EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-025-20

(UNFAIR LABOR PRACTICE)

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| OREGON AFSCME COUNCIL 75,<br><br>Complainant,<br><br>v.<br><br>MID-COLUMBIA CENTER FOR LIVING,<br><br>Respondent. | ) | FINDINGS AND ORDER ON COMPLAINANT'S PETITION FOR REPRESENTATION COSTS |

On November 10, 2020, this Board issued a consent order holding that Respondent Mid-Columbia Center for Living (MCCFL) violated ORS 243.672(1)(i) and the "in the exercise of" prong of ORS 243.672(1)(a) "when it created, printed, and distributed flyers and talking points that conveyed to employees the employer's preference that employees not form a union" with Complainant, Oregon AFSCME Council 75 (AFSCME or Union). The consent order also held that MCCFL violated ORS 243.672(1)(e) when, "without first providing notice and an opportunity to bargain to the Union," it "eliminated the benefits for a vacant bargaining unit position," and when it implemented the decision to terminate a state contract to provide Intellectual and Developmental Disabilities Services (IDD) "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." The stipulated order directed MCCFL to remedy the unfair labor practices in several ways and to pay a $3,000 civil penalty. The consent order also provided that the Union would "submit a petition for representation costs to the Board," and MCCFL reserved its right "to object to the amount of any claimed fees." 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). We award representation costs to the prevailing party according to OAR 115-035-0055(1)(b). Where, as here, a civil penalty is awarded, we award the full amount of reasonable representation costs, OAR 115-035-0055(1)(b)(E), so long as the prevailing party timely files a petition for the full amount of representation costs,

OAR 115-035-0055(1)(c) and (2)(b). If a petition for full representation costs is filed, the opposing party has 21 days to file written objections. OAR 115-035-0055(2)(c).

2. On November 23, 2020, AFSCME timely filed a petition seeking full reasonable representation costs of $37,486.25, for a total of 198.75 hours of legal work.[1] The petition was properly supported with a statement of the costs incurred and the basis for the amount of the costs requested. *See* OAR 115-035-0055(2)(b).

3. On December 14, 2020, MCCFL timely filed objections to the petition. MCCFL first contends that no representation costs should be awarded to AFSCME because it is not the prevailing party, as that term is defined under OAR 115-035-0055(1)(d). That rule defines "prevailing party" as "the party in whose favor a Board Order is issued." *Id.* MCCFL bases its objections on the portion of the rule that addresses cases "[w]here one charge (or more) in a complaint is upheld while one charge (or more) in a complaint is dismissed." *Id.* In such cases,

> "the Board shall determine which party is the 'prevailing party' based on the charge or charges that the Board determines to be the primary or most significant in the case. If the Board determines that upheld and dismissed charges are equally significant, no representation costs will be awarded."

*Id.* The consent order held that MCCFL violated ORS 243.672(1)(a), (e), and (i) and directed MCCFL to remedy its unfair labor practices and pay a civil penalty. The stipulated order also specifically provided that AFSCME would file a petition for representation costs, which at least implies that the parties agreed AFSCME is the prevailing party. MCCFL nonetheless argues that AFSCME is not the prevailing party because AFSCME agreed to withdraw the "primary" or "most significant" claims alleged in its complaint. However, even assuming MCCFL's characterization of the withdrawn claims as the primary and most significant claims is correct, those claims were voluntarily withdrawn by AFSCME, not "dismissed" by this Board's order.[2] Accordingly, we find that AFSCME is the prevailing party.

4. MCCFL alternatively argues that "the Union's claim based on 198.75 hours is excessive," and that we should award only five percent of the costs claimed by AFSCME because the "issues upon which the Consent Order is based simply should not have consumed much time." "A party objecting to costs based on excessive time spent must submit a supporting statement describing the amount of time spent on the case by the objecting party." OAR 115-035-0055(2)(d). MCCFL did not submit the required supporting statement describing the amount of time that MCCFL spent on the case. Consequently, MCCFL failed to establish that AFSCME's representation costs were unreasonable, and the objection on that ground is denied.

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[1]The parties agreed to the consent order after two days of hearing.

[2]In arguing that MCCFL, not AFSCME, is the prevailing party, MCCFL incorrectly asserts that AFSCME prevailed on only two claims (which MCCFL refers to as the "flyer" and "per diem" claims), and that AFSCME did not prevail on any claims related to the IDD contract. In fact, the consent order concludes that "MCCFL violated ORS 243.672(1)(e) when, without first providing notice and an opportunity to bargain to the Union, * * * 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."

5. MCCFL also argues that the amount of hours claimed by AFSCME should be reduced to an amount that reflects only those claims that were upheld or for which a civil penalty was awarded. In support of that argument, MCCFL cites *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757*, Case No. UP-020-15 (2017) (Rep. Costs Order). However, as MCCFL acknowledges, that case "was decided under the former version of OAR 115-035-0055" and is no longer applicable precedent. Further, this Board has held that our current "rules do not provide for reducing representation costs" on the ground requested by MCCFL. *AFSCME Local 2831 v. Lane County*, Case No. UP-009-18 at 2 (2019) (Rep. Costs Order). In that case, the county argued that the amount of representation costs should be reduced to an amount reflective of those claims that were upheld and for which a civil penalty was awarded. *Id.*[3] We declined to reduce the award and explained that we considered the extent to which the complainant's claims were upheld and dismissed when making the prevailing party determination, and that "where, as here, the prevailing party was also awarded a civil penalty, they are entitled to '[t]he full amount of reasonable representation costs.' OAR 115-035-0055(1)(b)(E)." *Id.* As discussed above, MCCFL failed to establish that AFSCME's representation costs were unreasonable. Accordingly, we award AFSCME the full reasonable representation costs requested of $37,486.25.

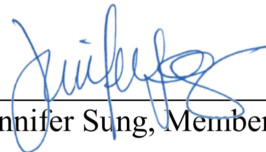
ORDER

MCCFL shall remit $37,486.25 to AFSCME within 30 days of the date of this Order.

DATED: January 25, 2021.

Adam L. Rhynard, Chair

*Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

Member Umscheid, Concurring:

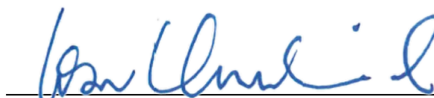
I concur. I write separately to emphasize that I join my colleagues because the Public Employee Collective Bargaining Act (PECBA) and our rules do not authorize us to award less than full representation costs in this case.

[3]The underlying final order in *Lane County* held that the county violated ORS 243.672(1)(a) and (c), dismissed the union's claims under ORS 243.672(1)(b), and awarded a civil penalty for some, but not all, of the unfair labor practice conduct at issue. *AFSCME Local 2831 v. Lane County*, Case No. UP-009-18 (2019).

Here, AFSCME secured an order concluding that MCCFL violated ORS 243.670(2), as well as other sections of PECBA. When a public employer violates ORS 243.670(2), the Board "shall impose" a civil penalty of "triple the amount of funds the public employer expended to assist, promote or deter union organizing." ORS 243.676(4)(b). The award of a civil penalty is thus automatic for such a violation, unlike all other unfair labor practices.[4] The parties stipulated to a civil penalty of $3,000.

Under our present rules, an award of the full amount of reasonable representation costs is also automatic when a civil penalty is awarded. Specifically, our rules provide that representation costs "shall be awarded" to the prevailing party in identified amounts according to a tiered schedule. The lowest tier provides for a $250 award for cases dismissed without a hearing if the dismissal order concludes that the respondent did not engage in an unfair labor practice. OAR 115-035-0055(1)(b)(A). The highest tier (except for cases with a civil penalty) provides for a $5,000 award for cases that require more than one day of hearing. OAR 115-035-0055(1)(b)(D). Our rule then provides that the Board "*shall award* representation costs to the prevailing party" in the "full amount of reasonable representation costs if a civil penalty is awarded." OAR 115-035-0055(1)(b)(E) (emphasis added). A responding party can challenge the reasonableness of representation costs in a civil penalty case only by revealing its own lawyers' billing records and hourly rates. OAR 115-035-0055(2)(d), (e). There is no such filing here.

Consequently, we can award less than the "full amount" of representation costs only if AFSCME is not the prevailing party. I agree with MCCFL that AFSCME, in its request for expedited processing of this case, relied heavily on its theory of the case that MCCFL terminated its contract with the State of Oregon in retaliation for MCCFL employees unionizing, even contending at one point that MCCFL "clearly retaliated against" MCCFL employees for participating in union activity in violation of the motive-based "because of" prong of ORS 243.672(1)(a). Yet AFSCME ultimately abandoned that claim. In addition, at the end of the day, AFSCME did not secure a finding that MCCFL violated ORS 243.672(1)(e) when it decided for financial reasons to return the IDD program to the state. Nonetheless, despite the fact that AFSCME did not prevail on all its claims, I cannot conclude that AFSCME is not the prevailing party. AFSCME obtained an order concluding that MCCFL violated multiple provisions of PECBA, including the "in the exercise of" prong of ORS 243.672(1)(a), as well as ORS 243.672(1)(e) and (1)(i).



*Lisa M. Umscheid, Member

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[4]Specifically, ORS 243.676 provides that the Board may award a civil penalty of up to $1,000 per case if the Board "finds that the person who has committed, or who is engaging, in an unfair labor practice has done so repetitively, knowing that the action taken was an unfair labor practice and took the action disregarding this knowledge, or that the action constituting the unfair labor practice was egregious[.]" ORS 243.676(4)(a)(A). Also, the Board may award a civil penalty of up to $1,000 if the complaint was dismissed and "the complaint was frivolously filed, or filed with the intent to harass the other person, or both." ORS 243.676(4)(a)(B).

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-008-20

(UNIT CLARIFICATION)

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| WASHINGTON COUNTY POLICE OFFICERS ASSOCIATION,<br><br>Petitioner,<br><br>v.<br><br>WASHINGTON COUNTY SHERIFF'S OFFICE, WASHINGTON COUNTY,<br><br>Respondent. | ) | DISMISSAL ORDER |

On November 30, 2020, Washington County Police Officers Association (Association) filed a unit clarification petition under ORS 243.682(2)(a) and *former* OAR 115-025-0005(7) to add the classifications of Criminal Records Specialist 1 and Criminal Records Specialist 2 to its current bargaining unit at the Washington County Sheriff's Office, Washington County (County).[1]

On December 1, 2020, the Board's Election Coordinator caused a notice of the petition to be posted at the County by December 4, 2020. *Former* OAR 115-025-0030(3); *former* OAR 115-025-0065. On December 18, 2020, the County filed timely objections to the petition, asserting that (1) the petition is untimely under the contract bar doctrine and allowable window periods in *former* OAR 115-025-0005(4) and *former* 115-025-0015(4); and (2) the petitioned-for unit is not appropriate. With respect to the first objection, the County provided information that the petitioned-for positions have existed since 2010, and that the parties ratified a successor collective bargaining agreement in 2019, which is effective through June 30, 2022. Accordingly, the County stated that the window period for the petition is April 1, 2022 to May 1, 2022.

Based on this information, the Election Coordinator asked the Association for its response as to the timeliness of its petition. On January 12, 2021, the Association responded that the Board's contract bar and window period rules are unconstitutional in light of *Janus v.*

[1]The Board's Division 25 rules were modified, effective January 7, 2021. With respect to this petition, those modifications consist of renumbering the relevant rules; there are no substantive changes to those rules. We use the rule numbers that were in effect at the time that the petition was filed.

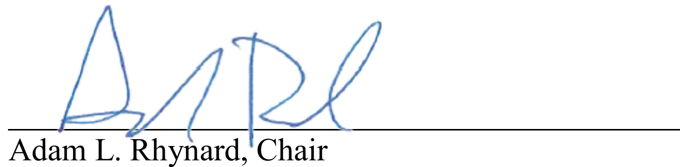
*AFSCME, Council 31*, __ US __, 138 S Ct 2448, 201 L Ed 2d 924 (2018).[2] Because the Association's response did not dispute that the petition is untimely under our rules, the Election Coordinator requested that the Association withdraw the petition. The Association declined to do so.[3]

Because the petition was prematurely filed, and the Association declined to withdraw it, we may dismiss it. *Former* OAR 115-025-0025(2)(b). In doing so, we disagree with the Association that *Janus* rendered the applicable rules (which do not concern fair share or other compelled payments from a public employee) unconstitutional. The Association argues that, under *Janus*, the time restrictions for filing unit clarification petitions (and presumably representation petitions) unconstitutionally infringe on public employees' First Amendment rights under the Constitution of the United States. *Janus*, however, concluded only that it is unconstitutional for a public employee who is not a union member to have any agency fee or other payment to a union deducted from the employee's wages, unless the public employee affirmatively consented to that deduction or payment. *See Janus*, 138 S Ct at 2486. *Janus* did not change the underlying system of exclusive representation and has no bearing on the timeliness of filing representation or unit clarification petitions. *See Salem Police Employees' Union v. City of Salem and Oregon AFSCME Council 75, Local 2067*, Case No. UC-010-18 at 2 (2018). Because the record establishes, and the Association does not dispute, that the petition is untimely under our rules, we dismiss the petition.

ORDER

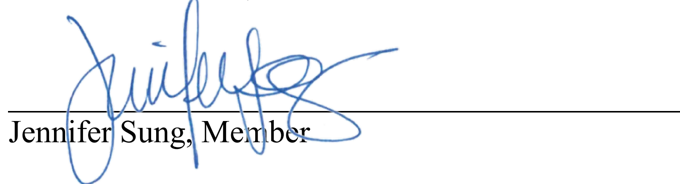
The petition is dismissed.

DATED: January 25, 2021.



Adam L. Rhynard, Chair

Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

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[2]The Association also advanced other arguments unrelated to the timeliness of the petition. Because the petition is untimely, we do not address those other arguments.

[3]The Association did file a new petition that would include the petitioned-for classifications in a new, separate bargaining unit. That type of petition is not subject to a contract bar.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-009-20

(UNIT CLARIFICATION)

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|---|---|---|
| OREGON AFSCME COUNCIL 75,<br><br>Petitioner,<br><br>v.<br><br>CITY OF PORTLAND, POLICE BUREAU,<br><br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | ORDER ADDING UNREPRESENTED EMPLOYEES TO EXISTING UNIT |

On December 31, 2020, Oregon AFSCME Council 75 filed a unit clarification petition under ORS 243.682(2)(a) and former OAR 115-025-0005(7) to add the Internal Affairs Investigators at the City of Portland, Police Bureau to its current bargaining unit.[1] A majority of eligible employees specified in the petition signed valid authorization cards designating Oregon AFSCME Council 75 as the exclusive bargaining representative.

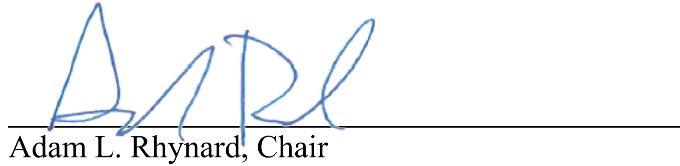
On January 4, 2021, the Board's Election Coordinator caused a notice of the petition to be posted at the City by January 7, 2021. OAR 115-025-0030(3); OAR 115-025-0065. Pursuant to the terms of the notice posting, OAR 115-025-0030(3)(d), OAR 115-025-0065(7), and OAR 115-025-0075(2), objections to the proposed bargaining unit or a request for an election were due within 14 days of the date of the notice posting (*i.e.*, by January 21, 2021). There were no objections to the petition.

[1]The Board's Division 25 rules were modified, effective January 7, 2021. With respect to this petition, those modifications consist of renumbering the relevant rules; there are no substantive changes to those rules. We use the rule numbers that were in effect at the time that the petition was filed.

## ORDER

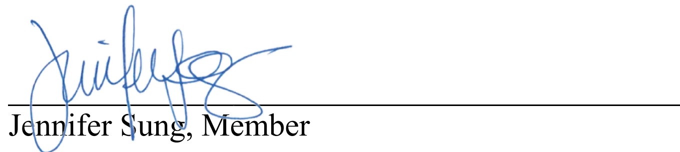
Accordingly, it is certified that the Internal Affairs Investigators at the City of Portland, Police Bureau be added to the bargaining unit currently represented by Oregon AFSCME Council 75.

DATED: January 25, 2021.



Adam L. Rhynard, Chair

Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-003-20

(UNIT CLARIFICATION PETITION)

KLAMATH COUNTY,<br>
Petitioner,<br>
v.<br>
TEAMSTERS LOCAL 223,<br>
Respondent.

RULINGS,
FINDINGS OF FACT
CONCLUSIONS OF LAW,
AND ORDER

Adam Collier, Attorney at Law, CDR Labor Law, LLC, Portland, Oregon, represented the Petitioner.

Julie D. Reading, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented the Respondent.

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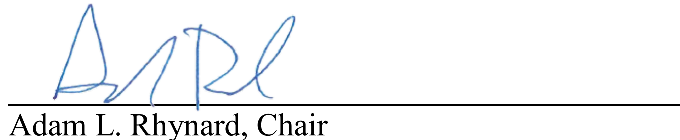
On December 16, 2020, Administrative Law Judge Martin Kehoe issued a recommended order in this matter. The parties had 14 days from the date of service of the order to file objections. OAR 115-010-0090(1). No objections were filed, which means that the Board adopts the attached recommended order as the final order in the matter. OAR 115-010-0090(4).

ORDER

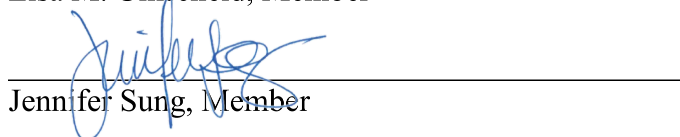
The Sergeants employed by the County in the Sheriff's Office are excluded from bargaining.

DATED: January 26, 2021.



Adam L. Rhynard, Chair

Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-003-20

(UNIT CLARIFICATION PETITION)

| | | |
|---|---|---|
| KLAMATH COUNTY,<br><br>Petitioner,<br><br>v.<br><br>TEAMSTERS LOCAL 223,<br><br>Respondent. | ) | RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER |

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on June 29, 2020. The record closed on September 10, 2020, upon receipt of the parties' post-hearing briefs.

Adam Collier, Attorney at Law, CDR Labor Law, LLC, Portland, Oregon, represented the Petitioner.

Julie D. Reading, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented the Respondent.

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On April 3, 2020, the Petitioner, Klamath County (County), filed a unit clarification petition with the Employment Relations Board (Board). The petition seeks to clarify whether the Sergeants employed by the County in the Klamath County Sheriff's Office are "supervisory employees" under ORS 243.650(23)(a) and, as a result, whether they can be included in the existing bargaining unit currently represented by the Respondent, Teamsters Local 223 (Union). On April 14, 2020, the Union timely filed an objection to the petition, contending that the Sergeants are not "supervisory employees." As set forth below, we conclude that the Sergeants are "supervisory employees," and are therefore excluded from bargaining.

## RULINGS

All rulings by the ALJ were reviewed and are correct.

## FINDINGS OF FACT

Background

1. The County is a "public employer" within the meaning of ORS 243.650(20). The sole County department at issue in this case is the Klamath County Sheriff's Office. The Sheriff's Office currently has around 98 employees in total. (Exh. P-3.)[1] The Klamath County Sheriff is an elected position.

2. The Sheriff's Office consists of a number of Divisions, the largest of which are the Patrol Division and the Corrections Division. The Patrol and Corrections Divisions have around the same number of employees, depending on vacancies. Both Divisions operate 24 hours a day, 7 days a week. Corrections Division employees work in the Klamath County Jail, which currently has around 52.5 positions in total.

3. The Sheriff's Office maintains one policy manual for the Patrol Division (Exh. P-15) and another for the Corrections Division (Exh. P-16). All Sheriff's Office employees have access to these policy manuals and are expected to become familiar and comply with them to the extent possible. Nonetheless, certain policies do not accurately reflect the Sheriff's Office's current practice. The Sergeants' job descriptions, though largely accurate, also contain limited inaccuracies.

4. The Union is a "labor organization" within the meaning of ORS 243.650(13). It is also the exclusive representative of a bargaining unit that includes all regular full-time Sergeants employed in the Sheriff's Office. That unit currently includes five Patrol Sergeants, all of whom work in the Patrol Division, as well as three Corrections Sergeants, all of whom work in the Corrections Division. In 2002, the Union entered into an affiliation agreement with the preexisting Klamath County Sergeants Association to represent this unit. (Exh. R-7.)

5. The County and the Union are parties to a collective bargaining agreement (CBA). By its terms, that CBA expired on June 30, 2020. (Exh. P-1.) Because of the filing of the County's unit clarification petition, as of the hearing for this case, the parties had not started bargaining a successor CBA. However, the Union made a "reopener request" before the petition was filed.

6. The Klamath County Peace Officers' Association (KCPOA) is a separate labor organization. It represents the Sheriff's Office's regular full-time and regular part-time Patrol Deputies, Patrol Corporals, Corrections Deputies, Corrections Corporals, Records Clerks, Jail

[1] Exh. P-3 purports to list every position at the Sheriff's Office along with the number of employees in each position. The exhibit is generally accurate, but there is no longer a Civil Sergeant position as it indicates. The Patrol Division's policy manual and other exhibits refer to an Administrative Sergeant, but that position no longer exists, either. (Exh. P-15 at 15.) Finally, the Chief Deputy position referred to in the evidence was phased out in 2017 and, in essence, has been replaced by the Patrol Lieutenant position.

Clerks, Transcriptionists, Senior Civil Deputies, Civil Deputies, and Court Security Deputies. Reserve Officers are excluded from the KCPOA unit. (Exh. P-2 at 8-9.) The County and the KCPOA are parties to their own CBA. (Exh. P-2.)

7. Under different contracts, the Sheriff's Office provides police coverage for outside entities including Klamath Community College, the City of Chiloquin, the Forest Service, and the Bureau of Land Management, among others. Each of those contracts requires that the Sheriff's Office provide a specific number of hours of work for each entity. The contract with the City of Chiloquin, for example, entitles it to 40 hours of patrol from the Sheriff's Office every month.

8. The Sheriff's Office uses a traditional chain of command. Sheriff Chris Kaber is in charge of the entire Sheriff's Office. He has been in his current position since January 2017. Lieutenant Randall ("Randy") Swan reports directly to Sheriff Kaber and is in charge of the Patrol Division. Lieutenant Swan has been in his current position since 2017. Lieutenant Brian Bryson also reports directly to Sheriff Kaber and is in charge of the Corrections Division. Lieutenant Bryson has been in his current position since January or February 2017.

9. Either Lieutenant may be called a Division Commander. The Patrol Lieutenant in particular is also called the "Patrol Operations Lieutenant." (Exh. P-5 at 1.) Further, the Patrol Lieutenant and the Sheriff are sometimes collectively called "the administration." The Corrections Lieutenant is also called the "Jail Commander" and the Search and Rescue Coordinator. (Exh. P-16 at 1.) In practice, and in the Sheriff's Office's policy manuals, Sergeants from either Division are commonly referred to as "Supervisors" or "Shift Supervisors."

10. Lieutenant Swan of the Patrol Division directly supervises the five Patrol Sergeants: Darren Frank, Ryan Kaber, Steven Lewis, Shane Mitchell, and Benjamin Scheen. Lieutenant Bryson of the Corrections Division directly supervises the three Corrections Sergeants: Rose Cas, Daniel Justman, and Billy Stripling. (Exh. P-4.) All three of the current Corrections Sergeants were promoted to their current rank at the same time in October 2016.

11. Every Sergeant ordinarily oversees at least 3 to 10 employees during his or her assigned shift. Together, the Patrol Sergeants oversee approximately 30 Patrol Deputies, a Marine Corporal, and others. Lieutenant Swan does not directly supervise any of the Patrol Deputies. In the other Division, the Corrections Sergeants collectively oversee approximately 28 to 30 Corrections Deputies, 4 Corrections Corporals, 2 Corrections Clerks, 4 Cooks, and 2 Medics. In the Sheriff's Office's chain of command, the Corporal rank is higher than the Deputy rank.

12. All Sergeants share certain essential duties and responsibilities, especially with the other Sergeants in their Division. Among other things, all Sergeants assign their subordinates work and then review and correct that work. However, individual Sergeants can also have specific assignments with unique duties and responsibilities and oversee certain programs and groups. Those assignments can change and be rotated over time. Nevertheless, the Sergeants' duties have not changed significantly in the last five years.

13. Every newly-promoted Sergeant and Corporal is required to attend a two-week Department of Public Safety Standards and Training (DPSST) supervisor training. During that

class, attendees are trained on working together in groups, networking, liability assessment and mitigation, counseling, presenting briefings, and giving presentations. Further, every year, Corrections Sergeants complete additional supervisor training that covers sexual harassment and other topics. (Justman at 4:46 p.m.)

Schedules

14. Sheriff Kaber works Monday through Friday, from 8 a.m. to 4 p.m. (a 5x8 schedule). Lieutenants Swan and Bryson normally work Monday through Thursday, from 7 a.m. to 5 p.m. (4x10 schedules). The Sergeants and their subordinates work a variety of different schedules, as outlined below.

15. In the Patrol Division, both Sergeant Frank (the North County Supervisor) and Sergeant Kaber (the Detective Sergeant) work Monday through Thursday, from 7 a.m. to 5 p.m. (a 4x10 schedule). Sergeant Lewis (the Special Services Supervisor) works Tuesday through Friday, from 7 a.m. to 5 p.m. (a 4x10 schedule). Because of his Klamath Community College responsibilities (which are addressed below), for part of the year, Sergeant Mitchell works Monday through Thursday, from 7 a.m. to 5 p.m. (a 4x10 schedule). For the rest of year, Sergeant Mitchell works Monday through Friday, from 7:00 or 7:30 a.m. to 3:30 or 4:00 p.m. (a 5x8 schedule). Sergeant Scheen (the night shift Patrol Sergeant) works Wednesday through Saturday, from 5 p.m. to 3 a.m. (a 4x10 schedule).

16. For the majority of the hours in a workweek, a Patrol Sergeant is the highest-ranking officer on duty in the Patrol Division. (Swan at 9:20 a.m.) When a Patrol Sergeant is unavailable, "in most instances the senior qualified senior deputy shall be designated as acting Shift Supervisor." (Exh. P-15 at 315.) Quite often, however, an acting Shift Supervisor will still call his or her Patrol Sergeant while that Sergeant is off duty and ask for direction. Moreover, any Patrol Deputy can always contact his or her shift's Patrol Sergeant while that Patrol Sergeant is off duty.

17. On average, Patrol Sergeants spend about half of their time in the field on patrol and the other half in their offices reviewing or writing reports. That said, the exact amount of time spent in or out of the office varies from one Patrol Sergeant to the next depending on each Patrol Sergeant's specific assignments. Sergeant Lewis, the Special Services Supervisor, spends more time on paperwork in the office than the other Patrol Sergeants. Meanwhile, Sergeant Sheen of the night shift is out on the street more than the others.

18. Lieutenant Swan typically spends "very very little" time out in the field doing typical Patrol Division work. (Swan at 9:46 a.m.) However, he does try to respond to major incidents. Lieutenant Swan heavily relies on his Patrol Sergeants to let him know what is going on with their Patrol Deputies, but he also does his own research and listens to the radios. Additionally, Lieutenant Swan tries to meet with all of the Patrol Sergeants at once several times a year.

19. Each of the three Corrections Sergeants works a 4x10 schedule and is assigned one of the jail's three shifts: day shift, swing shift, or graveyard shift (*i.e.*, "mid shift"). Sergeant Stripling oversees the day shift and works Tuesday through Friday, from 6 a.m. to 4 p.m. Sergeant

Justman oversees the swing shift and works Sunday through Thursday, from 12 p.m. to 10 p.m. Finally, Sergeant Cas oversees the graveyard shift and works Wednesday through Saturday, from 10 p.m. to 8 a.m. Corrections Sergeants' shifts can change up to four times a year.

20. For the Corrections Sergeants' subordinates, the day shift runs from 6 a.m. to 2 p.m., the swing shift goes from 2 p.m. to 10 p.m., and the graveyard shift goes from 10 p.m. to 6 a.m. Three of the four Corrections Corporals bid for and then are assigned to one of the jail's three shifts. Lieutenant Bryson assigned the remaining Corrections Corporal to the jail's Transport Division, which is overseen by the day shift's Corrections Sergeant.

21. When Lieutenant Bryson is on vacation, a Corrections Sergeant may be designated acting Jail Commander. However, the Corrections Sergeants can always call Lieutenant Bryson while he is off work. When no Corrections Lieutenant or Corrections Sergeant is working, the highest-ranking officer in the jail is either a Corrections Corporal or a senior Corrections Deputy.

Sergeant Frank (Patrol Division)

22. Sergeant Frank is the North County Supervisor, and accordingly oversees the northern part of the County. He also acts as the Assistant Search and Rescue Coordinator for that district. Normally, Sergeant Frank has a single Patrol Deputy specifically assigned to his district. He also oversees other day shift Patrol Deputies.

Sergeant Kaber (Patrol Division)

23. Sergeant Kaber is the Detective Sergeant, and accordingly leads the Patrol Division's Detectives Unit. The Detectives Unit handles major crimes, other crimes that involve more intense investigation, and some background investigations. As Detective Sergeant, Sergeant Kaber regularly oversees three Patrol Deputies designated as Detectives and one unsworn part-time Evidence Technician. He also temporarily oversees other Patrol Deputies (who are not Detectives) when another Patrol Sergeant is absent or unavailable. Sergeant Kaber has been a Patrol Sergeant since December 2017 and the Detective Sergeant since January 1, 2020.

24. Sergeant Kaber regularly gives out assignments and cases to his three Detectives and himself. When doing so, Sergeant Kaber tries to balance the Detectives' workloads and considers each Detective's experience, skill level, and expertise. Often, he asks Detectives if they can take a case. Some of the Detectives' cases come from the Patrol Division, while others come from outside agencies or the Detectives themselves. Sergeant Kaber discusses the status of his Detectives' cases with Lieutenant Swan and Sheriff Kaber multiple times a week.

25. Sergeant Kaber reviews his Detectives' reports like other Sergeants do (as explained below), but he tries not to guide his Detectives' investigations. Nevertheless, his Detectives do come to him with questions and concerns about their cases, and he gives them answers or instruction. The Detectives most often ask him whether something is consistent with policy.

26. Patrol Deputies designated as Detectives get paid more than regular Patrol Deputies do. Patrol Deputies who want to be a Detective submit a letter of interest when a Detective position is available. Once those letters are collected, the Detective Sergeant and Lieutenant Swan talk about the applicants. Lieutenant Swan considers the Detective Sergeant's input and the existing Detectives' input. On at least one occasion, a Patrol Sergeant has recommended to Lieutenant Swan that a specific applicant not be selected as a Detective. However, Lieutenant Swan has never rejected a candidate for Detective solely because of a Patrol Sergeant's objection.

27. Sergeant Kaber is also part of the Major Crime Team. The Major Crime Team is a group of representatives from local law enforcement agencies that responds to and attempts to solve certain major crimes that occur in the County. Those crimes include homicides, certain robberies, and rapes. The group includes Detectives from the Sheriff's Office, the Klamath Falls Police Department, and the Oregon State Police, as well as representatives from the Klamath County District Attorney's Office.

28. Whenever a major crime or incident occurs in the County, the Klamath County District Attorney is contacted, and he or she decides whether to activate the Major Crime Team. If the group is activated, the Detectives either report to the scene or the Major Crime Team's current command post in the Klamath Falls Police Department's station.

29. Each time the Major Crime Team is activated, the administration of whatever agency is up next on the rotation takes over the case. The lead agency commands the crime scene, and that agency's administration is in charge of the overall investigation of the crime. For the Sheriff's Office, Lieutenant Swan and Sheriff Kaber delegate some of their authority in this area to Sergeant Kaber, but ultimate responsibility remains with Sheriff Kaber.

Sergeant Lewis (Patrol Division)

30. Sergeant Lewis has been a Patrol Sergeant since around 2005. He is currently the Special Services Supervisor. In that role, Sergeant Lewis oversees the Special Services Units, which currently include the Animal Control Unit, the Forest Unit, and the Marine Unit. As a result, Sergeant Lewis regularly oversees one Animal Control Deputy, three unsworn Animal Control Clerks, two Forest Deputies (one full time and one part time), one Marine Corporal (full time), and one Marine Deputy (full time). He also oversees regular Patrol Deputies on Fridays during his shift.

31. Sergeant Lewis does not assign his regular Patrol Deputies work "very often." (Lewis at 3:06 p.m.) However, he does make sure that the Sheriff's Office's Marine Unit, Bureau of Land Management, and Forest Service contracts are fulfilled by making sure that the required number of hours is actually worked in the right areas. Sergeant Lewis leaves it up to the discretion of the assigned Patrol Deputies to determine where to work on Forest Service lands. Moreover, the Marine Corporal essentially always knows how much time he should spend on each of the 28 bodies of water the Sheriff's Office is responsible for on a given day or week. Some Animal Control and Forest work comes from the Sheriff's Office's 9-1-1 Dispatch Center (which is discussed further below). Some Animal Control work comes directly from the public. Some Forest work comes from the Forest Unit's Patrol Deputies' own encounters with people. Separately,

Sergeant Lewis also makes sure enough employees are available for large scheduled events such as the "Gambler 500."

32. Patrol Deputies who are interested in filling openings in the Animal Control, Forest, or Marine Units submit a letter of interest. Next, applicants are interviewed by Sergeant Lewis and Lieutenant Swan. After the interviews, Sergeant Lewis can recommend to Lieutenant Swan whether an applicant should be selected, and the two can discuss that recommendation. Lieutenant Swan "values" this type of recommendation. Ultimately, Lieutenant Swan and Sheriff Kaber decide who is selected for one of these groups.

33. Sergeant Lewis is also the Special Response Team (SRT) Commander for the Patrol Division. SRT acts like a "mini SWAT team" and usually has 8 to 12 team members. SRT is also commonly called the "Crisis Response Unit." (Exh. P-15 at 256.) Sometimes, Sergeant Lewis does specialized training for SRT's members. If Sergeant Lewis is unavailable, either Sergeant Scheen or Lieutenant Swan is in charge of SRT.

34. Employees who are interested in joining the Patrol Division's SRT submit a letter of interest. Next, each applicant is "put through the paces" for a day and participates in an interview with an oral board. (Swan at 11:50 a.m.) After that, Sergeant Lewis and the rest of SRT can share a recommendation regarding whether the applicant should be hired. Eventually, Lieutenant Swan and Sheriff Kaber decide who is chosen together. Employees are not paid extra for being on SRT unless it results in overtime or compensatory time for training.

35. In addition to the foregoing, Sergeant Kaber is the Patrol Division's Field Training and Evaluation Program (FTEP) Supervisor. (Swan at 10:36 a.m.) FTEP is a standardized training program for new Patrol Deputies in which every new Patrol Deputy is assigned a specific Field Training Officer (FTO). Among other things, the FTEP Supervisor makes sure that each FTO's trainee performance evaluations are completed, monitors FTO performance, and develops ongoing training for FTOs. (Exh. P-15 at 298-99.)

36. Patrol Deputies who are designated as an FTO are paid extra for their FTO work. In order to be selected as an FTO, a Patrol Deputy must have three years of experience. FTO candidates are usually recommended for the assignment by a Patrol Sergeant. Once selected, FTOs are expected to go through FTEP training, which takes place outside the County.

<u>Sergeant Mitchell (Patrol Division)</u>

37. Sergeant Mitchell serves as the Sheriff's Office's "Law Enforcement Liaison." (Exh. P-13 at 2.) In that role, Mitchell provides security for schools including Klamath Community College under a contract and oversees three Patrol Deputies designated as School Resource Officers, a number of Reserve Officers, and some campus security personnel. Part of Sergeant Mitchell's work is conducted "at a substation located on campus." (Exh. P-13 at 2.) Outside of his Law Enforcement Liaison role, Sergeant Mitchell also oversees the day shift's five regular Patrol Deputies (a duty Sergeant Mitchell shares with Sergeant Frank).

38. Some of Sergeant Mitchell's Law Enforcement Liaison duties include correcting his School Resource Officers' reports, making sure that their investigations are done properly, and making sure that they work the number of hours required by the Klamath Community College contract.

39. School Resource Officers are paid more than regular Patrol Deputies. A Patrol Deputy who is interested in filling an open School Resource Officer position must submit a letter of interest. Subsequently, Sergeant Mitchell can provide "some input" to Lieutenant Swan regarding which applicant should be selected. (Swan at 9:44 a.m.)

40. Neither a School Resource Officer nor a Detective assignment lasts for a set amount of time. However, a Patrol Deputy typically remains in either of those special, premium pay assignments for three to five years. Theoretically, if a Patrol Deputy was not performing well in either special assignment, a Patrol Sergeant would let Lieutenant Swan know about it. Afterward, Lieutenant Swan or Sheriff Kaber could reassign the underperforming Patrol Deputy. However, to date, Lieutenant Swan has never had a Patrol Sergeant say that that should happen.

41. Patrol Deputies can ask their Patrol Sergeant for permission to attend specific "external trainings." Patrol Sergeants can also attempt to send a Patrol Deputy to the same after noticing a deficiency. When either of those things happens, the Patrol Sergeant determines whether the Patrol Deputy has enough time available to attend the training. If the Patrol Sergeant decides that the Patrol Deputy does have the time, the Patrol Sergeant passes the training request on to Sergeant Mitchell, the Patrol Division's current "Training Sergeant." (Exh. P-15 at 31.)

42. After receiving a request for an external training, Sergeant Mitchell checks to see if there is enough money for the training in the budget. He also determines whether the external training seems necessary. If Sergeant Mitchell grants or denies the external training request, he submits and discusses the request with Lieutenant Swan. Sergeant Mitchell cannot authorize an external training on his own. Before Lieutenant Swan ultimately decides how to handle a particular external training request, Swan considers Sergeant Mitchell's recommendation, and he usually agrees with it. Previously, Lieutenant Swan has denied a training request that Sergeant Mitchell granted. But that result is "pretty uncommon." (Swan at 10:02 a.m.)

43. As Training Sergeant, Sergeant Mitchell also assigns Patrol Deputies and other employees to internal training provided by Sheriff's Office employees, and can and does do so without getting Lieutenant Swan's prior approval. The Sheriff's Office provides in-house training on defensive tactics and the range, among other things.

<u>Sergeant Scheen (Patrol Division)</u>

44. Sergeant Scheen oversees the Patrol Division's night shift, and accordingly is also called the Night Supervisor. Currently, around 10 Patrol Deputies are regularly assigned to the night shift. If the night shift's Patrol Deputies are ever unsure of what to do for an incident, they can go to Sergeant Scheen for help.

Sergeant Justman (Corrections Division)

45. Sergeant Justman, who currently oversees the jail's swing shift, is also the Training Sergeant for the Corrections Division. As a result, Sergeant Justman oversees all of the jail's internal and external training, including its FTEP and DPSST obligations. Among other things, this responsibility involves identifying the jail's training needs, scheduling and sending people to trainings, considering specific training recommendations from other Corrections Sergeants who have identified a deficiency, and considering subordinates' requests for either internal or external training.

46. Corrections Deputies who are interested in being an FTO apply for the assignment. After that, Sergeant Justman and Lieutenant Bryson have a discussion about who is the "best fit." (Bryson at 1:27 p.m.) When deciding who to choose, the two consider an applicant's work performance, whether the applicant has worked at the jail for two years, and whether the applicant is still learning. The two must also consider whether an applicant works on the same shift as a newer Corrections Deputy. The final decision regarding who is hired is made by Lieutenant Bryson, although Lieutenant Bryson generally relies on Sergeant Justman's recommendations for this issue. Once selected, the Corrections Division's FTOs go through the same offsite training as the Patrol Division's FTOs.

47. When Corrections Deputies submit internal or external training requests to Sergeant Justman, he can either grant or deny those requests. Sergeant Justman will deny a request if the jail does not have the right instructor for the requested training, or if he does not think that the training would benefit the jail. If Sergeant Justman approves a training request, he submits it and makes a recommendation to Lieutenant Bryson. Subsequently, Lieutenant Bryson decides whether the jail has enough money in its budget and enough staff on the shift for the training. Lieutenant Bryson typically agrees with Sergeant Justman's recommendations on this issue, but has not always done so. If Lieutenant Bryson approves and signs a request, Sheriff Kaber signs it as well.

48. Sergeant Justman also leads the Corrections Division's SRT along with Corporal Hansen, who serves as SRT's Assistant Team Leader. At some point in the future, this SRT will be used for extracting barricaded or violent inmates from their cells. However, as of the hearing for this case, the group had not had its first group training or been used yet. Eventually, Sergeant Justman will lead the SRT's trainings, and will decide when the group will be used for extracting inmates from cells.

49. Recently, Corrections Division employees who were interested in being on SRT submitted a letter of interest. Afterward, Sergeant Justman, Corporal Hansen, and Lieutenant Bryan went through all of the letters of interest together. It turned out that the exact number of people the group needed had applied, and that none of the applicants had any disqualifications. As a result, all of the applicants were selected and placed on the team. Lieutenant Bryson is ultimately responsible for deciding who is on the Corrections Division's SRT. (Bryson at 2:29 p.m.)

Assign and Direct

50. The KPCOA CBA provides, in part, "Except in emergencies, or other situations beyond the Sheriff's control, employees shall be scheduled to work a regular shift and each shift shall have regular starting and quitting times (starting and quitting times may vary from day to day) and the hours of work shall be consecutive." (Exh. P-2 at 14.) It also provides that, on or about November 1 of each year, the Sheriff posts shift assignments for the four quarters of the year beginning January 1. And according to the CBA, after that, employees in the KCPOA unit bid for their desired shifts by seniority. (Exh. P-2 at 19-22.)

51. Deputies from both Divisions also bid for their scheduled vacation time twice a year by seniority in accordance with the KCPOA CBA. (Exh. P-2 at 21.) Outside of that, Deputies can also submit additional vacation time requests to their Sergeants, who then can either grant or deny them. After receiving a vacation time request, a Sergeant determines whether the Deputy's shift is sufficiently covered and either grants or denies the request accordingly. A sergeant can make this decision without checking with his or her Lieutenant beforehand. That said, whenever a Patrol Sergeant denies a vacation time request, the Patrol Sergeant informs Lieutenant Swan.

52. Patrol Deputies' schedules in particular are largely established a year in advance. But some changes do occur. (Lewis at 3:13 p.m.) Moreover, the Detectives do not bid for their shifts or vacations like regular Patrol Deputies. Instead, the Detectives' shifts are assigned to them.

53. Patrol Sergeants are always responsible for making sure that their shifts are covered by the proper number of Patrol Deputies. For the Patrol Division, there must always be at least three Patrol Deputies working at any given time. (Swan 10:13 a.m.) However, a Patrol Sergeant can also decide that a particular situation requires additional Patrol Deputies be called in. That could occur if there is a major crime, for example. When a Patrol Sergeant decides to bring in more Patrol Deputies, the Patrol Sergeant will usually notify Lieutenant Swan.

54. Patrol Sergeants can assign overtime and either grant or deny Patrol Deputies' overtime requests. When overtime is needed, Patrol Sergeants can ask for volunteers first. If nobody volunteers to work the overtime, the Patrol Sergeant can order or mandate it. Patrol Sergeants can also choose to reassign a Patrol Deputy who is working under one of the Sheriff Office's various contracts (*e.g.*, from a Forest Service assignment).

55. Sometimes, a Patrol Deputy needs to keep working beyond the end of a shift to finish his or her work. When that happens, the Patrol Deputy asks a Patrol Sergeant for advice and approval. Otherwise, if a Patrol Deputy has someone in custody and needs to complete an in-custody report before going home, the Patrol Deputy will usually let his or her Patrol Sergeant know, and the Patrol Sergeant will authorize it. Patrol Deputies are guaranteed overtime pay if they have to go to court under a subpoena. However, when that happens, the Patrol Deputies still fill out overtime slips and submit them to their Patrol Sergeants, who ensure that they are correctly taken care of.

56. Corrections Sergeants can also assign overtime to their subordinates. In the Corrections Division, overtime may occur when someone has to cover for a colleague who is out

sick or on vacation. When that happens, someone else will either come in early or keep working beyond the end of that person's regular shift. Some of the jail's overtime opportunities are posted on a clipboard in order to find volunteers. However, if nobody volunteers for necessary overtime, a Corrections Sergeant can order a subordinate to work it. Currently, Lieutenant Bryson allows his Corrections Sergeants to let a single person take time off even if it creates overtime. He also allows them to let a second person take time off as long as it does not create overtime.

57. Sergeants in both Divisions can also grant or deny the use of compensatory time without checking with his or her Lieutenant beforehand. The Sergeants handle it much the same way as overtime.

58. Sergeants monitor their subordinates' sick leave usage and attendance and make sure that the sick time is documented.

59. Patrol Deputies' daily work is usually determined by the calls the Patrol Deputies receive from the County's 9-1-1 Dispatch Center, or by the follow-up that is necessary for the cases the Patrol Deputies are already working on. Most Dispatch Center calls are distributed on a rotation. But certain calls, including calls requiring the Animal Control or Forest Units, only go to specific individuals.

60. When the Dispatch Center gives a Patrol Deputy a call for service, the Patrol Deputy is expected to report to the scene. In general, Patrol Sergeants make sure that the Patrol Deputies respond to their calls appropriately and in a timely manner. However, a Patrol Sergeant can also override the Dispatch Center's call and reassign Patrol Deputies as the Patrol Sergeant sees fit.

61. When deciding how to assign or reassign Patrol Deputies, the Patrol Sergeants can generally use their own "independent discretion" and consider a variety of factors and "the day's needs." (Swan at 9:30 a.m.) Among other things, a Patrol Sergeant could consider where all the Patrol Deputies are located at the time, whether certain Patrol Deputies are behind in their reports or other work, whether the Sheriff's Office is satisfying all of its various contracts, whether a particular incident or area requires additional Patrol Deputies, and whether the Patrol Deputies have any medical needs. The Patrol Sergeant might also decide that a new Patrol Deputy should take a certain type of call, and also reassign that Patrol Deputy's FTO to the same call. In addition, a Patrol Sergeant can choose to go to Lieutenant Swan and ask him for advice.

62. Like Patrol Deputies, Patrol Sergeants have their own caseloads and may be called out by the Dispatch Center as part of its normal call rotation. A Patrol Sergeant may also report to a Patrol Deputy's scene. That could happen if a Patrol Deputy requests his or her "backup assistance," if the call is particularly high risk, if something is especially complicated about the situation, if there is a liability issue (as with any major crime), or if there is a barricaded subject. When a Patrol Sergeant arrives at a Patrol Deputy's scene, the Patrol Sergeant may take over command of the scene from the Patrol Deputy. Alternatively, the Patrol Sergeant may just "provide over-watch" at the scene.

