

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. DC-002-19

(REPRESENTATION)

CERTAIN EMPLOYEES OF YACHATS	)	
RURAL FIRE PROTECTION DISTRICT,	)	
	)	
Petitioner,	)	
	)	
v.	)	CERTIFICATION OF ELECTION
	)	RESULTS
IAFF LOCAL 4619,	)	
	)	(PETITION FOR DECERTIFICATION)
and	)	
	)	
YACHATS RURAL FIRE PROTECTION	)	
DISTRICT,	)	
	)	
Respondents.	)	
	)	

On October 17, 2019, certain employees of Yachats Rural Fire Protection District (District) filed a petition under ORS 242.682(1)(b)(D) and OAR 115-025-0000(5) to decertify IAFF Local 4619 (Union) as the exclusive representative of District employees.¹ On October 22, 2019, the Board's Election Coordinator asked the District for a list of employees in the bargaining unit to determine whether the petition was adequately supported. *See* OAR 115-025-0000(5) and OAR 115-025-0010(3)(b). After determining that the petition was sufficiently supported, the Election Coordinator caused a notice of the petition to be posted by October 30, 2019. OAR 115-025-0030(1). Pursuant to the terms of the notice posting and OAR 115-025-0030(1), objections to the petition were due within 14 days of the date of the notice posting (*i.e.*, by November 13, 2019). No objections were filed.

The Election Coordinator subsequently secured a consent election agreement. *See* ORS 243.686(6); OAR 115-025-0040. Pursuant to that agreement, the Election Coordinator sent ballots to eligible voters on December 13, 2019. Four valid ballots were returned by the deadline

¹On August 24, 2018, in Case No. RC-009-18, the Board initially certified the Union as the exclusive representative of the following District employees: "Full-Time Firefighters/EMTs and Full-Time Firefighters/Paramedics."

of December 27, 2019, which constituted the date of the election. *See* OAR 115-025-0060(4)(c). The two choices on the ballot were (1) representation by IAFF Local 4619; or (2) No Representation. A tally of ballots was held on December 30, 2019, and the majority of valid votes counted were cast for No Representation. The tally of ballots was provided to the parties on December 30, 2019.

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 January 9, 2020). OAR 115-025-0060(9). No objections were filed, and the Board accordingly issues this certification of the results of the election. OAR 115-025-0060(10).

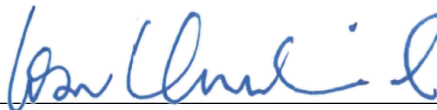
ORDER

The result of the election is certified, and the Union is decertified as the exclusive representative of District employees.

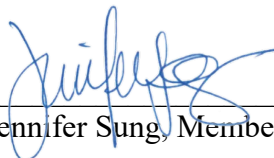
DATED: January 10, 2020.



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-005-18

(UNFAIR LABOR PRACTICE)

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

On September 24, 2019, this Board heard oral argument on Complainant's objections to a recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe after a hearing on November 16, 2018, in Bend, Oregon. The record closed on December 26, 2018, upon receipt of the parties' post-hearing briefs. At the September 24, 2019, oral argument before the Board, Respondent moved to submit additional briefing concerning the Americans with Disabilities Act (ADA), 42 USC § 12101 *et seq.* This Board granted the motion, and both parties submitted additional briefing on October 16, 2019, at which point the matter was deemed submitted to the Board.¹

Jennifer K. Chapman, Legal Counsel, Oregon AFSCME Council 75, Salem, Oregon, represented the Complainant at hearing. Jason M. Weyand, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented the Complainant at oral argument.

Bruce Bischof, Attorney at Law, Law Offices of Bruce Bischof, Bend, Oregon, represented the Respondent at hearing. Nancy J. Hungerford, Attorney at Law, The Hungerford Law Firm, Oregon City, Oregon, represented the Respondent at oral argument.

¹In their briefs, both parties argued that it was not necessary to rely on or invoke the ADA to decide this case. Relatedly, we note that AFSCME's underlying grievances asserted that the District discriminated against CN because of "either her age or her disability." However, AFSCME presented very little (and not sufficient) evidence to support such a claim and did not focus on this assertion in its post-hearing brief, its objections, or its submissions to the Board.

On February 12, 2018, Complainant Oregon AFSCME Council 75, Local 3997 (AFSCME) filed an unfair labor practice complaint against Respondent Deschutes County Public Library District (District). The issue presented by the complaint is: With respect to ORS 243.672(1)(g), in August 2017, did the District terminate library employee “CN” without just cause, and in violation of Article 6 of the parties’ collective bargaining agreement? We conclude that the District did not terminate CN without just cause and therefore did not violate ORS 243.672(1)(g).

RULINGS

All rulings made by the ALJ were reviewed and are correct.

FINDINGS OF FACT

Background

1. The District is a public employer within the meaning of ORS 243.650(20).
2. The District operates six library branches in Deschutes County—one in Sisters, one in La Pine, one in Sunriver, one in Redmond, and two in Bend. One of the two Bend branches is known as the “Downtown Bend” branch.
3. The Sisters branch is relatively small. When fully staffed, the Sisters branch employs just three Public Services Specialists (Public Services Specialist or PSS). Moreover, frequently only one Public Services Specialist is on duty there. In contrast, over 24 employees are assigned to the Downtown Bend branch. Accordingly, employees assigned to Downtown Bend never need to work alone. The Downtown Bend branch is also open seven days a week, while the Sisters branch is open only five days a week.
4. Todd Dunkelberg is the District’s Director. Lynne Mildenstein is the Assistant Director. During the events at issue, Tina Williams was the Human Resources Manager. Holly McKinley is the Library Operations Manager. All of the branches’ supervisors report to McKinley. Zoe Schumacher is a Public Services Supervisor for the District. In that role, Schumacher supervises a number of Public Services Specialists. Schumacher’s “home branch” is the Sisters branch. CN was a PSS at Sisters when she was terminated.
5. AFSCME is a labor organization within the meaning of ORS 243.650(13). It represents a bargaining unit of all regular employees of the District, excluding supervisory and confidential employees, temporary employees, and employees who work less than 80 hours per month. The bargaining unit includes CN’s former PSS position and the Materials Specialist position, among others. Jared Kollen is a Council Representative for AFSCME.
6. Over 80 people volunteer for the District. Some of them work at the Sisters branch. However, there is not always a volunteer on duty at every branch. Volunteers are usually between 50 and 60 years old, though there are some teenaged volunteers as well. A volunteer’s primary function is shelving books, but volunteers also empty book drops, shred paper, sharpen pencils, and pick up children’s areas. Normally, a volunteer’s shift is two hours long.

7. Before the events of this case, employees at the Sisters branch have been placed on work restrictions and have relied on help from others in order to help them heal from injuries or surgeries. Whatever accommodations were made were consistent with the injured employees' work releases. One District employee (not CN) who underwent stomach surgery was off work for several months then "had some weight restrictions on what she could lift for a time."

The Collective Bargaining Agreement

8. AFSCME and the District were parties to a collective bargaining agreement (CBA) in effect from July 1, 2015 through June 30, 2018.

9. Article 3 of the CBA addresses management rights. It states, in relevant part:

"In order to operate its business, the District, in its sole discretion, retains and shall have the following exclusive rights: to determine the number, location and type of facilities; to determine the type and/or quality of services rendered; to determine the methods, techniques and equipment utilized; to hire, supervise, evaluate, discipline, discharge, promote, demote, lay off, transfer and recall the work force; to assign work and change, combine, create or abolish job classifications and job content; to establish and make known reasonable work rules and safety rules for all employees; to contract; and to determine the number of employees, including the number of employees assigned to any particular operation or shift."

10. Article 4, Section 1 of the CBA states, "The District and the Union agree not to discriminate against any employee because of race, color, sex, age, national origin, marital status, religion, disability, sexual orientation, union membership or non-membership." Article 4, Section 2 of the CBA states, "The terms of this Agreement shall be applied equally to all members of the bargaining unit."

11. Article 6 of the CBA addresses discipline and discharge. Article 6, Section 1 of the CBA states, in relevant part, "The principles of progressive discipline shall be used except when the nature of the problem requires more serious action. A non-probationary employee shall not be disciplined or discharged without cause." In practice, the second sentence of that language is referred to as the "just cause" provision.

12. Article 7 of the CBA outlines the grievance procedure. The first step of that grievance procedure – "Step I" – is handled by the aggrieved employee's immediate supervisor, and the second step – "Step II" – is handled by the Director. The final step – "Step III" – is handled by the District Board. The CBA does not provide for binding arbitration as the final step in the grievance procedure.

13. Article 7, Section 2 of the CBA states, in part, "The aggrieved employee or group of employees should verbally present the grievance to the immediate supervisor within fourteen (14) calendar days of the occurrence of the problem or within fourteen (14) calendar days of the time the employee becomes aware of the problem." Article 7, Section 3 of the CBA states, "If the grievance procedures established by this Section are not initiated within the time limits, the grievance shall be considered not to have existed."

Public Services Specialists

14. Public Services Specialists' primary function is providing customer service. However, they are generally expected to perform a variety of physical tasks on any given day. Those tasks can include shelving books, managing book bins, and pulling carts, for example. On that subject, the position description for the PSS position lists some physical demands, including "[s]itting, standing, walking, bending, pulling, pushing, reaching, twisting, lifting (up to 30 pounds)" and "[p]ushing/[p]ulling 100 pound carts." Public Services Specialists also perform a variety of clerical work including managing the "money drawer," printing up "hold lists," and answering the phone, for example. One might also function as a branch's designated volunteer liaison, which can involve training volunteers.

15. When shelving books, Public Services Specialists can use a stepstool to help them avoid lifting books over their heads, though climbing on anything is not a preferred practice. Public Services Specialists are also supposed to alternate which arm is carrying books when shelving, and can also ask a coworker or a volunteer for assistance if one is available. Shelving books is not considered a time sensitive activity.

16. Public Services Specialists often push, pull, load, and unload book bins and carts. Most of the District's books are hardbound books. The average weight of a book is one pound. Depending on how many books are loaded into them, book carts can sometimes weigh over 100 pounds. That said, a PSS can always load fewer books and make more frequent trips with a cart to reduce its weight.

17. For at least half of a typical workday, a PSS is stooping and bending, but rarely pushing or pulling something weighting 100 pounds. During an average day at Sisters in particular, a PSS also bends down, and lifts and carries things that weigh more than 15 pounds, "multiple times" a day. In addition, a PSS frequently has to reach above chest level at the Sisters branch, but that does not typically involve both hands. One book bin is permanently affixed to Sisters' customer service desk and requires Public Services Specialists to bend over to get materials out of it. Before her dismissal, CN personally pushed wheeled carts for "[a] few minutes each day" on average, and lifted something that weighed more than 20 pounds (usually crates) "up to 12 times" a day.

18. A Public Services Specialist often "[p]erforms daily opening/closing procedures" for the assigned branch as well. Those include unlocking a library's main entrance doors in the morning, locking those same doors at the end of the day, and opening and setting up a library's public meeting rooms as needed. The PSS who works the earliest shift at the Sisters branch may need to arrive at work an hour before the library opens to the public. To lock or unlock each of the two main doors at Sisters, the employee on duty must be able to push in a safety bar and reach an overhead latch for each door. That typically requires two hands to do. A person can use a step stool or a ladder to reach a door's latch.

19. All District employees, including Public Services Specialists, are expected to be able to travel to and from the different branches as needed, and most District employees do in fact travel from time to time. How much travel is required can depend on where an employee lives and to which branch an employee is assigned. Some District employees live in Bend and commute to La Pine or Redmond, while others live in Redmond and commute to Bend. One District employee

lives in Bend and commutes to the Sisters branch. Occasionally, employees temporarily fill in for colleagues from other branches.

20. The position description for a PSS lists “[t]ravel to other district locations and/or to workshops/professional meetings/conferences” under “Working Environment/Physical Demands.” It also states that a Public Services Specialist “[o]perates District vehicles (*i.e.*, Bookmobile).”

21. A Materials Specialist is a different position with different responsibilities than those of a Public Services Specialist. However, performing materials handling position responsibilities is expressly listed in the Public Services Specialist position description as an essential function of the PSS position. A Materials Specialist’s predominant responsibility is checking in and shelving books.

Chronology of Events

22. CN was first hired by the District on September 3, 1996, and her first assignment was at the Sisters branch. Since that date, CN has almost always worked at Sisters, but she has also worked at the La Pine, Redmond, and Sunriver branches. CN once worked at Redmond three evenings a week for almost a year. For some reassignments, the District compensated CN for her mileage. CN’s home is in Sisters and is a 12 to 15-minute drive from the Sisters branch. The Downtown Bend branch is farther away.

23. In December 2004, CN had surgery on her feet. Afterward, CN was off work for seven weeks. When she returned to work, she had walking casts on both legs and was unable to perform some of her duties for a time. Later, in or around 2007, CN had carpal tunnel surgery on both hands and was “very briefly” off work. When she returned to work, she could not type on a keyboard at first.

24. On January 10, 2017, while off duty, CN slipped and fell on a small patch of ice at her home and dislocated her left shoulder, severed her left shoulder rotator cuff, detached a bicep, and “tore out a couple of chunks” from the inside of a joint. The accident also caused CN spine and joint instability, back strain, and “serious ulnar nerve damage.” In addition, CN “suffered a life-threatening hemorrhage in the ER, leaving [CN] weak with anemia.” CN is predominantly right handed.

25. Following her January 10, 2017 injury, CN took paid leave until it expired on April 4, 2017, then took unpaid leave until that expired on May 5, 2017. The District granted CN “additional unpaid leave as an additional accommodation,” which ultimately lasted until August 16, 2017.

26. CN was treated by a number of physicians and physician assistants at an orthopedic clinic in Bend called The Center. On January 26, 2017, Physician Assistant Ericka Luckel completed a return-to-work release form for CN. The form released CN for “modified duty” from January 31, 2017 through February 28, 2017, and stated that CN could perform only “[l]ight duty” work, and could work only with her right arm. Around two-thirds of this form was left blank.

27. At the end of January 2017, CN asked the District if she could return to work. The District responded that the return-to-work form that she had submitted was not sufficient. At that time, CN could not use her left arm at all and, as she acknowledged at hearing, she could not have lifted crates at that time. Nevertheless, CN believed that she could “probably push a cart with one hand” at that point. CN asked to come back at this time because she felt that her job was “threatened” and that the District was trying to eliminate her from Sisters. CN did not tell the District that she had those fears, however. At hearing, CN testified that seeking to return to work in January 2017 “was a bit premature.”

28. On February 3, 2017, Dr. Timothy Bollom, CN’s orthopedic surgeon, completed a “Certification of Health Care Provider for Employee’s Serious Health Condition (Family and Medical Leave Act),” a form published by the U.S. Department of Labor for use when an employee takes leave provided by the Family and Medical Leave Act (FMLA). Dr. Bollom wrote, in part, that CN was “unable to work” or use her left arm at that time.

29. On March 14, 2017, CN underwent repair surgery on her injured left rotator cuff.

30. On April 24, 2017, Dr. Bollom completed a second FMLA certification. Dr. Bollom indicated that CN’s left arm was significantly and persistently limited, and that CN was unable to lift, reach, extend, or repeatedly use her arm. He also indicated that CN would be unable to work until May 5, 2017, and could return to light duty work after that date with “very limited use of” her left arm with “[n]o heavy/repetitive lifting, reaching, pushing, pulling etc.”

31. On April 25, 2017, Physician Assistant Nathan Lynch completed an additional return-to-work release form. The form released CN to modified duty from May 5, 2017 through June 12, 2017. Lynch wrote that CN could not perform “[f]ine manipulation” with her left arm and could not crawl, climb, reach, or push or pull “at all.” At the bottom of the form, Lynch wrote, “light duty – Right arm work only, no above waist work Left arm.”

32. On April 28, 2017, CN met with the District to explore options that might allow her to return to work.

33. On May 1, 2017, Dr. Bollom completed another return-to-work release form. This form stated that CN could perform modified duty from May 5, 2017 through June 12, 2017. This form released CN to “light duty” work “per patient[’]s discretion.” However, it also stated that CN could not push and pull with her left hand, could not crawl or climb, and could reach and push/pull only intermittently. The form stated that CN was released to lift, carrying, and push/pull less than 10 pounds.

34. On May 12, 2017, CN met with the District again to further explore her options. During the meeting, CN told the District that it should “disregard” the latest return-to-work release form because, in her view, she was actually more capable than the release indicated. Also, at some point in May 2017, CN told the District that she had been “cleared for driving.”

35. On May 15, 2017, Dr. James Nelson completed a return-to-work release form. It released CN to modified duty from May 15, 2017 through June 12, 2017. It released her to lift, carry, and push and pull 10 pounds. Among other things, this form indicated that CN could occasionally (as opposed to continuously or frequently) perform a full range of physical actions, but it specified that CN could not reach “above chest level.”

36. On May 31, 2017, Dr. Nelson completed another return-to-work release form that covered the same time period. It released CN to lift and carry 15 pounds, and to push and pull up to 100 pounds. In the space after the typed text, “Other functional limitations or modifications necessary in worker’s employment,” Dr. Nelson added a hand-drawn line next to the typed task “reach,” and wrote, “LUE—using left upper extremity—no above chest—no more than physically capable of.” That same day, a “pre-dismissal meeting” was also held in which the parties once again discussed CN’s options. During that meeting, CN asked the District “for an outside, independent evaluation of the Sisters Library to see what could be done to make [her] return possible.” At that time, CN believed that she could open and close the main doors at Sisters. After the meeting, the District gave CN a list of supplemental questions for a doctor to answer.

37. On June 12, 2017, Physician Assistant Luckel authored and signed chart notes. Around that time, CN provided a copy of these notes to the District. However, CN intentionally redacted the following language from the copy she gave the District, and did so without telling the District:

“With respect to the patient’s left shoulder, she is doing well. She will continue with physical therapy following the rotator cuff rehabilitation protocols with focus on range of motion and strengthening exercise. She is to avoid any lifting, pushing, pulling with her left hand/upper extremity. Light activity with her elbow at her side is okay. The patient will plan on following up with Dr. Bollom in 6 weeks time for a recheck of her left shoulder and right shoulder as needed. All patient questions were answered.”

38. On June 14, 2017, Dr. Bollom completed a brief questionnaire written by the District. In response to a question about whether or not CN would have any “permanent restrictions,” Dr. Bollom responded “TBD.” Dr. Bollom’s answers also indicated that CN was halfway recovered at the time and would not be fully recovered for four to six more months. After the typed text, “Current range of motion of her left shoulder, arm and elbow,” Dr. Bollom wrote, “see last chart notes.”

39. On June 16, 2017, CN sent the District a letter with suggested job modifications, including:

- “1 Allowing extra time to complete moving items from one place to another
- “2 Use of step stools to work on the higher shelves
- “3 Limiting drive time to work to 20 minutes one-way; additional driving will add added stress to my left shoulder.”

CN’s letter also stated: “Please note that while I was recently in the Sisters Library, I took the opportunity to stand on the top step of a step stool and found that materials on all the highest shelves at the Sisters Branch are at chest-height.”

40. On June 19, 2017, AFSCME Council Representative Kollen sent the District a letter with accommodations that resembled those of CN's June 16, 2017, letter.

41. On July 24, 2017, Assistant Director Mildenstein gave CN a letter titled, "Reasonable Accommodation Agreement." The letter specifically noted the work restrictions included in Dr. Nelson's May 31, 2017, release and Dr. Bollom's June 14, 2017, supplemental release, then summarized the physicians' stated restrictions as follows:

- “• Maximum of two to eight hours per day and 30 hours per week
- “• Pushing or pulling up to 100 pounds
- “• Lifting and carrying no more than 15 pounds
- “• Crouch, crawl, kneel, climb, balance, and push/pull occasionally (34-66% of your day)
- “• Stoop/bend, twist, and reach up to four hours per day
- “• No reaching above chest level with the left upper extremity.”

After that summary, the letter concluded that CN's request for an accommodation at the Sisters branch was not feasible and explained the District's rationale. In essence, the letter noted that the Sisters branch only ever has three Public Services Specialists assigned to it. The letter explained:

“Members of the management team met to discuss your request for accommodation, your medical work restrictions and proposed modifications, and reviewed the essential functions of your Public Services Specialist (PSS) position at the Sisters Library of the Deschutes Public Library (DPL) district. A major consideration during this discussion was the fact that there are only three (3) PSS responsible for performing duties that maintain library operations, ensure access to the Sisters Library building and its services and provide excellent customer service five days a week, Tuesday through Saturday. With only three PSS in Sisters it means that there will be times when you would be required to work alone especially when one or both of the other PSS are on time management. There wouldn't be anyone available to perform the duties you are unable to perform due to the medical restrictions.

“Additionally, the Sisters Library is limited in the type of PSS tasks you are able to perform that accommodate your medical work restrictions. Equipment that might safely assist in performing the tasks at the Sisters Library were assessed, but due to the equipment's size did not fit within the confines of the library space. Also this equipment is not appropriate to help with some tasks that would need to be performed if employees were not there to help you.”

The letter also stated that the District could accommodate CN's restrictions at the Downtown Bend branch and described that location's features in detail. According to the letter, that accommodation would begin on August 1, 2017, and end on September 1, 2017, and any extension of the arrangement beyond that would “be decided on a case-by-case basis” and would be dependent upon additional information from CN's doctor and the needs of the District at that time. It clarified, however, that even if CN received “a full medical release without restrictions,” she would nonetheless remain in the Downtown Bend branch. The letter further provided that, if CN accepted the job at the Downtown Bend branch, she would receive the same compensation that she had

while working at the Sisters branch. At the end of the letter, CN could check a box and accept the District's accommodation, or alternatively, check another box with text that read, "I decline to accept the above accommodation and understand that by declining the accommodation I will be separated from employment."

42. On July 26, 2017, Dr. Bollom completed a return-to-work release form that indicated that CN could "return to regular work," but also indicated that CN should attempt to avoid repetitive heavy lifting with her left arm above her shoulder, and noted some limitations on CN's ability to climb, balance, reach, and push/pull.²

43. On July 28, 2017, Dr. Bollom completed another return-to-work release form. Dr. Bollom checked the box indicating that CN was released to "modified duty," and wrote that CN could return to "regular duty work as tolerated." Dr. Bollom also noted, in part, that CN should attempt to avoid repetitive heavy lifting with her left arm above her shoulder. CN provided the release to the District on Friday, July 28, 2017. That same day, CN sent the District a series of emails in which she claimed that she was "released to return to work with no special accommodation required."

44. On Sunday, July 30, 2017, CN contacted Library Services Supervisor Schumacher and made arrangements to have Schumacher meet her at the Sisters branch at 12:30 p.m. on Monday, July 31, 2017 (a day when the library was closed) in order to allow CN to turn in her building key and collect her personal items from her desk.

45. During CN's July 31, 2017, meeting with Schumacher, CN handed Schumacher an envelope with a letter that stated:

"My surgeon has released me to return to work with no special accommodations.[³] However, reassigning me to Downtown Bend would place additional stress on me physically and financially. It is a mere 12 – 15 minute drive from my home to the Sisters Branch. Commuting between my home and the Downtown Bend Branch takes a minimum of 1-1/2 hours each day; often 2 hours due to road & traffic conditions.

"I am willing and able to resume all my usual duties as a PSS at the Sisters Library, but must decline your 'Reasonable Accommodation' with reassignment to another branch. Therefore, I am returning your document, unsigned, as it requires me to transfer or resign. A reasonable accommodation should make it easier on a recovering employee, not harder."

46. CN did not report to work at the downtown Bend branch on August 1, 2017, or report to work at that branch thereafter.

²The record does not indicate whether or when CN provided this release to the District.

³During the hearing, CN testified that, in this sentence, she was referring to Dr. Bollom's July 28, 2017 form. But as noted, that particular release does include some restrictions. According to CN's testimony, Dr. Bollom "failed in filling out forms the way he needed to."

47. On August 16, 2017, AFSCME filed a grievance alleging that the District had violated Article 4 of the parties' CBA, the non-discrimination article. The grievance stated, in part: "Any restrictions that are still in place will not affect [CN] in her ability to perform her duties as prescribed in her current position." The grievance also stated that "management has failed to give any reasonable explanation as to why [CN] cannot return to her current position," and alleged that the reason CN was not returned to the Sisters branch was because of discrimination based on age or disability.

48. On August 17, 2017, Director Dunkelberg sent CN a three-page "letter of separation." It outlined the timeline of events and explained why the District concluded that CN's request for an accommodation was not feasible at the Sisters branch, noting specific staffing and equipment issues. It also stated, "Based on your rejection of the accommodation and failure to report to work on August 1, 2017, you are notified that you are dismissed effective August 17, 2017." The letter informed CN that, if she wanted to contest this "action," she "must file an appeal in writing within 14 calendar days of August 17, 2017, in accordance with Article 6 of the collective bargaining agreement." The initial decision to dismiss CN was made by Library Operations Manager McKinley, Library Services Supervisor Schumacher, and Assistant Director Mildenstein as a group, though that fact was not explained in the District's letter.

49. On August 18, 2017, Library Services Supervisor Schumacher sent CN a letter denying the August 16, 2017, grievance as untimely. As explained in the letter, CN was first presented with the District's accommodation on July 24, 2017, and CN's grievance was received on August 16, 2017, which was more than 14 calendar days later.

50. On August 30, 2017, Library Services Supervisor Schumacher responded to another grievance from CN that the District received on August 23, 2017, writing in part:

"Your separation is based on your rejection of the accommodation offered and failure to report to work on August 1, 2017.

"In reviewing the history of events in your situation, there is no evidence to validate your claim of discrimination based on age or disability. The grievance is denied."

51. On September 8, 2017, CN submitted a Step II grievance form related to her dismissal. The grievance repeated the allegations of CN's earlier grievances but in this instance the grievance specifically alleged that the District violated Articles "4 – Non Discrimination" and "6 – Discharge."

52. On September 18, 2017, Director Dunkelberg sent CN a letter denying the Step II grievance filed on September 8, 2017. At the outset of this letter, Dunkelberg wrote, "I have reviewed the grievance and the reason for termination was not due to discrimination based on age nor disability." At the end of it, he wrote, "Based on your rejection of the accommodation and your failure to report to work, the district declines the request for reinstatement."

53. On September 25, 2017, CN had a "fitness for duty evaluation" conducted by an occupational therapist. In part, this evaluation indicated that CN was released for "[l]ight to medium work," was at a low risk for harming herself or others, and did not need any

accommodations or assistance to do her work. Nevertheless, it also noted that “[r]epetitive heavy lifting above shoulder level” should be avoided.

54. On October 11, 2017, CN filed a Step III grievance that once again alleged violations of Articles 4 and 6 of the CBA. This grievance also included as an attachment a full, unredacted copy of the June 12, 2017, chart notes prepared by Physician Assistant Luckel.

55. In early October of 2017, Dr. Bonnie Malone, CN’s chiropractic physician, gave an undated letter to the District Board. In her letter, Dr. Malone asserted that the District’s actions were “beyond unreasonable” and that CN was capable of doing the essential functions of her job. However, no records of any of Dr. Malone’s treatments of CN were ever presented to the District. As of November 16, 2018, Dr. Malone was still treating CN for her January 2017 injury, though she was only doing so “[v]ery rarely.”

56. On November 9, 2017, District Board President Martha Lawler sent CN a letter denying her Step III grievance. This letter stated, in part:

“During an executive session on November 8, 2017, the [District] Board met with you, union representatives, and members of the management team. During the meeting, you provided information supporting your request for reinstatement.

“After thorough review of all information provided, the [District] Board unanimously denies the grievance and request for remedy.”

57. On February 12, 2018, AFSCME filed this unfair labor practice complaint.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The District did not terminate CN without just cause and therefore did not violate ORS 243.672(1)(g).

In this case, AFSCME alleges that the District discharged CN without just cause in violation of the parties’ collective bargaining agreement and ORS 243.672(1)(g). Specifically, the District discharged CN after she did not report to work at the downtown Bend branch library as assigned by the District. AFSCME alleges that the transfer to the Bend branch was unnecessary, and therefore that the District acted as an unreasonable employer in discharging CN for declining that transfer and failing to report to work. In response, the District contends that it had the contractual right to assign CN to the downtown Bend branch, and, moreover, could not reasonably accommodate her in the Sisters branch library because she could not perform the essential functions of her job there because of the limited staffing and small size of that branch. For the reasons explained below, we conclude that the District did not violate the parties’ collective bargaining agreement (and therefore did not violate ORS 243.672(1)(g)) when it discharged CN after she failed to show up to work at the downtown Bend branch.

Under ORS 243.672(1)(g) of the Public Employee Collective Bargaining Act (PECBA), “[i]t 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 * * *.” When a labor organization alleges that a public employer has violated the provisions of a written contract and “the collective bargaining agreement involved does not have a grievance procedure ending in binding arbitration, ERB’s responsibilities to construe the agreement and to find the facts are similar to those of an arbitrator.” *OSEA v. Pendleton School District*, 85 Or App 309, 311, 736 P2d 204 (1986), *rev denied*, 304 Or 55, 742 P2d 1186 (1987); *OSEA v. Lake County School District*, 93 Or App 481, 486, 763 P2d 160 (1988) (“if the collective bargaining agreement, as here, does not provide for a grievance procedure ending in binding arbitration, ERB is authorized to find the facts and construe the agreement *just as an arbitrator would be*”) (emphasis added).

Here, AFSCME alleges that the District violated Article 6, Section 1 of the collective bargaining agreement (CBA), which provides in relevant part that an employee, such as CN, “shall not be disciplined or discharged without cause.” In assessing whether the District terminated CN without cause, the parties argue, and we agree, that we apply a “reasonable employer” test—*i.e.*, whether the employer’s decision “was that of [a] fictive reasonable employer.” *Brown v. Oregon College of Education*, 52 Or App 251, 258, 628 P2d 410 (1981). “Under the reasonable employer standard, the Board reviews the disciplinary action in light of the factors which should be considered by the fictive reasonable employer and determines first whether the employee’s conduct warrants discipline and second, if some discipline is appropriate, what discipline is objectively reasonable.” *Oregon School Employees Association v. Canby Union High School District I*, Case No. UP-33-85 at 17, 9 PECBR 8510, 8526 (1986).⁴

We “begin by determining if the employee actually did what the employee was disciplined for.” *Oregon School Employees Association v. North Marion School District 15*, Case No. UP-60-09 at 29, 24 PECBR 661, 689 (2012). Here, the District terminated CN because she failed to report to work at the Bend branch on August 1, 2017. It is undisputed that CN did not report to work on that day (or any time thereafter). Therefore, we conclude that the District established that CN did what she was disciplined for.

⁴The dissent is almost exclusively based on an argument that the District violated the Americans With Disabilities Act (ADA). However, AFSCME, in its post-hearing brief, expressly urged that, “given the posture of this case, the Board need not apply or *even consider* [the] legal standards” under the ADA (emphasis added). Indeed, AFSCME’s ADA arguments in its post-hearing brief were presented largely in a single footnote, along with repeated assertions that its (1)(g) claim was not grounded in establishing an ADA violation. AFSCME went so far as to acknowledge that there has been no “finding” that the District violated state or federal law and assured that there was no need to become an “expert[] on disability discrimination” to decide this case, which is also consistent with the ALJ’s recommended order. AFSCME’s assertions are consistent with how the parties chose to conduct the hearing and present the dispute, as neither AFSCME nor the District presented evidence about the parties’ discussions during the interactive process, significant evidence about the time that particular PSS work tasks required, evidence about how often the PSS employees in Sisters work alone, or any testimony from CN’s medical providers—the type of evidence typically offered in civil claims under the ADA. Consequently, our decision is based on whether the District acted as a reasonable employer in making and implementing decisions in its attempt to return CN to work at the District. In making that decision, we considered whether, on this record, the District necessarily violated the ADA (and therefore acted unreasonably). In our view, there is insufficient evidence to reach such a conclusion. Given the limited record that these parties chose to submit, and the fact that CN’s exclusive representative chose not to present a case grounded in the intricacies of the ADA, we do not resolve this case on the basis advocated by the dissent.

We do not understand AFSCME to argue that the District does not generally have the right under the CBA to assign and transfer its employees to different branches to meet the District's operational needs. Similarly, we do not understand AFSCME to argue that, if an employee refused to show up to work at an assigned time or location, that the District would violate the CBA by disciplining that employee. Here, however, AFSCME asserts that the District violated the CBA when it discharged CN (after she refused to report to her assigned Bend branch location) because the District's decision to assign CN to the Bend branch was improper. Namely, AFSCME argues that the District unnecessarily assigned CN to the Bend branch because it unreasonably concluded that she could not perform the essential functions of the PSS position in Sisters. According to AFSCME, the medical evidence in this case established that CN had no limitations with respect to her ability to perform her job at the Sisters branch and, therefore, did not need to be accommodated. For the following reasons, we disagree.

The record contains substantial evidence of the functions of the PSS position, including the position description and witness testimony. That evidence indicates that the PSS position includes the functions of handling, moving, and reshelving books. In particular, the employee in a PSS position is required to stoop and bend to unload books from the interior bin at the Sisters branch front desk, which sits approximately three feet above the floor and has a telescoping floor that descends as the crate is filled with books. Emptying that crate, and lifting, handling, and sorting the books, are also functions of the PSS position, as is retrieving and handling books from the external book drop at the back of the branch. In addition, the PSS assigned to the Sisters branch would occasionally be the only District employee on duty when the branch opened or closed, and is responsible for unlocking or locking the library exterior doors. To do so, the PSS is required to engage or unengage the safety bars on each side of the dual doors, which are located at the top of the door; overhead reaching is required to lock and unlock the doors. Locking and unlocking the Sisters branch doors to open and close the library for the day typically requires two hands. Other functions of the PSS position include setting up meeting rooms, cleaning outside areas, removing snow when necessary, creating in-library displays, and operating District vehicles. These functions require pushing, reaching, twisting, and lifting up to 30 pounds, as well as pushing and pulling 100-pound carts.⁵

Lifting, moving, and handling materials, typically groups of books, up to 30 pounds is an essential function of the PSS position in Sisters, as is pushing and pulling carts weighing 100 pounds. Opening and closing the library is also an essential function of the PSS position in Sisters. "Essential functions" means the "fundamental job duties" of the position. 29 CFR § 1630.2(n)(1). Of particular significance here, a job "function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed[.]" 29 CFR § 1630.2(n)(2)(ii).⁶ There were only three PSS employees who worked in the Sisters branch, a factor that the District reasonably weighed in favor of concluding that these functions were essential, not marginal. In addition, these functions are listed in the position description, and

⁵AFSCME did not object to Findings of Fact 14 through 21, which outlined the duties of the PSS employees working in the Sisters branch and the physical demands associated with those duties.

⁶Because Oregon law requires that Oregon's disability statutes are construed to the extent possible in a manner consistent with similar provisions of federal law, we refer only to the federal statute and regulations. *See* ORS 659A.139 ("ORS 659A.103 to 659A.144 shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act of 1990, as amended by the federal ADA Amendments Act of 2008 and as otherwise amended.").

the District made a reasonable judgment that they are essential, also relevant factors in determining whether these functions are essential. *See, e.g.*, 29 CFR § 1630.2(n)(3)(i)-(vii) (enumerating evidence that may indicate whether a particular job function is essential).

To determine whether it could accommodate CN in performing these essential functions, the District met with CN on at least three occasions that involved discussions about her return to work—on April 28, May 12, and May 31, 2017. The District reviewed and took into consideration the May 31, 2017, release by Dr. Nelson, indicating that CN was released to modified duty, and able to lift and carry only 15 pounds. Dr. Nelson’s note also included an ambiguous statement that appears to state that CN should not reach above chest height “using left upper extremity,” and states that she cannot push/pull, reach, stoop, and bend more than four hours per day. The District requested clarifying questions about the May 31 release, and then also considered that clarifying information dated June 14, 2017, and provided by Dr. Bollom. Dr. Bollom opined that CN’s degree of shoulder impairment was “not stationary [at] this point,” described the percentage of recovery at that point as fifty percent, and identified the anticipated date of full recovery as four to six months later—assessments consistent with Dr. Nelson’s judgment that CN was released only to modified duty.

Using that medical information, and after meeting with CN at least three times to consider possible accommodations, the District determined that there were no reasonable accommodations that would enable CN to perform the essential functions of the PSS position *at the Sisters branch*. An employer is not required to remove essential functions from a position; it is required only to reallocate marginal functions. *See* Appendix to 29 CFR § 1630.2(o) (“An employer or other covered entity is not required to reallocate essential functions. The essential functions are by definition those that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position.”); *Dark v. Curry County*, 451 F3d 1078, 1089 (9th Cir 2006), *cert denied*, 549 US 1205 (2007) (employer is not required to exempt an employee from performing essential functions or to reallocate essential functions to other employees). Here, as of July 24, 2017, CN was not released by her physicians to lift the weight needed to perform the essential functions of emptying the crates and handling books, as well as reaching and lifting overhead, as required to open and close the branch. The District assessed equipment that could assist CN, but because of the equipment’s size, it did not fit within the spaces available in the branch. Because an accommodation at the Sisters branch was not possible, the District made available a PSS position in the Bend branch.⁷

⁷We note that District employees were hired to work District-wide, not at just one branch, and District employees occasionally rotated among branches. CN herself, over the course of her career at the District, had worked at the La Pine, Sunriver, Redmond, and Sisters branches. When the District assigned CN to the large downtown Bend branch, where a large group of employees was assigned, it was to perform her original position PSS duties at the same rate of pay. Neither party briefed or provided legal authority demonstrating that the District’s assignment of CN to the Bend branch constituted a “reassignment” within the meaning of 29 CFR § 1630.2(o)(2)(ii), and we are unaware of any. *See* 29 CFR § 1630.2(o)(2)(ii) (reassignment to a vacant position is a lawful reasonable accommodation); Appendix to 29 CFR § 1630.2(o) (“In general, reassignment should be considered only when accommodation within the individual’s current position would pose an undue hardship.”). Consequently, we do not decide this case on the basis of whether the District’s assignment of CN to work in the Bend branch was inconsistent with this rule, as the dissent advocates.

Although AFSCME and the dissent may have a different interpretation of the medical evidence, we do not agree that the District's assessment of that information was unreasonable.⁸ For example, when the District assessed the May 31 release by Dr. Nelson, it was not unreasonable to construe the task-specific limitations in the context of Dr. Nelson's overall conclusion: that CN was released only to modified duty, not to full duty.⁹ Moreover, when the District made its best assessment in determining how to accommodate CN based on the medical information CN had provided, CN did not show up for work as assigned and attempt to further the interactive process (discussed more below) or have AFSCME grieve the District's decision. Rather, CN elected to just not show up for work. Under those circumstances, we do not conclude that the District violated the CBA when it disciplined her.

In reaching this decision, we disagree with AFSCME's assertion that the District's reassignment of CN was unreasonable because the District violated CN's statutory rights under the ADA by engaging in the interactive process in only a perfunctory way. Under the ADA, employers and employees are required to engage in an interactive process to determine what reasonable accommodations are appropriate. *Barnett v. U.S. Air, Inc.*, 228 F3d 1105, 1114-15 (9th Cir 2000), *vacated on other grounds*, 535 US 391 (2002) (adopting Title VII retaliation framework for ADA retaliation claims); 29 CFR § 1630.2(o)(3) (it "may be necessary for the [employer] to initiate an informal, interactive process with the [employee] in need of the accommodation"). This interactive process does not require particular concessions or specific conduct; rather, it requires good faith. In this interactive process, *both* the employer and the employee have a duty to act in good faith. "The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees. The *shared goal* is to

⁸We also note that the full text of Physician Assistant Ericka Luckel's June 12, 2017, chart note further confirms that the District's decision was consistent with a reasonable assessment of CN's medical providers' restrictions. In particular, that chart note states that, as of June 12, 2017, CN was "to avoid any lifting, pushing, pulling with her left hand/upper extremity." As set forth above, CN redacted that portion of the chart note when attempting to persuade the District that she could return to work without restrictions. In doing so, CN admitted that she substituted her judgment for the medical providers when submitting this to the employer. This should not be overlooked in determining whether, in attempting to make sense of all the conflicting and often confusing records, the District's ultimate assessment of those records was a reasonable one. The question before us is whether the District's handling of CN's employment status, including its interpretation of her medical releases, was objectively reasonable, not whether some other interpretation is possible.

⁹The dissent argues that CN's May 31 medical release permitted CN to engage in physical activities for sufficient time periods that CN could, in fact, perform all the essential functions of the job in Sisters with accommodations. We read the very limited record these parties chose to submit differently. For example, we conclude that the District adequately demonstrated that lifting up to 30 pounds was required to work as a PSS in Sisters. That requirement is listed in the PSS position description, and several District witnesses described in detail the bending and lifting required to retrieve books from the inside and outside book bins at the Sisters branch. CN testified that she would lift something, typically book crates, that weighed more than 20 pounds as many as 12 times per day; CN's former coworker Linda Kurtz testified that she would have to "lift and carry things that weighed more than 15 pounds" at least ten times in a workday. It is undisputed that the medical information submitted to the District from CN's doctors immediately preceding the July 24, 2017, reasonable accommodation letter did not release CN to lift more than 15 pounds. We do not conclude that the District acted unreasonably by crediting the medical restrictions provided by CN's own health care providers in assessing whether CN could perform the essential functions of the PSS job in Sisters with or without reasonable accommodations.

identify an accommodation that allows the employee to perform the job effectively. Both sides must communicate directly, exchange essential information and neither side can delay or obstruct the process.” *Barnett*, 228 F3d at 1114-15 (emphasis added); *Rowe v. City & County of San Francisco*, 186 F Supp 2d 1047, 1051 (ND Cal 2002) (“A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith”).

Here, as set forth above, the record demonstrates that the District transferred CN to the Bend branch only after the District engaged in an interactive process with CN and determined that she could not perform all the essential functions of her job at the Sisters branch, with or without a reasonable accommodation. At that point, if CN disagreed with that assessment, she could have sought to further that interactive process by proposing something else. Instead, CN opted to just reject the accommodation and not show up to work.¹⁰ On this record, we do not agree that the District engaged in only a perfunctory interactive process, as AFSCME argues.

We also disagree with AFSCME’s assertion that the District’s action was unreasonable because it never required CN to undergo a fitness for duty evaluation. AFSCME is correct that the District lawfully could have required such an exam. Under the ADA, when an employee with a disability seeks to return to work, “there is no question” that an employer is “permitted to require a medical examination to determine his fitness to perform essential job functions.” *Harris v. Harris & Hart, Inc.*, 206 F3d 838, 844 (9th Cir 2000), citing *Yin v. State of California*, 95 F3d 864 (9th Cir 1996); *see also* 42 USC § 12112(d)(4)(A); 29 CFR § 1630.14(c). The fact that the District could lawfully have required an independent fitness for duty examination does not mean that its decision not to do so was necessarily unreasonable, however. Here, CN gave the District substantial medical information from her own medical providers—Dr. Nelson, Dr. Bollom, and Physician Assistant Luckel—during the two months preceding the District’s July 24, 2017, reasonable accommodation letter. Moreover, the District prepared a supplemental questionnaire to clarify Dr. Nelson’s May 31 release, which Dr. Bollom completed and which the District considered. CN’s medical

¹⁰On Friday, July 28, 2017, CN submitted another medical release from Dr. Bollom. Dr. Bollom checked the box releasing CN to “modified duty” and wrote that she could return to regular duty “as tolerated” and should “attempt to avoid repetitive heavy lifting” with her left arm and “above shoulder height/lateral lifting.” On Sunday, July 30, CN notified Schumacher that she wanted to turn in her key and retrieve her personal possessions on Monday, July 31. CN did so, and submitted a letter communicating that she would accept nothing other than a PSS position in the Sisters branch, despite the restrictions in Dr. Bollom’s July 28 release. The obligation to participate in the ADA interactive process is bilateral; unlike the dissent, we do not conclude that the District violated the collective bargaining agreement when CN so clearly communicated that she would no longer participate. *See, e.g., Allen v. Pac. Bell*, 348 F3d 1113, 1116 (9th Cir 2003) (because the employee “failed to cooperate in the [interactive] process, we cannot say that [the employer] failed to fulfill its interactive duty”); *Schuler v. Banner Health*, 2018 US Dist LEXIS 126634 (D Ariz 2018), *aff’d*, 778 Fed Appx 473 (9th Cir 2019) (summary judgment in favor of employer granted where employee, who had a hearing impairment, stated that she did not need an accommodation; the employee’s “failure to even ‘informally’ discuss her needs meant it was impossible for [the employer] to do more than it did. [The employer] cannot be liable for failing to accommodate given that, during the relevant time period, [the employee] was the party unwilling to participate in the interactive process”). Moreover, although CN contended on July 31 that she was fully released to return to work by Dr. Bollom, she simultaneously informed the District that driving to Bend would place “additional stress” on her physically. When questioned about that contradiction at hearing, CN testified that driving to Bend would cause a physical strain to her body. There is, however, no medical evidence in the record related to CN’s ability to drive.

providers' opinions were generally consistent. We do not find it unreasonable that, with CN's own medical providers' opinions before it, the District did not obtain an independent fitness for duty examination before issuing its July 24, 2017, letter.

We turn to whether the District acted reasonably in discharging CN, as opposed to using progressive discipline. We begin by acknowledging CN's prior service record. CN was a long-tenured employee, originally hired in 1996, with an excellent performance record. The record includes letters and statements of support for CN by members of the Sisters community, and the District's witnesses also described CN as a valuable employee. Progressive discipline is a "corrective measure[] that put[s] the employee on notice that further misconduct may result in the discipline ultimately imposed and that give[s] the employee a reasonable opportunity to modify" the unacceptable behavior. *North Marion School District 15*, UP-60-09 at 35, 24 PECBR at 695, quoting *Oregon School Employees Association, Chapter 89 v. Rainier School District 13*, Case No. UP-85-85 at 26, 9 PECBR 9254, 9279 (1986). Here, however, the District was not attempting to modify CN's behavior or motivate improved performance. Rather, CN's discharge was the unfortunate culmination of the District's attempt to return CN to work after a very serious off-the-job injury and CN's decision not to report to work at a work location where she did not want to work. Further, CN has not, at any point, indicated a willingness to reconsider and report to work. CN did not request (and apparently did not want) additional leave, so providing additional leave would be inapt here. Given these facts, we do not conclude that progressive discipline was required.

Moreover, the District also provided CN "prompt, timely notice" that separation of employment would result if CN did not report to work. See *Wy'East Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05 at 36, 22 PECBR 108, 143 (2007). Specifically, in its July 24, 2017, letter, the District notified CN that if she did not accept the accommodation and report for work, she would be "separated from employment." In response, CN informed the District in writing that she was returning the District's letter unsigned because it "requires me to transfer or resign." On these facts, we cannot conclude that CN did not have timely notice and fair warning that her employment would end if she did not report to work at the Bend branch.¹¹

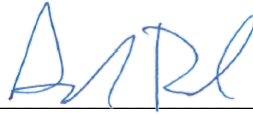
Taking all these facts together and applying our "reasonable employer" test, we conclude that the District exercised its contractual right to transfer CN from the Sisters branch to the Bend branch, and did so in an objectively reasonable manner. When CN declined that transfer and did not report to work, the District had just cause to discharge her. Consequently, the District did not violate Article 6 of the CBA and did not violate ORS 243.672(1)(g).

¹¹The dissent argues that the District acted unreasonably by incorrectly assuming that CN would pose a "direct threat" to her own health and safety if she returned to work at the Sisters branch. Under the ADA, if an employee with a disability, with or without a reasonable accommodation, poses a direct threat, then the employee is unqualified. See 42 USC § 12113; 29 CFR § 1630.15. AFSCME did not advance such a "direct threat" theory during the hearing or in its post-hearing brief, nor could it—"direct threat" is an affirmative defense to certain claims under the ADA, and the District did not raise it in its answer or at hearing. Although some District witnesses occasionally referred to a concern that CN might re-injure herself, that concern was not the District's rationale as set forth in its July 24, 2017, reasonable accommodation letter.

ORDER

The complaint is dismissed.

DATED: January 31, 2020.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member

*Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

*Member Sung Dissenting

I respectfully dissent. When the District offered the grievant, CN, the accommodation of reassignment to the Bend branch, it gave her an ultimatum: either accept that offer or be terminated. The District contends that it had cause to terminate CN for declining that offer because it had determined that it was “not feasible” to accommodate CN’s physical limitations in her existing position at the Sisters branch. After reviewing the record, I find that the District failed to meet its burden to prove that it was not feasible to accommodate CN at the Sisters branch. Rather, the record shows that CN could perform her job duties with a few effective and reasonable accommodations that the District could have easily provided at the Sisters branch, and that the District terminated her for declining an unnecessary accommodation. Consequently, I would conclude that the District violated the non-discrimination and just cause provisions of the CBA, and therefore ORS 243.672(1)(g).

The majority and I reach different conclusions in this case, primarily because of two differences in our respective approaches: First, the majority grants substantial deference to the District when reviewing its claims that CN could not perform the essential functions of her job because of her physical limitations and that it was not feasible to accommodate those limitations at the Sisters branch. I dissent because, in my view, the CBA’s just cause and nondiscrimination provisions require the District to prove those claims by a preponderance of the evidence, and require this Board to subject those claims to more scrutiny than the majority applies in its analysis.

Careful scrutiny is how adjudicators determine whether an employer’s claim that an individual cannot do the job because of a physical limitation is valid or discriminatory. As the court explained in *Arline v. Sch. Bd.*,

“While legitimate physical qualifications may be essential to the performance of certain jobs, both that determination and determination of whether accommodation is possible are fact-specific issues. The court is obligated to scrutinize the evidence before determining whether the [employer’s] justifications reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives, or whether they are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice.”

772 F2d 759, 764-65 (11th Cir 1985), *aff’d*, 480 US 273, 107 S Ct 1123 (1987) (citation omitted). Without careful scrutiny, the finder of fact cannot properly determine whether the employer’s action was discriminatory or not.

Second, the majority takes the position that it is unnecessary to reach all of the ADA issues addressed in this dissent. In my view, the issue of whether the District discriminated against CN in violation of ADA standards is properly before this Board. Article 4 of the parties’ CBA provides: “The District and the Union agree not to discriminate against any employee because of race, color, sex, age, national origin, marital status, religion, disability, sexual orientation, union membership or non-membership.” When a CBA contains such a nondiscrimination provision, most arbitrators will interpret the provision as indicating an intent to incorporate the applicable law on the subject. Norman Brand *ed.*, *Discipline and Discharge in Arbitration* at 413 (1998).¹² Additionally, the Union’s grievance specifically claims that the District violated both Article 4 (non-discrimination) and Article 6 (just cause), and states, “The Union feels that management has failed to give any reasonable explanation as to why [CN] has not been returned to her position and can only conclude that the reason [CN] has not been returned to her position is because of management’s discrimination based on either her age or her disability.” In responding to the grievance, the District addressed the Union’s discrimination claim on its merits; the District did not contend that the parties had not intended to contractually prohibit discrimination.¹³

Even if this Board were limited to addressing the question of whether the District had just cause to terminate CN, we would still need to address the question of whether the District complied with the ADA and the EEOC’s enforcement guidance. A discharge that is discriminatory by definition lacks just cause.¹⁴ Indeed, the District concedes that an employer’s exercise of its

¹²As the majority notes, in this case, the Board’s “responsibilities to construe the agreement and to find the facts are similar to those of an arbitrator.” Majority opinion at 12 (quoting *OSEA Chapter 115 v. Pendleton School Dist.*, 85 Or App 309, 311, 736 P2d 204 (1986), *rev denied*, 304 Or 55, 742 P2d 1186 (1987)).

¹³The majority declines to reach all of the ADA issues because AFSCME, in its post-hearing brief, argued that this Board did not *need* to consider ADA standards to decide that the District lacked just cause to terminate CN. However, AFSCME still cited and discussed the ADA standards, and sufficiently identified all of the issues addressed in this dissent. *See, e.g.*, Complainant’s Post-Hearing Brief at 7-8 & n 18, 14 & n 26. At oral argument, this Board granted the employer’s request for supplemental briefing on those standards. In AFSCME’s supplemental brief, it argued that this Board must reach the ADA issues, unless we sustain the grievance on a separate basis. I agree.

contractual right to assign or transfer complies with this Board’s “reasonable employer” standard only “as long as the employer makes those decisions within the parameters of the EEOC Guidelines on Reasonable Accommodation and Undue Burden.”¹⁵

The District did not comply with the ADA or the EEOC’s guidelines when it required CN to accept the accommodation of reassignment on pain of discharge and then terminated her for declining that accommodation. When CN was returning from her disability leave, she was entitled under the ADA to return to her original PSS position at the Sisters branch, even if she needed reasonable accommodations to perform her essential duties. CN’s return-to-work release authorized her to engage in a wide range of physical activities, with some limitations. She requested a few reasonable accommodations so that she could perform her job duties while complying with the limitations specified in her release. CN’s supervisors, however, believed that they needed to go beyond those limitations and prevent her from engaging in *any* physical activities. Because they could only eliminate physical activities from the PSS job at the Bend branch, they rejected her request for accommodations at the Sisters branch, and offered her reassignment to Bend instead. Further, the District required CN to either accept that accommodation offer or be terminated. When CN provided an updated return-to-work release that meant she could perform her duties without any accommodations, the District refused to reconsider its position, and reissued its ultimatum. When CN exercised her ADA right to decline an unnecessary accommodation, the District terminated her.

Although CN’s supervisors may have believed that they were acting in CN’s own best interest by preventing her from performing any work that involved physical activity, their understanding of CN’s physical abilities was not based on an objectively reasonable interpretation of her return-to-work releases or a valid, individualized assessment of her ability to do her job safely. Instead, the supervisors acted on their own assumptions about what CN could not or should not do. However well-meaning, the District’s decision to terminate CN was “the kind of workplace paternalism the ADA was meant to outlaw.” *Chevron U.S.A. v. Echazabal*, 536 US 73, 85-86, 122 S Ct 2045 (2002).

Below, I begin by explaining how the record shows that 1) CN could perform her job duties consistently with her return-to-work releases, at first with reasonable accommodations, and later, without any accommodations, and 2) to the extent that CN needed accommodations, it was feasible for the District to provide them at the Sisters branch. I then discuss how the testimony of the District’s supervisors shows that they refused to reinstate CN to her position at the Sisters branch, and ultimately terminated her, because they subjectively believed that CN should not, for her own good, perform *any* physical activities—and because they took it upon themselves to impose far greater restrictions on CN than her medical providers actually prescribed. By overprotecting CN in this manner, the District engaged in a prohibited form of disability discrimination, and consequently, violated the non-discrimination and just cause provisions of the parties’ CBA. After addressing the ways in which the District violated the ADA and EEOC enforcement guidance, I also explain why I would conclude, even without regard to the ADA standards, that the District

¹⁴“The essence of ‘just cause’ is that the Employer, in carrying out its inherent or express right to discipline employees, must do so in a manner that is not unreasonable, arbitrary, capricious, or discriminatory.” *Discipline and Discharge* at 35 (quotation marks and citation omitted).

¹⁵Respondent’s Supplemental Brief at 18.

did not act as a “reasonable employer” would under the circumstances, and therefore lacked just cause to terminate CN.

1. CN could perform the essential functions of the PSS position at the Sisters branch, consistent with the limitations specified in her May 31, 2017, return-to-work release, with reasonable accommodations.

On July 24, 2017, the District provided CN with a document that it had drafted unilaterally and titled, “Reasonable Accommodation Agreement” (“July 24 Accommodation Agreement”). In that document, the District explained that CN had requested accommodations so she could return to work in her Public Services Specialist (PSS) position at the Sisters branch, consistent with her return-to-work release dated May 31, 2017 (“May 31 Release”). Although CN’s position at Sisters remained open at that time, the District refused to reinstate her. The District explained that it had determined that her “request for accommodation [wa]s not feasible at the Sisters Library,” and that it would offer her the accommodation of “[r]eassignment to the Downton Bend Library” instead. The District made clear that if CN accepted this accommodation, the reassignment would be permanent.¹⁶ The District also explicitly stated that if CN “declin[ed] the accommodation” of reassignment, she would “be separated from employment.”

The majority accepts, with little scrutiny, the District’s claim that “there were no reasonable accommodations that would enable CN to perform the essential functions of the PSS position at the Sisters branch” consistent with the restrictions set forth in her May 31 Release. Majority opinion at 14. That claim, however, is not supported by substantial evidence in the record. Rather, the record shows that CN could perform her job duties with a few accommodations that the District easily could have provided at the Sisters branch. Below, I address each restriction indicated by the May 31 Release; the extent to which the restriction affected CN’s ability to perform the duties of a PSS (if at all); and the ways in which the District could have effectively and reasonably accommodated CN at the Sisters branch.¹⁷

Pushing and Pulling:

The May 31 Release indicated that CN was “released to return to work” “pushing/pulling” “up to 100 pounds.”¹⁸ Where the release form asks the medical provider to indicate how much time the employee can push or pull per day, CN’s provider checked the boxes for both “occasionally,” and “frequently.” The form defines “occasionally” to mean “6-33% of the day,” and “frequently” to mean “34-66% of the day.” The form does not specify whether the “day” in this definition refers to the total number of hours that the provider has authorized the employee to

¹⁶Specifically, the District wrote, “Should you receive a full medical release without restrictions it is understood that you will occupy the PSS position for Downton Bend.”

¹⁷As explained in more detail below, the District’s supervisors expressed concern about CN’s ability to perform certain “materials handling duties,” and the District asserts that all such duties are “essential functions” of the PSS position. Although there is evidence indicating that at least some of the materials handling tasks are “marginal functions,” for the purposes of this analysis, I assume that they are “essential,” as the District asserts.

¹⁸On the return-to-work release form, CN’s provider drew parentheses around the words “pushing/pulling” and then drew an arrow to a handwritten notation, “up to 100lb.”

work, or the total number of hours that the employee actually works on a given day. If the former, then CN was authorized to push and pull for over five hours per workday, because CN's provider released her to work up to eight hours per day, and 66% of eight hours equals 5.28 hours. If the latter, then when CN was working a six-hour shift, she could push and pull for up to four hours (66% of six hours equals four hours). For the purpose of this analysis, I conservatively assume that CN could push and pull up to 100 pounds for up to four hours per six-hour shift.

There is no evidence showing that CN would ever have to push or pull *more than* 100 pounds to perform any of the materials handling duties of her position at the Sisters location. The PSS Position Description states that the job's physical demands include "Pushing/Pulling 100 pound carts." Nothing in the position description indicates that a PSS must push or pull *more than* 100 pounds to perform any essential duty. Linda Kurtz, who worked for 15 years as a PSS at the Sisters branch (until she retired on October 31, 2015), could not recall ever having to push or pull more than 100 pounds.

Further, the weight of a cart depends on how many books are loaded onto the cart. The District's Assistant Director, Lynne Mildenstein, testified that employees can simply limit how many books they load on a cart to ensure that it does not weigh more than 100 pounds:

"Q. Is there any reason that a staff person couldn't choose to only load the cart to 90 pounds and then maybe make a second trip?

"A. No. There is no reason they couldn't do that."

Additionally, there is no evidence that a PSS ever has to push carts weighing up to 100 pounds for *more than four hours* during a six-hour work shift. CN, who worked as a PSS at Sisters for many years, testified (without rebuttal) that she pushed carts for "a few minutes a day."

Accordingly, the record shows that CN could perform the essential duties of her PSS position at the Sisters branch, consistent with her May 31 pushing and pulling limitations, without any accommodation.

Lifting and Carrying:

The May 31 Release indicated that CN was "released to return to work" "lifting" and "carrying" up to 15 pounds both "occasionally" and "frequently." As explained above, this means that the May 31 Release authorized CN to lift and carry up to 15 pounds for up to 5.28 hours per workday (regardless of the actual shift length), or, using more conservative assumptions, up to 66% of the actual workday, *e.g.*, four hours out of a six-hour shift.

The District did not prove that CN would have to exceed either the weight or the durational limit to perform the essential functions of the PSS position. The PSS Position Description indicates that the job’s “physical demands” include “lifting (up to 30 pounds).” However, *moving library materials* is the essential duty—not lifting 30 pounds.¹⁹

Library Operations Manager, Robin McKinley, testified that she believed CN would have trouble “bringing in the newspapers.” According to McKinley, “those are over five pounds, they can be up to ten pounds.” However, the May 31 Release authorized CN to lift and carry up to 15 pounds.

The District identified only one PSS task that involves lifting and carrying a load that *potentially* could weigh more than 15 pounds: moving a crate of books. However, a reasonable accommodation includes “[a]ltering how an essential or marginal job function is performed (e.g., modifying standing, climbing, lifting, or bending requirements).” *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015).²⁰ CN testified that she could lift and carry crates of books consistent with her 15-pound weight limitation simply by loading less than 15 pounds of books into each crate, and, if necessary, making a few extra trips. The weight of a book crate, like a library cart, can easily be reduced by loading fewer books into it. According to the District’s Public Services Supervisor, Zoe Schumacher, library books weigh an average of one pound each.²¹ Further, Kurtz testified that moving library materials is *not* a “time-sensitive” task; there are no library “emergencies” when it comes to moving books. Accordingly, if CN needed a few extra minutes to lift and carry book crates in 15-pound loads, that would not create an undue burden.

¹⁹Under the ADA, an employer may not disqualify an individual based on a lifting requirement or other physical standard unless the employer can show that the standard is 1) “job-related and consistent with business necessity”; and 2) “that there is no accommodation that would enable the person to meet the existing standard or no alternative approach (itself a form of accommodation) through which the employer can determine whether the person can perform the essential function.” *Complainant v. Donahoe*, EEOC Appeal No. 0120080613, 2013 EEOPUB LEXIS 3567, *19-20 (2013) (citing 42 USC § 12113(a); 29 CFR § 1630.15(b)). “When determining if a standard or test is job-related and consistent with business necessity, the central question is whether the standard or test is ‘carefully tailored to measure an individual’s actual ability to perform the essential function of the job’ HR Rep 101-485(II) at 36, 101st Cong., 2nd Sess. 1990, 1990 USCCAN 303, 353-5.” *Id.* at *20 (brackets omitted). As discussed above, the District did not show that a 30-pound lifting standard is actually job-related and consistent with business necessity. Further, the record shows that CN could perform the essential function – moving crates of books – by reducing the weight of each crate to 15 pounds or less.

²⁰Available at: https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

²¹There is no evidence that a PSS would ever have to lift or carry an item that in and by itself weighs more than 15 pounds.

CN and her union representative specifically asked the District to accommodate CN by allowing her to limit the weight of book crates, and if necessary, take a few extra minutes to move materials.²² Moreover, the District's Public Services Supervisor, Zoe Schumacher, testified that the District had granted this reasonable accommodation to CN in the past.²³ The District has never explained (either when it rejected CN's request or at the hearing in this matter) why it believed that it would be "infeasible" to provide this accommodation to CN at the Sisters branch, even though it had done so before. Nor did the District introduce any evidence to show that this accommodation would have been ineffective or created an undue burden.

The District did not claim, much less prove, that CN would have to exceed any limit on the number of hours she could lift and carry. As noted above, even when the durational limit is calculated conservatively, CN could lift and carry for up to four hours per six-hour shift. Kurtz estimated that, as a PSS at the Sisters branch, she lifted and carried a load weighing more than 15 pounds roughly 10 times in a work day. CN similarly estimated that she moved a crate of books "[a] few times a day, maybe up to 12 times" per day. There is no evidence or other reason to believe that it would take CN more than four hours to lift and carry the equivalent of 12 crates of books.

Thus, the record establishes that CN could perform the materials handling duties, within the lifting and carrying limits specified in her May 31 Release, with an effective and reasonable accommodation: limiting the weight of book crates to 15 pounds or less, and if necessary, taking the time to make a few extra trips.

Stooping, Bending, and Twisting:

The May 31 Release expressly authorized CN to "stoop/bend" and "twist" up to four hours per day.²⁴ According to District representatives, a PSS must stoop or bend, and twist, primarily to unload book drop bins. Assuming that unloading book drop bins and similar tasks are an essential function of a PSS, there is no evidence that CN would have been unable to complete such tasks within her prescribed limitations. That is, the District failed to prove that it would take CN more than four hours a day to perform all of the job duties that required her to stoop or bend and twist.

When asked to estimate what percentage of the day a PSS would be required to "stoop and bend," the District's Public Services Supervisor, Zoe Schumacher, responded, "It's kind of really – that's hard to estimate. It's going to depend on the day, but at a minimum, about 50 percent

²²In a letter dated June 16, 2017, CN provided the District with a few potential accommodations, including, "Allowing extra time to complete moving items from one place to another." Additionally, AFSCME representative Jared Kollen testified that when he and CN met with the District, he "brought up simple accommodations, just a little more time, using two more crates or an extra crate to move heavy objects, just simple things. It wouldn't have cost the district anything."

²³When Schumacher was asked to provide an example of reasonable accommodations that the District had provided to employees in the past, she explained that the District had previously accommodated CN by permitting her to partially unload crates, "so that she could pick them up and move them over and then transfer[] subsequent material."

²⁴On the May 31 Release, the provider handwrote "up to 4 hrs/days" and drew arrows to three of the physical activities listed on the release form: "stoop/bend," "twist," and "reach."

of their time, but it can be more.” CN was authorized to stoop or bend for four hours—which is 66% of a six-hour shift. Thus, even assuming Schumaker’s estimate was accurate, CN would not have had to exceed the May 31 Release’s stooping/bending limitation to do her job.

Assistant Director Mildenstein testified that it was “possible” that CN “could be stooping, bending, and twisting more than four hours per day,” but that possibility would arise only “if there is nobody else” at the library branch. That testimony is, at best, conclusory and speculative. There is no evidence that a Sisters branch PSS has ever actually needed to stoop, bend, or twist for more than four hours in a day to perform their essential functions. Further, the District’s witnesses explained that they make every effort to avoid scheduling employees to work alone. Although they also testified that, despite those efforts, employees frequently work alone at the Sisters branch for some portion of a shift, there is no evidence indicating that a PSS ever works alone *for an entire shift*. Thus, the District’s evidence at most shows that a PSS *might* need to stoop, bend, or twist for more than four hours under circumstances that occur rarely, if ever. That evidence does *not* show that CN needed to be able to stoop, bend, or twist for more than four hours to perform the essential duties of a PSS at the Sisters branch. *See Complainant v. Donahoe*, EEOC Appeal No. 0120080613, 2013 EEOPUB LEXIS 3567, *20-21 (2013) (70-pound lifting requirement was not justified where evidence indicated employees “occasionally lift between 35-50 pounds, and rarely lift between 50-70 pounds”).

Indeed, the record shows that the District concluded that CN could not perform her materials handling duties because they believed that CN’s release imposed greater restrictions on her stooping, bending, and twisting than her May 31 Release actually did. Specifically, Schumaker testified that it was her “understanding” that CN’s release did not allow CN to stoop, bend, and twist “on a repetitive basis,” and that it limited those activities to “six percent of a six-hour day” or “20 minutes.” However, none of CN’s releases actually indicated that she should not stoop, bend, and twist “repetitively.” And, as noted above, the May 31 Release actually authorized CN to stoop, bend, and twist for up to four hours per day, not just 20 minutes.

Thus, the District failed to show, as a threshold matter, that CN needed *any* accommodation to perform her materials handling duties consistently with her four-hour limitation on stooping, bending, and twisting.²⁵

Reaching:

The May 31 Release authorized CN to “reach” for up to four hours per day. The provider also wrote that CN should not reach with her “left upper extremity” “above chest” level, and “no more than physically capable of.” A PSS must reach when performing materials handling duties such as shelving library materials or removing them from bins. However, the District identified

²⁵Even if the District had shown that a PSS must stoop, bend, and twist for more than four hours per day to perform their essential functions, we would then need to determine whether the District could reasonably accommodate CN in her position at the Sisters branch. When asked whether there are “alternatives” that the District “can pursue for an employee that has some limitations on stooping and bending,” Schumaker responded, “We do.” Additionally, a PSS can modify how they perform their materials handling tasks to limit how much they actually stoop, bend, or twist. For example, retired PSS Kurtz testified that she “would bend down multiple times a day,” but there were “work-arounds,” such as sitting on a step stool, “if that was difficult.” The District did not rebut Kurtz’s testimony or otherwise establish that such modifications would be ineffective or create an undue burden.

only two PSS duties that potentially involve reaching above chest level: placing or removing books from the highest bookshelf level, and unlocking the main door when opening the library (or locking it when closing the library). As explained below, the record establishes that CN could perform those duties consistent with her May 31 Release simply by reaching up with her uninjured right arm (which is her dominant arm), instead of her left arm.

Reaching the highest bookshelves:

When CN discussed returning to work with the District, she explained that she could use her right arm (instead of her left) to reach the highest bookshelves while complying with her physical limitations. In or about June 2017, the District submitted a supplemental questionnaire to Dr. Bollom, the doctor primarily responsible for treating CN's injury, and asked him to confirm that she could use her right arm exclusively to perform her materials handling duties. Specifically, the District wrote:

"The majority of tasks for the PSS and MSS positions involves reaching, stooping/bending, crouching, crawling, kneeling, twisting, climbing, balancing, pushing/pulling, walking, sitting, and lifting. Best practice is to have staff use both arms or alternate arms when doing tasks to avoid injury from repetitive use.

"[CN] has stated she can use her right arm for many of these tasks. Is this a concern if [CN] uses her right arm exclusively?"

Dr. Bollom responded, "No." The District offered no explanation as to why, after receiving Dr. Bollom's response, it continued to believe that it should bar CN from engaging in any physical activity instead of allowing her to use her uninjured right arm to perform her duties. And at the hearing in this matter, the District offered no evidence to show that CN could not effectively perform all of her materials handling duties, consistent with her May 31 Release, by using her right arm exclusively.

CN also explained to the District that when she stood on one of the Sisters branch's existing step stools, the highest bookshelf was at her chest level, and that, as a result, she could shelve books without ever reaching above her chest level (with either arm). Thus, even if CN could not use her right arm exclusively (even though her doctor confirmed that she could), she could simply use a step stool instead. Again, there is no evidence showing that using a step stool would be an ineffective accommodation or create an undue burden. Indeed, at the hearing in this matter, Assistant Director Mildenstein confirmed that CN *could* use a step stool when shelving books to avoid reaching above her chest level:

"Q. And what about with respect to shelving books, is there any reason a staff person couldn't avoid a lot of lifting over their heads by using a step stool?"

"A. You can use a step stool. Again, we don't – we try to keep our books so that they are not as high that they have to use step stools. If you look at our – our shelving, much of it is within reach of an average height, so it's not frequently that people will use step stools, and I believe in the Sisters branch as well there – they have – what are they, about five feet? Yeah."

Unlocking and locking the doors:

According to District representatives, an employee must reach above their head with one hand to unlock or lock the main doors at the Sister's branch. There are two doors, and each has a lock or "latch" located at the top of the door, as well as a safety bar. An employee must push the safety bar and reach up to turn the key at the same time. Although the District tries to avoid scheduling employees to work alone, occasionally, an employee must unlock or lock those doors without assistance.

However, there is no evidence that unlocking or locking the door would actually require CN to exceed any of the limitations specified in her May 31 Release. CN testified that she practiced on her own and confirmed that she could open both doors by reaching up to turn the key with her right hand (instead of her left hand), and thereby comply with the restriction against reaching above chest-level with her left arm. At the hearing in this matter, Assistant Director Mildenstein confirmed that CN also could have used a step stool to avoid having to reach above her head to unlock and lock the doors:

"Q. With respect to the latches above her head, you said that would be difficult for her because it would be above her head. Is there any reason she couldn't use a step stool or a ladder to do that?

"A. No. There was no reason she couldn't."

The District did not rebut CN's testimony or otherwise prove that CN could not lock and unlock the doors by herself, while staying within the limits specified by the May 31 Release.

The District's evidence on this issue consists only of vague expressions of doubt and concern about CN's ability to open the doors by herself. For example, Assistant Director Mildenstein expressed skepticism that CN would have the strength to push the safety bar with her left arm (while turning the latch with her right arm). That skepticism, however, was not objectively reasonable in light of the fact that CN's May 31 Release expressly authorized her to push with her left arm, and to push up to 100 pounds.

Moreover, even if the District had a valid basis for questioning CN's ability to open the door consistent with her May 31 Release, it could have asked CN's doctor to address that issue. Yet, the District failed to ask that question when it submitted supplemental return-to-work questions to CN's doctor in June, or at any other time. Alternatively, the District could have given CN the opportunity to demonstrate that she could open the door without reaching above chest level with her left arm, but it did not.²⁶

²⁶CN testified that the District did not give her the opportunity to demonstrate her ability to unlock the door. Mildenstein testified that CN "had difficulty" with pushing the door's safety bar, but then admitted that she did not actually witness that. Mildenstein asserted other District representatives could testify about CN's difficulty unlocking the door, but they did not. Public Services Supervisor Schumaker described the door in more detail, and testified that she was "concerned" about CN's ability to unlock the door, but no one testified that they had actually allowed CN to try, or had actually witnessed CN have difficulty unlocking the door.

The record also shows that the four-hour durational limit on reaching would not interfere with CN's ability to perform her job duties. To begin, there is no evidence establishing that a PSS ever has to reach for more than four hours per workday. Further, even if the job actually required reaching for more than four hours, only CN's left arm was actually impaired, and she could avoid reaching for more than four hours with her left arm by reaching with her uninjured right arm instead. As discussed above, CN's doctor confirmed that she could use her right arm "exclusively" to perform her job duties, in response to the District's June 14, 2017, supplemental questionnaire.

Thus, the record establishes that CN could perform any duty that required her to reach while complying with the limitations specified in her May 31 Release. To the extent that CN needed accommodations, the record shows that the accommodations she requested (using her right arm to perform certain tasks, and using an existing step stool) would have been effective and easy for the District to provide at the Sisters branch.

Crouching, Crawling, Kneeling, Climbing, and Balancing:

The May 31 Release authorized CN to crouch, crawl, kneel, climb, and balance "frequently," which means up to 66% of the workday, or at least four hours per six-hour shift. There is no evidence that a PSS at the Sisters location ever has to crouch, crawl, kneel, climb, or balance to perform their essential functions. The PSS Position Description specifies that the job's physical demands include "sitting, standing, walking, bending, pulling, pushing, reaching, twisting, [and] lifting," but it does *not* mention crouching, crawling, kneeling, climbing, or balancing. Retired Sisters branch PSS, Kurtz, confirmed that a PSS does not have to engage in any of those activities to perform their essential functions:

"Q. How often would you need to in an average day crawl around on the floor?

"A. I wouldn't.

"Q. How often would you * * * crouch or kneel?

"A. I would bend down multiple times a day, but there were work-arounds, too, if that was difficult. There were step stools that were of a perfect height to sit on if one needed to.

"Q. How often would you have to climb on an average workday?

"A. Maybe step up a step or two on a step stool but not climb.

"Q. What about balance, how often would you have to balance?

"A. You mean like on a stool or something like that?

"Q. Yes.

"A. I don't feel like that was an issue. If I were stepping on a step stool in front of bookshelves, I would have the shelves in front of me to rest my hands on if I needed to, but there wasn't a lot of climbing up and down."

Although Assistant Director Mildenstein testified that shelving books involves “bending and crouching,” she also admitted, “That’s not something that I do in my job necessarily.” Even assuming that a PSS must sometimes crouch, crawl, kneel, climb, or balance to perform an essential duty, there is no evidence that a PSS must do any of those activities for more than four hours in a six-hour work shift. Therefore, the record establishes that the May 31 Release’s durational limitation on crouching, crawling, kneeling, climbing, or balancing had *no* impact on CN’s ability to perform the essential duties of her position.

In sum, the record shows that CN could perform the essential duties of her PSS position at the Sisters branch, consistent with all of the physical limitations specified in her May 31 return-to-work release. To the extent that CN needed accommodations to perform her job duties, the accommodations that she requested—reducing the weight of book crates, using her right arm, and using an existing step stool—were both effective and reasonable. In the July 24 Accommodation Agreement, the District explained that it had considered some unnamed type of equipment that could assist CN, but it did not specifically address any of the accommodations that CN actually requested. And, at the hearing in this case, the District failed to show that any of those requested accommodations would be ineffective, create an undue burden, or otherwise be “infeasible” to provide at the Sisters location.²⁷

Both the majority and the District note that the May 31 Release released CN “only to modified duty,” and that, on June 14, 2017, Dr. Bollom described CN’s “percentage of recovery at that point as fifty percent.” Majority opinion at 14. However, neither the majority nor the District adequately explains how being 50% recovered or on modified duty meant CN could not perform the essential duties of a PSS at the Sisters branch even with reasonable accommodations, and the fact that CN was not 100% recovered was not an appropriate basis for refusing to allow CN to return to her position. As the EEOC has explained, “An employer will violate the ADA if it requires an employee with a disability to have no medical restrictions -- that is, be ‘100%’ healed or recovered -- if the employee can perform her job with or without reasonable accommodation * * *.” *EEOC Employer Provided Leave and the Americans with Disabilities Act* (May 9, 2016) (“*EEOC ADA Leave Guidance*”).²⁸ In other words, the percentage of recovery is irrelevant. The District was supposed to determine—without regard to her percentage of recovery—whether CN could perform her essential duties within the specific limitations prescribed by her doctor, with or without reasonable accommodations. As discussed above, the record shows that she could.

²⁷If the District was not sure that the accommodations that CN requested would be effective, it should have given her the opportunity to demonstrate that they would be. As the Ninth Circuit explained in *Humphrey v. Mem’l Hosps. Ass’n*, the “continuing duty to accommodate” means that “‘an employer must consider each request for reasonable accommodation,’” and “‘if a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship.’” 239 F3d 1128, 1138 (9th Cir 2001) (quoting *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, FEP (BNA) 405:7601, at 7625 (March 1, 1999)). “This rule fosters the framework of cooperative problem-solving contemplated by the ADA, by encouraging employers to seek to find accommodations that really work, and by avoiding the creation of a perverse incentive for employees to request the most drastic and burdensome accommodation possible out of fear that a lesser accommodation might be ineffective.” *Id.*

²⁸Available at: <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>

2. CN could perform all of the duties of the PSS position at the Sisters branch, consistent with her updated return-to-work release dated July 28, 2017, without any accommodation.

On July 24, 2017, the District notified CN that, after considering her May 31 Release and the supplemental return-to-work information provided by her doctor on June 14, 2017, it had “determined that [her] request for accommodation is not feasible at the Sisters Library.” The District then offered her the alternative accommodation of reassignment to Bend, and gave her a week, until August 1, 2017, to accept that offer or decline it with the “understand[ing] that by declining the accommodation [she] will be separated from employment.”

Four days later, on July 28, 2017, CN gave the District an updated medical release, dated the same day (“July 28 Release”), and she sent the District “a series of e-mails” explaining that she was “released to return to work with no special accommodation required.” Although the July 28 Release relaxed or eliminated all of CN’s physical limitations, the District insisted that CN’s claim that she could work without accommodation was “simply not true.” Termination Letter (dated August 17, 2017) (“August 17 Termination Letter”). The District also refused to reconsider whether, in light of the updated release, CN could be accommodated at the Sisters branch. Instead, the District reissued its ultimatum: either accept the accommodation of reassignment to Bend or be terminated. However, the record establishes that CN was correct: she could perform all the duties of her PSS position at the Sisters branch, consistent with the July 28 Release, *without any accommodations*.

As discussed above, only some of the physical limitations specified in CN’s May 31 Release potentially affected her ability to perform her job duties: the 15-pound limitation on lifting and carrying; the restriction against reaching above chest level with her left arm; and the four-hour limit on reaching, stooping/bending, and twisting. The July 28 Release relaxed or eliminated each of those limitations, such that CN could perform all of her job duties, consistent with the release, without any accommodation.²⁹

Lifting and Carrying:

The May 31 Release authorized CN to lift and carry up to 15 pounds, both “occasionally” (“6-33% of the day”) and “frequently” (“34-66% of the day”). The July 28 Release authorized CN to lift and carry *up to 30 pounds*, both occasionally and frequently.³⁰ The July 28 Release also

²⁹Although the other physical limits prescribed by the May 31 Release did not affect CN’s ability to perform her job duties or require accommodation, I note that the July 28 Release eliminated those other limits as well. Specifically, the July 28 Release raised the weight limit on pushing and pulling from “up to 100 pounds” to “more than 100 pounds.” It also eliminated the durational limit on crouching, crawling, kneeling, climbing, balancing, pushing, and pulling (specifically, it changed “frequently” to “continuous”).

³⁰The return-to-work release form groups together “lifting, carrying, [and] pushing/pulling.” CN’s provider drew a circle around “pushing/pulling,” and then drew an arrow to the boxes for “100 pounds” and “>100 pounds,” and checked the box in the row marked “occasionally.” The provider also drew a circle around “lifting,” drew a line from that circle to “30 pounds,” and checked the boxes for both “occasionally” and “frequently.” With respect to “carrying,” the handwritten notations are less clear: they could be

(Continued . . .)

authorized CN to work up to 10 hours per day (an increase from the May 31 Release, which authorized her to work up to eight hours per day). Accordingly, the July 28 Release authorized CN to lift and carry up to 30 pounds for up to 66% of a 10-hour workday, which is over six hours. Even using more conservative assumptions to convert the durational limits from percentages into hours, the July 28 Release authorized CN to lift and carry up to 30 pounds for up to 66% of her actual shift, *e.g.*, if she were working a six-hour shift, she could lift and carry for up to four hours. There is no evidence indicating that CN would have to lift and carry significant loads for more than 66% of the workday.³¹

Further, there is no evidence that a PSS at the Sisters branch ever has to lift and carry *more than* 30 pounds. As noted above, the PSS position description indicates that a PSS may have to lift “up to 30 pounds.” Because the July 28 Release raised CN’s lifting and carrying weight limit from 15 pounds to 30 pounds, CN no longer needed any accommodation to perform the materials handling duties that involved lifting and carrying. Specifically, she would no longer need to limit the weight of book crates to 15 pounds, or take any extra time to move crates of materials.

Reaching:

The July 28 Release specified that CN was “able to” reach “continuous[ly],” *i.e.*, for “67-100% of the day.” The July 28 Release noted only that CN “should attempt to avoid repetitive heavy lifting w[ith] left arm/shoulder above shoulder height, lateral lifting.” (This note supplanted the note on CN’s May 31 Release, which indicated that CN should avoid reaching above chest-level with her left upper extremity.) CN’s doctor explained that the July 28 note meant that she should not be “lifting or chucking or pitching bales of hay or cotton up onto a wagon,” and that “heavy” meant something like a 40-pound bag of dog food.

There is no evidence that, to perform the essential duties of a PSS, CN would have to engage in any heavy lifting, much less do so with her left arm, above shoulder height, *and* repetitively. Similarly, there is no evidence that CN would ever have to perform a “lateral lift” with her left arm.

Because the July 28 Release eliminated the restriction against “reaching above chest level with left upper extremity,” CN could place books on (or remove books from) the highest book shelves in the Sisters branch without any accommodation. She would not even need to use a step stool, or use her right hand exclusively, to perform this work. Likewise, there could no longer be

(Continued . . .)

construed as authorizing CN to carry up to 30 pounds frequently, or more than 100 pounds occasionally. Because the May 31 Release clearly authorized CN to both lift and carry up to 15 pounds frequently, and the July 28 Release clearly authorized CN to lift up to 30 pounds frequently, for this analysis, I assume that the July 28 Release also authorized CN to carry up to 30 pounds frequently.

³¹In its termination letter, the District claimed that the July 28 Release authorized CN to lift 30 pounds only “occasional[ly].” As noted above, CN’s medical provider actually indicated that CN could “lift” both “occasionally” and “frequently.” However, even if CN were limited to lifting and carrying “occasionally,” that would mean CN could engage in those activities for up to 33% of the workday, and she was authorized to work up to 10 hours per day. There is no evidence that it ever takes a PSS more than three hours (or even 33% of a given shift) to perform essential tasks that involve lifting and carrying.

any question about CN's ability to lock or unlock the doors by herself. She could reach up to turn the door latch with either hand, and push the safety bar in with the other, without exceeding any limitation specified in her July 28 Release, and without any accommodation.

Stooping, Bending, and Twisting:

The May 31 Release had authorized CN to stoop, bend, and twist for up to four hours per day. The July 28 Release authorized CN to stoop, bend, and twist "continuous[ly]," *i.e.*, 67-100% of the day, and authorized her to work up to 10 hours per day. Even if CN had to stoop, bend, and twist for an entire shift (typically six hours), she could do so, consistent with her July 28 Release, without any accommodation.

Finally, the July 28 Release also included a handwritten note which stated, "Patient may return to regular duty work as tolerated." In the August 17, 2017, termination letter, the District suggested that that note meant CN still required "special accommodation." However, the qualifier, "as tolerated," is not a specific limitation, and there is no evidence that CN could not "tolerate" performing all of her essential duties. To the contrary, CN represented to the District, and testified at hearing, that she could perform all of her regular duties, without any accommodations. Her assessment of her ability to perform her job warrants fair consideration; she had 20 years of experience performing the job successfully, and she was well aware of the job's physical demands.

3. CN's May 31 Release expressly stated that CN was "able to" engage in various physical activities for substantial amounts of time, and it specified only a few, relevant limitations. Nonetheless (as the testimony discussed in detail below shows), the District's supervisors believed that they should prevent CN from engaging in any physical activity at all. As a result, when they were determining whether the District could accommodate CN at the Sisters branch, they asked the wrong question: instead of asking whether they could accommodate her actual limitations, they asked whether they could completely eliminate all physical activity from the PSS job. Because it would be difficult to eliminate all physical job duties from the PSS position at the Sisters branch, but feasible to do that at the Bend branch, the District supervisors decided to reassign CN to Bend.

Thus, the District determined that it was infeasible to accommodate CN in her position at the Sisters branch—not based on her prescribed limitations—but based on her supervisors' subjective belief that CN should not, for her own good, engage in *any physical activity at all*. While the supervisors' concern for CN's welfare may have been genuine, when the District imposed greater restrictions on CN than her medical providers actually prescribed, and went so far as to terminate her for declining an unwanted and unnecessary "accommodation," the District engaged in a form of discrimination—"workplace paternalism"—that "the ADA was meant to outlaw." *Chevron U.S.A.*, 536 US at 85.

At the hearing in this matter, the District's counsel asked Assistant Director Mildenstein to explain the District's decision (in July 2017) to "accommodate" CN by reassigning her to Bend. Mildenstein testified,

"[By] accommodating [CN] at the downtown Bend branch[,] *she would not have to do anything physical at that branch*. She would not be doing any of those -- she would not be shelving, she would not be pushing and pulling carts. * * * [M]ost of her work would be at a desk." (Emphasis added.)

Mildenstein further testified that the District “made every effort to make sure that [CN] *wouldn’t have to do anything physical.*” (Emphasis added.) Holly McKinley, Library Operations Manager, similarly explained that the District reassigned CN to Bend so that she “would not have to be doing the materials processing aspect of the job.”

When the Union’s counsel asked Assistant Director Mildenstein to explain how the District concluded that it was necessary for CN “to have a job that had no physical requirements,” Mildenstein referred to the May 31 Release and supplemental documents that the District received in June 2017, and then testified that this “return-to-work information * * * mention[ed] that it was modified duty and she had limited lateral use of her arm and shoulder.” When AFSCME counsel asked how “limited or modified duty translate[d] into ‘she can’t do anything physical at all,’” Mildenstein responded:

“We wanted [CN] to be able to have time to heal and recover. At the downtown Bend branch she would have *no physicality*. She would not even have to lift anything. The return-to-work things were that her – her ability to lift at certain – I think it was under – it was at ten, ten pounds.^[32] *We were taking away all of the ability for her to even have to lift anything. All she would be doing is sitting at our desks helping customers.*” (Emphases added.)

Mildenstein’s subsequent testimony further confirms that the District reassigned CN to Bend only because her supervisors wanted to bar her from engaging in *any* physical activity – despite the fact that her May 31 Release expressly authorized her to engage in physical activities with only moderate limitations:

“Q. Why did the library think it was the library’s place to give her time to heal that her doctor didn’t think she needed?

“A. The return-to-work releases didn’t state -- they stated that she still had modified duty. Her -- her regular work return, they didn’t know when it was going to be.

“Q. Do you understand the difference between modified duty and no physical requirements at all?

“A. Yes.

“Q. Okay. So, how did -- I’m trying to understand why the library came to the conclusion that a doctor’s note that says modified duty and that limits the physical requirements somehow means that she needed to be in a location where she wouldn’t have to do physical work at all.

“A. Again, we were looking at what would be best for [CN] and helping her. We thought that it would be good for her and her injury and to heal. She was having - - the subsequent doctor’s releases that she did even after the work release that were

³²The May 31 Release actually authorized CN to lift and carry up to 15 pounds, not ten.

dated on July 26th still continued to state, and that would be R-13, that [she] should attempt to avoid repetitive heavy lifting with left arm and shoulder. There is -- modified duty is permanent. Again, if modified duty she still needs to -- are there permanent restrictions? Unknown. We wanted to again help with her injury, her healing, no physical work at all. It was -- we were again --

“Q. How much medical training have you received personally?”

“A. None, of course.

“Q. And did you consult with a doctor when you were making conclusions about what would be best for Charlotte’s healing?”

“A. We consulted the medical work releases that we had at the time.”

It was not objectively reasonable for the District to interpret “avoid repetitive heavy lifting” or “modified duty” as meaning “no physical work at all.”

The supervisors’ testimony also shows that their understanding of CN’s physical abilities and limitations was not based on her most current release, but instead based on their own subjective views, or, at best, earlier releases that were supplanted by the May 31 Release. For example, when the District’s counsel asked Public Services Supervisor Zoe Schumaker to explain what essential functions she believed CN could not perform, Schumaker asked to look at the work releases, and then referred to CN’s “very first work release on April 25th,” and noted that “the physician or physician’s assistant had marked not to do [certain physical tasks] at all.” However, the District did not reject CN’s request for accommodation at the Sisters branch and reassign her to Bend until July 24, 2017. At that point, CN had already submitted the May 31 Release, and it was no longer appropriate for the District to base their assessment on a release from April 25th.

Similarly, Schumaker testified that she believed CN could not stoop, bend, or twist on a repetitive basis because CN’s “*initial* work releases indicated” that she was limited to doing those physical activities to “six percent of a six-hour day” or “20 minutes.” (Emphasis added.) Schumaker did not specify which release she was referring to, and none of the releases actually match her description. The closest match is the release dated May 15, 2017 (“May 15 Release”), which indicated that CN could stoop, bend, and twist (among other activities) for “6-33% of the day.” However, that means that 6% was the floor, not the ceiling, and nothing in the May 15 Release indicated that CN should avoid stooping, bending, or twisting “on a repetitive basis.” Moreover, the May 31 Release clearly and explicitly authorized CN to stoop, bend, twist, and reach up to four hours per day.

And, McKinley testified that, based on CN’s return-to-work release, she believed that CN “would also have trouble just answering the phone at the front desk.” However, nothing in CN’s May 31 Release even suggests that she might have trouble answering the phone. To the contrary, the May 31 Release indicated that CN could engage in “fine manipulation,” “pushing and pulling,” “simple grasping,” and “keyboarding,” with both her left and right hands, without any qualifications.

Thus, the testimony of Assistant Director Mildenstein, Public Services Supervisor Schumaker, and Library Operations Manager McKinley, makes clear that they decided reassignment was the *only* accommodation option because they believed that CN should not engage in any physical activity at all. But that belief was not objectively reasonable in light of CN's May 31 Release, which expressly and specifically authorized her to engage in a wide range of physical activities, for many hours per workday.³³ CN could perform all the duties of a PSS at the Sisters branch, while fully complying with her May 31 Release, with a few reasonable accommodations. It was unnecessary for the District to relieve CN from performing *all* materials handling duties (even temporarily), and as a result, it was unnecessary for the District to reassign CN to Bend.

Assistant Director Mildenstein emphasized that the District was trying to do “what would be best for [CN],” and I have no doubt that they sincerely believed that relieving CN of *all* her materials handling duties by reassigning her to Bend “would be good for her and her injury and to heal.” However, CN did not actually need to be relieved of all her materials handling duties to comply with her doctor's prescribed limitations, and it was not the District's prerogative to impose restrictions on her that she neither wanted nor needed. As Congress recognized when it enacted the ADA, “overprotective rules and policies” are a form of disability discrimination. 42 USC § 12101(a)(5).

To prevent that form of discrimination, the EEOC enacted the “direct threat” regulation, 29 CFR § 1630.15(b). Under that standard, “an employer will violate the ADA if it claims an employee with medical restrictions poses a safety risk [to herself] but it cannot show that the individual is a ‘direct threat.’” *EEOC ADA Leave Guidance*. “‘Direct threat’ means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” *EEOC Enforcement Guidance: Workers' Compensation and the ADA*.³⁴ See also *Nathan v. Holder*, EEOC Appeal No. 0720070014,

³³The majority asserts that the redacted portion of Physician Assistant Ericka Luckel's notes, dated June 12, 2017, confirms that the District's assessment of CN's physical abilities was “consistent with CN's medical providers' restrictions.” Luckel's note advised CN to “avoid any lifting, pushing, pulling with her left hand/upper extremity,” but also indicated that “[l]ight activity with her elbow at her side is okay.” Luckel's notes, however, were inconsistent with CN's May 31 Release, which was completed by a different medical provider, James Nelson, M.D. The form completed by Dr. Nelson specifically asks the provider to indicate which hands the patient can push and pull with, and Dr. Nelson checked the boxes for both left and right hands. (He also authorized her to push and pull with both hands on her May 15 Release.) The form does not ask the provider to indicate which hands the patient can use to lift, but Dr. Nelson authorized CN to lift and carry up to 15 pounds, and she presumably would use both hands to lift and carry that much weight. Dr. Nelson also authorized CN to “reach” for up to four hours, and although he indicated that she should not reach “above chest” level using her “left upper extremity,” that implies she could extend her left arm at least up to her chest level (and did not need to keep her left elbow at her side, as Luckel's note suggests). The fact that Luckel's notes contradicted Dr. Nelson's May 31 Release does not justify the District's decision to bar CN from engaging in physical activities that the May 31 Release expressly and specifically authorized her to engage in. Even if Luckel's June 12 notes somehow supplanted Dr. Nelson's May 31 Release, then CN's updated return-to-work release dated July 28, 2017, supplanted Luckel's June 12 note. And the July 28 Release, like the May 31 Release, expressly and specifically authorized CN to reach without any limitation; to push and pull with both hands; and to push, pull, and lift in weight and duration ranges that exceeded what was necessary to perform any PSS duties.

³⁴Available at: <https://www.eeoc.gov/policy/docs/workcomp.html>

2013 EEOPUB LEXIS 3571 at *22 (2013) (“In order to exclude an individual on the basis of possible future injury, the [employer] bears the burden of showing there is a significant risk, for example, a high probability of substantial harm. A speculative or remote risk is insufficient.”). “This means that an employer may not ‘err on the side of safety’ simply because of a potential health or safety risk.” *EEOC Enforcement Guidance: Workers’ Compensation and the ADA*.

Additionally, “[t]he determination that a direct threat exists must be the result of a fact-based, individualized inquiry that takes into account the specific circumstances of the individual with a disability.” *Id.* “A determination of significant risk cannot be based merely on an employer’s subjective evaluation, or, except in cases of a most apparent nature, merely on medical reports.” *Nathan*, 2013 EEOPUB LEXIS 3571 at *23.

The record in this case shows that the District’s assessment of CN’s ability to safely perform her materials handling duties was based solely on the subjective view of her supervisors (who are not medical professionals), and actually conflicted with that of her medical providers (who expressly authorized her to resume her regular work duties). That assessment falls far below the EEOC’s standard for an adequate “individualized assessment.” *See Nathan*, 2013 EEOPUB LEXIS 3571 at *25-27 (explaining that the employer’s assessment, which was based on a single study, was “insufficient to establish” that complainant posed a direct threat); *Harrison v. Ashcroft*, EEOC Appeal No. 01A03948, 2003 EEOPUB LEXIS 4333 at *16 (2003) (employer unlawfully based risk assessment on “generalized assumptions about complainant’s condition, and preconceived notions about how the condition [would] impact his health”).

The majority argues that there is no need to apply the direct threat standard in this case because the District has never raised direct threat as an affirmative defense. Majority opinion at 17 n 11. The District’s supervisors, however, testified that they concluded that reassignment was the only feasible option because they believed that CN might harm herself if she performed any materials handling duties. When an employer denies an individual an employment opportunity because of such concerns, an adjudicator (whether the EEOC, a court, an arbitrator, or this Board) must apply the direct threat standard to distinguish between an employer’s legitimate refusal to place an individual “at a specifically demonstrated risk” and the “sham protection” or “workplace paternalism” disallowed by the ADA. *Chevron U.S.A.*, 536 US at 86.

The majority declines to apply such scrutiny to the District’s claims; instead, they grant deference to both the supervisors’ subjective (and demonstrably incorrect) interpretation of CN’s releases, and their resulting determination that CN could not perform her duties at the Sisters branch, even with her requested accommodations. Majority opinion at 14-15.³⁵ In doing so, the majority permits the District to violate its contractual promises not to discriminate on the basis of disability and not to terminate employees without just cause.

³⁵For example, when the majority discusses the District’s determination that it was infeasible to accommodate CN at the Sisters branch, the majority simply quotes the District’s July 24 Accommodation Agreement, which does not specifically address the few accommodations that CN actually requested. The majority does not require the District to explain why it rejected those accommodations, much less prove that they were not feasible.

4. The District violated the ADA by rejecting CN's request for reasonable accommodation in her position at the Sisters location, and instead reassigning her to Bend.

When the District terminated CN, she was attempting to return from unpaid leave that the District had granted her as a reasonable accommodation under the ADA. "Leave as a reasonable accommodation includes the right to return to the employee's original position." *EEOC ADA Leave Guidance*. Accordingly, at the end of her leave, CN was legally entitled to return to her original position: a PSS at the Sisters branch.

CN requested a few accommodations so she could return to work in her original position while complying with the physical limitations specified in her May 31 Release, which was also her right under the ADA. *EEOC ADA Leave Guidance* ("Employees on leave for a disability may request reasonable accommodation in order to return to work.").

So long as the accommodations that CN requested were reasonable (*i.e.*, did not create an undue burden), and effective (*i.e.*, enabled CN to perform the essential duties of her original position), the ADA required the District to provide those accommodations and return CN to her original position, instead of unilaterally reassigning her. *See, e.g.*, 29 CFR § 1630.2(o); *Skerski v. Time Warner Cable Co.*, 257 F3d 273, 285-86 (3d Cir 2001).

As the court explained in *Skerski*, "the EEOCs commentary to the [ADA] regulations makes clear that reassignment 'should be considered only when accommodation within the individual's current position would pose an undue hardship.'" *Id.* at 285 (quoting *EEOC Interpretive Guidance*, 29 CFR pt 1630, App 1630.2(o)). In that case, the employee had requested an accommodation that would have enabled him to stay in his position, but the employer rejected his request and reassigned him instead. The court held that if the employee's requested accommodation was reasonable, then "the reassignment * * * did not satisfy the requirements of the ADA." *Id.* at 286. *See also Vollmert v. Wisconsin Department of Transportation*, 197 F3d 293, 301-02 (7th Cir 1999) (rejecting employer's argument that reassignment was a reasonable accommodation as a matter of law, because "reassignment generally should be utilized as a method of accommodation only if a person could not fulfill the requirements of her current position with accommodation"); *Smith v. Midland Brake, Inc.*, 180 F3d 1154, 1177 (10th Cir 1999) (The ADA "requires the employer to use reasonable accommodation to keep the employee in his or her existing job, and if that cannot be accomplished, to use reasonable accommodation to offer a reassignment to another vacant job which that person would be qualified to perform with or without a reasonable accommodation." (emphasis added)); *Gile v. United Airlines, Inc.*, 95 F3d 492, 496-98 (7th Cir 1996).

Further, as the D.C. Circuit noted in *Aka v. Wash. Hosp. Ctr.*, the ADA's legislative history confirms that "Congress saw reassignment, as the EEOC does, as an option to be considered *only after other efforts at accommodation have failed.*" 156 F3d 1284, 1301 (DC Cir 1998) (citing HR Rep No. 485(II), 101st Cong., 2d Sess. at 63 (1990), *reprinted in* 1990 USCCAN 267, 345; S Rep No. 116, 101st Cong., 1st Sess. at 6 (1989) (emphasis added)).

In this case, the District argues that the ADA did not require it to give CN her preferred accommodations, and that it had the prerogative to choose the accommodation of "reassignment" instead. In support of that argument, the District cites EEOC guidance which states: "The employer may choose among reasonable accommodations as long as the chosen accommodation is

effective.” *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (October 17, 2002) (“*EEOC Accommodation Enforcement Guidance*”).³⁶ However, that same enforcement guidance, like the authority discussed above, makes clear that *reassignment* as an ADA accommodation is different: an employer may reassign an employee only as a “last resort.” *Id.* (section titled “Reassignment”).³⁷ The guidance that the District relies on means that the District could have chosen to provide any of the accommodations that would have enabled CN to stay in her position at Sisters, but it does not mean that the District could reject all of those accommodations in favor of reassigning her to Bend.

Additionally, the *EEOC’s Accommodation Enforcement Guidance* makes clear that if an employer wants to reassign an employee, it is the employer’s burden to show that accommodating the employee in their current position would cause undue hardship:

“Example B: An employee with an ADA disability has taken 10 weeks of FMLA leave and is preparing to return to work. The employer wants to put her in an equivalent position rather than her original one. Although this is permissible under the FMLA, the ADA requires that the employer return the employee to her original position. *Unless the employer can show that this would cause an undue hardship, or that the employee is no longer qualified for her original position (with or without reasonable accommodation), the employer must reinstate the employee to her original position.*” (Emphases added.)

Like the employer in the EEOC’s hypothetical scenario, the District wanted to reassign CN to an equivalent position (a PSS in Bend), instead of returning her to her original position (a PSS in Sisters). However, the ADA required the District to reinstate CN to her original position, unless it could show that there was no accommodation that would enable CN to perform her essential duties, or that returning CN to Sisters would create an undue hardship. As discussed above, the District failed to make that showing in this case. CN requested that the District permit her to limit the weight of loads that she would need to lift and carry to 15 pounds; use her right arm instead of her left to perform various tasks, such as shelving books; and use the library’s existing step stools. The District failed to prove that any of those accommodations would have been ineffective or created an undue burden. Consequently, the District violated the ADA by reassigning CN to Bend instead of reinstating her to her position at Sisters.

The majority asserts that the PSS positions are “District-wide,” not branch-specific, and therefore questions whether the District’s action “constituted a ‘reassignment’ within the meaning of 29 CFR § 1630.2(o)(2)(ii).” Majority opinion at 14 n 6. Even if the “reassignment to Bend” was not a “reassignment” for the purposes of the ADA, I would still conclude that the District violated

³⁶Available at: <https://www.eeoc.gov/policy/docs/accommodation.html>

³⁷The Reassignment section of the Accommodation Enforcement Guidance states, in relevant part: “Before considering reassignment as a reasonable accommodation, employers should first consider those accommodations that would enable an employee to remain in his/her current position. Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodations would impose an undue hardship.”

the nondiscrimination and just cause provisions of the parties' CBA, because the District still discriminated against CN by imposing greater work restrictions on her than she actually needed (as discussed above), and violated the ADA by requiring CN to accept an accommodation offer and terminating her for declining it (as described below).

Nonetheless, based on my review of the record, I find that the PSS positions are branch-specific, and as a result, I conclude that what the District itself described as a "reassignment to Bend" was a "reassignment" within the meaning of 29 CFR § 1630.2(o)(2)(ii). To begin, the parties' CBA provides, "Regular employees shall be assigned a base work location at the time of employment." The parties define the "base work location" as "the location to which the employee normally reports at the start of the workday." Although the District may require an employee to report to an alternate location on a temporary basis, if it does so, the District must pay the employee for "travel time," including "[t]ravel time from home to the temporary work site which is in excess of commute time from the employee's home to the base work site."³⁸

Additionally, the District repeatedly referred to the PSS positions by location, and characterized moving CN to Bend as a "reassignment." For example, in the July 24 Accommodation Agreement that the District drafted unilaterally, the District explained that it had "reviewed the essential functions of [CN's] Public Services Specialist (PSS) position at the Sisters Library of the Deschutes Public Library (DPL) district"; determined that her request for accommodation at the Sisters Library was not feasible; and offered CN "[r]eassignment to the Downtown Bend Library" instead. Further, the District made clear that if CN accepted the offered accommodation, the reassignment would be permanent.³⁹ If the PSS positions were District-wide, as the majority suggests, it would not have been necessary for the District to specify that CN's reassignment to Bend would be permanent.

5. The District also violated the ADA when it terminated CN for declining to accept an unnecessary accommodation.

Under the ADA, "an employer cannot require a qualified individual with a disability to accept an accommodation that is neither requested nor needed by the individual." *EEOC The ADA: Your Responsibilities as an Employer*.⁴⁰ See also 29 CFR § 1630.9(d) ("An individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept.").

³⁸CN testified at hearing that to reach the Bend branch (instead of the Sisters branch), she would need to travel an additional 45 miles per workday (approximately 58 miles instead of 13 miles), which meant approximately 75 minutes extra commuting time per workday (and potentially more, depending on traffic and weather conditions). If CN accepted the accommodation of permanent reassignment to a position in Bend, the District would not pay her for that additional commuting time.

³⁹In the District's July 24, 2017, letter titled "Reasonable Accommodation Agreement," the District wrote, "Should you receive a full medical release without restrictions it is understood that you will occupy the PSS position for Downtown Bend."

⁴⁰Available at: <https://www.eeoc.gov/eeoc/publications/ada17.cfm>

If an individual rejects an accommodation, the employer can terminate the individual only if, as a result of that rejection, they are no longer “qualified” for their position. 29 CFR § 1630.9(d) (“[I]f [an] individual rejects a reasonable accommodation, aid, service, opportunity or benefit *that is necessary* to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered qualified.” (emphasis added)); *EEOC The ADA: Your Responsibilities as an Employer* (“[I]f a necessary reasonable accommodation is refused, the individual may be considered not qualified.”). Under the ADA, the term “qualified individual” “means an individual who, *with or without reasonable accommodation*, can perform the essential functions of the employment position *that such individual holds or desires*.” 42 USC § 12111(8) (emphases added).

In this case, the District required CN to accept the accommodation of reassignment (which was neither requested nor needed by her) or else be discharged. Specifically, in the July 24 Accommodation Agreement (which the District drafted unilaterally), the District directed CN to “check” one of two boxes:

- 1) “I accept the [reassignment] accommodation,” or
- 2) “I decline the [reassignment] accommodation and understand that by declining the accommodation I will be separated from employment.”

On July 28, 2017, after CN submitted an updated return-to-work release and explained that she no longer needed any accommodation, the District “notified [her] that the [reassignment] accommodation still applied and failure to check any option on the accommodation letter would be considered an indication of [her] declining the accommodation *resulting in separation from service*.” August 17 Termination Letter (emphasis added). On July 31, 2017, when CN met with her supervisor to turn in her building key and collect her personal belongings, she also submitted a letter stating that she was “declining” the District’s accommodation offer. The District, in its termination letter, confirmed that it terminated CN for declining to accept the accommodation offer, stating:

“You have rejected the offer despite the fact that we advised you in advance that your rejection of the offer would lead to termination of your employment.

“Based on your rejection of the accommodation and failure to report to work on August 1, 2017, you are notified that you are dismissed effective August 17, 2017.”

The District contends that, “[i]f CN had been allowed to reject the accommodation of working in the Bend Library, * * * she would not have been ‘qualified’ to perform at Sisters the ‘essential functions’ of retrieving and shelving materials.” Respondent’s Supplemental Brief at 8. For the reasons discussed above, I find that the District failed to prove that CN was no longer qualified for her position when it terminated her for declining the accommodation of reassignment. Rather, the record shows that, at least by July 28, 2017, CN could perform all of the essential functions of her position at Sisters – including retrieving and shelving materials – without any accommodation. Even though CN no longer needed any accommodation, the District reissued its ultimatum to CN, requiring her to either accept its accommodation offer by August 1, 2017, or be terminated. Because the District terminated CN for declining an unnecessary accommodation, the

District violated the ADA, and therefore the nondiscrimination and just cause provisions of the CBA.

6. Even putting aside the requirements of the ADA and the EEOC's enforcement guidance, I would conclude that the District lacked just cause to terminate CN.

Everyone agrees that to determine whether the District had just cause to terminate CN, we apply the "reasonable employer" test. When applying that test, we must decide "the factual question of whether the [employer's] action itself is objectively reasonable." *Brown v. Oregon College of Education*, 52 Or App 251, 260, 628 P2d 410 (1981). We often reframe that question as "whether a fictive reasonable employer would have taken the same action under similar circumstances." *Oregon School Employees Association v. North Marion School District 15*, Case No. UP-60-90 at 30, 24 PECBR 661, 690 (2012). The fictive reasonable employer, among other fair practices, "takes disciplinary action based on substantial evidence." *Id.* In a dismissal case, we apply the reasonable employer test to each of the employer's stated reasons for the dismissal. *Id.* at 31, 24 PECBR at 691. Additionally, the employer must prove "the underlying facts" of the disciplinary action by a preponderance of the evidence. *Id.* at 31 n 31, 24 PECBR at 691 n 31.

The District, in its August 17, 2017, termination letter, explained its reasons for dismissing CN as follows: 1) the District had "determined that [CN's] request for accommodation is not feasible at the Sisters Library"; 2) on July 24, 2017, the District offered her the alternative accommodation of "a reassignment from Sisters to the Downtown Bend Library stating on August 1, 2017"; 3) CN submitted a new return-to-work release on July 28, 2017, and explained that she was "released to return to work with no special accommodation required"; 4) the District "notified [her] that the accommodation [of reassignment] still applied and failure to check any option on the [July 24] accommodation letter would be considered an indication of [her] declining the accommodation resulting in separation from service"; 5) on July 30, 2017, CN notified the District that she was declining the accommodation offer and arranged to meet Library Services Supervisor Zoe Schumaker to turn in her building key and pick up her personal belongings; 6) CN "rejected the offer [of accommodation] despite the fact that [the District] advised [her] in advance that [her] rejection of the offer would lead to termination of [her] employment"; and 7) the District decided to dismiss CN "[b]ased on [her] rejection of the accommodation and failure report to work on August 1, 2017."

In my view, under the reasonable employer test, the District must prove by a preponderance of the evidence its threshold claim that it was "not feasible" to accommodate CN at the Sisters branch. That claim was the underlying factual basis for every employment action that the District subsequently took, including requiring CN to accept the accommodation of reassignment to Sisters on pain of discharge, and terminating her for declining that accommodation. If the District had proven that claim by a preponderance of the evidence, then I would conclude that its subsequent actions were objectively reasonable. Because the District failed to prove that claim, I conclude that it was not objectively reasonable to dismiss CN for declining the accommodation of reassignment to Bend.

The majority avoids asking whether the District proved that it was not feasible to accommodate CN at the Sisters branch, primarily by asserting that "the District terminated CN because she failed to report to work at the Bend branch on August 1, 2017." By oversimplifying the basis for the dismissal, when the majority asks whether the District proved "that CN did what

she was disciplined for,” *i.e.*, they require the District to prove only that CN did not report to work on August 1. There is no dispute that CN did not report to work that day; the District knew on July 31, 2017, that CN was declining its accommodation offer and that she would not report to work on August 1, because the District had made clear that it would terminate her if she declined its offer.

Under these circumstances, I believe that the just cause standard requires this Board to do more than ask whether the District proved that CN failed to report to work. Rather, the just cause standard requires us to ask whether the District proved its stated basis for requiring CN to accept the accommodation of reassignment on pain of discharge. If the District failed to prove the reason why it required CN to accept the accommodation to begin with, then it was not objectively reasonable for the District to discharge CN for declining it.

Further, I believe that the just cause standard also requires us to ask whether it was objectively reasonable for the District to discharge CN for declining the reassignment accommodation after she submitted her July 28 Release, which eliminated the few limitations that had any arguable impact on CN’s ability to perform her job duties. I submit that, under such circumstances, a reasonable employer would not have continued to insist that CN accept reassignment to Bend or be terminated. Rather, a reasonable employer would have recognized that the underlying basis for the reassignment had changed. Even assuming that CN would have to perform all of her materials handling duties at the Sisters branch without any assistance, and even assuming that the District still had a legitimate basis for questioning her ability to do so after CN submitted her July 28 Release, a reasonable employer would not simply reissue the ultimatum to either sign the July 24 Agreement or forfeit her employment.⁴¹ There were many reasonable alternatives that would not have involved termination of a 20-year employee “with an excellent service record.” Majority opinion at 17. To name a few, the District could have asked CN’s medical provider to provide more clarification; it could have required CN to undergo a fitness-for-duty exam; it could have given her the opportunity to prove that she could perform her essential duties at Sisters; it could have offered a temporary assignment to Bend instead of a permanent one.⁴²

The majority implies that it does not matter whether the District correctly determined that it was “not feasible” to accommodate CN at Sisters and therefore necessary to reassign her to Bend, because, in the majority’s view, CN unilaterally ended the interactive process by failing to

⁴¹The majority questions CN’s representation that she needed no accommodations to perform her PSS duties consistent with her July 28 Release, because she simultaneously stated that driving to Bend would cause her physical strain. I do not find those statements to be inconsistent because the essential duties of a PSS (as described in the record) are unlike driving. As CN testified, driving the longer distance to Bend, unlike any PSS duty, would require her to keep both arms raised at chest level for an extended period of time each day, and driving for longer distances places more physical strain on the body, whether injured or not. In any event, even if there were sufficient reasons to question or disregard CN’s representation that she could do her job, I would still find that the record shows CN could perform her essential duties within the few limits specified in her July 28 Release without any accommodation, and that the District failed to meet its burden to prove (1) that she still needed accommodation and, (2) if she did, that it was infeasible to provide such accommodation at Sisters.

⁴²Indeed, if the PSS positions are District-wide, as the majority asserts, then it was more unreasonable for the District to insist on permanently transferring CN to Bend, rather than temporarily.

“propos[e] something else” and instead “opt[ing] to just reject the accommodation and not show up to work.” Majority opinion at 16. However, CN did not simply “not show up to work.” Rather, she did exactly what the majority suggests she should have done: she proposed something else. Specifically, she provided an updated medical release, and proposed that the District return her to position at Sisters without any accommodations. If anyone ended the interactive process, it was the District, when it first informed CN that it would terminate her if she did not accept its offer of reassignment. If issuing such an ultimatum did not clearly signal that the District was done with the interactive process, then the District’s response to CN’s counterproposal did: the District refused to reconsider its position despite the fact that CN’s July 28 Release eliminated any relevant limitations and instead reissued its ultimatum—either accept the District’s final accommodation offer or be terminated.

Ultimately, the majority concludes that the District had cause to dismiss CN because she did not comply with the District’s directive to report to work in Bend on August 1. In other words, they find that CN was insubordinate. For the following reasons, I do not agree that CN’s decision to not report to work, under the circumstances of this case, amounted to insubordination or gave the District cause to dismiss her.

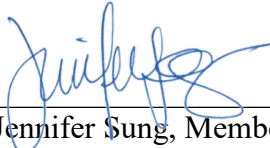
To begin, an employer does not have cause to discipline an employee for refusing to obey a directive unless the employer proves, as a threshold matter, that the directive was reasonable and lawful. Discipline and Discharge at 157, 165-66. For the reasons discussed above, I conclude that the District failed to prove that reassigning CN to Bend was either objectively reasonable or lawful.⁴³

Moreover, the District did not simply direct CN to report to work in Bend. Rather, the District directed CN to sign a document that it titled, “Reasonable Accommodation Agreement” (*i.e.*, the July 24 Accommodation Agreement). By its terms, signing that agreement would indicate CN’s “acceptance” of the permanent reassignment to Bend, and CN could reasonably believe that if she signed the agreement, she would be waiving her rights or giving up any claim she had to her position in Sisters under the ADA or the collective bargaining agreement. *See, e.g., Oregon Public Employees Union v. Malheur County, Commissioner Cox, Commissioner Hammock and Sheriff Mallea*, Case No. UP-47-87 at 4-5 & 8-9, 10 PECBR 514, 517-18 & 521-22 (1988) (employee reasonably understood that by signing contract she would be repudiating her grievance, even though that was not the employer’s intent and there was no express waiver).

⁴³The majority points out that the parties’ CBA generally permits the District to assign and transfer employees to other locations for operational reasons. However, the District has never claimed that it was reassigning CN to a position in Bend for operational reasons. Rather, the District’s stated reason for reassigning CN was that reassignment was the only way to accommodate CN’s physical disability, consistent with her May 31 Release. The District failed to prove that assertion. Further, the CBA also prohibits the District from discriminating on the basis of disability. Therefore, as the District acknowledges, it could not exercise its right to assign or transfer CN to a position in Bend if doing so discriminated against her on the basis of disability.

The District also made very clear to CN that if she did not sign the July 24 Accommodation Agreement by August 1, it would terminate her.⁴⁴ As a result, after CN notified her supervisor that she was declining the accommodation and returned the unsigned Agreement to the District on July 31, she could reasonably understand that she was terminated as of that date. Indeed, the District's supervisor met with CN on July 31 so she could turn in her building key and collect her personal belongings. Because CN could reasonably understand that the District had terminated her on July 31, she could also reasonably understand that she should not report to work on August 1. Under these circumstances, CN's decision to not report to work in Bend on August 1 was not insubordination or other voluntary forfeiture of her employment, but the natural and probable consequence of the District's directive to sign the agreement or be terminated. *See id.* at 9, 10 PECBR at 523 (holding employer unlawfully terminated employee, where employer presented employment contract on a sign-or-quit basis and employee resigned). Thus, I disagree with the majority's conclusion that CN's decision to decline the accommodation and not report to work gave the District cause to dismiss her, because I conclude that the District's underlying conduct gave CN sufficient cause to make that decision.⁴⁵

Finally, I recognize that the District reasonably accommodated CN by granting her extensive unpaid leave, and that the District engaged in the interactive process when CN requested reasonable accommodations to return to her position at the Sisters Library. However, the fact that the District acted lawfully and reasonably at earlier stages in the process does not mean that the District acted lawfully and reasonably when it dismissed CN for declining an unnecessary accommodation. The question is not whether the District is a generally reasonable employer, but whether the dismissal of CN was objectively reasonable under the circumstances.⁴⁶ Again, I conclude that it was not.



Jennifer Sung, Member

⁴⁴Specifically, the District stated in the August 17 Termination Letter, on July 28, 2017, that it “notified [CN] that * * * failure to check any option on the [July 24 Accommodation Agreement] would be considered an indication of [her] declining the accommodation resulting in separation from service.” Thus, CN did not have the option of refusing to sign the July 24 Accommodation Agreement but continuing to work for the District after August 1.

⁴⁵Even if CN's failure to report to work in Bend on August 1 could properly be deemed insubordination or other conduct warranting discipline, I would find that the level of discipline that the District imposed—dismissal—was objectively unreasonable in light of the mitigating circumstances, including the District's own conduct and CN's 20-year service record.

⁴⁶“If the course of action is not one that would have been pursued by the reasonable employer, then we must conclude that ‘no reasonable employer’ would have acted in that manner, regardless of whether or not we believe the actual employer in question is, overall, a reasonable employer.” *Brown*, 52 Or App at 258 (quoting *Brown v. Oregon College of Education*, Case Nos. 1046 & 1067 at 8 (1981) (Board Member Hein, dissenting)).

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-002-19

(MANAGEMENT SERVICE DISMISSAL)

V.,	)	
	)	
Appellant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
STATE OF OREGON, OREGON HEALTH	)	AND ORDER
AUTHORITY,	)	
	)	
Respondent.	)	
_____	)	

On January 9, 2020, this Board heard oral argument on Appellant's objections and Respondent's cross-objections to a November 6, 2019, recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew, after a hearing on May 23 and June 14, 2019. The record closed on July 19, 2019, upon receipt of the parties' post-hearing briefs.

Appellant, of Portland, Oregon, represented himself.

Brena Moyer Lopez, Senior Assistant Attorney General, Labor & Employment Section, Oregon Department of Justice, Salem, Oregon, represented Respondent.

On March 28, 2019, the State of Oregon, Oregon Health Authority (OHA) removed Appellant from management service, terminating his employment. On April 23, 2019, Appellant filed a timely appeal.

On review before the Board, the issue is whether OHA violated ORS 240.570(3) when it removed Appellant from management service (and ended his employment), effective March 28, 2019.¹

As discussed below, we conclude that OHA's removal of Appellant from management service did not violate ORS 240.570(3). We therefore dismiss the appeal.

RULINGS

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

FINDINGS OF FACT

The Parties

1. OHA is an agency of the State of Oregon. One of its components is the Center for Public Health Practice, whose mission is to prevent and control infectious disease, record vital events, and assure an effective, statewide public health emergency preparedness and response system for Oregon. The Administrator of the Center is Collette Young. One of the six components of the Center is the Oregon State Public Health Laboratory (OSPHL or Lab).

2. The Lab's work includes genetic testing of samples provided by individuals to be tested for chlamydia and gonorrhea (STDs).² The sample providers grant permission for their samples to be used only for that purpose. The genetic testing is actually for the genetic material of the bacteria or viruses that cause the STDs, not the DNA of the human hosts.

3. This type of work is very technical and raises significant privacy concerns. Accordingly, the work is highly regulated, and the Lab is responsible for working within specific federal and state statutes and regulations, as well as technical standards and Lab policies. Lab managers, such as Appellant, are responsible for Lab compliance with these policies. The Lab also has a Quality Management Officer, SH.

4. In May 2017, Appellant, a geneticist, began work as the Virology and Immunology Section Manager at OSPHL, a position classified as a Principal Executive Manager F (PEM-F). He was responsible for overseeing analysis and specialized testing for infectious diseases and disease agents relevant to public health in Oregon, and supervising approximately nine

¹For purposes of this final order, we have modified the issue statement to reflect what is still in contention. Specifically, because the ALJ's recommended order determined that OHA had not proved certain charges, and OHA did not object to those portions of the recommended order, OHA has not preserved those issues. We therefore adopt and affirm those conclusions and reproduce in this order only what remains at issue. For purposes of clarity and brevity, we have also modified the findings of fact to remove those that are no longer at issue or extraneous to what is still contested.

²The Lab refers to gonorrhea and chlamydia by the medical shorthand "CT/GC." The parties also appear to use CT/GC more broadly to refer to the specimens submitted for testing, and the testing process. For purposes of this order, we will use the broader but more familiar acronym "STDs."

microbiologists. Appellant's supervisor was Lab Director John Fontana, and Appellant was a member of the Lab's management team. Fontana's supervisor was Administrator Young.

5. Before working at the Lab, Appellant worked at a private research laboratory where his work was not subject to the level of regulatory and policy constraints in place at OSPHL. One of Appellant's hobbies was the pursuit of proof of a cryptid in the forested Pacific Northwest and other similar habitats. At the private lab, Appellant had tested samples of hair and other material provided by others to see if they were from the cryptid. Appellant brought some unprocessed and processed samples from his previous work with him and stored them in the Lab freezer. LG, the Lead Microbiologist in Appellant's section, used a special box in the Lab freezer for Appellant's oligos³ and other material that was not related to the normal work of the section. The materials in the box were not labeled in the Lab's format, and the tubes had non-Lab label codes.

Appellant's early work at the Lab⁴

6. In May or June 2017, Appellant asked Lab Director Fontana if he (Appellant) could get some supplies and a small space where he could do his own research.⁵ Fontana denied the request, and urged Appellant to focus on managing his section and becoming more familiar with the regulatory constraints on the Lab. Appellant continued to mention his desire to pursue research projects to Fontana and SH throughout his tenure at the Lab. Fontana and SH generally responded that the Lab does not engage in new research, and that even when the Lab needs to adopt new technical practices, the Lab does not have the resources or expertise to develop those practices, and usually adopts practices developed elsewhere.

7. The only formal research done at the Lab is method evaluation, *i.e.*, review of the Lab's current or proposed scientific testing or evaluation processes. Method evaluation is conducted through validation and verification experiments to determine whether the Lab should adopt a new testing or evaluation process to improve the Lab's scientific work.

8. When Appellant began work at the Lab, employees used a checklist of steps to follow in order to implement any new method to be used in the Lab's work. According to the checklist, before taking steps to order supplies or equipment, section managers were to (1) decide whether implementing a new method was justified in light of the OHA mission; (2) outline the details of the proposed new method and implementation plan (including a timeline estimate);

³An oligo, or oligonucleotide, is a short nucleic-acid chain usually consisting of up to approximately 20 nucleotides (DNA, the chemicals designated by the letters A, G, C, and T). Oligos are used in genetic testing of a sample of DNA or RNA to determine the sample's genetic composition. See *Merriam-Webster Online Dictionary*, retrieved October 29, 2019, <https://www.merriam-webster.com/dictionary/oligonucleotide>.

⁴We have removed various findings originally set forth in the recommended order that concerned various statutes, regulations, and OHA policies that were related only to a charge that is no longer at issue.

⁵In his objections, Appellant disputes the timing of these requests, asserting that he did not initiate them until "much later on" around September 2017. We find that the record supports the timeline as set forth in this finding of fact, but note that, in any event, our ultimate conclusion on the appeal does not rely on the specifics of when Appellant first approached Fontana to discuss these research projects.

(3) perform a cost analysis; and (4) present all of the above to the Lab Director (Fontana) for approval.

9. Lab Quality Management Officer SH's duties include ensuring that Lab employees follow statutory and regulatory obligations and the Lab's policies to maintain its accreditation for clinical practice. Appellant and SH did not have a good working relationship.

10. Appellant's subordinates complained to SH on occasion regarding what SH described as Appellant's poor communication regarding Lab policies and procedures, including method evaluation procedures. SH eventually raised these issues with Fontana and Young, who consulted with OHA Human Resources staff.

11. As a result, Fontana and SH created a method evaluation flow chart explaining the Lab's relevant policies and procedures to be used by Appellant and his subordinates in doing method evaluation. The flow chart included, as a step, the approval of the Lab Director before any plan could be implemented. Fontana discussed this flow chart with Appellant.

Appellant's research projects

12. At some point before fall 2018, Appellant and Lab Director Fontana discussed the fact that the new technology available to the Lab might provide some opportunities to gather more data about the relationship between STDs and the genomes of infected individuals. Appellant testified that he started to create a formal proposal on the subject, which we refer to as Appellant's STD inquiry.⁶ Fontana did not authorize Appellant to engage in a formal or informal research project, or to create a proposal for such a research project.

13. Appellant testified that, in order to create a research proposal on this subject and complete the steps of the method evaluation flow chart, he needed to assess the quality of the Lab's STD specimens. Appellant testified that he decided to use scientific means and the Lab's tools to assess the quality of the specimens.

14. Appellant tested some of his own DNA and determined that the method he used to obtain his DNA contaminated the sample with DNA from his pet dog.

15. Appellant did not get Fontana's approval to assess any specimens in relation to an STD inquiry.

⁶When we refer to Appellant's STD inquiry in this order, we do so for the purpose of representing the record and not to make a factual finding that he actually engaged in that inquiry. In that regard, Appellant testified that he used the various Lab resources at issue in this case for both his STD inquiry and his cryptid research. The State contends that Appellant never actually engaged in any STD inquiry, noting that there is no evidence of that inquiry other than Appellant's own testimony. It is unnecessary to resolve this factual dispute because, for purposes of this order, we need only determine that Appellant's use of Lab resources was unauthorized. In other words, even if we credited Appellant's testimony, his explanation would not mean that OHA's discipline violated ORS 240.570(3).

16. During August, September, and October 2018, Appellant ordered scientific equipment and supplies, including small metal forceps, primers and probes, and a thermo mixer. Appellant used these supplies for research outside the scope of the Lab's authorized work.

17. Appellant stated that he ordered the small forceps because he did not like the larger, plastic forceps in use at the Lab. Small forceps are preferred for handling mammalian DNA sample preparations in testing not performed in the course of the Lab's authorized work. On September 27, 2018, at Appellant's direction, the Lab ordered eight small forceps, at a cost of \$56.60.

18. Primers and probes are specific oligonucleotides (or oligos) used for polymerase chain reaction (PCR) in gene sequencing and identification. This is the method of determining the specific composition of a sample of DNA. Primers and probes can be viewed as chemical tools to unravel, reveal, identify, duplicate in large quantities, or otherwise use genetic material.

19. Appellant directed Lab employees to procure the following primers and probes, all for mammalian DNA, useful in the STD inquiry and cryptid research. On September 19, 2018, the Lab purchased eight primers to sequence mammalian mitochondrial DNA, costing approximately \$330.⁷ On October 10, 2018, the Lab purchased six primers and three probes for approximately \$390. On October 26, 2018, the Lab purchased seven primers for approximately \$275. Appellant asked LG to put these materials in the "freezer with the rest of my sequencing stuff when delivered."

20. Appellant ordered a thermo mixer, which was purchased by the Lab on October 3, 2018, at a cost of approximately \$2,600. The thermo mixer was not necessary for the Lab's regular work with STD specimens.

21. During the fall of 2018, Appellant's subordinates told SH that Appellant had designated a lab bench for work he was doing, but they did not know what that work was. As a result, SH scheduled an audit of the Virology and Immunology Section for November 7, 2018. SH, Fontana, and Appellant were present during the audit.

22. During the audit, SH and Fontana noticed the box of materials and storage tubes in the Lab's storage freezer labeled "[Appellant]'s oligos." When SH and Fontana asked Appellant what the materials in the box were for, Appellant answered that they were for "sequencing." SH considered that answer to be evasive, because it described a method of analysis (determining a DNA sequence), rather than the reason for the analysis (the particular DNA sequences sought). Fontana later asked Appellant whether he was doing his own work or research at the Lab; Appellant replied that he was not.

23. Also in the fall of 2018, the Lab acquired a new DNA/RNA sequencing instrument (the Sequencer). The Sequencer, about the size of a small microwave oven, enables its user to determine the DNA/RNA sequences of multiple samples at once. The discovered sequences can then be used to identify the type of living thing (or virus) that the sample came from.

⁷At the January 9, 2019, investigatory meeting, Appellant stated that this purchase was "not that much for [the cryptid]," but more for the STD inquiry.

24. The Sequencer operates as follows. The user prepares a sample on or in a gel, often by pipetting material and adding it to the gel. The user inserts the gel in a container, puts the container into a plate or grid holding multiple samples, and inserts the grid into the machine. The user separately places tubes of primers or probes into the machine, which the machine uses in sequence to chemically determine the genetic sequence of each sample. The Sequencer collects the data generated by the action of the primers and probes and reports the DNA sequence of each sample to the user through a monitor screen or a user-attached computer.

25. The Sequencer was installed in the fall of 2018, while Appellant was on vacation. LG, the Lead Microbiologist in Appellant's section, was responsible for the installation. The installation was successful, and the Sequencer was functional. However, the Sequencer could not be used for official, reported Lab work until the machine had completed a validation process to be completed on a non-scheduled date in the future. The validation process was not completed before the Lab placed Appellant on home-duty status on December 3, 2018. After installing the machine, LG gave it a generic password so that any Lab employee could use it. This was the process that LG generally used when she installed a machine in the Lab.

26. When Appellant returned from vacation, he viewed the Sequencer and concluded that it was not configured as he preferred. He changed the configuration and also changed the Sequencer's password to one known only to himself. He intended that ultimately each user would have their own password. However, he did not implement that plan, and, later, after hearing of complaints from an employee who wanted to do some preparation work for the validation process, Appellant changed the password back to the original password. Except for one employee who called Appellant at home while he was stationed there, no employee asked him for either password.

27. In October and November of 2018, Appellant spent significant time at a lab bench near the Sequencer, pipetting substances, creating gels, and then running them through the Sequencer. Because the machine had not been validated, no other Lab employees used the machine, and the other Lab employees were puzzled about what Appellant was doing. At some point, an employee sought to access the machine to prepare it for the validation process, but did not ask Appellant for the password.

28. During this period, Appellant used the forceps, primers and probes, and thermal mixer that he had directed the Lab to order, as well as the Sequencer itself, for unauthorized projects that were outside of the scope of the narrow work that the Lab performed. Specifically, Appellant acknowledged that he took some or all of his old cryptid-related samples (which were collected or sent to him by others), prepared them for the Sequencer, and then ran them through the machine. During the disciplinary process, Appellant stated that he needed to do this to refresh the sometimes illegible labels on the specimens' containers. However, no one had authorized Appellant to do this testing, and Appellant did not disclose to his coworkers or supervisors that he was doing it.

29. Appellant further did some computer processing of data that he had obtained in previous cryptid work. Either from his cryptid work at the lab, or his work at home, Appellant determined that he had reached an important breakthrough in cryptid research that he wanted to

share with his supervisors. He did not, however, share this information with his supervisors at any time before his disciplinary process.

30. The Lab planned to use the Sequencer (after validation) to sequence potential noroviruses. However, SH noticed that Appellant had apparently not ordered any oligos required to sequence noroviruses. SH reviewed Appellant's previous purchase orders to find out what supplies he had ordered in the preceding months.

31. SH discussed the purchase orders with LG. LG typically purchased supplies for others in the section, had processed several of Appellant's purchase orders, and had become concerned that Appellant's activities were not work related.⁸ SH and LG discovered that Appellant's orders included primers and probes to sequence mammalian mitochondrial DNA.⁹ They became concerned about those orders because the Lab is only authorized to analyze bacteria or viruses, not mammalian mitochondrial DNA.

32. SH was also concerned because the Lab had not obtained consent from specimen donors to test their mitochondrial DNA. Those donors had authorized use of the specimens only for bacteria or viruses. Accordingly, she believed that if Appellant were engaged in human mitochondrial DNA testing, he could be violating the regulations governing donors' rights that were followed by the Lab.

33. Fontana, SH, and LG were aware that one of Appellant's hobbies was the pursuit of proof of cryptids in the forested Pacific Northwest and other similar habitats. In mid-November, 2018, LG did an internet search regarding cryptids. She found a newsletter article, which stated that "[Appellant] has a lab in Oregon who would conduct the study [of genetic evidence of the cryptids]." The article did not identify Appellant as an employee of the State, or identify the lab as a State lab. During this time, LG collected information about Appellant's work in a file.

34. LG reported this information to SH, and, on November 16, 2018, SH raised the issue with Director Fontana and Center Administrator Young. Fontana and Young became concerned that Appellant was using Lab resources in a search for cryptids. They believed such work was not only outside the scope of the Lab's work but also potentially damaging to its reputation for scientific rigor.

35. On November 21, 2018, LG took a photograph of the Sequencer's monitor screen, which showed that it was running a file called "Paterson Samples." Paterson was a name associated with the cryptid-seeking community.

⁸LG testified that she did not confront Appellant about his orders because she was worried about his reaction; the record does not reveal why she did not report the purchases immediately to SH or Fontana.

⁹SH and LG determined the exact purpose of the primers and the probes during the investigation by checking the DNA and RNA base pair sequences and other codes located on the primer and probe purchase orders against a database of the National Center for Biotechnology Information.

36. Fontana reviewed documents regarding Appellant's activities supplied by SH and LG, and requested copies of additional purchase orders. After the Thanksgiving holiday, Fontana reported to Young and OHA's Human Resources Department that he had evidence that Appellant had engaged in unauthorized activities and purchasing at the Lab.

37. On December 3, 2018, the Lab ordered Appellant to be duty stationed at his home pending further investigation. Fontana, LG, and a Lab information technology (IT) specialist inspected Appellant's work area, materials in the freezer, his ordered materials, the contents of his state-issued laptop and thumb drive, and other electronic data records and storage. They discovered that Appellant had used the Sequencer. Specifically, they found that 30 out of 125 injections were used from the Sequencer injection cartridge (multiple DNA samples can be sequenced from each injection). The sequencing occurred on seven different dates, ending on November 29, 2018.

38. Fontana and the IT worker reviewed Appellant's state-issued laptop, desktop computer, and thumb drive. They also noticed a personal hard drive connected to the desktop computer. The thumb drive held photographs of the PCR/amplified DNA from gels which were run through the Sequencer.

39. The results in the gel photos also corresponded to the contents of a Russian language "legend" or "key" document on the thumb drive. Fontana translated the legend into English using an online program. The legend identified the origin of each tested specimen, which included samples of Appellant's blood, a wolf, and hair samples from two names associated with the cryptid research community.

40. LG compared the data from the Sequencer runs against the Center for Biotechnology Information Database to identify the source. The oligos (primers and probes) matched those that Appellant directed the Lab to order.

41. Lab officials found no evidence that Appellant had performed any work on an STD inquiry, on the Sequencer or any other device or computer file.¹⁰

Fact-finding meeting and related correspondence

42. On January 9, 2019, Young, Fontana, and an OHA Human Resources worker held an investigatory meeting with Appellant.

43. During the meeting, Appellant stated that he had used the Sequencer and Lab supplies on his STD inquiry, looking at human mitochondrial DNA to identify non-individual characteristics of the donors without other identifying information.

¹⁰During the investigation, Appellant represented to his managers that he used the same file structures and data reporting templates in his STD inquiry that he had used in his cryptid research, retaining the file names but overwriting the data. The record does not contain non-testimonial evidence to confirm or deny this assertion.

44. Appellant also stated that he had used the Sequencer to re-analyze the DNA samples that he brought with him from his former employer and that were part of his cryptid investigation.

45. When asked if he had obtained an approved evaluation plan before beginning his testing projects, Appellant said he did not believe it was necessary, because the data was de-identified. He stated that he had planned to take the results of the STD inquiry and important cryptid data to Fontana and Young once the quality of the data could be confirmed, but this effort had been sidelined by his being duty stationed at home.

46. Appellant also stated that Fontana had expressed interest in his potential study regarding STDs. Appellant asserted that in academia, expressing an interest meant “yes.” Fontana, meanwhile, did not believe that he had actually expressed any interest in an STD study, and had never suggested interest or granted permission for the STD activities that Appellant asserted that he performed.

47. When asked where the documentation related to the STD research was located, Appellant stated that he had deleted it.

48. After he returned home on January 9, Appellant supplemented his statements at the fact-finding through an email to Young, Fontana, and the Human Resources employee. Appellant described his displeasure with the lack of scientific rigor of a piece of cryptid literature from the internet that had been discussed in the meeting, and reiterated that he participated in a cryptid discussion group (regarding his work in 2010 through 2012) purely as a private citizen and that he had never told the group that he had a lab in Oregon to do DNA analysis of possible cryptid samples.

49. Appellant then stated, “What I have described in my answer to [Fontana]’s question on what studies I was conducting prior to investigation started has nothing to do with the above as the analysis results I have mentioned were obtained only about a month ago [late November 2018] and were totally unexpected, while the above discussions took place several months-to-half a year ago. I am putting together more detailed account of this and will send it later.”

50. On January 11, 2019, Appellant sent another email to the investigatory meeting participants. The letter detailed Appellant’s reasons for reconfiguring the Sequencer and changing the password. He asserted that the reagents, once placed in the machine, had only a three-month shelf life, and that, for reasons not in Appellant’s control, the machine would not be validated for formal Lab work before the three months had elapsed.¹¹

51. In the same email, Appellant stated,

“To avoid useless loss of valuable supplies I decided to use it for method development for the project I briefly discussed earlier with [Director Fontana] on several occasions – I recall at least two, maybe three, during the past year. [Fontana]

¹¹OHA disputes that assertion, noting that it was within Appellant’s control to have the Sequencer validated. Additionally, it appears that Appellant also used the purchased mammalian primers and probes at some point in this sequencing process.

expressed interest in the project, which I briefly describe below. It was understood that such interest did not mean formal approval for performing such studies. In fact, at the time there was nothing even in the planning phase yet to request approval for. There was no clearly written study plan with transparent goals and a realistic budget with defined sources of funding, and with all regulatory requirements associated with research involving human patient samples taken into consideration and satisfied.

“* * * * *

“Therefore, before engaging in a laborious process of developing the research plan, budget and regulatory compliance it was decided to use the already installed reagent and supplies to clarify if the collected samples are satisfactory for the planned studies. That is, whether the collected samples do contain human DNA of satisfactory quality (undegraded) and in sufficient quantities, and whether the routinely used in the section ‘clean lab’ practices are adequate to obtain reliable results. In a most economical and efficient way the goal could be achieved by isolating total DNA from randomly selected and reliably de-identified patient samples followed by PCR amplification and sequence analysis of a highly conservative fragment of human DNA. Since all humans share the same DNA sequence at the examined locus, this seemed to preclude challenges associated with handling of private genetic information. *My mistake, as I found during the fact finding meeting, * * * * *, was that interest expressed in earlier brief discussions did not mean that even a limited sample qualification yes/no study should be considered approved. In other words, even testing for suitability of the collected samples for the planned study was expected to be discussed in detail with the director, defined in some form as a research plan, and approved before initiated. I sincerely apologize for misunderstanding and misinterpretation of the situation.*

“For this purpose, I have analyzed a PCR-amplified human mitochondrial DNA (mtDNA) fragment * * *. Over 95% of humans, * * * have identical DNA sequence in this region. * * *. Based on my previous [cryptid] studies in 2010-2012 * * *, this fragment or its subfragments reliably amplify by PCR from miniscule amounts of human DNA. * * *. To much of my surprise, however, along with a few instances when my mtDNA^[12] was detected, more than a half of DNA samples contained clearly non-human sequences * * *. The pattern of differences, however, seemed familiar, which prompted me to dig through archived data I collected during [cryptid] studies * * *.

“* * * * *

“[Appellant describes his apparently successful efforts to convert data files containing results of his 2010-2012 research into a format accessible to his current computers at home, and then turns to a description of that data.] In 2010-2012 studies, the analyzed fragments from all 43-50 submitted hair samples were shown

¹²The term “mtDNA” is an abbreviation for mitochondrial DNA.

to be of animal origin, among which a significant number of sequences were of canine origin (wolves, coyotes, dogs, foxes). Upon reexamination of the recovered datasets, I found the sequence pattern I was observing in sequenced mtDNA fragments from [STD] patient samples. This strongly suggested contamination of DNA isolated from patient samples with canine DNA and indicated that practiced in the VI¹³ section 'clean lab' procedures are not adequate to protect patient specimens from contamination with external DNA. The only feasible source of the observed contamination was my hands and/or clothes contaminated with my house dog DNA, which was confirmed by analysis of DNA from dog's hair.

"The described sequencing activities were performed during November 2018, and the analysis was ongoing at the time the studies were interrupted due to investigation. The plan was that upon completion the results are to be discussed with the director. At large, the results indicated that 'clean lab' practices currently accepted in the VI section are not adequate for studies involving human samples suggesting that the feasibility of the planned study needs to be reconsidered. Relevant discussion with the director was planned during December 2018.

"During reexamination of the archived [2010-2012] datasets my attention was attracted to sequencing data recovered from samples submitted from the North West * * *, which did not seem conclusively analyzed but looked unusual. I reanalyzed these using new analysis algorithm and open source software, which resulted in a shocking conclusion. While two out of three of the reanalyzed North West samples were clearly identified as of horse and canine origin, the third sample was undoubtedly human-like yet clearly not human. Based on alignment to mtDNA of known human DNA haplotypes, Neanderthal, Denisovan, known great apes (chimpanzee, gorilla, orangutan) and rhesus monkey, the sequence undoubtedly pointed to a new unknown primate species, which was much closer to humans, yet shared some of great ape and extinct Homo species. * * *

"Based on reports of numerous [cryptid] research enthusiasts and field researchers * * *. Washington and Oregon are two states that purportedly have the biggest population of wild human-like creatures * * *. Lack of a biological proof of existence of such human-like species precludes even mere consideration that [the cryptid] and contacts of humans with it, which have significantly increased in last 50 years, should be of public health concern. For example, it is widely accepted now that HIV emerged somewhere in Africa when the Simian Immunodeficiency virus (SIV) jumped the species barrier. However, no one ever considered that in Northern California lives a substantial population of creatures, which biologically are much closer to humans than any of great apes, so viruses would not need to jump the species barrier to emerge in human population. * * *. While definition of OHA activity boundaries and formulation of public health strategy are a way beyond my responsibilities and expertise, I felt that the shocking finding can be the first biological proof of their existence and this need to be discussed with the management beginning from the lab director. However, I was not completely sure

¹³Appellant is apparently referring to his Virology and Immunology Section.

that the obtained stunning evidence is not just result of an artefact stemming from malfunction of the sequencer used to collect sequencing data. The original raw data files were not available as they remained on the ABI sequencer that [Appellant's former employer] has chosen to retain. Most likely they have been lost. For this reason, as part of my preparation of meeting with the management for discussion of this really astonishing result, I attempted to reexamine DNA extracts archived after completion of the 2010-2012 studies by reamplifying and resequencing the analyzed mtDNA fragment. The analysis of sequencing data files has not been completed due to initiation of the investigation.

"I agree, however, that such activity would need to be approved by the director before it is initiated. It was not, and I apologize for that. In defense of my actions, however, I felt that due to the controversy of the topic my suggestion would not be taken seriously and, to be honest, could even raise question of my sanity. So before facing the challenge of presenting my recent finding in such a controversial field, I wanted to ensure I have a solid methodological ground under it.

" * *. The result I have mentioned was obtained during last week of November 2018 and sequencing data were not accessed due to investigation. The discussions, which presumably resulted in misrepresentation of my position on the topic in the above document, took place several months-to-half a year ago when I was not even considering to reexamine the archived data and DNA samples."* (Emphases added.)

52. A member of the OHA Human Resources staff contacted Appellant for the Sequencer password when he was duty stationed at home, but he did not provide it. Rather, he replied via email that he did not remember the password because he had reset it.

Software purchases

53. The Lab had several licenses for "CLC Genomics Workbench" software. One license was in Appellant's name. Appellant had a version of the software at home, and when the license was due to expire Appellant used \$1,000 of Lab funds to extend it. Appellant contends that he intended to transfer the license to the Lab, but several practical problems, including access to his home computers, arose. However, at the time of his duty stationing at home, Appellant's CLC Genomics Workbench license had never been applied to any software installed on any Lab computer.

54. Before being duty stationed at home, Appellant had installed three unauthorized computer programs on his state-issued laptop computer: Team Viewer Remote Control, Technitium MAC Address Masker, and NORDVPN. None of these programs were installed or approved by the Lab, OHA Office of Information Services (OIS), or the State.

55. Team Viewer Remote Control allows one person to remote-control another person's computer. Appellant used this program for a time to assist his wife, who spoke only

Russian, in communicating with other Russian speakers. By using the remote program, Appellant was able to assist his wife with computer problems without leaving the office. Appellant also used the program to pull documents from his home computer data storage.

56. Technitium MAC Address Masker allowed Appellant to change or “spoof” his computer’s address in order to avoid computer network restrictions based on a computer address, and hide the real computer address of the State-issued laptop from others.

57. NORDVPN, a virtual private network program (VPN), allowed Appellant to create a network to prevent other network users from tracking or detecting his computer network activity.

58. When a computer in the State network operates outside the firewall of the normal State computer network, the State computer system is exposed to risk. Viruses from outside computer networks could invade the State network, and confidential information could be taken by outside parties. The Lab, in particular, holds very sensitive health-related information for Oregonians.

59. Previously, Appellant had tried several times to find ways to work outside of the State computer system firewalls so that his State-issued laptop could connect with outside computer networks. State information technology staff repeatedly told Appellant that it was inappropriate to do so. After the Regional IT Manager for OIS refused some of Appellant’s requests, Appellant unsuccessfully asked the Regional IT Manager’s subordinates directly to enable his OHA laptop to make outside connections.

60. In 2015, OHA terminated a management service employee for personal use of his state-issued cellphone. The employee had incurred charges for approximately \$1,000 in personal calls, and initially lied about possession of the phone. The employee also asserted that his personal use was because the State-issued phone speaker made it easier to hear his mother during his daily calls to her.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. OHA’s removal of Appellant from management service did not violate ORS 240.570(3).

Standards for Decision

Before he was terminated, Appellant was a management service employee. ORS 240.570(3) provides that a “management service employee may be disciplined by reprimand, salary reduction, suspension or demotion or may be removed or dismissed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily.” When a State management service employee appeals an agency’s removal to this Board, the agency has the burden of proving that its discipline did not violate ORS 240.570(3). OAR 115-010-0070(5)(c). The agency meets its burden of proof if this Board

determines that, under all of the circumstances, the agency's actions were "objectively reasonable." *A.D. v. State of Oregon, Department of Transportation*, Case No. MA-011-17 at 9 (March 2019).

We have defined a reasonable employer as one that disciplines employees in good faith and for cause, imposes sanctions that are proportionate to the offense, and considers the employee's length of service and service record. *Id.* A reasonable employer also administers discipline in a timely manner and clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met. *Id.* In addition, a reasonable employer applies the principles of progressive discipline, except where the offense is so serious or unmitigated as to justify summary dismissal or removal, or the employee's behavior probably will not be improved through progressive discipline. *Id.* (citing *Nash v. State of Oregon, Department of Human Services*, Case No. MA-008-14 at 23 (December 2014)).

A management service employee may be held to high standards of behavior, so long as those standards are not arbitrary or unreasonable. *Stoudamire v. State of Oregon, Department of Human Services*, Case No. MA-4-03 at 7 (November 2003). Further, a significant factor for this Board's consideration is the extent to which the employer's trust and confidence in the employee have been harmed, compromising the employee's ability to be effective as a member of the management team. *A.D.* at 14-15.

We review management service disciplinary appeals using a two-step process. *Id.* at 10. First, we determine if the employer proved a charge or charges that are the basis of the discipline, although the employer need not prove all of the charges. *Id.* Second, if the employer has proven some or all of the charges, we apply a reasonable employer standard to determine whether the employer was justified in taking the disciplinary action. *Id.* If the employer's actions are not objectively reasonable, we will rescind or modify the discipline. *Id.*

With those standards in mind, we now apply them to the facts in this case. In doing so, we note at the outset that Appellant does not dispute that he engaged in some inappropriate conduct, but asserts that the penalty of dismissal was too severe. Nevertheless, we address the charges made by OHA, some of which were not proved, and then address the appropriateness of the penalty.

a. OHA did not prove that Appellant violated OSPHL procedures, as defined in ORS 192.531 to 192.549, the Health Insurance Portability and Accountability Act [HIPAA], and OSPHL policy.

In its removal letter, OHA stated that Appellant "violated OSPHL procedures, as defined in ORS 192.531 to 192.549, the Health Insurance Portability and Accountability Act [HIPAA], and OSPHL policy." The recommended order concluded that OHA did not establish this violation. OHA did not object to that portion of the recommended order, and we adopt and affirm that conclusion.

b. Appellant directed OHA staff to order supplies that were not intended to be used for the Lab's authorized public health purposes.

The record in this case demonstrates that Appellant directed the ordering of the following supplies for unauthorized research: small forceps (\$56); chemical primers and probes (\$1,000); and a thermo mixer (\$2,600), for a total of approximately \$3,656. Appellant does not dispute that he directed these purchases, but contends that he ordered them to further an STD inquiry, and that he had been authorized to engage in such an inquiry by his supervisor, Lab Director Fontana. OHA contends that Fontana never approved any such inquiry, and that Appellant never actually used these supplies for an STD inquiry, but used them only for his cryptid research. Even assuming that Appellant used the supplies for an STD inquiry, the record establishes that such an inquiry was outside the scope of the Lab's work and unauthorized.

Appellant testified that he had multiple brief discussions with Fontana about the potential for using STD specimens to determine if there was a relationship between a person being infected with a specific STD and that person's DNA, and that, based on those discussions, he believed that Fontana had authorized Appellant to begin such research. However, Appellant also testified that Fontana had expressed, at most, an interest in such a project. Fontana disputes that he ever indicated interest in such a project. Although Appellant contended that, to a research scientist, "interest" means "yes," even if true, such a vague expression of support is insufficient to authorize a research project in the setting of the Lab, which is a public health testing facility, not a research laboratory. Moreover, it is undisputed that Fontana never actually said yes to any such proposal.

Appellant also testified that he merely conducted some preliminary testing to assess whether the potential research project was viable and prepare a formal proposal. The State contends that Appellant never conducted such preliminary testing, and only performed cryptid research. Even assuming that Appellant conducted preliminary testing to develop a proposal for his STD inquiry, there is no evidence that Fontana or any other supervisor gave Appellant permission, overt or vague, to engage in any such preliminary testing, or to purchase lab equipment or supplies to prepare an STD research proposal. As Appellant has stated, the need for the preliminary testing had not even occurred to him before beginning the method analysis for the broader research project that Fontana had expressed only vague interest in (if any). Nor is there any evidence that there was any discussion, or expression of "interest," that would justify the expenditure of significant agency funds on preparing any research proposal. Moreover, the Lab is a highly-regulated clinical laboratory whose work does not involve independent research, particularly the type of research that Appellant wanted to undertake. Under these circumstances, we conclude that Appellant's directions to order small forceps, mammalian primers and probes, and the thermo mixer, and the use of public funds to do so, were not for Lab-authorized public health purposes. Therefore, OHA proved this charge.

c. Appellant used OHA's Sequencer to pursue unauthorized work.¹⁴

Appellant acknowledges that he used the Sequencer, and related primers/probes/reagents, to re-identify his own, preexisting DNA samples related to research on a cryptid. Although Appellant also asserts that he used the Sequencer, and related primers/probes/reagents, as part of an STD inquiry, such use would also be unauthorized and outside the scope of the work of the Lab. Accordingly, OHA proved this charge. In reaching this conclusion, we note that Appellant's actions significantly affected his staff, who were troubled by his work on a project that he had not explained to them and appeared to be working on privately. Indeed, it is that discomfort, in part, that appears to have led to Fontana's investigation of whether Lab resources were being used for a non-public health purpose. Moreover, Appellant's work and use of the Sequencer were neither explained to nor authorized by any Lab supervisors. It is reasonable, under such circumstances, for the Lab to lose trust in Appellant's ability to fully perform his managerial responsibilities, particularly given the high level of trust required of someone in Appellant's position.¹⁵

d. Appellant inappropriately used \$1,000 of state funds to renew a personal software license.

