that AFSCME engaged in a particular course of bargaining in order to set up a strike. The County points to (1) the parties bargaining for over 150-days, including eleven regular negotiation sessions, while AFSCME filed a promptly declared impasse at 4:59 p.m. on the first possible date; (2) two mediation sessions, after which AFSCME issued a strike notice for the earliest possible date; and (3) after the parties bargained into the early hours of the morning of the strike, AFSCME began its strike while the County had an offer on the table, without informing

the County that negotiations had ended. The County also argues that AFSCME's lack of intent to reach agreement was illustrated by its reluctance to agree to minor non-substantive language proposals and failure to make meaningful concessions at the bargaining table during the 150-day process.

We have already noted that Union treatment of admittedly minor, non-substantive changes proposed by the County do not support a claim of bad faith bargaining in this case. Turning to the other issues, the County argues:

“The decision to strike is significant in light of the testimony that that the County's bargaining team bargained throughout the night and into the early hours the morning of the strike. The County remained at the bargaining table waiting for a response to the County's economic proposal when the strike was declared. AFSCME elected not to inform the County of its decision to strike through the mediator who was present and tasked with facilitating agreement between the parties. Instead the County learned of the strike through AFSCME's social media posts stating that ‘the strike was on’ and informing its members to report to their picketing stations.” (County post-hearing brief at 21.)

However, AFSCME had provided the County with notice of the date and time of the strike sixteen days before the County's last pre-strike offer. There was no evidence that the parties had agreed to extend the scheduled start of the strike if the parties moved closer, but had not reached, agreement. Moreover, there is no evidence that AFSCME unilaterally ended negotiations in the early morning of the strike. Rather, the evidence is that the tired representatives of the parties understood that the other party had given up for the day.

The lengthy, well-documented bargaining history presented as evidence in this case cuts against a conclusion of bad faith bargaining. The negotiations between the parties featured lengthy discussions addressing issues important to the parties. While there were occasions where AFSCME's negotiator was lighthearted about his preparation and positions, the discussions indicate his thorough knowledge of the issues facing the parties. While the County complains that AFSCME failed to identify its financial priorities, we conclude that AFSCME did so, repeatedly, emphasizing the need for market adjustments in wages and indicating a willingness to compromise in other areas if the County agreed to prioritize that issue. Failing to disclose bargaining priorities is not uncommon in bargaining, in order to prevent the other party from immediately ignoring the lower priority issues, and this Board has never held that a parties' refusal to rank its proposals by priority was evidence of bad faith bargaining.

The parties met eleven times over 152-days, and their representatives' maintained regular communications and exchanged ideas, information, and options. The parties reached some tentative agreements. The parties exchanged at least one controversial document, a Union communication with its members, and used it to defuse a controversy. On this record, it appears that AFSCME's adherence to its bargaining positions, and demands for significant alteration of the County's bargaining positions, were made in good faith and connected to past events in the parties' history. In particular, AFSCME was motivated by a determination to rectify what it perceived as out-of-market wage rates, frustration from the County's actions regarding previous

contract language regarding market-level compensation, which AFSCME believed were inconsistent with the prior agreement, and a desire not to undercut a pending arbitration. While the County condemns AFSCME's prompt issuance of a strike notice, AFSCME credibly pointed to the goal of resolving the labor dispute resolved prior to the November and December holidays.

The record shows that AFSCME stubbornly adhered to their goals for the successor collective bargaining agreement, while the County was adamant that those goals were completely out of the realm of possibility. The bargaining transcript reveals that the parties also appeared to believe, throughout the negotiations, that the other party had failed to move sufficiently to justify dramatic movement on its part. AFSCME's explanations for its more costly proposals were consistent and clear. While AFSCME's more costly proposals were unacceptable to the County, they were not unlawful for that reason. Similarly, while AFSCME made no major concessions regarding its more costly proposals during negotiations before the strike, neither ORS 243.650(4) nor our case law requires parties to make concessions. *Clatskanie School District*, UP-9-04 at 4, 21 PECBR at 603, *AWOP* 219 Or App 546, 183 P3d 246 (2008).

Therefore, we find that the course of negotiations indicates that AFSCME was willing to reach a negotiated agreement.

7. Other Factors

In considering whether a party has committed surface bargaining, the Board also reviews other factors. Here, we address the different obligations and options available to the parties available under subsection (1) and subsection (2)(b). An employer of strike-permitted employees, who assures that negotiations fail, will come to the end of the process with the ability to unilaterally implement its last offer, which creates some incentive to bargain in bad faith to reach that point.²² However, a labor organization who assures that regular negotiations fail either ends up with implementation of the employer's final offer or a strike. The ending of a strike is achieved through union acceptance of the employer's final offer or some other bargain obtained through negotiation. Even if successful, a strike generally imposes a financial and emotional hardship on bargaining unit members. A strike situation is "incredibly scary" for most bargaining unit members, and "maybe the most important decision" of a bargaining unit member's economic life. Finding of Fact 84. A strike may result in an improved final agreement, or may result in successful implementation of the employer's last offer.

In addition to the factors above, it is worth noting that choosing to go on strike presents a great risk to labor organizations. Rather than a mirror image to an employer unilaterally implementing its final offer, with no economic losses, a strike costs participating employees all of their wages each day of the strike. Meanwhile, employees who do not participate in the strike are paid all of their wages. While strikes may be successful, they may be brutal failures, and may result

²²A labor organization or an employer negotiating regarding strike-prohibited employees will, without agreement, proceed to an interest arbitration in which the arbitrator will accept one party's last best offer, again presenting some incentive to move to the end of the process without appropriate bargaining.

in decertification of the exclusive representative.²³ We also give weight to the parties' ability to reach agreements on other matters, the amount of detailed bargaining during the 150-day period, and the parties bargaining until the literal dawn of the strike. Collectively, these factors weigh against concluding that AFSCME "merely went through the motions of bargaining without any intention of reaching an agreement." *Medford School District # 549C*, UP-77-11 at 26-7, 25 PECBR at 517, citing *McKenzie School District #68*, UP-14-85 at 35, 8 PECBR at 8196.

After weighing the totality of AFSCME's conduct in bargaining, we do not find that AFSCME engaged in surface bargaining, as alleged by the County. Although, as set forth above, we agree that AFSCME's adherence to a compensation package unacceptable to the County could indicate bad-faith bargaining, the totality of AFSCME's conduct does not establish that AFSCME lacked serious intention to reach a negotiated agreement. Accordingly, we conclude that AFSCME did not engage in bad faith surface bargaining in violation of ORS 243.672(2)(b), and we will dismiss this claim.

3. AFSCME did not engage in unlawful bad faith bargaining through communications with its bargaining unit members and through an attorney suggesting a change in contract language in violation of ORS 243.672(2)(b).

1. Union Communication with Retirees about Healthcare Costs

The County contends that AFSCME misinformed unit members and retirees about a County health care proposal, pretended to misunderstand the County's attempts to correct the misinformation, and then failed to correct AFSCME's misinformation. The County presented a proposal which would increase the expenses of employees covered by various health plans. AFSCME argues that, in previous agreements and negotiations, health care benefit programs and procedures did not distinguish between current employees and retirees, and that therefore AFSCME officials reasonably believed that the County proposal at issue also applied to retirees. AFSCME also argues that the County's first attempts to clarify the issue did not do so to AFSCME's satisfaction.

In its post-hearing brief, the County does not explain or cite relevant language from its proposal demonstrating that AFSCME communication was incorrect. Nor do the County's communications about the issue in the record identify the proposal's language. In any event, the relevant communications between the parties and AFSCME's reliance on past practice regarding health benefits indicate a fair attempt by AFSCME to confirm and memorialize the County's position on the issue rather than an attempt to intentionally circulate false information. We note that AFSCME promptly turned over the Steiner's email, the County did not cite specific language

²³See, e.g., *Oregon Public Employees Union v. Jefferson County*, Case Nos. UP-55-98, UP-9-99, UP-19-99, UP-20-99, and UP-22-99 reported at 18 PECBR 109, 128, 146, 245, and 310 (1999); *Jefferson County v. Oregon Public Employees Union*, Case Nos. UP-16-99, UP-18-99, 18 PECBR 285 (1999) and 20 PECBR 217 (2003) (Order on Remand); *Irene Smith and Employees of Jefferson County v. Oregon Public Employees Union*, Case No. DC-45-99, 18 PECBR 419 (2000) (Decertification petition, dismissed as moot); *Laborers International Union of North America Local 121 v. Jefferson County*, Case No. RC-52-99, February 24, 2000 (Representation petition, unopposed).

in its proposals or in the bargaining discussions to Union officials in support of its position, AFSCME acted promptly to clarify the issue with the County, and AFSCME offered to accept language formalizing the County's position.

In addition, the County cites no case from this Board holding that an employer may challenge the content of Union communications with its members outside of the contract ratification process. Nor is it clear that the County would even have standing to assert such a claim, because it does not allege a cognizable injury. *See District Council of Trade Unions, et al. v. City of Portland*, Case No. UP-023-14 at 14, 26 PECBR 525, 538 (2015).

2. Union Counsel's Communication of a Proposed Language Change to County Counsel

Union representative Steiner emailed retirees to contact County Commissioners about certain changes in health care benefits that they believed affected retirees. Andrea Nagles, County Counsel, and member of the County bargaining team, sent an email to Union Counsel Jennifer Chapman, asking her to provide a copy of Steiner's email. Chapman was not on the AFSCME bargaining team. Chapman provided a slightly redacted copy of the email, while noting that she believed AFSCME was not required to do so. Nagles and Chapman exchanged emails about whether Steiner's emailed statements about the County proposal were correct. Nagles asserted that the County did not propose to change the disputed aspect of retiree benefits, and demanded that AFSCME send out a corrected email, but failed to persuade Chapman that the statement was incorrect. In response, Chapman made the following statement:

"Can you send Jim [Steiner] and I a revised proposal that clarifies that the County will continue to pay 100% of the premiums? Once we get that revised proposal, we will send out the clarification ASAP." (Finding of Fact 60.)

Nagles responded, in turn:

"At this point we are not intending on presenting a proposal with any clarifying language to the retiree benefits and if we are to make any proposal changes that would go through Jim [Steiner] and Inga [Wood] and the bargaining teams in mediation." (Finding of Fact 61.)

Nagles also sent Chapman a detailed explanation of the County's proposal, and represented that it would not affect retirees as Steiner's email had described. Chapman then responded,

"I read through the proposals, and I don't think it is clear that the co-insurance would not apply to the retirees. I also talked to Jim, and he does not remember the discussions during bargaining the same way you've outlined in this email. The bargaining team does not remember it that way either. Had the County's intent been clear, AFSCME would never have sent out the summary that was sent out; AFSCME has no interest in misinforming AFSCME members or retirees.

“All this having been said, we appreciate that you have clarified the County’s intent in these emails. In an act of good faith, AFSCME is willing to update the retirees with the clarifications you’ve requested. Jim is going to have limited availability the next couple of days, but we will try to get that clarification out next Tuesday.” (Finding of Fact 62.)

Nagles closed the exchange on this issue as follows:

“Thank you. The County appreciates AFSCME’s willingness to make the correction. The retiree impact information is below, but I know Mary and our team would be happy to answer any additional questions about the County’s insurance proposal as we move forward with mediation.” (Finding of Fact 63.)

The County argues that Chapman’s suggestion that the County change its bargaining proposal to clarify the retiree benefits issue was a per se violation of its duty to bargain in good faith, because Chapman allegedly requested

“the County to provide proposals away from the bargaining table and outside of the bargaining representatives. AFSCME’s actions either sought or had the natural consequence of fundamentally undermining the outlined roles and responsibilities of the designated bargaining representatives. Attempting to seek proposals away from the bargaining table outside of the Chief Negotiators is a fundamental example of a party attempting to bypass the collective bargaining process.” (County post-hearing brief at 24.)

We disagree. The County has provided no authority that this Board has ever held attorney-to-attorney communication to be a per se violation of the duty to bargain in good faith. Nor is this communication fairly part of a totality of circumstances supporting a bad faith bargaining claim. Counsel for the County, and a bargaining team member, contacted Union counsel and had multiple communications about a bargaining issue regarding retirees. The parties disagreed, and Union counsel proposed the addition of a clarifying statement in the County’s proposal that would resolve the parties’ disagreement about the effect of the proposal on retirees. Chapman was an appropriate representative of the bargaining unit for this type of communication. Moreover, the County could have chosen to have another representative contact Union representative Steiner directly (after all, he wrote the email at issue) but chose not to. Nothing in the facts of this case suggests that these communications were an attempt to circumvent the bargaining representatives of the parties. Instead, they were resolving a technical issue regarding language in the County’s proposal. When an attorney for one party contacts legal counsel of another party about a bargaining issue, both attorneys are acting within the scope of their duties to their clients in representing their client’s interests, often regarding a technical issue of language or law. It would not advance the purposes and policies of the PECBR to exclude attorneys from fulfilling that role.

We conclude that the County has failed to meet its burden to establish that AFSCME violated its duty to bargain in good faith in violation of ORS 243.672(2)(b). We will dismiss this portion of the Amended Complaint.

4. AFSCME Did Not Violate The Parties' Ground Rules And ORS 243.672(2)(d).

ORS 243.672(2)(d) states that it is an unfair labor practice 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. We use the same principles of contract interpretation in both types of cases. The County alleges that AFSCME violated the parties' Ground Rule agreement, which is a written contract enforceable under ORS 243.672(2)(d). *Hood River County*, UP-009-08 at 22-3, 23 PECBR at 604-5. This Board has stated,

“When we interpret contracts, our goal is to discern the parties’ intent. To do so, we apply the three-part analysis described in *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04 at 10, 21 PECBR 20, 29 (2005) (citing *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997)). We first examine the text of the disputed contract language in the context of the contract as a whole, and if the language is clear, the analysis ends. Unambiguous contracts are enforced according to their terms. *Portland Fire Fighters’ Assn. v. City of Portland*, 181 Or App 85, 91, 45 P3d 162 (2001), *rev den*, 334 Or 491, 52 P3d 1056 (2002). Contract language is ambiguous if it can be given more than one plausible interpretation. *Id.* If the provision is ambiguous, we proceed to the second step and examine extrinsic evidence of the parties’ intent. Finally, if the provision remains ambiguous after applying the second step, we proceed to the third step and apply appropriate maxims of contract construction. *See Yogman*, 325 Or at 364.” *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Local 757*, Case No. UP-020-16, at 16, __ PECBR __ (2018).

The complainant, here the County, bears the burden to prove that AFSCME violated the Ground Rules and, as a result, ORS 243.672(2)(d). OAR 115-010-0070(5)(b); *see also Oregon School Employees Association, Chapter 37 v. Reynolds School District 7 and Ellingboe*, Case No. C-12-82 at 9, 6 PECBR 5465, 5473 (1982).

The relevant provisions of the Ground Rule agreement state:

“The parties will negotiate in good faith. The parties shall only negotiate through their designated bargaining representatives. These negotiations will be conducted under the provisions of applicable law.” (Finding of Fact 12.)

The County contends that AFSCME violated the Ground rules by failing to “negotiate in good faith” and failing to “negotiate through [its] designated representative.” We first turn to the meaning of the agreement’s terms. If they are the same as the standards under the PECBA, that analysis has been addressed above, and rejected.

Nothing in the Ground Rules provides a definition for “negotiate in good faith” or “designated bargaining representatives.” However, both terms are terms of art in the field of public employee collective bargaining. *See Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District Of Oregon*, Case No. UP-003-16 at 56, __ PECBR __ (2018)

(“contract administration” is a legal term of art); *Hood River County*, UP-009-08 at 22, 23 PECBR at 605 (“new” bargaining proposal a term of art). Both terms, and their equivalents, have been subject to many years of analysis in reported decisions of this Board. The County provides no argument regarding any different interpretation of this language. Accordingly, we conclude that the language of the Ground Rules here provides no additional basis for concluding that AFSCME failed to negotiate in good faith.