63. Patrol Deputies can also formally request a change in assignment using a letter of intent. Eventually, that letter of intent is forwarded to Lieutenant Swan along with a recommendation from a Patrol Sergeant. (Exh. P-15 at 538.)

64. In the other Division, Corrections Sergeants assign Corrections Deputies to six different areas of the jail known as "posts" on a weekly basis. Those posts include Booking Unit, Master Control, Transport Division, A Pod, B Pod, and C Pod. Each of those posts has a unique set of duties and grouping of prisoners affiliated with it. Sometimes, Corrections Sergeants also work a shift at a post.

65. Corrections Sergeants are responsible for making sure that all of the posts are sufficiently covered every day. In a typical weekly schedule, each Corrections Deputy is assigned to a different post every day of the week. In general, Corrections Sergeants try to rotate everyone through every one of the posts every week to keep their skills fresh. However, Corrections Sergeants also pay special attention to where they assign newer Corrections Deputies. For the Booking Unit, which is uniquely challenging, Corrections Sergeants try to have a seasoned Corrections Deputy work with a newer one, and try to avoid having two newer Corrections Deputies work together. Corrections Sergeants may also have to consider whether someone has already been assigned to be an FTO and is linked with a particular Corrections Deputy.

66. The Transport Division normally includes three Corrections Deputies and a Corporal. If one of those three is on vacation, a Corrections Sergeant can assign a line Corrections Deputy to temporarily fill in. A Corrections Sergeant may also specifically decide who is going to transfer inmates. Either the day shift Correctional Sergeant or the Transport Corporal specifically decides which deputies go outside of the jail facility and cover inmate cleaning crews.

67. Both Division's Sergeants complete annual and quarterly performance reviews for their regularly assigned subordinates. For each performance review, the Sergeant marks a number of boxes to indicate whether the subordinate needs improvement or meets or exceeds standards in different areas. A Sergeant can also include his or her own comments on the subordinate's performance and note any areas of concern. (Exh. R-3.)

68. Once a Sergeant completes an annual performance review, he or she submits it to the appropriate Lieutenant, who then conducts his own review of the review. At that point, the Lieutenant can give feedback and/or guidance to the Sergeant, direct a Sergeant to change a review (including having the Sergeant change a specific performance rating), or simply make a change or add something on his own. Later, the Lieutenant gives the review to Sheriff Kaber, who can also make changes and ultimately either accepts each review or not. Once the Sergeant gets the performance review back from Sheriff Kaber, the Sergeant can have a meeting with the subordinate being evaluated and go over the review. After that meeting, the subordinate can add his or her own remarks to the review.

69. Every Sergeant conducts briefings for oncoming shift personnel in order to communicate changes in policies, procedures, and laws, and to discuss departmental activities and assigned duties. These briefings, which may also be called "roll calls," occur at the beginning of every shift. (Exh. P-15 at 252.) Other topics that may be discussed during briefings include

significant events from the earlier shift, teletypes that have come in (*e.g.*, missing persons, stolen vehicles), problems with reports, officer safety information, and upcoming schedules and training. During a Patrol Division briefing, a Patrol Sergeant may announce who will be working the hours for a particular contract that day.

70. In the Patrol Division, briefings are usually conducted by a Patrol Sergeant or the oncoming shift's senior Patrol Deputy. Occasionally, though, a Patrol Sergeant chooses a particular senior Patrol Deputy to do it for training purposes. In addition, if a Patrol Sergeant is not present for a briefing, Lieutenant Swan may attend and help out.

71. Patrol Sergeants make sure that all of their Patrol Deputies' written reports are turned in on time. Afterward, the Patrol Sergeants review those reports and make sure that they are accurate, complete, correct, and sufficient. If a report is deemed insufficient, the Patrol Sergeant sends it back to the Patrol Deputy, and may ask the Patrol Deputy to make certain changes or corrections (including to make something clearer, for example) or follow up with additional investigation. Once a Patrol Sergeant approves a report, it is passed on to the Klamath County District Attorney's Office or some other entity. If a Patrol Sergeant has a question about a report, he can ask Lieutenant Swan for advice.

72. Corrections Sergeants review all of their subordinates' various written reports for correctness and completeness. If a Corrections Sergeant determines that a report is insufficient, the Corrections Sergeant sends the report back to the Corrections Deputy.

73. If a subordinate from either Division is repeatedly writing deficient reports, the Sergeant may try coaching, counseling, or training. If the problems continue beyond that, the Sergeant can bring the matter to Lieutenant Swan's attention. If a Patrol Sergeant fails to address issues with a Patrol Deputy's report, that Patrol Sergeant could potentially be subject to discipline. (Swan at 11:25 a.m.)

74. Patrol Sergeants are also responsible for continually evaluating their Patrol Deputies' work, identifying Patrol Deputies' deficiencies and training needs, and helping Patrol Deputies improve their performance. When a Patrol Sergeant identifies a training need or a deficiency, the Patrol Sergeant can point out the issue to the Patrol Deputy, try to coach the Patrol Deputy through the issue, or recommend the Patrol Deputy attend a particular training if that coaching does not work.

75. Patrol Sergeants otherwise review their subordinates' use of force or a TASER gun, authorize the use of a "control device," decide whether to terminate or continue a Patrol Deputy's "hot pursuit," and monitor their workplace for discriminatory harassment and take action to avoid it. (Exh. P-15 at 41, 50, 60, 88, and 131.) If a Patrol Sergeant fails to monitor the workplace for discriminatory harassment, that Patrol Sergeant could be "held responsible" for that failure. (Swan at 10:29 a.m.) Separately, Patrol Sergeants also make sure that Patrol Deputies' investigations are conducted properly.

76. Correctional Sergeants can direct a particular Corrections Deputy to search a jail cell or common area, or to help out another post, an investigator, or an attorney. Additionally, a Corrections Sergeant may take command if there is a fight in the jail.

77. Neither Lieutenant Swan nor Bryson has ever disciplined a Sergeant because of the conduct or work of a Sergeant's subordinate. However, a Sergeant may be held responsible if that Sergeant gave a subordinate bad advice, or failed to take action on something the Sergeant was aware of and knew was unethical or unlawful.

Discipline and Suspend

78. According to the KCPOA CBA, "Disciplinary actions include written reprimand, suspension without pay, demotion, discharge, or any combination thereof, or in lieu thereof with the consent of the employee, loss of vacation, holiday or compensatory time. Discipline shall not include administrative relief from duty with pay." (Exh. P-2 at 35.) In practice, a written reprimand can also be called a letter of reprimand.

79. A Sergeant cannot issue formal discipline (*e.g.*, a written reprimand) on his or her own. Before a Sergeant can issue formal discipline, he or she must have the Lieutenant or the Sheriff's approval. In addition, in practice, every instance of formal discipline is ultimately issued at either a Lieutenant or the Sheriff's request. If a Sergeant issued a written reprimand without consulting with the Lieutenant, the Sergeant could be counseled. If that happened multiple times, the Sergeant could be disciplined.

80. In the Patrol Division, most discipline-related issues are decided by Lieutenant Swan. However, Patrol Sergeants can give Lieutenant Swan recommendations and/or share their concerns with him. After that, Lieutenant Swan or Sheriff Kaber decides whether to move forward with discipline. Since Swan became Patrol Lieutenant in 2017, Swan is the only person in the Patrol Division to have issued a written reprimand.

81. In the Corrections Division, a written reprimand is specifically considered the "first level" of discipline, is only issued after a formal Internal Affairs investigation, and almost exclusively emanates from Lieutenant Bryson or Sheriff Kaber. (Bryson at 1:45 p.m.) Moreover, if Lieutenant Bryson was going to allow a written reprimand, he would brief Sheriff Kaber about it. In one instance, some corrective action was taken against one Corrections Sergeant after he improperly issued a written reprimand without getting the Lieutenant's permission when the Lieutenant was absent.

82. Patrol Sergeants cannot suspend a subordinate without the prior approval of either Lieutenant Swan or Sheriff Kaber. However, Patrol Sergeants can send Patrol Deputies home from a shift if Lieutenant Swan is unavailable. That could occur when a Patrol Deputy is having "extreme emotional or physical problems," is sick, or smells of alcohol. (Swan at 10:12 a.m.) If Lieutenant Swan is available, he makes the call for such issues once notified. The Sheriff's Office does not consider sending someone home for being sick or intoxicated to be discipline.

83. Sergeants can also give their subordinates "verbal counseling" or instruction. Neither of those options is considered discipline by the Sheriff's Office. Instruction may take the form of a written "letter of instruction," which "is intended to address areas of concern and to provide documentation that the issue(s) have been addressed." (Exh. P-25 at 1.) In the Patrol Division, several counselings can eventually lead to formal discipline. In addition, in practice, Patrol Sergeants may check with Lieutenant Swan before issuing a letter of instruction.

84. Patrol Sergeants can receive complaints about their subordinates from citizens and from neighboring agencies such as the Klamath Falls Police Department. Corrections Sergeants can receive complaints about their subordinates from citizens and inmates. After a Sergeant receives such a complaint, or if the Sergeant otherwise believes a subordinate may have violated the law or policy, the Sergeant can initiate an informal investigation to gather facts as needed and preliminarily determine whether there was a violation. A Sergeant may also discuss an issue or a complaint with his or her Lieutenant and make a recommendation to the Lieutenant before starting an informal investigation.

85. After conducting an informal investigation, a Sergeant can ask the Lieutenant whether the Sergeant can initiate and then conduct a formal Internal Affairs investigation. At that point, the Sergeant and the Lieutenant have a discussion about it. After that, the Lieutenant and Sheriff Kaber make the final decision about how to proceed. A Lieutenant or Sheriff Kaber may also simply order a Sergeant to initiate an Internal Affairs investigation.

86. If a Sergeant initiated an Internal Affairs investigation without consulting with the Lieutenant or Sheriff Kaber, the Sergeant could be counseled. If that happened multiple times, the Sergeant could be disciplined. Further, Sergeants may only conduct formal Internal Affairs investigations when their subordinates are being investigated. If the investigation involves a Sergeant, the Lieutenant conducts it.

87. In the Patrol Division, Lieutenant Swan takes his Patrol Sergeants' recommendations regarding whether to have an Internal Affairs investigation "very seriously." (Swan at 11:22 a.m.) In the Corrections Division, Lieutenant Bryson "typically" agrees with the Corrections Sergeants' recommendations regarding whether to have an Internal Affairs investigation. (Bryson at 1:48 p.m.) In practice, Internal Affairs investigations are atypical for either Division, and even less common in the Corrections Division.

88. At the end of a formal Internal Affairs investigation, the Sergeant writes an Internal Affairs report. That report can include a synopsis, a summary of allegations, applicable policies, an outline of the evidence, a subordinate's background and disciplinary history, and findings regarding whether there has been a law or policy violation. Additionally, in some but not all instances, Sergeants may make a recommendation regarding what if any action should be taken in light of the investigation. In other instances, a Lieutenant or the Sheriff specifically directs the Sergeant to include a recommendation. A recommended result could be issuing a letter of instruction, removing a special duty (*e.g.*, SRT, FTO), issuing a particular type of discipline, or mandating extra training, for example. Recommended discipline may be based on past practice.

89. Sergeants submit completed Internal Affairs reports to their Lieutenant. After reviewing an Internal Affairs report, the Lieutenant may return it to the Sergeant and ask for corrections, clarifications, or further investigation. Eventually, the Lieutenant gives his own recommendation to Sheriff Kaber, who makes the final decision about the matter. The Lieutenant's recommendation may or may not be the same as the Sergeant's, and a Lieutenant does not accept every recommendation a Sergeant makes.

Reward

90. Sergeants cannot give their subordinates tangible rewards such as a monetary bonus or raise, a new patrol car, or additional time off. Furthermore, those subordinates do not get any kind of reward based on the ratings they receive in their performance reviews. However, a Sergeant can give positive feedback, including telling a subordinate that he or she did a "good job" or giving him or her "a pat on the back." (Swan 12:11 p.m., Lewis at 2:59 p.m.)

## CONCLUSIONS OF LAW

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

2. The sergeants are "supervisory employees" as defined by ORS 243.650(23)(a).

Standards of Decision

Under Oregon's Public Employee Collective Bargaining Act, "[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, the Board assesses whether an employee meets the specific criteria set out 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 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)). Significantly, 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 under just one of the 12 statutory criteria. We also recognize that an employee's title or rank in a law enforcement paramilitary structure is not dispositive of supervisory status under the statute. *Keizer Police Association v. City of Keizer*, Case No. UC-004-18 at 19, _ PECBR _, _ (2019) (citing *City of Portland*, UC-17-13 at 22-23, 25 PECBR at 1017-18).

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," the Board considers 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. That said, the exercise of independent judgment does not mean that decisions can never be reviewed, reinvestigated, or changed. Such a possibility is inherent in a chain of command or other multi-level management structure, such as the paramilitary structure of a police department. Instead, the determinative factors in such cases are the circumstances and frequency of such changes. *City of Keizer*, UC-004-18 at 23 n 17, _ PECBR at _ (citing *Oregon State Police Officers' Association v. State of Oregon, Department of State Police*, Case No. UC-7-07 at 32 n 10, 22 PECBR 717, 749 n 10 (2008)).

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.

In this case, the County argues that all of the sergeants are "supervisory employees" as defined by ORS 243.650(23)(a) and therefore cannot be appropriately included in a bargaining unit. In its post-hearing brief, the County centrally argues that its Sergeants suspend, assign, reward, discipline, and direct their subordinates. Further, at the outset of the hearing, the County

stipulated that the Sergeants do not have the authority to hire, transfer, lay off, recall, promote, discharge, or adjust grievances. The Union argues that the Sergeants do not exercise any supervisory authority, and that the petition should be dismissed.

Discussion

Assign

The term "assign" can 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. However, choosing the order in which the employee will perform discrete tasks within those assignments is not indicative of exercising the authority to "assign." *City of Portland*, UC-017-13 at 23-26, 25 PECBR at 1018-1021 (citing *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688-89 (2006)). For the reasons discussed below, we conclude that the Sergeants are "supervisory employees" as defined in ORS 243.650(23)(a) because they assign subordinates work, use independent judgment in doing so, and hold that authority in the interest of management.

In this case, Sergeants never assign subordinates to a particular Division. Moreover, Sergeants do not appear to independently assign their subordinates to a particular shift. Instead, subordinates largely bid for their shifts by seniority. Detectives' shifts are assigned, but it is ultimately unclear who makes that assignment. A Sergeant can grant vacation time requests without a Lieutenant's involvement. However, a Sergeant's decision regarding whether to award vacation time is also generally a matter of bidding by seniority as well as considering a Division's preset minimum manning requirements. Otherwise, Sergeants cannot independently assign their subordinates to specialty positions such as Detective, School Resource Officer, or FTO. They also cannot independently assign them to special groups such as SRT or the Special Services Units. As detailed above, those kinds of assignments require the input and approval of a Lieutenant and/or Sheriff Kaber. Although Training Sergeants play a considerable role in determining whether requests for external trainings are approved, the Lieutenants are always heavily involved with that.

On the other hand, Patrol Sergeants regularly "assign and reassign" Patrol Deputies to calls, scenes, and different geographical locations within the County. *See City of Portland*, UC-017-13 at 26, 25 PECBR at 1021. As the Union states in its post-hearing brief (at page 3), "in some cases, a Patrol Sergeant may be able to dispatch a Patrol Deputy to a different call if warranted." Additionally, Corrections Sergeants regularly assign subordinates to one of the jail's six posts every day, and can also assign specific work and tasks beyond that. Those kinds of assignments go beyond simply choosing the order discrete tasks are performed, and are not of a merely routine or clerical nature. In short, they demonstrate the use of "independent judgment."

Importantly, when deciding how to assign or reassign Patrol Deputies, Patrol Sergeants can consider the day's needs, where all of the Patrol Deputies are at the time, whether certain Patrol Deputies are behind in their reports or other work, whether the Sheriff's Office is satisfying all of its contracts, whether the Patrol Deputies have any medical needs, whether a new Patrol Deputy needs experience with a particular type of call, and whether a Patrol Deputy is an FTO. Further, after considering an incident, a Patrol Sergeant can decide to bring in more Patrol Deputies, even

if the Division's minimum manning requirements are met. That choice can also necessitate overtime work, which can be mandated, or pulling a Patrol Deputy away from his or her work on a contract. Sergeant Kaber likewise considers each Detective's skill level and expertise. In our view, the fact that Sergeant Kaber often asks the Detectives whether they can take a case is not dispositive here. The Patrol Division's Training Sergeant can also assign subordinates internal training without getting a Lieutenant's approval. In the other Division, when Corrections Sergeants decide how to assign work, they consider Corrections Deputies' experience levels, where Corrections Deputies were assigned on other days, whether they are FTOs, and whether a post is particularly challenging. Corrections Sergeants can also decide to allow vacation time for one subordinate, even if that means that another subordinate will have to work overtime.

Responsibly to Direct

The term "direct" can refer to deciding what job shall be undertaken next or who shall do it. Moreover, the person directing must be "accountable" for the success or failure of those whom he or she is directing. *City of Portland*, UC-017-13 at 25-26, 25 PECBR at 1020-21 (citing *Oakwood Healthcare, Inc.*, 348 NLRB 686, 691-92 (2006)). Additionally, employees "responsibly" direct others as the statute requires when they are "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." *City of Portland*, UC-017-13 at 27, 25 PECBR at 1022 (quoting *Oakwood Healthcare, Inc.*, 348 NLRB at 691-92). Here, we cannot conclude that the Sergeants "direct" as that term is used in ORS 243.650(23)(a).

The record does demonstrate that Sergeants regularly instruct, direct, and coach their subordinates, and also review and correct their work. This is evident in Sergeants' performance reviews and briefings and in how they handle subordinates' reports, for example. Limited evidence also generally indicates that Sergeants are "responsible" and "accountable" for their subordinates. However, the totality of the evidence presented for that issue is split and ultimately does not support a conclusion that the Sergeants "responsibly direct" as required by the statute.

As noted, neither Lieutenant has ever disciplined a Sergeant because of the conduct or work of a Sergeant's subordinate. It is also unclear that they would ever really do so. Sergeants would purportedly be held responsible or disciplined for giving bad advice to a subordinate, failing to take appropriate action in response to a subordinate's unethical or unlawful action, or for failing to address issues with subordinates' reports or monitor for discriminatory harassment. But that sort of evidence largely shows superiors making sure the Sergeants do their own work appropriately, and has less to do with whether the subordinates are following the Sergeants' direction. The only adverse consequence for a Sergeant that was discussed during the hearing came after a Corrections Sergeant issued a written reprimand without getting his Lieutenant's permission first, and even that example was relatively ambiguous. To the extent that the Sheriff's Office's policy manuals ostensibly provide some higher level of accountability for Sergeants, those manuals do not appear to accurately reflect reality.

Discipline

The record does not demonstrate that Sergeants can currently "discipline" with independent judgment. As noted, Sergeants cannot issue discipline, including written reprimands, on their own. Instead, Sergeants are required to get a Lieutenant or Sheriff Kaber's approval. The one clear example of a Sergeant issuing formal discipline on his own, which was a written reprimand, was from 1998, possibly before the Sergeants' unit was even formed, and thus is quite unlikely to reflect current authority. (Exh. P-28.) In essence, Sergeants can only recommend formal discipline to their Lieutenant or Sheriff Kaber. Furthermore, if a Sergeant issued formal discipline without consulting with a superior, that Sergeant could be counseled or disciplined. In practice, when discipline is issued, it usually emanates from a Lieutenant or Sheriff Kaber, and is preceded by a formal Internal Affairs investigation. Sergeants can issue verbal counseling and letters of instruction with some level of independence, but the Sheriff's Office does not consider those actions to be discipline. In the Patrol Division, several counselings can eventually lead to formal discipline, but that formal discipline is unlikely to be issued with independent judgment for the reasons given above. As for whether a Sergeant's recommended discipline is "effective," in our view, the record presented does not show such recommendations regularly being accepted without significant modification and reconsideration.

Suspend

Sergeants have not been shown to be able to suspend or recommend suspension with independent judgment as required by the statute. Patrol Sergeants can send Patrol Deputies home from a shift if Lieutenant Swan is unavailable, but it is unclear whether that has ever occurred, or whether a Patrol Deputy can independently be sent home without pay. Additionally, sending someone home who patently has "extreme emotional or physical problems," is sick, or smells of alcohol would not demonstrate the use of meaningful discretion (and otherwise is not considered discipline here). A Sergeant can recommend that a subordinate be suspended, and could do so in an Internal Affairs investigation report. But the overall record indicates that, whenever a Sergeant recommends a suspension, that recommendation will always be carefully and independently reviewed, reconsidered, and potentially modified by a superior officer. That does not indicate that the recommendations are "effective."

Reward

The evidence also does not show that Sergeants can reward as that term is used in ORS 243.650(23)(a). As indicated above, Sergeants cannot give their subordinates tangible rewards such as a monetary bonus or raise, a new patrol car, or additional time off. In addition, Sergeants' performance reviews do not result in any kind of reward. Sergeants can indeed give positive feedback, but that does not amount to the sort of substantive supervisory authority contemplated by the statute.

Sergeants likewise play a role in selecting Deputies for special, premium pay assignments as outlined above. However, that role is quite limited and, as a result, does not demonstrate independent judgment. While Patrol Sergeants may potentially have a more significant role in the selection of FTOs as an FTEP Supervisor, the decision making process for that specific role was

not well developed in the record. Further, in this case, the selection of employees to be FTOs or for other special designations is much more akin to an assignment than a reward. *See City of Portland*, UC-017-13 at 31, 25 PECBR at 1026.

Conclusion

The Sergeants are "supervisory employees" as defined in ORS 243.650(23)(a) because they assign subordinates work, use independent judgment in doing so, and hold that authority in the interest of management.

PROPOSED ORDER

The Sergeants employed by the County in the Sheriff's Office are excluded from bargaining.

SIGNED AND ISSUED on December 16, 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. UC-001-21

(UNIT CLARIFICATION)

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| OREGON EDUCATION ASSOCIATION / LINN-BENTON COMMUNITY COLLEGE PART-TIME FACULTY ASSOCIATION,<br><br>Petitioners,<br><br>v.<br><br>LINN-BENTON COMMUNITY COLLEGE,<br><br>Respondent. | ) | ORDER AMENDING CERTIFICATION/RECOGNITION OF EXCLUSIVE BARGAINING REPRESENTATIVE |

On January 11, 2021, the Oregon Education Association (OEA) filed a petition under OAR 115-025-0050(11) (*former* 115-025-0008)[1] to amend the certification/recognition of the Linn-Benton Community College Part-Time Faculty Association (Association) at Linn-Benton Community College (LBCC). Specifically, the petition requested that the certification/recognition be amended to reflect the Association's affiliation with OEA.

With its petition, OEA provided additional documentation establishing the following:

The Association's Executive Committee voted on August 20, 2020, to approve affiliation with OEA, subject to a secret-ballot vote of the members of the Association.

Over the month of October 2020, the Association sent multiple emails to the bargaining unit regarding the decision of the Association's Executive Committee to pursue affiliation with OEA. These emails included information on the process of voting on whether to approve of the affiliation. The emails also included documents relating to the affiliation and to the benefits and costs of membership in OEA.

[1]The Board's Division 25 rules were modified, effective January 7, 2021.

On October 13, 15, and 20, 2020, the Association's officers conducted meetings on Zoom that were open to bargaining unit faculty to explain the decision by the Association's Executive Committee to pursue affiliation with OEA and the process of voting on the question of affiliation.

Over the period of October 26 through 30, 2020, the Association conducted an online secret-ballot election of Association members to determine whether to approve affiliating with the OEA. 75 members voted for the affiliation and two voted against.

On October 30, 2020, the Association membership approved the affiliation.

On January 12, 2021, the Board's Election Coordinator provided LBCC with the petition and caused a notice of petition for amendment of certification to be posted. Pursuant to the terms of the notice posting, objections to the petition were due by February 8, 2021. No objections were filed. We conclude that the affiliation vote was conducted in compliance with at least minimal due process requirements and that a majority of votes cast by the bargaining unit members supported the Association's affiliation with OEA. *See* OAR 115-025-0050(11).

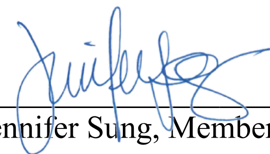
ORDER

The petition is granted, and the Association's certification/recognition is amended to reflect the Association's affiliation with OEA.

DATED: February 9, 2021.

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-005-20

(UNFAIR LABOR PRACTICE)

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| AFSCME COUNCIL 75, LOCAL 2503,<br><br>Complainant,<br><br>v.<br><br>HOOD RIVER COUNTY (PUBLIC WORKS),<br>Respondent. | ) | RULINGS,<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND ORDER |

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

Bruce Bischof, Attorney at Law, Law Offices of Bruce Bischof, Bend, Oregon, represented the Respondent at hearing.

Nancy Hungerford, Attorney at Law, The Hungerford Law Firm, Oregon City, Oregon, represented the Respondent in the filing of objections and the motion regarding the objections.

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On March 2, 2020, AFSCME Council 75, Local 2503 (Complainant), filed an unfair labor practice complaint against Hood River County (County or Respondent). On January 13, 2021, Administrative Law Judge Martin Kehoe issued a recommended order in this matter. The parties had 14 days from the date of service to file objections, meaning that objections were required to be received by the Board by 5 p.m., January 27, 2021. OAR 115-010-0090(1). No objections were received by that deadline.

On February 1, 2021, Respondent filed a motion for an extension of time to file objections, citing workload and issues with this agency's electronic case management system (CMS) as the causes of the late filing. On that same day, Complainant objected to the motion. We deny the motion because Respondent has not demonstrated good cause to extend the time for filing objections. OAR 115-010-0090(1).

As background, we note that our rules permit parties to file documents with the Board by four means: mail, email, fax, and in-person delivery. OAR 115-010-0033(1)(a). Additionally, the agency permits efiling through CMS, a web-based electronic system developed after OAR 115-010-0033 was most recently promulgated. The record establishes that, before the January 27, 2021, 5 p.m. deadline, Respondent attempted to file the objections using only CMS, but was unable to do so because Respondent's current counsel was not the counsel of record for this case, had not previously been involved in this case, and consequently, was not listed as an "active participant" for this case in CMS.[1] For the reasons explained below, however, Respondent's failure to file by mail, email, or facsimile, as permitted by OAR 115-010-0033(1)(a) before 5:00 p.m., and failure to seek an extension before the filing deadline, does not constitute good cause to extend the filing deadline.

At 5:59 p.m. on January 27, 2021, Board Chair Rhynard received an email from Respondent's current counsel, with a copy to Complainant's counsel, stating "I have been trying to file electronically for several hours but I am sending this to you by email and will try electronic filing later this evening." The email included an attached Microsoft Word document captioned "Respondent's Objections to Proposed Order." At 6:14 p.m. Board Chair Rhynard received another email from Respondent's counsel stating "I have been trying to file the objections to ERB for several hours, but my computer repair guy was here today and nothing is working for me. So I'm sending these by email and will connect with you tomorrow if I can't figure this out tonight. Thanks." That email also included an attached Microsoft Word document with the same caption as the prior email. At 6:55 p.m., Board Chair Rhynard received another email from Respondent's counsel with no text in the body of the email, but an attached PDF copy of the objections.[2] At 7:05 p.m., the Board Chair received a fourth email from Respondent's counsel (with a copy to Complainant's counsel) stating

> "I think I may finally have gotten my Objections into the electronic system, but I can't be sure and I didn't include a form. So I used the form for the ULP Complaint, but that didn't seem to fit. There isn't any item listed that is for 'objections'. Anyway, I think I've sent them to you 3 or 4 times. I'll call in first thing in the morning and see if the electronic filing worked. Sorry about this, but the system just isn't working for me today - first the problem with my computer settings all being changed by the computer repairman, which took much time to figure out, then problems with the ERB website."

Respondent's counsel did not successfully upload the objections in the CMS electronic file for this case, but rather created a new case in CMS and uploaded the objections to that new case.

The following morning, January 28, Respondent's counsel contacted Board staff by telephone to confirm issues with the filing of Respondent's objections. In that conversation, Board staff relayed to Respondent's counsel that counsel was unable to upload the objections to this case using CMS because she was not listed in CMS as a party representative or other active participant in this case. In that same conversation, Respondent's counsel asked Board staff whether a motion or request to the Board should be filed with respect to Respondent's filing.

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[1]Any registered user of CMS may initiate a new case and file the case-initiating documents (such as a complaint). A registered user of CMS cannot access or upload documents to an existing case in CMS unless and until they are listed in CMS as an "active participant" in that case.

On January 28, the Board emailed a letter to counsel for both parties stating that

> "objections to the Recommended Order were due no later than January 27, 2021. OAR 115-010-0090(1). Documents submitted after 5:00 p.m. are deemed filed with the Board the next business day. OAR 115-010-0033(1)(d). The Board did not receive timely objections to the Recommended Order by 5:00 p.m. yesterday. If Respondent wishes to seek leave to file objections, it may file a motion in accordance with OAR 115-010-0045, and include in the motion a description of good faith efforts to confer with the non-moving party to seek resolution of the matter, as required by OAR 115-010-0045(2)."

On February 1, 2021, Respondent filed a motion for leave to file objections.[3] The motion asked for leave to file objections beyond the objection period on the ground that Respondent made a good-faith effort to timely file the objections and "immediately emailed the Board Chair and opposing counsel within an hour after the deadline" once counsel "became aware that [she] may not have" successfully filed the objections on time. With respect to the efforts to timely file the objections, Respondent's counsel set forth the following: (1) counsel needed to confer with her client multiple times; (2) counsel needed to confer with opposing counsel over the possibility of settlement; (3) counsel had an all-day mediation on January 25; (4) counsel needed to prepare for and participate in an oral argument in federal district court on January 26 and 27; and (5) counsel "had computer updating that morning and attributed difficulties [that she] was having to changes made in that process." The motion further stated that counsel "believed that [she] had uploaded the file prior to 5 p.m." and emailed a copy of those objections when she "was unable to confirm that the document actually loaded."

On February 1, 2021, Complainant objected to the motion, stating that "the Board has multiple avenues for filing documents electronically (fax and email in addition to the case management system)." Complainant further noted that, based on the motion, it was "unclear whether there actually was a problem with the Board's filing system going down, or if the problem was on the filing party's end." Complainant argued that "[a]llowing documents to be filed late absent something more definitive could potentially invite future parties to cure late filings after the fact by raising the mere possibility of technical difficulties," which "would certainly undermine the Board's established deadlines * * *."

Under OAR 115-010-0090(1), "[u]pon good cause shown, the Board may extend the time for filing objections."[4] We evaluate whether good cause exists based on the "circumstances of the individual case." *Multnomah County Correction Deputies Association v. Multnomah County*, Case No. UP-58-05 at 5 (2008). We have found good cause for a late filing where a party "made every reasonable effort to comply with the filing deadline," but filed a document five minutes after the 5 p.m. deadline due to "circumstances beyond [the party's] control." *See Laborers Local 483 v. City of Portland*, Case No. UP-15-05 at 9 (2007) (finding good cause for the late filing of answer filing fee where respondent faxed answer to ERB and complainant before deadline and hired

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[3]In accord with OAR 115-010-0045(2), the motion indicated that Respondent's counsel had conferred with Complainant's counsel and that Complainant opposed the motion.

[4]As set forth above, there is no dispute that the objections were not timely filed.

messenger to hand deliver answer with filing fee to ERB, but messenger arrived late). Inadvertence, or a lack of awareness of a deadline, however, does not constitute good cause. *Multnomah County*, UP-58-05 at 5-6. We also do not take into account whether the opposing party was prejudiced by the late filing. *Id.* at 6.

Here, the good cause asserted rests largely on three issues—(1) Respondent's counsel's busy workload; (2) Respondent's counsel's own computer problems; and (3) Respondent's counsel's difficulties e-filing the objections with the agency's CMS. Although we acknowledge that Respondent's counsel set forth a significant workload in the days up to and including the filing deadline (January 27, 2021), counsel did not request an extension based on those obligations before the filing deadline. We do not find good cause for the untimely filing of the objections based on other professional obligations when there was no attempt to file a pre-deadline request to extend the time to file the objections.

We turn to the technological reasons set forth in the request. Respondent has not established that counsel's computer problems on January 27 precluded filing the objections by email by 5:00 p.m. on January 27, or that Respondent was otherwise precluded from filing by facsimile.

Further, the filings submitted to the Board indicate that Respondent's counsel had tried for "several hours" to upload the objections in the agency's CMS. At the time, Respondent's counsel attributed at least some of the difficulties to her computer being updated in the morning. After counsel uploaded the document into the agency's CMS system as a new-case filing (which occurred after the deadline), the agency explained that counsel was unable to upload the document in CMS as a filing for this case because counsel was not the attorney of record or otherwise associated with this case before she attempted to upload the objections. Neither the motion nor any other information establishes that the CMS was not properly functioning.[5] Relatedly, there is no assertion that Respondent's counsel attempted to contact the agency by phone or email to ask whether the attempted filing was successful, to request technical assistance with the filing, or to alert the agency to any difficulties or problems with filing the objections.[6]

Under the circumstances of this case, we do not find good cause to extend the time for filing objections. To begin, the Board's rules provide for four ways to file documents with the Board—mail, email, fax, or in person. OAR 115-010-0033(1)(a). Here, Respondent did not timely file the objections by any of those methods, nor did Respondent timely seek an extension of time to do so.

In addition to the four filing methods permitted by OAR 115-010-0033(1), the agency has also within the last two years implemented an efiling system (CMS) that provides a fifth method for a party to file documents. Here, the record establishes that Respondent attempted to file the document by way of CMS, but had difficulty doing so. The record does not establish that

[5]The agency is unaware of any technological malfunction of its CMS on that day.

[6]Objections to a recommended order must be served on the opposing party. OAR 115-010-0033(2). When a party chooses to file a document through the CMS system, the filing party must serve the filed document on the other party by another means (because filing through the CMS system does not constitute service on another party). In this case, there is no assertion that Respondent's counsel served, or attempted to serve, the objections on Complainant, or otherwise attempted to confer with Complainant's counsel, before the filing deadline.

Respondent attempted to contact the agency about any issues or problems with filing the objections in CMS at any point in the day until after the filing deadline had passed. On the facts of this case, we do not find that Respondent "made every reasonable effort to comply with the filing deadline," but was unable to do so because of "circumstances beyond [the party's] control." *See City of Portland*, UP-15-05 at 9. Accordingly, we do not find good cause to extend the time for filing objections, and we deny the motion.

Because no timely objections were filed, we adopt the attached recommended order as the final order in this matter. OAR 115-010-0090(4). OAR 115-010-0090(5) allows the Board to limit the precedential value of the final order, and the Board does so in this case. Accordingly, the portion of this order adopting the recommended order is binding on, and has precedential value for, only the named parties in this case.

ORDER

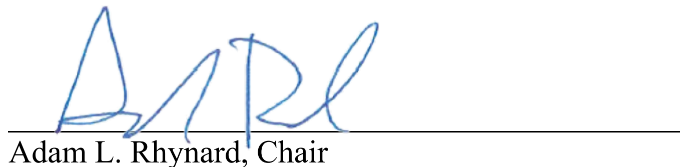
1. The County violated ORS 243.672(1)(g) when it terminated CV without just cause in violation of the CBA.

2. The County shall cease and desist from committing the above-referenced unfair labor practice.

3. The County shall rescind CV's termination and remove any mention of the termination from CV's personnel file and other employment records.

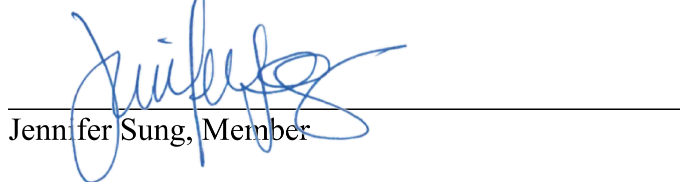
4. The County shall make CV whole for losses that he suffered as a result of the improper termination.

DATED: February 11, 2021.



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-005-20

(UNFAIR LABOR PRACTICE)

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|---|---|---|
| AFSCME COUNCIL 75, LOCAL 2503,<br><br>Complainant,<br><br>v.<br><br>HOOD RIVER COUNTY (PUBLIC WORKS),<br><br>Respondent. | ) | RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER |

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on August 21, 2020. The record closed on October 9, 2020, upon receipt of the parties' post-hearing briefs.

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

Bruce Bischof, Attorney at Law, Law Offices of Bruce Bischof, Bend, Oregon, represented the Respondent.

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On March 2, 2020, the Complainant, AFSCME Council 75, Local 2503 (AFSCME or Union), filed an unfair labor practice complaint with the Employment Relations Board (Board) against the Respondent, Hood River County (County).[1] The issues in this case are: (1) Did the County violate ORS 243.672(1)(g) by terminating "CV" (a pseudonym) without just cause in violation of a collective bargaining agreement (CBA) with AFSCME? (2) Is AFSCME entitled to a civil penalty? As set forth below, we conclude that the City did violate ORS 243.672(1)(g) as alleged, but also conclude that a civil penalty is unwarranted.

[1]AFSCME contends that its complaint was filed on March 1, 2020. (AFSCME brief at 1.) However, that date was a Sunday, outside of the Board's normal work hours.

RULINGS

1. On August 20, 2020, AFSCME's attorney, Weyand, emailed the County's attorney, Bischof, and the ALJ. Therein, AFSCME correctly pointed out that the County never filed its witness and exhibit lists with the Board at least seven days in advance of the August 21, 2020 hearing as required by OAR 115-10-0068(3) and the ALJ's July 21, 2020 prehearing order. Subsequently, AFSCME made a motion that the County not be allowed to call witnesses or submit exhibits as provided under OAR 115-10-0068(4). A similar motion was repeated orally at the outset of the hearing, then made again in AFSCME's post-hearing brief. After AFSCME's oral motion, the ALJ decided to hear testimony from the County's two witnesses, and postponed ruling on AFSCME's motion until after the parties submitted their post-hearing briefs.[2]

During the hearing, the County's attorney claimed that the County had given the ALJ its exhibit list, exhibits, and witness list when it emailed them to AFSCME on August 14, 2020. Upon review, it is clear that the County did email AFSCME the County's documents. However, those documents were not shared with the ALJ or the Board until after the August 21, 2020 hearing had already begun, when AFSCME forwarded the ALJ the County's August 14, 2020 email. The County now admits that its attorney "erroneously assumed" that its documents were provided to the ALJ within the required timelines. (County brief at 7.)

OAR 115-010-0068(3) provides,

> "Each party shall provide a witness list to the other parties and the Board Agent. Each party shall also provide an exhibit list and exhibits to any other party. These documents must be received no later than seven days before the scheduled hearing, unless the Board Agent directs otherwise."

Meanwhile, OAR 115-010-0068(4) provides,

> "A party that fails to comply with prehearing requirements set forth in the rule or ordered by the Board or Board Agent shall be denied the right to offer such evidence or make argument regarding such matter at the hearing unless good cause is shown."

The ALJ's prehearing order includes clear language that closely parallels the foregoing and specifically references OAR 115-010-0068(4) in three places.

The purpose of these rules is to streamline proceedings, eliminate undue surprise, and facilitate discussion toward possible settlement of the issues. *Cascade Bargaining Council v. Crook County School District*, Case No. UP-83-94 at 3, 16 PECBR 231, 233 (1995). The Board evaluates "good cause" based on the circumstances of the individual case. *Laborers' International Union of North America Local 483 v. City of Portland*, Case No. UP-014-14 at 2, 26 PECBR 269,

[2]Only four witnesses testified in this case. The County called Mikel S. Diwan and Jeffrey A. Hecksel and then rested its case. Afterward, AFSCME called Baoloc Nguyen and CV and then rested its case.

270 (2014) (citing *SEIU Local 503, OPEU v. Oregon University System, Portland State University*, Case No. UC-07-09 at 4, 23 PECBR 137, 140 (2009)).

There is no question that the County's witness list, exhibit list, and exhibits were not provided to the ALJ seven days in advance of the hearing as the rules require. Further, inattention and erroneously assuming that something was submitted are not compelling justifications. In short, the circumstances presented do not establish the "good cause" that OAR 115-010-0068(4) requires. As a result, the ALJ could have barred the County's exhibits and witnesses. However, we also recognize that the County verbally informed the ALJ and AFSCME who the County would be calling as a witness during the August 18, 2020 unrecorded prehearing conference (referring to the two individuals by their job titles, rather than by their names). And as noted, AFSCME was emailed copies of the County's lists and exhibits on August 14, 2020. To that extent, the late receipt did not prejudice AFSCME's case. *See Eagle Point Education Association/OEA/NEA v. Jackson County School District No. 9*, Case No. UP-61-09 at 2-3, 24 PECBR 943 at 944-45 (2012). We also conclude that, in this particular case, disregarding the disputed evidence does not materially change the outcome. For those reasons, we deny AFSCME's motion. That said, we do not condone the County's inaction or disregard for the Board's rules.

2. On August 25, 2020, four days after the Board's August 21, 2020 hearing had officially concluded, the County emailed the ALJ two additional exhibits and made a motion to introduce those exhibits "in direct rebuttal to [CV's] testimony." The same email also asserts that the two exhibits "were just discovered by the County based on the testimony of union witnesses." It did not include a specific motion to reopen the record. According to AFSCME, the County did not confer with it in advance about the County's intent to submit the additional exhibits. (AFSCME brief at 7.)

The first of the two late-filed exhibits appears to be a mail log indicating that, on April 30, 2018, while CV was in jail, CV received some unidentified mail from a purported "Union Rep" (a description that was clearly written onto the printed log by an unknown hand) named Ellen Davis (who was never mentioned during the August 21, 2020 hearing and did not testify). Notably, in an October 6, 2020 email to the ALJ, AFSCME also contends that Ellen Davis was not actually CV's union representative. The second exhibit is two April 30, 2018 emails from the County's former Human Resources Director, Denise Ford (who did not testify), to three other County officials regarding mailing notice of a pre-termination meeting to CV and emailing the same to CV's union representative. (Two of the three officials, Mikel S. Diwan and Jeffrey Hecksel, did testify, while the third, Heidi DeHart, did not. Additionally, DeHart's position is unknown.)

The Union objected to both of the County's late-filed exhibits. Later, the ALJ responded that he would like the parties to address this issue in their post-hearing briefs, and indicated that he would make a ruling on the issue in his recommended order. On October 6, 2020, AFSCME sent an email to the ALJ in which AFSCME proposed admitting the second late-filed exhibit (the Human Resources Director's emails) and calling it Exh. J-2. The same email also reiterated AFSCME's objection to the first late-filed exhibit. We now admit the second late-filed exhibit, and accept it as Exh. J-2, because both parties now seek its admission. However, we reject the County's first late-filed exhibit (the jail mail log). Again, a party seeking to add exhibits after the date set by the ALJ must show "good cause." *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 9, 22 PECBR 668, 676 (2008); *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06 at 5, 22 PECBR 61, 65 (2007). That has not been established here.

Submitting the first late-filed exhibit after the hearing closed clearly violated the Board's procedural rules, and effectively robbed AFSCME of the ability to refute or ask witnesses about the exhibit. The exhibit also lacks context, foundation, and the level of detail needed to meaningfully or independently rebut CV's testimony. In an October 6, 2020 email to the ALJ, the County asserted that CV "testified that he had no contact with any AFSCME representative while incarcerated," and that "a review of the prison[']s call logs clearly reflected otherwise." However, CV did not make that specific claim during the Board's hearing. At 12:00 p.m., CV was asked if he heard from a union representative about his pre-termination meeting while he was in jail. CV then said that he had not. The other selected quotations the County includes in its brief (at 3-4) are similarly unmoving, and do not demonstrate a lack of credibility. Likewise, the first late-filed exhibit (again, a mail log) does not indicate what mail CV received, or when or whether CV actually got ahold of it. Beyond that, the "call logs" that the County alludes to were never made a part of the record or referenced during the hearing.

3. During the August 21, 2020 hearing, at 8:54 a.m., AFSCME made an oral motion to have the County strike or withdraw the portion of its July 29, 2020 answer that alleges that CV engaged in theft (the County's "entire first affirmative offense"), given that the County could not present any evidence to support that allegation. The County declined to strike any portion of its answer, and asserted that CV had only been *alleged* to have committed crimes in the answer. (Bischof at 9:04 a.m.) The ALJ did not make a formal ruling on this issue during the hearing. Upon review, we deny AFSCME's motion here. Nonetheless, we do grant AFSCME's alternative motion, made at 8:55 a.m., which was to amend the portion of its complaint that concerns its request for a civil penalty to reflect the fact that the County has maintained its original answer.

4. In summary, on May 2, 2018, the County terminated CV's employment after CV was indicted, arrested, and incarcerated. After that, the parties agreed to hold CV's related grievance in abeyance until CV's criminal case was resolved. On October 1, 2019, CV's entire criminal case was dismissed with prejudice without a trial. On October 31, 2019, the State of Oregon appealed that dismissal.

As noted, on March 2, 2020, AFSCME filed the instant unfair labor practice complaint, which, as explained below, is also a grievance arbitration. On March 9, 2020, the County requested the complaint "be placed in abeyance as agreed to by the parties pending a final legal determination of this case." AFSCME immediately responded that it did not agree with the County's request, noting, among other things, that "the Court of Appeals can take upwards of two years to issue decisions in cases." On March 26, 2020, the ALJ denied the County's request.

On July 7, 2020, the County once again asked the ALJ to hold this dispute in abeyance after the State of Oregon filed an appellant's brief. In response, AFSCME urged the ALJ to adhere to his initial denial, and correctly emphasized that the Board's determination, which primarily involves an analysis of the Public Employee Collective Bargaining Act and the parties' CBA, is

independent of the criminal case being appealed. On July 10, 2020, the ALJ maintained his initial denial.

The County subsequently repeated its abeyance request during the August 21, 2020 hearing and again in its post-hearing brief, arguing that "the trial has not taken place and this unfair labor practice should be held in abeyance 'pending the outcome of the trial.'" (County brief at 6.) The County otherwise argues that a "lack of previous case law" justifies holding this case in abeyance. (County brief at 10.) Upon review, we uphold the ALJ's discretionary rulings on this issue for the reasons identified by AFSCME.