As set forth in our factual findings, before starting employment with the Lab, Appellant had some CLC Genomics Workbench software. While employed at the Lab, the software license expired. Appellant directed approximately \$1,000 in state funds to be used to renew that personal license. Appellant defended his use of state funds for the renewal of his personal license by stating that he ultimately sought to transfer the license to the Lab, when it acquired some relevant equipment. Even if that were true, Appellant did not request permission for this unusual purchase, did not document this purchase as ultimately for the Lab, did not inform his supervisor or colleagues of the purchase, and the software license was never, in fact, transferred to the Lab. We also note that OHA already had other licensed copies of that software. Accordingly, we conclude that OHA proved this charge.

e. Appellant installed unauthorized software applications on an assigned OHA laptop.

Appellant does not dispute that he had three self-installed computer programs on his State-issued laptop computer: (1) Team Viewer Remote Control; (2) Technitium MAC Address Masker; and (3) NORDVPN. Appellant used Team Viewer Remote Control to control a computer at his home that his wife used in order to assist her in communicating with other Russian speakers. According to Appellant, this permitted him to spend more time in the office during the day, because he did not have to go home to fix his wife's computer. Appellant also used Team Viewer to pull documents from his home computer data storage to a computer that he was using at his worksite.

¹⁴The recommended order concluded that OHA did not prove that Appellant changed the Sequencer's password for personal reasons or that such a change caused staff to be unable to use that instrument. OHA has not objected to this conclusion, and we adopt and affirm it.

¹⁵It is immaterial that, according to Appellant, the reagents used would have become useless if not used because their short shelf life would expire before the Sequencer was validated. Even if that were true, Appellant nonetheless used the Sequencer itself for unauthorized purposes; the short shelf life of the reagents does not mitigate the inappropriateness of that use.

Appellant claims that he installed the Technitium MAC Address Masker and NORDVPN as aides to allow him to use Team Viewer. Appellant further contends that it was reasonable for him to believe that all of the programs were acceptable under State information technology policies because the OHA OIS information technology office did not contact him to tell him to remove the programs. Appellant notes that OIS IT had previously contacted him to instruct him to remove an Adobe Photoshop program from his computer days after he had installed it.

We conclude, however, that Appellant should have known that it was not reasonable to install this type of software on a State laptop, even if not instructed by OIS IT to remove it. To begin, this type of software is far beyond limits imposed by the OHA OIS office. Moreover, this type of software does not serve an apparent work-related purpose, and Appellant has not provided one. Thus, even accepting Appellant's explanation for why he installed the software, such an explanation does not support his appeal, as the software did not advance the public health work of the Lab. Finally, the record does not establish that Appellant attempted to verify or advise his supervisors or IT employees that he had installed the software. We further note that Appellant bears a greater responsibility for this conduct as a manager supervising employees subject to the same policy. Therefore, we conclude that OHA proved this charge.

Level of Discipline

We now consider whether OHA's removal of Appellant from management service was the action of a reasonable employer. We have determined that Appellant directed the purchase of approximately \$3,656 worth of materials and equipment for unauthorized research; applied State resources to work with previously obtained samples from a research project outside the scope of the Lab's work; renewed a \$1,000 license for personal software without disclosing the purchase or any commitment to transfer that license to OHA; and installed software on his State-issued laptop without authorization and for nonwork purposes. We also note that Appellant engaged in most of this conduct without explaining it or its purpose to his supervisors, coworkers, or IT workers.

Based on these determinations, we conclude that the removal was objectively reasonable and consistent with ORS 240.570(3). To begin, OHA's "burden in justifying a removal from management service is relatively minor." *Zaman v. State of Oregon, Department of Human Services*, MA-21-12 at 15 (April 2013) (quoting *Plank v. Department of Transportation, Highway Division*, Case No. MA-17-90 at 29 (March 1992)). Here, Appellant's actions are not insignificant, particularly given his management-service status and his high-level responsibilities. As set forth above, OHA may hold a management service employee to strict standards of behavior, so long as those standards are not arbitrary or unreasonable. *Lucht v. State of Oregon, Public Employees Retirement System*, Case No. MA-16-10 at 24 (December 2011); *Helper v. Children's Services Division*, Case No. MA-1-91 at 22 (February 1992). Consistent with that approach, this Board has previously upheld the removal and dismissal of management service employees for personal use of state resources. See *Stoudamire* (personal use of State-issued cell phone, incurring several thousand dollars in charges); *Wesley v. Employment Department*, Case No. MA-20-02 (October 2003) (accessing ex-husband's confidential records for personal use in a child support dispute). We see no distinguishing characteristics of this case that would result in a conclusion that OHA violated ORS 240.570(3), or that OHA was required to progressively discipline

Appellant, given his management-service status, the significance of his actions, and the fact that all of those actions concerned, at least in part, the use of public resources for non-public work.¹⁶

On this point, Appellant acknowledges that he engaged in improper conduct, but he contends that the penalty of dismissal was too severe, and that he was entitled to some form of progressive discipline. In considering whether it was reasonable for OHA to forego progressive discipline, we reiterate that, where management-service employees are concerned, strict standards of behavior may be required, so long as they are not arbitrary. Here, we do not find OHA's standards to be arbitrary. For example, OHA is entitled to expect its managers to comply with all policies regarding the proper use of public funds and public equipment, including IT resources, and to seek clarification if those policies are not understood. Such expectations are particularly reasonable when the manager, like Appellant, is responsible for a significant component of its operations, such as the Virology and Immunology Section of the Lab, and is vested with substantial authority, including expenditure authority. Similarly, OHA is entitled to expect a Lab section manager to understand that engaging in unexplained projects would cause staff to have reasonable questions about whether the projects are within the approved scope of public science performed at the Lab. Additionally, given the seriousness of the conduct (unauthorized use of public resources), progressive discipline was not required. *See Stoudamire* at 7 (progressive discipline not required for misuse of state-issued cell phone, and characterizing the violation as "flagrant"). We also note Appellant's relatively short tenure (approximately 22 months), a factor that weighs against the need for progressive discipline of a high-ranking manager. Finally, the record in this case establishes that OHA has reasonably lost trust and confidence in Appellant's ability to act effectively as a member of the management team. That is a significant factor that we consider in these circumstances. *Lucht* at 24. Therefore, on this record, we do not find summary dismissal to be unreasonable.

Finally, in reaching our conclusion, we note that Appellant acknowledged that some of his conduct was wrong, and apologized to his supervisors regarding that conduct, which is commendable. At the same time, however, Appellant did not appear to fully realize the gravity of those actions, and particularly their impact on his ability to model appropriate behavior to subordinates including, in this case, microbiologists and other technically skilled staff who have a professional stake in the clinical reputation of the public health lab. In addition, OHA persuasively argues that Appellant's actions lacked proper judgment and discretion, which negatively reflected on the mission and image of the Lab. That is another significant factor that leads to our conclusion that OHA's decision was reasonable. *See Salchenberger v. State of Oregon, Department of Corrections*, Case No. MA-19-12 at 11 (July 2013). Therefore, for the foregoing reasons, we dismiss the appeal.

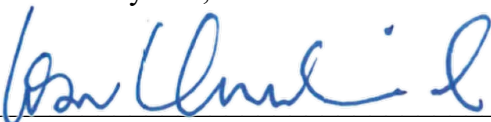
¹⁶We note that Appellant asserted that his professional status as a scientist and recognized researcher involved conducting some non-work-related professional activities (such as reviewing papers or research by others), and that such non-work-related professional activities during work time are not inappropriate. Even accepting that premise, Appellant's actions fall outside the range of those activities, and instead involved the use of public resources without notice and approval, or for purposes inconsistent with the work and image of the Lab. If Appellant sought to use incidental work time, for example, to engage in professional or scientific pursuits not directly work-related, OHA reasonably expected that he would explain those activities to his superiors, and ensure that they were consistent with the work, mission, and image of the Lab.

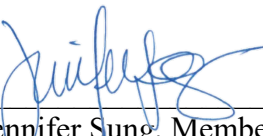
ORDER

The Appeal is dismissed.

DATED: February 6, 2020.


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-008-19

(UNIT CLARIFICATION)

SALEM CITY ATTORNEY'S COLLECTIVE	)	
BARGAINING UNIT,	)	
	)	
Petitioner,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND ORDER
CITY OF SALEM,	)	
	)	
Respondent.	)	

Daryl S. Garrettson, Attorney at Law, Lafayette, Oregon, represented Petitioner.

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

On January 23, 2020, 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 the matter. OAR 115-010-0090(4).

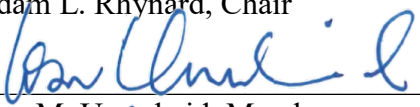
In these circumstances, OAR 115-010-0090(5) allows the Board to limit the precedential value of the final order. The Board does so in this case. Accordingly, the order is binding on, and has precedential value for, only the named parties in this case.

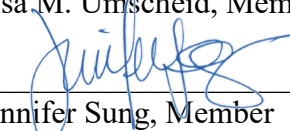
ORDER

The petition is dismissed.

DATED: February 13, 2020.


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-008-19

(UNIT CLARIFICATION)

SALEM CITY ATTORNEY’S COLLECTIVE	)	
BARGAINING UNIT,	)	
	)	
Petitioner,	)	RECOMMENDED RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND PROPOSED ORDER
CITY OF SALEM,	)	
	)	
Respondent.	)	

A hearing was held before Administrative Law Judge (ALJ) B. Carlton Grew on September 5, 2018, at the offices of the Oregon Employment Relations Board (ERB) in Salem, Oregon. The record closed on October 18, 2019, following submission of the parties’ post-hearing briefs.

Daryl S. Garrettson, Attorney at Law, Lafayette, Oregon represented Petitioner.

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

On June 3, 2019, the Salem City Attorney’s Collective Bargaining Unit (Petitioner or Union) filed a petition for unit clarification regarding the inclusion of the Deputy City Attorney (DCA) position in the Union bargaining unit.

On June 24, Respondent City of Salem (City) filed objections to the petition asserting that the DCA position is supervisory under ORS 243.650(23) and the collective bargaining agreement.¹

The issue in this case is:

Should the existing bargaining unit of “[A]ll career status assistant City Attorney’s for the City of Salem, excluding confidential and supervisory employees” be clarified to include the position of Deputy City Attorney?

¹The City also objected on the grounds that the position is confidential, but did not pursue that argument at hearing or in its post-hearing brief.

We conclude that the DCA position at issue is supervisory and therefore not appropriately included in the bargaining unit. We therefore will dismiss the petition.

RULINGS

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

FINDINGS OF FACT

The Parties

1. The City is a public employer within the meaning of ORS 243.650(20). Its employees are organized into several bargaining units. One administrative unit of the City is the Office of the City Attorney. That office includes three units whose employees are relevant to this Petition, a civil litigation unit, a general counsel unit, and a prosecution unit. Throughout the events at issue in this case, the City Attorney has been Dan Atchison.

2. The Union is a labor organization within the meaning of ORS 243.650(13). Prior to the events at issue, the Union represented approximately five Assistant City Attorney IIs (ACAs) in the three units of the City Attorney's office.

3. As of June 10, 2019, the City Attorney's office had seven staff attorney positions: litigation DCA Gaddis; two prosecutors overseen by prosecutor DCA Zimmerman; and three general counsel ACAs who report to and are directly supervised by the City Attorney. The prosecutor ACAs prosecute criminal offenses or violations of the city code in the City of Salem Municipal Court, and handle appeals from that court's decisions.² The general counsel ACAs provide general counsel services to various City departments. The litigation DCA, like her litigation ACA predecessor, represents the City against tort claims in state and federal court.

4. As of June 10, 2019, the City Attorney's office had seven non-attorney staff positions: one City Recorder/office manager, one Deputy City Recorder, one paralegal, three legal assistants, and one part-time office support person. All are unrepresented. The City Recorder serves as the office manager and supervises the other employees except for the paralegal and a legal assistant. The City Recorder reports to and is supervised by the City Attorney.

2013 Bargaining Unit Certification

5. On May 8, 2013, the Union filed a petition with this Board seeking recognition of a bargaining unit of "6 Assistant City Attorneys for the City of Salem, Unit includes 3 general counsel attorneys, 1 civil litigator, 2 prosecutors. All attorneys responsible for covering prosecution when staffing needs dictate." (Exh. P-1 at 2.) When the petition was filed, each of the proposed bargaining unit attorneys was classified as an ACA.

²The municipal court operates under ORS 221.336 *et seq.*, and is not a court of record. Appeals of criminal convictions from municipal court are to the Circuit Court for Marion County under ORS 221.339.

6. The City objected to the petition, arguing that the ACA responsible for litigation (litigation ACA) was not properly included in the bargaining unit. The ALJ's Recommended Order, as adopted³ by this Board on July 14, 2014, stated in part:

"An appropriate bargaining unit is: *Assistant City Attorneys for the City of Salem excluding confidential and supervisory employees*. The parties stipulated that [then Acting City Attorney] Atchison is excluded from the bargaining unit as a supervisory employee under ORS 243.650(23), and that [the prosecutor ACA, now the prosecutor DCA] Zimmerman is excluded from the bargaining unit as a confidential employee under ORS 243.650(6). The remaining employees are appropriately included in the bargaining unit." *Salem City Attorney's Collective Bargaining Unit v. City of Salem*, Case No. CC-004-13 at 2, 26 PECBR 61 at 62 (July 1, 2014) (emphasis added).

7. On October 23, 2014, during bargaining for its first collective bargaining agreement, the Union proposed a recognition clause stating: "The City recognizes the Association as the sole and exclusive bargaining representative under ORS 243.650 et seq. for all Assistant City Attorneys for the City of Salem excluding confidential and supervisory employees." (Exh. P-7.) On December 9, 2014, the City proposed a recognition clause stating:

"The City recognizes the Association as the sole and exclusive bargaining representative under ORS 243.650 et seq. for all career status employees in the classification of Assistant City Attorney I & II. Employees in supervisory or confidential position[s] as defined in ORS 243.650 are neither covered by this contract nor represented by this association." (Exh. P-6.)

The Union rejected the City's proposal.

8. On March 18, 2015, the parties agreed upon the following recognition clause: "The City recognizes the Union as the sole and exclusive bargaining representative under ORS 243.650 et seq. for all career status Assistant City Attorneys I & II for the City of Salem, excluding confidential and supervisory employees." (Exh. P-8.)

³Neither party objected to the 2014 Recommended Order, and this Board followed its practice of adopting the Recommended Order as binding on the parties but without other precedential authority:

"When neither party objects to a recommended order, we generally adopt the recommended order as our final order, and we consider any objections that could have been made to that order unpreserved and waived. *International Brotherhood of Electrical Workers, Local Union No. 659 v. Eugene Water & Electric Board*, Case No. UP-008-13, 25 PECBR 901 (2014). Consistent with that practice, we will adopt the recommended order as our final order in this matter. This final order is binding on, and has precedential value for, the named parties only. *Id.* Despite the precedential limitations of such a final order, we publish the uncontested recommended order as an attachment to the final order. *Clackamas County Peace Officers Association and Atkeson v. City of West Linn*, Case No. UP-014-13, 26 PECBR 1 (2014)." *City of Salem*, Case No. CC-004-13, 26 PECBR 60 (July 1, 2014).

9. Prior to the events at issue here, in early 2018, the Office of the City Attorney had approximately 14 employees: one City Attorney, one DCA, one City Recorder/office manager, five ACAs, a paralegal, a legal assistant, and four other support staff. The City Attorney is the head of this office. At that time, there were two supervisory employees, the City Attorney and the City Recorder. The City Attorney directly supervised the City Recorder, three ACAs, and the confidential DCA. At some point prior to 2018, the prosecutor DCA had become the supervisor of the two ACA prosecutors. The City Recorder supervised the support staff.

10. Until October, 2018, ACA Jane Doe⁴ was the City's in-house civil litigator. Previously, the City's litigation unit had consisted of the civil litigator ACA and a legal assistant. Under Doe, the City added a paralegal position funded by the City's self-insurance fund. The paralegal and legal assistant were supervised by the City Recorder.⁵

11. Litigation ACA Doe had difficulties working with the paralegal and litigation assistant. They questioned Doe's work assignments and direction with their supervisor, the City Recorder, who is not an attorney. Mina Hanssen, the City Human Resources Director, coached Doe in working with these employees. During Doe's tenure, two legal assistants transferred out of the unit, and one was terminated.

12. City Attorney Atchison had some concerns that the City Recorder did not completely understand the skills and personality required for civil litigation, and that the shared oversight between the City Recorder and the litigator ACA created room for second-guessing.

13. On September 13, 2018, Atchison emailed HR Director Hanssen the following:

"I've been thinking of adding a second deputy or other senior ACA in the office. Increasingly I have called upon [an ACA] to take on complicated non-risk litigation and involved him in a number of upper management issues. While those are not strictly confidential 'labor' issues, I would like the flexibility to bring him in discussions that may affect employees, and which the unions would likely object to. Because of that I am limited and haven't brought him in on a number of discussions.

"The financial cost would be fairly minimal. Let me know what you think."

(Exh. R-19.)

14. In response to Atchison's query, City Human Resources staff reviewed alternatives for the civil litigator position, including reviewing the responsibilities of civil litigators in other jurisdictions.

⁴A pseudonym.

⁵Both parties refer to the relationship between the City Recorder and these employees as supervisory.

15. On October 2, 2018, the City offered an ACA prosecutor position to a candidate; she accepted the offer.

Adding a Second DCA Position in the City Attorney's Office

16. In October, 2018, litigation ACA Doe left City employment. The City began a recruitment process to fill that vacancy.

17. During the recruitment for the litigation ACA position, HR Director Hanssen discussed the position with her analyst team. On October 16, 2018, Hanssen sent an email to Atchison, stating in part:

“We are recommending that the litigator be a supervisor over the litigation team. The litigator would supervise the paralegal and the legal secretary assigned to litigation. By making the litigator a supervisor the position is no longer represented by the Union. The additional duties would provide for great wage possibilities.” (Exh. R-26 at 1.)

18. On October 17, the City Recorder/office manager emailed Hanssen regarding the City Attorney's request to reclassify the vacant ACA position as a Senior Assistant City Attorney. She stated,

“Dan sent me an email asking that I check in with you regarding his request to reclass the position to a senior asst city atty. He said you had indicated language could be put in the job posting that the classification and pay scale are subject to change but he was not sure who would do that. He did not put that in the draft posting * * * so if we are supposed to do that, let me know and I can edit the attachment. He just wanted to be sure it was included.” (Exh. R-23 at 2.)

19. On October 18, 2018, HR Director Hanssen responded that the City had no Assistant City Attorney classifications except Assistant City Attorney I and II. Hanssen presented Atchison with three options: (1) Post the position immediately at the current pay and classification. (2) City Human Resources would develop a new classification, Assistant City Attorney III, which would require Union agreement, and City Council adoption, of the pay scale. Such a position could not be posted until adopted by the City Council. (3) The third option was to:

“[M]ake some minor adjustments to [the DCA] classification so that it would include the litigator. The litigator would no longer be part of the union and would need to be given supervisory responsibilities ([over the] paralegal and litigation legal secretary). This option would not require us to negotiate the classification with the union or go to [City] council. You would essentially end up with two supervisors (litigation team and prosecution team). If you decided to go with this option we could post fairly quickly.” (Exh. R-22 at 1.)

20. On October 23, 2018, Atchison informed Hanssen that they should not make any changes and see whether the current recruitment succeeded. If the recruitment failed, the City

could consider reclassifying the position or making other changes. Atchison also stated that he would talk with Hanssen about potential changes in the position for the next budget year.

21. On November 30, the City offered the litigation ACA position to a candidate. On December 3, the candidate declined the offer, stating that her current employer had raised her salary above the City's offer. That same day, Atchison offered to place the candidate on the DCA pay scale, and, the following day, step 7 of that pay scale, but the candidate continued to decline the position, ultimately citing personal reasons. On December 6, Atchison forwarded the candidate's final email declining the position to Hanssen. Hanssen replied, "Well . . . too bad. Should we prep to repost at the higher position." (Exh. P-11 at 1, ellipses in original.) Atchison replied that they should.

22. On December 6, 2018, Hanssen and Atchison decided to repost the position at the DCA wage scale. Shortly thereafter, Atchison notified the Union about the reclassification of the litigation ACA to DCA; Union officials expressed concerns about the change. Hanssen decided that the City could meet and discuss the issue with the Union but that this reclassification was a management right under the collective bargaining agreement.

23. On December 11, 2018, the City posted the recruitment for a litigation DCA. The posting stated in part:

"The civil litigator works as the lead within the litigation team, comprised of paralegal, legal assistant, and other city attorneys who assist with case preparation and prosecution."

(Exh. P-18 at 1, emphasis added.)

Other than the language emphasized above, the posting did not refer to any supervisory role, and did not state that supervisory experience was necessary or desirable to perform the litigation DCA duties.

24. On December 12, 2018, Atchison emailed City Attorney staff that the litigation ACA recruitment had failed, the City had opened a new recruitment, the position would be posted as a DCA, and the DCA would "oversee the litigation team and have direct supervisory responsibilities over the paralegal and legal assistant positions and other attorneys who assist in litigation matters." (Exh. R-27.) On December 19, the Union demanded to bargain over the change. The City agreed to bargain.

25. The December recruitment failed, and the City hired a professional recruiting firm. On February 12, 2019, the recruiting firm sent a position profile checklist to the City, which was filled out by Atchison. The sole mention of a supervisory role was the following language: "The civil litigator works as the lead within the litigation team, comprised of a paralegal, legal assistant, and other city attorneys who assist with case preparation and prosecution." (Exh. P-28 at 5.) The position title used by the City Attorney was "Deputy City Attorney – Civil Litigation." (Exh. P-28 at 5.)

26. On February 13, 2019, pursuant to the City Attorney's December 10, 2018 request, the City HR department issued a Position Classification Review of the vacant litigation attorney position, formally reclassifying it from ACA to DCA effective December 10, 2018. The review states in part,

"The legal department requested reclassification of a vacant Assistant City Attorney II to Deputy City Manager [*sic*] after a failed recruitment. The position is responsible [for] providing civil litigation services for the City, and representing the City and the Urban Renewal Agency in a wide variety of claims. *The position serves as lead over the litigation team over other assistant city attorneys, a paralegal and legal assistants*, and serves as general counsel for assigned City departments. The scope of duties and requirements of the civil litigator is more closely aligned with the Deputy City Attorney job classification in that it requires more experience in representing local governments or equivalent in order to represent the City in civil litigation matters." (Exh. P-36 at 2, emphasis added.)

27. The parties had their last bargaining session on March 12, 2019. The statutory 90-day bargaining period ended on March 19.

28. The final recruitment announcement, on March 14, used the same position title and litigation team lead language as before.

29. While the published recruitment material used the terms "lead" and "oversee," but not "supervise," Atchison believed that applicants outside the Oregon labor law community would likely not know the differences between those terms as used under the Public Employee Collective Bargaining Act (PECBA).

30. In his discussions with the ultimately successful candidate for this position, Atchison told the candidate that she would have hiring, firing, and assignment authority over the paralegal and legal assistant. Atchison viewed this information as an inducement to the candidate to accept the position.

31. On May 7, 2019, City Attorney Atchison announced that the City had hired Jenn Gaddis for the litigation DCA position. On May 8, Hanssen informed the Association that the City would implement its proposal to move the litigation ACA duties out of the bargaining unit to the DCA position, and to provide a one percent pay increase to the ACAs.

32. Gaddis began work on June 3, 2019.

33. Also on June 3, 2019, the Union filed this petition.

Litigation DCA Gaddis' responsibilities

34. Two of DCA Gaddis' previous jobs included supervisory responsibilities: chief administrative prosecutor for the Bureau of Labor and Industries; and chief deputy district attorney. As litigation DCA, Gaddis oversees two positions, a paralegal (temporarily vacant at the time of hearing) and a legal assistant. The litigation unit continues to defend the City against tort

claims and oversees and coordinates with outside counsel. DCA Gaddis also provides counsel to the City's risk division and appears in court on behalf of the City.

Assignment and direction of work

35. DCA Gaddis sets the work hours of her two subordinates, reviews and approves their flexible schedules, and approves adjustments to those schedules. Gaddis reviews and approves time cards, requests for time off and adjusted work hours. For example, Gaddis has approved compensatory time in lieu of overtime pay when her assistant worked overtime; approved a request for flexing a schedule in August, but refused to do so for that December, stating that December was too far into the future; granted various schedule changes based on an employee's need for medical leave; and granted the legal assistant the day off.

36. Gaddis generally makes these adjustments without any input from the City Attorney or any other superior to Gaddis. Gaddis has consulted with Human Resources staff regarding how certain leave events should be handled under City policies.

37. DCA Gaddis assigns work to her legal assistant and paralegal, depending on the skill required for the assignment and the skill and training of the two employees. However, as of the time of hearing, the paralegal Gaddis was to oversee had been on medical leave, on administrative leave pending an investigation, and then no longer employed by the County, leaving the paralegal position effectively vacant from early June, 2019, until the time of hearing.

38. The work Gaddis has assigned to the legal assistant includes drafting pleadings such as an answer and a response to a document request; compiling and labeling exhibits; adding exhibit citations to a submission in a legal proceeding; drafting correspondence; scheduling meetings; and managing contact with a prison in a case involving a prisoner. Gaddis has chosen not to have her legal assistant perform research, filing, or reviewing records.

39. Gaddis is responsible for the work product of the litigation unit. If a paralegal drafted, and Gaddis filed, an insufficient pleading, Gaddis would be held accountable by both the tribunal and the City Attorney.

Discipline and discharge

40. In early June, 2019, City officials discovered that litigation paralegal MC, one of Gaddis' subordinates, had possibly abused her work access to the Police Records Management System (PRIORS) database and the State Law Enforcement Data System (LEDS). PRIORS contains information such as police reports and witness statements; LEDS holds information about arrests and convictions. An investigation determined that (1) MC looked up certain individuals based solely on her personal life; (2) MC had a previous criminal conviction which disqualified her from having any access to the database in any event; (3) access to PRIORS and LEDS was a requirement for MC's position; and (4) another employee of the litigation unit, legal assistant TP, had assisted MC in looking up the individuals in question.

41. DCA Gaddis, with substantial assistance from Human Resources staff, oversaw MC's disciplinary process. Human Resources associate Kirsten Madigan performed an

investigation, and provided Gaddis with the information she obtained. The State Police also conducted an investigation, and DCA Zimmerman acted as the City Attorney liaison for that investigation. Gaddis, however, formally made the decisions for the City during the process, and she alone signed the relevant notices to MC. Those decisions included placing MC on administrative leave, determining that the investigation was complete, and concluding that there was cause to terminate MC. In drafting these notices, Gaddis referred to similar notices that the City had issued before. City Attorney Atchison did not participate in the decision to hold the due process hearing or in drafting the notice. Gaddis was the sole signatory of the notices of possible misconduct and termination.

42. After the due process hearing notice was issued, Gaddis agreed to MC's requests to change the hearing date and to bring a third-party observer. Gaddis attended the hearing with Human Resources associate Madigan and then decided to terminate MC. The decision to terminate MC was based on MC's inability to lawfully access the PRIORS and LEDS criminal databases, an essential function of her position, and was therefore a foregone conclusion.

43. Gaddis informed Atchison of the results of the investigation and her decision to terminate MC. Atchison accepted Gaddis' decision and did not conduct his own investigation.⁶

44. Gaddis was responsible for determining whether legal assistant TP should be disciplined for assisting MC in improperly accessing the databases. Gaddis chose to issue TP a counseling and an oral reprimand, and documented the counseling in a note in TP's personnel file. Gaddis understood that she was authorized to issue more significant discipline.

45. Prosecutor DCA Zimmerman has held the lead prosecutor's position since at least 2015. At the time of the bargaining unit certification in 2014, Zimmerman was an ACA, but the Union stipulated that she was excluded from the bargaining unit as a confidential employee under ORS 243.650(6). She has provided labor relations and collective bargaining assistance to City management since that time. DCA Zimmerman oversees the City's prosecution unit, which is Zimmerman and two ACAs who prosecute criminal offenses or violations of the city code in the City of Salem Municipal Court and handle the resulting appeals.

46. DCA Zimmerman sat on hiring interview panels as one of three panel members. She exercised her judgment and discretion in deciding whether to accept or reject the panel recommendation, undertake additional interviews, check applicant references, and evaluate information obtained in the additional interviews and reference checks. Zimmerman has also evaluated the work of new hires on trial service, deciding whether to promote a hire from trial service to career status. In one instance, Zimmerman decided to extend the trial service period for a new prosecutor and put him on a work plan.

47. At the time of hearing, the City was recruiting to hire paralegal MC's replacement. Gaddis was overseeing the hiring. She decided on test questions for the applicants, had the

⁶At her due process hearing, MC stated that other employees outside the litigation unit knew of her criminal conviction and had accessed PRIORS for nonofficial uses. The City conducted a separate investigation of those allegations. Gaddis was not responsible for that investigation or any resulting discipline.

authority to accept or reject panel recommendations, and the authority to direct a new recruitment if she was not satisfied with the field of candidates selected for interview or the candidate picked by the panel.

48. The City has granted DCA Gaddis the authority to evaluate the new hire's performance during and following their trial service period and deciding whether to grant the new hire permanent status.

49. The City intends that the relatively new litigation DCA Gaddis perform actions regarding hiring, discipline, trial service completion, assignment, and other supervisory functions with the same level of authority and discretion demonstrated by the longer-serving DCA Zimmerman.

CONCLUSIONS OF LAW

The issue in this case is:

Should the existing bargaining unit of “[A]ll career status assistant City Attorney’s for the City of Salem, excluding confidential and supervisory employees” be clarified to include the position of Deputy City Attorney?

We conclude that the DCA in the City’s litigation unit is a supervisory employee and therefore not appropriately included in the existing bargaining unit.⁷

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, “supervisory employees” are not “public employees” as defined by the statute and cannot be appropriately included in a bargaining unit. ORS 243.650(19); *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).

To determine supervisory status, this Board determines whether an employee meets the specific criteria set out in ORS 243.650(23). That provision 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

⁷We confine our decision to the litigation DCA (currently Gaddis) identified in the petition. Prosecutor DCA Zimmerman, the other DCA, has been deemed confidential by the parties since 2015, and determining whether the prosecutor DCA is also a supervisor would have no effect on the existing bargaining unit. We do not decide whether any future additional City DCA positions, created by hiring or reclassification, would be supervisory.

not of a merely routine or clerical nature but requires the use of independent judgment.”

This Board analyzes these factors by applying three questions to each of them. These three questions must be answered in the affirmative for at least one factor 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*? (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 may 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.

To determine whether a purported supervisor acts *in the interests of management*, we consider facts including whether the employee acts as more than a mere lead worker who ensures that day-to-day tasks are completed; enforces the employer's management culture and particular approach to its mission; acts with awareness of a hierarchical structure and a management expectation that employees respect the supervisor's authority to responsibly direct them; and ensures that employees act in a manner consistent with the employer's goals. *Keizer Police Association v. City of Keizer*, Case No. UC-004-18 at 57-8, ___ PECBR ___, ___ (May 28, 2019).

In a unit clarification case such as this one, 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 in the record to establish that the statutory exclusion applies before we may conclude that an otherwise “public employee” is a “supervisory employee.” This Board has stated that mere inferences and conclusory statements regarding supervisory authority are insufficient to render an employee a statutory “supervisor.” *City of Coquille Police Officers Association v. City of Coquille, Oregon*, UC-002-18 at 29-30, 27 PECBR ___ at ___ (citing *City of Portland v. Portland Police*

Commanding Officers Association, Case No. UC-017-13 at 24, 25 PECBR 996, 1019 (2014)). Accordingly, without detailed, specific evidence establishing that a putative “supervisor” has authority under the statutory criteria, 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.

Hiring

While the litigation DCA is a new employee in a new position, the record demonstrates that the City Attorney has deferred substantial authority in hiring to DCA Gaddis, and the City’s expectation is that Gaddis will exercise that authority with the hiring of a new paralegal and in the future.

Gaddis was responsible for initiating the process to hire a new paralegal and to write and approve application test questions. Gaddis was the supervisor overseeing the hiring. She had the authority to accept or reject panel recommendations. She also had the ability to direct a new recruitment if she was not satisfied with the field of candidates selected for interview or the candidate picked by the panel. Gaddis will be responsible for evaluating the new hire’s performance during and following their trial service period and deciding whether to grant the new hire permanent status.

To support a conclusion that Gaddis will, in fact, exercise these powers in the hiring process, the City points to the longer-serving DCA Zimmerman. Zimmerman sat on interview panels as one of three panel members, but also exercised her judgment and discretion in deciding whether to accept or reject the panel recommendation, undertake additional interviews, and undertake reference checks, and in deciding on information obtained in the additional interviews and reference checks. Further, Zimmerman evaluates the work of new hires on trial service, deciding whether to promote a hire from trial service to career status.

Because Gaddis, like Zimmerman, will do more than participate in interview panels with a single vote equal to other panel members, this is not a situation in which her role in hiring “is essentially no greater than that of any participating subordinate * * * .” *City of Coquille*, UC-002-18 at 16, 27 PECBR at 584 (citing *City of Portland*, Case No. UC-017-13 at 24, 25 PECBR 996, 1019). The litigation DCA’s responsibilities in hiring are more akin to the police sergeants in *Teamsters Local 206 v. City of Reedsport*, UC-46-98 at 8, 18 PECBR 189, 196 (1999), and *Jackson County Sheriff’s Employees Association v. Jackson County and Jackson County Sheriff’s Department*, Case No. UC-10-89 at 17-19, 12 PECBR 322, 338-40 (1990), where, after a panel interview, the sergeants undertook background investigations and then made an effective recommendation to the police chief regarding the hiring.

Further, while being responsible for evaluating other employees is not one of the 12 factors in the test for supervisory status, this Board will consider evaluations when they are “a factor in making personnel decisions that relate to” one of the 12 factors. *City of Coquille*, UC-002-18 at 18, 27 PECBR at 586 (internal quotation marks and citation omitted). See also *SEIU Local 503 v. Portland State University*, Case No. UC-002-17 at 14, 27 PECBR 222, 235 (2018), and *City of Portland*, UC-017-13 at 30, 25 PECBR at 1025 (advancement to trial service was routine and not

a promotion as used in the 12-factor test). The evidence in this case is that graduating from trial service as an attorney in the City Attorney's Office is not a routine matter; DCA Zimmerman has extended the trial service of an employee and put him on a work plan when she believed that passing the employee from trial service to regular status was not warranted. Both Zimmerman's extension of an employee's trial service period and the imposition of a work plan on that employee imply that Zimmerman had the authority to conclude that the employee had failed their trial service and were not suitable for the relevant position.

City Attorney Atchison deferred to Zimmerman's decisions regarding hiring without undertaking an independent review. "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 Coquille*, UC-002-18 at 13, 27 PECBR at 581 (citing *City of Portland*, UC-017-13 at 22-23, 25 PECBR at 1017-18). This includes her assessment of the references and need for and evaluation of second interviews, her decision whether to accept the panel recommendation, and her evaluation of the new hire's trial service performance and promotion to career status. While largely prospective, because Gaddis is a new employee in a new position, the evidence presented by the City is credible and clear that it intends that Gaddis hold the power to effectively recommend the hiring of an employee, and will follow the model set by Zimmerman's preexisting DCA position.⁸

Finally, we conclude that the litigation DCA holds the authority to responsibly direct her hiring activities in the interests of management. The Union does not challenge on whose behalf DCA Gaddis exercises her authority, and there is no evidence that the DCA's actions in the hiring process are not in the customary alignment with management interests that such a responsibility entails. DCA Gaddis has been granted the authority to fill the future needs in the workplace through her hiring decisions.

⁸Where purported supervisors lack a track record of supervisory actions because, for example, they hold a new position, or their work unit has not experienced turnover or discipline, this Board will look at the relevant employees' knowledge of the supervisory role:

"On the one hand, where the record contains no history of prior recommendations concerning the statutory indicia, and no clear evidence that an alleged supervisor knew he or she had been given authority and responsibility to recommend in such areas, then the Board will not find effective recommendations. On the other hand, if there is clear evidence of knowledge by the alleged supervisor that he or she had been delegated authority to recommend, but no track record of actual recommendations, there would have to be some clear evidence that higher authority would give substantial weight to such recommendation in ultimate decisions in such 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 228 at 923 (June 21, 2012), citing *Oregon School Employees Association v. Baker School District 5J*, Case No. C-184-79 at 7, 5 PECBR 2927, 2933 (1980)).

In this case, there is sufficient evidence of DCA Gaddis' hiring process, actual supervision, and equivalent actions by her DCA colleague that we need not use this standard.

We conclude that the litigation DCA has the authority to take action or to effectively recommend action be taken regarding City hiring, that the exercise of that authority requires the use of independent judgment, and holds that authority in the interest of management.

Discipline and discharge authority

This Board has stated,

“There are few more fundamental supervisory functions than the exercise of authority to assess culpability on the basis of an investigation, or to conclude that the evidence is insufficient to ascribe fault one way or another, thereby effectively exculpating the accused.” *City of Salem*, UC-58-88 at 17-18, 12 PECBR at 124-25, quoted in *Jackson County*, UC-10-89 at 20, 12 PECBR at 341.

This Board has, on occasion, considered five aspects of the discipline process: (a) how the process is initiated; (b) who investigates the conduct in question; (c) who defines and determines culpability; (d) how and by whom the type and severity of discipline is determined; and, (e) who imposes the discipline and in what manner. *Department of Administrative Services v. Oregon State Police Officers Association*, Case No. UC-35-95 at 18, 16 PECBR 846, 863 (1996).

Gaddis’ ultimate decision to terminate MC was a foregone conclusion; Gaddis had substantial support from the City’s Human Resources officials in making that decision; and, at the time the decision was made, Gaddis had been the litigation DCA for only three months. Nevertheless, the evidence in the record demonstrates that Gaddis was the City official responsible for overseeing the process and bringing it to a conclusion. Gaddis decided to put MC on administrative leave, drafted and issued the due process notice, identifying herself as the decisionmaker, articulated the grounds for termination, and made and signed the decision to terminate MC. The City Attorney deferred to Gaddis’ decisions during the process. Regarding legal assistant TP, Gaddis investigated TP’s conduct and made the decision to exercise her discretion to verbally counsel rather than issue a written reprimand. Gaddis’ decision was not independently reviewed or overridden by the City Attorney.

As the City notes, a decision *not* to discipline an employee is not as illustrative of supervisory status as is a decision to discipline. Nevertheless, the actual capacity to make such a decision tends to support a determination that the decisionmaker is supervisory. Here, the record demonstrates that Gaddis did make a decision whether, and at what level, to discipline legal assistant TP.

The Union argues that the litigation DCA’s role in the paralegal’s termination was meaningless given that the paralegal could not remain in her position because of her criminal background. Nevertheless, someone had to oversee the paralegal’s disciplinary process, use her authority to formally issue the required notices and issue the termination. DCA Gaddis was that person. In addition, the evidence in the record demonstrates that the City Attorney and litigation DCA both understand that the DCA has the disciplinary power the DCA exercised in the paralegal situation and declined to exercise in the legal assistant situation.

We also conclude that the litigation DCA holds hold the authority to responsibly direct her disciplinary activities in the interests of management. DCA Gaddis holds her subordinates accountable for violations of the City's rules. The record demonstrates that DCA Gaddis is aware of, and accepts a responsibility to, ensure that her subordinates act in a manner consistent with the goals of the City Attorney's Office. We conclude that the litigation DCA holds the authority to responsibly direct discipline in the interests of City management.

We conclude that the litigation DCA has the authority to take action or to effectively recommend action be taken regarding the discipline of litigation department staff, that the exercise of that authority requires the use of independent judgment, and that she holds that authority in the interest of management.

Assign work

This Board defines "assign" as "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, *i.e.*, tasks, to an employee.' *City of Portland*, 25 PECBR at 1021." *Hillsboro Sergeants' Association v. City of Hillsboro, Oregon*, CC-009-14 at 5, 26 PECBR 491, 495 (2015) (internal quotation marks and citation omitted).

Gaddis has assigned work to her legal assistant and the evidence in this case indicates that she would do the same with the new paralegal. She has also chosen to assign certain duties to the legal assistant such as drafting pleadings and correspondence, and compiling and labeling exhibits. She has also chosen not to assign certain duties to the legal assistant, such as research, filing, or reviewing records. The litigation DCA also, through flexible schedules and short term schedule adjustments, assigned her staff to work at particular times.

We conclude that the litigation DCA has the authority to take action or to effectively recommend action be taken regarding assignment, and that the exercise of that authority requires the use of independent judgment. We also conclude that the litigation DCA holds hold the authority to responsibly direct her disciplinary activities in the interests of management. DCA Gaddis looks towards the present and potential future needs of the litigation unit in granting and denying leave, and coordinates with City Human Resources staff regarding management expectations regarding employee leave. On this record, we conclude that the litigation DCA holds the authority regarding the assignment of work to responsibly direct in the interests of Department management.

Additional Union arguments

In its post-hearing brief, the Union devotes most of its text to making the following arguments: (1) the DCA position is part of the bargaining unit under the collective bargaining agreement; (2) making the litigation DCA position supervisory creates an unfavorable ratio of management employees versus bargaining unit employees; and (3) the timing and manner of the creation of the DCA position suggests that it was simply a device to remove work from the bargaining unit. We will deal with each in turn.

DCAs and the collective bargaining agreement

The Union argues that the DCA position is part of the bargaining unit pursuant to the original petition for certification and the parties' collective bargaining agreement. The recognition clause of the collective bargaining agreement states, in part: "The City recognizes the Union as the sole and exclusive bargaining representative under ORS 243.650 et seq. for all career status Assistant City Attorneys I & II for the City of Salem, *excluding supervisory and confidential employees.*" (Finding of Fact 7, emphasis added.) However, it is not necessary for us to address this argument in light of our conclusion that the DCA position at issue is supervisory⁹, and the fact that the parties have already agreed that the other DCA position is excluded from the bargaining unit as confidential. We make no determination of the bargaining unit status of any additional DCAs added to the City Attorney's Office.

Supervisory ratio

The Union argues that the DCA position should be held to be part of the bargaining unit because making this DCA position supervisory was unnecessary and creates an inappropriate ratio of management employees to bargaining unit employees. However, the issue we must determine is whether this DCA's duties are supervisory, not whether it was necessary, or creates a certain supervisory ratio, to give those duties to this DCA.¹⁰ The menu of choices available to an employer considering giving a position supervisory duties to an employee is irrelevant to the determination of supervisory status under ORS 243.650(23).

This Board has stated,

"We have rarely even mentioned the ratio of supervisors to bargaining unit personnel, instead focusing on the authority of the alleged supervisors. *See Portland Fire Fighters' Association, Local 43, IAFF v. City of Portland*, Case No. UC-59-92, 14 PECBR 726, 737 (1993) (the ratio of 5 supervisors to 600 bargaining unit employees is insignificant; the 'strong lead workers' were determined not to be supervisors where they 'effectively run the division without the need to exercise independent judgment' due to having detailed general orders); *AFSCME, Council 75, Local 2975 v. City of Corvallis*, Case No. UC-73-85, 9 PECBR 8859 at 8870, n.2 (1986) (absent evidence of employer subversion of statutory rights or evidence that the delegation of authority is 'ostensible but not real,' certain personnel held to be supervisors); *SEIU v. Salem Child Development Center*, Case No. R-11-84, 8 PECBR 6760 (1985) (private sector jurisdiction); *Teamsters Local Union No. 223*

⁹The Union does not argue that the term supervisor as defined in the PECBA differs from the identical term in the parties' collective bargaining agreement, and this record does not support an alternative definition. Accordingly, a DCA found to be a supervisor would not have a different status under the collective bargaining agreement.

¹⁰It is noteworthy that the supervisees at issue, litigation support staff, were originally supervised by the City Recorder/office manager. The City *transferred* existing supervisory duties from one employee to another, and did not create supervisory duties or add an additional layer of supervision.

v. City of Wilsonville, Case No. C-123-81, 6 PECBR 4925 at 4933, n.2 (1981) (‘We believe the question of supervisory status must logically and equitably depend on the specific facts of each case, rather than on any particular number of employees allegedly supervised.’).” *Sisters Police Association v. City Of Sisters*, Case No. RC-46-96 at 7 n. 12, 17 PECBR 212, 220 n. 12 (April, 1997).

We adhere to our longstanding refusal to consider the necessity of a supervisory position or the resulting supervisory ratio. This Board’s approach is consistent with the statutory requirements, and the diversity of size and function of public employment in this state. We do not consider the supervisory ratio created by a new supervisory position, but whether the actual duties and authority granted to and exercised by the position meet the statutory definition of a supervisor. We reject the Union’s argument that the supervisory ratio created with the litigation DCA’s duties lead to a different result in this case.

Motive to subvert PECBA rights

Finally, the Union argues the supervisory status at issue here is a sham and an artifice to remove the litigation ACA/DCA from the bargaining unit. As explained above, we have concluded that the litigation DCA meets the statutory definition of supervisor and that status, therefore, is not a sham or “ostensible but not real.” *Corvallis*, Case No. UC-73-85 at xx, 9 PECBR at 8870 n.2.

As to the artifice to subvert PECBA rights, the Union argues that:

“The Petitioner recognizes that the City presented evidence that the incumbent was involved in the termination of an employee and that this evidence if accepted would in normal circumstances be sufficient to exclude the position from the bargaining unit. However, the ERB has long recognized that the assignment of supervisory status for the purpose of depriving an employee of PECBA rights or as a sham will not result in the exclusion of an employee from the bargaining unit.

“Absent evidence of employer subversion of statutory rights or evidence that the delegation of authority is ‘ostensible but not real’ certain personnel has held to be supervisors. *Sisters Police Association v City of Sisters*, RC-46-96, 17 PECBR 212 (1997), [quoting *City of Corvallis*, Case No. UC-73-85, 9 PECBR at 8870 n.2 (1986)].

“* * *

“The addition of supervisory duties, is done for the purpose of subverting the PECBA rights of the employee to join a labor organization, and to negotiate for his or her conditions of employment. The fact that a termination occurred, does not in this case establish supervisory duties in that the employee in question was instructed through the process and that there was not a need for this employee to conduct this matter other than a petition was pending and the City seized upon that

as an opportunity to cover up the misconduct they had engaged in.” Union Post-Hearing Brief at 12, 17-18.

First, the term “subversion” appears only in the *Corvallis* case (1986) and the *Sisters* case (1997). In both cases, the remark is dicta, and it has not been repeated since. The Union cites no case in which this Board’s determination of supervisory status was actually based on the employer’s motive for creating that status. More recently, this Board has stated that even if the timing of assignment of supervisory duties supported an inference that the assignment was issued in reaction to union organizing activities, “our decision in this case would not be different without further evidence to support a finding that the supervisory powers assigned to [putative supervisors] are illusory rather than real.” *Teamster Local Union No. 670 v. Yamhill County Sheriff’s Office*, Case No. UC-25-95 at 11, 16 PECBR 344, 354 (February 1995) (emphasis added). To the extent “subversion” of PECBA rights was ever considered by this Board to be a bar to finding an employee to be a supervisor, that position has been repudiated by *Yamhill County*.

The reasons why this Board has never based a determination of supervisory status on an employer’s motive in granting that status are readily apparent. First, the question posed by the statute and regulations is whether the position is supervisory, not whether it was created with the motive to remove a position from a bargaining unit to deprive employees of PECBA rights. Moreover, there is no statutory remedy under the PECBA unit composition provisions if an employer gives a position supervisory duties to alter the composition of a bargaining unit. The PECBA does not grant this Board the power to strip an employee of supervisory duties in a unit composition case, and the statute bars this Board from including a statutory supervisor in a bargaining unit. Issues of employer motive to deprive an employee of their PECBA rights are addressed in the unfair labor practice section of the statute, ORS 243.672 *et seq.*, not the section regarding bargaining unit composition.

While an employer’s motive is not relevant to the PECBA’s treatment of an actual statutory supervisor position, that motive may be relevant to the credibility of an employer’s evidence that the position at issue is in fact supervisory. *Yamhill County, supra*. Here, however, we have determined that the litigation DCA does, in fact, have supervisory authority. We also note that direct supervision of the litigation paralegal and legal assistant existed before the creation of this DCA position – the supervisory duties at issue have been transferred from another position, not invented for the litigation DCA. For similar reasons, since a low level manager supervised these employees before, it is believable that those duties have actually been transferred to another low level manager rather than, as the Union contends, evidence of the creation of a mere pretense of DCA supervision while the City Attorney performs the actual supervision. The Union does not argue that the City Recorder/office manager was not a supervisor, or that she did not supervise the paralegal and legal assistant prior to the creation of DCA Gaddis’ position, or that the City Recorder continues to supervise those employees since that position was created. The facts of this case reflect a transfer of supervisory duties over two employees from one supervisory position to another, not creation of a supervisory relationship out of whole cloth.

In any event, the evidence in this record suggests that the primary reason for the City’s decision to grant supervisory powers to the litigation DCA was to enable the City Attorney to offer

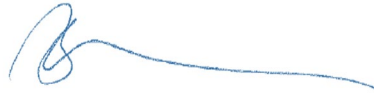
compensation and responsibilities for the position sufficient to attract a worthy candidate without having to go through the lengthier process of obtaining approval from both the Union and the City Council. The change in the position followed a lengthy process of recruitment that did not generate a viable candidate to take the position as an ACA.

We conclude that the litigation DCA position is supervisory under ORS 243.650(23). Therefore, we will dismiss the Petition.

PROPOSED ORDER

The Petition is dismissed.

SIGNED AND ISSUED 23rd January 2020.



B. Carlton Grew
Administrative Law Judge

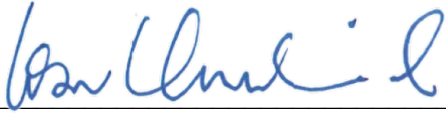
NOTE: The Employment Relations Board's rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The "date of filing objections" means the date objections are received by this Board; "the date of service" of 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.)

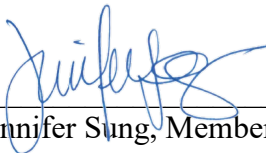
ORDER

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

DATED: February 13, 2020.


Adam L. Rhynard, Chair


Lisa M. Umscheid, Member


Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

MID-COLUMBIA FIREFIGHTERS
ASSOCIATION, IAFF LOCAL 1308

Complainant,

v.

MID-COLUMBIA FIRE AND RESCUE,

Respondent.

Case No.: UP-015-19

CONSENT ORDER

Statement of the Case.

On August 15, 2019, Complainant filed an Unfair Labor Practice against Respondent alleging violations as contained in UP-015-19. The parties have agreed to settle this matter by entry of this Consent Order and waive further proceedings and judicial review by the Board.

Stipulated Facts.

1. Mid-Columbia Fire Fighters Association (“Association”), Local 1308, is a labor organization within the meaning of ORS 243.650(13).
2. Mid-Columbia Fire and Rescue District is a public employer as defined by ORS 243.650(20).
3. On or about February 19, 2019, the District initiated a settlement discussion with an

employee and Association member, misunderstanding that the employee was a member of the Association's executive board. The member was not on the Association's executive board. The settlement discussion was in relation to a pending Unfair Labor Practice Complaint.

4. On or about August 1, 2019, the District provided a written apology for the mistaken contact.

Stipulated Conclusion of Law.

1. The Board has jurisdiction over these parties and subject matter.
2. Employer violated ORS 243.672(1)(b) when meeting directly with an Association member in attempting to settle a pending Unfair Labor Practice Complaint rather than meeting with the member's exclusive representative thus interfering with the Association's administration of its duties as a labor organization.

Stipulated Order

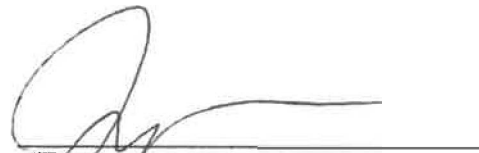
1. The District violated ORS 243.672(1)(b) by meeting directly with an Association member to engage in settlement discussions rather than meet with the member's exclusive representative.
2. All other complaints, as filed under UP-015-19, are withdrawn by the Association with prejudice.
3. The Association withdraws any requests for any other remedy (including representation costs, fees, civil penalty, or other relief).
4. The parties agree that there will be no posting to Association members.

/ / /

DATED February 18, 2020.



STEVEN SCHUBACK
On Behalf of the District



JASON WEYAND
On Behalf of the Association

This Consent Order is adopted and approved by the Board.

DATED: February 18, 2020.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-001-19

(UNFAIR LABOR PRACTICE)

SPRINGFIELD POLICE ASSOCIATION,	)	
	)	
	)	
Complainant,	)	
	)	FINDINGS AND ORDER ON
v.	)	COMPLAINANT'S PETITION
	)	FOR REPRESENTATION COSTS
CITY OF SPRINGFIELD-SPRINGFIELD	)	
POLICE DEPARTMENT,	)	
	)	
Respondent.	)	
	)	

On December 12, 2019, this Board issued an order holding that the Respondent City of Springfield-Springfield Police Department (SPD) violated ORS 243.672(1)(a). The order also directed SPD to pay a \$1,000 civil penalty to Complainant Springfield Police Association (Association). The appeal period under ORS 183.482 has run without any 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. Only a prevailing party in an unfair labor practice case is entitled to representation costs. ORS 243.676(2)(d); 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). We find, and SPD has not contested, that the Association is the prevailing party.

2. This case took two days of hearing.

3. We award representation costs according to OAR 115-035-0055(1)(b). Where, as here, a civil penalty is ordered, we award the full amount of representation costs, OAR 115-035-0055(1)(b)(E), so long as a timely petition for those costs is filed, OAR 115-035-0055(1)(c) and (2)(b).

4. The Association timely filed a petition seeking full reasonable representation costs of \$14,696. The petition was properly supported with a statement of the amount of costs requested and a description of the fees incurred by the petitioner. *See* OAR 115-035-0055(2)(b).

5. SPD did not file objections to the Association's petition.

6. As the prevailing party in a case where a civil penalty was awarded, the Association is entitled to the "full amount of reasonable representation costs." OAR 115-035-0055(1)(b)(E). The Association has sufficiently provided, without objection, the required information to ascertain the reasonableness of its representation costs. Accordingly, we award the Association the full reasonable representation costs requested of \$14,696.

ORDER

SPD shall remit \$14,696 to the Association within 30 days of the date of this order.

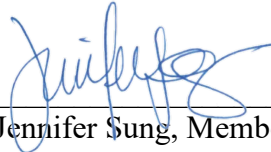
DATED: February 24, 2020.



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. MA-005-19

(MANAGEMENT SERVICE APPEAL)

RP,	)	
	)	
Appellant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
STATE OF OREGON, DEPARTMENT OF	)	CONCLUSIONS OF LAW,
CORRECTIONS,	)	AND ORDER
	)	
Respondent.	)	
_____	)	

Appellant RP, Kennewick, Washington, appeared *pro se*.

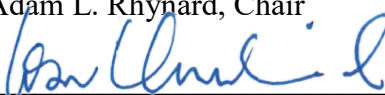
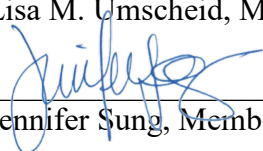
Neil F. Taylor, Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented the Respondent.

On February 7, 2020, 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 this Board adopts the attached recommended order as the final order in this matter. OAR 115-010-0090(4), (5).

ORDER

The appeal is dismissed.

DATED: February 27, 2020.


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. MA-005-19

(MANAGEMENT SERVICE DISCIPLINE)

RP,	)	
	)	
Appellant,	)	
	)	
v.	)	RECOMMENDED RULINGS,
	)	FINDINGS OF FACT,
STATE OF OREGON, DEPARTMENT OF	)	CONCLUSIONS OF LAW, AND
CORRECTIONS,	)	PROPOSED ORDER
	)	
Respondent.	)	
	)	

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on October 3 and 4, 2019 in Salem, Oregon. The record closed on November 15, 2019 upon receipt of the parties' post-hearing briefs.

RP, Kennewick, Washington, appeared *pro se* during and after the hearing. Before the hearing, Melissa Hopkins and Judy Snyder, Attorneys at Law, Law Offices of Judy Snyder, Portland, Oregon, represented RP.

Neil F. Taylor, Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented the Respondent.

On July 26, 2019, the Appellant, RP, filed an appeal with the Employment Relations Board (Board) against the Respondent, State of Oregon, Department of Corrections (DOC or Department). The issue presented is: Did the DOC violate ORS 240.570(3) when it terminated Appellant's employment? As set forth below, we conclude that the DOC did not violate the statute.

RULINGS

The rulings of the ALJs were reviewed and are correct.

FINDINGS OF FACT

Background

1. The DOC, a state agency, manages a number of state prisons in Oregon including, among others, the Eastern Oregon Correctional Institution in Pendleton, the Snake River Correctional Institution in Ontario, and the Two Rivers Correctional Institution (occasionally referred to as “TRCI”) in Umatilla.

2. “State and federal laws have established that inmates are entitled to mental health services during incarceration.” (Exh. R-5 at 1.) The Behavioral Health Services (BHS) section of the DOC “provides treatment at each of the Department’s institutions for offenders who are mentally ill, cognitively impaired[,] and/or developmentally disabled.” (Exh. R-5 at 1.) Inmates with a mental health diagnosis of gender dysphoria may receive medical support including hormone therapy and surgery. They may also receive non-medical and “canteen” (*i.e.*, commissary) items such as undergarments and makeup, for example.

3. The DOC has defined gender dysphoria as “[d]iscomfort or distress that is caused by a discrepancy between a person’s gender identity and that person’s sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics).” (Exh. R-20 at 11.) The term can also refer to “the medical diagnosis used to describe transgender identities,” “gender identity disorder,” or “transsexualism.” (Exh. R-20 at 3.)

4. All BHS Managers (Appellant’s final position at the DOC) directly supervise a team of Qualified Mental Health Professionals (QMHPs) at their institutions. Whenever an inmate identifies as transgender to BHS staff, a BHS Manager and BHS Clinical Director Claudia Fischer-Rodriguez are notified. After that, the BHS Manager is expected to have one of the BHS Manager’s QMHPs complete and submit a typed gender dysphoria evaluation/assessment form for the inmate, or to do so on the BHS Manager’s own. Among other things, every gender dysphoria evaluation involves asking an inmate a series of prescribed questions. Some of those questions address the inmate’s childhood history and preferred gender, pronoun, and name, for example. Before this procedure was put in place, gender dysphoria evaluations were conducted by “prescribers,” not QMHPs. (Exh. R-2 at 34.)

5. Broadly speaking, after an evaluation, a QMHP or BHS Manager can (1) determine that the inmate does not meet the criteria for a gender dysphoria diagnosis; (2) determine that the inmate does meet the criteria; or (3) make a “provisional diagnosis,” which essentially means that the inmate meets some of the criteria but additional information is required before a final

determination can be made.¹ (Exh. C-7 at 7.)² If the inmate does meet the criteria for a gender dysphoria diagnosis and the appropriate form is submitted, the diagnosis is entered into the DOC's information database, the "DOC400." The BHS Clinical Director then sends the relevant BHS Manager an email update, and the inmate's case is subsequently reviewed by a Gender Nonconforming Therapeutic Level Committee, or "GNC-TLC," which essentially determines whether hormone therapy and/or gender affirming surgery is "medically necessary." (Exh. R-21 at 1, 5.) GNC-TLC meetings occur once a month. If a provisional diagnosis is made, the inmate should be reevaluated within six months. After that, the QMHP or BHS Manager conducting the reevaluation can make an addendum or work on an entirely new form.

6. BHS Managers are expected to track whether and how quickly gender dysphoria evaluation forms are being completed and submitted at their institutions, and also make sure that that happens. In general, nearly all gender dysphoria evaluation forms should be completed and submitted within two months of when an inmate identifies as transgender to staff, and after a single evaluation session, which is generally around 60 minutes long. However, this may take longer or require additional sessions for an inmate who has no history with BHS or a particular clinician. In such a case, the clinician will not have a lot of background information about the inmate, may have to build a rapport, and may need to screen for or rule out other mental health concerns. Delays may also result if an inmate has a provisional diagnosis or a language issue, and inmates can always decline to be evaluated, as the services of BHS are voluntary.

7. It is critical that gender dysphoria is diagnosed in a timely manner. Some transgender individuals "can experience a variety of mental health concerns alongside gender dysphoria." (Exh. R-20 at 13.) Such "co-occurring" concerns can include "[d]epression, anxiety, dissociation, PTSD, disordered eating, [and] suicidality," for example. (Exh. R-20 at 13.) Some inmates may attempt to castrate themselves. Additionally, if an inmate is not getting proper care, it can result in significant liability for the DOC and its staff.

8. BHS Clinical Director Fischer-Rodriguez regularly updates and checks in with BHS Managers about their inmates and diagnoses, and frequently will remind a BHS Manager to schedule gender dysphoria evaluations for particular inmates. Furthermore, every BHS Manager "[w]orks closely with the BHS Clinical Director in the professional development of staff." (Exh. R-1 at 2.) Nevertheless, the BHS Managers are ultimately responsible for making sure that all of their team's gender dysphoria evaluations are tracked, assigned, completed, and submitted in a

¹The DSM-5 is the latest "Diagnostic and Statistical Manual of Mental Disorders." (Exh. R-20 at 13.) "The primary purpose of the DSM-5 is to assist trained clinicians in the diagnosis of their patients' mental disorders as part of a case formulation assessment that leads to a fully informed treatment plan for each individual." (Exh. C-1 at 1.) According to the DSM-5, "The specifier 'provisional' can be used when there is a strong presumption that the full criteria will ultimately be met for a disorder but not enough information is available to make a firm diagnosis." (Exh. C-1 at 3.) Limited testimony indicates that a "deferred diagnosis" may also be made when there is a possibility that an individual will have one diagnosis that will "trump" or supersede another diagnosis. However, it is unclear how a deferred diagnosis does or should affect the DOC's gender dysphoria evaluation process.

²All of Appellant's exhibits are marked with a "C" as if they are a complainant's exhibits, but in State Personnel Relations Law cases such as this one, the party who filed the case with the Board is referred to as an appellant.

timely manner. Moreover, if a BHS Manager's team needs additional training or resources, it is that BHS Manager's responsibility to provide it or reach out to those within the DOC who can do so.

Chronology of Events

9. On January 14, 2013, the DOC hired Appellant as a Qualified Mental Health Specialist at the DOC's Snake River Correctional Institution. On September 1, 2013, Appellant's position was "reallocated" to Psychiatric Social Worker. (Exh. R-1 at 1.) On October 20, 2014, Appellant transferred to the DOC's Two Rivers Correctional Institution. On April 29, 2016, Appellant promoted to a "Work-Out-of-Class Manager" position at Two Rivers. (Exh. R-1 at 1.)

10. On May 9, 2016, Appellant formally promoted to his final position of BHS Manager at Two Rivers. While a BHS Manager, Appellant reported directly to BHS Assistant Administrator Christy Hutson. The QMHPs at Two Rivers are represented by a union after they complete trial service.

11. On July 28, 2016 and January 27, 2017, BHS Assistant Administrator Hutson "coached" Appellant on appropriate and professional workplace interactions with staff after it was reported that Appellant was being "flippant" and minimizing his employees' concerns. (Exh. R-4 at 13.)

12. In or around October 2016, a transgender inmate at Two Rivers filed a lawsuit against the DOC, alleging that the DOC unlawfully denied the inmate's numerous requests for hormone treatment "despite an official diagnosis of gender dysphoria." (Exh. C-3 at 2.) The parties to the lawsuit eventually settled around a year later. As a result, the inmate received the desired treatment and "[t]he state agreed to significant policy changes." (Exh. C-6 at 1.)

13. On October 8, 2018, "CL" started working as a QMHP at Two Rivers under Appellant.³ This was CL's first time being a QMHP. In September 2018, before she started at Two Rivers, CL took a tour of the institution. During the tour, Appellant told CL that he had hired a QMHP named "G" even though he had found out that G had misrepresented that she had supervisory experience in her application. After that, CL told Appellant that she had made a human resources (HR) complaint against her prior employer and had resigned from her former position. At this time, G was filling in for a QMHP from Two Rivers named "MA," who had been out on maternity leave since June 2018 and had not met CL yet.

14. During CL's initial days at Two Rivers, Appellant told CL that "CP" and G, both of whom were Appellant's QMHPs, did not know how to do their jobs. Appellant also told CL that MA was out on maternity leave, that MA had already exhausted all of her FMLA leave, that the only way MA could come back to work was if MA could persuade a doctor to give her long-term disability, and that he did not think that MA could do so. Appellant also told CL that, if MA did come back, he and CL needed to be careful and prepared to take over MA's caseload because, according to Appellant, MA frequently called in sick, and because MA's baby was sick,

³In this recommended order, we refer to Appellant's subordinates by their initials. Inmate names have also been redacted from the record.

which Appellant said would lead to even more time off. In addition, Appellant told CL that MA was once escorted out of the institution and terminated before she completed her trial service period, and that MA had sued the DOC for wrongful termination in order to get her job back. During the same general time period, Appellant also spoke about MA's lawsuit with other QMHPs he supervised at Two Rivers, including CP and "SP," and with Brian Kubesh, who is currently a BHS Manager for the Eastern Oregon Correctional Institution.

15. Although Appellant did not mention it to CL, MA had formally settled her lawsuit with the DOC. One element of that settlement was that management would not publicly discuss the lawsuit. Appellant learned about the lawsuit and the settlement from BHS Assistant Administrator Hutson, who also told Appellant that the matter should not be discussed. MA believes that Appellant's conversations with other employees about her lawsuit ruined her credibility with her coworkers.

16. In a subsection titled, "Dissemination of Information," DOC Policy 20.1.3 provides, "Each employee shall maintain the integrity of information received in the course of employment with the department, and not seek information beyond that needed to perform their duties; or reveal such information to anyone not having proper authorization." (Exh. R-9 at 3.)

17. At some point in or around November 2018, Appellant also called CP an idiot in front of CP and other QMHPs including MA, who had recently returned to work. When MA heard Appellant say that about her colleague, MA told Appellant that he should not be saying that about anyone. In response, Appellant said that those were not his words but were other people's words.

18. In relevant part, DOC Policy 20.1.3 provides, "Employees shall, in the performance of their duties, be respectful, courteous, and considerate toward all members of the department ***. Employees shall not use terminology that disrespects the dignity * * * of others." (Exh. R-9 at 3.) Similarly, DOC Policy 20.6.1 states, "Employees at all levels shall be expected to interact with co-workers, inmates and the public in a business-like and professional manner at all times." (Exh. R-10 at 2.) It also provides, "Supervisors and managers shall serve as role models for subordinates." (Exh. R-1 at 5.)

19. On November 1, 2018, CL went to Two Rivers' administration building to collect a paycheck. When she did so, CL saw Appellant and all of the other QMHPs on her team except for her and G gathered on some couches. At that point, CL asked Appellant if she was missing something. Appellant replied to CL that she was not, but explained that he had called for a morning meeting with the other QMHPs, and that CL was not invited. Appellant also introduced CL to MA, then asked CL to leave. When Appellant scheduled this particular morning meeting, he did so through text messages sent to the other QMHPs' personal cellphones.

20. During the November 1, 2018 morning meeting, Appellant told the other QMHPs at Two Rivers (specifically, MA, "MN," CP, SR, and "ST") that CL could not be trusted, was a "whistleblower" at her last job, was "keeping notes on everyone," had issues with her last employer, and sued her last employer and got people fired. (Exh. R-4 at 6 and 7.) At some point during this meeting, MA offered to work with CL because MA did not have a caseload of her own yet. Appellant told the group that CL was "untrainable," but it was nevertheless determined that

MA would train CL. (Exh. R-1 at 6.) On a different date, Appellant also told Kubesh about CL's whistleblower experience.

21. Later in the day on November 1, 2018, Appellant explained to CL and G that that morning's team meeting was about CL's training. CL responded that it was not actually a team meeting because she and G had not been included. In response, Appellant asked CL to come to his office. Once they were there, Appellant told CL that, if she did not stop challenging him, (as CL put it) "things would end badly" for her. CL then asked Appellant what he meant by that, and stated to Appellant that it was threatening.

22. Shortly after Appellant warned CL about challenging him, BHS Administrator Dawnell Meyer walked into Appellant's office. At that point, CL, who was still in Appellant's office, told Meyer that Appellant had just threatened her and that Appellant had not given her the proper amount of training. In response to CL's claims, Appellant told Meyer that he was just giving CL advice because, politically, her actions would not be good for her. Around that time, Appellant spoke poorly of MN (another of his QMHPs), and Meyer told Appellant not to do that. Once CL left Appellant's office, Meyer told Appellant that, whenever he meets with his staff, Appellant should focus on listening to their concerns and should not use the word "political" in this context. (Exh. R-2 at 15.)

23. Appellant was (in his words) "really embarrassed" when he spoke with CL after the group meeting on November 1, 2018. He intended to share a specific experience from when he was a new DOC employee and challenged a superior in a group meeting (as opposed to a one-on-one meeting), and also share his belief that his career at the DOC suffered for it. In other words, Appellant wanted CL to learn from what he viewed as a prior mistake of his. However, Appellant did not actually share any of these details with CL. CL believed, and continues to believe, that through his warning, Appellant was implying that he would fire her for challenging him.

24. DOC Policy 20.1.3, in a subsection titled "Relationships with Colleagues/Courtesy Toward Others," provides, in part,

"Employees shall, in the performance of their duties, be respectful, courteous, and considerate toward all members of the department and the general public. Employees shall not use terminology that disrespects the dignity or violates the human rights of others. Employees shall not use physical force, *threats or intimidation toward fellow employees*, family members of employees, or visitors while at a department work site."

(Exh. R-1 at 4, emphasis added.)

25. In a "morning huddle" meeting on November 2, 2018, Appellant met with all of his QMHPs except for G, who was 30 to 40 minutes late for work at the time. (Exh. R-3 at 5.) During this meeting, Appellant told the QMHPs who were present that he intended to terminate G's employment at the end of her shift that day. At that point, G did not yet know that she was being terminated. Appellant told his staff about G's pending termination because he believed that they

would naturally be curious about why he was reassigning G's work at Two Rivers' mental health clinic that morning. In response to Appellant's update, MA and SR told Appellant that his approach was not a good one, and explained to Appellant what they believed the proper way to let G go was, which was to tell G that the DOC could not have two people working the same job. In essence, G had been covering for MA, who as noted had recently returned to her former position. When this meeting occurred, G's "employee packet" was out and visible on Appellant's desk. (Exh. C-48 at 11.)

26. Later in the day on November 2, 2018, Appellant terminated G as planned in his office. A couple of days later, Appellant spoke with CL, MA, and ST (all of whom were his QMHPs) and told them that they needed to find "negative documentation" on G so that Appellant did not have to hire G back.

27. When MA eventually started training CL, CL told MA that Appellant had spoken to her about MA's lawsuit and had shared other details about MA's personal life. Afterward, MA confronted Appellant about this, and Appellant responded by apologizing, buying MA a bag of Snickers bars, and telling MA not to trust CL.

28. In the late summer or fall of 2018, when MA was four or five months pregnant, MA told Appellant that she was interested in being a lead worker if such a position became available. Appellant responded to MA that MA could not be a lead because she was pregnant. He subsequently added that MA was also (as MA put it) "not prison savvy" and did not understand the DOC's politics or the deals that are made behind closed doors. This was not the first time that MA had told Appellant of her interest in a lead worker position, and she did not take Appellant's comments as a joke.

29. In a subsection titled "Discrimination/Harassment/Sexual Harassment," DOC Policy 20.1.3 provides, "DOC provides a work environment free from unlawful discrimination or workplace harassment based on or because of an employee's protected class status." (Exh. R-9 at 3.)

30. On or around November 20, 2018, CL submitted a personnel complaint about Appellant to DOC HR Manager Lori Holcomb. The complaint alleged that Appellant subjected CL to workplace harassment by (1) telling CL to not keep notes, (2) telling CL's coworkers that CL was a whistleblower and untrainable, (3) telling CL that if she challenged him it would not go well for her in the end, (4) announcing at a morning staff meeting that he would be terminating G, (5) failing to provide CL support as her supervisor during an inmate suicide assessment, (6) directing CL and MA to investigate MN and G, (7) discussing MA's protected leave and MA's DOC lawsuit with CL, (8) telling MA that she would not be considered for a promotional position due to her being pregnant, and (9) referring to CP as an idiot.⁴ This complaint became Investigation #2018-INV-0458.

⁴The DOC's investigative report detailing CL's allegations against Appellant (Exh. R-13) purports to list 10 separate allegations of workplace harassment, but it appears to skip the eighth allegation.

31. On November 26, 2018, BHS Clinical Director Fischer-Rodriguez sent Appellant an email marked as highly important. It stated, in part, “The following gender dysphoria evaluations are pending (some have been pending since June 2018) and need to be completed within the next three weeks. Please let me know when they are scheduled.” (Exh. R-25 at 11.) Ultimately, evaluation forms were not submitted for the seven inmates identified in this email within the three-week timeline.

32. On December 4, 2018, a transgender inmate at Two Rivers completed suicide. On December 5, 2018, HR Investigator Erin Reyes was assigned CL’s complaint. On December 18, 2018, CL sent BHS Assistant Administrator Hutson and BHS Administrator Meyer an email in which CL accused Appellant of harassing her about her “work performance and deescalation skills.” (Exh. R-16 at 2.)

33. On Monday, December 17, 2018, BHS Clinical Director Fischer-Rodriguez informed Appellant via email that Snake River’s BHS Manager, Terry Buster, had agreed to let Snake River’s QMHPs help Appellant complete his pending gender dysphoria evaluations via “televideo” interviews. (Exh. R-2 at 54.) The email, which was marked as highly important, also directed Appellant to coordinate interview times with Buster and suggested that Appellant provide Fischer-Rodriguez with a weekly update. That same day, Appellant started attending a weeklong in-service training. Further, during this week, Appellant never checked in with his staff or anyone from Snake River to ensure that any gender dysphoria evaluations were being completed.

34. By the end of the week of December 17, 2018, none of Appellant’s pending gender dysphoria evaluations had been completed. One reason for that was because of technical difficulties with Two Rivers’ “televideo machine” that made it difficult for Snake Rivers’ QMHPs to help. (Exh. R-2 at 54.) However, other video communication methods could have been used, and Appellant did not learn of the televideo difficulties until he came back to work after the in-service training. Appellant also could have attempted to complete the evaluations and forms on his own, asked for assistance, made himself available during the in-service training, and/or rescheduled the training. The DOC conducts in-service training on location at employees’ places of work several different times a year. Moreover, Appellant only actually attended two days of this weeklong training.

35. On December 20, 2018, Appellant sent his staff an email that stated, in part,

“I want to apologize for my behavior yesterday. A piece of very sensitive information was left out in the open and I had a real knee jerk reaction. I need to take accountability that I should be more mindful of all papers in my box. However it got me thinking about our process. I think the best thing to do is separate employee personal paperwork from inmate needs paperwork.”

(Exh. C-44.)

36. At some point in December 2018, SR was promoted from QMHP to BHS Manager, the same position as Appellant. Before that, SR was out on medical leave.

37. On January 29, 2019, HR received a personnel complaint about Appellant's alleged failure to complete his gender dysphoria evaluation reports in a timely manner.⁵ This became Investigation #2019-INV-0040.

38. On February 5, 2019, BHS Assistant Administrator Gabriell Gitnes sent Appellant an email that stated, in part, "I have been asked to conduct an Administrative Investigation into TRCI's lack of timely follow through with a number of Gender Dysphoria evaluations. I would like to conduct an interview with you next week * * *." (Exh. C-37 at 1.) On or around February 11, 2019, Dorothy Wettlaufer was reassigned this investigation. On February 12, 2019, Wettlaufer interviewed Appellant about the evaluations.

39. On February 20, 2019, HR Investigator Reyes interviewed Appellant in Two Rivers' administration building about the various allegations in CL's November 2018 personnel complaint. A related interview had previously been conducted at some point in December 2018. On February 26, 2019, Reyes completed an investigative report for the complaint and submitted it for review.

40. On March 15, 2019, BHS Administrator Joe Bugher had a phone call with Appellant in which Bugher notified Appellant of a duty reassignment. Effective March 17, 2019, Appellant was placed on "duty station at home status." (Exh. R-1 at 11.) On March 18, 2019, Appellant was reassigned to Two Rivers' administration building. On March 20, 2019, Bugher hand-delivered Appellant a letter changing Appellant's duty assignment to working in a general administrative support capacity in Two Rivers' administration building. On March 22, 2019, Bugher informed Appellant by telephone that Appellant was reassigned to the mailroom. After that, Appellant took time off to be with his family, then returned to work on April 8, 2019.

41. Upon Appellant's return to work on April 8, 2019, BHS Administrator Meyer issued Appellant a letter notifying him of an April 15, 2019 meeting at Two Rivers' administration building regarding his possible "removal from management service with effective dismissal from state service" under ORS 240.570(3).⁶ (Exh. R-1 at 1.) Meyer's letter included an overview of Appellant's employment history with the DOC, his job duties, and the DOC's investigations of Appellant's work performance, as well as copies of certain DOC policies. The letter otherwise identified the DOC's four main charges against Appellant: (1) failure to perform the duties of his position, (2) making inappropriate remarks to and about subordinate staff regarding their use of sick leave and protected leave, (3) making inappropriate remarks about subordinate staff regarding their employment, and (4) making demeaning and inappropriate remarks about subordinate staff members. According to the letter, this April 15, 2019 "pre-removal meeting" would afford

⁵The investigative report for this particular complaint (Exh. R-19) lists BHS Clinical Director Fischer-Rodriguez as the complainant. During the Board hearing, however, Fischer-Rodriguez testified that she did not officially request this investigation.

⁶In relevant part, ORS 240.570(3) provides that a management service employee "may be removed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." This letter and the subsequent termination/removal letter indicate that, in Appellant's final, regular status position with the DOC, he had no "restoration rights to classified service." (Exh. R-4 at 1.)

Appellant the opportunity to discuss these charges “and/or present mitigating circumstances.” (Exh. R-1 at 11.)

42. On April 12, 2019, MN sent BHS Assistant Administrator Hutson an email in which MN shared that she had just learned that Appellant had discussed the circumstances of her taking FMLA leave with MN’s coworkers, which MN alleged created a “hostile work environment.” (Exh. R-17.)

43. Appellant attended the April 15, 2019 pre-removal meeting as scheduled. During this meeting, HR Manager Holcomb, BHS Assistant Administrator Hutson, and BHS Administrator Meyer interviewed Appellant. In addition, Appellant provided a variety of ostensibly “mitigating information” and context. (Exh. R-3 at 2.) For the first time, Appellant “identified mental health and side effects of a medication as considerations at the time of the investigation interviews.” (Exh. R-4 at 11.) Appellant also told the interviewers about “chaos” resulting from the December 4, 2018 suicide at Two Rivers, and about problems with getting enough resources and with the DOC’s televideo machine. (Exh. R-4 at 14.) Afterward, the DOC carefully considered Appellant’s mitigating and refuting statements.

44. On July 2, 2019, BHS Administrator Meyer issued Appellant a 16-page termination/removal letter that reiterated the DOC’s four main charges against him (outlined above) and detailed the DOC’s numerous investigatory findings. BHS Administrator Bugher is the ultimate decision-maker whenever a BHS Manager is terminated.

45. Also on July 2, 2019, shortly after he was terminated, Appellant sent a number of Facebook messages to MA, his former QMHP. One message Appellant sent MA at 1:02 p.m. states, “[S]o I guess we can be friends again. Yeah!!! [H]ey let me know if you have some time to meet for lunch or something.” (Exh. R-18.) A subsequent string of messages that Appellant sent MA at 6:08 p.m. reads,

“Trust me. This is not your fault. I’ll have to explain what happened.

“Oh and DON’T PROMOTE!!!!

“Being out in admin for 4 months, listening in on meetings etc. That place is so crooked.

“Stay with the Union.

“My advice, get a lead position, get vested, promote elsewhere. You can do it.”

(Exh. R-18.)

46. On July 26, 2019, Appellant filed the instant appeal with the Board.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The DOC's termination of Appellant's employment did not violate ORS 240.570(3).

Legal Standards

The appeal contends that the DOC violated ORS 240.570(3) when it terminated Appellant's employment. In relevant part, that statute provides that a "management service employee may be disciplined by reprimand, salary reduction, suspension or demotion or removed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." As the respondent employer in this case, the DOC has the burden of proving, by a preponderance of the evidence, that its discipline was consistent with that statute. OAR 115-010-0070(5)(c) ("In a hearing on an appeal from a disciplinary action under ORS 240.555 or ORS 240.570(3), the respondent shall have the burden of proof and the burden of going forward with the evidence."); *Ahlstrom v. State of Oregon, Department of Corrections*, Case No. MA-17-99 at 14 (October 2001); *Morisette v. Children's Services Division*, Case No. 1410 at 2, 22 (March 1983). In order to meet that burden, the employer must ultimately show that, under all of the circumstances of the case, the discipline it imposed was "objectively reasonable." This is known as the "reasonable employer standard." *Morisette*, 1410 at 23 (citing *Brown v. Oregon College of Education*, 52 Or App [251], 260, 628 P2d 410 (1981)).

A reasonable employer is one that disciplines employees in good faith and for cause; imposes sanctions that are proportionate to the offense; considers the employee's length of service and service record; and applies the principles of progressive discipline, except where the offense charged is gross or an employee's behavior probably will not be improved through progressive measures. *Smith v. State of Oregon, Department of Transportation*, Case No. MA-4-01 at 8-9 (June 2001) (citing *Oregon School Employees Association v. Klamath County School District*, Case No. C-127-84 at 20-21, 9 PECBR 8832, 8851-8852 (1986)); *Peterson v. Department of General Services*, Case No. MA-9-93 at 10 (November 1994) (citing *Oregon School Employees Association Chapter 89 v. Rainier School District 13*, Case No. UP-85-85 at 26, 9 PECBR 9254, 9279 (1986)); *Patrick v. Department of Agriculture*, Case No. MA-2-91 at 13 (June 1991) (defining the term "objectively reasonable" as "rational and fundamentally fair") (citing *Stark v. Mental Health Division, Oregon State Hospital*, Case No. MA-17-86 (April 1989)). A reasonable employer otherwise defines performance expectations, clearly expresses those expectations to employees, informs employees when those expectations are not being met, and administers discipline in a timely fashion. *Flowers v. Parks and Recreation Department*, Case No. MA-13-93 at 15-7 (March 1994); *Stark*, MA-17-86 at 36.

Even within a system of progressive discipline, some offenses are so serious or unmitigated as to justify summary dismissal. *Nash v. State of Oregon, Department of Human Services*, Case No. MA-008-14 at 23 (December 2014) (citing *Zaman v. State of Oregon, Department of Human Services*, Case No. MA-21-12 at 12 (April 2013)). Indeed, that may be the case even where there is no history of previous warnings and disciplinary measures progressing in degree of severity. Stealing, striking a superior, and the persistent refusal to obey legitimate orders, for example, are

generally regarded as such offenses because they strike at the fabric of the employer-employee relationship. *Demaray v. Department of Environmental Quality*, Case No. MA-2-88 at 14 (February 1989), *AWOP*, 100 Or App 261, 786 P2d 229, *rev den*, 309 Or 521, 789 P2d 1386 (1990) (citing Elkouri and Elkouri, *How Arbitration Works*, pp. 670-71 (4th Ed. 1985)). We have also emphasized that a significant factor in an ORS 240.570(3) analysis is the extent to which the employer's trust and confidence in the disciplined employee have been harmed and, therefore, the extent to which the employee's capacity to act as a member of the "management team" has been compromised. See *Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984); *Tuthill v. Oregon Liquor Control Commission*, Case No. 1423 at 10 (August 1983), *AWOP* 68 Or App 383 (1984). Another circumstance that the Board considers in these cases is the likelihood of repeated misconduct. *Garrett v. State of Oregon, Department of Human Services*, Case No. MA-02-11 at 12 (December 2011) (citing *Smith*, MA-4-01).

Procedurally, we generally review management service disciplinary appeals using a two-step process. First, we determine if the employer has proven the charges that are the basis of the discipline. If the employer has proven some or all of the charges, we then apply the reasonable employer standard to determine whether the employer was justified in taking the disciplinary action it did. *Greenwood v. Oregon Department of Forestry*, Case No. MA-03-04 at 30 (July 2006), *recons den* (September 2006). Where discipline is issued for multiple reasons (as in this appeal), even a single proven charge may be enough to warrant sustaining discipline if the charge is sufficiently serious. *Ahlstrom*, MA-17-99 at 15; *Hopkins v. Mental Health and Developmental Disability Services Division*, Case Nos. MA-6/23-92 at 11 (July 1993) (citing *Helper v. Children's Services Division*, Case No. MA-1-91 at 24 (February 1992)).

DISCUSSION

Did the DOC prove its charges?

Appellant's termination/removal letter (Exh. R-4) charges that he: (1) failed to perform the duties of his position, (2) made inappropriate remarks to and about subordinate staff regarding their use of sick leave and protected leave, (3) made inappropriate remarks about subordinate staff regarding their employment, and (4) made demeaning and inappropriate remarks about subordinate staff members. For the reasons outlined below, we conclude that the DOC has proven each of those charges by a preponderance of the evidence.

Charge 1 of 4: Failing to perform the duties of the position

For this initial charge, the DOC specifically alleges, "You confirmed/admitted that you received numerous emails regarding the need for evaluations to be completed. The Gender Dysphoria Evaluations were not done in a timely manner. You admitted to lack of oversight or follow-up." (Exh. R-4 at 10.) We acknowledge that Appellant's work was specialized, that all inmate/patient names have been redacted from the record, and that both of those elements make it difficult for us to carefully track every evaluation. It is also possible that some of the delay was the result of the QMHPs' "clinical judgment," which Appellant aimed to support. Nevertheless, we must conclude that Appellant's clear, repeated admissions (including those made during his April 15, 2019 pre-removal meeting in particular); the numerous examples provided of BHS

Clinical Director Fischer-Rodriguez reminding Appellant to complete his evaluations (*e.g.*, Exh. R-25); and the range of testimony presented on the subject during the hearing are sufficient evidence for this charge. We are ultimately unmoved by Appellant's subsequent denials. *See Morisette*, 1410 at 22 (manager's prior admission of performance deficiency during an initial investigation not undone by his subsequent denial of the same).

The transcript of Appellant's April 15, 2019 pre-removal meeting shows that Appellant, referring to certain gender dysphoria evaluations, said, "'Cause absolutely the ones that ([SR]) took from April 'til January, that is too long. Anyone would say that's too long. I would say that's too long and those are the ones that I absolutely agree were not completed in a timely manner.'" (Exh. R-2 at 51.) Later on in the same meeting, Appellant stated,

"Yeah and I feel very responsible for those ones. Absolutely and I am owning that mistake. Those ones should have been done, the ones that we're talking about that were grossly delinquent. And what we're talking about, in my eyes, the ones that are grossly delinquent are the two that ([SR]) did and the one that starts with an A. I think that those three - I am embarrassed of those and I am - and I think I could've followed up better and I think I could've done a better job getting those ones done. I absolutely am - absolutely take accountability for that."

(Exh. R-2 at 61.)

Shortly after making the foregoing statement, Appellant added, "And I should've been on top of it. I agree ma'am. I should - I should've followed up more and I say that in here. And I definitely own that." (Exh. R-2 at 61.) Subsequently, Appellant stated, "My staff didn't learn how to do this in college. It's a new process that they're learning. So I'm trusting that they're making good clinical decisions. Now that's where I want to also take accountability. I could have done more. I could have done more." (Exh. R-2 at 63.) Appellant also stated, "I should have been using progressive discipline * * * and I didn't." (Exh. R-2 at 64.) He later said, "If she's that behind in notes and I'm not aware of it, then I'm not a good manager. That's my thought." (Exh. R-2 at 64.) Afterward, he once again stated, "Six months is a long time to do an evaluation, I think that's too long. Definitely though, from April to the end of January is absolutely too long." (Exh. R-2 at 64.)

Appellant now argues that the DOC's policies and procedures for handling gender dysphoria are unethical, overly complicated, unnecessarily time consuming, against the recommendations of the DSM-5, and unlawfully discriminatory against inmates with gender dysphoria (asserting that that population is the only one that cannot receive treatment with a mere provisional diagnosis), and that accordingly those policies and procedures should share the blame for his delayed evaluations. However, one of Appellant's duties as BHS Manager was to recommend "revisions to agency policy and procedure." (Exh. R-1 at 1.) And significantly, there is no compelling evidence in the record showing that Appellant ever voiced any of these concerns to his superiors about the DOC's gender dysphoria policies before he was investigated.

Our precedent is also clear that no employee, especially a manager, may be excused from following a supervisor's directive simply because he or she considers the directive invalid. *Hopkins*, MA-6/23-92 at 12; *Patrick*, MA-2-91 at 13. A management service employee may even

be expected to conform his or her behavior to strict standards of behavior, so long as those standards are not arbitrary or unreasonable. *Helper*, MA-1-91 at 22 (citing *Jones v. Department of Transportation Highway Division*, Case No. MA-6-87 (May 1989)). The state can reasonably expect a management service employee to demonstrate both the willingness and initiative to complete assigned work or notify his or her supervisor if he or she could not. *Dubrow v. State of Oregon, Parks and Recreation Department*, Case No. MA-03-09 at 30 (May 2010), *recons* (June 2010) (citing *Patrick*, MA-2-91 at 13). Likewise, higher management can reasonably expect their supervisors to “shape up” their units. *Morisette*, 1410 at 22.

Appellant separately argues that the charge involving gender dysphoria evaluations would not have been made if the DOC’s investigators and decision-makers were “trained mental health clinicians.” Relatedly, in his brief, Appellant specifically asserts that BHS Administrator Dawnell Meyer is not a clinician and accordingly “has no right judging the clinical decisions of [Appellant] or [his] staff.” Yet Meyer is plainly Appellant’s superior in the DOC’s managerial chain of command, and nothing in the State Personnel Relations Law or our caselaw requires an investigator or a superior to hold a particular qualification. Moreover, in this case, the DOC has essentially charged Appellant via his own admissions of wrongdoing, and the majority of the DOC’s charges did not involve clinical matters. In addition, according to Appellant’s own statements during his pre-removal meeting, during her investigatory meeting regarding Appellant’s timeliness issues, Wettlaufer, a registered nurse, was “professional, organized, and clear,” while Appellant admittedly “could not recall simple facts” and was “constantly disoriented.” (R-2 at 11.) During the hearing, Appellant also testified that Wettlaufer’s conclusions were accurate. Finally, BHS Administrator Bugher, the ultimate decision-maker in this case, is a licensed professional counselor with a master’s degree in professional counseling.

In the end, Appellant was given a number of opportunities to explain his timelines to the investigators and his superiors and to provide the relevant context. If Appellant was unable to do his work because of physical or mental problems (including a problem with medication), if he was overworked due to a staffing shortage, or if his staff was unable to cope with an inmate suicide, Appellant should have articulated that clearly and done so early on. *See Dubrow*, MA-03-09 at 30.

Charge 2 of 4: Making inappropriate remarks to and about subordinate staff regarding their use of sick leave and protected leave

For the second charge against Appellant, the DOC alleges, “You admitted you discussed the [particulars] related to Ms. [MA]’s protected leave with Ms. [CL] and rationalized it because Ms. [CL] did not want to shadow Ms. [MA] because she felt she had missed too much work and would not be effective at her job. You said, ‘I did, and it was probably inappropriate.’” (Exh. R-4 at 10.)

During his pre-removal meeting, when confronted with this allegation, Appellant stated that the word “particulars” was “a bit of a misrepresentation.” (Exh. R-2 at 18.) However, he also said, “The things that I, you know, I said I felt were general statements of fact.” (Exh. R-2 at 18.) Appellant then stated,

“I ju- I think I was – what I’m, sayin’ is that I felt like I was just makin’ a statement of fact which is like, ‘Oh, she’s a good clinician, she misses a little bit – or she misses a lot of time.’ These are the kind of statements that I made. And she -- I didn’t think that was gonna be offensive. However, she told me it was. So when -- so you look in this report, when I’m sayin’ that, ‘Yeah’ you know, when I’m, re- when I’m sayin’ I did say that, you know, those kind of things. I - I’m talkin’ about, um, Ms. ([MA])’s wishes and my - my dis- I want to -- if she’s offended by it, I need to change my behavior. Does that makes sense? So this is totally true is what I’m sayin’.”

(Exh. R-2 at 19.)

Later in the same pre-removal meeting, when asked if he discussed a lawsuit, Appellant responded, “Yeah,” then shared that he said that “she sued and got her job back.” (Exh. R-2 at 72.) We further note that the word “particulars” does not appear in the actual wording of the final termination/removal letter, and is only found in Appellant’s pre-removal letter. (Exh. R-1 at 10.)

Charge 3 of 4: Making inappropriate remarks about subordinate staff regarding their employment

For the third charge against Appellant, the DOC made four different allegations, the first of which states, “You admitted to telling the BHS staff at their morning meeting you intended to terminate Ms. [G] and did not tell Ms. [G] first because she was late for her shift and you were not able to tell Ms. [G] before the morning staff meeting.” (Exh. R-4 at 10.) In Appellant’s pre-removal meeting, he admitted, “On November 2, 2018 I did tell my staff that I was terminating Ms. ([G])’s service before I was able to tell Ms. ([G]).” (Exh. R-2 at 17.) Appellant also specifically noted G being “30 to 40 minutes late” as one reason for his actions, and later stated, “I’m admitting to that - that I did tell my team before then and it was – it was a bad idea.” (Exh. R-2 at 18.)

The second allegation of the third charge states, “You admitted you told staff that Ms. [CL] had issues with her last employer.” (Exh. R-4 at 10.) When Appellant discussed that allegation during his pre-removal meeting, Appellant said, “I did” and “I admitted to this,” then admitted that talking with staff about CL’s last employer as he did was a “mistake.” (Exh. R-2 at 71.) He otherwise stated, “In regards to the November 1, 2018 meeting, I did admit to, uh, disclosing information about... [CL]’s previous employer. (Exh. R-2 at 13.)

The third allegation of the third charge states, “You admitted you discussed Ms. [MA]’s lawsuit with Ms. [CL] and said, ‘I was probably giving too much information.’ Ms. [MA] was upset so you brought her chocolate to make it up to her.” (Exh. R-4 at 10.) This particular allegation essentially parallels the second overall charge we addressed above, as does the evidence that supports it. We also note that, during his pre-removal meeting, Appellant specifically confirmed that he said that he was “probably giving too much information.” (Exh. R-2 at 72.) Moreover, the testimony of MA, CL, and Appellant himself reaffirm that Appellant did indeed bring MA chocolate as alleged.

The fourth and final allegation of the third charge states,

“You reported you did tell Ms. [MA] you would not give her the lead worker position due to her pregnancy and rationalized it as a joke and remembered telling her she was not aware of what goes on behind doors. Ms. [MA] understandably did not interpret your statements as joking. This is a highly inappropriate statement for any DOC employee to make, and especially a manager.”

(Exh. R-4 at 10.)

During Appellant’s pre-removal meeting, he stated, “I did not make a joke about denyin’ Ms. [MA] a lead position because she was pregnant. I made a joke about the lead position possibly being posted while she was out on leave.” (Exh. R-2 at 20.) However, we view that as a distinction without a difference and a *de facto* admission of the allegation because MA’s leave was plainly tied to MA’s pregnancy (as Appellant acknowledged during his cross-examination). We also find that the DOC’s version of the exchange is supported by MA’s testimony. As for the “behind doors” element of this allegation, during the pre-removal meeting, Appellant (at Exh. R-2 at 72) could not recall whether he made that statement or not. However, Appellant subsequently messaged MA through Facebook about Appellant “listening in on meetings” in Two Rivers’ administration building and told MA, “That place is so crooked.” (Exh. R-18.) That message lends credibility to the DOC’s position on this aspect, as does MA’s testimony.

Appellant now contends that he cannot deny a person a position that does not exist, and asserts that there was no lead position available at the time he spoke with MA about the matter. We reject this argument. In the pre-removal meeting, Appellant admitted that whatever he said to MA was “absolutely” a “highly inappropriate statement for any D- DOC employee to make,” and that he “definitely did something wrong there.” (Exh. R-2 at 72, 23.) He also said that it was a “[b]ad,” “stupid,” and “horrible joke.” (Exh. R-2 at 23, 21.) Relatedly, DOC Policy 20.6.1, titled “Promotion and Maintenance of a Respectful Workplace,” provides, “It is the policy of the Department of Corrections to provide a work environment free from behavior, action, or language, which may be *perceived by others* as discriminatory or harassing.” (Exh. R-10 at 1, emphasis added.) In a subsequent subsection dealing with discrimination, it is also clarified, “This policy applies to *all matters* related to hiring, firing, transfer, promotion, benefits, compensations, and other terms and conditions of employment.” (Exh. R-10 at 1, emphasis added.)

Charge 4 of 4: Making demeaning and inappropriate remarks about subordinate staff members

As with the DOC’s third charge, the fourth charge encompasses four distinct allegations. The first of those states, “You admitted you made the following statements when you were asked if you called Ms. [CL] a ‘whistleblower’ because of her note taking: ‘Maybe I did’, ‘I did inadvertently paint her as a whistleblower’, ‘I regret that’, ‘Very poor idea’, and ‘I think I fueled the fire with [CL]’.” (Exh. R-4 at 15-16.) The transcript of the pre-removal meeting (at Exh. R-2 at 74) shows Appellant making each of these alleged statements. In addition, MA, CP, and SR all testified that Appellant did call CL a whistleblower during the November 1, 2018 meeting, and Appellant testified that “the word ‘whistleblower’” was said by someone in the meeting. In his

brief, Appellant states, “I think that what is important is that my comments portrayed Ms. [CL] as a whistleblower.” In our view, this is sufficient evidence for this allegation.

For the second allegation of the fourth charge, the DOC alleges, “You told BHS staff that Ms. [CL] sued her last employer and referred to her as not trainable.” (Exh. R-4 at 11.) During the pre-removal meeting, Appellant admitted to (in his own words) “disclosing information about * * * Ms. ([CL])’s previous employer.” (Exh. R-2 at 13.) As for the second part of this allegation, during the same meeting, Appellant also said that he could “not recall calling her untrainable,” then later contradicted himself, stating, “I did not refer to her as not trainable.” (Exh. R-2 at 13, 74.) On balance, we conclude that these ambiguous statements are effectively undermined by the testimony given by MA, CL, and CP, all of which supports the DOC’s position.

For the third allegation of the fourth charge, the DOC states, “You admitted you told Ms. [CL] if she challenged you it would not go well for her in the end. You said you were referring to the politics and perception of the Department of Corrections. You said Ms. [CL] told you she was offended by the remark and you apologized to her.” (Exh. R-4 at 11.) In his pre-removal meeting, Appellant clarified that he “wasn’t intending to threaten her” when he spoke privately with [CL] on November 1, 2018. (Exh. R-2 at 15.) He also denied using the words “if you challenge me.” (Exh. R-3 at 5.) But in the same meeting, Appellant admitted to telling CL, “It would not go well for you in the end” and/or “It might be a bad day for ya and it might not e- go well for you in the end,” which we consider to be sufficient evidence for this allegation. (Exh. R-2 at 15, 13, 14.) Appellant’s subsequent Board testimony also confirms that he told CL that she would have a “bad day” if she challenged her superiors, and that he knows he should not have said what he did. In addition, as alleged, other evidence shows that Appellant did claim that CL told him that what he said to her “really feels threatening” and that he then told her, “Oh, I’m sorry, I didn’t mean it as that.” (Exh. R-2 at 14.) Finally, BHS Administrator Meyer specifically testified that Appellant repeatedly spoke about politics during this meeting.

For the last allegation of the fourth charge, the DOC states, “You were asked if you referred to your staff as idiots or stupid. You said, ‘I think so,’ and said in the past you have bantered with Ms. [CP] and said, ‘I have to watch what I am saying now that I am a supervisor.’” (Exh. R-4 at 11.) During his pre-removal meeting, Appellant effectively confirmed (at Exh. R-2 at 24, 74-75) that he did make these statements during his interview with Reyes. He also stated that “sometimes our banter gets – we – our banter gets a little, you know, inappropriate,” then said that “that’s not appropriate and I need to watch my language.” (Exh. R-2 at 24.) After that, Appellant said, “I think that I can do a lot better. I feel like I can, um, be more respectful with staff and I think that I can improve.” (R-2 at 75.) Separately, MA, CP, and Appellant himself specifically testified that Appellant called CP an idiot as alleged. On this subject, our precedent provides that “a manager can reasonably be expected to show sensitivity to the feelings of other employees and to avoid making patently offensive comments.” *Helper*, MA-1-91 at 23 (manager who “repeatedly made offensive comments to his co-workers” reasonably removed from management service).

Did the DOC act reasonably?

Appellant contends that the DOC improperly used “two completely unrelated investigations” to justify his removal, and that the two matters should have been dealt with

separately. However, both investigations involved critical areas of Appellant's managerial and supervisory authority. Further, the two investigations started around the same period of time (one in November 2018 and the other in January 2019), and as Appellant previously noted, "the allegations fall within a short time span." (Exh. R-3 at 6.) Under those circumstances, it was reasonable for the DOC to consider the two matters together.

Appellant otherwise argues that other DOC managers received lesser punishment for similar offenses; that the reasons given for terminating him are "purely pretextual;" that unnamed BHS administrators intentionally fabricated a hostile work environment while he was manager by drawing out their investigations and not giving him enough staff support; and that the true reason he was terminated was because he had some unspecified information about an inmate's suicide, while SR, who was allegedly out on leave when the suicide occurred, did not. However, no evidence has been provided that meaningfully supports any of those claims, and as we outlined above, the DOC's final charges against Appellant largely relied upon on his own admissions of wrongdoing. As stated in ORS 183.450(2), "The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact of position."

As for whether the DOC properly followed progressive discipline here, we recognize Appellant's lengthy service with the DOC, which started in January 2013. We further note that there is no evidence that Appellant had been formally disciplined in the past. Under normal circumstances, those factors could make us question whether summary termination was appropriate or reasonable. However, the evidence shows that, in 2016 and 2017, the DOC "coached" Appellant on appropriate interactions with staff after it was reported that Appellant was being "flippant" and minimizing his employee's concerns. (Exh. R-4 at 13.) Those performance issues can rationally be linked with the charges at issue in this appeal, and Appellant's brief expressly links the 2017 matter with MN, who is clearly linked with the events at issue here. We otherwise note that Appellant was only officially in his *managerial* role for approximately three years when he was terminated, specifically May 9, 2016 to July 2, 2019. Moreover, CL's initial personnel complaint was filed against him on November 20, 2018, which was about half a year before his termination date.

As noted above, standard progressive discipline is inappropriate where the offense charged is sufficiently serious or "gross." *See Smith*, MA-4-01 at 8-9 (citing *Klamath County School District*, C-127-84 at 20-21, 9 PECBR at 8851-8852). Another noted instance in which progressive discipline should not be followed is when a manager persistently refuses to follow orders. *Demaray*, MA-2-88 at 14. Beyond that, DOC Policy 20.1.3, the DOC's "Code of Conduct," provides in part that every DOC employee will adhere to the "rules, policies, and procedures of the department," and clarifies that failure to follow that directive "may result in appropriate disciplinary action, up to and including dismissal." (Exh. R-9 at 1.) A similar warning about serious discipline is included in DOC Policy 20.6.1, which addresses "Promotion and Maintenance of a Respectful Workplace." (Exh. R-1 at 5.)

During his pre-removal meeting, Appellant specifically admitted that some of his team's gender dysphoria evaluations were, in his own words, "grossly delinquent." (Exh. R-2 at 61.) He also stated that he was "very responsible for those." (Exh. R-2 at 61.) Additionally, the record contains numerous examples of Appellant being directed to complete his evaluations in a timely

manner, then failing to follow that direction. There is also notable testimony from Appellant himself indicating that he has serious concerns about, and little respect for, the DOC's existing gender dysphoria policies, which Appellant said were simply created "to save a couple bucks on hormone treatment" and "should not exist." That evidence is perhaps particularly significant in this case, given the serious risks affiliated with the particular inmate population at issue, including (as BHS Clinical Director Fischer-Rodriguez put it) increased "sexual violence" and a "higher suicide rate." On top of that, we cannot overlook the fairly large number of substantiated charges and allegations in this case.

In sum, under these circumstances, we conclude that summary termination was proportionate and reasonable. Appellant contends that he was not given time to change his behavior and that he is still learning. But "no reasonable employer can be expected to retain a manager who offends others, promotes dissention among subordinates, and does not obey orders." *Helper*, MA-1-91 at 24.

It is also clear that Appellant's colleagues at the DOC have lost "trust and confidence" in Appellant, which further reinforces our conclusion that termination was reasonable. *See Reynolds*, 1430 at 10; *Tuthill*, 1423 at 10. CL testified that working under Appellant was "really miserable" for her and other staff members, that his department was "a lot healthier not having him there," and that they "are still trying to heal." She also testified that Two Rivers would lose its QMHPs if Appellant returned, and that she cannot believe "anything" he says. MA similarly testified that working under Appellant was "pretty miserable" and that he talked behind her back a lot. CP testified that it would not be a very good idea for Appellant to return to her workgroup. SR (who is now in Appellant's old position) testified that Appellant frequently lied, was untrustworthy, and shared QMHPs' personal information. At the end of her April 12, 2019 email to BHS Assistant Administrator Hutson, MN wrote, "I do not feel comfortable working under Mr. Appellant as he has already proven time and time again that he breaks confidentiality between his subordinates * * *." (Exh. R-17.) BHS Administrator Bugher testified that Appellant's situation was ultimately "not recoverable." BHS Manager Kubesh testified that he could not trust a word out of Appellant's mouth, that the work environment at Two Rivers was "toxic" with Appellant, and that it would be "catastrophic" if Appellant returned as a manager. Additionally, BHS Assistant Administrator Hutson testified that Appellant was not honest with her.

////

////

////

////

Conclusion

We conclude that the DOC has proven all of its charges supporting Appellant's termination by a preponderance of the evidence. We also conclude that termination was a reasonable level of discipline for those charges. Accordingly, we conclude that the DOC's termination of Appellant's employment did not violate ORS 240.570(3).

PROPOSED ORDER

The appeal is dismissed.

SIGNED AND ISSUED on February 7, 2020.



Martin Kehoe
Administrative Law Judge

NOTE: The Employment Relations Board's rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The "date of filing objections" means the date objections are received by this Board; "the date of service" of a recommended order means the date this Board mails or personally serves it on the parties.) A party that files objections to a recommended order with this Board must simultaneously serve a copy of the objections on all parties of record in the case and file with this Board, proof of such service. 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. UC-001-20

(UNIT CLARIFICATION)

GRESHAM POLICE OFFICERS	)	
ASSOCIATION,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER TRANSFERRING
	)	POSITION TO ANOTHER
CITY OF GRESHAM,	)	BARGAINING UNIT
	)	
and	)	
	)	
TEAMSTERS LOCAL 223,	)	
	)	
Respondents.	)	
	)	

On January 15, 2020, Gresham Police Officers Association filed a unit clarification petition under OAR 115-025-0005(6) and OAR 115-025-0010(4) to transfer the position of Body Worn Camera Technician from representation by Teamsters Local 223 to representation by Gresham Police Officers Association. The eligible employee in the position signed a valid authorization card designating Gresham Police Officers Association as the bargaining representative. OAR 115-025-0005(6)(a).

On January 21, 2020, the Board's Election Coordinator caused a notice of the petition to be posted at the City of Gresham (City) by January 24, 2020. OAR 115-025-0010(4); OAR 115-025-0030(3). Pursuant to the terms of the notice posting, OAR 115-025-0030(1), objections to the transfer were due within 14 days of the date of the notice posting (*i.e.*, by February 7, 2020). No objections were filed.

Thereafter, the parties entered into a consent election agreement for a self-determination election. OAR 115-025-0005(6)(c). A notice of election was furnished to the City. OAR 115-025-0055(1). Pursuant to the consent election agreement, the Election Coordinator sent a ballot to the eligible voter on February 14, 2020. One valid ballot was returned by the deadline of February 28, 2020, which constitutes the date of the

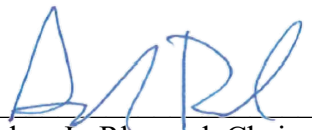
election. OAR 115-025-0060(4)(c). The two choices on the ballot were (1) representation by Gresham Police Officers Association; or (2) representation by Teamsters Local 223. A tally of ballots was held on March 2, 2020, and the valid vote counted was cast for Gresham Police Officers Association. The tally of ballots was provided to the parties on March 2, 2020.

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 12, 2020). OAR 115-025-0060(9). No objections were filed.

ORDER

Accordingly, the result of the election is certified, and the petition to transfer the position of Body Worn Camera Technician to the bargaining unit represented by Gresham Police Officers Association is granted.

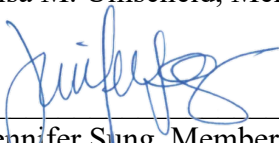
DATED: March 13, 2020.



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-003-19

(UNFAIR LABOR PRACTICE)

MULTNOMAH COUNTY CORRECTIONS	)	
DEPUTY ASSOCIATION,	)	
	)	
Complainant,	)	
	)	
v.	)	ORDER ON RECONSIDERATION
	)	
MULTNOMAH COUNTY,	)	
	)	
Respondent.	)	
	)	

Aruna A. Masih, Attorney at Law, Bennett Hartman, LLC, Portland, Oregon, represented Complainant.

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

On October 17, 2019, the Multnomah County Corrections Deputy Association (Association) filed a request for rehearing and reconsideration of this Board's October 11, 2019, order. Multnomah County (County) opposed the request for rehearing, but joined in the request for reconsideration. On October 30, 2019, the Board denied the Association's request for rehearing and granted the joint request for reconsideration.¹ The Board heard oral argument on the request for reconsideration on January 8, 2020.² Having considered the parties' arguments, we adhere to our prior order, as supplemented by this order.³

¹The Board notified the parties that the denial for the petition on rehearing would be incorporated into this order on reconsideration.

²The Board declined to consider a supplemental memorandum in aid of oral argument submitted by the County on January 9, 2020, because the Board's rules do not allow for the filing of a supplemental memorandum without advance permission from the Board, which the County did not obtain in this instance.

³The parties' respective requests for reconsideration ask us to clarify certain issues; neither party asked us to reconsider our ultimate conclusion that the County did not refuse to bargain over mandatory safety issues in violation of ORS 243.672(1)(e).

Ruling on Request for Rehearing

The Association requests rehearing to introduce additional evidence regarding its Workday claim. Specifically, the Association seeks to introduce evidence concerning “the impact of Workday on the bargaining unit” that the Association asserts has continued “after the record closed in this case.” The Association asserts that, if its petition is denied, it will suffer undue prejudice because if it files a new complaint, then the County “will argue waiver or even that the 180 day statute of limitations period has expired.” The County opposes the petition for rehearing, in part on the basis that the Association chose the timing of the filing of its complaint (which it filed on an expedited basis).

Under OAR 115-010-0100(2)(a), a “petition for rehearing asks the Board to return the matter to the ALJ for the purpose of submitting additional evidence.” Such a petition is granted “only if the petitioner establishes that the petitioner would be unduly prejudiced if the petition was denied.” OAR 115-010-0100(2)(b). Where, as here, the petition is based on an assertion of “previously unavailable evidence, the petitioner must establish that the evidence could not reasonably have been discovered and produced at the hearing.” *Id.*

The Association’s petition does not satisfy the requirements for rehearing. To begin, the Association’s assertions about what the County may argue in a subsequent proceeding are not sufficient to establish undue prejudice, and we do not see a reasonable likelihood of any such affirmative defenses prejudicing the Association in the manner presented in the petition. Additionally, the Association does not sufficiently describe the evidence that it would offer if the petition for rehearing were granted; it states only broadly that it would offer post-hearing evidence of the impact of Workday. Without a more specific proffer or representation of the expected evidence, we decline to grant the petition.

Order on Reconsideration

The parties ask us to address two questions that were not addressed in our discussion of the “safety issue” presented by the Association’s unfair labor practice complaint. As stipulated by the parties, that safety issue was: “Has the County refused to bargain in good faith with the Association regarding mandatory safety issues during a time when there has been an increase in staff assaults? If so, has the County violated ORS 243.672(1)(e)?”

That issue arose when the Association demanded to bargain about mandatory safety issues in response to a report titled, “Staff Assault Review,” which was issued by the County Sheriff Office’s Planning and Research team. At that time, the parties’ 2017-2022 CBA was in effect. In response to the Association’s demand to bargain, the County took the position that it had no duty to engage in midterm bargaining over safety issues because it had not made a unilateral change involving that subject. Nonetheless, the County agreed to meet with the Association to discuss its safety concerns.

The Association, in its unfair labor practice complaint, claimed that the County violated (1)(e) by refusing to bargain in good faith over mandatory safety issues (either by flatly refusing to bargain or by engaging in surface bargaining). In our October 11, 2019, order, we found that the County, notwithstanding its legal position, in fact met and conferred in good faith with the

Association on the subject of safety issues, and therefore did not violate (1)(e). As we explained, the County's preservation of its legal position (that it had no duty to bargain) was not dispositive to the (1)(e) claim, because it is fairly common for labor and management to articulate and preserve their respective legal positions while nonetheless engaging in good faith negotiations. Because it was unnecessary to resolve the parties' underlying legal dispute over whether the County had a duty to bargain over the safety issues, we declined to do so.

In its request for reconsideration, the Association asked us to clarify some bargaining process questions, including which bargaining process the parties should follow to complete their midterm bargaining over safety issues: the standard 150-day bargaining process for strike-prohibited employees, or the expedited bargaining process set forth in ORS 243.698. The County joined in the Association's request for reconsideration, but asked us to clarify a different question: namely, whether the County has a duty to engage in midterm bargaining about the safety issues raised by the Association.⁴

We begin with the question of whether the County has a duty to bargain. The parties' dispute stems primarily from the timing and circumstances of the Association's demand to bargain. Specifically, the Association demanded to bargain midterm about the subject of safety issues, and it did so in response to new information about officer safety, not a midterm change proposed or made by the County. The following is undisputed: the subject of safety issues is mandatory; that subject is not specifically covered by the parties' existing agreement; and the Association did not waive its statutory right to bargain about safety issues. The County argues only that it has no duty to engage in midterm bargaining over safety issues because it did not propose or make any unilateral change concerning or impacting that subject in the first instance. In other words, the County contends it has a duty to engage in midterm bargaining only if it initiates the process (by making or proposing a midterm change) and the Association timely demands to bargain in response. The Association contends that it has the right to initiate midterm bargaining over mandatory safety issues, and that it should not have to wait until the next round of successor bargaining to address its safety concerns. Thus, the issue boils down to whether the County has a duty to bargain when the Association requests midterm bargaining over a mandatory subject not specifically covered by the parties' agreement, even in the absence of a unilateral change proposed or made by the County.

Under this Board's longstanding precedent, the answer to that question is yes, the County has a continuing duty to bargain under such circumstances. Specifically, in one of the first cases interpreting the Public Employees Collective Bargaining Act (PECBA), this Board recognized that an employer has a duty to bargain in good faith when a union initiates midterm bargaining on mandatory subjects not specifically covered by the parties' agreement. *See Redmond Education*

⁴This Board unanimously agreed to grant both parties' requests for clarification. After subsequent briefing and oral argument, the concurrence ultimately declines to resolve the issue of whether the County has a duty to bargain because, in her view, the legal issues have not been sufficiently briefed. We decide to address the issue because the County asked us to on the basis that "both parties would benefit from clarification as to whether there was a duty to bargain." After both parties submitted memoranda in aid of oral argument, the County squarely argued at oral argument that an employer has no duty to engage in midterm bargaining unless the employer initiates it, and was given the opportunity to identify any legal authority that supports that position. Therefore, we believe that it is incumbent on us to provide the clarification that the County requests.

Association v. Redmond School District No. 2J, Case No. C-221 at 3-4, 1 PECBR 41, 43-44, *aff'd*, 19 Or App 212, 527 P3d 143 (1974). In that case, the employer argued that it had no duty to bargain over such subjects because the agreement's open clause provided that it would be open for annual cost of living changes, but did "not specifically authorize negotiation on working conditions which [were] not covered in an existing agreement." *Id.* The Board rejected that argument, and held that the narrow open clause did "not relieve [the] employer of [its] obligation to bargain in good faith on such working conditions." *Id.*

In reaching this conclusion, the Board stated that it was adopting the rationale of a private sector case, *Nat'l Labor Rels. Board v. Jacobs Mfg. Co.*, 196 F2d 680 (2d Cir 1952). *Redmond*, C-221 at 4, 1 PECBR at 44. One of the issues in *Jacobs* was whether the employer had a duty to bargain when the union requested midterm bargaining over pensions, a mandatory subject not specifically covered by the parties' existing agreement. 196 F2d at 682. The employer argued that it had no midterm duty to bargain, relying on a proviso to 29 USC § 158(d) that was added to the National Labor Relations Act (NLRA) by the Taft-Hartley Act. Section 8(d) defines the "obligation to bargain collectively," and before the proviso was added, "an employer was under a duty, upon request, to bargain with the representatives of his employees as to terms and conditions of employment whether or not an existing collective bargaining agreement bound the parties as to the subject matter to be discussed." *Jacobs*, 196 F2d at 683. The Section 8(d) proviso of the amended Act "narrowed this requirement by providing that the duty to bargain collectively shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period." *Id.* (quoting 29 USC § 158(d), quotation marks omitted). The employer argued that the Section 8(d) proviso meant that, "except as to subjects expressly reserved for further negotiations in a reopening clause, any fixed period contract creates a static period in the entire industrial relationship between the employer and his employees, for the term of the contract, even as to aspects of that relationship which were not covered by that contract or even discussed in the negotiations leading up to it." *Id.* at 683-84.

Both the National Labor Relations Board (NLRB) and the court rejected that argument. As the court explained,

"[T]he purpose of [the Section 8(d) proviso] is, apparently, to give stability to agreements governing industrial relations. But, the exception thus created necessarily conflicts with the general purpose of the Act, which is to *require employers to bargain as to employee demands whenever made* to the end that industrial disputes may be resolved peacefully without resort to drastic measures likely to have an injurious effect upon commerce, and the general purpose should be given effect to the extent there is no contrary provision. Since the language chosen to describe this exception is precise and explicit, 'terms and conditions contained in a contract for a fixed period,' we do not think it relieves an employer of the duty to bargain as to subjects which were neither discussed nor embodied in any of the terms and conditions of the contract."

Id. at 684 (emphasis added). In short, *Jacobs* recognized the general rule that either party may initiate bargaining about any mandatory subject at any time, including during the term of an

existing agreement, and construed the NLRA Section 8(d) proviso as creating a narrow exception to that rule (which applies only to the existing terms of a contract).⁵

Although PECBA does not contain the equivalent of the NLRA Section 8(d) proviso, when the Board adopted the rationale of *Jacobs* in the *Redmond* case, the Board adopted both the general rule that parties have a continuing duty to bargain during the term of a contract, and the limited exception to that rule created by the Section 8(d) proviso. *See Redmond*, C-221 at 4, 1 PECBR at 44 (holding respondent employer violated (1)(e) by refusing to bargain “on the new matters which are mandatory subjects” but not matters already covered by the existing agreement).

Thus, we disagree with our concurring colleague’s assertion that this Board has not previously addressed the question of whether a labor organization may initiate midterm bargaining over a mandatory subject not addressed by an existing collective bargaining agreement. The Board unequivocally answered this question in *Redmond*, and it did so by expressly adopting the rationale of private sector precedent that (as our concurring colleague acknowledges) decides the issue. Although the court of appeals affirmed the Board’s order on a narrower ground, *Redmond* remains the law of this Board and has not been overruled or abrogated since its issuance.

Moreover, even in the absence of *Redmond*, we would reach the same conclusion. We start with the basic principles of collective bargaining. Under PECBA, both the employer and the union have the statutory right to demand to bargain over mandatory subjects of bargaining, and the corresponding duty to bargain in good faith in response to such a demand. *See* ORS 243.650(4) (defining “collective bargaining” as a “mutual obligation”); *Corvallis School District 509J v. Oregon School Employees Association Chapter No 2*, Case No. C-82-82 at 4, 6 PECBR 5409, 5412 (1982) (union unlawfully refused to bargain over various mandatory subjects proposed by the employer, where employer did not waive its statutory “right to demand such bargaining”).

Further, “[t]he duty to bargain in good faith continues during the term of a collective bargaining agreement,” *Oregon School Employees Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81, 6 PECBR 5027, 5030 (1982), *unless* one or both parties waive their respective right to demand such bargaining during the contract term, *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 185, 295 P3d 38 (2013) (*AOCE*). *See also Oregon School Employees Association v. Bandon School District #54*, Case Nos. UP-26/44-00 at 16, 19 PECBR 609, 624 (2002) (“[T]here is a continuing duty to bargain during the contract term over mandatory subjects *unless* there is a showing of waiver.” (Emphasis in original.)). In other words, “after the parties have entered into a collective bargaining agreement,” “a union retains its right to bargain on mandatory subjects of bargaining unless it waives that right.” *AOCE*, 353 Or at 185.⁶

⁵As the NLRB explained in the decision affirmed by the court, it concluded that the employer had a duty to bargain when the union requested midterm bargaining over a subject not covered by the parties’ agreement because there is a continuing duty to bargain over mandatory subjects “at any time.” *See The Jacobs Mfg. Co.*, 94 NLRB 1214, 1217-19, 94 NLRB No. 175 (June 18, 1951).

⁶“A party may waive its right to bargain through (1) ‘clear and unmistakable’ contract language, (2) a bargaining history that shows the party consciously yielded its right to bargain, or (3) by the party’s action or inaction.” *AOCE*, 353 Or at 177 (quoting *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03 at 10, 20 PECBR 890, 899 (2005)).

As noted above, in this case, the County does not contend that the Association waived its right to bargain over safety issues (or that the parties' agreement already specifically covers that subject). Therefore, the Association retained its statutory right to demand to bargain about mandatory safety issues, and both parties have a continuing duty to bargain in good faith over that subject, including during the term of the CBA.⁷

Our concurring colleague does not dispute the Supreme Court's holding that, in the absence of waiver, a union retains its right to bargain midterm. However, the concurrence questions whether a *union's* statutory right to bargain includes the right to *initiate* midterm bargaining. To be clear, everyone, including our concurring colleague, agrees that an *employer* has the right to initiate midterm bargaining, and a review of our cases indicates that it is not uncommon for a public employer to exercise that right. Thus, the concurrence at least suggests that we should adopt a rule that, in the two-sided collective bargaining relationship, only one side (the employer), and not the other (the union), has the statutory right to initiate midterm bargaining. We conclude that such a rule would be contrary to PECBA and its express purposes, and we decline to adopt it.

To begin, "collective bargaining" is, by definition, mutual. As stated by the legislature:

"'Collective bargaining' means 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) (emphasis added). Further, PECBA contains "mirror provisions" that require both employers and labor organizations to bargain in good faith, ORS 243.672(1)(e) and (2)(b), and this Board applies the same standards when determining whether an employer or a union has violated

⁷The County argues that it has no duty to bargain in response to the Association's demand because it did not make a "unilateral change in working conditions" that "trigger[ed] the requirement to engage in interim bargaining." However, a unilateral change does not *initiate* the duty to bargain; a unilateral change *violates* the duty to bargain. In other words, the continuing duty to bargain is the source of the prohibition against making a unilateral change, not the other way around. See, e.g., *Bandon*, UP-26/44-00 at 11, 19 PECBR at 619 ("The duty to bargain in good faith under the PECBA prohibits unilateral changes in mandatory subjects of bargaining."). In support of its argument that the County had no duty to bargain *unless* the Association proved that the County made a unilateral change, the County cites only this Board's standard for determining whether an employer made an unlawful unilateral change. However, that standard is inapplicable here, where the question on reconsideration is whether the County has a duty to bargain in response to the Association's request, even in the absence of a unilateral change. To the extent that the concurrence contends that the wording of the Association's demand to bargain justifies the County's focus on the unilateral change standard, we note that the Association did not allege that the County made an unlawful unilateral change to safety issues; rather, the Association pleaded that the County refused to bargain over safety issues. Although the Association sought to prove that officer safety had worsened over time, we understand that the Association believed that such proof of "change" might be relevant to establishing that it was seeking to bargain about "safety issues" as that term is defined in ORS 243.650(7)(f).

that duty. *See, e.g., Tri-County Metro. Transp. Dist. of Or. v. Amalgamated Transit Union Div. 757*, Case No. UP-001-13 at 21-22, 26 PECBR 322, 342-43 (2014), *aff'd without opinion*, 279 Or App 811, 381 P3d 1096 (2016). For example, because both employers and labor organizations have a continuing duty to bargain, both parties have a *mutual* obligation to furnish information, including during the term of a collective bargaining agreement. *See, e.g., Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757*, Case No. UP-020-15 at 16, 26 PECBR 822, 837 (2016). Indeed, we cannot think of any scenario (and the concurrence does not identify one) in which the statute gives one party the power to unilaterally dictate whether bargaining about mandatory subjects will occur. To interpret PECBA as giving only a public employer, and not a labor organization, the right to initiate bargaining during the term of the contract, we would have to ignore the “mutual” element of the statutory definition of collective bargaining.

Additionally, when the legislature enacted PECBA, “it intended to bring the parties into [a] collective bargaining atmosphere of equality of bargaining power.” *Redmond*, C-221 at 4, 1 PECBR at 44. And, as the Supreme Court has concluded, the legislature’s statement of policy in ORS 243.656 “demonstrates an intent for PECBA to apply broadly in favor of public employees’ rights to organize and bargain collectively.” *AFSCME, Local 2043 v. City of Leb.*, 360 Or 809, 823, 388 P3d 1028 (2017). To allow public employers to retain the right to raise new issues when they arise midterm, but deny that same right to public employee unions, would provide an unfair advantage and create a bargaining inequality that conflicts with the legislature’s stated purposes and intent.

It is also well-established that, “in enacting PECBA, the legislature extended to public employees in Oregon the same benefits and protections that federal law had long afforded to employees in the private sector under the National Labor Relations Act.” *AFSCME*, 360 Or at 816. Thus, “we consider federal cases interpreting the NLRA that were in existence at the time that the legislature enacted PECBA.” *Id.* at 824. *See also Elvin v. OPEU*, 313 Or 165, 177, 832 P2d 36 (1992) (“Because * * * PECBA was adopted to model the NLRA, we look to cases decided under the NLRA, and particularly to cases decided prior to 1973—the year in which PECBA was adopted—to obtain guidance in interpreting PECBA.”). The NLRA case discussed above, *Jacobs*, was decided in 1952.⁸ Because the rule that unions have the right to initiate midterm bargaining was already well-settled under the NLRA when the legislature modeled PECBA on that statute, and because we agree with our predecessors that the rationale of *Jacobs* is persuasive, even if this Board had not already adopted that rationale in *Redmond*, we would do so today.

The concurrence acknowledges that the legislature modeled PECBA on the NLRA, and that, under the NLRA, unions and employers have always had an equal right to initiate midterm bargaining. The concurrence questions only whether the legislature intended to eliminate unions’ right to initiate midterm bargaining when it enacted the “SB 750” amendments to PECBA in 1995, pointing to three changes in particular. After reviewing the text and context of the SB 750 amendments, we find no evidence of a legislative intent to eliminate the substantive right of unions

⁸In the decision affirmed by the Second Circuit in *Jacobs*, the NLRB noted that it had reached the same conclusion twice before. *Jacobs Mfg.*, 94 NLRB at 1217 (citing *Allied Mills, Inc.*, 82 NLRB 854, 82 NLRB No. 99 (April 7, 1949), and *Tide Water Assoc. Oil Co.*, 85 NLRB 1096, 85 NLRB No. 189 (September 6, 1949)).

(but not employers) to initiate midterm collective bargaining. We address each of the amendments noted by the concurrence in more detail below.

First, the concurrence points out that SB 750 amended the definition of collective bargaining. However, SB 750 left *unchanged* the first part of that definition, which is the portion that is material to our decision. That is, PECBA still 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.” SB 750 modified only the second part of the definition; specifically, SB 750 replaced the phrase, “or the negotiation of an agreement, or any question arising thereunder,” with, “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.” That amendment appears to be a mere wording change: “a dispute concerning the interpretation or application of an agreement” is the same thing as “a question arising under an agreement.” However, we need not decide whether that wording change has any significance, because even if it does, it has no bearing on this case because the Association does not seek to bargain over a question “arising under” the parties’ CBA. Rather, the Association seeks to negotiate concerning a mandatory subject that is not covered by the CBA.

Second, SB 750 created the expedited midterm bargaining process set forth in ORS 243.698. Before SB 750, when an employer desired a midterm change but had a duty to bargain, the employer could not lawfully implement its desired change without either reaching agreement with the union or exhausting the full PECBA dispute resolution process. *See, e.g., Federation of Oregon Parole and Probation Officers v. Corrections Division, Field Services Section, Watson, Administrator and Executive Department, State of Oregon*, Case No. C-57-82, 7 PECBR 5649, *recons den*, 7 PECBR 5664 (1983). ORS 243.698 alters that circumstance by providing for a speedier 90-day (as opposed to 150-day) dispute resolution process. The concurrence notes that the legislature did not adopt a parallel expedited process that applies when a union desires a midterm change, and suggests that we can infer from that omission a legislative intent to eliminate union-initiated midterm bargaining. We disagree, for several reasons. As this Board has repeatedly explained, ORS 243.698 merely changed the bargaining process, it “did not change the standards for determining when an employer is ‘obligated to bargain.’” *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 at 7, 20 PECBR 721, 727 (2004) (“*Medford*”). Additionally, it is not surprising that ORS 243.698 expedites only employer-initiated midterm bargaining, given that the legislature enacted ORS 243.698 “largely at the behest of employers,” who generally would have no interest in speeding up union-initiated midterm bargaining. Moreover, the mere fact that the legislature did not create an expedited *process* for union-initiated midterm bargaining does not mean that the legislature intended to eliminate a union’s *right* to initiate midterm bargaining altogether. Nothing in our case law or SB 750’s limited legislative history indicates that union-initiated midterm bargaining was creating a problem that the legislature needed to address by eliminating it. If, notwithstanding the absence of any apparent problem, the legislature had intended to eliminate union-initiated midterm bargaining, and thereby depart from the long-settled and basic principles of labor law that it adopted when it enacted PECBA, we believe the legislature would have done so explicitly.

Third, SB 750 amended ORS 243.702. That section provides that “either party” may reopen a collective bargaining agreement midterm if any of its “words or sections” are rendered invalid. ORS 243.702(1). As the concurrence notes, SB 750 made two changes to this section: it limited the scope of the reopening to the invalid words or sections, and it provided that such reopener bargaining is subject to the expedited procedure set forth in ORS 243.698. Because ORS 243.702, and the SB 750 amendments to that section, pertain only to the midterm renegotiation of an existing contract, they are not relevant to the issue in this case, where the Association has not asked to renegotiate the parties’ existing agreement, but instead seeks to bargain over a mandatory subject that is not covered by that agreement.

Finally, we see no policy reason that would justify holding that only employers have the right to initiate midterm bargaining. The legislature enacted PECBA because it found that “unresolved disputes in the public service are injurious to the public, the governmental agencies, and public employees * * *.” ORS 243.656(2). Accordingly, the legislature declared that “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.” *Id.* We do not see how forcing labor organizations, but not public employers, to wait until successor bargaining to raise concerns that arise midterm is consistent with these legislative findings and the foundational policies of PECBA.⁹ Rather, the policies and purposes of PECBA are achieved by acknowledging that some issues appropriate for resolution through collective bargaining are unforeseen or unforeseeable at the time of successor negotiations, and when such issues arise, it serves the public interest to allow *both* parties to raise and resolve such issues promptly.¹⁰

The concurrence suggests that, because PECBA permits midterm bargaining, one party could “strategically” withhold a “particularly difficult issue” from successor bargaining and later raise it as an undiscussed midterm issue. However, *both* parties theoretically could engage in such strategic conduct—we do not agree that any such risk justifies barring only unions from initiating midterm bargaining.¹¹ Rather, in our view, PECBA is adequately equipped to limit such conduct by either party. Indeed, this Board dealt with the risk of such conduct in *AFSCME Local 2831 v. Lane County*, where the union alleged that the county intentionally withheld an issue from successor bargaining to take tactical advantage of the expedited midterm process. Case No.

⁹Barring labor organizations from raising issues when they arise midterm could delay the resolution of labor disputes by several years—as demonstrated by this case, where the staff assault report that prompted the Association’s safety concerns was issued four years before the end of a five-year contract term.

¹⁰*See also Jacobs Mfg.*, 94 NLRB at 1217-19 (discussing reasons why “making mandatory the discussion of bargainable subjects not already covered by a contract” furthers the purposes of the NLRA, including labor peace).

¹¹The concurrence argues that barring only union-initiated midterm bargaining would “not necessarily create an unfair advantage for public employers” because employers often have legitimate reasons for proposing midterm changes, such as “changes in laws, unanticipated increases or decreases in funding, or because voters elect new public officials who direct changes to policies or programs.” But unions may propose midterm changes for the exact same reasons, or other equally legitimate reasons, such as new information about employee safety issues.

UP-38-09 at 17, 24 PECBR 197, 213 (2011). The Board explained that “[a]n employer cannot use the expedited bargaining process to undermine successor contract negotiations,” and evaluated whether “the totality of circumstances” demonstrated bad faith bargaining. *Id.* at 17-21, 24 PECBR at 213-17. In that case, the Board ultimately concluded that the record did not establish that the county had acted with “deliberate intent to frustrate the bargaining process in violation of subsection (1)(e).” *Id.* at 21, 24 PECBR at 217. However, it remains this Board’s law that any such intentional conduct (by either employers or unions) would be inconsistent with the statute’s requirements of good faith collective bargaining, and if such conduct ever occurs, it can be dealt with accordingly.¹²

The concurrence also suggests that a departure from the longstanding NLRA rule on this issue could be warranted because of differences between the public and private sectors, particularly noting that, under PECBA, some labor disputes may be resolved through interest arbitration.¹³ However, the federal public sector labor relations statute also provides for interest arbitration to resolve bargaining impasse,¹⁴ and the Federal Labor Relations Authority (FLRA) has authoritatively construed that statute as giving both employers *and unions* the right to initiate midterm bargaining over mandatory subjects not covered by an existing agreement. *See United States DOI*, 56 FLRA 45, 56 FLRA No. 6 (February 28, 2000).¹⁵

¹²The County argues that permitting union-initiated midterm bargaining undermines labor peace, and that it is arbitrary to expect employers to bargain whenever a union requests it. However, the legislature enacted PECBA because it recognized that “collective negotiation * * * can alleviate various forms of strife and unrest.” ORS 243.656(2). That is, collective bargaining itself is not disruptive, it is a means for avoiding disruption. Further, as the County acknowledges, an employer may propose midterm changes that involve or impact employees’ working conditions at any time, for any reason (so long as it is not acting in bad faith). If it is arbitrary or disruptive to have to respond to a good faith proposal for a midterm change to employees’ working conditions, that is true regardless of whether it is the employer or the union who makes the proposal in the first instance.

¹³The concurrence raises various policy concerns about the potential resolution of union-initiated midterm bargaining through interest arbitration. Those concerns, however, are equally applicable to *all* bargaining that could be resolved through interest arbitration, including employer-initiated midterm and successor bargaining. The legislature has weighed those concerns and determined that, for certain types of employees, bargaining disputes should be resolved through interest arbitration instead of strikes and unilateral implementation. Further, the legislature has addressed those concerns by requiring interest arbitrators to give “first priority” to “the interest and welfare of the public,” and to give “secondary priority” to several factors, including “the reasonable financial ability of the unit of government to meet the costs of the proposed contract giving due consideration and weight” to the government’s other services and priorities while maintaining a “reasonable operative reserve.” ORS 243.746(4).

¹⁴*See* 5 USC § 7119(b) (providing for resolution of impasse by either the Federal Service Impasses Panel or other approved binding arbitration process).

¹⁵The FLRA issued its decision on remand from *Nat’l Fed’n of Fed. Emples., Local 1309 v. DOI*, 526 US 86, 99, 119 S Ct 1003 (1999), in which the Court determined that the Federal Service Labor-Management Relations Statute was ambiguous as to whether unions may initiate midterm bargaining and delegated to the FLRA the power to determine “whether, when, and where midterm bargaining is required.” In reaching its decision, the Court observed, “Without midterm bargaining, for example, will it prove possible to find a collective solution to a workplace problem, say a health or safety hazard, that first
(Continued . . .)

The FLRA explained that under the federal labor relations statute (as under PECBA), “[i]t is undisputed that the parties must bargain over an agency employer’s proposed changes in conditions of employment midterm.” *Id.* at 51. Accordingly, the FLRA concluded (as we do here) that “[r]equiring an agency, during the term of an agreement, to bargain over a union’s proposed changes in negotiable conditions of employment thus maintains the mutuality of the bargaining obligation prescribed in the Statute,” and “serves to equalize the positions of the parties.” *Id.*

In reaching that conclusion, the FLRA considered similar arguments raised by the concurrence here, but found that there was no “probative evidence of excessive costs or disruption to agency operations as a result of union-initiated midterm bargaining.” *Id.* at 53.¹⁶ For example, during the 12-year period of 1987 to 1999, the FLRA found that “there were only seven reported instances (approximately one percent of the [Federal Service Impasses Panel’s] reported decisions during that period) where the Panel has been obliged to resolve union-initiated midterm disputes.” *Id.* Similarly, the FLRA’s general counsel reported that, in a three-year period, “union-initiated midterm bargaining was a dispositive issue in less than one percent of the unfair labor practices filed.” *Id.* at 48. The FLRA “agree[d] with the General Counsel’s assertion that the lack of litigation suggests that union-initiated midterm bargaining is either infrequent or that it is not a significant area of concern for the parties.” *Id.* at 53.¹⁷ After reviewing the record, the FLRA concluded that “arguments that union-initiated midterm bargaining has been or will be harmful to the federal sector labor relations program in general, or individual labor and management relationships in particular, are unsupported and speculative,” *id.* at 54, and that the evidence

(Continued . . .)

appeared midterm? The Statute’s emphasis upon collective bargaining as ‘contributing to the effective conduct of public business,’ 5 U.S.C. § 7101(a)(1)(B), suggests that it would favor joint, not unilateral, solutions to such midterm problems.” *Nat’l Fed’n of Fed. Emples.*, 526 US at 94.

¹⁶There was evidence regarding the practical impact of requiring federal agencies to bargain in response to union-initiated midterm bargaining when the FLRA decided this issue in 2000, because the FLRA had been requiring most federal agencies to do so for many years, consistent with the D.C. Circuit’s decision in *Nat’l Treasury Employees Union v. FLRA*, 810 F2d 295, 258 US App DC 176 (DC Cir 1987). (For a complete summary of administrative and judicial precedent on this issue in the federal context, see *United States DOI*, 56 FLRA at 46-47.) Additionally, before reaching its conclusion in 2000, the FLRA “invited the parties and, pursuant to a *Federal Register Notice*, interested persons to file briefs addressing whether and under what circumstances agencies are obligated to engage in midterm bargaining,” including “what policy considerations and empirical data” the Authority should balance. *Id.* at 47. Numerous parties submitted briefs on both sides. *Id.* The FLRA has continued to recognize the right of unions to initiate midterm bargaining since then (see *United States OPM*, 71 FLRA 423, 2019 FLRA LEXIS 81, 71 FLRA No. 79 (November 25, 2019)), and we are unaware of, and the concurrence has not cited, any intervening evidence from the last two decades that contravenes the FLRA’s conclusion that such midterm bargaining furthers, rather than impedes, the purposes of the Federal Service Labor-Management Relations Statute.

¹⁷As discussed above, the issue of whether a union has the statutory right to initiate midterm bargaining on mandatory subjects not covered by the agreement was decided by this Board in 1973, in *Redmond*. To our knowledge, union-initiated midterm bargaining has not been a significant issue in a case before this Board again until now, almost 50 years later. That lack of litigation suggests that, in Oregon, as in the federal context, union-initiated midterm bargaining either is very rare or very rarely results in a significant dispute that the parties cannot resolve themselves.

weighed in favor of continuing to recognize the right of unions to initiate midterm bargaining, *id.* at 52.

The FLRA also explained its reasons for concluding that “requiring agencies to bargain over union-initiated midterm proposals furthers Congress’s goal of promoting and strengthening collective bargaining in the federal workplace”:

“[A]s the D.C. Circuit has recognized, collective bargaining, including midterm bargaining, is in the public interest because it ‘contributes to stability in federal labor-management relations and effective government.’ In addition, permitting unions to raise issues at the time they arise or become a priority for the parties serves the public interest in a more efficient Government because it will likely lead to more focused negotiations. * * * [T]he ability to bargain over such issues in a timely manner is preferable to the alternative of leaving potentially important concerns unaddressed for perhaps a period of years until term negotiations on the basic contract commence again. Moreover, requiring unions to raise matters that do not currently present problems, but might do so in the future, could unnecessarily and inefficiently broaden and prolong term negotiations. That is, by permitting unions to raise certain matters midterm, the term negotiations will, in our view, proceed more efficiently in addressing existing and primary problems, and there will be no requirement to bargain over remote and secondary issues that do not appear to raise immediate concerns.”

Id. (quoting *Nat’l Treasury Employees Union v. FLRA*, 810 F2d 295, 300, 258 US App DC 176 (DC Cir 1987)).

We agree with this reasoning and therefore disagree with our concurring colleague’s suggestion that allowing both employers and labor organizations to initiate midterm bargaining over mandatory subjects not specifically covered by the parties’ existing agreement is in tension with the policies and purposes of PECBA and related statutes. To the contrary, consistent with *Redmond* and our sister agencies, the NLRB and FLRA, we conclude that the collective bargaining rights and duties that PECBA confers on *both* parties, not just an employer, include the right to initiate midterm collective bargaining under such circumstances, and that permitting both parties to exercise that right advances PECBA’s policies and purposes. Having clarified the bargaining obligations of the parties in this case, we adhere to our ultimate conclusion (and reasoning) that the Association did not prove that the County violated ORS 243.672(1)(e).

We turn to the Association’s question regarding whether the parties should follow the standard 150-day bargaining process for strike-prohibited employees, or the expedited 90-day process set forth in ORS 243.698. “Expedited bargaining under ORS 243.698 is an exception to the regular bargaining process, and is limited to the situation the legislature sought to address—*i.e.*, where the employer wishes to make a mid-term change in a condition of employment that is not already covered by the existing contract.” *Medford*, DR-2-04 at 8, 20 PECBR at 728. This case does not fit within that limited exception, as the County is not seeking to make a midterm change and did not, therefore, initiate the expedited 90-day bargaining process by giving the Association the written notice required by ORS 243.698(2). Accordingly, we conclude that the standard 150-day bargaining process applies in these circumstances.

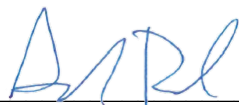
Relatedly, the Association asks us to clarify when the 150-day period provided for in ORS 243.712(1) began to run in this case. Under that provision, “[t]he 150-day period shall begin when the parties meet for the first bargaining session and each party has received the other party’s initial proposal or an alternative date to which the parties agree in writing.” *Id.* On this record, the statute’s default rule applies because there is no evidence of a written agreement to an alternative date. Further, it appears that the rule’s three conditions were met, at the latest, by January 15, 2019. Specifically, the record indicates that the parties discussed the subject of safety issues on August 16, 2018, at a September Labor Management meeting, and on December 19, 2018. The Association also presented the County with a proposal at the December meeting, and the County responded with a counterproposal on January 15, 2019.¹⁸

ORDER

1. We deny the Association’s petition for rehearing.

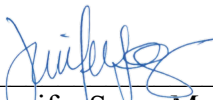
2. We adhere to our October 11, 2019, order, as supplemented by this order. The complaint is dismissed.

DATED: March 20, 2020.



Adam L. Rhynard, Chair

*Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

*Member Umscheid, Concurring:

I concur in the conclusion that the County did not violate ORS 243.672(1)(e). I write separately because I do not join in the conclusion that the County has a duty to bargain in response to a midterm demand by the Association when there was no midterm change caused or anticipated by the employer.

Under the Public Employee Collective Bargaining Act (PECBA), an employer has a duty to bargain midterm over mandatory subjects when it seeks to change the status quo. *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 183, 295 P3d 38 (2013) (*AOCE*) (absent “a sufficient affirmative defense, a union has a statutory right to insist that an employer bargain over mandatory subjects before making changes to the status quo”); *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) (under “most circumstances, a public employer commits a *per*

¹⁸Although the parties may have exchanged initial proposals before this date, the record does not contain enough information for us to make such a determination.

se violation of its duty to bargain in good faith if it makes a unilateral (*i.e.*, unbargained) change in a past practice or the *status quo* concerning a subject that is mandatory for bargaining”); *see also Oregon School Employees Association v. Bandon School District #54*, Case Nos. UP-26/44-00 at 16, 19 PECBR 609, 624 (2002) (waiver is the appropriate affirmative defense and “provides a consistent analytical framework that may be applied, when appropriate, across unilateral change contexts”). Here, there was no midterm change made or proposed by the County to the status quo.

The parties’ request for clarification of our order raises a question the Board has never addressed: whether a public employer, in the absence of any midterm change proposed or made by that employer, is obligated to bargain in response to a *union*-initiated midterm demand regarding a mandatory subject not addressed by a collective bargaining agreement negotiated pursuant to PECBA. Stated differently, should PECBA be construed to mirror private sector labor law, which imposes such a duty to bargain? *See, e.g., Nat’l Labor Rels. Board v. Jacobs Mfg. Co.*, 196 F2d 680, 684 (2d Cir 1952) (“we do not think [the amendment to section 8(d) of the National Labor Relations Act] relieves an employer of the duty to bargain as to subjects which were neither discussed nor embodied in any of the terms and conditions of the contract”); *see also Nat’l Fed’n of Fed. Emples., Local 1309 v. DOI*, 526 US 86, 93, 119 S Ct 1003 (1999) (construing the federal public sector labor relations statute, and acknowledging the midterm duty to bargain in the private sector in response to a union-initiated demand).¹⁹

¹⁹This Board cited *Jacobs* in a case analyzing a reopener provision in a contract negotiated and entered before PECBA. In *Redmond Education Association v. Redmond School District No. 2J*, Case No. C-221, 1 PECBR 41, *aff’d*, 19 Or App 212, 527 P2d 143 (1974), the employer contended that it was not required to bargain in response to the union’s midterm demand, where the parties had negotiated a contract under the pre-PECBA “confer and consult” statutes, which did not permit bargaining on many subjects, and PECBA was later enacted while the parties’ agreement was in effect. The union contended that the agreement was “open as to issues which were unbargainable” under the pre-PECBA confer and consult statutes. C-221 at 2, 1 PECBR at 42. The Board concluded that the reopener clause did not bar negotiations “on matters on which there was no consultation prior to consummation of the agreement, or upon matters not expressly covered therein.” *Id.* The Board cited *Jacobs*, calling it “persuasive,” and adopted “its rationale to the extent it holds that an open clause which does not specifically authorize negotiation on working conditions which are not covered in an existing agreement, does not relieve an employer of his obligation to bargain in good faith on such working conditions.” *Id.* On appeal, noting the Board’s reliance on *Jacobs*, the court wrote, “We need not and do not decide whether the law of Oregon is that broad.” 19 Or App at 214.

Determining whether PECBA should mirror private sector labor law on this point requires the resolution of a number of legal questions that, understandably, were not briefed or argued in this case.²⁰ One such question is whether the analysis in *AOCE* compels a conclusion that a union may require an employer to bargain midterm in response to a *union*-initiated demand. In *AOCE*, the court considered the Board's "use of the waiver standard to evaluate [the employer's] defense" to a unilateral change claim under ORS 243.672(1)(e). 353 Or at 177. The court concluded that the Board did not err in applying a waiver standard to assess the employer's defense that the parties' contract permitted it to unilaterally change employees' shift start and stop times and days off. The court reasoned that the Board's waiver analysis "recognizes that the duty to bargain under ORS 243.672(1)(e) continues after the parties have entered into a collective bargaining agreement and that a union retains its right to bargain on mandatory subjects of bargaining unless it waives that right." *Id.* at 185. The claim in *AOCE*, however, arose from an *employer's* unilateral change. The employer did not dispute that it "had a statutory obligation and [the union] had a statutory right to bargain" regarding the mandatory subject at issue (days off and shift start and stop times) or that it had made changes to those subjects without first bargaining. *Id.* at 175. The court's analysis in *AOCE*, therefore, arose from a different question than that raised here—whether a *union* has a statutory right to insist that an employer bargain in response to a midterm demand by the union, even when there are no changes made or proposed by the employer. Whether *AOCE* requires the conclusion reached by my colleagues is, in my view, an open question.

In addition, determining whether the County has a duty to bargain in this case also implicates the question of whether the substantial amendments to PECBA in 1995 foreclose or limit any duty to bargain an employer may have in response to a union-initiated midterm demand. The 1995 amendments included changing the definition of collective bargaining, creating a new expedited midterm bargaining process, and limiting the scope of and timeline for the midterm renegotiation permitted under ORS 243.702. *See* Or Laws 1995, ch 286, § 1 (amending definition

²⁰The scope of the briefing and arguments arose from the specificity of the Association's demand to bargain, the County's response to it, and the resulting narrow legal issues. Specifically, the Association's demand to bargain asserted that assaults on employees working in County corrections facilities "have doubled in the last few years creating a unilateral change in working conditions." In response, the County contended that it had no duty because it had not made a unilateral change involving that subject. In its complaint, the Association alleged, under the headings "Refusal to Bargain" and "ORS 243.672(1)(e)," that the County's "MCSO Corrections Staff Assault Review" document showed a significant increase in staff assaults "constituting a gradual but significant unilateral change in working conditions/employment relations for the MCCDA bargaining unit members." Complaint at 4, paragraph 23. In its objections to the Recommended Order, the Association contended that the evidence established that "(1) staffing levels have changed; (2) a variety of external factors other than staffing have contributed to a significant increase in inmate assaults of corrections officers; and (3) the combined impact of these changes on officer safety was unknown or at best speculative, until the [County's] June 2018 study made these impacts manifest." Complainant's Objections at 4. The Association described the question arising from this evidence as whether "a 'cumulative effect' unilateral change doctrine for 'safety issues' [is] supported by ORS 243.650(7)(f)?" Complainant's Memorandum in Aid of Oral Argument at 4. Thus, the parties' arguments focused on the narrow issue of whether a reported increase in assaults constituted a change that required bargaining, rather than the broader issue of whether the County has a duty even in the absence of a change proposed or made by the County. Neither party, for example, raised or briefed whether the Board's decision in *Redmond School District No. 2J*, which addressed the parties' obligations under PECBA with regard to a contract negotiated and entered before PECBA was enacted, supports the view that the Association was entitled to bargain midterm in this case.

of collective bargaining); § 13 (creating expedited midterm bargaining process); § 4 (limiting midterm renegotiation under ORS 243.702 to only “invalid words or sections” of an agreement, rather than “all or any part” of the agreement).

Specifically, in Senate Bill 750, the legislature deleted from the definition of collective bargaining two phrases modeled on the National Labor Relations Act. Before the 1995 amendments, ORS 243.650(4) defined collective bargaining, in part, as:

“[T]he 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, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party[.]”

See Or Laws 1995, ch 286, § 1. In SB 750, the legislature struck the phrase “or the negotiation of an agreement, or any question arising thereunder,” the text copied from the NLRA. *Id.*; see also 29 USC § 158(d) (defining collective bargaining as the “performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, *or the negotiation of an agreement, or any question arising thereunder*, and the execution of a written contract incorporating any agreement reached if requested by either party”) (emphasis added). As amended by SB 750, ORS 243.650(4) now defines collective bargaining as:

“[T]he 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) (emphasis added). As relevant here, the legislature omitted the NLRA phrases “or the negotiation of an agreement, or any question arising thereunder,” and replaced them with “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.” How the legislature, when it made this textual change in 1995, intended to affect the nature and scope of the duty to bargain is a question not addressed by the briefs in this case. The obligation to meet and confer with respect to “any dispute concerning the interpretation or application of a collective bargaining agreement” is at least arguably narrower than an obligation to meet and confer with respect to “the negotiation of an agreement, or any question arising thereunder.”

In addition to changing the definition of collective bargaining, in SB 750 the legislature created a new, expedited process governing midterm bargaining—another change that arguably affects the nature and scope of any midterm duty to bargain in response to a union-initiated demand. Specifically, the new expedited midterm bargaining statute, ORS 243.698, was “adopted, largely at the behest of public employers, not as a new requirement for employers, but rather *as a*

limitation on mid-term bargaining obligations.” Oregon School Employees Association v. Astoria School District, Case No. UP-40-02 at 3, 20 PECBR 63, 65 (2002) (Reconsideration Order) (emphasis added). Under ORS 243.698, *the employer* is required to “notify the exclusive representative in writing of anticipated changes that impose a duty to bargain.” ORS 243.698(2) (emphasis added). Under the statute, “[w]hen the employer is obligated to bargain[,]” and “the exclusive representative demands to bargain, the bargaining may not, without the consent of both parties and provided the parties have negotiated in good faith, continue past 90 calendar days after the date the notification specified in subsection (2) of this section is received.” ORS 243.698(1). As this Board has explained, “[T]he legislature intended ORS 243.698 to provide a relatively expeditious process to address those mid-contract change proposals which arise outside the normal bargaining period.” *In the Matter of the Petition for Declaratory Ruling Filed by the Sandy Union High School District*, Case No. DR-4-96 at 6, 16 PECBR 699, 705 (1996).²¹ By its terms, ORS 243.698 applies when the employer is required to notify the union of anticipated changes. The legislature did not include in the statute a parallel provision governing *union-initiated* demands to bargain. That omission is odd if, in fact, the legislature intended after SB 750 that both parties would have the right to require midterm bargaining.