The County cites no statute or case that excludes an individual attorney for a labor organization that is an exclusive representative from the class of “designated bargaining representative.” Nor does it seem prudent, on this record, for this Board to exclude the parties’ attorneys from assistance with bargaining. It is routine in this practice for attorneys to iron out issues of language that are complex or have particular legal significance, and we see nothing in this case which suggests they should be excluded from doing so absent a clear agreement between the parties. In this case, nothing in the language of the Ground Rules appears to exclude attorneys.

The County having failed to meet its burden to establish that AFSCME violated the Ground Rules agreement and ORS 243.672(2)(d), we will dismiss this portion of the Amended Complaint. Since the County has failed to meet its burden to establish any claim in the Amended Complaint, we will dismiss the Amended Complaint in its entirety.

5. The ALJ acted properly within his discretion in denying leave to AFSCME to amend its Answer to allege a claim for a civil penalty.

After presentation of Complainant County’s case, AFSCME moved that it be granted leave to amend its Answer to seek a civil penalty on the grounds that the County’s case was frivolous. A pleading is frivolous only if every argument presented “is one that [1] a reasonable lawyer would know is not well grounded in fact, or that [2] a reasonable lawyer would know is not warranted either by existing law or by a reasonable argument for the extension, modification, or reversal of existing law.” *Portland Police Association v. City Of Portland*, Case Nos. UP-25/26/27-11 at 11, 25 PECBR 481 at 493 (2013), quoting *SEIU Local 503, OPEU v. State of Oregon, Department of Transportation*, Case No, UP-11-09 at 22, 23 PECBR 939, 960 (2010), quoting *AFSCME Council No. 75 v. City of Forest Grove*, Case Nos. UP-5/25-93 at 8, 14 PECBR 796, 797 (1993). *See also*, *SEIU Local 503, OPEU, v. State of Oregon, Department of Transportation*, Case No, UP-11-09 at 20, 23 PECBR 939, 960 (2010).

////

////

////

Although we dismiss the Amended Complaint, it has a basis in law and fact. Surface bargaining is an established form of bad faith bargaining, and AFSCME was unusually tenacious in not moving from its bargaining positions and seeking significant financial concessions from the County. Such tenacity is often a key factor in surface bargaining cases. Moreover, there are few reported decisions of this Board regarding alleged surface bargaining by a labor organization, and this is case is, in some respects, one of first impression. Accordingly, the ALJ acted within his discretion in denying AFSCME's request to add a claim for a civil penalty.

We will dismiss the Amended Complaint.

PROPOSED ORDER

The Amended Complaint is dismissed.

SIGNED AND ISSUED 9th October 2018.



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. Email filings should be directed to 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. RC-013-18

(REPRESENTATION)

REDMOND FIREFIGHTERS	)	
ASSOCIATION, IAFF LOCAL 3650,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER CERTIFYING
	)	EXCLUSIVE REPRESENTATIVE
REDMOND FIRE AND RESCUE,	)	
	)	
Respondent.	)	
_____	)	

On October 31, 2018, Redmond Firefighters Association, IAFF Local 3650 (Association), filed a petition under ORS 243.682(2)(a) to certify (without an election) a new bargaining unit of certain employees of Redmond Fire and Rescue (described below). A majority of eligible employees in the proposed bargaining unit signed valid authorization cards requesting that the Association represent the designated bargaining unit.

On November 7, 2018, the Board's Election Coordinator caused a notice of the petition to be posted. OAR 115-025-0030(3); OAR 115-025-0065. Pursuant to the terms of the notice posting, OAR 115-025-0030(3)(d), OAR 115-025-0065(7), and OAR 115-025-0075(1), objections to the proposed bargaining unit or a request for an election were due within 14 days of the date of the notice posting (*i.e.*, by November 21, 2018). There were no objections to the petition or a request for an election.

Accordingly, it is certified that:

REDMOND FIREFIGHTERS ASSOCIATION, IAFF LOCAL 3650

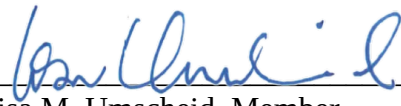
is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

“All full-time employees of Redmond Fire and Rescue in the Paramedic, Community Paramedic, and Emergency Medical Technician classifications, excluding any temporary (less than three months) full-time employees.”

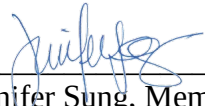
DATED: November 28, 2018.



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-009-17

(UNFAIR LABOR PRACTICE)

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

On October 18, 2018, this Board heard oral argument on Complainant's objections to a recommended order issued by Administrative Law Judge (ALJ) Julie D. Reading on January 30, 2018. The parties submitted the case on stipulated facts and exhibits, without an evidentiary hearing.

Shirin Khosravi, Staff Attorney, Service Employees International Union Local 503, Oregon Public Employees Union, Salem, Oregon, represented the Complainant.

Daniel L. Rowan and J. Chris Duckworth, Attorneys at Law, Bullard Law, Portland, Oregon, represented the Respondent.

On March 14, 2017, Service Employees International Union Local 503, Oregon Public Employees Union (Union) filed a complaint alleging that the University of Oregon (University) violated ORS 243.672(1)(e) by refusing to provide the name of a student who was a witness to an incident that led to an employee's discipline. The Union also requested a civil penalty. The University filed a timely answer, which included requests for a civil penalty and representation costs. The University also pled the affirmative defense of failure to exhaust contractual remedies, but it withdrew that defense before the ALJ issued the recommended order.

The stipulated statement of the issue in this case is: Did the University engage in bad-faith bargaining within the meaning of ORS 243.672(1)(e) by failing to provide information requested by the Union regarding the student witness involved in a written reprimand issued to an employee, and by failing to negotiate an accommodation with the Union?

We conclude that the University did not violate ORS 243.672(1)(e).

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties

1. The University is a public employer as defined by ORS 243.650(20). It is the employer of certain employees represented by the Union.

2. The Union is a labor organization within the meaning of ORS 243.650(13). It represents a bargaining unit that includes certain classified employees employed by the University.

3. The Union and the University have been parties to a series of collective bargaining agreements, the most recent of which is effective by its terms from October 16, 2015 through June 30, 2019.

The CH Discipline

4. CH (Employee) is an employee of the University and is in the bargaining unit represented by the Union. On January 6, 2017, Employee received a written reprimand from the University. Specifically, the letter told Employee that she was being reprimanded due to:

“complaints that you have been aggressive, disrespectful, and unprofessional in your communications. This included complaints that you are accusatory towards coworkers when you become frustrated with them, that you speak and act aggressively towards coworkers and your supervisor, you avoid communication, that you order coworkers around and that you voice complaints about your coworkers to other coworkers and students. This behavior has gotten to the point that people feel bullied by you and that they try to avoid you because of this.”

5. On January 13, 2017, Union steward Chuck Theobald emailed the University and requested “the names of everyone whose testimony was used in concluding that this Written Reprimand was justified, including Classified staff and students.”

6. On January 17, 2017, Tiffany Lundy, Associate Director of Facilities and Operations for the University, responded to Theobald’s request by sending him the names of

Employee's coworkers whom Lundy had interviewed, along with their job titles and regular schedules. Lundy also indicated that she had consulted a student, but was unable to release that student's name.

7. On January 23, 2017, Bryan Dearing, Assistant General Counsel for the University, emailed Shirin Khosravi, Attorney for the Union, and provided the University's position for not disclosing the name of the student involved in the Employee disciplinary matter. Dearing stated that the University believed that the student's name was protected by the Family Educational Rights and Privacy Act (FERPA). He also noted that "[w]hile we recognize that FERPA must yield to constitutional due process rights, those rights are not implicated when the discipline at issue is a written reprimand."

8. On January 24, 2017, Khosravi responded to Dearing, disagreeing with the University's position. The Union argued that the University's position was contrary to this Board's precedent and indicated that the Union would file an unfair labor practice complaint if the University did not provide the requested information by January 27, 2017.

9. On January 27, 2017, Dearing replied to Khosravi's email and further explained the University's position.

10. On January 30, 2017, Khosravi emailed Dearing and further disagreed with the University's position.

11. Later, on January 30, 2017, Dearing replied to Khosravi and further explained the University's position. Dearing wrote, "I also understand that the Union is currently in the process of interviewing several of the people whose identities and contact information were provided by the University, which should lead to additional information about the underlying matter."

12. On January 31, 2017, Dearing sent an additional response to the Union, clarifying the University's response to the Union's information request. He stated,

"I also learned that this student provided no witness statement or testimony to anyone at UO and that the conduct upon which your client was disciplined that involved the student was not based on any statement by the student but rather, was based on an interaction between your client and the student that Tiffany Lundy, the Associate Director for Facilities and Operations at PE & Recreation, personally witnessed."

13. On February 1, 2017, Khosravi responded to Dearing's January 31, 2017, email and requested "any and all documents related to the conversation witnessed by Ms. Lundy between a student and [Employee], including the student's name and contact information."

14. On February 8, 2017, Dearing responded to the request for information referred to in the February 1, 2017, email. Dearing stated that there were no available documents, and that the University did not rely on any statement of the student in issuing the discipline. Dearing also stated, "the reasonable accommodation in this instance * * * is to make Ms. Lundy available

for you to interview. From what I understand, [the University] has done that.” Dearing then asked if the Union had taken the opportunity to interview other witnesses, or if the Union needed additional assistance.

15. On February 9, 2017, Khosravi emailed Dearing and disagreed with the University’s response to the information request. Khosravi stated,

“The discipline in this matter was based in part on a conversation between Ms. Harrington and a student, witnessed by Ms. Lundy. The Union is thus requesting the student’s information so that we may talk to any and all witnesses to the allegations. * * * The Union wants to talk to all witnesses and we are entitled to do so.”

16. On February 15, 2017, Lundy met with the student and asked if the student would consent to the University releasing the student’s personally identifiable information (*i.e.* name and contact information) to the Union. The student declined to consent.

17. On February 16, 2017, Dearing responded to Khosravi’s February 9, 2017, email and further responded to the Union’s information requests. Dearing stated, “It is my understanding that SEIU did nothing to follow through with any of [the coworker] interviews.”

Previous Case History

18. The Union has filed previous unfair labor practice complaints when the University has asserted that FERPA prevents it from providing the names of students who have witnessed events that have resulted in employee discipline.

19. One previous case is this Board’s *Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon*, Case No. UP-009-15, 26 PECBR 724 (2016) (*University of Oregon*). That case involved two separate situations. In one instance, the Union sought the name of student witnesses after interviewing faculty witnesses and determining that those witnesses did not corroborate the University’s allegations against employee “CB.” CB filed a grievance, which ultimately settled. In the other instance, the University terminated employee “RG” after a student reported that he had sexually abused her at a university facility several years earlier. The victim had written a report, and the University provided it to the Union, but it had been heavily redacted.

20. On May 4, 2015, Brian Caufield, then-Director of Labor Relations for the University Shared Services Enterprise, requested guidance on behalf of the University from the United States Department of Education’s Family Policy Compliance Office (FPCO) regarding the interaction between FERPA and the Oregon Public Employee Collective Bargaining Act (PECBA) when it came to responding to the Union’s request for the victim’s report in the RG case.

21. On November 6, 2015, the University received a guidance memorandum from the FPCO in response to the University’s request. After summarizing the applicable law, the FPCO memorandum’s author concluded:

“Under FERPA, at the postsecondary level, disclosures of [personally identifiable information (PII)] from education records must either be made with the student’s prior written consent or must meet one of the exceptions to FERPA’s general consent requirement. In the case before us, FERPA would only permit the University to disclose to the Union PII from the student’s education records, absent the prior written consent of the student complainant, if the disclosure is necessary to comply with any federally guaranteed due process rights or unless the University receives a lawfully issued subpoena or judicial order. In the event of a subpoena, the University would have to make a reasonable effort to notify the student complainant involved and provide the student with sufficient time to seek protective action before complying.”

22. The University submitted the FPCO letter as evidence in *University of Oregon*, UP-009-15, 26 PECBR 724. The ALJ’s findings of fact, adopted by this Board, characterized it as follows:

“On May 4, 2015, University Director of Labor Relations Brian Caulfield wrote a letter to the FPCO requesting assistance with the RG information request. The letter referred to RG’s misconduct solely as a ‘violation’ of the University ‘policy prohibiting sexual harassment.’ Caulfield’s letter did not include the victim’s non-student status at the time of RG’s misconduct, the time frame of the criminal conduct, or the fact that RG had been convicted and sentenced for that conduct 14 years prior to the University’s ‘finding’ of the ‘violation.’ The letter also asserted that RG’s due process rights had been protected by the University.”

Id., UP-009-15 at 6, 26 PECBR at 729. The Board also noted that “the Union disputed how the University framed the facts to FPCO, and subsequently argued that FPCO’s conclusion on the conflict was based on inaccurate information.” *Id.*, UP-009-15 at 8 n 6, 26 PECBR at 731 n 6.

23. The ALJ determined that the information sought by the Union in both the CB and RG disciplines was not an “education record” as defined by FERPA and was subject to disclosure under PECBA. The University sought review by this Board. We concluded that the University had failed to pursue a good faith accommodation regarding the requested information as required under PECBA. Because that conclusion was dispositive, we did not reach the issue of whether the requested information was protected by FERPA. The University appealed to the Oregon Court of Appeals.¹

¹The University’s appeal in Case No. UP-009-15 was still pending when the ALJ issued the recommended order in this case on January 30, 2018. On April 4, 2018, the Court of Appeals affirmed this Board’s order, *see SEIU Local 503 v. Univ. of Or.*, 291 Or App 109, 419 P3d 779 (2018), and on October 12, 2018, the Supreme Court denied the University’s petition for review, *see id.*, 363 Or 599 (2018).

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The University's response to the Union's information request did not violate ORS 243.672(1)(e).

The University disciplined a bargaining unit employee for allegedly inappropriate and unprofessional conduct based, in part, on an interaction with a student that a supervisor witnessed. To investigate whether the discipline should be grieved, the Union requested the names of anyone whose testimony was used in concluding that the discipline was justified, including staff and students. The University promptly responded to the request by identifying all of the staff involved and making them available for interviews, but it declined to provide the name of "one student who was consulted." In the parties' ensuing correspondence, the University stated that it would not release the student's name due to confidentiality concerns. Subsequently, the University explained that when making the disciplinary decision, the supervisor had relied only on her direct observation of the employee's interaction with the student, not on any testimony or statement by the student. The University also clarified that the supervisor did not interview the student or ask them to provide a report, and that there was no documentation of the incident. The University offered to make the supervisor available for the Union to interview as an accommodation of the parties' conflicting interests. Eventually, the University also asked the student whether they would consent to the disclosure of their name, but the student declined. The Union filed this unfair labor practice complaint, contending that the University violated subsection (1)(e) by withholding the student-witness information. For the following reasons, we conclude that the University's response to the information request did not violate (1)(e).

"It is well settled that a public employer's obligation to collectively bargain in good faith under ORS 243.672(1)(e) includes promptly providing an exclusive representative with requested information that has 'some probable or potential relevance to a grievance or other contractual matter.'" *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), *aff'd*, 291 Or App 109, 419 P3d 779, *rev den*, 363 Or 599 (2018) (quoting *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98 at 5, 18 PECBR 64, 70 (1999)). As a threshold matter, the University argues that the student-witness information is not relevant because the University did not actually rely on the student's statement or testimony. Even so, the student was involved in an incident for which an employee was disciplined, and they could corroborate or dispute the supervisor's account. As such, we conclude that the student-witness information is potentially or probably relevant to a contractual matter.