5. The County separately argues that this case must be dismissed because, according to the County, AFSCME failed to meet the deadline to initiate the Step 3 grievance process after the dismissal of CV's criminal case. (County brief at 10.) The ALJ declined to rule on this issue during hearing. We reject the County's position here.

As detailed below, AFSCME's original grievance, which was filed on May 11, 2018, combined Steps 1 and 2 of the parties' contractual grievance procedure. On May 17, 2018, Public Works Director Diwan denied the grievance via email. The parties' CBA specifically provides, "If the grievance is not resolved in Step 2, above, it shall be referred to the County Commission or designee in writing within fourteen (14) days thereafter." (Exh. J-1 at 19.) Accordingly, AFSCME had until May 31, 2018 to move its grievance to Step 3. However, AFSCME did so via email on May 21, 2018, well within the timeline. (Revised Exh. C-12 at 8.)[3]

Importantly, shortly after AFSCME's May 21, 2018 submission, the parties agreed to hold the dispute in abeyance "pending the trial court proceedings," referring to CV's pending criminal trial. They also agreed that, "[f]ollowing the final disposition by the court, the union will have 14 days to move the grievance forward again at step 3," and that "failure to pursue the grievance will constitute dismissal of the grievance." (Revised Exh. C-12 at 7.) On October 1, 2019, CV's criminal case was dismissed with prejudice without a trial.

In an October 18, 2019 letter, the County reminded AFSCME of the foregoing agreement, correctly noted that AFSCME had not moved the grievance to Step 3 again, then concluded that the grievance should be dismissed. (Revised Exh. C-12 at 9.) On October 21, 2019, AFSCME moved the grievance to Step 3 again. Of course, October 21, 2019 was more than 14 days after the October 1, 2019 dismissal of the criminal case. However, significantly, the record credibly demonstrates that AFSCME was unaware of the dismissal until it received the County's October 18, 2019 letter. (Revised Exh. C-12 at 10.) As we see it, the 14-day timeline the parties agreed to should not have started until AFSCME learned of the dismissal.

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[3]Regrettably, the full record contains three versions of Exh. C-12. The first version was mailed on August 14, 2020, and then uploaded to the Board's case management system on or around August 20, 2020. It is cited here as simply "Exh. C-12." The second was emailed by AFSCME at the outset of the August 21, 2020 hearing, and is cited here as "Revised Exh. C-12." The third was emailed by the County on August 24, 2020, and is identified here as "Supplemental Exh. C-12." Although AFSCME may not have been included in the County's August 24, 2020 email, the record indicates that AFSCME already had a copy of the materials included with it.

A union is generally presumed to have notice of changes that affect its bargaining unit members when changes occur. *See North Clackamas Education Association v. North Clackamas School District 12*, Case No. UP-17-09 at 9, 23 PECBR 200, 208 (2009) (citations omitted). But this was not a change in employment conditions, the dismissal itself was not an unfair labor practice, and AFSCME was not a party to CV's criminal case. It is also unclear when CV was released from jail, or when he learned of the dismissal. On top of that, we recognize that, after its October 18, 2019 letter, the County has continued to process the grievance, and has frequently asked AFSCME and the Board to hold the case in abeyance "until such time as a final judicial decision has been rendered." (Exhs. C-13 at 1, C-15 at 3.) As the County's attorney put it in a July 7, 2020 email, "the Circuit Court proceedings are still very much alive."

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

## FINDINGS OF FACT

### Background

1. The County is a "public employer" within the meaning of ORS 243.650(20).

2. Jeffrey A. Hecksel has been the County Administrator since August 2016. Mikel S. Diwan is the County's Public Works Director. During many of the events of this case, Denise Ford was the County's Human Resources Director. However, as of as early as October 18, 2019, Ford was replaced by Cheryl Berger. (Revised Exh. C-12 at 9.) Ford no longer works for the County. (Neither Ford nor Berger testified.)

3. AFSCME is a "labor organization" within the meaning of ORS 243.650(13).

4. AFSCME *Council 75* represents three distinct bargaining units of County employees via three different Locals. AFSCME *Local 2503* (*i.e.*, the Complainant), is the exclusive representative of a bargaining unit that includes certain positions in the County's Forestry and Public Works Departments. The Public Works Department includes the County's Parks & Buildings Department. (Exh. J-1 at 4.) AFSCME Local 1082 represents a "general unit" of County employees. AFSCME Local 1082-G represents a unit of Deputy District Attorneys.

5. At all times material, Amy Marvin and Baoloc Nguyen were "Council Representatives" for AFSCME Council 75. (Revised Exh. C-12 at 10.) Nguyen was responsible for the County's bargaining units from July 2015 through May or June 2017, then again from September 2019 through the Board's August 21, 2020 hearing. Marvin and another AFSCME Council 75 employee named Denise Basil were responsible for the County's units in the interim, which included CV's May 2, 2018 termination. Marvin no longer works for AFSCME Council 75 (and also did not testify).

6. CV, the employee whose May 2, 2018 termination is in dispute here, most recently worked in the Public Works Department as a "Park Technician II," which is an AFSCME-represented position. (Exh. C-17 at 2.) CV first started working for the County on March 16, 1993. He started as a Parks Technician II on June 16, 2000. (Exh. C-1 at 1.)

7. Prior to his May 2, 2018 termination, CV had never been disciplined by the County, received a negative performance appraisal, or been convicted of any crimes. Public Works Director Diwan was CV's supervisor since Diwan started working for the County on July 29, 2013, but Diwan was never CV's direct supervisor.

8. While CV worked for the County, he also served in a number of "union officer" positions, including trustee, then vice president, and then president.[4] (CV at 11:44 a.m.) CV also served as a member of AFSCME's executive board for roughly six years. As a union officer, CV has negotiated contracts and filed grievances. In 2012, he filed a grievance on his own behalf that involved longevity pay. That grievance went to arbitration, and ultimately CV won the pay increase that he sought along with back pay. CV believes that his union activity complicated his relationship with the County and made him feel as if he had a target on his back. (CV at 11:45 a.m.)

9. AFSCME and the County were parties to a CBA that, by its terms, was effective from July 1, 2017 through June 30, 2020. (Exh. J-1 at 1.) A successor CBA expires on June 30, 2021.

10. Article XIII of the CBA includes a grievance procedure. The fourth and final Step of that procedure (*i.e.*, "Step 4") involves AFSCME filing the unresolved grievance with this Board, which is expected to enforce the terms of the contract and provide "binding arbitration." (Exh. J-1 at 20.)

11. The CBA's grievance procedure includes specific timelines for filing at each Step. For Step 2, the CBA provides,

> "If the grievance is not resolved in Step 1, it shall be filed in writing with the Department Head within fourteen (14) days of the occurrence of the grievance or the employee's demonstrated first knowledge of same, whichever shall occur later."

(Exh. J-1 at 19.)

For Step 3, the CBA provides,

> "If the grievance is not resolved in Step 2, above, it shall be referred to the County Commission or designee in writing within fourteen (14) days thereafter."

(Exh. J-1 at 19.)

For Step 4, the CBA provides,

> "In the event the County Commission's decision is not satisfactory, the Union may, within fourteen (14) days after receiving the written reply, serve written notice to

[4] CV is listed as a 2019 trustee in the CBA. (Exh. J-1 at 2.)

the County Commission or designee of its intention to file the grievance with the Employee Relations Board for settling the dispute."

(Exh. J-1 at 20.)

12. Article XVI, Section 2 of the parties' CBA addresses promotions and transfers. It provides, in part, "Any employee who has successfully completed an initial trial service period may not be discharged except for just cause as provided in Section 3 hereof." (Exh. J-1 at 24.)

13. Article XVI, Section 3 the CBA addresses discipline, and provides that disciplinary action shall include, but is not necessarily limited to, written reprimand, demotion, suspension, and discharge. It also provides,

> "Disciplinary action may be imposed upon an employee for failing to fulfill his/her responsibilities as an employee of the County. Conduct of an employee which hinders the operation of the County shall be considered just cause for disciplinary action. Also, the willful giving of false information, or the withholding of information in making application for employment, or willful violation of departmental rules, shall be considered just cause for disciplinary action."

(Exh. J-1 at 24.)

14. The County also maintains a Personnel Code. According to the Personnel Code, "In the event there is conflict between the Collective Bargaining Agreement and the Personnel Code, the Collective bargaining Agreement shall prevail." (Exh. R-6 at 2.)

15. Section 24 of the Personnel Code addresses causes for warning, suspension, or dismissal as well as appeal rights. (Exh. R-6 at 2.) Section 24.1(e) provides that "[d]ishonesty, supplying fraudulent information, falsifying records or documents or deliberate breach of confidentiality" is cause for discipline. Section 24.1(l) provides that "[s]abotage, willful destruction, misuse, abuse, or theft of County property or another employee's property" is cause for discipline. (Exh. R-6 at 4.) Section 24.2 of the Personnel Code provides, in part,

> "Investigating charges of supervisor or employee misconduct shall be the responsibility of the Department Head. If an alleged criminal violation charge is involved, the matter will be referred to the District Attorney for investigation. A full report shall be submitted to the County Administrator and a copy of the report shall be placed in the personnel file."

(Exh. R-6 at 5.)

16. Section 43 of the Personnel Code addresses ethics. Section 43.3 specifically provides, "Employees who violate the Ethics policy or State laws governing ethics as referenced above and in doing so, creates an equally detrimental impact on the organization, may be subject to disciplinary action up to and including discharge." (Exh. R-6 at 7.)

Chronology of Events

17. On February 1, 2018, Public Works Director Diwan arrived at work at around 6:00 or 7:00 a.m. At approximately 8:45 a.m. that morning, Officer Rick Princehouse of the Hood River County Sheriff's Office contacted Diwan by telephone. During the call, Princehouse explained that he wanted to interview CV, and asked Diwan to have CV come to Public Works' main office's conference room. Diwan agreed to do so. He did not ask Princehouse what the police would do or suggest another location. At the time, Diwan did not know what exactly the interview would be about or what would occur afterward. However, since September 20, 2017, Diwan had been cooperating with the police and knew that the police were investigating CV. (Diwan at 10:27 a.m.)[5]

18. Shortly after Public Works Director Diwan's February 1, 2018 call with Officer Princehouse, Diwan called CV's desk phone. However, CV was out. As a result, Diwan left a message with another County employee, which was to have CV come over to Public Works' front office. Diwan did not tell CV what the meeting was going to be about, or that he would be in an investigatory interview with police officers. In addition, Diwan did not inform AFSCME of the interview.

19. At some point after 8:55 a.m. on February 1, 2018, CV stopped by Public Works Director Diwan's office in the Public Works building and asked Diwan what he needed. Diwan told CV that CV was going to be interviewed by "a couple gentlemen" who were already waiting for him in the conference room. (Diwan at 9:58 a.m.) As before, Diwan did not tell CV why CV was being interviewed, or that CV was being interviewed by the police. Subsequently, CV went to the conference room and was interviewed by Officer Princehouse and another officer.

20. Public Works Director Diwan was not present for CV's February 1, 2018 interview, and neither was an AFSCME representative. Further, the interview was not visible to any other County employees. During the interview, the conference room's door remained shut. The interview lasted for 30 to 60 minutes in total.

21. CV did not expect to be interviewed about theft. During the interview, however, CV was told that his wife had accused him of theft. At the time, CV and his wife were going through an acrimonious and difficult divorce. Because of that, and because his wife had previously told him that she was going to ruin CV's life, CV was unsurprised that his wife had accused him of something. (CV at 11:48 a.m.)[6]

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[5]As noted below, Supplemental Exh. C-12 at 6 indicates that, on approximately January 8, 2018, the Hood River County Sheriff's Office informed Human Resources Director Ford, Public Works Director Diwan, and Administrator Hecksel "that they were investigating a criminal allegation that [CV] was stealing cash from the camping reservation boxes."

[6]Exh. C-18, which was not admitted, includes a number of text messages from CV and CV's wife, who did not testify. At 11:54 a.m., the ALJ rejected the exhibit after the County effectively stipulated that it was previously unaware of the messages' existence, which establishes that the messages could not have been part of the County's decision-making process. (Bischof at 9:29 a.m.) In its post-hearing brief (at 16 n 1), AFSCME contends that the Board should admit Exh. C-18. We conclude that the ALJ was correct to reject the exhibit. During the hearing, AFSCME withdrew Exhs. C-10 and C-11.

22. Right after the February 1, 2018 interview concluded, the two police officers escorted CV to his Parks Department office and searched CV's desk, locker, and privately-owned truck. During this search, the police officers made CV sit in the back of a police car. CV was visible to his coworkers while being escorted and while he was in the police car. They could also see CV's truck being searched. Afterward, the officers searched CV's home. At some point after the searches, CV was released from custody.

23. Shortly after CV left the Public Works building with the two officers, Public Works Director Diwan called Administrator Hecksel and told him that the police had interviewed CV. Before the call, both Diwan and Hecksel were already aware that CV was being investigated. Nevertheless, Hecksel was "very concerned" about what Diwan told him in this call. (Hecksel at 10:45 a.m.) Similarly, Diwan was "very concerned" about the disruption of the workplace that was caused by his employees seeing CV escorted and seeing CV's truck searched. (Diwan at 10:03 a.m.)

24. After Public Works Director Diwan and Administrator Hecksel's call, the two met in Hecksel's office with Officer Princehouse and another police officer named Dave Stefanini. During that short meeting, which also took place on February 1, 2018, the two officers briefed Diwan and Hecksel about what had occurred in the interview with CV. The two officers also explained that the search of CV's truck revealed "a significant amount of cash," and that they "recovered a significant amount of money" through the search of CV's home. (Diwan at 10:01 a.m., Hecksel at 10:45 a.m.) During the same meeting, one officer placed a laptop bag on the table and opened it up, revealing "lots and lots of cash" in little transparent bags. At that point, an officer explained that the cash in the briefcase had been recovered from CV's truck, and that the officers believed that it was "County money." (Diwan at 10:02 a.m.)[7]

25. After the February 1, 2018 meeting with Public Works Director Diwan, Administrator Hecksel, and the two officers ended, Diwan and Hecksel spoke with Human Resources Director Ford about what the County should do about the situation with CV. Eventually, the three decided that CV would be put on paid administrative leave in order to allow for time to sort out what was happening, and to protect all of the parties involved.

26. At around 4:00 or 5:00 p.m. on February 1, 2018, CV met with Public Works Director Diwan in Diwan's office as directed. Diwan spoke to CV for a "very short time." Diwan told CV, "[CV], I'm not sure what happened today. But it certainly needs to be sorted out. I'm gonna need you to come back in tomorrow morning, first thing." After that, CV said "Okay" then left work for the day. (Diwan at 10:04 a.m.)

27. On February 2, 2018, CV received a letter from Public Works Director Diwan, dated February 1, 2018, that placed CV on paid administrative leave. The beginning of the letter states,

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[7]The County asserts that the officers showed "over $18,000 in cash obtained from a search of [CV]'s vehicle parked in the Public Works Parking lot." (County brief at 2, 9.) However, it is unclear where that figure comes from.

"This is to inform you that the Hood River County Sheriff's Office provided information regarding your possible misconduct. As it is my responsibility to investigate such matters, you are being placed on paid administrative leave effective this date until such time as the issue has been resolved."

(Exh. R-1.)

Diwan prepared this paid administrative leave letter during the afternoon of February 1, 2018. When CV was placed on administrative leave, nobody from the County had asked CV anything about the underlying allegations or any other issues.

28. While CV was out on paid administrative leave, CV's designated AFSCME Council Representative was Marvin. Further, during that period, before CV went to jail, CV spoke with Marvin.

29. On April 20, 2018, a grand jury indicted CV on 13 counts. (Diwan at 10:07 a.m.) Of those counts, 3 were for aggravated theft in the first degree and 10 were for theft in the first degree. (Exh. R-4.) The charges were "based on theft of County funds, specifically, campground receipts." (Revised Exh. C-12 at 10.) The amount of money at issue totaled $130,000. (Revised Exh. C-12 at 13.)

30. On April 25, 2019, an arrest warrant was issued for CV. On April 27, 2018, CV was arrested and taken to jail based on the grand jury indictments.

31. While CV was in jail, his AFSCME Council Representative continued to be Marvin. However, CV did not communicate with Marvin while he was in jail. CV also did not have Marvin's telephone number during that period. Instead, CV only had his lawyer's number. (CV at 12:03 p.m.)

32. Administrator Hecksel learned of CV's April 20, 2018 indictment the day that it occurred. Afterward, Hecksel informed Public Works Director Diwan. Once Diwan learned that CV had been indicted for the theft of County funds, arrested, then put in jail, Diwan determined that he would recommend that CV be terminated. Diwan also believed that lesser forms of discipline were inappropriate under the circumstances.

33. After Public Works Director Diwan learned of CV's indictment, he had a discussion about the matter with Administrator Hecksel and Human Resources Director Ford. After that, Diwan drafted a pre-termination letter. That letter was subsequently reviewed by legal counsel. Eventually, Diwan gave copies of the letter to Hecksel and Ford, expecting Ford (who, as noted, did not testify) to mail the letter to CV and a union representative.[8] (Diwan at 10:09 a.m., 10:22 a.m.) The pre-termination letter was dated April 30, 2018 (a Monday). As indicated below, the letter noted that a pre-termination hearing was scheduled for 8:30 a.m. on May 2, 2018 (a Wednesday).

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[8]AFSCME asserts that Council Representative Marvin was located in Pendleton at the time. It also asserts that it did not receive a copy of the pre-termination letter until after the May 2, 2018 pre-termination hearing. (Weyand at 10:24 a.m. and 10:52 a.m.)

34. At 11:41 a.m. and 2:21 p.m. on April 30, 2018, Ford sent emails to Public Works Director Diwan, Administrator Hecksel, and Heidi DeHart (whose position is not provided in the record) about mailing the pre-termination letter. The subject of both emails is "Due process." In essence, the emails indicate that Ford wanted someone to email CV's union representative (who is unnamed in the email) a copy of the letter and mail a copy to CV's "home address," despite the County's firm knowledge that CV was in jail and thus would not receive a copy "anytime soon." Ford's emails do not confirm when or whether copies of the letter were actually mailed or emailed, or whether anyone ever responded to Ford. Near the end of the 11:41 a.m. email, Ford wrote, "We will also need a Status Change form terminating employment on May 2, first thing in the morning." (Exh. J-2.)

35. The pre-termination letter specifically provides,

> "This letter is to advise you of my proposed recommendation to terminate your employment with Hood River County. This discipline is the direct result of your recent alleged criminal activity and incarceration; specifically, the theft of County funds over the course of your employment.
>
> "On February 2, 2018 you were placed on paid administrative leave while an investigation through the Hood River County Sheriff's Office was taking place. In making a final determination regarding your employment status with Hood River County, you will be provided an opportunity to meet with myself and the Human Resources Director in a pre-termination hearing scheduled for 8:30 a.m. on May 2, 2018 in the BOC conference room located on the first floor of the County Business Administration Building at 601 State Street, Hood River.
>
> "The purpose of this due process hearing is to allow the opportunity to provide any information, facts, documents, and/or mitigating reasons why you believe your involuntary separation from County employment is inappropriate. Should you choose to appear at this due process hearing I will carefully consider any information you provide prior to making a final decision.
>
> "Due to your union representative invoking your Garrity Rights on February 2, we will not be asking any questions that may or could be used against you in a court of law. You are entitled to bring any other county employee or union representative of your choosing to this hearing, should you desire.
>
> "You are not required to attend this hearing. If you choose not to attend you should contact Denise Ford, Human Resources Director and your termination would then be official May 2, 2018 and all final wages will be processed and mailed to you via certified mail."

(Exh. R-2 at 1, emphasis in original.)

The letter does not specify what rules or policies were violated.

36. Public Works Administrator Diwan never received a response from CV or AFSCME regarding the pre-termination letter in advance of the pre-termination meeting. Diwan also never tried to contact Marvin. In addition, the County did not attempt to call CV about the pre-termination meeting while CV was in jail.

37. On May 2, 2018, CV's pre-termination meeting occurred as scheduled. However, only Public Works Director Diwan and Human Resources Director Ford attended. The two waited for about 30 minutes before ending the meeting.

38. After the May 2, 2018 pre-termination ended, Public Works Director Diwan prepared a termination of employment letter, dated May 2, 2018, which was eventually sent out via certified mail. (Exh. R-3.) The letter stated, in relevant part,

> "You failed to appear at your due process pre-termination hearing scheduled for today. Based on the details of the investigation currently known to me regarding your willful misconduct in relation to the theft of County funds, my only alternative is to terminate your employment for just cause, effective today's date of May 2, 2018."

(Exh. R-3.)

39. The May 2, 2018 termination letter does not specify what County rules or policies were violated. However, in reality, the County terminated CV for being charged, arrested, and then incarcerated. (Diwan at 10:08 a.m., 10:21 a.m.)

40. The County did not make an "independent determination" that CV was guilty of theft, and did not conduct an investigatory interview with CV or any other Public Works employees. Indeed, the County "conducted no investigation" whatsoever, and viewed it as simply "a criminal matter." (Diwan at 10:26 a.m., Bischof at 10:26 a.m. and 11:20 a.m., Hecksel at 10:46 a.m.) Stated differently, the decision to terminate CV was entirely "based on outside sources." (Diwan at 10:13 a.m.) Moreover, when the decision was made to terminate CV, the County had not read any police reports or investigatory files, and had not known how the police investigation of CV had started, or that CV's then-wife had accused him of the theft. (Bischof at 9:29 a.m. and 11:49 a.m., Diwan at 10:26 a.m.) The County also did not consider CV's personnel file or his unblemished service record when deciding to terminate him. (Diwan at 10:30 a.m.)

41. There is no County policy against County employees having cash in their vehicles or homes. Additionally, the County "certainly" has the option of putting employees on unpaid leave during ongoing investigations or until the end of a criminal trial. (Hecksel at 10:54 a.m.) CV maintains that he has never stolen anything from the County. (CV at 11:45 a.m.)

42. On May 3, 2018, Council Representative Marvin requested that, by June 1, 2018, the County provide her with copies "of all information used to make the decision to terminate [CV], including all notes, names, and witnesses." (Supplemental Exh. C-12 at 6.)

43. On May 8, 2018, Human Resources Director Ford sent an email responding to Council Representative Marvin. Ford wrote, in part,

> "Approximately 4 months ago the Hood River County Sheriff's office informed myself, the PW Director and the Administrator that they were investigating a criminal allegation that [CV] was stealing cash from the camping reservation boxes. In February we were informed by Deputy Richard Princehouse during working hours that his investigation was on[]going and that he wanted to interview Mr. [CV], which he did. He also informed us that he had a subpoena to search Mr. [CV]'s private vehicle and other personal locations. At that time we placed Mr. [CV] on paid administrative leave pending any further action by the Sheriff's officer or the District Attorney's office."

(Supplemental Exh. C-12 at 6.)

44. On May 11, 2018 (a Friday), Council Representative Marvin filed a grievance over CV's termination. "As the Department Head made the decision to terminate the employment of Mr. [CV], steps 1 and 2 were combined." (Revised Exh. C-12 at 11.)[9]

45. On May 16, 2018 (a Wednesday), Council Representative Marvin emailed Public Works Director Diwan a copy of CV's grievance. The email also notes that Marvin had sent Human Resources Director Ford a copy of the same grievance the week before. After that, Marvin wrote, "In order to uphold [CV]'s due process rights, I ask that the grievance be held in abeyance, pending the outcome of his trial. Please let me [know] if the County is agreeable to suspending the grievance timeline until then." (Revised Exh. C-12 at 3.)

46. On May 17, 2018, Public Works Director Diwan emailed Council Representative Marvin a letter denying CV's grievance. It states, in part,

> "Mr. [CV] was terminated for cause in accordance with Article 16 of the 2503 CBA contract and all provisions of said contract have been followed. Specific details regarding the determination of cause were outlined in an email sent to you by Hood River County Human Resources Director Denise Ford on May 8, 2018. As per the email, because this was a criminal investigation, all notes, names, witnesses, etc. are part of the Sheriff's Office and/or District Attorney's Office investigations.
>
> "In closing, it is my determination that Mr. [CV]'s termination is final and your grievance is denied."

(Revised Exh. R-12.)

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[9]Exh. C-12 at 3 and 6 appears to indicate that AFSCME moved CV's grievance to Step 2 on "2/11/18." We presume that that is a typo, given that CV was not terminated until May 2, 2018. Similarly, Revised Exh. C-12 at 6 appears to indicate that AFSCME moved the grievance to Step 3 (for the first time, at least) on "2/21/18," which also appears to be a typo. Revised Exh. C-12 at 5 and 8 indicates that the Step 3 grievance was actually filed on May 21, 2018.

47. In a May 21, 2018 email to Human Resources Director Ford and Administrator Hecksel, sent at 2:17 p.m., Council Representative Marvin submitted a Step 3 grievance on behalf of AFSCME and CV. Marvin also wrote, "I ask that this grievance be held in abeyance and that the grievance timeline be suspended pending the outcome of the trial in order to uphold [CV]'s due process rights." (Revised. Exh. C-12 at 8.)

48. At 2:34 p.m. on May 21, 2018, Council Representative Marvin sent a separate email to Human Resources Director Ford, Bischof, Administrator Hecksel, and Public Works Director Diwan. In that email, Marvin noted that the County had not provided the information she had requested on May 3, 2018, and that the County had "cited the ongoing sheriff's investigation." Marvin then wrote that she knew of "no basis for the County to withhold from disclosure any of the information that was relied upon in deciding to terminate [CV]." At the end of the email, Marvin asked for the requested information by June 1, 2018. (Supplemental Exh. C-12 at 6.)

49. On May 29, 2018, at 11:53 a.m., Human Resources Director Ford sent an email to Council Representative Marvin. In part, Ford wrote,

> "I have been instructed to advise you that the County contends, for the record, we did not violate the employee's due process rights or any contract provisions of the 2503 contract. However, we will agree to hold the grievance in abeyance pending the trial court proceedings. Following the final disposition by the court, the union will have 14 days to move the grievance forward again at step 3. Otherwise, as the contract states, failure to pursue the grievance will constitute dismissal of the grievance. Is this agreeable?"

(Revised Exh. C-12 at 7.)

At 5:07 p.m. the same day, Marvin responded, "Yes, we agree to these terms." (Revised Exh. C-12 at 7.)

50. In September 2019, Council Representative Nguyen was reassigned the County's bargaining units and took over responsibility of CV's grievance. At that point, a criminal trial was still pending and the grievance was being held in abeyance.

51. On October 1, 2019, State of Oregon Circuit Court Judge John A. Olson dismissed all of the criminal charges against CV with prejudice. (Revised Exh. C-12 at 12, Exh. C-16 at 1-13.) No trial was held.

52. On October 18, 2019, Human Resources Director Berger mailed and emailed a letter to Micaela Keller, the president of AFSCME Local 1082, about the October 1, 2019 dismissal. (Revised Exh. C-12 at 9.) (As noted, CV's position is actually part of the bargaining unit represented by AFSCME Local 2503.) Around the same time, the County also mailed Nguyen a copy of this letter, which Nguyen received on October 20, 2019. Before receiving Berger's letter, AFSCME was unaware of the dismissal.

53. Human Resources Director Berger's October 18, 2019 letter specifically stated,

> "Upon request from Amy Marvin received May 21, 2018, Hood River County agreed on May 29, 2018, to hold the grievance for [CV] in abeyance pending trial court proceedings. The agreement indicated that following final disposition by the court, the union would have 14 days to move the grievance forward again at step 3. As the contract states, 'Failure by the Union to pursue the grievance on a timely basis at any step as outlined in the Article, shall constitute a dismissal of the grievance.'
>
> "Tuesday, October 1, 2019, Judge Olsen [sic] dismissed the State's case against [CV]. Per Contract language, the Union had 14 days to pursue the grievance again at step 3. As of this date, Hood River County is not in receipt of any documentation from the Union with regard to the [CV] Grievance.
>
> "At this time, Hood River County considers the [CV] Grievance dismissed."

(Revised Exh. C-12 at 9.)

54. On October 21, 2019, Council Representative Nguyen emailed the County's Board of Commissioners. That email, which included a copy of the October 18, 2019 letter as an attachment, specifically stated,

> "The Union is in receipt of the letter that was sent received [sic] today in regards to the termination grievance of this member. The Union disagrees that the case is dismissed and is moving the grievance to Step 3 for resolution. The Union was never notified from the county about the disposition of the trial and until than [sic] the grievance was still in abeyance. The attached letter is the first notification that we received about the results of the trial and therefore we are moving the case to Step 3."

(Revised Exh. C-12 at 10.)

As noted above, Council Representative Marvin had already filed a Step 3 grievance with the County on May 21, 2018.

55. The day or the day after CV was released from jail, CV checked the mail at his home and found copies of the pre-termination and termination letters. This was the first time that CV knew of either letter's existence, or knew that a pre-termination meeting had been scheduled. CV did not receive a copy of the pre-termination letter while he was in jail, and was not called about it. (CV at 11:58 a.m., 12:05 p.m.) At some point after CV was released from jail, he was in contact with either Council Representative Marvin or Council Representative Nguyen. (CV at 12:03 p.m.)

56. On October 28, 2019, the County's Board of Commissioners "held a special meeting where the County Administrator was designated by the Board to respond to the step 3 grievance." (Revised Exh. C-12 at 11.)

57. On October 30, 2019, Administrator Hecksel sent a three-page letter to Council Representative Nguyen and AFSCME Local 2503's president, Steven Watt. The letter includes what purports to be a chronological summary of events beginning on February 1, 2018 along with an explanation of the County's position. The letter also references language from Article XVI of the CBA and from Sections 24.1(e), 24.1(l), and 43.3 of the County's "Personnel Handbook" (which we presume refers to the County's Personnel Code). At the end of the letter, Hecksel once again denied the grievance. (Revised Exh. C-12 at 11-12.)

58. On October 31, 2019, the State of Oregon appealed Judge Olson's dismissal. On November 5, 2019, the State amended its appeal.

59. On November 8, 2019, Council Representative Nguyen sent Human Resources Director Berger an email asking for a variety of information relating to CV's grievance by November 22, 2019. In sum, Nguyen sought CV's "Supervisory File," certain information related to the County's investigation of CV, and information about other County employees who were previously disciplined for the same infractions. (Exh. C-13 at 2.)

60. On November 19, 2019, Human Resources Director Berger sent Council Representative Nguyen an email. It states,

> "Oregon Department of Justice has now become involved with the [CV] case through an appeal of the Judge's decision. As a result of this, Hood River County would like to ask to continue to hold this grievance in abeyance until such time as a final judicial decision has been rendered. At that time, should the Union desire, you can again file for next steps in the grievance process."

(Exhs. C-13 at 1, C-15 at 3.)

61. On January 17, 2020, Council Representative Nguyen responded to Human Resources Director Berger's email, writing,

> "I sincerely apologize for the long delay in emailing you back [regarding] the [CV] Termination case. While we have held it in abeyance for the initial trial and resolution the Union unfortunately will not agree to hold it in abeyance again and is therefore proceeding with Step 3. The reason for the delay in responding was because of internal procedures that we had. I have cc'd our counsel on this email also and they will be shepherding this case moving forward."

(Exhs. C-13 at 1, C-15 at 3.)

62. On January 21, 2020, at 9:25 a.m., Human Resources Director Berger sent an email back to Council Representative Nguyen, writing,

> "I am a bit confused. On October 30, 2019, Hood River County provided the Union a response to Step 3 in the [CV] case. It was after that that the Union was also provided with information that there was an appeal to the Oregon Department of Justice in the [CV] case.
>
> "The Union has already asked to move forward to Step 3. The County has already provided a response to Step 3…. And, in fact, you responded with an acknowledgement of receipt (see attached). It feels like the Union may be confused about documentation?
>
> "Please advise."

(Exhs. C-14 at 1, C-15 at 2.)

63. On January 21, 2020, at 10:26 a.m., Council Representative Nguyen wrote back to Human Resources Director Berger, stating, "You are correct that the Union has moved the grievance to Step 3 but I was replying to your email in regards to holding the grievance in abeyance because DOJ was appealing the case." (Exhs. C-14 at 1, C-15 at 1.) At 10:32 a.m. the same day, Berger responded, "Then accordingly with your last email, the Union will be moving to file with ERB?" (Exh. C-15 at 1.) At 11:37 a.m., Nguyen wrote, "Yes. Thank you. Sorry I just re read my email. It was a. It confusing. Yes the Union will be submitting the grievance to ERB." (Exh. C-15 at 1.)

64. On March 2, 2020, AFSCME filed the instant unfair labor practice complaint against the County with the Board.

65. On March 9, 2020, the County's attorney, Bischof, emailed the ALJ and AFSCME the County's informal response. Among other things, it noted that the criminal case was still pending in the Oregon Court of Appeals. Bischof also asked "that the ULP continued [sic] to be placed in abeyance as agreed to by the parties pending a final legal determination of this [criminal] case." Later the same day, AFSCME's attorney, Weyand, responded that AFSCME objected to the County's request to postpone the Board's case, then asked that the matter be set for hearing soon.

66. On March 12, 2020, Bischof emailed the ALJ documentation regarding the State's appeal of the criminal case.

67. On March 26, 2020, the ALJ decided not to hold the Board case in abeyance as the County requested. On June 19, 2020, the ALJ scheduled a hearing for August 21, 2020.

68. In the County's June 29, 2020 answer to the complaint, the County "alleges that AFSCME failed to follow the time[]lines in the grievance procedures thereby forfeiting their right to grieve."

69. On July 7, 2020, Bischoff sent the ALJ an email noting that the State of Oregon had filed an appellant's brief with the Court of Appeals. The email, which includes a copy of that brief as an attachment, also states, in part,

> "A majority of all the evidence in this case was developed by the Oregon State Police which Hood River County does not have access to. As a result, the Circuit Court proceedings are still very much alive and the ULP hearing set for August must be held in abeyance pending the parties['] agreement."

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 terminated CV without just cause in violation of the CBA.

Standards of Decision

ORS 243.672(1)(g) provides that it is an unfair labor practice for a public employer or its designated representative to "[v]iolate the provisions of any written contract with respect to employment relations including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept arbitration awards as final and binding upon them." Here, the parties' written employment relations contract – its CBA – expressly allows for filing an unfair labor practice with the Board to enforce its terms. (Exh. J-1 at 20.) The CBA also provides that AFSCME-represented employees "may not be discharged except for just cause." (Exh. J-1 at 24.) As noted, AFSCME has filed its grievance with the Board in accordance with the CBA. And again, that grievance contends that CV was terminated without the just cause the CBA requires. In such cases, the Board's role is analogous to that of a grievance arbitrator. *See Wy'East Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05 at 33, 22 PECBR 108, 140 (2007). Our role, then, is to interpret the CBA to determine whether the County violated it when it terminated CV.

Ordinarily, the Board's determination of whether there was just cause is based on the objective "no reasonable employer" standard as adopted in *Brown v. Oregon College of Education*, 52 Or App 251, 628 P2d 410 (1981). Under that 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 No. 1*, Case No. UP-33-85 at 17, 9 PECBR 8510, 8526 (1986).

There is no single, comprehensive definition of a reasonable employer. Among the traits of a reasonable employer, however, are the following: (1) disciplinary action is taken in good faith, for cause, and for nondiscriminatory reasons; (2) rules enforced are reasonable, and employees are given fair notice that violations of the rules may lead to discipline; (3) disciplinary action is taken in a timely manner; (4) an employee is warned of proposed discipline and given an opportunity to refute the charges; (5) a fair investigation is made before discipline is administered; and (6) the

burden of proving the elements needed to justify discipline is borne by the employer.[10] *Oregon School Employees Association v. North Marion School District 15*, Case No. UP-60-09 at 30-31, 24 PECBR 661, 690-91 (2012); *Oregon Trail School District No. 46*, UP-32-05 at 33, 22 PECBR at 140 (citing *OSEA v. Klamath County School District*, Case No. C-127-84 at 20-21, 9 PECBR 8832, 8851-52 (1986)). In addition to the foregoing, a reasonable employer generally imposes sanctions proportionate to the offense, considers the employee's length of service and record in determining sanctions, and applies principles of progressive discipline unless the offense is gross. It also bases any disciplinary action on "substantial evidence." *Oregon AFSCME Council 75 Local #1329 v. Crook County Road Department*, Case No. UP-045-10 at 23, 25 PECBR 121, 143 (2012) (citing *Bellish v. State of Oregon, Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 (April 2004), *recons* (June 2004)); *Oregon Trail School District No. 46*, UP-32-05 at 33, 22 PECBR at 140).

In this case, Article XVI, Section 3 the CBA specifically provides the following relevant guidance:

> "Disciplinary action may be imposed upon an employee for failing to fulfill his/her responsibilities as an employee of the County. Conduct of an employee which hinders the operation of the County shall be considered just cause for disciplinary action. Also, the willful giving of false information, or the withholding of information in making application for employment, or willful violation of departmental rules, shall be considered just cause for disciplinary action."

(Exh. J-1 at 24.)

The County now concludes, "None of the normal tests of just cause apply in this case." (County brief at 6.) We disagree. For the reasons explained below, we conclude that, on balance, the County failed to act as a reasonable employer here. We also conclude that it terminated CV without just cause in violation of the CBA, and therefore violated ORS 243.672(1)(g).

Discussion

In analyzing whether an employee's conduct warranted discipline, we often begin by determining if the employee actually did what the employee was disciplined for. *North Marion School District 15*, UP-60-09 at 29, 24 PECBR at 689 (internal citations omitted). Here, testimony indicates that CV was terminated for being charged, arrested, and then incarcerated, which certainly did occur. However, those events are actually things that happened to CV, rather than things that CV did. To the extent that the County actually terminated CV for the "theft of County funds" as specifically stated in CV's termination letter, the County has presented no actual evidence of that. (Exh. R-3.) While we can reasonably assume that some investigation file exists, it was never made a part of this case. On the other hand, during our hearing, CV provided sworn

[10]The complainant has the ultimate burden of proof and the burden of going forward in unfair labor practice complaints that allege a violation of a contractual just cause provision. *Association of Oregon Corrections Employees v. Oregon Department of Corrections*, Case No. UP-21-94 at 2, 15 PECBR 621, 622 (1995) (citing *Ralphs v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO*, Case Nos. UP-68/69-91 at 3, 15 PECBR 115, 117, *recons*, 15 PECBR 474 (1994)).

testimony that he has never stolen anything from the County, and the related criminal case against CV was dismissed with prejudice. Given that clear imbalance, we can only conclude that CV did not commit the theft, or that the County did not meet its burden of proving the elements needed to justify its discipline. *See Oregon Education Association v. Willamette Education Service District*, Case No. UP-8-07 at 29, 22 PECBR 585, 613 (2008). Either is fatal to the County's claim that CV was terminated in good faith for cause.

Turning to some other common traits of a reasonable employer, we readily conclude that a rule against theft is perfectly appropriate. In fact, there is no need to inform employees that they cannot steal from the employer. *Willamette Education Service District*, UP-8-07 at 28, 22 PECBR at 612 (citing *Nass v. State of Oregon, Employment Department*, Case No. MA-06-03 at 9 (February 2004)). We also recognize, though, that the County's Personnel Code explicitly warns employees that "theft of County property" is cause for discipline, and that CV was apparently aware of the Code. (Exh. R-6 at 5, 8.) In addition, the discipline given was issued in a timely manner, and if proven, proportionate to the offense alleged. We certainly appreciate the disturbing nature of the allegations against CV, as well as the striking evidence presented to the County on February 1, 2018. As for whether the County has acted discriminatorily, on this record, we are unconvinced that the County was motivated by CV's union activities or some other inappropriate factor.

Whether a County employee can be disciplined for simply being charged, arrested, and incarcerated, however, is neither axiomatic nor clearly addressed in either the CBA or the Personnel Code. There is also no evidence of any related oral instruction being given to CV. As indicated, a reasonable employer does not discipline an employee on the basis of a rule of which the employee had no notice, or was never clearly explained to the employee. Moreover, ordinarily, the mere existence of a complaint says little about the validity of that complaint. *Oregon Trail School District No. 46*, UP-32-05 at 35-37, 22 PECBR 108 at 142-44. It follows that the County cannot simply conclude that CV violated the law here, for there was no conviction or guilty verdict. The County repeatedly asserts that CV never provided an "affirmative response to the allegations." (County brief at 8, 9, 10.) But as noted, the burden is on *the employer* to support its discipline with substantial evidence, and AFSCME did file a timely grievance on CV's behalf and has continued to support it.

Although the County may have briefly considered the principle of progressive discipline, it evidently never considered the option of simply placing CV on unpaid leave while the criminal case ran its course. Relatedly, the County admits that it never considered CV's 25 years of experience working for the County, or his complete lack of prior discipline. We grant that there is no evidence in the record of other employees being treated differently in similar situations. However, it also appears that the County made no serious attempt to review how other employees were treated.

We also cannot conclude, based on the evidence presented, that CV was given a meaningful opportunity to refute the charges against him. The County did hold a "due process" pre-termination meeting for CV on May 2, 2018. Nevertheless, the County knew for a fact that CV would not be attending that meeting, for he was in jail. Notice of the meeting was otherwise sent to CV's home, effectively ensuring that CV would not be personally notified of his situation "anytime soon," as

Human Resources Director Ford put it. (Exh. J-2.) That choice tends to suggest that the County was not genuinely interested in letting CV present a defense. To the extent that the County also notified some union representative of the pre-termination meeting (albeit at some unknown time after 2:21 p.m. on April 30, 2018 at the earliest), the evidence does not show when that happened. Ford, Council Representative Marvin, and Heidi DeHart (the unknown individual named in Exh. J-2) did not testify. And according to AFSCME, it did not receive a copy of the pre-termination letter until after May 2, 2018 meeting. For reasons unknown, the County also chose to have the due process meeting just a couple days after it announced it intended to terminate CV. Even assuming proper service, that tight timeline gave CV or a potential representative little or no time to prepare a response, or request a continuation or extension.

It does appear that the Hood River County Sheriff's Office, which is one branch of Hood River County, conducted a lengthy investigation. However, respectfully, we have no way of telling whether that investigation was actually fair or objective, as we have no records to examine. On top of that, CV and AFSCME were given no warning of the serious stakes involved in advance of CV's February 1, 2018 investigatory interview. We do know that that investigation at least resulted in 13 indictments, as the County notes. But it is unclear what evidence was provided to the grand jury. Further, the burden of proof for a grand jury indictment, which is "probable cause," is lower than the burden in a contractual just cause case like this one. Our case also presents different legal issues, and AFSCME was not a party to the grand jury proceedings. *See Tancredi v. Jackson County Sheriff's Employee Association and Jackson County Sheriff's Office*, Case No. UP-31-04 at 11, 20 PECBR 967, 977 (2005).

It is significant that the Public Works Department conducted no investigation of its own, never reviewed the Sheriff's Office's records for itself, and evidently never sought those records. A reasonable employer makes an effort to discover whether the employee did in fact violate a rule of management. *See C.S.L. v. SEIU Local 503, OPEU and State of Oregon, Oregon Department of Transportation*, Case No. FR-004-18 at 15, _ PECBR _, _ (2019). The County's approach also conflicts with Public Works Director Diwan's written statement to CV that it is Diwan's "responsibility" to investigate possible misconduct. (Exh. R-1.) In its brief (at 5), the County concludes, without any elaboration, that it could not have conducted its own investigation without potentially violating ORS 162.247 or CV's "*Garrity* rights." However, there is no clear evidence in the record that the County's decision-makers ever considered either possibility prior to the termination. We are also unmoved by the merits of that particular legal argument as it is articulated in this case.

In essence, ORS 162.247 makes it a crime for a person to intentionally act in a manner that prevents, or attempts to prevent, a peace officer from performing his or her duties, or to refuse to obey the peace officer's lawful order. In *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616 (1967), the U.S. Supreme Court held that statements made by public employees under threat of job termination were compelled, and that it was unconstitutional for a public employer to use these statements in a criminal prosecution. In that case and in subsequent cases, the Court defined a number of "*Garrity* rights" that include the following: (1) employers cannot use compelled statements in subsequent criminal proceedings against employees, (2) employers cannot use threats of discharge to coerce employees to waive their constitutional right against self-incrimination, and (3) employers cannot lawfully dismiss employees on the grounds the

employees refused to incriminate themselves. *See Eugene Police Employees' Association v. City of Eugene*, Case Nos. UP-38/41-08 at 29, 23 PECBR 972, 1000 (2010) (internal citations omitted).

Upon review, we fail to see how either legal concept is dispositive in this particular case, or how either inherently conflicts with the County's Public Employee Collective Bargaining Act or contractual obligations outlined above. Presumably, neither concept would bar the County from giving CV a real and meaningful opportunity to refute the charges his employer made against him prior to terminating him, considering how long CV had worked for the County without any discipline, ensuring that it terminated CV for something that was previously known to be a violation, or simply waiting to decide whether to terminate CV until the criminal case had ended, for example.

Conclusion

The County violated ORS 243.672(1)(g) when it terminated CV without just cause in violation of the CBA.

3. AFSCME is not entitled to a civil penalty.

In relevant part, ORS 243.676(4)(a) provides,

> "The board may award a civil penalty to any person as a result of an unfair labor practice complaint hearing, in the aggregate of up to $1,000 per case, without regard to attorney fees, if: (A) The complaint has been affirmed pursuant to subsection (2) of this section and the board finds that the person has committed, or who is engaging in, an unfair labor practice has done so repetitively, knowing that the action taken was an unfair labor practice and took the action disregarding this knowledge, or that the action constituting the unfair labor practice was egregious ***."

As noted in ORS 243.676(5), when the term "person" is used in the foregoing statute, it "includes but is not limited to individuals, labor organizations, associations and public employers." Previously, we have defined the term "egregious" as "conspicuously bad" and "flagrant." *East County Bargaining Council (David Douglas Education Association) v. David Douglas High School District*, Case No. UP-84-86 at 11, 9 PECBR 9184, 9194 (1987).

We conclude that a civil penalty is unwarranted here. There is no indication that the County is repetitively terminating employees without just cause or otherwise violating the CBA. We are also ultimately unconvinced that the County "knew" that it was committing an unfair labor practice. We can appreciate that the circumstances of this case are highly unusual. Although we have ultimately rejected many of the County's arguments here, we do not find them to be so frivolous or lacking in merit or good faith that a civil penalty is warranted. It is quite troubling that the Public Works Department never meaningfully investigated CV before terminating his employment, and later presented no actual evidence of CV's misconduct to the Board. However, it is also apparent that a different branch of Hood River County government, the Sheriff's Office, did conduct an investigation that lasted for several months or more. Information that the County gleaned from that investigation, along with the subsequent proceedings, formed the basis of the County's decision. AFSCME correctly points out that, over time, the County has provided

"shifting explanations" for why it terminated CV. But in our view, that fact merely serves to undercut the County's position that it acted with good faith and for cause.