Also, in SB 750, the legislature amended ORS 243.702, which permits midterm negotiations under limited circumstances. Under ORS 243.702, parties may renegotiate contract provisions midterm if words or sections of their agreement are declared invalid or if the employer or employees are unable to perform them. ORS 243.702(1). In SB 750, the legislature restricted the scope of permitted renegotiation to only the invalid “words or sections” of the agreement (rather than “all or any part” of the agreement) and specified that any such renegotiation must occur on the expedited timeline required by ORS 243.698. *See* Or Laws 1995, ch 286, § 4.

In sum, in SB 750, the legislature amended PECBA to (1) change the definition of collective bargaining, (2) require expedited midterm negotiations, and (3) narrow the scope of permissible renegotiation under ORS 243.702 and require expedited bargaining for those negotiations. These changes resulted in less textual connection between PECBA and the NLRA in the amended portions of the statute. We treat private sector labor law as persuasive authority when there is a textual connection between PECBA and the NLRA. *See, e.g., AFSCME, Local 2043 v. City of Leb.*, 360 Or 809, 824 n 7, 388 P3d 1028 (2017) (where there is a “textual connection” between PECBA and the NLRA, “the relevant federal case law in existence at the time of PECBA’s enactment provides persuasive authority when interpreting the unfair-labor-practice provisions of PECBA”); *Klamath Cty v. Laborers Int’l Union*, 21 Or App 281, 288, 534 P2d 1169 (1975) (“the similarity between parts of the [NLRA and PECBA] indicates that federal decisions interpreting the NLRA be given some weight in interpreting similar sections of the Oregon statute”). The differences in the text of PECBA and the NLRA on the relevant points after SB 750 call into question the basis for relying so heavily on private sector case law for guidance in the

²¹Under the analysis offered by my colleagues, when a union demands midterm bargaining in the absence of an employer-proposed change, that bargaining will occur pursuant to the 150-day bargaining timeline. However, when an employer seeks to propose a midterm change—typically because new legal requirements or unanticipated funding changes require it—bargaining will take place on the 90-day timeline. It is unclear why the legislature would create such a two-track system in light of the fact that ORS 243.698 was added to PECBA “largely at the behest of public employers” to *expedite* midterm bargaining, *Astoria School District*, UP-40-02 at 3, 20 PECBR at 65.

interpretation of public sector labor law with regard to whether a union may initiate midterm bargaining in the absence of a change made or proposed by the employer.

Moreover, the overall import of these 1995 changes indicates a preference for faster, more streamlined midterm bargaining. That apparent legislative preference is difficult to square with the requirements that a public employer must bargain in response to a union-initiated demand on a mandatory subject not covered by the contract, and that such bargaining must occur on the 150-day bargaining timeline. Resolving that apparent contradiction requires analyzing whether and how the 1995 amendments affect a public employer's duty to bargain in response to a union-initiated midterm demand, inviting our usual analysis under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), as modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). That analysis was not undertaken by the parties in this case, and reasonably so, because they were focused on whether an increase in staff assaults constituted a unilateral change.

Finally, the question posed by this case raises multiple significant labor policy issues. The policy statement in PECBA includes the recognition that the “people of this state have a fundamental interest in the development of harmonious and cooperative relationships between government and its employees” (ORS 243.656(1)); that “unresolved disputes in the public service are injurious to the public, the governmental agencies, and public employees” (ORS 243.656(2)); and that the “state has a basic obligation to protect the public by attempting to assure the orderly and uninterrupted operations and functions of government” (ORS 243.656(4)). Requiring public employers to bargain in response to union-initiated midterm proposals is in tension with these policy statements. For one example, pushing “complicated issues through the crucible of collective bargaining often results in creative, agreeable solutions in circumstances that initially looked daunting or even hopeless.” *Portland Association of Teachers/OEA/NEA v. Multnomah County School District No. 1J (Operating as Portland Public Schools)*, Case No. UP-024-17 at 12, 27 PECBR 146, 157 (2017). The bargaining process can aid harmonious and cooperative relationships, and when all bargainable issues are confronted during successor bargaining by both parties, orderly governmental functions can result. But if one party segregates an issue (perhaps a particularly difficult issue) from successor bargaining, that issue is isolated from that give-and-take of comprehensive negotiation—potentially hindering the very compromises that characterize productive public sector collective bargaining.²² Parties would not have the same incentive to attempt to foresee all the issues that need to be negotiated, subject them to successor negotiations, and ultimately bargain a compromise workable for both the public entity and its employees.

²²Public employers occasionally propose midterm changes that affect mandatory subjects of bargaining, and those issues are therefore also “segregated” from regular-cycle successor bargaining. But public employers initiate midterm bargaining often because they are required to change practices in response to changes in laws, unanticipated increases or decreases in funding, or because voters elect new public officials who direct changes to policies or programs. Acknowledging that public employers are occasionally required to initiate midterm bargaining about changes to mandatory subjects, and permitting midterm bargaining related to employer-proposed changes without a corresponding obligation to bargain in response to union-initiated midterm demands, does not necessarily create an unfair advantage for public employers. Rather, it recognizes the different roles public employers and labor organizations serve in the administration and functioning of public entities.

Requiring bargaining over midterm proposals by a union also isolates those midterm issues from periodic public budget-setting, and the public accountability that accompanies it. As an example, in most of local government, policy makers must comply with local budget law, which requires citizen involvement and public disclosure, and limits spending to the adopted schedule of appropriated funds. *See, e.g.,* ORS 294.305 *et seq.* In a strike-prohibited unit, as is the case here, if a union may force midterm bargaining over an issue, during successor negotiations it can defer negotiations over that subject, initiate bargaining midterm, and then advance the subject to interest arbitration. Ultimately, an interest arbitrator—rather than politically accountable elected officials with input from citizen members of a budget committee (*see* ORS 294.414(2))—would make a decision with potentially significant financial consequences. Such consequences would be in addition to the costs resulting from the terms in the parties’ contract itself, creating potential mid-contract budgetary challenges for the public employer.

Although this is a novel issue in Oregon public sector labor law, it has been addressed elsewhere in the public sector. It was debated and resolved in federal public employment, for example, but only after analysis in multiple cases by both the federal labor relations administrative agency (the Federal Labor Relations Authority (FLRA)) and the courts.²³ Ultimately, resolving a split in the circuits, the U.S. Supreme Court concluded that Congress delegated to the FLRA the power to determine “whether, when, where, and what sort of midterm bargaining is required” by the Federal Service Labor-Management Relations Statute, 5 USC § 7101 *et seq.* *DOI*, 526 US at 98-99. The court reasoned that the language of the federal statute is “sufficiently ambiguous or open on the point as to require judicial deference to reasonable interpretation or elaboration by the agency charged with its execution.” *DOI*, 526 US at 92. The court remanded the case to the FLRA “to consider these questions aware that the Statute permits, but does not compel” the agency’s prior conclusion that the federal statute required employers to bargain midterm in response to union-initiated demands. 526 US at 100.

On remand, the FLRA invited briefing on the question from its general counsel, the parties, and amici curiae (nine amici submitted briefs). *United States DOI*, 56 FLRA 45, 47, 56 FLRA No. 6 (February 28, 2000) (in a notice in the *Federal Register*, the FLRA asked interested persons to answer the following question: “In the context of resolving this case, what policy considerations and empirical data should the Authority balance in determining whether, when, and where union-initiated midterm bargaining is required?”). In a split decision, the FLRA concluded that federal employers “are obligated to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters that are not ‘contained in or covered by’ the term agreement, unless the union has waived its right to bargain about the subject matter involved.” *United States DOI*, 56 FLRA at 50. One FLRA member dissented from the conclusion that the statute requires union-initiated midterm bargaining, and noted disagreement with “the decision by

²³*See, e.g., IRS*, 17 FLRA 731, 17 FLRA No. 103 (April 24, 1985) (statute does not require federal employers to bargain in response to a union’s midterm demand), *rev’d*, *Nat’l Treasury Employees Union v. FLRA*, 810 F2d 295, 258 US App DC 176 (DC Cir 1987), *on remand*, *IRS*, 29 FLRA 162, 167, 29 FLRA No. 12 (September 28, 1987) (“the duty to bargain in good faith imposed by the Statute requires an agency to bargain during the term of a collective bargaining agreement on negotiable union-initiated proposals concerning matters which are not addressed in the agreement and were not clearly and unmistakably waived by the union during negotiation of the agreement”); *Soc. Sec. Admin. v. Fed. Labor Relations Auth.*, 956 F2d 1280, 1288 (4th Cir 1992) (“Congress did not intend the [federal statute] to require bargaining over midterm union proposals”).

the majority to not seek input from the general public and the parties here regarding the issue of ‘zipper clauses,’ a matter too intertwined with midterm bargaining to ignore.” 56 FLRA at 56.

I do not join in my colleagues’ conclusion that the County has a duty to bargain because the parties’ request for clarification implicates significant legal questions that were not briefed or argued. Without that briefing, including the healthy debate between labor and management that would accompany it, I decline to conclude that a public employer has a duty to bargain under PECBA in response to a union-initiated midterm demand to bargain on a mandatory subject not covered by the contract. In addition, because I do not join in the conclusion that the County has a duty to bargain in response to a union-initiated midterm demand where there was no change made or proposed by the County, I also do not join in the conclusion that the 150-day bargaining period applies.



Lisa Umscheid, Member

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-013-19

(UNIT CLARIFICATION PETITION)

PROFESSIONAL AND TECHNICAL	)	
EMPLOYEES, LOCAL 17, DBA	)	
PROTEC17,	)	
	)	
Petitioner,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND ORDER
CITY OF PORTLAND,	)	
	)	
Respondent.	)	
	)	

Paul Marvy and Elliot Levin, Professional and Technical Employees, Local 17, Seattle, Washington, represented the Petitioner.

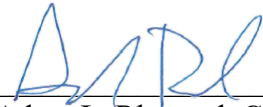
Lory J. Kraut, Senior Deputy City Attorney, City of Portland, Portland, Oregon, represented the Respondent.

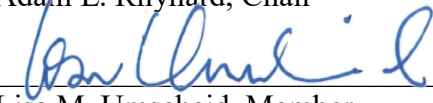
On March 2, 2020, Administrative Law Judge Martin Kehoe issued a recommended order in this matter. The parties had 14 days from the date of service of the order to file objections. OAR 115-010-0090(1). No objections were filed, which means that the Board adopts the attached recommended order as the final order in this matter. OAR 115-010-0090(4), (5).

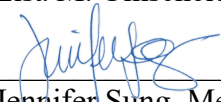
ORDER

The petition is dismissed.

DATED: March 23, 2020.


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-013-19

(UNIT CLARIFICATION PETITION)

PROFESSIONAL AND TECHNICAL	)	
EMPLOYEES, LOCAL 17, DBA	)	
PROTEC17,	)	
	)	
Petitioner,	)	RECOMMENDED RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW, AND
	)	PROPOSED ORDER
CITY OF PORTLAND,	)	
	)	
Respondent.	)	
	)	

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on October 7 and 8, 2019 in Portland, Oregon. The record closed on November 20, 2019, upon receipt of the parties' post-hearing briefs.

Paul Marvy and Elliot Levin, Professional and Technical Employees, Local 17, Seattle, Washington, represented the Petitioner.

Lory J. Kraut, Senior Deputy City Attorney, City of Portland, Portland, Oregon, represented the Respondent.

On August 6, 2019, the Petitioner, Professional and Technical Employees, Local 17, DBA Protec17 (Protec17), filed a unit clarification petition with the Employment Relations Board (Board). The petition seeks to clarify whether the Maintenance Supervisor I-Nonexempts (MSI-NEs) employed by the Respondent, City of Portland (City), should be added to Protec17's existing bargaining unit via the Board's card check process. The City filed timely objections on August 28, 2019. The issues raised by those objections are:

- (1) Are the petitioned-for MSI-NEs "supervisory employees" as defined in ORS 243.650(23)(a)?

- (2) Does the petition unduly fragment the City's workforce because the petition seeks to add some, but not all, MSIs?
- (3) Do the MSI-NEs share a sufficient community of interest with Protec17's existing bargaining unit?
- (4) Is the petition blocked by a contract bar?

As set forth below, we conclude that the MSI-NEs are supervisory employees as defined in the statute, and that the petition must be dismissed for that reason. Therefore, we need not reach any conclusions regarding the three remaining issues. We also note that, as stated in its post-hearing brief (at 1 n 1), the City has ultimately declined to pursue its contract bar objection.

RULINGS

All rulings by the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties

1. Protec17 is a "labor organization" within the meaning of ORS 243.650(13). The group has also been called PTE Local 17 as well as COPPEA, its original name.
2. The City is a "public employer" within the meaning of ORS 243.650(20).
3. The City employs around 1,600 "non-represented" employees. (Exh. P-5 at 1.) The rest of the City's workforce is represented by a number of unions including, but not limited to, Protec17; Laborers' International Union of North America Local 483, Portland City Laborers (Laborers); American Federation of State, County and Municipal Employees (AFSCME), Local 189; International Brotherhood of Electrical Workers, Local 48; Machinists and Aerospace Workers, District Lodge 24; Auto Mechanics, District Lodge 24; International Union of Operating Engineers, Local 701; Plumbers, Local 290; and Painters and Allied Trades, District Council 5. The last seven of those unions bargain together as a single entity called the District Council of Trade Unions (DCTU). Generally speaking, additional unions represent the City's police and fire employees.
4. The City is a party to nine collective-bargaining agreements (CBAs). That includes one CBA that covers the various bargaining units represented by the DCTU. It also includes the CBA between the City and Protec17 that runs from July 1, 2017 to June 30, 2021. All of these CBAs address assignment of overtime, breaks, discipline, grievances, hiring, pay, and seniority, among other subjects.
5. Protec17 is the exclusive representative of a bargaining unit with approximately 900 members that includes all City employees in regular or probationary status in a wide range of classifications including Engineers (some of whom work closely with the petitioned-for

MSI-NEs), Planners, and Technicians, among many others.¹ Compared to members of the City's other bargaining units, members of Protec17 are generally at the higher end of the wage range spectrum, and Protec17's Engineers are some of the City's highest paid employees. Protec17's unit also includes Fair Labor Standards Act (FLSA) exempt (*i.e.*, ineligible for overtime) employees and FLSA nonexempt (*i.e.*, overtime eligible) employees (a distinction addressed below).

6. Organizationally, the City is divided into a large number of units, offices, and bureaus. Protec17's members work in most of the City's major bureaus except for its Police and Fire Bureaus. Several hundred of those members work in the City's Bureau of Transportation and Water Bureau. However, within the Maintenance Operations Group of the Bureau of Transportation in particular, Protec17 represents only a few classifications. One of those classifications is that of Utility Locator, which reports directly to MSI-NEs.

Maintenance Supervisor I (MSI) Classification

7. MSIs come in two varieties: (1) MSI-Exempts (MSI-Es), who are treated as if they are exempt from the FLSA under City Human Resources Administrative Rule (HRAR) 8.03 and therefore cannot earn overtime pay (*i.e.*, "Compensation for hours worked beyond 40 in a workweek"), and (2) the petitioned-for MSI-Nonexempts, who are treated as if they are not exempt from the FLSA under the same City HRAR and can therefore earn overtime pay. (Exh. R-11 at 5.) Stated differently, FLSA exempt employees are not eligible for overtime, while FLSA covered and FLSA nonexempt employees are eligible for overtime.² This distinction between Exempt and Nonexempt MSIs went into effect in April 2018. When that happened, the City did not change any job duties of those employees who became MSI-NEs.

8. The MSI classification is the first of two classifications in the Maintenance Supervisor promotional series, the second being a Maintenance Supervisor II (MSII). MSIs are distinguishable from MSII in that the latter directly supervise a larger group of assigned positions, including one MSI. The MSI classification is also distinguishable from the broader Supervisor I classification, in that "the former supervises those who perform maintenance work within well-established guidelines." (Exh. J-4 at 1.) However, the Supervisor I classification has similarly been split into Exempt and Nonexempt varieties, and like the MSI classification, also represents a conglomeration of older, now-defunct job titles.

9. In general, every MSI is responsible for overseeing a specific kind of maintenance work in the City, and as a rule, "[d]irectly supervises a minimum of four (4) employees." (Exh. J-4 at 2.) The "class specification" for MSIs, which covers both MSI-Es and MSI-NEs, also provides that an MSI:

¹The petition indicates that Protec17 represents approximately 45 classifications. However, Rachel Whiteside, a union representative for Protec17, testified that the group represents approximately 154 classifications. Schedule A of the parties' CBA (Exh. J-1 at 49-51) appears to list all of Protec17's classifications, but the exact number of classifications remains ambiguous.

²The City asserts that, in reality, "all MSIs are and remain exempt from overtime under the Fair Labor Standards Act." (City brief at 3.) It also asserts that this same law permits employers to treat otherwise exempt employees as hourly employees and pay them overtime.

“Reports to a Manager, or other management- or executive-level positions. Under minimal supervision, responsible for supervising the maintenance, repair, and cleaning of City facilities, public works, streets, sewers, water distribution infrastructure, raceway, parks and public spaces, streetcars and linear track, and related assets and infrastructure.”

(Exh. J-4 at 1.) The same class specification further states that Exempt and Nonexempt MSIs have the same “pay grade.” (Exh. J-4 at 1.)

10. Ordinarily, MSIs oversee one or more work crews who operate in the field, and each crew is led by a crew leader. The MSIs regularly go into the field as well, but the MSIs typically do not work hand-in-hand with their crews or perform the same kind of fieldwork that their crew leaders and the rest of the crews do. Instead, MSIs often work in an office setting, and some MSIs spend more of their time in an office setting than they do on jobsites. The crew leaders and the employees they lead are generally represented by a union (*e.g.*, by Laborers), while all MSIs are non-represented. In certain workgroups (like those of the City’s Water Bureau, which follows the DCTU CBA), being a crew leader is simply a temporary, “premium pay assignment” or “upgrade.” In the other workgroups, it is a permanent classification.

11. By design, crew leaders have a lower level of authority over their crew members than the MSIs do, and they have no authority over other crew leaders. Crew leaders may coach and train, but they do not build their teams, give input regarding hiring decisions, complete performance appraisals, recommend hires, upgrade employees, handle time off or leave of absence requests, determine whether their crews will work overtime, take “corrective action,” discipline or recommend discipline, or respond to potential grievances as MSIs are authorized to do. When a crew leader has a problem with one of the other crew members, the crew leader can only “refer” that problem to that crew leader’s MSI. (Exh. R-4 at 2.) Unlike MSIs, crew leaders are also unlikely to know whether other employees have requested or are out on leave, or what equipment other crews have. Moreover, crew leaders only ever lead a single crew (the one to which they belong), while the MSIs can oversee multiple crews.

Class Comp Study

12. The City’s Classification and Compensation unit, which is part of the Bureau of Human Resources (HR), “develops and manages the City’s classification and compensation plans and systems.” (Exh. P-5 at 1.) On September 5, 2018, City Council approved an ordinance “creating a new classification structure and compensation plan for non-represented work effective December 13, 2018.” (Exh. P-5 at 1.) This ordinance was based on the results of a “Citywide Non-Rep Class Comp Study” that was initiated in 2014 and conducted by the Classification and Compensation unit with the assistance with outside consultants. (Exh. P-5 at 1.)

13. During the Class Comp Study, every non-represented City employee, using a template, submitted a “position description” to the Classification and Compensation unit outlining the employee’s “unique body of work,” which could include supervisory authority. (Exh. P-6.) Based on those position descriptions, new, significantly broader classifications were created that

encompassed a variety of now-defunct job titles. As a result, “[t]he total number of non-represented classifications decreased from approximately 450 to 150.” (Exh. P-5 at 1.) Additionally, a formal class specification was generated for each new classification using the employees’ position descriptions. In essence, a class specification is a “general description” covering the work of many different positions “with similar requirements, levels of authority, complexity, and scope of work.” (Exh. P-6.)

14. One of the many new classifications that were created through the Class Comp Study process was that of MSI. This MSI classification now covers what used to be called Parks Maintenance Supervisor I and II, Parks Facilities Maintenance Supervisor, Parks Turf Maintenance, Irrigation & Equipment Supervisor, Public Works Supervisor I and II, and Facilities Maintenance Supervisor. Moreover, all of those job titles were in the Maintenance Operations Group of the Bureau of Transportation, the Water Bureau, the Parks & Recreation Bureau, and the Facilities Division of the Office of Management & Finance.³

15. On August 6, 2019, Protec17 filed the instant petition. On September 16, 2019, Rachel Whiteside, a union representative for Protec17, sent an email to Tom Rinehart, the City’s Chief Administrative Officer in the Office of Management & Finance and the Bureau of HR. It states, in relevant part,

“Thanks for your time last week. This email is to follow-up on the topic of Voluntary Recognition that we discussed on Thursday. Every time PROTEC17 met with the Mayor both before he was elected and since, he has pledged his support for voluntary recognition of classifications which wish to be represented or that should logically be represented. However, since his election there has been no change to the standard practices within BHR and the City Attorney’s Office. The Union has two recent incidents of concern where it feels like Labor Relations (and the City Attorney) have stuck with the historic patterns of objecting to all requests for representation:

“1) **Engineer II’s**: ***

“2) **Maintenance Supervisor I’s - NE**: This group approached PROTEC17 with a desire to obtain representation following the Non-Rep Study. It was their opinion (and ours) that when the City made them overtime eligible and defined them distinctly from other Maintenance Supervisors that they created a classification eligible for union representation. This group still has the word ‘Supervisor’ in their title and reference in their job description, but all true supervisory duties have been stripped and assigned to a higher level of management, leaving these folks acting more as shift leads.

³This list parallels what is included in the City’s brief (at 5 n 3). Meanwhile, Protec17’s brief (at 4) contends that the MSI classification includes the following now-defunct job titles: Public Works Supervisor II, Facilities Supervisor, Golf Course Superintendent, Parks Maintenance Supervisor I and II, and Parks Turf Maintenance and Irrigation Supervisor. It also contends, “Many incumbents (although evidence did not establish clearly that all) of the Public Works Supervisor II positions were assigned to the Non-Exempt job class while the other prior job classifications appear to have all folded into the Exempt job class.”

“Again, Labor Relations reflexively denied the Union’s request for voluntary recognition without any meeting or discussion, stating only this was a matter handled through the Employment Relations Board. Since then, the City Attorney has aggressively objected to the Union’s petition (UC-013-19) to the ERB. A hearing before that Board is currently scheduled for October 7th.”

(Exh. R-65 at 1-2, emphasis in original.)

The City’s Organizational Structure

16. When Protec17 filed its petition, the City employed 50 MSIs in total. That number includes 29 MSI-NEs, 21 of whom work for the Bureau of Transportation’s Maintenance Operations Group, and 8 of whom work for the Water Bureau. All of these MSI-NEs primarily work out of the City’s “Kerby building” on North Kerby Avenue, which is also the main work location for a small number of Protec17 members including its Utility Locators and CAD and GIS Technicians.

17. Of the remaining 21 MSI-Es, 1 MSI-E, Andrea Swanson, works in the Office of Management & Finance; 14 MSI-Es work in the Parks & Recreation Bureau; 1 MSI-E works in the Water Bureau; and 5 MSI-Es work in the Bureau of Transportation, where 4 MSI-Es work in a “Streetcar” group and 1 MSI-E works in a “Meters” group. (Exh. P-4.)⁴

18. The Bureau of Transportation, as noted, employs 21 MSI-NEs as well as 5 MSI-Es. One division within the Bureau of Transportation is its Maintenance Operations Group, which is split between five divisions: (1) the Environmental Systems Division, (2) the Maintenance & Construction Division, (3) the Operations Division, (4) the Project Delivery & Technical Support Division, and (5) the Street Systems Division. All of the Maintenance Operations Group’s divisions except the Operations Division employ MSI-NEs and no MSI-Es, while the Operations Division has one MSI-E (Rose Crouchley). Maintenance Operations Group Manager Tara Wasiak oversees all five of these divisions. She reports directly to Bureau of Transportation Director Warner. Beneath Wasiak, each of the five divisions is led by a different Division Manager.

19. Each of the 10 MSIs in the Environmental Systems Division of the Bureau of Transportation’s Maintenance Operations Group, which is led by Division Manager Scott Clement, oversees a different area of environmental systems maintenance work and is Nonexempt. Primarily, the work of the Environmental Systems Division involves cleaning and repairing storm and sanitary sewer systems. The City’s Bureau of Environmental Services is considered the “owner” of these sewer systems, however, and works with the Environmental Systems Division to maintain and repair these sewer systems via an interagency agreement. As for the other divisions in the Maintenance Operations Group, there are five MSI-NEs in the Maintenance & Construction Division, no MSI-NEs in the Operations Division, two MSI-NEs in the Project Delivery & Technical Support Division, and four MSI-NEs in the Street Systems Division.

⁴Exh. P-4 is a City-generated list of all of the City’s MSIs as of August 2019, the month in which Protec17 filed the instant petition. The exhibit also identifies whether each of those MSIs is Exempt or Nonexempt, along with each MSI’s bureau/office and work unit.

20. As indicated, the City's Water Bureau employs eight MSI-NEs as well as one MSI-E (Richard Rice). Broadly speaking, the Water Bureau is organized into seven different groups representing seven geographic districts and a separate construction group, and one MSI-NE is (as Kovatch put it) "in charge of" each of those eight divisions. Typically, each of these MSI-NEs has at least two crews. All of the employees in those crews are represented by AFSCME, Local 189 and accordingly operate under the DCTU CBA. The MSIs in the Water Bureau generally serve a more "administrative" role than the Water Bureau's MSIs, but the MSIs might fill in for MSIs when they are unavailable.

21. Another relevant workgroup is the Facilities Division of the City's Office of Management & Finance, and one notable subdivision of the Facilities Division is Maintenance Operations. That particular division is managed by Timothy McCormack, who has MSI-E Swanson and many other employees under him. MSI-E Swanson's 17 subordinates are represented by Operating Engineers, Local 701 (also part of DCTU) and the Laborers. There are no MSI-NEs in the Office of Management & Finance.

22. As indicated, the Parks & Recreation Bureau has 14 MSI-Es but no MSI-NEs. These MSI-Es work in the Parks & Recreation Bureau's Assets & Development, Recreations Services, and Lands Stewardship Divisions. These MSI-Es' subordinates are represented by either Laborers or Protec17.

Supervisory Indicia

Hire

23. MSI-NE Gayle Wilson oversees multiple sanitary and storm sewer repair crews (each of which is led by an Environmental Systems Crew Leader) in the Environmental Systems Division of the Bureau of Transportation's Maintenance Operations Group. She does not hire employees on her own. However, Wilson has participated in hiring panels, given input regarding who should be hired, and helped create "skills demonstrations tests." That said, Wilson's most recently hired crew leader was hired by her Division Manager, Clement, without Wilson's input or participation.

24. MSI-NE Michael Williams oversees two sanitary and storm sewer repair lining crews in the Environmental Systems Division of the Bureau of Transportation's Maintenance Operations Group. Like MSI-NE Wilson, Williams does not have the authority to hire employees on his own. But he has been on three-person hiring panels, given input to the ultimate hiring authority, and participated in related skills demonstrations tests.

25. In Williams' current MSI-NE position, he does not have any casual/seasonal employees. However, Williams was once responsible for 12 seasonal employees as a Public Works Supervisor II who was responsible for street cleaning and landscaping crews. In that position, which is now an MSI-NE position, Williams sat in during seasonal employee applicants' interviews; could recommend to his Manager that a particular applicant be hired; and at the end of a season, could recommend to his Manager whether a specific seasonal worker should be rehired for the next season using a form.

26. Recently, as an MSI-NE, Williams has also participated in “speed interviews” for potential Utility Worker IIs, which is an entry-level classification for the Maintenance Operations Group. Those interviews included more people on the employer’s side than usual and involved applicants speaking with two employer representatives at four different tables in a row and remaining at each table for around two minutes. Williams sat at one of these tables and conducted some of these speed interviews. He also recommended that one individual (who had previously worked with Williams as a Seasonal Maintenance Worker) be hired, and that individual was hired. Nevertheless, some of the Utility Worker IIs that were hired through the speed interviews were not for Williams’ own team. The “hiring manager” for these speed interviews was Maintenance Operations Group Manager Wasiak.

27. The speed interview format was created by a “stakeholder group” that was intended to increase diversity in the Maintenance Operations Group. The same group also identified the “core competencies” of a Utility Worker II and developed the skills demonstrations tests that were used. MSI-NE Williams was a member of this stakeholder group, as was MSI-NE Chad Tippin, who also works in the Environmental Systems Division.

28. The four MSI-NEs of the Street Systems Division of the Bureau of Transportation’s Maintenance Operations Group are expected to evaluate job applicants; sit in on interview panels; participate in, design, and consider how applicants perform on proficiency/skills tests; and ultimately recommend to Street Systems Division Manager Michael Magee (who testified that their recommendations were “effective”) whether particular candidates should be hired. Additionally, these particular MSI-NEs may be asked to prescreen applicants using set criteria. These MSI-NEs also evaluate Seasonal Maintenance Workers and recommend whether they can come back the next year, but Manager Magee ultimately decides who is hired. In Magee’s view, all of these recommendations are “critical” because he cannot interact with these employees on a daily basis like his MSI-NEs do.

29. The Water Bureau typically hires (as Kovatch put it) “by consensus” using large interview/hiring panels that include non-represented higher level employees and represented frontline employees who, together, generate hiring lists. For interviews for positions in the field, one or two MSI-NEs are always involved, which can include scoring the interviewees and recommending candidates. In this context, the MSI-NEs are viewed as a good source of relevant information and are expected to have a well-founded understanding of what is going on. The Water Bureau has used skills demonstrations testing in the past, and currently does so when interviewing potential Backhoe Operators. The Water Bureau MSI-NEs participate in developing this demonstrations test and evaluating the results, but they are not solely responsible for it.

30. As noted, MSI-E Andrea Swanson works in the Facilities Division of the Office of Management & Finance. In that role, Swanson is responsible for initiating all of the “requisitions” for the positions that report to her. She also works with an HR recruiter to post for the open positions. After that, Swanson is responsible for coordinating any subject matter experts who would review the applications, scheduling the interviews, leading the interviews and selection panels, and making the final recommendations regarding whether to hire candidates. Swanson also makes the offer letters for successful candidates.

31. The MSI-Es in the Parks & Recreation Bureau generally work with HR on recruitment, create interview questions and skills demonstrations tests, sit in on interview panels (which may have three to nine people, including an MSI-E's Manager), and create the list that is used for selecting potential new hires. MSI-Es can also choose which Seasonal Maintenance Workers should be hired.

Transfer, Assign, and Direct

32. In relevant part, the MSI class specification adopted in 2018 provides that all MSIs:

- are responsible for “assigning and supervising the day-to-day workload of staff; ensuring the tasks and duties assigned to the staff are performed and completed in within well-established guidelines; overseeing staff activities to ensure achievement of organizational goals and objectives; implementing, coordinating, and supervising unit programs, functions, and personnel resources; ensuring critical unit functions are completed;”
- may “[a]ssess, identify, and schedule maintenance and repair of assets in assigned organizational unit;”
- may “[a]ssess and evaluate the daily care and maintenance of facilities and other City assets; ensure routine maintenance and repair tasks are performed for all public facilities overseen by the unit;”
- may “[e]nsure staff follow City, Occupational Safety and Health Administration (OSHA), and Bureau-/Office-specific safety rules and guidelines; educate staff on rules, regulations, codes, and hazards in the work environment;”
- may “schedule, assign work to, and supervise staff, including highly skilled tradespeople, volunteers, and casual/seasonal employees;”
- may “[a]ssist with oversight related to performance requirements and personal development targets for staff; provide instruction for performance improvement and development, evaluate performance and complete annual performance reviews;”
- may “[l]ead supervise, assign, and coordinate the work of staff;”
- may “[c]reate standard practices, policies, and procedures for day-to-day operations of assigned unit, program, project or tasks; establish goals and direction and communicate expectations to staff;”
- may “[e]nsure that critical unit functions are completed, and tasks and duties assigned to staff are achieved within schedule and budget, or progressing as scheduled;”

- may “[s]upervise confined space entry team; train staff on team;” and
- may “[s]upervise dispatch employees responsible for sending out maintenance crews.”

(Exh. J-4 at 1-2.)

33. MSI-NE Wilson of the Environmental Systems Division of the Bureau of Transportation’s Maintenance Operations Group gets much of her work from the Bureau of Environmental Services’ Engineers, who are represented by Protec17. This often involves planned maintenance, and may initially get scheduled by one of the Environmental System Division’s two “Planner Schedulers.” (Exh. J-5 at 2.) Moreover, this particular kind of work is pre-prioritized and comes with due dates, and some of the work follows standard operating procedures and guidelines that designate which employees can do certain kinds of tasks and how many employees are needed for the same. Nevertheless, Wilson can always reprioritize her team’s work or change who is doing a particular assignment. She can also give her employees additional, unscheduled work, or temporarily “trade” equipment, vehicles, and personnel with other crews as needed. In addition, Wilson regularly has to deal with unplanned emergencies as they come up, and when that happens, Wilson redeploys her employees from their previously planned work. She does not assign her employees’ work shifts.

34. MSI-NE Wilson is responsible for making sure that all of her crews’ work gets done, and for understanding what needs to be accomplished each week, quarter, and year. If Wilson notices that something is wrong with her crews’ work and does not let her superior know about it, her superior may hold her personally responsible for it. Relatedly, all MSIs in the Maintenance Operations Group, including Wilson, receive formal performance evaluations, and these MSIs have to be rated “effective” or better to receive a merit pay increase.

35. As noted, MSI-NE Williams is also assigned to the Environmental Systems Division of the Bureau of Transportation’s Maintenance Operations Group. Williams’ subordinates, all of whom are represented by the Laborers, have largely predefined roles based on their classifications. Further, those same subordinates get some of their work from others including one of the Environmental Systems Division’s two Planner Schedulers, who distributes work orders by priority. However, Williams nevertheless assigns his employees work using the resources that are available to him on a given day. He also evaluates his employees’ skills and considers whether those skills and the tools that they have are enough to get a particular job done. Moreover, Williams can switch around, redeploy, and reschedule whatever work has already been assigned, which frequently occurs. This could happen when someone calls in sick, for example. He, like MSI-NE Wilson, does not assign his employees shifts.

36. MSI-NE Williams is also responsible for the productivity of his crew, and is held accountable if he does not address a safety issue with his crew. If there is a problem that is interfering with his crews’ ability to get their work done, it is Williams’ responsibility to address that barrier. Williams regularly evaluates his staff’s work and also submits “weekly accomplishment reports” to his superior, Environmental Systems Division Manager Clement. In

addition, Williams reviews his employees' timesheets, as do all of the MSI-NEs of the Water Bureau.

37. MSI-NEs Williams and Wilson, like all MSIs, cannot unilaterally transfer their employees to another position in another part of the City. Nonetheless, their shared superior, Maintenance Operations Group Manager Wasiak, has authorized every one of her MSIs to collaborate and trade employees with another MSI if one employee is not getting along with others in the employee's work group. Indeed, recently, two MSI-NEs who handle sewer inspections made such a trade.

38. Broadly speaking, in the Water Bureau and in the Street Systems Division of the Maintenance Operations Group, every MSI-NE "organizes, prioritizes and schedules the work needing to be done, [and] identifies the correct maintenance activities in order to maintain the city's existing infrastructure." (Exh. R-13 at 1.) They also "organize and arrange personnel, equipment, [and] materials, along with current and future work activities." (Exh. R-13 at 1.) As part of these responsibilities, these MSI-NEs can independently share resources with other MSIs, and can defer, assign, or reassign work in light of unforeseen circumstances and emergencies. The MSI-NEs in the Water Bureau and the Street Systems Division also regularly grant or deny employees' vacation and sick leave requests. The MSI-NEs of the Parks & Recreation Bureau grant or deny vacation requests as well.

39. Under normal circumstances, the Water Bureau's MSI-NEs regularly assign, adjust, plan, prioritize, and schedule the reactive and proactive projects and work of their crews. This often can involve assigning overtime and upgrading their crew members into premium pay assignments (operating dump trucks, backhoes, or specialty equipment, for example) when the MSI-NE, upon careful review, deems it appropriate. Additionally, each of the Water Bureau's MSI-NEs is responsible for being on call, 24/7, once every eight weeks. During these on call periods, when responding to unplanned events (such as a water main break), the MSI-NEs are (as Kovatch put it) "pretty much the beginning and the end" in terms of the Water Bureau's decision-making regarding whether to put together a crew, how to fix the issue, and with whom to coordinate.

40. Water Bureau MSI-NEs also regularly "evaluate the performance of assigned staff" and are responsible for the productivity of their crews. (Exh. R-32 at 1.) Every quarter, each Water Bureau district is given work targets and the MSI-NEs are measured against those. These targets are also considered in the MSI-NEs' annual performance evaluations. On top of that, Water Bureau MSI-NEs are expected to be on their crews' jobsites every day to inspect their work in person and make sure that their work is being done correctly and safely.

41. All of the MSI-NEs of the Street Systems Division of the Maintenance Operations Group plan and schedule the work of their particular crews. This can result in an assignment for a particular day or for future work, and who is on which team or crew can change from one day to the next. How these MSI-NEs assign the work of this division can depend of what teams are available, what targets that have already been set, the size of a given project, what season it is, whether someone has called in sick, and what equipment and resources are needed or available. If necessary, these MSI-NEs can share resources with one another. When these MSI-NEs go onto a jobsite, they do it to verify in person that the work is being done as intended and on schedule. They

also do it to ensure the productivity of their crews, as they are (as Magee put it) “held accountable” for their crews’ work.

42. When MSI-NE Stacy Lauer of the Street Systems Division gets complaints about potholes, she prioritizes her body of work using factors such as how old or significant a pothole is and whether there is a safety issue and directs her crews accordingly. She can also refer the pothole to another MSI-NE in her division. In order to prioritize, she can choose to visit and inspect a pothole in person on her own ahead of time. MSI-NE Mike Smith of the Street Systems Division, who oversees three separate crews, specifically determines how many days each of his large scale projects should take. The Planner Scheduler of the Street Systems Division essentially tracks information and helps the MSI-NEs and others with filing and documenting the work.

43. The MSI-Es of the Parks & Recreation Bureau regularly determine which of their employees go to which parts of their geographical zones. Some of the work that they assign involves normal upkeep while other work emanates from citizen complaints. These MSI-Es also prioritize their subordinates’ work and determine what tools and resources are needed for their assignments. Additionally, they can upgrade their employees and assign overtime as long as that overtime is within the budget. Parks & Recreation Bureau MSI-Es typically do not work in the field, but they do visit their parks to investigate citizen complaints and “inspect and monitor” their employees’ work. (Exh. R-44 at 2.) Further, these MSI-Es are held accountable, and are responsible for, the productivity of their crews.

44. MSI-E Swanson’s workgroup in the Facilities Division of the Office of Management & Finance uses a “dispatch team” to assign work. In general, that dispatch team has two types of work orders that come in: (1) “demand” work orders from the group’s customers and (2) preventative maintenance work orders. Initially, the dispatch team assigns work to a Technician who normally handles the work at a given work order’s location/facility. However, MSI-E Swanson nevertheless reviews these work orders, prioritizes and reassigns the work to balance workload, and follows up on work orders that seem to be going beyond their expected completion dates. She also regularly directs her subordinates to respond to emergencies once they arise, which can occur afterhours. Otherwise, Swanson is always responsible for making sure that her subordinates have the tools, vehicles, resources, vendor lists, and training that they need to do their work. She is likewise responsible for personally inspecting her subordinates’ work and work areas, ensuring their productivity, and for making sure that they are properly and accurately accounting for all of their work time and that there are no safety hazards.

45. In general, all of the City’s represented employees who begin a new position or promotional opportunity are subject to a probationary period. According to the relevant CBAs, during that period, all MSIs are expected provide a set number of written performance evaluations. Further, MSIs can generally recommend to a superior whether a particular probationary employee’s employment be terminated. Parks & Recreation Bureau MSI-Es have similar authority regarding whether their Seasonal Maintenance Workers can return at the end of a season.

46. For Street Systems Division Manager Magee, an MSI-NE’s recommendation regarding whether to terminate a probationary employee would always be taken very seriously. That is because, in Magee’s mind, the MSI-NE is going to be the most informed and knowledgeable person to make this determination, and will know how the probationary employee has responded to coaching.

47. In the Water Bureau in particular, some but not all subordinate classifications go through a lengthy apprenticeship, during which they are evaluated every 90 days by a crew leader, an MSI-NE, and a Manager I named Charles Smith who acts as the “apprenticeship coordinator.” In this context, the MSI-NEs’ evaluations are considered very significant, as the performance of the MSI-NEs is dependent upon how their crews execute the MSI-NEs’ assigned tasks. For the classifications who do not have apprenticeships, their probationary evaluations are actually written by a Manager, not an MSI-NE. Nevertheless, these Managers get most of their information from an MSI-NE.

48. MSI-NEs Williams and Wilson of the Environmental Systems Division regularly write performance evaluations for their probationary employees. When Wilson has issues with this responsibility, she seeks out advice from HR. She does not write evaluations for her non-probationary employees.

49. If MSI-E Swanson concludes that a probationary employee should not make it out of probation, she recommends termination. Her recommendations in this regard (as McCormack put it) “carry almost complete weight,” although the ultimate decision regarding whether a probationary employee of Swanson’s is terminated is made by a superior. That said, if one of Swanson’s probationary employees is going to be terminated, Swanson drafts, signs, and delivers the termination letter.

50. City HRAR 8.02 provides, in part, “Bureaus will designate those supervisory employees and managers who are authorized to approve overtime. Overtime must be pre-approved and FLSA covered employees may not authorize their own overtime.” (Exh. P-7 at 1.) The second part of this rule exists because a supervisor who schedules overtime work has a financial interest in the matter because many of the requesting supervisors, including MSI-NEs, generally work the overtime with their subordinates. The managers who approve supervisors’ overtime requests make sure that there is an appropriate business reason for each request.

51. MSI-NE Wilson has the authority to make her subordinates work overtime, but she does not do so often. For Wilson, this overtime can take the form of “incidental,” extra time at the end of a shift (which may be just a half an hour of additional work to finish a job or make things safe, for example). Wilson can simply assign that overtime on her own. Alternatively, her overtime can take the form of “scheduled overtime” that Wilson wants to happen on a weekend. For that type of overtime (which is usually related to traffic or sewer flow), Wilson sends Environmental Systems Division Manager Clement a request along with her rationale. In practice, Clement usually accepts Wilson’s overtime requests unless he needs the resources for something else. Lately, however, Wilson is less likely to request overtime work for herself because there is a “swing shift supervisor” in her group now. Which of Wilson’s employees need to work the overtime is largely guided by the language of a CBA, but the decision regarding when overtime is needed is largely up to her.

52. When MSI-NE Williams needs to schedule overtime for his subordinates, he also runs it by Environmental Systems Division Manager Clement for his approval. In contrast, MSI-E Swanson can simply assign her subordinates overtime work if she feels that it is necessary to get her work accomplished. Likewise, the MSI-NEs of the Street Systems Division can also assign

overtime work for their subordinates, and Street Systems Division Manager Magee does not consider that authority to be subject to his approval.

53. MSI-NE Wilson does not promote her employees to permanent positions, but she can and regularly does select individuals for temporary upgrades or premium pay assignments (*e.g.*, upgrading a Utility Worker II to an Automotive Equipment Operator for the day). Nonetheless, how Wilson's subordinates can be upgraded by Wilson (or by one of her crew leaders after Wilson delegated her authority in this area) is partially restricted by a CBA. In practice, Wilson uses "eligibility lists" to determine who should be upgraded. To get placed on this kind of list, employees take a test. Traditionally, she goes with the most senior qualified person on the list in accordance with the CBA.

54. MSI-NE Williams also does not promote employees to new, permanent positions. Yet, like MSI-NE Wilson, Williams does give upgraded or premium pay assignments when he decides that those assignments are necessary for a particular job. For Williams, whether a particular assignment justifies a higher pay rate is set by the Laborers CBA. Further, as set out in the CBA, Williams follows an "active hiring list" when deciding which employees to give a premium pay assignment to. One example of a premium pay assignment Williams has given is related to an emergency truck. Whether someone can be assigned that particular job depends on whether a person is interested in taking it, the person's skill level, and the availability of the crew.

55. In the Street Systems Division of the Maintenance Operations Group, all of the MSI-NEs have the ability to upgrade/assign their personnel to premium pay assignments (*e.g.*, having a Utility Worker drive a truck or a piece of equipment that is normally driven by an Automotive Equipment Operator) if those MSI-NEs have resource needs. These same MSI-NEs can also make recommendations to their superior, Manager Magee, regarding who they think is most qualified to receive a promotion. These recommendations are considered paramount because, in Magee's view, these MSI-NEs have a sense of how their employees have handled special assignments.

56. There are no true promotional opportunities in MSI-E Swanson's particular workgroup within the Office of Management & Finance. However, Swanson can and has assigned her subordinates to act as a crew leader, which in her workgroup is not a promotion to permanent position, but rather an "at will" premium pay assignment that may change from month to month.

57. In the Water Bureau, when MSI-NEs' subordinates seek an internal promotion, the applicant interviews with subject matter experts, who typically are not MSI-NEs and simply determine whether each is minimally qualified. This could involve multiple City bureaus. Applicants who pass this initial phase are then interviewed by others in a panel that includes an MSI-NE and represented employees. From there, an "eligible list" is created, which is eventually used for hiring. Any recommendations that a Water Bureau MSI-NE makes during the second interview phase are considered equally with the recommendations of the other panel members, but an MSI-NE may have unique insights that might influence the process.

Suspend, Discharge, and Discipline

58. MSIs are generally responsible for intervening when they see their subordinates committing work rule violations, acting unsafely, or having other performance issues. That can require an MSI to conduct a pre-discipline investigation (which may involve watching video of a subordinate) or a “fact finding” interview. The MSI may also opt to provide an employee “coaching and counseling,” which is not considered formal discipline, but nevertheless results in a written document, drafted by the MSI, that is placed in an employee’s file. After these low-level steps have been taken, or when an issue is deemed more serious, MSIs can “recommend discipline as necessary.” (Exh. J-4 at 2.) When that happens, the relevant Manager may speak with the MSI to learn more about the issue or have the MSI conduct an investigation. In general, MSIs are expected to apply the principle of progressive discipline in this area.

59. Beyond the foregoing, Maintenance Operations Group Manager Tara Wasiak has delegated her MSI-NEs (including MSI-NEs Wilson and Williams, for example) the authority to issue “low-level discipline” including oral and written reprimands (as Wasiak put it) “on their own,” without making a recommendation to her.⁵ However, this independent authority does not extend to suspensions and terminations/discharges. Separately, in the Maintenance Operations Group, it is traditional that whenever an MSI’s subordinate is disciplined, the affiliated discipline letter is signed and hand delivered by that MSI.

60. The same type of independent disciplinary authority has been embraced by Wasiak’s immediate subordinate, Manager Magee of the Street Systems Division, whose own subordinates have in fact issued such low-level discipline. However, Magee expects his MSI-NEs to inform him of whatever discipline action has been taken. Further, when Magee’s MSI-NEs recommend discipline to him, he takes the recommendation seriously, as he sees his MSI-NEs as a knowledgeable resource in this area. When Magee makes his decision regarding MSI-NE-recommended discipline, he generally will not go back and reinvestigate the matter after one of his MSI-NEs has already conducted an investigation, but he will “review the record.”

61. As stated in the parties’ CBA, “Disciplinary action or measures shall include only oral reprimand, written reprimand, suspension or demotion.” (Exh. J-1 at 41.) It also states, “Disciplinary action may be imposed upon an employee only for just cause.” (Exh. J-1 at 41.) Subsequently, the CBA provides, “The City shall not discharge without just cause.” (Exh. J-1 at 42.) The Laborers CBA similarly provides, “Disciplinary actions or measures shall include only oral warning, written reprimand, demotion, suspension and discharge. Disciplinary action or measures may be imposed only for just cause.” (Exh. J-2 at 60.) It also states, “If the parties agree, a Performance Improvement Plan (PIP) may be used in place of the disciplinary steps prior to discharge in cases of employee performance problems.” (Exh. J-2 at 60.) The DCTU CBA’s discipline/discharge section (at Exh. J-3 at 65) contains comparable contract language.

62. MSIs can always use their workgroup’s assigned “HR Business Partners” to help them navigate the discipline process and draft discipline letters if they feel it is necessary. However, officially, these HR Business Partners can only assist and act in an “advisory capacity” for an MSI. In other words, if an HR Business Partner makes a recommendation, an MSI does not need to follow it. How much a particular MSI relies on an HR Business Partner can depend on the

⁵To the extent that Wasiak’s testimony concerning her delegated disciplinary authority conflicts with that of MSI-NEs Williams and Wilson, we defer to Wasiak’s testimony, which was comparatively clear and unequivocal.

MSI's skill level. One HR Business Partner is specifically assigned to the Maintenance Operations Group, and is heavily relied upon by MSI-NEs Wilson and Williams.

63. In the Water Bureau, MSI-NEs are expected to recognize and resolve employee performance issues as early as possible and at the lowest possible level. They are also expected to thoroughly document any problems that they observe and share that documentation with administrative staff and their Managers. If the initial efforts of the Water Bureau's MSI-NEs are unsuccessful, the issue can be passed on to a Manager or one of the Water Bureau's two MSII's, who are more familiar with the HR process. In such a scenario, an MSII may end up writing a discipline letter and taking input from an MSI-NE. This process can also involve the MSI-NE making a recommendation to an MSII, or conducting a fact finding investigation with an MSII.

64. If one of MSI-E Swanson's employees in the Facilities Division of the Office of Management & Finance is not performing, she can provide informal counseling, which generally involves reviewing the issues with her employee, seeing if there are any barriers to the employee's success, and coming up with a plan to remove those barriers. If an employee's performance issue continues after that, Swanson can conduct an investigatory hearing with HR and subsequently issue an oral or written reprimand or a performance improvement plan on her own, or recommend suspension or termination to her Division Manager. If Swanson recommends suspension or termination, her recommendation (as McCormack put it) "carries total weight" and drives the decision.

65. In the Parks & Recreation Bureau, an MSI-E can provide coaching to their employees, but if an issue is habitual, the MSI can start an investigation and work with an HR Business Partner. After that, the MSI-E can move the issue "up the ladder" to the MSI-E's superiors.

66. On February 18, 2016, a Public Works Supervisor II (a job title that, as noted, is now covered by the MSI classification) named Linda Goheen (who is now a Senior Program Manager in the Street Systems Division under Manager Magee and helps oversee the MSI-NEs of that division) hand delivered a signed written reprimand to a subordinate Automotive Equipment Operator I (represented by the Laborers) in the Maintenance Operations Group. The reprimand charged this employee with "failing to call in when unable to report to work and showing up for work late on February 16, 2016." (Exh. R-67 at 1.) It also noted which work rules were violated and listed the employee's prior counseling and discipline. In a section describing supporting facts, the reprimand noted, "I held a fact finding meeting with you on February 17, 2016. Also present was Kenneth Carter, HR Business Partner, you elected not to have a shop steward present." (Exh. R-67 at 2.) A subsequent conclusion section further noted, in part, "I have taken into careful consideration your length of employment, your disciplinary history, and this incident of not calling in or showing up for your shift on time and I have concluded that a written reprimand is warranted. *** I must advise you that any further rule violations may result in discipline up to and including discharge." (Exh. R-67 at 2.) A copy of the reprimand was placed in the disciplined employee's personnel file.

67. On April 11, 2019, a Utility Worker II in the Maintenance Operations Group (represented by Laborers) was hand delivered a written reprimand after the employee was "issued a photo radar citation for exceeding the speed limit while driving a City vehicle," which was a

violation of the City's safety rules. (Exh. R-67 at 4.) The reprimand stated, "Supervisor Justin Buchanan held an investigative interview with you on April 8, 2019. Also present were Wes Albin, Shop Steward for PCL Local 483, and Stephanie Reynolds, HR Business Partner." (Exh. R-67 at 5.) After that, it stated, "Should violations of City Code, Human Resources Administrative Rules or Bureau of Maintenance Rules occur in the future, you will be subject to further discipline as necessary." (Exh. R-67 at 5.) The letter indicates that it was written by MSI-NE Kirsten Byer, but Byer's signature line was left blank, and the signature that was included in the reprimand was that of Peter Wojcicki, who was the Street Systems Division Manager at the time (a position now held by Magee). A copy of this reprimand was placed in the employee's personnel file.

68. MSI-NE Wilson normally does not discipline her subordinates on her own and they generally do not have a lot of disciplinary issues. In practice, Wilson mainly documents whatever she sees as issues and informs her HR Business Partner of those issues, and the issues that Wilson documents may or may not result in discipline. Wilson also contacts HR whenever she is unsure about how to handle a discipline issue. Traditionally, when discipline is going to be issued, Wilson's HR Business Partner sends Wilson a draft discipline letter. If Wilson finds something inaccurate in it, Wilson shares that inaccuracy with the HR Business Partner. Wilson's peer, MSI-NE Williams, has conducted fact finding interviews and has provided and written coaching and counseling for his subordinates. However, Williams' fact finding interviews were largely led by HR.

69. On June 26, 2019, MSI-NE Wilson signed and hand delivered another written reprimand to a Utility Worker II in the Maintenance Operations Group after the employee was "issued a photo radar citation for speeding while driving a City vehicle." (Exh. R-67 at 7.) The reprimand stated, in part, "I held an investigative interview with you on June 25, 2019. Also present was Stephanie Reynolds, HR Business partner. You opted not to have a union representative with you." (Exh. R-67 at 8.) It also warned, "Should violations of City Code, Human Resources Administrative Rules or Bureau of Maintenance Rules occur in the future, you will be subject to further discipline as necessary." (Exh. R-67 at 8-9.) A copy of this reprimand was placed in the employee's personnel file. Although Wilson signed and hand delivered this reprimand, the substance of the reprimand was written by Stephanie Reynolds, the HR Business Partner. Moreover, HR told Wilson to conduct this particular investigatory meeting and what questions to ask during the same.

70. Also on June 26, 2019, MSI-NE Daniel Puha signed and hand delivered a written reprimand to a Utility Worker II in the Street Systems Division of the Maintenance Operations Group after the employee was "issued a photo radar citation for running a red light while driving a City vehicle," which violated City safety rules. (Exh. R-67 at 10.) The reprimand stated, "I held an investigative interview with you on June 25, 2019. Also present was Stephanie Reynolds, HR Business Partner. You opted not to have a union representative with you." (Exh. R-67 at 11.) It further noted, "Should violations of City Code, Human Resources Administrative Rules or Bureau of Maintenance Rules occur in the future, you will be subject to further discipline as necessary." (Exh. R-67 at 11.) A copy of the reprimand was placed in the employee's personnel file.

71. On or around August 22, 2019 (after Protec17's August 6, 2019 unit clarification petition was filed), MSI-NE Russell Kreis of the Maintenance & Construction Division signed and hand delivered a written reprimand to a Concrete Finisher (represented by Laborers) from one of

his crews after the employee was “issued a traffic citation for running a red light while driving a City vehicle.” (Exh. R-67 at 13.) The reprimand stated, “I held an investigative interview with you on August 20, 2019. Also present was Stephanie Reynolds, HR Business Partner. You waived your right to a union representative.” (Exh. R-67 at 14.) It also stated, “Should violations of City Code, Human Resources Administrative Rules or Bureau of Maintenance Rules occur in the future, you will be subject to further discipline as necessary.” (Exh. R-67.) A copy of this reprimand was placed in the employee’s personnel file.

72. The parties’ CBA provides a policy regarding reasonable suspicion of drug or alcohol use. In one section, this policy states, “The City reserves the right to determine whether reasonable suspicion exists. Only managers and supervisors trained in the signs and symptoms of drug and alcohol use may refer employees for reasonable suspicion testing.” (Exh. J-1 at 46-47.) Similar language is included in the Laborers CBA (at Exh. J-2 at 51), the DCTU CBA (at Exh. J-3 at 53), and the City’s Commercial Driver’s License Drug & Alcohol Policy (at Exh. R-12). In accordance with their training on this subject, MSIs are expected to monitor their employees for inappropriate drug and alcohol usage in the workplace and enforce the City’s related policies, which can include the MSIs reporting suspected infractions to their Managers. MSIs are otherwise responsible for enforcing the City’s Fragrance Free Workplace policy, which bars employees from wearing scented products (*e.g.*, scented hairspray, perfumes, and colognes).

73. City HRAR 2.02 establishes a prohibition against workplace harassment, discrimination, and retaliation in the workplace and MSIs are expected to take action when their employees are engaging in those kinds of behaviors. That could involve interviewing witnesses. Further, MSIs receive training on this work rule, and are subject to discipline if they fail to take action when they know the rule has been violated. MSIs are also responsible for providing their employees with Americans with Disabilities Act accommodations.

74. In relevant part, City HRAR 2.02 states, “Every employee shares the responsibility for bringing to the City’s attention conduct that interferes with providing a work environment free of harassment, discrimination, and retaliation.” (Exh. R-9 at 1.) After that, it states, “Managers and supervisors shall enforce this rule and maintain a productive, respectful, and professional workplace. Managers and supervisors must take immediate action to stop and prevent discrimination, harassment, or retaliation where they know or have reason to know that it is occurring.” (Exh. R-9 at 3.) It further states,

“If a manager or supervisor receives a complaint from a City employee, an applicant, a member of the public or a contractor about harassment, discrimination, other inappropriate conduct, or retaliation in a City worksite or if a manager or supervisor observes or becomes aware of discrimination, harassment, other inappropriate conduct or retaliation in a City worksite, they shall contact the Human Resources Business Partner or Site Team Manager as soon as possible, but no later than two working days after receiving the complaint or becoming aware of the discrimination, harassment or retaliation.”

(Exh. R-9 at 4.)

Adjust Grievances

75. The parties' CBA describes the various steps in the parties' grievance and arbitration procedures. It also describes an "Informal Step" as follows:

"Before initiating a formal written grievance at Step 1, the aggrieved employee(s) shall attempt to resolve the matter informally with the employee's immediate supervisor. The employee shall notify the Union, and a representative of the Union shall be given the opportunity to be present at any meeting under this section. The employee or the Union will inform the immediate supervisor if they file a formal grievance."

(Exh. J-1 at 43.) The Laborers CBA (at Exh. J-2 at 62) and the DCTU CBA (at Exh. J-3 at 67) contain nearly identical language. For purposes of this case, the "immediate supervisor" alluded to in this type of contract language is either an MSI-E or MSI-NE because all of their subordinates are represented employees.

76. None of MSI-NE Wilson's employees have ever formally invoked this informal step, and neither has Wilson herself. Similarly, none of MSI-NE Williams' employees have had a conversation with him that overtly involved this step. On the other hand, the Water Bureau's MSI-NEs do resolve employee grievances at the lowest level. This frequently involves disputes involving hours of work. Additionally, MSI-E Swanson utilized this informal step a few months before the Board's hearing. In that instance, Operating Engineers, Local 701 made an informal complaint about Laborers-represented employees changing lightbulbs, which Operating Engineers, Local 701 alleged was exclusively its work. After consulting the relevant CBA, Swanson changed the work assignment as requested, thereby resolving the dispute.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The petitioned-for MSI-NEs are "supervisory employees" as defined in ORS 243.650(23)(a), and thus cannot be added to Protec17's existing bargaining unit.

Standards of Decision

Under Oregon's Public Employee Collective Bargaining Act (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 therefore 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).

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? (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, the employee’s 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, among other things, 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 may 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 *IAFF, 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.

Discussion

In its post-hearing brief, the City indicates that it does not assert that the petitioned-for MSI-NEs “have authority or effectively recommend regarding lay off, recall, promotions[,] or rewards.” (City brief at 6 n 4.) Accordingly, this Recommended Order will not focus on those supervisory indicia and, instead, will focus on the remaining indicia. Furthermore, the City does not dispute that the MSI-NEs work “in the interest of management,” and the evidence provided demonstrates that such authority is in fact held. Accordingly, we conclude that the third prong of

the supervisory status test has been established. *See Hillsboro Sergeant's Association v. City of Hillsboro, Oregon*, Case No. CC-009-14 at 6, 26 PECBR 491, 496 (2015).

Protec17 contends that the accuracy of the City's position descriptions should be questioned given the circumstances surrounding their creation. We recognize that these former job titles are now defunct, and that, since the descriptions were written down years ago, some job duties may have changed. Nonetheless, the limited evidence that was presented in this case does not indicate, as Protec17 suggests, that *all* of the employee drafters inaccurately inflated their duties in an effort to protect their jobs and justify how they were paid. There is also no evidence that the City improperly or inaccurately inflated or exaggerated the authorities and duties listed in its class specifications, which the petitioned-for employees could have formally disputed with the City's Classification and Compensation unit prior to this case's hearing. The most relevant differences between the older position descriptions and the new MSI class specification are minimal. In the end, however, we can only treat these documents as evidence that must be weighed against the rest of the record, which includes numerous additional exhibits and sworn testimony. *See Keizer Police Association v. City of Keizer*, Case No. UC-004-18, _PECBR_ (2019) (wherein the Board relied upon a job description in addition to other evidence in finding supervisory status); *NLRB v. Security Guard Service, Inc.*, 384 F.2d 143, 149 (5th Cir. 1967) ("Tables of organization and job descriptions do not vest powers.")

Protect17 separately argues that MSI-Es and MSI-NEs are entirely distinct groups and should be treated as such, and that accordingly evidence of supervisory authority of the MSI-Es should not be taken as evidence of the supervisory status of the MSI-NEs. We disagree. For one thing, the evidence consistently indicates that the City did not change anyone's job duties when the MSI classification was split in two in 2018. MSI-NE Wilson, for example, testified that, while she has held the same position, she has been both exempt and nonexempt. To the extent that there are notable differences between certain MSI-Es and MSI-NEs, upon review, we conclude that those differences are ultimately no greater or lesser than the differences between MSI-NEs of different workgroups. Testimony also suggests that the distinction between whether a particular MSI is considered Exempt or Nonexempt was the result of recruitment and retention issues, and is essentially a matter of employer preference that may easily be changed at any point in the future. And, logically, whether a particular MSI can or cannot earn overtime pay under an HR rule or interpretation would not, on its own, have much bearing on whether or not that MSI is a supervisor as defined by the PECBA. Nevertheless, whenever possible, we rely on evidence that specifically demonstrates MSI-NEs' authority and responsibilities.

Hire

As outlined above, MSI-NEs can provide input and recommendations regarding who should be hired, and some applicants who MSI-NEs recommended be hired were in fact hired. In addition, MSI-NEs participate in hiring/interview panels; create, participate in, and evaluate skills demonstrations tests; identify core competencies for subordinates' classifications; and belong to hiring-related stakeholder groups. It is also clear that MSI-NEs have a highly useful perspective regarding whether or not applicants should be hired as their employees. Nevertheless, in our view, hiring by consensus or as part of a panel of interviewers as is the case here does not equate to *independent* judgment. *See City of Portland*, UC-017-13 at 25, 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, 887 (2008)); *Sisters Police Association v. City of Sisters*, Case No. RC-46-96 at 9, 17 PECBR 212, 220 (1997). The MSI-NEs' other hiring-related duties, though notable, do not elevate this authority to the level needed under ORS 243.650(23).

In addition to the foregoing concerns, there is very little evidence that explains how or why MSI-NEs choose whether to recommend a person be hired, which is generally necessary for demonstrating independent judgment. Likewise, the record indicates that MSI-NEs can recommend whether potential casual/seasonal employees should be hired or rehired, but the evidence addressing that particular subject does not meaningfully demonstrate whether those recommendations are "effective" within the meaning of the statute. Certain MSI-NEs, whose positions we conclude are quite similar to the MSI-NEs, also initiate requisitions, help post openings, coordinate subject matter experts, schedule and lead interviews, make offer letters, and create interview questions. But once again, the evidence addressing those factors does not demonstrate true independent judgment or effectiveness as required. It otherwise appears that many employees are hired without the involvement of those employees' own MSI-NEs. Under these circumstances, we cannot conclude that MSI-NEs "hire" within the meaning of the statute. For similar reasons, we also cannot conclude that MSI-NEs "promote."

Transfer, Assign, and Direct

The record demonstrates that MSI-NEs generally assign and coordinate the day-to-day workloads of their many subordinate employees (who we note are often *12 or more* in number per MSI-NE); adjust their work assignments as the MSI-NEs deem necessary; provide goals, instruction, and training; review and evaluate their employees' work and worksites, which can include generating formal performance evaluations; manage what tools, equipment, vehicles, and other resources their employees use; and ensure that their employees' work is completed correctly, safely, and on time. Additionally, MSI-NEs can generally assign overtime and upgrade their subordinates to premium pay assignments (which, importantly, we do not consider to be evidence of the authority to "reward"). The preponderance of the evidence also indicates that MSI-NEs are accountable for and held responsible for the work and productivity of their subordinates, in contrast to their subordinate crew leaders. In short, all of those circumstances demonstrate the authority to direct and assign employees' work. *See City of Portland*, UC-017-13 at 25-28, 25 PECBR at 1020-23 (distinguishing indicia of direct and assign).

We also conclude that the MSI-NEs exercise independent judgment in directing and assigning. On one hand, the evidence does show that MSI-NEs' assignments and the work that their employees perform must comply with OSHA rules, City rules, and CBAs. However, *all* City employees must do so, including even those at the very top of the City's chain of command. Accordingly, we cannot conclude that these considerations are dispositive in this case. The evidence also indicates that MSI-NEs are bound by standard operating procedures to some degree, but the record presented does not contain evidence that those procedures eliminate the MSI-NEs' independent judgment in decisions.

Similarly, we recognize that some subordinates of MSI-NEs initially get their work assignments from others besides their MSI-NE superiors, including citizens, Planner Schedulers, and Bureau of Environmental Services Engineers. However, critically, the preponderance of the evidence demonstrates that the MSI-NEs can largely reassign and reschedule work in light of "ever

changing priorities,” add to that work as they see fit, and trade and redeploy employees as needed. (Exh. R-19 at 2.) Further, when deciding who should get which assignments, MSI-NEs can consider their employees’ relative skills. Although MSI-NEs are generally required to get their overtime approved under HRAR 8.02, there is no indication that their supervisors seriously question or investigate MSI-NEs’ overtime requests. The evidence does not indicate that MSI-NEs’ handling of vacation or other time off requests in particular is anything other than routine or clerical. However, that does not take away from the significant independent authority permitted in other areas outlined above.

In sum, under these circumstances, we conclude that the MSI-NEs “assign” and “direct” as those terms are used in ORS 243.650(23). *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 33, 24 PECBR 893, 925 (2012) (citing *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994)). Nevertheless, we cannot conclude that these same circumstances demonstrate that MSI-NEs can “transfer” or “reward” within the meaning of the statute, as their authority to do so is largely limited to their particular workgroups and to temporary assignment upgrades.

Suspend, Discharge, and Discipline

The record demonstrates that all MSI-NEs can recommend a full range of discipline and can exercise meaningful independent judgment when doing so, and the majority of the petitioned-for employees can issue low-level discipline on their own. In addition, the evidence in this case includes several documented examples of this authority being used, and all of those examples but one were issued before the instant petition was filed. As a result, we must also conclude that the MSI-NEs can “discipline” as that term is used in ORS 243.650(23).

Significantly, the numerous MSI-NEs in the Maintenance Operations Group of the Bureau of Transportation (which notably includes 21 of the City’s 29 MSI-NEs) have full authority to issue oral and written reprimands without ever asking their superiors for permission, and there is no evidence that MSIs in other workgroups could not have a similar level of authority delegated to them. Outside of that particular delegation of supervisory authority, it also appears that many MSI-NEs can generally conduct their own pre-discipline investigations (which may cause a subordinate to bring in a union representative), opt to provide coaching and counseling in lieu of other options, draft discipline letters that are placed in employees’ personnel files and can trigger escalating discipline down the line, and recommend whether a probationary employee elevates and attains regular employee status. MSI-NEs who supervise casual/seasonal employees can control whether these employees are rehired the following year.

Although some MSI-NEs may discuss discipline with superiors before it is issued, there is no evidence of recommended discipline ever being overturned by a superior. Moreover, all of the evidence on this subject indicates that MSI-NEs’ discipline recommendations are taken very seriously. The fact that MSI-NEs are supposed to adhere to principles of progressive discipline does not change their authority to issue discipline. That is particularly appropriate in this case, where documentary evidence also suggests that MSI-NEs carefully consider a variety of factors when determining how to proceed, including length of employment, disciplinary history, and the seriousness of a performance issue, for example. We are likewise unmoved by the fact that certain MSI-NEs (*e.g.*, MSI-NEs Williams and Wilson) choose to heavily rely on HR Business Partners,

as the HR officials' recommendations to MSI-NEs need not be followed and the ultimate decision lies with the MSI-NEs. We also note that even MSI-NE Wilson testified that, before she delivers a discipline letter, Wilson reviews her HR Business Partner's drafts for accuracy and lets her know if something needs to be changed.

Adjust Grievances

The record demonstrates that MSI-NEs can informally resolve potential grievances as provided in the relevant CBAs. It also indicates that this authority is exercised by MSI-NEs in the Water Bureau and by MSI-E Swanson in the Office of Management & Finance (which, as noted, employs no MSI-NEs). However, there is insufficient evidence regarding how or why these MSIs have resolved these informal disputes, and the record does not show if any of these MSIs were simply guided by their superiors or some other authority. As indicated above, mere inferences and conclusory statements regarding supervisory authority are insufficient evidence in this type of case. *City of Portland*, UC-017-13 at 23, 25 PECBR at 1018. Therefore, we cannot conclude that these employees "adjust grievances" as that term is used in ORS 243.650(23).

Conclusion

We conclude that the petitioned-for MSI-NEs assign, direct, and discipline with independent judgment and are therefore "supervisory employees" as defined by ORS 243.650(23), and thus cannot be appropriately included in a bargaining unit. Accordingly, Protec17's unit clarification petition must be dismissed. As a result, we need not reach any conclusions regarding whether the petition unduly fragments the City's workforce, whether the MSI-NEs share a sufficient community of interest with Protec17's existing bargaining unit, or whether the petition is blocked by a contract bar.

PROPOSED ORDER

The petition is dismissed.

SIGNED AND ISSUED on March 2, 2020.



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-002-20

(UNFAIR LABOR PRACTICE)

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

Brett Baumann, Attorney at Law, Medford, Oregon, represented Complainant.

Jared Franz, Staff Attorney, Salem, Oregon, represented Respondent.

On February 6, 2020, Jackson County (County) filed an unfair labor practice complaint alleging that Service Employees International Union Local 503, Oregon Public Employees Union (SEIU or Union) violated ORS 243.672(2)(b) by including a Public Employees' Benefit Board (PEBB) option in the Union's final offer submitted under ORS 243.712(2)(b) and OAR 115-040-0000(1)(d). The County asked that this Board expedite the complaint under OAR 115-035-0060. The Union took no position on whether the complaint should be expedited. After considering the parties' submissions and the factors set forth in OAR 115-035-0060, the Board exercised its discretion to expedite the complaint. On February 19, 2020, the County requested (without objection from the Union) to amend its complaint, and the Board, on that same date, granted the request. The County filed the amended complaint on February 19, 2020, and the Union timely filed its answer on February 21, 2020, pursuant to a February 14, 2020, prehearing order. The parties agreed to submit the matter on stipulated facts and filed, on March 3, 2020, (1) a stipulated issue statement; (2) stipulated facts; and (3) joint exhibits. Pursuant

to the prehearing order and a subsequent ruling granting a motion to extend the time, the parties also filed briefs on March 13, 2020, at which point the record closed.

The stipulated issue is: did the Union violate ORS 243.672(2)(b) by including a PEBB option in its final offer? For the following reasons, we conclude that the Union did not violate that provision.

RULINGS

The parties agreed to submit the matter on stipulated facts and joint exhibits, which the Board received. No rulings were made.

FINDINGS OF FACT

The Parties and Relevant Individuals

1. The County is a public employer within the meaning of ORS 243.650(20).
2. The Union is a labor organization within the meaning of ORS 243.650(13).
3. The County and the Union were parties to a collective bargaining agreement that was effective from July 1, 2016, to June 30, 2019 (the “CBA”).
4. Joel Benton is the County Counsel and has served as the chief bargaining spokesperson for the County at all times relevant to this dispute.
5. Keith Quick is the Bargaining Coordinator for the Union and was the chief bargaining spokesperson for the Union from August 27, 2019, to the present.

Bargaining History

6. In a letter dated November 15, 2018, the Union gave the County written notification of its intent to open negotiations for modifications to the CBA, pursuant to Article 3, Section 2 of the CBA.
7. The parties held their first table bargaining session over a successor agreement on April 18, 2019, and have continued to exchange proposals on a regular basis. Since May 29, 2019, health insurance has been a primary focus of bargaining.
8. Under the parties’ expired CBA and the status quo, the County provides the Union with a monthly, fixed-dollar amount for each bargaining unit employee, and the Union uses those funds to purchase health insurance coverage at a benefits level chosen by the Union, from a health insurance provider chosen by the Union. The employees pay the difference between the cost of the insurance and the County’s contribution.

9. On May 30, 2019, the Union provided the County with its first health insurance proposal. The Union proposed to continue the parties' existing practice, but to increase the County's contribution by an amount approximately equaling the expected increase in the cost of insurance.

10. The parties failed to reach agreement on a successor agreement by June 30, 2019. Since the expiration of the parties' CBA on that date, the parties have maintained the status quo on employment relations while they continue negotiations over a successor agreement.

11. During an August 27, 2019, bargaining session, Quick first suggested that the parties explore the costs and benefits of health insurance and other programs offered by PEBB. Under ORS 243.129:

“(1) The governing body of a local government may elect to participate in a benefit plan offered by [PEBB].

“(2) The decision of the governing body of a local government to participate in a benefit plan offered by [PEBB] is in the discretion of the governing body of the local government and is a permissive subject of collective bargaining.”

12. In a September 5, 2019, email to Quick, Benton indicated that the County was evaluating the concept of participation in PEBB and indicated that a formal proposal by the Union would help with his evaluation.

13. On September 10, 2019, the Union provided the County with a proposal for the County to “contract with PEBB for health, dental and vision insurance programs, as well as life, disability, employee assistance programs and any other insurance programs PEBB offers.”

14. On September 20, 2019, the parties held a conference call with representatives of PEBB to get more information about the County's possible participation in PEBB.

15. After the County learned more about PEBB, the County has asserted throughout negotiations and mediation for a successor agreement that participation in PEBB is a permissive subject of bargaining and declined Union proposals regarding health insurance costs and benefits that reference PEBB.

16. The parties' inability to reach an agreement on health insurance is primarily responsible for the parties' failure to reach a successor agreement.

Impasse and Final Offers

17. On January 21, 2020, the Union declared impasse. On this same date, the Employment Relations Board (ERB) confirmed receipt of a written declaration of impasse. ERB required the parties to submit their Final Offer and Cost Summary to ERB by January 28, 2020.

18. On January 27, 2020, the Union submitted its Final Offer and Cost Summary to ERB.

19. Article 16 of the Union's Final Offer included two different options for County contributions towards the costs of health insurance premiums and the benefit levels for County employees in the Union's bargaining unit. The first of the two Article 16 options ("Option 1") references the benefit levels available through PEBB and requires that the County provide health insurance and other benefits "at or exceeding the benefit levels currently provided under PEBB" by procuring such insurance "through the PEBB system or by privately contracting with another insurance carrier approved by the union." The second of the two Article 16 options ("Option 2") does not reference PEBB and provides for continuing the parties' current practices relating to health insurance with increased premium contributions by the County. The Union did not specify who would choose between these two options, or how the parties would make that choice.

20. On January 28, 2020, the County objected to various aspects of the Union's Final Offer and Cost Summary. Regarding Article 16, the County specifically objected to Option 1, contending that it "contains two permissive subjects of bargaining": (1) "the decision of a local governing body to elect to offer a benefit plan through PEBB," and (2) "the selection of the insurance carrier." After explaining why it considered Option 1 to be a permissive proposal, the County "request[ed] that SEIU comply with its obligations and submit a Final Offer which does not contain permissive topics of bargaining." The County did not object to or identify any aspects of Option 2 as permissive. However, the County objected to the Union's inclusion of Option 1 and Option 2 for Article 16, because the Union appeared to be making two "separate and distinct" but "mutually exclusive" proposals, and therefore not complying with the requirement to propose "contract language for the CBA."

21. On February 3, 2020, the Union submitted its First Amended Final Offer and Cost Summary to ERB.

22. Article 16 in the Union's First Amended Final Offer essentially continued to include two options for providing health insurance, but it simplified the proposed language and clarified that it would be the County who would choose between the two options. Specifically, the first several sections of the Union's modified proposal provide that the parties will continue with their current practices relating to health insurance for the contract term, with per employee premium contributions by the County in the amounts of \$1,718.20 per month in 2020, \$1,880 per month in 2021, and \$2,037 per month in 2022, "[u]nless the County elects to provide healthcare through PEBB." The last section of the proposal states: "In order to save taxpayer money and provide quality healthcare to employees, the County may elect to enter into an agreement with PEBB to provide healthcare to employees during the term of this agreement after providing sufficient notice to the Union. If the County elects to provide healthcare to employees through PEBB, the Union agrees to the following reductions in base contributions by the County for each eligible bargaining unit employee: \$1,550 per month per plan year 2020, \$1,604 per month for plan year 2021, and \$1,660 per month for plan year 2022."

23. On February 4, 2020, the County objected to the Union's First Amended Final Offer, asserting among other things that the Union had unlawfully included a permissive subject of bargaining in its Final Offer by including a PEBB option. That same day, the Union submitted a Second Amended Final Offer and Cost Summary to ERB.

24. The Union's Second Amended Final Offer addressed the County objections to other aspects of the Union's Final Offer, but maintained its Article 16 proposal as written in the First Amended Final Offer.

25. Between January 28, 2020, and February 4, 2020, the parties exchanged several emails in which they disagreed about whether it was unlawful for the Union to include a PEBB option in its final offers.

26. On February 4, 2020, the County filed a complaint against the Union alleging that the Union had unlawfully included a permissive subject of bargaining by including a PEBB option in its final offer.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The record does not establish that the Union violated ORS 243.672(2)(b).

Under ORS 243.672(2)(b), it is an unfair labor practice for a labor organization or its designated representative to refuse to bargain collectively in good faith with a public employer if the labor organization is an exclusive representative. Including a permissive subject of bargaining in a final offer over the other party's objection violates the obligation to bargain in good faith within the meaning of ORS 243.672(2)(b) (or ORS 243.672(1)(e), the "mirror" provision regarding public employer unfair labor practices). *See Oregon Trail School District No. 46 v. East Education Association, East County Bargaining Council, OEA/NEA*, Case No. DR-01-05 at 10-11, 21 PECBR 157, 166-67 (2005); *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95 at 23-24, 16 PECBR 559, 581-82 (1996). Under ORS 243.129, "[t]he decision of the governing body of a local government to participate in a benefit plan offered by [PEBB] is in the discretion of the governing body of the local government and is a permissive subject of collective bargaining." Relatedly, the selection of a particular insurance provider is also a permissive subject of bargaining. *See Salem Police Employees Union v. City of Salem*, Case No. C-94-84 at 8, 8 PECBR 6642, 6649 (1984). However, the level of health insurance benefits and employer contribution rates are mandatory subjects of bargaining. *Executive Department, Labor Relations Division, and Oregon State Police v. Oregon State Police Officers' Association*, Case No. UP-11-85 at 32, 8 PECBR 7874, 7905 (1985).

The issue in this case is whether the Union included a permissive subject of bargaining in its final offer, and did so over the County's objection, and therefore violated ORS 243.672(2)(b). According to the County, the Union did that with respect to both its initial final offer and its amended final offers by including a PEBB option in those offers. The Union counters that its proposals, while referencing a PEBB option, concerned the mandatory subjects of premium contributions and benefit levels.

We begin with the Union's January 27, 2020, final offer. The Union's health insurance proposal included two "options." However, the proposal did not specify how the parties, or which party, would select between the two options. The first option stated that the County

“will provide health, dental and vision insurance programs as well as life, disability, employee assistance programs to employees at or exceeding the benefit levels currently provided under PEBB’s Providence Choice medical plan, Providence Statewide medical plan, the Delta dental (Moda), VSP plan (vision), life and disability program as well as the Cascade Employee Assistance Program – 5 visit limit plan. The County may procure such insurance through the PEBB system or by privately contracting with another insurance carrier approved by the union.”

The second option would effectively continue the parties’ expired CBA terms, under which the County makes specified health insurance premium contributions but the Union selects both the benefit levels and the carrier, while changing the County’s monthly premium contribution amounts. Specifically, the second option stated that “the County shall make available for health, dental, vision, disability and life insurance premiums, a maximum of one thousand six hundred seventy dollars (1,670.00) per month for each eligible bargaining unit employee towards premium costs. It shall be the right and the responsibility of the Union to use the available funds for any combination of these insurance programs.”

The County’s complaint focuses on the first of the two options, which the parties refer to as “Option 1.”¹ Option 1 contains provisions that touch on (1) benefit levels; (2) the option to provide insurance benefits through PEBB; and (3) the choice of insurance carrier. When a proposal includes subjects that are both mandatory and permissive, we must determine the overall subject of the proposal. Although there is no specific calculation that can be performed to neatly sum up the subject of a proposal, we attempt to identify the “core feature” of a proposal “that defines and ultimately shapes the scope of” the proposal. *See In the Matter of the Declaratory Ruling Petition Filed by Portland Firefighters Association, IAFF Local 43 and City Of Portland*, Case No. DR-001-19 at 3.

Applying that analytical framework to Option 1 of the Union’s January 27, 2020, final offer, we conclude that the subject of that proposal is choice of carrier, which is a permissive subject of bargaining. The Union contends that the subject of the proposal is the mandatory subject of benefit levels, noting that the first part of Option 1 merely references certain PEBB plans as a shorthand for the benefit levels associated with those plans. The Union also notes that the proposal permits the County to provide insurance with those benefit levels through PEBB *or* a private carrier. However, the proposal also specifies that the choice of private carrier is subject to the Union’s approval. As a result, the proposal ultimately vests the choice of insurance carrier with the Union, and the subject of carrier choice is undisputedly a permissive subject of bargaining.

¹We analyze the first option, without reference to the second option, because the Union’s final offer did not specify which option would be controlling, or how that would be determined, or by whom. We also note that, when the County explained its objections to the Union’s final offer on January 28, 2020, the County objected to the Union’s health insurance proposal because it did not specify which option would be controlling for purposes of the contract. That objection, however, is not part of the County’s unfair labor practice complaint, and, at the County’s request, the Union subsequently amended its final offer to clarify its proposal.

Having concluded that the subject of this proposal is the permissive subject of choice of carrier, we must determine whether the Union included that permissive subject in its final offer over the County's objection, in violation of ORS 243.672(2)(b). Although the County, after learning more about PEBB, declined to engage in bargaining about whether it will participate in PEBB, the County had not, at the time of the Union's January 27, 2020, final offer, expressly objected to a proposal that vested the choice of an insurance carrier with the Union. That distinction is particularly important here because, under the parties' expired CBA, the County contributed to insurance premium costs but gave the Union the right and responsibility to use those contributions to procure insurance benefits with the carrier of the Union's choice. After the contract expired, the parties maintained that practice during the hiatus period. Thus, the parties had a CBA and history of ceding the choice of insurance carrier (a permissive subject of bargaining) to the Union. Further, in successor bargaining, the Union proposed continuing that practice, and there is no evidence in the record that the County ever objected to that proposal as permissive, or otherwise objected to bargaining over the permissive subject of carrier choice before the Union submitted its final offer.

After the Union included the Option 1 proposal in its final offer, the County did object to that proposal as permissive, in a January 28, 2020, email. The County specifically identified and objected to the Option 1 proposal because it would require the County to "obtain the permission of the Union as to the selection of the private insurance provider to provide the negotiated level of benefits if PEBB is not selected." The County then asked the Union to modify its final offer to remove this permissive subject of bargaining, and the Union (as discussed further below) did so.² Under these circumstances, we conclude that this record does not establish that the Union included a permissive subject of bargaining in its January 27, 2020, final offer, over the objection of the County. Therefore, that final offer did not violate ORS 243.672(2)(b).

We turn to the Union's modified health insurance proposal in the amended final offer that it submitted on February 3, 2020. Specifically, the Union proposed continuing the parties' practice, under which the County makes funds available to the Union for the purchase of insurance benefits, and the Union uses those funds to procure insurance from a carrier selected by the Union. The Union's proposal specified the contribution rates that the County would pay to the Union for each year of the CBA's term. The County has not objected to this aspect of the Union's proposal. The Union's proposal then stated that the County would retain the right to "elect to enter into an agreement with PEBB," and then specified lower premium contributions rates that would apply *if* the County elected to do so. Those monthly contribution rates (per eligible employee) were \$1,550 per month for plan year 2020, \$1,604 per month for plan year 2021, and \$1,660 per month for plan year 2022. These proposed contribution rates were lower than the funds that the County would have to make available under the parties' existing arrangement and the Union's proposal for continuing that arrangement, which were (per eligible employee) \$1,718.20 per month in 2020, \$1,880 per month in 2021, and \$2,037 per month in 2022.

In assessing the subject of this proposal, we again look to its terms to determine its core feature. *See City Of Portland*, DR-001-19 at 3. Here, the core feature of the proposal is the contribution rates or funds that the County will make available for insurance benefits. That is a mandatory subject of bargaining. *Executive Department, Labor Relations Division*, UP-11-85 at

²However, the County did not object to Option 2 of the Union's final offer, which would continue the parties' existing practice of providing insurance through a carrier selected by the Union.

32. To be sure, the proposal references PEBB, but the proposal does not compel the County's permissive right to enter into an agreement with PEBB, nor does it burden that permissive right to such a degree that we can say that the core feature of the proposal is, in essence, the decision to join PEBB. To the contrary, the proposal expressly acknowledges that the *County* has the discretion and *right* to enter into a PEBB agreement. ORS 243.129, which the County relies on, effectively provides for the same (“[t]he decision of the governing body of a local government to participate in a benefit plan offered by [PEBB] is in the discretion of the governing body of the local government.”).³ The Union's final offer goes on to propose that *if* the County elects to exercise that right, then the County will make certain premium contributions.⁴ Thus, in essence, this proposal is offering different contribution rates based on different insurance options, which include, but do not require, a PEBB option. Those contribution rates are the core feature of this proposal, and the proposal leaves to the County its managerial prerogatives of selecting its preferred option. Accordingly, we conclude that the Union's amended final offer did not violate ORS 243.672(2)(b).

We offer one final note on the submission of multiple, amended final offers, which occurred here. Under ORS 243.650(11), a “final offer” is “the proposed contract language and cost summary submitted to the mediator within seven days of the declaration of impasse.” *See also* ORS 243.712(2)(b). Once the mediator receives the parties' respective final offers and cost summaries, both are made public. *Id.* The publication of the parties' final offers is followed by a 30-day cooling off period. That period allows the public to view and potentially weigh-in on the competing final offers. If no agreement is reached by 30 days after the mediator makes the competing final offers public, the public employer may implement all or part of its final offer, and the public employees have the right to strike. ORS 243.712(2)(d). The statute and its constructed timelines, and our corresponding administrative rule (OAR 115-040-0000(1)(d)), do not contemplate or authorize the submission of multiple, amended final offers. Although we have found that amendments to correct mistakes or errors do not *per se* constitute unfair labor practices, we write here to remind parties, and to emphasize, that a final offer, as part of PECBA's carefully constructed collective bargaining process, is supposed to be just that – final. To be sure, the statute envisions that the parties will continue bargaining and modifying proposals after each party submits their respective final offer, but it does not envision that such modifications will be codified in subsequently submitted “final offers.”

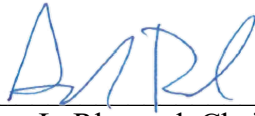
³We also note that the decision of the governing body of a local government to participate in a PEBB benefit plan touches not only on health insurance benefits, but also on the relationship between state government and local government, such as by affecting the composition of the PEBB board itself, and by requiring an intergovernmental agreement between PEBB and the participating local government. *See* ORS 243.061(3) (requiring the Governor to appoint additional members to the PEBB board when local governments elect to participate in a PEBB benefit plan, to represent local government management and nonmanagement employees (up to a maximum of three each)); OAR 101-070-0005(3)(b) (a participating local government must agree to and sign an inter-governmental agreement with PEBB).

⁴Without the PEBB-option provisions, the Union's amended proposal, like the County's proposal, would effectively preclude the County from exercising its discretion to switch to PEBB for the term of the CBA, because neither party may modify the terms of an existing CBA (unless the parties mutually agree to reopen the contract). By including the PEBB-option provisions, the Union's proposal preserves the County's managerial right to decide whether to participate in PEBB for the term of the CBA.

ORDER

The complaint is dismissed.

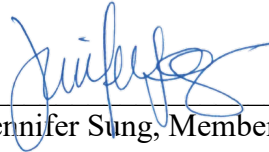
DATED: March 31, 2020.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.



Oregon

Kate Brown, Governor

Employment Relations Board
Old Garfield School Building
528 Cottage St. NE, Ste 400
Salem, OR 97301-3807
Phone: 503-378-3807
Fax: 503-373-0021
EmpRel.Board@oregon.gov
<http://www.oregon.gov/ERB>

April 3, 2020

VIA EMAIL ONLY

Jason Weyand
Tedesco Law Group
1316 NE Broadway Street, Unit A
Portland OR 97232
jason@tlglabor.com

Re: *In the Matter of the Declaratory Ruling Petition Filed by Albany Fire Fighters, IAFF Local 845 et al*
ERB Case No. DR-001-20

Letter Ruling on Petition for Declaratory Ruling

Mr. Weyand:

The Board has considered the petition submitted by the Coalition/Petitioners, seeking a declaratory ruling pursuant to OAR 137-002-0010 *et seq.* For the reasons explained below, the Board declines to issue a ruling on the question presented in the petition.

As a general matter, the Board encourages labor organizations and public employers to seek resolution of disputes through use of the non-adversarial declaratory ruling procedures where appropriate. However, not all cases are best suited for a declaratory ruling because of the limitations of the declaratory ruling process.

Here, the facts in the petition provide that the Coalition represents bargaining units in the public sector where the employer has agreed to provide retirement benefits through the Public Employees Retirement System (PERS).¹ According to the petition, SB 1049, which was signed into law on June 11, 2019, “made significant changes in the PERS statutes that were intended to reduce employer contribution rates for PERS in future years.” Broadly speaking, the petition asserts that SB 1049 (1) diverts money from employees’ Individual Account Program (IAP) accounts to pay employers’ PERS obligations; (2) caps the maximum annual salary for calculating PERS benefits; and (3) modifies retiree work-back rules. The petition asserts that these changes will result in significant reduced compensation for the Coalition’s represented employees and that the impact of the retiree work-back provisions will also affect employment relations.

¹The Coalition also includes umbrella organizations comprised of multiple unions that directly represent members who participate in PERS.

Based on these impacts, the petition states that the Coalition and other labor organizations demanded to bargain over those impacts with public employers. The petition further avers that when successor bargaining was underway or imminent, “many employers have agreed to bargain over the impacts of SB 1049.” In contrast, the petition states, “where public employers and unions were in the middle of a collective bargaining agreement with no successor negotiations imminent, employers generally refused to bargain over the impacts of SB 1049.” Based on these facts (and others set forth in the petition), the Coalition asks us to answer the following question: During the life of an existing collective bargaining agreement, after receipt of an appropriate demand to bargain, are public employers obligated to collectively bargain with the exclusive representatives of their employees over the impact of SB 1049?

The primary difficulty we see is that the answer to that broad question about midterm bargaining obligations depends on facts that are not contained in the current petition, and which could vary with each petitioner. Although the obligation to engage in midterm bargaining over a mandatory subject continues throughout the life of a collective bargaining agreement, *Multnomah County Corrections Deputy Association v. Multnomah County*, Case No. UP-003-19 (October 11, 2019), *recons* (March 20, 2020), the question of whether there is a midterm duty to bargain regarding a particular change (or impact of a change), depends in part on the parties’ existing contract. *Id.* Here, we do not have the agreements for each public employer/exclusive representative relationship. Nor do we have information on any disputes regarding how to interpret the relevant contract provisions, or have the evidence necessary to resolve any such disputes. Further, we cannot assume that each petitioner’s collective bargaining agreement and related bargaining history are the same in all material respects. In other words, we do not see that a one-size fits all answer, which the petition appears to seek, can be provided.²

Additionally, when a declaratory ruling petition is filed by either just a public employer or just a labor organization, this Board, before exercising its discretion to rule on the petition, typically seeks to engage the other potentially affected party to see if they want to (1) join; (2) oppose; (3) intervene; or (4) otherwise participate in any declaratory ruling hearing. We also note that, as stated in your cover letter, the petitioners “anticipate that various parties will want to submit arguments on the legal issues presented,” and request that we solicit briefs or responses from interested parties. Although we have the discretion to invite intervention (OAR 137-002-0025(3)) or invite briefing by interested parties, here, we have serious concerns about our practical ability to engage all of the potentially affected employers, both because there apparently is a large number of them, and because the petition does not specifically identify them.³ These procedural concerns are heightened in light of the breadth and potential complexity of the legal and factual issues underlying the question presented.

²We recognize that the petitioners offered to supplement the Petition upon request, including by providing additional documents. However, the rules governing the declaratory ruling process require this Board to issue a ruling based solely “on the facts stated in the petition,” without accepting “testimony or other evidence.” OAR 137-002-0040(2).

³We have also been cautious about issuing a declaratory ruling where the other affected party has not joined in the petition or agreed to be bound by a ruling on the petition. *See, e.g., In the Matter of the Petition for Declaratory Ruling filed by The Oregon School Employees Association*, Case No. DR-4-97 at 6, 17 PECBR 403, 408 (1997). Here, no affected public employer has joined in the petition or agreed to be bound by any ruling on the petition.

In sum, as set forth above, we encourage the use of declaratory ruling petitions to avoid the need for the filing of an unfair labor practice complaint or conducting a contested case hearing. However, for the foregoing reasons, we conclude that the question asked by the petition is not well suited for the declaratory ruling process. Therefore, we exercise our discretion and decline to issue a declaratory ruling in this matter. *See* OAR 137-002-0020(3).

For the Board,

A handwritten signature in blue ink, appearing to read 'A. Rhynard', is written above the printed name.

Adam Rhynard
Board Chair

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-005-18

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,	)	
LOCAL 3997,	)	
	)	
Complainant,	)	
	)	
v.	)	FINDINGS AND ORDER FOR
	)	REPRESENTATION COSTS
DESCHUTES COUNTY PUBLIC	)	
LIBRARY DISTRICT,	)	
	)	
Respondent.	)	
	)	

On January 31, 2020, this Board issued an order holding that Deschutes County Public Library District (District) did not violate ORS 243.672(1)(g), as alleged in the complaint filed by Oregon AFSCME Council 75, Local 3997 (AFSCME). 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).

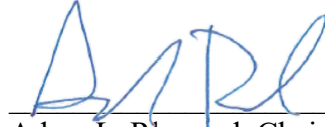
Pursuant to ORS 243.676(3)(b) and OAR 115-035-0055, this Board finds that:

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 one day of hearing, which was held on November 16, 2018.
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

AFSCME shall remit \$3,000 to the District within 30 days of the date of this order.

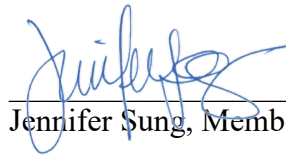
DATED: April 9, 2020.

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 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.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-001/003-20

(UNFAIR LABOR PRACTICE)

TRI-COUNTY METROPOLITAN
TRANSPORTATION DISTRICT OF
OREGON,

Complainant,

v.

AMALGAMATED TRANSIT UNION,
DIVISION 757,

Respondent.

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

AMALGAMATED TRANSIT UNION,
DIVISION 757,

Complainant,

v.

TRI-COUNTY METROPOLITAN
TRANSPORTATION DISTRICT OF
OREGON,

Respondent.

Jeffrey P. Chicoine and Taylor Richman, Attorneys at Law, Miller Nash Graham & Dunn LLP, Portland, Oregon, represented Tri-County Metropolitan Transportation District of Oregon.

Whitney Stark, Attorney at Law, Albies & Stark, LLC, Portland, Oregon, represented Amalgamated Transit Union, Division 757.

On February 4, 2020, Tri-County Metropolitan Transportation District of Oregon (TriMet) filed an unfair labor practice complaint (Case No. UP-001-20) against Amalgamated Transit Union, Division 757 (ATU). The complaint alleged that ATU violated ORS 243.672(2)(b) by conditioning settlement of the parties' successor agreement on bargaining over TriMet's proposed elimination of its apprenticeship programs, which TriMet contends is a permissive subject. TriMet requested that this Board expedite the complaint under OAR 115-035-0060.

On February 6, 2020, ATU filed an unfair labor practice complaint (Case No. UP-003-20) against TriMet, alleging that TriMet violated ORS 243.672(1)(e) by hiring outside workers instead of apprenticeship graduates into "diesel technician" positions, which ATU contends was a unilateral change to the status quo. In response to TriMet's request to expedite Case No. UP-001-20, ATU contended that TriMet did not make the required showing, but ATU also requested that this Board consolidate the two cases. ATU further indicated that, if we consolidated the cases, it would agree to an expedited process that would allow the parties adequate time to prepare for a hearing and provide post-hearing briefing.

On February 10, 2020, this Board issued a letter ruling consolidating and expediting the cases for hearing and decision. On February 14, 2020, we issued a prehearing order, which set forth the parties' agreed upon schedule. ATU and TriMet each filed timely answers to the complaints. The parties jointly submitted a stipulated statement of issues and facts on February 26, 2020. This Board conducted a hearing on March 2 and 3, 2020. The parties submitted post-hearing briefs on March 27, 2020, at which point the record closed.

The issues as stipulated by the parties are:

1. Did ATU condition bargaining in violation of ORS 243.672(2)(b) by continuing to insist on bargaining over TriMet's proposal to eliminate the Maintenance Department apprenticeship programs (and not withdrawing from its proposals those that relate to the apprenticeship programs), over TriMet's objections?

2. Did TriMet violate ORS 243.672(1)(e) by externally posting ten job openings for Diesel Technicians while the parties were engaged in bargaining a successor agreement to the 2016-2019 Working and Wage Agreement?

For the following reasons, we conclude that ATU did not violate ORS 243.672(2)(b), and TriMet did not violate ORS 243.672(1)(e).

RULINGS

Neither party has raised any objections to this Board's rulings.

FINDINGS OF FACT

The Parties and the Working Wage Agreement

1. TriMet is a public employer within the meaning of ORS 243.650(20).

2. ATU is a labor organization within the meaning of ORS 243.650(13) and is the exclusive representative of a bargaining unit of employees at TriMet, which includes employees in TriMet's Maintenance Department.

3. TriMet and ATU were parties to a collective bargaining agreement in effect from December 1, 2016 to November 30, 2019 (2016-2019 Working Wage Agreement or WWA). They have been collectively bargaining for more than 40 years, and have had numerous prior agreements.

The Apprenticeship Programs at TriMet

4. TriMet has offered apprenticeship programs in its Maintenance Department for many years. Broadly speaking, apprentices are TriMet employees who receive a mix of on-the-job training and classroom instruction. They are paid bargained wages for both their on-the-job and classroom training. When an apprentice successfully completes a program, the graduating apprentice is eligible to bid for journey worker positions in the Maintenance Department. With limited exceptions set forth in the parties' collective bargaining agreements, TriMet has hired journey workers in its Maintenance Department solely from the ranks of workers who have completed a TriMet apprenticeship program.

5. TriMet's apprenticeship programs are registered with the State of Oregon, which administers apprenticeship programs through the Bureau of Labor and Industries (BOLI). Registered apprenticeship programs in Oregon operate pursuant to ORS Chapter 660 and OAR Chapter 839, Division 11, as well as the National Apprenticeship Act, 29 USC Section 50, and 29 CFR Parts 29 and 30. ORS 660.002 provides that it is the policy of the State of Oregon to "encourage the development of an apprenticeship and training system through the voluntary cooperation of management, labor and interested state agencies, and in cooperation with other states and the federal government," and to "encourage the preparation of persons with skills that will enable them to find gainful employment in an ever-changing society and ensure the continued growth and development of the economy of Oregon by contributing to the maintenance of an adequate supply of skilled workers." ORS 660.002(1) and (3). A registered apprenticeship program provides individuals with the opportunity to learn a skilled trade that employers need, while individuals work and earn income, without paying tuition costs for credits that can be used toward a college degree.

6. In Oregon, the State Apprenticeship and Training Council (SATC) approves and oversees registered apprenticeship programs. The SATC is a nine-member council comprised of the Commissioner of the Bureau of Labor and Industries (BOLI) and eight members appointed by the Governor. The SATC has the authority to develop, administer, and enforce statewide apprenticeship program standards for the operation and success of apprenticeship programs in the State of Oregon.

7. Each registered apprenticeship program in Oregon is overseen by its own Joint Apprenticeship Training Committee (JATC). An apprenticeship program's JATC is the policymaking and administrative body responsible for the operation and success of the program.

8. TriMet has two registered apprenticeship programs, which train apprentices in a total of seven journey worker classifications or “occupations.” Each TriMet JATC is comprised of eight members, including four TriMet management representatives and four non-management employee representatives. TriMet’s Director of Training serves as the chair of the JATC, and the chair has the authority to make decisions if the committee does not reach consensus or is evenly split on an issue.

9. The TriMet Heavy Duty Bus Mechanic JATC program (registered as MA 1061) was approved in 1985 and trains apprentices in two occupations: Heavy Duty Bus Mechanic (a two-year program) and Plant Maintenance Mechanic (a four-year program, in which apprentices also earn their Limited Maintenance Electrical License through Portland Community College).

10. The second apprenticeship program is the TriMet Rail Maint/Vehi/Mech/Tech JATC program (MA 1078). It was registered in 1987 and trains apprentices in the following disciplines: Rail Vehicle Maintenance Tech (a three-year program); Traction Substation Tech (a three-year program); Overhead Catenary Tech (a three-year program); Signal Tech (a three-year program); and Field Equipment Tech¹ (a two-year program).²

11. Each JATC is governed by written committee policies and procedures, which are developed by the JATC and approved by the SATC. The policies and procedures describe both the operation of the JATC and the administration of the apprenticeship programs overseen by that JATC. For example, policies and procedures describe the expectations of apprentices, the components of the on-the-job training and classroom instruction, the award of credit to apprentices for prior experience, and the review and evaluation of apprentices.

12. Each JATC also adopts program-specific standards, which are set forth in a document entitled “Standards of Apprenticeship.” The JATC submits proposed program-specific standards (including proposed modifications) for approval by the SATC. The SATC must “[a]pprove and register program standards and modifications to program standards that are submitted by appropriate local joint committees as provided in ORS 660.126, if the standards and modifications are in substantial conformity with the statewide standards approved under ORS 660.155.” ORS 660.120. Each “Standards of Apprenticeship” document describes the apprenticeable occupation to be taught, the minimum qualifications required of apprentice applicants, the minimum eligible starting age, the statement of work processes, wages and wage progression, and the requirements for completion of apprenticeship.

13. For each Standards of Apprenticeship, some components are legally required, and some components may be customized by the JATC. For example, the SATC requires that minimum qualifications “be clearly stated and applied in a nondiscriminatory manner,” while the JATC determines what those minimum qualifications are for its programs. The minimum qualifications for each of TriMet’s seven apprenticeship programs, as determined by the JATC

¹The Field Equipment Tech program is not within TriMet’s Maintenance Department.

²TriMet trains employees for journey level “track maintainer” positions through a training program that is not a BOLI-registered apprenticeship program. Pursuant to the WWA, there is a laborer/track trainee classification, which is filled from the laborers classification by seniority. Track trainees are given both “formal training” and on-the-job training.

and approved by the SATC, are (a) a minimum age of 21 (because TriMet requires all apprentices to obtain a commercial drivers' license); (b) a high school diploma or GED certification; (c) successful completion of a mechanical aptitude test; and (d) a three-year acceptable driving record.

14. The SATC also requires each program to pledge not to discriminate against applicants or apprentices “on race, color, religion, national origin, sex (including pregnancy and gender identity), sexual orientation, genetic information, or because they are an individual with a disability or a person 40 years old or older”; to “take affirmative action to provide equal opportunity in apprenticeship”; and to offer any “out of work apprentices in good standing” the opportunity for re-employment before registering new apprentices. The remainder of the apprentice selection process is determined by the JATC; for example, the Standards of Apprenticeship for TriMet’s heavy duty bus mechanic program provide that “[n]ew apprentices will be selected from a pool of current employees or outside new hire in accordance with the Tri-Met/ATU Working and Wage Agreement.”

15. For the “term of apprenticeship,” the SATC sets a minimum standard of 2,000 hours of work experience in the apprenticeable occupation. The JATC determines the actual term of apprenticeship for a particular program. For example, according to the Standards of Apprenticeship for the TriMet Heavy Duty Bus Mechanic, the term of apprenticeship is 4,000 hours of employment. The TriMet Heavy Duty Bus Mechanic JATC also developed a “schedule of work experience” that every bus mechanic apprentice must “follow as closely as conditions will permit,” which includes 470 hours of lab (simulated) work and 2,910 hours of on-the-job training (*i.e.*, “actual” work) in specified work processes, including air systems, rear axle and brakes, heating and cooling/HVAC, Cummins and Detroit engines, electrical, suspension, transmission, and similar systems. The Standards of Apprenticeship also include the following qualification: “The committee realizes that the completion of 4,000 hours of on-the-job training is the ideal, but recognizes that most apprentices will not be able to fulfill the total amount of hours specified in every work process as set forth in this standard. When an apprentice is unable to fulfill the total work hours in each work process the committee will evaluate the apprentice’s knowledge, skills and abilities and provide appropriate additional related instruction to ensure that competency is acquired in each work process.”

16. The SATC requires that apprentices be paid for all hours of on-the-job training, but not classroom instruction. Pursuant to the 2016-2019 WWA, TriMet pays apprentices the same bargained-for hourly wages for both on-the-job and classroom training.

17. According to the current standards set by TriMet’s JATCs for its apprenticeship programs, the on-the-job training component requires direct supervision of each apprentice by a TriMet journey worker on a 1:1 ratio.³ Journey workers who train apprentices receive a pay

³Stephen Sims, the Administrator of the Apprenticeship and Training Division at the Bureau of Labor and Industries, explained that the 1:1 journey worker to apprentice ratio is consistent with the recommended guidelines for non-construction/non-industrial apprenticeship programs. Sims further explained that a JATC may request a “modification” to (*i.e.*, deviation from) those recommended ratios (as well as other recommended guidelines), and that many such modifications in different occupations have been approved.

differential for providing that training. During the on-the-job training, apprentices perform work assigned by their supervising journey workers, and after they gain enough training and experience, apprentices may perform their assigned tasks with less direct supervision. However, under TriMet's current program model, apprentices are not permitted to "sign off" on any of the work that they complete; their supervising journey worker must review and sign off on all work completed by the supervised apprentice.⁴ To review the work of an apprentice, the supervising journey worker could, for example, ask the apprentice to explain what they did, or ask other questions to confirm that they completed the assigned work properly.

18. Pursuant to the 2016-2019 WWA, journey workers receive premium pay when they are supervising and training apprentices.

19. TriMet's apprenticeship programs include a classroom training component, which TriMet operates in conjunction with Mt. Hood Community College. Apprentices register for required classes through the Mt. Hood Community College web portal and receive credit from the college for their completed coursework. Apprentices do not pay tuition or fees for this college coursework. An apprentice who completes a TriMet apprenticeship program typically will have completed all but a few (commonly 9 to 12) of the credits necessary to receive an associate's degree from Mt. Hood Community College.

20. The ATU bargaining unit includes bus maintenance trainers, whose job duties include providing classroom instruction to registered apprentices.

21. Upon successful completion of a TriMet apprenticeship program, the apprentice receives a certificate of completion from the Oregon State Apprenticeship and Training Council and a journey certificate (colloquially referred to as a journey card) from the BOLI Apprenticeship and Training Division. The card identifies the card holder as a journey worker who has completed a registered apprentice program.⁵ A journey card is recognized by employers nationally as evidence that the worker possesses journey-level skill in the apprenticeable discipline. A journey card is therefore perceived as a valuable occupational qualification.

⁴Sims explained that there are three models of apprenticeship programs used in Oregon: time-based, competency-based, or a hybrid of both. TriMet currently uses a time-based model. Under a competency-based model, after an apprentice demonstrates competency in a particular work area, the apprentice may work independently (*i.e.*, without supervision by a journey worker) in that work area. Sims further explained that the TriMet JATC could change any of its apprenticeship programs to a competency-based or hybrid model. Such a change would be subject to SATC/BOLI approval. Sims testified that he saw no reason why it would not be approved.

⁵As defined by OAR 839-011-0070(12), a journey worker is "a fully skilled practitioner who can work independently in a given trade or occupation in accordance with ORS chapter 660.010(4). Generally, a skilled crafts person has a minimum of four years of verifiable trade-specific experience or has completed a state certified apprenticeship program in the applicable trade and holds a license where required. Use of the term may also refer to a mentor, technician, specialist or other skilled worker who has documented sufficient skills and knowledge of an occupation, either through formal apprenticeship or through practical on-the-job experience and formal training."

22. Once an apprentice graduates from a TriMet apprentice program, the apprentice is qualified for a journey position in the discipline. 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. Sign-ups typically occur twice a year, with one sign-up occurring in the spring and the other in the fall. If a newly graduated journey worker successfully bids for a position, the journey worker’s classification seniority begins to accrue on the date that the journey worker begins working in that classification.

23. Until the 2012-2016 WWA, the almost exclusive path for an employee to become a journey worker was to begin as a service worker, next become an apprentice, and only then, upon completion of the apprenticeship program, become a journey worker. Correspondingly, before ratification of the 2012-2016 WWA, 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 TriMet apprenticeship programs.⁶

24. Service workers are entry-level, frontline employees who get buses ready for runs or provide service on transit platforms. The opportunity to participate in one of TriMet’s registered apprentice programs is an important feature of TriMet employment that motivates some job applicants to apply for and accept a service worker position. Historically, for service workers, the apprenticeship programs have been the main source of promotional opportunities in the Maintenance Department.

25. To become an apprentice, a service worker must first pass a mechanical aptitude test. Historically, TriMet has used a particular brand of mechanical aptitude test called the Bennett Test. After passing the test, the service worker must 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. Over the course of TriMet’s history, service workers have typically waited from one to six years for an opportunity to enter an apprentice program.⁷

26. Under the 2016-2019 WWA, TriMet and ATU agreed that TriMet could hire up to half of its apprentices annually from outside TriMet.⁸

27. TriMet has not placed any service workers into a TriMet apprenticeship program, or administered mechanical aptitude testing, since about September 2018.⁹ There are approximately 64 employees who have passed the mechanical aptitude test and are waiting for an opportunity to participate in a TriMet apprenticeship program. ATU believes that there are also

⁶See *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Local 757*, Case No. UP-020-16 at 4, _ PECBR _ (2018).

⁷See *Amalgamated Transit Union, Local 757*, UP-020-16 at 4.

⁸See *Amalgamated Transit Union, Local 757*, UP-020-16 at 4 (describing the addition of the contract language permitting hiring of apprentices from outside TriMet).

⁹The most recently placed apprentices will graduate from their apprenticeship programs at varying dates (depending on the length of the program) between June 2020 and March 2022.

service workers who want to participate in an apprenticeship program but have not yet taken the mechanical aptitude test.

28. The record includes an email from a TriMet service worker hired in November 2014. The service worker indicates that he was promised an opportunity to participate in a Plant Maintenance Mechanic apprenticeship program, but has never been provided one.

29. Christopher Tyson, a TriMet service worker since approximately September 2018, explained that his duties include cleaning and maintaining the interior of buses, servicing the bus (e.g., refilling engine fluids), conducting safety inspections, and performing mechanical triage. When he first considered employment at TriMet, he noticed information about TriMet's training programs in its literature. During new employee orientation, TriMet discussed the apprenticeship programs in detail, including the various options and requirements for entering the program. Tyson recalled that he had many discussions with other new employees about the apprenticeship programs and which program they would try to enter. Tyson passed the mechanical aptitude test, and his name was placed on an apprenticeship eligibility list (by seniority), copies of which were posted on various TriMet bulletin boards. Aside from completing an apprenticeship and becoming a journey-level mechanic, Tyson is not aware of any other promotional path for service workers at TriMet. He testified that, without the apprenticeship programs, the service worker position "appears to be a dead end."

Relevant Collective Bargaining Agreement Provisions

30. The 2016-2019 WWA, in Article 3 and Article 4, contains numerous provisions that relate to TriMet's Maintenance Department apprenticeship programs. Those provisions address a variety of topics, including, for example, what kinds of training programs TriMet will operate; apprentice mechanics' hourly wage rates; premium pay for journey level mechanics who are assigned to train apprentice mechanics; and how apprenticeship openings are filled. All of those contract provisions are set forth in an appendix to this order.

TriMet's Planned Changes to the Maintenance Department

31. As has been the case for many years, TriMet's Maintenance Department is short-handed due to a combination of staffing cutbacks during the 2008 recession and retirements, and TriMet's growth since then. Additionally, House Bill 2017, which took effect on October 6, 2017, created a new employee-paid payroll tax in Oregon, and the revenues from that tax now provide TriMet with millions of dollars in additional funding every year. House Bill 2017 also requires TriMet to greatly expand its bus services.¹⁰

32. In fiscal year 2018, TriMet determined that it was understaffed by 16 bus mechanics. TriMet projected that it would need to hire an additional 17 to 25 bus mechanics in fiscal year 2019, 20 to 26 in fiscal year 2020, and 23 to 25 in fiscal year 2021. Assuming that 12

¹⁰See *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-019-18 at 9-11 (2019), *appeal pending*, for a description of House Bill 2017. The transcript from the hearing in *Tri-County Metropolitan Transportation District of Oregon*, UP-019-18, was admitted into the record in this case.

apprentices would graduate per year, TriMet projected that it would need to hire a total of 40 to 55 additional bus mechanics in those three years.

33. Edmund Bennett, Director of Bus Maintenance, testified that TriMet needs one bus mechanic for every five or six buses in operation. Bennett testified that, at the time of hearing, TriMet was understaffed by 49 journey bus mechanics. Bennett testified that the shortfall of journey level mechanics will become more pressing because of the requirement in House Bill 2017 that TriMet increase bus service.

34. Daniel Blair, Director of Rail Equipment Maintenance, testified that Rail Equipment Maintenance was understaffed by 13 or 14 journey workers. Blair testified that the shortage was exacerbated by the apprenticeship programs because some of TriMet's existing journey workers are required to train apprentices, which reduces the amount of work time that those journey workers have available to perform maintenance work themselves.

35. At some point, TriMet decided to make a number of changes in the Maintenance Department. In relevant part, TriMet's plans include changing many of the journey worker classifications, and phasing out the apprenticeship programs, at least in part because those programs, in their existing forms, have not been able to train enough apprentices fast enough to meet TriMet's maintenance staffing needs. In addition, TriMet wishes to modernize what Laird Cusack, TriMet's Labor Relations Director, described as "archaic" or outdated components in some Maintenance Department classifications.

36. On December 2, 2019, TriMet emailed ATU a chart and draft job descriptions that provided more detail about TriMet's planned changes to the Maintenance Department.¹¹ For each of the five divisions within the Maintenance Department (Bus Equipment Maintenance, Rail Equipment Maintenance, Facilities Maintenance, Maintenance of Way, and Field Fare Equipment), TriMet plans to eliminate all of the apprentice classifications. For employees who are currently working in apprentice classifications, TriMet has stated that it intends to keep those employees in their respective apprentice classifications (and in the apprenticeship programs) until they complete or leave the program.

37. In the Bus Equipment Maintenance and Facilities Maintenance divisions, TriMet intends to eliminate the apprentice classifications without creating new trainee classifications. This means that TriMet will no longer provide bus mechanic or facilities mechanic training to individuals who do not already have some training or experience as mechanics from outside of TriMet. Instead, for diesel technicians, for example, TriMet has lowered the minimum qualifications and will hire applicants who already have 18 months of diesel mechanic training and two years of experience working as a heavy duty diesel mechanic, or any equivalent combination of experience and training. A minimum of a high school diploma is also required.

¹¹The chart attached to Cusack's December 2 email showed the elimination of the apprentice classifications in each division of the Maintenance Department by striking through those classifications and their associated wage rates. Each eliminated apprentice classification was accompanied by an asterisk, and the associated text read, "The plan for current apprentices is to continue them as apprentices until they pass or leave the program." In some divisions, the chart indicated that there would be "new" trainee classifications. The chart also indicated that there would be title changes to existing journey worker classifications.

This means that service workers or other entry level employees who do not have these minimum qualifications would not pass the minimum qualification screening for these jobs. TriMet does not plan to create a “diesel mechanic trainee” classification because it anticipates that new hires who meet the revised minimum qualifications will need only limited training to perform TriMet-specific diesel mechanic work.

38. In the Rail Equipment Maintenance, Maintenance of Way (MOW), and Field Fare Equipment divisions, TriMet intends to create new “trainee” classifications. For example, in the Maintenance of Way division, TriMet intends to eliminate the classifications of overhead traction apprentice, signal maintainer apprentice, and traction substation technician apprentice, and create the new classifications of overhead power maintainer trainee, signal maintainer trainee, and traction substation trainee. TriMet will also continue to have a MOW track maintainer trainee classification.

39. According to the job descriptions that TriMet shared with ATU, the new “trainee” classifications (in the rail-, MOW- and fare-equipment divisions) will have greater “prerequisites” or minimum qualifications than the existing apprentice classifications: generally, at least two years of related work experience (as opposed to none, although TriMet apprentices must be at least 21 years old). For example, for the light rail trainee classifications, an associate’s degree, equivalent military training, two years’ experience, or any equivalent combination of training or experience is required (as opposed to a high school diploma or GED). Applicants for the new trainee classifications will need to obtain the minimum required training and experience from outside of TriMet. TriMet will provide the new trainees the additional training and more specialized training that they will need to maintain TriMet’s rail- and fare-related equipment.¹²

40. The new training programs will not be registered apprentice programs. As a result, the programs will not need to comply with SATC standards, and upon completion of training, the employees will not receive journey cards or college credit.

41. In addition, for each of the five Maintenance Department divisions, TriMet is eliminating or modifying journey worker classifications and creating new, corresponding classifications that will perform journey-level skilled work. Generally, TriMet is retitling each journey-level classification by replacing the term “journey worker mechanic” with the term “technician.”¹³ In some instances, the existing journey worker classification will be replaced by several new classifications, because TriMet intends to allocate the body of work currently performed by the particular journey worker classification among multiple new classifications.

42. For example, TriMet will separate the functions of the existing journey worker bus mechanic into three positions: diesel technician, bus electronics technician, and bus body and paint

¹²ATU representatives have expressed concern (at hearing and in bargaining) that it will be substantially more difficult for service workers, and community members in general, to meet the minimum education and work experience requirements for the new “trainee” positions (compared to the apprentice positions).

¹³Cusack testified that the term “technician” is merely a more modern term for “journey worker,” and that, in TriMet’s view, any terms of the WWA that apply to “journey workers” should apply equally to “technicians.”

technician. A revised job description for the classification historically referred to as a “journey worker mechanic” in the bus maintenance division substituted the term “diesel technician” for “journey worker mechanic,” and eliminated from the “knowledge, skills, and abilities” section of the document “[k]nowledge of body repair practices and procedures.” The revised description also reduced the minimum qualifications (from two years of training plus five years of heavy duty diesel mechanic work experience, to 18 months of training and two years of heavy duty diesel mechanic work experience (or any equivalent combination of experience and training).

43. In the Rail Equipment Maintenance division, TriMet intends to eliminate the journey worker LRV mechanic classification, divide the work into three bodies of work, and create the new classifications of LRV maintenance technician, LRV overhaul technician, and LRV electronic technician.

44. In the Facilities Maintenance division, the current journey worker classification requires an LME electrician license, but only a small portion of the work performed by current journey workers requires that license. The plant maintenance technician classification will be replaced by the classifications of facilities field maintenance worker (which does not require an LME license) and facilities technician—LME (which requires an LME license).

45. In the Maintenance of Way division, TriMet intends to replace each of the existing four journey worker classifications (overhead power maintainer journey worker, signal maintainer journey worker, traction substation technician journey worker, and track maintainer journey worker) with a new corresponding “maintainer” or “technician” classification (overhead power maintainer, signal maintainer, traction substation technician, and track maintainer).

46. In the Field Fare Equipment division, TriMet intends to replace the field technician journey worker classification with a new field technician classification.

47. On August 13, 2019, the parties held a small group discussion regarding the Maintenance Department, including the apprenticeship programs, in advance of formal bargaining over the successor agreement to the 2016-2019 WWA, which would expire on November 30, 2019. Cusack and Block both attended the small group discussion. Over the course of that meeting, Cusack described various potential changes to the Maintenance Department, including, but not limited to, the elimination and creation of classifications, and the elimination or modification of the existing apprenticeship programs, as described above. (Other changes that TriMet discussed include, for example, the elimination of tool allowances for some journey workers; limiting servicer workers’ ability to work in different divisions; and removal or modification of existing CBA provisions governing warranty work and subcontracting.) When the parties started discussing the number of journey worker vacancies, Bennett indicated that there is a “pause on the apprenticeship program,” but that TriMet “may open that back up.” Among other topics, the parties discussed their respective views about the existing apprenticeship programs, as well as potential ways to improve them and address the journey worker shortage. In the course of the discussion, TriMet explained to ATU that it was sharing its plans for the Maintenance Department to explain its end goals and get feedback from ATU, and that the plan details were “not set in stone.” When ATU raised concerns about TriMet eliminating the bus mechanic training program, TriMet responded that it “may do a small apprentice for bus, but that is still [a] work in progress.”

The Parties' Successor Bargaining and Discussions about the Maintenance Department

48. On October 10, 2019, the parties initiated formal bargaining over the successor agreement to the 2016-2019 WWA and held an initial bargaining session. The parties exchanged initial bargaining proposals. Both Kimberly Sewell, TriMet's Executive Director of Labor Relations and Human Resources, and Cusack attended the October 10 bargaining session, along with other members of TriMet's bargaining team. ATU's attorney Whitney Stark, as well as Krista Cordova, ATU's in-house attorney, and Shirley Block, ATU President, attended on behalf of ATU, along with other members of ATU's bargaining team.

49. TriMet presented a proposal that included a number of changes to Article 3 of the WWA, which addresses the Maintenance Department. TriMet's proposed changes to Article 3 were generally consistent with the potential changes that TriMet had discussed when the parties met in August. Regarding the apprenticeship programs, TriMet's proposal stated that TriMet would "maintain the status quo for mandatory subjects of bargaining for employees currently in Apprenticeship positions, until such time as they complete or otherwise leave their program." TriMet also proposed to strike all of the provisions of Article 3 of the 2016-2019 WWA that address the apprenticeship programs. Cusack explained that TriMet was "proposing not having an apprenticeship program," and that if there were no apprenticeship programs, all of those contract provisions would be unnecessary.¹⁴

50. ATU presented a proposal on October 10 that included a number of changes to Article 3, including provisions that increased the pay differential (referred to as "allowances") for journey workers who train apprentices, as well as proposals regarding seniority and wage increases.

51. At the October 10 session, after Cusack had reviewed several of TriMet's proposed changes to Article 3, Block addressed Sewell and asked, "Kim, do you want a contract?" Block also said something to the effect of, "This is a waste of time. There is no way I'm going to sign this. Let's just go to interest arbitration right now."

52. Block testified that her comment was a reference to possible difficulties that ATU would have obtaining member ratification of a tentative agreement because TriMet was proposing so many changes that Maintenance Department employees would view as "takeaways," without offering counterbalancing benefits. Block further explained that the Maintenance Department employees could effectively block ratification because of a June 2016 change to ATU, Division 757's bylaws. Specifically, those bylaws now provide, "Regarding the TriMet Working and Wage Agreement, there will be three separate groups within the bargaining unit; Transportation, Maintenance and all non-Maintenance and non-Transportation employees. Before an agreement can be ratified with TriMet, all three groups must individually approve the tentative agreement before a total agreement can be reached with TriMet."

¹⁴At the hearing, Cusack testified that TriMet intended that, under its proposed changes to Article 3, Section 2, Paragraph 8, the Maintenance Department would still have Assistant Supervisors, but that they would come from the new classifications that replaced the journey worker classifications. In addition, although TriMet's initial proposal eliminated all of Article 3, Section 5, Paragraph 1 (providing longevity pay for journey workers), Cusack testified that the employees in the newly created classifications replacing the journey worker classifications would receive longevity pay.

53. After Block addressed Sewell, Stark indicated that the parties should finish reviewing the remainder of TriMet's proposed changes, and they did so. After Cusack reviewed more of TriMet's proposals, he reached what TriMet labeled as "Proposal 5," and stated, "[W]e are proposing eliminating the apprenticeship program. The current apprentices will complete the program." Cusack asked whether the parties "still have a disagreement as to whether an apprenticeship program is a permissive subject," and Stark confirmed that they did.

54. On November 7, 2019, the parties held an information session (not a bargaining session) and discussed the Maintenance Department. ATU's officers, but not its bargaining committee members, attended. At that meeting, Cusack explained in more detail TriMet's proposed changes to the Maintenance Department, including but not limited to the elimination of the apprenticeship programs. ATU Vice President Jon Hunt explained that, because of the June 2016 amendments to ATU's bylaws, a majority vote of represented employees in the Maintenance Department (not just a majority vote of the bargaining unit as a whole) was necessary to ratify a contract. Hunt expressed his view that it would be difficult to persuade the majority of Maintenance Department employees to ratify a contract with all of the changes described by Cusack, which the Maintenance Department employees would view as significant takeaways without any counterbalancing benefits.

55. On December 2, 2019, Cusack emailed ATU's bargaining team a chart showing TriMet's anticipated changes to classifications in the Maintenance Department and the associated new and amended descriptions for these classifications (as described in more detail above). Cusack also attached revised or new job descriptions for 23 classifications. Cusack explained that the information was offered "to flesh out the information I provided during the November 7 informational session."

56. On December 5, 2019, the parties held another bargaining session that included discussion of the Maintenance Department. At that meeting, Stark explained that the ATU bargaining team was planning on drafting a counterproposal to TriMet's proposal to eliminate the apprenticeship programs, but in order to do so, ATU wanted to "understand [TriMet's] goal and intentions" and the reasons why TriMet was proposing "so many changes." Cusack explained TriMet's view that, given the constraints of the existing apprenticeship programs, TriMet was unable to hire sufficient numbers of workers who could be trained quickly enough to meet TriMet's needs. Cusack also explained that TriMet was not an educational institution and that the apprenticeship programs were too costly. In response, ATU pointed out that TriMet is a public agency that successfully provided significant job training for many years, and that many TriMet managers went through the apprenticeship program. ATU generally, and Block in particular, also expressed concerns about existing service workers who have been waiting to enter the apprentice programs. Over the course of the discussion, TriMet representatives from the various maintenance divisions discussed their specific concerns about their respective apprenticeship programs. ATU representatives explained the reasons why they believe that the problems would be better addressed by improving, rather than eliminating, the apprenticeship programs, and pressed TriMet to explain why it was "jumping" to elimination "instead of fixing" the programs. During that session, Cusack asked Stark if ATU would not approve a contract if the BOLI-registered apprenticeship programs were eliminated. Stark responded that she was not conditioning the contract on any one item.

57. On December 19, 2019, the parties met again for a bargaining session that included discussion of the Maintenance Department. ATU presented a proposal concerning the Maintenance Department. Stark explained that she had not drafted contract language, but that the proposal was “a concept of what [ATU] would agree to.” ATU proposed that all current service workers be provided an opportunity to enter an apprenticeship program after passing the Bennett test or, if they decline the opportunity, receive a one-time \$5,000 bonus. Once all current service workers had the opportunity to enter an apprenticeship program, TriMet could establish different minimum qualifications and hire from the outside for journey positions. In order to protect promotional opportunities for ATU workers, ATU also proposed that there be a trainee program for all journey worker classifications, including bus mechanic, and that TriMet limit its hiring of outside journey workers to the number of TriMet employees who enter the apprenticeship program. ATU also proposed that TriMet retain JATC and BOLI standards for the training programs, so that employees would receive certification when they completed their training. However, ATU noted that BOLI has “non-apprentice” programs, and that the TriMet training programs would not have to be “apprenticeship” programs. ATU’s proposal also included provisions to address qualification and retention issues raised by TriMet. ATU’s proposal also addressed seniority and transfer by current journey workers between apprenticeable disciplines.

58. After a caucus, TriMet responded to ATU’s proposal with a document entitled, “A Concept for Discussion, Not a Proposal 12-19-19.” TriMet’s concept outlined a two-stage process for transitioning to its plan. The first stage addressed conditions while there were still employees on the “Bennett list,” *i.e.*, current service workers who had already passed the Bennett test but had not yet participated in an apprentice program. Current employees on the Bennett list would be offered (in seniority order) a “trainee opportunity” in bus, rail, MOW, or fare equipment (but not facilities maintenance), or \$2,500 to “waive the opportunity.” The training programs would not be BOLI-registered apprenticeship programs. The bus trainee program would be temporary, and offered only to those current employees on the Bennett list. Additionally, all current apprentices would be converted to trainees, and TriMet could use outside classes, instructors, and training organizations to provide the training. TriMet could hire journey workers in an open, competitive process “so long as all trainees are hired to a journey worker position when they graduate.”

59. The second stage of TriMet’s concept addressed what would happen after all employees on the Bennett test list had started in a trainee classification. At that point, TriMet would implement the new trainee positions in REM, MOW, and Fare Equipment (with the higher minimum qualifications described above), and cease offering bus mechanic trainee positions. Hiring for all TriMet positions would be based on minimum qualifications and be conducted as open, competitive recruitments.

60. After a caucus, ATU responded to TriMet’s concept. Stark explained that ATU wanted there to be bus and facilities maintenance training programs because one of ATU’s priorities is to ensure there will be training available for employees. Stark also explained that ATU believed it was “critical” for BOLI and JATC to be “involved,” for reasons including ATU’s ability to have input through the JATC, BOLI’s safety requirements, and the value of a journey worker certification. Stark also explained that ATU had not yet heard from TriMet the reasons why it was so opposed to BOLI/JATC involvement, and that ATU believed that TriMet could address its needs by modifying the current apprenticeship program requirements while still working within the BOLI/JATC system, and that ATU would support those efforts.

61. Cusack responded that TriMet would take a caucus to consider ATU's position once TriMet had heard everything. Stark responded that she had given ATU's complete response. Cusack replied, "So we are at impasse?" Stark replied, "I'm not saying at impasse," but that if TriMet did not offer something "really big," then ATU could not agree to the concept described by TriMet. Stark also asked TriMet to explain what "the barriers to BOLI" are.

62. After a caucus, Cusack informed ATU that BOLI-registered apprenticeship programs were "just as much a non-starter" for TriMet as for ATU. Stark asked why. Cusack replied that the registered apprenticeship system was developed for a multi-employer system, and TriMet wanted to develop its own training standards, which it viewed as more cost-effective. The parties then discussed dates for their next bargaining session.

63. On December 30, 2019, Cusack emailed a letter to Block that addressed the parties' bargaining over TriMet's apprenticeship programs. In the letter, Cusack wrote, "TriMet understands that ATU is conditioning a contract settlement on the continuation of the apprenticeship programs." Cusack also wrote, "TriMet declines to bargain over the permissi[ve] subjects of bargaining that it has identified and struck in its proposals." Cusack attached a "listing of the classifications and associated language that TriMet believes is permissive and over which TriMet declines to bargain." The attachment listed all of the existing "apprentice" classifications, as well as the non-registered apprentice "laborer/track trainee" classification, and all of the existing contract language related to apprenticeships and training programs in Article 3 (Section 1, Paragraphs 10 and 11; Section 7, Paragraphs 1-11; Section 11, Paragraphs 1-3; Section 15, Paragraphs 1-9; and Section 21, Paragraphs 1-4), and Article 4 (Section 5, Paragraph 1). In addition, Cusack wrote, "TriMet will bargain how current apprentices can continue in the programs until they journey out or leave, but that can be bargained in a side letter to memorialize our mutual understandings about those employees."

64. On January 6, 2020, Block sent Cusack a letter regarding the parties' bargaining over TriMet's apprenticeship programs. Block refuted Cusack's statement that ATU was conditioning bargaining on a permissive subject, maintaining that ATU was lawfully expressing its legal position, providing relevant information, and explaining its bargaining position. In addition, Block wrote:

"ATU has not ever stated that it will not agree to a contract without the apprenticeship program, nor that it will refuse to engage in further bargaining. To be clear: ATU is not conditioning either bargaining or a settlement of the contract on specific proposals regarding the apprenticeship program.

"* * * * ATU's statements to TriMet (and to its bargaining unit members) make clear that maintaining apprenticeship programs are a high priority to ATU during bargaining, which is not unlawful."

65. Cusack and Block subsequently exchanged additional letters regarding the parties' bargaining over TriMet's apprenticeship programs. Cusack sent Block a letter on January 21, 2020. Cusack reiterated TriMet's position, and wrote, "If ATU does not concede that bargaining over

maintaining the apprenticeship programs is permissive, TriMet intends to file a ULP to resolve this dispute.”

66. Block replied on January 27, 2020. Block reiterated ATU’s position that ATU was not conditioning bargaining on a permissive subject, and wrote, “Despite the dispute over the mandatory versus permissive nature of TriMet’s proposal to strike all aspects of the apprenticeship programs from the Working and Wage Agreement, ATU has and continues to bargain in good faith with TriMet.” Block did not withdraw ATU’s proposal related to continuing the apprenticeship programs. Block also discussed the upcoming bargaining sessions, and wrote that “ATU is amenable to [a] further exchange of proposals, or designating a topic for February 27 at a later date.”

67. The parties had a bargaining session scheduled for February 13, which TriMet cancelled because one of its key bargaining team members was unavailable.

68. ATU has not withdrawn its December 19, 2019, proposal to bargain over TriMet’s apprenticeship programs in the Maintenance Department.

TriMet’s Hiring of Diesel Technicians

69. On January 17, 2020, TriMet posted, for internal hire only, ten job openings for diesel technicians. The job opening lists the position’s minimum qualifications as including 18 months of training in diesel technology and power systems at an accredited school or training program, and two years’ experience working as a heavy duty diesel mechanic, or any equivalent combination of experience and training (*i.e.*, the minimum qualifications listed in the draft “diesel technician” job description that Cusack emailed to the ATU bargaining team on December 2, 2019). Three internal applicants applied; one subsequently withdrew.

70. On January 24, 2020, TriMet posted ten job openings for diesel technicians as open, competitive positions. At the time of this posting, the parties had not reached an agreement for a successor agreement to the expired 2016-2019 WWA and had not completed the dispute resolution procedures required by the Public Employee Collective Bargaining Act (PECBA).

71. As of the date of the hearing, the parties had additional bargaining sessions planned.

The Parties’ Other Recent Disputes Related to Apprentice and Journey Worker Hiring

72. TriMet filed a prior unfair labor practice complaint (Case No. UP-020-16) on June 29, 2016. In that case, TriMet alleged that, in May 2016, ATU violated ORS 243.672(2)(d) by refusing to approve a “classification seniority list” affecting journey workers hired outside of the parties’ apprentice program. TriMet alleged that ATU’s conduct violated the parties’ 2012-2016 WWA, and therefore, (2)(d). On July 24, 2018, the Board concluded that ATU did not violate the 2012-2016 WWA and dismissed the complaint. As of the date of the hearing for these consolidated cases (Case Nos. UP-001/003-20), the parties were still negotiating how seniority should be handled for outside hires.

73. ATU filed a prior unfair labor practice complaint (Case No. UP-019-18) on August 13, 2018. In that case, ATU alleged that TriMet violated ORS 243.672(1)(g) by hiring more than five journey workers from outside of TriMet in 2018 in violation of Article 3, Section 1, Paragraph 10 of the 2016-2019 WWA.¹⁵ ATU also alleged that TriMet violated ORS 243.672(1)(e) by making a unilateral change to a longstanding practice of not hiring journey workers from outside of TriMet. On December 31, 2019, the Board concluded that TriMet violated ORS 243.672(1)(g) by hiring more than five journey workers annually from outside TriMet to fill positions in any apprenticeable discipline, in violation of Article 3, Section 2, Paragraph 10 of the 2016-2019 WWA. The Board declined to reach the ORS 243.672(1)(e) claim. The Board ordered the parties to bargain in good faith over the appropriate make-whole remedy for 60 days and, if the parties were unable to agree during that time, to submit to the Board the last proposal each party made. The parties were unable to agree on a remedy and, on March 6, 2020, submitted their last proposals to the Board.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The record does not establish that ATU violated ORS 243.672(2)(b).

Under ORS 243.672(2)(b), it is an unfair labor practice for a labor organization or its designated representative to refuse to bargain collectively in good faith with a public employer if the labor organization is an exclusive representative. Paragraph (2)(b) is the “mirror provision” of ORS 243.672(1)(e), which applies to public employers, and this Board applies the same standards when determining whether an employer or a union has violated the duty to bargain in good faith. In this case, TriMet contends that ATU refused to bargain in good faith by insisting on bargaining, over TriMet’s objection, about the continuance of TriMet’s apprenticeship programs (as opposed to their elimination), which TriMet contends is a permissive subject. ATU contends that the continuance of the apprenticeship programs is a mandatory subject, and that, in any event, it has not unlawfully pursued bargaining on that subject. We conclude that ATU has not unlawfully pursued bargaining about the apprenticeship programs, and therefore, ATU has not violated (2)(b). Because we find no violation of ORS 243.672(2)(b), regardless of whether the continuance of the apprenticeship programs is a permissive or mandatory subject of bargaining, it is unnecessary for this Board to rule on the scope of bargaining issue, and we decline to do so. *Oregon City School District No. 62 v. Oregon City Education Association*, Case No. C-179-79 at 15 n 10, 5 PECBR 4246, 4260 n 10 (1981) (*Oregon City*).

In *Oregon City*, this Board addressed the question of, “[u]nder what circumstances does an attempt to bargain over a permissive subject become a refusal to bargain in good faith over mandatory items and, thereby, constitute an improper practice under the PECBA?” *Id.* at 8, 5 PECBR at 4253. On the one hand, “[a] party may urge inclusion of permissive matters in an agreement so long as it remains willing to negotiate and execute a bargaining agreement that does not include such matters.” *Id.* at 10, 5 PECBR at 4255. On the other hand, “it is a violation of ORS 243.672(1)(e) or (2)(b) for a party to precondition a bargain upon the inclusion of a permissive subject in a collective bargaining agreement or to insist that a permissive subject be discussed

¹⁵The full text of that contract provision is included in the appendix to this order.

before that party will negotiate over mandatory subjects.” *Id.* “Whether a party is merely proposing and urging negotiations on a permissive subject or is unlawfully pursuing a permissive subject is an issue of fact.” *Id.*¹⁶ “Barring express admissions” by a party’s representative that they “refuse[] to negotiate unless permissive items are bargained over or included in a contract, a finding of unlawful conditioning must be based on the totality of circumstances surrounding the [party’s] conduct in bargaining.” *Eugene School District No. 4J v. Eugene Education Association*, Case Nos. UP-32-87/DR-2-87 at 25, 9 PECBR 9455, 9479 (1987) (*Eugene*).

In this case, the evidence establishes that ATU has urged TriMet to continue the apprenticeship programs, but it does not establish that ATU conditioned settlement of the successor agreement on continuation of those programs, or that ATU has insisted on discussing that subject before negotiating over other subjects. Specifically, the parties exchanged proposals at their first formal bargaining session on October 10, 2019. TriMet proposed a large number of changes to Article 3 of the WWA, which relates to the Maintenance Department; those proposed changes included, but were not limited to, elimination of the apprenticeship programs (for all employees but the current apprentices). After TriMet described some of its proposed changes, ATU President Shirley Block commented by saying something to the effect of, “this is a waste of time,” and the parties should “just go to interest arbitration right now.” Block testified that her comments were intended to reflect that ATU would not be able to obtain member ratification of an agreement because TriMet was proposing so many changes that Maintenance Department employees would view as “takeaways,” without offering counterbalancing benefits. Block further explained that the Maintenance Department employees could effectively block ratification because, under ATU’s bylaws, that group had to individually approve any agreement.

On December 5, the parties met to bargain about Maintenance Department issues, and ATU explained that it needed more information to develop a counterproposal to TriMet’s proposal to eliminate the apprenticeship programs. In response to ATU’s questions, TriMet explained further why it wanted to eliminate the programs, and what it hoped to accomplish by doing so. On December 19, the parties met to bargain about Maintenance issues again, and ATU presented a “concept” (instead of formal contract language) for its counterproposal regarding the apprenticeship programs. TriMet countered with its own “concept document,” instead of a formal counterproposal. ATU explained its concerns about TriMet’s concept, and stated that it would not accept that concept without modifications. TriMet asked whether the parties were at impasse. ATU stated that they were not at impasse, but explained that ATU would not agree to TriMet’s concept unless TriMet also offered something else “really big.” The parties then continued to discuss the reasons for their respective positions about the apprenticeship programs, and scheduled additional bargaining sessions.

In correspondence following the December 19 bargaining session, TriMet stated that it was “declin[ing] to bargain” over the permissive subjects of bargaining that it had identified (*i.e.*, all of the existing contract provisions that it contends are related to the apprenticeship programs). TriMet also demanded that ATU withdraw any proposals that “relate to maintaining the apprenticeship program,” and indicated that if ATU did not do so, TriMet would file an unfair

¹⁶The Board further held that, because “[m]ediation is a continuation of negotiations between the parties,” “[i]t is not unlawful * * * merely to attempt to bargain over permissive matters during mediation.” *Id.* at 11, 5 PECBR at 4256.

labor practice complaint. In response, ATU maintained that it had never stated that it would not agree to a contract without the apprenticeship program, or that it would refuse to engage in further bargaining. ATU further clarified that it was “not conditioning either bargaining or a settlement of the contract on specific proposals regarding the apprenticeship program,” and reiterated that it wanted to continue bargaining. ATU did not withdraw its prior proposals related to the apprenticeship program.

TriMet contends that “ATU’s refusal to withdraw its December 19, 2019, counterproposal” after TriMet objected to it as permissive and refused to bargain over it, “constitutes unlawful conditioning in violation of the duty to bargain in good faith,” notwithstanding “ATU’s purported willingness to bargain over other subjects.” We disagree. To begin, “[w]hen negotiations are taking place over mandatory subjects, it is not unlawful to indicate that further compromises will be made if a permissive subject is bargained, so long as bargaining continues over the mandatory proposals.” *Oregon City*, C-179-79 at 12, 5 PECBR at 4257. *See also Eugene*, DR-2-87 at 27, 9 PECBR at 9481 (statement that union “could ‘sell’ an agreement to its constituents that included less money if the contract also contained provisions on other issues of importance to [them] * * * does not constitute a demand that the employer waive” its “right to refuse to discuss permissive subjects in exchange for good faith negotiations and a reasonable settlement on mandatory items”). Indeed, “[a] party may continually propose discussions” of a purportedly permissive subject, “so long as it engages in good faith negotiations” over outstanding mandatory subjects. *Oregon City*, C-179-79 at 10, 5 PECBR at 4255. Further, good faith collective bargaining does not require a party to agree to any particular proposal or to make any particular concession. *Id.* at 12, 5 PECBR at 4257; ORS 243.650(4). Under the totality of the circumstances, ATU’s refusal to withdraw its December 19 proposal does not cross the line from attempting to bargain about the continuation of apprenticeships to conditioning bargaining on discussion of that subject. *See id.* (respondent “put[] forth allegedly permissive proposals,” including in mediation, but did not “condition[] meeting and conferring in good faith with respect to the outstanding mandatory items” on complainant’s “willingness to bargain over such allegedly permissive items”); *cf. Jackson County v. SEIU Local 503, OPEU*, Case No. UP-002-20 at 10-11 (2020) (“Including a permissive subject of bargaining in a final offer over the other party’s objection violates the obligation to bargain in good faith.”).

TriMet also contends that Block’s October 10 statements (that bargaining “is a waste of time” and that the parties should “go to interest arbitration right now”) establish that ATU refused to collectively bargain in good faith. Specifically, TriMet argues that these statements amounted to a refusal to bargain unless TriMet withdrew its proposals to discontinue the apprenticeship programs. We disagree. Block’s statements did not amount to an express refusal to bargain. Block testified that she was attempting to articulate that TriMet’s proposals, which ATU viewed as significant takeaways, would not be ratified by the Maintenance employees (and thus ATU membership), even if ATU’s bargaining committee were to accept them. ATU subsequently explained that it was not conditioning bargaining on TriMet’s withdrawal of its proposal. ATU also continued to engage in good faith negotiations over a broad range of subjects and contract proposals. Moreover, advocacy and bargaining posturing are commonplace at the bargaining table, and this Board generally gives parties considerable latitude to speak freely in that context, so long as the comments do not violate PECBA. *See Oregon School Employees Association, Chapter 20 v. Baker School Dist. 5J*, Case No. C-165-81 at 6, 6 PECBR 5103, 5108 (1982) (“[PECBA] is primarily designed to require the parties to bargain over the employment relations of represented

employees. ORS 243.656(5). That underlying policy requires this Board to make room for a vigorous exchange of views at the bargaining table.”). Here, Block’s spur-of-the-moment comments in response to TriMet’s first bargaining proposal, which proposed, among other things, eliminating the long-established apprenticeship programs that hold particular value for ATU and its members, do not amount to a violation of the obligation to collectively bargain in good faith.

In sum, based on the evidence at hearing, we conclude that TriMet did not prove that ATU’s bargaining conduct related to TriMet’s apprenticeship programs violated ORS 243.672(2)(b).

3. The record does not establish that TriMet violated ORS 243.672(1)(e) by externally posting ten job openings for diesel technicians while the parties were engaged in successor bargaining.

An employer commits a per se violation of ORS 243.672(1)(e) if it makes a unilateral change in the status quo concerning a mandatory subject of bargaining without first completing its bargaining obligation under PECBA. *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177, 295 P3d 38 (2013) (*AOCE*); *Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11 at 8, 25 PECBR 525, 534, *adh’d to on recons*, 25 PECBR 764 (2013) (*AEE*). This obligation to maintain the status quo applies equally during the term of a collective bargaining agreement and the “hiatus period,” the period between the expiration of an agreement and the completion of PECBA’s statutory bargaining process. *Id.* In this case, there is no real dispute that TriMet unilaterally changed the status quo when it externally posted ten job openings for diesel technicians during the hiatus period. The status quo may be determined by, among other things, an expired agreement. Here, the parties’ expired agreement limited the hiring of outside journey-level workers in apprenticeable disciplines (which includes diesel mechanics) to five per year; otherwise, the agreement required TriMet to fill such journey-level positions internally, generally by promoting graduating apprentices. TriMet changed the status quo by externally posting ten diesel mechanic positions in January 2020. The issue is whether that change was mandatory or permissive for bargaining.

We conclude that the subject of the change at issue is the permissive subject of standards for filling vacancies. This Board has previously determined that the subject of comparable restrictions against external hiring is “the standards by which the [employer] fills vacancies,” and that such standards are a permissive subject of bargaining. *Gresham Grade Teachers Association v. Gresham Grade School District No. 4 and Larson*, Case No. C-61-78 at 23, 5 PECBR 2771, 2793 (1980); *see also Eugene Education Association v. Eugene School District No. 4J*, Case No. C-279 at 7, 1 PECBR 446, 452-53 (1975), *aff’d after remand*, 290 Or 217 (1980). Under ORS 243.650(7)(b), subjects determined to be permissive by this Board before June 6, 1995, continue to be permissive.

ATU, in its brief, does not squarely address the issue of whether the external posting of diesel technician positions was, in and of itself, mandatory or permissive for bargaining. Rather, ATU contends that TriMet had a duty to bargain about the external posting because that act, ATU asserts, “effectively ended the apprenticeship program,” which ATU contends is a

mandatory subject.¹⁷ However, even assuming that elimination of the apprenticeship program is both an impact of the external posting and mandatory for bargaining, that does not mean that TriMet had a duty to bargain about the decision to post more than five positions externally. An employer has a duty to bargain over the mandatory impacts of a permissive change before implementing it, including during the hiatus period. *See AEE*, UP-043-11 at 10, 25 PECBR at 536. But an employer does not have a duty to bargain the permissive change itself, just because it has mandatory impacts. *Id.*

Alternatively, ATU contends that TriMet made an unlawful unilateral change when it posted the diesel technician positions because, in doing so, it changed their classification's title from "journey worker" to "technician," and lowered the minimum qualifications. ATU does not dispute that the classification title and minimum qualifications are permissive subjects of bargaining. Rather, ATU contends that TriMet had a duty to bargain because those changes "involve compensation," citing *Oregon Public Employees Union v. City of Tualatin*, Case No. UP-122-85 at 8, 8 PECBR 8214, 8221 (1985) (holding that proposal concerning compensation after reclassification was mandatory), and *International Brotherhood of Electrical Workers v. City of Forest Grove*, C-201-75 at 7, 4 PECBR 2168, 2174 (1979) (concluding that employer violated (1)(e) by unilaterally reclassifying employees where "the evidence established that employees suffered a wage reduction by reason of the changes made in their classifications"). However, those cases are inapposite. Here, no employee is being moved from one classification to another because of the title change or change in minimum qualifications. Further, there is no evidence that those changes have directly caused, or will directly cause, any employee's compensation to change.

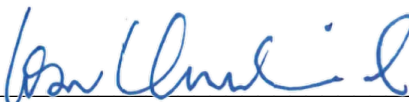
In sum, based on the evidence at hearing, we conclude that ATU did not prove that TriMet violated ORS 243.672(1)(e) by externally posting ten diesel mechanic positions.

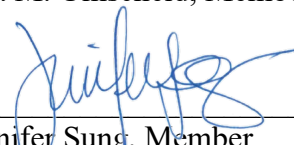
ORDER

The complaints are dismissed.

DATED: April 21, 2020.


Adam L. Rhynard, Chair


Lisa M. Umscheid, Member


Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

¹⁷We do not understand ATU to be claiming that TriMet violated (1)(e) by unilaterally ending (or deciding to end) the apprenticeship program, and, in any event, that issue is outside the scope of the stipulated issue statement. Accordingly, we do not address it.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-001/003-20

APPENDIX OF RELEVANT CONTRACT PROVISIONS

Article 3, Section 1, Paragraph 10 of the 2016-2019 WWA provides:

“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 apprenticeable discipline within the District.”

Article 3, Section 1, Paragraph 11 of the 2016-2019 WWA provides:

“Notwithstanding any other provision of this Agreement, all journey level workers shall be required to work for seven years in their discipline prior to moving to a different discipline unless there is a hardship established by the JATC.”

Article 3, Section 5, Paragraph 5 of the 2016-2019 WWA provides:

“Any Journey Level Mechanic who is assigned to train Apprentice Mechanics will receive an additional twenty-five cents (\$0.25) per hour over base rate of pay for each Apprentice assigned. This provision shall not apply to Assistant Supervisors.”

Article 3, Section 7 of the 2016-2019 WWA is entitled, “Mechanic Training Program.” It provides:

“Par. 1. There shall be a Mechanic Training Program. The purpose of this program is to offer qualified trainees an opportunity to advance in the field of bus maintenance to a high level of proficiency.

“Par. 2. This program is an on-the-job program. Routine assignments as well as training instruction will be delegated to trainees in this program.

“Par. 3. Work assignments, shift hours, and area of instruction will be decided by the Training Manager.

“Par. 4. Applications will be accepted from employees of the District. A qualification test to determine mechanical aptitude will be given and appointments will be made based on seniority from those applicants receiving a passing test score. All Helpers on the payroll as of April 1, 1979, shall have a right to enter this training program with no reduction in wages, based on seniority and a passing test score before other applicants are appointed. Should no one apply, or

should all applicants fail to receive a passing test score, the District shall have the right to recruit applicants from outside the employee group.

“Par. 5. Trainees in the training program shall, except as otherwise provided in this section, operate in accordance to the rules and procedures previously entered into between the parties.

“Par. 6. Trainees will receive the Helper’s rate for the first two (2) years in the training program, the Maintenance Mechanic’s rate for the third year of training, and shall be advanced to the Journey Level Mechanic’s rate upon the successful completion of the third year.

“Par. 7. A log or diary will be kept to record the assignments and duties performed by the trainees, including comments and observations of Supervisors and instructing Mechanics. The Director of Maintenance, or his/her designee will evaluate trainees at the end of ninety (90) days. Unsatisfactory progress will necessitate dismissal from the training program. Helpers unsuccessful in the training program will be returned to their former assignment with no loss of seniority or rights in the former classification. Evaluation of the trainees resulting in continuation in, or dismissal from, the program will take place every ninety (90) days until training has been completed. All trainees retain their rights to the grievance procedure.