Where, as here, a union's information request meets the threshold test of probable or potential relevance, whether the employer's response violates (1)(e) depends on the totality of the circumstances. *Oregon School Employees Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81 at 5, 6 PECBR 5027, 5031 (1982). "There are many factors that must be considered," including such factors as: (1) the reason given for the request; (2) the ease or difficulty

in producing the data; (3) the kind of information requested; and (4) the history of labor-management relations regarding information requests. *Id.*²

Here, the Union requested the student's name and contact information because the student was involved in an interaction for which a bargaining unit employee was disciplined. As such, the student might have some information pertinent to the disciplinary matter, and the Union might have some need to interview the student at some point. However, although the University initially indicated that the supervisor had "consulted" with the student, the University later explained to the Union that the supervisor who made the disciplinary decision had not relied on any statement by the student-witness. The University also stated that there was no document or student statement to provide to the Union. Additionally, the record establishes that the student declined to be involved in the matter.³

Thus, on this record, we find that the requested information was tangential to the disciplinary matter. Further, although the student-witness information was potentially relevant, it was sufficiently collateral to the discipline that, in light of the student's refusal to be involved, the University's actions did not amount to bargaining in bad faith. Rather, it was reasonable for the

²The University also asserts that FERPA prohibits it from disclosing the student-witness information to the Union, and that the University has an interest in protecting the student from retaliation. With respect to the latter, the record is devoid of any evidence of a reasonable risk of retaliation, and we reject that as a basis for withholding the information. *Portland State University Chapter of the American Association of University Professors v. Portland State University*, Case No. UP-36-05 at 19, 22 PECBR 302, 320 (2008), *aff'd*, 352 Or 697, 291 P3d 658 (2012).

We also find it unnecessary to resolve the parties' FERPA dispute. As a condition of federal funding, FERPA requires educational institutions, including the University, to adopt certain policies and practices regarding "education records." FERPA defines an "education record" as "those records, files, documents, or other materials which (i) contain information directly related to a student; and (ii) are maintained by an education agency or institution * * *." 20 USC §1232g(a)(4)(A). On the one hand, the University must have a policy and practice of granting the parents of students, or adult students themselves, "the right to inspect and review the[ir] education records" and to challenge the content of those records. 20 USC §1232g(a)(1)-(2). On the other hand, the University must *not* have a policy or practice "permitting the release of education records (or personally identifiable information contained therein other than directory information)," except as authorized by FERPA. 20 USC §1232g(b). The Union contends that the student-witness information at issue is not an "education record" under FERPA. We note that the University represented that "the student provided no witness statement or testimony" and that there are no documents regarding the interaction for which the employee was disciplined. Based on those representations, it is unclear what "record" regarding that interaction could constitute an "education record," as that term is defined under FERPA.

Nonetheless, we decline to decide the FERPA issue because, even assuming that FERPA does not prohibit the disclosure of the information, we conclude that the Union did not establish that the University's response to the information request violated (1)(e) under the totality of the circumstances.

³The Union does not contest the University's factual representations regarding the basis for the disciplinary decision and the student-witness, and pursuant to the parties' stipulation, those representations may be relied on as evidence.

University to try to reconcile the student's reluctance to be involved in the disciplinary matter with the Union's need for the information. *See Colton*, C-124-81 at 5, 6 PECBR at 5031 (“[T]he existence of the duty to supply information, when the request meets the threshold test of having probable or potential relevance to a contractual matter, does not mean that a party must immediately and automatically produce all data requested.”).

In this context, the University reiterated its offer to make the supervisor who witnessed the employee-student interaction at issue available for the Union to interview. We find that this offer was a reasonable, “common-sense” starting point under the circumstances of this case. *See id.*, C-124-81 at 7, 6 PECBR at 5033. If the Union had interviewed the supervisor (and other witnesses that were made available to the Union), the Union might have determined that it did not actually need the University to disclose the student's name and contact information.⁴ Conversely, if the Union had interviewed the supervisor, it might have identified issues (such as a factual dispute) that could be addressed only by interviewing the student—in which case, the Union's need for the student's information potentially could have overcome any competing interests in our analysis. *See, e.g., East County Bargaining Council v. David Douglas School District*, Case No. UP-43-07 at 20-21, 23 PECBR 333, 352-54 (2009). The Union, however, made no effort to interview the supervisor or any of the other witnesses, and this record does not establish that a live factual dispute or other issue made it necessary for the Union to interview the student before the supervisor. Nor does the record show that it would have been unduly burdensome for the Union to interview the supervisor and then assess whether it needed to interview the student. Moreover, the Union did not adequately explain to the University the reasons why it believed that the University's proposal was inadequate, or counter-propose any alternative arrangement.

The Union also contends that other factors show that the University was not acting in good faith, such as the University's insistence that the student's information was not even relevant; inconsistencies or changes in the University's representations regarding the bases for the discipline; and the history of the parties' labor relations (including this Board's decision in *University of Oregon*, UP-009-15, 26 PECBR 724). The Union also points out that the University, at first, flatly refused to provide the student information and waited several weeks to seek the student's consent to disclosure of their contact information. Although we consider those factors, and we do not condone those aspects of the University's conduct, we also note that the University promptly responded to the Union's overall information request and provided all of the responsive information except for the student-witness information. Additionally, the University made all other witnesses available for the Union to interview and made arrangements to assist the Union in conducting those interviews. After considering the parties' course of dealing as a whole, we do not find sufficient evidence of bad faith.

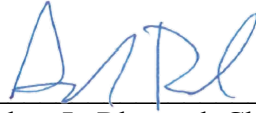
⁴For example, it is reasonably possible that the employee would not have disputed the supervisor's account of what occurred, or that the employee would have been able to identify the student based on the supervisor's description of what occurred. *See Colton*, C-124-81 at 6, 6 PECBR at 5032 (“In cases where the requested information is more easily available from another source, a party might respond by just pointing the other party to that source.”).

In sum, we conclude that the University's information request response, under the totality of the circumstances, did not violate (1)(e). Accordingly, we dismiss the complaint.⁵

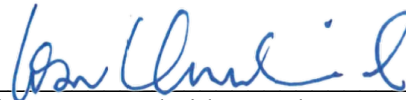
ORDER

The complaint is dismissed.

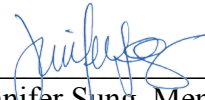
DATED: December 4, 2018.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

⁵The University requested a civil penalty in its answer. Where the respondent is the prevailing party, this Board may award a civil penalty if "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). The University alleges that the Union's complaint was filed with the intent to harass. We find no evidence to support that allegation. Further, the Union's claim was not frivolous. Therefore, we decline to award a civil penalty.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-014-17

(UNFAIR LABOR PRACTICE)

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

On October 18, 2018, the Board heard oral argument on Respondent's objections to a May 21, 2018, recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe, after a hearing held on January 11, 2018, in Eugene, Oregon. The record closed on March 6, 2018, upon receipt of the parties' post-hearing briefs.

Shirin Khosravi, Staff Attorney, Service Employees International Union Local 503, Oregon Public Employees Union, Salem, Oregon, represented the Complainant.

Daniel L. Rowan, Attorney at Law, Bullard Law, Portland, Oregon, represented the Respondent.

On April 28, 2017, Service Employees International Union Local 503, Oregon Public Employees Union (SEIU or Union), filed a complaint alleging that the University of Oregon (University) violated ORS 243.672(1)(e) by refusing to produce an unredacted version of a document entitled Resource Sharing Staff Interview Report. The University filed a timely answer, including an affirmative defense that the University has a legitimate and substantial confidentiality interest in the information requested by the Union.

The issue in this case is: Did the University violate ORS 243.672(1)(e) by failing to provide SEIU an unredacted copy of a Resource Sharing office interview report upon request?

We conclude that the University violated ORS 243.672(1)(e).

RULINGS

The University objected to the admission of Exhibit C-1 because the Union did not provide the exhibit to the University until the day of the hearing, and thus did not provide it at least seven days before the hearing, as required by OAR 115-010-0068(3). We conclude that the ALJ properly admitted Exhibit C-1.

A party that fails to disclose an exhibit in compliance with the prehearing notice and OAR 115-010-0068(3) “shall be denied the right to offer such evidence or make argument regarding such matter at the hearing unless good cause is shown.” OAR 115-010-0068(4). The Union did not disclose Exhibit C-1 to the University seven days before the hearing, as required by the prehearing notice and the rule. Thus, the exhibit was admissible only upon a showing of good cause. Here, the Union offered Exhibit C-1 to rebut information in two exhibits offered by the University, Exhibits R-9 and R-11. The University, however, did not disclose those two exhibits to the Union before the hearing, as required by the prehearing notice and OAR 115-010-0068. Under these circumstances, there was good cause shown, and the ALJ properly admitted Exhibit C-1.¹

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

FINDINGS OF FACT

1. The University is a public employer within the meaning of ORS 243.650(20).
2. SEIU is a labor organization within the meaning of ORS 243.650(13). It represents a bargaining unit that includes University employees who work for the University’s Resource Sharing office, which is one part of the University’s Access Services Department. The relevant employees’ work is performed in the University’s Knight Library.
3. The University and SEIU are parties to a collective bargaining agreement (CBA or Agreement) that, by its terms, runs from October 16, 2015 through June 30, 2019. Before that period, the two were parties to other CBAs.
4. In August 2014, a Resource Sharing office employee named KS told Patrick John Taylor that she believed that her supervisor, DK, was targeting her for harassment and abusive behavior because of her age. Taylor is currently SEIU’s chief steward and has served in that capacity for around two years. For around two years before that, Taylor was a regular steward for SEIU. Taylor is also a University employee and works in the Knight Library. DK’s current job title is Head of Access Services. He has held that position since February 2016 and worked for the University in a different role before that.

¹Our disposition of the complaint would be the same regardless of whether Exhibit C-1 is admitted.

5. On or around October 1, 2014, KS retired from her position in the Resource Sharing office. The month before, KS submitted to the University a document in which she was critical of DK's management and asserted that there was "more than a small degree of age discrimination going on." At the time of her retirement, KS's "steward of record" for her age discrimination concerns was Theodora Ko Thompson, not Taylor. However, no age discrimination grievance was ever filed on KS's behalf. Further, the University's Office of Human Resources did not have any conversations with DK about any allegations of age discrimination around the time KS retired.

6. In August 2016, another Resource Sharing office employee named SI approached his steward with some concerns about certain changes being made to his position description. Later that month, SI shared those concerns with Taylor, and also told Taylor that DK was treating SI with hostility because of SI's age.²

7. Patrick Moore is the Human Resources Manager for the University. At 1:31 p.m. on October 11, 2016, Moore sent Taylor an email regarding SI and the changes to SI's position description. Moore also shared a willingness to have a conversation with SI and Taylor, and indicated that Taylor had previously expressed to Moore that Taylor's primary concern was with communication in SI's department. Taylor responded to Moore's email at 2:27 p.m. the same day. In that response, Taylor indicated that he would be happy to sit down with Moore and SI, confirmed that his concern was indeed primarily about communication in SI's department, and noted that SI was the sixth employee to contact him with concerns about workplace climate and that he took the issues about SI's position description "to be a microcosm of that issue." Beyond that, Taylor shared that he would be taking October 19 through November 11, 2016, off in order to work for SEIU and participate in SEIU's Member Leadership Development Program. At 3:50 p.m., Moore responded that he would be happy to meet with Taylor that week. Then, at 4:52 p.m., Taylor indicated that, going forward, he would need to hand off the matter to another steward while he was out working for SEIU. Taylor also wrote, "My thoughts are that the issues of climate and internal mistrust in Access Services are escalating, and that this will not change without a course-correction of some form. The department will continue to hemorrhage long-time workers until mutual respect and trust can be restored."

8. At 10:05 a.m. on October 12, 2016, Moore sent Taylor another email. In it, Moore asked, "How does the union typically handle these kinds of situations? Don't employees at this

²The University objected to the second sentence of this finding of fact on the basis that it is not supported by sufficient evidence in the record and is based solely on hearsay testimony by Taylor. Taylor's testimony about SI's statements, however, was not offered to prove the truth of the matter asserted—that age discrimination was occurring—but instead was offered to prove that SI made the report to Taylor. Thus, Taylor's testimony was not hearsay. *See* ORS 40.450(3). Further, hearsay is admissible under our rules, subject to the factfinder's evaluation of the weight of that evidence. OAR 115-010-0050(1); *Reguero v. Teacher Standards and Practices*, 312 Or 402, 417, 822 P2d 1171 (1991). Here, the record supports a finding that Taylor believed there was reason for concern that DK was treating older employees adversely on the basis of age.

We note that we also omitted other findings of fact to which the University objected on the basis of lack of sufficient evidence. We omitted those findings because they are immaterial to our decision.

scale of distrust typically file a grievance?” Taylor wrote back at 10:43 a.m. that same day. In that email, Taylor wrote that SI would meet with the two of them; alleged that certain behaviors were “causing employees to feel bullied, disrespected, or sabotaged”; and noted that he would be meeting with Dean of Libraries Adriene Lim the next day. At 1:30 p.m., SI, Moore, and Taylor had a meeting. During that meeting, the three discussed SI’s position description and the climate and communication in Resource Sharing. Moore and Taylor also decided that Moore would interview all of the employees in Resource Sharing at one time in a group setting, with a Union representative present and without non-Human Resources management present, in order to provide a safe space for employees to express concerns and to minimize any perception that employees were being “pitted against” one another. No specific concerns about age discrimination were mentioned during the October 12, 2016, meeting. When Taylor subsequently met with Lim, he shared some of his concerns about DK and the Resource Sharing office with her.

9. On or around October 14, 2016, Moore had a meeting with Lim and Associate Dean of Libraries Mark Watson, who directly oversees DK’s unit. In that meeting, Moore explained the group interview idea that had been discussed with Taylor on October 12, 2016. Lim and Watson rejected that idea, and instead directed Moore to interview Resource Sharing employees individually and to give each employee the option of having a steward present.

10. Taylor left his position as chief steward as planned on October 19, 2016. Nevertheless, at 8:50 a.m. on October 20, 2016, Moore emailed Taylor to let him know that he would be conducting interviews with Resource Sharing employees individually in accordance with Lim and Watson’s direction. Then, at 8:52 a.m., Moore sent out emails to every Resource Sharing employee except SI. In each of those emails, Moore wrote:

“I would like to meet with you to formally discuss the climate in Resource Sharing. I would like to hear from you, personally, about your perception of RS (challenges, stresses, opportunities, etc.). The information provided to me in this meeting will be aggregated with the feedback I receive from your peers and shared with Adriene and Mark. You will not be singled out or asked for a follow-up meeting with management based on feedback given to me in this meeting. This is a concerted effort by Library Administration to address growing concerns in Resource Sharing over issues of communication and interaction (whether by yourself or others) with management. I hope you will take me up on this offer because I see it as the first, important step towards improving the overall climate in RS.”

At 10:55 a.m. on October 20, 2016, Taylor responded to Moore’s email, stating in part that he was concerned about Moore’s unilateral change in plans, and that he was already receiving concerned emails about the interviews.

11. Shortly after Moore emailed the Resource Sharing employees, he started interviewing them individually in his office. Among other things, Moore’s interviews revealed problems with DK’s communication style and indicated that two bargaining unit employees were particularly aggressive toward one another. Moore did not specifically ask anyone about age discrimination during his interviews, and no employees brought up that topic on their own.

12. Moore interviewed six Resource Sharing employees in total. That group included DK, but as noted, did not include SI. For SI's perspective, Moore simply relied on what SI had already shared with him. Further, at some point around this time, SI was transferred to a position in the University's Collection Services department that does not report to DK. Only one Resource Sharing employee named DC asked Moore to have a steward present. However, DC eventually gave up on that preference after failing to receive a response from her union representative, and went ahead and had an interview with Moore on October 26, 2016, without any representation.