PROPOSED ORDER

1. The County violated ORS 243.672(1)(g) when it terminated CV without just cause in violation of the CBA.

2. The County shall cease and desist from committing the above-referenced unfair labor practice.

3. The County shall rescind CV's termination and remove any mention of the termination from CV's personnel file and other employment records.

4. The County shall make CV whole for losses that he suffered as a result of the improper termination.

SIGNED AND ISSUED on January 13, 2021.

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 Nos. UP-035/036-20

(UNFAIR LABOR PRACTICE)

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| TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON,<br><br>Complainant,<br><br>v.<br><br>AMALGAMATED TRANSIT UNION, DIVISION 757,<br><br>(UP-035-20) Respondent. | RULINGS,<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND ORDER |
| AMALGAMATED TRANSIT UNION, DIVISION 757,<br>Complainant,<br><br>v.<br><br>TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON,<br><br>(UP-036-20) Respondent. | |

Jeffrey P. Chicoine and Matthew Tripp, 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.

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On November 4, 2020, Tri-County Metropolitan Transportation District of Oregon (TriMet) filed an unfair labor practice complaint against Amalgamated Transit Union, Division 757 (ATU) (Case No. UP-035-20). The complaint alleged that ATU violated ORS 243.672(2)(b) by unlawfully including proposals containing permissive subjects of bargaining in its final offer over TriMet's objections and, thus, conditioning settlement of the parties' successor agreement on bargaining over these permissive subjects. TriMet requested that this Board expedite the complaint under OAR 115-035-0060.

On November 6, 2020, ATU filed an unfair labor practice complaint against TriMet (Case No. UP-036-20). The complaint alleged that TriMet violated ORS 243.672(1)(e) by engaging in direct dealing and surface bargaining. ATU opposed TriMet's request to expedite Case No. UP-035-20, requested that the Board consolidate the cases, and indicated that if we did so, ATU would agree to an expedited process that would allow the parties adequate time to prepare for a hearing.

On November 12, 2020, this Board issued a letter ruling consolidating and expediting the cases for hearing and decision. On November 16, 2020, we issued a prehearing order, which set forth the parties' agreed upon schedule. Also on that date, TriMet filed an amended complaint. Both parties filed timely answers to the complaints. The parties filed pre-hearing briefs on December 7, 2020. The parties jointly submitted a stipulated statement of issues and facts on December 11, 2020. The Board conducted a hearing on December 11, 14, 15, and 17, 2020, which included oral closing arguments. The record closed on December 17, 2020.

The issues as stipulated by the parties are:

1. Did ATU violate ORS 243.672(2)(b) by unlawfully including proposals containing permissive subjects of bargaining in its final offer over TriMet's objections and, thus, conditioning settlement of the parties' successor agreement on bargaining over these permissive subjects?

2. Did TriMet violate ORS 243.672(1)(e): (1) through the totality of its conduct during bargaining for a successor contract; or (2) by engaging in direct dealing with ATU-represented employees?

## RULINGS

Neither party has raised any objections to this Board's rulings.

## FINDINGS OF FACT

1. TriMet is a public employer under ORS 243.650(20).

2. ATU is a labor organization as defined in ORS 243.650(13) and is the exclusive representative of a bargaining unit of employees at TriMet. ATU bargaining unit employees work in several different TriMet departments, including transportation, maintenance, training, finance, and customer information services.

3. From December 1, 2016 to November 30, 2019, TriMet and ATU were parties to a collective bargaining agreement titled the Working and Wage Agreement (the "2016-2019 WWA"). The parties have had numerous prior agreements.

4. Kimberly Sewell is TriMet's Executive Director of Labor Relations and Human Resources. Laird Cusack is TriMet's Labor Relations Director and chief negotiator in successor bargaining.

5. Shirley Block is ATU's President. Krista Cordova is ATU's Labor Relations Coordinator. Whitney Stark is ATU's outside counsel. Block, Cordova, and Stark shared responsibility for leading negotiations for ATU in successor bargaining.

TriMet's Maintenance Department and Apprenticeship Programs

6. TriMet's Maintenance Department is responsible for maintaining and repairing various types of TriMet equipment, including buses, light rail vehicles, tracks, maintenance of way (MOW) equipment (such as signals), and field fare equipment. Some years ago, TriMet split the mechanics and other employees who are responsible for maintaining its facilities into a separate Facilities Maintenance Department. For ease of reference, we refer to those departments collectively as the "maintenance departments."

7. Bargaining unit employees in the maintenance departments include service workers, apprentices, journey workers, and assistant supervisors.

8. TriMet has offered apprenticeship programs in its maintenance departments for many years. Broadly speaking, apprentices are TriMet employees who receive a mix of on-the-job training and classroom instruction. They are paid collectively bargained-for 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 departments.[1]

9. TriMet has two apprenticeship programs that 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.

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[1]As explained in more detail below, the parties have had a series of related disputes, including *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Local 757*, Case No. UP-020-16 (2018), *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-019-18 at 9-11 (2019) (*appeal pending*), *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757*, Case Nos. UP-001/003-20 (2020) (*appeal pending*), and the instant case. The hearing transcript from each case was admitted into the record for the subsequent case. For context, we include some of the undisputed findings of fact from the prior cases here.

10. TriMet's registered apprenticeship programs train apprentices in a total of seven journey worker classifications or "occupations."

11. 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).

12. 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 Tech (a two-year program). In this matter, the parties commonly referred to the Signal Tech program as the MOW program.

13. 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 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.

14. 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. 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.

15. Upon successful completion of a registered TriMet apprenticeship program, the apprentice receives a certificate of completion from the SATC 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. 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.

16. During the on-the-job training, apprentices perform work in the apprenticeable discipline under the supervision of journey workers. There are three models of apprenticeship programs: time-based, competency-based, or a hybrid of both. TriMet's apprenticeship programs currently use a time-based model. Under that model, apprentices must complete a specified number of on-the-job training hours to graduate from the program. Until then, after apprentices gain sufficient training and experience, they may perform their assigned tasks with less direct supervision, but journey workers still must review and sign off on their work. Under a competency-based model, after apprentices demonstrate competency in a particular work area, the

apprentices may work independently (*i.e.*, without supervision by journey workers) in that work area.

17. The TriMet JATC could modify various aspects of its apprenticeship programs, including by switching from a time-based model to a competency-based or hybrid model. However, because the apprenticeship programs are registered, such changes are subject to SATC/BOLI approval.

18. Generally, a registered apprenticeship program must meet state and national standards, and SATC/BOLI exercises oversight to ensure that registered programs meet those standards. However, a JATC may request SATC/BOLI approval for a "modification" of (*i.e.*, or deviation from) the applicable standards. In some respects, TriMet's registered apprenticeship programs exceed state or national standards.

19. TriMet operates the classroom training component of its apprenticeship programs 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. 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, 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.

22. 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. Under the 2016-2019 WWA, TriMet and ATU agreed that TriMet could hire up to half of its apprentices annually from outside TriMet.

23. Until the 2012-2016 WWA, TriMet also drew its journey workers exclusively from the ranks of TriMet's own apprenticeship programs (except on a few occasions, when ATU agreed to the external hiring of journey workers). Under the 2012-2016 WWA, the parties agreed to a new provision, Article 3, Section 1, Paragraph 10, which states: "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 apprenticable discipline within the District." The

parties refer to journey workers who are hired from outside of TriMet's apprenticeship programs as "outside journey workers."

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 departments.

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. Service workers who pass the test are placed on the "Bennett list." Service workers on the Bennett list 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.

26. TriMet has not placed any service workers into a TriMet apprenticeship program, or administered mechanical aptitude testing, since about September 2018.[2] 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 service workers who want to participate in an apprenticeship program but have not yet taken the mechanical aptitude test.

27. In fiscal year 2018, TriMet's then-Director of Bus Maintenance, Edmund Bennett, determined that TriMet needed to hire a substantial number of journey bus mechanics to meet its then-current bus maintenance needs, and that the shortage of journey bus mechanics would become more pressing because TriMet was required to greatly expand its bus services under legislation referred to as House Bill 2017. House Bill 2017, which took effect on October 6, 2017, created a new employee-paid payroll tax in Oregon.

28. TriMet's Director of Rail Equipment Maintenance, Daniel Blair, determined that TriMet also needed to hire a substantial number of journey rail mechanics.

Related Disputes

29. TriMet filed a prior unfair labor practice complaint on June 29, 2016 (Case No. UP-020-16). 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 outside journey workers. 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. In that case, the Board found that, when the parties negotiated the 2012-2016 WWA,

[2]The most recently placed apprentices graduated or will graduate from their apprenticeship programs at varying dates (depending on the length of the program) between June 2020 and March 2022.

they agreed to defer bargaining over the classification seniority of the new outside journey workers until after the contract was ratified. As of the date of the hearing for these consolidated cases (Case Nos. UP-035/036-20), the parties were still negotiating over how classification seniority should be determined for outside journey workers. In particular, the parties disagree over whether outside journey workers' seniority should be ranked above or below that of apprentices who were working for TriMet at the time the outside journey workers were hired.

30. 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. 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.

Successor Bargaining Before the COVID-19 Pandemic

31. In April 2019, the parties discussed and exchanged emails about reserving dates for successor bargaining in the fall and winter of 2019-2020. On April 2, 2019, Cusack emailed Block, notifying her that he had reserved space for 19 potential bargaining dates, ranging from September 2019 to February 2020.

32. On April 15, 2019, Cordova responded, stating that ATU was available on 10 of the dates offered by Cusack. Cordova also reiterated ATU's request that the parties meet in smaller groups before formal bargaining commenced, and indicated that ATU could meet as early as June.

33. The same day, Cusack and Cordova spoke by phone, and Cusack sent an email to Cordova and other ATU representatives summarizing his understanding of their conversation. Cusack expressed his "concern at the lack of agreeable dates," noting that ATU had agreed to only 10 bargaining sessions over 140 days. Cusack also noted that Cordova had agreed to see if ATU could schedule additional sessions. The parties also agreed that October 10, 2019, would be considered the first day of bargaining, and that the parties would conduct small group meetings before then.

34. On April 16, Block responded to Cusack's email, indicating that ATU was close to voting on three open contracts and that additional dates might free up as a result.

35. That same day, Cusack responded, stating, "I'm really concerned. It seems you are suggesting we only meet 10 times during the first 140 days of bargaining. I originally offered 19 days at Center Street with the idea that ATU would propose additional dates at a facility of your choice. I conveyed this idea to Krista when I gave her the dates. Maybe we should start regular bargaining in the last week of June or probably more realistically, late July so we can get more days scheduled."

36. On June 13, 2019, Cusack sent Block a letter documenting the parties' agreements and issues still in discussion regarding successor bargaining. In relevant part, Cusack reiterated his concern about the number of scheduled bargaining sessions, stating: "I offered 19 dates with rooms at Center Street. ATU accepted the 10 above and suggested that half be at ATU. I have requested that ATU propose alternative dates to hold bargaining at ATU. The current agreed dates would only give us 10 days in the first 140 days of bargaining. Even with a lot of small group work, I don't believe that is sufficient for the level of complexity of our contract. As the District's Chief Negotiator, I'm willing to commit to meet on any day after the start of bargaining on October 10, except actual holidays, and be prepared to bargain on open topics."[3] Regarding small group meetings, Cusack indicated that he would be open to more dates in September, and invited ATU to propose some.

37. In his June 13 letter, Cusack also suggested that the parties discuss "full ground rules" for bargaining "so everyone knows how to proceed." Ultimately, ATU declined to establish additional ground rules. Consequently, there was no agreed deadline for the exchange of proposals.

38. On June 27, 2019, TriMet filed a petition for declaratory ruling on scope of bargaining issues before this Board, *In the Matter of the Declaratory Ruling Petition Filed by Tri-County Metropolitan Transportation District*, Case No. DR-002-19 (2019). TriMet's petition sought declaratory rulings on 12 questions, each of which presented the issue of whether the subject of an existing WWA or Supplemental WWA provision is mandatory, permissive, or prohibited for bargaining. The first four questions in the petition related to TriMet's apprenticeship and training programs.

39. On August 13, 2019, the parties held a small group discussion regarding the maintenance departments, including the apprenticeship programs, before 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 departments, including, but not limited to, the elimination and creation of classifications, and the elimination or modification of the existing apprenticeship programs. (Other changes that TriMet discussed include, for example, the elimination of tool allowances for some journey workers; splitting the service worker classification into three classifications, which would limit service 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 departments 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

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[3]The record does not contain a written response from ATU to TriMet's offer to schedule additional bargaining dates. Ultimately, the parties had a total of nine formal bargaining sessions in the 150-day period from October 10, 2019 to March 8, 2020. The parties' correspondence indicates that they agreed to postpone one of the ten scheduled sessions from February 27, 2020, to March 12, 2020, because of their pending unfair labor practice litigation, Case Nos. UP-001/003-20.

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."

40. On August 30, 2019, the Board held a hearing on TriMet's petition for declaratory ruling. On September 30, 2019, this Board "decline[d] to issue a declaratory ruling" on the 12 questions presented by TriMet's petition. Describing TriMet's attempt to seek a determination of its bargaining obligations as "laudable," the Board nonetheless declined to issue a ruling on the petition, in part because the "purposes of [the Public Employee Collective Bargaining Act (PECBA)] would be better served" if the parties attempted to resolve the scope of bargaining issues through bargaining. *See In the Matter of the Declaratory Ruling Petition Filed by Tri-County Metropolitan Transportation District*, DR-002-19 at 3. The Board noted that TriMet had not submitted any proposals outlining specific proposed changes to the existing contract provisions at issue, and that the parties had not yet exchanged proposals or commenced successor bargaining, and thus the petition appeared premature. *Id* at 2-3.

41. The parties generally agreed to determine in advance which articles of the WWA would be discussed at each bargaining session, so that each party could bring the appropriate bargaining team members and subject matter experts.

42. On October 10, 2019, the parties initiated formal bargaining over the successor agreement to the 2016-2019 WWA.

43. At the October 10 initial bargaining session, the parties exchanged some initial bargaining proposals, including TriMet's proposals on Article 1, 2, and 3, and ATU's proposals on Articles 1, 2, 3, 9, and 10.

44. After the parties discussed preliminary matters, Cusack described each of TriMet's proposals. Article 1 contains generally applicable provisions regarding matters such as representation rights, grievance and arbitration, discipline, vacations, holidays, and benefits. TriMet proposed approximately 11 substantive changes to Article 1, including modifying the continuation of service provision to reduce employee eligibility for benefits, limiting holiday pay to employees who work or are on paid leave status the day before or after a holiday, extending the probationary period for new hires from 120 days to 180 days, and creating a promotional probationary period of 90 days.

45. Article 2 contains provisions applicable to Transportation Department employees, who are primarily bus and rail operators. Operators are scheduled through various "boards." Operators who are regularly assigned to a particular route work on a "fixed route board." Operators who fill in when a regular operator is absent work on an "extra board." TriMet proposed approximately nine changes to Article 2. Most significantly, TriMet proposed substantially changing how the bus extra board works; reducing the number of operator sign-ups to three per year; and merging the boards for two rail yards into one (so that TriMet could require an operator to work at either location).

46. TriMet also proposed substantial changes to Article 2, Section 1, Paragraph 9, which is the provision that defines the scope of ATU bargaining unit work. Under the 2016-2019 WWA, Paragraph 9 states:

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

TriMet proposed replacing that existing language with the following:

> "Only buses requiring a CDL driver and providing service to the public on a fixed route of the District will be operated by Bus operators. LRV's requiring an operator will operated [*sic*] by LRV operators. No other service, including paratransit, will be operated by bargaining unit members."

47. Article 3 contains some provisions that are applicable to all maintenance employees, include those in the Facilities Department, and some provisions that apply only to specific areas, such as bus or rail maintenance. Article 4 contains additional provisions specifically applicable to Facilities Department employees.

48. Many of 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, including Article 3, Section 15, Paragraph 8. 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.

49. TriMet also proposed numerous other changes to Article 3, including (1) provisions that would expressly authorize TriMet to mandate overtime: (2) substantial modifications to Article 3, Section 2, Paragraph 1, which would reduce existing employees' rights related to the filling of open positions; (3) changes that would affect assistant supervisors,[4] and Cusack explained that TriMet was considering replacing bus and rail assistant supervisors with more non-represented supervisors; (4) eliminating the tool allowance for equipment maintenance and maintenance of way employees, and (5) splitting the service worker classification into three: bus service worker, rail service worker, and facilities service worker. Under the existing system,

[4]In its October 10, 2019, proposal, TriMet proposed amending Article 3, Section 2, Paragraph 8, relating to assistant supervisors, to specify that Paragraph 8 "applies to the Maintenance Sections that decide to use Assistant Supervisors." TriMet appended a footnote to that proposed language that stated, "A section may decide not to have Assistant Supervisors."

service workers could bid on positions in different areas; TriMet's proposal would generally eliminate such movement. TriMet also proposed substantially reducing existing protections against the contracting out of bargaining unit work in relation to warranty repairs.

50. TriMet also proposed adding a provision to expressly exclude various types of work on electric or hybrid buses from bargaining unit work and to exempt the contracting out of such work from existing limits.[5] TriMet is in the process of transitioning to an all-electric or hybrid fleet, and anticipates having an all-electric fleet in 2040.

51. During the discussion about electric buses, Cusack explained that TriMet currently is testing three types of electric buses, but is not sure which type of bus it will eventually purchase. Cusack explained that, until then, TriMet wants to have the maintenance of such buses (including warranty work) done externally and, after TriMet selected a model, TriMet would talk about whether to train TriMet employees on the new bus technology so that some bus maintenance work could be brought back in house. In response, an ATU representative stated that TriMet did not think TriMet employees were "trainable." Bennett described the charging issues that TriMet had with five electric buses, and remarked that the problems were addressed by software engineers supplied by the vendor who wrote new software code to fix the problems, and made a remark to the effect of "this is high quality engineering, writing code." TriMet's October 10 proposal included the following provision, "At the time TriMet determines which new bus technology to adopt and initiates orders for significant numbers of new buses to replace the diesel fleet, the parties will meet to discuss whether this work should be brought in house."

52. ATU also made its first proposal on October 10, 2019. ATU proposed a four-year contract, with four annual wage increases of five percent, as well as an increase in TriMet's contribution to health insurance premiums from 95 percent to 100 percent. In addition, ATU proposed increasing the extended sick leave benefit from $150 per week to a benefit equal to 60 percent of the employee's base pay.

53. ATU also proposed changes to TriMet's retirement benefits. Specifically, for employees hired after July 31, 2012, ATU proposed that TriMet make a monthly contribution on behalf of each employee of 12 percent of employee base pay (an increase from eight percent, which was the amount non-represented employees received). ATU also proposed that TriMet adopt an early retirement benefit, which would allow employees at any age with at least 30 years of employment to retire with no pension reduction.

54. ATU proposed that TriMet increase its annual contribution to a recreation trust fund from $55,000 to $75,000. It also proposed that TriMet revive a child/elder care assistance program, and increase its annual contribution from $55,000 to $75,000. ATU also proposed a change to

[5]On October 10, 2019, TriMet proposed to amend Article 3, Section 9 by adding a new Paragraph 5, which would provide, "Notwithstanding the above, the maintenance and repair of the electric propulsion systems, high voltage batteries and connections, and high tech exteriors on electric or hybrid buses has not and will not be done by District employees. This work shall not be counted as part of the District's MAF allotment. At the time TriMet determines which new bus technology to adopt and initiates orders for significant numbers of new buses to replace the diesel fleet, the parties will meet to discuss whether this work should be brought in house."

Article 1, Section 7, relating to vacations, that would allow salaried classifications to be permitted to convert all weeks of vacation each year to use one day or hours at a time, and "shall be considered floaters for end of year payoff."

55. ATU also proposed increasing "road relief" pay. Road relief is compensation for an operator who starts or ends a run in the field. ATU proposed that road relief would equal the time allocated by the TriMet trip planner plus (a) 25 minutes for operators reporting to a shift in the field, and (b) 10 minutes for operators ending a shift in the field. ATU also proposed that road relief would be considered pay for time worked.

56. ATU also proposed adding five minutes to operator "prep" time, increasing the permitted time from 10 minutes to 15 minutes. "Prep" time is the time between when an operator signs in and when the operator leaves with the coach.

57. ATU also proposed a number of changes to the discipline and grievance provisions in the contract. ATU's proposals included a requirement that any new rules be developed by a rules committee comprised of three union and three management representatives; a new verbal warning step; precluding certain terminations unless there were two instances of similar suspensions; and precluding the use of warnings for progressive discipline after six months. ATU also proposed new language for the grievance provisions.

58. ATU's October 10 proposal including a proposal to increase TriMet's "extended sick leave benefit," but it did not include a proposal for short- and long-term disability plans. In the course of discussing the extended sick leave provision, Stark noted that ATU had asked for quotes for such plans.

59. On October 31, 2019, the parties held a bargaining session regarding Article 2 (Transportation). TriMet provided ATU with a revised version of its Article 2 proposal. The parties spent a substantial amount of time discussing TriMet's proposal regarding the "extra board." The extra board is used to schedule operators who will cover bus routes when regular (or "fixed route") operators are absent. TriMet currently uses one extra board, and operators may work shifts at varying times of day. TriMet proposed splitting the extra board into AM and PM shifts, referred to as an "AM/PM board" model. TriMet provided some related data regarding extra board operator shifts, which TriMet contended showed that the majority of operators would prefer the AM/PM board model. ATU disagreed with TriMet's interpretation of the data, and represented that the majority of operators preferred the flexibility afforded by the existing model. ATU proposed that the parties jointly survey the operators regarding TriMet's proposal so that TriMet could help ensure the questions were neutral. TriMet declined to do a joint survey, so ATU indicated that it would conduct one independently.

60. At some point before the October 31 session, Manager of Service Delivery Steven Callas had asked an ATU bargaining unit member, Mike Arronson, to provide him with factual details about the extra board. Arronson is one of the chief station agents that "runs" the extra board for TriMet; in that role, he determines which routes need coverage due to an operator's absence or other reasons, such as a bus breakdown. Arronson, formerly a TriMet manager, is very knowledgeable about the technical details of how the extra board operates. He also had prior

experience with an AM/PM model. At some point before the start of bargaining, TriMet asked Arronson to help develop TriMet's proposal to convert the extra board to an AM/PM model, and Arronson did so.

61. TriMet invited Arronson, the chief station agent at the Powell garage and a bargaining unit member, to attend the October 31 bargaining session as a "subject matter expert" on TriMet's extra board proposal. TriMet did not seek ATU's consent or disclose to ATU that it would be inviting Arronson to attend bargaining.

62. When Arronson arrived at the October 31 bargaining session, no one on the ATU bargaining team was aware that he had been invited by TriMet. ATU's bargaining team members were confused by Arronson's presence. When Arronson asked where he should sit, someone on ATU's bargaining team said he should sit with ATU. When the parties caucused, Arronson asked which party he should go with, and he caucused with ATU. ATU's bargaining team included other bargaining unit members who are also very knowledgeable about how the extra board operates, including a station agent and operators.[6]

63. At hearing, Cordova explained that there are different models of AM/PM boards. Decades ago, TriMet used one model of an AM/PM board. Cusack told ATU that Seattle Metro used another model of an AM/PM board. During the October 31 bargaining session, ATU asked TriMet whether it was proposing an AM/PM board like the one TriMet used in the past or the one used by Seattle Metro. Cusack responded that TriMet was proposing neither of those models, but a model suggested by Arronson.

64. The parties also addressed Cusack's questions about ATU's Article 2 proposal, which included increasing "road relief" pay, which compensates operators who are required to start and end their shift in different locations.

65. 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.

66. On November 14, 2019, Cordova and Cusack exchanged emails about the extra board. Cordova wrote that ATU was "still waiting for information regarding your plans for the proposed am/pm board." Cusack responded, "I'm not sure what else to provide as information. Our AM/PM board is explained in our proposal, probably better than the current system[.]"

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[6]When operators bid for schedules, they choose whether to bid for a schedule on the regular fixed route board or the extra board.

Cordova replied that she was confused by the response. She wrote, "As I said then, there are many iterations/understandings of an 'am/pm board' just within the room that day: the one TriMet used in the past, the one you saw at Metro, and the one that Mike Arronson suggested to you."

67. On November 21, 2019, the parties continued collective bargaining. TriMet gave ATU a proposal regarding Article 6 (Customer Information Services), which largely preserved the existing provisions. The parties also broadly discussed issues related to the bargaining unit employees who are referred to as "supervisors" or "white shirts." Cusack explained that TriMet was in the process of developing proposals that would limit trades and vacation scheduling to address scheduling and staffing issues. The parties also broadly discussed potential ways to address attendance issues.

68. On December 2, 2019, Cusack emailed ATU's bargaining team a chart showing TriMet's anticipated changes to classifications in the maintenance departments and the associated new and amended descriptions for these classifications. The email included a chart and draft job descriptions that provided more detail about TriMet's planned changes to the maintenance departments. 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 planned to eliminate all of the apprentice classifications. For employees who were currently working in apprentice classifications, TriMet stated that it intended to keep those employees in their respective apprentice classifications (and in the apprenticeship programs) until they complete or leave the program.

69. Broadly speaking, TriMet indicated that it intended to eliminate all of the registered apprenticeship programs, and hire experienced mechanics from the outside instead of training existing TriMet service workers to be mechanics. TriMet would also rename all of the existing journey worker mechanic classifications to "technician" classifications, and in some cases, TriMet would split existing classifications into more specialized classifications. The minimum qualifications for the "technician" classifications would be lower than those for journey worker mechanic classifications; technicians would not be required to have journey cards or journey-level experience. However, the minimum qualifications for technicians would still require some mechanic-related training and experience.

70. TriMet would establish non-registered training programs for technicians in the rail, maintenance of way, and field fare equipment divisions, and corresponding "trainee" classifications.[7] The minimum qualifications for the new trainees would be substantially higher than those for existing apprentices. Essentially, the training programs would teach new hires who already have some mechanic training and experience how to maintain TriMet's specialized equipment.

71. TriMet would no longer have bus or facilities mechanic training programs. TriMet would not create a "diesel mechanic trainee" classification because it anticipated that new hires who meet the revised minimum qualifications will need only limited training to perform TriMet-specific diesel mechanic work.

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[7]TriMet's plan for the Maintenance Department, as presented to ATU on December 2, 2019, is described in detail in our order in Case Nos. UP-001/003-20 at 9-11 (Findings of Facts 36-46).

72. On December 5, 2019, the parties continued collective bargaining. They discussed Article 3 (Maintenance). 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.

73. At the December 5 bargaining session, Cusack stated that there was hazing going on, and Stark responded that it was an insulting comment. TriMet's bargaining notes indicate that Ruffin explained, in response to the hazing allegation, that the outside hires did not know how to maintain TriMet's specialized equipment, like fare boxes, and that the outside hires were asking the inside journey workers to train them, but the inside journey workers were not getting paid to train the outside hires. At hearing, Cusack testified that one or two outside hires had complained that they were ignored by TriMet journey workers, and that Cusack had asked Bennett to attend to this problem.

74. On December 12, 2019, the parties continued collective bargaining. At that session, they discussed multiple topics, including subcontracting of maintenance work, the grievance procedure, discipline, and representation rights (including implementation of amendments to PECBA that were enacted under legislation commonly referred to as House Bill 2016). TriMet offered an Article 1 proposal regarding discipline that eliminated Step 2 of the grievance process and proposed other changes. The parties also discussed side letters to the 2016-2019 WWA, and exchanged lists of side letters that they were respectively moving forward. The parties also discussed the bargaining schedule. Several times, Stark explained that ATU wanted the parties to make "substantive counterproposals," or to engage in "more substantive back and forth" regarding existing proposals, in the upcoming bargaining sessions.

75. On December 19, 2019, the parties met again for a bargaining session that included discussion of the maintenance departments. ATU presented a proposal concerning the maintenance departments. 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.[8] 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 current journey workers. Specifically, ATU proposed that outside journey workers hired before the date of the signing of the successor WWA go behind any apprentices in the program at the time they were hired. ATU also proposed removing requirements that journey workers stay in their current disciplines; increasing pay for journey workers assigned to train apprentices and temporary journey worker training assistants; and bringing all journey workers up to the highest journey worker pay rate.

76. 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." Seniority for outside journey workers would be set below anyone in a trainee class at the time they were hired.

77. 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 conducted as open, competitive recruitments. If there were equally qualified internal and external candidates, the internal candidate would be hired. Seniority for all employees (including outside hires and graduating trainees) would start on the date of hire into the classification.

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[8]In response to questions from TriMet, Stark explained that ATU was not necessarily proposing that TriMet hire one apprentice for every outside hire, and that its intent was to propose that TriMet maintain the apprenticeship programs.

78. The parties engaged in a substantive discussion to address ATU's questions about TriMet's concept. For example, ATU asked TriMet whether current service workers who were not already on the Bennett list would have the opportunity to enter a training program under the first stage of TriMet's concept. Cusack indicated that it was something TriMet might consider, but it could depend on how many more service workers would be added to the list.

79. Stark also asked why TriMet was opposed to BOLI registration of the training programs. Sewell responded by asking why ATU wanted BOLI oversight. Stark explained that ATU's reasons include BOLI's safety requirements, accountability, and the value of a journey worker certification. Stark also asked about the status of TriMet's other maintenance-related proposals under its concept. Cusack explained that TriMet had focused on the apprenticeship programs, but indicated that some of those proposals could "go away" if the parties reached an agreement about the apprenticeship programs.

80. 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." 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.

81. 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.

82. Cusack asked whether there was anything else the parties could discuss at that time. Stark responded that ATU was willing to discuss service workers. She explained that ATU understood the reasons for TriMet's proposal to split the service worker classification into three separate classifications but was concerned about restricting service workers' mobility, and that ATU had ideas for an alternative proposal that would address both parties' concerns. Specifically, ATU suggested that TriMet, rather than splitting the classification, require service workers who bid into certain positions that require more training to stay in those positions for a longer period, such as two or three years.

83. After a caucus, Cusack informed ATU that TriMet liked the idea of restricting certain service workers' movement for two- or three-year periods, as a potential alternative to splitting the service worker classification. The parties agreed that ATU would further develop that concept by drafting a list of service worker positions that would be restricted.[9]

84. Cusack then stated 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

[9]ATU did not subsequently provide TriMet with a list.

apprenticeship system was developed for a multi-employer system, TriMet wanted to develop its own training standards and tailor training to specific needs, and there were administrative overhead costs associated with BOLI registration. The parties then discussed dates for their next bargaining session.

85. 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."

86. For the health benefit plan year starting January 1, 2020, fully insured rates for the HMO (Kaiser) plan went up, and the Regence rates went down. Pursuant to ORS 243.756, TriMet maintained the status quo by passing those rate changes through to the employees. Specifically, according to Cusack, "during open enrollment for 2020, ATU members saw the full amount of the Kaiser medical increase passed through to employee premium and the Regence employee medical premiums go down."

87. On January 6, 2020, Block sent Cusack a letter regarding the parties' bargaining over TriMet's apprenticeship programs. Block disputed 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.

88. On January 10, 2020, the parties continued collective bargaining. They primarily discussed Article 1 proposals, including proposals regarding representation rights and implementation of HB 2016, the grievance procedure, and discipline. ATU provided a revised version of its Article 1 proposal. That proposal continued the same proposed amendment to Article 1, Section 7 relating to end-of-year payoff for vacation that ATU had proposed in its October 10, 2019, proposal. TriMet provided a revised list of side letters that it was electing to move forward. Regarding the grievance procedure, the parties generally agreed that they needed to address a grievance backlog, but they had different ideas about how to expedite the grievance and arbitration process. TriMet proposed eliminating the second step of the parties' existing two-step procedure; under TriMet's proposal, the parties would move from Step One to arbitration. Cusack explained that, in TriMet's view, the second step was "a paper chase" that did not resolve much. Cusack indicated that TriMet was open to some aspects of ATU's proposal (such as different procedures for different types of grievances), but not others, such as multiple arbitrations with the

same arbitrator on the same day. The parties agreed that ATU would make a revised grievance procedure proposal based on the parties' discussion.

89. At the January 10 session, Cusack also asked for ATU's feedback regarding TriMet's October 10 proposal regarding Article 2, Section 1, Paragraph 9, which defines and preserves bargaining unit work for operators. ATU asked why the parties could not retain the existing provision. Cusack stated that TriMet's proposal anticipated a future when "non-transit vehicles will people pick up" on TriMet lines. Cusack explained, for example, that Uber might sometimes pick people up, and that TriMet wants to provide van shares. TriMet intended its proposal to make clear that ATU operators would not operate such non-transit vehicles, and that ATU members drive only buses or trains. Cusack also explained that TriMet's proposal anticipated a future with driverless transit vehicles (such as light rail trains), which would not require operators. ATU objected to bargaining over merely potential future changes without adequate information, and suggested that the parties bargain over such changes if and when they were occurring. TriMet noted that the parties have disputed the interpretation of Paragraph 9, and ATU responded that the parties had resolved those disputes. At the end of the discussion, ATU agreed to make a counterproposal.

90. The parties also engaged in an extensive discussion of their respective proposals regarding disciplinary standards.

91. On January 13, 2020, the parties continued collective bargaining. TriMet provided ATU with a benefits proposal. The front page of the proposal stated that there were "[n]o proposals" in Article 10, the article that relates to the TriMet pension plan. Under the expired contract, TriMet agreed to contribute 95 percent of premiums for two different plans, a PPO plan and a more expensive HMO plan. TriMet proposed capping its premium contribution for both plans to 95 percent of the PPO plan (*i.e.*, the employee premium share for the HMO plan could be greater than 5 percent). TriMet's proposal also reduced the amount of, or eligibility for, certain stipends paid to some retirees to help pay for health care costs, and eliminated life insurance benefits for retirees under TriMet's defined contribution plan (*i.e.*, most future retirees). TriMet also continued to propose a revision to the "continuous service definition," which would reduce employees' medical leave rights and benefits. TriMet also proposed eliminating the benefits coordinator provision, under which TriMet had paid ATU $1,500 per month "for the purpose of employing and paying a benefits coordinator whose sole duty will be to assist and advise individual employees with insurance-related problems."

92. The parties also discussed short-term disability benefits. TriMet proposed ending its existing extended sick leave benefits on January 1, 2023, when Oregon's new paid family medical leave law will take effect. Stark explained that the new law would require only 12 weeks of paid leave, and that ATU wanted TriMet to provide a short-term disability benefit that would start after the 12 weeks required by law. Cordova noted that ATU had asked TriMet to obtain a quote for such a benefit, and Stark stated that she thought TriMet would make a proposal on short term disability. Cusack responded something to the effect of, "Absenteeism is a problem. We are not going to make a proposal on short term disability so they can miss more time." Stark reiterated ATU's request that TriMet obtain quotes for short- and long-term disability benefits, and Cusack agreed to do so.

93. After a break, ATU expressed disappointment in TriMet's proposal because it represented only "takeaways." ATU also noted that TriMet did not respond to ATU's proposal to reinstate a child and elder care benefit that TriMet used to provide. The parties also discussed potential labor management committees regarding benefit issues, and Cusack agreed to email a description of his idea to ATU.

94. On January 23, 2020, the parties held another bargaining session. ATU provided TriMet with an Article 6 proposal (regarding customer service and public affairs employees). Cordova explained the proposal, which accepted some changes proposed by TriMet and countered with others, such as an increased training premium, a night shift differential, and uniform costs.

95. TriMet gave ATU multiple proposals. Regarding Article 1, TriMet made revised proposals regarding its hours of service policy and the term of the successor agreement.

96. TriMet also made additional proposals regarding Article 2. Most significantly, TriMet made a new proposal to impose various limits on how many employees in various "white shirt" classifications could take vacation at the same time. Cusack stated that the limits were needed because work was not being done. ATU representatives suggested that the problem stemmed from an insufficient number of employees, and asked TriMet to provide documentation of the alleged problem. ATU also expressed concern that TriMet's proposed limits would prevent employees from using all of their accrued vacation.

97. TriMet also gave ATU some information related to road relief (which is part of Article 2), and TriMet made a verbal counterproposal to ATU's road relief proposal by offering to increase pay for every "relief point" by $2. Stark and other ATU representatives contended that the $2 increase was not sufficient to adequately compensate operators.[10]

98. TriMet made a new proposal regarding Article 4, which applies to Facilities Maintenance employees. TriMet's proposed revisions to Article 4 generally reflected its plan to reorganize the maintenance departments and end the apprenticeship programs, including the facilities maintenance mechanic program. Cusack explained that TriMet had determined that the majority of facilities maintenance work did not require a license to perform electrical work, and that TriMet was creating a non-licensed facilities technician classification. TriMet's proposal struck all apprenticeship-related provisions. Cusack indicated that if ATU wished to make an alternative training proposal, TriMet would discuss it.

[10]The record indicates that the road relief issue had been the subject of wage and hour litigation between the parties and negotiations that preceded successor bargaining.

99. Additionally, TriMet proposed striking all of Article 4, Section 2, Paragraph 1,[11] and a portion of Article 4, Section 3, Paragraph 6. Cusack explained that TriMet proposed modifying Paragraph 6 because some maintenance employees had objected to being assigned to work at a different garage. ATU's representatives explained that ATU agreed such assignments were permitted under the existing contract language, and that TriMet's proposed revision was unnecessary to address the issue.

100. TriMet also proposed new Article 4 provisions regarding overtime and callout. TriMet also proposed ending a mediated grievance settlement agreement, dated March 5, 2007, regarding Plant Maintenance Techs and Plant Maintenance Mechanics.

101. Regarding wage rates, which are addressed in Article 9, TriMet proposed two across-the-board increases: 2.4 percent on December 1, 2019, and 2.2 percent on December 1, 2020. TriMet Director of Budgets and Grants Nancy Young-Oliver stated that TriMet's fare revenues were down for multiple reasons, revenues from the employer payroll tax were down by $7.5 million, and that passenger revenue was down because of fare evasion and underperforming revenue from Hop cards. She also noted that TriMet was required to use HB 2017 funds, also referred to as "STIF" funds, for new service.

102. TriMet also proposed striking all of Article 9, Section 2, Paragraph 1, which primarily requires TriMet to offer open positions in new bargaining unit jobs and classifications to existing TriMet employees, "if they can meet the qualifications of the job."

103. TriMet also proposed some revisions to the parties' existing Memorandum of Agreement (MOA) regarding Portland Streetcar operators. The City of Portland operates the Streetcar service, but TriMet employs the Streetcar operators, maintenance employees, and controllers. Under the existing MOA, existing light rail operators and mechanics could essentially bid into open streetcar operator and mechanic positions by seniority. TriMet proposed changes that would give TriMet discretion to choose among applicants. TriMet also proposed adding a new provision that would authorize TriMet to "choose to remove any District employee from streetcar at any time and return them to their prior work location."

104. TriMet also proposed a new MOA that would establish two labor management committees. A "benefits committee" would review and discuss potential options for union benefits plans. A "scheduling committee" would review operator work schedules and discuss potential improvements.

105. During the January 23, 2020, bargaining session, Jonathan Hunt, ATU Vice President and Assistant Business Representative, explained that ATU was concerned with the extent to which TriMet's proposals simply struck existing contract language because TriMet did

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[11] Article 4, Section 2, Paragraph 1 states, "It is understood and agreed that in filling vacancies that are not filled by promotion within the Department, preference will be given to employees or laid off employees of the Maintenance or Stores Department. Such vacancies will be posted on all department bulletin boards for five (5) days. If unable to fill the vacancy, it may be filled according to seniority within the District."

not like it or viewed it as permissive for bargaining. Hunt explained ATU's view that TriMet's approach to bargaining was "not effective for a collaborative relationship."

106. On February 4, 2020, TriMet filed an unfair labor practice complaint against ATU, Case No. UP-001-20. TriMet contended that its proposal to eliminate the maintenance department apprenticeship programs (and ATU's proposals regarding those programs) involved a permissive subject of bargaining, and alleged that ATU was conditioning settlement of the parties' successor agreement on bargaining over those proposals, in violation of ORS 243.672(2)(b). On February 6, 2020, ATU filed an unfair labor practice complaint against TriMet, Case No. UP-003-20. ATU contended that TriMet made a unilateral change, in violation of ORS 243.672(1)(e), by externally posting ten job openings for Diesel Technicians while the parties were engaged in successor bargaining. The Board granted TriMet's request for expediting and consolidated the cases for hearing and decision. The Board conducted the hearing on March 2 and 3, 2020.

Emergence of the COVID-19 Pandemic and Subsequent Successor Bargaining

107. On March 8, 2020, Oregon Governor Kate Brown issued Executive Order 20-03, declaring an emergency due to the coronavirus ("COVID-19") outbreak in Oregon.

108. On March 12, 2020, the parties held another bargaining session. At the start of the session, Stark asked to discuss COVID-19 issues. ATU representatives asked questions and raised concerns about some aspects of TriMet's response. ATU also asked TriMet to start communicating first with ATU, particularly regarding issues affecting employees' employment terms. Sewell and Cusack acknowledged that communication was important and should be improved, but disagreed that it needed to discuss all COVID-19 communications to employees with ATU first.

109. ATU then gave TriMet a revised Article 2 proposal. Specifically, ATU countered TriMet's proposal to change the extra board to an AM/PM model by proposing alternative ways to address TriMet's stated concerns. ATU explained that it had surveyed employees regarding TriMet's AM/PM model proposal, and that the majority opposed it. ATU also countered TriMet's road relief proposal; ATU proposed basing road relief pay on the amount of travel time indicated by TriMet's trip planner system.

110. TriMet also gave ATU a revised Article 2 proposal. TriMet withdrew its proposal to create a single rail board; Cusack explained that there had been a change in rail management, and the new rail manager did not want a single board. TriMet continued to propose changing the extra board to an AM/PM model, but withdrew one of the proposed rules that ATU had explained operators objected to (a rule that would have required trades across the AM and PM board to be for full weeks). TriMet provided ATU with more information regarding the reasons why it had proposed changes to the extra board rules. ATU disputed how TriMet was interpreting the information, and represented that the majority of surveyed employees preferred the flexibility afforded by the existing single-board model.

111. After a caucus, ATU made a verbal counter to TriMet's AM/PM board proposal. Stark explained that ATU continued to believe that changing to an AM/PM board would have many negative impacts, but that ATU would agree to a non-contract based pilot project in which employees would be barred from trading into a "pass-up" on the extra board, and potentially a revised pilot project for a second period.

112. The parties then returned to discussing TriMet's proposals. Cusack explained that TriMet wanted to set up a formal conversation between contracts, to address matters that needed to be discussed before bargaining. Cusack again proposed that the parties establish a labor management committee to address operator scheduling. The parties tentatively agreed to that proposal.

113. The parties then discussed TriMet's response to ATU's Article 2 proposals, including the issues of road relief, and operator meal and rest breaks. After a break, Stark explained that ATU heard TriMet's feedback and explained how ATU would revise its Article 2 proposals in response.

114. The parties then discussed TriMet's Article 1 proposal regarding hours of service. The parties also engaged in lengthy discussion of TriMet's Article 1 proposal regarding the Service Improvement Program (SIP), and ATU's earlier proposal on the same topic. In particular, the parties debated when and how SIP complaints (essentially customer complaints) could be used in the disciplinary process, and alternatives to discipline for responding to SIP complaints (such as training or a peer committee). At the end of the discussion, Stark stated that ATU appreciated the SIP information that TriMet provided, and that ATU would consider TriMet's proposal, review its own proposal, and respond.

115. On March 16, 2020, the parties exchanged emails confirming that, due to the COVID-19 pandemic, they would cancel the in-person bargaining session scheduled for March 19, 2020, and instead conduct a brief session by telephone. In an effort to "keep things moving," Stark also emailed Cusack and Sewell ATU's latest Article 1 proposals.

116. On March 19, 2020, the parties conducted a brief negotiation session by telephone. The parties first discussed COVID-19 issues. Regarding successor bargaining, the parties agreed that they needed to prioritize COVID-19 issues. They also agreed that bargaining over the pandemic-related restrictions presented challenges, and discussed how successor bargaining would proceed. Cusack also indicated that he had some information regarding union release time that he would send to ATU for review.

117. Beginning approximately March 23 through December 2020, the parties attended approximately 84 phone meetings outside of successor bargaining to discuss numerous issues regarding operating the transit system during the COVID-19 pandemic. Cusack and Sewell attended on behalf of TriMet, occasionally accompanied by higher-level managers. Block and Cordova represented ATU, occasionally accompanied by an ATU officer such as Hunt. Stark did not attend these meetings.

118. On April 21, 2020, the Board issued a final order in Case Nos. UP-001/003-20, dismissing both parties' claims. Regarding TriMet's claim, the Board found that ATU did not unlawfully condition agreement on bargaining over the apprenticeship program proposals, and did not reach the issue of whether those proposals involved a permissive subject of bargaining. Regarding ATU's claim, the Board concluded that TriMet did not make an unlawful unilateral change because the subject of the change (exceeding a numeric limit on the external posting of mechanic positions) involved a permissive subject (the standards by which the employer fills vacancies).

119. In May and early June 2020, Stark and Cusack exchanged numerous emails regarding implementation of HB 2016, and related Article 1 proposals regarding representation rights. On May 21, 2020, Cusack wrote, in pertinent part, "Could you provide me with your thoughts about how to deal with the employees who are not on full time union release time, but are spending up to 75% of their non-vacation/holiday time doing union business." Cusack questioned whether that amount of time was reasonable under the law. On May 21, 2020, Stark responded that ATU did not believe it was "an efficient use of our bargaining time to rehash how officers previously spent their time. You made a proposal regarding how reasonableness will be accepted moving forward and we agreed to that proposal. Should issues arise, we will address them pursuant to your proposal."

120. On June 3, 2020, a negotiation meeting was conducted by telephone. ATU provided a revised proposal regarding representation rights (part of Article 1). The parties discussed their respective proposals on that topic and implementation of HB 2016. Cusack agreed to send ATU a revised proposal based on the discussion.

121. On June 4, 2020, Cusack emailed Stark TriMet's proposal for the Article 1 provision governing dues deduction. On June 9, 2020, Stark emailed Cusack a counterproposal.

122. On June 7, 2020, Cusack emailed Stark, stating that he was "not sure how to word a proposal or form" regarding union release time, and asked Stark seven questions on that topic. On June 9, 2020, Stark responded. Stark provided substantive responses to some questions, and objected to the remaining questions, contending that the inquiries sought irrelevant information and interfered with activity protected under PECBA.