“Par. 8. A joint committee composed of three (3) representatives each, for both the District and the Union shall be established in conjunction with this training program.

“Par. 9. Nothing in this Agreement bars the District from promoting a Mechanic Trainee to a Journey Level Mechanic when qualified.

“Par. 10. Apprentice Mechanics may be promoted to a Journey Level Mechanic when qualified. If so promoted, the individual will be paid at the top rate at time of promotion.

“Par. 11. Any District employee who has successfully met all the prerequisites established by the District and is selected to enter a District apprenticeship program, shall, as a condition of entering an apprenticeship program, attend an apprenticeship program orientation of that program. The orientation will include a meeting with a supervisor to cover job requirements and expectations, working conditions, and an interview with a journey level worker. Any employee after entering a program and who leaves that program for any reason prior to attaining journey level status, shall forfeit their right to enter another program for one year or the length of time served in that program, whichever is lesser.”

Article 3, Section 11 of the 2016-2019 WWA is entitled “LRT Maintenance Vehicle Mechanics’ Training.” It provides:

“Par. 1. All light rail employees shall receive their regular rate of pay while training.

“Par. 2. The LRT Mechanic Apprentice Program shall be governed by the same provisions contained in Section 7 of this Article with the following exceptions:

- a. Work assignments, shift hours, and areas of instruction will be decided by the Maintenance Manager.
- b. A qualification test to determine mechanical, electrical and electronic aptitude will be given.
- c. The LRT Mechanic Apprentice may be promoted to Journey Level Mechanic when qualified, and if so promoted will be paid at top rate at time of promotion.

“Par. 3. A joint committee composed of three (3) representatives each, for both the District and the Union, shall be established in conjunction with this apprentice program.”

Article 3, Section 15 of the 2016-2019 WWA is entitled “LRT Apprenticeship Training Programs.” It provides:

“Par. 1. Light Rail Maintenance Department shall have six (6) Journey Level Classifications:

Overhead Traction Electrification Maintainer
Traction Substation Technician
Signal Maintainer
Track Maintainer
Rail Vehicle Mechanic
Field Equipment Technician

“Par. 2. Each Journey Level Mechanic shall hold seniority only with his/her specific classification. The District may administer cross training to light rail Maintenance of Way (MOW) employees for purposes of teamwork, optimum productivity, and mutual assistance among MOW disciplines, as well as to enhance safety

“Par. 3. The District shall establish MOW Apprenticeship Programs in the classifications of:

Signal Maintainer
Overhead Traction Electrification Maintainer
Traction Substation Technician
Field Equipment Technician

“Par. 4. The parties acknowledge the joint apprenticeship and training committees (or trade committees) as the exclusive source for apprenticeship and training standards as approved by the State of Oregon Apprenticeship and Training Council.

“Par. 5. The District shall fill light rail apprenticeship openings in order of seniority of applicants passing aptitude tests offered to District employees in the following priority order:

- a. Journey Level maintenance employees who have seven (7) or more years of Journey Level status.
- b. Other non-Journey Level maintenance employees who are not currently enrolled in a District apprenticeship program.
- c. All other District employees.
- d. If an apprentice opening remains open after offering aptitude tests to internal applicants, as outlined above, the District may offer such openings to outside applicants.

“Par. 6. District employees entering the light rail MOW Apprenticeship Program shall be paid according to the LRV Apprentice Mechanic schedule.

“Par. 7. In the event that the selection of the most senior Journey Level mechanic (bus or rail) applicant for a light rail MOW apprenticeship vacancy would result in a severe hardship on the District relating to the performance of a Journey Level’s regular work (i.e., the resulting Journey Level mechanic vacancy would result in the need to cut jobs or to contract out work under the terms of the Maintenance Assistance Fund), the District may pass over that mechanic and select the next qualified applicant. In such cases, the mechanic who has been passed over will be given the opportunity to fill the next light rail MOW Apprenticeship Program vacancy. Upon successful completion of the Apprenticeship Program, the passed-over mechanic shall be afforded the seniority s/he otherwise would have had if selected for the initial opening.

- a. ‘Passed Up Mechanics’:
 1. Journey-level mechanics from all disciplines, after meeting the seven (7) year requirement and other pre-qualifications, would go into apprenticeship at the top apprentice rate (equal to the top helper rate) under conditions in Article 3, Section 7, Paragraph 6, and as outlined in the Apprentice Mechanics pay schedule of this Agreement.
 2. Helpers from Bus and Rail would enter apprenticeships based upon Article 3, Section 7, Paragraph 6 and the existing pay schedule for Apprentice Mechanics of this Agreement.

3. The District may use the MOW hold back language for journey-level movement into any apprentice program.

“Where applicable, the above provisions also applies to Bus Maintenance.

“Par. 8. Nothing in the Agreement bars the District from promoting an apprentice to a Journey Level in less than four (4) years; however, promotion to Journey Level status from an apprentice program in four (4) years shall be based on District seniority in accordance with the collective bargaining agreement. Upon six (6) months’ accrual in an apprenticeship program, an employee shall forfeit seniority held in the employee’s previous classification. Prior to such six (6) months’ accrual, however, an employee may elect to return to his/her previous classification, whereupon the employee’s seniority held upon return shall be the same as if he/she has remained in the previous classification; this provision may also be effective following six (6) months’ accrual for a particular employee by mutual agreement between the District and the Union.

“Par. 9. In lieu of a certified apprenticeship program for Track Maintainer, the following provisions shall govern the filling of Track Maintainer openings.

- a. Create a classification of Laborer/Track Trainee: Labor/Track Trainees will be filled from the Laborers classification. By seniority, Laborers will be offered the Track Trainee positions. The Track Trainees will be given formal training as well as On the Job training (OJT) in Track Maintenance. When not performing Track OJT they will perform their regular Laborer job duties.
- b. Those holding the Laborer/Track Trainee positions will be eligible for overtime call-outs, to assist when track work is being performed during off-hours. These call-outs would come after the regular Track Maintainers had been called but before other journeymen were called.
- c. Laborer/Track Trainees shall remain in those positions until such time as the District offers an opening for Track Maintainer. When such an opening occurs it shall be offered by seniority to qualified Laborer/Track Trainees. Those that decline to fill the offered positions will either fill a classification held prior to Laborer with loss of all seniority as Laborer and/or Laborer/Track Trainee. Once a person declines a Track Maintainers position they will not be eligible for another opportunity for a period of five (5) years.
- d. A maximum of four (4) Laborer/Track Trainee positions may be created. Additional positions, if needed, may be created with District/Union agreement.

- e. The State of Oregon Apprenticeship Council shall not govern the Laborer/Track Trainee program, but the Light Rail Apprenticeship Committee shall oversee the training, testing and qualifying of those persons holding these positions.
- f. Openings for Laborer/Track Trainees shall be filled [in] accordance with Article 3, Section 15, Paragraph 5.

“Par. 10. The payment of tool allowances to Journey Level Mechanics and Apprentices as provided in Article 3, Section 5, Paragraph 3 shall not apply to Maintenance of Way (MOW) classifications, including:

Signal Maintainer
Overhead Traction Electrification Maintainer
Traction Substation Technician
Track Maintainer
Plant Mechanic

All tools required by the classifications listed above shall be furnished by the District.

“Par. 11. Apprentice Programs.

“Any District employee who has successfully met all the prerequisites established by the District and is selected to enter a District apprenticeship program, shall, as a condition of entering an apprenticeship program, attend an apprenticeship program orientation of that program. The orientation will include a meeting with a supervisor to cover job requirements and expectations, working conditions, and an interview with a journey level worker. Any employee after entering a program and who leaves that program for any reason prior to attaining journey level status, shall forfeit their right to enter another program for one year or the length of time served in that program, whichever is lesser.”

Article 3, Section 21 of the 2016-2019 WWA is entitled, “Hiring Apprentices From Outside.” It provides:

“Par. 1. This Section applies to all District apprenticeship programs.

“Par. 2. Notwithstanding any other provision of this Agreement, the District shall have the right to hire from the outside up to ½ of all apprentices annually in each apprentice program within the District. All newly hired apprentices, whether from within or outside the bargaining unit, shall meet the minimum qualifications established by the District.

“Par. 3. As provided under standards of the State of Oregon Apprenticeship and Training Council, the Joint Apprentice Training Committee (JATC) for the respective apprenticeship program will evaluate placement of an apprentice hired from the outside into the appropriate progressions step of the program, and the District will pay such apprentice at the wage pertaining to that step.

“Par. 4. Any apprentice hired from the outside will establish classification seniority behind any apprentices currently in the respective apprenticeship program as of the date such apprentice is hired.”

Article 4 of the 2016-2019 WWA relates to the Operations Division/Facilities Maintenance. Section 5 is entitled, “Apprentice Programs.” It provides:

“Par. 1. Any District employee who has successfully met all the prerequisites established by the District and is selected to enter a District apprenticeship program, shall, as a condition of entering an apprenticeship program, attend an apprenticeship program orientation of that program. The orientation will include a meeting with a supervisor to cover job requirements and expectations, working conditions, and an interview with a journey level worker. Any employee after entering a program and who leaves that program for any reason prior to attaining journey level status, shall forfeit their right to enter another program for one year or the length of time served in that program, whichever is lesser.”

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-019-18

(UNFAIR LABOR PRACTICE)

AMALGAMATED TRANSIT UNION,
DIVISION 757,

Complainant,

v.

TRI-COUNTY METROPOLITAN
TRANSPORTATION DISTRICT OF
OREGON,

Respondent.

SUPPLEMENTAL ORDER ON REMEDY

Whitney Stark, Attorney at Law, Albies & Stark, LLC, Portland, Oregon, represented the Complainant.

Jeffrey P. Chicoine and Taylor Richman, Attorneys at Law, Miller Nash Graham & Dunn LLP, Portland, Oregon, represented the Respondent.

On December 31, 2019, this Board issued a final order holding that Tri-County Metropolitan Transportation District of Oregon (TriMet) violated ORS 243.672(1)(g) by hiring more than five journey workers annually from outside TriMet to fill positions in any apprenticeship discipline, in violation of Article 3, Section 2, Paragraph 10 of its collective bargaining agreement with Amalgamated Transit Union, Division 757 (ATU). As a remedy, we ordered TriMet to cease and desist from that conduct. We also ordered the parties to bargain in good faith over an appropriate make-whole remedy. In the event that the parties were unable to reach an agreement after bargaining in good faith for 60 days, we ordered the parties to submit their last remedy proposals to this Board so that we could determine an appropriate make-whole remedy. Although the parties bargained in good faith about an appropriate make-whole remedy, they were unable to reach an agreement. Consistent with our prior order, both parties submitted their last proposals to this Board.

“In ordering a remedy for an unfair labor practice violation, this Board has broad authority to fashion an appropriate remedy under the circumstances of each particular case to effectuate the purposes of the Public Employee Collective Bargaining Act (PECBA).” *Medford Education Association v. Medford School District*, Case No. UP-047-13 at 2, 26 PECBR 272, 273 (2014) (*Supplemental Order*) (quotation marks and citations omitted); ORS 243.676(2)(c). The goal of a make-whole remedy is to restore an injured party to the status that existed before the violation occurred. *Id.* Here, however, attempting to restore ATU to the status that existed before TriMet violated PECBA is particularly complicated, in part because ATU does not want TriMet to discharge the 15 outside hires that exceeded the contractual limitation. In addition, according to the parties’ submissions, they are currently in successor bargaining, including bargaining about seniority.

Under ATU’s last proposal, the seniority of all the 2018 outside hires (including both the five outside hires that complied with the contract and the 15 “excess” hires) would “follow any apprentice in a program at the time of their hire,” and TriMet would be barred from making any additional outside hires until the parties have a successor agreement. Under TriMet’s last proposal, seniority for the “15 excess” outside hires “would be adjusted to six months after their actual date of hire.” Having considered the parties’ submissions and the circumstances of the case, we supplement our cease-and-desist order with the following make-whole remedy: for each of the 15 excess outside hires, their seniority shall follow the seniority of any apprentice who was in a program at the time that the outside worker was hired, unless the parties mutually agree otherwise. This remedy recognizes that historically, TriMet has filled journey-level openings by hiring apprentices, and that, if TriMet had complied with the parties’ agreement, it could not have made the fifteen excess hires until a later date.

ORDER

For each of the 15 excess outside hires, their seniority shall follow the seniority of any apprentice who was in a program at the time that the outside worker was hired, unless the parties mutually agree otherwise.

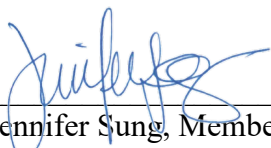
DATED: April 30, 2020.



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-021-18

(UNFAIR LABOR PRACTICE)

UNITED ACADEMICS OF OREGON	)	
STATE UNIVERSITY,	)	
	)	
Complainant,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND ORDER
OREGON STATE UNIVERSITY,	)	
	)	
Respondent.	)	
	)	

On February 27, 2020, this Board heard oral argument on Respondent's objections and Complainant's cross-objections to a recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe on November 27, 2019, after submission of a stipulated record. The record closed on August 19, 2019, upon receipt of the parties' rebuttal/reply briefs.

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

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

On August 13, 2018, United Academics of Oregon State University (Union), filed an unfair labor practice complaint alleging that Oregon State University (OSU) violated ORS 243.672(1)(a) and (1)(i), by conduct related to the publication and dissemination of a webpage regarding faculty unionization. The Union amended its complaint on December 26, 2018, and again on January 21, 2019. The parties agreed to submit the matter on stipulated facts, joint exhibits, and declarations in lieu of testimony, which the parties filed on June 6, 2019.

The issues are:

1. Did OSU use public funds in an attempt to influence the decision of employees regarding whether to support or oppose the Union, in violation of ORS 243.672(1)(i), when it solicited questions from faculty and subsequently created, maintained, and distributed a “Frequently Asked Questions” (FAQs) webpage in March through June 2018?
2. Did OSU interfere with, restrain, or coerce employees “in the exercise” of rights protected by the Public Employee Collective Bargaining Act (PECBA), in violation of ORS 243.672(1)(a), when it solicited questions from faculty and subsequently created, distributed, and maintained the FAQ webpage in March through June 2018?

As set forth below, we conclude that OSU violated ORS 243.672(1)(i). Because any additional violation would not alter our remedy in this case, we decline to reach the remaining claim.

RULINGS

All rulings made by the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties and Relevant Individuals

1. OSU is a public employer within the meaning of ORS 243.650(20).
2. OSU is a state-supported institution of higher education with its main campus in Corvallis, Oregon, engaged primarily in research and teaching. OSU has more than 32,000 students enrolled on two physical campuses and in a virtual “e-campus.” Undergraduate students account for 83 percent of students, with the remainder in graduate or professional programs. OSU has approximately 4,700 full- and part-time faculty of all ranks, including tenure, tenure-track, instructor, and other ranked classifications.
3. The Union is a labor organization within the meaning of ORS 243.650(13).
4. On June 5, 2018, the Union filed a petition (Case No. RC-006-18) under ORS 243.682(2)(a) to certify a new bargaining unit of faculty employees at OSU through the card check process. On June 27, 2018, the Board certified the Union as the exclusive representative for a bargaining unit consisting of various faculty members employed at OSU. Specifically, the Union’s bargaining unit includes:

“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.”

5. The following individuals are supervisory or confidential employees employed by OSU and were involved in the situation that gave rise to this unfair labor practice complaint:

Susan Capalbo, Senior Vice Provost for Faculty Affairs
Donna Chastain, Interim Chief Human Resources Officer
Steve Clark, Vice President of University Relations and Marketing
Sara Daly, Executive Assistant to Edward Feser
Edward Feser, Provost and Executive Vice President
Michelle Klotz, Faculty Affairs Associate
Edward Ray, President of OSU
Kegan Sims, Digital Communications Manager

6. OSU maintains an email system that it routinely uses to communicate with employees.

Union Organizing Campaign and OSU Distribution of FAQs

7. The certification of the Union was the result of an organizing drive that began informally in 2014, with the public phase beginning in 2017.

8. In response to the organizing drive, OSU administrators began to distribute information to faculty members via its email system and through its website. On July 18, 2017, Senior Vice Provost for Faculty Affairs Susan Capalbo used OSU faculty email distribution lists to distribute a link to an OSU website with a list of questions described as “frequently asked questions.” OSU leadership had started hearing questions from faculty members in informal meeting or event contexts; however, OSU did not track those questions. OSU drafted both the questions and answers for the initial set of 27 FAQs. Those FAQs did not respond to specific questions received by OSU from faculty members. (For ease of reference and consistent with the parties’ briefs, the various questions and responses are referred to collectively as the “FAQs,” even where the question was drafted by OSU.)

9. In her July 18, 2017, email to faculty distribution lists, Capalbo explained the FAQ webpage as follows:

“Earlier this year, we became aware of an effort by United Academics to unionize the academic faculty at the Corvallis campus. Recognizing that unionization is often a complicated process, and in an effort to best serve the school community, we have created an interactive webpage containing factual information related to unionization under Oregon law. This webpage was developed to provide the OSU community with answers to frequently asked questions about the unionization process, common issues that may arise during a bargaining campaign, and what the

success of a unionization effort might mean at OSU. The webpage also provides members of the community the opportunity to anonymously submit additional questions of interest for us to respond to.”

Capalbo’s email provided a link where employees could submit their own questions to OSU relating to the organizing drive. The initial FAQ entries that were posted caused some alarm among the staff and leadership of the organizing campaign.

10. Capalbo’s email was distributed through OSU email distribution lists established for employees and faculty as Inform-C07 (Professional Faculty), Inform-C08 (Instructors, Research Associates/Assistants), and Inform-C09 (Professors, Associate/Assistant Professors); and copied to Inform-C11 (Office Managers, Executive Assistants, Administrative Assistants). Professional faculty are employees working in an academic, student, or other administrative support position with professional titles, and without an assigned rank.

11. The FAQs were posted on the OSU intranet and accessible only to OSU employees with a university-issued login. To access the FAQs, the employee had to be logged in to the OSU intranet. The FAQs could be accessed by clicking on a link in the email sent by Capalbo, an OSU administrator. The link took the employee to an entry page. The webpage was then designed in what OSU described as an “accordion” format, with pages sequentially accessed, as follows:

- a. At the entry page, the employee had to click on a button stating that the employee was an “OSU employee with questions about the unionizing process.” That click took the employee to a page with a list of questions.
- b. At the next level, there was a page with a published list of questions, without answers. The employee could click on any question to see OSU’s response.
- c. A click on the question page took the employee to the third level. At the third level, the user would be at a webpage displaying only the particular question or questions that the user clicked on, and OSU’s corresponding answer.
- d. An employee who wanted to ask a question not posted could click on the button that stated: “I have a question that is not answered on this website, how can I find an answer?” From there, the employee would be taken to a portal where the employee could submit a question, anonymously if preferred.

12. Any OSU employee was able to submit questions for consideration and posting as a FAQ, including supervisory or managerial employees.

13. The original set of FAQs remained unchanged until March 22, 2018.

14. In the original set of 27 FAQs drafted by OSU, OSU referred to strikes in three of the answers. For example, OSU included the following questions and responses:

“Could the union call a strike if an agreement is not reached on a contract?”

“Yes. If the parties have declared impasse, as noted above, UA can call for a strike vote after the required 30-day cooling-off period. Oregon law requires a 10-day notice of intent to strike, but based on the outcome of the membership strike vote, UA may ultimately call a strike or work stoppage.

“Would faculty continue to receive their salary if they participate in a strike?”

“When employees are on strike, they are not working and therefore are not entitled to receive the compensation or benefits traditionally provided by the employer in return for the work they perform.”

15. Some of the original FAQs drafted by OSU also included questions regarding “what the success of a unionization effort might mean at OSU.” For example, the initial set of FAQs included the following responses regarding the potential results of collective bargaining:

“Would all members of a bargaining unit be required to join the union and pay dues?”

“Although individuals do not have a choice as to whether they are part of a bargaining unit, membership in a union is voluntary. Unions, however, typically seek to secure a provision in a collective bargaining agreement that requires bargaining unit members who do not join the union to pay what is known as a ‘fair share’ fee. A ‘fair share’ fee reflects a share of the cost to the union to provide basic services and benefits to everyone in the bargaining unit. Full union members will pay a full dues amount determined by the union. Depending on how the union determines the full dues amount, the difference between a full dues fee and a ‘fair share’ fee can be minimal or nothing at all.¹

“Would OSU faculty retain all of the benefits they currently enjoy if there is a new collective bargaining agreement?”

“The terms and conditions of faculty’s employment would be subject to the bargaining process and the positions taken by the UA and OSU at the bargaining table. It is important to understand that while some terms and conditions may continue unaffected, some of the benefits currently in place may change or be discontinued as the requirements of the new collective bargaining agreement are implemented.”

16. OSU administrators and employees continued to create, publish, and distribute additional FAQs on issues related to unionization as the organizing drive continued. As the new FAQs were added, OSU kept the older FAQs and responses on its website, periodically adding new FAQs and responses to the initial postings.

¹OSU posted this FAQ before the U.S. Supreme Court’s decision in *Janus v. AFSCME, Council 31*, 138 S Ct 2448 (2018).

17. On March 22, March 30, May 23, May 31, and June 7, 2018, Provost and Executive Vice President Edward Feser sent emails to email distribution lists with links to updated FAQs. Each new email directing employees to the FAQs and responses would take employees to a site where all of the FAQs and responses could be viewed (following the “accordion” format described above), not just the most recently added FAQs.

18. Feser’s emails dated March 22, March 30, May 23, and May 31, 2018, were distributed through the following email distribution lists: Inform-C07 (Professional Faculty); Inform-C08 (Instructors, Research Associates/Assistants); and Inform-C09 (Professors, Associate/Assistant Professors).

19. Feser’s email dated June 7, 2018, was distributed through the following email distribution lists: Inform-C07 (Professional Faculty); Inform-C08 (Instructors, Research Associates/Assistants); Inform-C09 (Professors, Associate/Assistant Professors); and Inform-C12 (Academic Wage & Other Misc.).

20. Feser’s emails conveyed the impression that OSU was maintaining the FAQ webpage for the purpose of responding to actual questions submitted by faculty. For example, Feser’s March 22 email stated, in part:

“We continue to receive inquiries about this [union organizing] effort. Oregon law allows public employers to respond to questions they receive from employees during a union organizing drive. Last summer, the university created a web page to provide responses to such questions.

“Recently we updated the page and included responses to additional questions we have received since the fall.”

The email also included two options for faculty to submit additional questions. Similarly, Feser’s March 30 email informed employees that the FAQ webpage had been updated after OSU “received a number of additional questions about faculty unionization.” Later, Feser’s May 31 email described the changes to the FAQ webpage as updates that were made “as new questions are submitted by faculty members.”

21. None of Feser’s emails informed faculty that the questions published on the FAQ webpage had been edited or changed from the questions actually submitted by employees.

22. OSU updated its FAQs on the same days that Feser sent his emails, and on June 13 and 15, 2018.

23. In some instances, OSU edited the questions before publishing them on the FAQ webpage. Some of the textual changes were minor grammatical or stylistic changes. Some questions were edited to omit the opinions expressed by the employee. For example, on June 7, 2018, an anonymous employee submitted the following question via the web form on the FAQ webpage:

“Unionized peer institutions have higher wages (e.g., University of Oregon) and some higher benefits. OSU has failed to keep pace with either of these two essential things often used to retain valued employees. Will unionization make OSU a more attractive employer, and will unionization allow the bargaining unit to reduce the bloated size of the OSU administration?”

When OSU published the question, it edited out the first two sentences, and the reference to the “bloated” size of the OSU administration, and published the question as, “Will unionization make OSU a more attractive employer, and will unionization allow the bargaining unit to reduce the size of the OSU administration?”

24. In another example, on May 24, 2018, an employee submitted the following question by email sent to Capalbo:

“A fellow faculty member informed me that the union representative misrepresented the purpose of the cards when visiting his office. The card was presented as a request for additional information, and it wasn’t until my colleague told the union representative that he knew the actual purpose of the card was a vote for unionization that the union representative confirmed its actual purpose.

“While researching the UAOSU, I noticed that universities that do not have unionized tenure-track and tenured research faculty are listed as ‘comparable universities with faculty unions.’ For example, Temple University has a graduate student union and an involuntary adjunct [sic] faculty union but the tenure-track and tenured faculty are not unionized. The proposed union would require all faculty to pay dues, which is not comparable, as UAOSU is presenting it.

“How can this card process be considered legitimate and binding when the parties collecting cards are lying to faculty and presenting false information?”

OSU edited the question, omitting the details about the conversation between the colleague and the union organizer, as well as the phrase describing organizers as “lying to faculty and presenting false information,” and printed only the following text:

“A fellow faculty member informed me that the union representative misrepresented the purpose of the cards when visiting his office. While researching the UAOSU, I noticed that universities that do not have unionized tenure-track and tenured research faculty are listed as “comparable universities with faculty unions.” For example, Temple University has a graduate student union and a voluntary adjunct faculty union, but the tenure-track and tenured faculty are not unionized. How can this card process be considered legitimate and binding?”

OSU responded to the question as follows:

“Unions and their representatives are given a very wide latitude under the law because the right a union obtains from successfully unionizing a group of employees is only the right to negotiate. An employer is not obligated to accept any union proposal but only to meet and confer in good faith negotiations with the union over employment conditions such as wages, hours and other working conditions. OSU created this website to provide factual and truthful answers in response to the many questions that are often raised during the union organizing effort, and we encourage faculty to ask questions of UA also.”

25. In another example, on April 9, 2018, an anonymous employee submitted a question via the FAQ webpage about a union organizer coming to her home at 7:00 p.m., and asked:

“How do I know whether this is right or it is violating my privacy? Personally, I don’t understand why these two persons need to come to my private address to talk about this process, it didn’t feel right. Please let me know.”

OSU edited this employee’s description of her feelings, and published the question as, “Is it legal or appropriate that two persons from the union come to my home at 7:00 pm to speak about this process? How do I know whether this violates my privacy?”

26. In another example, on March 30, 2018, an anonymous employee submitted the following question via the FAQ webpage:

“Is there any way to reverse this if the 50%+1 is achieved? Will this be a binding union forever? (I know there are very few cases of unions being dissolved once established, this is more of a suggestion to include on the page, because it is an important thing to consider).”

OSU edited this employee’s question before posting it, including by deleting the parenthetical explaining that the employee perceived that there “are very few cases” of decertification, and that the employee submitted the question as a “suggestion” for OSU to post so that other employees would consider the issue. OSU published the question as:

“Will this be a binding union forever? Is there any way to reverse this if the union prevails in either a card check certification or an election?”

27. In some FAQs, OSU did not edit out extraneous opinion statements or allegations from the question. For example, OSU published the following question:

“It feels like the process to unionize is actually a bit out of the hands of faculty generally and the university administration completely. It's unclear, then, how to have a fair process with open dialogue about the pros and cons related to

unionization. Is the faculty senate expected to maintain neutrality on this issue as well? Where are the debates and public forums?”²

28. For another example, OSU published the following question and response on the FAQ webpage, without deleting the questioner’s assertions that OSU’s existing shared governance system is “great” and would “disappear” if the faculty unionize. OSU’s response also included advisory information that went beyond the scope of the actual question asked by the employee.

“Where is our faculty senate in this effort? We should be discussing this topic at every senate meeting. OSU has great shared governance already and it will disappear if we unionize. Why is our senate not leading an opposition?”

“OSU encourages discussion over this and other relevant issues among colleagues and within the faculty community. How unionization may impact OSU’s shared governance is not known at this time, *but it is important to discuss the quality of the current shared governance model and its many benefits.* This debate discussion may be introduced by participants in Faculty Senate as well as other forums throughout campus. Because of Oregon law, however, OSU cannot introduce opposition to the union through its Faculty Senate.” (Emphasis added.)

29. For another example of OSU providing advisory information, in response to a question about whether an employee could request the return of a signed authorization card after the Union filed the petition, OSU answered that it “may be possible,” and noted that there “is no formal process” for revoking an authorization card. OSU also included the following suggested course of action:

“It may be possible. OSU now have [*sic*] seven days with which to gather and provide the Employment Relations Board (ERB) with a list of employees so the ERB can check the list against the authorization cards filed by UA in support of its petition. Provided that you request your card back before that check, the ERB may honor your request to disregard your authorization card as a part of its showing of interest check. Under Oregon law there is no formal process for revoking an authorization card. However, the method most likely to achieve a revocation is through a written and dated communication (such as an email) to the union’s leadership and ERB at this address: emprel.board@oregon.gov.”

30. In another example, in response to a question about how union organizers obtained employees’ home addresses, OSU included in its answer, “Whether you choose to engage the union representatives, however, is entirely your choice.” In response to another question, OSU included in its answer its view that “OSU encourages faculty who may be affected by unionization to actively engage their colleagues and to communicate their opinions freely and openly—whether that be individually or as a collective. Similar to methods employed by the unionization effort, *opposition can be achieved through campus activism.*” (Emphasis added.)

²The record does not identify the original source or text for this question.

31. In one answer, OSU included its subjective opinion about the process of decertification, as follows:

“Will this be a binding union forever? Is there any way to reverse this if the union prevails in either a card check certification or an election?

“Yes, *but it is a difficult process*. The process is known as decertifying a union and it is accomplished through the filing of a decertification petition with the Oregon Employment Relations Board (‘ERB’). If a contract is in place between OSU and the union, a decertification petition could only be filed within a narrow 30-day period before the expiration of the contract. The decertification petition must be supported by signatures of at least 30% of the members of the bargaining unit. If ERB determines the signatures are valid, it will schedule an election for the entire bargaining unit. 50%+1 of those voting would need to vote in support of decertifying in order for the union to be decertified. As an aside, it is not permissible for OSU to provide any assistance (financial or otherwise) to a decertification effort and it is also impermissible to decertify a portion of the faculty from the bargaining unit (i.e., College of Business).” (Emphasis added.)

32. In response to an employee’s question about whether unionization would result in union dues and a pay cut, OSU published the following response:

“If this unionization effort is successful, will there be union dues (how much?) and can I expect a pay cut?

“While we do not know exactly how United Academics will implement a dues structure, it is typical for faculty unions to assess dues as a percentage of salary, though some unions choose to implement a flat fee. Most faculty unions have rates in the range of 1 %-2% of a faculty member’s total salary. Regarding your question about a pay cut, when a union represents employees, the employer is required to meet and confer with the union about wages. Thus, we cannot say whether you can expect a pay cut as such is determined through the collective bargaining process with the union.”

33. On April 16, 2018, an anonymous employee submitted the following question via the FAQ webpage: “How is my ability to conduct research (e.g., field-based research that is time sensitive), participate in workshops/conferences, and meet deadlines set by funding agencies affected if the union decides to strike?” In its answer, OSU did not edit the employee’s inaccurate assumption that the union (rather than the represented employees) decides whether to strike. OSU also surmised what actions it would take in response to a strike, as follows:

“The answer depends on whether the employee participates in the strike by choosing not to work. If an employee chooses to participate in a strike and not come to work, they are not considered an employee for the time period during which they choose not to come to work. To this end, the individual’s ability will be impacted because he/she will receive no access to OSU’s computer systems (email, ONID

access, etc.), will not receive compensation or benefits, nor be able to participate in workshops or conference in their OSU capacity or using OSU resources. During this time period, these individuals generally would be unable to participate as an OSU principal investigator in OSU grant funded research. If an employee chooses not to participate in the strike and, instead, decides to work, the employee will continue as an OSU employee and the strike will not impact his/her ability to conduct research, participate in workshops and conferences, and meet deadlines.”³

34. An anonymous employee also submitted the following question on April 16, 2018:

“How does the unionization process, and potentially a strike, impact faculty who are in the U.S. on a work visa?

“The unionization process does not impact faculty who are in the U.S. on a work visa. A strike impacts only faculty being sponsored for employment in the U.S. on an H-1B work visa who have not yet begun their employment. A new H-1B petition filed for a faculty member who is not yet employed at the University will be denied if the sponsored position is one currently impacted by a certified strike. In contrast, faculty members already working in the United States in H-1B status do not have any negative impact to their U.S. immigration status as a result of participation in a strike. According to regulations, faculty members who have already begun employment in the United States under an approved H-1B petition do not violate the terms of their nonimmigrant status by virtue of past, present, or future participation in the strike. However, faculty members remain subject to all other applicable terms of the Immigration and Nationality Act in the same manner as other H nonimmigrants. For example, a faculty member engaging in unauthorized employment with a different employer while participating in a strike would violate other applicable terms of the Immigration and Nationality Act just as if the faculty member engaged in unauthorized employment in the absence of a strike. Finally, the faculty member’s status and authorized period of stay is not modified or extended in any way by virtue of participating in the strike. Time spent in H-1B status participating in a strike is treated no differently from time working in H-1B status and will continue to count against the faculty member’s maximum six year stay in H-1B status.”⁴

³The questions of whether, and the extent to which, an employer may lawfully terminate striking employees’ access to publicly owned computer resources while those employees are not working are subject to dispute. See, e.g., *Portland State University Chapter, American Association of University Professors v. Portland State University*, Case No. UP-013-14 at 14, 26 PECBR 438, 451 (2015) (telling employees two days before strike authorization vote that they would lose their computer systems access violated ORS 243.672(1)(a) because it had the “quality of a reprisal,” even “assuming that the University’s announcement might, in different circumstances, have been lawful”).

⁴Pursuant to 8 CFR § 214.2, a strike will cause H-1B petitions to be denied only “[i]f the Secretary of Labor certifies to the [immigration] Commissioner that a strike or other labor dispute involving a work

(Continued . . .)

OSU has numerous faculty from other countries who are generally able to work in the United States only if they hold a valid H-1B work visa.

35. OSU routinely uses a FAQ format for transmitting information to faculty and staff. At least 56 webpages on the OSU intranet for faculty or staff utilize a format loosely resembling that of the FAQs at issue here.

36. The Union submitted the declaration of attorney Michael Tedesco, who also serves as an adjunct labor law professor at the University of Oregon. Based on his experience representing unions in both the private and public sectors, Tedesco testified that the FAQ format is also commonly used in the context of anti-union materials, and that anti-union materials typically highlight topics such as union dues and strikes. He further testified that anti-union materials typically suggest that unionization is unnecessary, futile, or even harmful, for example, by suggesting that unionization can result in the loss of existing wages and benefits, flexibility, autonomy, or the ability to communicate directly with employer representatives, or that employees will have to go on strike to resolve labor disputes, even though strikes are rare in most all workplaces.⁵

37. Throughout the time the FAQs at issue here were posted, OSU restricted access to OSU employees, used the “accordion” approach in formatting the website, and required employees to take multiple steps to access the FAQ website.⁶

38. On June 16, 2018, legal counsel for the Union contacted Brian Caufield with concerns about OSU’s FAQs and requested more information about the process and source of the

(Continued . . .)

stoppage of workers is in progress in the occupation and at the place where the beneficiary is to be employed or trained, and that the employment or training of the beneficiary would adversely affect the wages and working conditions of U.S. citizens and lawful resident workers.” 8 CFR § 214.2(h)(17)(i). “If there is a strike or other labor dispute involving a work stoppage of workers in progress, but such strike or other labor dispute is not certified under paragraph (h)(17)(i), the Commissioner shall not deny [an H-1B] petition or suspend an approved petition.” 8 CFR § 214.2(h)(17)(ii). *See also* 20 CFR § 655.733(a)(2) (“Upon receiving from an employer a notice described in paragraph (a)(1) of this section, ETA shall examine the documentation, and may consult with the union at the employer’s place of business or other appropriate entities. If ETA determines that the strike or lockout is covered under DHS’s ‘Effect of strike’ regulation for ‘H’ visa holders, ETA shall certify to DHS, in the manner set forth in that regulation, that a strike or other labor dispute involving a work stoppage of workers in the same occupational classification as the H-1B nonimmigrant is in progress at the place of employment.”).

⁵OSU referred to strikes in a total of six FAQ responses, three of which were in the initial set of FAQs drafted by OSU. In its FAQ responses, OSU did not provide factual information regarding the frequency of strikes in general, or of Oregon public sector strikes in particular.

⁶For the convenience of the Board, the parties submitted as a joint exhibit a printed version of the content of all 77 of the questions and answers posted on the website. A user would not be able to access the FAQs in that format.

questions.⁷ On June 18, 2018, Caufield responded by email, and later provided additional information to the Union, including who worked on the FAQs and a spreadsheet listing the dates and manner in which some of the questions were received.

39. Caufield's spreadsheet showed how OSU responded to some of the questions that were submitted by email or through the website, specifically, by indicating whether OSU posted the question on its FAQ webpage or instead responded only directly to the employee. The spreadsheet also identified the sources of some of the questions that OSU posted on the FAQ webpage. Specifically, OSU indicated that 37 were derived from anonymous questions submitted via the online form on the FAQ webpage, one was submitted via the online form with the employee's name listed, 17 were submitted by email from faculty members, and four were listed as received by "other" means. OSU did not verify that the people submitting anonymous questions were limited to faculty who would have been included in the likely bargaining unit or that questions were not submitted by supervisors or administrators.

40. The FAQs labeled by OSU as "other" and dated May 21, 2018, were prompted by a *Corvallis Times-Gazette* news article entitled, "Getting Organized: OSU Faculty Members Take Steps to Form a Union." The article included a passage regarding conversations that United Academics organizers were having with OSU faculty, which stated, in relevant part:

"One issue that comes up frequently, organizers say, is the question of shared governance.

"While the Faculty Senate gets a say in matters such as academic regulations and curriculum, it has no decision-making powers when it comes to things such as university budgets, faculty assessment mandates and the structure of academic units.

"* * * * *

"As faculty, we should have a stronger voice in the running of the institution and in our working conditions,' [a faculty member] said. * * *

"Some critics of the United Academics organizing campaign counter that OSU functions pretty well already and that forming a union would only create an adversarial relationship between faculty and university administrators."

OSU posted three questions on the FAQ webpage to correct what it considered incorrect information in the article. The three questions and answers that OSU posted to respond to the article are:

"If a union is elected as the exclusive representative of the faculty, will the union have decision-making authority over OSU's budget process?

⁷Brian Caufield is the Director of Labor Relations Services for the University Shared Services Enterprise (USSE). Caufield advised OSU on the FAQs.

“No. The University budget process is considered a management prerogative. That said, OSU believes it already has a strong collaborative budgeting process that includes a diverse University Budget Committee and numerous University-wide budget forums and presentations. In fact, the University Budget Committee includes Faculty Senate representation.

“If a union is elected as the exclusive representative of the faculty, is OSU required to negotiate with a union over faculty assessment mandates?

“If by faculty assessment mandates you mean faculty performance evaluations, the answer is no. The basis for an evaluation, including the criteria or standards by which performance is to be evaluated, areas to be evaluated, the content of the evaluation form, the number and timing of evaluations, and the use of evaluations are considered permissive subjects of bargaining. Neither party is required to negotiate over subjects which are considered permissive.

“If a union is elected as the exclusive representative of the faculty, will the union have decision-making authority over OSU’s academic units?

“No. Staffing levels, assignment of duties, and workload when the effect on duties is insubstantial, are considered permissive subjects of bargaining. Neither party is required to negotiate over subjects which are considered permissive. Moreover, OSU already has a robust Faculty Senate that addresses issues related to academic units. Unless there is an agreement by Faculty Senate to cede this to a union, OSU will continue to address permissive subjects of academic issues through the Faculty Senate.”

In a May 15, 2018, email to Bennet Hall, the author of the story, Vice President of University Relations and Marketing Steve Clark declined an interview request, citing the neutrality requirement. Specifically, Clark wrote, “I confirmed that we believe Oregon law does not allow the university to offer comment on Oregon State University employees’ consideration of forming a collective bargaining unit. So we will respectfully decline your request to interview President Ray.” After that, Clark’s email directed Hall to a website that purportedly contained the “personal opinions of individual faculty members.” Later that same day, Hall responded, stating, “I’ve already interviewed some faculty members on both sides of the question, including a couple connected with that website.”⁸

41. The fourth FAQ labeled “other,” dated June 7, 2018, was prompted by an inquiry from Keith Leavitt, a professor in the College of Business, who was a vocal opponent of the organizing drive.⁹ Specifically, Leavitt submitted a request to use an email distribution list to send

⁸Although the record does not actually show where the link in Clark’s email to Hall went, we find based on the context that it directed viewers to Keith Leavitt’s OSU Excellence website (described below), a website that opposed the unionization efforts.

⁹The evidence suggests that this specific entry is titled, “Attempting to reach OSU employees for purposes of union discussions.”

information to faculty. Faculty are required to submit written requests to use a distribution list to the person controlling the list, who then approves or denies the message. OSU denied Leavitt the use of the distribution list because it was related to the union campaign. On June 7, 2018, Gigi Bruce, Special Assistant to Provost Feser, emailed Leavitt to deny his request to distribute his message through faculty email distribution lists. Bruce provided him with information about how to obtain email addresses through a public records request, and also advised him that his faculty message would generally comply with OSU's Acceptable Use of Computing Resources policy.

42. Based on Leavitt's inquiry, OSU published the following question, "How do I contact my fellow colleagues without using the faculty Listserv?" OSU published the following answer:

"You can make a Public Records Request seeking the public email addresses for all faculty. Email Julie.Rondeau@oregonstate.edu your public records request. Once received, you can use that list to create your own email distribution list. Please keep in mind your obligations under the Acceptable Use of University Computing Resources Policy."

43. There is no evidence in the record that the question about how to contact faculty was a question that was frequently asked of OSU administration.

44. Leavitt helped create an opposition website called "OSU Excellence."

45. Leavitt also gathered names of individuals opposed to the organizing drive and solicited people to sign a petition for election in lieu of card check, as authorized by ORS 243.682(3)(a) and OAR 115-025-0075. Leavitt filed a petition for an election on June 25, 2018, but the petition was not supported by the 30-percent showing of interest required by ORS 243.682(3)(b) and OAR 115-025-0075(1).

46. On March 4, 2018, Faculty Senator Charles Murnieks from the College of Business sent an email to all faculty senators with links to OSU's FAQs, the OSU Excellence website, and the Union's website, and stated that he was doing so "to promote awareness of arguments that both support and oppose unionization."

47. Capalbo, Caufield, Chastain, Daly, Feser, Klotz, and Sims are employees of OSU or USSE, and OSU and USSE are funded by public funds. Public funds were used to pay for work on the website and for the computers, email system, website, software, and hardware used in such work. The parties stipulated that OSU spent one dollar of public funds in preparing, distributing, or posting the emails and FAQs at issue in this case.¹⁰

¹⁰By stipulating that OSU used one dollar of public funds for the activities at issue, OSU did not agree that the expenditures were unlawful and the Union did not agree that additional funds were not spent beyond one dollar. At oral argument, OSU confirmed that that stipulation meant that the "use of public funds" element of an ORS 243.672(1)(i) violation had been proven. The parties intended for the amount of one dollar to be used solely for the purpose of determining the amount of the civil penalty mandated by ORS 243.676(4)(b), if this Board concluded that OSU violated ORS 243.672(1)(i).

48. OSU faculty rely on various electronic systems, accessible through OSU's ONID system, to perform their duties. Through ONID, faculty can access OSU's email system, Canvas (for online course and course components), OSU library resources, laboratory management and grant management database systems, procurement resources, employee information resources (such as pay stubs and timesheets), and other work-related electronic resources. Some faculty members use ONID resources for mixed personal and professional obligations. Some also use the systems, including email, for union organizing. Many faculty members are nine-month employees and arrange summer employment through their OSU email address.

49. Without ONID access, faculty would be unable to administer their grants, send and receive emails to colleagues and external contacts, engage with colleagues for their required services work within OSU, or access the library resources for research and writing purposes. The loss of this access could have innumerable professional and personal consequences because it could limit any faculty member's ability to pursue a wide variety of personal, professional, and mixed personal-professional activities.

50. When faculty are not teaching for a short period of time – for example, they are on sabbatical leave or medical leave – they retain their ONID access. Faculty who retire with emeritus status also retain their access.

51. Employee use of the OSU computer system is governed by OSU's "Acceptable Use of Computing Resources" policy. Access to OSU computing resources is controlled through a single sign-on or login. OSU views accessing its computer resources, even when done remotely, as the virtual equivalent of physically showing up at work.

CONCLUSIONS OF LAW

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

2. OSU violated ORS 243.672(1)(i) when it solicited questions from faculty and subsequently created, maintained, and distributed a FAQ webpage in March through June 2018.

The Union alleges that OSU violated ORS 243.672(1)(i) when it solicited questions from employees about union organizing and created, maintained, and distributed information through its FAQ webpage, while OSU faculty were in the process of deciding whether to unionize. ORS 243.672(1)(i) makes it an unfair labor practice to "[v]iolate ORS 243.670(2)." ORS 243.670(2)(a) provides, in relevant part, that a public employer may not "[u]se public funds to support actions to assist, promote or deter union organizing[.]" ORS 243.670 and ORS 243.672(1)(i) were added to PECBA in 2013, when the legislature enacted the Public Employer Accountability Act through House Bill 3342 (HB 3342). *See* 2013 Or Laws, Ch 663, § 4.

OSU stipulated that it used public funds to support the actions at issue, which, for brevity, we refer to collectively as publication of the FAQ. The parties dispute only whether those were "actions to assist, promote or deter union organizing," which the statute defines as follows:

“(a) Assist, promote or deter union organizing” means 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.”

ORS 243.670(1)(a). We have previously construed this statutory definition as “expressly limit[ing] the scope of subsection (2)(a), such that it prohibits only *attempts to influence* employees’ decisions regarding union organizing and membership.” *Amalgamated Transit Union, Division 757 v. Tri-County Transportation District of Oregon*, Case No. UP-003-16 at 55, 27 PECBR 375, 429 (2018) (emphasis in original). Thus, to determine whether OSU violated ORS 243.670(2)(a) (and thereby violated ORS 243.672(1)(i)), we must determine whether OSU’s conduct in preparing and publishing the FAQs was an “attempt to influence” the decision of OSU employees regarding whether to support or oppose representation by United Academics, within the meaning of ORS 243.670(1)(a).

When construing a statute, our goal is to determine and give effect to the legislature’s intent. ORS 174.020; *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993) (“Our goal in interpreting a statute is to determine what meaning the legislature intended in drafting the statute.”). In doing so, we apply the analysis in *PGE*, 317 Or 606, as modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). The words chosen by the legislature are the best evidence of its intent; accordingly, we first review the text and context of the statute in question. *Gaines*, 346 Or at 171-72. We then review any relevant legislative history. *Id.* If we are still unable to determine the legislature’s intent, we then apply maxims of statutory construction. *Id.*

Starting with the statutory text, ORS 243.670(1)(a) provides, in relevant part, that “[a]ssist, promote or deter union organizing” means any attempt by a public employer to influence the decision of any or all of its employees * * * regarding: [w]hether to support or oppose a labor organization that * * * seeks to represent those employees.” Where, as here, the legislature uses words of common usage, we give them their “plain, natural, and ordinary meaning,” *PGE*, 317 Or at 611, using a dictionary of common usage. *Pete’s Mt. Homeowners Assn. v. Or. Water Res. Dept.*, 236 Or App 507, 516-17, 238 P3d 395 (2010). The definition of “attempt” includes “to make an effort to do, accomplish, solve or effect,” and used as a noun means “the act of attempting.”¹¹ The term “influence” is defined as “to affect or alter the conduct, thought, or character of by indirect or intangible means.”¹² Thus, the text prohibits any act or instance of a public employer making an effort to affect or alter the decision of any or all of its employees regarding whether to support or oppose a labor organization that seeks to represent those employees.

¹¹*Webster’s Third New Int’l Dictionary* 140 (unabridged ed 2002).

¹²*Webster’s Third New Int’l Dictionary* 1160 (unabridged ed 2002).

That textual understanding is consistent with the statutory context and legislative history. The statute expressly provides that the legislative “purpose of ORS 243.670 is to maintain the neutrality of public bodies in labor organizing by forbidding the use of public funds for unintended purposes and to conserve public resources by ensuring that public funds are used as intended.” ORS 243.668(2). HB 3342’s sponsors explained that the bill prohibits public employers from trying to influence employees’ decisions. *See* Transcript of Audio, House Committee on Business and Labor, HB 3342, March 27, 2013 at p. 2:21-24 (Rep. Michael Dembrow explaining that when “an employer *tries to disrupt* a union-organizing drive, this has a negative effect on the workplace, including decreased productivity and a hostile work environment.”) (emphasis added); *id.* at p. 5:22-25 (Rep. Jeff Barker referred to past events as an illustration of “why it’s bad for the employer, public employer, *to try to stop* union activity”) (emphasis added). Similarly, Rep. Dembrow’s floor letter described HB 3342 as “a simple solution” that would “*ensure that public employers are not weighing in*, using our public resources to promote their personal opinions at the expense of the services they should be providing.” Rep. Michael Dembrow floor letter, April 23, 2013 (emphasis added). “Weighing in” is a colloquial expression that means entering a debate or conversation as a participant, contributor, or mediator.¹³ *See also* Transcript of Audio, Senate Committee on General Government, Consumer, and Small Business Protection, HB 3342, May 15, 2013 at p. 3:11-14 (Testimony of Rep. Dembrow: “This bill requires public employers to remain neutral in organizing campaigns just as they are required to remain neutral in elections and other political activities. It’s up to the employees to decide whether or not they want to form a union[.]”); *id.* at pp. 8:23-9:1 (Testimony of Tom Chamberlain, President of Oregon AFL-CIO: “Right now, public employers can spend money weighing in to support their opinion on whether or not workers should form a union when, frankly, that’s a worker’s decision.”).

Accordingly, we interpret ORS 243.670(1)(a) and ORS 243.672(1)(i) as prohibiting any act or instance of a public employer making an effort to affect or alter (including by indirect or intangible means) the decision of any or all of its employees regarding whether to support or oppose a labor organization that seeks to represent those employees. Applying that framework here, we find, as a factual matter (and as described in detail below) that OSU used its FAQ webpage to subtly influence the campus debate on whether its employees should support or oppose the Union and, in some instances, OSU actively participated in that debate. That is sufficient to conclude that OSU tried to influence the decision of its employees regarding whether those employees should support or oppose the Union. Consequently, OSU violated ORS 243.672(1)(i).

To begin, OSU repeatedly told employees that it would publish *actual* employee questions on its FAQ webpage and answer them, but ultimately, in multiple instances, it did not do that. Specifically, while the organizing drive was underway, OSU sent emails to employee distribution lists and informed employees that they could submit questions to OSU, and that OSU would answer those questions. For example, Provost Feser sent an email on March 22, 2018, to an employee distribution list, and informed employees that, despite the neutrality required by PECBA, OSU was permitted “to respond to questions they receive from employees during a union organizing drive” and that OSU created a webpage “to provide responses *to such questions*.” (Emphasis added.) The email informed employees that it had updated its website to include “additional questions we have received since the fall,” and invited employees to “submit additional

¹³*See Webster’s Third New Int’l Dictionary* 2593 (unabridged ed 2002) (defining “weigh in” as “to enter as a participant, contributor, or mediator”).

questions.” Later, in a May 31, 2018, email, Feser informed employees that OSU was continuing “to update our Frequently Asked Questions website as new questions are submitted by faculty members.”¹⁴ OSU’s emails conveyed the impression that it was doing nothing more than collecting employees’ questions and answering them—acting essentially as an aggregator of questions.

Despite those assurances, OSU edited some questions before publishing them, substituting its own voice for the voice of the employees, but without telling employees that it was doing so. For example, one employee submitted a question that contained preliminary comments supportive of the union, but OSU edited out those comments. The employee actually asked:

“Unionized peer institutions have higher wages (e.g., University of Oregon) and some higher benefits. OSU has failed to keep pace with either of these two essential things often used to retain valued employees. Will unionization make OSU a more attractive employer, and will unionization allow the bargaining unit to reduce the bloated size of the OSU administration?”

OSU omitted the union-supportive preliminary sentences, as well as the employee’s characterization of the OSU administration as “bloated.” The published question on the FAQ website reads only, “Will unionization make OSU a more attractive employer, and will unionization allow the bargaining unit to reduce the size of the OSU administration?”

At the same time, OSU did *not* edit out some extraneous comments that expressed opposition to unionization. For example, OSU posted the following question in its entirety:

“Where is our faculty senate in this effort? We should be discussing this topic at every senate meeting. OSU has great shared governance already and it will disappear if we unionize. Why is our senate not leading an opposition?”

In its published response, OSU stated:

“OSU encourages discussion over this and other relevant issues among colleagues * * *. How unionization may impact OSU’s shared governance is not known at this time, *but it is important to discuss the quality of the current shared governance model and its many benefits.*” (Emphasis added.)

OSU’s response was not strictly factual, but also communicated an opinion that the existing model (without a faculty union) has many benefits (as opposed to downsides or limitations). The record establishes that the faculty were debating the relative merits of the existing shared governance system in the context of discussions about whether to unionize. OSU weighed into that debate, including by advising faculty to discuss “the benefits” of shared governance.

These editorial changes to employees’ questions went beyond editing to improve readability or to make minor grammatical or spelling corrections. Rather, in multiple instances,

¹⁴Similarly, in an email to an opponent of the organizing drive, Dr. Keith Leavitt, Senior Vice Provost Capalbo told Leavitt that OSU’s FAQ website was not intended to influence the debate, “but to answer direct questions with direct, factual answers.”

OSU's edits changed the tone of the questions. Changes to employees' opinions are suggestive of an attempt to frame or influence the campus debate. Further, OSU's contribution of its own suggestions in its answers—such as by encouraging discussion about the benefits of shared governance—is also evidence that the FAQs were an attempt to influence employees' decisions about whether to support or oppose the Union.

In addition, OSU posted some questions on its FAQ webpage that were not questions actually received from employees. Specifically, OSU used the ostensibly factual FAQ webpage to publish questions in response to what OSU considered to be incorrect information in a local newspaper article entitled, "Getting Organized: OSU Faculty Members Take Steps to Form a Union." The article reported the following when discussing why the faculty at OSU were organizing:

"One issue that comes up frequently, [Union] organizers say, is the question of shared governance.

"While the Faculty Senate gets a say in matters such as academic regulations and curriculum, it has no decision-making powers when it comes to things such as university budgets, faculty assessment mandates and the structure of academic units."

When the reporter sought comment from OSU, it declined to comment, citing PECBA's neutrality requirement. OSU nonetheless included the following three questions on the FAQ website: (a) "If a union is elected as the exclusive representative of the faculty, will the union have decision-making authority over OSU's budget process?" (b) "If a union is elected as the exclusive representative of the faculty, is OSU required to negotiate with a union over faculty assessment mandates?" and (c) "If the union is elected as the exclusive representative of the faculty, will the union have decision-making authority over OSU's academic units?" OSU stipulated that it posted those three questions to respond to statements in the article that it believed were "incorrect." OSU answered each question with a "no," and in two of the responses, expressed its opinions on issues relevant to the faculty unionization effort. For example, in responding to its own question about the budget process, OSU opined, "OSU believes it already has a strong collaborative budgeting process that includes a diverse University Budget Committee and numerous University-wide budget forums and presentations." Further, OSU published these questions on its FAQ webpage without disclosing to employees that the questions were in fact vehicles for OSU to respond to press coverage. These editorial choices also weigh in favor of finding an attempt by OSU to influence the decisions of its employees.

Other FAQ responses similarly presented OSU's opinions and legal positions or conclusions. Such statements are not facts, notwithstanding OSU's statements to its employees that its intent was "only to provide factual information." For example, in response to a question about whether it is possible to "reverse" a decision to unionize, instead of merely stating "yes, it is possible to decertify a union," OSU opined that "it is a difficult process." For another example, OSU answered a question (submitted anonymously via the web form) as follows (in part):

“How is my ability to conduct research (e.g., field-based research that is time sensitive), participate in workshops/conferences, and meet deadlines set by funding agencies affected if the union decides to strike?

“The answer depends on whether the employee participates in the strike by choosing not to work. If an employee chooses to participate in a strike and not come to work, they are not considered an employee for the time period during which they choose not to come to work.”

Although OSU edited other employees’ questions, it published this question as it was actually submitted, choosing not to correct the misstatement in the question by clarifying that it is *employees*, not labor organizations, who have the right to strike and who decide whether to strike. By not clarifying that misstatement, OSU published the question with phrasing that can be read as overstating the authority that a union holds over bargaining unit members. Additionally, in its answer, OSU incorrectly stated that an employee who strikes is “not considered an employee” during the strike; “[w]orkers on strike remain employees of the struck employer.” *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 10 n 5, 24 PECBR 786, 795 n 5 (2012) (*Order on Remand*). These editorial choices by OSU are evidence of OSU using indirect means to essentially weigh in on whether its employees should support or oppose the Union.

Finally, in some instances, OSU also inserted into the debate among faculty members its own advice to employees by answering some questions with information that exceeded the scope of the questions actually asked. For example, in response to a question about whether an employee could request the return of a signed authorization card after the petition was filed, OSU answered that there “is no formal process for revoking an authorization card.” Instead of providing only that factual response, OSU also included what amounts to advice to the employee:

“[T]he ERB may honor your request to disregard your authorization card as a part of its showing of interest check. Under Oregon law there is no formal process for revoking an authorization card. *However, the method most likely to achieve a revocation is through a written and dated communication (such as an email) to the union’s leadership and ERB at this address: emprel.board@oregon.gov.*” (Emphasis added.)

Similarly, in response to a question inquiring about how union organizers obtained faculty members’ private information, such as home addresses, OSU answered that it had provided the Union only employee “names, but no personal home address information.” OSU then supplemented that factual response with advice: “As an aside, it is common for union representatives to actively engage potential members by unsolicited phone calls and in-person home visits. *Whether you choose to engage the union representatives, however, is entirely your choice.*” (Emphasis added.) In another example, OSU included a similar advisory comment in response to the following question: “How do faculty who are not supportive of the unionization effort ‘vote’ against it? Is there no active way to oppose?” In its answer, OSU wrote, in part, “OSU encourages faculty who may be affected by unionization to actively engage their colleagues and to communicate their opinions freely and openly—whether that be individually or as a collective.

Similar to methods employed by the unionization effort, *opposition can be achieved through campus activism.*” (Emphasis added.) These answers, which go beyond the scope of the questions, presuppose that employees wanted (or needed) OSU’s view—even though that view was not actually requested by the questions. These editorial choices, like those described above, suggest that OSU was making an effort to participate in the debate about whether faculty should support or oppose the Union.

OSU asserts that it intended to remain neutral, citing its multiple public statements that it was not actively taking a position or role in the campus debate. OSU also contends that its neutral intent should be inferred because it published questions from both supporters and opponents of unionization. For example, it points out that it published both of the following questions:

“After listening to the faculty forum, I no longer support the union. Even though the petition for certification was filed, is it too late to request my card back?”

“A number of my colleagues watched the faculty forum and now support the Union. Is it too late for them to sign a card?”

It is accurate, as a factual matter, that OSU printed questions that can be interpreted as supportive of the Union, and others that can be interpreted as critical of the Union. However, OSU’s statements of neutrality and publication of union-supportive questions are inadequate, in light of the totality of OSU’s conduct, to persuade us that OSU was not, in fact, making an effort to influence the decisions of its employees. Rather, all of OSU’s conduct taken together, as described above, indicates at least an act or instance of OSU attempting to influence its employees’ decisions about whether to support or oppose the Union.

To the extent that OSU contends that the publication of its opinion statements in the FAQs falls within the exception set forth in ORS 243.670(3), we disagree. That subsection provides:

“If an employee requests the opinion of the employee’s employer or supervisor about union organizing, nothing in this section prohibits the employer or supervisor from responding to the request of the employee.”

OSU argues that this section expressly permits “the employer”—*i.e.*, not just individual management employees—to provide its opinion. OSU, however, did more than merely share its opinion when an employee asked for it. OSU wrote some of its own questions, including three questions that it drafted so that it could respond to employees’ statements about why they supported union representation, as reported in a newspaper article. OSU did not disclose on the FAQ website that OSU, not employees, had posed those questions. OSU also *solicited* questions from its employees, rather than allowing the employees to “request the opinion of the employee’s employer” and then “responding to the request of the employee,” as the ORS 243.670(3) exception allows. OSU also changed some of the questions that were submitted through the website, and then “answered” those changed questions publically, via its FAQ webpage, without revealing that the

questions had been altered. In some cases, OSU's response went beyond the scope of the question asked. Such conduct is outside the scope of the protection afforded by ORS 243.670(3).¹⁵

Relying on legislative history, OSU also argues that ORS 243.670 should be construed as generally permitting public employers to provide factual answers to questions posed by employees. OSU is correct that the legislative history includes statements by the bill's advocates that HB 3342 would not preclude employers from answering employees' questions under certain circumstances. *See* Transcript of Audio, House Committee on Business and Labor, HB 3342, March 27, 2013 at p. 24:10-14 (Statement of Elana Guiney that "I also want to clarify, again, that this is not stating that management can't answer questions. Where there are factual questions asked by workers of their managers, they're absolutely allowed to answer those questions."); Transcript of Audio, Senate Committee on General Government, Consumer, and Small Business Protection, HB 3342, May 15, 2013, at p. 9:17-20 (Statement of Tom Chamberlain that this "bill doesn't stop a manager or worker from having a conversation off the clock if a worker is interested in that conversation."). However, OSU does not identify any statutory text that supports its interpretation that the statute permits the actions that it took, and the only relevant express statutory exception is the one provided for in ORS 243.670(3), discussed above. In any event, as set forth above, OSU's conduct was not limited to merely providing factual responses to questions asked by its employees. OSU did not merely answer employees' questions: it created some of its own questions; it changed some of the questions that were submitted through the website; and in some cases, it published answers that went beyond the scope of the questions asked. Additionally, OSU's responses were not merely factual, but included various opinion statements, predictions about the future, and legal positions. OSU also advised employees how to take certain actions, such as retracting a signed authorization card or using campus activism to oppose the organizing drive. *That* conduct goes beyond answering employees' questions with factual answers, and OSU's defense that it was merely answering the questions it received does not assist it here.¹⁶

¹⁵The Union contends that publishing questions and answers on a website (particularly when questions could be submitted anonymously by any employee, regardless of supervisory status) is outside the scope of the exception provided by ORS 243.670(3). OSU counters that the "accordion format" of its website meant that employees asked questions "virtually" by clicking sequentially on the layered pages in order to "ask" a question. Because we conclude that OSU's conduct went beyond answering employees questions, it is not necessary to determine whether publishing questions in such an "accordion format" is tantamount to an employee requesting an opinion from the employee's employer or supervisor.

¹⁶OSU argues that the National Labor Relations Board's decision in *Bridgestone/Firestone, Inc. and Automotive Chauffeurs, Parts and Garage Employees, Teamsters Local Union 926*, 335 NLRB 941 (2001), is instructive. There, the NLRB concluded that it was not an unfair labor practice for the employer to give an employee a decertification petition, even though the employee asked only if there was a way that he "could get out of being in the union." *Id.* at 941. The Board concluded that the decertification petition "was untainted by the [employer's] ministerial involvement" in its drafting. *Id.* at 942. OSU argues that its conduct was similar—according to it, it merely provided factual answers to specific questions about Board process. The National Labor Relations Act does not contain the equivalent of ORS 243.670, and, in any case, OSU's conduct was not limited to providing factual answers about Board process, and it was not merely ministerial.

In sum, we conclude that the totality of OSU's conduct, which included soliciting questions from employees and changing some of those questions, answering some questions with non-factual information including advice, using the FAQ webpage to respond to a newspaper article, and publishing such questions and answers from March to July 2018 on its FAQ webpage, is sufficient to demonstrate that OSU attempted to influence faculty members' decisions regarding whether to support union representation by United Academics. Accordingly, OSU used public funds to support actions to "assist, promote or deter union organizing" in violation of ORS 243.670(2)(a), and thus ORS 243.672(1)(i).

Remedy

We turn to the appropriate remedy. Having concluded that OSU violated ORS 243.672(1)(i), we order it to cease and desist from the unfair labor practice conduct. ORS 243.676(2)(b). We must also order affirmative action necessary to effectuate the purposes of PECBA. ORS 243.676(2)(c). Here, this Board granted the certification petition on June 27, 2018, designating the Union as the exclusive representative. Under these circumstances, the effects of OSU's conduct are better remedied by the posting of a notice.

We generally order notice 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). In this case, a notice posting is warranted because OSU's conduct affected a significant number of bargaining unit employees. In addition to the traditional physical posting of the notice, we require an employer to electronically notify employees of its wrongdoing when the record indicates that electronic communication is the customary and preferred method that the employer uses to communicate with employees. *Southwestern Oregon Community College Federation of Teachers, Local 3190, American Federation of Teachers v. Southwestern Oregon Community College*, Case No. UP-032-14 at 9, 26 PECBR 254, 262 (2014). Here, the record establishes that email is the common method of communication between OSU and Union-represented employees. Accordingly, we will order OSU to post the notice and distribute it to bargaining unit employees by email.

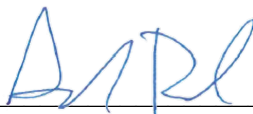
The Union requested a civil penalty pursuant to ORS 243.676(4)(b). As amended by HB 3342, PECBA provides that when the Board finds that a public employer violated ORS 243.670(2), the Board "shall impose a civil penalty equal to triple the amount of funds the public employer expended to assist, promote or deter union organizing." ORS 243.676(4)(b). The statute requires us to impose a civil penalty for violations of 243.670(2) without regard to the civil penalty standard set forth in ORS 243.676(4)(a), which is applicable to all other unfair labor practices. Here, the parties stipulated that "OSU spent one dollar of public funds in preparing,

distributing, or posting the e-mails and FAQs at issue in this case.” In accordance with this stipulation, and as required by ORS 243.676(4)(b), we award the Union a civil penalty of \$3.00.¹⁷

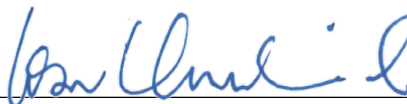
ORDER

1. OSU shall cease and desist from violating ORS 243.672(1)(i).
2. OSU shall post the attached notice for 30 days in prominent places where Union-represented employees are employed.
3. OSU shall distribute the attached notice by email to all Union-represented employees within 10 days of the date of this order.
4. OSU shall pay the Union a civil penalty of \$3.00 within 30 days of the date of this order.

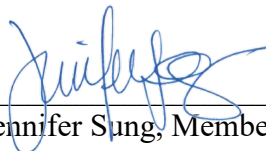
DATED: May 4, 2020.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482

¹⁷We also decline the Union’s request for reimbursement of its filing fee. PECBA authorizes us to order reimbursement to the prevailing party “in any case in which the complaint or answer is found to have been frivolous or filed in bad faith.” ORS 243.672(6). The Union did not address this request in its briefing, and we see no basis for finding that OSU’s answer was either frivolous or filed in bad faith.



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

PURSUANT TO AN ORDER of the Employment Relations Board (Board) in Case No. UP-021-18, *United Academics of Oregon State University v. Oregon State University*, and in order to effectuate the policies of the Public Employee Collective Bargaining Act (PECBA), we hereby notify our employees that the Board found that Oregon State University committed an unfair labor practice in violation of ORS 243.672(1)(i), which prohibits a public employer or its designated representative from violating ORS 243.670. Specifically, ORS 243.670(2)(a) provides, in relevant part, that a public employer may not “[u]se public funds to support actions to assist, promote or deter union organizing[.]”

The Board concluded that the totality of OSU’s conduct, which included soliciting questions from employees and changing some of those questions, answering some questions with non-factual information including advice, using the FAQ webpage to respond to a newspaper article, and publishing such questions and answers from March to July 2018 on its FAQ webpage, was sufficient to demonstrate that OSU attempted to influence faculty members’ decisions regarding whether to support union representation by United Academics. Accordingly, OSU used public funds to support actions to “assist, promote or deter union organizing” in violation of ORS 243.670(2)(a), and thus ORS 243.672(1)(i).

To remedy this violation, the Employment Relations Board ordered OSU to:

1. Cease and desist from violating ORS 243.672(1)(i).
2. Post this notice for 30 days in prominent places where Union-represented employees are employed.
3. Distribute this notice by email to all Union-represented employees within 10 days of the date of the Board’s order.
4. Pay the Union a civil penalty of \$3.00 within 30 days of the date of the Board’s order.

EMPLOYER

Dated _____, 2020

By: _____

Title: _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

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

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-004-20

(UNIT CLARIFICATION)

CITY OF LINCOLN CITY,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER CLARIFYING
	)	PUBLIC EMPLOYEE STATUS
LINCOLN CITY POLICE	)	
EMPLOYEES ASSOCIATION,	)	
	)	
Respondent.	)	
_____	)	

On April 22, 2020, the City of Lincoln City (City) filed a unit clarification petition under OAR 115-025-0005(2) to exclude the positions of Sergeant and Dispatch Supervisor from the existing bargaining unit represented by Lincoln City Police Employees Association (Association), on the ground that the positions are supervisory.

On April 23, 2020, the Board's Election Coordinator caused a notice of the petition to be posted at the City by April 27, 2020. OAR 115-025-0010(4); OAR 115-025-0030(1). Pursuant to the terms of the notice posting and OAR 115-025-0030(1), objections to the petition were due within 14 days of the date of the notice posting (*i.e.*, by May 11, 2020). No objections were filed.

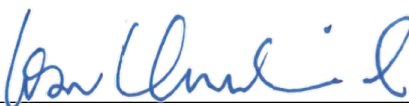
ORDER

The petition is granted, and the unit is clarified to exclude the positions of Sergeant and Dispatch Supervisor from the bargaining unit represented the Association.

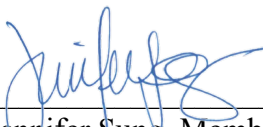
DATED: May 13, 2020.



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-007-19

(UNIT CLARIFICATION)

OREGON AFSCME COUNCIL 75,	)	
LOCAL 189, ¹	)	
	)	
Petitioner,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND ORDER
CITY OF PORTLAND,	)	
HOUSING BUREAU,	)	
	)	
Respondent.	)	

On March 31, 2020, this Board received memoranda in lieu of oral argument regarding Respondent's objections and Petitioner's cross-objections to a recommended order issued by Administrative Law Judge (ALJ) Jennifer Kaufman on January 8, 2020.² This case was transferred to ALJ Kaufman in a periodic reassignment of cases after a hearing held before ALJ B. Carlton Grew on August 13, 2019, in Salem, Oregon. The record closed on October 3, 2019, following submission of the parties' post-hearing briefs.

Isela M. Ramos Gonzalez, Attorney at Law, Oregon AFSCME Council 75, Portland, Oregon, represented the Petitioner at hearing. Jason M. Weyand, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented the Petitioner thereafter.

Matthew V. Farley, Attorney at Law, Portland City Attorney's Office, Portland, Oregon, represented the Respondent.

¹We have corrected the caption to reflect the proper name of the petitioner.

²After receiving the objections and cross-objections to the recommended order, the Board scheduled oral argument for March 31, 2020. Subsequently, on March 17, 2020, the Board Chair held a telephonic conference with the parties to discuss the oral argument in light of the public health crisis caused by the novel coronavirus and the spread of COVID-19. *See, e.g.*, Executive Order 20-03 (March 8, 2020) (declaration by Governor Kate Brown of state of emergency due to emerging public health crisis caused by the spread of the coronavirus). The parties elected to submit memoranda in lieu of oral argument. The Board retained its discretion to hold oral argument if, after receiving the memoranda, the Board determined that it was prudent to do so. Neither party requested oral argument.

On May 17, 2019, the Petitioner, Oregon AFSCME Council 75, Local 189 (AFSCME or Local 189) filed a unit clarification petition seeking to add three employees working in positions in the Analyst classification in the Portland Housing Bureau (PHB) to an existing bargaining unit. On May 21, 2019, Local 189 amended the petition to add the petitioned-for employees via card check. On June 13, 2019, Respondent City of Portland (City) filed timely objections to the petition, asserting that inclusion of the petitioned-for employees into the existing bargaining unit was not appropriate because they do not share a community of interest with the existing bargaining unit and because it would create fragmentation of the workforce. The City also objected on the basis that the petitioned-for positions do not comprise a logical group.

The issue is whether it is appropriate to add the Analyst I and II classifications³ employed within the PHB to the existing bargaining unit.⁴ For the following reasons, we find that the petitioned-for clarification is inappropriate and therefore dismiss the petition.

RULINGS

The rulings of ALJ Grew were reviewed and are correct.

FINDINGS OF FACT

The Parties

1. Local 189 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).

Background of the Local 189 and Local 189-3 Bargaining Units

3. In or around 2009, certain affordable housing functions performed by the Portland Development Commission (PDC) were consolidated with the City's housing-related programs, resulting in the formation of the Portland Housing Bureau (PHB). In connection with the consolidation, some PDC employees transferred to the City and became employees of the PHB. Some of the transferred employees had been represented by Local 189 while employed at PDC.

³The City's Analyst classification series for non-represented employees includes the classifications Analyst I, II, III, and IV. As clarified during the hearing, the employees sought by the petition include the nonsupervisory Analyst I and IIs working within the PHB.

⁴After filing its objections, the City raised an additional argument that the petition was untimely under the contract bar doctrine. The ALJ determined that, although it may have been appropriate to dismiss the petition on procedural grounds, given that the parties and the agency spent significant time and resources holding a hearing and developing a record, it was most prudent to address the City's objections on the merits. In its objections to the recommended order, the City objected to the ALJ's decision not to reach the procedural issue. Because the ALJ dismissed the petition on the merits, we agree that it was unnecessary for the ALJ to address the procedural basis for dismissal. Likewise, on Board review, because we dismiss the petition on the merits, it is unnecessary to reach the procedural issue.

4. Some of the transferred PDC employees wished to be represented by a union after becoming City employees. Ultimately, in 2011, Local 189-3 was certified as the exclusive collective bargaining representative of a unit of approximately 47 employees in the PHB. The following classifications were included in the Local 189-3 bargaining unit:

Housing Administrative Specialist, Sr.
Housing Business Systems Analyst
Housing Business Systems Analyst, Assistant
Housing Community Outreach & Information Rep, Sr.
Housing Construction Coordinator
Housing Construction Coordinator, Sr.
Housing Financial Analyst
Housing Financial Analyst, Assistant
Housing Lead Grant Program Coordinator
Housing Loan Compliance Analyst II
Housing Loan Compliance Analyst III
Housing Loan Coordinator
Housing Loan Coordinator, Sr.
Housing Management Assistant
Housing Portfolio Finance Coordinator
Housing Program Coordinator
Housing Program Specialist
Housing Program Specialist, Assistant.

5. The most recent collective bargaining agreement between the City and Local 189-3 was effective July 1, 2015 through June 30, 2019.

6. On November 7, 2017, pursuant to OAR 115-025-0005(5), AFSCME filed a petition to merge Local 189-3 and Local 189. Local 189 represents approximately 850 employees working in various bureaus throughout the City. The City did not object to the petition.

7. On December 28, 2017, pursuant to an order issued by this Board, the Local 189-3 bargaining unit was merged into the citywide unit represented by Local 189.

8. Local 189 is a party to a master collective bargaining agreement between the City and the District Council of Trade Unions (DCTU). The current collective bargaining agreement between the City and DCTU is effective July 1, 2017 through June 30, 2020.

9. On May 15, 2019, the City and Local 189-3 entered into a tentative agreement (TA) regarding the application of the DCTU collective bargaining agreement to the former Local 189-3 bargaining unit employees. The TA specified which terms of the expired Local 189-3 contract and which terms of the current DCTU contract would apply to unit employees in the PHB until the City and Local 189 negotiated a successor agreement for the merged unit. The TA was ratified by the City on July 10, 2019.

10. On May 17, 2019, Local 189 filed the instant unit clarification petition, as amended on May 21, 2019, seeking to add three employees in the Analyst classification to an existing bargaining unit described as “Housing Bureau members who assist the public with housing needs throughout the [C]ity.”

The Analyst I and II Classifications

11. Effective December 13, 2018, the City implemented a new classification structure and compensation plan for non-represented positions. The new structure and plan resulted from a multi-year classification study. The new structure classified about 425 preexisting, non-represented positions citywide.⁵

12. As a result of the classification study, the City classified its non-represented positions into 107 classifications.⁶ About 75 positions were reclassified as Analyst I and about 90 positions were reclassified as Analyst II. The Analyst I and II classifications are located in various bureaus and departments throughout the City. Although the classification titles of the reclassified positions were changed, the duties did not change. Employees who work in the Analyst classifications also have specific working titles for their positions.

13. Analyst Is are responsible for performing professional administrative, management, operational, statistical, financial, and other analyses in support of bureau/office and citywide activities. The specific duties of individual Analyst Is vary based on the bureau or office to which they are assigned, but the essential duties of Analyst Is, described in the City’s 2018 classification specification, are as follows:

- “1. Participate in the planning, development, and administration of research, programs, and projects; review project design, development, and implementation; research and analyze technical questions, scheduling, public involvement, budgeting, performance, and results; communicate with relevant parties; assist with developing and implementing plans, policies and procedures.
- “2. Research and compile data from a variety of sources; identify historical trends and irregularities; assemble, analyze, and interpret data; perform

⁵The ordinance by which the City Council adopted the new classification structure and compensation plan states that the City Charter requires periodic review of the classification plan of all city positions, and that the City had not reviewed the non-represented positions since 2002. The record indicates that the City began considering conducting the classification study in 2010, but it was postponed in part because of the economy. Ultimately, the City began working on the study in about 2013. The City did not include any represented positions in this classification study because its purpose was to review the non-represented positions and determine a new pay structure for those positions.

⁶The new non-represented classifications include multiple classifications consisting of a numbered sequence, such as Analyst I through IV, Business Systems Analyst I through III, Deputy Director I through III, Director I through III, and similar sequences. The classification structure also includes stand-alone classifications, such as Accounting Supervisor, City Attorney, Chief Engineer, Police Captain, and Police Chief.

causal analyses; assist in developing analytical techniques and data-gathering processes.

- “3. Utilize analytical models and forecasts to analyze and document project, program, or policy development and implementation, budget, fiscal year costs, revenue and expenditures, and staffing impacts; recommend updates to forecasting, planning, tracking, or performance monitoring models.
- “4. Prepare correspondence and reports identifying issues and presenting recommendations to management on a variety of budgetary, administrative, fiscal, policy, funding, legislative, program, project, and managerial issues.
- “5. Develop, maintain, and review code and policy recommendations and process improvement initiatives; respond to changes in federal and state laws and policies.
- “6. Assist with developing performance indicators; monitor and support program, project, operational development and management planning; determine whether performance is acceptable and identify opportunities for improvement; ensure all data is reliable, accurate, and relevant.
- “7. Update, adjust, reconcile and maintain budgets, financial systems and databases; ensure accuracy of entries; allocate costs to programs and monitor spending.
- “8. Develop recommendations on the allocation of resources based on analyses; make recommendations to improve effectiveness and efficiency.
- “9. Assist in drafting proposed contracts, grants, and interagency agreements; tracking related contract performance, revenues, and expenditures.
- “10. Assist with analyzing the financial impacts of business decisions and draft fiscal impact statements.
- “11. Research, share information, and provide answers to questions from the public, elected officials, external public agencies and jurisdictions, other Bureaus/Offices, and various organizations, committees, community groups, and labor representatives.
- “12. Draft and present objective analyses, observations, findings, conclusions, and recommendations to supervisors, managers, and City officials via written reports, oral presentations, and public forums.
- “13. Perform a variety of Bureau-/Office-specific program administration and analytical functions in area of responsibility.”

14. Analyst Is are paid an hourly wage of \$25.62 to \$47.50. Analyst Is are supervised by an Analyst III or IV, or another supervisor or manager. The minimum qualifications for the Analyst I classification are college coursework in management, finance, accounting, business administration, public administration, or a related field, and one year of professional analytical or related work experience. A bachelor's degree is preferred.

15. Analyst IIs perform similar duties to the Analyst I, but Analyst IIs require less supervision, may lead the work of other staff, and exercise moderate discretion in applying analytical techniques and developing recommendations. Analyst IIs are paid an hourly wage of \$30.45 to \$50.66. Like Analyst Is, Analyst IIs report to an Analyst III or IV, or another supervisor or manager. The minimum qualifications for the Analyst II classification are an associate's degree in management, finance, accounting, business administration, public administration, or a related field, and four years of professional experience performing analytical or related work in a public agency. A bachelor's degree is preferred.

16. There is at least one Analyst I working in almost every bureau of the City. Analyst Is may transfer to vacant Analyst I positions throughout the City by undergoing an abbreviated recruitment process in which they submit their interest with a resume and bypass the regular application process. A transfer candidate is able to forgo the supplemental questions that are asked of other applicants because there is a presumption that the candidate is qualified for another Analyst I position.⁷

17. None of the Analyst I or IIs citywide are represented by a labor organization.

The Petitioned-For Employees

18. At the time the petition was filed, the employees working in the petitioned-for classifications were Analyst I Michelle DePass, Analyst I Anna Shook, and Analyst II Bimal RajBhandary.⁸

19. Shook began working in the PHB as an Assistant Financial Analyst in 2009 and was promoted to Housing Financial Analyst in 2011. She moved into her current position in 2017, and moved out of the bargaining unit (which, at that time, was Local 189-3).

⁷The record does not specifically address the distribution of Analyst II positions throughout the City, or whether they are subject to the same transfer procedures as the Analyst Is.

⁸The City objected that the recommended order erroneously identified the Analyst II as Bimal RajBhandary. The record does, in fact, indicate that there are two Analyst Is (Shook and DePass) and one Analyst II (RajBhandary) who were employed when the petition was filed. After the petition was filed, the City hired Thuan Duong as Equity and Inclusion Manager, which is an Analyst I position. Duong's position was vacant when AFSCME filed the petition. The Equity and Inclusion Manager position is located on the Equity and Policy Team of the PHB and reports to the PHB Director. The Equity and Inclusion Manager oversees equity initiatives as they relate to the delivery of services, programs, and policies that affect the PHB's work to serve community members, and performs complex and responsible administrative, financial, and statistical analysis in support of the PHB's equity program.

20. Shook's working title is Contract Administrator. Her position is located in the Business Operations Division of the PHB, which is responsible for finance and accounting, compliance and grant management, contract administration, council document coordination, and administrative support. She reports to the Business Operations Manager. Shook's position description describes the purpose of her position as:

"The contract administrator is broadly responsible for coordinating with the rest of the bureau for their contracting needs, either subrecipient, goods and service or professional technical expertise. The position also coordinates the Bureau's council document submission and council calendar for the Mayor's office."

21. In the course of performing her duties, Shook interacts with represented PHB employees on a day-to-day basis, and works particularly closely with Housing Financial Analysts. Some of Shook's current duties are similar to her former duties as a Housing Financial Analyst, including interpreting data, using analytical models and forecasts, developing recommendations, drafting reports, assisting in drafting contracts, and tracking revenues and expenditures. In Shook's experience, the primary difference between the Housing Financial Analyst and the Housing Assistant Financial Analyst is that the Housing Financial Analyst utilizes more independent judgment.

22. Shook regularly works with City employees in other bureaus, including employees working in procurement and in the grant office, both part of the Office of Management and Finance. Shook testified that she works "a lot" with central procurement employees. She also works with the City Council clerk and the Office of Mayor.

23. DePass's working title is Community Engagement and Policy Coordinator. Her position is located in the Communications Team of the PHB and she reports to the PHB Director. The Community Engagement and Policy Coordinator facilitates the planning and implementation of the PHB's engagement with the community, and assists in the planning, development, and implementation of policy that guides PHB investments. DePass's position description describes the purpose of her position as:

"The Engagement and Policy Coordinator is a member of the Communications Team. The position facilitates the planning and implementation of the Bureau's engagement with the community and PHB's community based partners, so that the community's experience and needs inform PHB's policies and practices. The Engagement and Policy Coordinator also assists in the Bureau's planning, development, and implementation of policy that guides Bureau investments, and links housing to the work of the City, other jurisdictions and our community."

24. The record does not reflect RajBhandary's working title or duties.

The Existing Bargaining Unit Positions in the PHB

25. At the time of the hearing there were about 66 employees in the PHB, including approximately 43 positions in the Local 189 bargaining unit. All PHB employees work in the same office and attend common staff meetings. All PHB employees share common supervision at the bureau level.

26. Local 189 unit employees in the PHB are paid an hourly wage of \$25.87 to \$44.87.

27. The essential duties for the Housing Financial Analyst are:

- “1. Participates in the planning, development, implementation and administration of Bureau budgets; performs difficult and responsible assignments in connection with preparation and management of bureau or division budgets; with direction, develops financial plan projections and documents; prepares revenue and expenditure analyses, staffing analyses and budget status and monitoring reports; develops and presents recommendations; drafts and/or analyzes budget request reports and documents, including budget adjustment requests.
- “2. Conducts analyses of division or bureau budget proposals; conducts analyses to identify issues and opportunities; develops alternative scenarios to improve service delivery at lower costs.
- “3. Develops revenue estimates and coordinates and prepares interagency agreements.
- “4. Explains budget guidelines to Bureau managers and supervisors; reviews and evaluates requests to ensure compliance with established guidelines.
- “5. Participates in preparation, review, evaluation and monitoring of capital improvement plans and budgets; monitors and updates operating and capital budgets to reflect budget adjustments and funding changes; reviews CIP requests for technical compliance; incorporates with Bureau operating budget requests.
- “6. Develops and utilizes spreadsheets, databases and other computer applications required to carry out assigned studies, projects and reports.
- “7. Develops revenue estimates and coordinates and prepares interagency agreements.
- “8. Explains budget guidelines to Bureau managers and supervisors; reviews and evaluates requests to ensure compliance with established guidelines.

- “9. Participates in preparation, review, evaluation and monitoring of capital improvement plans and budgets; monitors and updates operating and capital budgets to reflect budget adjustments and funding changes; reviews CIP requests for technical compliance; incorporates with Bureau operating budget requests.
- “10. Develops and utilizes spreadsheets, databases and other computer applications required to carry out assigned studies, projects and reports.
- “11. Performs financial analyses and statistical computations for various rate studies, financial models and cost allocation plans.
- “12. Prepares periodic and ad-hoc financial reports and provides in-depth analysis of financial conditions and future trends; maintains integrity of the internal budget and accounting system.
- “13. Assists in reconciling year-end fund balance reports and forecasting multi-year revenues and expenditures at project and program level.
- “14. Researches and answers financial and budget inquiries submitted by staff, City management, citizens, other municipalities and the City Council.”

28. The duties of the Housing Assistant Financial Analyst are distinguished from those of the Housing Financial Analyst in that the latter performs more difficult and varied analytical work and exercises greater independent judgment.

29. The essential duties of the Housing Management Assistant are as follows:

- “1. Performs administrative, management, program, policy and legislative analysis assignments in accordance with guidance and instructions given regarding approach and expected results; uses appropriate analytical techniques and statistical and information-gathering processes to obtain required information; performs analyses and summarizes findings; studies and makes recommendations on assigned projects; prepares reports; assists in developing and implementing program or functional goals and objectives.
- “2. Performs analytical and administrative assignments in connection with preparation and management of bureau or division budgets; with direction, prepares revenue and expenditure analyses, staffing analyses and budget status and monitoring reports.
- “3. Assists in drafting proposed contracts and tracking contract expenditures.

- “4. With direction, conducts research, analyzes data and drafts policy and procedure documents to address identified needs and issues; drafts associated communications materials for review.
 - “5. Drafts for supervisory review a wide variety of materials on assigned issues, including reports, procedures, manuals, handbooks, newsletters, communications memoranda, proposed Code or ordinance changes and other materials; collects background information, input and feedback, and prepares recommendations and a variety of other supporting materials.
 - “6. Compiles materials, researches problems and complaints and responds to requests for information.
 - “7. Attends meetings of other governmental agencies, business and community groups as assigned and summarizes discussion and action items; drafts responses to requests for information.”
30. The essential duties of the Housing Program Coordinator are as follows:
- “1. Researches, develops, recommends and implements program or project plans to meet overall program goals established by the bureau; develops and recommends program budgets and rate models, features and metrics; develops and recommends associated program policies and operating and administrative procedures; identifies and recommends solutions to program resource needs and requirements; develops an annual work program and calendar; plans, organizes, implements and evaluates work activities to meet established overall program or project goals and objectives; analyzes alternative methods or processes to meet program and service delivery goals, including conducting cost benefit and resource requirement analyses; ensures program compliance with all applicable City and outside agency requirements.
 - “2. When serving as program/project leader: defines project scope and boundaries; performs critical path analyses and sets project priorities; develops project task lists and time estimates; performs cost benefit analyses; establishes project metrics; oversees and coordinates completion of project tasks to meet time, quality and cost expectations; meets with customers to review project status and resolve development/implementation issues.
 - “3. Identifies public and private resources to support program objectives; develops proposal and funding applications; drafts requests for proposal, including defining scope of work; participates in evaluating bidder proposals and recommending selection of the successful contractor; drafts required ordinances and other related reports; administers contracts for services and monitors work to ensure contract requirements are met.

- “4. Maintains program data and evaluates program effectiveness; monitors conformance with program budget and other City/grantor requirements; gathers and tracks data on associated City costs for program activities; develops narrative and statistical program performance reports and recommendations.
- “5. Coordinates program services and activities with other bureaus and City offices; develops program partnerships, where applicable, with external agencies and organizations; facilitates development of agreements for multi-agency efforts.
- “6. Plans, develops and conducts program outreach and promotional activities; develops information and outreach materials; plans and conducts program events, including planning and carrying out event/activity logistical arrangements.
- “7. Serves as a technical resource for program information; may lead other staff assigned to the program; provides training and technical assistance to City and other agency staff; provides interpretations of program policies and associated regulations; represents the bureau in meetings with outside agencies regarding program issues.”

31. The essential duties of the Housing Program Specialist are distinguished from those of the Housing Program Coordinator in that the latter has overall program management responsibility for a small to moderate-sized program or project, and is responsible for ensuring program results to meet established goals and objectives.

32. The essential duties of the Housing Loan Compliance Analyst are distinguished from those of the other housing classifications by the responsibility for monitoring and servicing housing loans, monitoring loan compliance, and managing related databases and reports.

33. The City’s class specifications for each of the unit classifications discussed above provide that a typical way of obtaining the knowledge, skills, and abilities necessary for the position is graduation from a four-year college or university.

CONCLUSIONS OF LAW

- 1. This Board has jurisdiction over the parties and the subject matter of this dispute.
- 2. The petitioned-for employees are not appropriately included in the Local 189 bargaining unit.

When presented the question whether it is appropriate to add unrepresented employees to an existing bargaining unit, we consider such factors as community of interest, including the wages, hours and other working conditions of the employees involved; the history of collective

bargaining; and the desires of the employees. *See* ORS 243.682(1)(a). Those statutory factors are not exclusive; we may also weigh other non-statutory factors, including our administrative preference for larger units. *Oregon AFSCME Council 75 v. Douglas County*, Case No. CC-004-14 at 31, 26 PECBR 358, 388 (2015). The Board has the discretion to decide how much weight to give each factor in any particular case. *OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251 (2001). In addition, we consider whether the petitioned-for group constitutes a “logically defined group or class of employees (as opposed to interested individuals or fragments of a group * * *).” *Service Employees International Union Local 503, Oregon Public Employees Union v. Marion County*, Case No. UC-11-10 at 29, 24 PECBR 521, 549, *nunc pro tunc*, 24 PECBR 557 (2012), quoting *Oregon Public Employees Union, SEIU, Local 503 v. Executive Department, State of Oregon*, Case No. UC-59-87 at 16, 10 PECBR 456, 471 (1988).

Here, the petition ostensibly seeks to add three unrepresented employees to a unit of PHB employees. As established above, however, the former Local 189-3 bargaining unit referenced in the petition no longer exists. The existing bargaining unit is the merged, citywide unit certified in 2018. With that clarification in mind, we proceed with our analysis.

We begin our consideration of the petition by determining whether the employees the Petitioner seeks to add to the bargaining unit share a community of interest, wages, hours, and other working conditions with the bargaining unit employees. “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.

Although the record does not contain specific, detailed evidence regarding the employment terms and conditions for unit employees who work in other bureaus citywide, the record establishes that the petitioned-for employees share a community of interest with unit employees in the PHB. Hence, although the petitioned-for employees exercise more discretion than PHB unit employees in performing their duties, they have certain duties in common (*e.g.*, assistance with drafting proposed contracts, tracking expenditures, analyzing and interpreting data, formulating recommendations, and drafting reports). Furthermore, there is at least one instance where a PHB unit employee was promoted to an Analyst I position, supporting a conclusion that Analyst Is share common qualifications and skills with PHB unit employees. Additionally, there is regular interaction between the petitioned-for employees and PHB unit employees because they work in the same office, attend common staff meetings, and in at least some instances, work closely with one another in the course of performing their duties. Although the wage scales for Analyst I and IIs top out at approximately \$3 to \$6 more per hour than the wage scales for PHB unit employees, there is a significant overlap in the wage scales for the petitioned-for employees and PHB unit employees at the lower and middle ranges. Finally, all PHB employees share common upper level management. In these circumstances, we conclude that the petitioned-for employees share a community of interest and common working conditions with employees in the bargaining unit.

We turn next to the history of collective bargaining and desires of the employees. The petitioned-for employees were historically excluded from the former Local 189-3 bargaining unit, and there is no record evidence that Analyst I and IIs in the City’s other bureaus or departments have ever been represented. Furthermore, there is no record evidence that the Petitioner or another

labor organization has tried to organize the Analyst I and II classifications as a group and failed. Although we give weight to the desires of the petitioned-for employees to join the existing bargaining unit, we are also mindful that the record does not reflect the desires of the excluded Analyst I and IIs. Given the lack of evidence of an impediment to organizing the Analyst I and II classifications on a citywide basis, our administrative preference for larger units weighs against including the petitioned-for employees in the existing bargaining unit in this case. *See Oregon AFSCME Council 75 v. Washington County*, Case No. RC-57-92 at 6-8, 14 PECBR 271, 276-78 (1993) (a proposed unit of 22 county housing department employees out of a total of 670 unrepresented county personnel, many in the same classifications as employees in the proposed unit, was inconsistent with the Board's wall-to-wall unit preference and the petition was dismissed). *But see Oregon AFSCME Council 75 v. State of Oregon, Oregon Judicial Department – Yamhill County*, Case No. RC-003-17 at 15-16, 27 PECBR 240, 254-55 (2018) (Board majority concluded that the larger-unit preference was entitled to less weight in circumstances where employees had repeatedly rejected the preferred wall-to-wall unit). Thus, in the absence of evidence of an impediment to organizing the Analyst I and II classifications as a whole, we are not persuaded that there is a justifiable basis to disregard our preference for larger units and carve out a subsection of Analyst I and IIs for the purposes of collective bargaining.

Finally, we consider whether the petitioned-for employees constitute a logical group or class of employees. AFSCME asserts that the petitioned-for positions comprise all the Analyst I and II positions in the PHB and therefore constitute a logical group. In support of its argument, AFSCME points out that the now-represented positions in the PHB were a logical group when they organized in 2011, even though they had the same classification titles as analyst positions (e.g., Financial Analyst) in other bureaus, just as the petitioned-for Analyst I and II employees share classification titles with Analyst I and IIs in other bureaus.⁹ Further, AFSCME asserts that the strong community of interest between the represented PHB employees and the Analyst I and II employees in PHB indicates that the petitioned-for employees are a logical group. For the following reasons, we disagree.

To begin, AFSCME's argument overlooks the unusual history of labor relations in the PHB. We recognize that, when we certified AFSCME as the exclusive representative of the Local 189-3 bargaining unit in 2011, the PHB analyst positions had the same classification titles as other analyst positions throughout the city, as AFSCME points out. At that time, however, AFSCME sought and obtained certification of a unit comprised *only* of PHB employees, a consequence, at least in part, of the transfer and subsequent integration of PDC employees into the City organization. Subsequently, in November 2017, the employees in that PHB-only unit, Local 189-3, petitioned to merge the PHB-only unit with the larger, citywide Local 189 bargaining unit. Consequently, AFSCME's present petition seeks to add Analyst I and II positions not to a unit of only PHB employees, but to a citywide bargaining unit comprised of approximately 850 employees. Thus, the import of the fact that the present petition covers all PHB Analyst I and IIs is of little weight, because those Analyst positions would not be added to a unit comprised only of

⁹The City added the name "housing" to the Housing Bureau classifications for positions that were included in the former AFSCME Local 189-3 bargaining unit to differentiate them from the non-represented positions in other bureaus that carried the same classification name.

PHB employees, but to a citywide unit.¹⁰ Whatever could be said about the petitioned-for Analyst I and IIs being a logical group with respect to the *former* Local 189-3 unit, they are not now a logical group in light of that unit's decision in 2017 to merge into the citywide Local 189 unit.

Moreover, 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), and taking the unusual history of labor relations in this case into account, it is not logical to exclude from the petitioned-for positions the Analyst Is and IIs working in other City bureaus. The petitioned-for Analyst I and II positions share a strong community of interest with the excluded approximately 140 Analyst I and II positions citywide. The Analyst I and II positions in the PHB are in the same salary range and receive the same benefits, including management leave, as Analyst I and II positions citywide, and share similar working conditions. Analysts Is may transfer into other Analyst I positions in other bureaus without going through the full recruitment process, indicating that they share common qualifications and perform similar functions citywide. Moreover, the record indicates that at least the petitioned-for Contracts Administrator position (currently occupied by Anna Shook) has a high level of interchange with procurement employees (who are classified as Analyst I) in other bureaus, communicating with them on a daily basis. That strong community of interest among all Analyst I and II employees citywide undermines a conclusion that it is logical to exclude the citywide Analyst Is and IIs from a petition seeking to add Analyst Is and IIs in the PHB to the Local 189 unit. *See Marion County*, Case No. UC-11-10 at 29, 24 PECBR at 549; *Laborers' International Union of North America, Local 483 v. City of Portland*, Case No. UC-011-13 at 16, 25 PECBR 953, 968 (2014) (concluding that the petitioned-for employees were a logical group where the petitioned-for employees had different duties than the excluded employees and, other than a common classification and salary range, the petitioned-for employees and excluded employees did not share a community of interest).

¹⁰The City's renaming of classifications in the PHB after the PHB employees organized in 2011 was not arbitrary. Rather, the PHB employees sought and obtained departmental representation in 2011. When they did so, they did not seek representation of a larger group that included non-PHB employees. Consequently, once the PHB employees were represented by a union, the City, to distinguish between represented and non-represented employees for administrative reasons (such as administering cost of living increases and leave policies), placed the word "housing" before the PHB job classifications. The "classification splits" referred to by the dissent are simply a result of that administrative change. Since then, the PHB employees chose to alter their representation and merged with Local 189. It does not follow that the historically non-represented classifications, such as Analyst I and II, are now appropriately included in the Local 189 unit.

In conclusion, after weighing the relevant factors, we find that the petition does not propose the addition of an appropriate group of employees to the existing bargaining unit. Therefore, we dismiss the petition.

ORDER

The Petition is dismissed.

DATED: May 18, 2020.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member

*Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482

*Member Sung, Dissenting:

I respectfully dissent. As it stands, all but three of the eligible, regular employees in the Portland Housing Bureau (*i.e.*, regular Housing employees who are not statutory supervisors, managers, or confidential employees) are in the AFSCME-represented bargaining unit. The unit clarification petition proposes to address that anomaly by adding the three non-represented Housing employees to the existing bargaining unit. Because the petitioned-for clarification would result in *all* of the eligible, regular employees in the Housing department being included in the bargaining unit, the petition would make the unit *more* appropriate. *See* OAR 115-025-0050(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.*” (emphasis added)); *Oregon AFSCME Council 75 v. Douglas County*, Case No. CC-004-14 at 31, 26 PECBR 358, 388 (2015) (departmental unit that included all eligible, regular employees was appropriate).

At first glance, the City’s objection to adding the three excluded Housing employees to the bargaining unit has some superficial appeal – as the City points out, it would involve splitting off the three Housing employees in the Analyst I and II classifications from the rest of the City employees in those classifications. However, the record shows that the City did exactly that – split

off every Housing employee from other City employees in the same classifications – in 2011. Before then, all of the Housing employees were in citywide classifications.¹¹ In 2011, the Housing employees voted for representation by AFSCME and formed a departmental bargaining unit, referred to as Local 189-3. As a result, the City split all of the Housing employees into Housing-specific classifications – *including analyst classifications*. So, for example, the City created a new classification for the Housing department’s Financial Analysts – “Housing Financial Analyst,” while the other departments’ Financial Analysts remained in the generic “Financial Analyst” classification. Similarly, the City split the Business Systems Analyst classification into two classifications: “Business Systems Analyst” and “Housing Business Systems Analyst,” and so on for every classification in the Housing bargaining unit. The City’s witness explained that they split all of those classifications in 2011 – not because there is some substantive difference between the Housing and non-Housing versions of each classification – but simply to distinguish between the represented and non-represented employees. Now that the remaining Housing employees have petitioned to be added to the bargaining unit, the City could easily do the same thing that it did in 2011, *i.e.*, split the Analysts I and II in the Housing department into Housing-specific Analyst classifications. But, unlike in 2011, the City now contends that doing so would be so “illogical” that the proposed unit clarification is “inappropriate.” However, in my view, the City has not provided any compelling reason for treating the three Housing employees who happen to be classified as an Analyst I or II differently from every other Housing employee, including other analysts.

Further, the record shows that the exclusion of the three petitioned-for employees from the bargaining unit is *not* based on a rational division between employees who perform analyst work and those who do not. That is, the record does not establish that *all* employees who perform analyst work are outside of the bargaining unit. Rather, as noted above, the AFSCME bargaining unit already includes employees classified as “Financial Analyst” and “Business Systems Analyst.” Additionally, the record suggests that the AFSCME bargaining unit also includes employees who perform the work of an Analyst I or II, but were not classified as such in 2018 because of timing and happenstance.¹² In short, the universe of City employees who perform analyst work (including the work of an Analyst I or II) *is already split*: some of those employees are in the AFSCME bargaining unit, and some are not. The unit clarification petition would simply shift the three Housing Analyst I and II employees from one side of the split to the other, so that *all* of the employees who both perform analyst work *and* work in the Housing department are in the

¹¹According to the City’s witness, when the Portland Development Commission merged with the City’s housing programs to form the Portland Housing Bureau in 2009, the City placed all of the former Commission employees in non-represented, citywide classifications.

¹²In 2018, the City undertook a reclassification project that resulted in the reclassification of various employees, based on the work they perform, to “Analyst I” or “Analyst II.” However, according to the City’s witness, the City reclassified *only* those employees who happened to be *non-represented* at that time; the City did not reclassify any AFSCME bargaining unit employees, even if they were “analysts.” That is, even if an AFSCME bargaining unit employee was performing the work of an Analyst I or II, the City would not have reclassified them as an Analyst I or II. And, the record indicates that there most likely are AFSCME bargaining unit employees who perform the work of an Analyst I or II. For example, the AFSCME bargaining unit includes employees who are classified as “Housing Management Assistant,” and in 2018, the City reclassified approximately six non-represented employees who were classified as “Management Assistant” to “Analyst I.”

AFSCME bargaining unit (instead of all but three). Because every other Housing employee who performs analyst work is already in the bargaining unit, it is appropriate to add the remaining three. The City's objection to doing so is based on form, not substance.¹³

The majority emphasizes that the petitioned-for employees share a strong community of interest with employees outside of the Housing department who are classified as Analyst I and II. But that does not negate the fact that the petitioned-for employees *also* share a strong community of interest with the other Housing department employees who are in the AFSCME bargaining unit, nor does it cause the proposed unit clarification to be "inappropriate." Rather, the fact that the petitioned-for employees share a community of interest both with all of the Housing department employees and with all of the employees classified as Analyst I and II means only that there is *more than one* potential appropriate unit. PECBA 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). Further, even assuming that it would be "more" appropriate for AFSCME to petition to add *all* of the employees classified as Analyst I or II to the bargaining unit, "PECBA does not require that a petition set forth *the* most appropriate unit, only *an* appropriate unit." *Oregon AFSCME Council 75 v. Douglas County*, Case No. CC-004-14 at 31, 26 PECBR 358, 388 (2015) (emphases in original).

In the majority's view, the parties' history of labor relations weighs heavily against finding that the proposed clarification is appropriate. In my view, it does the opposite: the parties' history of creating a bargaining unit of Housing department employees (without objection by the City), even when that meant that the Housing employees would be split from their citywide counterparts into Housing-specific classifications, weighs heavily in favor of permitting the same thing to happen now for the remaining three Housing employees.¹⁴ The majority

¹³One of the petitioned-for employees previously worked as a Housing Financial Analyst (in the AFSCME bargaining unit), and at the time of hearing, worked as an Analyst I in the Housing department (outside of the bargaining unit). She testified that, because the work of a Financial Analyst and Analyst I is "very similar," and that "[t]here's nothing that makes [an Analyst I] different than the financial analysts," her exclusion from the bargaining unit is an "arbitrary separation." I agree.

¹⁴This is not a case where the petitioned-for positions existed at the time of certification and the parties mutually agreed to exclude them from the bargaining unit. Although the record is not definitively clear, the evidence strongly indicates that, when the Housing employees first unionized, the bargaining unit included every eligible classification that existed in the Housing department at that time, and the classification of the three petitioned-for employees was not introduced into the Housing department until some years *after* the bargaining unit was certified. Specifically, before the petitioned-for employees were reclassified as "Analyst I" or "Analyst II" in 2018, they were classified as "Management Analyst" or "Management Analyst, Sr." According to the City's witness, when the City added a new, but limited duration, "Management Analyst" position to the Housing department in about late-2013, AFSCME contended that it was a bargaining unit position. The Housing department management agreed that if the limited duration Management Analyst position was converted to a regular position, they would work with AFSCME to add it to the bargaining unit. The Housing department management tried to keep that promise – but Human Resources refused to approve placement of the Management Analyst position in the bargaining unit on the ground that it was in a citywide classification – even though just a couple years earlier, in 2011, the City had split all of the other citywide classifications with positions in the Housing

(Continued . . .)

emphasizes that AFSCME's Housing department bargaining unit was, in the interim, merged with AFSCME's citywide bargaining unit. However, that merger did not erase the classification splits between employees in the Housing department and employees outside of the Housing department. For example, there still is an AFSCME-represented "Housing Financial Analyst" classification and a non-represented "Financial Analyst" classification. Nor did the merger erase the fact that the Housing department employees organized on a departmental basis. Even now, after the merger, the scope of the AFSCME bargaining unit is still effectively defined, in part, by the scope of the Housing department; *i.e.*, Financial Analysts are in the bargaining unit only if they work in the Housing Department and are, as a result, classified as "Housing Financial Analysts."¹⁵ Nor did the merger erase the fact that only three of the eligible, regular Housing department employees are excluded from the AFSCME bargaining unit. Nor did the merger erase the fact that those three employees share a strong community of interest with the other Housing department employees in the AFSCME bargaining unit. Under these circumstances, I am not persuaded that the merger of AFSCME's Housing department and citywide bargaining units causes the history of labor relations factor, or the overall balance of factors, to weigh against finding that the petitioned-for unit clarification is appropriate. After weighing all of the statutory factors, as well as our administrative preference for larger units, I would find that the petitioned for unit is an appropriate unit.



*Jennifer Sung, Member

(Continued . . .)

department into Housing- and non-Housing versions. Because the evidence does not establish that the parties mutually intended to exclude the petitioned-for employees from the former AFSCME Local 189-3 bargaining unit (and at least suggests that the parties intended to include *all* eligible, regular Housing employees), the past exclusion of the petitioned-for employees is not a strong basis for dismissing the petition to add them to the unit now.

¹⁵The majority describes the merged unit as a "citywide unit," and concludes that, because the merged unit is "citywide," it is inappropriate to organize employees in the Analyst I and II classifications on anything but a citywide basis. I disagree with that conclusion in part because I believe it is inaccurate to describe the merged unit as "citywide." For all of the classifications that have historically been split into Housing and non-Housing versions, an employee's classification – and therefore their bargaining unit status – is still based solely on whether the employee works in the Housing department. If a Financial Analyst works in the Housing Department, they are in the merged AFSCME bargaining unit. If a Financial Analyst works in a different department, they are outside of the merged AFSCME bargaining unit. Accordingly, the merged unit is more accurately described as a part-citywide and part-departmental unit.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-005-20

(UNIT CLARIFICATION)

OREGON AFSCME COUNCIL 75,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER REVOKING
	)	CERTIFICATION OF
NORTHWEST OREGON	)	EXCLUSIVE BARGAINING
HOUSING AUTHORITY,	)	REPRESENTATIVE
	)	
Respondent.	)	
	)	

On April 30, 2020, Oregon AFSCME Council 75 (AFSCME) filed a petition under OAR 115-025-0009 to revoke its certification as the exclusive representative of the existing bargaining unit of Northwest Oregon Housing Authority (Authority) employees.

The petition included AFSCME's disclaimer of interest in further representing the bargaining unit. The filing also showed that the collective bargaining agreement expires June 30, 2020. *See* OAR 115-025-0009. On May 4, 2020, the Board's Election Coordinator caused a notice of the petition to be posted at the Authority by May 6, 2020. Pursuant to the terms of the notice posting, objections to the unit clarification were due within 14 days of the date of the notice posting (*i.e.*, by May 20, 2020). No objections were filed.

Under OAR 115-025-0009, we will revoke a certification 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. *Id.* Here, the petition was accompanied by evidence that AFSCME disclaimed interest and that the existing bargaining agreement is set to expire on June 30, 2020.¹ The May 6, 2020, notice provided that, in the absence of valid objections, the revocation would be effective once the June 30, 2020, agreement expired. We find that the petition satisfies the criteria for revocation of certification, effective upon expiration of the existing agreement.

¹Although we will not revoke a certification unless the existing agreement has expired, a revocation petition may be filed at any time. OAR 115-025-0009.

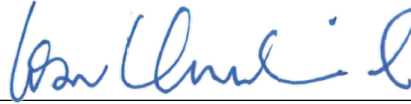
ORDER

The petition is granted, and the certification of AFSCME as the exclusive representative for the employees of the Authority is revoked, effective July 1, 2020.

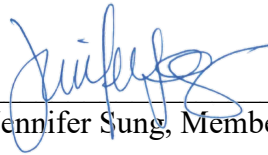
DATED: May 21, 2020.



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-003-19

(UNFAIR LABOR PRACTICE)

MULTNOMAH COUNTY CORRECTIONS	)	
DEPUTY ASSOCIATION,	)	
	)	
Complainant,	)	
	)	
v.	)	RULING ON MOTION TO STAY
	)	
MULTNOMAH COUNTY,	)	
	)	
Respondent.	)	
	)	

In an order dated October 11, 2019, the Board concluded that Multnomah County (County) did not violate ORS 243.672(1)(e) by refusing to bargain in good faith with the Multnomah County Corrections Deputy Association (Association) regarding mandatory safety issues during a time when there was an increase in staff assaults. On October 17, 2019, the Association filed a request for rehearing and reconsideration of the Board's October 11, 2019, order. The County opposed the request for rehearing, but joined in the request for reconsideration. Specifically, the County requested that this Board address the issue of whether the County had a duty to bargain about safety issues in response to the Association's midterm demand to bargain. On January 8, 2020, the Board heard oral argument on the request for reconsideration.

On March 20, 2020, this Board issued an order on reconsideration. In the reconsideration order, the Board majority adhered to the conclusion that the County did not violate ORS 243.672(1)(e). In doing so, the Board majority clarified that the County had a duty to engage in midterm bargaining about the safety issues raised by the Association, and that the parties are required to use the 150-day bargaining process provided for in ORS 243.712(1). Board Member Umscheid, specially concurring, declined to join the conclusion that the County had a duty to bargain in response to a midterm demand by the Association when there was no midterm change caused or anticipated by the employer and, as a consequence, also declined to join in the conclusion that the 150-day bargaining period applies.

Although the County prevailed, and we dismissed the Association's complaint, the County filed an appeal on May 19, 2020, along with a motion to stay our order pending appeal.¹ On June 1, 2020, the Association filed its opposition to the motion to stay. For the following reasons, we deny the County'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.”

Because it is dispositive, we begin with whether the County made a sufficient showing of irreparable injury. 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 v. Salem-Keizer Sch. Dist.*, 185 Or App 679, 660, 60 P3d 1126 (2003). The determination of whether “an injury is irreparable depends not upon the magnitude of the injury, but upon the completeness of a 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, as the Association's response correctly points out, the County's motion and supporting declaration do not allege any irreparable injury, much less offer proof that irreparable injury probably would result if the County's motion for stay is denied. Without an allegation of

¹We note that the County's motion cites OAR 137-003-0090 and 137-003-0091 in the Attorney General's Model Rules of Procedure for Contested Cases. Those rules, however, do not apply to contested cases before this Board. See OAR 115-001-0005 (“The Employment Relations Board adopts only the Attorney General's Model Rules of Procedure specifically identified in these rules.”).

irreparable injury supported by proof, we would have to speculate about both the nature of the harm, as well as the probability that such harm would result by denying a stay. Consequently, the County's motion does not meet the standard required by ORS 183.482(3)(a)(A), and we deny it on that basis.

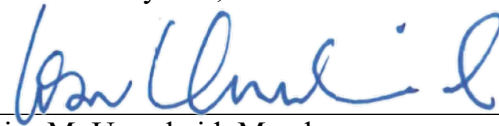
ORDER

The County's motion to stay the Reconsideration Order pending judicial review is denied.

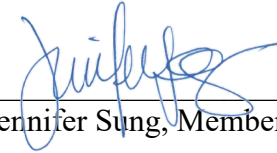
DATED: June 3, 2020.



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-002-20

(UNFAIR LABOR PRACTICE)

JACKSON COUNTY,	)	
	)	
Complainant,	)	
	)	
v.	)	FINDINGS AND ORDER FOR
	)	REPRESENTATION COSTS
SERVICE EMPLOYEES INTERNATIONAL	)	
UNION LOCAL 503, OREGON PUBLIC	)	
EMPLOYEES UNION,	)	
	)	
Respondent.	)	
	)	

On March 31, 2020, this Board issued an order holding that Service Employees International Union Local 503, Oregon Public Employees Union (Union) did not violate ORS 243.672(2)(b) as alleged by Jackson County (County). 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:

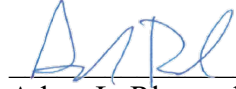
1. The Union is the prevailing party. Only a prevailing party in an unfair labor practice case is entitled to representation costs. ORS 243.676(2)(d), (3)(b); OAR 115-035-0055(1)(a). The prevailing party is “the party in whose favor a Board Order is issued.” OAR 115-035-0055(1)(d).
2. This case was presented solely on stipulated facts, without an evidentiary 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 presented solely on stipulated facts is \$1,000. OAR 115-035-0055(1)(b)(B).

///

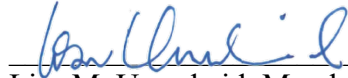
ORDER

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

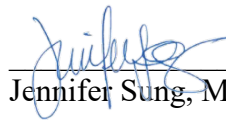
DATED: June 16, 2020.

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.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-001/003-20

(UNFAIR LABOR PRACTICE)

TRI-COUNTY METROPOLITAN)
TRANSPORTATION DISTRICT OF)
OREGON,)

Complainant,)

v.)

AMALGAMATED TRANSIT UNION,)
DIVISION 757,)

Respondent.)

ORDER ON RECONSIDERATION

AMALGAMATED TRANSIT UNION,)
DIVISION 757,)

Complainant,)

v.)

TRI-COUNTY METROPOLITAN)
TRANSPORTATION DISTRICT OF)
OREGON,)

Respondent.)

Jeffrey P. Chicoine and Taylor Richman, Attorneys at Law, Miller Nash Graham & Dunn LLP, Portland, Oregon, represented Tri-County Metropolitan Transportation District of Oregon.

Whitney Stark, Attorney at Law, Albies & Stark, LLC, Portland, Oregon, represented Amalgamated Transit Union, Division 757.

On April 21, 2020, this Board issued a final order in which we dismissed each party's respective complaint. On May 5, 2020, each party filed a request for reconsideration of that order. Because we had expedited the complaint and issued a final order without a recommended order, we granted both requests. *See* OAR 115-010-0100(3)(b).¹ Having considered the parties' arguments, we adhere to our prior order, as supplemented by this order.

Summary of the Findings of Fact

Because TriMet's apprenticeship programs and the parties' relevant bargaining history are described in detail in our prior order, we only briefly summarize the relevant facts here.² TriMet has two apprenticeship programs that train employees in a total of seven journey worker disciplines: Heavy Duty Bus Mechanic, Plant Maintenance Mechanic, Rail Vehicle Maintenance Mechanic Tech, Traction Substation Tech, Overhead Catenary Tech, Signal Tech, and Field Equipment Tech. Apprentice positions are essentially entry-level mechanic positions (*i.e.*, positions that do not require prior mechanic-related education and experience). Apprentices are TriMet employees in the ATU bargaining unit. They receive both on-the-job training and classroom instruction, and they are paid for all hours in the program, including the classroom components. When working, registered apprentices are supervised by journey-level mechanics. Apprenticeship positions are a significant source of promotional opportunities for TriMet service workers. Apprentices earn income and college credit at the same time, with few out-of-pocket costs.

The apprenticeship programs at issue are registered with the Oregon Bureau of Labor and Industries (BOLI). (TriMet has a track maintainer training program that is not BOLI-registered and is not at issue in this case.) Because the programs are registered with BOLI, BOLI provides substantial oversight over the programs and ensures that they meet national and state standards, and that graduating apprentices receive nationally recognized certification as journey workers.

Before the parties started successor bargaining, TriMet began planning to eliminate the apprenticeship programs. Under that plan, TriMet would continue to operate some training programs, but none of the training programs would be registered with BOLI, and the minimum qualifications for the new "trainee" positions would be higher than those for apprentices. Generally, to qualify as a trainee, an individual would need some prior mechanic experience or education.

The parties' collective bargaining agreement (which expired before the parties completed successor bargaining) addresses many aspects of the apprenticeship programs, including their existence. For example, Article 3, Section 7, Paragraph 1 of the 2016-2019 Working Wage Agreement (WWA) states, "There shall be a Mechanic Training Program." The WWA also establishes the compensation of apprentices, supervising journey workers, and trainers (who are also members of the ATU bargaining unit).

¹Neither party requested oral argument.

²We provide this summary for context; it does not supersede the findings of fact in our prior order.

TriMet's Objections to the Findings of Fact

TriMet's request for reconsideration includes eight objections to the findings of fact in our prior order. We resolve those objections as follows.

Objection 1: TriMet objects that our findings failed to include "that the direct cost of TriMet's apprenticeship programs is approximately \$100,000 annually per apprentice." We deny that objection because such costs are not relevant to the scope of bargaining issues presented in this case. *See, e.g., Oregon School Employees Association v. Gervais Union High School District No. 1*, Case Nos. C-83/137-79 at 14, 5 PECBR 4209, 4222 (1980) (*Gervais*). In this same objection, TriMet requests that we add a finding "that running the apprenticeship programs also results in substantial productivity loss for TriMet, due to factors such as BOLI's supervision requirement for apprentices during on-the-job training and providing classroom instructors for the apprenticeship program." We deny this portion of the objection because the alleged omission is addressed in Finding of Fact 34 of our prior order.

Objection 2: TriMet objects that our findings "fail to state that BOLI has prevented TriMet from determining the minimum qualifications for apprentices who are hired from outside the bargaining unit," including "that BOLI has prohibited TriMet from administering discipline-specific assessments to outside applicants for apprenticeship." We decline to modify our findings to characterize BOLI's oversight in this way and adhere to our prior order's findings regarding BOLI's oversight and authority over the registered apprenticeship programs.

Objection 3: Per TriMet's request, we find that some TriMet maintenance directors testified that it takes some graduating apprentices some additional years to work as proficiently as more experienced journey-level mechanics.

Objections 4 and 7: TriMet objects to several findings on the ground that they are incomplete or omit certain details. We deny these objections because the alleged omissions are immaterial to our conclusions of law.

Objection 5: TriMet objects to a portion of Finding of Fact 24 on the ground that there is no reliable "evidence in the record that any TriMet employee applied for and accepted a service worker position because of the opportunity to participate in apprenticeship." We disagree with TriMet's assertion. In addition to the testimony of Shirley Block noted by TriMet (which TriMet asserts is hearsay), the record includes the testimony of service worker Christopher Tyson and Respondent Exhibit 11 (December 10, 2019, email from service worker Dustin Hunter stating, "I was hired November 2014, and I was 1 of many promised an apprenticeship from within. As being [*sic*] told service worker was the only way to get into one of them. * * * I have been waiting for a facilities apprenticeship for over 5 years now. I know many other Tri-Met employees have been waiting. If they are getting rid of them it won't take very long for people to start leaving. I know myself and others who have started looking at other career opportunities with this unstable environment and are tired of this happening and being sold false hope."). For clarity, we amend the objected-to portion of Finding of Fact 24 as follows (amendment marked in italics): "The opportunity to participate in one of TriMet's registered apprentice programs is an important feature of TriMet employment that motivates some job applicants to apply for and accept a service worker position *or some service workers to stay in their positions at TriMet.*"

Objection 6: TriMet objects that our findings omitted that it “has no legal obligation to hire any apprentices.” We modify our findings to reflect that the record establishes that the parties have no contractual provision that requires TriMet to hire a specific number of apprentices or that determines how often TriMet must start a new apprenticeship class. The record also establishes that when TriMet has decided not to hire new apprentices (or start new apprenticeship classes) for certain periods, ATU has not filed a grievance or otherwise disputed TriMet’s prerogative to make such decisions.

Objection 8: TriMet objects that Finding of Fact 66 in our initial order “omits * * * that in this letter Ms. Block confirmed that ATU had ‘continued to bargain with TriMet without limitation on the subject matter [of apprenticeship]’ after TriMet objected to bargaining over its apprenticeship programs.” We deny this objection because TriMet’s proposed finding is not supported by the record. *See infra*, pages 14-15 (discussion of statement made in ATU President’s January 27, 2020, letter to TriMet).

TriMet’s Request for Clarification Regarding the Scope of Bargaining

In our prior order, we concluded that ATU did not unlawfully condition bargaining on continuation of the apprenticeship programs. As a result, it was unnecessary to reach the issue of whether that is a mandatory or permissive subject of bargaining, and we declined to do so. On reconsideration, TriMet requests that we address that scope of bargaining issue, on the ground that such guidance would help the parties cooperatively settle their successor contract. ATU did not specifically ask us to address that issue, but one of its arguments on reconsideration rests (at least in part) on the premise that “elimination of the apprenticeship programs” is a mandatory subject of bargaining.³ Under these circumstances, we find it appropriate to resolve the scope of bargaining issues, but only to the extent addressed below.

The parties generally have treated the question of whether TriMet has a duty to bargain over its plan to eliminate its BOLI-registered apprenticeship programs as an all-or-nothing proposition: either TriMet has no duty to bargain over any aspect of the apprenticeship programs, or it must bargain over all of it. However, the TriMet plan at issue involves multiple, discrete decisions or changes. For example, the decision to deregister an apprenticeship program from BOLI is distinct from the decision to eliminate the program altogether; TriMet can offer entry-level, on-the-job training programs that are not registered with BOLI. Further, for each decision or potential change encompassed by TriMet’s plan, the question of whether there is a duty to bargain over the decision and any mandatory impacts (or just any mandatory impacts) could have a different answer. In light of the record and briefing, the status of the parties’ bargaining, and the practical limitations of any Board order, we cannot resolve the scope of bargaining issues for all of those decisions. Accordingly, we address only those decisions that both appear to be significant and are sufficiently addressed in the record and the briefs.

³After the parties submitted their respective requests for reconsideration, ATU did not oppose, or request an opportunity to address, TriMet’s request that we reach the scope of bargaining issue.

For the reasons discussed below, we conclude that TriMet does not have a duty to bargain over the decision to deregister its apprenticeship programs from BOLI because deregistering TriMet's apprenticeship programs is a permissive subject of bargaining.⁴ However, we also conclude that TriMet has a duty to bargain over a proposal to eliminate its existing apprenticeship programs (irrespective of their BOLI-registered status).

1. BOLI registration of an apprenticeship program

We begin with the subject of BOLI registration of an apprenticeship program. We analyze BOLI registration as its own subject because, unlike other aspects of TriMet's apprenticeship programs, BOLI registration is a discrete feature, in large part because it is external to TriMet's workplace. Consequently, BOLI registration is a severable component of the apprenticeship programs.

The subject of BOLI registration of an apprenticeship program is not specifically designated as mandatory or permissive under the statute, and this Board has not previously addressed the status of that subject. Under such circumstances, we apply the balancing test codified in the Public Employee Collective Bargaining Act (PECBA), ORS 243.650(7)(c), to determine whether the subject is mandatory or permissive for bargaining. Under that test, a subject is permissive if this Board determines that the subject has "a greater impact on management's prerogative than on employee wages, hours, or other terms and conditions of employment." *Id.*

The record establishes that BOLI registration of the apprenticeship programs substantially impacts management's prerogative to make decisions involving permissive subjects. As a result of BOLI registration, the programs generally must conform to national and state standards, unless BOLI approves a modification.⁵ Those standards govern many aspects of the programs that would otherwise be permissive subjects of bargaining, such as the types and amount of work duties that must be assigned to an apprentice; the number of journey workers that must be assigned to supervise the work of the apprentices (a one-to-one ratio); and the rules that determine when an apprentice can work independently. Although BOLI does not determine all of the program standards, and many of the BOLI-prescribed standards can be modified, the authority to make program decisions is vested with a joint apprenticeship training committee (JATC) that must include representatives from management and labor, and program modifications are subject to approval by BOLI.

BOLI registration also impacts employees' wages, hours, and other terms of employment. Most notably, because the programs are BOLI-registered, an apprentice who successfully completes a program receives the benefit of a nationally recognized journey worker certification from BOLI. That certification is recognized as a valuable occupational qualification. Additionally, because of BOLI registration, employees are represented on the JATC, and it is in the employees' interest to have a vehicle to address apprentices' employment conditions (other than the grievance

⁴As with any permissive subject, TriMet would have a pre-implementation duty to bargain over any mandatory impacts of this decision.

⁵For brevity, we use the term BOLI to refer to both BOLI and the State Apprenticeship Training Council.

procedure or successor negotiations). However, because the JATC discusses both mandatory and permissive subjects, this aspect of BOLI registration also has countervailing impacts on TriMet's management prerogatives, as discussed above. ATU representatives also believe that BOLI oversight helps to ensure employee safety.

The TriMet apprenticeship programs also impact employees' employment terms and conditions in many other ways, including by providing work and promotional opportunities, work-related training, paid educational benefits, and premium pay for journey workers. However, those impacts are not dependent on BOLI registration; a non-registered apprenticeship program could have substantially similar impacts on employees. To the extent that the impacts on employees' terms and conditions of employment are not dependent on BOLI registration, we do not consider them when applying the balancing test to that subject.

After weighing the impacts of BOLI registration itself, we find that the impact on management's prerogative outweighs the impact on employees' terms and conditions of employment. Consequently, the subject of BOLI registration is permissive. However, TriMet must bargain over any impact of deregistering from BOLI on mandatory subjects of bargaining before implementing such a decision, including but not limited to the impacts on existing service workers. *Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11 at 10, 25 PECBR 525, 536, *adh'd to on recons*, 25 PECBR 764 (2013).

2. Elimination of an apprenticeship program

We turn to the separate question of whether TriMet has a duty to bargain over the decision to eliminate an existing apprenticeship program (irrespective of its BOLI-registered status). As above, there is no statutory provision or Board precedent that directly addresses the subject of elimination of an apprenticeship program. Accordingly, to determine whether there is a duty to bargain over the subject of that decision, we must apply the balancing test set forth in ORS 243.650(7)(c).

Before we apply that balancing test, we note the highly unusual (possibly unique) nature of TriMet's particular apprenticeship programs. TriMet argues that, at its core, apprenticeship is simply a job classification, and therefore permissive. Although it is technically true that "apprentice" is a classification at TriMet, that statement does not accurately or completely reflect the actual nature of the apprenticeship programs *at TriMet*. At TriMet, for most of the history of the apprenticeship programs, apprenticeship has been treated by both TriMet and ATU as essentially the exclusive path to journey-level positions (and hence to promotion and seniority in that higher classification); the programs involve both apprentices and the journey workers who train them; and the apprenticeship programs have been the subject of collective bargaining for multiple decades. The programs touch on numerous components of the workplace, some of which, if analyzed individually, would be permissive (for example, classification and assignment of duties), and others mandatory (for example, wages and premium pay). However, for many years, both parties have treated these individual aspects of each apprenticeship program as elements that have coalesced into a single, integrated program. Consequently, it is not practicable to select one individual element and conclude that, because that particular element is mandatory or permissive, the entire apprenticeship program is mandatory or permissive.

Further, we also note that in some respects, the proposed elimination of TriMet's apprenticeship programs is an operational decision. This Board has addressed the duty to bargain over operational decisions in prior cases; however, this case presents unique issues. In typical public employment, an employee performs work for the benefit of the employer (to provide public services), in exchange for compensation and other benefits. In TriMet's apprenticeship programs, the work that an apprentice employee performs is not solely for the benefit of TriMet—by performing work for the employer, the apprentice simultaneously learns a particular skilled craft. That on-the-job training is supplemented by classroom instruction, and the training component of the program directly benefits the employee and indirectly benefits the employer. For example, TriMet apprentices enroll in community college, and by completing the apprenticeship program, they earn almost enough credit for an associate's degree, without paying tuition. In short, an apprenticeship program operates both as a job and as a valuable educational benefit.

Additionally, the elimination of TriMet's apprenticeship programs does not neatly fit into any operational category that this Board has previously addressed. As set forth in TriMet's plan, the elimination of an apprenticeship program does not constitute a partial closure of TriMet's operations; TriMet is not, for example, shutting down a service line or station. Further, TriMet does not plan to subcontract the maintenance work performed by apprentices, or transfer that work to employees outside of the bargaining unit; maintenance work will still be performed by bargaining unit employees (namely, journey-level workers). TriMet will effectively rely on outside entities to perform the bargaining unit work of *training* employees in skilled mechanic disciplines; community colleges or other employers will provide that training instead of TriMet's own full-time trainers and journey workers (who earn premium pay for supervising apprentices). However, TriMet will not actually contract with any outside entity to provide that training; it will simply hire employees who have already been trained in other settings (in the military, in training programs, or at other employers).

Although this case is unique in many respects, we find that the Board's reasoning in *Federation of Oregon Parole and Probation Officers v. Corrections Division, Field Services Section, Watson, Administrator & Executive Department, State of Oregon*, Case No. C-57-82 at 6-7, 7 PECBR 5649, 5654-55 (1983) (*FOPPO*), which addressed subcontracting decisions, provides useful guidance. There, the Board acknowledged that subcontracting decisions cannot be analyzed independently of their impacts. Here, TriMet's decision is not a subcontracting decision, but because apprenticeship has been treated by both parties for decades as an inextricable part of the classification structure, duty assignments, training, promotional path, seniority system, and benefits available at TriMet, the decision to end the existing apprenticeship programs (and all the attendant subjects encompassed within those programs) cannot, as a practical matter, be analyzed independently from its impacts. That conclusion is best illustrated by the fact that both parties, during the successor bargaining at issue in this case, have made broad proposals that address apprenticeship as multi-component programs, rather than proposals that address only individual aspects of a particular program.

Accordingly, when applying the statutory balancing test, we will, like the Board in *FOPPO*, consider "all circumstances surrounding the change * * * in determining whether, in any particular case, bargaining will be required under the PECBA." *Id.* at 7, 7 PECBR at 5655. See also *Washington County Police Officers' Association v. Washington County*, Case No. UP-15-08 at 30, 23 PECBR 449, 478 (2009) (applying "all-things-considered" approach to determine

whether employer had duty to bargain over transfer of bargaining unit work). In other words, unlike in a typical scope of bargaining case, we will not decide *categorically* whether there is a duty to bargain over a decision to eliminate an apprenticeship program. Rather, we will make that determination on a case-by-case basis. Specifically, we will determine whether elimination of an existing apprenticeship program “has a greater impact on management’s prerogative than on employee wages, hours, or other terms and conditions of employment,” ORS 243.650(7)(c), “in light of *all* relevant circumstances—e.g., the motive or reason for the decision, the nature of the work affected, the parties’ collective bargaining history, the past practices of the employer.” *FOPPO*, C-57-82 at 7, 7 PECBR 5655 (emphasis in original).

We begin by considering the impact that bargaining over the decision to eliminate the existing apprenticeship programs has on TriMet’s prerogative to manage its enterprise. Principally, it impacts TriMet’s right to determine the scope of its training department, specifically, the types of training programs that it will operate. TriMet believes that it no longer needs to provide entry-level training in certain mechanic disciplines, such as heavy duty bus (also referred to as “diesel”) maintenance, because individuals can get entry-level training in those disciplines outside of TriMet. However, TriMet does not intend to eliminate its training department, because TriMet will still need to train employees on how to maintain TriMet’s equipment and facilities, much of which is specific to public transportation.

Further, as TriMet pointed out during successor bargaining, TriMet’s fundamental enterprise is public transportation, not training. *See, e.g., Gervais*, C-83/137-79 at 14, 5 PECBR at 4222 (school bus services are “incidental” to district’s fundamental enterprise, public education); *Eugene Education Association v. Eugene School District 4J*, Case No. C-104-76 at 8, 2 PECBR 1101, 1110 (1977) (contracting out of extra duty supervision work was not “a fundamental change in the basic direction of the employer’s enterprise” or educational policy). Because the apprenticeship programs are only incidental to TriMet’s fundamental enterprise, bargaining over their elimination (versus continued existence) does not significantly abridge TriMet’s prerogative to manage its fundamental enterprise. *Id.*

The maintenance of TriMet’s buses and other equipment, however, is not incidental to its fundamental enterprise, and the record establishes that the diesel mechanic apprenticeship program could not, even if it were operating at full capacity, meet the maintenance department’s current demand for journey-level diesel mechanics. Nonetheless, the record also shows that TriMet’s shortage of diesel mechanics was caused in large part by the recent adoption of a transportation tax that requires TriMet to greatly expand bus services, combined with limitations on outside journey worker hiring that TriMet voluntarily agreed to—not the existence of the diesel mechanic apprenticeship program. Further, we determined in our prior order that the contractual limitations on outside hiring involve the permissive subject of standards for filling vacancies, and the record establishes that TriMet has already exercised its prerogative to begin hiring outside diesel mechanics. Thus, although the past *contractual* limitation on hiring outside journey workers has affected TriMet’s ability to hire sufficient numbers of journey workers, without that contractual limitation, the existence of an apprenticeship program, in itself, does not significantly impair TriMet’s ability to address its journey worker shortage. With the contractual limitation on outside hiring no longer operative, the mere existence of some type of apprenticeship program does not significantly impact TriMet’s management prerogatives in this area.

TriMet contends that the existence of the apprenticeship programs impacts its management right to set the minimum qualifications for journey workers, because under its current system, it can take some years for some graduating apprentices to perform at the same level as more experienced journey-level workers. The minimum qualifications for a position is a permissive subject of bargaining, as TriMet points out. However, we disagree with TriMet's contention that the existence of an apprenticeship program necessarily impinges on its prerogative to set the minimum qualifications for a journey worker position. For example, the existence of an apprenticeship program does not prevent TriMet from changing the minimum qualifications of a journey-level position and making corresponding changes to the content of the apprenticeship program or the standards for successful completion of a program.⁶ Although *BOLI registration* limits TriMet's discretion to make such changes, we have determined that BOLI registration is a permissive subject of bargaining, and TriMet can deregister a program without eliminating it altogether. Accordingly, we do not consider the impact of BOLI registration on TriMet's management prerogative in this analysis.

TriMet also contends that the existence of an apprenticeship program impacts its management right to assign duties, which also is a permissive subject of bargaining. In an apprenticeship program, an apprentice must be assigned work that gives them the opportunity to learn the targeted skills. Additionally, because some TriMet journey workers are involved with supervising apprentices, elimination of an apprenticeship program would permit TriMet to assign different duties to those journey workers, which TriMet believes would increase the productivity of its maintenance department. However, at least some of the impact on TriMet's authority to assign duties stems from BOLI registration of the apprenticeship programs. For example, it is a BOLI standard that requires TriMet to assign one journey worker to supervise each apprentice (although TriMet could seek JATC and BOLI approval to modify that ratio). Without BOLI registration, TriMet would have the discretion to assign fewer (or no) journey workers to supervise the work of apprentices or adopt different standards for determining when an apprentice can work independently.

We turn to the impacts of elimination of an apprenticeship program on bargaining unit employees' terms and conditions of employment. The apprenticeship programs provide premium pay for journey workers, who receive that pay when supervising an apprentice. The programs also provide promotional opportunities for service workers in two ways. An apprenticeship position is, itself, a promotion for a service worker. Additionally, the apprenticeship programs provide service workers with the education and work experience necessary to meet the minimum qualifications for a journey-level mechanic position, at essentially no cost to the employees.

TriMet notes that there are outside programs that individuals could attend instead of an apprenticeship program, such as the diesel service technology program at Portland Community College. And, TriMet suggested at hearing that it would be willing to bargain with ATU over a tuition reimbursement benefit. Although we agree that apprenticeship programs provide a monetary benefit that is akin to tuition reimbursement, an apprenticeship program has substantial

⁶When noting that TriMet would have the management right to make changes to aspects of apprenticeship programs that involve permissive subjects, we make no comment on whether such changes would have bargainable impacts on mandatory subjects, as such issues are outside the scope of this case.

advantages for employees: it enables an employee to work, earn income and other employment benefits (such as health insurance), learn a skilled trade, and earn college credit, all simultaneously (rather than attend school instead of working, or outside of work hours). Further, in a typical tuition reimbursement program, the employee must have the resources to pay the tuition out of pocket, and then apply for reimbursement (which may be subject to conditions). In the apprenticeship programs, employees receive college credit for their on-the-job and classroom training, but they do not pay any tuition.

On balance, we find that elimination of the apprenticeship programs has a greater impact on the terms and conditions of employment of ATU bargaining unit employees (including service workers) than on TriMet's management prerogatives. Although bargaining over the decision to eliminate an apprenticeship program impacts some management rights, the impact on employees' terms and conditions of employment is greater than the impact on TriMet's right to manage its fundamental enterprise, public transportation. For employees, the apprenticeship programs provide significant paid education benefits (including college credits), premium pay, and promotional opportunities for service workers, apprentices, trainers, and journey-level mechanics.

In reaching this conclusion, we also consider "all relevant circumstances." One circumstance that weighs in favor of TriMet's position is that, unlike in *FOPPO*, C-57-82, 7 PECBR 5649, TriMet is not seeking to eliminate ATU-represented apprentice positions by transferring their work to non-bargaining unit employees or by contracting out their work to a third party. Rather, TriMet seeks to transfer the work of apprentices to other ATU-represented employees, namely journey workers. Other circumstances, however, weigh in favor of finding that the subject matter is mandatory. To begin, the administrative infrastructure for the apprenticeship programs already exists, and TriMet plans to continue operating a training department even if it eliminates the apprenticeship programs. Further, TriMet's apprenticeship programs are very longstanding, having been in place for multiple decades, and by their tenure have become an integral part of the TriMet workplace. Several of the witnesses who testified at hearing (including Manager of Training Roland Henson, Director of Rail Equipment Maintenance Daniel Blair, and ATU Executive Board officer Kevin Kinoshita) graduated from TriMet apprenticeship programs. Further, TriMet historically has bargained over many aspects of the apprenticeship programs, including their existence, and even specifically provided for the existence of the apprenticeship programs in the parties' collective bargaining agreement. Finally, it should go without saying that our conclusion that TriMet has a duty to bargain over the decision to eliminate an apprenticeship program does not preclude TriMet from proposing its elimination, modification, or something else. Nor does our conclusion compel TriMet to agree to any contractual provision concerning an apprenticeship program; we conclude only that TriMet must collectively bargain with ATU over that program. Under these circumstances, collective bargaining over the decision to eliminate an apprenticeship program will substantially benefit the parties' labor relations, and thereby further the policies of PECBA.

For the foregoing reasons, we conclude that the subject of TriMet's proposed elimination of the parties' longstanding apprenticeship program has a greater impact on employees' terms and conditions of employment than on TriMet's management prerogatives. The subject is, therefore, mandatory for bargaining.

TriMet's Unlawful Pursuit Claim

We turn to TriMet's request for reconsideration of our conclusion that ATU did not unlawfully pursue bargaining over a permissive subject. In our prior order, we assumed that bargaining over continuation of the apprenticeship programs is permissive, but concluded that ATU did not condition bargaining on that subject. In this order, we have concluded that bargaining over BOLI registration of an apprenticeship program is permissive, but bargaining over TriMet's decision to eliminate (or continue) its apprenticeship programs is mandatory. As explained in more detail below, the record establishes that ATU proposed continuation of the apprenticeship programs and continuation of BOLI registration. However, it does not establish that ATU *conditioned* bargaining on continuation of the apprenticeship programs (BOLI-registered or otherwise). Accordingly, we adhere to our conclusion that ATU did not bargain in bad faith by unlawfully pursuing bargaining over a permissive subject.

Under PECBA, a party may lawfully pursue a proposal that involves a permissive subject until the objecting party *both* informs the pursuing party that the proposal is permissive *and* refuses to bargain over it. *See, e.g., Sandy Union High School District UH2 and Sandy Elementary School District 46 v. East County Bargaining Council/SEA/SETA*, Case Nos. UP-8-97/DR-1-97 at 12, 17 PECBR 151, 162 (1997) (*Sandy*) (“[A] union cannot be found guilty of unlawfully pursuing negotiations concerning permissive bargaining proposals unless the employer notifies the union of its objections to the proposals and of its refusal to bargain further over the matters identified as permissive.” (quoting *OPEU v. State of Oregon, Executive Dept.*, Case No. UP-64-87 at 18, 10 PECBR 51, 68 (1987))); *Portland Association of Teachers v. Multnomah County School District No. 1*, Case No. UP-10-96 at 3, 16 PECBR 429, 431 (1996) (on recons) (“A scope of bargaining dispute does not mature into an unlawful refusal-to-bargain by one party or the other until an objector makes clear that it declines to bargain over a proposal that is being pursued by the other party. Without the presence of both factors—(1) a clear objection (and consequent refusal to bargain further) based on alleged permissiveness and (2) pursuit of a proposal in spite of such objection—there can be no violation.”); *Eugene Education Association v. Eugene School District 4J*, Case Nos. UP-8/18-87 at 8-10, 9 PECBR 9391, 9398-9400 (1987) (*Eugene I*) (discussing requirements for scope of bargaining dispute to “ripen” into unlawful pursuit claim against association and refusal to bargain claim against district); *Redmond School District 2J v. Redmond Education Association*, Case No. C-154-77 at 9, 3 PECBR 1564, 1572 (1977) (association did not unlawfully pursue proposal involving permissive subject because employer “failed to meet its obligation to inform [the association] that the proposal was permissive nor did the [employer] notify the [association] if its intention not to negotiate over” the proposal “thereafter”); *see also International Association of Firefighters, Local 696 v. City of Astoria and Curry*, Case No. C-72-84 at 5, 8 PECBR 6604, 6608 (1984) (city bound by awarded contract term, even if permissive, because city “did not declare the proposal to be permissive and refuse to bargain over it”). If the proponent continues to pursue bargaining on the permissive subject *after* the objecting party has both stated their objection *and* refused to bargain, then the pursuing party's conduct may constitute unlawful pursuit.

As we explained in our prior order, the question of whether a party's conduct crossed the line from lawful proposing and urging of negotiations on a permissive subject to unlawful “conditioning” is “an issue of fact.” *Oregon City School District No. 62 v. Oregon City Education Association*, Case No. C-179-79 at 10, 5 PECBR 4246, 4255 (1981) (*Oregon City*). “Barring

express admissions” by a party that they “refuse[] to negotiate unless permissive items are bargained over or included in a contract,” “a finding of unlawful conditioning must be based on the totality of circumstances surrounding the [party’s] conduct in bargaining.” *Eugene School District No. 4J v. Eugene Education Association*, Case Nos. UP-32-87/DR-2-87 at 25, 9 PECBR 9455, 9479 (1987) (*Eugene II*) (citing *Oregon City*)).

In its request for reconsideration, TriMet argues that the *Oregon City* standard for unlawful pursuit “does not comport with the plain language of the PECBA or its purposes,” and suggests that we narrow the circumstances under which a party may lawfully pursue permissive proposals “to instances in which (1) the parties mutually agree to discuss the permissive subject and (2) in response to an objection based on permissiveness, the proposing party expressly states that bargaining to include the permissive subject in the contract is optional.” We see no basis for narrowing this Board’s longstanding unlawful pursuit standard, or imposing the express disclaimer requirement that TriMet suggests.

Specifically, TriMet argues that the *Oregon City* standard for unlawful pursuit is inconsistent with the statutory provisions establishing that a party is not obligated, and cannot lawfully be forced, to bargain over a permissive subject. However, this Board considered those statutory principles when it set that standard in *Oregon City*.⁷ This Board also fully considered PECBA’s purposes. See *Eugene I*, UP-8/18-87 at 8-9, 9 PECBR at 9398-99, and *Oregon City*, C-179-79 at 10, 5 PECBR at 4255. As this Board explained in *Eugene I*,

⁷The Board explained:

“While a particular purpose of the PECBA is to ‘obligate’ parties to bargain over issues ‘relating to employment relations’ (mandatory subjects), the more general purpose of the statute is to aid in the development of ‘harmonious and cooperative relationships’ between public employers and their employees. ORS 243.656. Such relationships generally are enhanced by a free and full discussion of any issues that concern either party, regardless of whether or not an individual issue constitutes a mandatory bargaining subject. Many, perhaps even a majority, of the collective bargaining agreements negotiated under the PECBA include articles that deal with what are arguably permissive bargaining subjects. This circumstance is the result of the willingness of a party (most often an employer) to negotiate solutions to problems and thereby ‘alleviate various forms of strife and unrest.’ ORS 243.656(2). It is not a purpose of the PECBA to prohibit such voluntary bargaining over permissive items. To allow a party to be forced, at any stage of the negotiations process, to involuntarily bargain over permissive issues, however, would seriously interfere with the more specific purposes of the statute, which are to obligate all parties initially to negotiate over employment relations and ultimately to reach agreement on such mandatory matters. ORS 243.656(5). This is so because insistence on bargaining over a permissive subject as the price of reaching an agreement forces an unwilling party to accede to such pressure or to give up its right to reach an agreement that comprises only matters relating to employment relations.”

Oregon City, C-179-79 at 10, 5 PECBR at 4255.

“It is the policy of [PECBA] to encourage voluntary discussion over any issues, including permissive matters, that concern either party engaged in collective bargaining. In furtherance of that policy, we have interpreted the PECBA to prohibit insistence on negotiation of, or agreement to, permissive proposals (‘conditioning’) but not to prohibit the ‘proposing and urging’ of negotiations on such proposals where good faith bargaining continues over mandatory items. Whether the proponent of a proposal is following the former or the latter course of action is largely a question of fact; and, whether an objecting party is actually refusing to bargain, as opposed to merely posturing or stating an opinion, is likewise a question of fact.”

UP-8/18-87 at 8-9, 9 PECBR at 9398-99.⁸ The *Oregon City* standard for unlawful pursuit strikes an appropriate balance between permitting a party to urge bargaining over permissive subjects and prohibiting them from effectively forcing such bargaining.

We turn to TriMet’s argument that the standard for unlawful pursuit has been met here. Specifically, TriMet contends that three ATU statements constitute “express admissions” that ATU was conditioning bargaining on continuation of the apprenticeship programs. The first statement was made by ATU at the parties’ December 19, 2019, bargaining session. For context, we note that at that session, ATU made a concept proposal that involved modifying the existing apprenticeship programs but continuing with BOLI registration. TriMet countered with its own concept proposal, under which TriMet would continue to operate some apprenticeship programs (which TriMet referred to as “trainee programs”), but those programs would not be BOLI-registered, and only existing service workers who had already passed the mechanic aptitude test would be eligible for trainee positions.⁹ In response, ATU’s counsel stated something to the effect of, “ATU cannot agree to that concept unless TriMet offers something else really big.” TriMet asserts that, by making that statement, ATU effectively insisted that TriMet agree to ATU’s proposal regarding apprenticeships, including BOLI registration. We disagree with that characterization of ATU’s statement. ATU merely rejected *TriMet’s* proposal—while indicating that it could agree to that proposal if TriMet made compromises elsewhere. ATU did not state that the only alternative to TriMet’s proposal was ATU’s proposal, or even that TriMet had to modify its concept to include BOLI registration. And, as we explained in our prior order, “it is not unlawful to indicate that compromises on mandatory subjects will be made if a permissive subject is bargained, so long as bargaining continues over the mandatory proposals.” *Oregon City*, C-179-79 at 12, 5 PECBR at 4257; *see also Eugene II*, UP-32-87/DR-2-87 at 27, 9 PECBR at 9481. Here, the record establishes that ATU was continuing to bargain over mandatory subjects.

⁸TriMet argues that the SB 750 amendment to ORS 243.650(4) shows legislative intent to impose greater limits on permissive bargaining. However, in the 25 years since the passage of SB 750, the Board has continued to adhere to its precedent regarding unlawful pursuit, *see, e.g., Bend Police Association v. City of Bend*, Case Nos. UP-44/48-03 at 20, 20 PECBR 611, 630 (2004); *Sandy*, UP-8-97/DR-1-97 at 12, 17 PECBR at 162, and TriMet does persuasively establish any such legislative intent.

⁹Under TriMet’s concept proposal, current apprentices would be converted to trainees, and TriMet would eventually fully implement its plan to eliminate the apprenticeship programs.

Even if ATU had insisted that TriMet bargain over BOLI registration of the apprenticeship programs at the December 19 bargaining session, it would not have been unlawful for ATU to do so at that time, because TriMet had not refused to bargain over BOLI registration.¹⁰ TriMet had informed ATU that it generally considered the apprenticeship programs to be a permissive subject, before the parties started successor bargaining.¹¹ However, TriMet did not expressly notify ATU that TriMet was *refusing to bargain* over its apprenticeship programs until December 30, 2019.¹² Further, even if TriMet had informed ATU that it would not bargain about apprenticeships before the December 19 bargaining session, the record shows that TriMet discussed ATU's December 19 proposal regarding the apprenticeship programs, and made its own counterproposal. Thus, TriMet did not, by its conduct, unequivocally and objectively convey to ATU that it was refusing to bargain over the apprenticeship programs.

TriMet also contends that, by “[a]sserting that apprenticeship is mandatory for bargaining, ATU inherently insisted that the apprenticeship terms of the [expired CBA] carry forward into the new contract or that TriMet bargain over removing these terms from the contract.” We disagree. By stating that apprenticeship is a mandatory subject, ATU merely articulated and preserved its legal position regarding the scope of bargaining issue. “It is fairly common for labor and management to have different perspectives on scope of bargaining issues, and for both sides to articulate and preserve their respective legal positions while nonetheless engaging in good-faith negotiations over those issues.” See *Multnomah County Corrections Deputy Association v. Multnomah County*, Case No. UP-003-19 at 15 and n 9 (2019), *adh'd to on recons* (2020). Accordingly, a party's statement of its legal position does not, by itself, establish bad faith bargaining. See *id.* (county's statement of its legal position that it had no duty to bargain was not dispositive to allegations that the county flatly refused to bargain or engaged in surface bargaining).

TriMet also argues that a portion of a sentence from ATU's January 27, 2020, letter to TriMet should be construed as an express admission of conditioning. For context, we note that ATU sent that letter in response to a January 21, 2020, letter from TriMet, in which TriMet asserted that ATU had limited bargaining for the Maintenance Department to discussion of the

¹⁰As this Board explained in a mirror refusal-to-bargain case, “if a proponent is not *insisting* on bargaining (i.e. conditioning) an objector's ‘refusal’ becomes academic.” *Eugene I*, UP-8/18-87 at 9 n 3, 9 PECBR at 9399 n 3. A proponent's insistence is equally “academic” if the objector is not refusing to bargain.

¹¹TriMet's objection to bargaining over its apprenticeship programs as permissive was overbroad and vague (e.g., TriMet did not specifically contend that *BOLI registration* of the programs was permissive). For the purpose of this analysis, we assume, without holding, that TriMet's objection satisfied its obligation to notify ATU which aspects of ATU's proposal were permissive.

¹²On December 30, 2019, TriMet's Labor Relations Director Laird Cusack sent a letter to ATU President Shirley Block, in which he stated: “TriMet declines to bargain over the permissible subjects of bargaining that it has identified and struck in its proposals.” TriMet has not identified any evidence that establishes that TriMet informed ATU that it was refusing to bargain about the apprenticeship programs before December 30, and we have found none.

apprenticeship programs, and thereby conditioned bargaining on continuation of those programs.¹³ ATU responded, in relevant part:

“As you know ATU does not agree that the apprenticeship program is permissive. Despite the dispute over the mandatory versus permissive nature of TriMet’s proposal to strike all aspects of the apprenticeship programs from the Working and Wage Agreement, ATU has and continues to bargain in good faith with TriMet.

“Although TriMet announced on December 30 that it would no longer bargain over the apprenticeship program, *ATU has continued to bargain with TriMet without limitation on the subject matter*. Further, contrary to your claim that ATU has only bargained over the apprenticeships, ATU has made numerous proposals regarding maintenance.” (Emphasis added.)