13. After all of the interviews were finished, Moore drafted a written report titled "Resource Sharing Staff Interview Report" (Report) that formally summarized what he had learned and what he recommended should be done about it. On or around October 28, 2016, Moore gave a copy of the Report to Lim and Watson. At that time, Moore did not expect the two to share the Report with anyone else. Nonetheless, on November 18, 2016, Watson shared some quotes from the Report with DK.

14. In mid-November, 2016, Taylor returned to his role as chief steward. Upon his return, throughout November and December, Taylor met with a number of Resource Sharing employees and one faculty member to discuss and investigate age discrimination, harassment, and hostile work environment concerns in Resource Sharing. Taylor viewed these meetings as part of an investigation at this point; Taylor was concerned because he did not believe that the University had complied with the collaborative spirit of the initial approach he discussed with Moore—in which Moore would talk with employees in a group setting with a Union representative present and without management present. At some point around this time, based on those meetings and his prior conversations with bargaining unit employees, Taylor determined that DK was systematically targeting Resource Sharing's senior employees.

15. On November 17, 2016, Taylor met with Moore at a café near the University. During that meeting, Moore told Taylor that he had written a report about his interviews for Lim and Watson, that the Report noted problems with DK's managerial style, and that nothing in the Report was damaging to bargaining unit employees. At that point, Taylor asked Moore for a copy of the Report, but Taylor did not explain why he wanted one. Moore responded that Taylor should make his request in writing. The two did not specifically talk about age discrimination or a hostile work environment during this meeting. A few days later, Taylor met with Lim, whose statements contradicted some of what Moore had told Taylor about the Report's contents. In particular, Lim told Taylor that the Report indicated that two senior employees were stirring up trouble. After that, Taylor met with Moore again and Moore repeated his earlier account. When Taylor told Moore that DK had a copy of the Report, Moore said that he was disappointed that the document had been disclosed to DK.

16. At 11:42 a.m. on November 21, 2016, Taylor sent Moore an email asking Moore to forward him a copy of the Report. Taylor also wrote: "If preferred I can process as an official information request if that better fits your procedural needs. Either way works for me." Moore replied at 1:06 p.m. the same day, stating in part: "I think it would be best to follow official channels on this request. I am not an expert in what is or is not appropriate to send you, since the report focused on personnel-related subjects." At 1:50 p.m., Taylor responded to Moore with the following:

“Please provide the Union with the information listed below. The information is necessary for and relevant to the Union’s performance of its statutory rights, privileges and obligations in administering and policing the collective bargaining agreement and otherwise performing its lawful functions.

“Please provide the material by close of business Monday, November 28. If the material is not collected in that time frame, please notify the undersigned in writing and provide an estimated date of when production will be completed. Please provide all material that has been gathered on the date noted above and do not hold that material until all material has been collected.

“Information Requested:

“Any and all reports, documents, or related materials attained, aggregated, compiled, or solicited during the months of October and November, 2016, pursuant to investigations related to and interviews conducted with members of UO Libraries Access Services, Resource Sharing, Lending Services, and any other departmental staff, faculty, management, administration, or student workers employed at UO Libraries that are related to issues or concerns within the above mentioned departments or units. This information request should be considered open and ongoing throughout the duration of any and all current and ongoing investigations by SEIU into matters related to the above. Thus any and all reports, documents, or related materials attained, aggregated, compiled, or solicited henceforth pursuant to the matters noted above should be considered to fall under the purview of this information request.”

17. The language that Taylor used in his November 21, 2016, information request paralleled what SEIU had historically used for prior information requests. It is also typical for SEIU to include a deadline for complying with the request, and to submit their requests to Human Resources. When Taylor made his request, Taylor’s view was that he was investigating concerns of age discrimination and hostile work environment (which would implicate Articles 19 and 69 of the CBA), but Taylor did not refer to those articles or any other specific contract language in his information request or in any other communications with the University up to that point.³ SEIU does not normally cite a particular part of the CBA in its grievance-related information requests. Instead, that kind of information is presented in a subsequent back-and-forth.

18. Article 19 of the parties’ CBA is titled “No Discrimination.” At its outset, Article 19 states: “It is the policy of the Employer and the Union to continue their policies not to engage in unlawful discrimination against any employee because of race, color, marital status, religion, sex, national origin, age, or disability, or any other protected class under State or Federal Law.”

³It appears that Article 19 was first specifically mentioned in Taylor’s December 21, 2016, email to Assistant Vice President for Employee and Labor Relations Bill Brady, which is quoted below. It also appears that Taylor’s interest in Article 69 was first disclosed to the University during Taylor’s testimony in the hearing for this case.

19. Article 69 is titled “Mutual Respect.” Section 1 of Article 69 states, in part: “Behaviors that contribute to an intimidating work environment, such as abusive language or behavior, are unacceptable and will not be tolerated.” Subsequently, Section 2 of Article 69 states, in part: “Employees who believe that they are subject to such behavior should raise their concerns with an appropriate manager or supervisor as soon as possible, but no later than thirty (30) days from the occurrence of the incident(s).” After that, Section 5 of Article 69 states: “The Union acknowledges the university’s right to deal directly with employees in resolving complaints of inappropriate workplace conduct, provided bargaining unit employees maintain their rights to grieve discipline under applicable provisions of the Agreement, pursuant to the grievance procedure.”

20. At 9:33 a.m. on November 23, 2016, Moore sent Taylor an email that stated:

“Thank you for your patience while we work this out. Since there are personnel-related items in the report regarding management, I am working with the Office of Public Record[s] to see what should be redacted. Once they have weighed in, you will receive the report. This may not happen by Monday, November 28, but you will hear back from me as soon as I get the report.”

That email was the first time that Taylor had experienced an information request being forwarded to Public Records. Later, at 10:55 a.m. that day, Taylor wrote back with the following message:

“No problem. From my understanding, it’s unusual for information to be redacted in labor information requests unless sensitive personal information (e.g. information protected under FERPA) is included. I’ve never seen personnel-related items fall under that category. I’m interested to see what Public Records has to say and I’ve reached out to our legal team as well.

“No problem on extending the deadline, especially given the holidays.”

21. On December 5, 2016, Taylor sent Moore an email that stated: “Any word back from Public Records? We’re now three weeks out from the original information request. When you requested an extension from the originally [sic] November 28th deadline, we didn’t specify a new date. Can we shoot for end of business day Friday, December 9th?” At 9:49 a.m. on December 6, 2016, Moore responded with the following: “No word yet. I assure you, I will forward to you as soon as I receive it. We can certainly shoot for December 9. I will let you know if we need to extend it again.” Taylor then responded to that at 8:34 p.m., writing: “Just wanted to make sure this didn’t fall through the cracks. Public Records sometimes needs a gentle push from HR to remind them of deadlines.”

22. At 4:39 p.m. on December 8, 2016, after a reminder email from Taylor, Moore sent another message to Taylor. This one stated:

“I just got a call from Lisa in OPR. Since the request was a bit outside normal procedure, she wanted to touch base with Bill Brady first just to make sure they’re understanding one another. She let me know that this is a priority and it may not be

ready this evening in time for tomorrow, but it will be very soon. Their office is out for a conference next week so they want to get this wrapped up. Stay tuned.”

Taylor then responded at 5:27 p.m. that day, stating: “Thanks for the update Patrick. Did Lisa specify how this was outside of normal procedure? It was a pretty standard information request from my perspective.” Over the next few days, Moore and Taylor exchanged additional emails, with no notable developments.

23. At 4:57 p.m. on December 19, 2016, Public Records Officer Lisa Thornton sent Taylor an email. Her letter stated:

“The office has received your request for the Resource Sharing Staff Interview Report, drafted in October. From your request, it is not clear whether you have made a public records request or a request for information under the Public Employee Collective Bargaining Act. The office wants to be as helpful as possible, but in order to do so we will need additional information from you.

“According to the request, you believe that the Resource Sharing Staff Interview Report ‘is necessary for and relevant to the Union’s performance of its statutory rights, privileges and obligations in administering and policing the collective bargaining agreement and otherwise performing its lawful functions.’ But you do not explain why. It is my understanding that no discipline has or will result from this report, no grievance has been filed, and that the report is not related to current bargaining on a contract proposal. Please provide more explanation regarding how the report is relevant to [a] particular contract matter. That will allow the office to provide information responsive to the request, if appropriate.

“Additionally, a majority of the information contained in the report relates to a UO employee outside the bargaining unit. This material is considered the confidential and personal faculty record of that individual and is not a ‘public record’ under ORS 352.226(12). Other information in the report may also constitute internal advisory communications and/or matters of personal privacy exempt from the OPRL under ORS 192.502(1)-(2) that may need to be redacted. Though as noted, the office is unclear as to whether you are seeking this additional information through the public records process or under PECBA.

“Please provide the above-referenced clarification so that we may respond to your request.”

24. Taylor responded to Thornton’s email at 5:37 p.m. on December 19, 2016, writing:

“The information is requested under PECBA and is relevant to an ongoing grievance investigation by the union. The language you quote was provided by our legal department.

“Additionally, as you note, the request for information was filed five weeks ago as of today. We regard this as an unreasonable delay that has impeded our Union’s ability to properly conduct its investigation. Further delay will result in consideration of an Unfair Labor Practice filed on behalf of the Union.

“If the documents requested are not released by Thursday, December 22nd, we will consider the University of Oregon to be in violation of standard fair labor practices as understood by PECBA and the NLRB.”

25. On December 20, 2016, Thornton responded to Taylor’s email, stating:

“Thank you for clarifying that you are not making a Public Records Request, but a PECBA request. As such, I suggest you contact Employee Labor Relations directly. I have copied Bill Brady, Assistant Vice President for Employee and Labor Relations, in order to expedite the process.”

26. At 2:39 p.m. on December 21, 2016, Brady sent an email to Taylor. In that email, Brady stated, in part:

“Based on the below string that was forwarded to me, it is my understanding that the union has made a request to the Public Records Office for a report out of the libraries under PECBA. In the future, if you run those requests through Employee and Labor Relations first we will do what we can to help expedite the process of getting you the information to which you are entitled. In the instant case, can you provide me a little more context as to the basis for this request? As you are aware, PECBA doesn’t provide for just a blanket access to documents, but there should be some probable or potential nexus to a specific grievance or other contract administration issue that the union is working on. Is there a specific aspect to the report that is tied to something you are working on? Are there specific concerns or allegations of contract violations you believe the report would assist the union with? We want to get you what you are entitled to, but we also need to understand the basis for which we are providing the info.

“Also, one complication with this report which necessitates an accommodation is that it is full of personnel data that is protected under state law. The personnel data related to any OAs or faculty included in the report (and outside your bargaining unit) would be separately protected as confidential; under state law and UO policy and would need to be redacted. I do think we will be able to get you a redacted version relatively quickly once we get the additional information as noted above.”⁴

⁴The parties stipulated that DK is covered by and is subject to the University’s Faculty Records Policy.

27. At 5:29 p.m. on December 21, 2016, Taylor sent an email back to Brady. Therein, Taylor stated, in part:

“We submitted our information request on November 21st through the UO Libraries HR Director. I can provide email verification if necessary. We’ve submitted many such requests through departmental HR and administration in the past and received the requested documents without incident. Would it be preferable to bypass departmental HR in such matters and direct straight to ELR in the future?

“The Union is investigating a potential grievance involving a manager within the Resource Sharing department at UO Libraries. Specifically, we’ve had reports from multiple sources of potential violations of Article 19 relating to age-based discrimination. Per PECBA and ERB, the report that we have requested is necessary to execute a thorough investigation into the verity of these claims.

“With regard to your comments regarding redaction of information, it is incumbent upon the University to provide adequate justification for such redaction. As stated above, the information that you are requesting be redacted is necessary for the execution of the Union’s investigation into this matter. If it is ELR’s opinion that such material should be redacted, please provide in detail such justification as would support the claim.

“Given that it is the holidays, and granting that there were numerous internal issues involved in the proper routing of the Union’s request, we would like to grant an extension until Wednesday, January 4th, 2016, for the release of the requested documents. Such extension is contingent upon these particular contingencies and should not establish any sort of precedent regarding the permissibility of a seven-week delay in execution of future information requests.”

28. On January 5, 2017, Brady sent Taylor another email, writing in part:

“I apologize for not getting back to you. I have been unexpectedly out with the flu. I will be back in the office tomorrow and will get you a copy of the report. We do not actually believe that you will find the report germane to the concerns you have expressed, as there doesn’t seem to be anything in the report related to those concerns. We are still planning, however, to provide to [*sic*] the report under PECBA, as we want to work with you in a cooperative fashion. As indicated prior, the report does have some information that is protect[ed] under law and policy related to OAs and/or faculty and those portions will be redacted. If after reviewing the redacted report, you still have concerns about the contents, I will see what I can do to address those concerns.”

29. On January 6, 2017, Brady sent Taylor an email that attached a highly redacted version of the Report. Specifically, all references to DK were redacted (*i.e.*, blacked out), while some criticism of bargaining unit employees remained unredacted. In the body of his January 6, 2017, email, Brady noted, in part:

“We are providing this report in response to your PECBA request. As I mentioned in a recent email, we do not believe that this report actually contains any information that would be relevant to the concerns you outlined as the basis for the request. It would, therefore, not squarely fall within PECBA. Nevertheless, as we want to work collaboratively with SEIU, we are providing the document.

“The report has been redacted in compliance with state law and university policy as it relates to the faculty records. If, after you review the report in its redacted form, you still have concerns, please let me know.”

30. Taylor responded to Brady on January 9, 2017. In that email, Taylor indicated that he would review the document with SEIU’s legal team “regarding the permissibility of redaction under these circumstances.” Later, on January 18, 2017, Taylor sent Brady another email. In it, Taylor commented that the version of the Report that was provided “was very heavily redacted” and asked Brady for “a summary or synopsis of the redacted content and also a justification or explanation for why the redaction was necessary.”

31. On January 24, 2017, Brady wrote back to Taylor. In that email, Brady reaffirmed his view that the Report was redacted in accordance with the University’s Faculty Records Policy. Brady also summarized the redacted information, offering that it included “[e]valuative information related to an OA’s communication style/skills, work habits and abilities, and actions as a supervisor” and “[r]ecommendations for an OA’s professional development.” After that, Brady concluded that “the redacted information is not actually or potentially related to the stated purpose” of Taylor’s request, as “[n]one of the redacted information contains any allegations or statements having anything to do with different treatment based on age or, for that matter, different treatment based on any other protected characteristic.”

32. Taylor later responded to Brady via email on February 14, 2017. In his response, Taylor outlined several issues that he had with the University’s position and noted that, unless the University turned over an unredacted copy of the Report by February 21, 2017, SEIU would be adding the matter to an unfair labor practice complaint that was purportedly being filed the next week.

33. In response to Taylor’s February 14, 2017, email to Brady, the University’s Associate General Counsel, Bryan Dearing, sent SEIU’s lawyer, Shirin Khosravi, a lengthy email on February 20, 2017. In that email, Dearing reasserted and explained the University’s position that it could not grant Taylor’s information request “because of Oregon law and University policy governing the confidentiality of faculty records.” However, Dearing’s email also expressed that the University was “willing to explore additional accommodations in an attempt to satisfy the request.”

34. Khosravi replied to Dearing’s email on February 24, 2017. In her email, Khosravi disputed the University’s position and asked when the two sides could meet. Dearing wrote back at 10:10 a.m. on March 7, 2017. In his email, Dearing repeated the University’s position and indicated that he was seeking out some potential meeting dates and would reach out to DK about

this matter. At 11:12 a.m. that same day, Khosravi wrote back, “As you continue to disagree with regard to relevance and refuse to disclose the report absent the manager[']s consent, it does not appear we have much to talk about and will proceed with the Complaint.”