123. On June 9, 2020, Sewell sent an email to Block, Cordova, and Hunt suggesting that the parties meet to "try for a little earlier" and meet to bargain on June 18, rather than in late June. The parties did not bargain on June 18.

124. On June 24, 2020, the parties held another bargaining session by telephone. The parties discussed bargaining logistics, including switching to video conferencing, and reprioritizing successor bargaining. ATU made written proposals on Articles 1, 9, and 10. It offered an Article 1 proposal with proposals regarding the discipline and grievance provisions of the WWA, including a proposal that made expedited arbitration mandatory for certain grievances. Its proposal on Article 1, Section 7, relating to vacation leave, continued to propose the language it proposed on October 10, 2019, permitting vacation to be considered "floaters for end of year payoff" for salaried classifications. Stark reviewed the proposals that ATU had sent "before

Covid," and highlighted where ATU had made changes to address TriMet's concerns or moved off their previous positions.

125. Stark also discussed ATU's proposal for short- and long-term disability benefits. ATU proposed eliminating the extended sick leave benefit and replacing it with a short–term disability benefit and proposed adding a long-term disability benefit. It proposed adding the following language to Article 1, Section 9, Paragraph 4:

> "b. TriMet shall provide a short-term disability coverage to all employees in the bargaining unit that provides a minimum of 60% of pre-disability earnings for a benefit period of 6 months that provides coverage for all non-occupational accident or sickness, including maternity leave.
> "h. TriMet shall provide and administer a long term disability policy and pay for 50% of the costs to employees who may elect to purchase it that provides coverage if employees are partially or totally disabled due to a covered physical disease, injury, pregnancy, or mental health condition."

126. Stark reiterated that ATU needed TriMet to cost out the proposed disability benefits, and Cusack indicated that he would do so.

127. The parties then turned to TriMet's June 24 proposals.[12] TriMet gave ATU a revised Article 9 proposal, which reduced its proposed wage increases to 1.8 percent on December 1, 2019, and 0 percent in 2020. Nancy Young-Oliver, TriMet Director of Budget and grants, was unable to attend the bargaining session because she was attending the meeting of the TriMet Board of Directors. Cusack presented the proposal, and said that TriMet reduced the wage proposal due to changed circumstances. Cusack also explained TriMet's view that 1.8 percent was close to the expected change in the consumer price index, and that ATU employees are already well compensated compared to other jurisdictions.[13] Cusack also indicated that TriMet was anticipating layoffs in 2021.

128. Cusack reviewed TriMet's June 24, 2020, Article 9 proposal. Cusack explained that TriMet wanted a separate agreement regarding the apprenticeship classification, which would apply until all of the existing apprentices graduated. Cusack stated that depending on when the parties settled the WWA, the parties "may not need to include the bus maintenance apprentices October," because all of the existing bus apprentices would graduate by October 2020.

129. Cusack also noted there is a new "bus battery electric technician" that TriMet anticipated needing to hire before the end of the contract term. He stated that he would send the job description soon.[14] He also stated, "We aren't intending to hire very many, but will hire some."

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[12]These proposals are dated June 25, 2020, but were provided to ATU on June 24, 2020.

[13]TriMet's non-represented employees also received no wage increase in 2020.

[14]The record includes no evidence that Cusack provided ATU with a job description for the "Battery Electric Bus Technician" classification, or that ATU requested one.

130. Cusack explained that he was proposing moving all provisions regarding longevity increases and tool allowances from Article 3 to Article 9, and clarifying that anything applicable to the journey worker classifications would apply to the new "technician" classifications. Cusack also indicated that TriMet was withdrawing its proposal to cease paying the tool allowance to light rail mechanics. Cusack also noted that ATU had not made proposals on the new trainee classifications that TriMet was creating in the maintenance departments.

131. The parties confirmed that ATU was expecting TriMet to send ATU a revised proposal regarding Article 1 representation rights and implementation of HB 2016, and that TriMet intended to do so within the next few days.

132. Cusack then reviewed TriMet's June 24, 2020, proposals on Articles 1, 2, 3, 4, and 6, and the Portland Streetcar MOA, and identified changes from the previous versions. Regarding health care benefits, TriMet revised its proposal to return to the status quo of TriMet covering 95 percent of the premiums for both the PPO and HMO plan options. In its Article 1 proposal, TriMet did not incorporate ATU's proposed change to Article 1, Section 7 respecting vacation benefits. TriMet withdrew its earlier proposal to change the "continuous service" definition to reduce employee eligibility for benefits while on leave.

133. Cusack also noted that TriMet's proposal included the elder/child care benefit that ATU had proposed. Cusack explained that TriMet would pay for this benefit with savings it anticipated from changing the extra board to the AM/PM model.

134. For Article 2, TriMet agreed to increase operators' paid preparatory time from 10 minutes to 13 minutes. Cusack explained that this increase would also be paid for with anticipated savings from changing the extra board. TriMet added a new proposal regarding reassignment when operators' runs are cancelled. TriMet increased its road relief proposal from $2 to $3 and added new relief points.

135. Cusack also reminded ATU that TriMet was anticipating layoffs, and asked ATU to make a proposal if it wanted any changes to the existing 2016-2019 WWA provisions.

136. TriMet's proposals regarding Articles 3 and 4 remained largely the same. Cusack explained that TriMet was removing all references to "journey worker" from the WWA because that classification name would no longer exist. After Cusack finished reviewing all of TriMet's June 24 proposals, the session ended.

137. Also on June 24, 2020, the Board issued an order on reconsideration in Case Nos. UP-001/003-20. The Board further explained and adhered to the conclusions in its final order. Per TriMet's request, the Board also addressed whether the continuation (or elimination) of TriMet's apprenticeship programs involves a mandatory or permissive subject of bargaining. The Board concluded that the subject of BOLI registration of an apprenticeship program is a severable component and a permissive subject of bargaining. In so holding, the Board noted that "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." Case Nos. UP-001/003-20 at 6 (Recons Order). The Board also "conclude[d] 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," and "is, therefore, mandatory for bargaining." *Id.* at 10.

The Parties' Bargaining After the Reconsideration Order

138. On July 6, 2020, Stark emailed Cusack to state that ATU was prepared to bargain on July 23. Stark suggested that the parties address Article 1 issues. Stark noted that ATU had sent a proposal on discipline and grievance matters and "have not heard back," and that the parties had exchanged benefit proposals that "have not been responded to." Stark also invited Cusack to suggest other topics and propose additional dates.

139. Cusack responded on July 9, agreeing to bargain on July 23. Cusack also expressed disappointment that ATU had offered only one date for bargaining, and one that would occur a month after the June 24 session. Cusack wrote, "It's almost like ATU doesn't want to bargain." He also wrote, "In regard to the proposals that you have not heard back about, TriMet thought we might actually discuss our proposals in a bargaining session." He indicated that he would send ATU a revised Article 3 proposal in light of this Board's June 24 order. He also offered five additional dates for bargaining in July.

140. Later that day, Stark responded, indicating that July 23 would not actually work for ATU, and she proposed bargaining on July 29 and 31.

141. Over the following weeks, Stark and Cusack exchanged multiple emails about bargaining over the apprenticeship programs. In relevant part, on July 13, Cusack wrote,

> "We can discuss whether the currently proposed trainee jobs remain as trainees or instead are titled as "unregistered apprentices" and what trainee jobs there will be. TriMet is not interested in pursuing an unregistered apprenticeship, which is why we continue to propose trainee classifications. Consistent with ERB's ruling, TriMet will discontinue ***any*** BOLI certified apprenticeship programs after the current apprentices graduate or leave the program. If ATU is interested in unregistered apprenticeship classifications, please make a proposal and provide some detail about what that entails.
> "If ATU wishes to make proposals regarding the change of apprenticeship to trainee or the proposed end of training classifications in Bus Maintenance or Facilities, it would be helpful for those to be sent as well." (Emphasis in original.)

142. On July 24, Cusack wrote,

> "Given ERB's ruling on BOLI registration being permissive and TriMet's clear decision to remove BOLI as soon as possible, I also need to know ATU's proposal for future trainee classifications; trainee or unregistered apprentice? If it is the latter, what exactly would the components be to such a system. Please note, TriMet would prefer REM and MOW trainees who are trained, evaluated and supervised by the

current TriMet non-represented trainers with curriculum developed by TriMet with our outside educational partners.

"* * *

"I also wanted to ask about Tuition reimbursement. When I have raised this before both you and Jon Hunt have been less than positive about the topic; to put it kindly. Both REM and MOW believe there are community college classes which would both prepare and demonstrate that an employee had the potential to be successful in the LRV Technician Trainee and MOW trainee classifications. I haven't worked on the details of this because of seriously negative reaction it elicited. If ATU indicates it's interested in tuition reimbursement, I'd put some effort into what it would look like."

143. Stark responded on July 27. Regarding tuition reimbursement, she wrote, "ATU continues to believe that it offers little, if any, value to employees and that TriMet's insistence on a tuition reimbursement in replace of an apprentice program shows a significant misunderstanding of what provides an actual benefit to employees. That said, we can discuss that further on Friday."

144. On July 29, 2020, bargaining negotiations continued. TriMet made a proposal regarding Article 1. As it had in its January 10, 2020, and June 24, 2020, proposals, TriMet did not incorporate ATU's requested change to Article 1, Section 7 to enhance vacation benefits by allowing certain vacation hours to be considered "floaters" for "end-of-year payoff."

145. The parties discussed the term of the agreement. TriMet continued to propose a two-year contract term. Cusack stated that federal COVID-19 relief funds from the CARES Act would be used up by September 2020, and that TriMet expected problems to continue after that. Stark responded that ATU a two-year contract could be acceptable if it were basically a rollover with wage increases, but not a two-year contract with the amount of changes TriMet was proposing. Stark questioned whether TriMet was taking into account the legislative change that permits using STIF funds for existing services. Cusack said that TriMet was aware of how STIF funds could be used, but would be short funds every year even with those funds. Cusack again raised the issue of anticipated layoffs and asked ATU to make sure layoff language was what it wants. During the session, Cusack asked why ATU was asking for five percent wage increases; Stark responded that ATU was not ask pessimistic as TriMet on the effects of the pandemic. She stated that ATU was willing to come down from five percent, but would not agree to 1.8 percent. After a caucus, Stark stated that ATU would move to four percent.

146. The parties discussed the Article 1 proposals regarding representation rights and implementation of HB 2016. Stark noted on several occasions that the parties were getting close to agreement on aspects of the contract language.

147. The parties also discussed at length ATU's revised proposal regarding grievance and arbitration procedure and discipline standards. They discussed promotional probation, deleting outdated language, whether the contract should contain a list of conduct that constitutes cause for immediate suspension or discharge, and precluding the use of written warnings, reprimands and suspensions for progressive discipline after 12 months. In response to the last item, Cusack stated that TriMet's response was "no."

148. The parties also discussed the use of SIPS complaints, particularly unsubstantiated complaints, in discipline, and discussed a compromise in which unsubstantiated SIPs could be used for evidence (such as credibility) but not for discipline. The parties also discussed ATU's proposal requiring mandatory expedited arbitration for discipline. Cusack explained TriMet's reluctance to agree to expedited arbitrations if there were more than one hearing per day. Stark and Cordova stated that ATU tried to address TriMet's concerns, and repeatedly asked Cusack to make a counteroffer or propose language that would address those concerns.

149. The parties also discussed ATU's vacation proposal. Cordova explained that ATU was attempting to put MOU language in the contract to make "permanent" salaried employees' ability to get vacation payout. With regard to mini-run operators, Stark explain that ATU believed very few people would be affected by ATU's vacation proposal.

150. The parties also discussed ATU's proposal regarding short- and long-term disability. Cusack noted that he owed ATU a quote for the proposed disability plans. In the course of this discussion, Cusack explained his belief that if a plan provided more disability pay, more people would take disability leave, and remarked to the effect of "more people will take time off because it's a good benefit." Stark responded that it was her understanding that disability benefit plans require individuals to demonstrate they are qualified for the disability pay, and questioned why TriMet would want employees who qualify for disability benefits to continue working. Cusack said that he would research what the screening process is for disability benefits.

151. The parties also discussed other benefits issues, including the employee assistance program and benefits for retirees.

152. The parties also discussed reviving the elder/child care fund. Cusack explained that TriMet would agree to fund a benefit for a two-year term with the ability to audit the contract. The parties also discussed TriMet's proposed Article 1 seniority provision. Cusack explained he intended the language to apply prospectively, after apprenticeship programs ended. Stark indicated that seniority was a difficult conversation without settling maintenance seniority.

153. The parties also discussed TriMet's proposed changes to Article 9, Section 2, which is titled, "New Jobs and Classifications." Cusack explained that TriMet wanted to be able to hire individuals who meet the minimum qualifications and are the most qualified. Cusack also represented that elsewhere it had proposed that TriMet would hire a TriMet employee over an outside candidate "if everything else is the same."

154. Cusack explained that TriMet was moving the tool allowance provision (and others) for organizational purposes only, and that TriMet was no longer proposing to take the tool allowances away from anyone. Cusack also noted that TriMet was applying the tool allowance to "the new battery/electric bus technician as well."

155. The parties briefly discussed ATU's proposals regarding retirement benefits, and agreed to incorporate the existing eight percent contribution rate for (for non-represented employees) for the defined contribution plan into the 2016-2019 WWA for ATU employees.

156. The parties discussed the wage schedule for various classifications. Cusack asked whether ATU was going to make a wage proposal for the new technician classifications. ATU clarified that its proposal was for the new "technicians" to be paid the same as "journey worker" classifications, and also proposed that the "electric bus technician" would be paid the same as "diesel mechanic." Stark also stated that ATU would make a proposal for apprentices (referred to by TriMet as "trainees").

157. The parties also discussed TriMet's plan to split service workers into three classifications, and its related proposal. Stark said she thought that ATU's idea about the alternative of locking an employee into a position for period of time had been well-received. Cusack explained that the problem with keeping one classification is that it required a CDL, and not all service workers need a CDL. Stark said that the parties could discuss how to address that, but did not want TriMet to return to a split. Cusack acknowledged that the parties had discussed ATU's alternative, but reiterated that it did not solve the CDL issue. Stark said the parties would need to "rebargain" this issue at the following session, which would address Articles 3 and 4.

158. Cusack asked if ATU would withdraw its proposal to continue BOLI registration of the apprenticeship programs. Stark said that ATU would not withdraw its proposal to continue BOLI registration of the apprenticeship programs, but that it was not conditioning settlement of the agreement on BOLI registration.

159. Cusack asked for ATU's thoughts about calling in a mediator. The parties generally agreed mediation would be helpful.

160. Stark and Cusack agreed that it would be helpful to clarify where the parties were on the various issues, and identify where they were close versus far apart. Stark indicated that she believed the parties were close on some of the topics discussed that day. Cusack agreed, and noted that they could continue corresponding to work out details. Cusack also noted that he owed ATU some information, including information regarding the short-term disability benefit that ATU sought.

161. On July 30, 2020, Cusack emailed Stark regarding the status of bargaining, particularly addressing the parties' respective positions regarding the apprenticeship programs and their scope of bargaining disputes. Regarding the apprenticeship programs, Cusack stated,

> "To avoid any misunderstanding, TriMet refuses to bargain or consider any continuance of BOLI apprenticeship beyond the time it takes for current employees to complete or leave the programs. Any future hires of Trainees will not be in a BOLI system. TriMet further demands that ATU withdraw its BOLI proposal. Additionally, TriMet refuses to discuss or bargain any proposal, concept, or idea that BOLI would continue to have any role in our training program for new hires or future training.
>
> "You have told me often that I don't understand how badly ATU perceives TriMet's position that there will be no more BOLI apprenticeship. I would say in return that

> TriMet's resolve to end the BOLI's participation is absolute and will not change. Not even our "not a proposal" contemplated the continuance of BOLI participation. "My concern is that if ATU persists in raising BOLI and other permissive subject like hiring limitations, we won't be able to bargain about realistic settlement options."
>
> Stark responded,
>
> "ATU shares your concern that this contract is unlikely to be settled given TriMet's proposals. As you know, ATU believes that TriMet's positions are unrealistic, unfair to employees, and include significant takeaways to employees. Unless you are willing to remove all of the takeaways from your proposals, including the elimination of apprenticeship programs, we agree we won't be able to bargain about realistic settlement options."

162. Also on July 30, 2020, Cusack emailed Arronson (the ATU-represented chief station agent), copying TriMet manager Callas, but not anyone from ATU. Cusack wrote, "ATU had said there was a change in language which would eliminate most pass ups[.] I think it was something about no trades into pass ups by extra board operators, but the notes are a bit sketchy[.] * * * If you are on the board can you make trades prior to being assigned work?" Arronson responded early on July 31, stating, "Yes you can trade days off on the board which could create pass ups. What is not allowed would be trading operators off the extra board with operators on the board that create pass ups. That is the language change I remember." Cusack responded to Arronson and asked, "Do you have a number I can call to talk with you right now?"[15]

163. On July 31, 2020, bargaining continued. The parties first discussed their Article 2 proposals, which relate to operators in TriMet's transportation department. The parties discussed their proposals related to operators' hours of service and noted they were close to agreement.

164. The parties also discussed their proposals regarding operator "prep time." ATU had previously proposed increasing prep time to 15 minutes. Cusack noted that TriMet's July 31 proposal included a counteroffer that increased operator prep time from 10 to 13 minutes.

165. Cusack noted that TriMet's proposal regarding road relief remained the same as before. Stark explained that ATU revised its proposal to address TriMet's concerns, including by clarifying that it would not create overtime scenarios. Stark also explained the reasons why ATU preferred its proposal, which based road relief pay on the operator's wage rate, over TriMet's proposal, which paid road relief at a flat rate. The parties debated their respective proposals, and whether TriMet was legally obligated to compensate operators for road relief time. Cusack noted that TriMet had proposed the labor-management committee on operator schedules in part to address road relief.

166. Callas invited Arronson, the ATU-represented chief station agent, to the July 31, 2020, bargaining session, which was conducted via a video platform, to answer questions

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[15]ATU was not aware of this exchange between Cusack and Arronson until it received TriMet's exhibits for this matter.

about the technical details of TriMet's extra board proposal. Callas was on the TriMet bargaining team. Arronson spoke via telephone from Callas's office. Other individuals attending the session appeared by video, but Callas and Arronson dialed in by telephone, and thus Arronson's presence was not visible to others. At some point, ATU asked a question, and Callas stated that Arronson was with him and asked Arronson to answer ATU's question. Arronson's presence surprised ATU representatives when he spoke. Arronson made several comments during the session about the operation of the extra board.

167. In several instances, ATU asked a question about TriMet's proposal, and Arronson answered it. There were also some extended exchanges between Arronson and other bargaining unit employees on ATU's team, wherein Arronson had different interpretations of proposed contract language or different views of how proposals would affect TriMet's operations or the operators' working conditions. Cordova testified that normally, if bargaining unit employees involved in table bargaining had different views, ATU would caucus, to avoid appearing divided or undermining its own position in bargaining. At times, Block and others on ATU's team responded to the exchanges with Arronson by stating that ATU needed to discuss the matter in caucus. Arronson did not caucus with either party at this bargaining session.

168. Regarding TriMet's proposal to split the extra board into AM/PM boards, Stark noted that TriMet had not responded to ATU's last proposal, which ATU believed would make changing to the AM/PM board model unnecessary. Cusack reiterated that TriMet believed the change would reduce operators' need to make trades and save TriMet money, which TriMet could transfer to road relief. Cusack contended that TriMet's data showed that the majority of operators would prefer the AM/PM model, and ATU contended that its survey demonstrated that the majority of operators did not want to switch, and that TriMet's prior experience with an AM/PM board demonstrated that it did not work.

169. The parties moved on to discuss other details of the Article 2 proposals. When the parties discussed the layoff provision, Cusack reiterated that ATU should review it and make a proposal because he believed there were going to be layoffs.

170. The parties also discussed TriMet's proposed revision to Article 2, Section 1, Paragraph 9, which addressed the scope of ATU's bargaining unit work. TriMet's proposed language remained the same as it was in TriMet's October 10, 2019, Article 2 initial proposal. Sewell represented that TriMet's intent was to clarify ambiguous contract language, not to open the door to more contracting out of ATU bargaining unit work. ATU representatives explained why they believed TriMet's proposed language would reduce the scope of ATU's bargaining unit work and permit more contracting out. Specifically, they pointed out that TriMet replaced "all lines of the District" with "fixed route," and "all vehicles" with "buses," and that the rail provision anticipated driverless vehicles. Sewell represented that TriMet was working on a revision to address ATU's concerns.

171. The parties then discussed the remaining Article 2 issues, including TriMet's proposals to change the number of operator sign-ups and impose vacation limits. After a caucus, ATU explained that it would agree to certain aspects of TriMet's proposal if TriMet agreed to drop

some aspects of its own proposal and agreed to some aspects of ATU's proposals, including ATU's prep time and road relief proposals.

172. After a lunch break, the parties discussed TriMet's maintenance proposal (Articles 3 and 4). Stark asked Cusack to review its July 24 proposal again because ATU's maintenance representatives were not at the July 24 session, and he did so. In relevant part, Cusack identified various provisions of the existing WWA that TriMet struck and would not bargain over on the ground that they were permissive subjects. Cusack stated that it was TriMet's intent to hire for various positions from the outside, and to replace certain assistant supervisors with non-bargaining unit supervisors. He reiterated TriMet's reasons for proposing to split the service worker classification into three new ones. Regarding layoffs, Cusack stated that TriMet was not interested in allowing someone to bump back into a prior classification.

173. Regarding the contracting out section of Article 3, Cusack explained TriMet's operational reasons for striking the warranty work provisions, and also contended that they are "permissive." Cusack also explained TriMet's reasons for proposing to Paragraph 5, which if added to the WWA, would expressly state that ATU bargaining unit employees "will not do the maintenance and repair of the electric propulsion systems, high voltage batteries and connections, and the high tech exteriors on electric or hybrid buses," and provided that the contracting out of such work would not count against the cap on contracting out imposed by a different provision of the WWA. Cusack asserted that TriMet lacked the expertise and facilities to perform that work, and that the electric buses would be on warranty for a long time. Cusack stated, "Down the road, once we figure out which buses to buy, then at that point we will have a discussion as to what can be brought in house." He also stated that mechanics would continue to work on the parts of those buses that are "like the diesel fleet," and acknowledged that "is ATU work."

174. Cusack reiterated TriMet's intent to eliminate the BOLI registered apprenticeship programs. He indicated that if, at some point, ATU wanted to have an unregistered program or trainee program, the parties could have that discussion.

175. ATU representatives reacted strongly to TriMet's maintenance proposal, expressing their belief that TriMet was taking away significant rights and benefits for maintenance employees and "doing away with 40 years of bargaining." Stark stated that TriMet was proposing many takeaways without offering anything in exchange. Cusack responded that he believed that bargaining would be better if ATU identified what the "price is." The parties debated the merits and impacts of TriMet's proposal. Hunt explained that ATU members in transportation and other departments wanted the contract settled, but that TriMet's maintenance proposal was a "poison pill" that would lead to interest arbitration. ATU requested a caucus, and ATU later informed TriMet that they would not return from caucus.

176. The same day, on July 31, 2020, ATU sent a written letter to the Oregon Employment Relations Board requesting assignment of a mediator pursuant to ORS 243.712(1).

177. On August 4 and 5, 2020, Cusack and Stark exchanged a series of emails. Cusack asked ATU to explain whether its December 19, 2019, proposal regarding apprenticeships was its current proposal, and if so, to address various contract language details. In response, Stark

stated that "ATU is not prepared to bargain with TriMet about anything related to maintenance or Articles 3 or 4 outside of mediation," and addressed Cusack's questions by reiterating that ATU's December 19, 2019, proposal was a concept proposal and "never intended to replace specific contract language." Stark also expressed her view that "it could be beneficial to schedule a call to discuss whether we can make any bargaining progress prior to our scheduled mediation dates, and what issues to address on which dates of the currently scheduled mediation," and asked Cusack to contact her if he was "interested in having that call." Cusack responded, "Yes, I intend to use this time between to make progress."

178. On August 11, 2020, Cusack sent Block a letter stating that TriMet was declining to bargain over 33 categories of provisions in ATU's proposals for Articles 1, 3, and 4, contending that that they all involved permissive subjects of bargaining. Most of the objected-to provisions consisted of contract language to be carried forward from the parties' existing WWA. TriMet also objected to multiple aspects of ATU's December 19, 2019, concept proposal regarding the apprenticeship programs, which TriMet understood to be ATU's current proposal.

179. On August 16, 2020, Cusack emailed ATU to forward quotes for short- and long-term disability plans. Cusack asked ATU to identify which plan options it intended to propose, or to provide descriptions and quotes for the plans ATU intended. Stark responded on August 31. Regarding the short-term disability (STD) plan quotes, Stark asserted that the quotes were pricier than they needed to be, in part because the plans would provide benefits for one year (versus three to six months). Stark also questioned whether the quotes were based on the assumption that, if such a plan were offered, more employees would participate, and disputed the validity of that assumption. Stark also wrote, "There are numerous ways to provide a meaningful short and long term disability to its employees that are more cost effective than this, such as with voluntary plans, or a fully insured plan of a limited amount with the option of an employee to buy up." She indicated that ATU would obtain its own quotes, but also asked TriMet to request additional plan options from its preferred broker.

Regarding the long-term disability (LTD) quotes, Cusack noted that the LTD plans included a "minimum enrollment" requirement. Stark responded, "ATU proposes Group LTD Plan 23 from the choices presented, however, in reviewing these policies they also appear to require a minimum participation and that the employer contribute 100 percent of the policy (unless we are reviewing that incorrectly). As stated in our proposal below, ATU is agreeable to a LTD plan that is made available to employees and for which they contribute 50 percent of the premium. We did not see that as an option in the quotes TriMet had prepared. These plans also seem significantly limiting compared to what we believe are available from LTD providers."

180. On September 2, 2020, Stark responded to Cusack's August 11, 2020, letter regarding the parties' scope of bargaining disputes. Stark expressed ATU's view that TriMet's approach, *i.e.*, contending that 33 existing provisions of the WWA are permissive, was counterproductive to bargaining. Stark also responded to each objection. In some instances, ATU agreed to withdraw objected-to provisions. In other instances, ATU maintained that the objected-to provisions involve mandatory subjects of bargaining. And in other instances, ATU contended that TriMet could not simply strike (or demand that ATU strike) the existing contract language,

and that if TriMet wished to remove provisions from the existing WWA, TriMet first needed to bargain over the impacts of such changes on mandatory subjects.

181. On September 2, 2020, Cusack emailed ATU representatives, stating, "We had some discussions about an alternative to the AM/PM board." Cusack then briefly described the alternative approach, and stated, "I've talked to both Steve [Callas] and Mary [Hill] about it, but Arronson has been out so haven't run it by him." Cusack represented that this alternative would be "much simpler because it uses the current system." He also wrote, "I wanted to send this so you could share it with your group when you are putting your Article 2 proposal in writing tomorrow. Don't consider this an official proposal yet because it needs some work, but if your group has input or ideas, we would like to hear them."

Mediation with the State Conciliator

182. The parties held mediation sessions on September 3, 10, 17, and 23, 2020. On or about September 1, ATU made a revised proposal regarding meal and rest break periods and restroom facilities, and an Article 2 package proposal.

183. On September 3, TriMet made a revised Article 1 proposal regarding SIP complaints. Specifically, TriMet added a provision addressing how unsubstantiated complains could and could not be used in disciplinary matters.

184. TriMet also made a revised Article 2 proposal. Among other revisions, TriMet withdrew its proposal to change the extra board to an AM/PM board model. TriMet's proposed replacement language for Article 2, Section 1, Paragraph 9, regarding the scope of ATU bargaining unit work (the "lines of the District" provision), remained the same.

185. Also on September 3, ATU made a revised Article 1 and benefits proposal. In the margin, ATU noted that that TriMet had not provided a response to ATU's proposed revisions to Article 1, Section 7, which addressed paid vacation for salaried employees and certain mini-run operators. ATU also withdrew or modified other aspects of its benefits proposal. For example, ATU withdrew its proposal that TriMet increase its share of health benefit premiums from 95 percent to 100 percent.

186. ATU also gave TriMet a counterproposal regarding SIP complaints. ATU proposed language precluding TriMet from disciplining employees based on unsubstantiated complaints, but provided that TriMet could use "unsubstantiated complaints of a similar nature as evidence in credibility determinations between complainants and operators or of past operator behavior." ATU also proposed that complaints would be removed after 12 months.

187. On September 8, ATU made a proposal for a pilot project to trial converting the extra board to an AM/PM board model.

188. On September 8, TriMet made a proposal regarding its track trainee program. On September 9, TriMet made a mediation proposal regarding maintenance (Articles 3 and 4) that was generally the same or substantially similar to its preceding proposal.

189. On September 17, ATU gave TriMet a concept apprenticeship proposal. In this proposal, ATU expressed its concerns about TriMet's plan to change the title of "journey worker" to "technician" and "respectfully ask[ed] that TriMet revisit" that issue. Regarding the apprenticeship programs, ATU proposed the following:

- For current apprentices, ATU (like TriMet) proposed to maintain the status quo.
- For current helpers and service workers, ATU proposed that they be provided an opportunity to enter a training program "as status quo with current programs," after passing a mutually agreed on qualifying test. Employees who declined the opportunity would receive a one-time $4,000 bonus. Employees who left the program would have the right to return to their former position, but with a loss of seniority (with a limited exception for personal hardship).
- After opportunities were provided to current employees, TriMet would establish minimum qualifications and hire from the outside. All journey worker classifications would have a training program, including bus mechanic, but the facilities maintenance training program would no longer include electrical licensure. "All Trainee programs shall meet the minimum standards for nationally or state certified competency-based model for the specific program. All Trainee programs shall provide minimum in-class hours for competency-based model for the specific program, for which TriMet shall ensure they receive course credit through a local college for the classroom hours." TriMet would retain a joint committee to "provide oversight" to the training program, and employees would receive certification upon completion of training. The hiring panel for outside hires would include representation from the union members of the joint committee. The training program would "include new product training in order to maintain in-house ability to perform maintenance work."
- Regarding hiring outside hires into current journey worker or "technician" classifications, ATU proposed that TriMet would have the right to hire from the outside, provided that outside hires received at least 12 months of on-the-job training (unless the joint committee agreed to an exception), and so long as TriMet maintained apprenticeship/training programs positions in equal number to outside hires. Outside journey workers/technicians would receive seniority behind any apprentice/trainee in program at the time of hire.
- ATU also proposed increasing training premiums, and bringing all journey workers to the highest journey worker rate.
- ATU's concept proposal was conditioned on TriMet withdrawing all of its other Article 3 and 4 proposals.

190. That same day, TriMet countered ATU's concept. TriMet's concept included the following:

- All current service workers and helpers who passed the Bennett test but have not received an opportunity to become an apprentice, and those hired after the last Bennett test was given, would receive $2,500.
- Agreeing to ATU's seniority proposal, but with a date of January 1, 2019 and the deletion of the "JATC language."
- TriMet will promote bus, rail, and MOW apprentices to their technician classification immediately, but they would still be required to complete their training.
- Proposing a tuition reimbursement program. In essence, TriMet would reimburse tuition for certain classes that could help employees meet some of the minimum qualifications for the new MOW and rail trainee classifications. TriMet would pay for half of the tuition for specified classes up front, and the remainder if the employee achieved a certain grade. TriMet indicated that the tuition reimbursement would be limited to "15(?) participants at a time."
- The parties would agree that all bargaining regarding the new technician and trainee classifications "is completed."
- The service worker classification would be spilt as TriMet proposed.
- ATU would agree to the end of BOLI apprenticeship, the Bennett test, and the JATCs.
- ATU would agree that "hiring is a permissive subject of bargaining and to the deletion" of Articles 3.1.10, 3.2.3, and 3.21.
- Regarding overtime, TriMet's concept asked whether a "subgroup" could "identify the status quo so both parties know exactly what can be 'clarified' to end disputes as opposed to what 'changes' TriMet would propose?"
- Regarding the "MAF" contracting out fund, TriMet asked, "What is the ATU's proposed exclusion list? Is ATU open to mandatory overtime for items not on the exclusion list?"
- TriMet also asked a series of questions about ATU's proposed increases in training premiums.
- TriMet also indicated that ATU's proposal to bring all current journey workers to the highest level "is a monetary proposal that needs to be discussed with all other monetary proposals," and "equals about 1.25% across the board increase."

191. On September 22, TriMet made a series of Article 2 proposals.

192. Also on September 22, Cusack wrote Stark and other ATU representatives regarding health benefit premium increases. Cusack notified ATU that premium rates for all plans would increase for 2021 plan year, and noted that, "[u]nder the state law, until the parties reach an agreement, TriMet could pass along the full amount of the increase to employees and continue to only pay the 2019, 95% employer rate." He then presented TriMet's "proposal to reach an early agreement for open enrollment":

> "1. TriMet will run the 2021 open enrollment with ATU employees and retirees using the 2021, 95/5% premium split that both parties have proposed
> "2. ATU will withdraw its proposal for retroactive 2020 premiums.
> "3. The topic of benefit premiums will be settled for the new contract."[16]

[16]Although ATU did not accept TriMet's September 22 offer, TriMet did not pass on the 2021 premium increases to employees.

193. On September 23, ATU countered TriMet's Article 2 proposal, and made a revised road relief proposal.

194. On September 24, 2020, Cusack emailed ATU to forward additional information about long-term disability plan options. He wrote, "Mercer did a survey about the availability of voluntary LTD; minimum participation is required." The attached information consisted of a chart titled, "Market survey of carriers who offer standalone voluntary LTD - 2020." The chart identified 11 carriers that offer "voluntary" LTD plans, and then specified the minimum participation requirements for each voluntary LTD plan.

195. On October 6, 2020, TriMet Senior Labor Relations Representative Sarah Browne met with MOW managers for a recurring meeting between TriMet labor relations and MOW managers to discuss labor relations. Casey Goldin, MOW Manager of Signals, and Keith Bounds, MOW Manager, attended the meeting. Goldin had promoted from a supervisor to MOW Manager of Signals only the day before.

196. After the planned agenda items were discussed, an MOW manager requested that Browne provide an update on the collective bargaining mediation with ATU. Browne indicated that the parties were at a "standstill," and that TriMet was waiting for ATU to declare impasse or agreement by TriMet's General Manager's "agreement to declare impasse."

197. Bounds asked, on Goldin's behalf, whether TriMet had "negotiated" about MOW apprentices who want to leave the apprenticeship program and returning to the service worker classification. Browne asked whether this was an individual person or more common in the group of apprentices. Bounds said that there were two or three apprentices out of five that wanted to do this. Browne's notes state, "So Keith raised as an issue for negotiation," and, "Have we thought about letting them out of apprenticeship program and getting seniority they would have if they had graduated."

198. Goldin then explained to Browne his concern that, "if they [some MOW apprentices] don't want to be there," there could be a "negative attitude" issue with the group, and his view that this should be addressed because MOW signals work is "safety sensitive." Browne asked whether this was something that MOW had brought up previously, when working on proposals for Cusack, or was something that came up more recently. Bounds responded that it came up more recently.

199. Bounds told Browne that some MOW apprentices wanted to leave the program based on information he had received from Goldin. At hearing, Goldin testified that he believed some apprentices wanted to leave the program, because he had "overheard" MOW signals apprentices Jason Breedlove, Irving Doctrine, and Robert Baker say that they felt "stuck" in their positions, or something similar, on approximately three to five occasions over the course of two

or three years. Goldin recalled only one such comment with specificity. According to Goldin, Breedlove "basically said he didn't want to be there but he couldn't leave because of seniority."

200. At hearing, Breedlove testified that he had told Goldin that he "felt stuck." and that he probably had made such a comment on multiple occasions. Breedlove explained that he made such comments as "part of [his] fight for the seniority thing," referring to ATU's opposition in bargaining to TriMet's proposal to place outside journey workers ahead of existing apprentices on the seniority list.[17] Breedlove explained that he "was really upset about the seniority thing," and he "felt stuck" because he "had to wait to get into the [apprenticeship] program and then they want to hire people to go in front of [him] and [he] couldn't just leave." Breedlove further explained that "[l]eaving is not really an option for [him]," because the apprenticeship program involves higher pay and the other advantages of learning a skilled trade." He also testified, "I'm going to stay regardless even if ten people go in front of me. I'm just unhappy about it." Breedlove never said that he wanted to leave the apprenticeship program, and he never asked TriMet to allow him to leave the program and retain his service worker seniority.

201. After the labor relations meeting, Browne sent Cusack an email reporting on the October 6 meeting, and described the MOW apprentice discussion as "a suggestion of [Bounds] for proposal to ATU."

202. Browne and Cusack conferred about how to proceed. They decided that they would go to ATU to share the information provided by the MOW managers, but they believed that they first needed to get the names of the apprentices who would be interested in leaving the apprenticeship program if the parties agreed that they could retain their seniority.

203. Browne asked Bounds to obtain the names of the apprentices, and Bounds delegated that task to Goldin.

204. On October 8, 2020, Goldin met briefly with each signals apprentice, individually, to check their interest in the potential option of returning to their former service worker positions without loss of seniority.[18] Goldin's understanding of the purpose of the questioning was so that TriMet could see if the apprentices were interested in this option, before taking the issue up with ATU, because ATU would have to agree to the option before it could actually be offered. Goldin essentially asked each apprentice, "If this was an option for you, would you be interested in this option?"

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[17]Relative placement on the seniority list is a significant issue because journey workers bid for schedules and other terms of work by seniority. As of October 2020, the parties had been bargaining for several years over the issue of whether outside journey workers should be placed ahead of or behind existing apprentices. The parties continued to bargain over this issue during successor bargaining, and it remained unresolved at the time of hearing.

[18]Goldin testified that he chose to talk to all the MOW apprentices individually to be, as he viewed it, "equitable."

205. Goldin also told each apprentice that he would share their responses with TriMet's labor relations, and that TriMet would take it up with ATU. Goldin also told the apprentices that he was sharing "the company's perspective" (referring to TriMet), and that if they were interested in this option, they could also bring it up to ATU.

206. Goldin testified that Lucy Barbosa, Frank Morris, Robert Baker, and Irving Doctrine (all of the MOW apprentices, except Breedlove) responded to his question by saying that their interest in leaving the apprenticeship program depended on how contract negotiations regarding the seniority issue went: if additional outside hires bypassed the apprentices in seniority, they would be interested in the option, but if the outside hires did not bypass them in seniority, then they would not be interested. Goldin testified that Breedlove declined to indicate whether he was interested in the option or not.

207. Baker testified that, when Goldin met with him, Goldin made it sound like it was "possible" for him to leave the apprenticeship program and return to his service worker classification without losing seniority, and asked him for a definite answer on whether he would like to leave the apprenticeship program or not. Baker further testified that he responded by stating, "No, I would like to stay and finish what I started. I do not want to go back."

208. Breedlove testified that shortly after he started work on Thursday, October 8, Goldin called him into a meeting and asked if he was interested in leaving the apprenticeship program. If he was interested, he needed to let Goldin know by Friday, and Goldin would let TriMet labor relations know, and labor relations could "make a deal that I would be able to leave the program." Goldin also told Breedlove that he was going to "talk to all the other apprentices, too." Breedlove also testified, "The problem wasn't that we couldn't leave the program, because any of us can leave the program at any time, but he made it clear that we would be able to keep our service worker seniority as a possible deal, if we were interested."

209. One or two days later, Breedlove filled out an ATU grievance form regarding his October 8 meeting with Goldin. He wrote:

> "On 10/8/20 I was approached by Casey Goldin in a private meeting in his office to discuss me leaving the apprenticeship and they'd negotiate with labor relations for me to keep my service worker seniority. I have top seniority in the apprenticeship, yet I was approached second to last of 5 with this empty promise. I'm claiming a grievance on seniority for one. For two, no one else who is currently a journeyman has had such an offer. This is not SOP. Why are we treated differently during a year where the company is trying to rid themselves of the apprenticeships AND we have an ongoing fight for our seniority against one outside hire and, from what I hear 10 additional new hires. I feel bullied and intimidated that management is trying to push me out of something I waited 3.5 years to enter and an additional 25 months in this program. I feel this creates hostility in the workplace."

210. At hearing, Breedlove testified that he was upset about the meeting with Goldin because "we had been in the program two years at that point and we still hadn't had any of our classroom training. And I know they're trying to hire people off the street. And they're fighting them on seniority and if we dropped out then they wouldn't have to provide training and these people could go—they wouldn't have to fight for seniority."

211. Breedlove gave his grievance to ATU representative Joe Ruffin. Ruffin said that the issue Breedlove was raising was not a grievance, and he explained, "It is bigger than a grievance, it is a ULP." Based on Ruffin's explanation, Breedlove agreed that they should not actually file his grievance form with TriMet.

212. On Friday, October 9, 2020, Goldin conveyed his understanding of the apprentices' responses to Browne. Browne testified that Goldin gave her the names of four apprentices, Lucy Barbosa, Frank Morris, Robert Baker, and Irving Doctrine, and it was her understanding that those four apprentices were interested in leaving the apprenticeship program if they could retain their seniority. Shortly after receiving the information from Goldin, Browne relayed it to Cusack.

213. On October 11, 2020, TriMet filed a written declaration of impasse with the Oregon Employment Relations Board.

214. Also on October 11, 2020, TriMet forwarded ATU an estimate of the cost of ATU's early retirement proposal.

215. On October 13, Browne called Shirley Block and indicated that four of the MOW apprentices were interested in leaving the apprenticeship program if they could retain their seniority.[19] Block asked Browne to send her an email. That same day, Browne emailed Block and wrote:

> "The names of the MOW Apprentices who are interested in leaving the apprenticeship program if they can retain the seniority they would have had prior to the accrual of 6 months in the apprenticeship program are as follows:
> "Lucy Barbosa
> "Frank Morris
> "Robert Baker
> "Irving Doctrine
>
> "I will let Keith Bounds know that Joe and you will have a discussion about this. The District would agree that they all get their Service Worker seniority back. Hopefully we can reach a mutual agreement."

Browne then wrote, "The contract language is as follows," and quoted Article 3, Section 15, Paragraph 8 of the 2016-2019 WWA:

[19]Browne testified that she perceived that Block "seemed fine" with the information.

> "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."

216. As of the date of hearing, all five of the MOW apprentices were still in the apprenticeship program. Goldin testified that he hoped the apprentices would stay in the program because the MOW signals group is short-handed.

Final Offers

217. On October 19, 2020, the parties exchanged final offers.

218. TriMet's final offer included the following:

- It withdrew its proposal to revise Article 1, Section 1, Paragraph 9, regarding the scope of ATU bargaining unit work (the "lines of the District" provision)
- With regard to Article 1, Section 7, it proposed to permit salaried employees to have up to two weeks of vacation paid out at the end of the vacation year.
- It withdrew its proposal to change Article 1, Section 8, Paragraph 1, which limited employee eligibility for holiday pay.
- In Article 1, Section 19, Paragraph 11, TriMet proposed that Service Improvement Program complaints that are not substantiated (a) shall not be used as the basis for higher levels of discipline for future substantiated complaints, but may be used as evidence, such as in determining credibility, and (b) shall not be included in the employee's record (incorporating ATU's concepts from its June 24, 2020, proposal).
- In Article 2, it added $4.00 to road relief payments, and three minutes to operator sign-in time.
- Regarding the maintenance department, the mediation concepts were not incorporated, so TriMet's proposals regarding Articles 3 and 4 were substantially the same as TriMet's initial proposals.
- TriMet proposed a separate MOA to transition current employees from the current classifications to the new classification system, which transitions the service workers from the current sole classification into three new classifications, and the current journey worker mechanic and journey worker LRV mechanic into the new technician classifications.
- TriMet also proposed a tuition reimbursement pilot project, "To provide ATU employees with funding to learn the basic concepts necessary for Trainee positions in REM and MOW, and demonstrate an aptitude to be successful in a trainee program[.]" TriMet would pay tuition for up to five classes at PCC, three specified and up to two prerequisites, if needed. TriMet would pay tuition upfront, but employee must maintain C grade to be eligible for pre-payment of the next class. The proposal specifies that only twenty employees may be enrolled in any given school term. The proposal also specifies, "If an employee successfully passes the three required classes and meets attendance, discipline and driver licenses requirements, they may apply for

Trainee vacancies when they are open for recruitment. An internal candidate meeting these requirements will be hired before an external trainee is hired."

- TriMet proposed that only maintenance sections that decide to do so would have assistant supervisors (*i.e*, bus, light rail, maintenance of way, and facilities would no longer have assistant supervisors).
- TriMet proposed to discontinue the service worker/helper classification and replace it with three new classifications (bus service worker, REM service worker (non-CDL), and facilities service worker (non-CDL)).
- With respect to bus warranty work, TriMet proposed that TriMet employees "will not do the maintenance and repair of the electric propulsion systems, high voltage batteries and connections, and the high tech exteriors on electric or hybrid buses. This work will not count as part of the District's MAF allotment. After TriMet determines which new bus technology to adopt and initiates orders for significant numbers of new buses to replace the diesel fleet, the parties will meet to discuss whether parts of this work should be brought in house."
- In Article 9, TriMet proposed an across-the-board two percent wage increase on December 1, 2019, and proposed no other wage increases for the remainder of contract. TriMet retained the tool allowance and included the battery electric bus technician classification in the list that receives that allowance. TriMet also proposed to contribute 95 percent of the cost of health insurance premiums for both the PPO and more expensive HMO plans. The final offer also states that TriMet would implement the 95 percent premium contribution (what was proposed by both parties), effective January 2021 regardless of the status of negotiations.

219. TriMet's cost summary included the following costs associated with its final offer: (a) $10,061,527 for the wage increase proposed in Article 9, Section 3; (b) $390,000 for the addition of three minutes to operator sign-in time, as provided in proposed Article 2.1.2.a; (c) $755,114 for the addition of $4.00 to road relief pay, as provided in proposed Article 2.1.2.g; and (d) $2,805,352 for implementation of TriMet's 95 percent health insurance premium contribution on January 1, 2021.

220. ATU's final offer included the following:

- A three-year contract from December 1, 2019 through November 30, 2022.
- Wage increases of 3.5 percent on December 1, 2020, 3.5 percent on December 1, 2021, and 3.5 percent on December 1, 2022.
- Continuation of TriMet's 95 percent contribution to health insurance premiums, plus a requirement that TriMet "reimburse employees for the increased cost of health insurance they have incurred since the contract expired."
- An increase in the extended sick leave benefit from $150 per week to $500 per week, and the addition of a "voluntary long term disability policy that would be available to employees after 52 weeks and pay for 50 percent of the costs to employees who may elect to purchase" the policy.
- An increase from $55,000 to $75,000 in TriMet's annual contribution to the Recreation Trust Fund.