TriMet asserts that the italicized portion of ATU’s letter should be read as, “ATU has continued to bargain without limitation on [TriMet’s apprenticeship program],” instead of “ATU has continued to bargain without limitation on the subject matter.” TriMet further construes ATU’s statement as evidence that ATU was insisting on bargaining over the apprenticeship programs. However, after reading ATU’s letter in its entirety and in context, we do not agree that ATU intended to refer to “TriMet’s apprenticeship program” when it used the term, “the subject matter.” Rather, it appears that ATU meant to say what it actually said—that it had “continued to bargain with TriMet without limitation on the subject matter”—in order to *refute* TriMet’s allegation that ATU had limited bargaining to the subject of apprenticeships.¹⁴

TriMet also asks us to revisit the question of whether ATU’s refusal to withdraw its December 19 apprenticeship proposal, after TriMet objected to the proposal as permissive and refused to bargain over it, amounts to unlawful pursuit. In our prior order, we concluded that ATU’s conduct did not, under the totality of the circumstances, cross the line to unlawful pursuit. On reconsideration, TriMet argues that we failed to take into account the statements discussed

¹³TriMet’s January 21 letter stated, in relevant part:

“Although your January 6 letter claims that ATU is not conditioning an agreement on TriMet continuing apprenticeship programs, that assertion is contradicted by repeated statements by you and others representing ATU.

“In addition to statements outlined in my December letter, you have done the following:

* * * * *

“All we have really talked about for Maintenance during bargaining sessions is apprenticeship.”

¹⁴TriMet also argues that the ATU statements discussed above should be construed as express admissions because ATU has never (according to TriMet) disclaimed that it was insisting on bargaining over apprenticeships. Without holding that ATU needed to make such a disclaimer, we note that ATU did so at least once. Specifically, ATU President Shirley Block stated in her January 6, 2020, letter to TriMet Labor Relations Director Laird Cusack, “To be clear, ATU is not conditioning either bargaining or a settlement of the contract on specific proposals regarding the apprenticeship program.”

above, including ATU's rejection of TriMet's apprenticeship proposal at the December 19 bargaining session, and ATU's statement of its legal position. Because TriMet had not argued in its post-hearing brief that we should consider those particular statements, we did not specifically address them in our prior order. That, however, does not mean that we did not consider them in our analysis, which encompassed the totality of the circumstances. In any event, for the reasons discussed above, consideration of those statements does not change our conclusion.

Finally, we note that our resolution of the scope of bargaining issues in this order strengthens our conclusion that ATU's conduct did not, under the totality of the circumstances, constitute unlawful pursuit. TriMet broadly objected to bargaining over the apprenticeship programs, but, as we discussed above, some bargaining over TriMet's apprenticeship programs is mandatory, including the decision whether to eliminate or continue those programs. Consequently, some aspects of ATU's apprenticeship proposal were mandatory for bargaining, and TriMet's objection to the proposal was overbroad. Further, although we concluded that the decision to disassociate the apprenticeship programs from BOLI oversight is permissive for bargaining, when TriMet objected to ATU's proposal on the ground of permissiveness, TriMet did not specifically address BOLI registration. The overbreadth and vagueness of TriMet's objection to ATU's December 19 proposal weighs against finding that ATU's refusal to withdraw that proposal amounted to unlawful pursuit.

Having clarified the parties' bargaining obligations regarding BOLI registration and elimination of the apprenticeship programs, we adhere to the reasoning of our prior order, as supplemented by this order, and our ultimate conclusion that TriMet did not prove its claim that ATU bargained in bad faith by unlawfully pursuing bargaining over a permissive subject.

ATU's Unilateral Change Claim

In our prior order, we dismissed ATU's claim that TriMet made an unlawful unilateral change by externally posting 10 diesel technician positions. Although the parties' expired CBA limited outside hiring for such positions to five per year, and there was no dispute that TriMet unilaterally changed the status quo by exceeding that limit, we found that TriMet did not act unlawfully because the subject of the unilateral change is the standards by which an employer fills vacancies, which is permissive for bargaining. On reconsideration, ATU does not dispute that the subject of the unilateral change at issue (the external posting) is permissive. Rather, ATU contends that TriMet violated ORS 243.672(1)(e) because it failed to bargain over the mandatory impacts of that permissive change. For the reasons explained below, that contention does not save ATU's claim in this case.

It is well-established that PECBA permits a public employer to make changes involving permissive subjects, but if such changes "also directly impact mandatory subjects over which the employer is required to bargain under the Act, then the employer must give notice of the proposed change and give the exclusive bargaining representative an opportunity to bargain over the impact of the change on mandatory subjects" before implementing the permissive change. *International Brotherhood of Electrical Workers, Local 125 v. City of Forest Grove*, Case No. C-201-75 at 6, 4 PECBR 2168, 2173 (1979); *see also FOPPO*, C-57-82 at 6-7, 7 PECBR at 5654-55. And, ATU argues, in its petition for reconsideration, that "the evidence shows that mandatory subjects of bargaining *may be* impacted by TriMet's change, but TriMet failed to

bargain prior to implementation.” (Emphasis added.) However, ATU did not claim that TriMet violated (1)(e) by failing to give ATU notice and opportunity to bargain over the mandatory impacts of a permissive change before implementation, or by refusing to bargain in response to a demand by ATU to bargain over the mandatory impacts of a permissive change. Rather, ATU alleged that TriMet made an *unlawful unilateral change* by externally posting ten diesel mechanic positions.¹⁵ To establish *that* alleged violation, which is a per se violation of (1)(e), ATU had to prove 1) that TriMet actually made a change, and 2) that the subject of that change was mandatory. As noted above, ATU concedes that the subject of the change at issue in this case (externally posting more than five positions) was permissive.

ATU correctly points out that, in *Forest Grove*, this Board found a unilateral change violation even though the employer ostensibly made a permissive change (reclassifying employees), because the record established that the permissive change directly caused a change to a mandatory subject (lower wage rate). C-201-75 at 7, 4 PECBR at 2174 (“[T]he evidence established that employees suffered a wage reduction by reason of the changes made in their classifications.”). However, *Forest Grove* did not modify the basic elements of a unilateral change claim. See, e.g., *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06 at 38, 22 PECBR 323, 360 (2008) (discussing the elements of a unilateral change claim). Rather, *Forest Grove* simply means that a complainant can establish those elements by establishing that a mandatory change occurred (or necessarily will occur) as a direct result of a permissive change; a complainant still must establish that an employer made a change involving a mandatory subject. Thus, even assuming that, as ATU contends, “the evidence [in this case] shows that mandatory subjects of bargaining *may be* impacted by TriMet’s change,” (emphasis added), such evidence is insufficient to establish its unilateral change claim.¹⁶

Unlike *Forest Grove*, the record in this case does not establish that any change involving a mandatory subject has actually occurred (or necessarily will occur) as a direct result of the permissive change at issue (external posting). ATU asserts that the external posting caused the elimination of the apprenticeship programs. However, the record does not establish that, at the time of hearing, the apprenticeship programs had already been eliminated, or that TriMet had made a final decision to eliminate the apprenticeship programs, such that their elimination is a *fait accompli*. We recognize that, at the time of hearing, TriMet had made a *plan* to eliminate the apprenticeship programs; that it had not started any new apprentice classes since September 2018; and that it had stopped publicly posting the lists of service workers eligible for promotion to apprentice. But the record also shows that TriMet was continuing to operate the apprenticeship programs for existing apprentices; that TriMet has, in the past, temporarily ceased starting new

¹⁵ATU stipulated that the issue presented is: “Did TriMet violate ORS 243.672(1)(e) by externally posting ten job openings for Diesel Technicians while the parties were engaged in bargaining a successor agreement to the 2016-2019 Working and Wage Agreement?” And, in its post-hearing brief, ATU contended that “TriMet committed a violation of ORS § 243.672(1)(e) because it made a unilateral change in the status quo by hiring diesel technicians.”

¹⁶Not all (1)(e) claims require proof that a change to a mandatory subject has occurred, but where, as here, the claim rests on an allegation of a unilateral change, a complainant must establish the existence of such a change.

apprenticeship classes without eliminating the programs altogether; and that a TriMet representative told ATU in August 2019 that there is a “pause on the apprenticeship program,” but that TriMet “may open that back up.” Additionally, in successor bargaining, TriMet described elimination of the registered apprenticeship programs as a “proposal,” and the parties discussed issues such as whether, to what extent, and in what form, the programs could continue.¹⁷

Further, the record does not establish that the external posting of diesel technician positions will directly cause the elimination of the apprenticeship programs. Although TriMet *can* eliminate the apprenticeship programs if it can hire sufficient numbers of qualified journey workers from the outside, that does not mean that TriMet *must*, or even *will*, eliminate the apprenticeship programs because it has increased its external hiring. Indeed, the record shows that TriMet has, in the past, hired a substantial number of outside journey workers while maintaining the apprenticeship programs. Thus, we do not conclude that the hiring of outside journey workers is equivalent to the elimination of the apprenticeship programs.¹⁸

ATU also points out that when TriMet posted the diesel mechanic positions, it changed the position’s title to “technician” and lowered the minimum qualifications. ATU further argues that the external posting of “diesel technician” positions directly caused mandatory changes because the provisions of the CBA that apply to “journey-level mechanics” do not apply to positions with the title “technician” and lower minimum qualifications. However, the record does not establish that the parties mutually understood that the journey worker provisions of the CBA would be inapplicable to the diesel technician positions as a result of the permissive changes that TriMet made. Rather, the record shows that TriMet believed that the CBA provisions that apply to “journey-level” mechanic positions would still apply to the “diesel technician” position, and there is no evidence that TriMet actually changed any mandatory terms for employees hired into “diesel technician” positions as a consequence of the changes that TriMet made to the position title and minimum qualifications.

¹⁷We recognize that, in its complaint, ATU alleged, “TriMet’s unilateral change by eliminating the apprenticeship program and, instead of hiring apprenticeship graduates, hiring workers from outside the district into the Journey Worker Mechanic classification constitutes an unfair labor practice under ORS 243.672(1)(e).” However, even if we construed ATU’s pleading and briefings as claiming that TriMet made an unlawful unilateral change *by eliminating the apprenticeship programs*, we would dismiss that claim because ATU did not prove that the apprenticeship programs have already been eliminated (or that TriMet presented a decision to eliminate the apprenticeship programs as a *fait accompli*).

¹⁸ATU contends that the external posting of diesel technician positions means that TriMet is hiring outside diesel technicians *instead* of new apprentices. However, the record establishes that, at the time of hearing, TriMet had budgeted for, and aimed to hire, more experienced diesel mechanics than the apprenticeship programs could produce, even operating at full capacity. For example, ATU submitted an exhibit showing that, for the 2020 fiscal year, TriMet projected it would need to hire 20-25 bus mechanics, and that after hiring all 12 graduating apprentices, it would still need to hire 8-13 outside journey workers. In other words, the record does not establish that TriMet lacked the capacity to hire both outside diesel technicians and graduating apprentices into journey-level positions, or that the external hiring of diesel mechanics and the continuation of the apprenticeship programs are mutually exclusive.

In sum, the record does not establish that TriMet made a unilateral change to the status quo that concerns a mandatory subject of bargaining by externally posting 10 diesel technician positions. Accordingly, we adhere to our conclusion that ATU did not prove that TriMet violated (1)(e).

ORDER

We adhere to our April 21, 2020, order, as supplemented by this order. The complaints are dismissed.

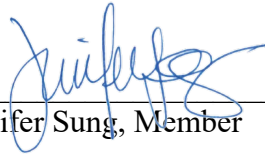
DATED: June 24, 2020.



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-002-20

(REPRESENTATION)

OREGON AFSCME COUNCIL 75,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER CERTIFYING
	)	EXCLUSIVE REPRESENTATIVE
MID-COLUMBIA CENTER FOR LIVING,	)	
	)	
Respondent.	)	
	)	

On June 12, 2020, Oregon AFSCME Council 75 filed a petition under ORS 243.682(2) and OAR 115-025-0000(4) to certify (without an election) a new bargaining unit of certain employees (described below) of the Mid-Columbia Center for Living. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards requesting that Oregon AFSCME Council 75 represent the designated bargaining unit.

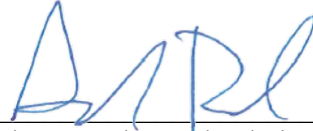
On June 15, 2020, the Board's Election Coordinator caused a notice of the petition to be posted. OAR 115-025-0030(3); OAR 115-025-0065. Pursuant to the terms of the notice posting, OAR 115-025-0030(3)(d), OAR 115-025-0065(7), and OAR 115-025-0075(1), objections to the proposed bargaining unit or a request for an election were due within 14 days of the date of the notice posting (*i.e.*, by July 2, 2020). There were no objections to the petition or a request for an election.

ORDER

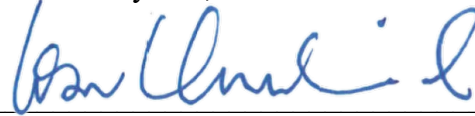
Accordingly, it is certified that Oregon AFSCME Council 75 is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

“All employees of the Mid-Columbia Center for Living, excluding supervisory and confidential employees.”

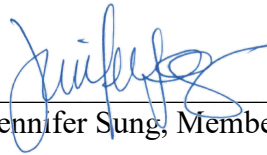
DATED: July 6, 2020.



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-003-20

(REPRESENTATION)

NORTH DOUGLAS ASSOCIATION	)	
OF CLASSIFIED EMPLOYEES,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER CERTIFYING
	)	EXCLUSIVE REPRESENTATIVE
NORTH DOUGLAS SCHOOL DISTRICT,	)	
	)	
Respondent.	)	
_____	)	

On June 15, 2020, North Douglas Association of Classified Employees filed a petition under ORS 243.682(2) and OAR 115-025-0000(4) to certify (without an election) a new bargaining unit of certain employees (described below) of the North Douglas School District. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards designating North Douglas Association of Classified Employees as the exclusive representative of the proposed bargaining unit.

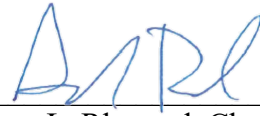
On June 17, 2020, the Board's Election Coordinator caused a notice of the petition to be posted. OAR 115-025-0030(3); OAR 115-025-0065. Pursuant to the terms of the notice posting, OAR 115-025-0030(3)(d), OAR 115-025-0065(7), and OAR 115-025-0075(1), objections to the proposed bargaining unit or a request for an election were due within 14 days of the date of the notice posting (*i.e.*, by July 6, 2020). There were no objections to the petition or a request for an election.

ORDER

Accordingly, it is certified that North Douglas Association of Classified Employees is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

Classified employees of North Douglas School District, including instructional assistant(s), maintenance, custodial, cooks, office assistant(s), library assistant(s), and office manager(s).

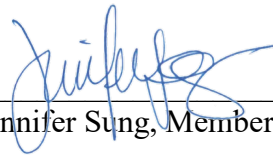
DATED: July 7, 2020.



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-059-13

(UNFAIR LABOR PRACTICE)

PORTLAND FIRE FIGHTERS'	)	
ASSOCIATION, IAFF LOCAL 43,	)	
	)	
Complainant,	)	FINDINGS AND ORDER ON
	)	COMPLAINANT'S PETITION FOR
v.	)	ATTORNEY FEES ON APPEAL
	)	
CITY OF PORTLAND,	)	
	)	
Respondent.	)	
	)	

On December 2, 2015, this Board issued an order holding that the City of Portland (City) had violated ORS 243.672(1)(e) by unilaterally changing the process for selecting candidates for promotion in the City's Fire & Rescue Bureau, as alleged by the Portland Fire Fighters' Association, IAFF Local 43 (Association). In that same order, we dismissed the Association's claim that the City had violated (1)(e) by making certain operational changes. The Association petitioned the Oregon Court of Appeals for review of the dismissal, and the City cross-petitioned for review of the unfair labor practice determination. On February 26, 2020, the court issued an order reversing and remanding our order for further proceedings on the Association's petition but affirming our order on the City's cross-petition. *See Portland Fire Fighters' Association, IAFF Local 43, v. City of Portland*, 302 Or App 395, 461 P3d 1001 (2020). On April 29, 2020, the court issued the appellate judgment, designating the Association as the prevailing party on its petition and the City's cross-petition.

On May 7, 2020, the Association filed a timely petition for an award of attorney fees on appeal. OAR 115-035-0057(1). Under OAR 115-035-0057(2), the City 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 Association is the prevailing party, as it was designated as such in the appellate judgment. OAR 115-035-0057(3).

2. The Association requests an attorney fee award of \$5,000, which is 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 a declaration demonstrating that 58.4 hours were spent on the appeal; 56.9 of those hours were billed at the rate of \$175 per hour, and 1.5 hours were billed at the rate of \$185 per hour. The total amount of attorney fees on appeal billed to the Association was \$10,235.

3. The City did not object to the amount of hours or the billing rates as excessive. OAR 115-035-0057(2). Based on the Association's un rebutted declaration, we find that the amount of hours and billing rates were reasonable.

4. The City did not object to the Association's request for the maximum award of \$5,000, which would represent approximately half of the total cost of the reasonable attorney fees incurred. Having found the claimed attorney fees reasonable, we award the Association \$5,000. In doing so, we have decided to no longer adhere to a prior practice in which the Board awarded a percentage of the reasonable attorney fees requested (based on a range of factors), up to the \$5,000 cap.¹ Before applying that change in this case, we afforded the City an additional opportunity to respond or object to that approach, and we did not receive any such response or objection. Accordingly, we order an award of attorney fees on appeal to the Association in the amount of \$5,000.

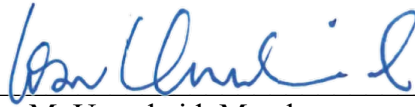
ORDER

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

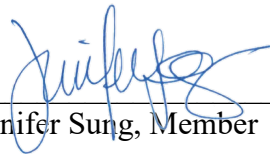
DATED: July 8, 2020.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

¹The Board's prior practice was not required by the Public Employee Collective Bargaining Act or this Board's rules, and it no longer appears necessary or consistent with current Board practice in light of the changes to the rule governing attorney fees for appeals that were effective February 1, 2017. Specifically, those rule changes streamlined the process and established new requirements for objections based on the hours or rates claimed, while maintaining a \$5,000 cap on any award.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-006-18

(UNFAIR LABOR PRACTICE)

D.G.,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
LANE COMMUNITY COLLEGE	)	CONCLUSIONS OF LAW,
EMPLOYEES FEDERATION,	)	AND ORDER
	)	
Respondent.	)	

Bob Baldwin, a layperson of Eugene, Oregon, represented Complainant.

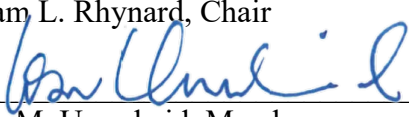
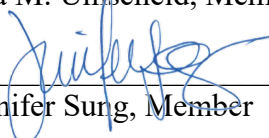
Katelyn S. Oldham, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented Respondent.

On July 7, 2020, 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: July 24, 2020.

	_____
Adam L. Rhynard, Chair	
	_____
Lisa M. Umscheid, Member	
	_____
Jennifer Surg, Member	

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-006-18

(UNFAIR LABOR PRACTICE)

D.G.,	)	
	)	
Complainant,	)	
	)	RECOMMENDED RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
LANE COMMUNITY COLLEGE	)	AND PROPOSED ORDER
EMPLOYEES FEDERATION,	)	
	)	
Respondent.	)	

A hearing was held before Administrative Law Judge (ALJ) B. Carlton Grew on January 24, 2020, at the offices of the Oregon Employment Relations Board (ERB or this Board) in Salem, Oregon. The record closed on March 25, 2020, following the denial of Complainant's motion to file a late post-hearing brief.

Bob Baldwin, a layperson of Eugene, Oregon, represented Complainant.

Katelyn S. Oldham, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented Respondent Lane Community College Employees Federation.

On December 10, 2018, Complainant DG filed a Complaint for unfair labor practices against the Lane Community College Employees Federation (Federation or LCCEF) and Lane Community College (College or LCC) regarding the College's termination of DG and the Federation's related representation. On April 26, 2019, Complainant filed an Amended Complaint naming only against the Federation, because the College and DG had reached a settlement agreement and release of claims.¹ On December 2, 2019, the Federation filed its Answer admitting and denying allegations in the Amended Complaint.

¹The Amended Complaint consisted of the ERB form for an Unfair Labor Practice Complaint, and stated as follows:

"This is an amended filing of this complaint, as ordered by Judge Grew. It clarifies certain issues relating to the statute of limitations, with respect to information provided in the

Pursuant to the Amended Complaint,² the issue in this case is: Did the Federation intentionally refuse to provide appropriate representation to DG, knowingly and deliberately seek his termination from employment by the College, and deliberately deprive him of his rights to grievance and arbitration regarding the College's actions? If so, did this conduct violate the Federation's ORS 243.672(2)(a) duty of fair representation?

This Board concludes that the Federation did not violate its duty of fair representation to Complainant DG.

RULINGS

After the ALJ granted an extension sought by the Federation, the post-hearing briefs of the parties were due on March 19, 2020. After no brief was received from Complainant, the ALJ wrote Complainant's lay representative, stating that ERB had not received a post-hearing brief from him or directly from Complainant, and asking him to please advise. Baldwin responded,

"I apologize. As LCC is no longer open at its physical campus [because of the Covid-19 pandemic], I am no longer working at my usual, physical location. I have had to establish an office in my home, and relocate files, etc, over the last two weeks. That, in addition to all the things I assume we are all dealing with (food, household supplies, etc.) If I have the ability to request an extension on the time to file a final brief, I will do so. If not, then please advise as to what, procedurally, the next steps are."

Baldwin email, March 24, 2020.

Respondent Federation objected, noting that while the pandemic had created an unusual situation, Baldwin would be

original filing. All documents and information provided in the original filing are hereby incorporated, by reference, into this amended filing.

"With respect to the case against the union, the actions which we allege violated Mr. [DG's] rights under PECBA occurred on or after June 13, 2018. Specifically, the refusal by the union to provide Mr. [DG] with representation in asserting a defense against the employer's claims in support of their decision to terminate Mr. [DG].

"All information and documentation relating to events or circumstances before June 13, 2018, are provided for the purpose of establishing that the union's actions were, at a minimum, arbitrary and capricious, taken with the deliberate intent of preventing Mr. [DG] from availing himself of his due process rights; and with full knowledge that the employer's case could not survive a Just Cause review."

²The original Complaint asserted that the Federation had sought DG's termination through promoting false accusations regarding comments he made to a coworker who was a Federation officer. The Amended Complaint states that all claims except the final termination and grievance process are barred by the 180 days statute of limitations, ORS 243.672(6).

“unfairly advantaged by being able to review the closing brief we have already prepared and filed days or weeks before he submits his own late-filed brief. Further, we had requested a set-over of the due date of that closing brief and there was no reason Mr. Baldwin could not have done the same if he realized he could not timely file his closing brief. He chose not to do so. For these reasons, we object to a late-submitted closing brief in this case. It is prejudicial to the LCCEF and Mr. Baldwin has not availed himself of processes (including an e-mail request) that he knew to be available.”

Oldham email, March 24, 2020.

On March 25, 2020, the ALJ notified the parties that he would not consider a late post-hearing brief from Complainant. The ALJ agreed with Respondent, noting that, while an extension for Complainant would have been freely given if it had been requested, it was not, and Respondent had filed its brief as directed. The ALJ determined that Complainant had not shown good cause for failing to file a timely brief or to request an extension. Accordingly, the ALJ acted properly within his discretion in denying Complainant’s request to file a late brief.

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

FINDINGS OF FACT

The Parties

1. The College is a public employer within the meaning of ORS 243.650(20). It employs classified employees in more than 100 job classifications, including approximately 20 custodians.

2. The Federation is a labor organization as defined in ORS 243.650(13), and the exclusive representative of certain classified employees of the College, including the custodians. It is affiliated with the Oregon chapter of the American Federation of Teachers (AFT Oregon).

3. The College and the Federation are parties to a collective bargaining agreement (the contract) defining the terms and conditions of employment for the represented employees. The term of the contract is July 1, 2016 through July 30, 2023.

4. The contract includes a dispute resolution or grievance process that includes several steps and ends in binding arbitration.

DG’s Early College Employment

5. Beginning in approximately January 2017, DG was employed by the College as a custodian. There were approximately 4 custodians on the day shift, and approximately 16 custodians on the night shift. DG was on the night shift for the period relevant to this Amended Complaint.

6. Some of DG's coworkers identified as white supremacists, and some put stickers on their clothing, personal cars, and College radios to indicate their support for white supremacist ideology.

7. DG was invited to a July 4, 2017 cookout in Creswell, Oregon³ by some coworkers. DG, who was Caucasian, brought an African-American coworker with him. DG was unaware that the picnic was attended in part by white supremacist activists, and that some of them had intended to approach DG at the picnic about his interest in white supremacist views. The picnic proceeded without incident. Afterwards, a white supremacist asked DG to disavow any relationship with non-white College employees. DG did not do so.

8. At some point during the summer of 2017, DG recommended his African-American coworker for the Federation Diversity Chair position. Some of DG's white supremacist coworkers expressed dismay to DG about his recommendation.

9. Following these events, some of DG's white supremacist co-workers began to make generalized negative and obliquely threatening comments to him. At some points during his employment by the College, DG also found some of the bathrooms he had been scheduled to clean were smeared with feces. College bathrooms not cleaned by DG were occasionally smeared with feces for a variety of reasons.

10. In October 2017, A Eugene newspaper article on the antifa movement included portions of an interview with an individual identifying as an "anti-antifa supremacist" and activist who had served more than a decade in prison for a hate crime against a synagogue. (Exh. C-9 at 3.)

DG Absenteeism

11. Between August 21 and November 14, 2017, DG was absent without leave for 456 hours of scheduled work time (the equivalent of approximately 57 eight hour shifts). There were approximately 59 workdays (not counting weekends and holidays) in that time period. DG cited health reasons for his absences, but did not provide the further detail or medical documentation that the College requested.

12. College officials contacted DG repeatedly to meet to discuss the absences, setting up meetings that DG then failed to attend. DG offered various reasons for missing the meetings: illness, needing more preparation time before meetings, and a visit from family members.

13. DG was very reluctant to talk to managers or the Federation about his absences, because he was concerned that he might be complaining about white supremacist harassment to white supremacist sympathizers or their potential friends and relatives who worked at the College. DG was also concerned that any report he would make to any College official would subject him to retaliation from the white supremacists. While DG was correct that some of his coworkers were white supremacists, his belief that white supremacists had effective control of the College and

³The community of Creswell, with a population of approximately 5,400, is located approximately 13 miles south of Eugene, Oregon.
<https://sos.oregon.gov/blue-book/Pages/local/cities/a-d/creswell.aspx>.
https://en.wikipedia.org/wiki/Creswell%2C_Oregon, accessed June 18, 2020.

Federation was based on limited information, speculation, and some paranoia. DG knew that, at least, one of his supervisors was close to white supremacists. DG did not know who he could trust, and was unable to figure out how to determine who he could trust.

14. At some point during 2017, DG communicated to Federation representatives that his absences were because he had outed some unnamed white supremacist coworkers and they were out to get him. He also asked Federation president Pat Griffin to file a grievance over his harassment. Griffin told DG that the contract did not provide for a grievance over that kind of issue unless the employee was a member of a protected class.

15. On November 14, 2017, the College issued a written reprimand to DG for the 456 hours of absences and for violating College policies regarding leave. The reprimand stated that further absences without permission and without medical documentation could result in termination.

16. After receiving the November 2017 reprimand, DG continued to be regularly absent from work and continued to violate College policies regarding leaves with and without pay.

17. In late January, 2018, news reports identified a group of white supremacists in Creswell, Oregon as identifying with the American Front, printing a photograph of them posing at a gathering with clothing and banners bearing white supremacist symbols including the sonnenrad and the valknot. One of the individuals in the photograph had served more than a decade in prison for a hate crime against a synagogue, and was reported to have been arrested in connection with a January 2018 stabbing incident.

Last Chance Agreement

18. During the late winter of 2017-2018, DG, College Employee and Labor Relations Manager Sharon Daniels, and Federation representatives had meetings to address DG's concerns about work. DG did not provide specific information to College or Federation representatives about his workplace fears. This lack of disclosure hindered the College and the Federation in addressing DG's apparent concerns.

19. During the spring of 2018, Federation President Griffin began representing DG. DG never provided Griffin with specifics about his safety concerns or the individuals who threatened or harassed him. DG never filed a complaint with the College relating to harassment, discrimination or personal safety, and never asked anyone for assistance in doing so.

20. Also during the spring of 2018, the College, Federation, and DG negotiated a Last Chance Agreement (LCA) which would allow him to return to work and which included specific provisions intended to provide protection for him. During this process, the college assigned him to a different building to clean (Building 10), because DG had expressed safety concerns about his previous assignment. The LCA included processes for DG to report that he felt unsafe or had a concern. The College also gave DG a radio, so he could report concerns in real time.

21. The LCA required DG to adhere to its conditions, including all College leave policies, in order to retain his employment. The LCA also stated that any more absences would be grounds for termination.

22. On March 29, 2018, DG signed the LCA.

The LCA provided, in part:

“You are expected and directed to immediately report any concerns or incidents in your assigned work area(s) directly to the Custodial Services Coordinators, or to the College’s Custodial Services Manager, [Heath] Pierce, or to the Facilities Director, Jennifer Hayward. Examples of concerns and incidents that you are directed to report immediately would include the following types of concerns. (1) Any and all concerns about your personal safety, (2) Any and all concerns about workplace safety, (3) Any and all concerns about the words, conduct and actions of anyone you work with or encounter during your custodian work shifts that cause you to feel unsafe or disrespected in any ways. The meaning of ‘immediately report’ is that you are directed to immediately speak with the Custodial Services Coordinator, the Custodial Services Manager, or the Facilities Director using the following methods:

“A. Use your radio to contact the Custodial Services Office and request a brief and immediate meeting to report the concern.

“B. If you cannot contact the Coordinator or Manager by radio, you are directed to go directly to the Custodial Services Office in Building #7 and immediately report your concerns to the Custodial Services Manager or to the Custodial Services Coordinator.

“C. If there is not a Coordinator or Manager in the Custodial Services Office, you are directed to use the telephone in Building #7 to immediately call the Custodial Services Manager, Heath Pierce, on his cell phone at [redacted].

“D. If the Custodial Services Manager does not answer his cell phone, leave a voice mail message for [Heath] Pierce describing the concern and then use a telephone in Building #7 to immediately call the Facilities Director, Jennifer Hayward, on her cell phone at [redacted].

“E. This directive requires that you immediately report any and all concerns in a very timely manner when you first become aware of an unsafe circumstance or condition, or immediately when you experience a disrespectful encounter.

“On the very same day that the concern noted in #3 arises, you are further directed to use a computer in the Custodial Services Office in Building #7 to immediately email a factual description of your concern to the attention of both Heath Pierce and Jennifer Hayward at [redacted] and at [redacted].

“This directive #4 to you mandates that you both verbally and via email immediately report your concerns on the same day that workplace concerns arise for you. Reporting any and all concerns immediately is required and essential to inform the Custodial Services Coordinator(s), the Custodial Services Manager and the Facilities Director to timely follow-up on workplace and safety concerns.

Complying with directive to immediately report any/all concerns will also establish a written record of the concerns that you report.”

(Exh. R-5.)

23. Despite his outward agreement with the LCA, including his signature, DG believed from the start that the LCA did not address his primary concerns. DG did not like his assignment to Building 10, because he believed it placed him in a more isolated and therefore more vulnerable position. He did not like where he was supposed to check in to begin his workday, because his harassers were there. DG also did not want to report harassment to some individuals listed in the LCA reporting process, because he believed one of them to be one of his harassers, and thought another was related to one of the harassers. He did not wish to use a computer to report harassment, because the computer was in the office of one of his harassers. DG also did not believe that the radio offered him any safety, because communications over the radio were transmitted to some of the individuals DG was concerned about. DG never disclosed these concerns to College administrators or Federation officials while they discussed the LCA.

24. DG did not follow the procedures for reporting harassment after signing the LCA. On May 25, 2018, DG acknowledged to College administrators that he had not followed the LCA’s reporting mechanisms.

25. On April 1, 2018, Bob Baldwin, a former Federation President, sought to meet with College President Margaret Hamilton and DG regarding the LCA. Baldwin informed her that DG did not wish to be represented by the Federation regarding the LCA, and asked that no Federation officials be present at, or notified of, the meeting. Hamilton referred Baldwin to College Human Resource officials.

Allegations of Inappropriate Comments Made by DG

26. On or about April 4, 2018, a female College security guard, who was also a Federation officer, filed a complaint against DG. The guard stated that DG had called her a “white supremacist” and a “fat gay bitch” during a phone conversation. (Exh R-9.)

27. The College investigated the guard’s complaint. DG denied making the statements to the guard.⁴ During the investigation, the College investigator was told by another College employee that DG had made similar disparaging comments about the guard to him. The investigator concluded that there was no motive for the other employee to lie about this information, and concluded that DG had made the alleged comments about the guard to the other employee, and to the guard.

28. DG suspected that the Federation was behind the complaint, and that the complaint was a Federation ploy to obtain his termination, because the guard was a Federation officer, and had some connections to people who lived in Creswell. In fact, the Federation was not responsible for the complaint, and during the disciplinary process the Federation did not refuse to represent DG and did not attempt to secure his termination.

⁴At hearing, DG testified that he could understand how comments he made to the guard could be construed as inappropriate conduct.

29. On May 16, 2018, as discipline for his alleged statements to and about the guard, the College suspended DG for two weeks without pay and ordered him to complete a course of Employee Assistance counseling.

30. On May 25, 2018, the Federation appealed the suspension and sought to reduce the discipline. In response, the College reduced the unpaid suspension to one week.

Additional DG Absenteeism, Termination, and Appeal

31. From March 29, 2018, the date of his signature on the LCA, until his termination on June 15, 2018, DG was generally absent from work without leave. From June 4 to June 14, 2018, DG called in to work every day and simply stated that he “would not be in” to work. (Exh. R-15.)

32. On June 13, 2018, the College directed DG to attend a disciplinary meeting on June 15, 2018 at 1:00 pm. The College also told DG he was excluded from the College campus under pain of trespassing charges. DG did not attend the June 15 meeting.

33. Also on June 15, College Human Resources Director Dennis Carr sent a letter to DG noting that DG had not appeared at the disciplinary meeting, and enclosed a Recommendation for Termination which was to have been delivered to DG at the meeting.

34. The June 15 Recommendation for Termination stated that the recommendation was based on DG’s violation of the LCA on several occasions since June 4. The letter also notified DG of his right to appeal, with an appeal hearing to be held no later than June 28, 2018.

35. In June and July of 2018, Federation officials sought to schedule an appeal of the Recommendation for Termination. During this process, DG did not attend some meetings scheduled with Rodolfo Palma, an AFT Oregon representative, and Federation President Griffin to prepare his appeal and prepare for the appeal hearing. The Federation asked the College to reschedule one or two appeal meetings that DG did not attend, which it did. However, the College refused to reschedule the meeting again after DG again failed to appear.

36. On July 19, the Federation submitted a written appeal of DG’s termination, prepared with assistance from AFT representative Palma. The appeal stated that DG continued to work in fear after signing the LCA, and after being shifted to clean Building 10, and that he was unable to comply with the LCA’s reporting procedures. The letter stated, in part,

“Mr. [DG] was assigned to a building working with an open white nationalist. Mr. [DG] informed college management and they did not take action appropriate to address the matter. One possible solution could have been a placement change. Instead, management chose to keep him working in a hostile building and/or

surrounding buildings with other known white nationalists. [DG] experienced mental and emotional distress due to the constant violation of Article 12.7.2.⁵

“The distress was the cause of [DG] missing work, when he had previously rarely missed any work.

“He met with the college president, Dr. Hamilton, and she advised him to work with Greg Evans, Interim Diversity Chief to resolve these issues. However, attempts to address this situation were marginal at best.

“Mr. [DG] returned to work after he signed a Last Chance Agreement. Unfortunately, due to the severity of his situation and fear for his safety, Mr. [DG] used unconventional methods to continue to notify administration of a persistent hostile environment. As a result of unresolved issues, Mr. [DG] continued experiencing emotional distress due to the hostile environment.

“In the midst of his return, Mr. [DG] was accused of harassing a fellow worker. This accusation was never proven, and the stress of the accusation added to the additional emotional distress of Mr. [DG]. The college chose to punish Mr. [DG] further and made the work situation unbearable.

“Mr. [DG] attended one of the sessions he was required to attend, but none of this addressed the origins of the distress Mr. [DG] and other employees had experienced: persistent unaddressed discrimination and bias at work.

“We object to the termination of Mr. [DG], and seek for a systemic solution to the persistent racism experienced by workers of color and sympathizers throughout Lane Community College.”

(Exh. R-17 at 3.)

37. The July 19 letter was the first time DG had informed the College of his issues with the protections the LCA had set up for him.

38. On July 26, 2018, the College rejected the appeal, issuing its “final decision concerning [DG’s] appeal of the recommendation to terminate [his] employment,” and terminating his employment effective that date. (Exh. R-16 at 1.) The College stated, in part, that it had provided the assignment in Building 10 after the execution of the LCA for the specific purpose of assuring the safest possible work environment for DG. The College stated that, contrary to the directives provided in the LCA, after assuming the Building 10 assignment in early April, DG never conveyed his ongoing fear to any College administrators, including the Custodial Services Manager, and never reported his fear to any other designated supervisor or administrator in the College Facilities, Management & Planning Department.

⁵Article 12.7.2 of the contract provides: “The Union and the College agree that the maintenance of a safe and healthy work environment includes the expectation that all interactions among employees, and employees and managers, will be conducted with respect and courtesy.”

39. Following the failure of the appeal, Federation officials considered whether to file a grievance on DG's behalf.

40. Federation officials believed that the first steps in the grievance process would be unsuccessful, because the same College officials who rejected the appeal would consider the grievance. Were the grievance taken to arbitration, Federation officials believed that no arbitrator would overturn DG's termination. They considered DG's repeated violations of the LCA, and DG's continuing failure to follow College directives despite the multiple chances that the College had given DG to correct his attendance. Federation officials also believed that DG's pattern of absenteeism continued even after his termination, because he failed to show up to scheduled meetings to work on the appeal with Federation representatives and to meetings with College administrators regarding his appeal of the termination.

41. On December 7, 2018, DG filed the Complaint in this case, naming the College and the Federation.

42. On April 17, 2019, DG settled his unfair labor practice claim, BOLI complaint, and unspecified claims against the College. The settlement agreement and release of claims stated in part that the College did not admit to any liability and was settling the matter solely to avoid the cost of defending against DG's claims. As part of the settlement, DG agreed to dismiss the College from this action.

43. On April 26, 2019, DG filed an Amended Complaint naming only the Federation. The Amended Complaint also stated that the only issue not outside the statute of limitations was DG's June 15, 2018 termination and the Federation's decision not to grieve or arbitrate that termination.

CONCLUSIONS OF LAW

DG alleges that the Union violated ORS 243.672(2)(a) through the Federation's allegedly inadequate representation in his employment disciplinary process, and the decision not to pursue a grievance on his behalf.⁶ We conclude that DG failed to meet his burden to establish that the Federation violated its duty of fair representation and dismiss the Complaint.

We turn to our analysis.

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The Federation did not breach its duty of fair representation under ORS 243.672(2)(a) in investigating DG's termination and in making the decision not to take his grievance to arbitration.

Standards for Decision

⁶DG states, in his Amended Complaint, that the Federation's decision not to pursue a grievance is the only issue before this Board that is within the ORS 243.672(6) limitation period. Accordingly, the question of adequate representation at issue here is confined to the grievance decision process. However, we consider the prior actions of the parties to determine their course of conduct and motives.

ORS 243.672(2)(a) makes it an unfair labor practice “for a public employee or 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” by the Public Employee Collective Bargaining Act (PECBA), ORS 243.650 to 243.782, including “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 Subsection (2)(a) imposes a “duty of fair representation” on a labor organization when it acts as the exclusive representative of a bargaining unit of employees. *Griffin v. Service Employees International Union Local 503, Oregon Public Employees Union and State of Oregon, Employment Department*, Case No. FR-02-09 at 24, 24 PECBR 1, 24 (2010). At the same time, “a labor organization's actions and decisions as the exclusive representative of employees must be afforded broad discretion.” *Block v. Amalgamated Transit Union, Division 757*, Case No. FR-001-15 at 4, 26 PECBR 486, 489 (2015). *See also Caddy and Van Hooser v. Multnomah County Deputy Sheriff's Association*, Case No. C-62-84 at 10-11, 7 PECBR 6545, 6554-55 (1984) (citing *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S. Ct. 681 (1953)). Balancing those considerations, “[w]e will find a violation of subsection (2)(a) only where a labor organization's actions are arbitrary, discriminatory, or taken in bad faith.” *Block*, FR-001-15 at 4, 26 PECBR at 489.

A labor organization's action is arbitrary if it lacks a rational basis or is so perfunctory that no reasoned decision is made. *Howard Jr. v. Western Oregon State College Federation of Teachers, Local 2278, OFT and Western Oregon State College*, Case Nos. UP-80/93-90 at 27, 13 PECBR 328, 354 (1991). A labor organization's conduct is unlawfully discriminatory if there is “substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives.” *Id.* (quotation marks and citation omitted). A labor organization's conduct is in bad faith “if it intentionally acts against a member's interest and does so for an improper reason.” *Block*, FR-001-15 at 4, 26 PECBR at 489.

In this case, DG contends that the Federation violated its duty of fair representation by failing to challenge his termination through the collective bargaining agreement’s grievance and arbitration process.

To determine whether a labor organization fairly represented an employee by deciding not to take a grievance to arbitration, we consider several factors. First, as stated above, labor organizations have broad discretion to make decisions concerning the representation of employees. Decisions about whether to file or pursue a grievance are entitled to substantial deference. *Conger v. Jackson County and Oregon Public Employees Union*, Case No. UP-22-98 at 10, 18 PECBR 79, 88 (1999). This deference exists because “[i]f a union’s decisions are constantly attacked by disgruntled members, the organization’s collective power is weakened and the employees’ interest in having a strong and effective organization to represent them is defeated.” *Ralphs v. OPEU, Local 503, SEIU, AFL-CIO and State of Oregon, Executive Department*, Case Nos. UP-68/69-91 at 14, 14 PECBR 409, 422 (1993).

However, a labor organization can violate its duty of fair representation if its decision not to pursue a grievance is arbitrary, discriminatory, or made in bad faith. To answer this question, this Board focuses on the labor organization’s conduct and the process by which it made its decision, not the merits of the grievance. *Chan*, 21 PECBR at 575. As long as the labor organization acts reasonably, it may rationally decide not to pursue a grievance, even if it would

likely win in arbitration. *Martin v. Ashland School District #5, Morris, OSEA; Fields, Helman Elementary*, Case No. UP-30-01 at 14, 20 PECBR 164, 177 (2003).

Based on these standards, we accord discretion to a union's choices in investigating a potential grievance, so long as some reasonable good-faith investigation is undertaken. *Randolph v. International Alliance of Theatrical Stage Employees, Local B-20, and Metropolitan Exposition Recreation Commission*, Case Nos. UP-15/16-92 at 22, 15 PECBR 85, 106 (1994), AWOP 134 Or App 414, 894 P2d 1267 (1995).

Analysis

Federation Investigation of DG's Potential Grievance

The record shows that the Federation was heavily involved in providing representation to DG during the lengthy series of events that resulted in his termination, and therefore was quite familiar with those events. Federation representatives, the Federation president, and a representative from AFT-Oregon assisted DG in various meetings with College officials. The Federation president successfully pressed the College to reduce a disciplinary suspension without pay from two weeks to one week for an unprofessional interaction that DG agreed, at hearing, could be construed as inappropriate conduct. Federation officials also pursued two appeals for DG, one of his two-week suspension and one of his termination. While Federation officials did not have some specifics regarding the harassment of DG, this was due to DG's reticence to provide that information.

The evidence in the record does not demonstrate any intent by Federation officials to have DG terminated. While the security guard who reported offensive comments from DG was a Federation officer, there is no evidence that she influenced Federation decision-making at any point, and no evidence that even the guard herself sought his termination. Indeed, during this process, the Federation's representation succeeded in reducing DG's level of discipline.

The Federation also forestalled DG's termination for absenteeism in the spring of 2018 by advocating for an LCA. That agreement resulted in DG continuing to be employed by the College, with a meaningful opportunity to resolve his workplace issues. While DG later contended that the LCA did not resolve the issues in his workplace, and even made them worse, DG did not inform Federation or College officials of that information until he was notified of his impending termination in June 2018. We determine that Federation officials were not biased against DG, did not seek his termination, and were fully informed of the relevant issues in DG's case that DG chose not to withhold. We determine that the Federation conducted a reasonable good-faith investigation.

Decision Not To Pursue a Grievance for DG

At the time of their decision regarding a filing grievance for DG, Federation officials were fully informed of DG's workplace issues, as more completely described by DG. There was no dispute that DG failed to disclose information essential to the purpose and text of his LCA, and that he then refused to comply with it. Federation officials were also fully informed of the opinion of College officials regarding DG's continued employment. They were aware of College officials' statements during the College appeal process that paralleled the lower levels of the grievance process. Federation officials considered whether DG would prevail at those grievance steps, and

concluded that he would not. They also considered whether it was likely that DG's case would convince an arbitrator to order his reinstatement. In light of DG's repeated violations of the LCA, and other factors, they concluded that it would not. Nothing in this process indicates that the Federation's decision not to pursue the grievance was arbitrary, discriminatory, or made in bad faith.

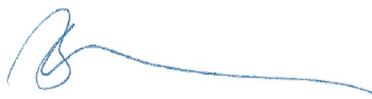
We conclude that Complainant DG has failed to meet his burden to prove that the actions of the Federation were arbitrary, discriminatory, or taken in bad faith such that the Federation violated its duty of fair representation to him.⁷

We will dismiss the Amended Complaint.⁸

PROPOSED ORDER

The Amended Complaint is dismissed.

SIGNED AND ISSUED 7 July 2020.



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.)

⁷DG's position at hearing, combined with his Amended Complaint, suggest that DG believes that the College and the Federation had a duty to investigate and act upon the interactions DG had with white separatist employees without specifics from DG about the events that occurred and who was involved in them. The Amended Complaint states that those claims are outside the 180 day statute of limitations set out in ORS 243.672(6), and we do not consider them.

⁸The Federation contends that the settlement with the College, which expressly included language that the College did not admit to any liability and was made solely to avoid the cost of defending a frivolous case, is essentially an admission that is fatal to DG's allegation that the employer's case could not survive a Just Cause review. The Federation also contends that DG may not pursue back pay damages or reinstatement because whatever claims he may have had were resolved by the settlement, and therefore Federation handling of the grievance is now moot. Because of our disposition of the Amended Complaint, we need not reach these issues.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-012-19

(UNFAIR LABOR PRACTICE)

MULTNOMAH COUNTY CHAPTER OF THE)	
FEDERATION OF OREGON PAROLE AND)	
PROBATION OFFICERS,)	
)	
Complainant,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND ORDER
MULTNOMAH COUNTY,)	
)	
Respondent.)	

On June 25, 2020, this Board heard oral argument on Respondent's objections to a recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew on April 10, 2020, after submission of a stipulated record. The record closed on January 22, 2020, upon receipt of the parties' briefs.

Seth Davis, Attorney at Law, Fenrich and Gallagher, PC, of Eugene, Oregon, represented Complainant.

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

On August 15, 2019, the Multnomah County Chapter of the Federation of Oregon Parole and Probation Officers (FOPPO) filed a complaint alleging that Multnomah County (County) violated ORS 243.672(1)(g) when it did not comply with an arbitration award ordering the reinstatement of Parole and Probation Officer John Doe.¹ On December 2, 2019, the County filed an answer admitting and denying the allegations in the complaint.²

¹A pseudonym.

²FOPPO states, correctly, that the County did not assert any affirmative defenses in its answer, including an affirmative defense that reinstatement of Doe was barred by public policy. However,
(Continued. . .)

The issue in this case is: Did the County fail to comply with the Doe grievance arbitration award on the grounds that it was barred by public policy? If so, did the County violate ORS 243.672(1)(g)?

We conclude that the County violated ORS 243.672(1)(g).

RULINGS

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

FINDINGS OF FACT

1. The County is a public employer within the meaning of ORS 243.650(20). Its employees are organized into several bargaining units. The County includes the Multnomah County Department of Community Justice.

2. FOPPO is a labor organization as defined in ORS 243.650(13), and the exclusive representative of certain employees of the Multnomah County Department of Community Justice, including parole and probation officers.

3. The County and FOPPO were parties to a collective bargaining agreement (Agreement) defining the terms and conditions of employment for bargaining unit employees. The Agreement expired on June 30, 2020.

4. Article 15.1 of the Agreement governed discipline of bargaining unit members. It provided, in part:

“**1. General Principles:** Disciplinary action will only be imposed for just cause. Progressive disciplinary action shall be employed, provided that the severity of the offenses may warrant the imposition of disciplinary action at any stage of progressive discipline, including termination.

“* * *

“**3. * * * Dismissal:** The parties jointly recognize that the professional truthfulness, honesty, and integrity of Parole and Probation Officers are essential to effective performance. Consequently, the County may dismiss Parole and Probation Officers, for just cause which includes but is not limited to, in general, misconduct, inefficiency, incompetence, insubordination, or failing to fulfill responsibilities as an employee, and specifically, for stealing, untruthfulness in the line of duty, willful falsification of forms or other official documents, willful omission of material fact, personal possession or use of an illegal controlled substance, and legal convictions

(Continued. . .)

the parties debated the effect of public policy on the reinstatement ordered by the arbitrator before FOPPO filed the complaint, and this case was presented to the ALJ under an issue statement focused on the public policy issue without objection from FOPPO. Therefore, we consider the County’s public policy arguments.

which would interfere with an employee's ability to perform as a Probation and Parole Officer." (Emphasis added.)

5. Article 16.3 of the Agreement provided for grievance arbitration for alleged violations of the Agreement by the County and stated that "the decision of the arbitrator shall be binding on both parties."

6. Article 16.3 of the Agreement provided that FOPPO shall ask ERB to provide a panel of nine arbitrators; a coin flip will determine which party strikes from the list first; each party shall alternately strike two names; and the remaining name on the list shall serve as the arbitrator. It also stated, "The power of the arbitrator shall be limited to interpreting this Agreement and determining if the specific alleged violation occurred and to resolve the grievance within the terms of this Agreement."

7. On January 8 and February 27, 2018, Jane Smith,³ a coworker of Doe and his former romantic partner, reported to the County and local police, respectively, that Doe had engaged in a nonconsensual sexual act with her during otherwise consensual sexual activity, off duty, and outside of the workplace. Smith reported that this occurred on March 17, 2017, when Smith and Doe were in a consensual romantic relationship. In February through May, 2018, the County (through an outside investigator) and local police investigated the allegation. On May 7, 2018, the Washington County District Attorney informed the County that it would not prosecute Doe.

8. On June 1, 2018, the County investigator concluded that there was insufficient evidence that Smith withheld her consent to the sexual act on March 17, 2017. The investigator also concluded: "It is more likely than not that [Doe] was not honest nor truthful during this investigation [and the police investigation] when he denied" the sexual act occurred at all "on the night at issue." The investigator concluded that "the evidence supports a substantiated finding that [Doe] violated the Criminal Justice Code of Ethics because he was dishonest during this investigation."

9. On September 14, 2019, the County terminated Doe for untruthfulness during the County's investigation. FOPPO challenged that termination through the Agreement's grievance and arbitration procedure. That process resulted in a grievance arbitration on March 5, 2019, before Arbitrator Eric B. Lindauer.

10. The arbitrator summarized the parties' dispute as follows:

"The issue, as stipulated by the parties, is whether the County had just cause to terminate the employment of [Doe] on September 14, 2019 and, if not, what is the appropriate remedy. *The County terminated [Doe's] employment for being untruthful during an investigation.* In the Notice of Dismissal, the County set forth the basis for [Doe's] termination and concluded:

³A pseudonym.

“‘In accordance with Article 15.E, of the FOPPO collective bargaining agreement, ‘professional truthfulness, honesty, and integrity of Parole and Probation Officers are essential to effective performance’. *Your untruthfulness during this investigation is grounds for dismissal.*’” (Emphasis added.)

11. On May 21, 2019, the arbitrator issued an opinion and order. The arbitrator concluded that the County had established by clear and convincing evidence that Doe was untruthful during the investigation about whether the sexual act reported by Smith occurred at all. The arbitrator based his conclusion on a finding that Smith was more credible than Doe “on the critical issue of whether [Doe] engaged in” the sexual act, “based on the text messages between [Smith] and [Doe], the results of the two independent investigations, and the corroborating evidence of other witnesses.” The arbitrator was not asked to determine, and did not determine, the separate issue of whether the sexual act was nonconsensual.

12. The arbitrator evaluated the level of the County’s discipline, and concluded that the County’s penalty of discharge was unreasonable. The arbitrator reasoned that Doe’s dismissal should have been considered in the context of Doe’s off-duty relationship with Smith. The arbitrator also considered, in determining the reasonableness of the penalty, Doe’s tenure as a four-year employee with above-average job performance and the lack of progressive discipline.

13. The arbitrator ordered the County to modify Doe’s discharge “to a 30-day disciplinary suspension, without pay, extending from September 14, 2018 through October 13, 2018.” The arbitrator also ordered that Doe be offered “immediate reinstatement to his former position as a Parole and Probation Officer with Multnomah County and * * * be restored all lost wages, without interest, from October 14, 2018, to the date of his reinstatement * * *.” The arbitrator retained jurisdiction to July 20, 2019, to address any issues arising out of the implementation of his award.

14. On May 28, 2019, FOPPO attorney Seth Davis emailed Multnomah County attorney Kathryn Short to ask for a timeline on Doe’s reinstatement and back pay.

15. On May 31, 2019, Short told Davis by telephone that the County had reservations about reinstating Doe. The County proposed a settlement in which Doe would resign in exchange for the County paying all of Doe’s back pay and benefits without an offset of income earned after discharge.

16. On June 12, 2019, Davis emailed Short, stating that Doe was “‘not interested in anything short of the County’s application of Arbitrator Lindauer’s May 21st award.” Davis asked Short for a date upon which Doe would be reinstated. Short did not provide one, and told Davis that a colleague, David Landrum, would be handling the matter while Short was on an upcoming vacation.

17. On June 18, 2019, Davis emailed Landrum, asking for the date that the County would reinstate Doe and provide a statement of his back pay amount. Landrum replied that he would have some information within the next week.

18. On June 27, 2019, having received no response from the County about Doe's reinstatement, Davis left a phone message with Landrum and then emailed him for an update.

19. In a subsequent telephone call, Landrum stated that Multnomah County labor relations officials wanted to meet with FOPPO to discuss the next steps.

20. On July 16, 2019, Davis requested that the arbitrator extend his jurisdiction in the matter by 45 days because the County had not yet implemented the award. The arbitrator agreed to retain jurisdiction over the matter until resolution.

21. On July 18, 2019, Davis and FOPPO representative Jay Burke met with Multnomah County labor relations officials and Short to discuss the Doe matter. County officials declined to reinstate Doe. Instead, the County proposed that the parties jointly petition ERB for a declaratory ruling to determine if reinstating Doe would be contrary to public policy requirements. Davis supplied the County with relevant Oregon Court of Appeals case law in support of his argument that Doe's reinstatement would not be contrary to public policy.

22. As of the date of the parties' submission of stipulated facts, the County had not reinstated Doe or complied with any other provision of the arbitrator's award.

CONCLUSIONS OF LAW

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

2. The County violated ORS 243.672(1)(g) when it did not comply with the arbitration award and order requiring the County to reinstate Doe.

FOPPO contends that the County violated ORS 243.672(1)(g) when it declined to comply with an arbitrator's order to reinstate John Doe. Here, the parties agreed in Article 16.3 of their collective bargaining agreement to use binding arbitration as the sole and final means of resolving contractual grievances. An arbitrator, under authority of that article, issued an award requiring the County to reinstate Doe to his position. The County declined, and asserts that the arbitrator's award is unenforceable under ORS 243.706(1). For the reasons explained below, we disagree with the County.

Under ORS 243.672(1)(g), it is an unfair labor practice for a public employer to "[v]iolate the provisions of any written contract with respect to employment relations including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept arbitration awards as final and binding upon them." Public policy strongly favors the longstanding practice of using binding arbitration to resolve labor disputes. *See generally Marion County Law Enforcement Association v. Marion County*, Case No. UP-24-08 at 15-16, 23 PECBR 671, 685-86 (2010). In the labor context, unlike the commercial context, "'arbitration is the substitute for industrial strife' and 'part and parcel of the collective bargaining process itself.'" *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-022-16 at 8, 27 PECBR 112, 119 (2017),

aff'd, 298 Or App 332, 447 P3d 50 (2019) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 US 574, 578, 80 S Ct 1347, 1351 (1960)).

Consistent with these principles, when an arbitrator's decision is based on interpretation of the contract language, the parties are bound by that decision unless a statutory exception applies. *Clatsop Community College Faculty Association v. Clatsop Community College*, Case No. UP-139-85 at 16-17, 9 PECBR 8746, 8761-62 (1986). The Oregon Court of Appeals has held that this Board's consideration of arbitration awards is only a "sparing review, in the interest of promoting the efficiency and finality of arbitration as a decision-making process for those who contract to use it." *Fed'n of Or. Parole & Prob. Officers v. State, Corr. Div.*, 67 Or App 559, 563, 679 P2d 868, *rev den*, 297 Or 458, 683 P2d 1371 (1984). Further, this Board does not review an arbitrator's decision to determine whether it is right or wrong, and we must enforce the decision even if we believe it was erroneous. *Portland Association of Teachers and Hanna v. Portland School District 1J*, Case No. UP-64-99 at 22, 18 PECBR 816, 836-37 (2000), *ruling on motion to stay*, 19 PECBR 25 (2001), *aff'd without opinion*, 178 Or App 634, 39 P3d 292 (2002).

In this case, the County relies on the statutory exception in ORS 243.706(1). That statute provides:

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

To determine whether an arbitration award violates public policy within the meaning of ORS 243.706(1), we apply a three-part analysis. First, we determine whether the arbitrator found that the employee engaged in the misconduct for which discipline was imposed. If so, we then determine whether the arbitrator reinstated or otherwise relieved the employee of responsibility for the misconduct. If both of these tests are met, we then determine whether the award violates "a clearly defined public policy expressed in statutes or judicial decisions." *In the Matter of an Arbitration Between the State of Oregon, Department of Human Services v. Service Employees International Union, Local 503, OPEU*, Case No. AR-001-13 at 7, 25 PECBR 836, 842 (2013); *Portland Police Association v. City of Portland*, Case No. UP-023-12 at 18, 25 PECBR 94, 111 (2012), *aff'd*, 275 Or App 700, 365 P3d 1123 (2015).

The first and second components of the three-part test are present. Specifically, the arbitrator concluded that the County proved by clear and convincing evidence that it had just cause to discipline Doe for untruthfulness during the County's investigation.⁴ In addition, the arbitrator reinstated Doe, reducing the discharge to a 30-day suspension without pay. The arbitrator concluded that the penalty of discharge was unreasonable because Doe (a) was untruthful during the course of an investigation into off-duty conduct that occurred in the context of a consensual relationship, (b) worked for four years for the County with no prior disciplinary record and above-average performance, and (c) was not provided with progressive discipline.

We turn to the third, and dispositive, inquiry—whether the arbitrator's award violates a clearly defined public policy expressed in statutes or judicial decisions. At the outset, we note that the statutory public policy exception has stringent requirements. The Oregon Supreme Court has instructed us that we may not overturn an arbitrator's award because we believe that an *employee's conduct* violated public policy. Rather, “[t]he proper inquiry * * * is whether the *award itself* complies with the specified kind of public policy requirements.” *Wash. County Police Officers’ Ass’n v. Wash. County*, 335 Or 198, 205, 63 P3d 1167 (2002) (*Washington County I*) (emphasis in original). The public policy requirements must be found in statutes and judicial decisions; we may not consider “statements of public policy that, arguably, we might find in administrative rules, employment manuals, office policies, or proclamations by administrative officials.” *Id.* Further, the public policy requirements must be “clearly defined.” *Id.* Consequently, “to be pertinent to our analysis, a statute or judicial decision must outline, characterize, or delimit a public policy in such a way as to leave no serious doubt or question respecting the content or import of that policy.” *Id.* at 205-06.

Here, the court of appeals decision in *Wash. County Police Officers’ Ass’n v. Wash. County*, 187 Or App 686, 69 P3d 767 (2003) (*Washington County II*), on remand from the Oregon Supreme Court, controls our analysis. In that case, the grievant, a sheriff's deputy, tested positive for marijuana use. During the employer's internal investigation, the grievant initially lied about using marijuana, but eventually admitted off-duty use. The employer terminated him. An arbitrator ultimately rejected the employer's argument that there was just cause to terminate the employee for dishonesty and ordered his reinstatement. Relying on ORS 181.662 (1999), which prohibited the certification of a public safety officer who has been convicted of unlawful use of a controlled substance, the employer declined to reinstate the grievant.

⁴The arbitrator reached that conclusion by determining that, “on the critical issue of whether [Doe] engaged in” the sexual act at issue, Smith's testimony was “more credible based on the text messages between [Doe] and [Smith], the results of the two independent investigations, and the corroborating evidence of other witnesses.” The arbitrator also expressly noted, however, that the County's investigator concluded that the “evidence was insufficient” to support Smith's allegation that the sexual act was nonconsensual, and that Doe was terminated for “being untruthful in his denial” that he and Smith engaged in the sexual act, and not for “whether it was nonconsensual.” Accordingly, the arbitrator concluded only that the sexual act did occur, and that Doe was untruthful about *that fact*.

On remand from the Oregon Supreme Court, the court of appeals described the “precise question” before it as whether a statute or judicial opinion stated a public policy “against reinstating a police officer whom an investigation has found to be, and who has admitted to having been, dishonest but who has not been convicted of dishonesty[.]” *Washington County II*, 187 Or App at 691. The court thus focused its analysis on whether the grievant’s “dishonesty, *as distinct from his use of marijuana*, made his reinstatement contrary to public policy.” *Id.* at 689 (emphasis added).⁵ The court noted that the relevant question was not the broader inquiry of “whether the public policy dictates that public safety officers should be honest.” *Id.* Finding no statute or judicial decision about reinstating a police officer who had admitted to having been dishonest but had not been convicted of dishonesty, the court held that the employer violated ORS 243.672(1)(g) when it declined to reinstate the grievant.

Applying that framework here, the only relevant question before us is whether Doe’s untruthfulness during an investigation into his conduct, as distinct from the allegation that he engaged in a nonconsensual sexual act with Smith, makes the arbitrator’s reinstatement order contrary to public policy. The County does not identify a statute or judicial decision pertinent to that precise question, and we have been unable to find one. In the absence of such a statute or judicial decision, under *Washington County II*, 187 Or App 686, there is no clear public policy within the meaning of ORS 243.706(1) that excuses the County from reinstating Doe. Consequently, the County violated ORS 243.672(1)(g) when it did not comply with the arbitrator’s order.

The County nonetheless argues that we should depart from the analysis compelled by *Washington County II* and consider a broader question—whether there is a clearly defined public policy against reinstating an employee whom a coworker accused of a nonconsensual sexual act, where the arbitrator specifically found that the accuser was more credible than the accused on the issue of whether the act occurred, even though the County did not raise, and as a result, the arbitrator did not address, the separate issue of whether the act was consensual.⁶ In support of its position, the County argues that Title VII of the Civil Rights Act and ORS 659A.030 impose liability on employers who know or should have known about harassment but fail to take

⁵The Oregon Supreme Court reasoned that, even accepting that ORS 181.662(3) “defined a public policy concerning the continued certification of a public safety officer who has been convicted of drug-related offenses,” the statute nonetheless did not define a clear public policy “respecting the continued certification of a public safety officer who has *not* been convicted of any offense.” *Washington County I*, 335 Or at 206 (emphasis in original). Consequently, the court concluded, the “statute does not define a clear public policy respecting the separate question of such an officer’s reinstatement.” *Id.* In so holding, the court rejected the contrary conclusion of the court of appeals, which had construed ORS 181.662 as adequately articulating, for purposes of ORS 243.706(1), a “clear statement of public policy against the continued certification of public safety officers who use controlled substances.” *Wash. County Police Officers’ Ass’n v. Wash. County*, 181 Or App 448, 454, 45 P3d 515 (2002).

⁶The arbitrator did not decide whether a nonconsensual sexual encounter occurred because the County terminated Doe only for untruthfulness during the County’s investigation, not for sexual harassment.

prompt and appropriate remedial action.⁷ Relying on those statutes, and on *Tomka v. Seiler Corp.*, 66 F3d 1295 (2d Cir 1995), the County asserts that reinstating Doe would be tantamount to exempting the County from its duties under Title VII.

In *Tomka*, the court held that a single off-duty incident of sexual assault can create a hostile work environment under Title VII. Here, however, the County's investigation did not determine that an off-duty sexual assault occurred. The County investigator's report did not discuss sexual harassment, and the County did not terminate Doe on the basis of sexual harassment. Because the County chose not to present the issue of whether Doe had engaged in conduct in violation of a sexual harassment policy, the arbitrator, appropriately, did not address that issue in the arbitration award or consider it when determining whether discharge was a reasonable penalty. In short, there has been no finding by an investigator or adjudicator that Doe engaged in conduct that constitutes sexual harassment. The county does not identify, nor have we, a statute or judicial decision that construes Title VII as requiring an employer to discharge an employee without such a finding.

The County acknowledges that there has been no such finding, but contends that this Board should independently assess whether Doe's conduct constituted sexual harassment. But "that approach, with its focus on the officer's conduct rather than on the arbitrator's award," has "been soundly rejected" by the Oregon courts. *Portland Police Ass'n v. City of Portland*, 275 Or App 700, 711, 365 P3d 1123 (2015) (where arbitrator determined that employee's conduct did not violate city policy, this Board may not "independently assess the arbitrator's decision regarding [the employee's] conduct").⁸ Further, even if the statute permitted us to adopt the

⁷Because ORS 659A.030 is substantially similar to Title VII, and Oregon courts analyze claims under these statutes together, for ease of readability, we refer only to Title VII throughout the remainder of this order. See *Winnett v. Portland*, 118 Or App 437, 442, 847 P2d 902 (1993) (ORS 659.030 is modeled after Title VII of the federal Civil Rights Act); *Heller v. EBB Auto Co.*, 8 F3d 1433, 1437 n2 (9th Cir 1993) ("Courts construe Oregon's statutory counterpart, [ORS] § 659.030 (1992), as identical to Title VII.").

⁸Relying on academic analysis of the legislative history of Senate Bill 750 (1995), the County urges us to revisit the limitation that we determine only whether the arbitrator's award (as opposed to the public employee's conduct) contravenes public policy. See, e.g., Henry H. Drummonds, *A Case Study in the ex Ante Veto Negotiations Process: The Derfler-Bryant Act and the 1995 Amendments to the Oregon Public Employee Collective Bargaining Law*, 14 LERC Monograph Ser 13 (1996); Nancy Hungerford, *The Continuing Public Policy Exception Conundrum*, 17 LERC Monograph Ser 59 (2003). Specifically, the County points out that ORS 243.706(1) expressly provides that an arbitration award that orders reinstatement "shall comply with public policy requirements as clearly defined in statutes or judicial decisions including but not limited to * * * sexual harassment or sexual misconduct" policies, and argues that this statutory language indicates that the legislature intended to bar reinstatement of employees who engage in that specific behavior. Even assuming that is correct, however, it does not follow that the statute authorizes this Board to independently assess whether the arbitration record establishes that the employee engaged in such behavior, either in a case where the arbitrator determined that the employee did not, or in this case, where the arbitrator was not asked to make such a determination. Moreover, the courts have authoritatively construed ORS 243.706(1) and clearly held that, "by its unambiguous terms, [ORS 243.706(1)] 'dictates that the public policy analysis be directed at the arbitration award itself, not the

(Continued. . .)

approach advocated by the County, it would be impossible to do so in this case because the County did not discipline Doe for engaging in sexual harassment, and, as a result, there is no arbitration record on that issue for this Board to independently assess.⁹

In reaching our conclusion, we recognize, as the County points out, that there is clear public policy requiring employers to prevent harassment. *See, e.g., Faragher v. City of Boca Raton*, 524 US 775, 806 (1998) (it would “implement *clear statutory policy* and complement the Government’s Title VII enforcement efforts to recognize the employer’s affirmative obligation to prevent violations” of Title VII) (emphasis added). Consistent with that obligation, employers have “a duty to ‘express[] strong disapproval’ of sexual harassment.” *Fuller v. City of Oakland*, 47 F3d 1522, 1529 (9th Cir 1995), quoting *Ellison v. Brady*, 924 F2d 872, 881 (9th Cir 1991). The duty to prevent harassment includes the obligation, when harassment occurs in the workplace, to implement remedial “actions * * * designed not only to prevent future conduct by the harasser, but also other potential harassers.” *McGinest v. GTE Serv. Corp.*, 360 F3d 1103, 1121 (9th Cir 2004) (discussing duties under Title VII in race-based harassment case). Further, even after an employer’s investigation has concluded that an employee’s complaint about a coworker was not substantiated, a court may find that the complainant proved that sexual harassment occurred. *See City of Oakland*, 47 F3d at 1529 (directing entry of judgment in favor of plaintiff on Title VII claim where employer investigated and found plaintiff’s allegations unsubstantiated, but court found that plaintiff proved the alleged conduct and that such conduct amounted to sexual harassment).

Nonetheless, if there is no actionable sexual harassment, an employer is not liable for “failure to take remedial steps” under Title VII. *Brooks v. City of San Mateo*, 229 F3d 917, 927 n 10 (9th Cir 2000); *see also City of Oakland*, 47 F3d at 1528 (once “an employer knows or should know of harassment, a remedial obligation kicks in,” citing *Steiner v. Showboat Operating Co.*, 25 F3d 1459, 1464 (9th Cir 1994)). Here, the County did not terminate Doe for sexual harassment, and, as a result, the arbitrator made no finding that sexual harassment occurred. Thus,

(Continued. . .)

conduct for which discipline was imposed.” *See Washington County I*, 335 Or at 205 (internal citation omitted); *Portland Police Ass’n v. City of Portland*, 275 Or App 700, 708, 365 P3d 1123 (2015) (“[T]he text of [ORS 243.706(1)] indicates that the focus of the public-policy condition is on the *consequence* that an arbitrator imposes for an employee’s misconduct.” (Emphasis in original.)).

⁹In the County’s view, the arbitrator generally found that Smith’s testimony at the arbitration was more credible than Doe; this credibility finding necessarily means that the sexual act was nonconsensual as Smith alleged; and therefore, the arbitration award provides this Board with sufficient information to determine that Doe’s conduct constituted sexual harassment, such that reinstatement of Doe would violate Title VII. We note that the arbitrator’s credibility finding was not as broad as the County suggests; rather, it was expressly limited to “the critical issue of whether [Doe] engaged in” the sexual act. But more importantly, we cannot, consistent with due process, determine whether Doe engaged in conduct that constitutes sexual harassment based on the arbitration award alone, when the County did not allege or try to prove at the arbitration hearing that Doe engaged in such conduct; FOPPO had no reason or opportunity to attempt to prove otherwise; and neither party briefed the pertinent legal issues.

we cannot conclude that the public policies in Title VII are pertinent to the analysis we are required to conduct under *Washington County II*.¹⁰

Therefore, we conclude that the County has not established that ORS 243.706(1) precludes enforcement of the arbitrator's award. The County has not demonstrated a clear public policy that prohibits the reinstatement of an employee who was untruthful during a workplace investigation. Consequently, we hold that the County violated ORS 243.672(1)(g) when it refused to comply with the arbitrator's award.

We turn to the appropriate remedy. Having found that the County violated ORS 243.672(1)(g), we order it to cease and desist from the unfair labor practice conduct. ORS 243.676(2)(b). We must also order affirmative action necessary to effectuate the purposes of PECBA. ORS 243.676(2)(c). We order the County to comply with the arbitrator's award within 30 days of the date of this order.

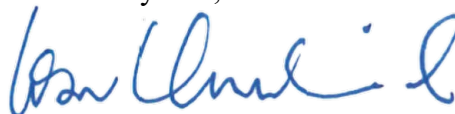
ORDER

1. The County shall cease and desist from violating ORS 243.672(1)(g).
2. The County shall comply with the arbitrator's award within 30 days of the date of this order.

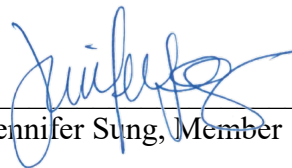
DATED: August 6, 2020.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

¹⁰We also note that, when a plaintiff alleges sexual harassment in violation of Title VII on the basis of a hostile work environment, the plaintiff must demonstrate that the alleged harasser's conduct altered the conditions of the plaintiff's employment. *Brady*, 924 F2d at 876. In the absence of evidence in this record about any effect on Smith's working environment (because sexual harassment was not at issue in the arbitration), we cannot say with "no serious doubt or question," see *Washington County I*, 335 Or at 205-06, that public policy embodied in Title VII prohibits Doe's reinstatement.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-012-19

(REPRESENTATION)

AMALGAMATED TRANSIT UNION,	)	
DIVISION 757,	)	
	)	
Petitioner,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND ORDER
SALEM AREA MASS TRANSIT DISTRICT,	)	
	)	
Respondent.	)	

Whitney Stark, Attorney at Law, Albies & Stark, LLC, Portland, Oregon, represented Petitioner.

Chris Duckworth, Attorney at Law, CDR Labor Law, Portland, Oregon, represented Respondent.

On July 31, 2020, Administrative Law Judge Jennifer D. Kaufman 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, OAR 115-010-0090(5) allows the Board to limit the precedential value of the final order. 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 petition is dismissed.

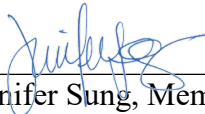
DATED: August 28, 2020.



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-012-19

(REPRESENTATION)

AMALGAMATED TRANSIT UNION	)	
DIVISION 757,	)	
	)	
Petitioner,	)	RECOMMENDED RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND PROPOSED ORDER
SALEM AREA MASS TRANSIT DISTRICT,	)	
	)	
Respondent.	)	

A hearing was held before Administrative Law Judge Jennifer Kaufman on February 12, 2020, in Salem, Oregon. The record closed on April 24, 2020, following receipt of the parties' post-hearing briefs.

Whitney Stark, Attorney at Law, Albies & Stark, LLC, Portland, Oregon, represented Petitioner.

Chris Duckworth, Attorney at Law, CDR Labor Law, Portland, Oregon, represented Respondent.

On December 20, 2019, Petitioner Amalgamated Transit Union, Division 757 (Petitioner or ATU) filed a petition proposing a bargaining unit of operations supervisors.

On January 10, 2020, Respondent Salem Area Mass Transit District (the District) filed objections to the petition asserting that all of its operations supervisors are supervisory employees within the meaning of ORS 243.650(23), and are therefore excluded from representation.

For the reasons explained below, we conclude that operations supervisors are supervisory employees within the meaning of ORS 243.650(23). We therefore dismiss the petition.

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).
2. The District is a public employer within the meaning of ORS 243.650(20).
3. ATU represents a bargaining unit of transit operators, maintenance workers, and facilities workers at the District. The parties' current collective-bargaining agreement is effective July 1, 2018, through June 30, 2021.

Overview of Operations

4. The District provides mass transit services in the greater Salem area. The majority of the District's day-to-day operations take place within the Operations Division, which is overseen by Chief Operating Officer and Deputy General Manager David Trimble. The Operations Division houses a Transportation Department, a Maintenance Department, a Planning Department, and a Contracted Services Department. The largest department within the Operations Division is the Transportation Department, which is responsible for all aspects of service delivery.

5. The Transportation Department is overseen by Transportation Manager Mark Poulson. Beneath Poulson are Assistant Transportation Manager Don Clifford, Transportation Training Supervisor Don Rundle, 10 operations supervisors, about 124 transit operators, and an administrative assistant.

6. Assistant Transportation Manager Clifford assists Manager Poulson with day-to-day management duties, fills in for Poulson as needed, and acts as a liaison between the operations supervisors and upper management. Clifford works closely with the operations supervisors, for whom he functions as a sounding board, but he does not supervise them. Operations supervisors report to Transportation Manager Poulson. Each operations supervisor is responsible for a team of a roughly equal number of transit operators. Manager Poulson is also marginally involved in the day-to-day work of the transit operators.

Operations Supervisors

7. Operations supervisors perform three roles: road supervisor, dispatcher, and scheduler. All operations supervisors are trained in each of the different roles and share the same authority.¹

¹Although there is some evidence that operations supervisors rotate among the three roles and fill in for one another, the full extent of their interchange is unclear. The parties do not always distinguish among the three roles, and frequently refer to them as simply "operations supervisors."

8. Dispatchers work in the office, where they receive and log radio calls from operators and handle situations that arise with buses on the road. As explained more fully below, dispatchers are responsible for assigning work that arises as a result of operator illness, service disruptions, and other issues.

9. Road supervisors work in the transit system, where they ensure that the system runs smoothly and according to schedule. Road supervisors conduct time point checks throughout the day, survey traffic accidents for potential service impacts, evaluate mechanical issues, conduct initial investigations of accidents involving District vehicles, and handle disturbances caused by passengers. Road supervisors collaborate with dispatchers to reroute buses when needed.

10. Schedulers work in the office, assigning open work to the District's "extra board" operators. As explained below, extra board operators are assigned open work pursuant to the rules of the collective-bargaining agreement.

11. The job description for the operations supervisor position describes the essential functions of the position as follows:

"Supervise a team of Transit Operators: provide necessary training including classroom and behind-the-wheel instruction; monitor performance to assure maintenance of schedules and compliance with all operating policies, procedures and service standards; provide recognition for good work; provide corrective counseling as needed; conduct performance evaluations; administer discipline; recommend terminating if necessary.

"Dispatch Transit Operators and equipment to assure daily service levels: assign open work coordinating work assignments on the extra board; assess Transit Operator fitness for duty and take appropriate action when necessary; monitor and respond to radio transmissions; coordinate bus assignments with maintenance; coordinate emergency adjustments in routes, driver and equipment assignments; process leave requests; maintain dispatch logs.

"Monitor service routes to assure roads are open and safe; communicate with other District personnel to coordinate special event services, implement snow and ice procedures, route detours and other operational variations.

"Conduct on-site accident investigations (both vehicular and on-the-job injury); assure appropriate authorities, District personnel and/or emergency personnel are contacted; assure proper documentation; determine need for post-accident drug and alcohol testing; transport Transit Operator for testing if necessary.

"Investigate and resolve incidents; exclude or assist security/police with exclusions (service denials); clean and disinfect biohazard spills and dispose of waste in accordance with law and District policy.

“Assist in establishing departmental safety and security procedures and enforce these procedures to reduce or minimize departmental safety and security risks.

“Investigate and document customer service complaints and compliments; resolve or provide guidance toward resolution of problem situations.

“Monitor transit mall: document late buses and unusual incidents; assure buses are safely and securely parked; assure correct destination signs are displayed; provide information to the public on schedules and other transit information.

“Participate in the screening and selection process for Transit Operators; recommend new hires.

“Submit recommendations for reducing costs and/or increasing efficiency.

“Develop or assist in developing training programs for transit operators related to specific functions of their jobs.

“Drive a transit bus in an emergency or other circumstances where it is deemed necessary to keep service running on schedule.

“Provide assistance and support to the Fixed Route Manager as needed by working on special projects or committee assignments.”

(Exh. R-9 at 1-2.)

Assignment

12. Transit operators bid on their positions three times annually. The positions up for bid include regular route operator, vacation relief operator, and “extra board” operator. The number and type of each position available for bidding are determined by upper management. In the most recent round of bidding before the hearing, there were 15 extra board operator positions.

13. Extra board operators fill open work on an as-needed basis. The assignment of open work to extra board operators is controlled by a complex set of rules in the collective-bargaining agreement, but in general, extra board operators are assigned work based on seniority and their positions on a rotating list.

14. The scheduler assigns open bus runs to extra board operators by 3:30 p.m. each day. The scheduler also assigns extra board operators to work as “report operators” each day, meaning that they report to work at a designated time and wait to be dispatched if the need arises. The number of report operators scheduled on a given day is up to the discretion of the scheduler, who looks at the amount of open work from the previous day and the reasons why work became available, and tries to anticipate the operational needs for the next day. Some schedulers prefer to “run lean,” meaning to have fewer report operators sitting at the office, while other schedulers prefer to have additional report operators on hand in case work comes up. The advantage of

“running lean” is that there are fewer operators getting paid while not working. If the scheduler does not assign enough report operators, however, it may be necessary to call in additional operators, necessitating the payment of overtime.

15. Same-day work is assigned to extra board operators by the dispatcher. When an operator needs to be replaced because, for instance, the operator becomes ill or a District vehicle has been involved in an accident, a road supervisor notifies the dispatcher that a replacement is needed and the dispatcher consults the extra board and assigns a report operator to the bus run in conformity with the rules of the collective-bargaining agreement.

16. Same-day work may also be assigned to report operators when regular operators fail to report on time, in which case operations supervisors have the discretion to allow the operator to work his or her shift, or to send the operator home without pay and assign the run to a report operator. For example, on May 13, 2019, Operations Supervisor Al Bathke allowed a late reporting operator to work even though there were 12 report operators scheduled that day. Assistant Manager Clifford questioned Bathke about that decision, and Bathke explained that the operator was already on her way in to work when she called in and that although it appeared they had enough resources, there were seven pieces of open work waiting to be filled, it was a Monday, it was the first day of new operator training, and the operator’s estimated arrival time at work provided enough time for her to meet her first scheduled time point.

17. Operations supervisors have the authority to call in operators on overtime to fill open work or to be available in case open work arises. For example, if the scheduler realizes that all of the extra board operators have assignments the following day, the scheduler may solicit volunteers to be report operators. Operations supervisors do not exercise discretion regarding which operators are offered overtime work. All overtime work is offered to operators by seniority, pursuant to the rules of the collective-bargaining agreement.

18. Operators bid on vacation days four times annually. Pursuant to the rules of the collective-bargaining agreement, three operators are permitted to take vacation leave each day. Operations supervisors have the discretion, however, to approve additional operators to take vacation leave through same-day requests. In determining whether to approve same-day vacation requests, operations supervisors consider whether there are enough operators to cover any open runs that come up, keeping in mind that if there are not enough extra board operators scheduled and open work arises due to unforeseen circumstances, then the District will have to pay overtime. For example, Operations Supervisor Tyler Burgett granted an operator’s request for same-day vacation leave when her grandmother was hospitalized, reasoning that he had an extra board operator available. The next day, Burgett denied the operator’s request for an additional vacation day because he did not have anyone available to cover her shift. Ultimately, Burgett determined that the operator was too distressed to work, so he approved the driver to take unpaid leave.

19. Operations supervisors have the discretion to relieve operators from their shifts early, with pay, in certain circumstances. Pursuant to the collective-bargaining agreement, operators are required to have a minimum of nine hours of rest between shifts (the “9-hour rule”). If an operator on duty is scheduled for a later shift that conflicts with the 9-hour rule, operations supervisors have the discretion to send the operator home with pay and have another operator

finish the run, or to modify the operator's starting time for their next shift and have a report operator complete the first part of the run. After a report operator has been on report for five hours, an operations supervisor has the discretion to send the operator home with pay for his or her full shift, thereby preventing the District from having to pay overtime should a piece of work open up that would necessitate the operator staying on duty longer than eight hours.

Direction of Operators

20. The turn-by-turn directions that operators follow are created by the Planning Department. Occasionally, operations supervisors revise route directions. For example, when there are street closures to accommodate community events such as parades, it is up to an operations supervisor to examine the information provided by whatever entity requested the street closure, determine which routes will be affected, determine if there is a way to efficiently maintain service, and plan any necessary detours.

21. Operators are not authorized to deviate from their routes without consulting the dispatcher. For example, if an operator makes a wrong turn, the protocol is for the operator to notify the dispatcher of their off-route status and request a correction.

22. From time to time, the District experiences service disruptions resulting from weather, traffic, mechanical issues, or customer incidents. Road supervisors are dispatched to evaluate service disruptions and make recommendations to the dispatcher about the most effective way to restore on-time service. The dispatcher may address the service disruption with steps including rerouting the bus involved, sending out another operator to service the affected run, and/or directing the operator to go out of service until they can get caught up and reenter the system on schedule.

23. When there is an accident involving a District vehicle, a road supervisor is typically dispatched to the scene to make a determination whether the bus is safe to operate or must be taken off the road immediately. It is then up to the dispatcher to determine how to continue service. For a minor issue such as a broken headlight, the dispatcher may direct the operator to pull the bus into the station out of service at the end of the route and continue with a replacement bus. The dispatcher might also choose to put a report operator on standby in case replacement is necessary. For example, the dispatcher might relieve the operator from driving duty so that necessary paperwork can be completed. If a replacement operator is necessary, the work is assigned to an extra board operator in conformity with the rules of the contract.

24. If there is a traffic delay due to an accident that does not involve a District vehicle, a road supervisor surveys the situation and makes a recommendation to the dispatcher about how to reroute the bus. When rerouting a bus is necessary, operations supervisors consider factors including the safety of the alternate route, how many stops will be missed, and how to get the bus as close to on-schedule as possible. For example, a few days before the hearing in this matter there was a significant traffic disruption caused by an accident that caused four bus routes to be delayed. Operations Supervisor Tyler Burgett handled the situation by directing an extra board operator to take out an extra bus to handle the inner routes of two of the affected bus lines. Burgett held one of the delayed drivers in place and directed her not to start driving until her next scheduled

departure time from that stop, and directed another delayed driver to complete half of her route, and then jump over to the other side of her route where she would have been if she were on time.

25. Operations supervisors do not consult with management when making decisions about how to handle service disruptions. Operations managers are not subject to discipline or other consequences in connection with their judgment calls on how to handle service disruptions.

26. Operations supervisors are not held accountable for the job performance of transit operators. There are no consequences, either positive or negative, for operations supervisors as a result of the performance of the operators they work with.

Discipline

27. Pursuant to the collective-bargaining agreement, the first level of discipline is a written warning. Verbal and written reminders are not considered discipline under the collective-bargaining agreement.

28. Operations supervisors issue written warnings, but suspensions and terminations are handled by upper management.² Short of discipline, operations supervisors issue verbal and written reminders. Those corrective actions are documented as a “confirmation of discussion” or a “verbal reminder” in a database known as “supervisor contacts.” Although verbal and written reminders are not considered discipline, they may be taken into consideration when evaluating whether to issue a written warning.

29. The District maintains a document entitled “Corrective Action – Important Steps” (Corrective Action memo) that provides written guidance to operations supervisors for handling discipline. The Corrective Action memo summarizes the steps to be taken by operations supervisors when evaluating potential discipline as follows:

- Identify and notify direct Supervisor of violation (behavior or pattern of poor performance)
- Discuss with Transportation Manager or Assistant Transportation Manager to identify a course of action
- Hold an investigatory meeting with the employee (offer Union representation to employee)
- Discuss investigation findings with Transportation Manager or Assistant Transportation Manager
- Issue corrective action

(Exh. R-11 at 1.)

²Although Manager Poulson testified that operations supervisors can recommend suspension or termination of operators, no specific evidence was presented in support of this assertion.

30. The Corrective Action memo contains a list of infractions and the appropriate consequences. For example, the consequences for reporting late are: first violation (within any 12-month period), verbal warning with a written reminder; second violation, written warning; third violation, unpaid suspension considered; fourth violation, termination considered.³ The memo lays out consequences for unauthorized leave, poor attendance, red light violations, safety violations, inappropriate or unprofessional conduct, and standard policy violations. The consequences are not automatic for every situation. For example, the consequence for a first red light violation is “written warning considered.” (Exh. R-11 at 3.) The Corrective Action memo also advises that there will be personnel issues that come up that are less common, and states, “When a rare situation presents itself it is important to discuss the situation as soon as possible with the Operations Manager to identify a plan of action.” (Exh. R-11 at 4.)

31. Operations supervisors initiate investigations into transit operator conduct when the District receives a customer complaint about an operator or an operations supervisor personally observes a performance issue. Operations supervisors begin the investigation with a review of the operator’s personnel file to determine if there have been any previous issues within the past 12 months. The investigation may also include a conversation with the operator and a review of any video footage of the incident. In some situations, Assistant Manager Clifford also reviews the video footage. At this stage, operations supervisors may confer with Clifford to determine whether there is a potential for discipline. If it appears that discipline (*i.e.*, a written warning) may be warranted, then the operations supervisor conducts an investigatory meeting with the operator and an ATU representative and gives them a chance to present their position. After the investigation is completed, the operations supervisor determines whether a written warning is warranted. In doing so, the operations supervisor confers with Clifford, who acts as a sounding board and assists operations supervisors to determine appropriate next steps.⁴

32. Operations supervisors do not deviate from the guidance provided in the Corrective Action memo without management approval. If an operations supervisor is uncertain about what corrective action is appropriate in a given situation, Assistant Manager Clifford is consulted. For example, on December 6, 2019, Operations Supervisor David Bryson consulted Assistant Manager Clifford asking whether a supervisor contact would be sufficient for an operator who had not shown up for work, but had no previous no shows or late reports, or if a written warning should be issued. Clifford advised that as long as the issue was documented, it could be either a supervisor contact or a written reminder. On another occasion, Operations Supervisor Burgett issued a written warning to an operator for a red light violation. Because the operator had a prior history, the operator could have been eligible for either a written warning or a one-day suspension. Burgett consulted with Clifford and they decided to issue the lesser discipline.

³The Corrective Action memo states that “[d]isciplinary issues that could result in an [u]npaid [s]uspension or [t]ermination will be led by the Transportation Manager or Assistant Transportation Manager.” (Exh. R-11 at 2.)

⁴Operations supervisors may also recommend retraining for operators who have driving issues, such as, for example, right turn clearance problems. The record does not contain detailed, specific evidence whether operations supervisors make those determinations on their own or with the approval of Assistant Manager Clifford. In any event, it does not appear that retraining is considered to be discipline.

33. Assistant Manager Clifford often agrees with operations supervisors' recommendations regarding whether to issue written warnings. For example, on December 24, 2019, Clifford emailed Operations Supervisor Bryson to notify him that an operator was involved in a minor accident that the operator failed to report. Clifford asked Bryson to "take a look in her file, I believe we had a failure to report recently with her. Once you look at her file let me know where you think we need to go with this." (Exh. R-25.) Bryson recommended a written warning, and Clifford agreed. On another occasion, after Operations Supervisor Burgess had met with an operator and an ATU representative about a problematic merge, he thought that discipline was not warranted. Burgess explained to Clifford why he did not want to issue discipline, and Clifford agreed.

34. When there is disagreement regarding whether a written warning should be issued, operations supervisors have an opportunity to explain their position to Assistant Manager Clifford, who may request additional investigation. For example, in November 2019, an operator was facing discipline for a road rage incident. Operations Supervisor Julie Ryan wanted to issue the operator a written reminder, but Assistant Manager Clifford thought the operator had some prior history that warranted discipline. Clifford asked Ryan to pull the operator's record for a history of unsafe driving. Because the operator had a clean record, Clifford agreed that they could issue a written reminder rather than discipline. On another occasion, in January 2020, Operations Supervisor Bryson wanted to issue a written reminder in connection with a late report, while Assistant Manager Clifford wanted to issue a written warning because he thought the operator had some prior history. Clifford conducted a search and found documentation of a prior attendance incident, which he showed to Bryson, and they decided to issue the operator a written warning.

35. Management has the final authority on whether to issue written warnings. On at least one occasion, Clifford overruled Training Supervisor Rundle's recommendation on whether to issue a written warning. Clifford has also overruled the disciplinary recommendations of Operations Supervisor Burgett.⁵

36. Written warnings are drafted by operations supervisors. Assistant Manager Clifford edits the written warnings for formatting and consistency, and then sends them back to the operations supervisor to issue to the operator.

37. Dispatchers conduct fitness for duty checks on operators at the beginning of their shifts. Dispatchers look for symptoms of fatigue or impairment, ensure that operators are in proper uniform, have necessary equipment, and appear fit to operate a vehicle. If the operator is not prepared to drive, the dispatcher may send the employee home on paid leave, or, if impairment is suspected, may direct the operator to remain at the facility for drug and alcohol testing. Operations supervisors receive training on reasonable suspicion for drug and alcohol use.⁶

⁵ Burgett testified that Clifford does not always follow his recommendations, but also testified "I can't say I've had him overturn too many of my judgments." (Burgett testimony.)

⁶The record does not contain specific evidence of an instance where an operations supervisor has sent an operator home or referred an operator for drug and alcohol testing because they appeared to be under the influence of drugs or alcohol. The District furnished a notice of paid administrative leave, pending the results of post-accident drug and alcohol testing, that was issued to an operator by Operations Supervisor

38. In September 2019, Operations Supervisor Bob Lehman notified Assistant Manager Clifford that he planned to relieve an operator who he had observed making multiple driving errors.⁷

Adjustment of Grievances

39. The collective-bargaining agreement includes a grievance and arbitration provision. Under that provision, grievances are processed by Chief Operating Officer and Deputy General Manager Trimble. Operations supervisors are not involved in the processing of formal grievances.

40. From time to time, an operator may claim that they were wrongfully passed over for open work. Those complaints can be investigated by operations supervisors, who look into the matter by reviewing the “open work worksheet” where all work that becomes available is recorded on a daily basis. If an operations supervisor determines that an assignment was made contrary to the rules of the collective-bargaining agreement, then the operations supervisor can make the operator whole with a pay adjustment. If no error is found, then an explanation is provided to the operator. No formal grievances have been filed over work assignments.⁸

Other Duties

41. When the District hires new operators, candidates are interviewed by a three-member panel that typically includes Manager Poulson, Assistant Manager Clifford, and an operations supervisor. Operations supervisors provide input on whether an individual should be hired and the panel comes to a consensus-based decision on whether to hire an applicant. Each panel member has an equal vote on whether a candidate should be hired.

42. Operations supervisors fill out annual performance appraisal forms for operators. The performance appraisals do not impact pay increases for operators, which are dictated by the terms of the collective-bargaining agreement.

Keith Rosentrater. Rosentrater testified, however, that he has no discretion under such circumstances because drug testing is mandatory after an accident that causes disabling damage to a vehicle or personal injury, and an operator is automatically placed on paid administrative leave in those circumstances. The notice of paid administrative leave issued by Rosentrater indicated that the leave was non-disciplinary.

⁷It is unclear whether Operations Supervisor Lehman suspected the operator of being under the influence of drugs or alcohol, or just driving poorly. Furthermore, the record does not reflect whether the operator was ultimately relieved or whether the operator was relieved with or without pay. Assistant Manager Clifford testified, “In the end, I believe [Lehman] determined that he should remove her from her work.” (Clifford testimony.)

⁸Assistant Manager Clifford and Operations Supervisor Rosentrater both testified that operations supervisors have the authority to investigate and remedy assignment errors, but there were no specific examples provided in support of those assertions.

43. New transit operators must complete a trial service period before advancing to career service status. During their trial service periods, operators are supervised by Transportation Training Supervisor Rundle. Operations supervisors give Rundle feedback regarding issues they notice with trial service employees, and Rundle makes a recommendation to Assistant Manager Clifford whether the operator should advance to career service status based on their performance during their trial period.

44. Operator-involved accidents are reviewed by an “Accident Review Board” (ARB) that is tasked with making a determination whether an accident was preventable, meaning whether the driver took all reasonable measures to prevent the accident from happening. The ARB is composed of two operations supervisors and a safety and loss specialist from another department. The ARB makes preventability determinations by majority vote. Drivers who have no preventable accidents on their record get non-monetary driver safety awards (a pin to wear on their uniforms). The ARB does not issue discipline.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The petitioned-for operations supervisors are supervisory employees within the meaning of ORS 243.650(23).

DISCUSSION

Under the Public Employee Collective Bargaining Act (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. “Supervisory employees” are not “public employees” and cannot be appropriately included in a bargaining unit. ORS 243.650(19); *City of Portland v. Portland Police Commanding Officers Association*, Case No. UC-017-13 at 22, 25 PECBR 996, 1017 (2014). For the following reasons, we conclude that operations supervisors are supervisory employees.

To determine supervisory status, we assess the criteria set forth in ORS 243.650(23)(a), 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 to recommend such action, if in connection therewith, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment.” ORS 243.650(23)(a).

The issue of supervisory 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) whether the employee has the authority to take action (or to effectively recommend action be taken) in any of the 12 listed activities; (2) whether the exercise of that authority requires “the use of independent judgment”; and (3) whether the employee holds the authority in the interest of management. *Portland Police Commanding Officers Association*, UC-017-13 at 22, 25 PECBR 99 at 1017 (citing *Deschutes County Sheriff’s Association v. Deschutes County*, Case No. UC-62-94 at 12, 16 PECBR 328, 339 (1996)). The enumerated supervisory functions in ORS 243.650(23)(a) are read in the disjunctive, such that an employee is a “supervisory employee” if the employee has authority under one of the 12 statutory criteria. *Portland Police Commanding Officers Association*, UC-017-13 at 22, 25 PECBR at 1017.

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*, Case No. C-210-82 at 14, 7 PECBR 5973, 5986 (1983). Evidence of an effective recommendation can be found by the lack of any independent review or investigation of the recommendation by a higher-level supervisor. *American Federation of State, County and Municipal Employees, Council 75 v. Lane County Sheriff’s Office*, Case No. C-281-79 at 11, 5 PECBR 4507, 4517 (1981). When determining whether an individual exercises independent judgment, the Board considers 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)); *AFSCME Council 75 v. Lane County Sheriff’s Office*, Case No. C-281-79 at 11, 5 PECBR 4507, 4517 (1981)).

This matter is investigatory, and neither party bears the burden of proof. *See* OAR 115-010-0070(5)(a). Before we will conclude that an otherwise “public employee” is a “supervisory employee,” however, there must be sufficient evidence establishing that the statutory exclusion applies. *Portland Police Commanding Officers Association*, UC-017-13 at 23, 25 PECBR at 1018. Mere inferences and conclusory statements are insufficient. *Id.* Accordingly, in the absence of detailed, specific evidence establishing that a petitioned-for employee has authority under ORS 243.650(23), we will conclude that the employee is not a supervisory employee. *Id.*

Here, the District contends that operations supervisors have the authority to assign, discipline, and adjust grievances. Respondent additionally argues that supervisory status is established by the operations supervisors’ roles in addressing service disruptions, their involvement in hiring, their investigation of accidents, and the input they provide regarding whether to advance probationary employees. We address these activities in turn.⁹

⁹During the hearing, the District stipulated that it was not contending that operations supervisors have the authority to transfer, lay off, or recall.

Assignment

As we explained in *Portland Police Commanding Officers Association*, UC-017-13 at 25-26, 25 PECBR 996, 1020-21, we follow the National Labor Relations Board's (NLRB's) guidance in *Oakwood Healthcare, Inc.*, and *International Union, United Automobile Aerospace and Agriculture Implement Workers of America*, AFL-CIO, 348 NLRB 686, 688-89 (2006), regarding the definition of the term "assign." The relevant discussion is as follows:

"The ordinary meaning of the term 'assign' is 'to appoint to a post or duty.' Webster's Third New International Dictionary 132 (1981). Because this function shares with other [Section] 2(11) functions--i.e., hire, transfer, suspension, layoff, recall, promotion, discharge, reward, or discipline --the common trait of affecting a term or condition of employment, we construe the term 'assign' to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment. * * *

"The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as 'assign' within our construction. However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to 'assign.' * * * In sum, to 'assign' for purposes of Section 2(11) refers to the * * * designation of significant overall duties to an employee, not to the * * * instruction that the employee perform a discrete task." *Oakwood Healthcare, Inc.*, 348 NLRB at 689.

With these standards in mind, we review the evidence to determine whether operations supervisors have the authority to assign or effectively recommend the assignment of employees under ORS 243.650(23)(a). We find that in certain circumstances, operations supervisors have the actual authority to make assignments.

Although many operators are appointed to their positions through a bidding process, extra board operators receive their assignments and reporting times from the scheduler each day. Even though operations supervisors do not select *which* extra board operators receive open work, a matter controlled by the rules of contract, operations supervisors nonetheless exercise significant discretion regarding other aspects of the assignment of open work. Accordingly, we do not conclude that the contractual rules regarding which operators receive open work are necessarily dispositive of whether operations supervisors utilize independent judgment in connection with the assignment of open work.

On the contrary, the record establishes that operations supervisors regularly exercise independent judgment in connection with the assignment of open work. Thus, operations supervisors decide how many report operators to schedule each day based on their assessment of what the next day's service needs will be. Operations supervisors decide whether to send report

operators home with pay after they have been on duty for five hours, thereby avoiding the potential for overtime, or whether to keep them on report in case additional open work comes up. Operations supervisors decide when to relieve on-duty operators, with pay, so that they will be available to report for their next shift without running into a conflict with the 9-hour rule. Operations supervisors call in operators to work overtime to fill open work or to be a report operator in case work opens up. As indicated above, operations supervisors have the discretion to either “run lean” or to have additional operators on hand in case of unforeseen circumstances. *See Portland Police Commanding Officers Association*, Case No. UC-017-13 at 32, 25 PECBR at 1027 (commanding officers did not exercise independent judgment when assigning overtime where assignment was limited by city policies and largely driven by minimum staffing requirements). Operations supervisors determine whether to allow late-arriving operators to complete their runs or whether to give the run to a report operator, based on their assessment of staffing levels. Operations supervisors have the authority to approve or deny same day vacation requests and unpaid leave, based on their assessment of whether they have enough resources to cover operational needs. Under these circumstances, we find that operations supervisors exercise assignment authority. *See Deschutes County*, UC-62-94 at 15, 16 PECBR at 342 (sergeants exercised “extensive” assignment authority where they authorized overtime, called in replacement deputies as they deemed necessary, allowed deputies to take time off, and could approve vacation as long as it did not conflict with master vacation list that would create staffing problem).

The record further establishes that operations supervisors exercise independent judgment and hold the authority to assign in the interest of management. The assignment determinations made by operations supervisors are not merely routine or clerical, but require operations supervisors to assess workload, staffing needs, and the likelihood of service disruptions, assessments that they make without consulting management. Furthermore, the operations supervisors’ exercise of assignment authority requires them to balance the District’s overall objective of delivering on-time service against the District’s interest in avoiding the payment of overtime. Accordingly, operations supervisors are protecting the interests of the employer and not acting in the capacity of a peer-to-peer relationship. *See Hillsboro Sergeant’s Association v. City of Hillsboro*, Case No. CC-009-14 at 6, 26 PECBR 491, 496 (2015).

For the reasons stated above, we find that there is sufficient evidence to establish that operations supervisors have the authority to assign employees within the meaning of ORS 243.650(23)(a). As set forth above, this conclusion is sufficient to establish that operations supervisors are “supervisory employees.” Nonetheless, we will address the additional arguments advanced by the District.

Discipline

This Board has considered five aspects of the discipline process when determining 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.

Here, the record is clear that operations supervisors do not suspend or discharge employees. Furthermore, the record contains no detailed, specific evidence in support of the District's assertion that operations supervisors recommend suspension and discharge of operators. Consequently, we do not find that operations supervisors effectively recommend suspensions or effectively recommend discharge within the meaning of 243.650(23)(a). *See Keizer Police Association v. City of Keizer*, UC-004-18 at 19, __PECBR at __ (May 28, 2019) (in the absence of detailed, specific evidence establishing that a petitioned-for employee has authority under ORS 243.650(23)(a), we will conclude that the employee is not a supervisory employee).

The evidence establishes that operations supervisors issue written warnings to transit operators. The evidence also establishes, however, that operations supervisors' discretion in doing so is limited by (1) the Corrective Action memo, and (2) the involvement of Assistant Manager Clifford. Although operations supervisors may deviate from the guidance provided in the Corrective Action memo, in practice, they do not do so without consulting with Clifford. Indeed, operations supervisors routinely consult with Clifford about whether to issue written warnings, and Clifford has the final say if there is a disagreement. Clifford also involves himself in the investigative process when he sees fit, occasionally reviewing video footage, requesting further investigation for prior history, or conducting that investigation on his own when he has doubts. Under these circumstances, we do not find that operations supervisors have independent authority to discipline or effectively recommend discipline. *See Portland Police Commanding Officers Association*, UC-017-13 at 22, 25 PECBR 996 at 1018 ("an effective recommendation can be found by the lack of any independent review or investigation of the recommendation by a higher level supervisor"); *Tualatin Police Officers Association v. City of Tualatin*, Case No. UC-61-89 at 10, 12 PECBR 413, 422 (1990) ("the direct and substantial involvement of higher authority usually precludes an accurate assessment of the subordinate's role and reflects * * * the retention of authority by management, rather than its delegation to a lower level.").

We turn now to the role that operations supervisors may play in sending employees home for appearing to be impaired by drugs or alcohol. As indicated above, the record contains no specific examples where an operations supervisor has actually done so. The District furnished a notice of administrative leave showing that an operator was placed on paid leave pending the results of a post-accident drug test, but the operations supervisor who issued that notice testified that such matters are not subject to discretion. Accordingly, the record contains insufficient evidence to demonstrate that operations supervisors exercise independent judgment when assessing whether operators appear to be under the influence of drugs or alcohol. Moreover, the notice states that the leave was non-disciplinary. In any event, we have previously explained that sending an employee home for a flagrant violation such as showing up for work while intoxicated is not an indicium of supervisory status because it does not require independent judgment. *Deschutes County*, UC-62-94 at 14, 16 PECBR at 341.

Responsible Direction

In arguing that operations supervisors have the authority to assign, the District relies, in part, on evidence regarding operations supervisors' handling of service disruptions. We find this evidence more properly evaluated under the factor of "responsible direction," and we analyze it accordingly.

In evaluating the factor of “responsible direction,” we again follow the NLRB’s guidance in *Oakwood Healthcare Inc.*, above, which held that for putative supervisors to meet this criterion, they must have employees under them and decide “what job shall be undertaken next or who shall do it.” *Oakwood Healthcare, Inc.*, 348 NLRB at 691. The direction must also be both “responsible” and carried out with “independent judgment.” *Id.* The NLRB explained that for direction to be “responsible,” the employee who is directing the work must be accountable for the success or failure of those whom they are directing:

“We agree with the circuit courts that have considered the issue and find that for direction to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. * * *

“Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Oakwood Healthcare, Inc.*, 348 NLRB at 691-92.

We have previously indicated that we agree with the NLRB's approach as described above, and in particular with the conclusion that the term “responsibly to direct” requires that a putative supervisor must be accountable (such that some adverse consequence may befall the supervisor) should the employees that they allegedly direct fail to adequately perform their duties. *Portland Police Commanding Officers Association*, UC-017-13 at 26, 25 PECBR at 1022.

Here, the record establishes that operations supervisors have operators working under them whom they direct regarding which jobs will be undertaken next. That is, when service disruptions arise, operations supervisors direct delayed operators whether to stay in their locations or to resume their runs, whether to go out of service, whether to reenter service at a different point on their route, and whether to detour and bypass segments of their route. Operations supervisors also direct replacement operators to service affected routes. Operations supervisors make those decisions independently or in consultation with other operations supervisors, but they do not solicit guidance from management.

The record does not establish, however, that there are any adverse consequences for operations supervisors should their attempts to restore timely service be unsatisfactory to management. Indeed, there is no record evidence that operations supervisors are held accountable for transit operators’ performance of their duties in any context. Accordingly, we do not find that operations supervisors’ direction of operators is “responsible.” Contrast *City of Keizer*, Case No UC-004-18 at 21, __ PECBR at __ (direction was responsible where sergeants would expect to be disciplined if they commanded a scene or community event at which officers performed their work improperly and sergeants were responsible for ensuring that the officers on their shift met

department standards). Consequently, we do not find that operations supervisors have the authority to responsibly direct employees within the meaning of ORS 243.650(23)(a).

Adjustment of Grievances

The District contends that operations supervisors have the authority to adjust grievances over the assignment of open work. The collective-bargaining agreement between the District and ATU specifies that the authority to process grievances rests with Chief Operating Officer and Deputy General Manager Trimble. In practice, there is no evidence that any formal grievances have been processed over the assignment of open work. Rather, the District contends that operations supervisors “adjust grievances” when they independently investigate operators’ complaints regarding scheduling errors and make operators whole for errors that resulted in a loss of pay.

The District cites no authority where this Board has conferred supervisory status based on the authority to *informally* remedy complaints that arise under a provision of a collective-bargaining agreement, where no grievance has been filed. Even if we were to hold that the authority to informally remedy scheduling disputes qualified as the “adjustment of grievances” under ORS 243.650(23)(a), however, there is insufficient evidence to do so in this case. Although the record contains conclusory testimony that operations supervisors independently conduct investigations of operator complaints that they were wrongly passed over for work, and that operations supervisors make operators whole for such errors, the testimony was not supported by any specific examples where it has actually been done. *City of Keizer*, UC-004-18 at 19, __ PECBR at __ (in the absence of detailed, specific evidence establishing that a petitioned-for employee has authority under ORS 243.650(23), we will conclude that the employee is not a supervisory employee). Accordingly, we do not find that operations supervisors have the authority to adjust grievances.

Other Duties

The District contends that various other duties of operations supervisors establish supervisory authority. We consider this evidence in turn.

We first address operations supervisors’ involvement in the hiring process. Although operations supervisors act as members of hiring panels, each panel member’s vote counts equally. We have previously held that participation as a member of a hiring panel, when the employee’s individual vote carries the same weight as other members of the panel, does not establish that a potential supervisor has the authority to effectively recommend the hiring of employees. *See, e.g., Group of Unrepresented Battalion Chiefs Employed by the City of Medford v. City of Medford*, and *IAFF Local 1431 v. City of Medford*, Case Nos. CC-002-14 & CU-003-14 at 23, 26 PECBR 294, 316 (2014); *City of Union v. Laborers' International Union of North America, Local 121*, Case No. UC-9-08, 22 PECBR 872, 887 (2008). In these circumstances, we do not find that operations supervisors have the authority to effectively recommend the hiring of transit operators.

The District also points to evidence that operations supervisors sometimes pass on their observations regarding trial service operators' performance to Training Supervisor Rundle. There is no specific evidence, however, that operations supervisors "recommend" whether trial service operators should be advanced to career status. Indeed, the record does not even establish whether Rundle's hiring recommendations are followed. As indicated above, input into the hiring process, on its own, is insufficient to establish hiring authority. Accordingly, to the extent the District is arguing that operations supervisors have the authority to promote or effectively recommend promotions based on the feedback they provide regarding trial service operators, we find insufficient evidence to confer supervisory status on that basis.

Next, we address evidence that operations supervisors fill out performance appraisals. Evaluation is not one of the statutory indicia of supervisory status, but "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)(internal citation omitted). Here, operators' pay increases are not tied to their performance appraisals. Nor does the record establish that performance appraisals have other consequences, positive or negative, for operators. Accordingly, we do not find this evidence indicative of supervisory status. *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) (evaluation authority is not a statutory criteria and is not considered when not relevant to discipline, hiring, or discharge).

Finally, we turn to the role that operations supervisors play as members of the ARB that investigates accident preventability. Operators who have a clean safety record do not receive monetary rewards, but do receive a pin to wear on their uniforms. Even assuming that the pin constitutes a "reward" within the meaning of ORS 243.650(23)(a), the evidence does not specifically establish that operations supervisors have the authority to make those rewards or to effectively recommend them, only that operations supervisors serve as members of a committee who collectively determine whether accidents were preventable. It is also unclear whether the ARB issue safety pins to employees, whether they make recommendations to management to do so, or whether management issues safety pins to operators on their own. Consequently, to the extent the District is arguing that this evidence establishes the authority to reward employees, we find insufficient evidence to support that conclusion.¹⁰

////

////

¹⁰The District also contends that the ARB's determinations can result in discipline; however, the ARB does not issue discipline and there is no record evidence that the ARB has been asked to recommend whether discipline should issue in connection with their accident preventability investigations. Accordingly, we do not find that argument persuasive.

CONCLUSION

Operations supervisors have the authority to assign within the meaning of ORS 243.650(23)(a). Accordingly, the proposed unit of operations supervisors is not an appropriate unit for collective bargaining.

PROPOSED ORDER

The petition is dismissed.

SIGNED AND ISSUED on July 31, 2020.



Jennifer D. Kaufman
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. UC-004-19

(UNIT CLARIFICATION)

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

On July 23, 2020, this Board heard oral argument on Respondent's objections to a recommended order issued by Administrative Law Judge (ALJ) Jennifer D. Kaufman on May 29, 2020, after a hearing held before ALJ Martin Kehoe on January 17, 2020, in Portland, Oregon. The record closed on February 19, 2020, following receipt of the parties' post-hearing briefs.

Jason Weyand, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented the Petitioner.

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

On April 5, 2019, Oregon AFSCME Council 75, Local 88 (the Petitioner), filed a petition seeking clarification of its general employee bargaining unit to include an Administrative Analyst position. On April 25, 2019, Multnomah County (the County) filed objections to the petition, asserting that the petitioned-for employee is a confidential employee within the meaning of ORS 243.650(6). On July 30, 2019, the Petitioner amended its petition, seeking to clarify a second Administrative Analyst into the bargaining unit. The Petitioner asked us to determine the status of both positions in a single proceeding. The County did not object to that request.

The issue at hearing was whether the petitioned-for Administrative Analysts are confidential employees within the meaning of ORS 243.650(6). In the May 29, 2020, recommended order, the ALJ concluded that neither employee was confidential and clarified the unit to include both employees. At oral argument, the County conceded that one of the employees (Administrative Analyst Hunter, who currently supports the interim Primary Care Services Director), is not a confidential employee. We accept the concession and treat it as a withdrawal of the objection to including that employee in the unit.

The remaining issue is whether the other petitioned-for Administrative Analyst (Johnston, who currently supports the interim Integrated Clinical Services Director), is a confidential employee within the meaning of ORS 243.650(6). We conclude that the petitioned-for employee is not a confidential employee and therefore is properly included in the bargaining unit. Accordingly, we grant the petition.

RULINGS

The rulings of ALJ Kehoe were reviewed and are correct.

FINDINGS OF FACT¹

The Parties

1. The Petitioner is a labor organization within the meaning of ORS 243.650(13).
2. The County is a public employer within the meaning of ORS 243.650(20).
3. The Petitioner represents a countywide bargaining unit of approximately 3,200 general employees. The collective bargaining agreement covering the general employee unit is effective July 1, 2017, through June 30, 2020.

Integrated Clinical Services Operations

4. The County Health Department is the largest department within the County, with approximately 1,500 employees. The Health Department contains numerous divisions, the largest of which is Integrated Clinical Services (ICS). ICS functions as a community health center providing direct clinical services to the public. Approximately 800 employees work in the ICS division, about 350 of whom work in primary care clinics.
5. ICS employees in the general employee unit include office assistants, medical assistants, eligibility specialists, psychologists, health consultants, and program specialists. The Petitioner also represents ICS employees in a single classification unit of physicians (the “physicians unit”) and a single classification unit of dentists (the “dentists unit”).

¹In light of the County’s concession that Hunter is not a confidential employee, we have narrowed the findings of fact and conclusions of law to address only the confidential status of the Administrative Analyst (Johnston) who supports the interim ICS Director (Wheatt-Delancy).

The physicians unit, organized in late 2013, contains approximately 20 employees. The current collective bargaining agreement for the physicians unit is effective from 2016 through 2020. The dentists unit, organized in January 2018, contains approximately 22 employees. The current collective bargaining agreement for the dentists unit is effective from 2018 through 2022. In addition to employees represented by AFSCME, the Health Department also has employees represented by the Oregon Nurses Association (ONA). These three bargaining units (representing physicians, dentists, and nurses) are specific to the Health Department.

6. Latasha Wheatt-Delancy has been the interim ICS Director since January 6, 2020 (just 12 days before the hearing in this matter). Before moving into her current position, Wheatt-Delancy was the Primary Care Services Director. The previous ICS Director, Vanetta Abdellatif, vacated her position shortly before the hearing in this matter. Reporting to Wheatt-Delancy are the ICS Deputy Director, Medical Director, Dental Director, Primary Care Services (PCS) Director, Quality Director, and two Co-Pharmacy and Lab Services Directors. Adrienne Daniels is the ICS Deputy Director and the interim Quality Director.

The ICS Administrative Analysts

7. The two petitioned-for employees are Administrative Analyst Anna Johnston, who supports interim ICS Director Wheatt-Delancy; and Administrative Analyst Priscilla Hunter, who supports interim PCS Director Dawn Shatzel and PCS Deputy Director Powers. Hunter and Johnston report to Deputy Director Daniels, but they also receive duties and assignments from the directors that they support. As explained below, the administrative support structure in ICS has undergone a number of recent changes.

8. Before the petitioned-for Administrative Analyst positions were created in ICS, the Director was supported by Executive Specialist Jordana Sardo, and the PCS Director was supported by Executive Specialist Erin Halton. Sardo was hired in August 2015 as an Administrative Specialist supporting former Director Abdellatif and former Quality Director Shatzel. Sardo's day-to-day duties included scheduling meetings, assisting with preparation of meeting materials, and handling telephone and email communications with Health Department leaders. The Administrative Specialist position description specifies the position's functions as 40 percent high-level administrative support, 20 percent meeting management, 20 percent communication, 10 percent project and program coordination and management, 5 percent other duties as assigned, and 5 percent maintaining a safe and healthful workplace. Sardo did not handle matters related to bargaining or grievances. Sardo's Administrative Specialist position was eventually reclassified as an Executive Specialist position, but her duties did not change as a result of the reclassification. The Administrative Specialist and Executive Specialist positions were both included in the general employee bargaining unit.

9. In February 2018, Sardo moved into a temporary, work-out-of-class position as an Administrative Analyst supporting former Director Abdellatif. The temporary position description states that the position was created "due to changes and increased demands placed on the Integrated Services Director, division and Health Department as a whole based on influx of FamilyCare

patients, changes within Health Department management structure, funding sources, etc.”² The temporary position description specifies the position’s functions as 50 percent administrative support to the Division and Co-Department Director, 25 percent Co-Interim Health Department Director Office Liaison, 15 percent public inquiries and complaints, and 10 percent special projects as assigned. Sardo’s day-to-day duties included prioritizing the Director’s emails and preparing agendas and materials for ICS leadership meetings. The materials prepared by Sardo did not relate to bargaining or grievances, and Sardo did not attend the leadership meetings. With one exception, when Sardo assisted with a request to put together a timeline of reprimands related to a grievance, Sardo was not involved with matters related to grievance processing or bargaining in her work-out-of-class position.

10. Sardo remained in the work-out-of-class position until July 2019, when she moved into her current position as an Executive Specialist supporting the ICS Medical and Dental Directors. Sardo does not handle matters related to grievances or bargaining in her current position, which is a represented position.

11. In February 2018, Johnston was hired as a temporary Executive Specialist supporting Latasha Wheatt-Delancy, who was the PCS Director at the time, and Debbie Powers, who was the Deputy Director of Operations at the time.

12. In June 2018, Deputy Director Daniels submitted a request to the County’s Classification and Compensation Unit requesting reclassification of Johnston’s temporary Executive Specialist position to an Administrative Analyst position. The reclassification request specified that the new position would be less involved with communications and meeting management and would have new duties involving personnel matters, collective bargaining support, and assisting the PCS Director with special projects. In July 2018 the reclassification request was approved. The County determined that the new position would be non-represented because it would involve access to, and work with, confidential information related to employee performance and collective bargaining.

13. On August 21, 2018, Johnston moved into the Administrative Analyst position as a permanent employee. The position description specifies the position’s functions as 40 percent high-level administrative responsibilities, 30 percent human resources and collective bargaining support, 15 percent special projects and program coordination, and 15 percent communication. The position description lists the following duties related to human resources and collective bargaining support:

“In partnership with Primary Care managers and Health Human Resources, coordinate personnel administration activities for the office; maintain confidentiality with sensitive personnel and labor relations information; working with Human Resources, review, draft and edit disciplinary actions for Primary Care staff.

²Between 2014 and 2016, the division of Mental Health and Addiction Services transferred over to the Health Department, resulting in an influx of approximately 200 to 300 bargaining unit employees. Additionally, with the implementation of Workday, a system for tracking employee payroll and other personnel related matters, the workload related to personnel matters has increased.

“Analyze data related to grievances, budgets, and collective bargaining issues; summarize and update Primary Care Director and Deputy Director on matters relevant to ICS, Primary Care and other areas within the Health Department.

“Perform tasks to support discipline strategy formulation, including research into leading practices for clinic management, personnel support, and staff development trainings.

“Analyze and review state, federal, and local laws/regulations/policies/procedures which impact the business practices of Primary Care Operations to ensure compliances and alert the Primary Care Services Director and/or Deputy Director to changes – may include scope of practice changes, reimbursement requirements, or accreditation policies.

“Verify information with Health Human Resources in areas of labor contracts, Personnel Rules, Health Administrative Guidelines, state and federal laws, payroll requirements for changes/terminations, etc.”

14. On August 15, 2019, Hunter was hired to fill a newly created Administrative Analyst position supporting former ICS Director Abdellatif and former Quality Director Shatzel. The position description specifies the position’s functions as 45 percent administrative support, 30 percent human resources and collective bargaining support, 15 percent coordination with County leadership, and 10 percent special projects and program coordination. The position description lists the following duties related to human resources and collective bargaining:

“In partnership with managers and Health Human Resources, coordinate personnel administration activities for the office; maintain confidentiality with sensitive personnel and labor relations information to include confidential, employee discipline and collective bargaining actions; working with Human Resources, review, draft and edit disciplinary actions on behalf of ICS Director and Quality Director; analyze data related to grievances and collective bargaining issues; summarize and update Directors on matters relevant to ICS, the Health Department and other areas within Multnomah County. On behalf of Directors, independently respond to our draft communication / prepare data related to staff grievances, complaints, or investigations. Perform tasks related to discipline strategy, collective bargaining support, staffing policy process improvement, and research on collective bargaining issues. As directed, research and review state, federal or local laws/regulations/policies which may impact clinic business operations or staffing practices. As assigned, collaborate on the development of the division budget for Department Administration; develop analysis and reports on staffing, union contracts, and County policies impacting budget projections. Facilitate collection of program offers. Monitor spending as assigned. Independently respond to and assist with audit investigations; prepare reports, presentation, and information on behalf of Directors.”

15. After Abdellatif vacated the ICS Director position, Wheatt-Delancy assumed the role of interim ICS Director (on January 6, 2020), and Administrative Analyst Johnston continued supporting Wheatt-Delancy in that new role. Administrative Analyst Hunter assumed responsibility for supporting Shatzel in her new role as interim Primary Care Services Director, and Deputy Primary Care Services Director Powers.

16. As the Administrative Analyst supporting the interim ICS Director, Johnston's day-to-day duties include scheduling and coordinating meetings, prioritizing emails, and assisting with responses to inquiries from managers. On one occasion, Johnston told a manager which provision of a collective bargaining agreement was relevant to an employee's request for a schedule change. As explained below, Johnston assists with matters related to grievances and bargaining as necessary. The amount of time Johnston spends on those duties fluctuates greatly throughout the year.

17. In August 2019, former Director Abdellatif provided Administrative Analyst Johnston with access to a folder containing information about personnel matters including reprimands and grievances. Johnston still has access to that information in her current role, as does Administrative Analyst Hunter. From time to time, Johnston makes formatting edits to disciplinary documents.³

18. Administrative Analysts Hunter and Johnston and Executive Specialist Sardo share office space and have weekly meetings to discuss workload and assisting one another. Hunter Johnston, and Sardo fill in for one another during absences; however, Sardo is not expected to perform work related to collective bargaining. Both Hunter and Sardo have supported interim ICS Director Wheatt-Delancy when Johnston was absent from work. On those occasions, Wheatt-Delancy has not assigned Sardo any tasks related to bargaining or grievances.

ICS Labor Relations

19. The County has a centralized Human Resources Department that oversees personnel and labor relations issues within its various departments. The Labor Relations unit of the central Human Resources Department negotiates the County's collective bargaining agreements and any midterm bargaining that comes up. Labor Relations also advises the County's departments on performance management, discipline, and grievances. Steve Herron is the Labor Relations Director. Three Labor Relations Managers report to Labor Relations Director Herron, including Labor Relations Manager James Opoka, who assists with matters involving the Health Department. Administrative support is provided by Labor Relations Technician Caitlyn Percell.

20. Each department within the County also has its own division of Human Resources. Debi Smith is the Director of Health Department Human Resources (HDHR). At the time of the hearing, there were approximately 26 employees in HDHR, generally in various HR Analyst positions. With a few exceptions for staff who are involved with the administration of employee benefits, HDHR staff are non-represented employees. Some HDHR employees have duties unrelated to labor relations.

³The record does not contain specific evidence regarding those disciplinary documents.

21. ICS managers work with HDHR staff on a regular basis regarding personnel issues that come up. Labor Relations staff also work directly with HDHR. For example, when Labor Relations Manager Opoka needs information related to an information request, a grievance, or contract negotiations, he typically works with departmental HR staff, who in turn solicit assistance from supervisors or managers in the departments involved, to research and gather the requested information.

22. The amount of time that Administrative Analyst Johnston spends on duties related to collective bargaining or grievances varies widely depending on the circumstances, and the exact amount of time she spends on those matters has not been quantified.

I. Contract Negotiations

23. During Health Department contract negotiations, Labor Relations Director Herron or a Labor Relations Manager is the chief spokesperson for the County. Health Department bargaining teams typically include a representative from HDHR, a budget analyst, and two to four department managers who range from supervisors to senior managers. Labor Relations Technician Percell typically attends bargaining sessions to take notes and offer support with logistical matters, such as printing documents. Department managers are relied on for their operations expertise. Labor Relations Manager Opoka relies on the department managers to conduct research to respond to union information requests and to provide the information he needs to develop proposals and counter proposals, answer questions, and develop bargaining strategy and priorities. To address department-specific issues, the chief spokesperson works with department leadership to identify the priorities that they are recommending and to provide any information regarding processes and procedures that is needed during the course of bargaining.

24. During the most recent round of bargaining for the general employee bargaining unit, Labor Relations Director Herron was the chief spokesperson. The County's bargaining team also included a director from each department's division of Human Resources, an equity inclusion manager, a representative from the budget office, one or two department managers, and the Labor Relations Technician.

25. During the most recent round of bargaining for the physicians' contract, Labor Relations Director Herron was the lead spokesperson and Labor Relations Manager Opoka was the second chair. Also present for the County were the HDHR Director, the ICS Medical Director, a previous PCS Director, and eventually Wheatt-Delancy, when she took over the role of PCS Director.⁴ Former ICS Director Abdellatif was present at two of the sessions, but she was not a regular participant. Administrative support was provided by the Labor Relations Technician. ICS administrative support staff did not attend the bargaining sessions.

⁴As the PCS Director, Wheatt-Delancy also attended bargaining with the Oregon Nurses Association as a subject matter expert, but the record does not contain specific evidence regarding her role in those negotiations. In preparation for the ONA bargaining, Wheatt-Delancy tasked Johnston with summarizing operational practices for Labor Relations.

26. During bargaining for the dentists' contract, Labor Relations Director Herron was the lead spokesperson and Labor Relations Manager Opoka was the second chair. Also present for the County were a representative from HDHR, ICS Deputy Director Daniels, the ICS Dental Director, and the Dental Operations Supervisor. The ICS Director was not part of the bargaining team. Labor Relations Technician Percell attended some of the bargaining sessions to provide administrative support. ICS administrative support staff did not attend.

27. Deputy Director Daniels spent approximately 40 percent of her time on bargaining-related issues during active bargaining for the dentists' contract.⁵ Daniels has not been involved in contract negotiations for other bargaining units.

28. In preparation for bargaining for the general employee unit, Administrative Analyst Johnston convened a workgroup with ICS supervisors to gather feedback about possible issues to be addressed in the next round of negotiations. Johnston met with the supervisors over the course of a few weeks and then relayed their input to senior ICS leadership. Johnston engaged in a similar process in preparation for bargaining for the physicians' contract, wherein she met with clinic managers, went through the existing contract, documented issues that they brought up, and relayed their feedback to ICS leadership.

29. In the fall or winter of 2019, Administrative Analysts Hunter and Johnston attended two meetings with ICS leadership, lasting one to three hours each, to present managers' input regarding contract bargaining issues. Present at those meetings were the ICS leadership team at the time, including the Director, Deputy Director, Primary Care Director, Dental Director, Deputy Medical Director, and Primary Care Services Director. One of the meetings was attended by HDHR Director Smith. The purpose of the meetings was to identify priorities before heading to the bargaining table. ICS leadership relayed the managers' feedback to Labor Relations Manager Opoka.

30. Administrative Analysts Hunter and Johnston have not attended any bargaining sessions. They have, however, been involved in meetings where matters related to collective bargaining agreements were discussed. In around December 2019, Hunter and Johnston attended a retreat for senior ICS leadership, known as the "SLICS" retreat. Pursuant to the direction of interim Director Wheatt-Delancy, and in consultation with HDHR, Hunter and Johnston gathered information related to ADA compliance and relevant collective bargaining agreement provisions. The information gathered included federal legislation and the types of disability accommodation requests that had been made. Hunter and Johnston presented their research during the retreat.

II. Grievances

31. Health Department grievances that arise under the general employee collective bargaining agreement are handled by the County as follows. Step one grievances are settled by line supervisors in consultation with HDHR. Step two grievances are handled by department-level management. Labor Relations is usually involved in the grievance process at step 2, at least on a consultation basis. A grievance that involves a minor remedy may be settled without consulting

⁵The record does not contain specific evidence regarding Daniels' role in the negotiations or the tasks that she performed related to bargaining.

Labor Relations, but in such a case department-level HR is still consulted. At step three, Labor Relations takes over the grievance process. Step four is arbitration, which is also handled by Labor Relations.

32. Eben Pullman, the Petitioner's Council Representative for the general employee unit, the physicians unit, and the dentists unit, processes grievances on behalf of the Petitioner. Pullman, who has been involved in about 20 step two grievances in the Health Department, has always dealt with department-level HR on those grievances. Pullman has not resolved any grievances in the Health Department without the involvement of HDHR and Labor Relations.

33. At step two of the grievance process, department management gathers the information related to a grievance and presents it to HDHR and Labor Relations. Department management then acts in consultation with HDHR and Labor Relations to draft a response. Interim Director Wheatt-Delancy's experience has been that before responding to a grievance she consults with HDHR, and, depending on the issue, central Human Resources or Labor Relations may also become involved.

34. Administrative Analyst Johnston has provided assistance related to two grievances in the general employee bargaining unit. In a grievance related to breaks and lunch periods for medical assistants, the County and the Petitioner each surveyed medical assistants about why they were not taking their breaks. In consultation with management, Johnston created a survey that was sent out on behalf of management. The survey required several hours of work from Johnston over the course of a month. Johnston also attended the step two grievance meeting, along with HDHR Director Smith, Wheatt-Delancy (as PCS Director), Shatzel (as Quality Director), and Deputy PCS Director Powers. Johnston assisted with the grievance response by cleaning up the wording and ensuring that the procedural summaries were accurate. In the other grievance, which involved a student health center, Johnston tracked deadlines for furnishing a response and provided input about what a reasonable timeframe would be to respond to an information request related to the grievance.

35. There have been no grievances in the physicians unit. There has been one grievance in the dentists unit. That grievance was handled by Labor Relations Manager Opoka and did not involve ICS leadership.

III. ICS Leadership Meetings

36. Interim ICS Director Wheatt-Delancy and Administrative Analyst Johnston attend weekly ICS leadership meetings, which are attended by 45 to 50 managers and supervisors, and last approximately two to four hours. Grievances are sometimes discussed during those meetings, including topics such as how management is going to respond to a pending grievance, how the grievance could impact other employees, and employee complaints that could lead to future grievances. Bargaining proposals may also come up during the meetings for the purpose of soliciting input from managers and supervisors.

37. Administrative Analyst Johnston takes notes and prepares minutes for the weekly ICS leadership meetings. In the past, when interim ICS Director Wheatt-Delancy was supported by a non-represented employee, she had to excuse that employee when labor relations issues arose and take notes herself or delegate notetaking to another management employee.⁶ Any follow-up that was needed related to bargaining or grievances also had to be done by her. It would be difficult for interim ICS Director Wheatt-Delancy to excuse Johnston every time discussions related to grievances or bargaining came up because she would have to do Johnston's job or assign it to another manager.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The Administrative Analysts in the ICS unit are not confidential employees and are properly included in the bargaining unit.

The Public Employee Collective Bargaining Act (PECBA) defines a confidential employee as "one who assists and acts in a confidential capacity to a person who formulates, determines and effectuates management policies in the area of collective bargaining." ORS 243.650(6). Under this definition, "[c]onfidential employee status is a narrow technical concept, determined by an employee's direct and specific involvement in collective bargaining matters, rather than work in conformance with the broad, generally-held concept of 'confidential' secretarial duties." *AFSCME Local 1724, Council 75, AFL-CIO v. City of Eugene*, Case No. UC-10-85 at 9, 9 PECBR 8591, 8599 (1986) (*Eugene*). Further, "[t]his Board seeks to avoid the proliferation of confidential employees." *Service Employees International Union Local 503, Oregon Public Employees Union v. Oregon Cascades West Council of Governments*, Case No. UC-16-04 at 8, 20 PECBR 786, 793 (2004) (*Oregon Cascades*); *Oregon AFSCME, Council 75 v. Benton County*, Case No. C-210-82 at 18, 7 PECBR 5973, 5990 (1983) (Board seeks to avoid proliferation of confidential employees that "has no justification other than the convenience of management").

To determine the confidential status of an employee, we apply a three-part test:

"(1) Does the allegedly confidential employee provide assistance to an individual who actually formulates, determines, and effectuates management policies in the area of collective bargaining?

"(2) Does the assistance relate to collective bargaining negotiations and administration of a collective bargaining agreement?

"(3) Is it reasonably necessary for the employee to be designated as confidential to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies?"

⁶At the time of hearing, Wheatt-Delancy had been serving as interim ICS Director for only approximately 12 days. As a result, she was asked to testify about her involvement in labor relations, and Johnston's support thereof, both as ICS Director and as PCS Director. The previous ICS Director, Abdellatif, did not testify.

Oregon Cascades, UC-16-04 at 8, 20 PECBR at 793 (internal quotation marks and citation omitted).⁷ All three questions must be answered affirmatively to establish confidential status.

The first part of the test focuses on the manager (or supervisor) whom the allegedly confidential employee assists, and requires a showing that the manager performs “all three functions” listed in the statute: *i.e.*, “formulates, determines, and effectuates employer policies in the area of collective bargaining.” *Eugene*, UC-10-85 at 9, 9 PECBR at 8599 (emphasis in original). *See also, e.g., City of Portland v. Portland Police Commanding Officers Association*, Case No. UC-27/28-95 at 12-13, 16 PECBR 525, 536-37 (1996) (*Portland*) (first part of test not met where police chief effectuated management policies, but did not play sufficiently direct and significant role in formulating and determining such policies); *Benton County*, C-210-82 at 16-17, 7 PECBR at 5988-89 (first part of test not satisfied where health department head formulated but did not determine management policies).

The second part of the test focuses on the purportedly confidential employee, and requires a showing that the employee gives assistance, in a confidential capacity, that is directly related to collective bargaining. *Eugene*, UC-10-85 at 10, 9 PECBR at 8600. Our analysis focuses on whether the employee in question actually acts as a confidential employee, not whether the employee’s job description is sufficient to establish confidential status. *Group of Unrepresented Battalion Chiefs Employed by the City of Medford v. City of Medford, and International Association of Fire Fighters, Local 1431 v. City of Medford and International Association of Fire Fighters, Local 1431 v. City of Medford*, Case Nos. CC-002-14 & CU-003-14 at 23 n 17, 26 PECBR 294, 316 n 17 (2014). Additionally, the employee at issue “must *currently* act in a confidential capacity.” *Id.* at 23, 26 PECBR at 316 (emphasis in original). “[M]ere access to information regarding labor negotiations is not sufficient to establish assistance in a confidential capacity.” *Eugene*, UC-10-85 at 10, 9 PECBR at 8600.⁸

⁷In representation-related cases, no party bears the burden of proof. OAR 115-010-0070(5)(a). However, where, as here, the issue is whether an employee falls within one of the statutory exclusions from the definition of “public employee,” there must be sufficient evidence establishing that the exclusion applies. In the absence of detailed, specific evidence establishing that a putative confidential employee meets the statutory definition, we will conclude that the employee is a public employee covered by the PECBA and not a confidential employee under the statute. *City of Portland v. Portland Police Commanding Officers Association*, Case No. UC-017-13 at 23, 25 PECBR 996, 1018 (2014).

⁸In this case, the County notes that Johnston has access to confidential information related to bargaining, and that Johnston is expected to attend bargaining on the management side to facilitate her ability to research proposals or gather information for the negotiators. However, “[p]ersonnel or other sensitive information or work done ‘in confidence’ is not sufficient to warrant exclusion under ORS 243.650(6). To be excluded as confidential, a position must meet the test described above.” *Portland*, UC-27/28-95 at 13, 16 PECBR at 537 (citation omitted). *See also Benton County*, C-210-82 at 16-17, 7 PECBR at 5988-89 (although assistant provided the “assistance” required by ORS 243.650(6), assistant was not a confidential employee because department head did not determine management policies).

In this case, the first part of the test is dispositive. We conclude that Administrative Analyst Johnston is not a confidential employee because there is insufficient evidence to show that the individual whom Johnston supports, interim ICS Director Wheatt-Delancy, determines management policies in the area of collective bargaining. ORS 243.650(6).

Generally, a manager “determines” management policies if the manager has a significant role in making final decisions in the negotiation of collective bargaining agreements (whether the manager actually sits at the table or not). In this case, the evidence does not show that the ICS Director plays such a role. Rather, the record establishes that Labor Relations managers establish bargaining priorities, develop proposals, and negotiate collective bargaining agreements, including for Health Department bargaining units, while departmental managers serve on the County’s bargaining team as “subject matter experts” who provide information and make recommendations. For example, Labor Relations manager Opoka testified that he typically asks two or three department representatives, ranging from supervisors to senior managers, to serve on management’s bargaining team, because he finds it “very helpful” to have “someone from the operations side” to provide information that he, “as the chief spokesperson,” needs to develop proposals and counterproposals, answer questions, and develop strategy priorities. For department-specific issues, Opoka testified that he works with senior department leadership “to help identify the priorities they are recommending and provide any needed information.”⁹

The County argues there is sufficient evidence to establish that the ICS Director determines management policies because the record shows that Labor Relations “looks to management representatives on the bargaining team” to provide recommendations on “proposals involving department specific operational issues,” and that “Labor Relations usually goes with [the department managers’] recommendation” regarding “operations.” Although we agree with the County’s factual description of the department managers’ role in bargaining, this Board’s case law makes clear that a manager who serves on the management bargaining team and makes recommendations, but is not the final decision-maker, does *not* determine management policy. *See, e.g., Portland*, UC-27/28-95 at 12, 16 PECBR at 536 (although chief made recommendations and considered himself part of management’s bargaining team, he did not “determine” management policy); *Oregon School Employees Association, Chapter 151, v. Linn-Benton Community College*, Case No. C-5-84 at 9-10, 8 PECBR 6691, 6699-6700 (1984) (“The Board has made clear that having input into the decisional-process in labor relations matters is not the same as ‘formulating and determining’ management policies under the PECBA.” (citing *Oregon Association of Classified Employees, OEA v. Centennial School District 28Jt*, Case No. C-88-79, 5 PECBR 4340 (1981) (*Centennial*))); *Benton County*, C-210-82 at 8 and 17, 7 PECBR at 5980 and 5989 (where health department head served on negotiating team, participated in administrative group that

⁹We recognize that Opoka, in his testimony, distinguished between bargaining for county-wide units and Health Department-specific units (*e.g.*, the nurse unit). He testified that he works with the Chair of the County Commission, who is the designated personnel officer for the County, for county-wide negotiations, and works with Health Department senior leadership when bargaining with Health Department-specific units. Even assuming that Opoka’s testimony suggests that he handles county-wide and department-specific labor relations differently, and that Health Department managers have a different role in the latter, his testimony was not sufficiently specific to allow us to conclude that the ICS Director, in particular, determines collective bargaining policy.

conferred regarding collective bargaining issues, supervised costing of bargaining proposals, and prepared strike plan, she “could reasonably be said to have a role in ‘formulating’ [management] policies,” but “[t]here [wa]s absolutely no evidence on the record” of her “*determining* such policies” (emphasis in original)). Even evidence that the manager’s recommendations are given great deference by the decision-maker does not establish that the manager actually determines management policy. *Oregon AFSCME, Local 502-A, v. Coos County and Coos County Board of Commissioners v. AFSCME*, Case Nos. C-224-81 & C-1-82 at 7, 6 PECBR 5209, 5215 (1982) (“It is clear to us that the County’s department heads, including the Parks Director, do not ‘formulate’ and ‘determine’ management policies in the area of collective bargaining. Rather, they make recommendations that are given great deference by the Personnel Officer and, subsequently, by the Board of Commissioners.”).¹⁰

The County also emphasizes that Labor Relations works in “partnership” with departmental managers when negotiating collective bargaining agreements, and there is some evidence that department managers participate in the decision-making process when they serve on the County’s bargaining team. Recognizing that this “team management” model of shared and participatory decision-making is common in the public sector, *Centennial*, C-88-79 at 7, 5 PECBR at 4346, this Board has explained what is required to satisfy the first part of the confidential status test in such contexts:

“As discussed in [*Centennial*, C-88-79 at 7-8, 5 PECBR at 4346-47], the confidential employee provisions of the PECBA are difficult to apply in team management situations because the language of the Act seems to have contemplated that decisions formulating and determining employer policies would be made by ‘a person’ rather than by a group. The Board, however, has not infrequently been faced with situations where employer bargaining is conducted with a wide system of participatory consultation and where it is quite difficult to specify the ‘person’ or persons who actually formulate and determine employer policies. See [*Linn-Benton Community College*, C-5-84, 8 PECBR 6691; *Centennial*, C-88-79, 5 PECBR 4340; *Coos County*, C-224-81, 6 PECBR 5209]. The Board must allow employers to have non-bargaining unit confidential assistance where warranted, but must not allow undue expansion of the confidential sphere to include every clerical employee assisting anyone involved in any way in the bargaining process. The answer lies in identifying those clerical employees who provide confidential assistance to individuals who have a *significant* involvement in the formulation and determination of employer policies in the area of collective bargaining.”

Eugene, UC-10-85 at 10, 9 PECBR at 8600 (emphasis in original).

¹⁰The record also establishes that ICS Director Wheatt-Delancy, with the assistance of an Administrative Analyst, gathers input from managers about bargaining priorities, and then relays that feedback to Labor Relations. A manager who plays that role “has input to the process of collective bargaining but does not authoritatively or directly formulate and determine management policies in the area of collective bargaining.” *Linn-Benton Community College*, C-5-84 at 12, 8 PECBR at 6702.

The Board's decision in *Centennial* illustrates what constitutes "significant involvement." In that case, every district bargaining team included a hired negotiator, the district personnel manager, a high school administrator, and a school principal. *Centennial*, C-88-79 at 3, 5 PECBR at 4342. Although "[f]inal authority for formulating contract proposals" rested with the superintendent and a cabinet composed of four administrators, a council of principals reviewed every proposal and made recommendations. *Id.* The Board concluded that none of the school principals determined management policies. *Id.* at 8, 5 PECBR at 4347. Further, the Board concluded that only the superintendent and two of the cabinet members (the personnel director and assistant superintendent), had "the final voices in determining management policy in the area of collective bargaining" and thereby "fill[ed] the policy role described in [ORS 243.650(6)]." *Id.* at 9, 5 PECBR at 4348. Although the other two cabinet members (the directors of support services and student services) "ha[d] limited roles in actually determining" management policy, and "provide[d] substantial assistance, each in his own limited area of expertise and responsibility," their roles in determining management policy were not sufficiently significant to establish confidential status for their respective assistants. *Id.*

Here, the evidence indicates that the role of the ICS Director is more comparable to that of the principals in *Centennial*, who made recommendations regarding proposals and sometimes served on management's bargaining team. The evidence does not establish that the ICS Director has a significant role in making final decisions for management in union contract negotiations. *Id.*¹¹ Consequently, we conclude that Wheatt-Delancy does not determine management policies in the area of collective bargaining, as required by ORS 243.650(6).

Because the requirements of the first part of the confidential status test are conjunctive (*i.e.*, a manager must formulate, determine, and effectuate management policies), and we have concluded that the ICS Director does not determine management policies, it is unnecessary for us to address the remaining requirements.¹² Further, because the first part of the confidential status test has not been met, we do not reach the second and third parts of that test. *Oregon AFSCME Council 75, Local 88 v. Multnomah County*, Case No. UC-005-14 at 7 n 3, 26 PECBR 467, 473 n 3 (2015). Because the ICS Director does not determine management policy in the area of collective bargaining, as required by ORS 243.650(6), the Administrative Analyst who assists her is not a confidential employee.

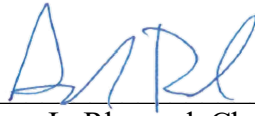
¹¹In reaching this conclusion, we recognize that, at the time of hearing, Wheatt-Delancy had been serving as interim ICS Director for less than two weeks. Although, as a result of that timing, Wheatt-Delancy's personal knowledge of the role of the ICS Director in collective bargaining was limited, the record also includes the testimony of Labor Relations manager Opoka, who has bargained many Health Department CBAs. His testimony does not establish with specificity that the ICS Director (as opposed to other directors in the Health Department) has a significant role in determining management policies.

¹²The evidence regarding the ICS Director's role in grievance processes is relevant only to the question of whether she effectuates management policies. *See, e.g., Portland*, UC-27/28-95 at 11-12, 16 PECBR at 535-36 (concluding that chief who played a significant role in grievance processes had "some responsibility for effectuating management policies" but did not formulate or determine those policies).

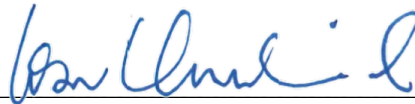
ORDER

The bargaining unit is clarified to include the petitioned-for Administrative Analysts in the ICS Division.

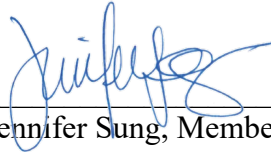
DATED: August 28, 2020.



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-021-19

(UNFAIR LABOR PRACTICE)

DON SCHALLERER,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
CITY OF PORTLAND,	)	CONCLUSIONS OF LAW,
	)	AND ORDER
	)	
Respondent.	)	
_____	)	

John Sutter, Attorney at Law, Law Office of John Sutter, LLC, Portland, Oregon, represented the Complainant.

Lory J. Kraut, Senior Deputy City Attorney, Portland City Attorney's Office, Portland, Oregon, represented the Respondent.

On July 29, 2020, 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).

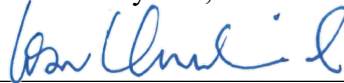
ORDER

The unfair labor practice complaint is dismissed.

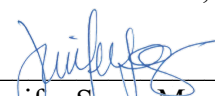
DATED: August 28, 2020.



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-021-19

(UNFAIR LABOR PRACTICE)

DON SCHALLERER,	)	
	)	
Complainant,	)	
	)	
v.	)	RECOMMENDED RULINGS,
	)	FINDINGS OF FACT,
CITY OF PORTLAND,	)	CONCLUSIONS OF LAW,
	)	AND PROPOSED ORDER
Respondent.	)	
	)	

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on March 12 and 13, 2020, in Portland, Oregon. The record closed on May 14, 2020, upon receipt of the parties' post-hearing briefs.

John Sutter, Attorney at Law, Law Office of John Sutter, LLC, Portland, Oregon, represented the Complainant.

Lory J. Kraut, Senior Deputy City Attorney, Portland City Attorney's Office, Portland, Oregon, represented the Respondent.

On October 2, 2019, the Complainant, Donald ("Don") Schallerer filed an unfair labor practice complaint with the Employment Relations Board (Board) against the Respondent, the City of Portland (City).¹ On October 17, 2019, the City filed a confidential informal response. On November 1, 2019, ALJ Kehoe issued Schallerer an order to clarify the complaint. On November 15, 2019, Schallerer submitted a response to that order.

¹Schallerer filed a "Statement in Support of Unfair Labor Practice Complaint" along with his complaint. We consider that filing to be part of the complaint. A copy of the filing is included in the record as Exh. J-14.

The issue in this case is: Did the City violate ORS 243.672(1)(a) by scoring Schallerer lower on interview questions than others as a result of his advocacy on behalf of himself and others? As set forth below, we conclude that the City did not violate the statute.

RULINGS

All rulings made by the ALJ were reviewed and are correct.

FINDINGS OF FACT

Background

Bureau of Development Services

1. The City is a public employer within the meaning of ORS 243.650(20).
2. The City “employs approximately 6000 represented and non-represented permanent employees.” (Exh. J-4 at 3.) The City’s Bureau of Development Services (BDS) has around 500 employees in total and consists of multiple divisions. Two of those divisions are Commercial Inspections and Residential Inspections.²
3. Regular electrical inspectors (who are often simply called electrical inspectors) in either Commercial or Residential Inspections are subordinate to *senior* electrical inspectors. (Exh. J-3 at 1, 2.) In turn, senior electrical inspectors are subordinate to a *chief* electrical inspector, who is subordinate to an inspections *supervisor*. The inspections supervisors are subordinate to a division *manager*.
4. An electrical inspector differs from other classes of inspector in BDS such as plumbing and structural/mechanical inspectors “by its focus on and certification in electrical inspection.” (Exh. J-3 at 1.) In short, regular electrical inspectors “inspect new and remodeled electrical installations to [e]nsure compliance with the national, state, and city electrical codes.” (Exh. J-3 at 1.)
5. In Commercial Inspections, a regular electrical inspector’s work assignments generally involve worksites that are located within just one of five geographical districts in the City: Northwest, Northeast, Southwest, Southeast, and North. Accordingly, he or she may also be called a district inspector. Further, the district to which a regular electrical inspector is assigned changes over time. In practice, regular electrical inspectors are allowed to pick which district they work in in order of seniority. However, technically, a manager can always make the assignment.
6. The City generally considers the position of senior electrical inspector to be “a leadership position.” As stated in its position description, the senior-level position “differs from Electrical Inspector by leading the work of subordinate inspectors and trainees and providing them

²For the purposes of this case, the divisions of BDS may also be called “sections,” but the same term may also apply to a smaller group within a division. In addition, we note that the organizational structure of BDS has changed over time.

with training and advice on the solution of technical problems.” (Exh. J-3 at 3.) That training includes “field training.” (Exh. J-3 at 2.)

7. One common duty of a senior electrical inspector is performing “plan reviews.” However, some regular electrical inspectors (including Schallerer, as noted below) have also been assigned that type of duty. Additionally, one senior electrical inspector position may have a different primary focus than another senior electrical inspector position. For example, one senior electrical inspector only does electrical plan reviews, while others focus on training or customer service.

8. In the City’s view, a senior electrical inspector must have the necessary technical competence and skills as well as certain “soft skills.” Those soft skills include communication skills (which include being an articulate speaker and a good listener, and being able to adjust your communication style to specific listeners), being collaborative, problem-solving skills, the ability to build consensus (particularly among different inspectors and while working out in the field), conflict resolution skills (which are used when dealing with difficult customers), being empathetic and supportive, and the ability to mentor less experienced electrical inspectors.

9. Schallerer (the Complainant) works for the City as a regular electrical inspector in the Commercial Inspections Division of BDS. As detailed below, Schallerer has applied and interviewed to be promoted to a senior electrical inspector position on a number of occasions (including March 2016, August 2018, April 2019, and January 2020), and has been unsuccessful in all of those attempts.³

10. Before Schallerer worked for the City, he was self-employed and did professional electrical work for about 30 years. For the 15 years before Schallerer worked for the City, he worked in Oregon. For the 15 years before that, he worked in the San Francisco Bay Area, where he “started and ran a general and electrical contracting business.” (Exh. J-5 at 3.)

11. Since June 2018, Darryl Godsby has been the Commercial Inspections Division Manager. Since February or March 2019, David (“Dave”) Tebeau has been the Residential Inspections Division Manager.

12. Cindy Meyer (the individual at the center of this complaint) was a supervisor in Commercial Inspections from May 2016 until she retired in May 2019. In that position, Meyer reported directly to Division Manager Godsby (from June 2018 on) and supervised the electrical, plumbing, and structural/mechanical inspectors who worked in Commercial Inspections, including Schallerer. Meyer started working for the City in April 2015 as a permit technician in the Permitting Services Division of BDS.⁴

³The complaint asserts that Schallerer has also applied for “other positions” with the City. (Exh. J-14 at 1.) It does not clarify what those positions were or when Schallerer applied for them.

⁴This Recommended Order and the City’s brief refer to Meyer as a supervisor, while Schallerer’s brief refers to Meyer as a manager. During the Board’s hearing, Meyer described herself as a supervisor. Many of the exhibits do as well. (*E.g.*, Exhs. J-2, C-9, C-16 at 2, and C-17 at 4.) However, other exhibits label Meyer as the “Commercial Inspections Section Manager” or simply “Section Manager.” (Exhs. C-1

IBEW and DCTU

13. The International Brotherhood of Electrical Workers, Local 48 (IBEW) is a labor organization within the meaning of ORS 243.650(13). It represents all of the City's regular, senior, and chief electrical inspectors, as well as other positions. Inspections supervisors (like Meyer) are unrepresented.

14. Schallerer has opted not to be an IBEW member, but he does pay voluntary "fair share dues" to, and is represented by, IBEW. Schallerer believes that, if he became a member, he could not work as a self-employed electrical contractor when he retires from the City.

15. IBEW is one of a number of affiliated local labor organizations that represent City employees and make up the District Council of Trade Unions (DCTU). All of the DCTU's member labor organizations bargain together collectively as a single entity with the City.