35. On March 8, 2017, Dearing sent another email to Khosravi. In it, Dearing asked, “If the employee was willing to provide you with access to the redacted portion of the report subject to an NDA, would you accept that?” Later in the same email, Dearing also provided a number of dates and time that he would be available to discuss the matter with SEIU. The term “NDA” refers to a nondisclosure agreement.

36. At some point around this time, in a meeting, the University told DK about its Faculty Records Policy and SEIU’s request and presented him with three options he could choose from. Those included: (1) comply with SEIU’s request for an unredacted copy of the Report, (2) reject the request and likely face an unfair labor practice charge, and (3) try to seek out a compromise with SEIU via an NDA. In the end, DK determined that he did not want the full Report to be made public and opted for trying for an NDA. By this time, DK had already been given an unredacted copy of the Report.

37. When considering what to include in the NDA, DK was particularly concerned about who would receive the Report and what use would be made of it. As indicated below, DK specifically would not allow Taylor to ever view the full Report because of Taylor’s “personal relationship with another library employee.” DK was also concerned about the Report being made public because the information in it was unflattering and lacked proper context. University management has not spoken to DK about discriminatory conduct toward Resource Sharing employees.

38. On March 10, 2017, Khosravi sent an email to Dearing, thanking Dearing “for taking the first stab at a draft NDA.” Next, Dearing sent Khosravi an email on March 17, 2017 that stated, “Per our email discussions last week, the employee at issue here is willing to provide you with access to the redacted portion of the report subject to the attached NDA.” Among a variety of other conditions, the University’s proposed NDA provided that no electronic copy would be provided, that only SEIU’s legal counsel could read the unredacted Report and only in person in Eugene, that SEIU’s counsel could not subsequently share or make a copy of any of the redacted information, and that SEIU would have to pay the University \$10,000 in liquidated damages for each violation of the arrangement along with attorney’s fees and costs associated with bringing a case against SEIU.

39. On March 24, 2017, Khosravi sent Dearing an email that included a highly edited version of the proposed NDA. Among other things, SEIU sought to allow Taylor an opportunity to review the unredacted Report. Later, on March 30, 2017, Dearing rejected SEIU’s proposed deletion of the paragraph of the proposed NDA that addressed liquidated damages. He also asked Khosravi if she would agree to any consequences at all for violating the NDA. On March 31, 2017, Khosravi responded that, if the University found a violation, it could file an unfair labor practice complaint. On April 4, 2017, Dearing wrote back, stating that the University disagreed with using an unfair labor practice as a remedy and proposed that the two sides “work together to try to come up with a middle ground that serves the interests of both sides.” Dearing’s email also

proposed that the liquidated damages be reduced to \$2,500 per violation or that SEIU suggest a different amount. On April 6, 2017, Khosravi responded to Dearing, writing in part that SEIU “does not agree to any amount in liquidated damages.”

40. On April 13, 2017, Dearing wrote to Khosravi again, stating that the University was happy to work with SEIU on the price per violation, and proposing that, in lieu of liquidated damages, “the NDA will state that the parties agree that breach of the NDA will cause the University irreparable harm; that in the event of a breach the Union will consent to ULP jurisdiction; and that if the University prevails on its ULP complaint the Union will pay the University’s costs, including attorney fees.” On April 17, 2017, Khosravi responded in part that SEIU “does not agree to erect a legal superstructure around a single agreement.”

41. At 10:48 p.m. on April 19, 2017, Dearing sent Khosravi another email. In that email, Dearing wrote in part:

“Assuming we can work out the rest of the details in the NDA, the University will agree to provide access to the redacted portions if the Union will agree to a liquidated damages clause in the NDA with an amount of \$500 per violation **OR** agree to NDA language which states that the parties agree that a breach of the NDA is an unfair labor practice, a breach of the NDA will cause the University irreparable harm, and ERB may fashion whatever remedy it deems necessary to effectuate the purposes of PECBA and award representation costs.

“Second, access to the redacted portion of the Report shall be limited to SEIU legal counsel and any SEIU steward at UO except for one of the stewards at the Library (Mr. Taylor). The faculty member who holds the confidentiality right at issue is not willing to permit access to that steward because of his personal relationship with another library employee, so we’re offering any other UO steward as an alternative, including one of the other stewards at the Library. You pick. We believe this condition the faculty member has placed on consent is reasonable given that the stated purpose for requesting the redacted portion of the Report is to determine whether age discrimination has occurred.”

42. Khosravi responded to Dearing’s email at 3:16 p.m. on April 19, 2017, writing:

“Again, the law establishes a remedy for a breach and the Union will not renegotiate the terms of the PECBA in order to receive relevant information that the Union is entitled to under the law.

“Furthermore, to the extent that the University is attempting to dictate who may or may not act as a Union representative, it is bumping up against an unfair labor practice.

“We do not believe the University is proceeding in good faith in its response to the Union’s request for information relevant to its representation of bargaining unit members and enforcement of the cba.”

43. Dearinger wrote back to Khosravi on April 21, 2017. In that email, he stated:

“We have tried to find a reasonable accommodation but it appears that is not possible given the Union’s position. Without some of the safeguards we have requested or consent from the faculty (who has a confidentiality right under state law and University policy, as I previously explained in detail), we cannot disclose the redacted information. Furthermore, the Union has not established that the redacted information (or any other portion of the Report, for that matter) is or may be relevant.

“I also disagree with your below representations of the University’s positions. First, all we are asking for is that the Union affirm in the NDA that the remedy you claim is available to the University is in fact an available remedy. Second, as I explained in prior correspondence, the faculty member has conditioned his consent on one library steward not having access; any other steward could have access. The University must have consent to disclose the confidential faculty record information. We are relaying the conditions for consent. The University is not dictating anything and has offered a reasonable solution to accommodate the faculty member’s concerns while also providing the Union with access to the redacted information.”

44. As of January 11, 2018, the date of the hearing, SEIU considered the investigation of potential age discrimination to be ongoing. However, Taylor is no longer assigned to that particular investigation and no related grievance has been filed. Article 18 of the CBA, which outlines the grievance and arbitration procedure, provides in part: “Grievances shall be filed within thirty (30) calendar days of the date the grievant or the Union knows or by reasonable diligence should have known of the alleged grievance.” No discipline has resulted from the Report.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The University’s response to the Union’s information request violated ORS 243.672(1)(e).

Standards of Decision

The Union alleges that the University violated ORS 243.672(1)(e) when it produced only a redacted version of the Resource Sharing Staff Interview Report. The University counters that it complied with its section (1)(e) bargaining obligation because the Report was not potentially or probably relevant to a contract administration matter and, moreover, it contained confidential information. The University argues that the Report is confidential under its Faculty Records Policy and, independently, because the manager whose subordinates were interviewed has his own personal privacy interest in the Report. Finally, the University contends that it complied with section (1)(e) by attempting to negotiate a good-faith accommodation to reconcile the conflict

between these confidentiality interests and the Union's need for the information under the Public Employee Collective Bargaining Act (PECBA).

It is well-settled that a public employer's obligation to collectively bargain in good faith under ORS 243.672(1)(e) includes the duty to provide an exclusive representative with requested information that has "some probable or potential relevance to a grievance or other contractual matter." *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98 at 7, 18 PECBR 64, 70 (1999). When analyzing (1)(e) claims, we "begin with the premise of full disclosure." *Id.* The burden "is on the union to show that the requested information is relevant, and if the union fails to make that threshold showing the employer's duty to provide the information does not arise." *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 (1993) (citing *OSEA v. Salem-Keizer School Dist. 24J*, Case No. UP-135-86, 10 PECBR 635 (1988), *aff'd*, 103 Or App 221, 797 P2d 375 (1990)).

Even when there is a request for information of probable or potential relevance, the "extent to which a party must supply the information requested and the length of time a party may take to do so are dependent upon the totality of circumstances present in the case; just as good or bad faith bargaining at the negotiations table must be determined by consideration of all circumstances." *Oregon School Employees Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81 at 5, 6 PECBR 5027, 5031 (1982). We assess the totality of circumstances, guided by the four factors identified in *Colton*: (1) the reason given for the request, (2) the ease or difficulty with which information could have been produced, (3) the type of information requested, and (4) the history of the parties' labor-management relations. *Id.* We urge parties to take a common sense approach in handling (1)(e) requests for information. *Oregon AFSCME Local 3581 v. State of Oregon, Real Estate Agency*, Case No. UP-42-03 at 5, 21 PECBR 129, 133 (2005).

Analysis

We first address the threshold question of "whether the information sought was of probable or potential relevance to a contractual matter." *Colton*, C-124-81 at 5, 6 PECBR at 5031. The Union contends that it sought the Report as part of its investigation into a potential grievance, begun after multiple bargaining unit employees complained to the Union steward about working conditions in the Resource Sharing office. The Union points out that it first reported those concerns directly to the University, and the Report is the result of interviews of bargaining unit employees by human resources. The University contends that the Union did not satisfy the threshold showing of relevance because it did not clearly identify the subject of its investigation, and because the Report contains no information about age discrimination, which the Union ultimately identified as the substance of its investigation.

On this record, the Union satisfied the threshold relevance test. It was the Union itself that initially raised the concerns about DK's management of the Resource Sharing office, which resulted in a human resources employee interviewing bargaining unit employees. The Union then

sought the Report that summarized those interviews. Relevance can be discerned from the context of the request itself. *See Colton*, C-124-81 at 5-6, 6 PECBR at 5031-32 (“In most cases, the relevance of the information sought can be discerned from the request itself; while in other cases, *the reason will have to be explicitly stated in order for the responding party to determine the relevance of the information.*”) (emphasis added). Here, the context included both the Union raising bargaining unit employees’ concerns about their workplace, and a contract that codified both respectful workplace conduct (Article 69) and non-discrimination (Article 19) as contract terms. Relevance could be discerned from this context.

Moreover, when asked by the University, the Union *did* explicitly identify a specific contract article in connection with its request. Specifically, when the University asked for more information about the Union’s request, the Union responded that it was investigating a possible violation of Article 19, relating to discrimination. Article 19 provides that complaints alleging discrimination may be presented as a Step 2 grievance. Under these circumstances, the Union satisfied the threshold relevance inquiry under *Colton*.⁵

The University nonetheless asserts that the Report was not relevant because the human resources employee did not ask about age discrimination and the interviewed employees did not talk about age discrimination, and as a result the Report contains no information about age discrimination. The absence of any information about age-related bias, however, does not make the Report conclusively irrelevant, as the University argues. Actual relevance is not required; the standard is potential or probable relevance to a contract administration matter. *See, e.g., Olney Education Association v. Olney School District 11*, Case No. UP-37-95 at 5, 16 PECBR 415, 419 (1996), *aff’d*, 145 Or App 578, 931 P2d 804 (1997) (rejecting employer’s argument that a request for school board executive session tapes was not potentially or probably relevant to a pending grievance because the grievance alleged a violation of a contract article requiring all complaints about teachers to be *written*, and there were no written complaints about teachers at issue).

The University also argues, as an independent reason why the Report is not relevant, that information about the Resource Sharing manager, DK, does not meet the heightened relevance standard for information about people outside the bargaining unit. The University relies on *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*,

⁵We note that the Report is also potentially or probably relevant to the administration of Article 69, entitled “Mutual Respect.” That article states, “Behaviors that contribute to an intimidating work environment, such as abusive language or behavior, are unacceptable and will not be tolerated.” In Article 69, the parties agreed that issues related to inappropriate workplace conduct “by employees or supervisors not covered by Article 19 – No Discrimination, are appropriate for discussion at bi-monthly meetings under Article 18- Grievance and Arbitration Procedure, Section 12.” The Union itself, however, did not identify this additional contractual provision as a basis of potential or probable relevance until the hearing in this matter. In any event, as set forth above, the purpose and relevance of the request was known to the University from the outset, as the Report was generated in response to concerns raised by the Union on behalf of its represented employees.

Case No. UP-7-98 at 10, 18 PECBR 64, 73 (1999), in which the Board explained that requests “for information relating to persons outside the bargaining unit require a special demonstration of relevance.” Under that standard, the Board must find “only a probability that the requested information is relevant and would be of use to the union in carrying out its statutory responsibilities.” *Id.* The requesting party must show that there is “a logical foundation and a factual basis” for the information requested. *Id.*

We question whether this standard applies to a request for a report summarizing bargaining unit employee interviews, but even assuming that it does, the Union met it.⁶ Bargaining unit employees presented concerns about their manager, DK, to their steward, including concerns that DK was treating senior members of the work group less favorably than younger employees. The steward told the assigned human resources employee about those concerns, and together they decided that interviews of bargaining unit employees were needed. The Report that resulted from those interviews meets the standard that the University asks us to apply.

The University asserts that if it is required to produce the Report, the Board would be enlarging the duty to provide information under ORS 243.672(1)(e), clearing the way for “fishing expeditions” into documents about supervisors’ performance. Our precedent expressly recognizes that a labor organization’s generalized concern, untethered to the contract, about a manager’s performance does not trigger a public employer’s duty to produce information, and we are not departing from that principle here. *See Ashland Police Association v. City of Ashland*, Case No. UP-50-05 at 6, 21 PECBR 512, 517 (2006) (a labor organization is entitled to express concerns about a manager, but “such concerns can be the basis for an information request only if it is potentially relevant to contract administration”); *see also Real Estate Agency*, UP-42-03 at 6-7, 21 PECBR at 134-35 (union met its obligation to demonstrate relevance where it informed the employer that it sought the requested document to evaluate the merits of a potential grievance; it “did not need to identify a specific action upon which a grievance would be filed nor a specific set of facts which, in the view of the [employer], would support the Union’s request for information”). For the reasons explained above, here the Union linked the relevance of the Report to a specific pending investigation about a possible contract violation.

Next, we turn to whether the University violated ORS 243.672(1)(e) under the totality of the circumstances. Applying the first *Colton* factor, the reason given for the request, as explained above, we conclude that the Union established the threshold relevance standard. The University nonetheless argues that the first *Colton* factor should weigh in its favor because the steward did not ask employees about their ages and no age discrimination grievance was ultimately filed. The University goes so far as to suggest that Taylor, the chief steward, sought the Report only because of a personal interest in the workplace dynamics in Resource Sharing. These assertions do not demonstrate an absence of potential or probable relevance. The fact that the Union did not

⁶The request did not seek information about DK unrelated to the University’s interviews of bargaining unit employees; it sought only the Report resulting from those interviews.

ultimately file a grievance does not mean that an investigation was not conducted. Moreover, on the record before us, we find no reason to question Taylor's credibility.

Next, we consider the second *Colton* factor—the ease or difficulty of providing the information. The Report would be easy to produce, which the University concedes. The University has produced the Report itself, and would need only to change those portions that are currently redacted.

With respect to the third factor identified in *Colton*—the kind of information requested—the University advances several arguments. Specifically, the University argues that the Report is confidential both under the University's Faculty Records Policy and, independently, as a consequence of DK's personal privacy interest.

Before we address those confidentiality issues, we note that when the Union asked the University to summarize the redacted information, the University represented that the redactions “covered * * * [e]valuative information” and suggestions for DK's “professional development.” And, when the Union questioned whether the redacted information also included a summary of interviews with Union-represented employees and “factual information,” the University did not acknowledge that the redactions included factual information, and instead maintained that it was entitled to withhold the redacted information because it was purely subjective evaluative material regarding DK. Although we would normally consider whether the requested information is “purely subjective” evaluative information of a supervisor, we cannot make that assessment here because the University did not submit an unredacted version of the Report for *in camera* review. Moreover, the University acknowledged for the first time at oral argument that the redacted portions of the Report also include objective, factual information. Thus, even assuming that a portion of the Report contains purely subjective evaluative information concerning DK that the University had a legitimate basis for redacting under the circumstances of this case, the University's redactions were overbroad, and its communications with the Union regarding the redactions lacked sufficient detail and accuracy to be consistent with the University's duty to bargain in good faith under (1)(e).⁷

We address first the University's primary argument that the Report is confidential pursuant to the Faculty Records Policy. When faced with possibly conflicting obligations under PECBA and another law that purportedly prohibits disclosure of information, public employers and labor organizations are not excused from their duty to bargain. Rather, in situations involving confidentiality or conflicting legal obligations, “the withholding party must prove both a legitimate and substantial confidentiality interest, and that it pursued a good-faith accommodation to reconcile the conflict.” *Service Employees International Union Local 503, Oregon Public*

⁷Although the University did not describe the objective, factual information it redacted, the unredacted portions of the Report suggest that some of the redacted information may consist of *bargaining unit employees'* statements about DK. A summary of bargaining unit employees' comments is not the University's evaluative information about the supervisor or recommendations for his professional development.