- A requirement that TriMet contribute annually to a Child/Elder Care Assistance Program operated by ATU in an amount sufficient to "replenish the fund to $75,000."
- A provision allowing salaried employees to convert "all weeks of vacation each year" to "floaters for end of year payoff."
- Road relief allowance paid at 70 percent of the operator's base rate calculated "based on the time estimated by TriMet, based on its trip planning estimate system."

221. On November 2, 2020, Cusack emailed Stark with some questions regarding ATU's final proposal, and Stark responded on November 5, and Cusack responded on November 13. The relevant parts of this correspondence are summarized below.

Regarding ATU's proposal that TriMet offer a "voluntary" long term disability plan, Cusack asserted that ATU proposed "a program that doesn't exist in the marketplace" because "all LTD programs have minimum participation requirements." Cusack referred Stark to his September 24, 2020, email. Stark responded, "ATU understands that the type of LTD program it requested has a minimum participation requirement, and that it was it intended its offer to convey (e.g. employees can voluntarily participate – it is not a benefit provided across the board by TriMet). If that is not clear, we are happy to amend." In response, Cusack continued to assert that ATU's proposal for a voluntary plan was "impossible to implement" because "ATU's proposal does not require a minimum participation level."

In ATU's final offer, it proposed revising Article 3, Section 7, Paragraph 4, to state that all trainee programs "shall meet the minimum standard for a nationally or state certified competency-based, time based hybrid [*sic*] model for the specific program." Among other things, Cusack requested, "Please provide me at least one example of this type of program for each of the training program(s) you propose require them?"

In relevant part, Stark responded,

> "With regard to providing an example, ATU declines to do so because that request seeks work product. I believe that ATU would consider providing that type of information voluntarily if it had any reason to believe that TriMet seriously considering engaging in good faith negotiations to maintain, but improve, the apprentice programs. However, TriMet has repeatedly insisted that its only position is complete elimination of the apprentice programs."

In relevant part, Cusack responded,

> "Our request for an example of "a nationally or state certified competency-based, time based hybrid model" for diesel technician is purely factual in nature and cannot possibly be a request for work product. TriMet does not seek any documents or analysis conducted by ATU on these programs, but an example of the existence of the "certified" programs that ATU seeks to implement in its final offer. The existence of a "certified" program is not a creation of work product. Any "certified" program would already exist outside the scope of these negotiations, and ATU could point me to where we could review the program, its requirements and its

> certifications. Without examples of the 'certified program' ATU seeks to propose in its final offer, I can't understand your proposal or its costs, from a bargaining or interest arbitration perspective.
> "Based on your answer that [ATU's proposed requirement] applies to all training programs, please provide all the 'certified' programs ATU is proposing in its final offer."

At the time of hearing, ATU had not responded to this request for information about the certified programs referenced in its proposal.

222. On November 4, 2020, TriMet filed its complaint in this case, claiming that ATU violated its duty to bargain in good faith by including permissive subjects in final offer over TriMet's objection. For readability, the objected-to proposals are set forth in the appendix in this order.

223. On November 6, 2020, ATU filed its complaint in this case, claiming that TriMet violated its duty to bargain in good faith by engaging in direct dealing and surface bargaining.

CONCLUSIONS OF LAW

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

2. ATU violated ORS 243.672(2)(b) by unlawfully including, over TriMet's objections, permissive subjects of bargaining in its final offer, thereby conditioning settlement of the parties' successor agreement on bargaining over these permissive subjects.

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). *Jackson County v. Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. UP-002-20 at 5 (2020). Here, TriMet alleges that ATU included multiple proposals covering permissive subjects of bargaining in ATU's final offer proposals, despite TriMet's objections. As discussed below, we conclude that some, but not all, of ATU's final offer proposals at issue in this case concerned permissive subjects of bargaining in violation of ORS 243.672(2)(b).[20]

We begin with the framework for how we assess the subject matter of bargaining proposals. We employ a subject-based approach when determining whether a proposal is mandatory or permissive for bargaining, using a two-step process. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-003-16 at 61 (2018)

[20]ATU, in its answer to the complaint, contended that TriMet waived some or all of its objections to the provisions at issue. However, ATU did not pursue that contention in its prehearing brief or at hearing, except with respect to the parties' grievance settlement agreement, which we decide on other grounds. Consequently, we do not address ATU's waiver argument.

(*TriMet I*). First, we identify the subject of the proposal within the context of the collective bargaining agreement as a whole. *Id.* "In many cases (perhaps even a majority), a straightforward analysis of the language proposed—applying to it this Board's expertise and experience in the field of labor-management relations—will reveal the actual nature of the proposal." *International Association of Firefighters, Local 314 v. City of Salem and Dearborn, Personnel Director*, Case No. C-61-83 at 8, 7 PECBR 5819, 5826 (1983). In other cases, a proposal might reference or implicate multiple subjects, in which case we identify the core feature of the proposal as the subject of that proposal. *Jackson County*, UP-002-20 at 6 (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)). We then determine whether the subject is mandatory for bargaining. *TriMet I*, UP-003-16 at 61.

In making that determination, ORS 243.650(4) identifies two specific categories of subjects for bargaining (mandatory and permissive). A subject is mandatory for bargaining if it qualifies as "employment relations," which "includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, labor organization access to and communication with represented employees, grievance procedures and other conditions of employment." ORS 243.650(7)(a). Permissive subjects of bargaining include all other subjects that the parties may discuss and execute written agreements on, so long as those terms "are not prohibited by law." *City of Portland*, DR-001-19 at 2 (quoting ORS 243.650(4)). The statute further clarifies that "employment relations" does not include (1) subjects that this Board determined before June 6, 1995, to be permissive subjects of bargaining; (2) after June 6, 1995, subjects that this Board determines to have a greater impact on management's prerogative than on employee wages, hours, or other terms and conditions of employment; or (3) subjects that have an insubstantial or de minimis effect on public employee wages, hours, and other terms and conditions of employment. ORS 243.650(7)(b)-(d). "Employment relations" also excludes specific enumerated subjects set forth in ORS 243.650(7)(g), such as "assignment of duties" and "determination of the minimum qualifications necessary for any position."

With that framework in mind, we turn to TriMet's objections to ATU's proposals. In all, TriMet asserts that ATU included 36 proposals on permissive subjects of bargaining in its final offer, and that ATU did so over TriMet's objections. Many of these objected-to proposals are repeated multiple times throughout ATU's final offer to reflect their application to different areas of TriMet's operations, sometimes with slight variations. For efficiency in analyzing TriMet's claims, we have grouped those proposals together, as neither party has suggested that they should be treated differently.

Seniority/Assignment of Duties

TriMet first objects to the proposal in ATU's final offer under Article 3.1.2. Specifically, TriMet objects to the underlined portion of the following proposal:

> "Par. 2 Seniority by classifications as established herein shall prevail in the performance of the work done in Paragraph 1, qualifications considered. All Journeyworkers/Technicians hired from outside the District prior to the effective date of this Agreement shall establish classification seniority

> behind any apprentice in the apprentice program on the date they were hired. All Journeyworkers/Technicians hired after the effective date of this Agreement shall establish classification seniority behind any Trainee in a Training program on the date they were hired. In the event of a dispute regarding seniority, ATU shall make the final determination of seniority placement."

TriMet asserts that the subject of the underlined sentence concerns the "assignment of duties" because the sentence "dictates how work tasks in the Maintenance Department will be assigned." ATU argues that the disputed provision is primarily definitional in explaining that seniority in the Maintenance Department is not determined by the Maintenance Department as a whole, but by classification. When read in conjunction with paragraph 1, ATU asserts that the proposal, which is longstanding language, "preserves the right for overtime call out to follow seniority" and for bidding on "postings to occur by seniority." ATU further argues that the provision is also aimed at protecting job security and preventing contracting out, in that it prevents "TriMet from giving work traditionally performed in maintenance by bargaining unit members to non-union employees or contractors." Thus, ATU argues that that the disputed proposal is mandatory for bargaining. *See, e.g., Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673 (2007) (job security is a mandatory subject of bargaining); *Oregon Public Employees Union, Local 503, SEIU, AFL-CIO, CLC v. State of Oregon, Executive Department*, Case No. UP-64-87, 10 PECBR 51 (1987) (assignment of overtime, seniority shift bidding is mandatory for bargaining).[21] For the following reasons, we agree with ATU that TriMet has not established that the disputed provision is permissive for bargaining.

We begin by observing that, when determining the subject of a disputed proposal, we must read the proposal in the overall context of the contract as a whole, as well as the parties' understanding and application of longstanding contract language. TriMet's approach with respect to this proposal is at odds with that framework. Specifically, TriMet isolates one sentence in the context of a much broader paragraph and article to advance its claim that the subject of the sentence is permissive for bargaining. It is not uncommon for parties to propose certain definitions in a contract or to describe contract terms for purposes of providing context for other contract terms and proposals. By way of example, a labor organization might propose what the duties of a particular classification are in order to advance wage proposals for those different classifications. Such a proposal is not read in isolation as dictating that an employer must create those particular job classifications with specific job duties (which would be permissive), but as part of the context for the labor organization's wage proposal (which would be mandatory). The same is true with some of the disputed proposals in this case—TriMet has isolated a sentence or two that, when read in isolation, could be understood to concern a permissive subject. However, when read in context with surrounding provisions and the contract as a whole, the disputed provision is not attempting

[21]TriMet does not argue that these subjects are permissive. Relatedly, both parties generally agree with the mandatory/permissive characterizations of the competing subjects in the proposals at issue—*e.g.*, ATU acknowledges that "assignment of duties" is permissive and TriMet does not dispute that "job security" is mandatory. Rather, the parties' disagreements concern what the subjects of the various proposals are (*e.g.*, is the subject of the proposal "assignment of duties" or "job security"). In situations where one of the parties has disagreed with whether a particular subject is mandatory or permissive, we have noted as much and provided additional analysis for our conclusion.

to dictate or curtail TriMet's management prerogatives in a particular area, but to address mandatory subjects of bargaining.

Additionally, the disputed sentence is not new contract language proposed by ATU, but rather longstanding contract language. Although TriMet is correct that existing contract language can concern either permissive or mandatory subjects (and is therefore not an answer to that question in and of itself), we disagree with TriMet's contention that the context of existing and longstanding contract language is entirely irrelevant to determining the subject of that contract provision. That is so because the parties' actions, understandings, and applications of existing contract language can illuminate the subject matter of that proposal through the parties' collective bargaining relationship. Ignoring that context would not aid our objective to determine what the true subject of a proposal is nor would it serve the policies and purposes of the PECBA.

With those observations in mind, we address TriMet's claim that ATU is making a proposal that infringes on TriMet's right in the assignment of duties. "[A]ssignment of duties" under ORS 243.650(7)(g) means the assignment of "tasks ordinarily performed by employees in the classification of the employee who is given an assignment." *TriMet I*, UP-003-16 at 62 (quoting *State of Oregon, Executive Department*, UP-64-87 at 21 n 4, 10 PECBR at 71 n 4). The disputed provision states: "Seniority by classifications as established herein shall prevail in the performance of the work done in Paragraph 1, qualifications considered." Paragraph 1, which is referenced by the disputed provision, states: "The Maintenance Department consists of those functions necessary to maintain and repair revenue and non-revenue rolling stock." Taken together, in the context of Article 3, which governs the Maintenance Department, the subject of the provision concerns the scope of work performed by the Maintenance Department employees and the role of seniority in the performance of that work. The proposal does not purport to govern the "tasks ordinarily performed by employees in the classification of the employee who is given an assignment," or the "distribution of normal duties among employees during the work day," meaning the assignment of duties. Therefore, we conclude that ATU did not violate ORS 243.672(1)(e) by including this provision in its final offer.

Tire Chains

TriMet next contests the underlined sentence of the following Article 3.1.5 proposal:

> "Par. 5. Service Workers may be used by the District to install and remove tire chains after Helper's classification on shift at the facility has been exhausted and under a Mechanic's supervision."

TriMet contends that the underlined provision concerns "assignment of duties" in that it requires TriMet to assign a mechanic to supervise the task of a service worker installing and removing tire chains. ATU asserts that the subject of the proposal is "safety" because the "chaining process, if done incorrectly, can harm both the employee performing the work, or an operator driving the bus," and that "the requirement of a mechanic's supervisor protects the safety of employees." Under ORS 243.650(7)(g), safety issues are permissive for bargaining, "except those * * * safety issues that have a direct and substantial effect on the on-the-job safety of public employees." For

the following reasons, we agree with TriMet that the subject of this proposal is assignment of duties, and therefore, permissive for bargaining.

For the subject of a proposal to constitute a "safety issue," the proposal must "reasonably be understood, on its face, to directly address a matter related to the on-the-job safety of employees." *Multnomah County Corr. Deputy Ass'n v. Multnomah County*, 257 Or App 713, 734, 308 P3d 230, (2013) (*MCCDA*). Here, the proposal to require TriMet to assign a mechanic to supervise the task of a service worker's installation and removal of tire chains is not, in our view, reasonably understood on its face to *directly* address a matter related to the on-the-job safety of employees.

As a factual matter, ATU maintains, and TriMet does not appear to dispute, that tire chains are a form of safety equipment and installing tire chains on a diesel bus is an activity that involves some risk of injury. Although those facts may be sufficient to establish that tire chain installation is a "matter related to the on-the-job safety of employees," ATU's proposal (that a mechanic supervise the installation and removal of tire chains), cannot reasonably be understood on its face to "directly" address that matter. Rather, at most, requiring mechanic supervision of the service worker is an *indirect* method of ensuring that the tire chains are installed properly (as opposed to, for example, requiring that the installer be adequately trained). Consequently, under the standard set in *MCCDA*, the subject of this proposal is not a "safety issue."[22] Rather, the proposal's subject is "assignment of duties," in that it requires TriMet to direct a particular employee (a mechanic) to perform a particular task (supervising) at any time that a service worker performs a work task (installing and removing tire chains).[23] Because this proposal concerns a permissive subject of bargaining, ATU was prohibited from including it in its final offer over TriMet's objection. The record demonstrates, and ATU does not dispute, that TriMet objected to bargaining over this proposal. Accordingly, when ATU included this proposal in its final offer, it violated ORS 243.672(2)(b).

Work Trades and Overtime

TriMet next contests the underlined provision in Article 3.1.8 in ATU's final offer:

> "Par. 8. All trading days off is a privilege granted by the Union and the District and may be canceled at any time by mutual agreement.
> "* * *
> "b. A trade can only occur between two (2) people working at the same garage, during the same hours, within the same job classification, having similar sign-up responsibilities, e.g., overhaul mechanics can only trade with overhaul mechanics, body shop mechanics can only trade with body shop mechanics. Requests for trades

[22]Because we conclude that the proposal does not involve a "safety issue," we need not reach the question of whether the proposal has a substantial effect on the on-the-job safety of TriMet employees and thereby falls within the exception to permissive status for safety issues set forth in ORS 243.650(7)(g).

[23]ATU does not allege that the tire installation is a task that is not "ordinarily performed by employees in the classification of" service workers.

> are subject to approval by the Supervisor. The District reserves the right to approve requests on a case-by-case basis based upon operational needs."

TriMet contends that the underlined section concerns the permissive subject of assignment of duties because the proposal gives employees "the right to pick their own work assignments on sign-up sheets that identify the work tasks to be performed." ATU asserts that the proposal does not allow employees to choose whatever work assignments that they want, but rather govern when day-off "trades can occur," which concerns the mandatory subject of hours of work. *See*, *e.g., State of Oregon, Executive Department*, UP-64-87 at 21, 10 PECBR at 71. Specifically, ATU notes that the provision limits an employee's right to obtain the privileges of trade, and is therefore a term and condition of employment. We agree with ATU—the terms of the proposal do not speak to or allow an employee to perform any work assignment that the employee chooses or limit *TriMet's* rights to assign duties, but rather limit *employees'* rights to trade days off with other similarly classified employees. Accordingly, the subject concerns hours of work, which is mandatory for bargaining, and ATU did not violate ORS 243.672(2)(b) by including this provision in its final offer.

Relatedly, TriMet also asserts that the following underlined provisions of Article 3.17.1 are permissive for bargaining in that they dictate assignment of duties:

> "Par. 1. The function of overtime is to facilitate the continuity and completion of work under unusual or extraordinary circumstances. Overtime will be used on an exception basis and is the prerogative and responsibility of maintenance managers.
> a. The criteria for making overtime assignments and paying employees at the overtime rate will be based on: classification, <u>current signed job function with which the work would normally be associated, (i.e. body shop employees do body work, engine rebuild employees do engine rebuild, spotters do spotter work, etc.)</u> then seniority. Overtime will not be offered to an employee who has been off sick until that employee has returned to work for one full workday."

Similar to our above conclusion regarding work trades, we agree with ATU that this provision concerns overtime eligibility and is therefore mandatory for bargaining. *See*, *e.g., State of Oregon, Executive Department*, UP-64-87 at 21, 10 PECBR at 71. We disagree with TriMet that the subject of the proposal is to limit TriMet's right to assign the tasks ordinarily performed by employees in the classification of the employee who is given an assignment. Rather, the proposal is directed as to how overtime eligibility is determined, which is mandatory for bargaining—the examples provided in the proposal that reference certain employees performing certain tasks is in aide of describing that eligibility, not to curtail TriMet's right to assign daily tasks to employees given an assignment. Therefore, ATU did not violate ORS 243.672(2)(b) by including this proposal in its final offer.

<u>Hiring/Internal Candidate Preference</u>

We next address TriMet's contention that the following proposal, which was new language included in Article 3.2.1 of ATU's final offer, is permissive for bargaining:

"Par. 1. When the District plans to hire for any ATU classification in the Maintenance Department a notice shall be posted on all department bulletin boards for not less than five (5) days before posting externally. If the District determines an internal candidate is equally qualified as an external candidate, the District shall hire the internal candidate."

According to TriMet, this proposal is permissive because its subject concerns how TriMet fills vacancies and sets the minimum qualifications for a job position. See ORS 243.650(7)(g) ("determination of the minimum qualifications necessary for any position" is a permissive subject of bargaining). ATU asserts that the subject concerns internal candidate preferences for vacant positions, which affects job security, and is therefore mandatory for bargaining. *See Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-009-13 at 20, 26 PECBR 225, 244 (2014) (job security is a mandatory subject of bargaining) *Portland Fire Fighters' Association, Local 43 v. City of Portland*, Case No. UP-14-07 at 30, 23 PECBR 43, 72 (2009), *rev'd and rem'd on other grounds*, 245 Or App 255, 263 P3d 1040 (2011) (proposals that affect job security are mandatory for bargaining).

We agree with ATU. The text and context of the disputed language is not aimed at, and does not restrict, TriMet's ability to establish what minimum qualifications are necessary to be hired for a particular position. Rather, the proposal presumes that TriMet both establishes those qualifications and determines (in its sole discretion) who, among particular candidates, is the most qualified. The proposal then provides for the hiring of an internal candidate, in the event that the District determines that the internal candidate is equally qualified for the position when compared to an external candidate. The subject of the proposal, therefore, affects job security and is mandatory for bargaining. In reaching this conclusion, we disagree with TriMet that *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) (*Gresham*), provides otherwise. In *Gresham*, the Board found a proposal that required the school district to give a "transferred teacher priority over new hires in filling any vacancy" was permissive because it required the district to "adhere to certain standards in filling vacancies." Here, unlike in *Gresham*, the challenged proposal does not require TriMet to adhere to certain qualification standards; rather, TriMet is free to set its own standards. ATU's proposal provides a benefit to existing employees only *after* TriMet has made its own qualification determinations. Accordingly, ATU did not violate ORS 243.672(2)(b) when it included this proposal in its final offer.

TriMet similarly objects to the following ATU proposal in Article 3.3.9 of ATU's final offer:

"e. If the District determines an internal candidate for any Service Worker classification is equally qualified as an external candidate, the District shall hire the internal candidate. Credit shall be given to employees who have worked in a Helper/Service Worker classification for prior experience equivalent to the time worked in that position for any Service Worker classification,"

This proposal is indistinguishable from the proposal discussed above in Article 3.2.5. Like that proposal, we conclude that this proposal affects job security and is mandatory for bargaining. For those same reasons discussed above, we disagree with TriMet's assertion that this proposal is directed at imposing minimum qualifications on a position.

Layoffs and Filling Vacancies

We turn to TriMet's objections to the following underlined language in Article 3.2.5:

> **"**It is understood and agreed that in filling vacancies that are not filled by promotion within the Department, preference will be given to employees or laid off employees of the Facilities Maintenance or Stores Departments. Such vacancies will be posted on all department bulletin boards for five (5) days. If unable to fill the vacancy, it may be filled according to seniority within the District. Following selection, District employees shall receive preference for all bidding purposes over employees hired from the outside."

TriMet asserts that the underlined language "dictates how TriMet can fill vacancies in all classifications and sets a minimum qualification" for positions. ATU asserts that the underlined language, which is longstanding contract language, concerns job security, in that it provides a preference for internal candidates or laid off employees when filling vacancies not filled by promotion. As discussed above, proposals that concern preferences for internal candidates or existing employees affect job security and are mandatory for bargaining. These proposals are distinct in nature from a proposal that, for example, limits the number of external candidates that a public employer can hire, which we have deemed permissive for bargaining. *See Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757*, Case Nos. UP-001/003-20 at 20, *adh'd to on recons* (2020) (*TriMet II*) (*appeal pending*) (contract provision that set numerical limit on external hiring concerned the permissive subject of standards for filling vacancies). That is so because the core feature of the disputed proposal is aimed to providing job security benefits for existing employees, rather than barring TriMet from hiring external candidates to fill vacancies or setting a numerical limitation on external hirings without regard to TriMet's operational needs. Although there is some nuance in distinguishing between those types of proposals, the proposal at issue here falls on the mandatory side of the line in that it is fundamentally aimed at providing job security benefits for existing employees. We further note that the proposal does not dictate the minimum qualifications for a position, or require TriMet to fill a vacancy with an unqualified internal candidate, or otherwise require TriMet to fill vacancies in a manner that interferes with management prerogatives. Because the above proposal concerns employment relations, ATU did not violate ORS 243.672(2)(b) by including it in its final offer.

We reach the same conclusion on TriMet's objections to the underlined language below in Article 3.4.1 of ATU's final offer:

> "Par. 1. Maintenance Department seniority shall govern in laying off and reemployment of employees. Employees so laid off because of lack of work shall be returned in the inverse order in which they were laid off, as the need for their classification, or classification of work, permits.

"a. If the District curtails the number of employees in any job, the employee with the least job seniority will be the first to be moved out of that job. That employee will then be entitled to exercise such job seniority s/he has on any other job in that department.

"b. Only in the event of layoff, Facilities Maintenance employees shall be allowed to exercise their departmental seniority for positions in Maintenance or Stores."

TriMet argues that the underlined language concerns the minimum qualifications and limitations on its ability to fill vacancies. ATU counters that the language concerns job security in that it allows employees to exercise departmental seniority in the event of layoff. We agree with ATU. The disputed sentence from ATU's proposal addresses how and when Facilities Maintenance employees may exercise departmental seniority in the event of a layoff. Such a proposal goes directly to job security. The proposal does not purport to curtail the minimum qualifications for a particular position. It also does not prohibit or limit the number of external hires necessary for TriMet to run its operations, such that it has a greater effect on TriMet's management prerogatives than conditions of employment. Therefore, ATU did not violate ORS 243.672(2)(b) by including this proposal in its final offer.

Assistant Supervisors/Acting Supervisors

TriMet next objects to the following underlined language in Article 3.3.8 as permissive for bargaining, in that it concerns assignment of duties:

"Assistant Supervisors shall perform journey-level work in addition to their Assistant Supervisor duties, except when acting Supervisor."

TriMet asserts that by dictating what work tasks are performed by assistant supervisors (who are bargaining unit members), ATU's proposal concerns the assignment of duties. ATU contends that its proposal is directed at preventing TriMet from "eroding the promotional opportunity, pay, and responsibility of" assistant supervisors. Specifically, ATU states that, without the limitation in the proposal, an assistant supervisor will be performing two jobs (journey level mechanic and acting supervisor) while being compensated for one, and will also lose the value of being promoted into an assistant supervisor position. ATU adds that the proposal has a direct and substantial impact on the on-the-job safety of TriMet employees because a supervisor "is a first responder to any injuries, or emergencies," and "[i]f that same person is unavailable because they are in the middle of their own work, it may significantly delay the response to an emergency or injury."

Although ATU is correct that promotional opportunity, pay, and safety issues that have a direct and substantial impact on the on-the-job safety of public employees are all mandatory subjects for bargaining, we disagree with ATU's characterization of this proposal. Here, the language of the proposal is directed specifically at limiting the work assignments that a bargaining unit employee ordinarily may perform when given an assignment, which constitutes the "assignment of duties." The objectives that ATU asserts as the basis for the proposal are simply too attenuated from the language of the proposal for us to conclude that the subject concerns

promotional opportunities, pay, or mandatory safety issues. Accordingly, ATU violated ORS 243.672(2)(b) by including this proposal in its final offer.[24]

Apprenticeship/On-the-Job Training

We next address a series of ATU's proposals that concern an apprenticeship or on-the-job training program. Before doing so, we review our prior holdings concerning the subject of proposals on such a program. In *TriMet II*, UP-001/003-20 at 5-10 (Recons Order), we concluded that TriMet could not unilaterally end its longstanding apprenticeship and on-the-job training programs because such a decision was mandatory for bargaining. We separately concluded that TriMet could unilaterally deregister those programs from the Bureau of Labor and Industries (BOLI) because BOLI registration was permissive for bargaining. *Id.* at 5-6. We noted, however, that TriMet still had to bargain over mandatory impacts of deregistering an apprenticeship program with BOLI. *Id.*

With that in mind, we turn to ATU's final offer proposals that TriMet has disputed. Because of the length and number of the proposals that are at issue (as well as the fact that several of the proposals are effectively repeated in different sections of the WWA), and because our conclusions concerning the mandatory or permissive nature of the proposals do not turn on the parsing of certain terms, we have grouped the disputed proposals into the following categories for purposes of this discussion: (1) proposals stating that there shall be an on-the-job training/apprentice program and specifying minimum in-class hours, local college course credit, and certificate of completion; (2) proposals to form a joint committee in conjunction with the program; (3) proposals providing that any employee selected to enter a TriMet apprenticeship program shall be provided an opportunity to attend program orientation before accepting the promotion (and further providing some details about the orientation); and (4) proposals stating that the training/apprenticeship program "shall meet the minimum standards for a nationally or state certified competency-based, time based hybrid model for the specific program."[25]

*a. Existence of an On-the-Job Training/Apprenticeship Program*

In our prior order, we concluded that the subject of the elimination of TriMet's on-the-job training/apprenticeship programs, in part because of their longstanding nature, is mandatory for bargaining. *Id*. at 10. In doing so, we followed the 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,

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[24]ATU does not argue that this proposal (which restricts the assignment of bargaining unit work to a bargaining unit employee who normally performs that work) concerns the preservation of bargaining unit work, as might be the case with a proposal that restricts assignment of bargaining unit work to *non-bargaining unit* employees.

[25]As previously stated, the full proposals may be reviewed in the appendix.

5654-55 (1983), and considered "all relevant circumstances" surrounding the change.[26] *Id.* at 7-8. Here, ATU has included in its final offer, various proposals that call for an on-the-job training/apprenticeship program. TriMet objects to these proposals on numerous grounds, none of which we find availing.

First, TriMet asserts that proposals stating that there shall be an on-the-job training program require TriMet to create a trainee job classification, and that the subject of creating a particular job classification is permissive for bargaining. TriMet's argument misstates the nature of ATU's proposal. ATU's proposals do not require TriMet to create a particular job classification, but rather propose the continuation of some sort of on-the-job training/apprenticeship program. By describing certain features of that program, ATU's proposals do not purport to state that TriMet must create "classification X," with certain specified duties assigned to that classification.[27] We particularly note that TriMet has proposed a Trainee classification in its final offer, and that any ATU proposal referencing a Trainee position cannot reasonably be read as requiring TriMet to create such a classification, but rather is reflective and responsive to TriMet's position that it intends to create that classification.

TriMet alternatively asserts that the subject of the proposals is the minimum qualifications for a position. We disagree—the text and context of these proposals is for the continuation of some form of on-the-job training/apprenticeship program, which is mandatory for bargaining. ATU is not, in advancing such proposals, asserting or stating what the minimum qualifications for a particular position must be. That determination remains with TriMet. The fact that ATU's proposals have some *effect* on TriMet's determination of minimum qualifications *for positions in the proposed apprenticeship programs* does not change the core feature of ATU's proposal. The core feature of the proposal is an on-the-job training/apprenticeship program, not minimum qualifications. And, as we have previously held, bargaining over the continuation or elimination of apprenticeship programs at TriMet is mandatory in part because of the particular way that these

[26]We reasoned that "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." *TriMet II*, UP-001/003-20 at 7 (Recons Order).

[27]We note that, in reaching our conclusion in the Reconsideration Order that elimination of the apprenticeship programs is a mandatory subject, we rejected TriMet's argument that, at its core, apprenticeship is simply a classification, and therefore a permissive subject. We explained that, at TriMet, the apprenticeship programs touched on "numerous components of the workplace, some of which, if analyzed individually, would be permissive[,]" but that, "for many years, both parties have treated these individual aspects of each apprenticeship program as elements that have coalesced into a single, integrated program." *TriMet II*, UP-001/003-20 at 6 (Reconsideration Order). We reasoned that, as a result, it was "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." *Id.*

programs have become integrated into the TriMet workplace. Accordingly, ATU did not violate ORS 243.672(2)(b) by including these proposals in its final offer.[28]

*b. Joint Committee*

TriMet also objects to ATU's proposals calling for a joint committee to be formed in connection with the proposed on-the-job training/apprenticeship program. TriMet acknowledges that proposals for joint committees on mandatory subjects of bargaining are, likewise, mandatory for bargaining. *See Service Employees International Union Local 503, Oregon Public Employees U v. State of Oregon*, Case No. UP-52-02 at 12-13, 20 PECBR 144, 155-56 (2002). TriMet, however, asserts that the scope of ATU's joint committee proposal is too amorphous to be limited to mandatory subjects of bargaining. We disagree. The disputed proposals each concern the formation of a joint committee as part of TriMet's on-the-job training/apprenticeship program, which we have already determined is mandatory for bargaining, and there is nothing in the proposals from which we can conclude that the committees will be directed at permissive subjects. Consequently, ATU did not violate ORS 243.672(2)(b) when it included its joint committee proposals in its final offer.

*c. Orientation*

TriMet objects to ATU's final offer proposal Article 3.7.8 that provides that any

> "employee who has successfully met all the prerequisites established by the District and is selected to enter a District a training program pursuant to Article 3, Section 21 shall be provided an opportunity to attend a orientation of that program prior to accepting the promotion. The orientation will include a meeting with a trainer to cover job requirements and expectations, working conditions, and an interview with a journey level worker."

According to TriMet, this proposal "infringes on TriMet's right to assign duties by (1) requiring that service workers who have been offered a position in a training program be assigned to attend an orientation session and (2) requiring TriMet to assign a trainer to provide an orientation session, which also imposes on TriMet's right to determine its staffing." ATU counters that the orientation proposal is simply an element of the overall training/apprenticeship program, and does not speak to the "tasks ordinarily performed by employees in the classification of the employee who is given an assignment," *TriMet I*, UP-003-16 at 62, or required "staffing levels." We agree with ATU—the objective reasonable reading of the proposal is not that ATU is attempting to dictate staffing levels or the daily tasks ordinarily performed by employees in a particular classification. Therefore, ATU did not violate ORS 243.672(2)(b) regarding its orientation proposals.

*d. National/State Certified Minimum Standards*

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[28]At points, TriMet asserts that these proposals are permissive because TriMet has stated its intention of not having an apprenticeship program. TriMet is certainly entitled to a bargaining position that it does not want such a program and its own final offer can reflect that bargaining position. Such a position, however, does not affect whether the subject of ATU's proposals is mandatory or permissive.

Finally, with respect to the training/apprenticeship proposals, we address TriMet's objection to ATU's proposal that the program "shall meet the minimum standards for a nationally or state certified competency-based, time based hybrid model for the specific program." TriMet contends that this proposal suffers from the same flaw that made the prior BOLI registration provision permissive for bargaining in our earlier order—namely, that it requires TriMet to relinquish to a third party its control over its own program, which has impacts on management prerogatives that outweigh the impacts on employees' terms of employment. ATU asserts that its proposal was intended to encompass only the mandatory aspects of TriMet's apprenticeship program, while not specifying an outside third-party overseer. The difficulty with ATU's position is that, when asked for further clarification of its proposal by TriMet as to what nationally or state-certified standards the proposal referenced, ATU did not respond. That lack of a response, coupled with the vagueness of the proposal, does not allow us to conclude that the proposal concerned "employment relations," such that ATU could include it in its final offer. In reaching that conclusion, we reiterate that the subject of the elimination of TriMet's on-the-job training/apprenticeship program is mandatory for bargaining, and like health insurance benefits, ATU is entitled to propose standards or minimum standards for such a program, but without specifying a particular provider or outside entity that TriMet must utilize. The vagueness, however, of ATU's proposal in its final offer does not allow us (or TriMet) to meaningfully conclude that its subject concerns employment relations. Therefore, we conclude that ATU violated ORS 243.672(2)(b) by including this proposal in its final offer.

Warranty Work

TriMet objects to the following underlined language in Article 3.9.3 and Article 3.14.2, as requiring TriMet to assign the duties of performing warranty work to trainees:

> "Warranty work will be done by District employees when qualified, and District mechanical employees will participate in all types of warranty work where such participation will aid in the training of District employees, ensures that employees learn the skill to avoid future work being contracted out, and is not merely repetitive in nature, and
>
> "a. Prior to commencing third party or vendor warranty work, including extended warranty work or retrofits that may include warranty work; the District will meet with the Union to explain the nature of the work and the warranty provisions covering the repairs. Documentation from this meeting in a manner and format acceptable to each party will be deemed to be a satisfactory record of the activity.
>
> "b. The District will provide time for mechanics to work with the vendor on warranty work that will provide District mechanics a direct training benefit. Accordingly, the location maintenance manager and the Union executive board member will meet to agree on a plan that provides the optimal training benefit and ensures that employees learn the skills involved in the mechanic work under warranty.
>
> "c. For declared campaigns, vendor 'policy' campaigns, and declared fleet defects where a significant portion of a fleet is affected (20% for Bus and 10% for Rail) the location maintenance manager and the Union will jointly, in good faith

and with all reasonable intent, determine whether the warranty work to be performed is repetitious with little or no continuing learning value. If so determined, in writing, the continued assignment of one mechanic per shift may terminate after the initial start of the work, but not before at least one mechanic per shift has been adequately trained. The District may thereafter allow the vendor to complete the campaign work on its own. In the event the location maintenance manager and the Union executive board member cannot agree on whether a specific warranty activity is 'repetitious with little or no continuing learning value,' the matter will be heard by the Contracting Out Committee, whose decision shall be final."

ATU disagrees with TriMet's assertion that the proposal is directed at the assignment of work tasks, but rather concerns job security and the protection of bargaining unit work, which are mandatory for bargaining. Specifically, ATU states that the proposal is directed at providing on-the-job training for maintenance employees that is relevant to their work at TriMet and ensures that maintenance employees are adequately trained to maintain and repair new vehicles or equipment that TriMet has purchased, so that such work can eventually be performed in-house, instead of being contracted out even after any warranty period has expired. We agree with ATU. The text of the proposal expressly states that mechanical employees will participate in warranty work where that work will aid in training, will ensure that employees learn skills to avoid future work from being contracted out, and is not merely repetitive in nature. Other provisions of the proposal provide further details on how to implement those objectives. We do not read those provisions as curtailing TriMet's right to assign tasks ordinarily performed by an employee when given an assignment. Therefore, ATU did not violate ORS 243.672(2)(b) by including this in its final offer.

Facilities Maintenance Work

TriMet objects to the following carry-forward language in Article 4.1.2 of ATU's final offer:

"Only those functions mutually agreed to be excluded shall be excluded. Facilities Maintenance employees retain the right to all work not specifically excluded. The District will maintain facilities, funding, staffing, and training for all functions necessary to maintain and repair buildings and grounds, owned or operated, in whole or in part, by or for the District. The District and the Union shall meet occasionally to add or delete items from the exclusion list by mutual consent."

TriMet asserts that means that the underlined language limits its right to assign duties because the provision means that "only employees in Facilities Maintenance may perform certain duties, and other ATU employees cannot be assigned those duties." ATU asserts that such an interpretation is incorrect and that, in context, the language is intended to provide job security by limiting TriMet's right to contract out Facilities Maintenance work. In support of that position, ATU notes that the contract contains an "exclusion list" for subcontracting. Therefore, ATU asserts that the above-underlined reference to "work not specifically excluded" means that TriMet cannot subcontract out Facilities Maintenance work, unless it is on that exclusion list. We find ATU's

explanation persuasive, as it is supported by the text of the proposal, in context with the parties' overall agreement. Because the proposal concerns job security and bargaining unit work, it is mandatory for bargaining, and ATU did not violate ORS 243.672(2)(b) when it included that proposal in its final offer.[29]

New Jobs and Classifications

TriMet objects to the following underlined language in Article 9.2.1 of ATU's final offer:

> "The District agreed on the following policy with reference to new jobs and classifications: In the event the District creates a job or classification within the bargaining unit but not presently covered by the Labor Agreement, openings shall first be offered to District employees and filled by these employees if they can meet the qualifications of the job as established by the District. In the event an employee has the basic qualifications necessary, s/he will be given a reasonable training period to learn the details of the job. In making its selection among qualified employees, seniority in the District will be considered. Reasonable rules and procedures to administer the above paragraph shall be worked out between the District and Union, as necessary."

According to TriMet, the underlined language dictates how it fills vacancies by requiring it to offer vacancies to current employees, without regard to whether those employees meet the minimum qualifications of the vacant position. Therefore, TriMet asserts that the subject of the proposal is minimum qualifications, which is permissive for bargaining. ATU asserts that the proposal expressly requires an employee to meet the minimum qualifications as established by TriMet, and that the proposal simply concerns promotional opportunities for existing employees, which is mandatory for bargaining. We agree with ATU. The proposal expressly recognizes TriMet's right to establish qualifications for a position, and merely provides that openings first be offered to existing employees who meet those qualifications. As such, the subject of the proposal concerns job security and promotional opportunities, which are mandatory for bargaining. ATU, consequently, did not violate ORS 243.672(2)(b) when it included this proposal in its final offer.

Mediated Settlement Agreement

On March 5, 2007, the parties reached a settlement agreement that reads, in relevant part, as follows:

> "It is agreed that the Plant Maintenance Tech will not perform work of the Plant Maintenance Mechanic which involves the installation, removal, replacement, maintenance, repair, welding, assembly or disassembly of items described in a, d, and k through bb on the list on page 10 of the PMM apprentice program (see attached) including any lighting, electrical or mechanical system or equipment involving Tri-Met buildings or facilities."

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[29]TriMet expresses concern about the proposal being used more broadly to limit its rights to assign duties. ATU's representation before this tribunal, and our conclusion regarding the meaning of the provision, should assuage those concerns.

TriMet asserts that the subject of this settlement agreement is permissive because it requires TriMet to assign a specific set of duties to the classification of Plant Maintenance Tech. We need not reach the question of whether the subject of the settlement agreement concerns a mandatory or permissive subject of bargaining, because ATU did not include this agreement as part of its final offer. Therefore, we do not find that ATU violated ORS 243.672(2)(b), as alleged.

3. TriMet violated ORS 243.672(1)(e) by bypassing ATU and directly dealing with ATU-represented employees on matters concerning employment relations.

"The foundation of collective bargaining is the concept of exclusive representation of employees by a labor organization." *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85 at 36, 8 PECBR 8160, 8195 (1985) (*McKenzie*). Accordingly, an employer's duty to bargain in good faith with the employees' exclusive agent "demands" that the employer "accept and respect the exclusivity of that agency." *Obie Pacific Inc.*, 196 NLRB 458, 459 (1972). A public employer violates that duty, and therefore ORS 243.672(1)(e), when it deals directly with its represented employees. *Blue Mountain Community College*, UP-22-05 at 97, 21 PECBR at 769; *McKenzie*, UP-14-85 at 36, 8 PECBR at 8195. This Board has described direct dealing as conduct by an employer "that amounts to dealing with the [u]nion through the employees, rather than the employees through the [u]nion." *Blue Mountain Community College*, UP-22-05 at 98, 21 PECBR at 769-70 (quoting *NLRB v. General Electric Co.*, 418 F2d 736, 759 (2d Cir 1969), *cert. denied* 397 U.S. 965 (1970)).[30]

Direct dealing is a per se violation, which means it violates (1)(e) regardless of the employer's subjective intent, because it is "inherently divisive." *McKenzie*, UP-14-85 at 36, 8 PECBR at 8195. Direct dealing "tactics * * * make negotiations difficult and uncertain," and "they subvert the cooperation necessary to sustain a responsible and meaningful union leadership." *Id.* UP-14-85 at 36-37, 8 PECBR 8195-96 (quoting *General Electric Co.*, 418 F2d at 759). Further, "direct dealing violates the union's statutory right to speak exclusively for the employees who have elected it to serve as their sole representative. This right necessarily includes the power to control the flow of communication between the employer and the represented employees concerning subjects as to which the union is empowered to negotiate." *SEIU, AFL-CIO, Local 509 v. Labor Rels. Comm'n*, 431 Mass 710, 715-16, 729 NE2d 1100, 1104-05 (2000). When an employer bypasses the union to deal with employees directly, it "undermines [the] employees' belief that

[30]This Board has decided relatively few section (1)(e) direct dealing cases. For decades, PECBA, unlike the NLRA, expressly prohibited employers from directly communicating employees about bargaining during the period of negotiations, *see former* ORS 243.672(1)(i), and most conduct that would be direct dealing under (1)(e) would also be unlawful communications under (1)(i). Section (1)(i) was repealed in 1995 by the PECBA amendments commonly referred to as SB 750. However, both before and after section (1)(i) was repealed, this Board adopted the NLRA's rule that direct dealing violates the duty to bargain, and therefore violates section (1)(e). *See McKenzie*, UP-14-85 at 35, 8 PECBR at 8194 (employer's direct communications with employees did not violate (1)(i) because they occurred after "the period of negotiations," but did violate (1)(e)); *and Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95 at 16-17, 16 PECBR 559, 574-75 (1996) (direct dealing violates (1)(e) notwithstanding repeal of (1)(i)).

the union actually possesses the power of exclusive representation to which the statute entitles it." *Id.*

In this case, ATU contends that TriMet impermissibly dealt with employees directly in two ways. First, ATU contends that TriMet engaged in direct dealing by asking a bargaining unit employee, a chief station agent named Arronson, to assist in drafting a TriMet bargaining proposal, and by continuing to consult that employee in the course of bargaining over that proposal. Second, ATU contends that TriMet engaged in direct dealing by approaching each employee currently in the Maintenance of Way (MOW) apprenticeship program and asking them whether they would be willing to leave the program and return to their former positions as service workers, if they could retain their seniority, contrary to an existing provision of the WWA. For the reasons discussed below, we conclude that both courses of conduct constitute direct dealing.

Before we address the specifics of each claim, however, we address TriMet's and our dissenting colleague's contention that, as a matter of law, an employer engages in direct dealing only if the employer "actually bargained or attempted to bargain directly with employees." Although we find that TriMet's dealings with Arronson and the MOW apprentices did amount to bargaining, or attempts to bargain, that issue is beside the point, because "[d]irect dealing need not take the form of actual bargaining." *Allied Signal Inc.*, 307 NLRB 752, 754 (1992).[31] In the labor law context, "the broad term 'dealing with'" is not "synonymous with the more limited term 'bargaining with.'" *NLRB v. Cabot Carbon Co*., 360 US 203, 210-11, 79 S Ct 1015, 1020 (1959) (interpreting "dealing," as used in the NLRA definition of "labor organization," as encompassing more conduct than "bargaining"). Thus, for example, this Board held that an employer engaged in unlawful direct dealing by presenting a proposal directly to employees without first presenting it to the union, "[r]egardless of whether the meetings" between the employer and employees "were considered 'bargaining.'" *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95 at 17-18, 16 PECBR 559, 575–76, *adh'd to on recons*, 16 PECBR 707 (1996). *See also Blue Mountain Community College*, UP-22-05 at 100, 21 PECBR at 772 ("The College asserts there was no violation because it never incorporated any of its ideas from the meetings into proposals. This misses the point. The issue is not whether the College made a formal proposal at the bargaining table concerning these issues. The violation is the discussion itself because the discussion was with bargaining unit members rather than their exclusive representative."). In cases where, as here, the employer directly "solicit[ed] employee sentiment over working conditions," the question is not whether the employer was "actual[ly] bargaining," but whether the employer's conduct "is likely to erode the Union's position as exclusive representative." *Allied Signal*, 307 NLRB at 754 (quotation marks and citation omitted)).

We turn to applying these standards to the facts presented in this case, beginning with TriMet's dealings with a bargaining unit employee, Arronson, who was not a designated representative of ATU or a member of ATU's bargaining team. The record establishes that TriMet dealt directly with Arronson in two ways: away from the bargaining table, and at the table. Away

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[31]For guidance in determining what constitutes direct dealing, we may look to cases decided under the NLRA, "particularly to cases decided before 1973, the year in which PECBA was adopted." *Portland Ass'n of Teachers v. Multnomah Sch. Dist. No. 1*, 171 Or App 616, 631 n 6, 16 P3d 1189 (2000). *See also AFSCME, Local 2043 v. City of Leb.*, 360 Or 809, 815-18, 388 P3d 1028 (2017) (reviewing PECBA's legislative history and relationship to the NLRA).

from the table, TriMet consulted with Arronson to determine its own position in bargaining. TriMet asked Arronson for information when developing its initial extra board proposal, and it continued to consult with Arronson regarding potential revisions to that proposal, over the course of successor bargaining. Additionally, TriMet asked Arronson to explain or comment on ATU's bargaining positions. TriMet did not give ATU prior notice, or obtain ATU's consent, before consulting with Arronson in this manner. Further, TriMet did not fully disclose to ATU the extent to which it was consulting with Arronson.