16. The most recent collective bargaining agreement (CBA) between the City and DCTU runs from July 1, 2017 to June 30, 2020. (Exh. J-1 at 1.)

17. Among other things, the CBA provides,

"Employee Rights. The City agrees not to interfere with the rights of employees to become members of the Union, and there shall be no discrimination, interference, restraint, or coercion by the City or any City representative against any employee because of Union membership or because of any employee activity in an official capacity on behalf of the Union, or for any other cause, provided that such activity shall not interfere with employees in the performance of their duties."

(Exh. J-1 at 55-56.)

18. The CBA otherwise includes a section on grievances, complaints, and arbitration that the CBA provides is "the sole procedure to be utilized" for settling grievances and complaints. (Exh. J-1 at 66.) That section also includes specific time limits for the processing of those grievances and complaints.

BDS Interviews

19. For vacant DCTU-represented positions in BDS, recruitments can be either external or internal. External recruitments (which are also called open recruitments) are open to all qualified candidates, while internal recruitments are only open to current City employees. In either scenario, the "hiring manager" chosen for the recruitment selects a group of qualified candidates to be interviewed by an interview panel comprised of a mix of existing City employees. The same hiring manager also selects who is on each interview panel. The group of qualified candidates that the hiring manager has chosen to be interviewed is commonly called the "eligible list." (Exh. C-14 at 3.)

at 3, C-4 at 1, and R-1 at 2.) In some exhibits, Meyer identifies herself as a "CBO" in BDS, but we presume that that is a professional title. (Exh. C-4 at 1.)

20. On the day that interviews will be conducted, the whole interview panel participates in a pre-interview 40-minute “panel briefing.” (Exh. C-19 at 1.) The longest part of that briefing involves 15 minutes of “bias awareness training.” (Exh. J-7 at 1, 4.) Another part includes a discussion about what the panelists should be looking for in candidates. Panelists are also told that candidates’ scores must be entirely based on the contents of candidates’ interview answers, and cannot be based on a panelist’s preexisting knowledge of a candidate. In addition, panelists are told that, although their panel can talk about candidates’ answers, each panelist’s scores should be independent from the other panelists’ scores.

21. In Meyer’s view, a panelist’s scores should be kept confidential. Accordingly, whenever Meyer was the hiring manager for a recruitment, she always asked her panelists not to talk about or share their scores with the other panelists. However, after the interviews were completed, Meyer asked her panelists if they had any questions or concerns.

22. In general, the City always first offers employment to the candidate or candidates who scored the highest during the interviews. Nevertheless, “[e]xceptions to hiring the top-scoring candidate may be requested” by a hiring manager. (Exh. C-14 at 3.)

23. During interviews, BDS almost always asks candidates at least one question about equity and/or diversity. In BDS’s view, equity is not the same as treating people equally or the same way. Instead, BDS defines equity as “[c]onditions that allow everyone to flourish so that race, gender, ability and/or other held identities do not determine access or outcomes.” (Exh. J-4 at 1.) Similarly, the City has defined equity as “when everyone has access to opportunities necessary to satisfy essential needs, advance their well-being, and achieve their full potential.” (Exh. J-7 at 4.) BDS gives its employees many opportunities to attend equity training.

Chronology of Events

24. On October 5, 2015, Schallerer started working for the City as a regular electrical inspector.

25. BDS provides coaching and training for employees who are interested in promoting, and Meyer encouraged all of her employees to participate in that. On January 7, 2016, Schallerer successfully completed an “Interviewing with Confidence” class with Adrienne Edwards, an “Analyst I” who works in the Business Operations & Finance Services Division of BDS. (Exhs. R-2 at 2 and J-2.) Among other things, attendees of that class are told that they should answer the City’s interview questions completely, and that interview panel members cannot use their prior knowledge of candidates when they score candidates’ answers.

26. In roughly March 2016, Schallerer applied to be a senior electrical inspector. For this particular recruitment, about 9 or 11 regular electrical inspectors applied in total. Schallerer was deemed one of the top three candidates, but ultimately he was not promoted. When Schallerer applied, he believed that there was (as he put it) “no way in hell” that he would get the promotion because, by that point, he had only worked for the City for around five months. Schallerer also believed that the result of this recruitment “was reasonable,” and that Jeff Copeland, who was hired as a senior electrical inspector in the March 2016 recruitment (and is now a chief electrical

inspector), was “the most competent” of the top three candidates. Leonard McDowell (who at the time was a regular electrical inspector, and is now a senior electrical inspector) was another unsuccessful finalist.

27. On August 2, 2017, Schallerer successfully completed the City’s “Equity 101 Training” class. (Exh. R-2 at 2.)

Schedule A Premiums

28. In one part of the most recent CBA between the City and DCTU called “Schedule ‘A’ Premiums” (which we will call “Schedule A”), the CBA states,

- “3. Any employee other than a Painter, Facilities Maintenance Technician, Facilities Maintenance Technician Apprentice, and Facilities Maintenance Technician Lead while working from temporary scaffolding, portable ladder, or boom, which is fifteen (15) feet above ground or working from any suspended device will receive a premium of four percent (4%) of the employee’s base wage, for a minimum of four (4) hours.
- “4. Any employee who is required to work over forty-five (45) feet above the ground on bridges and structures while working from a temporary scaffolding, portable ladder or boom shall be 1.5 times the employee’s base rate of pay, for a minimum of four hours. Any employee who is required to work over forty-five (45) feet above the ground on a fixed structure and required to wear fall protection equipment shall be paid at 1.5 times the employee’s base rate of pay, for a minimum of four hours. The appropriate pay for employees working over forty-five (45) feet on overtime is 1.5 times the employee’s base rate plus .5 time the employee’s base rate for a total of 2 times the employee’s base rate.
- “5. Any employee other than an Inspector, Facilities Maintenance Technician, Facilities Maintenance Technician Apprentice, and Facilities Maintenance Technician Lead who is instructed to work underground or in a shored excavation will receive a premium of four percent (4%) of the employee’s base wage, for a minimum of four hours.”

(Exh. J-1 at 73.)

29. Before the foregoing language was agreed to in late 2017, the high work premium described in Section 4 was paid for work over 90 feet, not 45. Further, until that point, Meyer had never had anyone request to be paid a premium for that kind of work. During the 2017 contract negotiations, DCTU proposed lowering that height to 45 feet. At the bargaining table, Brian Crise—who at that time was a senior electrical inspector and a member of DCTU’s bargaining team, and had been an IBEW shop steward since 2016—was specifically asked if that reduction to 45 feet would “impact” electrical inspectors. In response, Crise said, “No. It would

not.” Subsequently, the City and the DCTU agreed to the height reduction. As noted elsewhere, Crise is currently a chief electrical inspector, a position that is also represented by IBEW.

30. Schallerer was not on DCTU’s bargaining team in 2017, did not attend the 2017 contract negotiations as an observer, and has never reviewed any related bargaining notes. Likewise, Meyer did not participate in the 2017 contract negotiations.

31. In January 2018, Schallerer only performed “light duty” work (as opposed to his normal work out in the field). That included doing “electrical plan review.” (Exh. C-1 at 1.) Normally, that type of work is (as Schallerer put it) “almost exclusively” performed by senior electrical inspectors.⁵ Schallerer has also performed the same type of work while working out in the field, and once did so in order to help with a backlog.

32. In early 2018, Crise (who was still an IBEW shop steward at the time) told Schallerer and other electrical inspectors about Schedule A’s premiums, and said that they should all apply for them and track how often they did high work. During this same period, Crise also spoke with Meyer about the premiums. Meyer told Crise that she would take the issue to management and Human Resources and find out when to make the premium payments. At a different point, Meyer spoke with Copeland (again, a senior electrical inspector) and Brett Welland (a chief electrical inspector at the time) about the matter.⁶

33. After learning of the Schedule A premiums from Crise, Schallerer created a “daily route slip” Excel spreadsheet template and shared it with all of the other electrical inspectors. The template helped electrical inspectors track high work at 15 and 45 feet. Subsequently, using his template, Schallerer documented whenever he performed high work and saved that information electronically on the shared “H drive.”⁷ (Exh. J-10 at 3.) Other electrical inspectors have also used Schallerer’s daily route slip template “to varying degrees.” Electrical inspectors do not give copies of their daily route slips to Meyer.

34. Kathy Sharp works in the City’s Bureau of Human Resources as a Human Resources Business Partner. Sharp has worked with BDS since 2013, and is also assigned to other

⁵On November 30, 2018, Schallerer received a performance evaluation that was written and signed by Meyer for the period of October 2016 through October 5, 2018. In the evaluation, Meyer wrote, in part, “During a period of need for light duty work assignment, Don [Schallerer] successfully performed electrical plan review work, work that is usually assigned to Senior inspectors.” (Exh. C-1 at 1.) Elsewhere in the evaluation, Meyer also noted that Schallerer “is interested in advancing to a Senior Electrical Inspector or a management team role.” (Exh. C-1 at 2.)

⁶Welland was a senior electrical inspector when Schallerer started with the City in October 2015. Subsequently, Welland became a chief electrical inspector. In May 2018, Welland retired. In June 2019, Welland returned to work as a senior electrical inspector in Commercial Inspections.

⁷Exh. C-7, which is titled “Commercial Inspections Daily Report” and dated August 23, 2018, is one example of a daily route slip. Schallerer testified (at 11:12 a.m. on March 12, 2020) that, currently, every day, he hands in his daily route slip to an “office support staff” person named Norma. We presume that Schallerer was referring to “Norma Langi,” who works in Commercial Inspections as an “OSS II.” (Exh. J-2.)

City Bureaus. On April 9, 2018, Meyer sent an email to Sharp and others asking whether the language in Schedule A applied to the work of the electrical inspectors. At the end of the email, Meyer wrote, “We look forward to a response or a meeting to further discuss and direction on how and when to implement.” (Exh. R-4 at 1-2.) While Meyer waited for guidance from Sharp, Meyer held on to her employees’ Schedule A premium pay requests.

35. On April 23, 2018, Meyer sent an email to the Commercial Inspections electrical inspectors with the subject of “Weekend inspection scheduling.” In the email, Meyer wrote:

“Team: On Thursday there is a ‘brainstorming’ Residential/Commercial/FPP/FIR section and Division manager’s meeting on strategies for meeting inspection service demands. One idea that has been ‘floating’ is allowing the scheduling [of] weekend inspections through IVR.

“I would like to know your thoughts on this strategy, if it is something you would support, and if you support what type of time commitment could/would you make to weekend work?

“I realize that this is an impactful strategy on your personal time and that everyone has been putting in some to a lot of overtime and burnout is a serious issue. So please be candid and open about your support or concerns with this type of approach. If you could get back to Will [Morita] or I before EOD Wednesday it would be much appreciated.”⁸

(Exhs. C-4 at 3 and R-3 at 3.)

36. On April 25, 2018, at 1:28 a.m., Larry Wright, a “Sr. Struct./Mech. Inspector” in Commercial Inspections, responded to Meyer’s April 23, 2019 email, writing, “Cindy [Meyer], I do not support weekend work.” (Exhs. C-4 at 3 and R-3 at 2.) At 1:36 a.m. the same day, Schallerer also responded to Meyer’s email, writing, “I would only seriously consider weekend work if it was a minimum 3 hours pay even for one inspection. Generally, Time and a half isn’t enough to disrupt a weekend day.” At 2:23 a.m., Meyer responded to Schallerer, writing simply, “Thanks Don.” (Exhs. C-4 at 2 and R-3 at 2.) At 3:20 a.m., Schallerer emailed Meyer again, writing,

“I think that our district inspector staffing is too low for the workload we have.⁹ I have [an idea] that will significantly increase the pool of electrical inspector candidates. It is in our DCTU contract that any work over 45’ on a ladder, scaffold or boom gets paid for four hours at time and a half. Above 15’ is four hours at 4%

⁸The email does not state what Will Morita’s job title is, but the organizational chart that is in the record (and purportedly was accurate as of April 1, 2019) lists Morita as a “Sr Housing Inspector.” (Exh. J-2.) It is also unclear what IVR refers to.

⁹Meyer testified (at 1:52 p.m. on March 12, 2020) that she agreed with Schallerer’s assertion that there has been a staffing issue with regular electrical inspectors. Meyer also testified that she blamed that issue on the recent recession followed by “a very robust construction market.”

increase. Hot work is TBD.¹⁰ It would be within the DCTU contract to pay this premium for all time worked. That would make this job so attractive that highly qualified people would beat down the door to apply.

“Thanks for considering this.”

(Exhs. C-4 at 2 and R-3 at 1.)

37. On April 26, 2018, at 6:57 a.m., Meyer sent another email to Sharp. In the email, Meyer wrote,

“Kathy [Sharp], any word yet on how this is to be applied? Staff is wanting to know how and when they get this pay. We even have had suggestions that it should be for all hours worked as an incentive for candidates for our vacancies (ie a pay raise for all)[.]Thanks. Cindy [Meyer]”

(Exh. R-4 at 1.)

38. On April 26, 2018, at 7:10 a.m., Meyer responded to Schallerer, writing,

“Thanks Don [Schallerer] for the suggestion, and I agree people would be beating down the door to come to work for \$62 and 69.42 (Inspector/SR + an hour)[], but I am pretty sure that is not going to be possible. This would put the wage scale way out of sync in the overall City compensation plan. But there may be other options for recruitment/sign on incentives if we find we are not attracting a certain discipline of candidates for vacancies. So far not bad results on Electrical and Plumbing Inspector recruitments as there is a direct correlation of moving from the trade work to being able to work as an inspector with the licensing and mandatory licensing CEU’s. Not so much for Structural and Mechanical Inspectors as it is a total different training path and training availability for those trades to make the transition. Encouraging that more of the Building Inspection Technology programs are ramping up and recruiting students and the state working with us on some other options for hiring inspectors. Keep up the creative thinking, everything is worth considering.”

(Exhs. C-4 at 1 and R-3 at 1.)

39. On April 26, 2018, at 8:18 a.m., Schallerer wrote back to Meyer, stating,

“Thanks for the response. If we don’t want people beating down the door to work here, maybe a slightly less than time and a half increase across the board would get people knocking loudly. This would still be within the DCTU contract parameters. Then we may be at less risk of BDS’s ninety million dollar surplus being either an object of ridicule, or worse yet, being taken away by another bureau. Give some

¹⁰Schallerer testified that “hot work” is working with something that is “energized” (*i.e.*, contains a live electrical current).

back to the workers who earned the money for the Bureau. This is still me thinking outside the box but in the ballpark.”

(Exh. C-4 at 1.)

40. The acronym “SAP” refers to the City’s electronic timekeeping program. Through the program, employees can request sick and vacation leave as well as overtime or “exception pay.” Supervisors review then either approve or deny every SAP request. If a request is denied, the supervisor logs a reason for doing so.

41. On May 8, 2018, at 3:24 p.m., Schallerer electronically submitted an SAP request for premium pay for “OT for High work” to Meyer. (Exh. C-5.)

42. On May 9, 2018, at 6:35 a.m., Meyer sent an email back to Schallerer that stated,

“Don [Schallerer], Please list permit number and type of inspection in request. How close to the edge of the excavation did you have to access to conduct the inspection? Sorry to ask for so much detail but I am trying to develop a guideline with examples of when the Premium pay is applicable. Thank you.”

(Exhs. C-5 and R-5.)¹¹

43. On May 9, 2018, at 3:00 p.m., Schallerer submitted a request for certain scaffolding and ladder work, using “Overtime” coding to do so. (Exh. C-6.)

44. On May 10, 2018, at 7:29 a.m., Meyer responded via email to Schallerer’s May 8, 2018 Schedule A premium request. In her email, Meyer wrote, “Overtime is the wrong coding for this requ[est]. In addition DCTU contract Schedule A premium pay 4 does not cover workin[g]/inspecting next to an excavation, only working above ground on temporary sca[ffolding], portable ladder or boom. Request is denied.” (Exh. R-6.)

45. On May 10, 2018, at 7:34 a.m., Meyer responded to Schallerer’s May 9, 2018 request. In that email, Meyer wrote,

“This request is improperly coded. Request for premium pay per the DCTU contract is to be code[d] as other. In addition, D[CTU] Schedule A Premiums 4 is not applicable to the request per BHR determinat[i]on that access floors of a structure to conduct inspection is not the intent of the premium for Inspectors. Access to this structure/floors of the Multnom[ah] County Courthouse project is via personnel lift to floor 5 and then portabl[e] ladders that are properly secured and used by all persons on site to access floors 6, 7 and 9 are provided. Request is rejected.”

(Exh. C-6.)

¹¹Exh. R-5 indicates that Meyer’s May 9, 2018 email regarding Schallerer’s May 8, 2019 request was sent at 1:35 p.m., while Exh. C-5 indicates that Meyer’s email was sent at 6:35 a.m.

46. On May 11, 2018, Meyer sent an email with the subject of “DCTU Labor Agreement” to all of Commercial Inspections. At the outset of the email, Meyer wrote, “Recently Commercial Inspections Staff have been submitting SAP requests for Premium pay related to DCTU Labor Agreement Schedule A Premiums.” (Exh. R-8.) Meyer then provided the language of Sections 3 and 4 of Schedule A, which is provided above. After that, Meyer wrote,

“With these requests, Will [Morita] and I contacted Human Resources (HR) for guidance and understanding on processing these requests.

“HR provided the following information: This premium does not apply to inspectors who in the course of their work may come upon or walk across temporary scaffolding, portable ladders or boom. The intent of the premium specifically states ‘while working from’.

“Given this guidance, as supervisors we will not be able to approve these requests.

“If you have questions about this subject you may want to contact your shop steward, other union official or Human Resources.”

(Exh. R-8.)

47. By the time that Meyer sent her May 11, 2018 email clarifying the City’s position, she had received and denied Schedule A premium pay requests from Schallerer as well as McDowell, who was also a regular electrical inspector at the time.¹²

48. On May 14, 2018, Schallerer sent an email to Meyer and the rest of Commercial Inspections in response to Meyer’s May 11, 2018 email. In it, Schallerer wrote,

“Dear HR et.al.

“Thanks for providing the interpretation of the DCTU contract. But the last time I checked, an inspector would be considered ‘any employee’. Inspection, and access to do an inspection, is *work, and exposes inspectors to the risks for which the premium pay compensates. Inspector jobs are inherently risky, and deserving of the contractually agreed-upon premiums for engaging in that activity.

“Thank you for your reconsideration.

“*Work is the endeavor that which one is paid to do.”

(Exh. R-9 at 1.)

¹²Exh. C-12, which is an email that was written by Meyer, indicates that McDowell made four SAP requests for premium pay for high work (with one request on May 4, 2018, two requests on May 7, 2018, and another on May 9, 2018), and that Meyer rejected all of those requests. However, Exh. C-12 was withdrawn by Schallerer’s attorney during the hearing. Therefore, we shall not consider those particular details. Nevertheless, testimony otherwise firmly establishes that McDowell sent Meyer at least one Schedule A premium pay request for high work that Meyer also denied.

49. On May 15, 2018, “Chief Plumbing Inspector” McKenzie W. James responded to Schallerer’s May 14, 2018 email, writing, “Having been on the DCTU/City Bargaining Negotiations Committee, my understanding about the premium, it was for the water bureau employees who climb water tower tanks and clean them and some other employees. I don’t think the premium was for inspectors.” (Exh. R-9 at 1.) During the alluded-to 2017 contract negotiations, James represented DCTU, not the City. “Plumbers, Local 290” is one of the labor organizations in DCTU. (Exh. J-1 at 1.)

50. On May 23, 2018, Schallerer made a request for premium pay for certain ladder and scaffolding work.

51. On May 24, 2018, Meyer rejected Schallerer’s May 23, 2018 request and wrote, “DCTU Schedule A Premiums 4 is not applica[ble] to this request per BHR determination that access floors of a structure to conduct inspection is not the intent of the premium for Inspectors and as suc[h] supervisor cannot approve requests for premium pay.” (Exh. C-9).¹³

52. After “three or four” of Schallerer’s Schedule A premium pay requests were rejected by Meyer, Crise (who was still an IBEW shop steward at the time) told Schallerer that Schallerer should not bother making such requests anymore because the City would deny all of them. At some point around this time, some of Schallerer’s peers believed that Schallerer was taking the lead on this issue.

53. In June 2018, Godsby started working for the City as the Commercial Inspections Division Manager of BDS. Shortly after that, Godsby starting receiving requests for premium pay from electrical inspectors. Subsequently, Godsby spoke with Meyer about the issue and asked her for the City’s position. Meyer told Godsby that the premium pay being requested did not apply to electrical inspectors.

54. In the middle or end of 2018 (after Meyer’s May 11, 2018 email sharing the City’s position on the matter), IBEW decided that it would pursue a “combined grievance” regarding the Schedule A premium pay issue with two other labor organizations in DCTU. However, no such grievance was ever filed.

August 2018 Interviews

55. In August 2018, there were multiple rounds of interviews for three senior electrical inspector vacancies in BDS. One vacancy was in Residential Inspections and the two others were in Commercial Inspections. Joe Disciascio, a “Supervisor II” in Residential Inspections, was the hiring manager for the Residential Inspections vacancy, while Meyer was the hiring manager for the two Commercial Inspections vacancies.

¹³Exh. R-7 specifically lists all of the SAP requests that Schallerer made between April 1, 2018 and January 31, 2019. According to Exh. R-7, Schallerer made Schedule A-related SAP requests on May 8, 9, and 23, 2018, and Meyer rejected all of those requests. The exhibit does not reference the request Schallerer made on January 29, 2019 via email (Exh. R-14 at 2), which we also note below, or any requests that were made after January 31, 2019.

56. For the August 2018 recruitment, there were 14 candidates in total, one of whom was Schallerer. (Exh. R-10 at 1.) The first round of interviews was conducted on August 7 and 8, 2018. Later, on August 20, 2018, a second round of interviews for the Commercial Inspections vacancies was conducted.

57. Schallerer interviewed on August 8 and 20, 2018. For the August 8, 2018 interviews, the two hiring managers, Disciascio and Meyer, served as interview panelists along with Copeland (who was either a senior or the chief electrical inspector at the time) and Emily Volpert (a “Coordinator II” in the “Communications” workgroup of BDS). (Exh. J-2.) On August 20, 2018, David Barnhart (a senior electrical inspector in Commercial Inspections), Edwards¹⁴ (the Analyst I who works in the Business Operations & Finance Services Division of BDS), and Godsby (Commercial Inspections Division Manager) served as panelists. Godsby also observed the August 8 and 9, 2019 interviews, but did not score any candidates in that round.

58. Lisa Serrano (a regular electrical inspector in Residential Inspections) was selected by Disciascio for the August 2018 Residential Inspections senior electrical inspector vacancy. (Subsequently, Serrano turned the position down.) For the two Commercial Inspections vacancies, Meyer selected Cari Ebbert (another regular electrical inspector in Residential Inspections) to be a senior electrical inspector responsible for “electrical plan review,” and Meyer selected McDowell (again, a regular electrical inspector at the time) to be a senior electrical inspector responsible for the “master permitting program.” As indicated above, McDowell had previously asked Meyer for Schedule A premium pay for high work, and Meyer had rejected McDowell’s request.

59. For his August 8, 2018 first round interview, Schallerer received a final score of 84 points, placing him in the middle of the 14 candidates. For his August 20, 2018 second round interview, Schallerer received a final score of 55 points, which was the lowest final score of that day’s 7 candidates. The second-lowest final score from August 20, 2018 was 58 points. (Exh. R-10 at 1.) Schallerer believes that, despite those scores, he should have been selected for one of the senior electrical inspector vacancies from the August 2018 recruitment. Nevertheless, neither Schallerer nor IBEW filed a related grievance or unfair labor practice complaint.

60. While Meyer was a supervisor in BDS, she encouraged all of her employees to complete “Professional Development Plans,” have career goals, and achieve the highest level of employment desired. On August 10, 2018 (between Schallerer’s two August 2018 interviews), Schallerer signed a Professional Development Plan for himself. Meyer signed and approved the same on August 8, 2018 (the same day as Schallerer’s initial August 2018 interview). One of the goals that Schallerer identified in his plan was “[t]o become a highly-qualified candidate for senior-level and management positions in the Bureau.” (Exh. R-1 at 1.) As part of Schallerer’s Professional Development Plan, Meyer approved Schallerer’s requests to have the City pay \$1,576.90 and allow 43 paid work hours for classes that were intended to help Schallerer promote. (Exh. R-1 at 4.)

¹⁴Exh. R-10 at 26 merely indicates that “A Edwards” was a panelist the for the August 20, 2018 interview. We presume that that name refers to Adrienne Edwards, who is named in Exh. J-2, the BDS organizational chart, as well as the City’s post-hearing brief (at 5).

61. After the results of the August 2018 interviews came out, Schallerer met with Commercial Inspections Division Manager Godsby in Godsby's office, looking for feedback from Godsby regarding how he could do better in the interviews. During their conversation, Godsby shared that Schallerer did not answer the equity question well, and that Schallerer would benefit from some of the City's equity training. Schallerer expressed to Godsby that he was unhappy with the City's decision to not promote him, and that Godsby had made a mistake. In a separate meeting, Schallerer also spoke with Disciascio (again, one of the two hiring managers) about the results of the August 2018 recruitment.

62. For Question 4 of the August 8, 2018 interview, which was the interview's equity/diversity question, Meyer scored Schallerer as a 3. A score of 3 meant that, to Meyer, Schallerer's answer was a "Good" answer. (Exh. R-10 at 5.)¹⁵ However, in Meyer's interview notes for the question, she wrote that Schallerer did not share something that he had changed in his approach "to be more culturally competent," which was something that Question 4 specifically directed Schallerer to do. (Exh. R-10 at 5.) Volpert, who as noted was another interview panel member, made a similar comment on Schallerer's answer to Question 4 in her notes.

63. On October 12, 2018, Meyer forwarded Godsby a string of emails concerning the City's position on paying electrical inspectors Schedule A premiums. The string included Schallerer's May 14, 2018 email to Meyer on the topic, as well as other emails. (Exh. C-11.)

April 2019 Interviews

64. On January 14, 2019, the City posted a job opening for a single senior electrical inspector vacancy in Commercial Inspections that would be responsible for "Field Inspections." (Exh. J-4 at 1.) Later, a second senior electrical inspector vacancy opened up and was tied in with the same recruitment. Meyer was selected to act as the sole hiring manager for the January 2019 recruitment. However, it was also decided that Meyer and Godsby would make a joint decision regarding who was hired.

65. Schallerer applied for the posted senior electrical inspector vacancy on January 15, 2019. (Exh. J-5 at 1.) "DA" and "JS" also applied.¹⁶ (Exh. J-6.) At the time, DA was a regular electrical inspector in Residential Inspections (and had been since April 15, 2015), and JS was the "QA QC manager" for the Mercedes Benz Stadium in downtown Atlanta, Georgia. (Exh. R-18 at 1.) Before that, from 2010 to 2015, JS worked as an "Electrical Inspector Principle" for the City of Atlanta. (Exh. R-18 at 1.) From 2005 to 2010, JS was a senior electrical inspector for the City of Atlanta.

66. For the first time, the January 2019 recruitment was open to anyone who was qualified to be a senior electrical inspector, not just current City employees. One reason for the change was, during the 2017 contract negotiations, the "Rule of Two" was removed from the CBA.

¹⁵The same scoring system was used for the August 2018 and April 2019 interviews. It is described in greater detail below. (Exh. R-10 at 2.)

¹⁶We use initials instead of full names for these other two candidates in order to protect their privacy.

In short, the Rule of Two provided that, any time that there were already two or more internal candidates on an eligible list, the hiring manager would always choose from among those internal candidates, and therefore would not allow other candidates who were not City employees to apply. As a result of the change, JS, who was not already employed by the City, could apply. The City's decision to have an open recruitment in January 2019 caused some angst among the existing electrical inspectors, some of whom believe that promotions should be based on time spent working in BDS.

67. As with “[m]ost recruitments,” for the January 2019 recruitment, the City held two optional “informational meetings.” (Exh. C-14 at 2.) The first such meeting, which occurred on January 23, 2019, at noon, was intended for existing City employees. The other, which occurred during the evening of January 24, 2019, was open to the public. (Exh. J-4 at 3.) Godsby and Schallerer attended both meetings.

68. In “early 2019,” Schallerer met privately with Sharp (the Human Resources Business Partner assigned to BDS) in her office to discuss his interpretation of the contract language concerning the premiums for high work. Sharp responded that she was aware of the issue, and shared what she had been told was the City's position on it. The meeting lasted for more than 20 minutes. In a different meeting, Sharp spoke with one other (unnamed) regular electrical inspector from Commercial Inspections about the same topic.

69. On January 29, 2019, at 11:19 p.m., Schallerer sent an email to Meyer with the subject of “High Work Pay.” In his email, Schallerer wrote,

“I have requests for two High Work Jobs I worked on 1/28/19 and 1/29/19. I understand if you are directed to deny this request. But re-reading the labor agreement between the City of Portland and the DCTU page 69 #4 clearly states that the Schedule ‘A’ Premium is warranted. Thanks for your consideration.”

(Exh. R-12 at 1.)

The same January 29, 2019 email also included a number of photographs, and was Schallerer's first Schedule A premium pay request since May 23, 2018. Additionally, the email request was copied to Crise, the IBEW shop steward, and Ray Lister, an IBEW business representative.

70. On January 29, 2019, at 11:50 p.m., Meyer sent an email back to Schallerer, copying Godsby and others. In her email, Meyer wrote, “Don [Schallerer] the City continues to interpret the contract that inspectors are not included in this provision. As I have shared before you may want to take your concern to your labor representative. I cannot authorize the premium pay.” (Exhs. C-10 and R-13.)¹⁷ At the time, Meyer was not expecting Schallerer's January 29, 2019

¹⁷A copy of Meyer's January 29, 2019 email is also included in Exhs. C-10 and R-13, as well as in the first page of Exh. R-14, which ALJ Kehoe admitted over Schallerer's objection at 11:04 a.m. on March 12, 2020. Exh. R-14 at 1 indicates that Meyer's email was sent at 3:50 p.m. on January 29, 2019, while Exhs. C-10 and R-13 indicate that the same email was sent at 11:50 p.m. that day. Separately, we note that Exh. R-14 also includes an email that Schallerer wrote and sent, using his work email address, in response to Meyer's January 29, 2019 email. Among other things, Schallerer's email stated, “I feel uniquely

request because Meyer had already explained the City's position on the matter to him via email in May 2018.

71. On February 13, 2019, Schallerer sent an email to Lister, the IBEW business representative. In the email, Schallerer wrote,

"I'm not sure this is the proper vector to pursue this, but I have concerns that the transparent, legitimate hiring process is being circumvented for the senior electrical position here at BDS. The word is that the application date is being extended. That information does not show up in government jobs .com or anywhere else as far as I know. I suspect something shady is going on with preferential treatment to someone who has not yet applied. Or conversely, that there is subversive action against the two known applicants, one of which is me.

"A conspiracy theorist might infer that since I sent an email to Cindy Meyer and Darryl Godsby requesting High Work pay, that maybe there is retaliation going on here. Do you think that you could look into this without tipping your hand that I have anything to do with this?

"Thanks for your help.

"Also please take no action on the High Work until after the hiring process is completed. I have a real concern that it would be used against me, and prevent me from being seriously and fairly considered for this position."¹⁸

(Exh. R-15 at 1.)

72. On February 14, 2019, at 8:28 a.m., Lister responded to Schallerer's email, writing, "I'm looking into it. Thanks for the heads up." (Exh. R-15 at 1.) At 8:18 p.m. that day, Schallerer wrote back, "Ray, Thanks. I'm not clear on whether[]the city has any guidelines they are obligated to follow or can do whatever they feel like doing. Any information is appreciated." (Exh. R-15 at 1.)

73. On February 15, 2019, Schallerer sent an email to Chloe Massarello, an "Admin. Specialist II" in the Business Operations & Finance Services Division of BDS, and Sara Flores

qualified to make an interpretation of the language in our joint agreement." (Exh. R-14 at 1.) It also mentioned that Schallerer might be interviewing for a senior electrical inspector position soon, then stated, "I have grave concerns that requesting premium pay be properly applied would not be overlooked in the hiring process." (Exh. R-14 at 1.) However, significantly, instead of sending the email response to Meyer, on January 31, 2019, at 11:19 p.m., Schallerer sent the email to his own personal email address and to the personal email address of his wife. The subject of the email was "Confidential draft- Do not share." (Exh. R-14 at 1.) There is no evidence that Meyer ever saw the email that Schallerer sent himself and his wife.

¹⁸When presented this exhibit, Meyer testified that it was "completely untrue" that there was any conspiracy or retaliation against Schallerer. She also testified that she was unaware of Schallerer's February 13, 2019 email to Lister until just before the Board's March 2020 hearing.

Garduno, an “OSS II” in Business Operations & Finance Services. (Exhs. R-16 at 4 and J-2.) In that email, Schallerer wrote,

“I applied for the Commercial Senior Electrical Position on January 15th 2019. I haven’t heard anything at all from anyone. It is long past that date which was specified in[governmentjobs.com[. Thanks] for letting me know about the interviews.¹⁹

“Could you please look into this? We have been understaffed for five years or more and filling this position, and the other open positions, could help our department.”

(Exh. R-16 at 5.)

74. Following up on Schallerer’s original February 15, 2019 email, on February 25, 2019, Darryl Godsby sent an email update to Schallerer, writing,

“Thank you very much for your interest in the Sr. Electrical position. As you know, the City has a hiring process that needs to be followed. This has been impacted with the changes in Workforce Development and Recruitment. I expect that BHR will issue the eligible list soon. For further updates on this this position, please send your inquiries to me.”

(Exh. R-16 at 1.)

75. On February 26, 2019, Schallerer responded to Godsby’s email, writing, “Thank you for responding. I’m certain that all that could be done is being done.” (Exh. R-16 at 1.)

76. On February 27, 2019, the City determined that all three individuals who applied for the January 2019 recruitment (*i.e.*, DA, JS, and Schallerer) met the minimum qualifications for the vacancy and would be interviewed. (Exh. R-11.)

77. In March 2019, Crise promoted from senior electrical inspector (a position that Crise had held for around two and a half years) to chief electrical inspector. Around that same time, Crise chose to stop serving as shop steward. As noted above, chief electrical inspectors are also represented by IBEW. In the same month, Russ Tomka and Josh Weeks (neither of whom testified) also became supervisors in BDS. At the time, Weeks was intended to replace Meyer after her planned retirement in May 2019. (Testimony Meyer at 1:32 p.m. on March 12, 2020.)

¹⁹Exh. J-4 is a copy of the online posting for the January 2019 senior electrical inspector recruitment. It indicates that the period for applying for that particular vacancy opened on January 14, 2019 and closed on January 28, 2019. The record does not reveal when the candidates applied, or whether the January 28, 2019 application deadline was ever extended. Meyer testified that this application period was “possibly” extended, and that sometimes an extension is made when there is a small pool of applicants. As indicated elsewhere, only three people applied during the January 2019 recruitment. Further, the January 2019 posting noted that there was only one vacancy at the time, but also stated that the recruitment’s eligible list may be used to fill future senior electrical inspector vacancies. (Exh. J-4 at 1.)

78. On April 1, 2019, DA, JS, and Schallerer separately interviewed for the January 2019 senior electrical inspector vacancies. DA and Schallerer interviewed in person. JS, the external candidate from Atlanta, interviewed via Skype. Chronologically, DA interviewed first, JS interviewed second, and Schallerer interviewed third. (Exh. J-9.)

79. For all three candidates, the City's interview panel consisted of (1) Tara Carlson, an "Examiner" who works in the "Plan Review Services" Division of BDS; (2) Crise, the recently-promoted chief electrical inspector and former IBEW shop steward; and (3) Meyer, the supervisor.²⁰ (Exh. J-2.) As the hiring manager for the January 2019 recruitment, Meyer specifically chose who would be on the panel. Tomka and Weeks (both of whom were also supervisors, as noted) observed the April 1, 2019 interviews, but the two did not participate in them or score candidates' answers.

80. All three of the candidates that were interviewed on April 1, 2019 were asked the same five questions. All of those questions were chosen in advance by Meyer from a preexisting bank of City-approved interview questions. The five questions were:

- (1) "Tell us about your experience and education that has prepared you for the role of Senior Electrical Inspector." (Exh. J-12 at 1.)
- (2) "Tell us about a time when you had to interact with a disgruntled customer and how you handled the situation." (Exh. J-12 at 2.)
- (3) "Please share with us an example of when you have brought a group of inspectors to consensus on the interpretation and application of a code requirement. What was the issue and what skills, or techniques did you use to promote discussion and build agreement?" (Exh. J-12 at 3.)
- (4) "In the last year what have you done to improve your interpersonal/communication skills and electrical code knowledge to increase your effectiveness as an electrical inspector?" (Exh. J-12 at 4.)
- (5) "The City of Portland's workforce, customers, and business partners are diverse. Differences include race, ethnicity, language proficiencies, socioeconomic status, physical abilities, and other differences. When you have encountered racial or ethnicity bias, how have you addressed it?" (Exh. J-12 at 5.)

81. For every answer given by a candidate, each panelist privately gave the candidate a score of 0 through 5, with 0 as the worst possible score and 5 as the best possible score. Because each candidate was asked five questions, and because each of those five questions could result in five points from each of the three panelists, each candidate could receive a maximum score of 75

²⁰Carlson's position is listed as "Examiner" in the organizational chart, "Plans Examiner, Commercial" in the CBA, and "Commercial Plans Examiner" in Schallerer's post-hearing brief. (Exhs. J-1 at 90 and J-2, Schallerer's post-hearing brief at 4.) Given that Carlson's position is listed in the wage scales section CBA, it follows that she, like Crise and Schallerer, is represented by DCTU.

points in his interview (*i.e.*, 5 x 5 x 3 = 75). For the January 2019 recruitment, the City also calculated the percentage of points each candidate scored out of that maximum number, and treated that percentage as each candidate's "final score."²¹

82. A score of 2 was given for a "Fair" answer, which was defined as "Response identified some elements, but not all elements required for 'Good' rating." (Exh. J-12 at 1.) A score of 3 was given for a "Good" answer, which was defined as "Response indicated candidate is competent in relations to the question; specifically described possession of most of the criteria and provided examples." (Exh. J-12 at 1.) A score of 4 was given for a "Very Good" answer, which was defined as "Response encompassed all elements of 'good' response and some elements of 'outstanding' response." (Exh. J-12 at 1.) That high score of 5 was given for an "Outstanding" answer, which was defined as "Demonstrated possession of the criteria and provided clear examples indicating measurable results and[/]or positive outcomes." (Exh. J-12 at 1.) All of those definitions (including the definitions for scores of 0 and 1, which we need not provide here) were included in a "scoring matrix" that was included in each page of each panelist's question/scoring sheets. In addition, each panelist was given a sheet that outlined the ideal answers for each of the five questions. (Exh. J-8.)

83. Before the April 1, 2019 interviews commenced, the three interview panelists were given copies of the three candidates' resumes. The same resumes were also available to the panelists during the interviews. However, before the interviews began, the panelists were told that their scores should only be based on the candidates' answers to the interview questions, rather than the resumes or the panelists' preferences. That instruction was consistent with the City's standard practice.

84. The following table outlines the complete results of the April 1, 2019 interviews. The top row of the table lists the three panelists, while the left column lists the three candidates. The numbers listed in parentheses are the individual scores that were given for each of the five questions in the order that they were asked. The "Final" column provides the approximate percentage of the 75 possible points that each candidate received (with a maximum of five points for each of the five answers). As noted, that percentage also represents the final score that each candidate ultimately received.

	Meyer	Carlson	Crise	Total	Average	Final
DA	22 (4, 5, 5, 5, 3)	21 (5, 4, 5, 4, 3)	18 (4, 4, 4, 3, 3)	61	20	81
JS	21 (4, 4, 5, 5, 3)	17 (5, 3, 4, 3, 2)	16 (4, 3, 4, 3, 2)	54	18	72
Schallerer	17 (4, 4, 3, 3, 3)	17 (4, 4, 3, 3, 3)	19 (4, 4, 3, 4, 4)	53	18	71

(Exhs. J-13 and R-11.)

85. As indicated above, for the April 1, 2019 interviews, DA received the highest final score with 81 points, JS received the second highest final score with 72 points, and Schallerer received the lowest final score with 71 points (a difference of a single point). One of the three

²¹The City scores employees this way (rather than simply ranking candidates based on the total score) because it allows the City to give military veterans additional points. In the January 2019 recruitment, however, none of the three candidates were veterans.

panelists, Crise, scored Schallerer the highest. However, the two other panelists, Carlson and Meyer, scored DA the highest. Carlson scored JS and Schallerer equally. Further, Meyer and Carlson both gave Schallerer the same score of 17 points.

86. Meyer gave Schallerer a 4 on Questions 1 and 2, and a 3 for Questions 3, 4, and 5. Schallerer believes that Meyer's scores for him for Questions 1 and 2 are "reasonable," but believes that he "could have gotten a 4" from Meyer for Questions 3, 4, and 5. Schallerer also believes that Meyer intentionally scored JS higher than she should have to ensure that Schallerer was not promoted. Moreover, Schallerer believes that Meyer intentionally scored him and JS the way that she did because of Schallerer's earlier Schedule A premium pay requests and because he (as Schallerer testified) "advocate[s] so strongly for adequate staffing."

87. "[I]mmediately after" the April 1, 2019 interviews, all of the panelists' scoring sheets were collected and then forwarded to Sharp, who tallied the scores. (Exh. C-14 at 3.) Around the same time, the panelists were given a chance to discuss the three candidates, and Meyer asked the other panelists if they saw any "red flags." None of the three candidates shared any concerns about any of the candidates. At some point, Crise commented that, if JS was hired, it would help with the ongoing staffing issue because promoting Schallerer to a senior position would effectively result in Schallerer's regular electrical inspector work not getting done. At the time, Crise was also concerned that JS had never worked for the City and thus was "an unknown." But Crise did not express that concern aloud.

88. In Meyer's view, Schallerer came across as "superior and aloof" during his April 1, 2019 interview. However, Meyer did not share that position with the panel or hold that opinion about Schallerer "in general." Instead, Meyer believes that Schallerer did a "good job" as an electrical inspector.

89. At the end of her written notes about Schallerer's April 1, 2019 interview, Meyer wrote that Schallerer "[w]anted to express confidence but was a bit over the top." She also noted a "[c]oncern that his superiority may have detrimental effects on staff." (Exh. J-12 at 6.) For the first question in particular, Meyer noted, in part, that Schallerer ended his answer abruptly by telling the panelists, "I'd like to move on to [the] next questions." (Exh. J-12 at 1.) For the fifth question, which was the City's equity question, Meyer noted, among other things, that Schallerer described his brother-in-law as a "redneck." (Exh. J-12 at 5.) Meyer believed that the term was inappropriate.

90. On April 4, 2019, Sharp emailed the three candidates' final scores to Meyer. The email did not show how each panelist scored the candidates, or include the scores that were given out for individual questions. (Exh. C-15 at 1.)

91. After Meyer received the final scores from Sharp, Meyer met with Godsby, Tomka, and Weeks. During that meeting, the group reviewed the three candidates' scores, spoke about the two positions that they had to fill, and discussed the duties and roles affiliated with them. Meyer also expressed that she was "very excited" about JS, and told the group that JS had "tremendous work experience" and "excellent communications skills." Tomka and Weeks agreed with Meyer's assessment.

92. The ultimate decision regarding who was hired was made by Meyer and Godsby, but Meyer was always considered the “hiring manager” for the January 2019 recruitment. In the end, the January 2019 recruitment filled two open senior electrical inspector positions. DA, the highest scoring candidate, was selected to fill the first vacancy. JS, the second highest scoring candidate, was selected to fill the second vacancy. Schallerer, the lowest scoring candidate, was not selected.

93. On April 5, 2019, Meyer sent an email to Flores Garduno (the “Admin. Specialist II” in Business Operations & Finance Services), Godsby, Kathy Robertson (who has a similar position to Flores Garduno), and Sharp. (Exhs. R-16 at 4 and J-2.) In the email, Meyer wrote,

“We would like to extend an offer to [DA] as a Senior Electrical Inspector but only want to do that after we have talked to the third candidate that we are not moving forward as a potential hire.

“Either Kathy, can you confirm that we have 2 vacant Senior Electrical inspector positions. If we do also want to extend an offer to the second ranked candidate but we need to discuss some licensing, certification and possible state waivers as a condition of employment before we extend and offer. I will set up a meeting to discuss what would need to be required and how we might go about it for early next week.

“For the third candidate Darryl [Godsby] and I want to deliver the message to him that he is not being selected to fill a position at this time. Sara [Flores Garduno], we will notify you when we have had that meeting with the candidate so that you can then send them your letter. Our meeting will take place with him either this afternoon or perhaps Monday.”

(Exh. C-15 at 1.)

94. Shortly after April 5, 2019, Schallerer had an in-person “rejection interview” with Godsby. Meyer did not attend. In the interview, Godsby explained to Schallerer that the City was only filling two senior electrical inspector vacancies with the January 2019 recruitment, that Schallerer had “stiff competition,” and that Schallerer had not been selected for either vacancy. It was the first time that Schallerer had heard that there were two vacancies being filled, rather than one.

95. On April 9, 2019, Robertson (who works in Business Operations & Finance Services) sent out an email notifying the recipients that, as of that date, there was another senior electrical inspector vacancy in Commercial Inspections. However, Robertson’s email also indicated that only senior electrical inspectors within Commercial Inspections would be considered for the vacancy, which the email described as an “internal transfer.” (Exh. C-16 at 1.)

96. On May 2, 2019, Meyer emailed JS, the second highest scorer, a “conditional offer of employment.” (Exh. C-17 at 4.) In short, the email offered JS the job, but explained that, for JS to be hired as a senior electrical inspector, he needed to obtain “an Oregon Inspector Certification”

and an “Oregon Electrical Specialty Code Inspector Certification,” and meet other requirements. (Exh. C-17 at 2.) At the time, JS did not possess those two certifications. The January 14, 2019 job posting for this recruitment similarly noted that an applicant would need the certifications at the time of hire. (Exh. J-4 at 2.)

97. DA, the high scoring candidate who was already working for the City as a regular electrical inspector, started working as a senior electrical inspector shortly after he was chosen for the promotion.

98. After Schallerer was rejected in April 2019, he met with Sharp (the Human Resources Business Partner assigned to BDS) in her office for the second time. During that meeting, which lasted around 15 minutes, Schallerer repeatedly expressed that he wanted to review the panelists’ notes from the April 1, 2019 interviews. Sharp responded that she never shares such notes as a matter of policy, but offered to review the notes herself and then give Schallerer feedback based on them. Schallerer then indicated that he was not interested in Sharp’s interpretation of the notes. During the same meeting, Schallerer also said that his interview had not gone fairly. However, Schallerer did not explain or give any reason why he thought that. At that time, Schallerer did not know the other candidates’ scores.

99. The City typically does not provide panelists’ interview notes upon request because the City considers that information confidential. It takes that position because the City reuses questions, and because panelists’ notes are not a verbatim record of the interviews and could therefore be misleading.

100. On April 26, 2019, Lister (the IBEW business representative), sent an email to Godsby and Sharp. In the email, Lister wrote,

“Can we schedule some time to have a conversation about the hiring process for the recent Senior Electrical Inspector opening(s)? I have a member who believes that they experienced discrimination in the hiring process and I’d like to get the city’s understanding of what happened. Please feel free to extend this invitation to anyone appropriate that I may have missed.”

(Exh. R-20.)

101. On April 29, 2019, Godsby responded to Lister’s email, writing, “Let me get together with Kathy [Sharp] to figure out a good time to talk. Is there any time that does not work for you?” (Exh. R-20.) After that email, Godsby and Sharp met with Lister as requested. In the meeting, Lister asked a lot of questions about the City’s hiring process. In response, Sharp gave Lister an explanation of that process and told Lister what happened during the April 1, 2019 interviews.

102. On May 16, 2019, Lister sent the City an email in which he asked City to let him review the panelists’ interview notes and other related documentation as part of an investigation regarding whether the City discriminated against Schallerer in the hiring process. (Exh. R-21 at 1.)

103. On May 17, 2019, Meyer retired from her job with the City.

104. On June 11, 2019, at 7:54 a.m., Schallerer sent an email to Weeks, Schallerer's new supervisor. In the email, Schallerer wrote, "I would like for you to approve a high work schedule 'A' premium for a <45' scaffold I scaled on 5/3/2019 on the roof of 1200 SW 1st AV. You can consult Page 69 #4 of the DCTU Contract effective 7/1/2017 to verify compliance with the contract." (Exh. R-22 at 1.)

105. On June 11, 2019, at 8:21 a.m., Weeks wrote back to Schallerer,

"This was brought up when I was doing inspections last year on scaffolding over 45' and it was determined that inspection does not fall under this provision in the contract. I believe it was already grieved, but you are more than welcome to take any further action you deem necessary."

(Exh. R-22 at 1.)

106. On June 11, 2019, at 9:08 a.m., Schallerer responded, in part, "Thank you for your timely response. Given my lengthy experience and proven ability to interpret code and contractual language, I have a more literal interpretation of 'work'. I'll likely pursue the legitimate options to see this through to the workers' satisfaction." (Exh. R-22 at 1.)

107. On June 18 2019, the City and Lister (again, the IBEW business representative) reached a "Stipulated Protective Agreement" that allowed Lister to confidentially review the interview-related documents that he requested from the City on May 16, 2019. (Exh. R-23 at 4.) Lister was not allowed to share those documents with Schallerer.

108. On June 24, 2019, IBEW filed grievances with the City regarding the Schedule A premium pay issue via email. One grievance was specifically written to address Schallerer's formal premium pay requests (the first of which, as noted, was made over a year before on May 8, 2018), while the other applied to all of the electrical inspectors' requests. Both grievances were signed by Lister and addressed to BDS Director Rebecca Esau. (Exhs. C-13 and R-24 at 4-6.)

109. On July 3, 2019, Lister met with Elshad Hajiyeve, the "Senior Business Operations Manager" of BDS (who has also been called "Assistant Director" and "Deputy Director"), about the grievances. (Exhs. R-24 at 1 and C-14 at 1.)

110. On or around July 10 or 14, 2019, JS (the candidate from Georgia) started working for the City as a senior electrical inspector after receiving the necessary certifications.

111. On July 25, 2019, the City gave IBEW a "Level One response" denying IBEW's grievance concerning Schallerer's premium pay requests. (Exh. R-26 at 1.) In sum, the City's response asserted that the grievance was "without merit and time barred." (Exh. R-26 at 2.)

112. By the end of July 2019, IBEW determined not to pursue its premium pay grievances any further. IBEW's rationale was that the grievances were untimely, and that it would attempt to address the issue during subsequent contract negotiations.

113. On August 7, 2019, Schallerer successfully completed the City's Interviewing with Confidence class a second time. (Exh. R-2 at 2.) For that particular class, Sharp (the Human Resources Business Partner assigned to BDS) acted as a co-facilitator. In Sharp's view, Schallerer was "listening, but not engaging" during the class.

114. On October 2, 2019, Schallerer filed the instant unfair labor practice complaint against the City. It asserts that, as a result of Schallerer's advocacy on behalf of himself and other electrical inspectors, Meyer "arbitrarily" scored Schallerer lower on his interview questions than she did for JS during the April 1, 2019 interviews. The complaint also specifically asserts that Meyer had a related "bias." (Exh. J-14 at 2.)

115. Crise (again, a chief electrical inspector, current IBEW member, and former IBEW steward and contract negotiator) considers Meyer to be "even keeled," "a person who goes by the book," "professional," and "a straight shooter." Crise also has never felt that Meyer had any bias regarding Crise's union activities. Additionally, Crise feels that Meyer ran the April 1, 2019 interviews the same way that she had run her other interviews, and Crise did not see Meyer demonstrate any sort of bias against Schallerer during his April 1, 2019 interview.

116. Godsby (Commercial Inspections Division Manager) considers Meyer to be "very even keeled" and "very knowledgeable." Likewise, Godsby has never witnessed Meyer "express any kind of antagonism toward IBEW or union activities," and has never seen Meyer play favorites among employees or "demonstrate any kind of dislike of Mr. Schallerer." In Godsby's view, he and Meyer never thought of a union as being "adversarial."

117. Tebeau (Residential Inspections Division Manager) considers Meyer to be "very even tempered" and "very smart." In addition, Tebeau has never seen Meyer "get upset with anybody or even at anything."

118. Sharp (the Human Resources Business Partner assigned to BDS) believes that Meyer is "even keeled," "steadfast," and "steady." Furthermore, Sharp has never witnessed Meyer express any antagonism toward the electrical inspectors and their requests for Schedule A premium pay for high work.

January 2020 Interviews

119. Interviews for another senior electrical inspector vacancy in Residential Inspections occurred on January 21, 2020. Disciascio (again, a Supervisor II in Residential Inspections) was the hiring manager for the recruitment, as well as one of the four interview panel members for the same. Schallerer was one of four candidates, and ultimately scored the lowest of the four. (Exh. R-27.) According to Tebeau (who was also a panel member for the January 2020 recruitment), during Schallerer's interview, Schallerer was "confident when he came in, but he seemed very unprepared to * * * convince the panel that he was the best candidate." Additionally, for the 2020

recruitment's equity question, Schallerer was supposed to provide examples. Instead of doing so, however, Schallerer answered that all kinds of people had given him money and called him back for more work when he worked in San Francisco.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The City did not score Schallerer lower on interview questions than others as a result of his advocacy on behalf of himself and others, and therefore the City did not violate ORS 243.672(1)(a).

Standards of Decision

ORS 243.662 provides, "Public 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." To protect that interest, ORS 243.672(1)(a) makes 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 243.662." The burden of proof is on the complainant to prove its ORS 243.672(1)(a) claim by a preponderance of the evidence. ORS 183.450(2); OAR 115-010-0070(5)(b); *Slawson and International Association of Fire Fighters, Local #1817 v. Jackson County Rural Fire Protection District No. 3*, Case No. UP-6-86 at 18, 9 PECBR 8921, 8938 (1986) (citing *Oregon State Employees Association v. Coos Bay-North Bend Water Board*, Case No. C-122-80, 5 PECBR 4047 (1980)).

The language of ORS 243.672(1)(a) includes two distinct prongs, one of which prohibits restraint, interference, or coercion "because of" the exercise of protected rights. The other prong prohibits actions that restrain, interfere with, or coerce employees "in the exercise" of their protected rights. Here, Schallerer exclusively argues that he was scored as he was "because of" his protected activity. (Schallerer's post-hearing brief at 1, 5, 7, 12, and 14.) For claims under the "because of" prong, a complainant must ultimately establish that the employer was motivated by the exercise of a protected right to take the disputed action. For the Board, that is a fact determination based on the entire record. *Portland Assn. of Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623-26, 16 P3d 1189 (2000); *Service Employees International Union Local 503, Oregon Public Employees Union v. City of Tigard*, Case No. UP-040-13 at 8-9, 26 PECBR 131, 137-38 (2014); *Polk County Deputy Sheriff's Association v. Polk County*, Case No. UP-107-94 at 13-14, 16 PECBR 64, 76-77 (1995).

In order to prove a "because of" allegation, a complainant must at least demonstrate that the employee engaged in protected activity, that the employer took some adverse action against the employee, and that there is a sufficient connection between the protected activity and the employer's action to suggest a causal relationship. That final element is often called a "causal connection." *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transit District*, Case No. UP-48-97 at 8, 17 PECBR 780, 787 (1998). In this case, it is undisputed that Meyer and the City were aware of nearly all of Schallerer's allegedly protected activity, and that denying Schallerer a promotion was an adverse employer action. *See Oregon*

Public Employees Union, SEIU Local 503 v. Wallowa County, Case No. UP-77-96 at 16-17, 17 PECBR 451, 466-67 (1997); *IAFF, Local #1489, and Brown v. The City of Roseburg*, Case No. C-53-84 at 10, 8 PECBR 7805, 7814, *AWOP*, 76 Or App 402, 708 P2d 1210 (1985).

A causal connection is typically based on proximity of time between the protected activity and the employer's action, coupled with attending circumstances that suggest something other than legitimate reasons for the temporal tie. *Tri-County Metropolitan Transit District*, UP-48-97 at 8, 17 PECBR at 787. That said, the likelihood that there is a connection between the protected activity and the adverse employer action gets progressively smaller as time goes by. *Oregon School Employees Association v. West Linn School District*, Case No. UP-53-90 at 10, 12 PECBR 732, 741 (1991). Finally, the fact that an employee is participating in union activity at the time of the employer's action does not render that action unlawful; nor is the fact that the employee was engaging in union activity, standing alone, substantial evidence that the employer action was taken as a result of that activity. If the reasons for the employer's actions were in fact unconnected with the employee's protected activity, the action may have been taken for a good reason, a bad reason, or no reason at all. *Norris v. Oregon State Police Department*, Case No. C-128-77 at 9, 3 PECBR 1994, 2002 (1978) (citing *Petersburg Education Association v. Petersburg School District No. 14*, Case No. C-287, 1 PECBR 320, 23 Or App 482, 543 P2d 35 (1975)).

Discussion

Introduction

As noted above, the issue in this case is whether the City violated ORS 243.672(1)(a) by scoring Schallerer lower on interview questions than others as a result of his advocacy on behalf of himself and others. Nevertheless, the complaint and the parties' post-hearing briefs actually present a narrower issue. Although the complaint does mention in passing that Schallerer has applied for "other positions," the complaint only addresses Schallerer's April 1, 2019 interview in any detail. (Exh. J-14 at 1.) The complaint also narrowly alleges that "Meyer arbitrarily scored Schallerer lower on his interview questions than *Applicant number 2*," who the complaint does not actually mention by name, but describes as the candidate who received the second highest score. (Exh. J-14 at 2, emphasis added.) Further, in Schallerer's post-hearing brief (at 12), he specifically contends that the other panelists from the April 1, 2019 interview were "unbiased." Accordingly, our analysis is effectively limited to determining the motivation of Meyer (as opposed to any other panelists or City agents) and to how Meyer scored Schallerer and JS (the second place candidate) on April 1, 2019 in particular (as opposed to other candidates and Schallerer's other interviews).

The complaint also asserts, "The City has refused to release the supporting material for the scoring of the interviews for the Position to Schallerer." (Exh. J-14 at 2.) However, it appears that, after ALJ Kehoe ruled in Schallerer's favor regarding the City's January 24, 2020 motion to quash on February 26, 2020, and before the Board's March 2020 hearing, the City did provide Schallerer with all of the requested materials. Moreover, Schallerer did not return to this particular matter during the hearing or in his post-hearing brief. Therefore, we need not analyze this additional element of the complaint further.

Did Schallerer engage in protected activity?

In relevant part, the complaint asserts,

“Schallerer has pursued his rights and the rights of his co-workers under the Agreement with the City. This has included pursuing a pay differential with Meyer for the ‘high-work’ for all City Inspectors. * * * Schallerer has also advocated on behalf of all Inspectors for improved staffing levels in the Commercial Electric Section of BDS.”

(Exh. J-14 at 1.)

In a November 1, 2019 letter to Schallerer, ALJ Kehoe ordered Schallerer to provide some additional detail regarding the foregoing portion of the complaint, including how and when Schallerer engaged in the aforementioned activities. In a November 15, 2019 response to the order to clarify, which was also shared with the City, Schallerer specified that the following would prove his claim: (1) Schallerer’s April 25, 2018 (3:20 a.m.) email to Meyer regarding staffing levels and premium pay for high work; (2) Schallerer creating, sharing, and encouraging his coworkers to use an Excel spreadsheet to track high work; (3) Schallerer submitting requests for Schedule A premium pay for high work; (4) Schallerer’s May 14, 2018 email to Meyer in which he took issue with the City’s reasoning; and (5) Schallerer’s other (unspecified) emails to Meyer regarding premium pay. Accordingly, we must limit our analysis to those particular actions.

Under the circumstances presented here, Schallerer’s various formal requests for Schedule A premium pay for high work, his creation and distribution of his Excel template, and his May 14, 2018 email are essentially akin to joining in the filing of a union grievance, which is generally considered a “core protected activity.” *See AFSCME Local 189 v. City of Portland*, Case No. UP-7-07 at 35-36, 22 PECBR 752, 786-87 (2008); *Tri-County Metropolitan Transit District*, UP-48-97 at 8, 17 PECBR at 787. We recognize that, in one sense, Schallerer’s own formal requests would only result in premium payments for himself for his own high work. And generally, an individual’s pursuit of a personal objective, disconnected from his or her labor organization, does not constitute activity protected by ORS 243.672(1)(a). *Eugene Charter School Professionals, AFT, AFL-CIO v. Ridgeline Montessori Public Charter School*, Case No. UP-34-08 at 13, 23 PECBR 316, 328 (2009); *Oregon AFSCME Council 75, AFL-CIO and Demaray v. State of Oregon, Department of Environmental Quality*, Case No. UP-91-86 at 12, 10 PECBR 963, 974 (1988); *Oregon State Police Department*, C-128-77 at 9, 3 PECBR at 2002. We also note that the actual premium pay grievances were filed on June 24, 2019 (after Schallerer’s April 2019 rejection and Meyer’s May 2019 retirement), and that neither IBEW nor DCTU formally partnered with Schallerer in his requests. However, it is sufficiently clear from the testimony presented that IBEW’s shop steward, Crise, encouraged Schallerer and his colleagues to track high work and make premium pay requests. It is also clear that they did do so. Fundamentally, each of those requests (whether it was right or wrong on the merits) was asserting what was understood as a bargained-for contractual right, as part of a larger, coordinated group effort. According to the testimony provided, some of Schallerer’s peers also believed that Schallerer was taking the lead on this particular dispute. *See Central Educational Association and Vilches v. Central School District 13J*, Case No. UP-74-95 at 13-17, 17 PECBR 54, 66-70 (1996),

order modified on recons, 17 PECBR 93 (1997), *aff'd*, 155 Or App 92, 962 P2d 763 (1998); *Lucas v. Coos County Sheriff's Office*, Case No. UP-119-90 at 6-7, 13 PECBR 97, 102-03 (1991).

As for Schallerer's April 25, 2018 (3:20 a.m.) email regarding the staffing issue, however, it has no meaningful connection to Schallerer's labor organization, which the language of ORS 243.662 (provided above) requires. Accordingly, that communication was unprotected. Although Schallerer's April 25, 2018 email does reference the DCTU contract, his doing so did not automatically cloak the communication with the statute's protection. The fact that Crise happened to be included in the email chain is also not dispositive. (Exh. R-3 at 1.) At its core, the email was simply Schallerer sharing his own "idea" about how to increase the pool of electrical inspector candidates, which was to pay everyone a premium for "all time worked." (Exh. C-4 at 2.) Crise, IBEW, and DCTU were not meaningfully involved in or connected to the email. There is also no clear evidence that a related group effort had yet begun, or that anyone else shared Schallerer's position. See *Ridgeline Montessori Public Charter School*, UP-34-08 at 13, 23 PECBR at 328 ("Protected activity does not include strictly individual complaints about working conditions and other protest actions that are unrelated to the activities of a labor organization."); *West Linn School District*, UP-53-90 at 7-8, 12 PECBR at 738-39; *White v. Oakland School District No. 1*, Case No. C-128-78 at 10, 5 PECBR 2830, 2839, *AWOP*, 49 Or App 483, 621 P2d 682, (1980). To the extent that we may consider it at all (as it is not specifically mentioned in the clarification letter or Schallerer's post-hearing brief), there is no evidence that Schallerer's February 15, 2019 email that mentioned staffing was sanctioned by or affiliated with his labor organization either (or that it ever reached Meyer).

Schallerer testified that he has been "vocal" about Commercial Inspections being understaffed, "maybe" during staff meetings that were held by Godsby, Meyer, and/or Mitch Nichols, who Schallerer testified was either "Commercial Chief" or "Commercial Manager" in 2016 or 2017. (Testimony Schallerer at 9:31, 9:29, and 10:47 a.m. on March 12, 2020.) However, the record does not provide any additional details about those meetings such as when they occurred, what exactly Schallerer said in them, how he said it, or whether they were affiliated with his labor organization, for example. Moreover, that particular activity was not a clear part of the complaint or Schallerer's November 15, 2019 letter clarifying the same, and none of the exhibits address Schallerer's alleged verbal comments about staffing. (Testimony Schallerer at 10:47 a.m. on March 12, 2020). Accordingly, Schallerer's verbal comments about staffing are not a part of this analysis.

Is there a causal connection between the protected activity and Meyer's scores?

As we explain below, the record is bare of any direct or indirect evidence of any interference, restraint, or coercion by Meyer "because of" Schallerer's protected activity. There is also no evidence that Meyer was at all biased against, concerned about, or hostile toward IBEW, DCTU, or the prospect of paying Schedule A premiums for high work. Furthermore, there is no evidence that Meyer's scoring of Schallerer and JS reflected anything other than her reasonable interpretation of the two candidates' interview answers. Accordingly, no causal connection has been shown.

Testimony from others about Meyer suggests without contradiction that Meyer was “by the book,” “professional,” “a straight shooter,” “very even keeled,” and “very even tempered,” and that Meyer did not “express any kind of antagonism,” “play favorites,” think of a union as being “adversarial,” or “demonstrate any kind of dislike of Mr. Schallerer.” During the hearing (at 10:06 a.m. on March 12, 2020), Schallerer himself even speculated that Senior Business Operations Manager Hajiyevev (who was not mentioned in the complaint or the November 2019 complaint clarification letter) actually “directed” Meyer to not make the requested premium payments. (Exh. R-24 at 1.) Separately, Meyer has gone through multiple pre-interview bias awareness trainings. And as hiring manager for the January 2019 recruitment at issue, Meyer also chose to have Crise as a panelist, despite Crise’s IBEW membership, advocacy at the bargaining table, and long history as a shop steward. Carlson, the third panelist Meyer selected, was also represented. *Contrast Oregon School Employees Association v. Medford School District 549C*, Case No. UP-60-86 at 24, 10 PECBR 402, 425 (1988) (decision-maker “repeatedly showed open and unabashed hostility toward union participation”), *AWOP*, 94 Or App 781, 767 P2d 934 (1989); *The City of Roseburg*, C-53-84 at 10, 8 PECBR at 7814 (decision-maker looked upon unionism “with a strong disfavor”).

When Meyer testified, she showed no indication of a “bias” or retaliatory motive as Schallerer specifically alleged in the complaint. (Exh. J-14 at 2.) Meyer also came across as a credible witness, and because she was retired from the City when the hearing occurred, had no obvious reason to hide her true thoughts. When Meyer was directly asked by Schallerer’s attorney if “anything clouded [her] judgment” while she was interviewing Schallerer on April 1, 2019, Meyer unambiguously responded (at 1:45 p.m. on March 12, 2020), “I don’t believe so.” Meyer also testified that it was “completely untrue” that there was a conspiracy or retaliation against Schallerer, and that she and Schallerer “had a good working relationship.” As we indicated above, Meyer did testify that Schallerer came across as “superior and aloof” during his April 1, 2019 interview, but Meyer also testified that she did not hold that opinion about Schallerer “in general” and that, in her view, Schallerer did a “good job” as an electrical inspector.

Moreover, all of Meyer’s written communications that are in the record are polite, straightforward, and free of any hint of bias. In response to Schallerer’s April 25, 2018 (3:20 a.m.) email (which Schallerer specifically alleged was a motivating factor in his clarification letter), Meyer essentially responded by thanking Schallerer for his suggestion, partially agreeing with Schallerer, then writing, “Keep up the creative thinking, everything is worth considering.” (Exhs. C-4 at 1 and R-3 at 1.) Whenever Meyer rejected a specific premium pay request, she essentially just explained why she could not grant it, very much as Schallerer’s current supervisor Weeks did after Meyer’s retirement. (Exh. R-22 at 1.) In her May 9, 2018 message, Meyer simply wrote that she was “trying to develop a guideline with examples of when Premium pay is applicable,” then thanked Schallerer again. Further, in Meyer’s January 29, 2019 email rejecting a premium pay request, Meyer actually encouraged Schallerer to take his concern to his labor representative. (Exhs. C-10 and R-13.) It is also worth noting here that Meyer testified that she *agreed* with Schallerer’s April 25, 2018 concerns about understaffing (which we have already noted were not protected). Additionally, that same email was essentially solicited by Meyer in her April 23, 2018 email, which also encouraged its recipients to be “candid and open.” (Exhs. C-4 at 3 and R-3 at 3.)

We separately note that Meyer gave Schallerer a positive performance evaluation on November 30, 2018, which was after Schallerer’s May 2018 premium pay requests and

Schallerer's creation and distribution of the template. (Exh. C-1.) *See Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03 at 10, 20 PECBR 733, 742 (2004); *West Linn School District*, UP-53-90 at 10, 12 PECBR at 741. Beyond that, Schallerer's peer, McDowell, was promoted to the senior level, despite McDowell making the same type of Schedule A premium pay request as Schallerer. Relatedly, Crise was promoted from senior to chief electrical inspector, despite Crise's early role in encouraging the same premium pay requests. *See Coos County Sheriff's Office*, UP-119-90 at 7, 13 PECBR at 103. Schallerer, in contrast, was never a union negotiator or officer (let alone a union member), and all of his communications that are in the record were not particularly abrasive or hostile. *Compare International Association of Firefighters, Local 1395 v. City of Springfield*, Case No. UP-48-93 at 11-12, 15 PECBR 39, 49-50, *adh'd to on recons*, 15 PECBR 111 (1994); *Lane County Public Works Association, Local 626 and Bushek v. Lane County*, Case No. UP-36-90 at 11, 13 PECBR 187, 197, *recons*, 13 PECBR 233 (1991), *aff'd*, 118 Or App 46, 846 P2d 414 (1993).

In his opening statement, Schallerer's attorney argued that Schallerer's advocacy regarding premiums "seemed to annoy management," and that "the most logical explanation" for how Meyer scored Schallerer's interview answers was that Meyer was "consciously or subconsciously" "annoyed with" Schallerer because of his advocacy. Meanwhile, Schallerer's post-hearing brief contends, "While the record may not demonstrate that Meyer was hostile to union activity, it does establish that Schallerer's pursuit of the high work premium influenced her view of Schallerer and tainted her scoring of the Senior Electrical Inspector interviews." Schallerer has also described himself as a "thorn in management's side." After carefully considering the entire record, we see no evidence of Meyer ever being annoyed by Schallerer's protected activity, or a plausible reason why she would be under these circumstances. As for Schallerer's argument that Meyer might have "subconsciously" retaliated against him, it is clear that there cannot be an *unintentional* "because of" violation. *Tri-County Metropolitan Transit District*, UP-48-97 at 8, 17 PECBR at 787.

Again, Meyer was effectively on the brink of her May 2019 planned retirement in April 2019. Furthermore, evidently, Meyer only ever had to either hold onto the premium pay requests, pass them along to others, or write a few brief messages as "directed" by her superiors. (Exh. R-12 at 1.) It is also unclear how considering a premium pay request is any more challenging or frustrating than considering a run-of-the-mill overtime, sick time, or vacation time request. Purportedly, Schallerer's workgroup was already "putting in a lot of overtime." (Exh. C-4 at 3.) Turning to another alleged motivator, although Schallerer's May 14, 2018 email was technically sent to Meyer, it is specifically written to "HR, et.al." rather than Meyer. (Exh. R-9 at 1.) It also would have been clear to everyone in Meyer email's email chain, including Meyer and Schallerer, that Meyer was simply passing along the guidance that others had provided her. We recognize that Schallerer also created and distributed an Excel template to his colleagues, but it is ultimately unclear that Meyer ever saw those spreadsheets or was aware that Schallerer originated them, as they were not turned in to her and there is no evidence that they stated who created them.

Turning our attention to the *timeline* presented, we recognize that Schallerer made a premium pay request on January 29, 2019 and then was scored on April 1, 2019, which arguably establishes some minimal, logical relationship between the two events. But that is still an inactive period of around two full months, and does not suggest a causal connection here. It is even less likely that Schallerer's May 2018 premium pay requests (the earliest of which was made on

May 8, 2018) would naturally motivate Meyer's scoring around 11 months later in April 2019. Furthermore, as far as the record shows, Schallerer only made five or so formal premium pay requests over the whole course of the relevant time period. We also cannot overlook that Schallerer evidently made no premium pay requests from May 23, 2018 to January 29, 2019—a period of over 8 months.

The City's post-hearing brief (at 12 and 18) contends that the timing of Schallerer's January 29, 2019 premium pay request "is highly suspicious" and "dubious." According to the City (at pages 17 and 18 of its brief), Schallerer made that particular request because "he wanted to set up a claim for retaliation" and "was attempting to create some 'insurance' just in case he was not promoted." We cannot draw the same conclusions based on this record. However, we do note that Schallerer has not clearly explained why, after more than eight months without making a premium pay request, he did so again on January 29, 2019, shortly after he applied for the promotion at issue on January 15, 2019. In his post-hearing brief (at 3 and 12), Schallerer loosely explains that Schallerer started making requests again, many months later, because Schallerer "understood the issue of whether the Premium applied to Inspector's work was still unresolved," and because Schallerer "felt that the issue had never been finally resolved." Those explanations are ambiguous and unconvincing. It also remains unclear why Schallerer made his January 29, 2019 request via email (copying multiple individuals who had no control over the request) instead of simply making an SAP request as he had done in the past. Relatedly, Schallerer gave no concrete explanation for why, in February 2019, he suspected that he was being retaliated against. (Exh. R-15 at 1.)

Turning our focus to the *scoring* of April 1, 2019 interview, we grant that the evidence presented indicates that Schallerer has excellent technical knowledge and skills, and that many who work in BDS are aware of that. Further, Schallerer has already successfully performed some work that is typically assigned to a senior. In its post-hearing brief (at 16), the City concedes that Schallerer is "technically competent." In addition, some of the evidence suggests that Schallerer also has the soft or "interpersonal/communication skills" that are necessary for a senior electrical inspector position. (Exh. J-12 at 4.) However, ultimately, the record does not show that Schallerer was able to demonstrate all of his skills during his April 1, 2019 interview. As indicated above, as a rule, panelists were only supposed to give candidates points for the answers that candidates gave during their interviews. And significantly, the record also demonstrates that DA and JS were qualified.

In his post-hearing brief (at 12), Schallerer suggests that it was odd for Meyer to take the chance that JS might not get the necessary Oregon certifications, for one certification "requires a test that some applicants fail." But we see nothing suspicious in taking that risk. JS's offer of employment was conditional, and JS was already very experienced and, most importantly, had a higher interview score than Schallerer. In short, there is nothing inherently illegitimate about an employer scoring candidates' interview answers, then filling available vacancies in accordance with how those candidates were scored. *See Coos County Sheriff's Office*, UP-119-90 at 7, 13 PECBR at 103; *West Linn School District*, UP-53-90 at 9, 12 PECBR at 740 n 7.

As we understand his post-hearing brief, Schallerer would have the Board second-guess or recalculate Meyer's points, question by question. However, a number of factors make it difficult

for us to do so fairly. By design, BDS's interview panels do not always include panelists who do the work of the applied-for position, and they (like the Board) may not fully appreciate or understand everything that a candidate says, given their backgrounds. Carlson, for instance, works in a different BDS division than Schallerer and in a different type of position. Further, as stated in the record, "interviewing is not scientific" and the panelists naturally "make subjective observations." (Exh. J-7 at 4.) Under those circumstances, it is relatively unsurprising that Carlson and Crise, despite the two being "unbiased" according to Schallerer, came up with very different scores. (Schallerer's post-hearing brief at 12.) It also remains possible that a panelist simply failed or chose not to properly follow the scoring matrix or the ideal answer sheet for purely innocuous reasons, or tailored his or her scoring to the "primary focus" of the specific senior position(s) being filled. It follows, therefore, that even if the Board would score the answers differently, on its own, that would not necessarily indicate that Meyer was motivated by an unlawful bias. *See Oregon State Police Department*, C-128-77 at 9, 3 PECBR at 2002. In addition, the evidence does not contain a true record of the candidate's answers for us (or the parties) to reconsider. While the panelists' written notes are in evidence, as noted, they are not a verbatim record of the answers given. Crise, Meyer, and Schallerer gave some testimony about some of the answers, but Carlson and the other two candidates were not called to testify.

Continuing, Meyer gave Schallerer the same total score of 17 as did Carlson, who as noted Schallerer claims is "unbiased," is represented by DCTU, and as far as we know was unaware of Schallerer's protected activity. (Schallerer's post-hearing brief at 12.) The other panelist, Crise, only gave Schallerer a total score of 19, which is just two more points than Meyer gave. We also note that Schallerer testified that, for that two of his five answers, Meyer's scores were "reasonable," further complicating Schallerer's already nuanced argument. We likewise recognize that the same scoring system was used both before and after the April 1, 2019 interview at issue, and that Schallerer has consistently failed to be a top scorer in a number of recruitments. Significantly, one of those recruitments occurred after Meyer retired (and thus could not have been influenced by Meyer's scoring), and in that recruitment, Schallerer was once again the lowest scoring candidate. We further note that, on April 1, 2019, Meyer actually scored Schallerer four points higher than any panelist did for Schallerer's January 2020 interview. (Exh. R-27.) Meyer also scored Schallerer two points higher on April 1, 2019 than she did on August 8, 2018, and eight points higher than she scored him on August 20, 2018. (Exh. R-10.)

It also follows that, if Meyer really was intentionally scoring JS better than Schallerer as Schallerer claims, then Meyer was not scoring Schallerer "arbitrarily" as Schallerer's complaint also alleges. (Exh. J-14 at 2.) *See Howard Jr. v. Western Oregon State College Federation of Teachers, Local 2278, OFT and Western Oregon State College*, Case Nos. UP-80/93-90 at 27, 13 PECBR 328, 354 (1991) (defining "arbitrary" as "lacks a rational basis"). More importantly though, for Meyer to carefully score Schallerer the way that he claims that she did, Meyer would have to remember precisely how she scored JS earlier in the day, and also have some idea of how the other panelists would score. However, there is no indication that, during the interviews, Meyer was closely keeping track of the points that she allotted to candidates. Again, for their final scores, JS only got one more point than Schallerer did. Further, there is no evidence that Meyer ever knew how the other two panelists scored any candidate for any particular question. Instead, it appears that Meyer only ever got the candidates' *final* scores before making her hiring decisions. (Exh. C-15 at 1.)

Conclusion

Schallerer engaged in protected activity when he pursued a pay differential for high work and created and distributed a related Excel template. However, Schallerer did not establish that Meyer was motivated by that activity when she scored his answers during his April 1, 2019 interview as alleged. Accordingly, Schallerer did not establish, and we cannot conclude, that the City violated ORS 243.672(1)(a).

PROPOSED ORDER

The unfair labor practice complaint is dismissed.

SIGNED AND ISSUED on July 29, 2020.



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-008-19

(UNFAIR LABOR PRACTICE)

BOB BALDWIN,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
LANE COMMUNITY COLLEGE,	)	CONCLUSIONS OF LAW,
	)	AND ORDER
and	)	
	)	
LANE COMMUNITY COLLEGE	)	
EMPLOYEES FEDERATION,	)	
	)	
Respondents.	)	

Complainant Baldwin, a layperson, represented himself.

Katelyn Oldham, Tedesco Law Group, Portland, Oregon represented Respondent Lane Community College Employees Federation.

Randy Geller and Sharon A. Rudnick, Harrang Long Gary Rudnick P.C., represented Respondent Lane Community College.

On July 28, 2020, 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 the matter. OAR 115-010-0090(4).

In these circumstances, OAR 115-010-0090(5) allows the Board to limit the precedential value of the final order. 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 College will cease and desist from violating ORS 243.672(1)(a) and (b). We dismiss the remainder of the complaint.

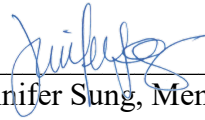
DATED: August 28, 2020.



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-008-19

(UNFAIR LABOR PRACTICE)

BOB BALDWIN,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	RECOMMENDED RULINGS,
LANE COMMUNITY COLLEGE,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
and	)	AND PROPOSED ORDER
	)	
LANE COMMUNITY COLLEGE	)	
EMPLOYEES FEDERATION,	)	
	)	
Respondents.	)	

A hearing in this case was held before Administrative Law Judge (ALJ) B. Carlton Grew on February 12 and 13, 2020, at Lane Community College in Eugene, Oregon. The record closed on April 10, 2020, following submission of the parties' post-hearing briefs.

Complainant Baldwin, a layperson, represented himself.

Katelyn Oldham, Tedesco Law Group, Portland, Oregon represented Respondent Lane Community College Employees Federation.

Randy Geller and Sharon A. Rudnick, Harrang Long Gary Rudnick P.C., represented Respondent Lane Community College.

On May 22, 2019, Complainant Baldwin filed a Complaint for unfair labor practices against the Lane Community College Employees Federation (Federation or LCCEF) and Lane Community College (College or LCC) regarding complaints by some Federation officers and members filed with the College concerning some of Baldwin's emails to all bargaining unit members sent through the College email system, and the College's investigation of those complaints. On January 22 and February 3, respectively, the Federation and the College filed their timely Answers admitting and denying allegations in the Complaint.

The issues presented for hearing are:

1. With respect to ORS 243.672(2)(a), did Federation officers unlawfully file a formal harassment complaint with the College based on emails Baldwin sent union members regarding union matters, subjecting Baldwin to possible discipline by the College?
2. With respect to ORS 243.672(1)(a) and (b), did the College unlawfully investigate those complaints?
3. If Baldwin prevails, should a civil penalty be assessed against the Federation or College?

This Board concludes that the College, but not the Federation violated the Public Employees Collective Bargaining Act (PECBA) through the harassment complaints and their investigation.

RULINGS

Complainant Baldwin filed this Complaint on May 22, 2019. In his Complaint, Baldwin requested that the case be expedited under OAR 115-035-0060, and consolidated with another case involving the Federation and College. The College and Federation objected to both expediting and consolidating the case. On May 30, 2019, the Board denied Baldwin's requests and assigned the case to this ALJ, who was also handling the other matter.

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

FINDINGS OF FACT

The Parties

1. The College is a public employer within the meaning of ORS 243.650(20). It employs classified employees in more than 100 job classifications.
2. The Federation is a labor organization as defined in ORS 243.650(13), and the exclusive representative of the classified employees of the College, including Complainant Baldwin.
3. The College and the Federation are parties to a collective bargaining agreement defining the terms and conditions of employment for the represented employees. The term of the contract is July 1, 2016 through July 30, 2023.

Baldwin's History with the College and Federation

4. Baldwin is a longtime employee of the College. At the time of hearing, he worked as a project coordinator in its finance department. Baldwin has been active in the Federation since 1997 and was Federation president for 15 years, from 2002 to early 2017. During that time, he often sent emails through the College-hosted Federation listserv expressing opinions about Federation matters.

5. In late 2016, Baldwin's relationship with some other Federation officials deteriorated. Those officials disapproved of Baldwin's manner of running the Federation. At one point, Alen Behrat, then Federation vice president, told Federation officer Robin Geyer that he did not believe he could work with Baldwin anymore. Later, a group of Federation members, including Geyer, met with Baldwin to share their concerns. They requested that he change his style of operation. Baldwin refused to make any changes.

6. Baldwin's opposition then pursued a recall election against him. In early 2017, 73 percent of the membership voted in favor of recalling Baldwin.

7. After the recall vote, Behrat became Federation president and Geyer became vice president. Behrat resigned that office before the end of his term, and Geyer became Federation president. At the end of that term, Pat Griffin ran for president, and Geyer for vice president.

8. In late 2018, Griffin was promoted to a management position and resigned the Federation presidency. Geyer became president again, and remained president through the time of hearing.

9. When Geyer became president in late 2018, Kenny Ascheri became Federation vice president, serving from December 2018 through the date of hearing.

Baldwin's Federation-wide Emails

10. After his recall, Baldwin continued to email opinions about Federation issues to the Federation listserv. He usually sent the emails once a month, but sent them more frequently during Federation bargaining or when other significant matters occurred.

11. Some Federation members found the emails inappropriate, perceiving them to be disrespectful, rude, distasteful, harassing, divisive, containing false statements, and bad for morale. Several Federation members asked Baldwin to stop sending them his emails. Baldwin responded to these requests by stating that, because of the structure of the listserv, which sent email to Federation members under a global address, it was impractical for him to remove individual members as recipients. In response, several Federation members complained to Federation leadership about the emails and their desire to no longer receive them.

12. College program analyst and Federation vice president Ascheri regularly received Baldwin's Federation-related emails.

13. Baldwin's emails made Ascheri anxious and worried that people would believe what he considered to be untruthful statements by Baldwin. Ascheri believed that Baldwin's emails violated Article 12.7.2 of the collective bargaining agreement and the College Online Policy and Procedure System: Information Technology (COPPS IT) regarding appropriate use of technology. Over multiple years, Ascheri communicated with his supervisor, human resources staff, managers, and the chief of human resources at the College about his concerns that the emails violated the College's policy regarding use of technology and harassment.

14. The College policy regarding appropriate use of technology includes the following as “Inappropriate and Prohibited uses”:

“Cheating, plagiarism, gambling, pornography, furnishing false information or other acts of academic dishonesty of its computer users

“Fraudulent, harassing or obscene messages and/or materials as defined by contemporary court decisions are not to be received, sent or stored.”

(Exh. R-1 at 124.)

15. Article 12.7.2 of the collective bargaining agreement provides:

“The Union and the College agree that the maintenance of a safe and healthy work environment includes the expectation that all interactions among employees, and employees and managers, will be conducted with respect and courtesy.”

(Exh. R-6 at 3.)

16. PM worked as College project coordinator for its health professions division. She was a member of the Federation, but was not a Federation officer. Beginning in 2017, PM asked Baldwin several times to remove her from his email list, without success. PM told Baldwin that she believed the emails were harassing and suggested that he confine his written thoughts to his blog. Baldwin responded that PM could ignore, delete, or filter his emails because he could not modify the listserv himself. PM believed that she could not filter or block Baldwin’s emails, because her job required her to communicate with him in his College position.

17. Other Federation members communicated to various College administrators that they also did not want to receive Baldwin’s emails.

18. The Federation and College took no action in response to the informal complaints of Federation members about Baldwin’s emails. Baldwin continued sending the emails to the listserv, and did not remove anyone from the list of recipients.

19. On April 29, 2019, Ascheri submitted a formal complaint about Baldwin’s emails to the College. He submitted the complaint using his employee email address and did not identify himself as Federation vice president.

20. Ascheri’s complaint stated:

“Dear College Administrators,

“For months, Classified Unit employee Bob Baldwin has repeatedly engaged in Impolite, discourteous, and unpleasant behavior utilizing college resources to do so. This employee is crossing the boundary of bullying and harassment towards other Classified employees and I need administration’s support. This employee has

repeatedly sent misguided and unfound communications to the entire Classified Unit causing anxiety, stress, discontent, as well as mental and emotional abuse to multiple other Classified employees.

“When Mr. Baldwin utilizes the college email servers and address book, this employee is making the choice to agree to follow the policies and rules set out to govern those resources. Whether Mr. Baldwin is on or off shift, engaging in the use of college resources means that the college has liability and will be held responsible.

“I feel that this Classified employee is violating LCCEF Contract 12.7.2 by engaging in interactions with other employees that are not respectful or courteous. Most common, these interactions occur using the Classified Employees address book and the college email system.

“Furthermore, I feel that this employee is in violation of COPPS IT Procedure: Appropriate Use of Technology which states, ‘Inappropriate and Prohibited uses include: ... Fraudulent, harassing or obscene messages.’

“First and foremost, I am asking for the support of our administration - Marge, Brian, Paul, and Dennis - to speak out and communicate to all employees that discourteous and hostile behavior will not be accepted at Lane Community College. All employees need to know that it’s not ok to be rude to other employees, period.

“Second, I need reassurance that within two weeks, a manager or administrator will have a documented conversation with Mr. Baldwin to reiterate verbally and in person that discourteous messages to other employees is not warranted.

“Third, I would like a documented, timely investigation to take place in which the college seeks the input of at least 5% of the contracted classified employees’ perspectives on their interactions with Mr. Baldwin.

“Finally, please consider this a formal information request for copies of all documented cases when LCC employees were disciplined because of confrontational, harassing, abusive, or other similar behavior in the past 10 years.

“I will not stand silent and let my fellow Classified employees treat each other with such disrespect and I hope LCC Administration will fully and completely support me in speaking out against this behavior.”

(Exh. C-1 at 5-6.)

21. Ascheri included copies of Baldwin’s emails that he believed violated the college’s policies with his formal complaint.

22. Also on April 29, Ascheri posted a statement about his complaint on the Federation website. It stated:

“Formal Complaint against Classified Employee

“April 29, 2019 by vp with no comment Announcement VP

“Dear [F]ellow Classified Colleagues

“Happy Monday everybody my name is Kenny Ascheri and I am your Vice President of LCCEF. I have held this position since last November and have attended and spoke at most board meetings since then to make sure my voice is heard by the people making the large impact decisions of our college. I am actively engaged in consistent advocacy for all classified staff to have healthier working environments and gaining access to more professional development and skill building. I feel like these topics have a wide breadth and I believe in holding LCC administration to the highest standard for showing their classified staff that they truly care about us!

“At first when I took this position I was anxious that I didn’t know enough about the workings of the classified unit and that I wouldn’t do well because of lack of experience with representing others. After months of treading water in the deep end, I will report that I feel quite comfortable in this new role. Don’t misunderstand my comfort in the new role with the tasks to be performed - the work is often voluntary, rigorous, and bleak - especially this time of year.

“I wanted to reach out to everybody to be open and transparent that I have submitted a formal complaint against another Classified employee, on the grounds of repeated discourteous and disrespectful behavior towards other Classified employees. This behavior is in violation of our LCCEF contract 12.7. 2. ‘The Union and the College agree that the maintenance of a safe and healthy work environment includes the expectation that all interactions among employees, and employees and managers, will be conducted with respect and courtesy.’

“I feel that this employee has crossed the boundary repeatedly with disrespectful language commonly pointed at LCCEF EC [Executive Council] and President Robin Geyer and I have finally found the appropriate administrative avenue to pursue in order to make a difference. That’s what I am going to do.

“To be completely clear, I am not advocating for this employee to be removed from their platform - I am headstrong in pursuing the support from EVERYBODY for a respectful and courteous working environment. Remember, this isn’t like mainstream politics - LCCEF is not a two party system where we tear apart the other party. We are one single community of working people doing our best to pull together and stand in solidarity for healthier working conditions and adequate compensation!

“Kenny Ascheri”

(Exh. C-6 B.)

23. On May 7, 2019, PM filed a formal complaint with the College regarding Baldwin's emails, alleging that they violated College policies against harassment. She also stated that Baldwin had refused to remove her email address from his emails, despite multiple requests.

24. The emails Ascheri attached to his complaint to the College covered the period February, 2017 to April, 2019. All of them appear to have been sent to all members of the classified unit. All of them concerned Federation business, generally issues being addressed by Federation officers at the time, such as bargaining over specific proposals. None of them included profanity; racist, sexist, or other terms denigrating a protected class; or other offensive language of that type. The emails questioned the intelligence, commitment, experience, integrity, and bravery of Federation officers, especially, its executive council, and, most often, by name, its presidents. A sampling of portions of Baldwin's emails follows. We have omitted salutations to save space except where their presence may affect the tone; Baldwin's emails generally begin with "Greetings" and end with "In Solidarity, Bob Baldwin."

25. Date: March 12, 2018, Subject Re: Campus Forum Reminder

"Why has the Exec Council not told us that the college intends to eliminate Co-Op and the Motor pool as part of the program cuts coming up? Has the EC agreed to this budget proposal?

">>> Bob Baldwin 3/9/2018 9:09 AM >>>

Greetings,

Why is the Exec Council not willing to answer questions?

When asked about [Oregon Educators Benefit Board] OEBC, instead of any information about how radical a change that would be in our health insurance, all you did was post their mission statement.

The faculty already have their official notice from management of possible layoffs; we hear nothing.

When I pose a question to your 'blog', it . . . disappears.

As elected *representatives*, you have an obligation to keep the members you represent informed.

* * * *

Clearly, there will be significant program cuts, possibly layoffs of classified and/or faculty.

Why are we not getting any information from the Exec Council about this?

Regarding your 'communications blog', I do not want my questions edited by you, then anonymized, or simply ignored.

Thank you,

Bob Baldwin"

(Exh. C-1 at 8 and 9.)

26. Date: April 13, 2018, Subject: Union "Open Forum"

"Greetings,

So, the Exec Council has decided to ‘close’ discussion of our health insurance while they ‘decide how to handle false information’.

As we no longer have an ‘open forum’, I’ll ask here:

Just what, *precisely*, is the ‘false information’, and what are the correct facts?”

(Exh. C-1 at 26.)

27. Date: May 21, 2018, Subject: Union Bargaining Wage & Benefit Cuts

“From the LCCEF Face Book page, Casandra has acknowledged that the ‘survey’ about bargaining will only look at how to cut benefits and/or raise our costs.

Why? Because that’s what the Board said they want, and the Exec Council won’t do anything but say ‘yes’ to that.

And, every time they give the Board more cuts, we can count on the Board wanting the same next year. And the year after that. And again, and again.

If we send in surveys saying how we want our wages and benefits cut, instead of saying ‘no’ to the cuts in the first place, all we do is legitimize the Board’s behavior.

If you want your wages & benefits cut every year, and never even keeping pace with inflation, well, OK.

But, if you don’t want that, then we need to change the discussion, now.

We need to start being clear that continued cuts are not acceptable, period.

Either at the Forum (if allowed), or at the Free Speech Zone, we need to start discussing how to get better wages and benefits, not cut them.”

(Exh. C-1 at 29.)

28. June 5, 2018, Subject: No voting allowed on insurance changes

“Hi Folks,

Please pardon my replying to myself . . .

I know that there are mixed feelings about me, personally.

I know there are mixed feelings about the current officers, as well as the substance of the proposed changes to our health insurance.

I’m asking that you set aside all of the personalities, as well as all of the details of the proposed changes.

For now, please, just focus on one question: should those of us in the union who have, literally, ‘paid our dues’ be allowed to vote on our own economic agreements?

Beyond knowing we all have disagreements, I cherish those disagreements, All of them. Because having disagreements about these things is part of a healthy democratic organization.

Whether it is a nation, a state, or a union, a democracy must, at it’s foundation, allow its citizens/members to have access to all of the information, to discuss and debate openly and freely, and then to vote their own conscience.

Whatever you may think of anyone involved, or any details, there will be new people and new details as time moves on. The only permanent thing is the process.

If we do not have a right to vote on a full and complete economic agreement, with all the details and information known, then what decisions will future officers make about future details?

Please, let's come together on one essential idea: the members make the final decisions.

If we give that up now, we lose it, forever.

“<<<Bob Baldwin 6/5/2018 . . . >>>

Wow.

Our union's officers have just announced they have approved major cuts and changes in our insurance plan, with no voting allowed.

HR will now be implementing their changes. All based on a survey with mangled access, only 106 returned, and 66 'in favor'.

So, 66 replies 'in favor' is all they allow for a process.

Are you happy with this?

Is this what you want from our officers?

We do not have to accept this.

We have options.

If you want to stop this, let me know ASAP.

Options we have, but not a lot of time for some of them.

Email back to me. We can organize and have decisions made by a proper process.”

(Exh. C-1 at 34.)

29. Date: June 9, 2016, Subject: Exec Council Position on Health Insurance

“Hi Folks,

I'm just reporting.

This, from [MD], Corresponding Secretary, interjecting in an email exchange between [TD] and [PG].

{[MD]}

‘I guess I am that one person who hardly uses the insurance I have through Lane. I don't have insurance through any other source, I'm just a healthy person who doesn't need more than a checkup once a year. While I do depend on the insurance for that annual checkup and getting my teeth cleaned, I do not use half of the money I receive on the FSA or come close to hitting even the smallest of deductibles. In your opinion I am an anomaly. In my opinion I am in the majority. *I'm sorry if your health is such that you rely that heavily on insurance. Perhaps there are resources out there that could help you be more healthy and rely less on medical insurance? Again, I don't know your specific situation, but I do know that exercise and making healthy choices for meals has made a huge difference in my personal health and that of my family and friends.*’

“I quote for brevity. I have [TD’s] permission to bring this forward. If you think (or get told) that this is ‘out of context’, I can forward the entire exchange. I only added emphasis to point out the key point.
I don’t know what else can be said about this.”

(Exh. C-2 at 6, emphasis in original.)

30. June 13, 2018, Subject: Re: Critical Bargaining Process Questions

“If the Exec Council would simply answer questions, then members would know what is happening. Fear is based on uncertainty and doubt, not on clear, direct answers to clear, direct questions.
In Solidarity
Bob Baldwin

“>>> Robin Geyer 6/13/2018 9:53 AM >>>

I am sending this message to all Classified Employees of Lane Community College. And here we are again.... So much about the message below, and many others lately, is absurd....

Friends please join us today 12:05pm in 4/106 as we announce the Tentative Agreement. Please note this is EXACTLY the same time line for the Contract Ratification last year. On June 13, 2017 we announced the Tentative Agreement with a deadline to vote on June 28, 2017.

Today, June 13, 2018, we are announcing a Tentative Agreement with a deadline to vote on June 28, 2018.

Last year insurance open enrollment took place BEFORE the contract was ratified as it has happened in many years past....

Please stop and think about the messages you have been receiving lately. Did they, do they, frighten you? Make you feel insecure? Cause you anxiety? If so was it helpful for you to feel that way? Did you perhaps say things in that fear/insecure/anxious state that you may now regret? Is any of this helpful to your work environment, your emotional, and physical health? I’m asking that we all pause, take a couple deep breaths, and perhaps take a little self-reflection.”

(Exh. C-2 at 8-9.)

31. Date: June 14, 2018 Subject: Voting No on Ratification

“Greetings,

I will be voting No on ratification.

I’ve run the numbers, and I, personally, am pretty much OK. I have E+1, Smart Choice is acceptable, and I am at a higher pay level.

But I also believe in the Social Justice model which is the foundation of the Labor Movement.

An Injury To One Is An Injury To All. See, I *believe* that.

And that ethic is nowhere to be seen in this TA.

This isn't founded in Social Justice, and it isn't based in Collective Action for Collective Benefit.

It's just individualistic/Libertarianism, the *antithesis* of Social Justice.

The members who are paying for this are those at the lowest pay levels, and those who need dependent coverage for sick/injured family members.

Those benefiting the most are those who have the least medical need, and who are at the higher pay levels.

This is taking from those who have the least and need the most, and giving it to those who have the most and need the least.

I have never voted for this type of thing, and I never will."

(Exh. C-2 at 16, emphasis in original.)

32. Date: September 4, 2018, Subject: Union Questions

"Back when the current officers were spinning the contract ratification vote, one of the talking points was that there would be no layoffs.

Now, we see the S3 program being eliminated, with . . . layoffs.

No word on that from the Exec Council.

The Board of Education has, for some time now, been seriously discussing outsourcing departments and/or functions.

The Exec Council knows this.

No word on that from the Exec Council.

Remember hearing about a new Comp & Class study?

Yeah, no word on that from the Exec Council.

Our new Field Rep, from AFT-Oregon, has already been witness to [then Federation president] Pat Griffin being presented with perfectly valid grievances, only to watch Pat say 'nope, not gonna file that'.

Apparently, grievances are not going to be filed for...shall we say 'certain members'.

All that, and more, coming soon to a Free Speech Zone near you."

(Exh. C-2 at 23.)

33. Date: September 16, 2018, Subject: Union Issues

"* * * *

The Current Officers

Simply put, the work is not being done.

The legal charge for union officers is to represent the union members (individually) and membership (collectively) with respect to wages, hours, and working conditions.

'Working conditions' is very broadly defined. If it relates to our employee status, it's working conditions.

That means negotiating and administering the contract, as well as any and all other duties as may be required to fulfill that charge.

We were given no meaningful information during bargaining.
 Next Spring will see another cut in our health insurance benefits.
 We are given no information about the Comp & Class study.
 We are given no information about on-going discussions about out-sourcing.
 We are given no information about the on-again, off-again, on-again discussions about terminating Specialized Support Services (S3). This, even though both current officers and I were approached by members who were told that with [AS] having retired, the program would be shut down and members terminated.
 We are given no information about the Local's political program. One of the Exec Council positions is the Committee On Political Education (COPE) Chair. What's being done locally, including a vacant Board of Ed position?
 We are given no information about grievances. Have there been zero filed since January 1? That would be . . . astounding. Are members having their requests for grievances denied? If so, is the established protocol for that being carried out?
 What we *have* been given is \$2.00 coupons for Splash!
 The membership deserves better than this.
 'Best They Can'
 The idea that this is, somehow, 'the best they can do' is flat-out wrong.
 Not just wrong, it misses the point.
 As usual, the answer is simple.
 There is one, single, simple reason why the current officers won't tell us what is happening, won't answer direct questions with direct answers, why the work isn't getting done, and why the current officers are all so self-congratulatory without any results to show:
 This *is* their plan, what's happening/not happening right now. This isn't a group of officers who are just not up to speed, this is (at least a functioning majority of the EC) a group of officers who deliberately, intentionally, are not *allowing* the work to be done. They won't have open discussions because that would lead to them being forced into admitting that, for their own personal and political reasons, they don't *want* the work to be done, at all, by anyone. The only way to assure that outcome is to hold the offices, then cover for each other.
 That I Filed an Unfair Labor Practice (ULP) Against the Union
 (A ULP is a charge of illegal activity by an employer or a union, in violation of the state's Public Employee Collective Bargaining Act, and is filed with the Employment Relations Board [ERB] in Salem. ERB decisions can be appealed, to the Oregon State Court of Appeals.)
 Not a rumor. A solid fact. More on that as it unfolds.
 Finally
 Folks, this is a Labor Union.
 It's not a social club, or a college committee, or the Cool Kids Table high school.
 If the current officers won't do the work, or if someone is afraid of upsetting the pro-Trump GOP activists, the Neo-Cons, the Neo-Nazis, the white supremacists, or any other such group, then they can't do the work of representing the members and membership.
 PS: If you do get actively involved with this group, I recommend not speaking out against racism. History suggests that if you do, you won't get invited back.

To borrow from Jim Steinman
And I ain't in it for the power
And I ain't in it for my health
I ain't in it for the glory of anything at all
And I sure ain't in it for the wealth
But I'm in it til' it's over
And I just can't stop
If you want to get it done, you have to do it yourself"

(Exh. C-2 at 26-8.)

34. Date: December 13, 2018, Subject: Outsourcing and layoffs (was Cuts and Changes to Service Departments)

"Hi Folks,

Well, bless their hearts.

After some six months or so of knowing that outsourcing classified work, and layoffs of classified staff were going to be part of this year's this years budget plan, we get . . . an email. One lone, passive email, to let members know that the Board is discussing terminating them. And not until the day of the Board meeting, at that. Has there been an all-out effort to organize around this? Of course not. That might upset someone. Better to just let members lose their jobs. Apparently quiet desperation is better than organized collective action.

Is outsourcing necessary? There is certainly money to keep adding new management positions, up to high level (Band 5) executive positions, even new VP positions. Have we been presented with any long-range plan for fixing any of the many problems which put us in this position? Not likely; that would mean change, and acknowledging that the college has been mis-managed for years.

And does anyone seriously believe that if this happens this year, we won't see it again next year? After the CML, Food Services, and the Titan Store are gone, look for Custodial, Trades, Public Safety and more to follow.

Are there ways a strong union can prevent this type of thing?

Certainly. But we don't have one.

We have a union which is more concerned with 'being friends with management' than in defending member's interests.

What has that gained us, a year after these 'officers' took office?

For the members, cuts in health insurance without any fight.

And, loss of jobs by outsourcing and layoffs.

One Unfair Labor Practice charge against the union resolved by Pat Griffin acknowledging that I was correct in pointing out that it is illegal to have a manager serve on the Exec Council (Lisa Rupp, Interim Director of Public Safety).

A second Unfair labor Practice has now been filed, which I have every reason to believe will be successful. Union Officers can not, ethically or legally, both bring charges against a member, and then deny the member Due Process in responding to those charges.

Nor may union officers *threaten* to bring trumped-up charges against members, intending to do the same as above.

That this is being done to former officers and activists who dare speak out against the current EC members is just additional evidence as to the real agenda at work.

On the other hand, the current officers have seen two significant accomplishments: their own promotions to management (Lisa Rupp, and Pat Griffin).

So . . . management faces zero resistance from our union, officers get requested transfers and promotions, and the members get benefit cuts and losing their jobs.

Who do these officers work for, us or themselves?

Join me over at the FSZ if you want to be able to discuss any of this without censorship.

(Or reply here. We all have the right to use email to discuss union issues, just not on work time)."

(Exh. C-3 at 1-2.)

35. Date: January 6, 2019, Subject: Support Food Services/CML/Titan Store

"Hi Folks,

Well, this is, without question, the weakest, least substantial, least effective response to proposed outsourcing and layoffs I have ever seen, from any union, in all my decades of working in and with labor unions. Still, I can't say I'm surprised. There are, of course, a great many things this union could do. Things the union 'leadership' could start organizing and putting in place, if they felt this was important. There are even a few things I might be able to do, but I greatly suspect that I (and any who want to join me) will be opposed by *both* the union *and* management, again.

Which brings us to a question: What has our 'leadership' actually accomplished for the benefit of the bargaining unit?

We've seen two rounds of secretive 'bargaining', in which what management wanted was immediately accepted.

We saw our insurance benefits cut, two years in a row, with no corresponding offsets, as in previous years.

We saw COLA and Steps set a level which did not make up for the insurance cuts.

We saw blatant 'shenanigans' (my polite term) attempted in the last officer elections, followed by the inevitable cover-up.

We see nothing but passive nothingness in the face of outsourcing and layoff.

We saw our *one* general membership meeting held with a 'no questions allowed' rule. Want to take bets on *why* no questions in that meeting?

This list can get *very* long. I'll leave it at that, for now.

Does anyone have a list of all the things the unit has gained in the last two years?

Remember the promises about how 'being friends with management' would get us all better contracts, and better labor relations?

Well, two of the officers elected on that spin are now managers.

Maybe being friends with management *did* provide something.

Who is the union supposed to work for?"

(Exh. C-3 at 15, emphasis in original.)

36. Date: February 5, 2019 Subject: union I recommend a No vote on the Proposed Constitution Amendment

“Hi Folks,

Well, bless their hearts. Robin Geyer and her cohort are at it again.

We are being conned. Scammed. Bamboozled.

We are being handed Grade A, USDA Certified Organic Compost, and told it’s ice cream.

I’ll get details up on the free Speech Zone this evening, but the bottom line is that essentially everything we are being told by them, about the proposed Constitution & Bylaws amendment is . . . compost. Warm, moist, compost.

Why are we not having meetings, noontime and evenings, to have a serious discussion about this? Robin has claimed that scheduling general membership meetings is ‘a lot of work’. Compost. It takes scheduling a room, and being ready to explain what they propose, why they propose it, and then answer any and all questions members have. Scheduling a room is easy enough. So . . . explaining what, why, and answering questions must be the ‘hard’ part, I guess.

We’ve been told we were having more meetings than ‘other locals’.

Really? That makes it a bad thing? Of course, no mention from them about other locals having departmental meetings, using online methods to answer questions (as opposed to editing and deleting member comments, or just ignoring them, or just shutting down anything they don’t like.

Last year, I asked for copies of Exec Council minutes. First, I was ignored, then they claimed that since ‘past EC’s’ hadn’t posted minutes, they wouldn’t make them available. While I was President, no one asked for them. Had anyone asked, of course they could have had them. Why didn’t anyone ask for them? Because all the info available was sent out in email, **and** we had GMMs for bargaining, elections, and anything else important.

* * * *

This is a **Labor Union**, it is *not* a high-school social club. But we have a President with a track-record of duplicity, which can be documented. We have an EC dominated by individuals more interested in their own self-interest and personal agendas than in the wages, hours, and working conditions of the members.”

(Exh. C-3 at 22-3, emphasis in original.)

37. Date: April 1, 2019, Subject: What will our union give away this year?

“Hi Folks,

So, another budget season, another round of bargaining, and another con job by Robin Geyer and her cohort.

As always, I’ll do my best to push aside the compost, and get down to reality.

Let’s start with the administration’s plan to contract out the Titan Store and Food Services.

(edit: Robin & Co. have just stated their ‘surprise’ at [Barnes and Noble] B&N being back on the Board agenda. Of course it’s back on the agenda. This is, emphatically, *not* surprising.).

First, while I do appreciate Kenny reading a good portion of an email sent the Exec Council to the Board last month, when it gets right down to it, absolutely nothing done by our union’s ‘leadership’ had any effect at all, nor was it intended to. Contrary to what Robin (and [AB], and [RG]) say, being ‘friends with management’ does not get our members better contracts or labor relations.

If you listen to the entire recording of the Board meeting (which I have), it’s painfully obvious that cutting our jobs was not ever a problem for the majority of the Board. It came down to completely different issues. And the decision is only (at best) a temporary postponement, no longer than one year. What caused a bare minimum of four votes to postpone the contract with B&N had to do with issues about the contract itself. Apparently some of the Board members became aware of significant issues in state law regarding how such contracts have to be implemented, as part of Oregon’s purchasing/contracting laws. *That* is what caused the postponement. It may also become an issue with Food Services, and other such contracts.

To be clear, at no time did Robin *ever* make clear to management that she would file the obvious grievances if the Board agreed to such outsourcing. And that applies to Food Services also, which the Board did approve outsourcing. Unless we, as the union membership demand it, there will be no such grievances, as there were in past years. That is because those grievances might upset management, AKA Robin’s ‘friends’. And given a choice between defending members, and upsetting management, Robin and her cohort have been absolutely clear as to who gets taken care of while they run the union their way.

Nothing happening now is a surprise, not one bit of it.. Outsourcing, wage & benefit cuts, a class & comp study delayed so long it will never amount to anything, *all* of this is exactly what Robin, the other EC officers, Allen, Rodger, and the rest of Robin’s merry band created in 2016, and the elections in 2017, We’ve been sold out, and at remainder prices.

There’s a reason they won’t have general membership meetings, or allow an open Q&A process about what they are doing and why they are doing it.

And there *is* a better way. If we want it enough to work for it.”

(Exh. C-4 at 9-10, emphasis in original.)

38. On April 24, 2019, then Federation president Robin Geyer sent an email to other Federation officers and their AFT-Oregon representative with her comments on an attached Baldwin email from April 19, 2019. Geyer’s email stated, in part:

“Keeping you in the loop on the most recent email from Bob.... sigh
We do have language in our contract that 12.7.2 ‘all interactions among employees, and employees and managers, will be conducted with respect and courtesy.’ Can we file a grievance on the college for allowing one of their employees to publicly attack and malign other employees?

Robin

“>>> Bob Baldwin 4/19/2019 5:34 PM >>>

Hi folks.

First off, other than to say they are categorically false, I'll not respond to Robin's fabrications about me.

If she has facts to show I'm wrong, she can show them. Don't hold your breath.

One thing does intrigue me, though. That's her absolute inability to use my name, whether the context is positive, or negative. I'm not Beetlejuice, saying my name three times does not conjure my presence.

From the 4/11 'Weekly Communication':

LCCFF continues to maintain the college cannot outsource our services if the contractor will succeed only because wages and benefits are less than available to college employees.

That's me, folks. That's a reference to ORS 279B.030, part of the Oregon Public Contracting Code. Not only is it fairly obvious who, around here, knows the details of state purchasing law, but I was part of the group which had the Business & Labor committee introduce that bill in 2009, I testified for it repeatedly, and against subsequent efforts to water it down. This is an example of union success in politics. Robin only knows about it, second hand, from me.

For the Exec Council, why no talk of a grievance? Not only is this (I believe) a violation of purchasing law, it also violates our contract.

So, there should be class-action grievances. Will there be? Again, don't hold your breath. Letting management do whatever they want, with no interference from our union, has been the point all along.

Go back, check the record. Look at the *evidence*.

How long have I been telling you this year's budget would include outsourcing?

How long was Robin denying it?

And, unlike a 'Strong Union', Robin and her cohort are fine with just letting it happen.

No one on the EC is being harmed, are they?

The same holds for essentially every other issue of significance.

It's all about evidence, and solutions. I'll keep at this, offering both, as long as there is a need for it.

Now, bargaining.

Face it folks, you *will* be put in OEBC.

Any 'vote' will, as last year, be structured in such a way as to make it seem impossible to vote 'no'.

Remember last year, when the insurance plan went from 12 month (June 30 end date) to 15 month (Sept 30 end date)?

We paid extra for that. The amount paid to Pacific Source went up because of adding those three months. That's not opinion, it's math.

And, that extra money came from our side in bargaining. You can say it was insurance, or COLA, or whatever, because it's all one big pot. Everything else is a sales pitch.

So, why do it?

What benefit could we have gained by having our insurance move to an October 1 start?

That's the OEGB plan year.

This was planned, in advance, and Robin and her Merry Band not only agreed, she let us pay for it.

And once in OEGB, we have zero to say about insurance, and we can never leave.

This is a one time, permanent selling out of the classified staff by Robin & Co.

Here's the bottom line:

For 15 years, along with some excellent assistance from [GG], [DB], and others, we were largely successful in labor relations. We didn't win every time, but we *always* defended our membership, and made what was happening as transparent as possible.

From the 2004 contract, up to and including the final 2016-23 Main Agreement, every contract saw more in gains than we lost. And, we won more throughout each year. And, through our Local's presence in AFI-Oregon, AFL CIO, and other community organizations, we were a respected part of the labor movement.

In addition to the 2016-23 Main Agreement, there was also a seven year strategic plan, regarding which issues to push, and in which year.

And, that is exactly what Robin, Allen, Rodger, and a handful of other set out to stop in 2016, when we finally wound up with a Board pushing a hard-line win-lose approach to bargaining. They sabotaged the union, by attacking me. That allowed a change to a very passive, docile union approach to labor relations.

From Alt-right politics, protecting racism, and threats made against members who spoke up, they got what they wanted.

It's up to you, folks.

We can have a union which answers to the members, or a union which answers to management.

That's an either/or choice.

As the classic song asks, 'Which side are you on?'

(Exh. C-4 at 11,12, emphasis added to Geyer email, in original in Baldwin email.)

39. Before these complaints, Federation members had publicly disagreed with the Federation's direction and its officers. However, no witness recalled any other Federation members who had complaints filed against them about their use of email. Ascheri believed that Baldwin's communications were different from other Federation critics on the listserv in that they were aggressive in tone, contained falsehoods, and were misleading.

College Investigation and Findings

40. Because the complaints concerned the use of College technology, College officials believed that College policies required it to investigate allegations of harassment or other violations of College policies. College officials do not base a decision to investigate based on who the complainants are or who the employee is.

41. The College procedure for handling this type of complaint is to first send the employee complained of a letter informing the employee of the complaint and the College's intent to investigate. Accordingly, on May 8, 2019, The College sent such a letter to Baldwin. It stated:

"Two complaints naming you have been submitted to college administrators. College administrators have determined that the allegations made in the complaints, if true and substantiated by an investigation, could violate Board of Education and College COPPS guidelines concerning appropriate use of technology. Additionally, they could constitute a violation of section 12.7.2 of the LCCEF Collective Bargaining Agreement, *'The Union and the College agree that the maintenance of a safe and healthy work environment includes the expectation that all interactions among employees, and employees and managers will be conducted with respect and courtesy.'* It has also been determined by College administrators that the allegations in the attached complaints, if true and substantiated by an investigation, could lead to discipline.

"The Board of Education and COPPS Procedures that College administrators have determined apply to this matter include *Board Policy PB630 - Harassment, and COPPS Procedure: information Technology.*

"HR Executive Director & Compliance Officer, Shane Turner been assigned to conduct an investigation regarding the concerns raised in the complaints naming you. Mr. Turner will be in contact with you to schedule an investigatory interview. You have a right to include a LCCEF representative in this investigatory interview with Mr. Turner.

"With the investigation of complaints pending, you are cautioned to remain professional at all times concerning your interactions with the complainants and with all members of the LCC community. You are expected to fully cooperate with the investigation, respond in a timely manner to all communications regarding these complaints (including all emails, phone messages and written communications), and not engage in any conduct toward the complainants or toward any member of the LCC community that could be construed to be retaliatory."

(Exh. C-10 at 1, emphasis in original and emphasis added.)

42. Along with the letter, Carr sent copies of the employee complaints, Board Policy 630 (governing harassment), and the COPPS IT regarding Appropriate Use of Technology. Carr sent copies of the correspondence to the Vice President for College Operations, College Chief Financial Officer, and to Robin Geyer, Federation President.

43. Baldwin was concerned that the term "construed" in the last paragraph of Carr's letter was overbroad and put the power to determine a violation in the hands of the complainants. However, Baldwin did ask for clarification of the term, and did not object to it. Instead, he chose to stop sending Federation-related emails for the duration of the investigation.

44. Turner began the investigation by reviewing the emails at issue. He then interviewed PM, Ascheri, then Federation President Geyer, former Federation Vice President Rodger Gamblin, and former Federation President Alen Behret.

45. Following those interviews, Turner decided not to interview Baldwin. Turner, correctly, concluded that Baldwin had, in fact, sent the emails in question. Turner believed he had all the information he needed from the emails themselves, and was concerned that conducting an interview of Baldwin would be perceived by Baldwin as a limitation of his speech rights and could lead Baldwin to file an unfair labor practice complaint over the interview.

46. Turner concluded that Baldwin's emails were harsh, discourteous, and provocative, and contained false statements, but that they did not include violence or threats of violence and, therefore, were protected union-related activity.

Federation Representation of Baldwin During the Investigation

47. In response to the investigation, Baldwin sought representation from the Federation. Federation officials first connected Baldwin with AFT Oregon field representative Bryan Lally. Baldwin told Lally that he did not believe Lally could fairly represent him because of Lally's prior work with the Federation. Accordingly, Lally connected Baldwin with Dan Andersen, an AFT Oregon field representative who had not worked with the Federation.

48. In May, 2019, after a series of emails, Baldwin and Mr. Andersen met on a Sunday afternoon and spent a few hours discussing the investigation and Baldwin's issues with the Federation. Andersen told Baldwin that he believed this was a normal College investigation and suggested that he follow the usual College procedures regarding the investigation. Baldwin told Andersen that he believed that the Federation had played a role in the complaints, and that he wanted representation in a separate potential legal action against the Federation. Anderson told Baldwin that he would not help Baldwin with any legal action against the Federation, but only assist him with the College investigation. Anderson did not refuse to represent Baldwin regarding the College.

49. During the College investigation, Andersen emailed College investigator Turner to make sure the College followed the appropriate investigation timeline and communicated directly with Baldwin.

College Investigation Report

50. On June 4, 2019, Brian Kelly, College vice president of College services, issued a letter entitled "Summary of Findings – Complaints by Kenneth Ascheri and [PM] against Bob Baldwin." The letter stated, in part:

"Scope of Complaint

"Mr. Baldwin, Projects Coordinator and former President of LCCEF, uses the global Classified Employee email address (ClassifiedEmployees@lanecc.edu) to

distribute his messages to classified employees. That group email address is maintained by the College IT staff and is un-editable by College users; that is, an email sent to that address will be distributed to all classified employees and the sender cannot exclude any employee on the list. At least two interviewees stated that it is impractical for employees to filter out Mr. Baldwin's unsolicited messages through automated rules or ignore Mr. Baldwin's messages because they rely on messages from him regarding the purchasing process to do their jobs.

"Both complaints assert that Mr. Baldwin's repeated group emails to all classified employees constitute harassment and have contained false information in violation of COPPS Procedure-Information Technology, Appropriate Use of Technology; Board Policy 630; and Article 12, section 12.7.2 of the LCCEF Collective Bargaining Agreement, which states that all interactions among employees 'will be conducted with respect and courtesy.'

Conclusions

"I reach the following conclusions with respect to the allegations in the complaints:

"1. Mr. Baldwin sent unsolicited emails to the Classified Employee group email that contained false information. Mr. Ascheri and Ms. Geyer offered as examples of such false information Mr. Baldwin's use of the term 'secretive bargaining' (when all bargaining sessions are open to the public) and his statement that Ms. Geyer promised that 'being friends with management would get us all better contracts' (which Ms. Geyer denies having said). I find that those are two examples of instances where Mr. Baldwin has inserted untruths into his messages to support his view.

"2. Mr. Baldwin sent messages to members of the Classified Employee email group that he knew or should have known to be unwelcome. Both [PM] and Mr. Bahret provided evidence that they have requested that Mr. Baldwin remove them from his email list specifically because they found his messages to be harassing. Rather than finding a way to fulfill those requests, Mr. Baldwin demurred, stating that he could not prevent them from continuing to receive his messages.

"3. All of Mr. Baldwin's messages submitted in support of the complaints address topics related to collective union activity, such as bargaining, union leadership and working conditions. As such, they enjoy significant protection from employer interference under Oregon statutes and administrative rules. That is the case even when some employees consider that activity to be unwelcome or when the speech is harsh, discourteous, or provocative, so long as the communications do not cross the line to violence or threats of violence, and do not interfere with the exercise of protected rights by others. I find that Mr. Baldwin's messages, while often harsh, discourteous and provocative, do not cross those lines and are protected collective union activity.

“Accordingly, the college must balance Mr. Baldwin’s right to engage in protected union activity against the College’s interest in maintaining a healthy working environment for all employees, including those who do not want to engage with Mr. Baldwin’s messages. *See* Board Policy 630, which states: ‘Whether or not the alleged harassing behavior is sufficiently severe or pervasive to be judged a violation of this policy, the college may take action to address a complainant’s concerns and to ensure that Lane, as a workplace and as an academic institution, maintains a respectful environment.’”

“In their interviews, Mr. Ascheri and [PM] stated that if employees were able to opt out of receiving those messages from Mr. Baldwin, it would resolve their complaints. Currently, the College is planning to migrate its email system to Gmail effective July 22, 2019. At that time, global email address functionality will no longer be available to the campus at large. However, Mr. Baldwin will be able to maintain a personal list of classified email addresses and to send messages to that list in lieu of a global email address after July 22, 2019, if he so chooses. Email policy changes that are currently working their way through the College governance structure would require an employee using a personal list for mass email distribution promptly remove a recipient who requests to be removed from the list. If so implemented, the policy changes will allow Mr. Baldwin to engage in collective union activity through email, and also will allow employees who choose not to receive those emails to opt out. I find that outcome to be an appropriate resolution of these complaints.”

(Exh. C-11 at 2-3.).

The College took no disciplinary action against Baldwin.

CONCLUSIONS OF LAW

Baldwin alleges that the Federation violated ORS 243.672(2)(a) when Federation vice president Ascheri¹ filed a formal harassment complaint against him with the College because of his emails regarding union matters. He also alleges that the College violated ORS 243.672(1)(a) and (b) by investigating the complaints in contemplation of possible discipline by the College over Baldwin’s Federation-related emails. We conclude that Baldwin met his burden to establish that the College violated his rights under the PECBA, but failed to meet that burden in his claims against the Federation.

We turn to our analysis.

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

¹Baldwin does not argue that PM’s complaint was part of the alleged Federation misconduct, and we do not consider PM’s complaint in that context.

2. The College did not violate ORS 243.672(1)(a) by investigating the complaints against Baldwin, but did violate the statute through its letters to Baldwin at the beginning, and at the end, of its investigation.

Standards of Decision

ORS 243.662 provides, “Public 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.” To protect that interest, 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.” The burden of proof is on the complainant to prove its claims by a preponderance of the evidence. ORS 183.450(2); OAR 115-010-0070(5)(b).

The language of ORS 243.672(1)(a) provides two distinct prongs,² one of which prohibits restraint, interference, or coercion “because of” the exercise of protected rights. The second prong of ORS 243.672(1)(a) prohibits actions that restrain, interfere with, or coerce employees “in the exercise” of their protected rights.

To determine if an employer violated the “because of” prong, we ordinarily examine the employer’s motives or reasons for the disputed action. However, it is not necessary for a complainant to prove that the employer 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 (2000); *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06 at 29, 22 PECBR 323, 351 (2008).

When analyzing “because of” claims, we typically examine the record as a whole to determine what motivated the employer to act. *Portland Assn. of Teachers*, 171 Or App at 626. We then decide whether the reasons were lawful or unlawful. *Portland Assn. of Teachers*, 171 Or App at 639. Generally speaking, if all of the employer’s actions 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). An example of a violation of the “because of” prong is when an employer privatizes employees’ jobs because they engaged in a strike. *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 22 PECBR 61 (October 30, 2007, *aff’d*, 234 Or App 553 (2010)).

To determine whether an employer has violated the “in the exercise” prong of ORS 243.672(1)(a), we consider the likely effects of the employer’s actions on employees. An employer commits an “in the exercise” violation if the employer’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; *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 employer’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 the employer’s motive nor the extent to which employees actually were coerced are controlling. Therefore, a complainant need not prove a causal connection between the employer’s action and the exercise of protected rights. While it generally has no impact on the resolution of a particular case, 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). An example of a violation of the “in the exercise” prong is when an employer terminates an employee during the grievance process as revised and increased punishment for the discipline grieved. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan District of Oregon*, Case No. UP-48-97, 17 PECBR 780 (1998).

Analysis: Baldwin’s Subsection 1(a) Claim Against the College

Baldwin argues that his emails to Federation bargaining unit members on the Federation listserv were protected activity, and therefore the College investigation of those emails was prohibited by ORS 243.672(1)(a). This Board has addressed a similar issue before. In *Lane County Peace Officers Association v. Lane County Sheriff’s Office*, Case No. UP-32-02, 20 PECBR 444 (2003), the employer investigated alleged inappropriate conduct at a union-sponsored party conducted outside of work hours. The union contended that, because the party was a union event, the employer had no lawful right to investigate alleged wrongful conduct by employees at the party. This Board rejected that argument under the “because of” prong of subsection (1)(a):

“The real question here, however, is not whether the party itself is a protected activity. An employer may impose discipline for serious proven misconduct that occurs in the course of otherwise protected activity. A basic example would be picket-line violence. Picketing is most certainly a protected activity, yet that protection will not insulate picketers from potential discipline for violent conduct on the picket line.

“If an employer may discipline bargaining unit members for such conduct, even where it occurs in the context of protected activity, it follows logically that the employer may investigate allegations that such conduct occurred. Put simply, the cover of protected activity does not shield all conduct from employer investigation. Here, the allegations included public nudity, fighting, gross intoxication in public, and inappropriate sexual contact. Under the principle discussed above, the County had the right to investigate such alleged misconduct, notwithstanding that it occurred in the context of an Association-sponsored party. Because such conduct is not protected, it also follows logically that the County’s investigation did not restrain, coerce, or interfere with bargaining unit members because of the exercise of protected rights. We will dismiss this element of the complaint.”

Lane County at 15-16, 20 PECBR at 458-9, footnote omitted.

In this case, while the level of misconduct differs, the principle is the same. The College received formal complaints about unwanted emails that violated College use of technology rules, and distributed using the College computer services. The College had the right to investigate such alleged misconduct, notwithstanding that it occurred in the context of Federation emails, just like it could investigate picket line violence. Because such conduct is not protected, the College's decision to investigate the allegations did not restrain, coerce, or interfere with bargaining unit members because of the exercise of protected rights.

However, Baldwin also alleges that two of the College's actions taken as part of the investigation violated subsection 1(a): First, the College effectively directed him to cease sending challenging emails to Federation bargaining unit members during the pendency of the investigation; second, the College issued a report without interviewing Baldwin stating that some of Baldwin's emails to bargaining unit members contained "untruths."

On May 8, 2019, the College sent Baldwin a letter advising Baldwin of the complaints and resulting investigation. The letter stated:

"With the investigation of complaints pending, you are cautioned to remain professional at all times concerning your interactions with the complainants and with all members of the LCC community. You are expected to fully cooperate with the investigation, respond in a timely manner to all communications regarding these complaints (including all emails, phone messages and written communications), and not engage in any conduct toward the complainants or toward any member of the LCC community that could be construed to be retaliatory."

Finding of Fact 41, emphasis added.

Baldwin's emails portrayed Federation leadership as relatively uninformed, insufficiently aggressive, confused, afraid to offend College officials, keeping bargaining unit members in the dark, and lacking integrity. Baldwin attacked Federation tactics, concessions, and outcomes for bargaining unit employees that he argued were a result of the qualities of Federation leaders that he condemned. At the time Baldwin was notified of the investigation, he was particularly involved in advocacy with union membership regarding Federation responses to the impending loss of bargaining unit jobs and a significant change in bargaining unit health insurance.

Upon receipt of the College direction to "not engage in any conduct toward the complainants or toward any member of the LCC community that could be construed to be retaliatory," Baldwin believed the implicit threat of discipline required that he cease his emails during that time of Federation controversy. The direction was both vague and overbroad on its face – "could be construed to be retaliatory" could encompass any communication Baldwin might make reflecting a disagreement with Federation leaders. (Finding of Fact 41.) Baldwin could have sought additional detail about what speech was banned. However, it was not unreasonable for him to conclude that most, if not all, of his prior emails, if re-sent after this notice, could be construed as retaliatory, and that the overwhelmingly safer choice was silence.

Baldwin's emails to the Federation bargaining unit were an exercise of his protected rights. Given the context, the College's letter imposed restraint, interference, and coercion on his protected rights by setting such a broad, vague standard to govern Baldwin's conduct that included those rights. In evaluating the motives of College in issuing that restriction, looking at the record as a whole, we note that the College had a great deal of information about the controversy before the May 8, 2019 letter. A cursory review by College officials of the Baldwin emails attached to the Federation official's complaint would have revealed that the complaints asked the College to intervene in substantive intra-union disputes. The College was aware that Baldwin was a controversial prior Federation president and that Federation unit members had made informal complaints about his emails for years. Despite the clear relevance of Baldwin's protected rights to any College restrictions on Baldwin, it nevertheless chose to issue this direct instruction to Baldwin. Imposing that instruction on Baldwin was an "adverse action" taken by the College against Baldwin; he was effectively coerced into silence in his use of the College-hosted Federation listserv. This conduct by the College would also deter a reasonable person from exercising PECBA rights – the College's vague, overbroad ban on speech, during an investigation for misconduct in speech, would lead a reasonable person to stop their union communication. Indeed, that is exactly what happened here, Baldwin having considered the requirements of the letter and making the choice to be silent.³

We turn to the "in the exercise" prong of subsection 1(a). In *Lane County*, this Board also evaluated the employer's conduct under the "in the exercise" prong:

"To decide whether the County's actions interfered with, restrained, or coerced bargaining unit members in the exercise of PECBA rights, we examine the natural and probable effect of the County's action. Here, the County conducted an investigation into alleged misconduct that occurred at the Association Christmas party. As discussed above, the conduct being investigated was not protected. Under the circumstances, no reasonable employee knowing that unprotected conduct was the subject of the investigation would be chilled from participating in Association activities. This is especially true here where the alleged misconduct being investigated occurred at a social event rather than an Association business meeting. We will dismiss this element of the complaint."

Lane County at 16, 20 PECBR at 459, footnote omitted.

We apply that reasoning here. Given that the investigation was into alleged conduct not protected by the PECBA, no reasonable employee knowing that unprotected conduct was the subject of the investigation would be chilled from participating in Federation activities. While the forum for the alleged misconduct was the Federation listserv, rather than a social event, it also took place on the employer's computer system, which was subject to the College's rules regarding inappropriate content.

³On the facts of this case, we need not determine the lawfulness the College barring Baldwin from only *actual* retaliation against Federation officials. Such retaliation could take the form, for example, of starting a Federation officer recall effort based on the filing of the complaints, conduct at the core of union organizational activity.

However, the College's effective silencing of Baldwin's emails exceeded the limits of the PECBA. A reasonable bargaining unit member would avoid forcefully advocating an honest unflattering opinion about the character and conduct of union leaders if they knew their employer could effectively silence them mid-debate. We conclude that the College violated the "in the exercise prong of ORS 243.672(1)(a)."⁴

3. The College did not violate ORS 243.672(1)(b) by investigating the complaints against Baldwin, but did violate the statute through its letter to Baldwin at the beginning of its investigation.

Standards for Decision: ORS 243.672(1)(b)

Under subsection (1)(b), it is an unfair labor practice for an employer or its representative to "dominate, interfere with or assist in the formation, existence or administration of any employee organization." To prove a violation of subsection (1)(b), a complainant must show that "the employer's actions actually, directly, and adversely affected a labor organization's ability to fulfill its duties as an exclusive representative. *Oregon AFSCME Council 75, Local # 3943 v. State of Oregon, Department of Corrections, Santiam Correctional Institution*, Case No. UP-51-05 at 25, 22 PECBR 372, 396, (2008). *See also Lane County Peace Officers Association*, Case No. UP-32-02 at 18, 20 PECBR 461. Thus, a labor organization "failed to establish a subsection (1)(b) violation when it provided no proof that the employer's conduct "was the sole, primary, or predominant reason for any change in member participation [in labor organization activities] or that the County's conduct had a substantial effect on the Association." *Oregon AFSCME Council 75, Local # 3943*, Case No. UP-51-05 at 25, 22 PECBR 396 (footnote omitted); *Lane County Peace Officers Association*, Case No. UP-32-02 at 18, 20 PECBR 461. This Board has stated,

"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) (quoting *Junction City Police Association v. Junction City*, Case No. UP-18-89 at 10, 11 PECBR 780, 789 (1989)).

To find a violation of section (1)(b), a complainant must show that the employer's conduct had an actual effect on the labor organization. *Lane County Peace Officers' Association v. Lane County*, Case No. UP-28-00, 18 PECBR 750, 767 (2000), citing *AFSCME, Haphey and Bondietti v. Linn County Sheriff's Office*, Case No. UP-115-87, 11 PECBR 631 (1989). In *Linn County*, we stated the "actual effect" test and then explained:

⁴We need not address whether the College "finding" that Baldwin had circulated "untruths," states a claim under the "because of" or "in the exercise" prongs of subsection 1 (a); it would add nothing to the remedy in this case, and that conduct is more simply addressed under subsection 1(b).

“* * * Another way of describing a section (1)(b) violation is that the employer conduct must have a direct effect on the labor organization. Unlawful employer interference ‘goes beyond merely interfering with [protected] rights of individual employees; it is aimed instead at the labor organization as an entity.’ *Morris, The Developing Labor Law* (BNA 2d ed. 1983) at 282 (footnote deleted). * * *” 11 PECBR at 656.

In *Linn County*, we concluded that employer’s refusal to hire two individuals did not actually interfere with the labor organization, in violation of ORS 243.672(1)(b). This Board has also stated:

“Circumstances in which this Board has found a (1)(b) violation include such actions as requiring employees to contact a supervisor before talking to the union, attempting to prohibit the union president from responding to questions from unit members on his own time, or making comments to the bargaining unit that would tend to undermine the unit members’ confidence in the union.”

Lane County at 17-18, 20 PECBR at 460-61, footnotes omitted.

Analysis of Subsection 1(b) Claim Against the College

Baldwin argues that the College violated ORS 243.672(1)(b) by investigating him at the request of a Federation officer and unit member. For the reasons identified in our analysis of subsection 1(a) above, we conclude that the College’s investigation of Baldwin’s emails, pursuant to requests from two employees, was lawful. In particular, Baldwin has not demonstrated that the investigation itself was the sole, primary, or predominant reason for any change in member participation in Federation activities (including himself) or that the College’s conduct had a substantial effect on the Federation.

Here, the College, after being requested to do so by bargaining unit members, began an investigation into alleged misconduct taking place on the Federation listserv, hosted on the College computer infrastructure. Unlike *Lane County*, the College did investigate PECEA-protected activities, emails to Federation members which were relevant to significant bargaining issues and Federation activities related to its statutory responsibilities to represent the members of the bargaining unit. However, it did so in response to allegations of verbal misconduct contained within those emails sent through the College computer infrastructure. Further, there is no evidence that the fact of the investigation itself had an effect on Baldwin’s or any other bargaining unit member’s participation in the Federation. As in the *Lane County* case, we conclude that no reasonable employee would be chilled from participating in Federation business because of an investigation into alleged misconduct that occurred through emails sent through the College’s computer infrastructure.

However, in the course of that investigation the College issued two communications to Baldwin. The first directed Baldwin to “not engage in any conduct toward the complainants or toward any member of the LCC community that could be construed to be retaliatory.” (Finding of Fact 41.) The second communication made findings about on Baldwin’s veracity, stating that he

had circulated “untruths,” a conclusion reached based on speaking only to those on the other side of this Federation controversy. (Finding of Fact 50.)

As we have described above, Baldwin had been stridently advocating for certain positions in bargaining, and severely criticizing Federation leadership, and the College’s May 8 letter effectively silenced him. Baldwin believed prudence required that he cease his emails during that time of Federation controversy. The direction was both vague and overbroad on its face. Baldwin could have sought additional detail about what speech was banned. However, it was not unreasonable for him to conclude that most, if not all, of his prior emails, if re-sent after this notice, could be construed as retaliatory. A cursory review by College officials of the Baldwin emails attached to the Federation official’s complaint would have revealed this to be the case.⁵

Since Baldwin was a key participant in a debate about Federation strategies and tactics and their relationship to Federation leaders, suspending his ability to engage in that debate actually, directly, and adversely affected the Federation’s ability to fulfill its duties as an exclusive representative. The College’s instruction was the sole, primary, or predominant reason for the change in Baldwin’s participation in Federation activities. We conclude that Baldwin has proven this claim and will order the College to cease and desist from these activities.⁶

4. The Federation did not violate ORS 243.672(2)(a) by filing a complaint against Baldwin.

Standards for Decision: ORS 243.672(2)(a)

ORS 243.672(2)(a) makes it an unfair labor practice “for a public employee or 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” by the PECBA, ORS 243.650 to 243.782, including “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. Subsection 2(a), because it addresses the conduct of labor organizations, has been interpreted to impose a duty on a labor organization to fairly represent all employees for whom it is the exclusive representative. *Chan v. Leach and Stubblefield, Clackamas Community College; McKeever and Brown, Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-05 at 12, 21 PECBR 563, 574 (2006). The Complaint at issue in this case, however, is not brought as a breach

⁵As with our analysis under subsection 1(a), above, we need not determine the effect of the College simply barring Baldwin from *actual* retaliation against Federation officials.

⁶We conclude, however, that the record does not show that Baldwin met his burden to prove that the report of the investigation itself, with its comments on Baldwin’s veracity, had any effect on the Federation controversies. Because of our disposition of this case, we need not address whether the College report casting doubt on Baldwin’s credibility constituted conduct “so inimical to the core values of the PECBA that it violated ORS 243.672(1)(b).” *Oregon AFSCME Council 75, Local # 3943*, Case No. UP-51-05 at 27, 22 PECBR at 398.

of the duty of fair representation, but as the analogue of ORS 243.672(1)(a). Therefore, we apply the analysis set out regarding ORS 243.672(1)(a) above.

Here, the actions alleged to be wrongful were performed by Ascheri, vice president of the Federation and employee of the College, and PM, Federation bargaining unit member and employee of the College. The Complaint in this case does not name these individuals as parties, only the Federation. Accordingly, we must address the threshold question of whether Ascheri's actions, at least, were those of "a labor organization or its designated representative."⁷ In legal terms, we consider whether Ascheri acted with actual or apparent authority on behalf of the Federation.

The relevant standards for determining whether an agent has actual or apparent authority are derived from common law. Actual authority is "that authority which the principal confers upon the agent in express terms." *Wiggins v. Barrett & Associates, Inc.*, 295 Or 679, 686, 669 P2d 1132 (1983). 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 him on that matter. The third party must also rely on that belief." *Jones v. Nunley*, 274 Or 591, 595, 547 P2d 616 (1976).

Regarding whether a particular individual is a "designated representative," the Board has previously 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 F2d 351, 355 (6th Cir 1983). A public employer is liable for the conduct of an individual who employees of the public employer would reasonably believe acted on the public employer's behalf in committing an unfair labor practice. *AFSCME, Local 2043 v. City of Leb.*, 360 Or 809, 832, 388 P3d 1028 (2017).

In applying this reasonable belief standard, a key factor is whether the individual at issue occupied a high-ranking position within the public employer. Other relevant factors include whether individuals acted in their official capacity when committing the unfair labor practice, whether the individuals had the power to hire and fire employees of the public entity, and whether the public entity disavowed the actions of the individuals. One or more of those factors may be sufficient to conclude that the individuals acted on behalf of the public entity and that the entity is therefore liable for the individuals' actions. *City of Leb.*, 360 Or at 832-33; *International Ass'n of Machinists v. NLRB*, 311 US 72, 61 S Ct 83 (1940).

⁷No party argues that PM's complaint is relevant to the claims at issue here.

Analysis: Claim Under Subsection 2(a)

Here, Ascheri did not state in his College complaint that he was filing on behalf of the Federation. However, Ascheri was vice president of the Federation, and posted about his complaint as vice president, on the Federation webpage, citing its benefits for the Federation, including to the goal of making the Federation more unified (implicitly by ending Baldwin's attacks). This webpage post was never repudiated or limited by the Federation. Other evidence in the record, in particular the email from Geyer, demonstrates that the complaint was filed as part of a strategy by Federation leadership. We conclude that Ascheri had actual authority to file the complaint, initially and as ratified by the Federation, and that his actions were those of the Federation or its designated representative.

Turning to the merits of this claim, we resolve it based on the requirement of subsection 2(a): did the Federation "[i]nterfere with, restrain or coerce" Baldwin by filing its complaint over Baldwin's emails? We conclude that Baldwin has failed to meet his burden to prove this claim. As noted above, this Board has held that an employer may investigate misconduct by employees even when it occurs in connection with union activities. A corollary of that holding is that filing a complaint over bargaining unit employee misconduct, even if filed by a labor organization, is not interference, restraint, or coercion of the affected employee. The actions we have found to be wrongful above were not the filing or acceptance of the complaints, but the College's handling of those complaints, especially in its communications with Baldwin.

Baldwin points to *Lane County's* holding that (1) investigating misconduct in connection with union activities is lawful. He argues that the corollary of that holding is that investigating conduct in connection with union activities that is not misconduct is not lawful. In other words, Baldwin argues that the merits of a complaint that prompts an investigation determines whether the complaint violates the PECBA. While that might be the case for a complaint filed in bad faith, the evidence here is that the complaining parties, and other Federation officials, believed in good faith that portions of Baldwin's emails violated College policies. The College investigation report did not find that the complaints were frivolous or filed in bad faith, but that they raised serious questions under College policies. We conclude that, in filing the complaint, the Federation did not violate ORS 243.672(2)(a), and we will dismiss this portion of the complaint.

5. The College is not required to pay Complainant a civil penalty, or post a notice.

This Board has concluded that the College violated ORS 243.672(1)(a) and (b), and will dismiss the remainder of the Complaint. We will order the College to cease and desist from such violations.

Baldwin also seeks a civil penalty, which we decline to order. The PECBA authorizes this Board to award a civil penalty when "the party committing an unfair labor practice did so repetitively, knowing that the action taken was an unfair labor practice and took such action disregarding that knowledge; or that the action constituting an unfair practice was egregious." ORS 243.676(4). In order to prove that a violation was repetitive, we generally require a complainant to show "the existence of a prior Board order involving the same parties that establishes that prior, similar activity was unlawful." *Lincoln County Education Association v. Lincoln County School*

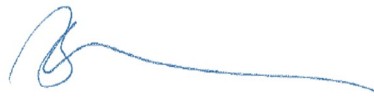
District, Case No. UP-56-04 at 16, 21 PECBR 206, 221 (2005) (quotation marks and citation omitted). Egregious means “conspicuously bad and flagrant.” *Id.*, UP-56-04 at 18, 21 PECBR at 223. See also *Crook County Firefighters Association, IAFF Local 5115 v. Crook County Fire and Rescue*, Case No. UP-011-18, __ PECBR __ (2019). The record does not establish that the College’s violation meets either standard. This appears to have been an unprecedented event, without relevant precedent to aid the College in determining its courses of action.

Baldwin also requests that a notice be posted of the College’s violation. This Board generally orders notice 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). See also *United Academics of Oregon State University v. Oregon State University*, Case No. UP-021-18, __ PECBR __ (May 4, 2020). We decline to do so in this case; this unusual event does not satisfy the above criteria.

PROPOSED ORDER

The College will cease and desist from violating ORS 243.672(1)(a) and (b). We dismiss the remainder of the Complaint.

SIGNED AND ISSUED 28 July 2020.



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-017-20

(UNFAIR LABOR PRACTICE)

EILEEN ORDWAY,

Complainant,

v.

SEIU LOCAL 503, OPEU,

Respondent.

DISMISSAL ORDER

Eileen Ordway, Salem, Oregon, appeared *pro se*.

Jared Franz, Staff Attorney, SEIU Local 503, OPEU, Salem, Oregon, represented the Respondent.

On July 6, 2020, Complainant, appearing *pro se*, filed a complaint alleging that Respondent, SEIU Local 503, OPEU (SEIU), violated ORS 243.672(2)(a) and (c). The complaint included a number of attachments, including a two-page “statement of claims” that includes the substance of the complaint. The statement of claims did not reference a specific statute, but stated that Complainant would “provide further details and applicable Oregon Revised Statutes as a *Pro Se* litigant upon acceptance of this complaint.” Complainant also filed a separate but related complaint against the State of Oregon, Department of Human Services (DHS) and Oregon Home Care Commission on July 6, 2020, which is addressed in a separate order.

The complaint was assigned to Administrative Law Judge (ALJ) Martin Kehoe, who conducted an investigation to determine if an issue of fact or law existed that warranted a hearing. *See* OAR 115-035-0005. As part of that investigation, ALJ Kehoe asked SEIU for an informal response. On July 21, 2020, SEIU provided ALJ Kehoe with an informal response asking that the complaint be dismissed without a hearing. With SEIU’s permission, ALJ Kehoe provided that response to Complainant on July 27, 2020, as part of an order to show cause as to why the complaint should not be dismissed. That order directed Complainant to respond to the arguments

that SEIU presented in its informal response, and to clarify precisely how the facts alleged in her complaint violated ORS 243.672(2)(a) and (c). On August 10, 2020, Complainant responded to the order. After reviewing Complainant's response, ALJ Kehoe recommended to this Board that the complaint be dismissed.¹

In considering whether a complaint presents an issue of fact or law that warrants a hearing, we assume well-pleaded facts to be true; we also rely on undisputed facts discovered during our investigation. *R.M. v. Portland Association of Teachers and Multnomah County School District No. 1J (Operating as Portland Public Schools)*, Case No. FR-001-18 at 2 (2019). Here, having considered the facts alleged in the complaint, as well as the facts uncovered in the ALJ's investigation, we summarize the well-pleaded and undisputed facts as follows.

1. SEIU represents a bargaining unit of homecare workers whose compensation is paid by DHS or other public agencies that receive money from DHS.

2. An individual who is included in the homecare workers bargaining unit that is represented by SEIU is also eligible for voluntary membership in SEIU. An individual who is not included in the bargaining unit represented by SEIU is not eligible for voluntary membership in SEIU.

3. To be included in the homecare workers bargaining unit represented by SEIU and to be eligible for voluntary SEIU membership, an individual must receive compensation from DHS for homecare work, and SEIU must receive verification of that compensation from DHS. If an individual does not receive such compensation for 120 days, that individual is not eligible for SEIU representation or membership.

4. Complainant has, during periods preceding January 2017, received compensation from DHS for homecare services and has previously been included in the bargaining unit represented by SEIU and been an SEIU member.

5. SEIU last received verification from DHS that it had compensated Complainant for eligible homecare services provided by Complainant in January 2017.

6. SEIU did not receive from DHS any verification of compensation paid to Complainant by DHS for more than 120 days. After the 120 days without verified compensation had passed, SEIU informed Complainant on multiple occasions that her SEIU membership would be terminated if she did not receive compensation from DHS for eligible homecare services.

7. After not receiving verified compensation from DHS for eligible homecare services provided by Complainant for over 120 days, SEIU terminated Complainant's membership in August 2017.

8. Because Complainant is not an SEIU member, Complainant is not entitled to attend SEIU membership meetings or otherwise participate as an SEIU member.

¹Thereafter, Complainant has filed additional documents with the Board, but those documents do not provide additional well-pleaded facts that would warrant a hearing.

9. In November 2019, SEIU’s Board officially prohibited Complainant from attending SEIU member meetings.

10. In a letter to Complainant dated January 7, 2020, SEIU formally documented that Complainant was not permitted to attend SEIU membership meetings. SEIU did so after in-person conversations and other attempts to communicate with Complainant failed to discourage her from attending meetings. The letter also told Complainant that she could resume attending SEIU meetings once she becomes an SEIU member again.

DISCUSSION

ORS 243.672(2)(a) makes it an unfair labor practice for a labor organization to “[i]nterfere with, restrain or coerce any employee in or because of any rights guaranteed under ORS 243.650 to 243.806.” This Board has interpreted subsection (2)(a) as imposing a “duty of fair representation” on a labor organization when it acts as the exclusive representative of a bargaining unit of employees. *Griffin v. Service Employees International Union Local 503, Oregon Public Employees Union and State of Oregon, Employment Department*, Case No. FR-002-09 at 24, 24 PECBR 1, 24 (2010). Generally, we will find a violation of subsection (2)(a) “only where a labor organization’s actions are arbitrary, discriminatory, or taken in bad faith.” *Block v. Amalgamated Transit Union, Division 757*, Case No. FR-001-15 at 4, 26 PECBR 486, 489 (2015).²

Here, Complainant’s complaint rests on the allegation that SEIU has improperly denied or ignored her applications for SEIU membership. SEIU admits that it has, after August 2017, denied Complainant’s membership applications. To establish a disputed issue of fact or law that warrants a hearing, there must be well-pleaded or undisputed facts that SEIU’s application denials were arbitrary, discriminatory, or taken in bad faith. Here, the undisputed facts show that SEIU had a rational, non-discriminatory, and good faith basis for denying Complainant’s membership applications and participation in SEIU membership meetings. Specifically, SEIU did not receive verification from DHS that Complainant has received eligible compensation from DHS for homecare services for over 120 days. As a result, SEIU legitimately concluded that Complainant is not currently included in the homecare worker bargaining unit, and, therefore, Complainant is not currently eligible for membership in SEIU. SEIU has informed both Complainant and this Board that Complainant will be eligible for SEIU membership if it receives confirmation from DHS of such compensation in the future.

Finally, with respect to Complainant’s assertion of improper communications between SEIU and DHS regarding her applications, Complainant has not alleged any facts that support her claim that the communications were improper, despite being afforded the opportunity to do so. Moreover, SEIU has acknowledged communications with DHS regarding Complainant, but only as part of its obligation to confirm compensation. Communications between SEIU and DHS to

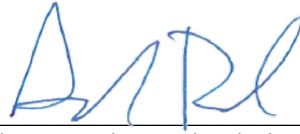
² The complaint also identified ORS 243.672(2)(c) as a claimed violation. That provision makes it an unfair labor practice for a labor organization to “[r]efuse to comply with any provision of ORS 243.650 to 243.806.” We do not understand Complainant to have asserted a violation of ORS 243.672(2)(c) that is independent of the ORS 243.672(2)(a) charge, and, in any event do not find an issue of fact or law that warrants a hearing on such an independent violation.

verify compensation are lawful and proper. Under such circumstances, there is no disputed issue of fact or law that warrants a hearing on Complainant's allegations. Accordingly, the complaint is dismissed.

ORDER

The complaint is dismissed.

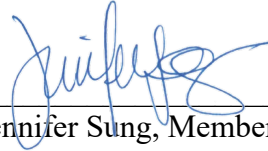
DATED: September 4, 2020.



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-018-20

(UNFAIR LABOR PRACTICE)

EILEEN ORDWAY,	)	
	)	
Complainant,	)	
	)	
v.	)	DISMISSAL ORDER
	)	
STATE OF OREGON, DEPARTMENT	)	
OF HUMAN SERVICES AND OREGON	)	
HOME CARE COMMISSION,	)	
	)	
Respondents.	)	
_____	)	

Eileen Ordway, Salem, Oregon, appeared *pro se*.

Brena Lopez, Senior Assistant Attorney General, Labor & Employment Section, Department of Justice, Salem, Oregon, represented the Respondents.

On July 6, 2020, Complainant, appearing *pro se*, filed a complaint alleging that the State of Oregon, Department of Human Services, and Oregon Home Care Commission (Respondents, collectively) violated ORS 243.672(1)(a)-(f). Complainant also filed a separate complaint against SEIU Local 503, OPEU, which is addressed in a separate order.

The complaint was assigned to Administrative Law Judge (ALJ) Martin Kehoe, who conducted an investigation to determine if an issue of fact or law existed that warranted a hearing. *See* OAR 115-035-0005. As part of that investigation, ALJ Kehoe asked Respondents for an informal response. On July 21, 2020, Respondents provided ALJ Kehoe with an informal response asking that the complaint be dismissed without a hearing. With Respondents' permission, ALJ Kehoe provided that response to Complainant on July 27, 2020, as part of an order to show cause as to why the complaint should not be dismissed. That order directed Complainant to respond to

the arguments that Respondents presented in their informal response, and to clarify precisely how the facts alleged in her complaint violated ORS 243.672(1)(a)-(f).

On August 10, 2020, Complainant responded to the order by virtue of four “sets” of documents, the first of which sets forth the substance of her response. Complainant also added allegations of ORS 243.672(1)(i) and (j), but without further explanation of how those statutes were violated. After reviewing Complainant’s response, ALJ Kehoe recommended to this Board that the complaint be dismissed.

In considering whether a complaint presents an issue of fact or law that warrants a hearing, we assume well-pleaded facts to be true; we also rely on undisputed facts discovered during our investigation. *R.M. v. Portland Association of Teachers and Multnomah County School District No. 1J (Operating as Portland Public Schools)*, Case No. FR-001-18 at 2 (2019). Here, having considered the facts alleged in the complaint, as well as the facts uncovered in the ALJ’s investigation, we summarize the well-pleaded and undisputed facts as follows.