Employees Union v. University of Oregon, Case No. UP-009-15 at 8, 26 PECBR 724, 731 (2016), *aff'd*, 291 Or App 109, 419 P3d 779, *rev den*, 363 Or 599 (2018). The Board “balances a labor organization’s need for information against any legitimate and substantial confidentiality interest established by the employer.’ The party asserting confidentiality has the burden of proof.” *City of Ashland*, UP-50-05 at 9, 21 PECBR at 520 (quoting *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98 at 8, 18 PECBR 64, 71 (1999)).

Applying those principles here, we conclude that the University did not meet its burden to establish a legitimate and substantial confidentiality interest arising from its Faculty Records Policy with respect to the Report. Specifically, the University asserts that the Faculty Records Policy has the force of law pursuant to ORS 352.087 and ORS 352.226. In particular, ORS 352.087(1)(m) provides that a public university may:

“Establish policies for the organization, administration and development of the university which, to the extent set forth in those policies, *shall have the force of law* and may be enforced through university procedures that include an opportunity for appeal and in any court of competent jurisdiction.” (Emphasis added.)

Further, the University asserts that it promulgated the Faculty Records Policy pursuant to ORS 351.065, subsequently renumbered ORS 352.226. That statute authorizes a public university governing board to adopt standards and specific orders by or through the university president governing access to certain personnel records. *See* ORS 352.226(1). Personnel records means records containing information concerning a faculty member, “including, but not limited to, information concerning discipline, membership activity, employment performance or other personal records of individual persons.” ORS 352.226(13). Access to personnel records “may be limited to designated classes of information or persons, or to stated times and conditions, or to both[.]” ORS 352.226(2).⁸

To establish a legitimate and substantial confidentiality interest, the University relies on Section C of its Faculty Records Policy, promulgated pursuant to the statutory authority in ORS Chapter 352. Section C(2) of the policy provides that “personal records” are “designated as confidential in order to protect privacy rights in an adequate educational environment. Access to personal records shall be restricted as hereinafter set forth in Sections E, F, G, and H.” Personal records under the Faculty Records Policy include information about discipline and counseling, other behavioral records, and records concerning professional performance. The University contends that the Report constitutes “personal records” and is, therefore, confidential. The parties stipulated that DK is covered by the Faculty Records Policy.

The problem with the University’s argument, even assuming that the Faculty Records Policy carries the force of law, is the express exception in the policy itself for information required

⁸*See also* ORS 352.226(12) (providing that any “category of personnel records specifically designated as confidential pursuant to valid standards or orders pursuant to this section is not a public record for the purposes of ORS 192.314”).

to be disclosed by *other* valid state laws. Specifically, Section E(3) of the Faculty Records Policy provides that the University may not release personal records of faculty members without their “written consent, unless upon receipt of a valid subpoena or other court order or process or as required by valid state or federal laws, rules, regulations, or orders.” Thus, if information is required by PECBA to be disclosed to a labor organization, there is no legitimate and substantial confidentiality interest arising from the Faculty Records Policy as to that particular information.

As explained in this order, after consideration of the totality of circumstances, including all the *Colton* factors, we conclude that PECBA requires the University to disclose the Report to the Union. Consequently, Section E(3) of the Faculty Records Policy expressly provides that the Report is not confidential information because a valid state law (PECBA) requires its disclosure.

The University argues that this conclusion would effectively remove the confidentiality protection from the Faculty Records Policy in PECBA records request cases. We disagree. We are not holding that, in every factual situation, there can be no conflict between PECBA and the Faculty Records Policy. In this case, however, for the reasons explained in this order, PECBA requires disclosure of the Report because it is potentially or probably relevant to a contract administration matter and the *Colton* totality-of-the-circumstances analysis requires its disclosure.

Next, we address the University’s alternative argument based on DK’s personal privacy interest. As the party asserting confidentiality, the University bears the burden to establish that this personal privacy interest gives rise to a legitimate and substantial confidentiality interest. *See City of Ashland*, UP-50-05 at 9, 21 PECBR at 520. Here, the University did not articulate any legal basis (other than the Faculty Records Policy, which it contends carries the force of law) for treating this personal privacy interest as a legitimate and substantial confidentiality interest. Moreover, the University did not demonstrate, as a factual matter, that the content of the redacted information provides a basis for this Board to find a legitimate and substantial confidentiality interest.⁹ On this record, we conclude that the University did not meet its burden to establish a legitimate and substantial confidentiality interest.¹⁰

⁹The University did not, for example, submit an unredacted version of the Report to the ALJ for an *in camera* review. We are not suggesting that a withholding party is required to submit withheld or redacted information for an *in camera* review in order to meet its burden, but an *in camera* review is one option available to a withholding party. A withholding party may meet its burden to demonstrate a legitimate and substantial confidentiality interest by other methods, including by precisely describing to the requesting party and ultimately to this Board the nature of the withheld information and the reasons why, under the circumstances of the particular case, the specific information is private or confidential.

¹⁰We note that, even if the University had established a legitimate and substantial confidentiality interest, the University’s proposed accommodations do not represent the common sense approach we have urged parties to use in resolving (1)(e) information request disputes. For example, the University initially proposed a nondisclosure agreement that required the Union to pay \$10,000 in liquidated damages upon a

(Continued . . .)

Finally, we turn to the last *Colton* factor—the history of the parties’ labor-management relations. The University argues that the Union’s request was an impermissible “fishing expedition” by the chief steward, whom the University asserts has only a personal interest in the Report. Where “there has been a pattern of numerous requests or of apparent ‘fish-and-grieve’ expeditions,” the obligation to provide the requested information “may be excused altogether.” *Colton*, C-124-81 at 6, 6 PECBR at 5032. Here, there is no evidence in the record that Taylor sought the Report for impermissible purposes, and there is no other evidence from which we can conclude that the University’s obligation to produce the Report should be excused.

In sum, under the totality of the circumstances, the University’s response to the Union’s request for the Report violated ORS 243.672(1)(e).

Remedy

We turn to the remedy for the University’s good faith bargaining violation. Because the University 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 University is ordered to produce the Report to the Union within 30 days of the date of this order. However, if (as the University represents) the Report includes purely subjective, evaluative information about DK or suggestions for his professional development that have no bearing on the workplace complaints raised by bargaining unit members, and the University maintains that it has a legitimate basis under PECBA for redacting that information, then the University may redact that information before disclosing the remainder of the Report, so long as it summarizes the nature of the redacted information and explains the basis or bases for the redaction. In the event that the Union disputes the redaction, the Union shall notify the University within 10 days of the production of the Report and the parties shall attempt to resolve the dispute. If the parties are unable to resolve the dispute, the University

(Continued . . .) breach, and that provided that only the Union’s attorney was permitted access to the Report, and only by an in-person review at the University’s offices in Eugene. Although the University later reduced its proposed liquidated damages amount and engaged in negotiations with the Union about other possible terms, including allowing a steward other than Taylor to see the Report, a nondisclosure agreement with terms as stringent as these was not aimed at a reasonable balance between the Union’s need for the information and the confidentiality interest the University was attempting to protect.

Similarly, the University’s argument that the nondisclosure agreement merely documented the conditions that DK attached to his consent—conditions that the University contends that it was required to observe—is also inconsistent with the good faith approach required by section (1)(e). According to the University, the Union could simply obtain a subpoena to obtain the Report for its non-attorney representatives if it ultimately decided to pursue a grievance. But the University’s belief that DK could bind the University to the conditions placed on disclosure arose from the University’s erroneous conclusion that the Faculty Records Policy conclusively prohibited the disclosure without DK’s consent. Moreover, the University’s proposal that it could codify DK’s approved conditions, whereas the Union could simply ultimately obtain a subpoena, does not demonstrate the type of reasonable balance between competing needs or the common sense approach that ORS 243.672(1)(e) requires.

shall submit to this Board, no later than 60 days from the date of this order, an unredacted Report for an *in camera* review by an administrative law judge. The ALJ shall determine which, if any, portions of the Report must be produced, and the University shall produce those portions to the Union. *See, e.g., Olney School District 11*, UP-37-95 at 5, 16 PECBR at 419 (directing employer to provide a copy of executive session tapes to the Board for an *in camera* review by an ALJ; portions of any tapes of probable or potential relevance to the union's grievance will be produced to the union).

The Union also requests that we order the University to post a notice of the (1)(e) violation. 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 fact that the University produced part of the information sought by the Union and engaged in some negotiations to attempt to reach a good-faith accommodation, we conclude that a posting of a notice is not warranted.

We also decline the Union's request that we impose a \$1,000 civil penalty on the University.¹¹ 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. The Union asserts that the University acted with full knowledge that its conduct violated the law. We disagree. Although we conclude that the University did not comply with ORS 243.672(1)(e), the University made some proposals for accommodations of the type that the Board has previously held may constitute, under certain circumstances, good-faith accommodations. Under these circumstances, we conclude that a civil penalty is not warranted.

The Union also requests an order that the University reimburse the Union's \$300 filing fee, which we may order if the University's answer was "frivolous or filed in bad faith." ORS 243.672(3). Although we have ultimately concluded that the University violated ORS 243.672(1)(e), the record does not establish that the University's answer was frivolous or filed in bad faith. Therefore, we deny the request for reimbursement of the Union's filing fee.

¹¹Because we have found a (1)(e) violation, and not dismissed the complaint, we do not impose a civil penalty on the Union, as requested by the University.

ORDER

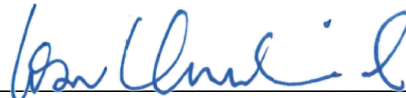
1. The University's response to the Union's request for the Resource Sharing Staff Interview Report violated ORS 243.672(1)(e).

2. The University shall cease and desist violating ORS 243.672(1)(e) and shall, within 30 days of the date of this order, produce the Resource Sharing Staff Interview Report to the Union. To the extent that the Report includes purely subjective, evaluative information about DK or suggestions for his professional development that have no bearing on the workplace complaints raised by bargaining unit members, and the University maintains that it has a legitimate basis under PECBA for redacting that information, then the University may redact that information before disclosing the remainder of the Report, so long as it summarizes the nature of the redacted information and explains the basis or bases for the redaction. In the event that the Union disputes that all information required by this order has been produced, the Union shall notify the University within 10 days of the production of the Report, and the parties shall attempt to resolve the dispute. If the parties are unable to resolve the dispute, the University shall submit, no later than 60 days from the date of this order, an unredacted copy of the Report to this Board for an *in camera* review by an administrative law judge, who will review the information and determine which, if any, portions of the Report must be produced, and the University shall produce those portions to the Union.

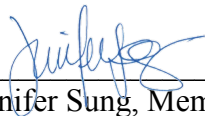
DATED: December 4, 2018.



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-009-15

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL	)	
UNION LOCAL 503, OREGON PUBLIC	)	
EMPLOYEES UNION,	)	
	)	
Complainant,	)	
	)	
v.	)	FINDINGS AND ORDER ON
	)	COMPLAINANT'S PETITION FOR
	)	REPRESENTATION COSTS
UNIVERSITY OF OREGON,	)	
	)	
Respondent.	)	

On June 3, 2016, this Board issued an order holding that the University of Oregon (University) violated ORS 243.672(1)(e) by failing to respond to information requests made by the Service Employees International Union Local 503, Oregon Public Employees Union (Union) in a manner consistent with the duty to bargain in good faith. On April 4, 2018, the Oregon Court of Appeals affirmed the Board's decision. *See Service Employees International Union Local 503 v. University of Oregon*, 291 Or App 109, 419 P3d 779, *rev den*, 363 Or 599 (2018). The appellate judgment was entered on October 12, 2018.

The Union filed a timely petition for representation costs on June 23, 2016, and the University filed timely objections to that petition.¹

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

1. The Union is the prevailing party.
2. This case required one day of hearing.

¹The Union filed a petition for attorney fees on appeal under ORS 243.676(2)(e). That petition is addressed in a separate order issued on this date.

²Effective 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.

3. The Union requests an award of \$5,000, based on total costs of \$12,540 resulting from 76 hours of attorney time at an average rate of \$165 per hour.

4. The Union's hourly rate is 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 at 2, 26 PECBR 129, 130 (2014) (Rep. Cost Order) (the average rate for representation costs is between \$165 and \$170 per hour).

5. The Union's claimed time exceeds the average that this Board uses to determine the reasonableness of representation costs. *See North Clackamas School District*, UP-017-13 at 2, 26 PECBR at 130 (cases generally require an average of 45 to 50 hours per day of hearing). The Union argues that the higher than average number of hours claimed in this case results from the work required to research and argue legal issues arising from the Family Educational Rights and Privacy Act, 20 USC § 1232g. The University does not object to the reasonableness of the hours claimed by the Union. As a result, we will use the Union'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 policies of the Public Employee Collective Bargaining Act, our awards in prior cases, and the reasonable cost of services rendered in this case, we order representation costs in the amount of \$4,180.

ORDER

The University shall remit \$4,180 to the Union within 30 days of the date of this Order.

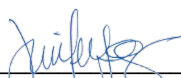
DATED: December 7, 2018.



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-009-15

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL	)	
UNION LOCAL 503, OREGON PUBLIC	)	
EMPLOYEES UNION,	)	
	)	
Complainant,	)	
	)	FINDINGS AND ORDER ON
v.	)	COMPLAINANT'S PETITION FOR
	)	ATTORNEY FEES ON APPEAL
UNIVERSITY OF OREGON,	)	
	)	
Respondent.	)	

On June 3, 2016, this Board issued an order holding that the University of Oregon (University) violated ORS 243.672(1)(e) by failing to respond to information requests made by the Service Employees International Union Local 503, Oregon Public Employees Union (Union) in a manner consistent with the duty to bargain in good faith. On April 4, 2018, the Oregon Court of Appeals affirmed the Board's decision. *See Service Employees International Union Local 503 v. University of Oregon*, 291 Or App 109, 419 P3d 779, *rev den*, 363 Or 599 (2018). The appellate judgment was entered on October 12, 2018.

On November 1, 2018, the Union filed a timely petition for attorney fees.¹ Under OAR 115-035-0057(2), the University had 14 days from the date of service of the petition to file any objection. No objections were filed.

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

1. The Union is the prevailing party, as it was designated as such in the appellate judgment. OAR 115-035-0057(3).

2. The Union requests \$5,000 in attorney fees, the maximum amount that we award in the absence of a civil penalty. OAR 115-035-0057(4). In support of this request, the Association submitted an affidavit demonstrating that 79 hours were spent on the appeal. Using a rate of \$165 per hour, the Union estimates attorney fee costs of \$13,035.

¹The Union filed a separate petition for representation costs under ORS 243.676(2)(d). That petition is addressed in a separate order issued on this date.

3. The Union's hourly rate is consistent with the standard that this Board uses to determine attorney fee awards. *See Portland Fire Fighters' Association, Local 43, IAFF v. City of Portland*, Case No. UP-013-10 at 1, 26 PECBR 479 (2015) (Attorney Fees Order) (the average rate used for an award of attorney fees is between \$165 and \$170 per hour).