TriMet also unilaterally invited Arronson to have a seat at the bargaining table. First, TriMet invited Arronson to the parties October 31, 2019, bargaining session, without giving prior notice to ATU or obtaining ATU's consent. Because TriMet invited Arronson to bargaining without ATU's prior knowledge or consent, Arronson and the ATU bargaining team members were confused about which "side" of the bargaining table Arronson should be sitting on. He ultimately sat and caucused with ATU. During the session, TriMet asked Arronson to respond to ATU inquiries about TriMet's extra board proposal.

At the July 2020 bargaining session, which was held via videoconferencing, TriMet again brought Aronson to the session without informing ATU. Specifically, Aronson was seated with Steven Callas, TriMet's Director of Service Delivery, who had asked Aronson to attend. Because Callas called into the meeting (and was therefore not visible), it was not immediately apparent to anyone on ATU's bargaining team that Arronson was with Callas at the bargaining session. ATU was not aware of Arronson's presence until ATU asked a question about the extra board proposal, and Callas stated that Arronson was with him and asked Arronson to answer ATU's question. During this session, Arronson and members of ATU's bargaining team expressed different views about the TriMet and ATU proposals under discussion. Normally, ATU would caucus to resolve differences among bargaining unit employees seated at the table, and ATU responded to the exchanges with Arronson by stating the need to caucus, but Arronson did not caucus with ATU at this session.

TriMet's direct dealings with Arronson violated ORS 243.672(1)(e). TriMet worked with Arronson to develop, explain, and revise TriMet's own proposal. TriMet engaged in this conduct without giving ATU prior notice or obtaining its consent. To the extent that TriMet disclosed some of this conduct, that disclosure was after-the-fact and incomplete. TriMet's actions put ATU in the position of bargaining against its own member.[32] TriMet's actions were inconsistent with its obligation to deal exclusively with ATU, and likely to have the effect of eroding ATU's status as the exclusive representative of employees. Accordingly, we conclude that TriMet engaged in direct dealing in violation of ORS 243.672(1)(e).

In reaching that conclusion, we disagree with TriMet's argument that Aronson was brought in simply as a "subject matter expert" to aid in the parties' negotiations. This Board has not

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[32]TriMet contends that its consultation with Arronson could not constitute direct dealing because it did not directly concern Arronson's own terms of employment. That fact makes no difference. ATU, as the employees' exclusive representative, had the sole prerogative to choose which employees would participate in bargaining. TM unlawfully overrode ATU's choice by unilaterally selecting Arronson to help TriMet develop and bargain over a proposal that affects other bargaining unit employees.

previously approved or disapproved of a public employer bringing a represented employee to table bargaining as a subject matter expert, and we need not make any broad proclamations about such a practice in this case. TriMet's actions went well beyond the act of inviting an employee to answer potential questions from both sides about an operational issue. Rather, the record establishes that TriMet approached a bargaining unit member, explained to him TriMet's concept for a proposal, and then used that member to develop its proposal, all before bringing the matter to ATU, the exclusive representative. TriMet continued to consult with Arronson, away from the table, as the parties bargained over TriMet's proposal. And, TriMet unilaterally invited Arronson to table bargaining, and deferred to that employee to answer ATU's questions about TriMet's proposal. Such actions go well beyond asking an employee to answer questions about existing operations that arise at the bargaining table.[33] Therefore, we conclude that TriMet violated ORS 243.672(1)(e).

Next, we address TriMet's solicitation of the MOW apprentices as to whether they would be interested in leaving the apprenticeship program. As set forth in the facts above, on October 6, 2020, Sarah Browne, a TriMet labor relations representative, and MOW managers met for a regular monthly meeting. At that meeting, MOW manager Keith Bounds represented that some MOW apprentices wanted to leave the program, based on a representation made by Casey Goldin, who had just been promoted from MOW supervisor to MOW manager.[34] Bounds asked whether TriMet had negotiated with ATU about allowing the apprentices to leave the program and return to their former service worker positions without a loss of seniority.[35] Browne reported the issue to Cusack, and they decided to determine which apprentices were interested in leaving the program if they could retain their service worker seniority, before raising the issue with ATU.

[33]We would expect in such circumstances that the public employer would notify the exclusive representative in advance about the need for such input at the bargaining table.

[34]Viewing the record as a whole, we find that Goldin subjectively believed that some apprentices wanted to leave the program, but that his subjective belief was based on a misinterpretation of a comment made by an apprentice, Jason Breedlove, indicating that he "felt stuck" in the program because TriMet was proposing, in bargaining with ATU, to place outside hires ahead of apprentices on the journey worker seniority list. (Goldin also testified that he based his belief on a few other comments by apprentices that he "overheard" over a period of two to three years, but his testimony was too vague and unspecific to establish that any apprentice actually expressed interest in leaving the program.) We credit Breedlove's testimony that he did not tell Goldin that he "felt stuck" because he wanted to leave the apprenticeship program. However, even if some apprentices had indicated that they felt stuck because they wanted to leave the program but could not without a loss of seniority, as Goldin apparently believed, that would not change our conclusion that TriMet engaged in direct dealing when it engaged in the conduct described above.

[35]Article 3, Section 15, Paragraph 8 of the expired CBA states: "Upon six (6) months' accrual in an apprenticeship program, an employee shall forfeit seniority held in the employee's previous classification" after six months in the program. 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 [TriMet] and the Union."

TriMet understood that this was an option that could not be offered to the apprentices unless TriMet and ATU mutually agreed to it, *i.e.*, it was a matter that was subject to bargaining.

Browne delegated the task of gauging the apprentices' interest in this bargainable option to Bounds, who delegated it to Goldin. Goldin met briefly with each of the five MOW apprentices, and he asked each one if they would be interested in leaving the program if it was an option to return to their service worker position without a loss of seniority. Goldin explained to each apprentice that, if they were interested in leaving the program, TriMet could "make a deal" with ATU so that they could retain their seniority. Goldin also explained to each apprentice that he was presenting TriMet's perspective, and that he would report their response to his question to TriMet. Subsequently, TriMet represented to ATU that four out of five of the apprentices wanted to leave the apprenticeship program, if they could return to their service worker positions without loss of seniority.[36] TriMet also informed ATU that TriMet "would agree that they all get their Service Worker seniority back."

At the time that Goldin questioned the apprentices, TriMet was engaged in successor bargaining with ATU, and the subject of ending the apprenticeship programs, including the MOW program at issue, was a significant, if not the primary, focus of the parties' bargaining.[37] Additionally, the parties had been bargaining for several years over whether outside-hired journey workers should be placed ahead of, or behind, existing apprentices on the seniority list. If all, or even just some, of the MOW apprentices left the program, that could enable TriMet to deregister or eliminate the MOW apprenticeship program sooner, and partly moot the parties' bargaining dispute over the journey worker seniority list.

Under these circumstances, we conclude that TriMet (through its manager), directly approached ATU-represented employees (the five MOW apprentices) to gauge their interest in changing a matter of employment relations (terminating their status as apprentices with the

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[36]In fact, the record establishes that none of the apprentices actually wanted to leave the program under the status quo. Baker testified unequivocally that he told Goldin that he did not want to leave the program, and that he wanted to "finish what he started." Further, even according to Goldin, the apprentices told him that they would be interested in leaving the program *only if* TriMet succeeded in bargaining to place the outside journey workers ahead of them on the seniority list. TriMet did not relay that aspect of the apprentices' responses to ATU; TriMet simply represented that the employees wanted to leave the program, even though the parties had not yet resolved the seniority issue (much less agreed to TriMet's proposal). Even assuming this omission was unintentional, it reveals another reason why TriMet should not have attempted to ascertain the employees' preferences by asking a manager to question them directly: because a management representative is more likely to view the employees' responses through the lens of the employer's management interests. Further, assuming that TriMet Labor Relations was unaware that Goldin omitted this information until the hearing in this matter, then TriMet's attempt to ascertain the employees' interest in leaving by questioning them directly caused TriMet to incorrectly believe that four employees wanted to leave the program—a belief that contradicted ATU's representations in bargaining that the employees highly value the apprenticeship programs and the journey worker status they convey.

[37]With respect to the MOW apprenticeship program, TriMet intends to end BOLI registration after the current apprentices graduate or leave the program. Although TriMet plans to operate a MOW signals training program after it eliminates the registered apprenticeship program, the minimum qualifications for a trainee position in that program, and the content and nature of the program, will be substantially different.

condition of maintaining seniority), rather than discussing that matter with the exclusive representative (ATU). Such conduct amounts to direct dealing, and is therefore a *per se* violation of ORS 243.672(1)(e), under longstanding labor law doctrine and case precedent.

Since before PECBA was enacted, the NLRA (which PECBA was modeled on), has barred an employer's "direct effort to determine employee sentiment" about a mandatory subject of bargaining as unlawful direct dealing. *See Obie Pacific*, 196 NLRB at 458-59 ("An employer who by polling its employees, or otherwise, solicits employee sentiment with regard to a subject of collective bargaining instead of leaving such effort to the employees' representative tends to undermine the union's status as the employees' exclusive representative and thereby violates the Act."). That foundational principle has been reiterated as a core concept of labor law. *See, e.g.*, *Harris-Teeter Super Markets, Inc.*, 310 NLRB 216, 217 (1993) (An employer "may not seek to determine for himself the degree of support, or lack thereof, which exists for a position that it seeks to advance in negotiations with the employees' exclusive bargaining representative." (internal quotation marks and citation omitted)); *Wallkill Valley Gen. Hosp.*, *aka Alexander Linn Hospital Assn.*, 288 NLRB 103, 106 (1988) *enfd sub nom*, *NLRB v. Wallkill Valley General Hospital*, 866 F2d 632 (3d Cir 1989) (An employer's "actions in ascertaining employee sentiment constitute[s] a bypassing of the [u]nion."). Moreover, such direct efforts to determine employee sentiment constitute "direct dealing," even though such conduct is not "actual bargaining." *Allied Signal*, 307 NLRB at 754 (citing *Alexander Linn Hospital Assn.*, 288 NLRB at 106; *Jafco, a Div. of Modern Merchandising Inc.*, 284 NLRB 1377, 1379 (1987); and *Obie Pacific*, 196 NLRB at 458-59). As PECBA was modeled on the NLRA (and nothing in PECBA indicates a contrary approach), we find it consistent with the policies and principles of PECBA to apply those longstanding principles here.

In this case, as described above, TriMet "sought to ascertain employee opinion" about an issue that is subject to bargaining before bargaining about it—"a job that belonged to the Union." *Wallkill Valley*, 288 NLRB at 106.[38] TriMet could have informed ATU that it would agree to permit any MOW apprentice to leave the program without loss of seniority without first polling the apprentices to determine which ones would be interested in that option, and allow ATU to determine which, if any, apprentices would be interested. Instead, TriMet chose to deal with ATU through the employees, instead of dealing with the employees through ATU. Such conduct "plainly erodes the position of the designated representative." *Allied Signal*, 307 NLRB at 754. Accordingly, we conclude that TriMet engaged in direct dealing, a per se violation of the duty to bargain in good faith.

TriMet contends that, in questioning the MOW apprentices, it was merely engaged in contract administration, citing Article 3, Section 15, Paragraph 8 of the expired CBA. We disagree with that characterization of TriMet's conduct, for several reasons. To begin, the contract expressly provides that an employee can leave an apprenticeship program after six months without loss of seniority only "by mutual agreement between" TriMet and ATU. That is, TriMet ascertained employee interest in an option that was, by the express terms of the CBA, subject to bargaining with ATU. Additionally, the contract provision, by its express terms, applies to individualized circumstances, *i.e.*, when "a particular employee" "elect[s] to return to his/her previous

[38]This is not a case in which the employees initiated a discussion with the employer.

classification." TriMet was not merely responding to a particular employee's request to leave the apprenticeship program after six months. Rather, TriMet initiated conversations with all of the MOW apprentices, and TriMet told ATU that TriMet would agree to allow all employees who wanted to leave the program to retain their seniority, without regard to any individualized circumstances. TriMet's offer to ATU went beyond the express terms of the contract provision, and represented a change in a term of employment for the MOW apprentices as a group.[39]

Even assuming that Paragraph 8 was applicable under these circumstances, the fact remains that TriMet attempted to determine whether the MOW apprentices would be interested in leaving the apprenticeship program pursuant to that provision, while the parties were engaged in bargaining over TriMet's plan to eliminate that program and TriMet's proposal to place outside journey workers ahead of the apprentices on the seniority list. Whether intended or not, TriMet's proposal to allow any MOW apprentice to leave the program without loss of seniority would undercut ATU's bargaining positions on those issues. When TriMet asked the apprentices about the option of leaving the program and retaining their seniority, and indicated that TriMet was willing or able to "make a deal" with ATU for that option, TriMet was effectively holding itself out as the party who is responsible for ascertaining the apprentices' preferences and advancing their interest in bargaining—thereby usurping ATU's role as exclusive representative. Further, when TriMet conveyed to ATU which employees were purportedly interested in leaving the program if they could retain seniority, TriMet placed ATU in an untenable position. If ATU agreed to allow four out of five (or potentially all) of the apprentices to leave and retain their seniority, it would be undermining its own positions in bargaining over the apprenticeship programs. If ATU refused, then ATU risked appearing to be the party standing in the way of the apprentices being able to leave the program without losing their seniority. "[D]irect employee communication which is conducted in such volume and under such conditions as to suggest to employees that 'the Employer rather than the Union is the true protector of the employees' interest,' violates the duty to bargain in good faith and constitutes unlawful 'direct dealing' with employees." *AMF Inc.-Union Mach. Div.*, 219 NLRB 903, 909 (1975) (quoting *General Electric Co*., 150 NLRB 192, 194-95 (1964)). Accordingly, whether TriMet's conduct can be characterized as an administration of Paragraph 8 or not, we conclude that it constituted direct dealing under the totality of the circumstances.[40]

In arguing for a different result, TriMet relies on *Hood River Employees Local 2503-2/AFSCME v. Hood River County*, Case No. UP-92-94 at 16, 16 PECBR 433, 448 (1996), *aff'd without opinion*, 146 Or App 777, 932 P2d 1216 (1997). In that case, the Board dismissed a

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[39]We also note that TriMet, in successor bargaining, had proposed striking Article 3, Section 15, Paragraph 8 from the contract, and taken the position that it (along with all other apprenticeship-related provisions) involved permissive subjects of bargaining, which means that, in TriMet's view, that provision was not part of the status quo at the time that TriMet questioned the apprentices (because the contract had expired).

[40]Because TriMet did not fully disclose to ATU the nature and extent of its dealings with Arronson or the MOW apprentices, we do not construe any lack of immediate and express objections by ATU as a waiver (which, in any event, is an affirmative defense that TriMet did not plead), or as sufficient evidence that ATU consented to that conduct. Further, when ATU gained sufficient information about the nature and extent of those dealings, it did object—by timely filing the instant unfair labor practice complaint.

(1)(e) direct dealing allegation where (1) the union president, rather than the union's chief bargaining spokesperson, spoke directly with the county administrator "to discuss an extension of the [] deadline for the conclusion of negotiations and receipt of retroactive pay"; and (2) the county administrator wrote a letter to the union president, rather than the union's chief spokesperson, that the County was not willing to return to the negotiating table and was modifying its proposals on wages and insurance premiums. In both instances, the union's designated bargaining spokesperson had no objection to the contacts at issue. We find this case distinguishable, as it did not involve communications between ATU's president and a high-level bargaining representative at TriMet. Rather, this involved a manager (and immediate former supervisor of the apprentices) holding one-on-one meetings with represented employees to assess their interest in a matter subject to bargaining with ATU, and that related to other issues of great concern to ATU at the bargaining table.

Likewise, we are not persuaded that *Coos Bay Firefighters Association v. City of Coos Bay and Coos Bay Fire Department*, UP-41-98, 18 PECBR 515 (2000), warrants a different result. In *Coos Bay*, the employer informed individual captains and the union on the same day about a reorganization plan that would convert those captain positions to battalion chiefs. When the association demanded to bargain, the employer agreed to delay implementation and engage in impact bargaining over the reorganization. In concluding that the conversations with the captains did not violate ORS 243.672(1)(e), the Board explained that the City was informing the captains of a decision that the City had already made (a decision that was, in itself, a permissive subject of bargaining), and that there was "no evidence that the City sought any feedback or input from the captains about its plans." *Coos Bay,* UP-41-98 at 11, 18 PECBR at 525. Here, in contrast, the primary purpose of TriMet's discussions with the apprentices was to get feedback or input from the apprentices about TriMet's idea of permitting the apprentices to leave the program with the promise of retained seniority, which was an idea that was subject to ATU's mutual agreement. Therefore, *Coos Bay* is materially distinguishable.[41]

In sum, we conclude that TriMet violated section (1)(e) when it dealt directly with Arronson regarding its extra board proposal, and when it dealt directly with the MOW apprentices regarding its proposal to allow them to leave the apprenticeship program without loss of seniority.

4. The totality of TriMet's bargaining conduct did not amount to surface bargaining in violation of ORS 243.672(1)(e).

ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer or its designated representative to "[r]efuse to bargain collectively in good faith with the exclusive

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[41]The facts that TriMet questioned the employees informally, that the MOW manager subjectively believed he was helping the employees, that TriMet lacked subjective intent to undermine ATU, that TriMet subsequently presented the information to ATU, or that the apprentices did not, ultimately, leave the program, have no bearing on the question of whether TriMet engaged in direct dealing by attempting to directly ascertain employee sentiment on an issue subject to bargaining. *See, e.g.*, *Shenango Steel Bldg., Inc.*, 231 NLRB 586, 586 (1977) (concluding that employer engaged in direct dealing by "bypassing the Union to ascertain employees' desires for a 10-hour-a-day 4-day workweek," where the employer "subsequently submitted its proposal to the Union" and then "withdrew it," and the employer's actions were "designed to help employees * * * rather than to disparage the Union's status").

representative." Under PECBA, "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[.]" ORS 243.650(4).

ATU contends that TriMet violated ORS 243.672(1)(e) by engaging in bad faith "surface" bargaining. Surface bargaining is going "through the motions of collective bargaining" without a "sincere desire—or 'willingness,' as called for in ORS 243.656(5)—to reach an agreement." *McKenzie*, UP-14-85 at 37, 8 PECBR at 8196. In a case involving a strike-prohibited unit, the complainant must prove that the respondent "did not intend or desire to reach a negotiated settlement, but rather, throughout all or most of the process, planned to take its proposals to arbitration." *City of Portland v. Portland Police Commanding Officers Association*, Case Nos. UP-19/26-90 at 44, 12 PECBR 424, 467, *adh'd to on recons*, 12 PECBR 646 (1990).

In reviewing a claim of alleged surface bargaining, we examine the totality of the circumstances to determine whether a party's cumulative actions indicate a sincere willingness to reach a negotiated agreement. *Jackson County v. SEIU Local 503, OPEU/Jackson County Employees Association*, Case No. UP-027-14, 26 PECBR 501 (2015); *Oregon AFSCME Council 75, Local 2936 v. Coos County*, Case No. UP-15-04 at 33-37, 21 PECBR 360, 392-96 (2006). We "judge the overall quality of bargaining[,]" *Lincoln County Employees Association v. Lincoln County and Glode, District Attorney*, Case No. UP-42-97 at 22, 17 PECBR 683, 704 (1998), and "carefully examine and weigh circumstantial evidence in order to draw an inference concerning good faith or bad faith bargaining." *McKenzie*, UP-14-85 at 37, 8 PECBR at 8196.

In a surface bargaining case, we examine multiple factors, including (1) whether dilatory tactics were used; (2) the contents of the proposals; (3) the behavior of the party's negotiator; (4) the nature and number of concessions made; (5) failure to explain a bargaining position; and (6) the course of negotiations. *Rogue Valley Transportation District*, UP-80-95 at 26, 16 PECBR at 584. We also consider other factors that might be relevant in any given case. *See, e.g., Rogue Valley Transportation District*, UP-80-95 at 29, 16 PECBR at 587. Ultimately, we our analysis is grounded in a careful assessment of the totality of the circumstances.

With this standard in mind, we turn to an analysis of ATU's claim. Because the parties dispute many aspects of TriMet's conduct, we first describe our assessment of the record with respect to the surface bargaining factors. Following that discussion, we assess TriMet's conduct under the totality of the circumstances.

Whether Dilatory Tactics Were Used

To begin, we consider ATU's contention that TriMet engaged in dilatory tactics. It "may indicate bad faith bargaining when a party engages in dilatory tactics that tend to unreasonably impede negotiations." *McKenzie*, UP-14-85 at 38, 8 PECBR at 8197. ATU contends that TriMet engaged in dilatory tactics by engaging in direct dealing. Direct dealing, like other unfair labor practice conduct, may be evidence of surface bargaining, and we will consider that in our analysis of all relevant factors. However, we do not agree that direct dealing conduct is a type of "dilatory tactic" that causes delay or unreasonably impedes negotiations.

As ATU concedes, the record shows that TriMet did not engage in any dilatory tactics. To the contrary, TriMet was diligent in scheduling and engaging in bargaining sessions with ATU. In addition to table bargaining, TriMet informally met with ATU in small groups multiple times before formal bargaining started, and TriMet's chief negotiator exchanged numerous emails with ATU's chief negotiators to clarify proposals and share information.

Ultimately, the parties participated in a total of 15 bargaining sessions from October 10, 2019 to July 31, 2020, when ATU requested mediation. For most of four of those months, from March to June 2020, the parties had mutually agreed to put table bargaining on hold because of the COVID-19 pandemic. The parties also engaged in four mediation sessions, from September 3 to September 23, 2020, when TriMet declared impasse. Moreover, TriMet representatives repeatedly suggested to ATU that the parties schedule more bargaining sessions to allow sufficient time to deal with their complex contract.

For example, in April 2019, when the parties were preparing for the upcoming successor bargaining, TriMet proposed 19 bargaining dates, in the period from September 2019 to February 2020. ATU agreed to only ten of those dates. When TriMet requested that the parties schedule additional sessions and ATU declined, Cusack notified ATU that he was "really concerned" about the lack of scheduled bargaining sessions in the 150-day bargaining period provided for under ORS 243.712. Later, in June 2019, Cusack reiterated that he did not believe ten sessions were "sufficient for the level of complexity of our contract." Cusack committed that he would "meet on any day after the start of bargaining," except holidays, but ATU did not agree to schedule additional sessions.

After the parties agreed to resume bargaining in June 2020, TriMet again suggested scheduling more bargaining sessions. Specifically, on June 9, 2020, Kim Sewell, TriMet's Executive Director of Labor Relations and Human Resources, emailed ATU to suggest that the parties bargain earlier than scheduled, on June 18 (instead of in late June). ATU did not agree, and the parties then held a bargaining session on June 24, 2020. Then, TriMet stated that it wanted to schedule additional dates, but once again, ATU declined to provide more dates. Later, on July 6, 2020, when the parties discussed scheduling, Stark proposed only a single bargaining date: July 23, 2020. Cusack responded with disappointment, noting that it was "almost like ATU doesn't want to bargain[,]" and proposed five dates in addition to July 23. In response, ATU explained that July 23 did not work after all, and agreed to bargain only on two dates, July 29 and 31. After the July 31 session, ATU unilaterally requested mediation.

In sum, TriMet's diligence in bargaining, and its repeated efforts to engage in more bargaining, are indicative of intent to reach a negotiated settlement.

The Behavior of the Party's Negotiator

Next, we consider the conduct of TriMet's chief negotiator, Laird Cusack. In examining the conduct of a party's negotiator, "we focus on the effect that the negotiator's conduct had on the bargaining process." *Oregon School Employees Association v. Medford School District #549C*, Case No. UP-77-11 at 15, 25 PECBR 506, 520 (2013). Where, for example, "a representative

makes no proposals, offers no counterproposals, has no apparent authority to negotiate, is non-responsive to inquiries from the other party, and tinkers with contract language away from the bargaining table, such conduct indicates an intention not to bargain or reach agreement." *Id*. (citing *Hood River County*, UP-92-94 at 22, 16 PECBR at 454). A party's failure to respond to legitimate inquiries, or failure to be responsive "even when responding," can illustrate "a lack of regard for the PECBA requirement that parties communicate with each other about their labor dispute in a forthright and timely manner." *Id*.

Here, ATU alleges that Cusack made insulting or demeaning remarks about bargaining unit employees, and that he was unresponsive to ATU's concerns and proposals. TriMet either denies that Cusack made the alleged statements, or contends that ATU misconstrues them. TriMet also denies that Cusack was unresponsive. We resolve those disputes as follows.

We begin with ATU's allegation that Cusack effectively accused employees of faking illnesses to obtain disability benefits. Cusack denied that he made a statement to that effect, and TriMet contends that ATU is merely misinterpreting statements that Cusack made when explaining why the quotes for short-term disability plans were high. Cordova, one of ATU's negotiators, testified that Cusack responded to ATU's short-term disability proposal by stating something to the effect of, "then they'll never come to work," and that she understood him to be implying that employees would fake illnesses to access disability benefits. Additionally, TriMet's bargaining notes reflect that, at the parties' January 13, 2020, bargaining session, Stark stated that she thought TriMet would make a proposal on short-term disability, and Cusack responded, "Absenteeism is a problem. We are not going to make a proposal on short term disability so they can miss more time." Those bargaining notes corroborate Cordova's testimony to the extent that Cusack equated a new benefit with increased absenteeism, and Cordova's interpretation of that statement as demeaning employees was understandable.

However, we also find that Cusack made distinct statements regarding the disability plan quotes, and that those statements do *not* reflect a belief that employees would fake illnesses, as ATU contends. In essence, Cusack repeatedly attempted to explain his understanding that the quotes were high because insurers assume that, when an employer provides a better disability benefit, more employees take disability leaves. We credit Cusack's testimony that he was merely reporting to ATU what insurance brokers had told him. Further, we do not agree with ATU's contention that by discussing that assumption, Cusack was again implying that employees will fake illnesses to get benefits. Rather, as ATU itself contends, it is reasonable to assume that, if employees have better disability benefits, more employees who have qualifying disabilities will be able to take disability leave. The assumption that, if TriMet offers better disability benefits, more employees will use those benefits, is merely an extension of the former.

Relatedly, ATU alleges that TriMet was unresponsive to ATU's proposals for short- and long-term disability benefits, and further alleges that TriMet was unresponsive because Cusack believes that employees would abuse such benefits. TriMet denies that it was unresponsive, and asserts that ATU was proposing a type of long-term disability plan that does not exist in the market. Based on our review of the record, we find that the facts are more nuanced than either party acknowledges.

ATU alleges that the record shows "TriMet never made a short-term or long-term disability proposal, and never counteroffered ATU's proposals on the same." It is true that TriMet never made a proposal for short- or long-term disability benefits. However, TriMet had no duty to make a disability benefit proposal in the first instance, even if TriMet employees need disability benefits, as ATU maintains. TriMet declining to make an *initial* proposal for disability benefits is not unresponsive conduct. Further, we do not agree with ATU's assertion that TriMet "never counteroffered" ATU's proposal for disability benefits: TriMet counter-proposed the status quo. Further, significantly, ATU did not make a written proposal for short- and long-term disability benefits until June 24, 2020, which was approximately nine months after the start of bargaining.[42] After the June 24 session, the parties had only two more table bargaining sessions, primarily because ATU declined to schedule more sessions before it requested mediation. Under these circumstances, we would not consider a failure to make a counteroffer to ATU's June 24 proposal to be "unresponsive" conduct.

The record does reflect that Cusack did not timely respond to ATU's request for quotes for short- and long-term disability benefits after he agreed to provide quotes. ATU made that request on or before January 13, 2020, and Cusack provided them on August 16, 2020.[43] By that time, the parties had ended table bargaining and were starting mediation. However, the record does not establish that Cusack was willfully unresponsive because he believed that a short-term disability benefit would encourage absenteeism, as ATU contends. There is no evidence that ATU reminded Cusack of its request for quotes, or otherwise pursued it, at any point between January 13 and June 24, 2020.[44] We also note that bargaining was on hold due to the COVID-19 pandemic from late March to early June. Under these circumstances, even considering Cusack's statement regarding absenteeism, we decline to infer that the delay was willful.

We agree with ATU that the parties did not engage in much meaningful bargaining about its disability benefit proposal. It appears that, instead of discussing the proposal at the table, the parties exchanged emails late in the bargaining process, and they lacked a shared understanding of what kinds of disability benefits are available and what ATU intended to propose. However, we do not agree with ATU that those problems were caused solely or even primarily by Cusack. Both

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[42]ATU's initial proposal, made on October 10, 2019, did not include a proposal for short- or long-term disability benefits. Rather, ATU proposed only to increase the amount of extended sick leave pay provided for under the existing CBA.

[43]The parties' bargaining notes suggest that ATU asked TriMet to obtain a quote for a short-term disability plan on or before October 10, 2019, but the notes are vague, and ATU provided no other testimony or evidence that clarifies when it first made the request.

[44]ATU reiterated its request for quotes at the parties June 24 session, and Cusack acknowledged that he still owed ATU the quotes at the parties July 29 session.

parties bear responsibility for delaying bargaining over the proposal, and both parties bear responsibility for their poor communication.[45]

We turn to ATU's allegation that Cusack stated in bargaining that TriMet maintenance mechanics are "not smart enough" or cannot be trained to maintain hybrid and electric buses (which, under TriMet's current plans, will eventually comprise TriMet's entire bus fleet). We find no evidence that Cusack actually made such statements. In support of this allegation, ATU points to one exchange reflected in the parties' bargaining notes: after TriMet made a proposal that would expressly exclude various types of electric bus maintenance from the scope of bargaining unit work, an ATU representative suggested that TriMet made the proposal because it does not think its employees are "trainable." Bennett, then TriMet's bus maintenance director, responded something to the effect of, "this is high quality engineering, writing code." At hearing, ATU did not dispute that TriMet lacks the specialized facilities and expertise needed to perform the type of engineering and coding work that Bennett was referring to. We also note that TriMet's proposal provided that, after TriMet determined which type of electric bus it would purchase, TriMet would meet with ATU "to discuss whether parts of this work should be brought in house." Under these circumstances, we do not construe Bennett's response, or TriMet's proposal, as demeaning the intelligence of TriMet employees.

ATU also notes that Cusack, at a bargaining session on December 5, 2019, accused TriMet employees of hazing other employees. Cusack did not deny he made that comment, but testified that, in his view, the comment was justified because some outside hires had complained that they were ignored by TriMet journey workers who had progressed through TriMet's apprenticeship programs. ATU also notes that Cusack accused bargaining unit supervisors of sleeping in their cars. Again, Cusack did not deny that he made such a comment, but testified that there had been an investigation of one supervisor who allegedly was sleeping in her car late at night. Cusack also recalled that he made the comment when discussing TriMet's desire to shift from a system in which supervisors waited in their cars to be called to address problems to a system in which they proactively visit platforms.

On the one hand, Cusack credibly testified that his comments were based on complaints or allegations against some employees, and ATU did not dispute that those complaints were made. On the other hand, Cusack's comments can fairly be characterized as overstating the nature or extent of the problem. We recognize why ATU considers overly negative

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[45]For example, in response to the quotes Cusack provided, ATU asserted that more cost-effective plans exist, including "voluntary" long-term disability (LTD) plans. Cusack then asked Mercer, TriMet's health care consultant, to research voluntary LTD plans, and provided ATU with Mercer's chart of "voluntary LTD plans," which indicated that all voluntary LTD plans have minimum participation requirements. Cusack's cover email stated, "Mercer did a survey about the availability of voluntary LTD; minimum participation is required." Cusack did not state, at that time, that voluntary LTD plans do not exist in the marketplace. After ATU submitted its final offer, which included a proposal that TriMet offer employees a "voluntary LTD plan," Cusack asserted that voluntary LTD plans do not exist in the marketplace, because all LTD plans have minimum participation requirements. In response, Stark clarified that ATU understood that voluntary LTD plans have minimum participation requirements, and that is the type of plan ATU was proposing. In response, Cusack again asserted that ATU was proposing a plan that does not exist, because ATU's proposal did not include a minimum participation level.

comments, or generalizations based on the conduct of a single employee, to be demeaning towards employees, and we do not condone them. However, as this Board has repeatedly observed, "Emily Post-approved deportment is not a requirement of good faith bargaining, even though discourteous or otherwise-offensive behavior is not necessarily desirable." *McKenzie*, UP-14-85 at 39, 8 PECBR at 8198. Cusack's comments do not rise to the level of incivility, falsity, or belligerence that indicates bad faith.

Finally, we address ATU's allegation that, throughout bargaining, Cusack's attitude was largely indifferent to ATU's concerns and interests. For example, Hunt, ATU Vice President and Assistant Business Agent, testified that Cusack appeared to have no interest in understanding how TriMet's proposals impacted ATU bargaining unit employees, and had little interest in collaborating with ATU to resolve problems, even when ATU made proposals in an effort to "meet TriMet's interests." The duty to bargain in good faith does not require the parties to adopt an interest-based or collaborative approach to bargaining. Nor does it require each party to have sincere interest in the concerns of the other. It requires only a sincere intent to negotiate an agreement. Thus, ATU bears the burden of proving not just that Cusack appeared indifferent, but that he was so indifferent or inattentive in bargaining that his conduct should be considered circumstantial evidence of bad faith. ATU did not meet that burden. ATU offers only conclusory and generalized testimony in support of this contention. Further, as discussed below, the record shows that TriMet modified at least some of its proposals in response to ATU's concerns, which suggests that Cusack "heard" those concerns, even if he appeared indifferent to them at the table.

<u>Factors Related to the Course of Bargaining</u>

ATU contends that several factors related to the course of bargaining indicate that TriMet engaged in surface bargaining, including the contents of TriMet's proposals, the nature and number of concessions and counteroffers made by TriMet, and TriMet's overall approach to bargaining. Specifically, ATU contends that TriMet made many unduly harsh and unacceptable proposals, including proposals that would lead to increased contracting out of ATU work; proposals that would eliminate or limit job mobility and career opportunities for ATU bargaining unit employees; and a regressive wage proposal. ATU also contends that TriMet's initial proposals, when viewed together, were unduly harsh, because they comprised an overwhelming number of significant "takeaways" that were counterbalanced only by TriMet's wage proposal (which it subsequently reduced). Further, ATU contends that TriMet generally adopted a "take-it-or-leave-it" approach to bargaining. TriMet contends that its proposals were not unduly harsh, but instead addressed legitimate operational issues or other management concerns. TriMet also contends that it was merely engaged in hard bargaining, and that its proposals must be judged in light of ATU's initial proposals, which were also aggressive. TriMet also contends that it made more significant concessions or counteroffers to ATU proposals than ATU asserts.

Below, we first address the content of the TriMet proposals that ATU contends were unduly harsh and predictably unacceptable. We then address ATU's argument that TriMet made so many harsh "takeaway" proposals that it knew or should have known that those proposals would impede bargaining. We will then assess the nature and number of TriMet's concessions and counteroffers, and the overall course of bargaining.

The Contents of TriMet's Proposals

Unduly harsh or unreasonable proposals can indicate bad faith bargaining, depending on the circumstances. The party attempting to prove bad faith must prove "not just that a particular proposal was harsh or unreasonable," but that the terms of the proposals were so *unduly* harsh or unreasonable that it can be said that the employer "knew or should have known that the proposals were predictably unacceptable." *Oregon AFSCME Council 75, et al. v. State of Oregon Executive Department*, Case No. UP-99-85 at 16, 9 PECBR 9085, 9100 (1986). An "unduly" harsh proposal is one that is harsh to an unwarranted degree. When proposals are unduly harsh or unreasonable, they do not in and of themselves establish bad faith, but they can be considered circumstantial evidence that indicates "that the employer engaged in negotiations with the intent to frustrate the bargaining process, rather than to reach agreement." *Id*.

When we assess a claim that a proposal is unduly harsh or unreasonable, we do not look at a proposal in isolation; we look to the totality of the circumstances. *See Ass'n of Or Corr Emps v. State*, 213 Or App 648, 660, 164 P3d 291, *rev den*, 343 Or 363, 169 P3d 1268 (2007) (assessing employer's wage freeze proposal in light of state budgetary shortfall); *Portland Association of Teachers v. Portland School District No. 1J*, Case Nos. UP-35/36-94 at 26-27 n 9, 15 PECBR 692, 717-18 n 9 (1995) (noting that wage cuts are always "predictably unacceptable," but the Board looks to the totality of the circumstances to assess proposals).

Below, we consider each of the TriMet proposals that ATU contends were unduly harsh, first individually, and then in the aggregate.

We begin with TriMet's proposal to eliminate the apprenticeship programs, which appears to be the crux of the parties' conflict in this matter. There is no dispute that maintaining the apprenticeship programs was a core (perhaps *the* core) bargaining priority for ATU, and that, correspondingly, ending the existing apprenticeship programs was a similar priority for TriMet. In our prior order and elsewhere in this order, we have explained the significance of these programs, as part of our conclusion that TriMet must bargain over the decision to end any of the apprenticeship programs. That the subject of the proposal is mandatory or particularly meaningful for one party (or both) does not, however, mean that either party is precluded from making proposals that reflect its own interests, even when those interests conflict with those of the other party. Determining when a proposal has crossed the line from harsh to unduly harsh can be difficult, particularly when both parties attach significance to the subject.

We begin by assessing TriMet's apprenticeship proposal in the context of the totality of the circumstances. Here, those circumstances included TriMet's legitimate operational reasons for changing how it hires and trains employees. Just as preserving the apprenticeship programs was a core priority for ATU, eliminating the rigidity that TriMet perceived in both BOLI-certification and other apprenticeship components, including the JATC, was a core bargaining priority for TriMet. Further, TriMet explained the operational issues that elimination of the apprenticeship programs is aimed at addressing; in essence, TriMet seeks to reduce training costs and address a

current shortage of mechanics by hiring employees with outside mechanic training and experience, instead of training TriMet service workers to be mechanics.[46]

ATU contends that elimination of the apprenticeship programs is unduly harsh because they constitute a substantial employment benefit at TriMet, without which, service workers have no career path at TriMet. However, ATU does not dispute that TriMet's stated reasons for eliminating the apprenticeship programs reflect legitimate management interests. Nor does ATU dispute that there are issues in the apprenticeship programs that need to be addressed, or that TriMet's proposal would address them. Rather, ATU contends that there are alternative ways to address those issues that would have less negative impacts on employees and still serve TriMet's management interests. However, even assuming that ATU is correct, *i.e.*, that there are alternatives that would better serve both parties' interests, the existence of such alternatives does not make TriMet's proposal unduly harsh. Rather, the proposal and consideration of alternatives, which may serve (or conflict with) the parties' respective interests to varying degrees, is precisely what the good faith collective bargaining process contemplates.[47]

ATU next contends that TriMet's regressive wage proposal was unduly harsh and predictably unacceptable. In January 2020, before the emergence of the COVID-19 pandemic, TriMet proposed wage increases of 2.4 percent on December 1, 2019, and 2.2 percent on December 1, 2020. On June 25, 2020, several months into the COVID-19 pandemic, TriMet decreased its wage increase to 1.8 percent on December 1, 2019, with no other increases. The "zero increase" mirrored the wage freeze that TriMet's non-represented employees received. TriMet relied on "changed circumstances" when it described this proposal at the June 24, 2020, bargaining session. Cusack explained at the table that the proposal reflected TriMet's assessment of the consumer price index from December 2018 to December 2020. He also explained TriMet's view that ATU members would receive wages comparable to other jurisdictions. TriMet did not present specific financial data underlying its decision; Nancy Young-Oliver, TriMet's Director of Budget and Grants, was unable to attend that bargaining session because she was attending the meeting of TriMet's Board of Directors.[48] Ultimately, in its final offer, TriMet improved its wage proposal to an increase of 2.0 percent on December 1, 2019, with no other increases during the contract.

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[46]*See, e.g.*, Finding of Fact 56 in *TriMet II*, UP-001/003-20 at 13 ("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.").

[47]ATU also contends that TriMet presented its proposals related to elimination of the apprenticeship programs as a "done deal," and that the manner in which TriMet bargained over the programs indicates bad faith. We address that argument below.

[48]Earlier during bargaining, on January 23, 2020, Young-Oliver had explained that TriMet was facing financial uncertainty. At the bargaining table, Young-Oliver explained that employer payroll tax revenue was down $7.5 million for fiscal year 2020, and that passenger revenue was down because of fare evasion and underperforming revenue from Hop cards.

The historic nature of the COVID-19 pandemic resulted in not just an economic downturn, but also sustained uncertainty about how quickly use of public transit by the public would rebound. Under the historic circumstances that confronted these parties, TriMet's regressive wage proposal was not so unreasonable that it suggests bad faith bargaining.

ATU also argues that several of TriMet's proposals were unduly harsh and unreasonable because they limited job opportunities for bargaining unit employees for no reason. Although there is no real dispute that some TriMet proposals would limit job opportunities, the record shows that TriMet had legitimate reasons for making those proposals. For example, TriMet proposed to split its existing service worker classification into three new classifications, and TriMet does not dispute that doing so will limit the service workers' mobility within TriMet. TriMet, however, contends that the split is warranted because movement between different positions within the existing service worker classification caused inefficiencies and retraining costs, and also because not all of the positions require a commercial driver's license. In bargaining, ATU acknowledged TriMet's reasons for its proposal were legitimate and sought to meet those "interests."

ATU nonetheless argues that TriMet's service worker proposal was unduly harsh because ATU proposed a less harsh alternative that addressed TriMet's concerns, and TriMet expressed interest in that alternative but failed to act on it. As discussed above, the existence of a less harsh alternative does not necessarily mean that TriMet's proposal was unduly harsh or unreasonable. Further, we do not find that TriMet failed to act on ATU's alternative in a manner that suggests bad faith. Rather, the record indicates that ATU failed to diligently pursue the idea. Specifically, the record indicates that ATU orally suggested that, instead of splitting the classification, TriMet could require service workers who bid into specific jobs to stay in those jobs for a two- or three-year period. The parties discussed ATU's idea at the December 19, 2019, bargaining session, and after a caucus, Cusack informed ATU that TriMet liked the idea, and requested that ATU propose a list of positions that would be restricted. ATU agreed that an ATU bargaining team member would provide the list.[49] ATU never provided the list, however, and never formalized its idea into a proposal. At the parties' July 29, 2020, session, ATU questioned why TriMet was still proposing to split the service worker classification, instead of adopting ATU's alternative. Cusack recalled that the parties had discussed that alternative, but also noted that it did not address the CDL issue. The parties agreed that they would need to discuss those issues at the next bargaining session, but it appears that neither party remembered to do so. ATU did not make a formal proposal reflecting its concept until its final offer. Under these circumstances, neither TriMet's proposal, nor its response to ATU's alternative, are indicative of bad faith.

We turn to TriMet's proposal to change all references to "journey worker" in the WWA to "technician," to reflect TriMet's decision to change the corresponding classification titles.[50] ATU contends that the proposed terminology change diminishes the value and skill set of its current journey worker employees, harms morale, and serves no purpose. TriMet contends that the "technician" title better reflects the fact that applicants for positions in those classifications do not actually need to be certified journey workers, or have journey-level training and experience, to

[49]ATU asserts that TriMet agreed to provide the list of affected positions, however, ATU's bargaining notes indicate that ATU agreed to provide the list.

[50]ATU acknowledges that the classification titles are a permissive subject of bargaining.

meet the minimum qualifications. TriMet also represents that the "technician" title is more "modern" and consistent with the terminology used by other transit systems, and that it intended the title change to communicate a change to a "continuous learning" organizational culture. We recognize that it is contrary to the interests of certified journey-level mechanics to have the term "journey worker," which connotes a particular level of skill and experience, removed from their title. We also recognize that TriMet appeared largely dismissive of ATU's repeated efforts to explain the importance of that title to the employees. However, not every proposal that is contrary to the other party's interests is an "unduly harsh or unreasonable" proposal that is indicative of bad faith. In this case, the record does not establish that the change to the journey worker classification title "serves no purpose," as ATU asserts.

TriMet also made a proposal that expressly states that TriMet bus mechanics "will not do the maintenance and repair of the electric propulsion systems, high voltage batteries and connections, and the high tech exteriors on electric or hybrid buses," and that expressly excludes the contracting out of such work from TriMet's contracting out allotment. ATU contends that this proposal is unduly harsh because it excludes all work on electric buses from the scope of bargaining unit work, and, given TriMet's plan to convert to an all-electric bus fleet, "essentially seeks to eradicate the bargaining unit in the future." ATU also contends that the proposal is unduly harsh because it is premature and unnecessary. Given that TriMet has not yet determined what type of electric bus it will purchase, and the conversion of its fleet will not be complete for many years, ATU contends there is no need to determine the scope of bargaining unit work now, and that it is unreasonable for TriMet to expect ATU to do so when neither party has sufficient information about the buses to engage in meaningful bargaining over what maintenance work the bargaining unit members can and cannot do.

TriMet contends that the proposal was intended to expressly exclude only the work on electric-bus systems that ATU bargaining unit members do not currently perform and cannot perform because TriMet lacks the facilities and the technical expertise. TriMet notes that there is a parallel provision in the WWA permitting TriMet to contract out work on similar systems on the light rail system, including electrical distribution system equipment and propulsion system equipment. TriMet also notes that the proposal provides that the parties "will meet" in the future "to discuss whether parts of this work should be brought in house."

This proposal is neither as harsh and unreasonable as ATU contends, nor as benign and reasonable as TriMet contends. On the one hand, ATU exaggerates when it asserts that the proposal excludes *all* work on electric buses and will eradicate the bargaining unit. Rather, the proposal, on its face, excludes work on specified systems, and will, at most, lead to the loss of bargaining unit bus mechanic positions (which may be a significant portion of the bargaining unit, but is far from the entire bargaining unit). Further, ATU does not dispute TriMet's representation that at least some work on electric buses requires facilities or expertise that TriMet lacks and cannot readily acquire, and that ATU agreed to a similar exclusion for light rail vehicle maintenance.

On the other hand, the record also confirms that TriMet told ATU that it will need only a few bus mechanic positions in the future, which could mean a significant loss of bargaining unit positions. Further, TriMet's proposal broadly excluded various types of work from the scope of bargaining unit work, without any limits. Consequently, TriMet's proposal could be construed as

authorizing the contracting out of work that ATU members do perform, or could perform.[51] Provisions that define the scope of bargaining unit work and limit contracting out are a form of job security protection, and "[f]or a labor organization, just cause and other job security protections are among the cornerstones of a collective bargaining agreement." *Lincoln County*, UP-42-97 at 23, 17 PECBR at 705. Accordingly, such provisions are of particular importance to labor organizations and represented employees.