1. Under ORS 410.612(1), Respondent Oregon Home Care Commission (OHCC) is the statutory employer of record for purposes of collective bargaining for homecare workers whose pay comes from public funds.

2. Respondent Department of Human Services (DHS) works through OHCC to, among other things, maintain a registry of homecare workers.

3. SEIU is the exclusive representative of homecare workers, with OHCC being the “employer of record” for purposes of collective bargaining for homecare workers.

4. In June 2007, Complainant became a homecare worker with an authorized provider number.

5. On January 31, 2018, her provider number was inactivated pursuant to OAR 411-031-0040(8)(f) because she had not worked as a homecare worker during the previous 12 months.

6. In February of 2018, Complaint reapplied for a provider number, but was denied pursuant to OAR 411-031- 0040(8)(b).

7. By letter dated March 9, 2018, Complainant was informed of the denial of her application.¹

8. On March 8, 2019, Complainant filed a complaint against DHS in Marion County Circuit Court.

9. The complaint alleged that DHS (1) wrongfully discharged her; and (2) wrongfully interfered with her employment.

¹Complainant also has an authorized provider number to work as a Personal Support Worker. That number remains active.

10. On February 20, 2020, the court granted summary judgment in favor of DHS. With respect to the first claim, the court concluded that DHS was not Complainant's employer. With respect to the second claim, the court reasoned that Complainant "advanced a theory but without offering any evidence in opposition to summary judgment that would support her claim."

11. Complainant appealed the court's order to the Oregon Court of appeals, and that matter remains pending.

12. Complainant's July 6, 2020, unfair labor practice complaint filed with this Board appears premised on the same general allegations of her civil suit—namely, that Respondents unlawfully inactivated her provider number and unlawfully failed to grant her subsequent application to activate that number.

DISCUSSION

Complainant's complaint alleged violations of ORS 243.672(1)(a)-(f), and her response to ALJ Kehoe's order to show cause also raised potential violations of subsections (i) and (j). Under ORS 243.672(1), "[i]t is an unfair labor practice for a public employer or its designated representative to do any of the following:

"(a) Interfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662.

"(b) Dominate, interfere with or assist in the formation, existence or administration of any employee organization.

"(c) Discriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization. * * *

"(d) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony under ORS 243.650 to 243.806.

"(e) Refuse to bargain collectively in good faith with the exclusive representative.

"(f) Refuse or fail to comply with any provision of ORS 243.650 to 243.806.
* * * * *

"(i) Violate ORS 243.670(2).²

"(j) Attempt to influence an employee to resign from or decline to obtain membership in a labor organization."

Complainant's complaint rests on assertions that DHS has improperly inactivated her provider number or not approved her applications to reactivate that number. Even accepting the well-pleaded allegations as true, the facts that Complainant has alleged do not implicate

²ORS 243.670(2) prohibits a public employer from (a) using public funds to support actions to assist, promote or deter union organizing; or (b) discharging, demoting, harassing or otherwise taking adverse action against any individual because the individual seeks to enforce that section or testifies, assists or participates in any manner in an investigation, hearing or other proceeding to enforce that section.

ORS 243.672(1)(a)-(f), (i), or (j). Additionally, many of Respondents' actions alleged by Complainant as the basis for her complaint took place and were known to Complainant more than 180 days before she filed this complaint. Under ORS 243.672(3), those allegations are untimely. *See Rogue River Educ. Ass'n v. Rogue River Sch. Dist. No. 35*, 244 Or App 181, 190, 260 P3d 619 (2011) (ORS 243.672(3) has a 180-day statute of limitations that begins to run when an injured party knows or reasonably should have known that an unfair labor practice occurred). Because Complainant's complaint alleges actions that are outside the scope of ORS 243.672 or are untimely, there is no disputed issue of fact or law that warrants a hearing. Accordingly, we dismiss the complaint.

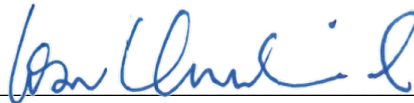
ORDER

The complaint is dismissed.

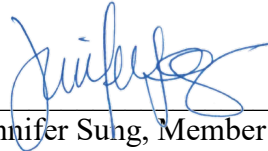
DATED: September 4, 2020.



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-004-20

(REPRESENTATION)

WARRENTON PUBLIC SAFETY	)	
ASSOCIATION,	)	
	)	
Petitioner,	)	ORDER CERTIFYING
	)	EXCLUSIVE REPRESENTATIVE
v.	)	
	)	
	)	(ELECTION RESULTS)
CITY OF WARRENTON,	)	
	)	
and	)	
	)	
OREGON AFSCME COUNCIL 75,	)	
	)	
Respondents.	)	
	)	

On July 1, 2020, Warrenton Public Safety Association filed a petition under ORS 243.682(1) and OAR 115-025-0000(2) to represent employees in a bargaining unit (described below) who were then represented by Oregon AFSCME Council 75. On July 7, 2020, Oregon AFSCME Council 75 disclaimed interest in representing the employees at issue in the petition.

On August 10, 2020, the Board's Election Coordinator sent ballots to eligible voters, pursuant to the terms of a consent election agreement. Six valid ballots were returned by the agreed-on extended deadline of September 3, 2020, which constitutes the date of the election. *See* OAR 115-025-0060(4)(c). A tally of ballots was held on September 4, 2020, and the majority of valid votes counted were cast for Warrenton Public Safety Association. The tally of ballots was provided to the parties on September 4, 2020.

Objections to the conduct of the election, or conduct affecting the results of the election, were due within 10 days of furnishing the ballot tally to the parties (*i.e.*, by September 14, 2020). OAR 115-025-0060(9). No objections were filed. Accordingly, it is certified that:

WARRENTON PUBLIC SAFETY ASSOCIATION

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

“All regular police department officers and the police clerk. The bargaining unit excludes the police chief, sergeants, police reserves, temporary employees, supervisory employees, confidential employees and part time employees, except for part-time employees who work more than 1,040 hours in 12 months shall be included provided they thereafter average 20 hours or more per week during each three month period.”

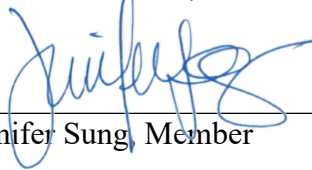
DATED: September 15, 2020.



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. MA-001-20

(MANAGEMENT SERVICE APPEAL)

R. Y.,	)	
	)	
Appellant,	)	
	)	
v.	)	DISMISSAL ORDER
	)	
STATE OF OREGON,	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	
_____	)	

R. Y., Kennewick, Washington, appeared *pro se*.

Neil Taylor, Assistant Attorney General, Labor & Employment Section, Department of Justice, Salem, Oregon, represented the Respondent.

On March 26, 2020, Respondent State of Oregon, Department of Corrections (DOC), issued a written reprimand to Appellant, a correctional lieutenant and management service employee.¹ An appeal of management service discipline must be filed by 30 days after the effective date of the discipline. ORS 240.560(1); OAR 115-045-0005. Here, a timely appeal was required to be filed by April 27, 2020.² Appellant acknowledges that he did not file his appeal by that date, but requests that we accept his appeal and set the matter for hearing. For the following reasons, we are unable to grant Appellant's request.

¹The record does not contain a copy of the reprimand, but both Appellant's and Respondent's submissions to the Board assume that the written reprimand is effective March 26, 2020.

²Thirty days from the effective date of the reprimand was Saturday, April 25, 2020. The 30-day period therefore expired on Monday, April 27, 2020. *See* OAR 115-045-0002 (computation of time determined by OAR 115-010-0012); OAR 115-010-0012 (time is computed by excluding the last day when the last day falls on a legal holiday, Saturday, or a day when the office is closed before the end of the day).

Appellant first asks us not to dismiss his appeal because he consulted with a DOC human resources employee when he sought to file an internal DOC grievance regarding the reprimand, and that human resources employee informed him that (1) his internal DOC grievance was untimely because it was more than 30 days from the date of the reprimand, (2) she was new in her position and was unsure how to proceed, and (3) he could file an appeal with this Board. We understand Appellant to be arguing that we should accept his appeal, even though it is untimely, because Respondent did not properly or accurately inform him of his appeal rights. The court's opinion in *Lamb v. Cleveland*, 28 Or App 343, 559 P2d 529 (1977), prevents us from granting Appellant's request. Specifically, in that case, the court stated that there is "no statutory duty to inform a discharged employee of the proper appeal procedure," and that an appeal must still be timely filed even if there was a "[f]ailure of the appointing authority to give advice or giving of inadequate advice." 28 Or App at 346 (footnote omitted).

Appellant also asks that we accept the untimely appeal because he did not fully understand his appeal rights. The statute and case precedent, however, require this Board to strictly enforce the statutory deadline for filing an appeal, even in cases where the management service employee was not aware of the deadline and missed it by only a short period. *Furqan v. State of Oregon, Department of Human Services*, Case No. MA-16-12 at 1-2 (August 2012) (on reconsideration) (citing *Nelson v. Department of Corrections*, Case No. MA-36-94 (January 1995), and *Lamb*, 28 Or App 343). Therefore, we cannot accept the untimely appeal on this ground either.

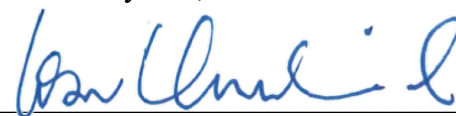
ORDER

The appeal is dismissed as untimely.

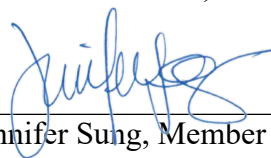
DATED: September 16, 2020.



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. MA-006-19

(MANAGEMENT SERVICE REMOVAL)

E. A.,	)	
	)	
Appellant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
	)	AND ORDER
STATE OF OREGON,	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	
	)	

On July 13, 2020, this Board heard oral argument on Appellant's objections to a recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe on May 14, 2020, after a hearing on January 6 and 7, 2020, in Pendleton, Oregon. The record closed on February 7, 2020, upon receipt of the parties' post-hearing briefs.

Steven N. Thomas, Attorney at Law, Corey, Byler & Rew, LLP, Pendleton, Oregon, represented the Appellant.

Margaret J. Wilson, Senior Assistant Attorney General, Department of Justice, Salem, Oregon, represented the Respondent.

On July 31, 2019, Appellant¹ filed an appeal of his removal from the management service (and effective dismissal from state service) by Respondent State of Oregon, Department of Corrections (DOC). The issue is: Did DOC violate ORS 240.570(3) when it terminated Appellant's employment? As set forth below, we conclude that the DOC did not violate the statute.

¹In this order, we refer to several employees, including Appellant and the complainant, Officer SJ, by initials.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT²

Background

1. DOC operates state prisons in Oregon, including Eastern Oregon Correctional Institution (EOCI) in Pendleton. EOCI houses adult male felons meeting medium-security classification requirements.

2. For its security employees, EOCI uses a traditional chain of command with the following ranks in ascending order of authority: officer, corporal, sergeant, lieutenant, and captain. These ranks are also often referred to as correctional officer, correctional corporal, etc. EOCI's captains report to an assistant superintendent, who reports to EOCI's single superintendent, who reports to DOC's east side administrator. The superintendent supervises hundreds of employees.

3. Since September 2017, David Pedro has been EOCI's assistant superintendent of security. Since December 2018, Susan Washburn has been EOCI's superintendent. Since Appellant started working for EOCI on September 15, 2008, he has worked under six superintendents.

4. All EOCI security series employees with ranks below lieutenant (*i.e.*, officer, corporal, and sergeant) are represented by a labor organization, American Federation of State, County and Municipal Employees, Local 3361. All lieutenants and their superiors are managers and are unrepresented. Lieutenants are the first line of management at EOCI. All managers wear a gold star (*i.e.*, "management security badge") on their uniforms.

Appellant's Employment History

5. Appellant began working for DOC as an officer at EOCI on September 15, 2008. On August 4, 2013, Appellant promoted to the rank of sergeant.

6. In 2016, Appellant worked out-of-class as a lieutenant for a time. During that period, Appellant was assigned the role of assistant emergency management coordinator. Appellant was originally given that assignment by Captain Calvin Lilienthal (who retired from DOC on August 1, 2017). Later, the role was reassigned to Appellant by Lilienthal's replacement, Captain Jeff Frazier. Lilienthal and Frazier both served as the lead/primary emergency management coordinator.

²Appellant prevailed at hearing on the first charge in the removal letter that he was untruthful in three particular statements during his April 12, 2019, investigatory interview. The ALJ concluded that DOC did not prove that Appellant was untruthful, and DOC did not object to that conclusion. We have narrowed the findings of fact to address only the remaining charge at issue.

7. The assistant emergency management coordinator role held by Appellant generally involved updating EOCI's emergency manuals, performing certain training duties, and having some shared oversight of EOCI's "specialty teams," which include its Special Weapons and Tactics (SWAT) team, Critical Incident Stress Management (CISM) team, and Crisis Negotiation Team (CNT). CISM is a peer support program for EOCI's union-represented staff. Under Captain Lilienthal, Appellant also helped the emergency management manager with an active shooter drill.

8. In February 2017, Appellant returned to working as a sergeant.

9. On March 29, 2017, at about 1:00 a.m., there was an electrical fire at EOCI's carpentry shop that had the potential to cause significant damage to the institution. Pendleton Fire Department was significantly delayed in responding to the fire at EOCI because it was responding to another fire elsewhere. In the interim, for about 48 or 49 minutes, Appellant heroically risked his own safety to deploy several chemical extinguishers on the fire, navigating through the smoke-filled building to do so. Appellant ultimately went to the hospital. Appellant later received several significant awards for his actions, which limited the spread of the fire and most likely saved the building from being consumed by fire.

10. On November 5, 2017, Appellant promoted to lieutenant, and thus to the management service.

11. On December 1, 2017, Assistant Superintendent Pedro awarded Appellant 40 hours of "performance recognition leave." Some of those hours were based on Appellant's time as alternate emergency management coordinator.

12. In February 2018, Captain Jason Walker verbally counseled Appellant on respectful workplace behavior as a result of Appellant making negative statements about a captain's assignment. The supervisory notes from that discussion noted that Appellant's comments were "contrary to team play."

13. In March 2019, Appellant was verbally counseled for failing to shave his beard as directed by a superior officer. The supervisory notes from that exchange indicate that Appellant replied by asking, in part, "[I]s there a reason as to why this issue is being continually brought up," and, "Is there a reason I am being singled out for this as well?" The superior officer replied in part, "I won't get into an email war with you and this will be my last email to you in this string. We both know what was said."

14. Appellant remained a lieutenant until he was removed from management service and dismissed from state service, effective July 11, 2019.

Relevant Policies; Expectations of Lieutenants

15. All EOCI employees are expected to follow DOC's Code of Conduct and Code of Ethics. An employee's failure to follow the Code of Conduct may result in disciplinary action, up to and including dismissal. However, all managers (including lieutenants) are held to an even higher standard than their subordinates, and are expected to serve as role models for their

subordinates and help them feel safe. That applies to how managers are expected to conduct their business and speak with coworkers. In addition, a manager's honesty is expected to be above reproach, and a lieutenant "is expected to recognize their responsibility to act ethically at all times in accordance with the very highest standards of integrity."

16. DOC Policy 20.6.1, which addresses "Promotion and Maintenance of a Respectful Workplace," provides, in relevant part,

"Employees at all levels shall be expected to interact with co-workers, inmates and the public in a business-like and professional manner at all times. This includes refraining from sexual or other harassment.

"Conduct in violation of this policy will not be tolerated. Any member of the staff found to have engaged in conduct in violation of this policy will be subject to disciplinary action up to and including dismissal."

17. The position description for lieutenant states, "Lieutenants supervise an entire shift of security staff, assigning staff as institution needs dictate, providing direction and instruction, makes operational decisions impacting the facility and maintains security at all times by ensuring staff follow and enforce established Department of Corrections rules and procedures, post orders, and administrative directives." Further, one of a lieutenant's many responsibilities is "[s]taff morale." Another is having "a willingness to assist and support co-workers." Each lieutenant regularly supervises between 20 and 40 employees.

18. Lieutenants and captains regularly serve as the Officer-in-Charge (OIC). The OIC is normally the highest-ranking manager on duty and is responsible for, and effectively in charge of, the entire institution for a set period of time. Typically, the OIC is a captain. However, for the graveyard shift, which runs from roughly midnight to 7:00 or 8:00 a.m., the OIC is always a lieutenant.

19. If an OIC observes that a subordinate is not performing his or her work, the OIC is expected to correct the subordinate's behavior. That can involve coaching, mentoring, motivating, and inspiring the subordinate. Occasionally, employees reach out to the OIC for assistance on their own. If an OIC notices a subordinate having a sex-related conversation while at work, the OIC should stop that conversation immediately. Likewise, all managers are expected to stop any conversations when they could be considered disrespectful or offensive.

20. All security series employees at EOCI must be "fit for duty" while at work. An employee who is not fit for duty is a safety or a security issue. Common examples of an employee who is not fit for duty include someone who is intoxicated or someone who is too tired and sleeping on the job. The final determination of whether an employee is fit for duty is made by Assistant Superintendent Pedro. However, in practice, a subordinate manager may need to decide whether to call Pedro about a particular employee's fitness for duty, and that may require the manager to make an initial assessment regarding the employee's fitness.

21. Assistant Superintendent Pedro does not want OICs to determine whether employees are fit for duty. Instead, he wants OICs to bring all of their questions and concerns about whether someone is fit for duty to him through a telephone call. For example, Lieutenant Rodney Jeff Carey once noticed that an employee may have been impaired and therefore unfit for duty. In that instance, Carey called Pedro about it so that Pedro could determine whether the employee was fit for duty.

22. According to Appellant (who was a lieutenant and an OIC of a graveyard shift when he was terminated) and Lieutenant Dray Williams (who was a sergeant during the events of this case, then became a lieutenant and OIC on August 4, 2019), the OIC of the graveyard shift should and does make sure that the OIC's employees are fit for duty. Additionally, whenever Captain Rabb is the highest ranking manager on duty, he also makes determinations regarding whether an employee is fit for duty.

23. Appellant does not believe that he needed to call Assistant Superintendent Pedro merely when an employee was being emotional. According to Appellant, his employees regularly complained to him about depression, medication changes, and a variety of other personal issues, and Appellant would then have had to call Pedro in the middle of the night frequently. In Appellant's view, determining whether someone who is being emotional is fit for duty can take five minutes to 90 minutes, depending on the employee who appears to be in crisis.

24. In practice, if an employee working the graveyard shift appears to be experiencing problems or be out of sorts, the OIC will first offer that employee CISM. If a represented employee is having problems that he or she needs help with, that employee can seek out a member of the CISM team in person (if a CISM team member is working the same shift), by telephone, or via a manager, who will confidentially connect the employee to a CISM team member upon request. CISM team members have designated telephone numbers that can be used for CISM and receive extensive training for CISM. Common examples of times when CISM is appropriate include after a fight, a divorce, or a death in the family. CISM is confidential, and CISM team members are not supposed to be managers or the OIC.

25. Appellant, as a manager and a lieutenant, was not a CISM team member.³

Facts Related to Appellant's Removal from Management Service

26. At some point in 2017, Appellant became the OIC of EOCI's graveyard shift. In that capacity, Appellant regularly supervised the entire institution and was typically the only manager on duty. While working the graveyard shift as the OIC, Appellant did regular rounds and frequently checked in with his staff.

27. In early January 2018, a young woman, SJ, started working at EOCI as an officer. In September 2018, Officer SJ moved to the graveyard shift. From that point until Appellant was duty-stationed at home on April 1, 2019, Appellant supervised SJ three to five days a week.

³Lieutenant McLouth is currently a member of the CISM team. Moreover, as part of that role, employees may come to McLouth for help or to have him act as a "sounding board." In that way, McLouth, a manager, may work with a subordinate non-manager as part of his CISM-related duties.

28. In September 2018, Appellant separated from his wife. Three days later, he was diagnosed with leukemia. Around that time, Appellant lost about 120 pounds in 11 months and had a number of other serious symptoms.⁴ However, he did not take any time off from work. At some point, Appellant was informed that his leukemia diagnosis had been incorrect, and that he actually had an autoimmune disorder.

29. Shortly after Appellant received the initial cancer diagnosis, Appellant called Captain Rabb from work. After that, Rabb came to EOCI and spoke with Appellant about Appellant's life, work, and separation from his wife, from approximately 3:00 to 7:30 a.m. (*i.e.*, for approximately 4.5 hours). During this conversation, Captain Rabb gave Appellant advice and let Appellant vent to him. At the end of the conversation, Rabb walked Appellant out of the institution.

30. The day after his lengthy conversation with Captain Rabb, Appellant began his next shift as usual. At 3:00 a.m., Assistant Superintendent Pedro met with Appellant and asked why Rabb had come in at 3:00 a.m. the previous shift. Appellant then explained his situation and that Rabb had helped him with his issues. In response, Pedro shared his own experience with divorce and gave Appellant his advice. This conversation with Pedro lasted until 5:00 a.m. (*i.e.*, for approximately two hours). Moreover, during the conversation, Appellant was unable to perform any of his main duties. Neither Appellant nor Pedro were disciplined for having this conversation.

31. In addition to the September 2018 interaction described above, Appellant and Assistant Superintendent Pedro have also had other conversations in Pedro's office that lasted "for many hours." One of those conversations concerned a fight involving Pedro's stepson at school.

32. After becoming a lieutenant, Appellant frequently called Officer CP, a male, by the nickname "Randi" while at work. The nickname is an allusion to Randi, the name of a former girlfriend of another male corrections officer. Officer CP's father, who previously worked at EOCI as a hearings officer, also called CP "Randi," as have others in the institution since 2014 or 2015. However, CP (who did not testify in this case) considers the nickname to be "unprofessional" when Appellant uses it. Although unprofessional nicknames are officially disfavored by EOCI, such nicknames are nevertheless commonly used by EOCI's represented staff and are (as Appellant put it) "part of the culture" at the institution. While he was still an officer, Justin McLouth (who is now a Lieutenant) was once counseled and disciplined for calling another employee a "d***head," but McLouth was not discharged for it.

33. In October or November of 2018, SJ commented to Appellant that she had heard that Appellant had previously taken employees to the Pendleton Police Department's shooting range, and that Appellant was involved with the SWAT team. SJ also told Appellant, "I want to get better at shooting my Glock because I want to try out for the SWAT team." Appellant replied,

⁴Appellant testified that, while he was struggling with this cancer diagnosis, Assistant Superintendent Pedro repeatedly referred to Appellant as "an AIDS patient" in front of others. Pedro testified that he "absolutely" did not say that and that he did not know about Appellant's diagnosis. Captain Rabb testified that, in 2016, Pedro once asked Rabb, "You got the AIDS?" when Rabb lost about 40 pounds in two months.

“[I]n the past I’ve taken people up to the range ‘cause [Chief Roberts] and I have known each [other] since I was a little kid. He’s given me authorization personally to pull the keys and go up there and shoot.” Appellant also said, “If you’re struggling with the Glock, I can take you up there. I’ve taken other staff there.” Appellant and SJ had not had any significant interactions before this conversation.

34. When Appellant had this brief conversation with Officer SJ in 2018, Appellant was still the assistant emergency management coordinator. Moreover, before the conversation, Appellant had offered to take male and female coworkers to the Pendleton Police Department’s shooting range while off duty if they showed interest in it, and occasionally he had actually done so. Appellant had never been told that that activity was inappropriate. Historically, many EOCI employees (including Williams, for example) have used the range for personal use outside of work hours. Moreover, EOCI employees have often taken other EOCI employees to the shooting range to help them shoot.

35. A few days after their initial conversation, Officer SJ approached Appellant and asked him if he was still willing to take her to the shooting range. Appellant responded that he was and that he would get a group together to go to the range. Appellant also clarified that they could not use their DOC-issued weapons or wear their DOC uniforms at the range, or go to the range on work time.

36. After the second conversation with Officer SJ, Appellant called the Pendleton Police Department and reserved the shooting range for a particular date and time. Subsequently, at the date and time reserved, while both of them were off duty, Appellant and Officer SJ went to the Pendleton Police Department, checked out the keys for the range together, then proceeded to use the range for approximately an hour. Both shot around 45 to 50 practice rounds using their personally owned (non-DOC) weapons.⁵ Once they were finished practicing, Appellant picked up the range, locked it up, then returned the keys. This experience at the range was the only interaction that Appellant had had with SJ outside of work. Originally, a male officer from EOCI was going to join the two at the range, but that officer cancelled.

Appellant’s March 28, 2019, Conversation with Officer SJ

37. During the Thursday, March 28, 2019, graveyard shift, Appellant was the OIC and the only manager on shift at EOCI. Officer SJ, Officer Christopher Mackey, and Sergeant Travis Tackett were specifically assigned to the Disciplinary Segregation Unit (DSU) for the shift. At the time, Officer SJ had been assigned to the DSU for only a few weeks, and Appellant had been a lieutenant for about 17 months. EOCI houses its adults-in-custody who cannot live among the institution’s general population or have committed a sufficiently serious infraction, such as

⁵Officer SJ testified that, while at the shooting range, Appellant said, “Let’s see you with your hair down,” and at a different point, moved her arms to improve her shooting stance. Appellant testified that he did not ask SJ to take her hair down, and testified that anyone who has been to the range multiple times knows that one “cardinal range rule” is to never have your hair down. Appellant otherwise testified that he never touched SJ at the range or anywhere else, and asked why he would ever touch someone “with a live firearm.” Resolving these conflicting statements is not necessary to our analysis.

fighting, in the DSU. Adults-in-custody in the DSU need extra attention from staff compared to the kind of attention given to EOCI's general population.

38. The DSU includes an open area with a centrally located "sergeant's desk." Right next to that desk is a small office known as the "lieutenant's office." The lieutenant's office includes one large clear glass window that looks to the DSU's open area. The only entrance to the lieutenant's office is a single door that also has a separate window in it. Both windows are uncovered. From the open area of the DSU, one can see much of the interior of the lieutenant's office through the two windows. If one were to step up to the main window of the lieutenant's office, one could see the whole interior of the office.

39. The lieutenant's office includes a single desk with a chair and a computer, as well as the DSU's only printer. The office also includes a movable stool, ordinarily reserved for adults-in-custody, which is normally placed against the wall opposite of the desk, right by the door to the office. The door to the lieutenant's office does not lock, and swings into the office when opened. The distance between the desk chair and where the stool normally sits, which is on the opposite side of the office, is about five to six feet. The printer is located at the opposite side of the office as the door.

40. Lieutenants commonly have lengthy closed door meetings with subordinates in the lieutenant's office. That could happen when a lieutenant is delivering a performance evaluation or when something private is being discussed, for example. Lieutenant McLouth, who currently acts as the OIC during the graveyard shift, regularly stays in the DSU for an hour or longer at a time, arriving in the DSU at around 3:00 a.m. then leaving around 4:00 a.m.

41. During the March 28 graveyard shift, EOCI had two extra employees on duty. Accordingly, Appellant and Sergeant Williams (who had recently promoted to sergeant in January 2019, and as noted, was a lieutenant at the time of hearing) formed a group to conduct a search of the laundry. Williams was put in charge of the search. The search group also included a corporal and two officers. For this shift, Williams worked as the "East Sergeant," and was not assigned to the DSU. This was the only search that occurred during the March 28, 2019, graveyard shift.

42. At approximately 2:52 a.m., Appellant went into the DSU as he normally would. After entering, Appellant spoke with Sergeant Tackett and Officer Mackey, both of whom were seated at the sergeant's desk just outside the lieutenant's office. Appellant talked briefly to Officer Mackey and Sergeant Tackett.

43. At 3:00 a.m., Appellant walked into the lieutenant's office with Officer SJ and remained there for around 30 seconds. At that time, SJ was sitting in the chair at the lieutenant's desk, checking her emails on the computer. SJ had been seated in that office since before Appellant entered the DSU. During this initial, brief encounter, Appellant did not touch the stool or sit down, and the door to the office remained open.

44. Before March 28, 2019, whenever Appellant observed Officer SJ working in the DSU during his graveyard shift, SJ was always working in the lieutenant's office in DSU or doing

a tier check. Moreover, previously, Officer SJ frequently used the computer in the lieutenant's office in the DSU for long periods of time as a regular part of her normal duties.

45. When Appellant entered the lieutenant's office at 3:00 a.m., he asked Officer SJ how she was doing and how her weeklong vacation had been. SJ responded, "My life is a mess." Appellant then replied, "Wait. What do you mean by that?" At the time, Appellant perceived SJ's eyes as "glassy and somewhat watery," but SJ was not crying.

46. After the initial 30-second interaction with Officer SJ, Appellant walked out of the lieutenant's office and returned to speaking with Sergeant Tackett at the sergeant's desk. Moments later, SJ walked out of the office as well and exited the DSU's open area. At 3:02 a.m., SJ returned to the lieutenant's office. At 3:06 a.m., SJ left the lieutenant's office once again, then returned to the office less than a minute later. At 3:20 a.m., SJ left the office, then returned to it and sat down at the desk at 3:23 a.m.

47. At 3:26 a.m., Appellant stepped into the lieutenant's office with Officer SJ again and immediately sat down on the stool, which was still in its usual location against the wall by the door. Appellant did not move the stool when he did so.⁶ Around the time that he sat down, SJ told Appellant that her grandmother had passed away during SJ's trip, SJ and her husband were going through a divorce, and SJ's husband had been giving her a hard time. SJ also said that it was "the year of f*** it." Around that time, at 3:27 a.m., Appellant shut the door to his office with one hand without getting up from or moving the stool. After that, Appellant asked SJ if she wanted to talk to peer support, and SJ declined and asked for Appellant's advice.⁷ A lengthy conversation followed.

48. Early on in this longer conversation with Appellant, Officer SJ mentioned some changes that she was making in her life, including changing her hair color and getting a new car and new piercings. In response, Appellant told SJ that, after her divorce, rumors about her would spread around EOCI, and that she should not let them affect her. Appellant also said that he knew that from his own experience, then explained that Officer CP, whom Appellant called "Randi" at the time, had previously shared false, "juicy gossip" about Appellant's personal life, including that Appellant was "dating a nurse in Tri-Cities." In an attempt to lighten the conversation, Appellant

⁶In Officer SJ's complaints and her testimony at hearing, SJ claimed that Appellant moved the stool to about a foot away from the door before sitting on it. However, Sergeant Tackett and Appellant testified, and the video footage shows, that Appellant never moved the stool from its normal position. During the hearing, SJ also testified that Appellant moved the stool and that this blocked Sergeant Tackett from fully entering the room. Further, Tackett testified, the video shows, and the DOC's investigation determined that Tackett "had no trouble opening the door and entering the office." In our view, SJ may have simply mistaken Tackett's entrance for that of Sergeant Williams.

⁷Officer SJ testified that Appellant never brought up CISM or ESS, and that she never asked Appellant for advice. Appellant, in contrast, testified that he offered SJ such support "multiple times," and that SJ frequently asked for his advice. Separately, Assistant Superintendent Pedro testified that, during this March 28, 2019, graveyard shift, a longtime CISM team member named Mike Wallace was on duty. In Appellant's April 2, 2019, memorandum, however, Appellant stated that he "didn't have a CISM team member on shift." Appellant also made a similar comment in his April 12, 2019, interview. Resolving these issues is not necessary to our analysis.

jokingly added that, since the rumor was circulating anyway, he hoped that “this fictitious nurse” was attractive. SJ then explained that she had gone with CP to a “battle of the bars,” and that CP had actually shared the same rumors about Appellant’s dating life with her. Early on in the conversation, responding to SJ’s new piercings, Appellant said, “I don’t get the piercings on the back. I’ve seen it before but that’s—I don’t get it.”

49. At some point in the same conversation, Officer SJ asked Appellant if he and Officer CP were “Facebook friends” and Appellant said that they were not. Then, at 3:54 a.m., for approximately three or four seconds, Appellant briefly showed SJ Facebook on his work cellphone to demonstrate that CP had sent him a pending Facebook “friend request” that Appellant had not accepted. When Appellant showed CP his cellphone, Appellant took a single step toward SJ, and SJ took a step or two toward Appellant. After that, the two quickly sat back down where they had been. As before, when Appellant sat down, he did not move the stool. DOC employees are not permitted to use Facebook on their work cellphones without a business-related reason. Appellant acknowledged that he briefly showed SJ his Facebook account on his work cellphone, and that doing so was not within the scope of his employment.⁸

50. During a different part of the conversation, Officer SJ mentioned that her husband was rehoming their dog and how stressful that was for her. In response, Appellant discussed co-parenting with his ex-wife, and noted that he had been with his ex-wife since they were 14 years old. In Appellant’s experience, it is “very common” for EOCI employees to speak about their children like this with subordinates, peers, and superiors. Appellant testified that, by discussing her dog and his co-parenting skills, he was “trying to build common ground” with SJ because he did not know her well yet.

51. Officer SJ also told Appellant that she was going to wait to date or get physical with anyone because she wanted to experience being single, but added that her libido had increased since she had separated from her husband. In response, Appellant stated something to the effect, “I believe that is common.” SJ also stated that she (as SJ testified) “felt like a whore” because she “grew up churchy” and because her family would be concerned that a male officer from EOCI (Officer EO, who was not her husband) had recently moved in with her. In response, Appellant told SJ that he did not understand why she should feel like a whore or that she should not call herself a whore. Additionally, SJ told Appellant that she did not want to be in a physical relationship with Officer EO, but that she was “easily influenced,” and that Officer EO had recently convinced her to let him go on a trip to Multnomah Falls when she actually wanted space from him. Referring to SJ’s situation with EO and her desire not to have sex with anyone, Appellant asked, “How long until the no physical thing stops?” Appellant testified that he was trying to help Officer SJ come to the realization that she was living with someone making “manipulative” statements, not by using that word himself, but by asking questions designed to prompt her into

⁸Officer SJ testified that, during this part of their conversation, Appellant said that he would send her a “f***boy message” through Facebook. Appellant testified that he did not say that, and claimed that, at the time, he would not have even known what that slang term meant. SJ similarly testified that she did not know what a “f***boy message” was, but also indicated that she knew that it was inappropriate. It is unnecessary to resolve this issue.

that realization on her own.⁹ Appellant also told SJ that she should not enter into a relationship with anyone at work, and that she should not make any life-altering decisions during this period. At some point, Appellant also commented about his own dating life, and stated that there were “people that I’ve been with that I look at as mistakes.”¹⁰

52. While Officer SJ was having her lengthy conversation with Appellant, she was also communicating individually with Officer Christopher Simson and Officer Mackey through Skype. In her messages with Simson, which ended at 3:30 a.m., SJ wrote that Appellant was talking with her, and that SJ was “paying attention and not paying attention.” In her exchange with Mackey, Mackey commented to SJ that her conversation with Appellant “was a long one.” SJ replied to Mackey that she and Appellant “talked about their divorces.” Relatedly, Appellant was “monitoring the radio” during his conversation with SJ and answered the telephone the two times that it rang.

53. At some point during this graveyard shift, Sergeant Williams’s search group found some “nuisance contraband” in the laundry. Subsequently, at around 3:36 a.m., Williams went to the DSU to find Appellant and get his input. When Williams arrived, he noticed that Appellant was in the lieutenant’s office speaking with Officer SJ. As a result, Williams left the DSU at around 3:40 a.m. Appellant saw Williams enter the DSU this first time, but Appellant saw no indication that Williams was specifically looking for him. Appellant also knew that Sergeant Tackett, who was very experienced and had previously been a lieutenant, was available to help Williams.

54. At around 3:50 a.m., Officer SJ told Appellant that she had missed three tier checks during their conversation. Appellant responded by telling SJ that she did not need to worry about it; that he, the OIC, would not be holding her “accountable” for missing her checks while the two were having their discussion; and that there were other employees in the DSU who would do them.¹¹ Doing DSU’s tier checks was one part of SJ’s regularly assigned duties that night, but the

⁹At hearing, Appellant initially testified that he did not know on March 28, 2019, that Officer SJ’s roommate was an EOCI employee. On cross examination, he conceded that Officer SJ told him during their March 28 conversation that her roommate was an EOCI employee.

¹⁰Officer SJ testified that, during their conversation, Appellant spoke about a relationship he had had with a woman with numerous piercings, about how those piercings distracted him during sex, and about his “sexual kinks.” SJ also testified that she did not talk about her sex life. Meanwhile, Appellant denied discussing any of those topics or his sex life, and claims that SJ was discussing her own new piercings. However, in his April 12, 2019, interview, Appellant admitted that he did tell SJ that he had seen back piercings and that he didn’t “get” them. Appellant also admitted that he told SJ, “[T]here are people that I’ve been with that I look at as mistakes.” To the extent that there is conflicting evidence on these subjects, we note that DOC’s charge and our own analysis rely on Appellant’s admissions.

¹¹At EOCI, tiers are essentially long hallways with cells branching off them, and each of those hallways is considered a separate tier. A “tier check” generally involves making sure that each tier within a particular unit is just as it should be. That could mean making sure that inmates are in their assigned areas and only doing activities that are allowed. During a graveyard shift, a tier check includes making sure that there is a “living, breathing person” in each assigned location. With limited exceptions (*e.g.*, suicide watches), tier checks are always conducted at least once every 20 or 30 minutes at random times. If an officer does not conduct an assigned tier check and then lies about it, that officer could be dismissed.

same was also true for Officer Mackey, who had been an officer at EOCI for nearly 10 years and would know to cover for her. Appellant testified that at this specific point in the conversation, tier checks were “the last thing on [Appellant’s] mind” because he “was working through the [CISM] process,” trying to “get [SJ] back to center.”

55. At around 4:00 a.m., Officer EO took a break and went into the East Sergeant’s office to get a cup of coffee, where Sergeant Williams and some others were present. Sergeant Williams mentioned that he was trying to reach Appellant after a search, and one employee joked that, at the time, Appellant was in the DSU “trying to get in [Officer SJ’s] pants.” The East Sergeant’s office is located outside of the DSU. Later, EO relayed this conversation to SJ. During this general period of time, EO was SJ’s good friend and, as noted, her roommate.

56. At 4:18 a.m., Sergeant Tackett knocked on the door to the lieutenant’s office, opened the unlocked door, apologized for the interruption, walked into the office (leaving the door open), picked up some papers from the printer, left the room, and closed the door after himself. When Tackett entered the room, Appellant said, “[C]ome on in,” and noted that he and Officer SJ were just about to end their conversation. Appellant did not get up from or move from the stool during this interruption, and did nothing to prevent Tackett from fully entering the office.

57. At 4:23 a.m., Sergeant Williams entered the DSU again. At 4:24 a.m., Williams walked up to the windows of the lieutenant’s office and got Appellant’s attention. At that point, Appellant signaled through the glass for Williams to wait. After that, Williams stood at the sergeant’s desk and briefly spoke with Sergeant Tackett and Officer Mackey. Around that time, Williams was “getting kind of irritated” because he still wanted to speak with Appellant about the search. However, that irritation quickly went away when Williams saw that Appellant was still in a closed door meeting.

58. At around 4:31 a.m., Sergeant Williams (who was still at the sergeant’s desk in the DSU) received a telephone call from Officer SK, who needed to speak with Appellant about the daily overtime. Shortly after that, Williams opened the door to the lieutenant’s office, handed the telephone to Appellant, and very quickly explained the situation with the search. In reply, Appellant told Williams that he would go over Williams’s search-related paperwork later, after the 5:00 a.m. count. At that point, Williams shut the door to the lieutenant’s office and left the DSU. Next, without leaving the office, Appellant took the call with SK, which lasted for “five to six minutes,” and resolved SK’s issue. Williams did not notice anything improper or unusual about Appellant’s responses during this exchange. Further, when Williams was in the lieutenant’s office, Officer SJ was smiling.

59. At the conclusion of his lengthy conversation with Officer SJ, Appellant asked SJ if she was okay, and SJ said that she was. Appellant then said that, if SJ needed to contact him, she should contact EOCI’s Control Center and get his work cellphone number. At 4:50 a.m., Appellant stood up from the stool and walked out of the lieutenant’s office by himself, leaving the office door open behind him when he did so. SJ remained in the office, alone.¹² By the time that

¹²Officer SJ testified that she got up and left the lieutenant’s office before Appellant did, but that is unsupported by the security camera video footage.

Appellant walked out of the lieutenant's office, he and Officer SJ had been in the office together for approximately 1 hour and 25 minutes.

60. At 4:51 a.m., Appellant walked out of the DSU. At the same time, Officer SJ sent a Skype message to Officer EO (the male roommate referenced above) that stated, "i hate life so f***ing much." EO replied, "dont feel bad." After that, SJ wrote back to EO, "not your fault." Appellant was not mentioned in this exchange.

61. After the 5:00 a.m. count, Appellant met with Sergeant Williams and looked over his search-related paperwork as planned. In Williams's view, Appellant did nothing to delay Williams's duties during the March 28, 2019 graveyard shift.

62. As indicated above, Appellant believed that part of his job as the OIC during graveyard shift was to make an initial assessment regarding whether each of his employees was fit for duty. He also believed that this lengthy conversation with Officer SJ was necessary in order to make that assessment, and that how long a fit for duty assessment takes is controlled by the person in the crisis, rather than the manager. Appellant also contended that SJ presented him with a "staff emergency," and that initially SJ could not be trusted working with the DSU's comparatively riskier inmates. Moreover, Appellant believed that he was modeling his approach to handling SJ on how he had been treated by his own superiors when he was in a similar crisis.

63. When Appellant saw Officer SJ at the beginning of the March 28, 2019, shift, she appeared uncharacteristically emotional and erratic to him and was, as Appellant saw it, making concerning self-deprecating comments. Previously, whenever Appellant asked SJ how she was doing, SJ always only said that she was good, and then Appellant always left. By the end of his long conversation with SJ, Appellant believed that SJ was no longer in distress and was fit for duty, and that accordingly he did not need to call Assistant Superintendent Pedro.

64. Appellant did not block the door or do anything physically to keep Officer SJ from leaving the office. One reason that SJ did not leave the lieutenant's office earlier than she did is because, in her words, management "stresses her out." SJ had also heard from multiple coworkers that female employees had to sleep with a superior to advance in their careers at DOC.¹³ SJ also believed that Appellant knew that SJ wanted to promote, and that Appellant's whole conversation with her in his office was a "seduction" and "entrapment technique." SJ did not feel physically unsafe during the conversation because she knew that two other people could see through the two windows into the office. However, SJ was still concerned about how Appellant would view her and about her reputation at EOCL.

65. After Officer SJ left the lieutenant's office at around 5:00 a.m., Sergeant Tackett joked to SJ, "Yeah, I've worked with you for - for two months and - I haven't gotten two words out of you but you sat there with the lieutenant for, like, two hours." At that time, SJ seemed unhappy and upset to Tackett. Around the same time, Officer Mackey told SJ, "You've got the

¹³Superintendent Washburn testified that Officer SJ's claim about the DOC's female employees is not "even close to being accurate," but Washburn also described previous problems with sexual harassment at EOCL.

next tier check,” because Mackey had covered all of her missed tier checks by himself. After these exchanges, Mackey left the DSU in order to get the food trays for breakfast, and SJ performed the 5:00 a.m. count.

66. During Appellant and Officer SJ’s long conversation, Officer Mackey covered all of SJ’s missed tier checks on his own, without Appellant telling him to do so, because he could see through the windows of the lieutenant’s office that Appellant and SJ were talking. Ultimately, all of the shift’s tier checks were completed in a timely manner, as was all of the work related to that shift’s search.

67. At around 5:20 a.m., Officer SJ left the DSU and went to the kitchen. There, SJ met with Officer SK (a female) and told her that she had had “a long conversation” with Appellant and that it was “good.” SK responded, “Well good, both of you are kind of going through the same things right now.” At that point, their conversation ended. At the time, SJ did not express to SK any problems or concerns about the conversation with Appellant. SJ had originally intended to ask SK for her advice about what had happened with Appellant. However, SJ decided not to because she remembered that SK and Appellant were friends.

68. From 6:12 to 6:21 a.m., Officer SJ and Officer EO (SJ’s roommate) exchanged more Skype messages. In this exchange, SJ wrote to EO that she was “influenced too easy,” and “im too vulnerable right now and i feel like ive just been bashed by whoever has a mouth.” SJ also wrote that she and EO would get locks put on their doors. Appellant was not mentioned in this exchange with EO. After her shift ended at around 7:00 a.m., SJ worked four hours of overtime.

69. As Appellant was leaving EOCI at around 7:00 a.m., he spoke to Officer SK in person in the kitchen. During their talk, SK commented, “I hear you and [Officer SJ] had a good conversation,” and stated that SJ had told SK that the conversation with Appellant had really helped SJ. After that, Appellant left the institution.

70. From 10:15 to 10:29 a.m., Officer SJ and Officer CP (the man Appellant and others called “Randi”) exchanged Skype messages. In that exchange, SJ informed CP that she and Appellant “had a heart to heart” earlier that day, and that Appellant spoke about his divorce, “wanted to know how [SJ] was doing,” and “hated” that SJ had hung out with CP. SJ also told CP that, during her conversation with Appellant, she told Appellant “way too much” and that Appellant made her “feel like sh*t.” Near the end of the exchange, SJ wrote, “idk i need to shut my mouth though.”

71. At around 12:00 or 12:30 p.m. on March 28, 2019, Officer SJ returned home. There, at 12:45 p.m., she spoke in person with Officer EO at length about her conversation with Appellant, and SJ asked for EO’s advice. Ultimately, EO did not encourage her to report the meeting with Appellant. To EO, SJ appeared to be distraught about the situation at the time.

72. At around 12:00 a.m. on March 29, 2019, Appellant started the graveyard shift again as usual and quickly spoke with his staff. At 3:00 or 3:30 a.m., Appellant went to the DSU, where Sergeant Tackett, Officer SJ, and Officer VanSickle (who had replaced Officer Mackey) were working. Upon entering, Appellant spoke briefly with Tackett and VanSickle. Appellant then

went into the lieutenant's office and asked SJ how she was. SJ smiled and said, "Good," then Appellant said, "Good." At that point, Appellant left the DSU.

73. At 5:15 or 5:20 a.m. on March 29, 2019, Appellant went to the kitchen to check in with Officer SK because SK had called him and asked to speak with him in person. When the two met, SK told Appellant that her daughter was having a baby, then vented to Appellant about it. At some point during this conversation, Officer SJ came to the kitchen to pick up the DSU's trays, then sat with Appellant and SK at a table while the two conversed. After that, Appellant finished out his shift then went home.

74. From 8:24 a.m. to 4:07 p.m. on March 29, 2019, Officer CP and another female Officer from EOCI named "CS" exchanged a number of Skype messages. In this exchange, CP asked CS if Officer SJ had told CS about SJ's conversation with Appellant, and CS responded that she had not.

Investigation and Subsequent Discipline

75. At approximately 11:35 p.m. on March 29, 2019, Sergeant Tackett and Officer SJ walked together toward the DSU. SJ said to Tackett, "Can you do me a favor? The next time that [Appellant] boxes me in the office with the door closed for two hours, can you tell him to f*** off and get me out of there? I'm not very good at addressing those kinds of situations with managers." Tackett responded that he did not know the gist of her conversation with Appellant, and that Tackett had thought that SJ and Appellant were having an important conversation. After that, SJ said, "We were. Then it became creepy." She then said, "[Appellant] would not take a hint when I tried to leave the office to conduct my checks. [Appellant] said, 'Don't worry. I'm the OIC. I won't hold you accountable for missing your tier checks.'" Next, SJ told Tackett that she felt very uncomfortable with the situation and did not want to be in there. After that, she told Tackett that she believed Appellant was using his lieutenant position in an inappropriate manner and that this was not the first time this has happened. SJ also stated that Appellant had also approached Officer CS and done the same thing to her. SJ had heard of this alleged incident involving Appellant and CS from Officer CP, and SJ believed him, but SJ did not talk to CS about the story before sharing it with Tackett. As Tackett and SJ entered the DSU, Tackett told SJ, "I will not let this happen again, and I am sorry for not stepping in when it was occurring. If I would have known what was taking place, I definitely would not have allowed it to happen." At that point, the conversation ended. During this conversation with Tackett, SJ seemed angry and upset to him.

76. At approximately 12:15 a.m. on March 30, 2019, Sergeant Tackett and Officer SJ stood alone by the sergeant's desk in the DSU. Tackett said, "Is this something you feel I need to take to a higher level?" SJ replied, "Yes. It was creepy, and he did the same thing to Officer [CS]. I've heard other staff were already making comments about him coming to the DSU that night just to talk with me. I'm not trying to get that sort of thing started." Tackett told SJ to document the entire situation.

77. At 12:20 a.m. on March 30, 2019, Sergeant Tackett contacted Lieutenant McLouth at the Control Center and told McLouth that they needed to have a closed-door conversation as soon as possible. At the time, McLouth and Appellant were both lieutenants and OICs for the

graveyard shift, but the two worked on different days. At 12:40 a.m., McLouth reported to the DSU and Tackett briefed him on Officer SJ's complaint about Appellant. At the conclusion of this conversation, McLouth asked Tackett to give him a memorandum about it.

78. After meeting with Sergeant Tackett, Lieutenant McLouth had a brief discussion with Officer SJ about the situation and asked for a memorandum from her as well. In their discussion, McLouth asked SJ if she felt safe and offered ESS and EAP. SJ refused both, but stated that she felt guilty and uncomfortable with the situation.¹⁴ McLouth also gave SJ his work telephone number in case she wanted to talk about the situation further, and told SJ that she probably would not be working the same shift as Appellant again. To McLouth, SJ appeared nervous at the time.

79. At 12:51 a.m. on March 30, 2019, Lieutenant McLouth called Assistant Superintendent Pedro and told Pedro about what had been reported to him. Pedro asked for a memorandum from Officer SJ, McLouth, and Sergeant Tackett, which they each provided the same day. Around the same time, Lieutenant McLouth also reached out to Captain Rabb for advice.

80. In her March 30, 2019, memorandum to Assistant Superintendent Pedro, Officer SJ specifically claimed that Appellant "took a seat on a stool, blocking the door." SJ's memorandum also claimed that she was in the office with Appellant for "almost 2 hours." In fact, the two were only in the office together for around 1 hour and 25 minutes and Appellant did not physically block the door. SJ also wrote, "I expressed my concerns to a fellow officer and was made aware that [Appellant] has done a similar entrapment technique to other female staff. Although I cannot confirm this, I do believe it to be accurate." SJ did not name the "fellow officer" or the "other female staff."

81. From 1:26 to 1:54 a.m. on March 30, 2019, Officer SJ and Officer Simson exchanged more Skype messages. In this exchange, SJ told Simson that Appellant had "blocked" her into the lieutenant's office, and had been "creepy" and "inappropriate." After that, SJ wrote, "guess he did something similar" to Officer CS.

82. At 7:00 a.m. on March 30, 2019, in a pair of emails, Assistant Superintendent Pedro forwarded the three above-referenced memoranda to Superintendent Washburn and DOC Human Resources (HR) Manager Andrea Neistadt, who was assigned to EOCL. The DOC's various HR employees, including Neistadt, do not report to Superintendent Washburn.

83. On March 31, 2019, from 10:33 to 11:09 a.m., Officer CS and Officer CP exchanged a number of text messages. In one message, CP wrote, "[Officer SJ] just told me she turned in [Appellant]. You should too." CS responded, "For what he didn't do anything wrong?" CP later wrote, referring to Appellant, "Dudes a predator and that's what predators do." CS wrote back, "Im not turning anyone in for something i dont feel is serious. He didnt do anything wrong

¹⁴ESS may refer to "Emotional Support Services." It may also refer to "Emergency Staff Services," a DOC peer support program that "provides for staff welfare during and after major emergencies and is [intended] to assist employees with their ability to process and cope with the effects of crisis, critical incidents or catastrophe." Appellant contends that ESS has effectively been absorbed by CISM over time. EAP is the employee assistance program.

and Im not getting involved. If she felt the need on her own to go report it thats on her but I'm not getting involved." Right after that, CS wrote, "Im there to do a job not get ppl in trouble or be caught up in drama." She then wrote, "Yeah what happened to [SJ] sounds weird but i wasnt there and havent talked to her about the situation so why would i get involved? Lol." CP responded, "Oh I don't know. Make her not feel alone in it," then wrote, "Friend stuff." In her final message to CP, CS wrote, "Look i understand how u think you feel about this but i have no direct knowledge about this other than what you're saying so respectfully i would just like to stay out of it and be left out of it it doesnt pertain to me. This is between them." In subsequent text messages, CP wrote, "Oh im writing a memo on that f***er," "Hostile work environment," and "Destroy that guy."

84. On April 1, 2019, Officer CS called Appellant while they were both off duty. CS told Appellant that Officer SJ had turned him in after Officer CP told SJ that Appellant sexually harassed people. In the same call, CS also complained to Appellant that CP had asked her to file paperwork against Appellant, and that CS felt harassed by CP. In response, Appellant told CS that she could file a complaint with Captain Rabb, the OIC for CS's next scheduled shift. During a different part of the call with CS, Appellant said, "You shouldn't get involved. I didn't do anything wrong so I have nothing to hide." This was Appellant's first conversation with CS outside of assigning jobs to her, and the two did not regularly interact with one another. CS normally works the third shift.

85. Officer CS (who testified in the Board's hearing) has never been sexually harassed by Appellant, or ever felt that Appellant has put in her in uncomfortable position or treated her unprofessionally. Moreover, CS has never actually told Officer CP or Officer SJ that Appellant has sexually harassed her or "weirded" her out.¹⁵

86. Previously, at some point in or around February or March 2019, Officer CS did say something to Officer CP about a time when Appellant spoke with CS one-on-one in a "rollcall room." However, in that instance, Appellant merely held CS back to talk "about work," and CS's entire conversation with Appellant only lasted between 5 and 15 minutes. During CS's April 5, 2019, interview with HR Manager Neistadt, CS stated that once, when she spoke with CP about Appellant's one-on-one conversation with SJ, CS told CP, referring to Appellant holding her back, "Oh, well he kind of did that to me." In the same interview, CS also theorized that CP "might have twisted" that comment.

87. After his telephone call with Officer CS, Appellant returned to work on April 1, 2019, before his next shift. At about 11:15 or 11:30 p.m. that day, Assistant Superintendent Pedro hand-delivered a letter to Appellant, written by Superintendent Washburn, notifying Appellant that he was immediately duty-stationed at home with pay until further notice pending an investigation. Shortly after receiving this letter, Appellant went home as directed.

88. At some point on April 1, 2019, Officer CP spoke with Captain Stewart (who was not part of any investigation) at a local gym, and CP claimed that Appellant had been "sexually inappropriate" with Officer SJ and Officer CS, and that Appellant had spoken to SJ "about sexual

¹⁵DOC conceded in its post-hearing brief that Officer SJ's concern regarding Appellant harassing Officer CS was "misplaced."

stuff.” On April 2, 2019, at approximately 12:45 p.m., Stewart directed CP not to discuss the matter with anyone who ranks lower than Assistant Superintendent Pedro. CP replied that he understood. That same day, Stewart sent a memorandum about these two interactions with CP to Superintendent Washburn.

89. On April 2, 2019, Superintendent Washburn asked HR to conduct an investigation. HR Manager Neistadt was directed to conduct the investigation. Superintendent Washburn was regularly briefed on the status of the subsequent investigation while it was being conducted, but Washburn was not actively involved with it. Over time, Neistadt’s investigation of Appellant branched into separate investigations of Appellant, Officer CP, Officer CS, and Officer SJ, all four of which were conducted largely simultaneously.

90. On April 2, 2019, HR requested the Skype messages of Officer SJ, Officer CS, Officer CP, and Appellant. In addition, Appellant gave Assistant Superintendent Pedro a memorandum detailing Appellant’s March 28, 2019, conversation with SJ. Pedro forwarded Appellant’s memorandum to Superintendent Washburn and HR Manager Neistadt.

91. At 3:32 p.m. on April 2, 2019, Officer CP sent Officer CS a text message that stated, “Hey regarding what I told you about the [Officer SJ] thing... don’t repeat it. Even to any manager besides [Assistant Superintendent Pedro].”

92. On April 4, 2019, Officer SJ reached out to Officer CS by text message, and asked CS if Appellant had ever “f***ed” with her as well. CS replied, “What?” After that, SJ wrote, “Has anyone talked to you about [Appellant]?” CS did not respond to the question.

93. On April 12, 2019, HR Manager Neistadt interviewed Appellant twice. During his initial interview, Appellant was asked if he was a member of the CISM team. In response, Appellant stated, “No I am not but through emergency management I have oversight of [CISM]. So I have oversight of SWAT, [CISM] and [CNT] teams. So am I a member of [CISM]? No. But I have a lot [of] direct knowledge of [CISM]. I’ve done a lot of self-study about [CISM]. Because if I have oversight of something I want to know what I’m getting into.” Very shortly after that, Appellant stated, “So I’m the alternate, um, emergency manager, emergency management coordinator for East Oregon Correctional Institution,” then clarified that he was Captain Stewart’s “backup.”

94. As part of her investigation of SJ’s complaint about Appellant, HR Manager Neistadt was able to review security camera video footage of the time period when Appellant and Officer SJ were together in the DSU on March 28, 2019. That footage includes a timestamp, but does not contain any useful audio, and the angle and quality of the camera does not allow the viewer to read anyone’s lips. Moreover, the footage shows Appellant the entire time that he was in the lieutenant’s office (viewable through the windows to the office), but does not show Appellant’s face or SJ sitting at the lieutenant’s desk (which is to the left of the office’s larger window). Appellant did not get a copy of this video footage until after he was terminated on July 11, 2019. Further, none of the other individuals who were interviewed by Neistadt, including SJ, ever received a copy of the video.

95. On April 16, 2019, Officer SJ sent HR Manager Neistadt an email. The body of this email stated, "I feel like I didn't really get to explain what happened while in the office with [Appellant]. Here is a memo of what I recall happening that morning." This second memorandum from SJ was longer and more detailed than SJ's March 30, 2019, memorandum. However, the new memorandum continued to assert that Appellant had "blocked the door" and had "done a similar entrapment technique to other female staff." Neistadt had previously interviewed SJ on April 5, 2019, and did not interview her again after receiving this memorandum.

96. At some point in May 2019, Officer CP spoke with Officer SJ in person at his house about Appellant's treatment of CS and other topics, in spite of Captain Stewart's April 2, 2019, directive.

97. On May 9, 2019, HR Manager Neistadt completed her investigation of SJ's complaint about Appellant. On May 10, 2019, Neistadt issued her final investigative report.

98. On June 17, 2019, Superintendent Washburn hand-delivered a letter to Appellant notifying him of the commencement of the process for consideration of removal from management service with effective end of state service.

99. On June 24, 2019, DOC held the pre-removal meeting. Appellant, Superintendent Washburn (who led the meeting), HR Manager Neistadt, and Captain Walker (who sat in for Assistant Superintendent Pedro) attended. This meeting, which lasted for over an hour, was recorded and subsequently transcribed.

100. Near the end of the pre-removal meeting, Appellant was asked if he would do anything differently if he could redo his March 28, 2019, shift. Appellant initially said that he would not, then said that he would not have called Officer CP by the nickname "Randi." Referring to his comments about Officer CP, Appellant also said, "I wouldn't have used the Correctional Officer's name, in hindsight that was a mistake." Appellant did not say that he would change anything about the rest of his lengthy conversation with Officer SJ.

101. Superintendent Washburn felt that Appellant was "somewhat evasive" during his pre-removal meeting, and that his stories had changed in subtle ways between his memorandum, his interviews with HR, and the pre-removal meeting. In addition, Washburn felt that Appellant was argumentative, "challenging," and "somewhat disrespectful" during certain parts of the meeting, including when Appellant asked her a question that she perceived as challenging in response to her own question. However, early on in the same meeting, when Appellant asked Washburn if he could ask questions. Washburn explained that Appellant could ask questions, that the pre-removal meeting was not investigatory, and that he was being afforded an opportunity to provide mitigation to the charges.

102. Superintendent Washburn made the final decision regarding Appellant's discipline. After the pre-removal meeting, Washburn concluded that removal and termination were appropriate because Appellant's actions were "egregious" and Appellant never took responsibility for his actions. When making her decision regarding Appellant's discipline, Washburn did not consider Appellant's awards for saving a building at EOCI or any other "prior good acts."

However, she did consider his years of service and the ostensibly mitigating information that Appellant provided during his pre-removal meeting. Appellant was removed from the management service and terminated effective July 11, 2019.

103. On July 11, 2019, DOC gave Officer CP a written reprimand for CP's usage of the Skype messaging system, for sharing information about a workplace complaint, and for asking questions of others in order to get more information about the complaint. Officer SJ and Officer CS were not disciplined at the end of their investigations. Instead, the two were given counseling (*i.e.*, "verbal instruction").

104. In August 2019, Officer SJ stopped working at EOCI because she did not feel safe at EOCI, she felt that nobody would help her if she was attacked by an adult-in-custody, and because of her March 28, 2019, conversation with Appellant.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. DOC's removal of Appellant from the management service (with effective dismissal from state service) did not violate ORS 240.570(3).

Standards for Decision

Before he was terminated, Appellant was a management service employee. ORS 240.570(3) provides that a "management service employee may be disciplined by reprimand, salary reduction, suspension or demotion or may be removed or dismissed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." When a State management service employee appeals an agency's removal to this Board, the agency has the burden of proving that its discipline did not violate ORS 240.570(3). OAR 115-010-0070(5)(c). The agency meets its burden of proof if this Board determines that, under all of the circumstances, the agency's actions were "objectively reasonable." *A.D. v. State of Oregon, Department of Transportation*, Case No. MA-011-17 at 9 (March 2019). "The employer's burden in justifying a removal from management service is relatively minor." *Zaman v. State of Oregon, Department of Human Services*, Case No. MA-21-12 at 15 (April 2013) (quoting *Plank v. Department of Transportation, Highway Division*, Case No. MA-17-90 at 29 (March 1992)).

A reasonable employer is one that disciplines employees in good faith and for cause, imposes sanctions that are proportionate to the offense, and considers the employee's length of service and service record. *Id.* A reasonable employer also administers discipline in a timely manner and clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met. *Id.* In addition, a reasonable employer applies the principles of progressive discipline, except where the offense is so serious or unmitigated as to justify summary dismissal or removal, or the employee's behavior probably will not be improved through progressive discipline. *Id.*

A management service employee may be held to high standards of behavior, so long as those standards are not arbitrary or unreasonable. *Stoudamire v. State of Oregon, Department of Human Services*, Case No. MA-4-03 at 7 (November 2003). Further, a significant factor for this Board's consideration is the extent to which the employer's trust and confidence in the employee have been harmed, compromising the employee's ability to be effective as a member of the management team. *A.D.* at 14-15.

We review management service disciplinary appeals using a two-step process. *Id.* at 10. First, we determine if the employer proved a charge or charges that are the basis of the discipline, although the employer need not prove all of the charges. *Id.* Second, if the employer has proven some or all of the charges, we apply a reasonable employer standard to determine whether the employer was justified in taking the disciplinary action. *Id.* If the employer's actions are not objectively reasonable, we will rescind or modify the discipline. *Id.*

Basis for Removal from the Management Service

With those standards in mind, we turn to the facts in this case. DOC included two charges in the management service removal letter: (a) untruthfulness and (b) lack of professional boundaries, poor judgment, and failure to maintain a professional and respectful workplace.

a. DOC did not prove that Appellant was untruthful on April 12, 2019.

In its removal letter, DOC alleged that Appellant made three untruthful statements during his investigatory interview on April 12, 2019. Those three instances were listed under a single charge of untruthfulness. The recommended order concluded that DOC did not prove that Appellant was untruthful on April 12, 2019. DOC did not object to that portion of the recommended order, and we adopt and affirm that conclusion.

b. Appellant demonstrated a lack of professional boundaries, used poor judgment, and failed to maintain a professional and respectful workplace.

Appellant's removal letter contained a second charge, identified as "lack of professional boundaries and poor judgment and failure to maintain a professional and respectful workplace." Under that charge, DOC listed nine factual allegations that describe three issues: (a) Appellant's graveyard shift meeting with Officer SJ; (b) Appellant's use of the nickname "Randi" to refer to Officer CP, and (c) Appellant's visit with Officer SJ during fall 2018 to the Pendleton Police Department shooting range.

We first consider the meeting between Appellant and Officer SJ. Based on Appellant's own statements, Appellant engaged in an overly personal conversation with SJ for an extended time, from 3:26 a.m. until 4:50 a.m. During that time, Appellant commented on a number of highly personal, even intimate, topics, including Officer SJ's dating life and sex life. Appellant remarked on Officer SJ's then-platonic relationship with her roommate, an EOCI employee (Officer EO, a corrections officer), and questioned her in an attempt to prompt her to realize that this EOCI employee was making "manipulative" statements (in other words, implying that the EOCI employee was manipulating Officer SJ to hasten a transition of their relationship from platonic to

physical). In response to Officer SJ remarking about her libido changing during her divorce, Appellant made a comment to the effect that he believed that was common. After Officer SJ referred to feeling like a “whore,” Appellant responded that he did not understand why she should feel like a whore or that she should not call herself a whore. Appellant also referred to his own dating life, his opinion about piercings, and referred to some of the people he had “been with” as “mistakes.” In what he described as an attempt to “lighten the mood,” Appellant made a joke about a nurse that he was rumored to be dating, commenting that he hoped that she was “attractive.” Based on these admissions by Appellant, we conclude that Appellant and Officer SJ engaged in a highly personal conversation with primarily a social purpose. Even if, as Appellant asserts, he initially perceived Officer SJ as being upset at the beginning of the meeting, this evidence indicates that the conversation became overly personal as it progressed, and that Appellant continued to participate even when it became clear that the conversation had developed into a social conversation that included comments about private details of their lives.¹⁶

During this conversation, Appellant made comments that were outside the bounds of appropriate conversation for a manager to have with any subordinate. For example, Appellant’s comments about his own dating life (such as referring to people he dated as “mistakes”) and opinions about “back piercings” had no work-related purpose and transgressed appropriate manager-subordinate boundaries. These comments are particularly problematic from the only manager on duty to a very junior subordinate who was relatively new to the institution.¹⁷

In addition, during his conversation with SJ, Appellant made inappropriate comments about two other EOCI employees. He inappropriately speculated about an EOCI employee’s romantic intentions toward SJ (and implied that the employee was being “manipulative” in an attempt to form a romantic relationship with SJ). He also made disparaging comments about Officer CP spreading rumors about Appellant’s divorce. Appellant also referred generally to the EOCI workplace as a place where rumors and gossip were common. Appellant had experienced being the subject of rumors and gossip about his own divorce. It is not uncommon for subordinates to make comments about managers, but it was nonetheless inappropriate of Appellant to share this particular perception of the workplace with Officer SJ—who was herself going through a divorce. Appellant’s role as OIC and lieutenant included fostering an atmosphere of trust in the workplace, not fomenting distrust.

Further, Appellant’s meeting with Officer SJ created the appearance that Appellant was giving some type of special attention to SJ, which created unease for SJ. Appellant seems not to have been aware of the appearance of possible impropriety caused by this meeting, given the power

¹⁶As we discuss below, this order should not be read as indicating that managers should not have social conversations with subordinates. Indeed, as part of maintaining a professional workplace, we would expect managers to engage in appropriate social conversations with coworkers, including subordinates. In characterizing this conversation as social, we are, in part, responding to Appellant’s assertion that it was a professional, non-social one in which he was attempting to assess SJ’s fitness for duty. We are not persuaded by Appellant’s characterization of the meeting as exclusively non-social.

¹⁷We also note that Appellant described Officer SJ as someone he barely knew. In other words, this is not an instance in which a manager has a lapse in judgment by having one overly personal conversation with a subordinate with whom the manager had previously been a peer or friend.

differential between Appellant and Officer SJ, the fact that they were each recently divorced or divorcing, and the fact that Appellant did not have such extended meetings in the lieutenant's office with other subordinates. Several other employees (Williams and Mackey) reacted during the shift to the length of the Appellant's meeting with at least some initial annoyance, and one employee (Williams) subsequently joked in the workplace that it appeared that Appellant had romantic intentions toward SJ. Appellant also seemed unaware that Mackey was initially irritated when Appellant had Mackey perform some of SJ's duties during that shift.

Appellant argues that the meeting was in fact appropriate because he was attempting only to assist an employee in acute emotional crisis. He contends that it was his job to determine whether Officer SJ was fit for duty, and that he was merely working through the "CISM process" and attempting to "get her back to center." We agree that the meeting began with SJ referring to the death of her grandmother and her pending divorce. However, the conversation then extended into areas of discussion that were beyond the bounds of an appropriate response to SJ's initial emotional state. Specifically, many of Appellant's remarks—for example, those about Officer CP's Facebook friend request, Officer EO (Officer SJ's roommate), rumors and gossip at EOCI, Appellant's own dating life, and comments about "back piercings"—are not consistent with an attempt to determine whether a subordinate employee is emotionally capable of working. Rather, the record establishes that the predominant purpose of the conversation was, or at least became, social. If Appellant had merely been attempting to determine SJ's fitness for duty or calming her as part of a CISM (or other legitimate) process, he could have avoided giving her advice, sharing his personal experiences, and sharing his personal Facebook page, and he could have ended the conversation much earlier (such as when she mentioned at 3:50 a.m. that she had missed tier checks). There is nothing to indicate that, at that time, Officer SJ was still distraught or unable to work. We also think it is unlikely that, if Appellant's purpose was related to the CISM process, he would have shown his cell phone to Officer SJ to demonstrate that he had not acted on Officer CP's Facebook "friend request."

Appellant also argues that this meeting was appropriate because it was similar to meetings that Assistant Superintendent Pedro and Captain Rabb had with Appellant when he was going through his own divorce and health crisis. Those conversations, however, were among managers, and are not analogous. Here, Appellant participated in a highly personal conversation (including on sexual topics) with a younger, union-represented subordinate who was quite new to the institution and to the corrections work environment. Further, the fact that the assistant superintendent and captain hold a higher rank than Appellant does not make those meetings analogous to Appellant's meeting with Officer SJ, his subordinate. Managers (irrespective of level of management) have substantial latitude to talk freely with one another; a manager must be more circumspect in discussing personal topics with a supervised classified employee.

Appellant also argues that we should reject the contention that the meeting was inappropriate because Officer SJ was not credible in "demeanor" and "factually." Appellant points out, for example, that SJ testified that she was "entrapped" in the room, whereas the video shows that Appellant did not block the door. Similarly, Appellant argues that Officer SJ was provoked by Officer CP to submit a false claim that Appellant had "entrapped" other female employees. We agree that some of Officer SJ's statements are inconsistent with other evidence in the record, and that she alleged, without any personal knowledge, that Appellant had done the same to Officer CS.

Our conclusion, however, is based on *Appellant's* own admissions and testimony, not SJ's statements. For example, Appellant acknowledged during his investigatory interview that he spoke with Officer SJ about "very personal things," and testified at hearing that he tried to get her to realize that her roommate, an EOCI employee, was making "manipulative" statements. Appellant's admissions are sufficient to support a conclusion that Appellant did not observe appropriate manager-subordinate boundaries, showed poor judgment, and failed to maintain a professional and respectful workplace.¹⁸

In reaching our conclusion, we note that many of Appellant's arguments focus on demonstrating that there was no sexual harassment in this case. DOC did not remove Appellant from the management service for violating the Harassment-Free Workplace Policy, however. After investigating Officer SJ's complaint, DOC charged Appellant only with (a) untruthfulness (a charge rejected by the ALJ, without objection by DOC), and (b) exercising poor judgment, failing to maintain professional boundaries, and failing to maintain a professional and respectful workplace. Appellant's arguments that he did not engage in sexually harassing behavior are, therefore, inapt. As we have often said, a management service employee may be held to high standards of behavior, so long as those standards are not arbitrary or unreasonable. *Stoudamire* at 7. DOC's expectations here were high, but we cannot say that they are arbitrary or unreasonable, particularly in the corrections work environment where maintaining appropriate boundaries and a respectful workplace are especially important. An employer may expect its managers not to disparage subordinates to one another and not to discuss sexual matters with subordinates. This expectation is even more compelling in the situation in which the manager is the only manager on duty at a state work site and the complaining subordinate is newer to the state workforce.

Finally, we also acknowledge that maintaining appropriate boundaries with subordinates can sometimes require nuanced judgment calls. Here, however, Appellant's statements of his own opinion about Officer SJ's sexual life (via Appellant's remark, "How long until the no physical thing stops?"), comment about his own dating partners as "mistakes," and disparaging remarks about Officers CP and EO are far outside the scope of appropriate remarks by a manager to a

¹⁸We note that the removal letter alleges that Officer SJ told Appellant at 3:50 a.m. that she needed to conduct tier checks and that Appellant excused her from that duty, noting that others on shift could do the checks. The ALJ concluded that Appellant was simply prioritizing their conversation over that particular work task and, therefore, this portion of the charge was not proven by DOC, because Appellant's response to SJ was not inappropriate. We also note that the removal letter alleged that a correctional sergeant felt irritated when he could not initially get Appellant's attention during his meeting with SJ in order to focus on a contraband search. The ALJ concluded that although Sergeant Williams did say that he got "kind of irritated," he also testified that Appellant did not impede his duties, and therefore DOJ did not prove this element of the charge. DOC did not object to these conclusions by the ALJ, and therefore we do not reconsider them. However, it is undisputed that Officer SJ did suggest at 3:50 a.m. that she conduct tier checks (one full hour before the meeting with Appellant ultimately ended). It is also undisputed that Sergeant Williams was "kind of irritated" at the meeting (as was Officer Mackey, who later made a frustrated comment to SJ about the length of the meeting with Appellant and her absence from her duties). These undisputed facts—although they are not sufficient as independent instances of poor judgment, as the ALJ concluded—support our larger conclusion that Appellant exercised poor judgment and showed poor boundaries by having an extended meeting with a younger subordinate new to corrections work, during which highly personal topics were discussed, and continued that meeting for an additional hour after Officer SJ herself suggested ending the meeting.

subordinate. We cannot say that DOC's expectation that a lieutenant refrain from such comments is unreasonable or arbitrary. We conclude that DOC met its burden to prove that Appellant's conduct during the graveyard meeting showed poor judgment, exceeded appropriate boundaries, and failed to maintain a professional and respectful workplace, as charged.

We turn next to the allegation that Appellant referred to Officer CP by the nickname "Randi." Randi was another male corrections officer's previous girlfriend. This nickname was thus an allusion to Officer CP being "the girlfriend" of another male corrections officer. Appellant conceded that he called Officer CP "Randi." Appellant contends, however, that others in the institution (as well as Officer CP's father) also used that nickname to refer to Officer CP. However, the record confirms that other EOCI managers (Lieutenant McLouth and Lieutenant Williams) knew that nicknames were disfavored, and that at least one union-represented employee had been counseled about using nicknames. Further, Appellant's argument overlooks the fact that DOC relies on its managers, including Appellant, to set the workplace culture. A manager "is expected not merely to refrain from violating rules or policies, but also to affirmatively model appropriate workplace behavior[.]" *A.D.* at 11; *Salchenberger v. State of Oregon, Department of Corrections*, Case No. MA-19-12 at 13 (July 2013) (whether or not appellant's actions violated employer's rules regarding standards of conduct, appellant's management role "required more than just not violating those rules"). DOC was entitled to expect Appellant not to model behavior that it counsels its union-represented staff to avoid. DOC met its burden to prove this aspect of the charge.

Finally, in the removal letter, DOC alleged that Appellant took Officer SJ to a gun range while off-duty, and exposed DOC to "significant liability" by doing so. The evidence indicates that DOC employees were permitted to use the City of Pendleton Police Department shooting range provided that they followed the City's procedures for doing so. Appellant called the City, arranged a time to practice shooting there with Officer SJ, and did so without incident. DOC did not prove that Appellant's trip with Officer SJ in October or November 2018 was inappropriate, violated the City's or DOC's procedures, or exposed DOC to liability.

Reasonable Employer Analysis

We next address whether DOC's removal of Appellant from the management service was the action of a reasonable employer. In applying the "objectively reasonable" standard to management service cases, an employer may hold a management service employee to strict standards of behavior, so long as those standards are not arbitrary or unreasonable. *Lucht v. State of Oregon, Public Employees Retirement System*, Case No. MA-16-10 at 24 (December 2011); *Helper v. Children's Services Division*, Case No. MA-1-91 at 23 (February 1992). A significant factor for this Board's consideration is the extent to which the employer's trust and confidence in the employee have been harmed, compromising the employee's ability to act as a member of the management team. *Salchenberger* at 11; *Lucht* at 24. In addition, our precedent gives weight to the effect of the management service employee's actions on the mission and the image of the agency and the extent to which those actions do or do not reflect the proper use of judgment and discretion. *Id.*

We begin by considering the extent to which DOC could no longer have trust and confidence in Appellant, compromising his ability to act as a member of the management team.

DOC asserts, and we agree, that it must be able to rely on its managers to model and maintain appropriate boundaries with subordinates, particularly when a manager, such as Appellant, is the only manager on duty in the institution. Here, Appellant engaged a younger subordinate, Officer SJ, in an extended, highly personal conversation that included discussing SJ's sex life, SJ's possible sexual relationship with another subordinate, and SJ's post-divorce libido. Appellant set a poor example by modeling that this type of highly personal conversation between subordinates and managers is acceptable, possibly even beneficial for a subordinate who wishes to be in "good standing" with a manager. All employers must be able to rely on managers to maintain appropriate boundaries with subordinates, but it is especially vital at DOC, where employees must understand and maintain appropriate boundaries because of their work with adults-in-custody.

In addition to those inappropriate, highly personal comments, Appellant made disparaging comments to Officer SJ about two other subordinates—Officer EO and Officer CP—and also cautioned SJ that employees at EOCI would spread rumors and gossip about her. In doing so, Appellant inappropriately modeled that DOC managers talk negatively to union-represented employees about other union-represented employees when they are not present. Such comments undermine staff morale, compromise the effectiveness of all DOC management, and create a lack of trust in the workplace. Cultivating trust among coworkers is vital in a corrections setting, and Appellant's comments undermined that trust.

Further, Appellant referred to Officer CP by the nickname "Randi," which was an allusion to another male corrections officer's ex-girlfriend. Appellant minimized his conduct by arguing that the use of nicknames was part of DOC "culture." Through this "apparent lack of understanding of his role as the manager in setting the culture," Appellant "demonstrated that his ability to act as a member of the management team is compromised." *A.D.* at 15.¹⁹ DOC must be able to rely on its managers to instill a culture of respect in the workplace. Appellant failed in this duty. DOC reasonably lost trust and confidence in Appellant to act as a member of the management team as a result of Appellant's comments and his use of the "Randi" nickname.

In management service removal cases, we also give weight to the extent to which the manager's actions do or do not reflect the proper use of judgment and discretion. Here, for the reasons explained above, Appellant did not exercise proper judgment and discretion in what he said to Officer SJ and in perpetuating the use of an inappropriate nickname for another corrections officer.

¹⁹Appellant argues that his use of "Randi" as a nickname for Officer CP should be considered in the context of Assistant Superintendent Pedro referring to Appellant as having "the AIDS" after Appellant lost weight. Another witness, Captain Rabb, testified that he heard Pedro make a similar comment about AIDS after that employee lost weight. Pedro denied making these remarks. The record nonetheless persuasively establishes that other employees (Williams and McLouth) understood that inappropriate nicknames were disfavored at EOCI, and Appellant himself acknowledged that nicknames were inappropriate. Consequently, Pedro's remarks, assuming that he made them as described by Appellant and Rabb and taking them as a mitigating factor, do not completely excuse Appellant referring to Officer CP by the name of another male corrections officer's ex-girlfriend.

Appropriate Discipline

Finally, because the Department proved one of the charges against Appellant, we assess whether dismissal for that charge was consistent with ORS 240.570(3). In considering the appropriate level of discipline, we determine whether a level of discipline is “objectively reasonable in light of all the circumstances.” *Rodriguez v. State of Oregon, Department of Human Services*, Case No. MA-14-11 at 9 (July 2012) (quoting *Belcher v. State of Oregon, Department of Human Services, Oregon State Hospital*, Case No. MA-7-07 at 20 (June 2008)). In dismissal cases, this Board has attempted to strike a balance between the severity of the discipline imposed and any extenuating circumstances, such as prior discipline, length of state service, whether the employee was warned, the magnitude of the actions, and the likelihood of repeated misconduct. *Rodriguez* at 9 (citing *Smith v. State of Oregon, Department of Transportation*, Case No. MA-4-01 at 8-9 (June 2001)); see also *Garrett v. Department of Human Services*, Case No. MA-02-11 at 8 (December 2011) (a reasonable employer “considers the employee’s length of service and service record”). We expect a reasonable employer to apply the principles of progressive discipline, except where an employee’s offense is serious or “the employee’s behavior probably will not be improved through progressive measures.” *Zaman* at 12 (quoting *Peterson v. Department of General Services*, Case No. MA-9-93 at 10 (March 1994)).

We turn first to Appellant’s tenure and service record. Appellant worked for DOC for 11 years. Until the discipline that resulted in this appeal, Appellant had never received any form of discipline. Several witnesses testified that Appellant was a reliable and motivated employee, which are commendable traits. Further, Appellant’s record includes a commendation for bravery in 2017, when, as a classified employee, he single-handedly responded to a fire in the institution.²⁰ The record indicates that Appellant was successful in his role as a classified corrections officer, and we take that aspect of his job history into account. We also consider that Appellant was fairly new in his management position. However, Appellant’s record since promotion into management is not unblemished. The record indicates that he was counseled twice (in February 2018 and in March 2019), and one of those instances involved Appellant making a negative comment about a captain in a manner that was contrary to “team play”—similar to the lack of judgment shown by making disparaging comments about subordinates to Officer SJ.

We also consider whether Appellant was warned that the conduct that resulted in his dismissal was inappropriate. As noted above, in February 2018, Appellant was cautioned about making a comment about another manager that was “contrary to team play.”²¹ Although that caution was not about making inappropriate comments to or about *subordinates*, it put Appellant

²⁰In management service cases, we have noted that a manager’s extraordinary effort during an emergency does not necessarily outweigh problematic conduct as a manager; the state is entitled to expect “more from its managers than just adequate technical performance and dedication during emergencies.” *A.D.* at 16.

²¹Appellant was also counseled in March 2019 for not shaving his beard as directed by a superior to conform to DOC’s appearance requirements. Although that conduct was unrelated to the conduct that resulted in Appellant’s removal from management service, we note that the supervising officer’s notes indicate that Appellant appeared argumentative and resistant to direction from a superior.

on some notice that managers must be aware of the impact of their statements about others. Moreover, Appellant attended substantial DOC training over multiple years on topics directly pertinent to the conduct at issue here, including training on respectful workplace (2013, 2017, and 2018); boundaries (2014, 2015, and 2017); nonverbal communications (2014); interpersonal communications (2014); resilience in communication (2015); communicating across generations in the workplace (2017); verbal de-escalation (2018); diversity and inclusion (2014 and 2015); and emotional wellness (2014 and 2017). That training was sufficient to educate Appellant about the importance of responding appropriately to a subordinate with personal problems, and understanding the negative impact of disparaging classified employees. Appellant himself taught boundaries and ethics to incoming officers. In light of this training, teaching experience, and counseling, Appellant was on sufficient notice that maintaining a respectful and professional workplace, communicating professionally, and using appropriate boundaries with subordinates were core duties of his management job.

We turn next to the question of whether a reasonable employer would forego progressive discipline on these facts, which presents a very close question. A reasonable employer “applies the principles of progressive discipline, except where the offense is so serious or unmitigated as to justify summary dismissal, or the employee’s behavior probably will not be improved through progressive measures.” *Blank v. State of Oregon, Construction Contractors Board*, Case No. MA-007-14 at 12 (March 2015) (on reconsideration), *aff’d without opinion*, 277 Or App 783, 376 P3d 304 (2016); *see also Zaman* at 12. Superintendent Washburn testified that, despite Appellant’s 11-year tenure and generally positive service record, she decided to remove him from the management service both because his conduct was egregious and because it appeared unlikely that he would improve with lesser discipline.

To begin, we disagree with the first basis of the Superintendent’s decision to forego progressive discipline—that Appellant’s conduct was sufficiently serious or unmitigated that progressive discipline was unnecessary. Certainly, Appellant’s conduct was inappropriate, and modeled poor behavior to Officer SJ and undermined trust in the workplace. Further, Appellant’s disparaging comments to Officer SJ about other corrections officers demonstrate an apparent lack of awareness of the appropriate role of a manager in any state workplace, much less in a correctional institution, where maintaining an atmosphere of trust is particularly important. Nonetheless, Appellant’s conduct was not the type of serious misconduct for which a reasonable employer would forego progressive discipline for an employee, such as Appellant, with a decade-plus tenure and an acceptable service record. *See, e.g., V. v. State of Oregon, Oregon Health Authority*, Case No. MA-002-19 (February 2020) (progressive discipline not required for unauthorized use of public laboratory resources for private research); *Clinton v. Oregon Military Department*, Case No. MA-016-11 (June 2013), *aff’d without opinion*, 268 Or App 717, 344 P3d 567, *rev den*, 357 Or 299, 353 P3d 594 (2015) (progressive discipline not required where appellant stored pornography on his state computer, used profane, sexist, and racist language in the workplace, and was abusive to his subordinate employees and outside vendors).

Our cases, however, recognize a second and independent reason that a reasonable employer may forego progressive measures—where the “employee’s behavior probably will not be improved through progressive measures,” *Zaman* at 12. Superintendent Washburn also relied on this reason to forego progressive measures. Appellant’s removal letter summarized the

Superintendent's conclusion as follows: "[Y]our lack of accountability during the pre-dismissal meeting was concerning. Based on your responses, lack of responses and failure to take accountability I do not believe you have the ability to change."

This is a very close call, but, on balance, we agree that a reasonable employer could conclude that Appellant's conduct would probably not be improved by progressive measures. Appellant did not appear to understand how his highly personal conversation and inappropriate comments about Officers EO and CP would likely be taken by Officer SJ. Further, he appeared not to take full responsibility for his actions, and attempted to justify them as connected to a "CISM process" and as an effort to help SJ through a "crisis"—an unpersuasive explanation that is inconsistent with the predominantly social content of the conversation. Further, Appellant was also at times overly defensive. For example, with respect to his remarks to Officer SJ about Officer CP, in the pre-removal meeting, he claimed that he was "not speaking negatively as a manager" about Officer CP, when clearly he was. At another point during the pre-removal meeting, when asked whether he would do anything differently in his meeting with Officer SJ, he stated that he would not do anything differently. Appellant was also argumentative with the Superintendent during the pre-removal meeting, and his testimony at hearing evidenced some disrespect toward the complainant, Officer SJ. Although Appellant asserted that he had done a lot of self-examination about his conduct, at hearing he continued to insist that he was not "inappropriate" with Officer SJ. He conceded only that he would have ended the March 28 meeting earlier, would not have called Officer CP "Randi," and would not have referred to Officer CP by name when telling Officer SJ about his interaction with him. Appellant also minimized his use of the nickname "Randi" by claiming it was part of EOCI culture. We have previously explained that a manager is unlikely to change inappropriate conduct if that manager minimizes the conduct by claiming that it is merely part of the agency's "culture." *See A.D.* at 17-18 (manager unlikely to change behavior because, by claiming it was part of the workplace culture, he seemed not to understand the "seriousness of his conduct or its impact on the workplace").

In light of the amount of training Appellant had received on boundaries, communication, and respectful workplace policies, prior counseling for a comment "contrary to team play," failure to fully acknowledge both his mistakes and their gravity, and lack of accountability, a reasonable employer could conclude that Appellant did not take full responsibility for his actions and that his conduct probably would not be improved through progressive measures. *See Poage v. State of Oregon, Department of Corrections*, Case No. MA-17-10 at 48-49 (April 2012) (progressive discipline not required where DOC reasonably lost trust in manager who did not seem to understand the nature and seriousness of the misconduct and insisted that his actions should be excused or were not serious).

In reaching this conclusion, we acknowledge that Appellant, having been accused by Officer SJ of "entrapping" her and other female employees, understandably was initially defensive during the investigation. We also acknowledge that Officer CP inappropriately inserted himself into the investigation (for which CP was later reprimanded), which also may have resulted in understandable frustration for Appellant. We do not weigh Appellant's initial frustration and defensiveness during the investigation against him. For example, during his investigatory interview, he twice referred to the investigation as "asinine," and when asked about how DOC staff could perceive his meeting with Officer SJ, he responded, "[T]he very blunt answer is I don't

care.” We also acknowledge that Appellant may understandably have felt frustrated after receiving the pre-removal letter, in which DOC alleged that he was untruthful during the investigatory meeting (a charge DOC ultimately failed to prove). However, that frustration does not excuse Appellant’s ultimate lack of responsibility or accountability at the pre-removal meeting with Superintendent Washburn. By that time, DOC was not alleging that Appellant had harassed SJ, and had concluded that Appellant showed poor judgment and poor professional boundaries and had failed to maintain a professional and respectful workplace. By his own admissions, Appellant did engage in *that* conduct, yet during the pre-removal meeting with Superintendent Washburn, he did not fully acknowledge that or take responsibility for it. If Appellant had acknowledged his conduct, demonstrated that he understood that it was a mistake, and committed to not repeating it, we would have difficulty agreeing that Superintendent Washburn’s decision to forego progressive discipline was that of a reasonable employer. But, here, on this record, and given the particular importance of appropriate boundaries in the DOC workplace, Superintendent Washburn’s decision that progressive measures were not likely to change Appellant’s conduct was not unreasonable.

Based on the entire record, removal from the management service was “objectively reasonable in light of all the circumstances,” *Rodriguez* at 9, and therefore did not violate ORS 240.570(3).²²

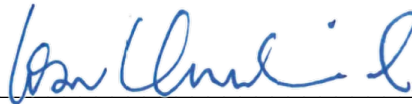
ORDER

The appeal is dismissed.

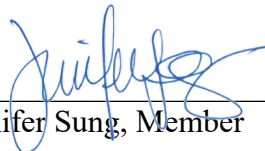
DATED: September 23, 2020.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

²²We note that the reasons for Appellant’s removal from management service are grounded in DOC’s expectations of its management service employees. The record does not indicate that Appellant was not, or could not be, a skilled corrections officer.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-059-13

(UNFAIR LABOR PRACTICE)

PORTLAND FIRE FIGHTERS'	)	
ASSOCIATION, IAFF LOCAL 43,	)	
	)	
Complainant,	)	
	)	
v.	)	ORDER ON REMAND
	)	
CITY OF PORTLAND,	)	
	)	
Respondent.	)	
	)	

This matter is before the Board on remand from the Court of Appeals. *Portland Fire Fighters' Assn. v. City of Portland*, 302 Or App 395, 461 P3d 1001 (2020) (*PFFA*). The court reversed and remanded that portion of the Board's December 2, 2015, order that dismissed the Complainant's allegation that Respondent violated ORS 243.672(1)(e) by making certain operational changes (described below) without bargaining.¹ After the matter was remanded to the Board, we received additional briefing by both parties and held oral argument on June 29, 2020. For the following reasons, we adhere to our decision to dismiss the complaint.

Procedural Background

On December 26, 2013, Complainant Portland Fire Fighters' Association, IAFF Local 43 (Union) filed an unfair labor practice complaint alleging that Respondent City of Portland (City) violated ORS 243.672(1)(e) by failing to bargain before unilaterally making the following operational changes due to a budget reduction: (1) eliminating the Dive Team; (2) transferring the duties of the Safety Chief and Chief Investigator to management; (3) consolidating companies by replacing trucks with quints and permanently implementing RRVs; (4) eliminating three Fire Investigator positions; and (5) eliminating standby pay in the Investigations unit.² The City timely filed an answer that contained several affirmative defenses, including waiver, estoppel, timeliness and failure to exhaust available remedies. In *Portland Fire Fighters' Association, IAFF*

¹The court affirmed the remainder of the Board's order.

²The complaint alleged other violations that are no longer at issue.

Local 43 v. City of Portland, Case No UP-059-13, 26 PECBR 548 (2015) (*Original Order*), the Board unanimously concluded that the Union’s inaction to the City’s changes constituted a waiver of the claim before the Board. Specifically, the Board concluded that the City provided the Union with notice of these changes, and that the Union never demanded to bargain over the changes. A majority of the Board separately concluded that, through conversations between the Union president and the mayor’s liaison, the Union’s agreement to not contest the changes constituted “collective bargaining,” and that therefore there was no “unilateral change.”

On appeal, the court determined that, although the City had raised the affirmative defense of “waiver,” that it had not raised the specific defense of “waiver by inaction.” The court also disagreed with the conclusion that the meetings and agreement between the City and the Union constituted “collective bargaining.” The court therefore reversed the Board’s order and remanded the matter to consider the City’s other affirmative defenses. *PFFA*, 302 Or App at 403.

OPINION AND ORDER ON REMAND

Facts

On remand, we adhere to the findings of fact in our Original Order, which also formed the basis of the court’s order.³ We provide the following summary of facts pertinent to our order on remand.

In December 2012, the City began its 2013-14 budget process anticipating a 25 million dollar shortfall. The City asked Portland Fire and Rescue (the Bureau) to develop its budget using a modified zero-based budget approach, requesting up to 90 percent of current appropriation levels with prioritized add-back packages for cut items. The Bureau developed its proposed budget through a budgetary advisory committee (BAC). The Union’s president, Ferschweiler, served on the BAC.

³The court drew its “summary of the undisputed facts from [our] findings.” *PFFA*, 302 Or App at 397. The court described the parties as having presented “conflicting testimony at the contested case hearing as to whether there ultimately was an agreement as a result of the meetings” between Ferschweiler and Siegel, *id.* at 398. The court then observed that the Board found “that, in the third meeting, the mayor’s liaison and Ferschweiler reached an oral agreement as to how the cuts would be implemented and that Ferschweiler agreed not to contest the changes through grievance.” *Id.* On remand, we provided the parties with the opportunity to brief the remaining issues on remand, and the Union did not contest the Board’s original findings or ask us to reconsider them. Rather, as set forth below, the Union did not dispute the existence of an agreement, but focused primarily on the scope of the agreement—*i.e.*, that it had only agreed to not file a grievance, but had retained the right to file an unfair labor practice complaint. For the reasons discussed below, we decline to interpret the Union’s agreement in such a limited fashion. On remand, the dissent asserts that there was no agreement at all. That assertion is at odds with the Union’s argument on remand that the agreement was limited only to not “grieving” the changes, as opposed to filing an unfair labor practice claim. Unlike the dissent, we decline to reassess all the evidence, including reweighing the credibility of the witnesses, to reexamine whether there was an agreement at all. Aside from leading to a lack of finality in administrative decision-making, such a reassessment was not advocated by the Union.

Between May 9 and approximately May 23, Ferschweiler met three times with Siegel, the mayor's budget liaison, to discuss and negotiate how the Bureau would implement the budget cuts, including consideration of the availability of a federal grant (the SAFER grant) that might fill budget gaps. Fire Chief Janssens attended one of those meetings.

At the outset, the mayor's proposed budget directed the Bureau to replace four companies with four RRVs, which would have resulted in laying off 26 firefighters. That budget also directed the Bureau to eliminate: (1) the Safety Battalion Chief position (shifting all functions to the Deputy Chiefs Office); (2) two Firefighter Specialists assigned during the Training Academy; (3) one Inspector position; (4) two carpenters; (5) the Hazardous Materials Coordinator (shifting those duties to the Training Division); (6) the Dive Rescue Team; and (7) three Investigators positions.

When Siegel and Ferschweiler first met (May 9, 2013), the two discussed the proposed budget and identified key concerns. The City (via Siegel) communicated that savings needed to be achieved, and that replacing the companies with RRVs was the identified method to accomplish that. For the City, the highest priority was "achieving the innovations," meaning expanding the use of RRVs and reducing the number of companies. The Union's highest priority was preserving the firefighter positions. Siegel asked Ferschweiler to think about whether the parties could agree to a compromise, wherein the City would achieve the RRV innovations without a reduction in the firefighter positions, and the Union would agree to not oppose or grieve those innovations. The two also discussed the possibility of the City applying for the SAFER grant. After the meeting, Siegel discussed the SAFER grant option with the mayor, who was quite resistant to that option because he believed that option to be a "band-aid" for larger financial and structural problems at the Bureau.

Siegel and Ferschweiler met again on May 16, this time accompanied by Janssens. At the meeting, the three agreed to a common course of action—namely, that they would try to reach the following compromise. The City would not close four companies or eliminate 26 firefighter positions, but would instead introduce quints and consolidate double-engine companies by adding RRVs to stations that already had an engine. The City would also apply for a SAFER grant, although Siegel explained that the SAFER component would be a difficult sell to the mayor, who had made clear that such an option "was not his first choice." Thus, if Siegel were to pursue this option with the mayor, he needed the assurance that the Union would not object to or grieve the "innovation" changes outlined above.

At the third meeting (sometime around May 23-25), both Siegel and Ferschweiler expressed their respective positions on the outstanding issues. Specifically, Siegel stated that getting the mayor to sign off on the SAFER grant would be difficult, and Ferschweiler indicated similar difficulty getting his members to sign off on a COLA reduction. Siegel indicated, however, that he believed that he could get the mayor on board with the SAFER grant, so long as the Union would not oppose the "innovations" (*i.e.*, RRVs, company consolidation, and quints discussed above). Siegel explained that he could not get the mayor to agree to apply for the SAFER grant, though, if the Union was then going to "grieve" those "innovation" changes. At the end of the meeting, Siegel committed to getting the mayor to agree to apply for the SAFER grant with the quid pro quo that the Union would not grieve the changes of consolidating the two companies and expanding the use of RRVs and quints, as discussed above.

Siegel then returned to the mayor's office and delivered on his end of the bargain—namely, the mayor agreed to pursue the SAFER grant so that the Union would not lose the 26 positions. The City ultimately received the SAFER grant, which was used as contemplated by the parties' agreement—namely, to pay for the 26 represented positions that otherwise the City would have eliminated due to the budget shortfall.

In sum, after the back-and-forth of multiple negotiations with the Union's president, the City agreed to move off of its original position and cede to the Union's primary objective—namely, that no bargaining unit positions would be lost, in exchange for the City being able to implement the "innovations" sought by the mayor without Union objection. Thus, the City and the Union agreed to the following terms: (1) two double companies would be consolidated into single companies with each station's truck and engine being replaced with a quint; (2) two additional RRVs would be added (for a total of four); (3) the Union would not oppose or contest these changes; (4) the bargaining unit members would retain their COLA; (5) all stations would be kept open; and (6) the City would apply for the SAFER grant, notwithstanding the mayor's earlier concern that a short-term funding mechanism was merely a "band-aid," with the understanding that receiving the grant would prevent 26 bargaining unit members from being laid off.

After the agreement was reached, Siegel briefed the City commissioners on the deal that had been reached with the Union, and the City Council approved a budget that reflected the deal. Specifically, on June 20, 2013, the City Council approved the following Final Approved Budget: (1) eliminating the Dive Team; (2) transferring Safety Chief and Chief Investigator assignments to management; (3) replacing some trucks and engines with quints; (4) permanently implementing an RRV program; (5) eliminating three Fire Investigator positions; and (6) eliminating standby pay in the Investigations unit.

Ferschweiler attended and testified at the June 20, 2013, meeting, noting that the Union was "not against the RRV program," but also emphasizing the importance of the City securing the SAFER grant. At that point, the City had obtained bridge funding to keep the 26 firefighter positions through the end of September. The plan was for the City to aggressively pursue the SAFER grant to keep those positions funded beginning October 1. At the meeting, Mayor Hales thanked Ferschweiler for being "a constructive partner" in the process. After Ferschweiler testified about the importance of securing the SAFER grant as part of the package, Commissioner Fish asked Ferschweiler if he was concerned that the City was "not aggressively pursuing [the SAFER grant] or are you just reminding us that we made a commitment to do so." Ferschweiler responded that the mayor's office "has been consistent," and that "as long as it is everything that we have talked about, I feel secure that the city has given their support to it." Mayor Hales and Commissioner Fish then urged Ferschweiler to inform the Council if there was some "glitch" in the process.

On June 20, 2013, Chief Janssens sent a budget memorandum to all employees explaining that the Final Approved Budget had passed and had provided bridge funding to maintain employment of 26 firefighters through the fall and that the City would apply for the SAFER grant to fund the continued employment of those firefighters.

On August 7, 2013, the City Council met, and both Chief Janssens and Ferschweiler testified. When Ferschweiler again emphasized the significance of securing the SAFER grant to ensure the continued employment of the 26 firefighters once the bridge funding was exhausted, Commissioner Fish thanked Ferschweiler for his “persistence on this issue.” Fish also stated that Ferschweiler had “been talking to each of our offices, making sure we get this right and honor a commitment that we made.” Fish then asked Ferschweiler whether he was “satisfied that we are fulfilling the commitment that we made?” Ferschweiler responded “Absolutely, absolutely.”

The City ultimately received the SAFER grant, which was used as contemplated by both the Union and the City—namely, to pay for the 26 represented positions that otherwise would have been cut by the City.

The Union never requested to bargain about any of the operational changes agreed to above, which are also the subject of this unfair labor practice complaint.

CONCLUSIONS OF LAW

On remand, there is a single, straightforward issue before us: whether the City committed an unfair labor practice by making budget-driven operational changes in 2013 after a collaborative series of discussions with its union that resulted in a plan to save 26 firefighter jobs from layoff. We adhere to our prior conclusion that the City did not violate ORS 243.672(1)(e) when it did so. We reason as follows.⁴

ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer or its designated representative to “[r]efuse to bargain collectively in good faith with the exclusive representative.” Under most circumstances, a public employer commits a *per se* violation of its duty to bargain in good faith if it makes a unilateral (*i.e.*, unbargained) change in the status quo concerning a subject that is mandatory for bargaining. *Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11 at 10, 25 PECBR 525, 534, *recons*, 25 PECBR 764 (2013).

Our methodology for analyzing unilateral change allegations involves considering: (1) whether an employer changed the status quo; (2) whether the change concerned a mandatory subject of bargaining; (3) whether the employer exhausted its duty to bargain; and (4) any

⁴We ultimately differ with the dissent on two main issues, one factual and one legal. As a factual matter, we conclude that a preponderance of the evidence shows that the Union agreed not to contest the changes that it now contests. The dissent believes otherwise. On the legal question, we conclude that the Union is bound by its agreement, even though it was not in writing. The dissent concludes that even if the Union orally agreed not to contest these changes, it need not be held to that agreement in this case.

Our conclusion is grounded in the realities of this type of arrangement, which is not an uncommon one between Oregon public employers and public sector unions. In time-constrained discussions held in response to dire budget circumstances, parties commonly collaborate and ultimately agree on how to accommodate the interests of both labor and management. In doing so, they commonly do not exchange written proposals or reduce their understanding to a formally signed agreement. But that understanding and practice nonetheless exists, and a public employer does not commit an unfair labor practice by taking the very actions that it agreed with its union to undertake.

affirmative defenses raised by the employer. *Id.* We need not apply this analysis in a mechanical manner and may proceed to a particular step if that step will be dispositive of the issue. *Id.*

Here, the City does not dispute that it made changes to the status quo that, at least in part, concerned mandatory subjects of bargaining. The City raises numerous affirmative defenses, including estoppel and waiver by action.⁵ On remand, the City described its arrangement with the Union as one in which the Union agreed not to contest “the budget cuts” in exchange for saving 26 jobs. *See* City’s Memorandum In Aid of Oral Argument at 2 (the “PFFA president agreed not to contest the budget cuts and agreed not to grieve”); *id.* at 3 (“Mr. Ferschweiler intentionally relinquished the Union’s right to challenge the budget cuts in exchange for saving the jobs of 26 firefighters.”). Specifically, with respect to waiver, the City contends that it did not commit an unfair labor practice by implementing the operational changes at issue because it reached a compromise with the Union, after multiple meetings involving high-level representatives from both sides, that allowed the City to implement those changes without Union objection. We agree with the City’s contention. Here, as set forth in the findings of fact that we adhere to on remand (and which the Union has not disputed on remand), before deciding on and implementing the disputed operational changes, the City met multiple times with the Union over these changes, and the Union ultimately agreed not to contest the changes that were part of a bundled package of budgetary measures that included the assumed SAFER grant funding to save 26 jobs for the Union’s members. Under these circumstances, we conclude that the Union’s action of agreeing not to contest the changes bars a (1)(e) charge on the same changes.⁶

In reaching this conclusion, we note that it is not uncommon for a public employer and an exclusive representative to engage in discussions over a public employer’s budget. Union representatives are sometimes included on budget advisory committees, for example, as was the case here, and occasionally union officials consult with public officials on budget matters even outside formal budget committee processes. We are not holding that discussions involving union representatives about budget setting are, on their own, sufficient to constitute a waiver of the exclusive representative’s right to bargain over changes to the status quo or a waiver to filing an unfair labor practice claim, nor is a generalized lack of opposition or even assent to a budget framework sufficient. (Here, however, the parties engaged in multiple discussions for the purpose of reaching a very specific accord to avoid substantial cuts to union-represented jobs.). Under that accord, the mayor did not insist on adhering to earlier reluctance to seek outside, short-term grant funding to save union-represented jobs, and in exchange, the Union committed that it would not contest department-level operational changes sought by the mayor. Indeed, the commitment to not contest those changes was an essential element of the parties’ accord.

⁵As noted above, the Board originally concluded that the Union’s inaction in not requesting or pursuing bargaining over the changes rendered its (1)(e) charges meritless. The court determined that such a conclusion was not available because the City did not specifically assert “inaction” as a basis for its affirmative defense.

⁶The dissent appears to argue that the City contends that it should prevail because of a “grammatical trick of using the verb ‘to agree’ instead of the noun ‘agreement.’” We do not see the City (or anyone else) advancing such an argument.

In addition, the record does not support a conclusion that the Union's discussions with Fire Chief Janssens and the mayor's liaison were merely preliminary to later bargaining (which the Union never later demanded or requested). Rather, during a time of substantial budget cuts, the Union had a core priority—saving 26 represented employees from lay-off—and it obtained that objective during time-constrained discussions by committing not to contest the budget changes and the associated operational changes, which included (1) eliminating the Dive Team; (2) transferring Safety Chief and Chief Investigator assignments to management; (3) replacing some trucks and engines with quints; (4) permanently implementing an RRV program; (5) eliminating three Fire Investigator positions; and (6) eliminating standby pay in the Investigations unit.⁷ Further, when another elected official asked the Union on the record at a City Council meeting whether the Union had any concerns that the City was not meeting its commitments to the Union, the Union did not notify the City, then or later, that it believed the City had not kept its commitments to seek outside grant funding for the 26 positions. Given all these circumstances, we agree with the City that the filing of a (1)(e) charge to contest those changes falls within the scope of the Union's commitment.⁸

On remand, the Union no longer pursues its argument that it did not reach an agreement with the City. Rather, the Union primarily asserts that the agreement reached by the parties only concerned filing a *grievance*, not an unfair labor practice complaint.⁹ Citing the requirement that a waiver must be “clear and unmistakable,” *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177, 295 P3d 38 (2013) (*AOCE*), the Union asserts that we cannot infer a waiver of filing an unfair labor practice charge from a waiver of a right to file a grievance. The Union further avers that, to be enforceable, the parties' agreement would need to be reduced to writing.

We disagree with the Union's assertion that the scope of the Union's commitment was limited to not filing a grievance, and that the commitment allowed the Union the option of pursuing this unfair labor practice charge. To begin, contrary to the Union's representation, the findings of fact, which the Union has not disputed on remand, did not limit the agreement to the mere filing of a grievance. Rather, we concluded that the Union agreed not to “oppose or contest” the operational changes. *See Original Order*, UP-059-13 at 12, 26 PECBR at 559 (Finding of Fact

⁷These changes were part of the Final Approved Budget adopted by the City Council on June 20, 2013.

⁸The Union and the City agree that a waiver requires an intentional relinquishment of a known right. The Union further argues that the “clear and unmistakable” standard should be applied when that intentional relinquishment occurs through conduct, rather than through a written agreement. Even under that standard, however, the unusual facts of this case—the time-constrained discussions, multiple meetings, participation by high-level representatives of both sides, and ultimate concession by the City to the Union's primary objective to retain 26 firefighter jobs—persuasively demonstrate a clear and unmistakable waiver by the Union not to contest the now-contested changes. To conclude otherwise, we would have to determine that the Union retained a right to contest the operational changes, even after the City made all the concessions sought by the Union during the discussions among Ferschweiler, Janssens, and Siegel. The record does not support such a determination.

⁹The Union initially filed a grievance over these same operational changes, but then abandoned that grievance in favor of filing this unfair labor practice charge.

67). On remand, we reiterate that the persuasive facts establish that, for the City to reach a deal on the Union's terms that would save the 26 union-represented positions (which required both adoption of a budget necessary for that deal and the agreed operational changes funded by that budget), it was essential for the City to have the Union's agreement that it would not oppose or contest those changes. We find nothing in the facts (and nothing persuasive) that establishes, as the Union argues, that the Union agreed not to file a grievance over the operational changes, but retained the right to file a (1)(e) charge regarding those same changes. To the contrary, the facts establish that it was a central concern for the City to have the Union's buy-in on the operational changes proposed by the Chief (and ultimately adopted by the City), such that the City would not have to defend or further modify those changes in any forum (either by grievance or in an unfair labor practice proceeding). The record includes sufficient evidence to demonstrate that the Union made a commitment not to contest the budget changes, which included the operational changes, in order to secure the City's commitment to apply for the SAFER grant and save 26 jobs.¹⁰

We also disagree that the Union's commitment not to contest the changes was required to be in a writing signed by the parties. The Court of Appeals, in its opinion, did not state that a waiver in this case was required to be in writing and signed. Specifically, the court separately analyzed the Board's alternative holdings. The court first rejected (in part based on the absence of a writing signed by the Union president and the head of human resources) the Board's rationale that the parties had engaged in collective bargaining that resulted in an enforceable side agreement. The court then separately turned to the Board's waiver analysis. In response to that waiver analysis, the court noted that, in the "labor context, case law establishes that a party may waive its right to bargain *through clear and unmistakable language in a contract*, bargaining history, *or the party's action or inaction*." *PFFA*, 302 Or App at 402, citing *AOCE*, 353 Or at 183 (emphases added). In other words, the court recognized that the Union's action could be the basis for a waiver, notwithstanding the absence of a side agreement to the collective bargaining agreement (which, here, required a signed writing), and it instructed us on remand to reconsider that claim of waiver.¹¹ If the court had determined that the City violated ORS 243.672(1)(e) unless the agreement was in writing, there would be no need to remand the matter, as there was never an assertion that the agreement was in writing. Moreover, if that were the court's position, it is reasonable to expect that the court would have directed us to limit any analysis of the City's affirmative defenses to an agreement in writing.¹²

¹⁰There is no persuasive evidence that the scope of the waiver was somehow limited to only certain changes encoded in the Final Approved Budget, but not others. The record demonstrates that, given the unusual circumstances present here (including both what Chief Janssens described as a "dire budget" and the limited time constraints the parties were working within to accomplish both the Union's and the City's objectives in that "dire" budget environment), the parties discussed the budget changes and the operational changes interchangeably and as a package, which ultimately was adopted by the City Council at a meeting attended by Ferschweiler.

¹¹We also note that the record indicates that some memoranda of agreement between the Union and the City have not, in fact, been signed by the parties, according to Chief Janssen's testimony.

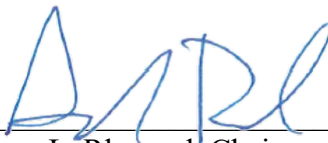
¹²The dissent frames our opinion as one on the "enforceability" of an oral agreement, as if the City filed an unfair labor practice or a declaratory ruling petition. That is not the question—rather, the question is whether the City committed an unfair labor practice when it adhered to the terms of the parties' agreement, but the Union did not.

Finally, we disagree with any contention that the Union should prevail on a (1)(e) unilateral change claim where the Union agreed not to contest those unilateral changes. Rather, as set forth above, we conclude that such an express action precludes the filing of a (1)(e) unilateral change claim. In reaching this conclusion, we reiterate that, unlike other budget discussions, the agreement here included a Union agreement not to contest the specific operational changes that are now the bases for the (1)(e) claim.¹³

ORDER

The Union's claim that the City's operational changes violated ORS 243.672(1)(e) is dismissed.

DATED: September 24, 2020.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member

*Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

¹³On remand, in its Memorandum In Aid of Oral Argument, with respect to its affirmative defense of estoppel, the City argued, "PFFA president Ferschweiler falsely represented that PFFA *would accept the budget cuts* and not grieve in exchange for the City pursuing the SAFER grant to prevent 26 firefighters from losing their jobs. Mr. Ferschweiler *knew of the budget cuts and the effect it would have on PFFA members* at the time he made those promises." City's Memorandum In Aid of Oral Argument at 4 (emphasis added). The City argued that, in exchange, the "Mayor forfeited his budget goal of establishing a sustainable budget" for the Bureau. *Id.* at 4. Ultimately, on June 20, the full City Council adopted a budget that included that policy forfeiture by the Mayor. Because we conclude that the City established its defense of waiver of by action, it is not necessary to address its affirmative defense of estoppel. On that point, contrary to what is posited by the dissent, no party has taken the position that some of the operational changes were agreed to, but others were not. In other words, this case has always been presented and understood as to whether the Union and City agreed to the operational changes (as a whole) or did not.

*Member Sung, Dissenting:

On remand, this Board must determine whether the City established one of its affirmative defenses to the Union's unilateral change claim, namely, "waiver by action" or "estoppel."¹⁴ The majority concludes that the Union waived its right to bargain by the action of orally agreeing not to oppose the changes at issue, in the context of budget discussions. I respectfully dissent, because I disagree with that conclusion on several grounds. First, the alleged oral agreement is not binding under the parties' CBA, which the court authoritatively construed as precluding enforcement of any side agreement unless it is reduced to writing and signed. Second, the evidence in the record is insufficient to support the factual finding that the Union orally agreed not to oppose the changes at issue. Third, the alleged oral agreement does not meet the standard for a valid waiver of a statutory right. Fourth, even according to the City's allegations, briefing, and witness, the purported waiver's scope does not cover all of the changes at issue, and it does not cover the impacts of those changes on mandatory subjects of bargaining. I address each of those issues in more detail below. Additionally, because I conclude that the City failed to establish its waiver by action defense, I also briefly explain why I conclude that the City failed to establish its estoppel defense.

1. Any oral agreement resulting from the budget discussions is unenforceable under the parties' CBA.

The majority concludes that the Union's oral "agreement not to contest" the changes constitutes a valid and enforceable waiver of the right to bargain over those changes. Majority Op. at 9. However, even assuming the parties reached an oral agreement as alleged, the court held that an oral agreement between these two parties is not enforceable under their CBA. Thus, the conclusion that the oral agreement is an *enforceable* waiver is at odds with the court's opinion.

In the original order in this case, a Board majority found that the City had multiple budget discussions with the Union's president about certain changes, and that "the Union's president ultimately agreed not to contest the changes as part of the package agreement that saved 26 jobs for the Union's members." *Original Order*, UP-059-13 at 14, 26 PECBR at 561. The majority further concluded that the City exhausted its duty to bargain over those changes by engaging in those budget discussions. *Id.* On appeal, the court held that the Board "erred in concluding that the parties had reached a binding agreement as to the changes and that the [C]ity had thereby satisfied

¹⁴The issue on remand is not, did the City have a good reason to believe that the Union had waived its right to bargain, so that the City could make the changes unilaterally, without violating (1)(e)? In the original order, the Board agreed that the answer to that question is yes, because the Union did not demand to bargain. The court, however, determined that the City failed to raise that defense and the Board erred by deciding the case on that ground. On remand, we may consider only the defenses that the City actually argued. As summarized by the court, "the city argued that the union had waived its right or was estopped to bargain the changes by having affirmatively agreed to them during the budget negotiations." *PFFA*, 302 Or App at 403. If either of those arguments is correct, then, *even if the Union had demanded to bargain*, the City would have been entitled to refuse to bargain and make the changes unilaterally. Thus, the issue presented by the City's arguments is: Did the City prove that the Union affirmatively made an agreement that waived its right to bargain, or estopped it from exercising that right, so that even if the Union had demanded to bargain, the City could have made the changes unilaterally, without violating (1)(e)? For the reasons discussed below, I conclude that the City did not.

its duty to bargain before implementing the operational changes in the 2013 budget.” *Portland Fire Fighters’ Assn. v. City of Portland*, 302 Or App 395, 402, 461 P3d 1001 (2020) (*PFFA*). The court determined that this Board erred for two reasons. First, the court held that the budget discussions did not satisfy the statutory requirements for collective bargaining. *Id.* Second, the court explained, “it is undisputed that the parties’ collective-bargaining agreement, which controlled, required that any side agreements to the collective-bargaining agreement were not binding unless reduced to writing and signed by the [U]nion’s president and the head of the [C]ity’s Bureau of Human Resources,” and “[t]here was no written and signed agreement as to the proposed changes.” *Id.* (Citation omitted.)

In short, the court held that the parties’ budget discussions did not “result[] in an enforceable agreement.” *Id.* Thus, even assuming those discussions resulted in an oral agreement that “included a Union agreement not to contest the specific operational changes” (Majority Op. at 8), this Board cannot enforce that agreement as a waiver of the Union’s right to bargain.¹⁵

The majority appears to read the court’s opinion as holding only that the budget discussions did not produce an enforceable *collective bargaining* agreement, and as leaving open the possibility that those discussions produced some other type of agreement that is enforceable, even though it was an oral agreement that was never reduced to writing. I understand the court’s holding to mean that *any type* of oral agreement produced by those budget discussions (whether a “collective bargaining agreement” or some other type) is not enforceable under the express terms of the parties’ CBA. But, even if the court’s opinion did not decide the issue, I would conclude that the parties’ CBA provision applies to any type of agreement, because the CBA expressly states that it applies to “any side agreement,” without limitation.

The majority also reasons that “the Union’s commitment not to contest the changes” is an enforceable waiver, even though it was not reduced to writing, because a party can waive “by action” instead of by agreement, and a waiver by action is enforceable without a written agreement. Majority Op. at 6. I agree that, as a general rule, a waiver by action is enforceable without any written agreement memorializing it. Here, however, the City argues, and the majority concludes, that the Union waived by the “action of *agreeing*.” Majority Op. at 6 (emphasis added). The conclusion that the Union waived by the action of agreeing begs the question of whether the resulting agreement is enforceable. It is not, because an oral agreement does not meet these parties’

¹⁵The City’s affirmative defenses rest on the premise that the Union is bound by the alleged oral budget agreement. However, if an agreement is binding, it is binding on *both* parties. That is, under the reasoning of the City’s defenses, if the City had deviated from the agreed-upon budget plan (*e.g.*, by making different changes, or not applying for the SAFER grant), then the Union would have had a valid contract claim (or potential estoppel claim) against the City. Yet, the City’s arguments before the court at least suggest that the City did *not* consider the alleged budget agreement to be legally binding on itself. For example, at oral argument, the City represented that even after the City Council approved the fire bureau budget, “it does not necessarily follow that all of those specific changes that here were negotiated between the parties would be implemented.”

CBA's requirements for enforceability.¹⁶ The City cannot evade those requirements by the grammatical trick of using the verb "to agree" instead of the noun "agreement."¹⁷

2. The evidence does not establish that the Union agreed to the alleged budget agreement.

For the same reasons stated in the special concurrence to the original order, I also find that there is insufficient evidence to establish that the Union agreed not to oppose certain changes in exchange for the City's agreement to apply for the SAFER grant, as alleged by the City. *Original Order*, UP-059-13 at 21-22, 26 PECBR at 568-69 (Member Weyand, concurring). In this dissent, I discuss the record in more detail only to show just how thin the evidence of that purported agreement is.

We apply the objective theory of contracts to determine whether both parties in fact agreed to the alleged deal. *Id.* at 21, 26 PECBR at 568. This means the parties' subjective beliefs are largely irrelevant; both parties' *conduct* must objectively indicate a meeting of the minds on the alleged deal. *Id.*; *North Clackamas Education Association v. North Clackamas School District*, Case No. UP-51-04 at 27, 21 PECBR 629, 655 (2007). Moreover, "the main focus" must be on the conduct of the party who disputes the existence of the agreement; here, the Union. *Id.* (the conduct of the party who "*believes* an agreement has been reached * * * will likely reflect that belief." (Emphasis in original.))

¹⁶As I understand it, the majority's view is that the alleged budget agreement may be treated by this Board (or a court) as an effective waiver, even if the agreement is not legally enforceable. I disagree. In my view, any agreement, including a budget or waiver agreement, must be legally enforceable to provide the basis for the City's affirmative defense of waiver by the action of agreeing (which, in this case, is the same thing as the affirmative defense of waiver by agreement). The same would be true if the tables were turned, and the Union had filed a charge claiming that the City violated the alleged budget agreement; such a claim would fail because the agreement was never reduced to writing and is unenforceable as a result. That said, when an agreement is unenforceable under contract law, a party may still have a claim or an affirmative defense under an estoppel theory. Here, however, the City argued only that equitable estoppel applies, and I conclude that argument fails for other reasons (not because the alleged oral agreement is unenforceable under the parties' CBA).

¹⁷The majority also suggests that the reasoning of this dissent must be incorrect, because the court directed this Board to consider the City's waiver argument on remand, notwithstanding the absence of a written agreement, and the court did not direct us to limit any analysis of the City's defenses to an agreement in writing. Majority Op. at 8-9. I do not read so much into the nature or scope of the court's remand directive, because there are other explanations for it. For example, the court may have directed us to consider the City's waiver by action defense because the original order did not address it, the issue was not squarely presented to the court, and the parties did not brief it on appeal. And, even if the court had decided the waiver by action defense, other questions would remain for this Board to address on remand, such as whether the City proved its alternative defense of estoppel, and if not, what is the appropriate remedy.

In this case, the record establishes only that the mayor's budget liaison, Siegel, subjectively believed that the Union's president, Ferschweiler, agreed to the alleged deal. There is no evidence that Ferschweiler engaged in conduct that objectively indicated the Union agreed to that deal.

According to Siegel, he first proposed the alleged "political deal" about the budget to Ferschweiler at a May 16 meeting that also involved Fire Chief Janssens. Also according to Siegel, he and Ferschweiler did not actually agree to that compromise at the May 16 meeting; they agreed only to "try to deliver our sides to that compromise." There is no evidence that Ferschweiler represented that the other Union officers were already on board with the political deal, or that he did not need to get approval from anyone else.¹⁸

Siegel and Ferschweiler met again a week later, on May 23, 2013, without Janssens. According to Siegel, he then "share[d] that the mayor had agreed to pursue SAFER grants if in fact his -- the PFFA were willing to accept the innovations that the chief and he had proposed on RRVs and quints, at least for a two-year period of time." When asked how Ferschweiler responded, Siegel stated, "I recall that we agreed that we had a deal as we had agreed to pursue in a meeting with the chief that we have realized our objectives and we were delivering." That's it. Siegel's testimony establishes only that he subjectively believed the parties reached a deal on May 23.

Siegel offered no specific testimony regarding what *Ferschweiler* said regarding the Union's position.¹⁹ Nor is there any other evidence, such as contemporaneous notes. In other words, there is no specific evidence of conduct by Ferschweiler that objectively indicates he was able to "deliver" the Union side and the Union firmly agreed to the proposed compromise.²⁰

¹⁸Siegel testified repeatedly that both he and Ferschweiler needed to get approval from their respective sides. In addition to the testimony quoted above, Siegel testified, "So we shook hands to pursue those avenues on each of our sides to see if we could come to an agreement." And, after Siegel explained he needed assurances that the Union "would allow the innovations that the mayor wanted," counsel asked him, "Did [Ferschweiler] provide you with that assurance at this [May 16] meeting?" Siegel responded, "My recollection is that we shook hands at this meeting to pursue these agreements from our respective sides, and then at a later meeting --."

¹⁹For example, Siegel did not testify that Ferschweiler stated, in any words, that he had discussed the proposed compromise with other PFFA officers and they had agreed to it.

²⁰Ferschweiler testified unequivocally that he did not make a deal that included the Union's agreement to the operational changes at issue. Specifically, counsel asked, "Did you make a deal agreeing to the changes that we're here about in exchange for the mayor supporting the application for the SAFER grant or to prevent layoffs of 26 firefighters?" Ferschweiler responded, "No." His testimony is corroborated by evidence showing he continued to publicly oppose those changes after the May 23 meeting with Siegel, including in a May 30, 2013, *Willamette Week* article titled, "Fire Union Prez Says Hales' Budget Will Lay Off 13 Firefighters," and at the June 20, 2013, City Council budget meeting (as described below).

Siegel's vague and conclusory assertion that the parties agreed they had a deal, standing alone, is insufficient to establish that the Union agreed not to oppose the changes as alleged.²¹

The majority's summary highlights comments by Mayor Hales, Commissioner Fish, and Ferschweiler at the June 20, 2013, City Council meeting regarding the budget. Although those comments show that the City had committed to applying for the grant, they do not show that the Union agreed not to oppose the changes at issue in exchange for that commitment.²² Indeed, at that meeting, Ferschweiler continued to oppose those changes and asked the City Council to reconsider. Specifically, he submitted maps to show the City Council how reducing staffing from eight to four in two stations would negatively impact service and explained, "you will see we'll no longer be able to respond [to several neighborhoods] and have 16 firefighters within 8 minutes." He also explained,

"we are not against the RRV program, *what we are against* is the increased [*sic*] level of service that will be provided for these neighborhoods – *some other stuff in the budget definitely concerning*. Arson investigator almost being cut in half. Definitely more active of the arson units in the state, let alone in the northwest. Reduced by almost 50%. Second thing is the dive team. As we look at things, removing the dive team from downtown Portland with the number of instance that we have, *that's something that you guys should look at again.*" (Emphases added.)

²¹To the extent a deal was discussed at the May 23 meeting, the evidence indicates that Ferschweiler and Siegel had different understandings of its terms, such that there was no meeting of the minds. According to Ferschweiler, he promised only to support a COLA reduction if the City applied for the SAFER grant in good faith but did not receive it. Specifically, he testified, "I remember the discussion with [Siegel] was that if the City in good faith applied for the SAFER grant, if we reviewed the grant to ensure that the City applied for it in good faith, that I would, if we didn't receive it and we still have the same budget problems, that I would push for our membership to consider giving up part of their COLA based upon that good faith effort of applying for the SAFER grant."

²²The fact that the mayor changed his mind about applying for the SAFER grant does not give rise to the inference that the Union promised not to oppose the operational changes, because there are several other things could have caused the mayor to change his mind. First, the evidence establishes that Chief Janssens also supported pursuing the SAFER grant instead of eliminating 26 positions; she included applying for the SAFER grant in the alternative budget plan that she presented to the mayor; and she publicly stated that the Mayor supported her plan on May 20, 2013. Second, the evidence establishes that the Union was trying to persuade the City to apply for the SAFER grant by enlisting public support for that option. Third, the City admits (in its post-hearing brief) that a *Portland Mercury* article "killed the political reality of obtaining a COLA concession [from the firefighters] without first attempting the SAFER grant," and that the mayor decided to apply for the grant, at least in part, because of the article. The article was published on May 22, 2013, before the May 23 meeting at which Ferschweiler allegedly agreed to waive the Union's rights in order to obtain the mayor's agreement to apply for the SAFER grant. Further, Ferschweiler recalls discussing the *Portland Mercury* article with Siegel at their May 23 meeting, and agreeing to support a COLA reduction if the City applied for the SAFER grant in good faith but was denied.

When viewed as a whole, Ferschweiler's testimony before the City Council supports the Union's contention that he never agreed "not to oppose" all of the changes contemplated in the budget.²³

3. The alleged budget agreement did not include a valid waiver of the Union's right to bargain.

The majority concludes that "the Union ultimately *agreed* not to contest the changes that were part of a bundled package of budgetary measures," and "that the Union's action of *agreeing* not to contest the changes bars a (1)(e) charge on the same changes." Majority Op. at 6 (emphases added). A waiver by agreement, *i.e.*, "contract," must be expressed "through clear and unmistakable language." *PFFA*, 302 Or App at 402 (citing *Assn. of Oregon Corrections Emp. v. State*, 353 Or 170, 177, 295 P3d 38 (2013) (*AOCE*)). The City argues that we should "analyze the City's waiver defense based on traditional contract principles rather than the clear and unmistakable standard," but it does not explain why or cite any authority to support that contention. The City cannot avoid the "clear and unmistakable language" standard for waiver by agreement by calling this a "waiver by action" case, when the purported action is agreeing to waive.

Even assuming Siegel and Ferschweiler made an enforceable agreement, the record does not establish that Ferschweiler orally agreed to waive the Union's right to bargain in "clear and unmistakable language." In the original order in this case, the Board unanimously determined that "*there was no express waiver of the Union's right to bargain over the budget-related changes but rather a waiver by inaction, which may be implied under certain limited circumstances.*" *Original Order*, UP-059-13 at 14-15, 26 PECBR at 561-62 (emphasis added). Neither the City nor the majority explain how there can be a waiver by "clear and unmistakable language" without an express waiver.

Significantly, the City did not even *allege* that the Union agreed to waive the right to *bargain*, which is the right that is actually at issue in this (1)(e) unilateral change case. Rather, the City alleged that the Union waived its right "to grieve" the budget plan. In the labor context, the terms "grieve" and "bargain" mean different things. "To grieve" means to claim that an action

²³The majority declines to reconsider whether there is sufficient evidence that the Union agreed to the alleged budget deal, because the Union did not argue that issue in its briefing on remand. Perhaps that exercise of discretion is prudent, considering the court held the original Board majority erred by dismissing the complaint based on an affirmative defense that the City neither alleged nor argued. Nonetheless, unlike the City, the Union has argued throughout this case that Ferschweiler did not make the alleged agreement, and the Union assigned error to that factual finding on appeal. (Specifically, the Union's sixth assignment of error on appeal was: "Was ERB's holding that the Union President reached an oral agreement supported by substantial evidence?") In its brief on remand, the Union assumed, for the sake of argument, that Ferschweiler agreed not to grieve certain changes, but it never conceded that he did. And at oral argument, the Union contended that, under such circumstances, this Board may reconsider the question of whether there is sufficient evidence in the record to establish that the parties made the alleged oral agreement. I agree. Further, because the Union appealed that factual finding, I do not believe that the interest in administrative finality requires this Board to refrain from reconsidering it. To the extent there is an interest in finality under these circumstances, it is outweighed by the interest in a decision that is supported by sufficient evidence.

violated an existing agreement. “To bargain” means to meet and confer with the other party for the purpose of negotiating a potential agreement.

Moreover, even assuming that a waiver of the right to grieve would also waive the right to bargain, the testimony of Siegel and Janssens establishes that no one ever used any version of the terms “waiver” or “grieve” when discussing the purported budget agreement with Ferschweiler. Their testimony regarding the language Siegel actually used to describe the deal is uncertain, vague, and inconsistent. At the hearing in this matter, counsel asked Janssens whether Siegel “specifically asked [Ferschweiler], do you agree not to grieve?” Janssens answered, “I know that was implied. I’m trying to remember if it was specifically stated that way.” Similarly, counsel asked Siegel, “[I]n terms of the discussions that you had with Alan Ferschweiler at station 4 [on May 23], would you consider that -- in the discussion that you had, was the word waiver used, or the word waive, like we will waive our right or we will waive a grievance?” Siegel responded, “I don’t remember the specific word waiver.”

When counsel asked Janssens for her best recollection of how Siegel described the proposed compromise, she answered, “Alan, you agree, okay, we’ve got a deal. If you agree, the union is going to be on board, here going to be behind the chief, you’re going to support these changes * * *.” However, when Siegel testified, counsel asked, “And when you say that all parties would support the chief’s proposal, does that include the union not grieving these changes?” And Siegel responded, “Yes. That’s what I mean by support. Actually, support is probably too strong a word to characterize Alan’s position. That they would not oppose I think would be a better way.”

In sum, Siegel and Janssens could not recall what language Siegel used when describing the proposed compromise to Ferschweiler. Janssens thought Siegel asked Ferschweiler to “support” the changes, but Siegel stated that “support” is “too strong a word.” Neither recalls ever using any variation of the words “waiver” or “grievance.” Even assuming that Siegel explicitly stated that the Union would have to agree to “not oppose” the changes, that does not clearly and unmistakably mean the same thing as “not grieve.” Moreover, none of those terms (“support,” “not oppose,” or “not grieve”) clearly and unmistakably mean the same thing as “waive the right to bargain.” Thus, the record does not establish that the Union orally agreed to waive its right to bargain through “clear and unmistakable language.”²⁴

Even assuming that “waiver by the action of agreeing” is somehow different from “waiver by agreement,” the standard for waiver by action requires the City to show that the Union acted in a manner that clearly, unequivocally, and decisively showed that the Union *intended* to waive the right to bargain. *AOCE*, 353 Or at 183 (“Under Oregon law, a waiver is the intentional relinquishment of a known right. To make out a case of waiver of a legal right there must be a

²⁴The majority concludes that the Union agreed “not to oppose or contest” the revised budget plan, and that “the facts establish that it was a central concern for the City to have the Union’s buy-in on the operational changes, such that the City would not have to litigate those changes in any forum (either by grievance or in an unfair labor practice proceeding).” I do not see any evidence in the record that the City expressed concern to the Union about litigation. Nor do I agree that the evidence in the record is sufficient to establish that the parties’ informal, political deal-making about the budget resulted in a valid waiver of the Union’s right to file an unfair labor practice complaint.

clear, unequivocal, and decisive act of the party showing such a purpose.” (Internal quotation marks and citations omitted.)).

For the reasons discussed above, I find that there is insufficient evidence in the record to establish that Ferschweiler said or did something at the May 23, 2013, meeting that clearly, unequivocally, and decisively shows that he intended to agree to not oppose the changes at issue. Even if he did, his conduct at the May 23 meeting would have to be viewed in context, and the record establishes that Ferschweiler continued to publicly oppose many of those changes, including by criticizing the budget plan in an article published on May 30, 2013; opposing many of the changes at the June 20, 2013, City Council meeting; and filing a grievance about those changes on July 14, 2013. Ferschweiler’s acts, when viewed together, do not clearly, unequivocally, and decisively show that the Union intended to agree to not oppose the changes, much less that the Union intended to agree to waive its right to bargain over those changes.

Finally, even assuming that Ferschweiler unequivocally agreed “not to oppose or contest” the operational changes in the context of the budget, such an agreement is not antithetical to, or inherently incompatible with, subsequent bargaining over those changes. For example, even after the City passed the budget on June 20, the Union still could have tried to persuade the City to make different operational changes. As both the City and the majority acknowledge, a budget normally is followed by, and does not foreclose, subsequent bargaining. Indeed, on appeal, the City represented that even after the fire bureau’s budget was approved by the City Council, it did “not necessarily follow that all of those specific changes that here were negotiated between the parties would be implemented,” and the Union did not have a duty to demand to bargain unless and until the City gave it notice that “those changes were going to happen.”²⁵ Additionally, as discussed further below, even if the Union accepted the City’s decision to make certain operational changes, the Union still would retain the right to bargain over the impacts of those changes on mandatory terms and conditions of employment. Thus, “the action of agreeing not to oppose” the changes in the context of the budget does not clearly, unequivocally, and decisively show that the Union intended to waive the right to bargain over those changes.

4. The scope of the purported waiver falls short of providing the City with a complete defense to the Union’s unilateral change claims, in two ways.

First, the Union’s complaint alleges that the City made unilateral changes to mandatory subjects of bargaining by making the following changes: (1) eliminating the Safety Chief position; (2) eliminating the Chief Investigator position; (3) eliminating the Dive Team; (4) reducing the number of investigators in the Investigative unit; (5) eliminating standby pay and mandatory overtime on weekends in the investigative unit; and (6) reducing the number of four-person truck and engine companies at Stations 2 and 8 (*i.e.*, the “consolidation” of companies at those stations) and replacing them with RRVs and quints. However, according to the City’s amended answer, the City’s briefing, and Siegel’s testimony, the Union agreed not to oppose only the last of those changes.

²⁵See *Original Order*, UP-059-13 at 9, 26 PECBR at 556 (finding that the City Council can change the Final Approved Budget at any time), and the City’s Opening Brief on Appeal (“Even after a final approved budget, * * * the City Council can change how it spends money throughout the year.”).

Specifically, the City alleged in its amended answer that the Union agreed to the “reduc[tion of] the number of four-person companies from 40 to 38,” the placement of “four, two-person RRVs in service on a 51.69-hour workweek,” and the “replac[ement of] two trucks with the Quints”, and that, “by agreeing to *those operational changes*, [the Union] waived any right that it had to bargain over the impact of the changes.” (Emphasis added.) Likewise, according to the City’s post-hearing brief, the purported deal included only those operational changes (“consolidate two double companies into single companies and replace the truck and engine with a Quint” and “add two additional RRVs”), not any of the other changes addressed by the Union’s complaint.

The first time that Siegel testified in this case, the City’s counsel asked him to describe the terms of “the deal,” and he stated that, in exchange for the mayor’s agreement to apply for the SAFER grant, the Union needed to “get behind the Chief’s plan.” When counsel asked him to explain what he meant by “the Chief’s plan,” he responded, “Introducing the quints and the RRVs.” Counsel then asked, “When you say introducing the quints, does that include the consolidation of the two companies?” He responded, “Yes.” Siegel did not mention any of the other changes at issue.

The City recalled Siegel to testify on Day 8 of the hearing. On redirect examination, counsel asked, “What agreement was reached at [the May 16 budget forum] meeting?” Siegel responded, “There was an agreement reached between the three parties, the chief, [Ferschweiler] and myself to pursue a common course that we thought was in everyone’s best interest, so it was not an agreement with the mayor on a final budget arrangement, but it was an agreement between the three people present to pursue something that we thought was everybody’s --.” Counsel then asked, “And what were the elements of this common course?” Siegel responded, “That we support the chief’s proposals for introducing quints and RRVs, to pursue a course that would preserve firefighter positions as our paramount shared value in the negotiations, and to be open to -- and to explore financial ways to make it possible to do that, so, for me, that involves bringing the idea of the SAFER grant to the mayor and advocate for that with him.” Counsel asked Siegel to clarify the terms of the deal that they were pursuing at least two more times, and each time, the only changes that Siegel specifically identified were the quints, RRVs, and consolidation of companies at two stations.

Even though, according to the City’s own allegations and briefing, the Union agreed only to the consolidation of companies, introduction of quints, and use of four RRVs, and even though Siegel testified that those were the only changes that he specifically discussed with the Union, the majority concludes that the Union agreed to every single change mentioned in the City’s Final Approved Budget, and thereby waived its right to bargain over all of those changes. In my view, the evidence is far from sufficient to establish that the Union waived its right to bargain over the entire “package” of changes, especially under the stringent standard for a valid waiver set by the court in *AOCE*.²⁶

²⁶The majority notes that the City asserted in its briefing that the Union agreed to all of “the budget cuts” at issue. However, that assertion is contradicted by the City’s allegations in its answer; the City’s list of the alleged agreement’s terms in its post-hearing brief; and the witness testimony.

Second, even assuming that the Union waived its right to bargain over the *decision* to make some (or even all) of the changes discussed in the budget plan, the Union would still retain the right to bargain over *the impacts* of those changes on mandatory terms and conditions of employment.²⁷ Our case law establishes that a waiver of the right to bargain over an employer's decision to make a change is distinct from a waiver of the right to bargain over the impacts of that change on mandatory terms and conditions of employment. *See Oregon School Employees Association v. Sherman Union High School District #1 of Sherman County and Coles*, Case No. C-218-80 at 5 and 9 n 7, 6 PECBR 4715, 4719 and 4723 n 7 (1981), *adh'd to on recons*, 6 PECBR 5009 (1982) (where union pursued bargaining over impacts of decision to contract out, but did not pursue bargaining over decision itself, union waived by inaction the right to bargain over decision, but retained right to bargain over the impacts of that decision). Here, there is no evidence that anyone ever stated, in clear and unmistakable terms, that by agreeing to the alleged budget deal, the Union would be agreeing to waive its right to bargain over *both* the decision to make the changes *and* the impacts of those changes on employees' terms and conditions of employment. Nor is there any evidence that Ferschweiler acted in a manner that clearly, unequivocally, and decisively showed that he intended to so broadly waive the Union's right to bargain.²⁸

5. The City also failed to establish the affirmative defense of estoppel.

The City alternatively argues that this Board "should employ the doctrine of equitable estoppel to prevent PFFA from claiming that president Ferschweiler never agreed to the Chief's plan or promised not to grieve." According to the City's post-hearing and remand briefs, to prove its equitable estoppel defense, "the City must show: (1) a false representation; (2) made with knowledge of the facts; (3) to a party who is ignorant of the truth; (4) with the intention that it be acted upon by the other party; and (5) the other party was induced to act upon it," citing *Day v. Advanced M&D Sales, Inc.*, 336 Or 511, 518-19, 86 P3d 678 (2004).

Regarding the first element, the City contends that "Ferschweiler falsely represented that PFFA would accept the budget cuts and not grieve in exchange for the City pursuing the SAFER grant to prevent 26 firefighters from losing their jobs." For the reasons discussed above, I find that the City failed to prove that Ferschweiler made any such representation.

Regarding the fifth element, the City contends that the alleged misrepresentation induced the City to apply for the SAFER grant instead of "eliminat[ing] four companies and la[ying] off

²⁷For example, the Union could agree to the decision to consolidate companies, introduce quints, and use four RRVs, and in impact bargaining, propose ways to mitigate the impacts of such changes on employees' on-the-job safety.

²⁸The majority concludes that the scope of the alleged waiver is broad because they find insufficient evidence to prove that the scope is limited to certain changes or that the Union retained any right to bargain. In my view, the majority is incorrectly placing the burden of proof on the Union. It is not the Union's burden to prove that the alleged waiver's scope is limited; it is the City's burden to prove that the alleged waiver's scope covers all of the Union's claims. *See PFFA*, 302 Or App at 403 ("Because waiver of the right to bargain is an affirmative defense, it is the employer's obligation to plead and prove it.").

26 firefighters.” The City, however, failed to establish that it would not have taken those actions but for the alleged misrepresentation.

I begin with the City’s assertion that, but for the alleged misrepresentation, the City would have eliminated four companies. The record establishes that Chief Janssens proposed an alternative budget plan, under which the City would make three operational changes instead of eliminating four companies: namely, consolidate two companies, introduce quints, and use four RRVs. The record further shows that the mayor supported making those three changes (instead of eliminating four companies), and that the mayor’s support predated, and therefore was not contingent on, the alleged misrepresentation.

I turn to the City’s assertion that, but for the alleged misrepresentation, the City would have laid off 26 firefighters instead of pursuing the SAFER grant. The record establishes that Janssens’ alternative budget plan also included applying for the SAFER grant. Specifically, in a May 20, 2013, memo to all employees, Janssens stated that, under her alternative plan, the fire bureau would pursue the SAFER grant to avoid laying off 26 firefighters. Janssens also stated that she was “optimistic about receiving this grant,” and that the mayor supported her alternative plan. Janssens made these statements *before* Ferschweiler made the alleged misrepresentation to Siegel on May 23. Thus, Janssens’ statements indicate that the mayor’s support for the SAFER grant predated, and therefore was not contingent on, the alleged misrepresentation.

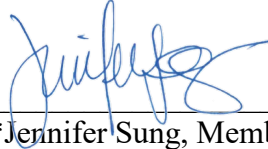
Further, the Union opposed and grieved the changes that it allegedly promised not to oppose or grieve, and it did so before the City actually applied for the SAFER grant. Specifically, the Union opposed the changes at the June 20 City Council meeting, and filed a grievance on July 14.²⁹ The City did not apply for the SAFER grant until September or October, *i.e.*, at least several months later. If applying for the SAFER grant was contingent on the Union’s alleged promise not to oppose or grieve the changes, then when the Union broke that alleged promise by opposing and grieving the operational changes, the City should have declined to submit the SAFER grant application (and proceeded with laying off 26 firefighters instead).³⁰ But the City did not; it applied for the grant anyway. Thus, the City has failed to prove that it would not have applied for the SAFER grant but for the alleged promise.

In sum, the parties, at most, made an informal oral agreement (a “political deal”), the terms of which are ambiguous and disputed. Because the parties never reduced the alleged oral agreement to writing, both the oral agreement, and any waiver included in that agreement, are unenforceable under the parties’ CBA. In any event, the evidence does not establish that the

²⁹The Union also refiled the same grievance on July 31, 2013; corresponded with Chief Janssens on August 8, 2013, regarding the parties’ attempts to resolve the grievance; and publicly criticized the introduction of quints (one of the operational changes at issue) on August 26, 2013.

³⁰Although the City Council acknowledged that the City had “committed” to applying for the SAFER grant on June 20, the record also establishes that the decision to apply for the SAFER grant was not irrevocable at that point. Specifically, the City issued layoff notices to 26 firefighters on July 30, 2013; the City Council did not formally authorize the City to apply for the SAFER grant until August 7, 2013; the City did not actually submit an application for the SAFER grant until September or October 2013; and the City did not receive and accept the grant funds until some point after that.

Union actually agreed to the alleged oral agreement. Nor does the evidence establish that the Union intended to waive its statutory right to bargain over every change discussed in the City's budget plan, as well as their impacts. Because the City failed to establish that the parties made an enforceable agreement that included a valid waiver of the Union's right to bargain over all of the changes at issue, the City failed to establish that the Union waived its right to bargain by the action of agreeing. The City also failed to establish its estoppel defense. Because "[t]he [C]ity has conceded that at least some of the changes in the adopted budget were changes to the status quo relating to operations that were mandatory subjects of bargaining," *PFFA*, 302 Or App at 399, and the City did not prove either of its affirmative defenses, I would conclude that the Union established its (1)(e) unilateral change claim.

A handwritten signature in blue ink, appearing to read "Jennifer Sung", is positioned above a horizontal line.

*Jennifer Sung, Member

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-007-20

(UNIT CLARIFICATION)

OREGON AFSCME LOCAL 88,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER CLARIFYING EXISTING
	)	BARGAINING UNIT
MULTNOMAH COUNTY,	)	
	)	
Respondent.	)	
	)	

On September 3, 2020, Oregon AFSCME Local 88 (AFSCME) filed a petition under OAR 115-025-0005(3) to clarify that certain employees of Multnomah County are in an existing bargaining unit based on certification or contract language. Specifically, AFSCME asked that this Board clarify that on-call employees who perform work at social distancing shelters and voluntary isolation motels are included in its “General Employee Unit.” In support of its petition, AFSCME included an agreement between the parties recognizing AFSCME as the exclusive representative of all on-call and temporary county employees in classifications represented by AFSCME, with the exception of (1) seasonal employees; and (2) employees without a reasonable expectation of continued employment.¹ The petition asserted that the petitioned-for employees did not fall into these exceptions, and that they are therefore already included in AFSCME’s existing unit.

On September 9, 2020, the Board’s Election Coordinator provided the County with the petition and supporting materials and caused a notice of the petition to be posted. Pursuant to the terms of the notice posting, objections to the unit clarification were due within 14 days of the date of the notice posting (*i.e.*, by September 25, 2020). There were no objections to the petition. In light of the petition and supporting information and the absence of objections to the petition, we clarify the unit as requested.

////

¹The agreement also identified other expressly excluded employees who are not applicable to the petitioned-for employees.

ORDER

The on-call employees (identified in the petition) who perform work at social distancing shelters and voluntary isolation motels are included in the “General Employee Unit” currently represented by Oregon AFSCME Local 88.

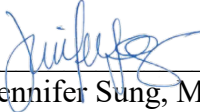
DATED: September 29, 2020.



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-012-19

(UNFAIR LABOR PRACTICE)

MULTNOMAH COUNTY CHAPTER OF THE)
FEDERATION OF OREGON PAROLE AND)
PROBATION OFFICERS,)

Complainant,)

v.)

MULTNOMAH COUNTY,)

Respondent.)

FINDINGS AND ORDER FOR
REPRESENTATION COSTS

On August 6, 2020, this Board issued an order holding that Multnomah County violated ORS 243.672(1)(g) when it did not comply with an arbitration award ordering the reinstatement of a parole and probation officer. 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. Multnomah County Chapter of the Federation of Oregon Parole and Probation Officers (the Union) 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).

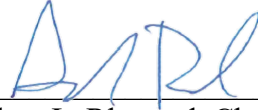
2. This case was presented solely on stipulated facts, without an evidentiary hearing.

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 presented solely on stipulated facts is \$1,000. OAR 115-035-0055(1)(b)(B).

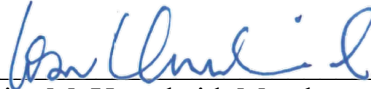
ORDER

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

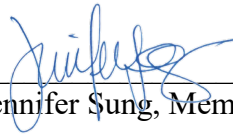
DATED: October 15, 2020.



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. MA-006-19

(MANAGEMENT SERVICE APPEAL)

E. A.,

Appellant,

v.

STATE OF OREGON, DEPARTMENT OF
CORRECTIONS,

Respondent.

ORDER ON RECONSIDERATION

Steven N. Thomas, Attorney at Law, Corey, Byler & Rew, LLP, Pendleton, Oregon, represented the Appellant.

Margaret J. Wilson, Senior Assistant Attorney General, Department of Justice, Salem, Oregon, represented the Respondent.

On October 7, 2020, Appellant requested reconsideration of this Board's September 23, 2020, order (Final Order). In the Final Order, we concluded that Appellant's removal from the management service (and dismissal from state service) did not violate ORS 240.570(3), and we dismissed the appeal. On October 13, 2020, Respondent State of Oregon, Department of Corrections (DOC) filed a response to the petition. Having considered Appellant's petition and DOC's response, we adhere to our Final Order, as supplemented by this order.

In his petition for reconsideration, Appellant asserts a claim of factual error with respect to six of the findings of fact in our Final Order (Findings of Fact 12, 24, 39, 54, 55, and 94). OAR 115-010-0090(1) requires parties to file specific written objections to facts or conclusions in a recommended order. In his objections to the recommended order in this case, Appellant did not object to the factual findings now included in Findings of Fact 24, 39, 54, 55, and 94 in the Final

Order.¹ When a party does not object to a finding of fact or conclusion of law in a recommended order, we consider “potential objections unpreserved and waived.” *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-022-16 at 12 n 14, 27 PECBR 112, 123 n 14 (2017), *aff’d*, 298 Or App 332, 447 P3d 50 (2019); *Jackson County Sheriff’s Employees’ Association v. Jackson County Sheriff’s Department*, Case No. UP-023-11 at 11, 25 PECBR 449, 459 (2013); OAR 115-045-0030. Consequently, we decline to reassess the facts in Findings of Fact 24, 39, 54, 55 and 94 that are belatedly challenged in the petition for reconsideration.²

With respect to Finding of Fact 12, Appellant asserts that the statement that Captain Jason Walker counseled Appellant about respectful workplace behavior is erroneous. Appellant is correct that Finding of Fact 12 contains a misstatement. Appellant was counseled *about* (not by) Captain Walker. In February 2018, Appellant was orally counseled by Assistant Superintendent David Pedro about making negative statements about Captain Walker’s assignment. Assistant Superintendent Pedro described Appellant’s comments as “contrary to team play.” Appellant disputes that this conversation occurred, but we credit Assistant Superintendent Pedro’s specific, credible testimony and documentation about the conversation. We adhere to our finding that Appellant was orally counseled on two occasions and to our conclusion that Appellant’s substantial training on communications, boundaries, respectful workplace, and related topics, as well as the counseling, was sufficient to put Appellant on notice of DOC’s expectations.

Appellant, in his petition, also asserts that “something more needs to be said about the fact that most of [DOC’s] charges against Appellant were not found to be substantiated.” In its removal letter, DOC alleged two charges, and substantiated only the charge identified as “lack of professional boundaries and poor judgment and failure to maintain a professional and respectful workplace.” Under our two-step analysis, if we find that the employer “has proven *any* of the charges, we then apply the reasonable employer standard to determine whether the employer was justified in imposing the disciplinary actions that it did.” *Blank v. State of Oregon, Construction Contractors Board*, Case No. MA-007-14 (December 2014), *recons* at 12 (March 2015), *aff’d without opinion*, 277 Or App 783, 376 P3d 304 (2016) (emphasis added). We did just that in this case, and analyzed whether DOC acted reasonably in removing Appellant from the management service based solely on the substantiated, second charge. *See Garrett v. State of Oregon, Department of Human Services*, Case No. MA-02-11 (December 2011) (“removal from management service may be based on a single proven charge”).

¹Specifically, Appellant did not object to the following numbered findings of fact in the recommended order: (1) that CISM members are not supposed to be managers or the officer-in-charge (Finding of Fact 21); (2) that the door to the lieutenant’s office does not lock (Finding of Fact 25); (3) that Officer SJ told Appellant at 3:50 a.m. that she had missed tier checks (Finding of Fact 68); (4) that an employee joked that Appellant was “trying to get in [Officer SJ’s] pants” (Finding of Fact 69); and (5) that Appellant did not get a copy of the video footage until after termination (Finding of Fact 111).

²We note that the challenged facts are either tangential (Finding of Fact 54) or immaterial (Findings of Fact 24, 39, 55, and 94) to our conclusion that DOC carried its burden to prove that Appellant’s removal from the management service was consistent with ORS 240.570(3).