4. The Board has reviewed attorney fee awards issued over the most recent ten years (since 2008). During that period, petitioning parties submitted an average of 63 hours per case on appeal.² The Board will use 63 hours as its starting point in awarding fees in this matter and going forward. Here, the Union's claimed time (79 hours) exceeds that average. The Union acknowledges that the time charged is higher than the average that this Board typically uses for an award of attorney fees, but notes that this case involved extensive legal research outside the scope of issues typically raised in an unfair labor practice matter. The University did not object to the time claimed by the Union as excessive or submit a supporting statement describing the amount of time spent by the University on the appeal. *See* OAR 115-035-0057(2). Under these circumstances, we will use 79 hours to calculate the award.

5. An average award is generally one-third of the reasonable attorney fees of the prevailing party, subject to the \$5,000 cap in OAR 115-035-0057(4). Performing that calculation here, and considering the purposes and policies of the Public Employee Collective Bargaining Act, our awards in prior cases, and the reasonable cost of services rendered in this case, we order attorney fees to the Union in the amount of \$4,345.

ORDER

The University shall remit \$4,345 to the Union within 30 days of the date of this Order.

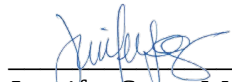
DATED: December 7, 2018.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

²The Board last reviewed the average hours submitted for attorney fees awards in 2011, when it reviewed the attorney fees awards issued from 1997 to 2011 and determined that petitioning parties spent an average of 35 hours per appeal. *See Gresham-Barlow Education Association/OEA/NEA v. Gresham-Barlow School District No. 10J*, Case No. UP-32-07 at 2, 24 PECBR 375, 376 (2011) (Attorney Fees Order). In calculating the average of more recent cases (2008 to present), the Board excluded two outlier cases (at the high and low ends).

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-009-17

(REPRESENTATION)

TEAMSTERS LOCAL 206,	)	
	)	
Petitioner,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
CITY OF EUGENE,	)	AND ORDER
	)	
Respondent.	)	
	)	

On November 6, 2018, this Board heard oral argument on the Petitioner's objections to a recommended order issued by Administrative Law Judge (ALJ) Julie D. Reading on July 13, 2018, after a hearing held on February 14 and 15, 2018, in Eugene, Oregon. The record closed on June 22, 2018, when the Respondent provided record clarifying information requested by the ALJ.

Jason M. Weyand, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented the Petitioner.

Todd A. Lyon and Margaret A. Burnham, Attorneys at Law, Fisher and Phillips LLP, Portland, Oregon, and Seattle, Washington, represented the Respondent.

On December 4, 2017, Teamsters Local 206 (Union) filed a second amended petition to certify a new bargaining unit by card check. The petition proposes to form a new bargaining unit comprised of "[a]ll temporary part-time instructors and rec[reation] leaders at Sheldon Community Center, except those represented by AFSCME." On January 2, 2018, the City of Eugene (City) filed timely objections to the petition.

The issue is: Has the Union identified an appropriate bargaining unit under ORS 243.682(2)?

We conclude that the bargaining unit is not an appropriate unit and dismiss the petition on that basis.¹

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties

1. The Union is a labor organization within the meaning of ORS 243.650(13).
2. The City is a public employer within the meaning of ORS 243.650(20).

City and Recreation Division Organization

3. The City is comprised of six different departments: Central Services; Fire and Emergency Medical Services; Planning and Development; Police; Public Works; and Library, Recreation, and Cultural Services (LRCS).
4. LRCS has three divisions: the Library Division, the Recreation Division, and the Cultural Services Division. Each of these divisions has its own director.
5. The Recreation Division of LRCS is divided into five sections based on the services provided: Administration, Athletics, Senior/Adaptive Recreation, Aquatics, and Youth & Family. Each of these sections has a manager.
6. The Recreation Division's services are primarily offered out of six community centers (Sheldon, Amazon, Peterson Barn, Hilyard, and Campbell Community Centers, and the River House Outdoor Center) and three aquatic centers (Sheldon, Amazon, and Echo Hollow Pools). The various community centers have similar structures: each has a reception area, a lobby, classrooms, a kitchen, open space for community events, staff offices, and storage areas. The

¹At the February 14 and 15, 2018, hearing, the Union represented that it had intended the petition to also include all temporary unrepresented Recreation Coordinators, Master Instructors, Skilled Clerks, Building Coordinators, and Recreation Activity Coordinators employed at the Sheldon Community Center. The Union explained that the petition named only those positions that Sheldon employees held at the time of filing and that the omission of the unfilled positions was inadvertent. The City moved to dismiss the petition, arguing that the Union was attempting to amend it during the hearing. The City cited OAR 115-025-0023, which allows the Board to dismiss any petitions that are not amended as requested by the Election Coordinator. Because that rule applies only when the Election Coordinator requests an amendment, it is inapplicable here. Moreover, we have the authority to determine whether a bargaining unit that includes additional positions is appropriate, if the showing of interest submitted with the petition is adequate for the larger unit. *Oregon AFSCME Council 75 v. City of Ontario*, Case No. RC-1-07 at 17, 22 PECBR 260, 276 (2008) (citing *IBEW, Local 659 v. Eugene Water and Electric Board*, Case No. RC-36-93 at 10, 14 PECBR 808, 817 (1993); OAR 115-025-0010(h); and OAR 115-025-0020). Accordingly, we decline to dismiss the petition on that ground.

Sheldon and Amazon Pools are adjacent to, but managed separately from, their respective community centers.

7. Each community center has a supervisor who is referred to as the “community center director.” Each community center temporary employee is assigned a “base” location, even if they work at different locations. The community center director is the primary supervisor for the temporary employees who are based at that center.

8. The Youth & Family section manager oversees four out of the six community centers: Sheldon, Peterson Barn, and Amazon Community Centers, and the River House Outdoor Center. At the Sheldon, Amazon, and Peterson Barn Community Centers, the Youth & Family section operates preschools, after-school programs, camps, and other children’s programs, plus a variety of classes and activities for adults or families. Through the River House Outdoor Center, the section offers a variety of outdoor activities (*e.g.*, kayaking, rock climbing, bike safety) and operates the Spencer Butte Challenge Course.

9. The Senior/Adaptive Recreation section manager oversees the Campbell and Hilyard Community Centers. Campbell primarily provides senior services, while Hilyard primarily provides adaptive recreation services. The Senior/Adaptive Recreation section also provides services at the other community centers. For example, it offers classes for senior citizens at the Peterson Barn Community Center. For another example, a Senior/Adaptive Recreation inclusion specialist may work for a time at the Sheldon Community Center to consult with staff about how to provide better services to a particular child at the Sheldon preschool. The Senior/Adaptive Recreation section also operates a preschool that integrates children with and without developmental disabilities at an auxiliary building.

City Employees – Regular and Temporary

10. A number of City employees currently have labor organization representation. Many City employees throughout all departments are represented by the American Federation of State, County and Municipal Employees (AFSCME). Additionally, many Fire and Emergency Medical Services employees are represented by the International Association of Fire Fighters. Police officers are represented by the Eugene Police Employees Association. Finally, a small number of employees in the LRCS’s Cultural Services Division are represented by the International Alliance of Theatrical Stage Employees.

11. The City has two broad categories of employment positions: “regular” and “temporary.” Regular employment positions may be full-time or part-time. According to the City’s Part-Time Positions Policy, “[r]egular part-time positions work at least 20 hours, but less than 40 hours, per week.”

12. The AFSCME unit is considered a “wall-to-wall” unit. The AFSCME collective bargaining unit includes regular full-time and part-time employees, but it expressly excludes “those employees who are temporary.”

13. The City defines “temporary employment” in the Temporary Employee Handbook as follows:

“Temporary employees fill positions for which there is no expectation of on-going funding or for which there is no expectation of continued employment, or those who routinely work less than 20 hours per week or 1,040 hours per year. Temporary employment is usually tied to the accomplishment of a specific function(s) which occurs within a specified time period (seasonal employment, special projects, temporary fill-in for regular employees) or within specified time limits (work-study/senior employment, on-call employment).”

14. The City has two employee handbooks. The Employee Handbook applies to all employees. The Temporary Employee Handbook applies to employees defined as temporary by the City. Many of the City’s policies are the same in both handbooks because they apply to all regular and temporary employees. These include, but are not limited to, the following policies: equal opportunity/affirmative action, respectful work environment, employee records, nepotism, conflicts of interest, drug-free workplace, and public service leave. Policies that apply to regular, but not temporary, employees include policies regarding promotions, lateral transfers, demotions, and benefits available only to regular employees such as health insurance, life insurance, disability insurance, deferred compensation, employee assistance programs, vacation leave, the leave donation program, and the vacation bonus for low sick leave use.

15. Represented employees’ terms and conditions of employment are also governed by the provisions in their respective collective bargaining agreements.

16. As the City uses the word “temporary,” there are three relevant sub-categories of “temporary” employees. First, there are temporary employees who were hired to meet a short-term need of the City and have no expectation of continued employment. Second, there are temporary employees who work in positions that are more commonly referred to as “seasonal,” *i.e.*, they were hired to work for one particular season (*e.g.*, summer). Third, there are temporary employees who were hired to work in a year-round, part-time position for an indefinite period of time, but who are generally limited to working less than 1,040 hours per year.²

17. Generally, when a seasonal employee’s employment term ends, the City keeps them on its “active” employee list for two years, so that they do not have to repeat the entire employment application process if they return to work another season. At the end of each season, supervisors ask seasonal employees if they have any potential interest in returning, but even if the seasonal employee says that they do not plan to return, the City will keep them “active” in its system in case they change their minds. If a seasonal employee does not return to work within two years, the City will check with the relevant supervisor to confirm that the seasonal employee should be

²For clarity, we will refer to the three sub-categories of employees whom the City defines as “temporary” as follows: (1) “short-term” employees are those hired on a short-term basis with no expectation of continued employment; (2) “seasonal” employees are those hired to work only for a particular season; and (3) “temporary part-time” employees are those hired to work indefinitely for less than 1,040 hours per year.

“terminated,” *i.e.*, removed from the active employee list. Many seasonal employees are students or teachers who are available to work only during the summer.

18. As of October 2017, there were approximately 750 temporary employees (including seasonals) listed as “active” in the City’s system. The record does not show how many of those employees were temporary part-time, seasonal, or short-term. Approximately 575 were in the Recreation Division of the LRCS Department, and 122 were in the Cultural Services Division of the LRCS Department.

19. Many of the temporary part-time employees have been employed by the City continuously for many years. According to the City Human Resources Manager, regular part-time and temporary part-time employees in the same classification are distinguished primarily by the number of hours they work. The City guarantees regular part-time employees at least 20 work hours per week, but it generally restricts temporary part-time employees to working less than 20 hours per week.

20. In the Recreation Division, there are several classifications that may be regular or temporary. The City designates the regular positions as Recreation Activity Employees (RAEs). These positions include RAE-Recreation Activity Leader, RAE-Recreation Activity Coordinator, and RAE-Instructors 1, 2, and 3. Like other regular employees, RAEs are guaranteed at least 20 hours of work a week and are represented by AFSCME. The City employs a total of approximately 18 RAEs.

21. The AFSCME collective bargaining agreement (AFSCME Agreement) defines “temporary employees” as follows:

“a. Temporary employees are those hired to work, except in the Recreation Division, on a temporary, seasonal, occasional, or on-call basis for less than one thousand forty (1040) hours in a calendar year. The same parameter shall apply to temporary positions. Temporary employment is used to supplement the regular work force but not supplant regular bargaining unit positions. It is not the intent of this Agreement to allow for a temporary position to be filled on a regular, on-going basis at, or close to, half-time from year to year.

“b. Seasonal Recreation Employees are those who are scheduled to work less than forty (40) hours per pay period in sixteen (16) of the twenty-six (26) pay periods. Typically, the ten (10) pay periods where employees will work more than forty (40) hours per pay period will be during the months of May through October and during school breaks.”

22. Seasonal Recreation Employees (SREs) are temporary part-time employees in the Recreation Division. Although the City’s Temporary Employee Handbook does not refer to SREs, the City considers SREs to be a type of “temporary” employee and therefore excluded from AFSCME’s bargaining unit. Despite their label, SREs are not conventional seasonal employees. Rather, SREs work year-round for an indefinite period of time. The temporary part-time employees

in the petitioned-for bargaining unit are SREs.³ Unlike other temporary part-time employees, whom the City generally limits to working less than 20 hours each week (or less than 1,040 hours per year), the City permits SREs to work 20 hours or more each week for 20 weeks (*i.e.*, ten pay periods) out of the year, which they typically do during the summer.

23. The City has a centralized application system. Announcements for open positions are published on the City's website. Applicants send their applications to the City's Human Resources Department (HR Department), which is part of the City's Central Services Department. The HR Department then forwards the applications to the hiring supervisors. The City posts several temporary Recreation Division positions on a continuous basis. The City recruits for the temporary positions of Recreation Activity Coordinator, Recreation Activity Leader, Fitness Instructor, Recreation Instructor, and Building Coordinator through a single, comprehensive job announcement. However, particular positions may require specific skills, experience, or certifications. The announcement states that employees may be placed at Sheldon, Amazon, Campbell, Hilyard, Petersen Barn, Amazon Pool, Echo Hollow Pool, or Sheldon Pool. Community center directors interview candidates for temporary positions based at their centers, and they have the authority to select and hire temporary employees. The HR Department works with the centers so that generally applicable employment requirements—such as the veterans' preference requirements and equal employment opportunity requirements—are administered properly.

24. Some City temporary employees hold more than one position and may work in more than one department, division, or section at the same time. Some employees have worked in a temporary position in a particular department, division, or section, and then subsequently moved to a different department, division, or section.

25. Temporary employees are not entitled to the same benefits as regular employees, with the exception of sick leave as required by state law, and retirement through the Public Employee Retirement System (PERS) and Oregon Public Service Retirement Plan (OPSRP).

26. Temporary employees must compete for regular positions as part of open recruitment processes; the City does not offer regular positions to temporary employees as promotions. Occasionally, employees within the Recreation Division have started as temporary employees and moved on to become regular employees. From July 2012 through October 2017, three Sheldon-based temporary employees were hired into regular positions.

27. The City has two separate compensation plans for temporary employees—the Temporary Employee Compensation Plan (Temp Plan) and the Recreation Services Temporary Employee Wages Placement Compensation Plan (Recreation Temp Plan). The Temp Plan applies to all temporary (including seasonal) employees across the City. Due to the particular needs of the Recreation Division, which employs the vast majority of temporary employees, the City also created the Recreation Temp Plan in July 2016. The Recreation Temp Plan provides Recreation supervisors with additional guidance in determining and adjusting temporary employees' wages.

³The City clarified how it categorizes SREs and confirmed that the petitioned-for employees are SREs in a June 22, 2018, letter responding to questions raised by the ALJ.

28. When a supervisor hires a temporary employee in the Recreation Division, the supervisor looks to the Temp Plan to determine the proper job classification for the employee and then references the Recreation Temp Plan to determine the employee's wage rate. For each classification, the Recreation Temp Plan sets forth a pay scale with a minimum wage, a midpoint, and a maximum wage. For example, the pay scale for a temporary Instructor 1 is \$9.75 per hour (minimum), \$10.48 per hour (midpoint), and \$11.21 per hour (maximum). The Recreation Temp Plan includes criteria (such as years of experience, training, and skills) to guide supervisors in placing new employees at the correct wage rate on the applicable pay scale. Additionally, the Recreation Temp Plan provides that a supervisor must place an employee who is reclassified onto the new pay scale at a rate that is at least 3.5 percent higher than the employee's previous wage rate, and supervisors have discretion to place a reclassified employee onto the new pay scale at a rate up to seven percent higher than their previous wage rate (with section manager approval required for pay increases greater than seven percent). Further, the Recreation Temp Plan provides that employees are eligible for merit increases on a common annual date, and supervisors have discretion to award merit increases up to five percent on that date (with section manager approval required for merit increases greater than five percent).

Sheldon Community Center Employees

29. When the petition was filed, there were approximately 57 Sheldon-based temporary employees (including part-time and seasonal employees) who were listed as "active" by the City. According to the Union, approximately 35 of those employees are temporary part-time employees included in the proposed bargaining unit.

30. At the Sheldon Community Center, the City potentially would employ temporary employees in the following classifications: Recreation Activity Leader; Recreation Activity Coordinator; Building Coordinator; Master Instructor; Instructors 1, 2, and 3; Clerk Aid; and General Clerk. When the petition was filed, there were no Sheldon-based temporary employees in the classifications of Recreation Activity Coordinator; Building Coordinator; Clerk Aid; or General Clerk.

31. There are approximately 10 AFSCME-represented regular employees (including seven or eight RAEs, one Recreation Program Assistant, and one Recreation Office Coordinator) who are based at the Sheldon Community Center.

32. The current Sheldon director circulated to Sheldon staff a one-page document entitled, "Staff Policy and Expectations," that applies only to Sheldon employees. This document sets forth the Sheldon director's specific expectations. For example, it directs employees to arrive at work "5 minutes early" to be "on time" for their shift; it specifies how to make sick calls; and it provides guidance on how to dress for work.⁴ The Recreation Division manager testified that the

⁴The document also includes the following employment-related expectations, among others: "Take your scheduled breaks," "request time off at least 2 weeks in advance," and "no eating in the classroom." It also includes the director's programmatic expectations, such as "[a]ll cleaning products must be locked up in a cabinet or placed out of reach of children"; "[a]ttendance sheets must have daily parent signatures on sign in / sign out"; and "[a]ll medications must be in original bottles with a current date and kept in our locked medication container." (Emphasis in original.)

Sheldon director's Staff Policy and Expectations are similar to other community center directors' policy and expectations.

33. Some of the Sheldon-based temporary part-time employees have worked for the City for many years. For example, Karen Creighton has worked for the Recreation Division as a temporary employee since 1990. Over the years, Creighton has worked at several different community and aquatic centers. She has been based at Sheldon since approximately 2009, and she taught a class at Amazon Community Center in fall 2017. For another example, Angelo Di Liberto has worked as a temporary employee at Sheldon since 2015. Di Liberto was hired as a Recreation Leader. He has been effectively promoted and received raises by being reclassified to a Recreation Activity Coordinator, and then to an Instructor 3.

34. Creighton and Di Liberto testified that the employees in the proposed unit are generally restricted to working 19.5 hours or less per week during the academic year, but they are permitted to work closer to full-time hours for 10 two-week pay periods per year, typically during the summer.

35. Some temporary part-time employees at Sheldon work in more than one classification. For example, Creighton clocks in under two different position designations. She records hours as an Instructor 2 when her duties include front desk staffing, building supervisor duties, or inclusion specialist duties. She records hours as an Instructor 3 when her duties include teaching fitness courses.

36. Sheldon's primary service is child care. It offers preschool programs, after-school programs, and summer camps for kids. It also hosts art and fitness classes for adults. It has multiple classrooms for children of different age groups.

37. Instructors 1, 2, and 3 who teach adult art and fitness classes at Sheldon have schedules that are flexible and variable. Some instructors work in preschool or other child care positions, and those employees have more consistent ongoing schedules.

38. When the City has provided training to Sheldon-based temporary employees, the training sessions were conducted at the Sheldon Community Center and involved only Sheldon-based employees.

39. Recreation Division temporary employees may work at different locations over the course of a year for a variety of reasons. Some employees work regularly at more than one facility, for example, to teach a class at different community centers or pools. Some employees may work briefly at a different facility to fill a short-term need, for example, to substitute for an absent employee, or to provide adaptive or inclusion services to a particular individual. And, some employees may transfer their base from one location to another.

40. The City provided some data showing the locations at which all Recreation Division temporary employees (including part-time, seasonal, and short-term) worked over the course of a recent one-year period. The City's data does not distinguish between the different types of temporary employees, and for those individuals who worked at more than one location, the

City's data does not identify the reasons why they did so. According to that data, 65 temporary employees worked some hours at the Sheldon Community Center in a year. Among those employees, 48 recorded 100 percent of their hours at Sheldon; 1 recorded 99 percent of their hours at Sheldon; 1 recorded 86 percent of their hours at Sheldon; 12 recorded anywhere from two to 36 percent of their hours at Sheldon; and 3 recorded only one percent of their hours at Sheldon. Among the 14 employees who recorded more than one percent (but less than 100 percent) of their hours at Sheldon, nine split their time among different centers within the Youth & Family section, and five split their time between Hilyard Community Center (the primary location for Adaptive Recreation) and centers within the Youth & Family section.

Petition

41. On December 4, 2017, the Union filed a second amended petition⁵ proposing a unit of “[a]ll part-time instructors and rec[reation] leaders at Sheldon Community Center, excluding those represented by AFSCME.”

42. On January 2, 2018, the City objected, asserting that the proposed unit was not appropriate because it did not include seasonal employees and sought to fragment a larger wall-to-wall unit.

43. Before filing the petition, some of the petitioned-for employees approached AFSCME representatives and requested to join that bargaining unit, but the request was declined.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The proposed unit is not an appropriate unit under ORS 243.682(2).

The Union proposes to form a new bargaining unit comprised of all “temporary part-time” unrepresented employees employed at the Sheldon Community Center, which is one of six community centers in the Recreation Division of the LRCS Department. The term “temporary part-time” in the proposed bargaining unit description refers to City employees hired to work for less than 1,040 hours per year, for an indefinite period of time. The proposed unit excludes temporary short-term employees, *i.e.*, employees hired only for a short, definite time period. The proposed unit also excludes seasonal employees, *i.e.*, those hired to work for only one part of the year (typically, the summer), even if they have worked seasonally for more than one year or expect to return in the future.⁶ The City contends that the proposed unit is inappropriate because: (1) it excludes all seasonal employees, and (2) it excludes all temporary employees employed outside of

⁵The procedural history related to the first two petitions is not relevant to the decision in this case.

⁶The proposed unit description does not expressly exclude short-term or seasonal employees, but the Union has confirmed that it intended to exclude them by limiting the unit to “temporary part-time” employees. At oral argument, the City clarified that it does not object to the exclusion of short-term employees.

the Sheldon Community Center. The City argues that the only appropriate unit is a City-wide (or “wall-to-wall”) unit including all temporary part-time and seasonal employees.

For the reasons discussed below, after considering all of the requisite factors, we conclude that the proposed unit is inappropriate.

Standards for Decision

The Public Employee Collective Bargaining Act (PECBA) defines an “[a]ppropriate bargaining unit” broadly as any “unit designated by [this Board] or voluntarily recognized by the public employer to be appropriate for collective bargaining.” ORS 243.650(1). “[A] bargaining unit may consist of all of the employees of the employer, or any department, division, section or area, or any part or combination thereof, if found to be appropriate by the Board.” OAR 115-025-0050(1).

PECBA also expressly provides that we may determine a unit to be appropriate in a particular case “even though some other unit might also be appropriate.” ORS 243.682(1)(a). Therefore, PECBA does not require that a petition set forth the most appropriate unit, only *an* appropriate unit. *Id.*; *see also Oregon AFSCME Council 75 v. Douglas County*, Case No. CC-004-14 at 31, 26 PECBR 358, 388 (2015).

When determining whether a unit is appropriate for collective bargaining, we must “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.” ORS 243.682(1)(a); *OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251 (2001). Those statutory factors are not exclusive; we may also weigh other non-statutory factors, including our administrative preference for certifying the largest possible appropriate unit. *Douglas County*, CC-004-14 at 31, 26 PECBR at 388.

We have the “discretion to decide how much weight to give each factor” in any particular case. *OPEU*, 173 Or App at 436; *see also OSEA v. Deschutes County*, 40 Or App 371, 376, 595 P2d 501 (1979). We also consider each of the factors in relation to each other. *See, e.g., International Union of Operating Engineers, Local 701 v. Deschutes County Public Works*, Case No. RC-4-88 at 12, 10 PECBR 906, 917 (1988). Thus, “our analysis of the propriety of a proposed unit is necessarily fact-driven, with the outcome depending on the specific facts and circumstances of the workplace and workforce at issue.” *Douglas County*, CC-004-14 at 31, 26 PECBR at 388.

A minimum requirement for an appropriate unit is that the proposed employees share a community of interest with each other. *See, e.g., Oregon AFSCME Council 75 v. Washington County*, Case No. RC-30-03 at 12, 20 PECBR 745, 756 (2004); *Oregon AFSCME, Council 75 v. City of Corvallis*, Case No. RC-41-03 at 11, 20 PECBR 684, 694 (2004). Additionally, where there is a contention that the proposed bargaining unit is inappropriate because it excludes certain employees, we consider whether the proposed employees share a sufficiently distinct community of interest such that the proposed unit may be deemed appropriate. *See, e.g., Washington County*, RC-30-03 at 12, 20 PECBR at 756. A proposed unit of employees may have a sufficiently distinct community of interest to constitute *an* appropriate unit, even if they also share a community of

interest with excluded employees. *See, e.g., id.* at 12-13, 20 PECBR at 756-57; *City of Corvallis*, RC-41-03 at 11-16, 20 PECBR at 694-99. Because we consider all factors in relation to each other, the degree of distinction that is sufficient depends on the circumstances of the case. *Deschutes County Public Works*, RC-4-88 at 12, 10 PECBR at 917.

Analysis

To begin, we review the relevant aspects of the City's organizational structure. The City has six departments, including the LRCS Department. The LRCS Department has three divisions: Library, Recreation, and Cultural Services. The Recreation Division has five sections: Administration, Athletics, Aquatics, Senior/Adaptive Recreation, and Youth & Family. The Youth & Family section manager oversees the employees based at four of the six community centers, including Sheldon. The Senior/Adaptive Recreation section manager oversees the employees based at the remaining two community centers.

Three of the Youth & Family community centers—Sheldon, Amazon, and Peterson Barn—offer a similar array of services, including preschools, after-school programs, camps, and fitness classes.⁷ The Senior/Adaptive Recreation section offers a similar array of services to both children and adults, but it tailors its programs to seniors and other groups with particular adaptive resource needs. The Campbell Community Center focuses on senior services, while the Hilyard Community Center focuses on adaptive recreation. The Senior/Adaptive Recreation section also provides services at the other community centers. For example, it offers some classes for seniors at Peterson Barn. For another example, an Adaptive Recreation employee may help assess the inclusion service needs of a Sheldon preschool student, and thus work at Sheldon for a period of time.

The City employs temporary employees (including part-time, seasonal, and short-term) in all six departments, but the vast majority of temporary employees work in the LRCS Department. At the time of hearing, there were approximately 750 temporary employees on the City's "active" list, approximately 700 of whom were in the LRCS Department. In turn, the vast majority of LRCS temporary employees (approximately 575 of those on the active list) were in the Recreation Division.

Community of Interest, Wages, Hours, and Other Working Conditions

With that context in mind, we first evaluate the petitioned-for employees' community of interest and other working conditions. We make that assessment by examining the wages, hours, and other working conditions that create communities of interest, including job duties, skills, and benefits; interchange or transfer of employees; promotional ladders; and common supervisors. *Douglas County*, CC-004-14 at 31, 26 PECBR at 388. Here, there is no dispute that the temporary part-time Sheldon Community Center employees share a community of interest with each other, along with other working conditions.

⁷The Youth & Family section also operates the River House Outdoor Center. Although the City also refers to the River House Outdoor Center as a community center, River House provides only outdoor activity programs.

Sheldon Community Center employees testified that they proposed a unit comprised only of Sheldon temporary part-time employees because they work closely together on a daily basis, know each other well, and form a cohesive unit. Additionally, they believe that many of the temporary part-time employees have worked for a relatively long time at Sheldon, and that they have built strong relationships with the families that they serve. They also share common concerns about their employment conditions and the impact of their temporary status on the services that they provide, particularly the preschool and other child care programs.

However, the temporary part-time Sheldon employees' community of interest and working conditions overlap substantially with those of, at a minimum, the temporary part-time employees at other community centers, particularly the Peterson Barn and Amazon Community Centers. The temporary part-time employees at those centers provide a comparable range of services (including preschools and child care); they are supervised by the same section, division, and department managers, and they have the same employment terms. In particular, their wage rates are governed by the same compensation plans (including the Recreation-specific plan); they are also ineligible for most employment benefits; and, as SREs, they are subject to the same Recreation-specific limitation on their work hours.

Additionally, there is interaction and interchange between the petitioned-for Sheldon employees and Recreation Division employees based at other centers, particularly employees in the Youth & Family and Senior/Adaptive Recreation sections. Thus, it appears that the temporary part-time employees at Sheldon and at least some of the other community centers share a strong community of interest and other working conditions.⁸

Additional Unit Determination Factors

We turn to the other unit determination factors. In this case, our conclusion that the temporary part-time employees at the Sheldon Community Center share a strong community of interest with other groups of temporary part-time employees weighs heavily in our analysis. Further, there is no evidence of previous attempts by temporary part-time employees to organize, or evidence of impediments to organizing a bargaining unit that includes at least some of the other temporary part-time employees. Although we also give weight to the employees' desire for representation and preference to organize a unit comprised solely of Sheldon Community Center

⁸Although this record shows that the petitioned-for employees share a strong community of interest and other working conditions with these other groups of temporary part-time employees, we note that the same cannot be said about seasonal employees. Specifically, temporary part-time employees are hired to work year-round, for an indefinite period of time. Many temporary part-time employees work continuously for the City, year after year. In contrast, seasonal employees are hired to work only for a particular season, typically the summer (for example, lifeguards at the City's pools). Although some seasonal employees return in subsequent years, they are neither obligated to return nor guaranteed a position. Thus, this record does not establish a strongly shared community of interest (or other meaningfully shared working conditions) between the petitioned-for employees and seasonal employees.

employees, under the circumstances presented, their community of interest is not sufficiently distinct to warrant creating a separate bargaining unit.⁹

Consequently, after considering all of the relevant factors, we conclude that the proposed bargaining unit is not an appropriate unit. In so holding, we do not agree with the City's contention that a temporary employee bargaining unit must include both part-time and seasonal employees to be appropriate. In this case, the record shows that temporary part-time employees who work year-round and truly seasonal employees have sufficiently distinct communities of interest to justify separate bargaining units.¹⁰ Further, we do not agree with the City's contention that a temporary employee bargaining unit must be City-wide. A City-wide unit may be an appropriate unit, but that is not the only appropriate unit. The record indicates that various smaller units may be appropriate.¹¹

ORDER

The petition is dismissed.

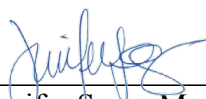
DATED: December 21, 2018.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

⁹We have given the administrative preference for the largest possible unit less weight in cases involving unrepresented employees. *See, e.g., Douglas County*, CC-004-14 at 34, 26 PECBR at 391. Nonetheless, here, that preference does not aid the petitioning Union.

¹⁰We address only the question of whether a unit of temporary part-time employees *must* include seasonal employees. The question of whether temporary part-time and seasonal employees *may* be included in the same unit is a different legal question that is not presented here.

¹¹In the event of dismissal, the Union requested that we identify the “smallest” appropriate unit. We cannot definitively identify the smallest appropriate unit for several reasons, including because the record lacks sufficient information for us to make that determination; the record in a future case may include new evidence; and the circumstances that affect the unit-determination analysis may change. However, as in any case, we hope that the discussion explaining our conclusion provides both parties with additional guidance regarding unit determination issues that may arise.