In reaching our conclusion, we adhered to the Administrative Law Judge's conclusions in the recommended order that two of the supporting facts listed under the second charge—that Appellant improperly encouraged Officer SJ to be inattentive to tier checks, and that Appellant was improperly inattentive to a request from Sergeant Williams—were not substantiated. *See* Final Order at 24 n 18. In addition, we concluded that DOC did not substantiate the factual allegation that Appellant acted improperly by taking Officer SJ to the Pendleton Police Department shooting range. We acknowledge, as Appellant asserts in his petition, that these *aspects* of the second charge in the removal letter were not established. That does not mean, however, that the charge itself was not proven. Here, the crux of the second charge was that Appellant, as a manager, engaged in and modeled inappropriate behavior by participating in an extended, inappropriate personal conversation with Officer SJ and by disparaging union-represented classified staff by making inappropriate remarks and by using an inappropriate nickname. DOC alleged that, as a consequence, it lost trust and confidence in Appellant as a member of its management team. DOC met its burden to prove sufficient facts to establish the second charge. As we did in our Final Order, we acknowledge that managers must sometimes make nuanced judgment calls when managing subordinates. *See* Final Order at 24. We also reaffirm our conclusion that—even taking into account that some aspects of the second charge were not substantiated—the record demonstrates that Appellant fell short of DOC's standards for its managers. Appellant was not a classified employee, and once he accepted promotion into the management service, he agreed to "be held to high standards of behavior, so long as those standards are not arbitrary or unreasonable." *Stoudamire v. State of Oregon, Department of Human Services*, Case No. MA-4-03 at 7 (November 2003). On the record in this case, DOC's standards for Appellant, as a lieutenant and officer-in-charge, were not arbitrary or unreasonable, and DOC proved that Appellant did not meet them.³

ORDER

We adhere to our September 23, 2020, order, as supplemented by this order. The appeal is dismissed.

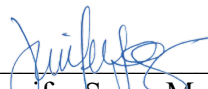
DATED: October 20, 2020.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

³Appellant, in his petition, also contends that our Final Order erroneously states that DOC did not remove Appellant for sexual harassment. Appellant argues that Superintendent Washburn testified that Appellant was removed on the basis of sexual harassment. We disagree. In her testimony, Superintendent Washburn mentioned DOC's "zero tolerance" for sexual harassment, but we understand that she was providing context to explain why Appellant, as a lieutenant with substantial training, should have known that his extended meeting with Officer SJ, under the circumstances presented by this case, was inappropriate. Superintendent Washburn did not testify that Appellant was removed for sexual harassment, and the removal letter does not allege sexual harassment.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-023-20

(UNFAIR LABOR PRACTICE)

OREGON TECH AMERICAN ASSOCIATION	)	
OF UNIVERSITY PROFESSORS,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
OREGON INSTITUTE OF TECHNOLOGY,	)	CONCLUSIONS OF LAW,
	)	AND ORDER
Respondent.	)	
	)	

Elizabeth A. Joffe, Attorney at Law, McKanna Bishop Joffe, LLP, Portland, Oregon, represented the Complainant.

Jeffrey Chicoine and Taylor Richman, Attorneys at Law, Miller, Nash, Graham & Dunn, LLP, Portland, Oregon, represented the Respondent.

On August 10, 2020, Oregon Tech American Association of University Professors (Association) filed an unfair labor practice complaint against Oregon Institute of Technology (Oregon Tech). The complaint alleges that Oregon Tech violated ORS 243.672(1)(e) by making unilateral changes concerning faculty workload and compensation. The Association requested that this Board expedite the complaint under OAR 115-035-0060. Oregon Tech opposed that request. On August 20, 2020, the Board issued a letter ruling expediting the case.

On August 24, 2020, we issued a prehearing order, which set forth the parties' agreed on schedule. We also issued a notice of hearing for September 9 and 10, 2020. Oregon Tech filed a timely answer to the complaint on August 28, 2020. The parties filed prehearing briefs on September 4, 2020. On September 9, 2020, the first date of the scheduled hearing, Oregon Tech filed a motion for leave to amend its answer to reflect the fact that it rescinded the 2020-2021 Faculty Workload Guidelines, one of the alleged changes at issue. At hearing, the Association indicated that it did not oppose the motion for leave to amend the answer; it opposed only Oregon Tech's arguments regarding the effect of the rescission on the Association's claim. Based on the

parties' representations at hearing, we granted Oregon Tech leave to file the amended answer, and it did so on September 11, 2020.

This Board conducted a hearing on September 9, 10, and 21, 2020, by video conference. The parties made oral closing arguments on September 21, at which point the record closed.

As stated by the Board at hearing, the issues presented in this case are: Did Respondent violate ORS 243.672(1)(e) by unilaterally changing the status quo with respect to (1) faculty workload and compensation and (2) program director release time and stipends?

For the following reasons, we conclude that Oregon Tech violated ORS 243.672(1)(e) when it unilaterally changed the 2018-2019 Faculty Workload Guidelines and when it unilaterally eliminated program director stipends and release time under the Academic Release Time and Stipend Model.

RULINGS

The Board reserved ruling on Oregon Tech's objections to the admission of the Association's exhibits C-35 (a document regarding cross-listing requests) and C-38 (an email dated August 7, 2020, from Debbie McCollam, a department chair) on the ground of relevance. We overrule the objections and admit both exhibits.

Oregon Tech also made a standing objection to all evidence (exhibits and testimony) regarding the Faculty Workload Guidelines, arguing that, because it rescinded the 2020-2021 Guidelines, the Association failed to state a claim and the claim should be dismissed.¹ When determining whether a party has stated a claim before conducting an evidentiary hearing, we assume all of the well-pleaded facts in the complaint are true, and under that standard, the Association's complaint stated a cognizable claim. Further, as we explain in our conclusions of law, the fact that Oregon Tech rescinded the 2020-2021 Guidelines does not necessarily mean that no unfair labor practice occurred. Accordingly, we decline to dismiss this claim, and we adhere to our ruling admitting all of the related evidence.

Neither party pursued any other objections to the Board's rulings.

FINDINGS OF FACT

The Parties

1. The Association is a labor organization within the meaning of ORS 243.650(13). On June 27, 2018, this Board certified the Association as the exclusive representative of the following bargaining unit:

"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:

¹Although Oregon Tech did not make a motion to dismiss, we address this argument because Oregon Tech raised it in support of its evidentiary objection.

(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.”

2. Oregon Tech is a public employer within the meaning of ORS 243.650(20). Oregon Tech is one of Oregon’s public universities.

3. Since July 1, 2015, Oregon Tech has been an independent public body governed by its Board of Trustees, who are appointed by the Governor and approved by the Senate. The Trustees approve Oregon Tech’s mission, programs, budgets, and strategies. Oregon Tech receives approximately 45% of its general fund from the State of Oregon, with the remainder (approximately 50%) generated from tuition.

4. Oregon Tech has four primary campuses: Oregon Tech Klamath Falls Campus; Oregon Tech Wilsonville Campus; Oregon Tech Online Campus; and the Oregon Tech Extension in Salem, Seattle, and La Grande.

5. Oregon Tech is divided into two colleges: the College of Health, Arts and Sciences (HAS), and the College of Engineering, Technology and Management (ETM). The colleges are university-wide and extend to all campuses and operations. Oregon Tech offers both undergraduate and graduate degree programs.

6. Oregon Tech is further divided into 15 academic departments, all of which operate within one of the two colleges. Each year, approximately 15 faculty members serve as department chairs; when they do so, they are represented by the Association in a separate bargaining unit.

7. The president of Oregon Tech is the executive and governing officer of the university, the president of the faculty, and, under the Board of Trustees’ supervision, has the authority to direct the affairs of Oregon Tech. The current president of Oregon Tech is Dr. Nagi Naganathan.

8. The provost is the chief academic officer of Oregon Tech. The provost supervises academic programs in the two colleges (HAS and ETM) in collaboration with the dean of each college and the Faculty Senate. The current provost is Dr. Joanna Mott, who holds the title of Provost and Vice President for Academic Affairs and Strategic Enrollment Management.

9. The vice provost is Dr. Abdeh Afjeh. The dean of the College of Health, Arts and Sciences is Dr. Dan Peterson. The dean of the College of Engineering, Technology and Management is Dr. Tom Keyser.

10. Oregon Tech employs approximately 300 faculty members, including administrators. The Association bargaining unit includes approximately 170 faculty members, who may be tenured, tenure track, or non-tenure track. Tenure track and tenured faculty are also referred to collectively as “professorial faculty.” Tenure track faculty typically start at the rank of assistant

professor, and they are eligible for promotion to associate professor, and then professor. Associate professors and professors are tenured. Non-tenure track faculty are also referred to as “professional faculty,” and generally hold the rank of instructor. Oregon Tech also employs adjunct faculty, who are unrepresented.

11. According to Oregon Tech’s faculty evaluation policy (OIT 21-040), it evaluates faculty on an annual basis. Oregon Tech considers faculty members’ evaluations when making decisions on reappointment, promotion, and tenure. It evaluates a faculty member’s work performance in three areas: (1) instruction, (2) professional development, and (3) institutional and professionally-related public service.

12. Under the category of instruction, the faculty evaluation policy notes that “the primary focus at Oregon Institute of Technology is teaching,” and that faculty are expected to “excel in instruction.” The policy indicates that, to excel in instruction, a faculty member must demonstrate knowledge of the subject matter; develop and revise curriculum to meet departmental and course objectives; organize and deliver course materials to stimulate interest and discussion; demonstrate growth in instruction; employ a variety of assessment tools for evaluation of both teaching effectiveness and student learning; and maintain student numerical evaluations at a departmentally established standard.

13. Under the category of professional development, the faculty evaluation policy provides, “Faculty will advance knowledge in education and/or areas consistent with institutional, departmental, and personal goals and objectives.” Examples of professional development include research and publishing, participation in academic conferences, participation in related professional organizations, professionally relevant employment or consulting, earning a higher degree, and continuing education.

14. Under the category of institutional service, the faculty evaluation policy provides, “Faculty will contribute to the advancement of the institution consistent with institutional, departmental, and personal goals and objectives.” Examples of institutional service include serving on institutional, departmental, and/or faculty senate committees, participating in student advising or activities, serving as a department coordinator (assessment, advising, curriculum, program, scheduling, etc.), contributing to student recruitment and retention, and serving as a department chair.

15. Most of the faculty in the bargaining unit represented by the Association are nine-month employees. Each faculty member receives an annual notice of appointment, running from mid-September to the following June (*e.g.*, approximately the academic year). The 2020-2021 notices of appointment were issued on July 1, 2020. The appointment period is September 16, 2020 to June 15, 2021. The notice of appointment states the faculty member’s annual base salary rate and the percentage of FTE that the salary rate is based on.

16. Oregon Tech has a Faculty Senate that is responsible for considering proposed changes in university policies, recommending policy changes to the president and the President’s Council, considering issues affecting the general welfare of the faculty, and establishing policies

regarding academic freedom. Senate elections are conducted annually. All full-time faculty members with the academic rank of instructor or above are eligible to be elected.

17. Dr. Mark Clark is a professor in the Humanities and Social Sciences Department. He served as the Association's first president from December 2018 to June 2020.

18. Dr. Sean St. Clair is a professor in the Civil Engineering Department. He succeeded Clark as the Association president. His term started at the end of June 2020, and he was president at the time of hearing.

First Contract Bargaining

19. Dr. Cristina Negoita is a professor in the Applied Mathematics Department. She is an Association vice president and its chief negotiator in first contract bargaining.

20. Brian Caufield is the Director of Labor Relations Services for University Shared Services Enterprise and the chief negotiator for Oregon Tech.

21. On July 12, 2019, the Association sent its first request for bargaining dates to Oregon Tech. The Association suggested that the parties meet to bargain on August 7 or 14, 2019.

22. Oregon Tech declined the initial dates proposed by the Association. The parties discussed ground rules from October 17, 2019 to November 20, 2019. The parties agreed to exchange first proposals on December 5, 2019, to begin the bargaining clock on December 5, 2019, and to extend the bargaining period to 300 days.

23. The parties have met for bargaining on the following dates: December 6, 2019, January 16, 17, 30, 31, February 27, 28, March 12, 13, April 6, 13, 20, 27, May 11, 18, June 1, 8, 23, 24, July 14, 15, 28, 29, and August 11 and 12, 2020. The parties scheduled additional bargaining dates for September 2020.

24. On June 1, 2020, the Association provided Oregon Tech a written proposal on workload and overload compensation. The Association also made a PowerPoint presentation regarding faculty workload, to provide context for its proposal. Oregon Tech requested, and the Association provided, a copy of the presentation and its supporting data.

25. On July 29, 2020, Oregon Tech provided the Association a written proposal on workload and overload.

26. At the time of hearing, the parties were still engaged in first contract bargaining.

The Faculty Workload Guidelines

27. Oregon Tech requires faculty members to perform both instructional work and non-instructional work. Instructional work is, primarily, teaching a course. Non-instructional work includes professional development and service.

28. Since at least 2009, Oregon Tech has issued a document titled, “Faculty Workload Guidelines” (Guidelines).

29. From 2009 to 2018, the provost’s office typically issued a revised version of the Guidelines each academic year. When the provost’s office issued new Guidelines for a given academic year, it typically did so in the preceding spring term (before the preceding June), so that faculty members’ fall schedules could be set in accord with the applicable Guidelines. Thus, for example, the 2018-2019 Workload Guidelines were issued in or about the spring term of 2018.

30. The provost’s office drafted 2019-2020 Guidelines, but it did not issue them. Thus, the 2018-2019 Guidelines remained in effect for the 2019-2020 academic year.

31. The first section of the 2018-2019 Guidelines is titled, “Instructional Workload Definitions.” It defines what constitutes a “full instructional load,” which Oregon Tech refers to as the “instructional load standard,” for faculty on tenure track (a.k.a. “professorial”) and non-tenure track (a.k.a. “professional”) appointments.

- For a full-time tenure track faculty member, the instructional load standard is defined as 12 workload units (WLU) per term, which equals 36 workload units per academic year.²
- For a non-tenure track faculty member, the instructional load standard is defined as 14 workload units per term, which equals 42 workload units per academic year.

32. The 2018-2019 Guidelines note that non-tenure track faculty are “also expected to carry the equivalent of 3 WLU for non-teaching duties per academic year as assigned by the Chair to meet their 1.0 FTE.” This means that Oregon Tech expects non-tenure track faculty to carry a combined total of 45 workload units per academic year (42 instructional workload units, plus three non-instructional workload units).

33. The 2018-2019 Guidelines do not expressly indicate how many non-instructional workload units tenure track faculty are expected to carry. However, other evidence in the record indicates that Oregon Tech also expects tenure track faculty to carry a combined total of 45 workload units per academic year to meet their 1.0 FTE (36 instructional workload units, plus nine non-instructional workload units).

34. The Faculty Workload Guidelines also include rules and formulas for calculating how many instructional workload units are credited for teaching various types of courses. For example, one “contact hour” is defined as “50 minutes of scheduled instruction.” One “lecture contact hour” equals one workload unit. Depending on the department, three “lab contact hours” equal either one or two workload units.

²The Guidelines use the terms “workload hour” and “workload unit,” and the abbreviation “WLU,” interchangeably. For ease of reference, we use the term workload unit.

35. Oregon Tech applies the Faculty Workload Guidelines to determine how many instructional workload units should be credited to a faculty member for the courses they teach. Oregon Tech also applies the Faculty Workload Guidelines to determine whether a faculty member has met the applicable instructional workload standard.³

36. Oregon Tech pays faculty additional compensation, referred to as “overload pay,” if they exceed the applicable instructional workload standard for the academic year. As stated in the 2018-2019 Guidelines, under the section titled “Overloads,” “[o]verload pay is triggered when faculty surpass their specified workload threshold.” Thus, for example, when a full-time, tenure track faculty member is credited with 40 instructional workload units in an academic year, Oregon Tech pays them overload compensation for the four workload units that exceed the 36-workload unit standard. Overload is compensated on “a per workload unit basis at each location’s specified rate.” Overload is “calculated at the end of spring term to be paid on June 30th.”

37. Oregon Tech applies the Faculty Workload Guidelines to determine whether a faculty member’s total instructional workload units for a given academic year exceeds the instructional workload standard, and to determine how much overload compensation to pay them.

38. Department chairs have the authority to assign bargaining unit faculty members instructional work (courses) and non-instructional work (such as program director duties). In at least some departments, the chairs and faculty discuss and reach consensus regarding course and non-instructional assignments.

39. Faculty members’ assignments for the fall term of the 2020-2021 academic year were determined in the spring of 2020. In some departments, the assignments for the winter and spring terms were also determined at that time. Faculty members’ assignments for the 2020-2021 academic year were based on the 2018-2019 Guidelines.

40. In past years, the changes that Oregon Tech made to the Guidelines generally were limited in number and substance. In some years, Oregon Tech increased the overload pay rate. For example, in the 2016-2017 Guidelines, Oregon Tech increased the rate from \$600 per workload unit above the 36-workload unit threshold to \$625 per workload unit.

41. In June 2020, Oregon Tech administrators circulated a new version of the Guidelines, titled “Faculty Workload Guidelines 2020-2021,” to department chairs and requested their feedback.

42. The 2020-2021 Guidelines differ from the 2018-2019 Guidelines in a number of respects. The substantive changes at issue are described below.

³The record indicates that, occasionally, deviations from the Guidelines have occurred (or exceptions have been permitted), but such deviations do not undermine the finding that, as a general matter, Oregon Tech administrators and faculty use the Guidelines to measure and quantify faculty workload.

Externships

43. In some programs, faculty teach externship courses, through which they supervise students who are completing externships with outside employers for academic credit.

44. For example, the Medical Imaging Technology Department (MIT Department) offers bachelor degrees in five professional programs: Radiologic Science, Vascular Technology, Nuclear Medicine and Imaging Technology, Echocardiography, and Diagnostic Medical Sonography. To graduate from one of those programs, a student must complete a year-long clinical externship that meets accreditation standards. Approximately 45-50 students are enrolled in the Radiologic Science program's externship course each year. All four of the other programs typically have 18-23 students enrolled in their respective externship courses each year.

45. The faculty member who teaches the externship course is responsible for regularly communicating with and mentoring the students; coordinating with clinical instructors to ensure each student is receiving the necessary experience and training; evaluating each student's progress; addressing incidents or unprofessional conduct; writing, administering, and grading exams; testing competencies; addressing accreditation issues; and completing required documentation.

46. Under the 2018-2019 Guidelines, Oregon Tech calculated the instructional workload units for teaching an externship course based on student enrollment, according to the following formulas:

- Fewer than 18 students enrolled: 6-12 workload units per term.
- 18-22 students enrolled: 12 workload units per term.
- 22-48 students enrolled: 12-24 workload units per term.

47. In the 2020-2021 Guidelines, Oregon Tech changed the workload unit formulas for externship courses so that the number of workload units is based on a combination of student enrollment and course credit hours. As stated in the 2020-2021 Guidelines posted on the provost's website, the new formulas are:

- Fewer than 3 students enrolled per year, WLU "= 0 WLU"
- 3-5 students enrolled per year, "WLU = $1/3 \times$ Number of course credit hours"
- 6-9 students enrolled per year, "WLU = $2/3 \times$ Number of course credit hours"
- More than nine students enrolled per year, WLU "= 3 WLU"

48. Richard Hoylman is a professor of Nuclear Medicine and Medical Imaging in the MIT Department. He has served as the externship coordinator, *i.e.*, taught the externship course,

for Nuclear Medicine since the spring term of the 2001-2002 academic year. Since then, including under the 2018-2019 Guidelines, he has received a total of 36 workload units per year for teaching the externship course (unless he split the responsibilities with another faculty member, in which case, each received 18 workload units per year). Hoylman testified that he and the other faculty in his department understood that, under the 2020-2021 Guidelines, they would receive only a total of three workload units per year for teaching their department's externship courses, because all of those courses have more than nine students enrolled per year.⁴

Graduate Courses

49. Under the 2018-2019 Guidelines, Oregon Tech calculated the instructional workload units for teaching a graduate course based on the following formulas:

- 1-5 students enrolled: workload units equal " $\frac{2}{3}$ x number of credits" (e.g., "3 credit course = 2 WLU").
- 6-11 students enrolled: workload units equal "1 x number of credits" (e.g., "3 credit course = 3 WLU").
- 12 or more students enrolled: workload units equal " $\frac{4}{3}$ x number of credits" (e.g., "3 credit course = 4 WLU").

50. In the 2020-2021 Guidelines, Oregon Tech eliminated the third tier, which increased the number of workload units credited for teaching a graduate course with 12 or more students enrolled. Under the 2020-2021 Guidelines, the workload unit formulas for graduate courses are:

- 1-5 students enrolled: workload units equal " $\frac{2}{3}$ x number of credits" (e.g., "3 credit course = 2 WLU").
- 6 or more students enrolled: workload units equal "1 x number of credits" (e.g., "3 credit course = 3 WLU").

⁴Because the 2020-2021 Guidelines state that an externship with more than nine students equals three workload units (" >9 students per year = 3 WLU"), faculty in the MIT Department, including the chair, understood that they would receive only three workload units per year for teaching their programs' externship courses in the 2020-2021 academic year. However, at hearing, Afjeh testified that "3 WLU" was a typo, and that the Guidelines were supposed to indicate that the workload units would equal the total number of course credit hours (e.g., the faculty member would receive 12 workload units for a 12-credit externship course with more than nine students enrolled). Although Oregon Tech was aware that the MIT Department chair and bargaining unit faculty were very concerned about the apparently large reduction of workload unit credit for externship courses under the 2020-2021 Guidelines, Oregon Tech did not inform them that there was a typo in the externship section before the hearing in this case. We do not need to resolve whether Oregon Tech made a typo or speculate as to whether or when Oregon Tech would have corrected it. Even assuming that Oregon Tech intended to state that the workload units for an externship course with more than nine students enrolled would "equal the course credit hours," that would still represent a change. And, Oregon Tech also made many other changes to the 2018-2019 Guidelines.

51. There are a total of six faculty in the Civil Engineering Department, including the chair, and all six teach in the graduate program. The Civil Engineering Department regularly has a number of graduate courses with more than 12 students enrolled. A typical engineering course is four academic credits.

52. Under the 2018-2019 Guidelines, a faculty member teaching a four-credit graduate course with more than 12 students enrolled would receive 5.33 workload units. Under the 2020-2021 Guidelines, they would receive 4 workload units.

Graduate Projects or Theses

53. In a graduate project or thesis course, the graduate student completes independent work under the supervision of the faculty member (commonly referred to as the faculty or graduate “advisor”). The graduate advisor’s duties typically include working with the student to select the project area; working with outside contacts to identify relevant projects; identifying literature to review; reviewing drafts and data analysis; training the student to use equipment or software; supervising conduct of the project; providing feedback; and assessing the project for final approval.

54. Under the 2018-2019 Guidelines, the workload unit formula for supervising graduate projects or theses is: “ $1/2 \times \text{number of credits} \times \text{number of students}$.”

55. Under the 2020-2021 Guidelines, the workload unit formula for supervising graduate projects or theses is: “0.5 credits per student per 3 credit hour course.”

56. Under the 2018-2019 Guidelines, a faculty member would receive 4.5 workload units for advising one graduate student’s project for a “3 term, 3 credit per term sequence.” Under the 2020-2021 Guidelines, a faculty member would receive 1.5 workload units for the same project.

57. Dr. Roger Lindgren is a professor in the Civil Engineering Department. At the time of hearing, he was serving as the department chair. His testimony established the following. Civil Engineering faculty sometimes teach multiple graduate courses with more than 12 students enrolled in one academic year. In a typical academic term, the Civil Engineering Department faculty members collectively advise 10-12 graduate theses or projects. Additionally, faculty members sometimes teach a graduate level course with more than 12 students enrolled and advise one or more graduate projects, in the same term. As a result, it is reasonably likely that the changes made in the 2020-2021 Guidelines will have a significant impact on some faculty members’ workloads. For example, under the 2020-2021 Guidelines, it is reasonably likely that some faculty members will need to teach one or two additional courses per term to meet Oregon Tech’s standard for a full instructional workload.

Independent Studies

58. According to the Guidelines, “[t]here may be times when it is necessary to accommodate students with special interests, needs, or when course schedules do not permit

students to take a required course. Independent Studies/Reading and Conference Courses are designed to fill this need.”

59. Under the 2018-2019 Guidelines, Oregon Tech calculated the instructional workload units for teaching an independent study based on the following formulas:

- “< 3 students per year = 0 WLU
- “3-5 students per year = 1 WLU
- “6-9 students per year = 2 WLU
- “> 9 students per year = 3 WLU”

54. Under the 2020-2021 Guidelines, faculty members will not receive any workload units for teaching independent study courses, regardless of the number of students. Specifically, the 2020-2021 Guidelines state: “No workload units are assigned for independent studies. Independent studies courses are not included in faculty workload calculations.”

Online Education Courses

60. The 2018-2019 Guidelines generally do not address online education courses. They state only that the development of “fully online courses * * * are not included in faculty workload calculations unless in accordance with the Online Workload Guidelines.”

61. Oregon Tech has issued two documents that address workload and compensation for online courses. One is titled “Online Compensation and Workload Guidelines” and is dated September 2018. Another is titled “Faculty Compensation Guidelines,” and indicates that it was last revised “Winter 2012.”

62. Some faculty members who normally teach on-campus courses also teach online courses. Oregon Tech generally requires faculty members to meet the instructional workload standard (36 WLU for tenure track faculty) by teaching only on-campus courses, and then permits them to teach online courses under a separate Oregon Tech contract for additional pay. (As stated in the Faculty Compensation Guidelines, “faculty will teach online courses outside of their regular work load, and will receive additional pay.”) In other words, Oregon Tech does not count the online course when determining whether the faculty member has met the standard for a full instructional workload. Under such circumstances, the online course is referred to as “out-of-load” work.

63. Under certain circumstances (as specified in Oregon Tech’s Online Compensation and Workload Guidelines), Oregon Tech may approve a faculty member teaching an online course as part of their regular workload. In other words, Oregon Tech may permit the faculty member to meet the instructional workload standard by teaching a combination of on-campus and online courses. Under such circumstances, the online course is referred to as “in-load” work.

64. Sometimes, faculty members teach an on-campus course and an online course on the same subject, in the same term, but at different times and to different groups of students. For some years, including under the 2018-2019 Guidelines, Oregon Tech did not require the faculty

member to cross-list those on-campus and online courses. Additionally, Oregon Tech counted those online and on-campus courses separately when calculating the faculty member's instructional workload units. In other words, the faculty member received workload units for two courses.

65. The 2020-2021 Guidelines include a new provision that states: "Any online course section offered in the same term in which an equivalent on-campus course section is offered should be co-listed and workload will be assigned as a cross-listed course. Exceptions may be approved by the Dean." Also according to the Guidelines, "cross-listed courses receive workload hours for one of the courses only." This means that, under the 2020-2021 Guidelines, faculty members who simultaneously teach on-campus and online courses on the same subject will receive workload units for one course, instead of two.

66. Negoita, a professor in the Applied Mathematics Department, sometimes teaches an online course section in the same term as an equivalent on-campus course section. When she did so under the 2018-2019 Guidelines, the on-campus and online courses were not cross-listed, she taught the online course out-of-load (*i.e.*, in addition to her regular instructional workload), and she received additional out-of-load pay for the online course. Under the 2020-2021 Guidelines, she would be required to cross-list the on-campus and online courses, and as a result, she would receive workload units for only one course (instead of two), and she would not be able to teach the online course as an "out-of-load" course for additional pay.

Overloads and Release Time

67. Oregon Tech may give faculty members "release time" for performing various types of non-instructional work. Release time reduces the amount of instructional workload units a faculty member must earn to meet Oregon Tech's instructional workload standard. In effect, a faculty member who receives release time is given instructional workload unit credit for performing non-instructional work. Thus, for example, if a faculty member receives 0.25 release time for serving as a program director, they can satisfy the 36-workload unit standard for instructional work by teaching 27 workload units and serving as program director.

68. In the 2018-2019 Guidelines, Oregon Tech provides the following examples of appropriate release time for non-instructional assignments:

- "Faculty Senate President – 0.25 (3 WLU) per term.
- "CPC Chair – 0.25 (3 WLU) for one term.
- "Assessment Commission Chair – 0.25 (3 WLU) Fall Term.
- "Faculty Athletic Representative – 0.25 (3 WLU) per term + \$1500 stipend"

69. The 2018-2019 Guidelines include the following section under the heading, "Overload":

"The FTE for an instructor carrying a paid overload is adjusted to reflect additional pay. For 9 month contracts, overload will be compensated on a per workload unit basis at each location's specified rate. Overload pay is triggered when faculty

surpass their specified workload threshold [*i.e.*, 36 WLU per year for tenure track faculty] *through a combination of instruction, approved release through [non-instructional workload], the Stipend Release model, or grant buyout.* Overload will continue to be calculated at the end of spring term to be paid on June 30th.” (Emphasis added.)

70. In the 2020-2021 Guidelines, Oregon Tech changed the Overload section and added a new section titled, “Release Time.” The new Overload section states:

“Instructional workload schedules in excess of 12 workload hours must be pre-arranged with the department Chair, Dean and provost, using a request for approval form prior to the start of the term. Overload is limited to one course per term except by special permission of the Dean and Provost. All efforts should be made to minimize overload for a faculty member, by utilizing an adjunct and reviewing the program schedule for efficiencies. Overload will be compensated on a per workload unit basis at each location’s specified rate. Overload pay is triggered when in-load workload hours exceed the load standards as indicated above. Overload will be calculated at the end of spring term and paid by June 30th.”

The new Release Time section states:

“The purpose of release time is to provide a faculty member the time for non-instructional activities such as grant funded research, administrative assignments etc. *Faculty given release time may not then teach overload or out of load courses.*” (Emphasis added.)

71. Before Oregon Tech issued the 2020-2021 Guidelines, including under the 2018-2019 Guidelines, Oregon Tech permitted, and in some cases required, faculty who receive release time to teach overload or out-of-load courses for additional pay.

72. For example, Lindgren has served as the Civil Engineering department chair since the middle of the 2018-2019 academic year, for which he has received a combination of stipend and 0.5 release time. With the 0.5 release time, he is expected to teach courses equaling 18 workload units per year. However, he is the only faculty member who is qualified to teach transportation engineering, and a certain number of transportation engineering courses must be taught each year. As a result, since he started as department chair, he has needed to teach overload courses, and he has received additional overload pay for doing so.⁵

73. For another example, Negoita has served as the program director for the Applied Math program since the 2017-2018 academic year. In the 2017-2018 and 2018-2019 academic years, she received 0.25 release time. In years that she has received release time, she has also taught overload or out-of-load courses for additional pay.

⁵Although department chairs are in a separate bargaining unit, the experience of faculty who receive release time as department chairs is relevant evidence of the status quo regarding release time and overload, because the relevant policies and practices apply to both chairs and bargaining unit faculty.

74. Under the 2020-2021 Guidelines, faculty who receive release time are no longer permitted to teach overload or out-of-load courses.

Senior Projects

75. Some faculty members supervise or advise undergraduate students who are completing senior projects.

76. The 2018-2019 Guidelines provide that faculty members “receive full workload units for [senior project] sections with enrollment of three students or more.” Senior project sections “with enrollment of one or two students will be treated as independent study,” *i.e.*, faculty members receive zero workload units for supervising senior projects if only one or two students are enrolled.

77. Under the 2020-2021 Guidelines, workload units for teaching senior project courses are credited as follows:

“Senior project courses will receive 0.3 WLU per student per 3 credit course. For example: an instructor for 12 students in a 3 credit hour senior project course will receive 3.6 WLU. No laboratory workload credits will be awarded to senior project classes.”

78. Under the 2018-2019 Guidelines, a faculty member teaching three students enrolled in a three-credit senior project course would receive three workload units. Under the 2020-2021 Guidelines, the faculty member would receive 0.9 workload units (0.3 WLU multiplied by three students). If 10 students enrolled in the course, the faculty member would receive the same number of workload units under the 2018-2019 and the 2020-2021 Guidelines. If less than three or more than 10 students enrolled, the faculty member would receive more workload units under the 2020-2021 Guidelines.

Communications regarding the 2020-2021 Guidelines

79. On July 1, 2020, St. Clair, on behalf of the Association, emailed Mott regarding changes to the Faculty Workload Guidelines and the Academic Release Time and Stipend Model. Regarding the Faculty Workload Guidelines, St. Clair wrote,

“It has come to our attention that you are planning to make significant changes to the Workload Guidelines * * *. These are changes in working conditions for the members of our bargaining unit. Since workload is a mandatory subject of bargaining the changes you are proposing may only be made through the bargaining process. We therefore insist that, should you wish to make this change to faculty workload and working conditions, you do so through the normal bargaining process, and that you immediately cease the unilateral implementation of changes [to the Workload Guidelines].”

Additionally, he requested “that anyone to whom these policies have been sent be informed that they are merely proposals and have not been adopted but will be addressed at the bargaining table.” St. Clair also wrote that if Oregon Tech “persist[ed] in implementing these changes,” the Association would file an unfair labor practice complaint.

80. On July 9, 2020, Mott replied by email to St. Clair. Regarding the Faculty Workload Guidelines, Mott wrote, “The workload guidelines are just that—guidelines, not policy. They are updated each year (hence the date on them) and this year is no different. A draft of this year’s update, which includes proposed assignments to the faculty that are still within the current credit hour confines, was sent to chairs and a meeting held to consult with them. We are currently receiving comments and concerns regarding proposed changes.”

81. On July 21, 2020, the department chair for Applied Mathematics, Tiernan Fogarty, emailed the department faculty, copying Peterson (dean of the College of HAS). Fogarty wrote:

“As per the new workload guidelines, anyone who has release time, including chairs, should no longer be teaching any online, out-of-load, or overload courses. Also there is another guideline that no full time faculty should teach more than one on-line course per term (excluding summer). During the fall term, Dan [Peterson] would like to meet with those of us who are involved in online to talk about how to develop a pool of adjuncts to teach our online courses so that we can comply with the workload guidelines and not cancel many of our online courses.”

82. On August 1, 2020, Oregon Tech posted the 2020-2021 Guidelines on the provost’s website. The posted version had a “draft” watermark. Oregon Tech did not request comments on the 2020-2021 Guidelines at that time. The posted version also stated that the 2020-2021 Guidelines would be “[e]ffective September 14, 2020.” Oregon Tech intended to implement the 2020-2021 Guidelines on September 14, 2020.

83. On August 7, 2020, the department chair for MIT, Debbie McCollam, emailed the department faculty. In her email, McCollam explained that the department chairs had met with Mott, and she described what they discussed at the meeting regarding the plan for re-opening campus in the fall and the Workload Guidelines. Regarding the Guidelines, she wrote:

“This is where I have EXTREME frustration. While working on the summer workload spreadsheet today * * *, I found that the supposed ‘draft’ of the workload guidelines is now ‘final’ and posted on the Provost website, stating ‘Effective September 14, 2020.’ NONE of our comments or concerns were addressed prior to this. We (chairs) have repeatedly asked to discuss the Workload Guidelines during various meetings (Fall re-opening, Academic Council, Chairs meeting) but there is never time allotted for that discussion. The response is ‘another meeting will be scheduled,’ but none thus far. My email to Dan [Peterson] and all chairs today certainly expressed my deep concern. Of course, Dan is furloughed so I won’t receive a response until next week. I sent Dan the Word document of the Workload Guidelines with our comments/concerns a while back and the Allied Health Chairs * * * submitted our proposal for externship workload early this week. We will be

meeting with Dan next week about the externship component, but no word regarding our other MAJOR concerns.”

84. Hoylman and other MIT Department faculty were very concerned because it was their understanding that, under the 2020-2021 Guidelines, they would receive significantly fewer workload units for teaching externship courses. They were also concerned that if they were unable to teach more courses to make up for the loss of instructional workload units, and, as a result, failed to meet the full-time instructional workload standard, their salary and benefits would be reduced accordingly. They tried to meet with Mott and Peterson regarding their concerns, but were unable to do so.

85. Peterson was aware that some faculty members, including the MIT Department faculty and chair, were very concerned about the impact of the changes made in the 2020-2021 Guidelines. He did not inform them that the Guidelines were a draft or otherwise inform them that their understanding of how they would be impacted by the Guidelines was incorrect.⁶

86. On August 10, 2020, the Association filed the unfair labor practice complaint in this case.

87. On September 8, 2020, Caufield stated in an email to Negoita, “Oregon Tech has decided to not implement the draft 2020-2021 Workload Guidelines and, instead, load bargaining unit members according to the 2018-2019 Workload Guidelines until such time as the parties reach agreement on changes through the ongoing negotiations.”

88. On September 11, 2020, an email was sent on behalf of Mott to the faculty. Mott stated, “Please note that due to continuing comments and concerns about the draft 20-21 workload guidelines we will not be implementing them this year. We have replaced them on the website with the current (18-19) guidelines.”

The Academic Release Time and Stipend Model

89. At Oregon Tech, each department may have one or more programs. A program essentially is a major that a student can pursue a degree in. Most programs have a director. Typically, the program director is a bargaining unit faculty member. In small departments, such as a department with only one program, the department chair may simultaneously perform the work of a program director.

90. Depending on the program’s discipline and location, program directors are responsible for some or all of the following activities: program design and curriculum coordination, program assessment, program marketing and recruiting, program outreach (such as

⁶Peterson testified that the administration expects faculty members whose workload units are reduced under the 2020-2021 Guidelines to teach more courses in order to meet the full-time instructional workload standard for the 2020-2021 academic year. However, he also testified that Oregon Tech had determined that it could not reduce a faculty member’s compensation if they failed to do so, because Oregon Tech had already issued the faculty members’ their notices of appointment for the 2020-2021 academic year.

professional meetings and industry contacts), program course scheduling, student advising coordination, program graduation petitions, recruitment and management of adjunct faculty for the program, admission selection to the professional program, and development and management of internships, externships, and/or partnerships. Program directors also oversee program faculty meetings, conduct workshops for strategic planning, and serve as the point of contact for the program (*e.g.*, respond to requests for information about the program).

91. Some of Oregon Tech’s programs are accredited, and must meet specified standards to remain accredited. In such cases, the program director also is responsible for ensuring that the program maintains accreditation.

92. Oregon Tech has issued a two-page document titled, “Academic Release Time & Stipend Model” (Model). The document was prepared in May 2013 and has been used by department chairs and the provost since 2013. The Model has not changed noticeably since 2013.

93. The Model’s background section identifies various “[d]ifferences among academic departments and programs affecting Program Directors,” and states, “These differences among degree programs and departments make creating a single uniform Program Director stipend/release model that is equitable and fair challenging.”

94. The Model then explains that it is structured to permit department chairs to make “dynamic” decisions regarding the award of release time:

“Given the aforementioned differences among departments and programs, the Program Director/Academic release time model needs to be flexible enough to accommodate such idiosyncrasies affecting the workload. Department Chairs are in a unique position to ascertain the particular workload involved for a program, option, or any other academic enterprise in their department and award the appropriate release time subject to general guidelines. This enables the department to make dynamic decisions regarding the release time awarded while taking into consideration the stage of the program (*e.g.*, new launch versus established), accreditation requirements (*e.g.*, a new accreditation or reaccreditation self-study is forthcoming, etc.), and other considerations.”

95. Under the Model, Oregon Tech allocates a certain amount of stipends and release time to each department, based on various formulas specified in the Model. The release time and funds allocated under the Model may be distributed among faculty who serve as department chair, program director, or similar roles, such as coordinator roles.

96. The Model also provides: “Departments have the option of ‘cashing in’ their release time at adjunct rates to be used as PD [*i.e.*, program director] stipends or professional development (no other uses are allowed).” “Cashing in” release time refers to converting release time into a dollar value that is credited to a department-level budget account.

97. Generally, the Model provides that a department will receive a stated amount of release time and stipend funding calculated based on student enrollment (referred to as “head count”). For example, non-general education departments receive a “floor” of 0.5 FTE in release time and \$5,000 in stipend funds, and general education departments receive 0.75 FTE in release time and \$5,000 in stipend funds. General education departments with a program or programs with 50 or more students receive 0.5 FTE plus \$5,000 in stipend funds (plus 0.25 FTE release time and \$3,000 in stipend funds for B.S. programs) for each multiple of 50 students in the major. The Model also provides formulas based on the degree offered, whether a department is undergoing accreditation, and whether the department offers programs in three or more physical locations.

98. The Model provides that, for the first three years of a “startup” or new program, a department chair negotiates release time and stipend funding directly with the dean or associate provost. After the first three years of a startup or new program, the formulas in the Model apply.

99. The Model provides that for online programs, contract programs (such as a program offered at Boeing), and for “pre-years,” the head count stated in the Model does not apply. Instead, “[g]iven the significant differences among contract courses and distanced education programs, the release time and stipend negotiations for these initiatives must be negotiated by the Department Chair with the Provost based on the idiosyncrasies associated with each case.” In addition, any other educational initiative or external service not described in the Model is negotiated “on a case-by-case basis by the Department Chair and the Provost.”

100. The Model directs department chairs to distribute stipends and release time based on an assessment of eligible faculty members’ relative workloads. Eligible faculty members include those serving as department chairs or program directors (or comparable roles, such as advising coordinator).⁷ Under the Model, an eligible faculty member may receive a stipend, release time, a combination of the two, or nothing.

101. Department chairs may choose to decide how to distribute their departments’ allocation of stipend and release time, and some choose to consult with the other faculty members. For example, Hallie Neupert, who has served as the department chair of the Management Department since 2013, testified that her department has a retreat each spring, and they decide as a group, based on consensus, how to divide the release time and stipends for the following academic year.

102. Department chairs request release time and stipends using a form called “Stipend/Release Time Allocation.” Using that form, the department chairs propose the release time and stipend funds that should be awarded to their department, according to the formulas specified in the Model. The department chairs also report in the form how they propose to distribute the release time and stipends among faculty in their department.

103. For some years, Oregon Tech’s online program has allocated additional stipends and release time to departments, referred to here as the “Online Model.” There are no known written guidelines for the allocation or use of funds under the Online Model. However, Oregon Tech Online has generally allocated each department a certain amount of stipend and release time

⁷For ease of reference, we use the term “program director” to refer to all comparable roles.

based on the number of students enrolled in the department's online courses. Under the practice since at least the 2017-2018 academic year, Oregon Tech has directed department chairs to request stipends and release time under the Online Model at the same time, and through the same form, that they request stipend and release time under the "on-ground" Model.

104. Unlike the release time and stipends allocated under the Model, any portion of the Online Model allocation may be "cashed out," deposited in a department account, and used for purposes other than stipends, release time, or professional development. The Natural Sciences Department, for example, has "cashed out" Online Model release time and stipends to a department account to purchase lab equipment. The MIT Department "cashed out" Online Model funds for faculty computers, equipment, and retreats.

105. The record includes the Stipend/Release Time Allocation forms for the 2017-2018 and 2018-2019 academic years, which show the amounts of stipend and release time requested and distributed under the on-ground Model and the Online Model. The record also includes charts showing how much stipend or release time department chairs allocated to faculty members for the 2017-2018 and 2018-2019 academic years, and for part of the 2019-2020 academic year.

106. Department chairs requested and received allocations of stipend and release time according to the formulas set forth in the Model. Departments generally distributed their allocations of stipend and release time in accord with the Model's provisions.⁸ Specifically, departments generally distributed the stipend and release time to faculty serving in roles such as chair or program director. In a relatively small number of instances, a department cashed out a portion of the funds allocated under the Model for professional development.

107. In the 2017-2018 academic year, approximately 50 bargaining unit faculty received a stipend, release time, or combination thereof, for serving as a program director.

108. In the 2018-2019 academic year, approximately 51 bargaining unit faculty received a stipend, release time, or combination thereof, for serving as a program director.

109. In the 2019-2020 academic year, approximately 53 bargaining unit faculty received a stipend, release time, or combination thereof, for serving as a program director.

110. Program director stipends are paid over the course of the academic year in faculty members' regular paychecks.

111. When faculty members receive a stipend or release time for serving as a department chair, program director, or similar role, they typically receive the stipend or release time in addition to (not instead of) service credit in their performance evaluations.

112. The provost, Mott, convened an ad hoc group of about five department chairs in late 2019 to assess the Model and make recommendations to her. The group met several times in

⁸The record suggests that, occasionally, stipend amounts and release time awarded or allocated did not conform precisely to the Model, but such deviations do not undermine the finding that, as a general matter, Oregon Tech used the Model to apportion stipend amounts and release time to departments.

late 2019 and early 2020, primarily over the winter break. At least some members of the group were concerned that, because the Association and Oregon Tech were engaged in bargaining, it was not an appropriate time to make changes to the Model. At a meeting with Mott, the chairs presented some of their ideas, but also raised their concern about faculty bargaining. In response, Mott agreed to suspend the discussion, and the ad hoc group ceased meeting.

113. In March 2020, Governor Kate Brown declared a state of emergency related to the developing COVID-19 global health crisis. Subsequently, Governor Brown asked each state agency, including public universities, to prepare for and report on the impact of an 8.5% decrease in biennial funding for 2019-2021. Because all of that shortfall would occur in the second year of the 2019-2021 budget period (beginning July 1, 2020), the state estimated a 17% decrease in state funding for the July 1, 2020 to June 30, 2021 period.

114. Oregon Tech has a policy titled “Program Reduction and Elimination, OIT-20-050” (PREC Policy). The current PREC Policy was adopted in April 2011.

115. On April 14, 2020, the Faculty Senate passed a resolution asking the Oregon Tech president, Naganathan, to “immediately follow the procedures outlined” in the PREC Policy.

116. The PREC Policy requires the Oregon Tech president to take prescribed steps when there are budgetary reductions imposed on the institution (as opposed to internal reallocations) that would impose a significant net reduction in budget, such that an entire program is at risk for elimination or academic or non-academic program quality may be compromised.

117. Under the PREC Policy, the president is first required to notify the Oregon Tech community at large, and specifically the Faculty Senate, of the financial condition that exists or is forecast which, in the judgment of the president, may require program reduction or elimination. The president then convenes an ad hoc Committee on Program Reduction and Elimination (PREC Committee) and charges it with “making recommendations to meet the financial parameters imposed on the institution.” The PREC Committee must consist of nine members, at least six of whom must be faculty members, no two of which may be from the same department. It also must include one representative from the Administrative Council. The Oregon Tech president appoints five of the members (three of whom must not be serving on the President’s Council) and the Faculty Senate President appoints four faculty members. The committee members are to be broadly representative of the institution as a whole, and generally recognized for their knowledge of the institution. PREC Committee members are expressly selected and charged to not represent specific constituencies.

118. The PREC Committee gathers information and deliberates regarding possible recommendations to the president. In performing its work, the PREC Committee applies the criteria in the policy. The policy lists both criteria supporting reduction or elimination of academic and non-academic programs, and criteria contra-indicating reduction or elimination of those programs. The PREC Committee performs its work in secrecy and its recommendations are not treated as public.

119. The president may accept the PREC Committee’s recommendations or modify them. If the president modifies the recommendations, they are returned to the PREC Committee with a rationale for those modifications. The PREC Committee may submit comments on the modifications.

120. The PREC Policy requires the Oregon Tech president to submit the proposal for reduction or elimination to the campus and community for review and comment. Under the policy as written, the president considers any comments received, makes a final decision, and forwards the plan to the Chancellor and the State Board of Higher Education.⁹ If the recommendations are rejected, the plan is returned to the PREC Committee for further consideration, application of the criteria, and the remainder of the process as outlined in the PREC Policy.

121. On May 1, 2020, Naganathan convened a PREC Committee charged with identifying and recommending a set of possible savings, reductions, and eliminations totaling \$4.5 million balanced across academic and non-academic operations for the fiscal year beginning July 1, 2020. The committee’s recommendations were due by June 5, 2020.

122. Naganathan subsequently lowered the PREC Committee’s target for reductions to \$3.5 million based on informal feedback he received from the state.

123. On June 4, 2020, the PREC Committee provided its recommendations to Naganathan. Naganathan informed the Committee that he generally agreed with its recommendations, except with regard to deferring hiring in vacant positions.

124. On June 12, 2020, Naganathan emailed a memorandum to the Oregon Tech campus and community with his proposed reductions, totaling \$3,665,654, for “campus review and comment.” In relevant part, the memorandum indicated that there would be \$300,000 in “cost-savings” from the “Provost Division” under the heading, “Restructure stipend releases.” The memorandum did not explain what restructuring of stipend releases would entail.

125. Effective July 1, 2020, Oregon Tech reduced the funding available to departments for stipends by approximately \$300,000. Subsequently, Mott reallocated \$75,000 to departments for department chair stipends (resulting in a net reduction of \$225,000 in funds for program director stipends during the 2020-2021 academic year). According to Mott, the reduction in funding cut the funding for stipends under both the on-ground Model and the Online Model.¹⁰

⁹Presumably, since 2015, the Board of Trustees performs the functions previously performed by the State Board of Higher Education. The record contains no evidence about the Board of Trustees’ specific actions with respect to the PREC Committee’s recommendations at issue in this case.

¹⁰In the 2019-2020 academic year, Oregon Tech estimated that faculty stipends (including stipends paid to department chairs) plus cash outs totaled approximately \$300,000. That figure does not include the indirect costs of release time. For example, when a faculty member receives release time, they may be assigned to teach fewer courses, and Oregon Tech may need to pay adjunct faculty to teach courses instead. Oregon Tech estimated that all faculty release time (including department chairs) in the 2019-2020 academic year indirectly cost Oregon Tech approximately \$1.5 million.

126. On June 12, 2020, Dr. Mark Neupert, the chair of the Department of Humanities and Social Sciences, emailed the department faculty. Neupert wrote,

“Dr. Mott informed department chairs that there will be no funding of stipends or releases for anyone other than department chairs next year. She believes that roles such as Program Director are a key form of ‘service’ to the department and would like to see that hold far more sway in promotion and tenure decisions than ever before. Thus, she will also be curtailing expectations and opportunities for university-level service. She did not address the impact of this late decision on teaching/workloads next year as Fall schedule is already set.

“She also recognizes that some departments are complex enough that chairs may need release beyond the typical .5 fte. This will need a ‘conversation’ with the Dean, who will then pass along requests to the Provost.”¹¹

127. On June 19, 2020, Clark, acting on behalf of the Association, emailed Mott. The subject line of the email was, “Information Request—Stipend Release Model.” Clark wrote that it had come to the Association’s attention “that you may be planning to end the current practice of providing release time or a stipend to faculty who serve as program directors and/or provide other academic functions as provided under the Academic Release Time & Stipend Model dated 5/10/2013.” Clark asked Mott a series of questions: “Would you please confirm if you are in fact making this change, if you have directed department chairs to make this change, and on what grounds are you making the change? If you are planning to make a change, what is the implementation date for this change?”

128. On June 25, 2020, Mott replied by email to Clark. She responded to his questions as follows: “As part of the budget reduction proposal following the PREC process, as announced recently, funds for the stipend release model were eliminated. I notified the chairs of the discontinuance of the model. It will be effective for this upcoming fiscal year.”

129. As noted above, St. Clair emailed Mott on July 1, 2020, on behalf of the Association, to ask about changes to the Guidelines and Model. Regarding the Model, St. Clair again explained that it had come to the Association’s attention that Oregon Tech was planning to end the current practice of providing release time or a stipend to program directors under the Model. The Association stated that this was a change in working conditions for bargaining unit faculty, and demanded that Oregon Tech make the change “through the normal bargaining process,” and that it “immediately cease the unilateral implementation of changes” to the Model. St. Clair also wrote that if Oregon Tech “persist[ed] in implementing the changes,” the Association would file an unfair labor practice complaint.

130. On July 9, 2020, Mott replied by email to St. Clair. With regard to the Model, she wrote, “As you are aware, the stipend and release model funding was cut in the President’s budget reductions proposal, based on PREC recommendations. Chairs will continue to receive a \$5,000 stipend, and can ask for increased release as needed to perform chair duties. This was a model, not a policy.”

¹¹Mott testified that Neupert accurately described the substance of her statements.

131. Departments set faculty assignments for all or part of the 2020-2021 academic year in the preceding spring term, before Oregon Tech informed faculty that program director stipend and release time would be eliminated. At that time, faculty assignments were made with the expectation that stipends and release time would be allocated and distributed according to the Model's terms.

132. Oregon Tech has not suspended or eliminated the need for program director duties for the 2020-2021 academic year. Oregon Tech has not communicated to the department chairs or to the faculty who serve as program directors that, because program director stipends and release time have been eliminated for 2020-2021, faculty will not be appointed or serve as program directors, or that they will not be assigned program director duties, or that they will not be expected to perform those duties. Multiple faculty members have been informed or concluded that they are expected to perform the program director duties for the 2020-2021 academic year, but without receiving either a stipend or release time.

133. Dr. Jherime Kellerman, an associate professor in the Natural Sciences Department, has served as the program director for environmental sciences since the 2017-2018 academic year. Kellerman has received a \$3,000 stipend for each academic year since 2017-2018 for performing program director duties.

134. Kellerman has also served as the advising coordinator for the program since at least the 2017-2018 academic year. In this role, he performs duties such as organizing advisory notes regarding the courses students should be steered to take, advising students who are considering transferring to the program, organizing events for new students, and ensuring that course listings are correct. He has consistently received release time equal to 1/12 FTE (three workload units) per academic year for performing advising coordinator duties.

135. Although Kellerman received release time, he continued to teach a full course load (*i.e.*, 36 workload units per year). As a result, he exceeded the instructional workload standard, and he was paid overload compensation, equaling approximately \$2,000 per academic year.

136. In or about June 2020, Kellerman was informed by his department chair that, for the 2020-2021 academic year, he would continue to perform his program director and advising coordinator duties, but he would not receive the program director stipend or advising coordinator release time that he had previously received, and expected to continue receiving, for performing those roles. As a result, Kellerman will receive approximately \$5,000 less than he expected for the 2020-2021 academic year (\$3,000 stipend and \$2,000 overload pay).

137. Negoita has served as the program director of the Applied Math program since the 2017-2018 academic year. Each year, she has received 0.25 FTE (nine workload units) release time for serving as program director. She agreed to serve as the program director for Applied Math for the 2020-2021 academic year before Oregon Tech notified faculty that it was eliminating program director stipend and release time. It is her understanding that she is expected to serve as program director even though she will not receive the release time. It is also her understanding that

Oregon Tech expects her to make up for the loss of release time by teaching more courses, in order to meet the instructional workload standard of 36 workload units per year.¹²

138. Hoylman is the program director for the Nuclear Medicine Program in the MIT Department. Since at least 2017-2018, he has received a \$3,000 stipend to serve as the program director.

139. Peterson testified that department chairs had “a variety of options” to ensure that the program director duties are performed. Peterson testified that the “program directors could do them. The chairs could do those responsibilities. The chair and the program director could work together. They could perhaps assign other faculty within their departments to work those items as well. The work could be spread out.”

140. Peterson testified that a dean could approve service credit for performance of program director duties. He also testified that a faculty member can fulfill their service requirements through a variety of activities, such as university committees, that are less onerous than serving as a program director.

141. Mott testified that, following the elimination of program director release time and stipends, department chairs could make varying choices about how to accomplish program director duties, depending on the size of the department. Mott told the department chairs that they could request additional release time if they were going to “take up” some of the program director duties. In Mott’s experience, at other institutions, many of the duties performed by program directors at Oregon Tech are done by committees or groups of faculty and distributed across a department. In Mott’s view, roles such as program director are a form of service to the department, and she would like to see such service hold more sway in promotion and tenure decisions.

CONCLUSIONS OF LAW

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

2. Oregon Tech violated ORS 243.672(1)(e) when it unilaterally changed the 2018-2019 Faculty Workload Guidelines.

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.” An employer commits a *per se* violation of the duty to bargain in good faith by unilaterally changing the status quo concerning 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) (*AOCE*). To determine whether an employer has made an unlawful unilateral change, we first identify the status quo and then determine if the employer changed it. *Id.* If the employer changed the status quo, we then decide whether the change concerns a mandatory subject of bargaining or has an

¹²According to Peterson, if a faculty member’s courses for the fall term of the 2020-2021 academic year were assigned with the assumption that they would receive program director release time, Oregon Tech expects that faculty member to make up for the loss of release time by teaching more courses in another term, in order to meet the instructional workload standard.

impact on a mandatory subject that is more than de minimis. *See id.* If the change concerns a mandatory subject, we determine if the employer completed its bargaining obligation before deciding to make the change. *Three Rivers Education Association, SOBC/OEA/NEA v. Three Rivers School District*, Case No. UP-16-08 at 5, 25 PECBR 712, 716 (2013). If the change concerns a permissive subject of bargaining but has a more than de minimis impact on a mandatory subject, we determine if the employer completed its bargaining obligation before implementing the change.¹³ *International Association of Fire Fighters, Local 1159, v. City of Lake Oswego*, Case No. UP-015-18 at 11-12 (2018).

The following is undisputed. For many years, Oregon Tech has promulgated faculty workload guidelines that, for example, define a full instructional workload for faculty members and determine how much workload credit a faculty member will receive for performing various types of instructional work. The version titled “2018-2019 Faculty Workload Guidelines” was in effect for the 2018-2019 and 2019-2020 academic years. On August 1, 2020, Oregon Tech posted a changed version titled “2020-2021 Faculty Workload Guidelines,” with a “draft” watermark and an effective date of “September 14, 2020,” which corresponds with the start of the 2020-2021 academic year. Oregon Tech did not bargain with the Association regarding the changed Guidelines.

The Association contends that, by issuing the 2020-2021 Guidelines without bargaining, Oregon Tech unilaterally changed the status quo concerning faculty workload, which is a mandatory subject of bargaining. Oregon Tech contends that the 2018-2019 Guidelines do not establish a status quo for faculty workload, and that the Guidelines concern only permissive subjects. Oregon Tech also argues that no unilateral change violation actually occurred because the 2020-2021 Guidelines were merely a draft, and it rescinded that version before its effective date.

We resolve those issues as follows: The 2018-2019 Guidelines and evidence of Oregon Tech’s practices under those Guidelines establish the relevant status quo. The 2020-2021 Guidelines changed the status quo concerning the mandatory subject of workload.¹⁴ The record establishes that Oregon Tech unilaterally decided to replace the 2018-2019 Guidelines with the 2020-2021 Guidelines, effective September 14, 2020, notwithstanding the draft watermark. When Oregon Tech unilaterally decided to make that change, a unilateral change violation occurred. Oregon Tech’s subsequent rescission of the 2020-2021 Guidelines affects the remedy, but it does not negate the Association’s unilateral change claim. We explain each of these conclusions in more detail below.

We begin by determining the status quo. A working condition can become the status quo in a number of ways, including through a contract, past practice, work rule, or policy. *AOCE*, UP-33-06 at 7, 22 PECBR at 165. In this case, the faculty unionized in 2018, and the parties have

¹³Generally, the final step is to consider any affirmative defenses raised by the employer. In this case, however, Oregon Tech withdrew all of its affirmative defenses.

¹⁴Although the issue statement also refers to the mandatory subject of compensation, in the Association’s prehearing brief, it argued only that the changes to the Guidelines concern workload. Because we agree with that contention, it is unnecessary to address whether the changes also concern compensation.

not yet completed first contract bargaining. In that situation, the terms and conditions of employment in place at the time of certification establish the status quo. Documents such as employer policies or manuals may be evidence of that status quo. *Teamsters Local Union No. 223, v. City of Shady Cove*, Case No. UP-3-94 at 11 and n 3, 15 PECBR 589, 599 and n 3 (1989) (referring to personnel manual to identify the status quo for recently certified bargaining unit and noting that evidence of employer practices under the manual would also be relevant).

Here, the Association's evidence of the status quo includes the 2018-2019 Faculty Workload Guidelines, as well as testimony regarding Oregon Tech's practices under those guidelines. Additionally, the record shows that the faculty unionized in June 2018, and the 2018-2019 Guidelines have been in effect for each academic year since then. Under these circumstances, those 2018-2019 Guidelines reflect the status quo.

Oregon Tech argues that the 2018-2019 Guidelines cannot establish the status quo because they are "just guidelines." The record establishes, however, that Oregon Tech expects department chairs and bargaining unit faculty to comply with the Guidelines, and that it applies the Guidelines when determining faculty workload, including the number and types of courses taught. For example, Oregon Tech generally expects faculty members to teach enough courses to constitute a "full" instructional workload as defined by the Guidelines. For another example, Oregon Tech applies the Guidelines to determine whether certain types of work, such as supervising students doing independent study, are credited toward a faculty member's instructional workload.

Oregon Tech also argues that an employer policy or practice must be "longstanding" to be the status quo, and that standard is not met in this case, because Oregon Tech has typically revised the Faculty Workload Guidelines every year. However, an employer policy or practice does not need to be "longstanding" to establish the status quo during initial contract bargaining. Oregon Tech cites the standard for a past practice discussed in *Oregon AFSCME Council 75, Local 2831 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987 (2005), but that is the standard we apply when an established union (*i.e.*, one with a collective bargaining agreement) argues that a particular practice must be maintained even if it is not addressed in the CBA. That standard is based in part on the premise that the practice "arose from [the parties'] joint understanding." *Id.* at 7, 20 PECBR at 993. That standard does not apply here, where the parties are still in first contract bargaining and have not yet had sufficient opportunity to establish mutually agreed upon practices. *See, e.g., NLRB v. Katz*, 369 US 736, 746-47, 82 S Ct 1107 (1962) (when an employer makes a discretionary change during first contract bargaining, "[t]here simply is no way * * * for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist" that the employer bargain over such changes).¹⁵ *Id.* at 7, 20 PECBR at 993.

Oregon Tech also essentially argues that it was permitted to change the Guidelines under the "dynamic status quo" doctrine. Under that doctrine, if an employer has regularly taken a

¹⁵Other cases on which Oregon Tech relies, such as *Oregon Public Employees Union v. State of Oregon, Department of Administrative Services*, Case No. UP-112-93, 15 PECBR 567 (1995), are inapposite for the same reason, *i.e.*, they determine the status quo after parties have a collective bargaining agreement (and have had the opportunity to mutually establish practices under that agreement), not the status quo during first contract bargaining.

particular action (*e.g.*, granting an annual three percent wage increase), such that employees have a reasonable expectation that the employer will continue taking that particular action, then the employer must continue taking that action in order to maintain the status quo. Conversely, the employer does not unlawfully change the status quo by taking that regular and expected action. In this case, Oregon Tech has typically revised the Guidelines each academic year. However, the changes that Oregon Tech made this year were not in line with a regular and predictable pattern set by the past revisions. In the past, when Oregon Tech revised the Guidelines, the changes were generally limited in scope and minor. In contrast, the 2020-2021 Guidelines are a significant departure from the prior guidelines, and the scope and nature of the change is well beyond that of the past annual revisions. In other words, Oregon Tech was not required to make the changes that it made to the 2018-2019 Guidelines to maintain the status quo. Accordingly, the dynamic status quo doctrine does not justify that action.

Further, although Oregon Tech annually made discretionary changes to the Guidelines in the past, before the faculty unionized, it does not follow that it may continue to make discretionary changes now, after the faculty have unionized. To the contrary, in this context, the fact that the change at issue was discretionary means that Oregon Tech could *not* decide to make it without bargaining. *See Katz*, 369 US at 746-47 (finding that employer made an unlawful unilateral change during first contract bargaining by granting discretionary merit increases without bargaining over “the procedures and criteria for determining such increases,” even though employer did so semiannually before the employees unionized). *See also City of Shady Cove*, UP-3-94 at 11, 15 PECBR at 599 (personnel manual constituted status quo for new bargaining unit, even though it was not a contract and could be changed at any time). In sum, we conclude that Oregon Tech had a duty to maintain the 2018-2019 Guidelines concerning mandatory subjects while the parties engaged in first contract bargaining.

We turn next to the question of whether the subject of the change at issue concerns a mandatory subject of bargaining. The Association contends the change concerns workload, which generally is a mandatory subject. However, ORS 243.650(7)(g) provides that workload is a permissive subject “when the effect on duties is insubstantial.” Thus, if we determine that the subject of the change at issue is workload, we must also assess its effect on faculty members’ duties.

Our first task is to identify the subject of the change. For context, we note that, according to both the 2018-2019 and 2020-2021 Guidelines, the instructional workload standard for full-time tenure track faculty is 12 workload units per term, and the instructional workload standard for full-time non-tenure track faculty is 14 workload units per term. In other words, Oregon Tech expects a full-time tenure track faculty member to teach courses totaling at least 36 instructional workload units each three-term academic year. The Guidelines also set forth various rules or formulas that determine how many instructional workload units will be credited to a faculty member for performing particular types of work.¹⁶

¹⁶Oregon Tech requires bargaining unit faculty to perform both instructional and non-instructional work, and the Guidelines set standards for both. In this analysis, however, only the instructional workload provisions are relevant, so for brevity, we sometimes use the generic term “workload” or workload unit to refer to “instructional workload” or “instructional workload unit.”

Oregon Tech changed multiple provisions of the 2018-2019 Guidelines. When a change (or proposal) has multiple components, “we attempt to identify the ‘core feature’” of the change “that defines and ultimately shapes” its scope. *Jackson County v. Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. UP-002-20 at 6 (2020) (citing *In the Matter of the Declaratory Ruling Petition Filed by Portland Firefighters Association, IAFF Local 43 and City of Portland*, Case No. DR-001-19 at 3 (2019)). In this case, Oregon Tech primarily changed the rules or formulas that determine how many instructional workload units are credited for performing various types of work. For example, under the 2018-2019 Guidelines, faculty members received zero to three workload units for supervising students doing independent study, depending on the total number of students enrolled in the independent study course. Under the 2020-2021 Guidelines, faculty members receive zero workload units for supervising students doing independent study, regardless of the number of students enrolled. When a faculty member is credited with fewer workload units for performing the same work, they must perform more work that qualifies for workload units under the Guidelines in order to meet Oregon Tech’s 36-unit standard.¹⁷ Based on the foregoing, we conclude that the core feature of the change to the 2018-2019 Guidelines is faculty workload, and that the change had more than an insubstantial effect on faculty members’ duties.¹⁸

Oregon Tech argues that the Association cannot prove that the change to the Guidelines has a more than insubstantial effect on faculty members’ duties because the 2020-2021 Guidelines permit administrators to approve certain exceptions to determining workload credits, and those exceptions could mitigate the effect on faculty members’ duties. For example, the 2020-2021 Guidelines changed the rule that determines how much workload unit credit will be credited for supervising externships, but also provide that exceptions to that rule are permitted with the approval of the dean and the provost. However, the mere possibility that Oregon Tech will approve exceptions does not reduce the effect of the underlying rule changes. Under the Guidelines’ terms, the administrators decide unilaterally whether to approve exceptions, and those decisions are completely discretionary and not subject to review. Moreover, there is no evidence establishing the magnitude or frequency of such exceptions; thus, we can only speculate about whether such exceptions will be made and, if so, what effect they would have on the changed workload unit credits. In sum, nothing in the Guidelines or the record establishes that administrators will definitely grant exceptions, and that those exceptions, when granted, will mitigate the effects of the rule changes so that they have an insubstantial effect on employee duties.

Oregon Tech also argues that the elimination of workload unit credit for independent study supervision, in particular, has an insubstantial effect on duties. The elimination of workload unit

¹⁷Additionally, Oregon Tech does not pay faculty members overload compensation unless they are credited with a total number of workload units that exceeds the 36-unit standard. Thus, when a faculty member is credited with fewer workload units for the same work, they must perform more work that qualifies for workload units before they will be paid overload compensation.

¹⁸We discuss how changes that reduce the number of instructional workload units credited for particular work affect faculty workload to illustrate why we conclude the changes at issue concern the subject of workload. However, changes that increase the number of workload units credited for particular work also concern the mandatory subject of workload, and therefore, cannot be made unilaterally.

credit for independent study supervision is only one component of the change at issue, and under the circumstances of this case, we are not persuaded that we should consider the effect of each component separately.¹⁹

Next, we address Oregon Tech’s contention that no (1)(e) violation actually occurred, because the 2020-2021 Guidelines were merely a draft, and Oregon Tech took no steps to implement them. As explained below, we disagree with the factual premise of that contention, because the record shows that Oregon Tech decided to change the 2018-2019 Guidelines and took steps to implement that decision. Additionally, even if Oregon Tech had not implemented its decision, we would still conclude that Oregon Tech violated (1)(e), because the unilateral change violation occurred when Oregon Tech made the decision.

“An employer must bargain about its decision to change a mandatory subject for bargaining *before* making the decision.” *Three Rivers School District*, UP-16-08 at 5, 25 PECBR at 716 (emphasis in original, quotation marks and citation omitted). *See also AFSCME, Local 173, v. Polk County*, Case No. UP-100-88 at 7, 11 PECBR 536, 542 (1989) (“When the subject matter of a management decision concerns employment relations, * * * the employer must bargain about the decision before it can lawfully even make the decision or take any action on the matter.” (Quotation marks and citation omitted.)). Thus, an employer violates the duty to bargain when it unilaterally *decides* to change the status quo concerning a mandatory subject of bargaining.

We find that Oregon Tech decided to change the 2018-2019 Guidelines in or about July 2020, based on the following evidence. The Association first became aware that Oregon Tech was planning to change the 2018-2019 Guidelines in or about June 2020, when Oregon Tech circulated the 2020-2021 version to department chairs. On July 1, 2020, the Association asked Oregon Tech to confirm that it would cease unilaterally changing the Guidelines and demanded to bargain over those changes. On July 9, 2020, Oregon Tech responded by asserting that the workload guidelines are “not policy,” that they are updated each year “and this year is no different,” and that it was in the process of consulting with department chairs about its “draft of this year’s update, which includes proposed assignments to the faculty that are still within the current credit hour confines.”²⁰ Despite the Association’s request, Oregon Tech did not confirm that it would cease

¹⁹Further, even considering the independent study component separately, we conclude that eliminating workload unit credit for independent study courses involving three or more students has more than an insubstantial effect on duties. Oregon Tech argues that this particular change has an insubstantial effect on duties because very few faculty members supervise independent study courses with three or more students. Even assuming that assertion is true, it does not make the effect insubstantial. When determining whether the effect of a workload change is sufficient to give rise to the duty to bargain, we do not consider how many employees are affected by the change. Rather, we consider the effect on employee duties. One instructional workload unit equals one-twelfth of a full-time tenure track faculty member’s instructional workload in an academic term. The effect of receiving one less workload credit on a faculty member’s duties is more than insubstantial.

²⁰PECBA does not prohibit Oregon Tech from consulting with department chairs about potential changes to bargaining unit faculty members’ terms and conditions of employment. However, such consultation is not a lawful substitute for collectively bargaining with the faculty members’ chosen labor representative, the Association.

unilaterally changing the Guidelines, and it did not agree to bargain with the Association over the changes.

Read in context, Oregon Tech's response to the Association shows that it had made a decision to change the Guidelines, and that it had taken the first step of implementing that decision—telling department chairs that there would be new Guidelines. Only the precise details of the change were subject to comment by department chairs. Then, on August 1, 2020, Oregon Tech posted the 2020-2021 Guidelines on the provost's website, with a stated effective date of "September 14, 2020," which corresponds with the start of the 2020-2021 academic year. Around that time, in late July and early August, at least some department chairs told bargaining unit faculty that the 2020-2021 Guidelines would be effective on September 14 and began discussing how the changes would be implemented. Further, Peterson, dean of the College of Health, Arts and Sciences, testified that Oregon Tech intended to implement the 2020-2021 Guidelines on September 14.

Oregon Tech's assertion that the 2020-2021 Guidelines were merely a draft is not persuasive, for several reasons. The evidence establishes that Oregon Tech intended to implement the 2020-2021 Guidelines on the stated effective date, notwithstanding their draft watermark. The evidence also establishes that Oregon Tech communicated that intent to department chairs, who in turn relayed that information to bargaining unit faculty.²¹ Although Peterson was aware that department chairs and bargaining unit faculty believed that the posted version of the 2020-2021 Guidelines were final and would be effective on September 14, despite the draft watermark, he did not inform them that their understanding was incorrect. There is no evidence that Oregon Tech ever communicated to the Association or bargaining unit faculty that it considered the 2020-2021 Guidelines to be a draft, that it had not made a final decision to implement the 2020-2021 Guidelines, and that it would bargain with the Association before making a final decision.²²

Finally, we address Oregon Tech's contention that no unilateral change violation occurred because Oregon Tech rescinded the 2020-2021 Guidelines before their effective date. As explained above, the unilateral change violation occurred when Oregon Tech decided to change the status quo concerning the mandatory subject of workload. A unilateral change is unlawful because it

²¹The record includes correspondence and testimony showing that department chairs told bargaining unit faculty members that Oregon Tech had decided to implement the 2020-2021 Guidelines that it had posted on the website, notwithstanding the draft watermark. Oregon Tech notes that this is hearsay evidence, and that the statements of department chairs cannot be attributed to Oregon Tech, because they are not supervisors under PECBA. See *Oregon Tech American Association of University Professors (Oregon Tech AAUP) v. Oregon Institute of Technology*, Case No. RC-007-18 (2019), *appeal pending*. Our rules, however, allow "[e]vidence of a type commonly relied on by reasonably prudent persons in conduct of their serious affairs," even if the evidence is hearsay. OAR 115-010-0050(1). Here, the evidence offered meets our standard for admissibility, and this evidence was unrebutted.

²²Oregon Tech also points out that, after Oregon Tech posted the 2020-2021 Guidelines, administrators considered making additional revisions, and argues that this shows Oregon Tech never made a final decision to change the Guidelines. We disagree. There is substantial evidence that Oregon Tech had already decided to replace the 2018-2019 Guidelines with the 2020-2021 Guidelines. Under these circumstances, the possibility that Oregon Tech would further revise the 2020-2021 Guidelines does not negate the fact that it had already decided to change the status quo concerning faculty workload.

frustrates the bargaining process and conveys the message to employees that the employer can change their terms and conditions of employment without bargaining in good faith with their chosen representative. *See, e.g., Katz*, 369 US at 743-44 (like a “flat refusal to bargain,” an employer’s unilateral “action plainly frustrate[s] the statutory objective of establishing working conditions through bargaining”); *May Dep’t Stores Co. v. NLRB*, 326 US 376, 385, 66 S Ct 203 (1945) (“[U]nilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.”). That harm to the bargaining relationship was done once Oregon Tech unilaterally decided to change the Guidelines. Thus, the fact that Oregon Tech rescinded the 2020-2021 Guidelines before their effective date does not mean that the violation caused no harm, or that the Association is not entitled to relief. A party is entitled to a cease and desist order and any other necessary remedy whenever we determine that a party “*has engaged in* or is engaging in any unfair labor practice charged in the complaint.” ORS 243.676(2) (emphasis added).

3. Oregon Tech violated ORS 243.672(1)(e) when it unilaterally eliminated program director stipends and release time under the Academic Release Time and Stipend Model.

The Association contends that Oregon Tech made an unlawful unilateral change to the status quo when it eliminated the stipends and release time that it provided to program directors (and comparable roles) pursuant to the Academic Release Time and Stipend Model (Model). Oregon Tech contends that the allocation of stipends and release time to program directors was too discretionary and variable to constitute a status quo. Oregon Tech also contends that the elimination of funding for program director stipends and release time concerns only permissive subjects of bargaining, namely its budget, staffing levels, and assignment of duties. For the reasons discussed below, we conclude that Oregon Tech changed the status quo by eliminating program director stipends and release time under the Model, and that this change concerns the mandatory subject of compensation. Because Oregon Tech made the change unilaterally, it violated its duty to bargain in good faith under (1)(e).

We begin by identifying the status quo. At the time that the faculty unionized, and until the change at issue, Oregon Tech followed the Model. According to the Model’s background statement, it was intended to provide program directors with stipends or release time while accounting for differences in program directors’ workloads among departments and programs.²³ Under the Model, Oregon Tech allocated a certain amount of release time and stipends to each department, according to specified, objective criteria (such as the number of students enrolled in the department’s programs). Then, department chairs determined how to distribute the allocated release time and stipends among faculty members who serve as chairs or program directors.

Effective July 1, 2020, Oregon Tech changed the status quo by eliminating stipends and release time provided under the Model, at least for the 2020-2021 academic year. Oregon Tech did

²³Oregon Tech requires faculty members to perform both instructional and non-instructional work. The work of program directors is considered “non-instructional work.” Release time reduces the amount of instructional work a faculty member must perform to meet Oregon Tech’s instructional workload standard. In effect, a faculty member who receives release time is authorized to meet their instructional work load standard through a combination of non-instructional and instructional work. A program director who does not receive release time must still carry a full instructional workload.

so by deciding not to spend \$300,000 of funds budgeted for stipends. The provost subsequently restored \$75,000 of that cut to fund department chair stipends (but not program director stipends), and informed department chairs that they would continue to receive their expected stipends and release time for the 2020-2021 academic year. Oregon Tech did not inform the faculty who were expecting to serve as program directors for the 2020-2021 academic year that they would not serve as program directors, or that they would not be expected to perform that role's job duties. Rather, Oregon Tech informed bargaining unit faculty that they would receive only service credit for performing the work of program directors, instead of stipends or release time (in addition to service credit).

The change at issue—elimination of program director stipends and release time under the Model—concerns the mandatory subject of compensation. Stipends are a form of compensation. The parties dispute whether release time is also a form of compensation. We need not resolve that dispute because, under the Model, program directors receive stipends or release time, or a combination of the two. Under these circumstances, stipends and release time are interchangeable parts of a single policy. And, Oregon Tech made a single decision to eliminate (or at least suspend) the entire Model; that is, it made one decision to stop giving program directors stipends or release time (or a combination of both)—not two distinct decisions. Thus, the elimination of program director stipends and release time under the Model is one change.

To determine the subject of that change, we must identify the “core feature” of the Model, considering the terms of the Model and how Oregon Tech has applied it. *Jackson County*, UP-002-20 at 6. We find that the core feature of the Model, and therefore the subject of its elimination, is compensation. At Oregon Tech, a faculty member's salary is based on their FTE, and Oregon Tech has defined “1.0 FTE” for a tenure track faculty member as 36 instructional workload units. A faculty member receives a stipend in addition to base salary. A faculty member who receives release time is given instructional workload credit for performing non-instructional work, and that credit counts towards the 36-instructional workload unit threshold. Under the Model, stipends and release time are parts of an integrated method of compensating faculty who take on certain administrative duties. The example provided by Professor Jherime Kellerman illustrates this point. At the time of hearing, Kellerman was assigned to serve as both a program director and an advising coordinator for the 2020-2021 academic year; both of those roles were eligible for stipends and release time under the Model. Under the status quo, Kellerman received a \$3,000 stipend for the program director work, and release time (equal to three workload units) for the advising coordinator work. Kellerman also regularly teaches courses that equal 36 instructional workload units, and he expected to do so again in the 2020-2021 academic year. Under the status quo, when he received release time and taught 36 instructional workload units, he was credited with a total of 39 instructional workload units, and paid overload compensation for the workload units that exceeded the 36-workload unit standard, approximately \$2,000 (in addition to his regular salary). In June 2020, his department chair informed him that he would still need to do the program director and advising coordinator work, but that he would not receive either the program director stipend or the advising coordinator release time. As a result, even if he teaches the same course load and continues to serve as program director and advising coordinator, he will not receive either the \$3,000 stipend or the \$2,000 overload pay that he was expecting for the 2020-2021 academic year. Based on the terms of the Model and how Oregon Tech has applied it,

we conclude that the core feature of the Model (and therefore, the subject of the change at issue) is compensation.

Oregon Tech contends that there is no status quo with respect to program director stipends and release time because department chairs have discretion over how much stipend or release time to award a program director (if any), and sometimes, a department chair “cashes out” a portion of funds allocated under the Model for faculty professional development.²⁴ We disagree. Despite the department chairs’ discretion, the record establishes that Oregon Tech has, for many years, allocated stipend and release time to departments according to the Model’s criteria, and department chairs have distributed the allocated stipends and release time among the faculty in their departments. Further, the department chair’s discretion is generally guided by the Model’s terms and guidelines (and subject to an administrator’s approval), and program directors have received (or not received) stipend or release time in accord with those terms and guidelines. Under these circumstances, the award of program director stipends and releases according to the Model’s terms and guidelines is the status quo, notwithstanding the discretionary element.²⁵

Oregon Tech alternatively contends that the elimination of funding for the Model concerns only the subjects of staffing levels and assignment of duties, which PECBA expressly designates as permissive subjects. ORS 243.650(7)(g). We first address Oregon Tech’s contention that this change concerns staffing because the “decision to appoint (or not to appoint) faculty members as program directors” is a staffing decision. We disagree, because the decision to eliminate (or provide) program director stipends and release time under the Model is distinct from the decision to appoint or not appoint a faculty member as a program director. The evidence does not indicate that Oregon Tech has changed the number of program directors, the conditions for the appointment of a faculty member to serve as program director, or any similar factor related to appointment. Oregon Tech delegates to department chairs the authority to appoint program

²⁴Professional development is a form of non-instructional work that Oregon Tech expects faculty to perform and is a requirement for promotion and tenure. Under the express terms of the Model, a department chair may choose to allocate a portion of the funds allocated to the department to pay for faculty members’ professional development, such as conference travel costs.

²⁵The NLRB has long held that where, as here, an employer has an established policy or practice that includes an element of discretion, the employer must maintain the status quo with respect to the non-discretionary aspects of the policy, and bargain with the union over the discretionary element. *See, e.g., Katz*, 369 US at 746-47 (discussing employer’s duty to bargain before granting semiannual merit increases); *Jensen Enter.*, 339 NLRB 877, 878 (2003) (“[T]he [NLRB] with court approval has consistently found that merit increase programs like the Respondent’s are a term and condition of employment notwithstanding the element of discretion retained by the employer in setting the amount of such raises. *Daily News of Los Angeles*, [315 NLRB 1236 (1994), *enfd* 73 F3d 406 (DC Cir 1996)]. As the [NLRB] stated in *Oneita Knitting Mills*, what is required in such circumstances ‘is a maintenance of preexisting practices, *i.e.*, the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.’ 205 NLRB 500 fn. 1 (1973).”). Thus, when employees unionize, the employer may not unilaterally “discontinue” such a program, notwithstanding the discretionary element. *Oneita Knitting Mills*, 205 NLRB at 500 n 1.

directors and coordinators. Oregon Tech has not informed department chairs that they must discontinue appointing program directors for 2020-2021. Rather, Oregon Tech has communicated only that it is suspending stipends and release time for program directors. Thus, the discontinuation of program director stipends and release time under the Model did not reflect a staffing decision to eliminate program directors; rather, it reflected a decision to cease compensating faculty for serving as program directors.

We next address Oregon Tech's argument that the granting of release time is a proxy for the management decision whether to assign a faculty member program director duties. "Assignment of duties, as a permissive subject, concerns the actual direction of employees during the workday." *Oregon Public Employees Union, Local 503, SEIU, AFL-CIO, CLC v. State of Oregon, Executive Department*, Case No. UP-64-87 at 31, 10 PECBR 51, 81 (1987). The Model, however, does not address whether or how department chairs assign program director duties to faculty. Rather, it addresses how stipends and release time are allocated to departments and the circumstances under which it is "appropriate" for department chairs to award a portion of the allocated stipends and release time to faculty who are assigned program director duties.²⁶

Further, at hearing, Oregon Tech's administrators conveyed that Oregon Tech has not yet decided how program director duties will be assigned for 2020-2021, while acknowledging that those duties are necessary and will continue to be performed. For example, the provost testified that program director duties would be handled differently in different departments, but she did not state that bargaining unit members would not perform these duties. If, in fact, the core feature of Oregon Tech's unilateral change was the assignment of program director duties, Oregon Tech would have made decisions regarding who would perform those duties (if anyone), rather than only eliminating the stipends and release time for the performance of those duties. We conclude, on this record, that assignment of duties is not the subject of Oregon Tech's change to the Model.

Oregon Tech also contends that the change to the Model was merely a change to a "budget model," and therefore, it had no duty to bargain, because budget-setting is not a mandatory subject. Oregon Tech is correct that a public employer is not required to bargain about budget-setting itself. *Cascade Bargaining Council, OEA/NEA v. Jefferson County School District 509J*, Case No. C-194-82 at 9, 7 PECBR 6039, 6047 (1983) (employer did not violate ORS 243.672(1)(e) by declining to collect all property taxes approved by the voters, even though that caused the employer

²⁶The text of the Model expressly links release time to the effect that the assignment of program director duties has on faculty workload, not the assignment of duties itself:

"Given the aforementioned differences among departments and programs, the Program Director/Academic release time model needs to be flexible enough to accommodate such idiosyncrasies affecting the workload. *Department chairs are in a unique position to ascertain the particular workload involved for a program, option, or any other academic enterprise in their department and award the appropriate release time subject to general guidelines.*" (Emphasis added.)

to be unable to agree to the union’s proposed wage increase in subsequent bargaining).²⁷ However, the record establishes that the decision at issue—the elimination of program director stipends and release time—was not a budget decision. Rather, it was a management decision about how to spend budgeted funds. This point is illustrated by Oregon Tech’s decision to continue paying stipends to department chairs, despite the elimination of funding for the Model. Specifically, after the Oregon Tech president announced the elimination of \$300,000 in funding for the Model, the provost decided to reallocate \$75,000 to pay department chairs the stipends that they expected to receive under the Model for the 2020-2021 academic year. Put differently, after Oregon Tech decided to cut funds for the Model, the provost decided to “restore” some of those funds, but in doing so made stipends available only for some faculty (department chairs), but not others (bargaining unit faculty who serve program directors, coordinators, and the like).²⁸ That decision illustrates that the elimination of funding for program directors’ stipends under the Model was not a policy-level budget-setting decision outside the scope of PECBA’s bargaining obligations, but instead was a management decision regarding the *administration* of budgeted funds that concerns the mandatory subject of compensation.²⁹

²⁷*Jefferson County* involved the employer’s ability to pay for *proposed* compensation, not an existing obligation. The Board distinguished the situation in which an employer cuts its budget and then cites lack of funds as the basis for avoiding an existing obligation to pay. *Jefferson County*, C-194-82 at 11, 7 PECBR at 6049 (“This would be a different case if the employer had tentatively agreed to an economic settlement, intentionally reduced tax collections below that authorized, and then attempted to avoid the agreement due to an ‘inability’ to pay.”). Here, Oregon Tech’s obligation to continue providing program director stipends and release time under the Model arises under the statute, not a collective bargaining agreement, but it is an existing obligation.

²⁸For another example, the evidence shows that Oregon Tech projected that it would save \$300,000 by defunding the Model, which corresponds only to the cost of department chair and program director stipends; it does not include the indirect costs associated with release time. Thus, Oregon Tech could have saved \$300,000 by eliminating only stipends, while continuing release time. However, Oregon Tech made a management decision to discontinue *both* program director stipends and release time under the Model (while continuing department chair stipends and release time, and potentially even increasing the latter).

²⁹The record does not establish that Oregon Tech engaged in the budget-setting process that is governed by applicable budget law, not PECBA. However, even if Oregon Tech had adopted an amended budget that did not include funds for program director stipends and release time under the Model, Oregon Tech would remain obligated to bargain over the decision to eliminate program director stipends and release time. *Oregon Nurses Association v. Polk County*, Case No. C-118-82 at 6-7, 6 PECBR 5426, 5431-32 (1982) (explaining that employer’s failure “to provide in its approved budget funds to maintain wages” did not relieve the employer of liability under ORS 243.672(1)(e) for its unilateral change in wages). In bargaining, the Association would be entitled to propose alternatives, including an alternative under which Oregon Tech would not cut faculty compensation at all. And, under PECBA, Oregon Tech would be required to bargain in good faith regarding such alternatives. If the Association successfully bargained for an alternative to the budgeted-for elimination of program director stipends and release time, then Oregon Tech could make the bargained-for adjustment accordingly. *See id.* at 7, 6 PECBR at 5432. If the Association agreed, in bargaining, to eliminate program director stipend and release time, then Oregon Tech could implement that change. However, Oregon Tech could not decide to make that change if it neither obtained the Association’s agreement nor completed the bargaining process, as it did here.

We also understand Oregon Tech to argue that defunding the Model was not tantamount to actually eliminating program director stipends and release time. We agree that the former did not *necessarily* have to result in the latter. However, the record establishes that Oregon Tech, in fact, implemented the decision to defund the Model by actually eliminating program director stipends and release time. Specifically, the Association asked Oregon Tech whether it was “in fact” ending “the current practice of providing release time or a stipend to faculty who serve as program directors * * * as provided under the Academic Release Time & Stipend Model.” And, the provost responded, “As part of the budget reduction proposal following the PREC process, * * * funds for the stipend release model were eliminated. I notified the chairs of the discontinuance of the model. It will be effective for this upcoming fiscal year.” The Association then asked Oregon Tech to cease unilaterally implementing the change to the Model. In response, the provost reiterated that “the stipend and release model funding was cut.” Further, she explained that chairs “will continue to receive a \$5000 stipend, and can ask for increased release as needed to perform chair duties,” despite the defunding of the Model. However, the provost did not state that program directors also would continue to receive their stipends and release time, despite the defunding of the Model. Rather, Oregon Tech made clear to department chairs and bargaining unit faculty that program directors would not receive any stipends or release time.³⁰

We recognize that Oregon Tech has given department chairs some discretion over the distribution of stipend and release time under the Model, and that, as a result, there is variation in what program directors actually receive. However, this variation does not mean, as Oregon Tech contends, that the program director stipends and release time for the 2020-2021 academic year were not ended. They were ended. Nor does the discretion exercised by department chairs mean, as Oregon Tech contends, that the decision to end the program director stipends and release time was made by department chairs, not Oregon Tech. Oregon Tech’s communications and other evidence establishes that Oregon Tech made the decision to end program director stipends and release time. Therefore, Oregon Tech unilaterally changed program director stipend and release time.

Oregon Tech also notes that it decided to defund the Model pursuant to the PREC process, which includes consultation with a committee that includes bargaining unit faculty. The process by which Oregon Tech made that decision, however, makes no difference because Oregon Tech has parallel, independent obligations under PECBA. Under PECBA, Oregon Tech has a legal obligation to maintain the status quo for unionized faculty members’ terms and conditions of employment while it engages in the collective bargaining process. The PREC process does not eliminate Oregon Tech’s statutory obligation to continue providing program directors with stipends and release time. *See Polk County*, C-118-82 at 7, 6 PECBR at 5432 and (“The bargaining rights of public employees established by the PECBA would be severely diminished if a public employer could, in essence, terminate them in mid-negotiations simply by making a policy

³⁰Oregon Tech asserted, in its prehearing brief, that department chairs could fund program director stipends and release time from other budgeted funds (and argued, based on that factual assertion, that the defunding of the Model was not tantamount to eliminating program director stipends and release time). However, at hearing, Oregon Tech presented no evidence that any department chair plans to or can fund program director stipends and release time from other funds. Likewise, the record contains no evidence about those ostensible other funds, where they are found in Oregon Tech’s budget, their amount, or what portion of them could be used to fund stipends and release time.

decision concerning its budget.”); *see also id.* at 9-11 n 2, 6 PECBR at 5434-36 n 2 (describing how a public employer can fulfill the duty to bargain when facing a budget shortfall).

In sum, we find that Oregon Tech decided to change the Faculty Workload Guidelines, and it decided to end program director stipends and release time under the Academic Release Time and Stipend Model. Those decisions changed the status quo concerning mandatory subjects. Because Oregon Tech made those decisions unilaterally, it violated its duty to bargain in good faith with the Association.

Remedy

Having found that Oregon Tech violated ORS 243.672(1)(e), we will order it to cease and desist from the unfair labor practice conduct. ORS 243.676(2)(b). We must also order affirmative action necessary to effectuate the purposes of PECBA. ORS 243.676(2)(c).

We generally order an employer to affirmatively remedy a unilateral change violation by restoring the status quo. Oregon Tech has already restored the status quo regarding the Faculty Workload Guidelines. We will order Oregon Tech to restore the status quo with respect to program director stipends and release time under the Academic Release Time and Stipend Model.

Because the record establishes that, under the status quo, faculty members would have started receiving a portion of their stipends at the start of the 2020-2021 academic year, a make-whole remedy is also necessary. Therefore, we will order Oregon Tech to pay the affected faculty members the portion of stipends that they would have received from the date of the violation to the date it complies with this order, plus interest at the rate of nine percent per annum. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04 at 16, 21 PECBR 206, 221 (2005) (citing *Oregon School Employees Association, Chapter 84 v. Redmond School District 2J*, Case No. C-237-80 at 14, 6 PECBR 4726, 4739 (1981)).

The Association also requests that we order physical and electronic notice posting. We generally order notice 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. *Southwestern Oregon Community College Federation of Teachers, Local 3190, American Federation of Teachers v. Southwestern Oregon Community College*, Case No. UP-032-14 at 8, 26 PECBR 254, 261 (2014). In this case, a notice posting is warranted because Oregon Tech’s conduct affected a significant number of bargaining unit employees. In addition to the traditional physical posting of the notice, we require an employer to electronically notify employees of its wrongdoing when the record indicates that electronic communication is the customary and preferred method that the employer uses to communicate with employees. *Id.* at 9, 26 PECBR at 262. Here, the record establishes that email is the common method of communication between Oregon Tech and Association-represented employees. Accordingly, we will order Oregon Tech to post the notice and distribute it to bargaining unit employees by email.

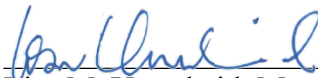
ORDER

1. Oregon Tech shall cease and desist from violating ORS 243.672(1)(e).
2. Oregon Tech shall restore the status quo with respect to program director stipends and release time under the Academic Release Time and Stipend Model.
3. Oregon Tech shall make all bargaining unit employees whole by paying them the portion of stipends that they would have received under the Academic Release Time and Stipend Model from the date of the violation to the date it complies with this order, plus interest at the rate of nine percent per annum.
4. Oregon Tech shall post the attached notice for 30 days in prominent places where Association-represented employees are employed.
5. Oregon Tech shall distribute the attached notice by email to all Association-represented employees within 10 days of the date of this order.

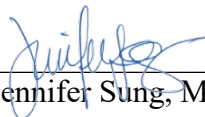
DATED: October 28, 2020.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.



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

PURSUANT TO AN ORDER of the Employment Relations Board (Board) in Case No. UP-023-20, *Oregon Tech American Association of University Professors v. Oregon Institute of Technology*, and in order to effectuate the policies of the Public Employee Collective Bargaining Act (PECBA), we hereby notify our employees that the Board found that Oregon Institute of Technology (Oregon Tech) committed unfair labor practices in violation of ORS 243.672(1)(e), which prohibits a public employer from refusing to bargain in good faith with the exclusive collective bargaining representative of its employees.

The Board concluded that Oregon Tech violated the duty to bargain in good faith when it unilaterally changed the 2018-2019 Faculty Workload Guidelines. The Board also concluded that Oregon Tech violated the duty to bargain when it unilaterally eliminated stipends and release time for faculty who serve as program directors (and comparable roles) under the Academic Release Time and Stipend Model.

To remedy these violations, the Board ordered Oregon Tech to:

1. Cease and desist from violating ORS 243.672(1)(e).
2. Restore the status quo with respect to program director stipends and release time under the Academic Release Time and Stipend Model. (The Board did not need to order Oregon Tech to restore the status quo with respect to the Faculty Workload Guidelines, because Oregon Tech reinstated the 2018-2019 Guidelines on or about September 8, 2020.)
3. Make all bargaining unit employees whole by paying them the portion of stipends that they would have received under the Academic Release Time and Stipend Model from the date of the violation to the date it complies with this order, plus interest at the rate of nine percent per annum.
4. Post this notice for 30 days in prominent places where Association-represented employees are employed.
5. Distribute this notice by email to all Association-represented employees within 10 days of the date of this order.

EMPLOYER

Dated _____, 2020

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 likely to see it. 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-021-19

(UNFAIR LABOR PRACTICE)

DON SCHALLERER,	)	
	)	
Complainant,	)	
	)	
v.	)	FINDINGS AND ORDER FOR
	)	REPRESENTATION COSTS
	)	
CITY OF PORTLAND,	)	
	)	
Respondent.	)	
	)	

On August 28, 2020, this Board issued an order holding that the City of Portland (the City) did not violate ORS 243.672(1)(a), as alleged in the complaint filed by Don Schallerer (Schallerer). 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:

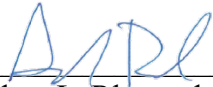
1. The Public Employee Collective Bargaining Act requires this Board to “award representation costs, if any, to the prevailing party” in an unfair labor practice case. ORS 243.676(2)(d), (3)(b). Only a prevailing party in an unfair labor practice case is entitled to representation costs. ORS 243.676(2)(d), (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). The City is the prevailing party.

2. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). Because Schallerer “had to rely on personal financial resources to litigate the matter,” the representation costs award is \$500. OAR 115-035-0055(1)(b)(F).

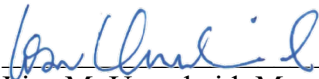
ORDER

Schallerer shall remit \$500 to the City within 30 days of the date of this Order.

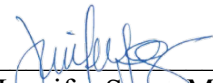
DATED: November 5, 2020.



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-008-19

(UNFAIR LABOR PRACTICE)

BOB BALDWIN,	)	
	)	
Complainant,	)	
	)	
v.	)	FINDINGS AND ORDER FOR
	)	REPRESENTATION COSTS
LANE COMMUNITY COLLEGE,	)	
	)	
and	)	
	)	
LANE COMMUNITY COLLEGE	)	
EMPLOYEES FEDERATION,	)	
	)	
Respondents.	)	

On August 28, 2020, this Board issued an order holding that Lane Community College (LCC) violated ORS 243.672(1)(a) and (1)(b), as alleged by the complainant, Bob Baldwin.¹ Baldwin also alleged that Lane Community College Employees Federation (LCCEF) violated ORS 243.672(2)(a), but our order held that LCCEF did not violate (2)(a). The appeal period under ORS 183.482 has run without any 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 Public Employee Collective Bargaining Act requires this Board to “award representation costs, if any, to the prevailing party” in an unfair labor practice case. ORS 243.676(2)(d), (3)(b). The prevailing party is “the party in whose favor a Board Order is issued.” OAR 115-035-0055(1)(d).

2. Baldwin is the prevailing party with respect to his claim against LCC. However, because Baldwin represented himself in this matter, he did not incur any representation costs. Accordingly, Baldwin is not entitled to a representation costs award under the statute. ORS 243.676(2)(d).

¹Pursuant to OAR 115-010-0090(5), this Board limited the precedential value of the final order, which is binding on, and has precedential value for, only the named parties in this case.

3. LCCEF is the prevailing party with respect to Baldwin's claim against LCCEF.

4. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). Because Baldwin "had to rely on personal financial resources to litigate the matter," the representation costs award is \$500. OAR 115-035-0055(1)(b)(F).

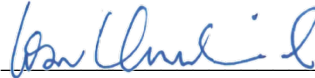
ORDER

Baldwin shall remit \$500 to LCCEF within 30 days of the date of this Order.

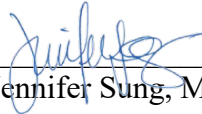
DATED: November 5, 2020.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

STATE OF OREGON
EMPLOYMENT RELATIONS BOARD
(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,

Complainant,

v.

MID-COLUMBIA CENTER FOR LIVING,

Respondent.

Case No. UP-025-20

CONSENT ORDER

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

Douglas S. Parker, Attorney at Law, Littler Mendelson, PC, Portland, Oregon, represented the Respondent.

On August 18, 2020, Complainant Oregon AFSCME, Council 75 (the “Union”) filed an unfair labor practice complaint against Mid-Columbia Center for Living (“MCCFL”) alleging violations of ORS 243.672(1)(a), (b), (c), (e), and (i). Two days of hearing were held on October 21-22, 2020, before Administrative Law Judge Martin Kehoe. The hearing was set to continue in November, but the parties have agreed to settle this matter by entry of this Consent Order and waive further proceedings and review by the Board. To the extent not included below, the Union is withdrawing the remaining allegations in the Complaint.

Stipulated Facts

1. The Union is a labor organization as defined in ORS 243.650(13).
2. MCCFL is a public employer as defined in ORS 243.650(20). MCCFL is an intergovernmental agency and a Certified Behavioral Health Clinic that provides mental health, substance abuse, and IDD services for three counties in Oregon – Hood River, Wasco, and Sherman.

3. MCCFL has experienced increasing financial difficulties in the past several years as a result of significant cutbacks in funding sources and due to changes in how those sources compensate MCCFL for service delivery within the counties it serves. By mid-2019, the financial situation had deteriorated such that MCCFL had to begin drawing down on its reserves to continue to fund services. Its Board of Directors began to tell its management that it could no longer budget in this way and instructed that a balanced budget be prepared for the fiscal year beginning July 1, 2020.

4. On June 12, 2020, the Union filed the Petition under ORS 243.682(2) and OAR 115-025-0000(4) to certify without an election a new bargaining unit for the employees of MCCFL to the ERB. MCCFL did not file objections and effective July 6, 2020, the Union was certified by the Employment Relations Board as the exclusive representative for all MCCFL employees, excluding supervisory and confidential employees.

5. On June 16, 2020, MCCFL managers and supervisors distributed two flyers to MCCFL employees and talking points to supervisors at the direction of Dr. June Gower, the Executive Director for MCCFL. Modified versions of the flyers were distributed the next day. The flyers and talking points communicated MCCFL's position that it preferred that employees not form a union and various reasons that it contended supported that position. MCCFL supervisors mistakenly believed that an election would be held and that it was lawful for it to convey its position on the election to employees. The information distributed was intended to influence employees' decision on whether to support the formation of a union.

6. The flyers and talking points were created by MCCFL supervisors with a review conducted by Akin Blitz, the outside legal counsel for MCCFL at the time. Public funds in the amount of \$1,000.00 were expended in legal fees, employee compensation for time spent in creating and distributing the flyers and talking points, and printing costs.

7. On July 21, 2020, Dr. Gower sent a memo directly to the MCCFL employees that the Union contended contained incorrect statements about the Union's position regarding restoration of employees to full-time status after hours had been reduced during the pandemic. This letter also contained statements that were critical of the Union as an organization.

8. On August 6, 2020, Dr. Gower announced that MCCFL was eliminating its Intellectual and Developmental Disabilities Services ("IDD") program by terminating the contract with the State of Oregon that provided funding for those services. Dr. Gower's stated purpose for eliminating the program was for budgetary savings. The Union had various concerns about this change and other issues raised in its Complaint in this case, including a concern that the reason for the elimination of the program was retaliatory. As a result, Union labor counsel Jason Weyand sent correspondence to Blitz on August 11, 2020 outlining these concerns and informing MCCFL of the likelihood that a ULP would be filed unless MCCFL agreed to rescind the decision to terminate the IDD program and to maintain the program pending negotiations. In response to the Union's threat of a ULP, Union representatives and Blitz later discussed—among other things—MCCFL's willingness to bargain over the impacts of the IDD decision at some future point if no ULP was filed. As MCCFL had already returned its contract to the State, it did not rescind the

decision as requested by Weyand on August 11, and neither party had put forth any proposals related to the impacts of the decision to eliminate the program as of the date of the parties' signatures below.

9. The IDD program was ended at MCCFL effective September 30, 2020. MCCFL did not provide advanced notice to the Union of this decision nor did it provide adequate time to bargain over the impacts of that decision on mandatory subjects of bargaining. The IDD contract was reassigned by the State to a new provider, which hired all of the bargaining unit members working in that unit effective October 1, 2020, and recognized the Union as their exclusive bargaining representative.

10. After the Union was certified as the exclusive representative for the unit, MCCFL reduced the hours and eliminated the benefits for certain bargaining unit positions when those positions became vacant and were refilled by new hires. This includes but may not be limited to a nurse position. MCCFL did not provide notice of these changes to the Union or bargain over the changes in benefits and compensation. MCCFL has, since at least its 2005 policy, had a policy that provides for the employment of employees on part-time status and only providing health insurance benefits for employees working over 22.5 hours per week.

11. The parties have been in bargaining since September 17, 2020.

Stipulated Conclusions of Law

1. The Board has jurisdiction over these parties and subject matter.

2. MCCFL violated ORS 243.672(1)(i) when it created, printed, and distributed flyers and talking points that conveyed to employees the employer's preference that employees not form a union. MCCFL supervisors were not aware of the neutrality requirement of ORS 243.670(2), but the information distributed was intended to influence the decision of its employees on whether to form or join the Union. For the purposes of a remedy, the parties stipulate that MCCFL spent \$1,000.00 on employee salary, attorney fees, and other costs in creating, printing, and distributing the flyers and talking points.

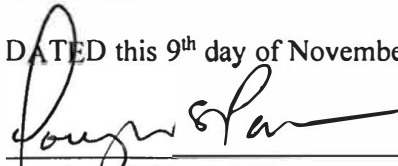
3. The natural and probable consequence of MCCFL's distribution of the flyers and talking points relating to the employer's position on the union organizing drive, and the July 21, 2020 letter concerning the Union's position on restoring full work hours for employees, would be to chill employees in their willingness to engage in protected activities. As a result, MCCFL violated the "in the exercise of" prong of ORS 243.672(1)(a).

4. MCCFL violated ORS 243.672(1)(e) when, without first providing notice and an opportunity to bargain to the Union, it: (1) eliminated the benefits for a vacant bargaining unit position, and (2) when it implemented the decision to terminate the IDD contract without providing the Union with a meaningful opportunity to bargain over the impacts of that decision on the IDD employees before the program was transferred by the State to a new entity.

Stipulated Order

1. MCCFL violated ORS 243.672(1)(i), (1)(a), and (1)(e) as stipulated above.
2. MCCFL will cease and desist from committing the unfair labor practices above.
3. Within 30 days of the date of this order, MCCFL will pay a civil penalty of three thousand dollars (\$3,000.00), which is equal to three times the amount of public funds used in response to the Union's organizing drive.
4. MCCFL will offer to convert the nurse who was hired without benefits to a full time position with benefitted status. It will also provide information to the Union on any vacancies filled after the Union was certified as the exclusive representative where hours of existing positions were reduced or benefitted positions were changed to non-benefitted positions. MCCFL will also cease converting positions to per diem or provisional status unless it bargains to completion over any mandatory subjects of bargaining before making such changes. Before reducing the hours or eliminating benefits for positions in the bargaining unit that become vacant, MCCFL will notify the Union at least two weeks in advance of posting the vacancy to provide the Union with an opportunity to assess whether bargaining might be required or appropriate.
5. MCCFL and the Union agree to bargain over the impacts to mandatory subjects of the decision to eliminate the IDD program. MCCFL will consider and bargain in good faith over Union proposals such as potential severance pay, treatment of employees' sick leave banks at termination of employment, right of recall/first refusal for vacant positions that ex-employees might be qualified for as vacancies arise, and other financial impacts.
6. MCCFL shall post the attached notice for 30 days in prominent places where Union-represented employees are employed and will also post the notice on its intranet system for employees to access.
7. The Union will submit a petition for representation costs to the Board within the time frame required by the Board's rules. MCCFL reserves its right to object to the amount of any claimed fees.

DATED this 9th day of November 2020.



DOUGLAS PARKER
On Behalf of the Respondent



JASON WEYAND
On Behalf of the Complainant

////

////

////

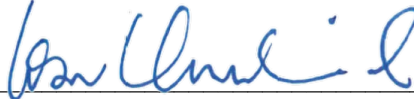
////

This Consent Order is approved and adopted by the Board.

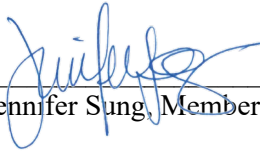
DATED: November 10, 2020.

A handwritten signature in blue ink, appearing to read 'A. Rhynard', written above a horizontal line.

Adam L. Rhynard, Chair

A handwritten signature in blue ink, appearing to read 'Lisa M. Umscheid', written above a horizontal line.

Lisa M. Umscheid, Member

A handwritten signature in blue ink, appearing to read 'Jennifer Sung', written above a horizontal line.

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 (Board) in Case No. UP-025-20, *Oregon AFSCME Council 75 v. Mid-Columbia Center for Living*, and in order to effectuate the policies of the Public Employee Collective Bargaining Act (PECBA), we hereby notify our employees that the Board found that Mid-Columbia Center for Living (MCCFL) committed unfair labor practices in violation of ORS 243.672(1)(a), (e), and (i), which prohibit a public employer from interfering with, restraining, or coercing employees in the exercise of protected activities, refusing to bargain in good faith with the exclusive collective bargaining representative of its employees, and spending public funds to influence the decision of employees to join or form a union.

The Board concluded pursuant to a Consent Order that:

1. MCCFL violated ORS 243.672(1)(i) when it created, printed, and distributed flyers and talking points that conveyed to employees the employer's preference that employees not form a union. MCCFL supervisors were not aware of the neutrality requirement of ORS 243.670(2), but the information distributed was intended to influence the decision of its employees on whether to form or join Oregon AFSCME Council 75 (the Union). For the purposes of a remedy, the parties stipulate that MCCFL spent \$1,000.00 on employee salary, attorney fees, and other costs in creating, printing, and distributing the flyers and talking points.

2. The natural and probable consequence of MCCFL's distribution of the flyers and talking points relating to the employer's position on the union organizing drive, and the July 21, 2020 letter concerning the Union's position on restoring full work hours for employees, would be to chill employees in their willingness to engage in protected activities. As a result, MCCFL violated the "in the exercise of" prong of ORS 243.672(1)(a).

3. MCCFL violated ORS 243.672(1)(e) when, without first providing notice and an opportunity to bargain to the Union, it: (1) eliminated the benefits for a vacant bargaining unit position, and (2) when it implemented the decision to terminate the IDD contract without providing the Union with a meaningful opportunity to bargain over the impacts of that decision on the IDD employees before the program was transferred by the State to a new entity.

To remedy these violations, the Board ordered the following:

1. MCCFL violated ORS 243.672(1)(i), (1)(a), and (1)(e) as stipulated above.
2. MCCFL will cease and desist from committing the unfair labor practices above.

3. MCCFL will pay a civil penalty of three thousand dollars (\$3,000.00), which is equal to three times the amount of public funds used in response to the Union's organizing drive.

4. MCCFL will offer to convert the nurse who was hired without benefits to a full time position with benefitted status. It will also provide information to the Union on any vacancies filled after the Union was certified as the exclusive representative where hours of existing positions were reduced or benefitted positions were changed to non-benefitted positions. MCCFL will also cease converting positions to per diem or provisional status unless it bargains to completion over any mandatory subjects of bargaining before making such changes. Before reducing the hours or eliminating benefits for positions in the bargaining unit that become vacant, MCCFL will notify the Union at least two weeks in advance of posting the vacancy to provide the Union with an opportunity to assess whether bargaining might be required or appropriate.

5. MCCFL and the Union agree to bargain over the impacts to mandatory subjects of the decision to eliminate the IDD program. MCCFL will consider and bargain in good faith over Union proposals such as potential severance pay, treatment of employees' sick leave banks at termination of employment, right of recall/first refusal for vacant positions that ex-employees might be qualified for as vacancies arise, and other financial impacts.

6. MCCFL shall post the attached notice for 30 days in prominent places where Union-represented employees are employed and will also post the notice on its intranet system for employees to access.

7. The Union will submit a petition for representation costs to the Board within the timeframe required by the Board's rules. MCCFL reserves its right to object to the amount of any claimed fees.

EMPLOYER

Dated _____, 2020 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 likely to see it. 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. MA-007-19

(MANAGEMENT SERVICE APPEAL)

L.H.,	)	
	)	
Appellant,	)	
	)	
v.	)	DISMISSAL ORDER
	)	
STATE OF OREGON, DEPARTMENT OF	)	
HUMAN SERVICES, STABILIZATION AND	)	
CRISIS UNIT,	)	
	)	
Respondent.	)	
_____	)	

Appellant L.H., Salem, Oregon, appeared *pro se*.

Yael Livny, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

On September 12, 2019, L.H. (Appellant) filed an appeal of a written reprimand issued on August 14, 2019, by the State of Oregon, Department of Human Services, Stabilization and Crisis Unit (Respondent). On August 14, 2019, Respondent also gave Appellant a letter of expectations. The Administrative Law Judge (ALJ) scheduled a hearing for March 19, 2020, which was later canceled after Governor Kate Brown declared an emergency in March 2020 as a result of the emerging COVID-19 pandemic. On May 11, 2020, when it had become clear that the pandemic would continue into at least the summer, the ALJ offered the parties new hearing dates. On May 11, 2020, Respondent's counsel informed the ALJ that Respondent had rescinded the August 14, 2019, written reprimand, and indicated that, if Appellant did not withdraw the appeal, Respondent would file a motion to dismiss. On May 18, 2020, the ALJ asked Appellant by email whether he intended to withdraw the appeal. Appellant replied on May 18, 2020, asserting that he had asked Respondent's human resources department to confirm the withdrawal of the

written reprimand in writing. From June through September 10, 2020, the ALJ sent Appellant four inquiries about whether he had obtained sufficient information to withdraw his appeal.¹ Appellant never disputed that Respondent had withdrawn the written reprimand.

On September 18, 2020, Respondent requested that the appeal be dismissed on the basis that Respondent had withdrawn the written reprimand, and this Board has no jurisdiction to hear an appeal of a letter of expectations. The same day, the ALJ directed Appellant to show cause by October 2, 2020, why the appeal should not be dismissed. Appellant did not respond.

For purposes of this order, we assume that the well-pleaded allegations in the appeal are true. We also rely on undisputed facts discovered during our investigation. *Miller v. State of Oregon, Department of Human Services, Seniors and People with Disabilities*, Case No. MA-010-10 at 2 (April 2011). Appellant has not disputed that Respondent rescinded the written reprimand and that the sole remaining basis of this appeal is the letter of expectations.

This Board's jurisdiction in management service appeals under the State Personnel Relations Law is set forth in ORS 240.570(4), which provides:

“Management service employees who are assigned, reassigned, transferred or removed, * * * and employees who are disciplined, removed or dismissed from the management service as authorized in subsection (3) of this section may appeal to the Employment Relations Board in the manner provided by ORS 240.560.”

Subsection (3) of ORS 240.570 sets forth the types of discipline that may be imposed on management service employees—namely, “reprimand, salary reduction, suspension or demotion” or removal or dismissal from the management service. ORS 240.570(3) does not include letters of expectation among the personnel actions that may be appealed to this Board under ORS 240.570(4). Therefore, this Board lacks jurisdiction to hear this appeal. *See M.T. v. State of Oregon, Department of Human Services, Stabilization and Crisis Unit*, Case No. MA-008-19 at 2 (October 2019) (Board has no jurisdiction to hear appeal of letter of expectations); *Burleigh v. Department of Transportation*, Case No. MA-16-96 (June 1996) (same); *Knutzen v. Department of Insurance and Finance, Oregon Occupational Safety and Health Division*, Case No. MA-13-92 at 7 (November 1994) (Order on Remand) (Board has “no jurisdiction to review management service personnel actions not enumerated in ORS 240.570”).

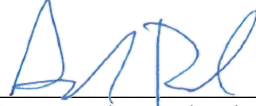
In addition, on September 18, 2020, the ALJ directed Appellant to show cause why the appeal should not be dismissed. The ALJ directed Appellant to respond by October 2, 2020, and informed Appellant that a failure to respond would result in a recommendation to this Board that the appeal be dismissed. Appellant did not respond. Appellant's failure to pursue the appeal also warrants dismissal. *See A.B. v. State of Oregon, Public Utilities Commission*, Case No. MA-006-17 at 1 (August 2017) (failure to pursue appeal warrants dismissal); *Templeton v. State of Oregon, Department of Human Services*, Case No. MA-020-15 at 1 (April 2016) (same).

¹The ALJ corresponded with Appellant on June 16, July 28, August 31, and September 10, 2020, inquiring about the status of the appeal.

ORDER

The appeal is dismissed.

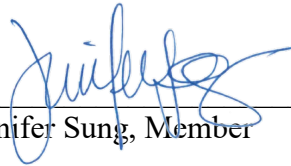
DATED: November 18, 2020.



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-007-20

(UNIT CLARIFICATION)

OREGON AFSCME LOCAL 88,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER ON RECONSIDERATION
	)	CLARIFYING EXISTING
MULTNOMAH COUNTY,	)	BARGAINING UNIT
	)	
Respondent.	)	
	)	

The County seeks reconsideration of this Board’s September 29, 2020, order that clarified the following group of Multnomah County (County) employees into an existing “General Employee Unit” represented by Oregon AFSCME Local 88 (AFSCME): “on-call employees who perform work at social distancing shelters and voluntary isolation motels.” That order issued after the County did not file objections to AFSCME’s petition within the time set forth in the notice posting, which required objections to be filed by September 25, 2020. For the following reasons, we grant the County’s petition for reconsideration, withdraw our September 29, 2020, order, and replace it with this order.

The following facts are undisputed. On September 3, 2020, AFSCME filed a petition under OAR 115-025-0005(3) to clarify that certain County employees were in AFSCME’s existing unit based on certification or contract language. In the box of the petition form that asks a petitioner to describe the proposed bargaining unit and summarize any change (Box 5), AFSCME stated, “See Attachment A and related documents.” AFSCME attached a total of five documents to the petition: (1) a document titled “Attachment A,” which contained AFSCME’s response to Box 5 of the petition form, (2) the parties’ 2017-2020 collective bargaining agreement, (3) the parties’ August 2020 memorandum of agreement, (4) the parties’ February 7, 2020, memorandum of agreement regarding “voluntary recognition of on-call and temporary employees,” and (5) a document titled “Attachment E: List of Affected Employees.”¹ The petition also indicated that there were 81

¹In Attachment A, AFSCME expressly referred to the condition in the parties’ February 7, 2020 agreement (expressed in Addendum L) that certain “on-call and temporary employees are included in the unit if they have a ‘reasonable expectation of continued employment.’”

employees to be added to the existing unit, which corresponds with the number of employees listed in Attachment E.

On September 9, 2020, this agency provided the County with the petition and Attachment E (the list of 81 affected employees), *but not Attachment A or the parties' agreements*. At the same time, the agency provided the County with a notice of the petition and a cover letter, which stated that "Oregon AFSCME Local 88 has filed a petition under OAR 115-025-0005(3) to clarify whether certain on-call employees from the "General Employee Unit" who perform work at social distancing shelters and voluntary isolation motels at Multnomah County are currently in the bargaining unit based on a written agreement between the parties dated February 7, 2020." The agency's letter also directed the County to post the notice of petition. The conclusion of the letter stated, "Written objections to the petition are due within 14 days of the date of the Notice (**by September 25, 2020**). If valid objections are filed, a hearing may be required." (Emphasis in original.)

The notice of petition stated:

"The EMPLOYMENT RELATIONS BOARD has been asked by OREGON AFSCME LOCAL 88 to clarify whether certain on-call employees from the "General Employee Unit" who perform work at social distancing shelters and voluntary isolation motels at MULTNOMAH COUNTY are included in the bargaining unit based on a written agreement between the parties dated February 7, 2020." (Capitalization in original.)

On September 14, 2020, the County returned two certificates of posting, as requested by the agency, one that set forth the physical postings of the notice, and the other that certified that the County had emailed the notice to the 81 employees at issue in the petition.

As noted above, when the objection period passed without objection from the County, the Board ordered that

"[t]he on-call employees (identified in the petition) who perform work at social distancing shelters and voluntary isolation motels are included in the 'General Employee Unit' currently represented by Oregon AFSCME Local 88."

That order was based on the language in the notice that the County posted and the letter that the Election Coordinator sent to the County with the petition. Elsewhere in the order, when describing the processing of the petition, the Board referenced the additional documents that AFSCME had submitted with its petition, including Attachment A. The Board's order also erroneously stated that those additional documents had been provided to the County, along with the petition and the notice. On September 30, 2020, the day after issuance of the order, the County notified this Board that it had not received the documents referenced in the order.

In its petition for reconsideration, the County requests that we rescind our September 29, 2020, order, and begin the petition process anew. The County asserts that it is entitled to such a remedy under OAR 115-010-0033 because the Board did not properly

serve it with all of the supporting documents included with the petition. The County asserted that it did not realize that AFSCME was contending that the petitioned-for employees do not fall within the exception for employees without a “reasonable expectation of continued employment,” as stated in the parties’ February 7, 2020, recognition agreement, until it received the September 29, 2020, order, because that exception was not specifically referred to in the documents provided to the County. The County further avers that, had it been furnished with all of those documents, it might have objected to the petition, and that it is appropriate to now provide it with that opportunity.

AFSCME contends that such relief is not warranted for several reasons. First, AFSCME notes that the petition itself expressly stated, “See Attachment A and related documents.” Thus, AFSCME asserts that the County was on notice and had an obligation to review Attachment A. Relatedly, AFSCME notes that the document was available at any point for the County to read in the Board’s Case Management System (CMS) or by requesting that document. AFSCME also argues that the notice posting itself, which used the bargaining unit language from Attachment A, accurately reflects the petitioned-for unit, and there is no dispute that the County received and posted that notice. Regarding the County’s assertion that it did not realize that AFSCME was contending that the petitioned-for employees do not fall within the exception for employees without a “reasonable expectation of continued employment,” AFSCME contends that there could be no reasonable confusion about that issue because the record establishes that the County had actual notice of which 81 employees were petitioned for; the notice of petition specifically referenced the parties’ February 7, 2020, recognition agreement; and by filing a petition pursuant to OAR 115-010-0005(3), AFSCME was, by definition, asserting that those 81 employees do not fall within any contractual exceptions to inclusion in the bargaining unit, including the exception for employees without a reasonable expectation of continued employment. Further, AFSCME asserts that the County had actual notice of that issue because the parties discussed the bargaining unit status of the petitioned-for employees before AFSCME filed the petition, and, at the time that AFSCME filed the petition, the parties’ only dispute was whether the employees should be excluded because they lacked a “reasonable expectation of continued employment.” AFSCME also notes that it expressly referenced those pre-filing discussions in the petition form, which the County received.²

We readily acknowledge that the Board did not send the County a copy of all of the documents that AFSCME submitted with its petition, and in doing so omitted a portion of the petition itself (petitioner’s response to Box 5). We also acknowledge that our September 29, 2020, order also erroneously states that we did provide the County with documents beyond the petition, the list of affected employees, and the notice of posting. That erroneous statement warrants setting aside that order and replacing it with a correct one.

²The County’s assertions regarding its response to the notice of petition (that not all of the petitioned-for employees have a “reasonable expectation of continued employment”), and AFSCME’s counter-assertions (that the petitioned-for employees do have such an expectation and the County is now precluded from arguing otherwise), raise factual or legal disputes that cannot be resolved without an evidentiary hearing. Because it is unnecessary for us to resolve those disputes in this proceeding, we decline to do so.

We are not persuaded, however, that the remedy that the County seeks is warranted. To begin, the rule that the County cites in support of its requested remedy, OAR 115-010-0033, is inapt. That rule discusses *a party's*, rather than this agency's, obligation to serve all documents filed with the Board on any other party, "[u]nless otherwise stated in these rules or directed by the Board or Board Agent." OAR 115-010-0033(2). Moreover, a petition for unit clarification under OAR 115-025-0005(3) and OAR 115-025-0010(4) is an exception to our general rule that a party must serve all documents on the other party. Rather, a party is only required to file such a petition with the Board on a form approved by the Board. OAR 115-025-0005(1)(d); OAR 115-025-0010(4). When a party does so, "a Board Agent will cause a notice of the petition to be posted in the work areas granting maximum access to employees in the existing or proposed unit." OAR 115-025-0030(1). "Copies of the notice shall be sent to the public employer and any known exclusive representative." *Id.* The notice shall set forth (a) the name of the petitioning organization or employer; (b) a description of the unit involved; and (c) a statement that parties and interested persons will have 14 days from the date of the notice to file objections to the appropriateness of the unit, the positions to be included or excluded, and to the petitioner's designation of the issue(s) in cases filed under OAR 115-025-0005, or a petition to intervene. *Id.*

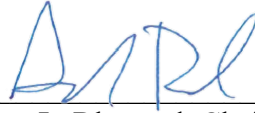
Here, AFSCME properly filed a petition on the Board's approved form, and the agency provided the County with a notice as set forth in OAR 115-025-0030(1). The description of the unit involved was drawn from the petition itself and Attachment A (as referenced in the petition). The County is correct that the agency did not also provide Attachment A or other documents submitted with the petition; however, nothing in our rules requires such an action. *See City of Oregon City v. Oregon City Police Employee Association*, Case No. UC-3-97, 17 PECBR 137 (1997) (*recons*) (declining to reopen a petition after it was granted where there was no dispute that a notice was posted). Moreover, the agency provided the County with the petition itself (although, as noted, Attachment A was omitted from the mailing). The agency also provided the County with the list of 81 employees provided by AFSCME, which was titled, "Attachment E." Attachment A and the three remaining documents (the parties' agreements) were available to the County (by way of the agency's CMS or by making a request). Nevertheless, to best ensure transparency in this unit clarification matter, we will modify our clarification order to conform to the notice posting itself (which the County acknowledges it posted and did not object to), and without any additional reference to Attachment A or documents that the agency did not provide to the County.

Accordingly, we find as follows. On September 3, 2020, AFSCME filed a petition under OAR 115-025-0005(3) to clarify that certain County employees are in an existing bargaining unit based on certification or contract language. On September 9, 2020, the Board's Election Coordinator provided the County with the petition and caused a notice of the petition to be posted. That notice stated that this Board had been asked to clarify whether certain on-call employees from the "General Employee Unit" who perform work at social distancing shelters and voluntary isolation motels at the County are included in the existing AFSCME General Employee bargaining unit based on a written agreement between the parties dated February 7, 2020. Pursuant to the terms of the notice posting, objections to the unit clarification were due within 14 days of the date of the notice posting (*i.e.*, by September 25, 2020). There were no objections to the petition. Accordingly, we clarify the unit as requested by the petitioner.

ORDER

The Board's September 29, 2020, order is withdrawn and replaced by this order. Certain on-call employees from the "General Employee Unit" who perform work at social distancing shelters and voluntary isolation motels at Multnomah County are included in the bargaining unit based on a written agreement between the parties dated February 7, 2020.

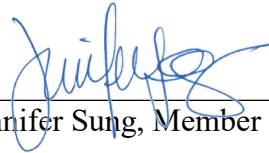
DATED: December 2, 2020.



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-009-20

(REPRESENTATION)

NORTH LINCOLN PROFESSIONAL	)	
FIREFIGHTERS, LOCAL 5169,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER CERTIFYING
	)	EXCLUSIVE REPRESENTATIVE
NESTUCCA RURAL FIRE PROTECTION	)	
DISTRICT,	)	
	)	
Respondent.	)	
_____	)	

On November 12, 2020, North Lincoln Professional Firefighters, Local 5169, filed a petition under ORS 243.682(2) and OAR 115-025-0000(4) to certify (without an election) a new bargaining unit of certain employees (described below) of the Nestucca Rural Fire Protection District. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards designating North Lincoln Professional Firefighters, Local 5169, as the exclusive representative of the proposed bargaining unit.

On November 13, 2020, 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 December 2, 2020). There were no objections to the petition or a request for an election.

ORDER

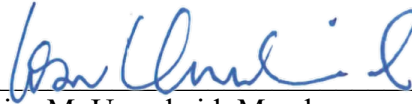
Accordingly, it is certified that North Lincoln Professional Firefighters, Local 5169, is the exclusive representative of the following bargaining unit at Nestucca Rural Fire Protection District:

“Firefighter(s), Lieutenant(s), and Captain(s).”

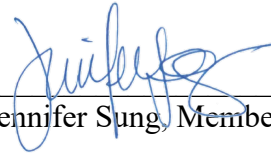
DATED: December 3, 2020.



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-004-20

(DUTY OF FAIR REPRESENTATION)

EILEEN ORDWAY,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
SEIU LOCAL 503,	)	DISMISSAL ORDER
	)	
and	)	
	)	
STATE OF OREGON, DEPARTMENT OF	)	
HUMAN SERVICES and HOME CARE	)	
COMMISSION,	)	
	)	
Respondents.	)	
_____	)	

Eileen Ordway, Salem, Oregon, appeared *pro se*.

Shirin Khosravi, Supervising Attorney, SEIU Local 503, OPEU, Salem, Oregon, represented Respondent SEIU Local 503.

Brena Lopez, Senior Assistant Attorney General, Labor & Employment Section, Department of Justice, Salem, Oregon, represented Respondent State of Oregon, Department of Human Services and Home Care Commission.

On October 29, 2020, Complainant, appearing *pro se*, filed a complaint claiming that Respondent SEIU Local 503 (SEIU) violated ORS 243.672(2)(a), and that Respondent State of Oregon, Department of Human Services and Home Care Commission (the State), violated ORS 243.672(1)(g). Complainant filed an amended statement of claims on November 2, 2020.

The complaint was assigned to Administrative Law Judge (ALJ) Martin Kehoe, who conducted an investigation to determine if an issue of fact or law existed that warranted a hearing. *See* OAR 115-035-0005. As part of that investigation, ALJ Kehoe asked each Respondent for an informal response. On November 16, 2020, each Respondent provided ALJ Kehoe with an informal response asking that the complaint be dismissed without a hearing. On November 17, 2020, ALJ Kehoe issued an order to show cause to Complainant, directing her to show cause why the complaint should not be dismissed without a hearing. In that order, ALJ Kehoe explained that none of Complainant's filings appeared to include any colorable claims that involve ORS 243.672(1)(g) or (2)(a), or fall within the Employment Relations Board's jurisdiction. On December 1, 2020, Complainant responded to the show cause order by filing a second amended statement of claims. After reviewing Complainant's response, ALJ Kehoe recommended to this Board that the complaint be dismissed without a hearing.

In considering whether a complaint presents an issue of fact or law that warrants a hearing, we assume well-pleaded facts to be true, and we may also rely on undisputed facts discovered during our investigation. *R.M. v. Portland Association of Teachers and Multnomah County School District No. 1J (Operating as Portland Public Schools)*, Case No. FR-001-18 at 2 (2019). In order to proceed to hearing, a complainant must allege facts that, if proven, would establish that the respondent engaged in conduct that violates the Public Employee Collective Bargaining Act (PECBA), as claimed. If the complainant does not allege facts sufficient to establish the claim, we dismiss the claim for "failure to state a cause of action." *Krogstad v. Oregon School Employees Association and Gresham-Barlow School District*, Case No. FR-001-16 at 2, 26 PECBR 738, 739 (2016). In this case, we dismiss Complainant's claims because, even assuming that all of the well-pleaded facts alleged by Complainant are true, those facts do not establish that SEIU violated ORS 243.672(2)(a), or that the State violated ORS 243.672(1)(g). We explain this conclusion further below.

We begin by addressing Complainant's duty of fair representation claim against SEIU. Complainant claims that SEIU violated the duty of fair representation by failing to enforce a term limit for an elected position on SEIU's Board of Directors that is set forth in SEIU's constitution and bylaws. "A union's violation of its constitution or bylaws is not in and of itself unlawful under [PECBA]." *St. John Jr. et al. v. Oregon School Employees Association, Local 119 and Mosher, President*, Case No. UP-70-90 at 2, 12 PECBR 409, 410 (1990). "PECBA does not prescribe specific rules for the conduct of a union's internal affairs," and it does not authorize "this Board to police a union's compliance with its own [constitution or] by-laws." *Id.* Accordingly, "a complainant cannot establish that a union's conduct violated its duty of fair representation merely by proving that the union violated its constitution." *Warkentin v. Bend La Pine School District and Oregon School Employees Association*, FR-003-18 at 11 (2019). Rather, the complainant must allege, and ultimately prove, additional facts that are sufficient to support a determination (1) that the union's failure to follow its constitution was arbitrary, discriminatory, or made in bad faith, and (2) that the failure to follow its constitution harmed the complainant. *Id.* If such additional factual allegations are not in the complaint, the complaint will be dismissed. *Krogstad*, FR-001-16 at 2, 26 PECBR at 739.

In this case, Complainant claims that SEIU's failure to enforce a term limit set forth in its constitution and bylaws discriminated against Complainant because that lapse permitted SEIU members to elect a term-limited individual to SEIU's Board of Directors, instead of Complainant.

Complainant also alleges that SEIU had a motive to favor the term-limited individual because Complainant has associated herself with an individual who has been critical of SEIU. We note that a union constitution, like other legal documents, may be subject to good faith disputes over their interpretation and application, and that the question of whether the individual at issue was term-limited is not a strictly factual question. However, even assuming that the individual at issue was term-limited, as Complainant claims, Complainant's factual allegations are not sufficient to establish that SEIU's failure to enforce the term limit was unlawfully discriminatory. "A union's conduct is unlawfully discriminatory if there is substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." *Warkentin*, FR-003-18 at 10 (quotation marks and citation omitted). Complainant does not allege facts that would, if proven, establish that SEIU has enforced the term limit differently against similarly situated individuals and that it did so intentionally for reasons unrelated to legitimate union objectives. Accordingly, Complainant has failed to state a cause of action against SEIU, and this claim must be dismissed.¹

We turn to Complainant's claim that the State violated ORS 243.672(1)(g). Section (1)(g) makes it an unfair labor practice for a public employer to violate the provisions of any written contract with respect to employment relations. Complainant does not allege that the State violated any such contract. Therefore, Complainant has failed to state a cause of action against the State, and this claim must also be dismissed.²

ORDER

The complaint is dismissed.

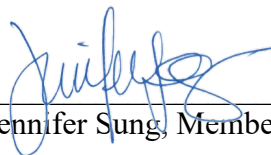
DATED: December 22, 2020.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

¹Complainant also appears to contend that SEIU is discriminating against her by "employing" the term-limited individual as a director instead of Complainant. However, it is undisputed that SEIU members elected the allegedly term-limited individual to serve on SEIU's Board of Directors, and a union does not engage in unlawful discrimination by accepting the results of an internal election.

²We note that, in her response to the order to show cause, Complainant appears to claim that SEIU violated ORS 659A.030(1)(b), and that the State is liable as a joint employer for that alleged violation. This Board does not have jurisdiction over claims brought under ORS 659A.030, and therefore, all such claims must be dismissed.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-002-20

(UNFAIR LABOR PRACTICE)

T.S.,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
PORTLAND ASSOCIATION OF	)	DISMISSAL ORDER
TEACHERS,	)	
	)	
and	)	
	)	
PORTLAND PUBLIC SCHOOLS,	)	
	)	
Respondents.	)	
	)	

T.S., Portland, Oregon, appeared *pro se*.

Elizabeth A. Joffe, McKanna Bishop Joffe, LLP, Portland, Oregon, represented Respondent Portland Association of Teachers.

Michael Porter, Miller Nash Graham & Dunn, LLP, Portland, Oregon, represented Respondent Portland Public Schools.

On June 16, 2020, Complainant, appearing *pro se*, filed her initial complaint against Respondent Portland Association of Teachers (Association) and Respondent Portland Public Schools (District). The complaint consisted of a narrative statement and 27 exhibits totaling more than 600 pages, and alleged that the Association violated ORS 243.672(2)(b), (c), and (d), and that the District violated ORS 243.672(1)(g).

The complaint was assigned to Administrative Law Judge (ALJ) Jennifer Kaufman, who conducted an investigation to determine if an issue of fact or law existed that warranted a hearing. *See* OAR 115-035-0005. As part of that investigation, both respondents submitted informal responses, on July 16 and 17, 2020. On July 31, 2020, Complainant filed additional documents. On August 12, 2020, ALJ Kaufman ordered Complainant to make her complaint more definite and

certain, explaining that many of the allegations in the complaint appeared to be time-barred or outside the scope of this Board's limited jurisdiction. ALJ Kaufman also requested that Complainant voluntarily withdraw the claims that were time-barred or that sought relief that this Board has no power to order.

On August 24, 2020, Complainant filed an amended complaint. The amended complaint alleges violations of numerous subsections of both ORS 243.672(1) and (2), as well as multiple statutes outside this Board's jurisdiction, including the Americans with Disabilities Act (ADA), the Rehabilitation Act of 1973, and multiple statutes in ORS Chapter 659A. On September 16, 2020, both respondents filed supplemental informal responses.

On September 25, 2020, after review of the amended complaint, ALJ Kaufman sent the parties a letter identifying the allegations that appeared appropriate for a hearing, as follows:

“During the 180 days preceding the filing of the initial complaint, did [the Association] violate ORS 243.672(2)(a) by: (1) breaching its duty to fairly represent [Complainant] in connection with her attempts to return to work with reasonable accommodations, and/or (2) breaching its duty to fairly represent [Complainant] in connection with the termination of her health insurance benefits in May 2020?”

ALJ Kaufman informed the parties that all other issues in the amended complaint were untimely or outside this Board's jurisdiction.¹ ALJ Kaufman set a deadline of October 5, 2020, for Complainant to object to this statement of the issues for a hearing. Complainant did not object that the statement was incomplete with respect to allegations related to events within the 180-day period preceding the initial complaint.²

On November 20, 2020, ALJ Kaufman served the amended complaint and issued a notice of hearing, scheduling a hearing for December 29 and 30, 2020. On December 7, 2020, the Association filed a motion to dismiss the amended complaint. On December 15, 2020, Complainant filed a response to that motion. After reviewing Complainant's response, ALJ Kaufman recommended to this Board that the amended complaint be dismissed.

¹ALJ Kaufman also advised Complainant that the claim against the District would be held in abeyance pending the outcome of the claims against the Association.

²On October 5, 2020, Complainant objected to the issue statement to the extent that it did not include the issue of “a lack of fair representation by [the Association] with these complaints about plan management by third party administrators.” Complainant asserted that, during the statutory period, she had asked the Association to represent her in connection with the District's alleged reporting errors and their impact on her long-term disability benefits. Complainant also asserted, however, that the Association had denied her representation on that issue as long ago as March 2019, well before the 180-day period of limitations. *See* ORS 243.672(6) (“An 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.”). Consequently, that issue does not present a question of fact or law that warrants a hearing.

In considering whether a complaint presents an issue of fact or law that warrants a hearing, we assume well-pleaded facts to be true; we also rely on undisputed facts discovered during our investigation. *R.M. v. Portland Association of Teachers and Multnomah County School District No. 1J (Operating as Portland Public Schools)*, Case No. FR-001-18 at 2 (2019). The Board does not consider merely conclusory statements or allegations that lack sufficient specificity. *Melendy v. Service Employees International Union Local 503, Oregon Public Employees Union and State of Oregon, Department of Human Services, Oregon State Hospital*, Case No. FR-3-08 at 18, 22 PECBR 975, 992 (2009); *Teamsters Local 57 v. City of Brookings/dba Brookings Police Department*, Case No. UP-85-92 at 1-2, 13 PECBR 677, 677-78 (1992). Here, having considered the facts alleged in the amended complaint, as well as the facts uncovered in the ALJ's investigation, we summarize the well-pleaded and undisputed facts as follows.

1. The Association represents a professional educator bargaining unit at the District. Complainant is a member of the bargaining unit.

2. The Association and the District are parties to a collective bargaining agreement (CBA) in effect from July 1, 2019 through June 30, 2020. Article 17.5.2 of the CBA provides:

“A professional educator returning from an unpaid leave due to disability shall, upon request, submit a written statement from a qualified physician attesting to the professional educator's ability to resume his/her duties.”

3. Complainant went out on a medical leave beginning February 9, 2018.³ The District, when it approved her medical leave, notified Complainant that she would be required to present a release to return to work from her medical providers before being restored to employment. On July 31, 2018, Complainant requested and was granted an extension of her medical leave.

4. Complainant remained on medical leave through the 2018-2019 school year. On November 9, 2018, the District reiterated to Complainant that it would require her to provide a release to return to work from her medical providers before it would return her to work.

5. On June 12, 2019, the District proposed to end Complainant's employment through a non-disciplinary medical termination of employment. In July 2019, the Association, on behalf of Complainant and other employees, filed a successful grievance challenging the District's proposed non-disciplinary medical terminations. Consequently, Complainant's employment by the District continued.

6. On July 16, 2019, the Association, on behalf of Complainant, requested (1) an interactive process meeting for Complainant, and (2) continued unpaid leave as a reasonable accommodation for Complainant's disability.

³We describe events before December 20, 2019 (180 days before the complaint was filed) solely to provide context to the events that occurred during the 180 days before the initial complaint was filed.

7. The Association, through its counsel, Noah Barish, took a series of actions on behalf of Complainant to facilitate her reasonable accommodations. On October 30, 2019, Barish explained to Complainant that a release to return to work was a prerequisite to her returning to her position, but that they could focus on extending her leave as an accommodation until she was able to return to her duties. Barish also communicated with the District regarding Complainant's return to work status, including securing the District's agreement in October 2019 to conduct the interactive process by sharing documents rather than meeting in person. Barish met with Complainant twice (on December 11, 2019, and February 20, 2020), and repeatedly communicated with Complainant to assist her in her attempt to seek reasonable accommodations.

8. On October 30, 2019, Complainant completed a request for "extended time off," which she described as "through November 2020." Complainant's medical providers verified that Complainant was unable to work. On November 1, 2019, Barish forwarded Complainant's request to the District, seeking leave for the remainder of the 2019-2020 school year. Barish wrote that Complainant "anticipates being able to return to work in some capacity for the 2020-2021 year."

9. In the course of the Association's representation of Complainant, she authorized her medical providers to share medical information with the Association's counsel. On December 11, 2019, Complainant informed the Association that she had revoked that authorization.

10. Ultimately, Complainant decided that she did not want the Association to attend her meetings with the District to discuss her possible return to work. Complainant met with the District, without the Association, on February 21, 2020. Following this meeting, on March 18, 2020, the District reiterated that, before it could return her to work, it needed documentation from Complainant's medical providers releasing her to return to her duties, and that the District had not received this release.

11. On March 25, 2020, UniServe Consultant Peter Brogan, on behalf of the Association, emailed Complainant and explained that the Association did not believe that a grievance regarding Complainant's return to work had merit because her medical providers stated that she was unable to perform her job duties, and could perform only a very narrow category of work. Brogan also explained that, although the Association was unwilling to file a grievance related to Complainant's return to work, it was willing to assist and support her in other ways. He advised Complainant that they should work with Complainant's medical providers to provide updated information about the kinds of jobs Complainant could perform. Brogan also stated that if Complainant was unwilling to allow the District to communicate with the Association about her, she should pursue her grievance directly under Article 5, and he explained how to do so.

12. On March 30, 2020, Complainant asked the Association to file grievances on her behalf regarding her wish to return to work in an open position.

13. On March 30, 2020, Brogan sent a letter to Complainant. In that letter, Brogan stated that, according to the District's counsel, Complainant had informed the District that the Association did not represent her, and that Complainant had directed the District not to

communicate with the Association about her. Consequently, Brogan confirmed with Complainant that the Association no longer represented her. He reiterated the Association's offer to assist her in the interactive process if Complainant changed her mind and decided to permit the Association to represent her.

14. On April 1, 2020, on behalf of the District, Director of Benefits Ligena Hein notified Complainant by letter that her medical providers had not provided the District with documentation that Complainant was released to perform her duties, or the duties of other available positions. Hein wrote, "We are happy to continue working through the interactive process with you, but we need more information from you and your medical providers to identify potential accommodations that would allow you to perform the essential functions of your job or another vacant position at the District."

15. On April 2, 2020, Brogan responded to Complainant's March 30, 2020, grievance request and described why Complainant's requested grievance about her return to work (and others she sought to pursue) were not meritorious. Brogan also reiterated to Complainant that, because she had informed the District that the Association did not represent her and directed the District not to communicate with the Association about her, the Association could not grant her grievance request unless she gave the Association clear, written authorization to represent her. In relevant part, Brogan wrote:

"As my March 30, 2020 letter to you attempted to clarify, there are many reasons it has been difficult to advocate for you. We have no assurance that you have retracted your prior order to [the Association] not to communicate with the District on [your] behalf nor that you have retracted your directive to the district that [the Association] does not represent you and that they should not communicate with [the Association] about your employment situation at PPS. So, before we can do any additional advocacy or representational work on your behalf we need confirmation from you that you have sent or will send authorization to the district that [the Association] can represent you and communicate on your behalf on all matters pertaining to your employment in the district. Otherwise, it makes any advocacy, including the filing of any grievance, impossible.

"As a precondition to performing further advocacy *** [the Association] needs to have some kind of statement from you, in writing, that [the Association] has authority to communicate with the District on your behalf and to represent you on matters relating to your employment concerns. Absent receiving it, we cannot assist you any further."

16. On April 8, 2020, Complainant filed grievances on her own behalf directly with the District.

17. On April 10, 2020, Brogan emailed Complainant, reiterating the Association's evaluation that Complainant's grievance was not meritorious. Brogan also wrote that, even if there were a grievance with merit, the Association needed her authorization to represent her. Brogan explained that, in light of Complainant's direction to the District not to communicate with the Association about her, the Association needed her authorization to communicate on her behalf. Brogan also wrote, "To date you have not provided us with medical documentation showing that you are entitled to be returned to work under the CBA or the ADA. Further, we still have not received any clear written communication from you that [the Association] is authorized to communicate with the District on your behalf."

18. On April 15, 2020, Brogan emailed Complainant again, confirming that Complainant had previously asked the Association not to attend her interactive process meeting with the District. Brogan wrote that if Complainant wanted the Association's assistance, he was "happy to continue to work with you on advocating around a return to work and accommodations under the ADA interactive process." Brogan also invited Complainant to provide him with "any additional information that you have to support the grievances if you want [the Association] to reassess the merits of any of grievances based on information not previously provided." Brogan also stated that, in light of the Association's evaluation of her grievance, he would attend the grievance hearing as an observer, as permitted by the CBA.

19. In response, Complainant stated that she wanted representation by the Association, and disputed the Association's view that she was required to provide a medical release in order to return to work.

20. On April 17, 2020, Brogan emailed Complainant to offer to speak with her, even over the weekend, about how the Association could assist her.

21. On April 22, 2020, Complainant met with the District about her grievance. Complainant declined representation by the Association for the meeting.

DISCUSSION

Complainant alleges that the Association violated ORS 243.672(2)(a), which requires the exclusive representative of a group of employees to represent all employees in the bargaining unit fairly. *Griffin v. Service Employees International Union Local 503, Oregon Public Employees Union and State of Oregon, Employment Department*, Case No. FR-002-09 at 24, 24 PECBR 1, 24 (2010). Complainant also alleges that the District violated ORS 243.672(1)(g), which prohibits a public employer from violating the provisions of any written contract with respect to employment relations.

In considering whether a complaint presents an issue of fact or law that warrants a hearing, we assume well-pleaded facts to be true, and, as noted, we may also rely on undisputed facts discovered during our investigation. *R.M.*, FR-001-18 at 2. In order to proceed to hearing, a complainant must allege facts that, if proven, would establish that the respondent engaged in conduct that violates the Public Employee Collective Bargaining Act, as claimed. If the

complainant does not allege facts sufficient to establish the claim, we dismiss the claim for “failure to state a cause of action.” *Krogstad v. Oregon School Employees Association and Gresham-Barlow School District*, Case No. FR-001-16 at 2, 26 PECBR 738, 739 (2016). In this case, we dismiss Complainant’s claims because, even assuming that all of the well-pleaded facts alleged by Complainant are true, those facts do not establish that the Association violated ORS 243.672(2)(a), or that the District violated ORS 243.672(1)(g). We explain this conclusion further below.

We turn first to Complainant’s claim that the Association breached its duty to fairly represent her in connection with her attempts to return to work with reasonable accommodations. Generally, we will find a violation of subsection (2)(a) “only where a labor organization’s actions are arbitrary, discriminatory, or taken in bad faith.” *Block v. Amalgamated Transit Union, Division 757*, Case No. FR-001-15 at 4, 26 PECBR 486, 489 (2015). A union’s action is arbitrary if it lacks a rational basis. *Chan v. Leach and Stubblefield, Clackamas County Community College; McKeever and Brown, Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-05 at 12, 21 PECBR 563, 574 (2006). A union’s conduct is discriminatory if there is “substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives.” *Id.* at 13; 21 PECBR at 575. A union’s conduct is in bad faith if it intentionally acts against a member’s interest and does so for an improper reason. *Id.*

Complainant asserts that the Association violated its duty to represent her with respect to her return to work with reasonable accommodations by not filing a grievance on her behalf. Generally, a union does not breach its duty of fair representation by declining to pursue a grievance if the union has conducted a proper investigation into the grievance and used “a rational method of decision-making in reaching its conclusion.” *Putvinskis v. Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO and Southwestern Oregon Community College*, Case No. UP-71-99 at 14, 18 PECBR 882, 895 (2000). Here, Article 17.5.2 of the CBA provides that the District may require a professional educator to provide a release from a qualified physician “attesting to the professional educator’s ability to resume his/her duties” before it returns the educator to work. It is undisputed that, when Complainant went on medical leave beginning February 9, 2018, the District notified her that she would be required to present such a medical release before being restored to employment. It is also undisputed that the District reiterated that requirement on November 9, 2018, and on multiple occasions thereafter. The Association never received from Complainant a medical release that met the requirements of Article 17.5.2 of the CBA. Consequently, the undisputed facts do not establish that the Association’s decision not to file a grievance on Complainant’s behalf was arbitrary, discriminatory, or in bad faith; to the contrary, it was grounded in the clear language of the collective bargaining agreement. Further, the Association conducted a reasonable investigation to verify that Complainant had not obtained the necessary release to return to work, and continued to offer assistance even after Complainant withdrew the authorizations necessary for the Association to assess the merits of her claim that she could return to work.⁴ Finally, on several occasions, Uniserve Consultant Brogan explained to Complainant the reasons for the Association’s evaluation of a grievance.

⁴We need not address the merits of the Association’s conclusion that Complainant’s grievance lacked merit, because this Board “generally does not substitute its judgment for that of a union that

Moreover, the undisputed facts demonstrate that the Association diligently attempted to assist Complainant with respect to her wish to return to work. In July 2019, the Association filed a successful grievance challenging the District's decision to change Complainant's employment status through a medical discharge. Thereafter, during the interactive process initiated at the Association's request, the Association's attorney advised Complainant on multiple occasions about her rights throughout her attempts to return to work, and attempted to facilitate an interactive dialogue with the District. During that interactive process, however, Complainant ultimately declined to furnish the medical documentation necessary, and declined to permit the Association to communicate with her medical providers. Although Complainant requested that the Association file grievances on her behalf, she simultaneously informed the District that the Association did not represent her, directed the District not to discuss her with the Association, and declined Association representation during her meetings with the District. Despite Complainant's reluctance (and sometimes refusal) to cooperate with the Association's efforts to represent her, the Association persisted in offering her assistance and support. Under these circumstances, there is no issue of fact or law that warrants a hearing.⁵

We turn next to Complainant's claim that the Association breached its duty to fairly represent Complainant in connection with the termination of her health insurance benefits in May 2020. We dismiss this claim because it fails to state a cause of action. To allege a claim for breach of the duty of fair representation, a complainant must plead three elements: (1) the union had a duty to represent the employee in the manner alleged; (2) the union breached that duty; and (3) the employee was injured by the breach. *See Melendy*, FR-3-08 at 16, 22 PECBR at 990. In order to proceed to a hearing, a complainant must also allege facts that, if proven, would establish a claim. If such factual allegations are not in the complaint, the complaint will be dismissed without a hearing for failure to state a claim for relief. *See Putvinskas*, UP-71-99 at 12, 18 PECBR at 893.

Here, the amended complaint does not allege that Complainant asked the Association to file a grievance or otherwise represent her in connection with the termination of her health insurance, or allege when the Association allegedly declined to do so. Accordingly, the amended complaint fails to plead facts sufficient to establish a claim that the Association refused to represent

rationally decided to process a grievance." *Putvinskas*, UP-71-99 at 14, 18 PECBR at 895. Nonetheless, here, we note that the District repeatedly explained to Complainant that it needed medical documentation to assist her by identifying reasonable accommodations that would enable her to return to work. The District also repeatedly indicated that Complainant's medical providers did not release Complainant to perform the duties of a school psychologist (or any other vacant position).

⁵Complainant, in the amended complaint, acknowledges the numerous efforts that the Association undertook to attempt to assist Complainant to return to work. The amended complaint, however, characterizes those attempts by the Association as "posturing only" that were not "intended to support my return to work from a medical leave of absence." Similarly, in her response to the Association's motion to dismiss, Complainant acknowledges that the District "initiated" an interactive process, but describes it as "on paper, but not in practice." Complainant's characterizations of the Association's actions, however, are not well-pleaded factual allegations that would establish the existence of an issue of fact or law that warrants a hearing.

Complainant with respect to her health insurance.⁶ See *E.K. v. Benton County and Benton County Sheriff's Office and Benton County Deputy Sheriff's Association*, Case No. FR-005-18 at 7 (2019) (dismissing claim of refusal to file a grievance where the complainant did not allege that he asked the union to pursue a grievance on his behalf or specify when the union declined to file a grievance). Moreover, the undisputed facts do not establish that the Association's actions related to Complainant's health insurance were arbitrary, discriminatory, or taken in bad faith.

Finally, we turn to the claim against the District. When we dismiss a duty of fair representation claim against a labor organization, we automatically dismiss the breach of contract claim against the employer, and we do so here. See *Seehawer v. American Federation of State, County and Municipal Employees, Council 75 and State of Oregon, Department of Corrections*, Case No. FR-02-11 at 7-8, 25 PECBR 47, 53-54 (2012); see also *Stotler v. Teamsters Local 223 and City of Medford*, Case No. FR-03-12 at 4, 25 PECBR 70, 73 (2012) (where a "complainant alleges both a duty of fair representation claim against the union and a breach of contract claim against the employer, the complainant must establish a breach of the duty of fair representation by the union before proceeding with the contract claim against the employer.").

For all of the reasons stated above, there is no issue of fact or law that merits a hearing, and we dismiss the amended complaint. See ORS 243.676(1)(b).

ORDER

The amended complaint is dismissed.

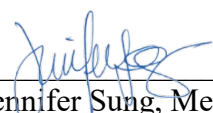
DATED: December 29, 2020.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

⁶We also note that the Association's motion to dismiss indicates that the District retroactively restored Complainant's health insurance benefits. Complainant does not dispute that contention in her response to the motion.