We also agree with ATU that TriMet's proposal is premature. It is aimed at TriMet's projected all-electric bus fleet 20 years from now. And, as TriMet acknowledges, the electric bus technology is not yet fully developed, and TriMet does not know what type of electric bus it will purchase. As a result, TriMet does not know what kind of maintenance the electric buses will require, or the extent to which the maintenance and repair work could be performed by TriMet employees (with or without reasonable training). Despite that uncertainty, TriMet broadly proposed that the maintenance and repair of various types of potential electric bus systems "would not be performed by ATU employees," and instead would be contracted out, without limit. In essence, TriMet's proposal requires ATU to broadly agree in advance to the contracting out of work, in anticipation of changes that are indefinite in many respects, and may not even occur during the CBA term. Under these circumstances, ATU lacks sufficient information to assess and engage in meaningful bargaining over the scope-of-work proposal. Consequently, we agree that the proposal is unduly harsh and unreasonable.

We turn to TriMet's proposed revision to the existing WWA's "lines of the District" provision, which defines the scope of bargaining unit work for operators. ATU contends that the proposal is unduly harsh because it reduces the scope of bargaining unit work (and thereby permits more subcontracting). TriMet contends that it was merely trying to clarify the existing language because it is ambiguous, and it has been the subject of multiple contract interpretation disputes. To the extent that TriMet's proposal was aimed at addressing that problem, it was not unduly harsh or unreasonable.[52] However, ATU also argues that the proposal is unreasonable because it is premature and vague, in two ways. First, as TriMet acknowledges, the proposal limits ATU's scope of work in anticipation of technology that does not exist yet (self-driving buses and trains).[53] Second, as TriMet again acknowledges, the proposal was intended to address, in part, the unknown

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[51]TriMet represents that it intends for ATU bargaining unit bus mechanics to continue performing work on the parts of electric buses that are the same as their counterparts on diesel buses (such as tires), and that it proposed a new classification titled "battery/electric bus technician" to reflect that intent. However, the record also shows that TriMet did not provide a job description for that new classification, and that Cusack informed ATU at the bargaining table that TriMet anticipates needing "only a few" such technicians.

[52]ATU contends that TriMet's proposal would not merely clarify the existing scope of bargaining unit work, but reduce it. The parties' bargaining notes indicate that ATU voiced that concern at the table, and, in response, Sewell stated that was not TriMet's intent, and that it would try to revise the proposal to address ATU's concern. Although it does not appear that TriMet ever presented a revised proposal, the record establishes that TriMet withdrew the proposal when making its final offer.

[53] Cusack conceded at hearing that TriMet's proposed change to the lines-of-the-district provision, with respect to possible autonomous mass transit vehicles, was "something of an overreach given the timing."

future relationship between mass transit and ride-sharing services such as Uber. In essence, these aspects of the proposal ask ATU to bargain about the effect of this language on potential, future operational changes, when it cannot know whether those changes would cause a significant reduction in bargaining unit work. Thus, TriMet's lines-of-the-district proposal is premature and was predictably unacceptable on that basis.

In sum, TriMet offered aggressive proposals—most notably, its wholesale and immediate elimination of the apprenticeship programs for all employees, except current apprentices. However, the record also shows that most of the proposals were designed to address specific issues it identified in the workplace and discussed with ATU. Those proposals were not unduly harsh or unreasonable. TriMet's proposals regarding the scope of bargaining unit work were predictably unacceptable, and we will consider them as circumstantial evidence of surface bargaining in our analysis of the totality or the circumstances. However, we do not find that the scope-of-work proposals, in and by themselves, establish that TriMet engaged in surface bargaining. "In cases involving predictably unacceptable proposals, the generally recognized principle is that, viewed in isolation, such a proposal is an insufficient basis to find a lack of good faith, 'provided the proposal does not foreclose future discussion.'" *Lincoln County*, UP-42-97 at 23, 17 PECBR at 705 (quoting Hardin, *The Developing Labor Law* at 618 (3rd ed 1992)). "Absent additional indicia of a lack of intention to reach an agreement, we cannot conclude that [predictably unacceptable] proposals constitute a bad faith violation, regardless of what we think of the proposals." *Id.* In this case, TriMet's proposals did not foreclose future discussion. Rather, the record indicates that TriMet continued to engage in discussion regarding these proposals throughout bargaining. For example, TriMet acknowledged ATU's concerns about the lines-of-the-district proposal at the table, and eventually withdrew it.

The Number of "Takeaway" Proposals Offered by TriMet

Next, we turn to ATU's contention that TriMet's proposals, when considered in the aggregate, are indicative of surface bargaining. Specifically, ATU contends that TriMet made so many harsh proposals that would "take away" longstanding contractual benefits and rights (including the elimination of the apprenticeship programs), that TriMet knew (or should have known) that those proposals would consume most of the parties' bargaining time and impede the parties' ability to reach an agreement. Such conduct may be indicative of surface bargaining. *See, e.g.*, *Rogue Valley Transportation District*, UP-80-95 at 27, 16 PECBR at 585.

Here, as in *Rogue Valley*, "the magnitude" of TriMet's proposed changes, "both in number and substance, was substantial," and TriMet's proposals "included elimination of numerous contractual benefits and rights which had been enjoyed for years by unit members." *Id.* TriMet's takeaway proposals included proposals to increase some employees' health care premiums; eliminate the benefits coordinator; modify the continuation of service provisions to reduce employee eligibility for benefits while on leaves; impose a new limit on employee eligibility for holiday pay; impose vacation leave limits on some employees; lengthen the probationary period; eliminate a step from the two-step grievance process;[54] eliminate or reduce various job mobility and job security provisions; split the operator extra board into AM/PM boards and limit shift

[54]Both parties were trying to find ways to speed up the grievance and arbitration process.

trading; merge the rail operator boards; eliminate a tool allowance for rail maintenance employees; authorize mandatory overtime for some maintenance employees; and eliminate the apprenticeship programs. Additionally, TriMet made several proposals that would limit or reduce the scope of bargaining unit work, and permit more contracting out of bargaining unit work. Those proposals include the electric-bus scope-of-work proposal and the "lines of the District" proposal discussed above, as well as a proposal to eliminate existing provisions regarding warranty work in the maintenance departments. TriMet also represented in bargaining that it intended to replace some bargaining unit "assistant supervisors" with unrepresented supervisors. Additionally, as ATU points out, TriMet initially offered only one counterbalancing proposal: its proposal to increase wages across-the-board, which TriMet subsequently reduced.[55]

Although a party may bargain on any subject that is not prohibited (absent objection by one party to permissive proposals), in this case, we note that TriMet attempted to substantially reduce or remove many significant contractual benefits for ATU employees, including job security protections, in one round of successor bargaining. ATU also correctly points out that the parties reached a tentative agreement on only one item, which lends some weight to ATU's assertion that TriMet's conduct impeded bargaining.

We also note that, in making the proposals described above, TriMet was striking many longstanding provisions the WWA (which Cordova described at hearing as "taking a Sharpie" to the contract). Further, TriMet refused to bargain over many of those provisions on the ground that they involve permissive subjects of bargaining, and ultimately contended that ATU violated the duty to bargain in good faith by proposing to carry over that existing language in its final offer. As discussed above, we conclude that the vast majority of those provisions involve mandatory subjects of bargaining. Although we agree that some of the provisions involve permissive subjects, and "a permissive subject does not become mandatory solely through inclusion in a prior collective bargaining agreement," *Gresham*, C-61-78 at 7-8, 5 PECBR 2777-78, TriMet's approach of selectively striking numerous provisions of the WWA as "permissive" is concerning, because it fails to recognize that parties typically agree to include permissive subjects to resolve problems, or to obtain other concessions. *See Oregon City School District No. 62 v. Oregon City Education Association*, C-179-79 at 10, 5 PECBR 4246, 4255 (1981). Striking only the permissive portions of a contract potentially upsets the balance the parties mutually achieved through collective bargaining.

TriMet does not dispute that it adopted an aggressive approach to bargaining, but contends that it was reasonable because ATU also opened the negotiations with its own substantial demands, including proposing four annual five-percent wage increases; an increase in TriMet's health insurance premium contributions from 95 percent to 100 percent; an increase in TriMet's contribution to its defined contribution retirement plan (for employees hired after July 31, 2012) from 8 percent to 12 percent of each employee's base pay; and a new early retirement benefit. ATU's initial proposals included other financial benefits for its members, including proposals to increase road relief pay, increase TriMet's annual contribution to a recreation trust fund from $55,000 to $75,000 and to revive and increase TriMet's annual payment to ATU from $55,000 to $75,000 for a child/elder care assistance program.

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[55]As detailed below, TriMet responded to some ATU proposals by offering to improve some existing economic benefits.

We agree that, when assessing TriMet's bargaining tactic of putting so many aggressive proposals on the table at the outset of bargaining, we must also take into account ATU's substantial proposed changes. The fact that both parties made aggressive initial proposals undermines ATU's argument that TriMet's decision to do so should be construed as circumstantial evidence of subjective bad faith. However, on balance, taking all the facts into account, we find that TriMet's tactic of proposing so many substantial changes to the WWA during negotiations went beyond typical hard bargaining. TriMet's decision to strike so many provisions in the contract did, to some degree, impede a possible settlement. That conduct was exacerbated by TriMet's overly aggressive contention that so many of those provisions were permissive for bargaining. On this record, we agree that TriMet's conduct of seeking so many concessions from ATU on so many issues (one of which sought to limit ATU's scope of work in anticipation of TriMet's projected operations 20 years from now), is one factor that suggests that TriMet bargained without a genuine intent to compromise its differences with ATU.

<u>The Nature and Number of Concessions Made</u>

We turn next to the nature and number of concessions that TriMet made. For clarity, we focus this discussion on the extent to which TriMet reduced or withdrew its own "takeaway" proposals, and we address the extent to which TriMet responded to ATU proposals in the next section.

The statutory obligation to meet and negotiate in good faith "does not compel either party to agree to a proposal or require the making of a concession." ORS 243.650(4). Consequently, we have said that this Board "cannot force an employer to make a 'concession' on any specific issue or to adopt any specific proposal or to adopt any particular position[.]" *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-37-08 at 22, 23 PECBR 895, 916 (2010); *Clackamas Intermediate Education District Education Association v. Clackamas Intermediate Education District*, Case No. C-141-77 at 8, 3 PECBR 1848, 1855 (1978) ("This Board has stated many times that a party may not be compelled to agree on any particular contract term."). Nonetheless, the employer "is obliged to make *some* reasonable effort in *some* direction to compose [its] differences with the union[.]" *McKenzie*, UP-14-85 at 39, 8 PECBR at 8198 (emphasis in original).

ATU notes that TriMet's initial proposals were almost exclusively "takeaways," and ATU contends that, in bargaining over those proposals, TriMet made concessions only on minor issues. TriMet contends that it made more significant concessions than ATU acknowledges.

The record demonstrates that TriMet made several concessions, including some that ATU did not acknowledge in its briefing or closing argument. Specifically, TriMet withdrew its proposals to increase the employee share of health care premiums; eliminate the benefits coordinator; modify the continuation of service provisions to reduce employee eligibility for benefits while on leaves; impose a new limit on employee eligibility for holiday pay; split the extra board into AM/PM boards; merge the rail operator boards; eliminate the tool allowance for rail mechanics; and revise the "lines of the District" provision. ATU identified most of those proposals as significant takeaways; thus, we consider TriMet's withdrawals of those proposals to be

significant concessions. TriMet's health insurance benefits proposal of maintaining its 95 percent health insurance premium contribution in 2021 alone amounted to a $2.8 million projected increase in TriMet's share of insurance premiums.[56] At the same time, we note that the total number of takeaways that TriMet ultimately withdrew is relatively small compared to the total number that TriMet initially proposed.

TriMet's Responses and Counteroffers to ATU Proposals

We turn to ATU's argument that TriMet failed to make counteroffers, or even respond, to many of ATU's proposals. Although ATU acknowledges that the duty to bargain does not require a party to agree to any particular proposal, ATU contends that TriMet failed to engage in any give-and-take, made no effort to meet ATU's interests, and was so unresponsive that its conduct is indicative of bad faith. For the reasons described below, however, we conclude that the record indicates that ATU's perceptions in multiple instances are inaccurate.

In arguing that TriMet failed to engage in any give-and-take, ATU ignores several significant counteroffers that TriMet made. For example, in its initial proposal, ATU proposed increasing "road relief pay." Road relief pay is compensation paid to an operator who starts or ends a run in the field, rather than at a TriMet garage. The payment compensates the operator for that inconvenience. In its opening October 2019 proposal, ATU proposed that road relief pay would equal the time allocated by the TriMet trip planner plus (a) 25 minutes for operators reporting to a shift in the field or (b) 10 minutes for operators ending a shift in the field. ATU also proposed that road relief would be considered pay for time worked. At hearing, ATU described road relief pay as one of its most important bargaining priorities. The parties engaged in a significant back-and-forth throughout bargaining on road relief pay. TriMet countered by increasing the amount of road relief by $2.00 and later by $3.00 per location. In its final offer, ATU proposed that TriMet "pay road relief, based on its trip planning estimate system, for the trip at 70% of the operator's base rate." ATU also proposed that road relief pay would not make an operator eligible for overtime pay. In its final offer, TriMet added $4.00 to every existing road relief location and added new locations. TriMet estimates that its final offer proposal to increase road relief pay will cost $755,114.

ATU also proposed increasing "prep time" for operators by five minutes, to a total of 15 minutes. TriMet made a counter-proposal to increase by prep time by three minutes, to a total of 13 minutes. TriMet included that counterproposal in its final offer, and estimates that it will cost $390,000.

ATU proposed provisions to limit the use of customer complaints (known as SIPS) in operator discipline. At the July 29, 2020, bargaining session, the parties discussed the use of SIPS in some detail, particularly the use of unsubstantiated complaints in discipline. They discussed a compromise in which unsubstantiated SIPs could be used for evidence (such as evidence of credibility) but not for discipline. ATU incorporated this compromise into a proposal it made in mediation. TriMet ultimately incorporated the compromise into its final offer, proposing that Service Improvement Program complaints that are not substantiated (a) shall not be used as the

[56]TriMet chose to pass on to its employees the increases in health insurance premiums for 2020, but not 2021, as permitted by ORS 243.756.

basis for higher levels of discipline for future substantiated complaints, but may be used as evidence, such as in determining credibility, and (b) shall not be included in the employee's record (incorporating ATU's concepts from its June 24, 2020, proposal).

ATU proposed reinstituting an elder and child care benefit administered by ATU (which had been dormant since about 2015), to which TriMet would contribute up to $75,000 annually. TriMet indicated it would agree to that proposal (among other things) in exchange for ATU's agreement to TriMet's extra board proposal. ATU continued to oppose TriMet's extra board proposal, and TriMet eventually withdrew both that proposal and its offer to accept ATU's elder and child care benefit proposal in exchange. ATU made similar package offers during bargaining.

ATU also identifies several proposals that it asserts TriMet never responded to. For example, ATU contends that TriMet never responded to ATU's short- and long-term disability proposals. However, as discussed above, ATU did not make a written proposal for such benefits until late in the bargaining process, and TriMet had no duty to make such a proposal in the first instance.

ATU also contends that TriMet did not respond to ATU's proposals on discipline and grievance, including its June 24, 2020, proposal to change the discipline provision in the WWA. The record indicates a substantial back-and-forth on both discipline and grievance topics. TriMet and ATU both proposed changes to the discipline language at the outset of bargaining on October 10, 2019. TriMet made its own grievance-related proposal on December 12, 2019, and ATU subsequently presented a revised grievance and discipline proposal on June 24, 2020. After those exchanges, the parties discussed both discipline and arbitration issues at length during their bargaining session on July 29, 2020. At that bargaining session, Cusack explained TriMet's reasons for declining to agree to ATU's proposals, and explained TriMet's positions about mandatory expedited arbitration and two arbitrations per day. Although ATU did not agree with the substance of Cusack's explanations, we cannot say that TriMet was unresponsive, as ATU asserts.

Next, ATU contends that TriMet did not provide sufficient responses to ATU's proposal regarding union representatives' rights, related to changes caused by House Bill 2016. ATU offered its proposal on January 10, 2020. The record indicates that Cusack and Stark corresponded repeatedly about various details regarding HB 2016. Cusack and Stark exchanged emails on January 12 and 13, 2020, regarding ATU's position that House Bill 2016 required TriMet to buy back union representatives' sick leave so that their retirement credit was not impaired by using release time. TriMet further responded on May 18, 2020, noting that the parties' agreement to toll HB 2016 implementation had "gone on too long," and included a new proposal. ATU responded on May 21, 2020, with its own revised proposal. Cusack and Stark continued to exchange emails, including proposed language, into early June 2020. On this record, we do not conclude that TriMet was insufficiently responsive. Rather, it appears that the parties "talked past each other," and we do not attribute that failure of communication solely to TriMet.

ATU also contends that TriMet failed to respond to other proposals it advanced. For example, it contends that TriMet did not respond to ATU's October 10, 2019, proposal regarding Article 10 to change TriMet's contribution to the defined contribution plan

from 8 percent to 12 percent of employee base pay, and to provide an early retirement benefit. On January 13, 2020, Cusack explained that TriMet did not want to make any changes to Article 10, and gave ATU a document that stated, "No Proposals in Article 10." TriMet's proposal to maintain the status quo can be construed as impliedly rejecting ATU's proposal. Later, on June 24, 2020, ATU amended its proposal regarding TriMet's contribution to the defined contribution plan, reducing the amount from 12 percent to eight percent. The proposed eight percent contribution was the status quo because the WWA entitles ATU employees to receive the same contribution as non-represented employees, and non-represented employees receive an eight percent contribution. Further, on October 11, 2020, TriMet shared with ATU a cost estimate it obtained regarding ATU's early retirement proposal. A rejection of a proposal (or a decision not to adopt language proposed by the other party) is a legitimate bargaining option. Here, there is no other evidence to suggest that TriMet's decision not to change retirement benefits was somehow indicative of bad faith. On this record, we cannot say that TriMet failed to respond to ATU's proposal, as ATU contends.[57]

ATU also contends that TriMet never responded to ATU's Article 6 proposal (which covers customer service employees), or its Article 1, Section 7 proposal (relating to vacation benefits). The record shows that TriMet did respond. ATU proposed changes to Article 6 on January 23, 2020. TriMet made its own Article 6 proposal on June 24, 2020, and consequently it did respond to ATU's proposal, albeit by proposing different changes to Article 6 and impliedly rejecting ATU's proposed changes. After the June 24 session, the parties met only two more times before ATU requested mediation, and it appears that neither party tried to schedule or otherwise initiate further discussion of Article 6.

With regard to Article 1, Section 7, on October 10, 2019, ATU proposed to change Article 1, Section 7 to enhance vacation benefits, including by permitting vacation for salaried employees to be "considered floaters for end of year payoff." TriMet made several proposals on Article 1 thereafter, but did not make a proposal related to Section 7. On January 10, 2020, ATU made another Article 1 proposal in which it continued to propose authorizing "end of year payoff," and it continued that proposal in language it proposed on June 24, 2020. On June 24, 2020, TriMet offered a comprehensive multiple article proposal, including on employee benefits in Article 1. It did not incorporate ATU's proposed change to vacation benefits. On July 29, 2020, TriMet proposed again on Article 1, and again did not adopt ATU's proposed vacation language. The parties discussed ATU's vacation proposal at some length on July 29, 2020. In mediation, on September 3, 2020, ATU again proposed its change to the vacation language in Article 1, noting in a margin comment on its written proposal, "Have not received a response on this." On this record, we interpret TriMet's continued proposals on Article 1 without incorporating ATU's proposed change to Section 7 as a continued rejection of ATU's proposal.

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[57]At hearing, Cusack testified that once ATU changed its proposal regarding TriMet's contribution to the defined contribution plan to an eight percent contribution, Cusack regarded that change as "housekeeping," because it merely documented the status quo. ATU contended at hearing that the change was substantive, because it "locked in" the contribution percentage for ATU employees, rather than merely stating that ATU employees would receive contributions equal to those of non-represented employees. Cusack acknowledged at hearing that he did not explain at the table his view of ATU's June 24, 2020, proposed change to TriMet's retirement contribution to ATU employees in the defined contribution plan. That would have been better practice, but we do not construe that omission as indicative of bad faith lack of responsiveness.

TriMet's own proposals for Articles 1, 6, and 10 can be interpreted as silent or implied rejections of ATU's proposals. To the extent that ATU argues that a rejection of a proposal is "not a response," we disagree. A rejection is a response. To the extent that ATU argues that a party must *expressly* state its response to a proposal, we also disagree. However, even assuming that TriMet "failed to respond" at all to these ATU proposals, we would not consider that conduct to be evidence of intentional bad faith under the circumstances of this case. As discussed above, TriMet did respond to *other* ATU proposals, and we do not see a widespread pattern of unresponsiveness. At times, ATU told TriMet that it was waiting for TriMet to respond to its proposals in general, but ATU made many proposals, and we do not see any evidence that ATU specified that it needed responses to these particular proposals, either at the table or in correspondence. The record suggests that both parties had difficulty keeping track of the status of proposals, or when they owed a response to the other. The parties did not make a comprehensive list and identify the status of all pending proposals until they entered mediation.[58] On this record, we are not persuaded that TriMet's failure to respond to some proposals was intended or willful.

The Course of Negotiations

Next, we consider the course of the parties' negotiations. Evidence that a party never intended to reach a settlement but planned from the beginning to proceed to interest arbitration indicates bad-faith bargaining. *Portland Police Commanding Officers Association,* UP-19/26-90 at 44, 12 PECBR at 467. "Likewise, an employer who rushes through the negotiation process may demonstrate a lack of serious intention to reach agreement." *Medford School District #549C*, UP-77-11 at 16, 25 PECBR at 521, citing *School Employees Local Union 140, SEIU, AFL-CIO, CLE v. School District No. 1, Multnomah County*, Case No. UP-44-02, 20 PECBR 420, 433 (2003).

Here, the course of bargaining does not indicate that TriMet planned from the beginning of bargaining to proceed to interest arbitration. TriMet did not avoid or rush through bargaining. To the contrary, TriMet engaged in informal sessions before bargaining, engaged in multiple formal bargaining sessions (and repeatedly suggested scheduling more frequent sessions), and corresponded extensively with ATU. After 150 days of bargaining, TriMet did not immediately request mediation. Around that time, the parties mutually agreed to pause bargaining because of the COVID-19 pandemic. After the parties resumed bargaining, TriMet again suggested scheduling more frequent sessions, and ATU again declined. Although TriMet raised the question of whether the parties should go to mediation, ATU did so unilaterally. After four mediation sessions, TriMet declared impasse.[59]

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[58]After the parties were in mediation, ATU noted in the margin of its Article 1, Section 7 proposal, "Have not received a response on this."

[59]Under 243.712(2)(a) and OAR 115-040-0000(1)(c), either party may declare an impasse after 15 days of mediation.

Other Factors

ATU also asserts that TriMet adopted a take-it-or-leave-it approach to bargaining and presented nearly all of its proposals as "the way things are going to be." A take-it-or-leave-it approach to bargaining can be indicative of bad faith. However, ATU did not prove that TriMet broadly adopted that approach. As discussed above, the record reflects more "give and take" than ATU acknowledges.[60]

There is also evidence that TriMet presented its most controversial proposal—elimination of the apprenticeship programs—as a foregone conclusion, and ATU contends that TriMet's approach to apprenticeship bargaining, in particular, shows bad faith. In support of this contention, ATU notes (and TriMet does dispute) that, before these successor negotiations, TriMet had touted the merits of its apprenticeship programs,[61] and did not inform or work with ATU to address the problems that TriMet now contends justify ending the programs. There also is no real dispute that TriMet has taken a hard position on not just ending BOLI-registration, but eliminating the entry-level apprenticeship programs (and replacing them with training programs for experienced mechanics). The record also supports ATU's allegation that Cusack repeatedly presented the elimination of the apprenticeship programs as "the way things will be," and such language supports an inference that TriMet intends to end the apprenticeship programs irrespective of ATU's views.[62]

However, there is additional context that we must consider when assessing ATU's claim that TriMet's conduct and statements show an unwillingness to reach a negotiated agreement. Specifically, before successor bargaining began, TriMet filed a petition with this Board, on June 27, 2019, seeking a declaratory ruling on whether the elimination of the apprenticeship programs (and other subjects) was a permissive or mandatory subject of bargaining. Recognizing that TriMet's attempt to seek a determination of its bargaining obligations was "laudable," we nonetheless declined to issue a ruling on the petition, in part because the "purposes of PECBA

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[60]In support of the claim that TriMet generally bargained on a take-it-or-leave-it basis, ATU alleged that Cusack presented nearly all of TriMet's proposals as "the way things will be." However, ATU offered only non-specific and conclusory testimony in support of that allegation. Although ATU represented that there was more evidence of such statements in the bargaining notes, ATU did not identify any with specificity. We also note that the bargaining notes are not verbatim transcripts, and often are vague and ambiguous. Such notes standing alone, without any explanatory and corroborating testimony, would not be strong evidence of this disputed factual allegation.

[61]*See, e.g.*, *Amalgamated Transit Union, Division 757, v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-019-18 at 7 (2019) (TriMet's former Executive Director of Labor Relations and Human Resources testified that the apprenticeship programs were "the best").

[62]For example, at the parties' June 24, 2020, bargaining session, Cusack stated that if the parties did not complete successor bargaining before October 2020, they would not need to include any provisions for bus mechanic apprentices, because all of the apprentices would graduate by then, and the program would end. For another example, Cusack repeatedly testified at the hearing in this matter that "there will not be" bus or facilities mechanic apprenticeship programs, notwithstanding the fact that bargaining over the decision to end the programs is not yet complete.

would be better served" if the parties attempted to resolve the scope of bargaining issues through bargaining. *See In the Matter of the Declaratory Ruling Petition Filed by Tri-County Metropolitan Transportation District*, DR-002-19 at 3. The fact that TriMet sought a ruling on its bargaining obligations indicates that it knew that it potentially had a bargaining obligation regarding the elimination of the programs, and that it would not simply ignore that obligation by making a unilateral decision.

After the Board declined to issue a declaratory ruling, the parties bargained for several months, with little progress.[63] Then, apprenticeship negotiations were essentially paused from February 4, 2020, when TriMet filed its unfair labor practice claim in Case Nos. UP-001/003-20, through June 24, 2020, when this Board issued a reconsideration order resolving the parties' scope of bargaining dispute. TriMet asserted in that case (as it had in its declaratory ruling petition) that bargaining over the elimination of the programs was permissive. In the reconsideration order, we held that TriMet is not obligated to bargain over the decision to deregister an apprenticeship program from BOLI, but TriMet must bargain over the decision to eliminate an apprenticeship program.

After the Board issued the June 24, 2020, reconsideration order, the parties held only two more bargaining sessions, on July 29 and 31. At the July 31 session, ATU concluded the session during a caucus without discussing its own proposal or giving TriMet a chance to ask questions about it. ATU thereafter declined to bargain with TriMet about any maintenance department issues (Articles 3 and 4) "outside mediation."

ATU contends that TriMet showed bad faith because it never offered a proposal that did not involve complete elimination of the apprenticeship programs, even after the June 24 order. That order, however, did not direct TriMet to stop proposing elimination of the apprenticeship programs. Rather, the order held that TriMet has a duty to bargain in good faith over that subject.

Further, although we agree the record shows that TriMet has been unwilling to consider alternative ways to address its concerns about the apprenticeship programs, the same can be said of ATU. TriMet has offered informal "concepts," and a revised formal proposal, that include elements aimed at addressing at least some of ATU's concerns. For example, ATU advocated for the interests of existing service workers who have been waiting for an opportunity to enter an apprenticeship program. In response, TriMet offered a concept that would maintain most of the apprenticeship programs for enough time to give at least some existing service workers the opportunity to participate. For another example, ATU pointed out that, going forward, service workers will have difficulty meeting the minimum qualifications for the new technician training programs that TriMet plans to create. In mediation, TriMet presented a "supposal" that included a limited tuition reimbursement benefit, which could help service workers (or other TriMet employees) take the community college classes needed to qualify for the training programs. TriMet's supposal also included a commitment to hiring qualified internal candidates before external candidates.

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[63]It appears that one or both of the parties were unwilling to follow this Board's suggestion that they focus on practical bargaining over the apprenticeship programs, instead of the legal scope of bargaining dispute. In other words, the parties continued to allow their legal dispute to determine their positions in bargaining, instead of engaging in bargaining to narrow their legal dispute.

ATU nonetheless asserts that TriMet "never made a proposal that addresses ATU's identified interests." Presumably, ATU asserts this because TriMet's tuition reimbursement proposal does not meet the employees' interests as well as the apprenticeship programs do. For example, in the existing apprenticeship programs, TriMet pays apprentices to attend classes on work time. Under the proposed tuition reimbursement program, employees would need to attend college classes on their own time, in addition to working full-time at TriMet. However, TriMet repeatedly invited ATU to bargain over tuition reimbursement and make its own proposal. Yet, ATU never made any counter-proposal for a tuition reimbursement program that it believes would better address the employees' interests and provide benefits more comparable to those provided by the apprenticeship programs.

Additionally, we note that on July 13, 2020 (shortly after the reconsideration order was issued), TriMet invited ATU to make a proposal for unregistered apprenticeship programs.[64] However, when the parties bargained on July 29, ATU declined to withdraw its proposal that TriMet continue BOLI registration of the apprenticeship programs. When the parties bargained on July 31, Cusack again stated that TriMet was willing to discuss an unregistered apprenticeship program. ATU again declined to withdraw its proposal for continued BOLI registration of the apprenticeship programs. ATU did not make its first concept proposal for continuing the apprenticeship programs without BOLI registration until September 17, 2020, when the parties were in mediation. ATU did not make a formal proposal for unregistered apprenticeship programs until October 19, 2020, when the parties exchanged final offers, and even then its proposal was vague with respect to whether it was intertwined with the permissive subject of BOLI registration. Given these circumstances, we cannot conclude that TriMet refused to bargain in good faith over the mandatory subject of continuing the apprenticeship programs.

We are troubled by TriMet's continued position that other individual aspects of ATU's proposal for continuing the apprenticeship programs are permissive, notwithstanding our ruling otherwise in our June 24, 2020, order. By continuing to contend that ATU is committing an unfair labor practice by pursuing such unregistered apprenticeship program proposals, TriMet impedes the parties' ability to bargain over the issue. However, as we discussed above, some aspects of ATU's final offer apprenticeship proposal are vague, and when TriMet asked for additional information, ATU declined to provide it—hence, ATU's conduct also impeded bargaining.

To summarize, some of TriMet's conduct in bargaining over the apprenticeship programs tends to show that TriMet made a firm decision to eliminate the apprenticeship programs (not just deregister them), and lacked intent to bargain over that decision. However, our assessment of TriMet's conduct is tempered by evidence that ATU was also generally unwilling to consider alternatives to its proposal, as well as other TriMet statements and conduct that are indicative of intent to bargain in good faith. Additionally, bargaining about apprenticeship was truncated in part due to the parties' good faith dispute about the scope of bargaining, and that pause in bargaining

[64]Specifically, in a letter dated July 13, 2020, Cusack informed ATU that TriMet would deregister the apprenticeship programs without bargaining over that decision (consistent with the reconsideration order), and stated that TriMet would not make its own proposal for unregistered apprenticeship programs because TriMet was "not interested in pursuing" them, but also wrote, "If ATU is interested in unregistered apprenticeship classifications, please make a proposal and provide some detail about what that entails."

itself contributed, at least in part, to the parties not fully exploring possible alternatives to the existing apprenticeship before mediation.

Direct Dealing

In a surface bargaining case, a finding that the respondent committed other unfair labor practices may be circumstantial evidence that the respondent also engaged in surface bargaining. *Rogue Valley*, UP-80-95 at 29, 16 PECBR at 587. However, direct dealing is a *per se* violation, which means the conduct violates the duty to bargain in good faith because it has the objective effect of undermining the exclusive representative and impeding bargaining, regardless of the respondent's subjective intent. To determine whether direct dealing conduct is circumstantial evidence of surface bargaining—which includes a subjective intent element, we must consider the totality of the circumstances. *See McKenzie*, UP-14-85 at 43, 8 PECBR at 8202. In this case, after considering the totality of the circumstances of TriMet's direct dealing conduct, we do not find that the conduct indicates that TriMet lacked a sincere intent or desire to negotiate an agreement with ATU.[65]

TriMet contends that its intent was to consult Arronson as a subject matter expert on the operator extra board. ATU does not dispute that Arronson is a subject matter expert, and that TriMet's available managers did not have as much knowledge and expertise. Although TriMet did not fully disclose to ATU the extent to which it dealt with Arronson, TriMet did not completely conceal the fact that it was consulting with Arronson. For example, Cusack disclosed to ATU at the outset of bargaining that he had talked to some chief station agents, and TriMet invited Arronson to the parties' initial bargaining session. Later, ATU learned that TriMet was still dealing with Arronson because Cusack told ATU that he wanted to consult Arronson. These actions indicate that TriMet did not subjectively believe that its dealings with Arronson were disruptive to the bargaining process.

Regarding the MOW apprentices, we note that the conduct at issue did not occur until early October 2020, after the parties had engaged in 15 bargaining sessions, and four mediation sessions. These circumstances weigh against drawing the inference that TriMet engaged in the conduct at issue as a tactic to avoid a negotiated successor agreement with ATU. Further, there is no other evidence that is sufficient to establish that TriMet engaged in the conduct with such subjective intent.

The COVID-19 Pandemic

In this case, we cannot overlook the fact that the COVID-19 global pandemic emerged during the parties' successor bargaining. Consequently, TriMet and ATU essentially paused their bargaining for approximately three months after Governor Kate Brown's declaration of emergency, the closure of businesses, and the widespread adoption of "social distancing." Because of the emergency caused by the pandemic, the parties met three to four times per week for recurring "COVID-19 meetings" from March 2020 through early December 2020 to confer about the effect

[65]Because Member Umscheid would find that no direct dealing occurred, Member Umscheid also agrees that TriMet's conduct regarding the direct dealing allegations did not indicate that TriMet lacked a sincere intent to negotiate an agreement with ATU.

of the pandemic on the workplace. They met by phone a total of approximately 84 times outside of successor bargaining.

Given these facts, we do not construe the communications in which the parties "talked past" each other and those occasions where proposals languished as evidence that TriMet did not intend to reach agreement with ATU. Rather, the record indicates that the parties were simultaneously responding both to the extreme demands of a historic crisis and to the renegotiation of a complex collective bargaining agreement. To some degree, given the urgency and novelty of the pandemic, it is understandable that the parties' focus and energies were diverted from successor bargaining. Although the global crisis does not excuse those aspects of TriMet's conduct that we find concerning, we cannot ignore the effect that the diversion of the parties' focus and energies had on bargaining.

The Totality of the Circumstances

We turn to assessing the totality of the circumstances, taking into account all relevant factors to determine whether there is sufficient evidence in the record that TriMet "did not intend or desire to reach a negotiated settlement, but rather, throughout all or most of the process, planned to take its proposals to arbitration." *Portland Police Commanding Officers Association*, UP-19/26-90 at 44, 12 PECBR at 467. We "carefully examine and weigh circumstantial evidence in order to draw an inference concerning good faith or bad faith bargaining." *McKenzie*, UP-14-85 at 37, 8 PECBR at 8196.

In making this assessment, we are mindful that PECBA does not require "either party to agree to a proposal or require the making of a concession[,]" ORS 243.650(4), and that hard bargaining is permitted. The line between hard bargaining and surface bargaining can be difficult to draw, particularly when both parties have strong positions. In this type of case, ATU bears the burden of establishing that TriMet's conduct crossed that sometimes nebulous line, such that we can conclude that TriMet had no genuine intent to reach agreement. *State of Oregon, Executive Department*, UP-99-85 at 16, 9 PECBR at 9100.

On the one hand, some of TriMet's conduct is indicative of bad faith. TriMet significantly impeded bargaining by proposing an unusually large number of "takeaways" and revisions to the existing CBA, including a massive reorganization of the maintenance departments and the elimination of well-established and much valued apprenticeship programs—programs that TriMet itself has previously described as "the best." TriMet, on some occasions, presented elimination of the apprenticeship programs as a *fait accompli*. TriMet was also largely dismissive of the value of the apprenticeship programs and journey worker certification to employees. TriMet also took an overly aggressive approach to striking longstanding contract provisions (including but not limited to all provisions related to the apprenticeship programs), and objected to bargaining over those "carryover" provisions because they purportedly involved permissive subjects of bargaining. TriMet also made two unduly harsh or unreasonable proposals to limit the scope of ATU bargaining unit work in anticipation of vague and uncertain future possibilities.

On the other hand, some of TriMet's conduct is indicative of good faith. TriMet tried to deal with some of these difficult and contentious issues before formal bargaining commenced,

including by engaging in multiple pre-bargaining discussions. TriMet also tried to resolve the parties' scope of bargaining dispute over the apprenticeship programs before successor bargaining formally commenced by seeking a declaratory ruling from this Board (instead of by simply refusing to bargain), which ATU opposed. TriMet also repeatedly made requests to schedule more formal bargaining, which ATU declined.

Additionally, although TriMet took a hard position regarding elimination of the registered apprenticeship programs, TriMet also repeatedly invited ATU to propose alternatives, but ATU declined to do so until the parties were in mediation. Generally, TriMet explained its proposals and established that it was trying to address legitimate concerns (with only the two exceptions noted above). ATU does not acknowledge all of the responses, concessions, and counteroffers that TriMet did make. In some instances, ATU claims that TriMet did not respond to ATU's concerns, but the record shows that ATU itself did not make proposals or counter-proposals that would address its own concerns, and instead expected TriMet to make such proposals in the first instance, which TriMet was not obligated to do.

Viewing the record as a whole, we find that both parties bear some responsibility for their failure to achieve a negotiated agreement. Although TriMet made aggressive proposals and engaged in hard bargaining, and at times communicated poorly or let things lapse, ATU does not acknowledge the extent to which it engaged in similar conduct. In our view, the parties also did not engage in enough bargaining, especially considering the complexity of the existing CBA, and the number and nature of the proposals made by both parties. However, as noted above, TriMet attempted to schedule more bargaining, and the parties did not in part because ATU repeatedly declined to do so, and in part because the parties paused bargaining while their litigation was pending and in response to the global pandemic. For these reasons, although there are some indicia of bad faith, on balance, we conclude that the evidence here does not establish that TriMet lacked a sincere intent or desire to reach a negotiated settlement.

Remedy

In addition to issuing a cease-and-desist order, this Board has "broad authority to fashion an appropriate remedy under the circumstances of each particular case to effectuate the purposes of" PECBA. *Oregon School Employees Association v. Parkrose School District*, Case No. UP-030-12 at 2, 25 PECBR 845, 846 (2013) (Recons Order).

Here, we must remedy two violations, ATU's violation of section (2)(b), and TriMet's violation of section (1)(e). For ATU's violation, we order ATU to strike the proscribed proposals from its final offer and to participate in an additional mediation session as described below. When submitting its revised final offer, ATU may replace the struck proposals with proposals that involve mandatory subjects of bargaining, consistent with this order and the duty to bargain in good faith.

We turn to TriMet's violation of section (1)(e). "The duty to bargain in good faith is not fulfilled when an employer is found guilty of a (l)(e) violation committed during the course of negotiations. This is so regardless of the employer's subjective good faith or bad faith. Commission of a per se (1)(e) violation taints the bargaining process and a remedy must be

provided. ORS 243.676(2)(b) and (c)." *McKenzie*, UP-18-45 at 43-44, 8 PECBR at 8202-03. Generally, we order the parties to resume bargaining at the step where the earliest violation occurred. *Id.* at 44, 8 PECBR at 8203; *Blue Mountain Community College*, UP-22-05 at 97, 21 PECBR at 7691. However, we also consider the extent to which ordering the parties to return to an earlier point in the bargaining process is warranted and helpful to the parties under the circumstances of the case. *Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections*, Case Nos. UP-006/016-10 at 24, 24 PECBR 864, 886 (2012).

In this case, although the earliest direct dealing conduct started before the parties' initial bargaining session, we do not believe that a return to the start of the statutory bargaining process would be helpful to the parties or further the purposes of PECBA. Likewise, although it would be warranted to return the parties to the start of the mediation process required under ORS 243.712(2)(a) (which would require 15 days of mediation), we also do not believe that such a remedy is the most appropriate remedy here. In reaching that conclusion, we take administrative notice that the parties have already scheduled multiple mediation sessions out through March 11, 2020. Because the parties are already committed to engaging in mediated bargaining for a period of 13 days following the issuance of this order, it is largely unnecessary to order them to do so. Under these circumstances, we order the parties to participate in good faith in at least one additional mediation session (beyond those scheduled) to address ATU's revised final offer, as well as to remedy TriMet's (1)(e) violation.[66]

ATU requests that we order TriMet to post a notice of its unfair labor practice conduct. We generally order a notice posting if we determine a party's violation of PECBA was: (1) calculated or flagrant, (2) part of a continuing course of illegal conduct, (3) committed by a significant number of the respondent's personnel, (4) affected a significant number of bargaining unit employees, (5) significantly (or potentially) impacted the designated bargaining representative's functioning, or (6) involved a strike, lockout, or discharge. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J, et al*. Case No. C-19-82 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). These factors are typically understood to be in the disjunctive and thus, not all of these criteria need be satisfied to warrant posting a notice. *Laborers' Local 483 v. City of Portland*, Case No. UP-15-05 at 17-18, 21 PECBR 891, 907-908 (2007); and *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02 at 2, 19 PECBR 684, 685 (2002). However, we typically require the presence of multiple factors before requiring a posted notice. *See Wy'East Education Association/East County Bargaining Council/Oregon Education Association, et al. v. Oregon Trail School District No. 46*, Case No. UP-16-06 at 47, 22 PECBR 668, 714 (2008). In this case, although TriMet's direct dealing conduct potentially impacted ATU's functioning as the employees' exclusive representative, no other factors or circumstances weigh in favor of requiring notice posting. Accordingly, we decline to order it.

ATU also requests that we order a civil penalty. ORS 243.676(4) authorizes us to consider awarding a civil penalty when "the party committing an unfair labor practice did so repetitively,

[66]Counsel represented at hearing that the parties have scheduled an interest arbitration hearing in April 2021. To avoid unnecessary delay, the parties may mutually agree to continue reserving the hearing dates, notwithstanding this order.

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." In this case, we decline to order a civil penalty because the record does not establish that TriMet knowingly and repetitively engaged in direct dealing, or that its conduct was egregious.

ORDER

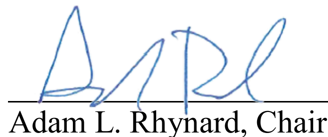
1. ATU is ordered to cease and desist its violation of ORS 243.672(2)(b), with respect to including, over TriMet's objections, permissive subjects of bargaining in its final offer, and thereby conditioning settlement of the parties' successor agreement on bargaining over those permissive subjects.

2. ATU is ordered to strike the proposals identified as permissive in this order from its final offer and submit a revised final offer.

3. TriMet is ordered to cease and desist its violation of ORS 243.672(1)(e), with respect to engaging in direct dealing with employees represented by ATU.

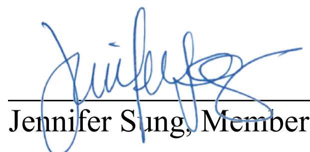
4. Both parties are ordered to participate in good faith in at least one additional mediation session (beyond those already scheduled), as set forth above in this order.

DATED: February 26, 2021.



Adam L. Rhynard, Chair

*Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

*Member Umscheid, Dissenting in Part:

I respectfully dissent from the conclusion that TriMet's interactions with represented employees constituted a *per se* violation of ORS 243.672(1)(e). I read the record very differently from the majority.[67]

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[67] I also dissent from Findings of Fact 60 through 63 and 166 through 168 to the extent they suggest that TriMet sought anything from Mike Arronson other than factual information about the extra board.

Dealing directly with represented employees is unlawful under ORS 243.672(1)(e) when the public employer "attempts to negotiate directly with its employees." *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05 at 97, 21 PECBR 673, 769 (2007) (citing *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85 at 36, 8 PECBR 8160, 8195 (1985)); *see also 911 Professional Employees Association v. City of Salem*, Case No. UP-62-00 at 20, 19 PECBR 871, 890 (2002) (a public employer cannot "bypass the exclusive representative to negotiate and seek changes in mandatory subjects directly with employees"). To constitute *per se* bad faith bargaining, this Board has assessed whether the public employer's conduct amounted to bypassing the labor organization by negotiating or attempting to negotiate directly with represented employees about terms and conditions of employment. In the absence of that type of conduct by the public employer—that is, conduct that, in some way, is tantamount to bypassing the labor organization in bargaining—there is no *per se* bad faith bargaining violation. *See, e.g., Oregon Public Employees Union v. Jefferson County*, Case No. UP-20-99 at 10, 18 PECBR 310, 319 (1999) ("direct communication with bargaining unit members can violate (1)(e) where the purpose of the communication is to bypass the union and *bargain* directly with employees," citing *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559 (1996)).

For two reasons, I would dismiss ATU's *per se* bad faith bargaining claim that arises from TriMet's interactions with represented employee Mike Arronson. First, ATU never objected to TriMet's interactions with Arronson. Second, there is no evidence that TriMet actually bargained with or attempted to bargain with Arronson. The evidence indicates only that TriMet (and ATU) relied on Arronson as essentially a fact expert on a subject that even ATU describes as highly technical. Both reasons are described below.

First, it is undisputed that ATU never objected to TriMet's communications with Arronson, even though it knew about TriMet's reliance on Arronson for more than a year. Specifically, at TriMet's invitation, Arronson attended the bargaining session on October 31, 2019. TriMet viewed Arronson as its in-house expert on the AM/PM model of the extra board. The extra board is the method by which routes that are open because of an unexpected absence or need are assigned to backup operators. Both parties agree that the extra board is highly technical. At TriMet, assigning routes through the extra board includes applying 51 separate, highly technical rules.[68] Although a union-represented employee, Arronson is the chief station agent who administers the extra board. The extra board does not affect Arronson's terms and conditions of employment.

Union officer Fred Casey and ATU Labor Relations Coordinator Krista Cordova both testified that Arronson's presence at the October 31 session was awkward because Arronson had

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[68]As examples, Rule 11 and Rule 12 provide, respectively, "If a report Operator catches any short part, s/he shall fall back into first place if s/he does not have eight (8) hours work and returns before all the other work is out. The next report Operator up for work that has been cut off in the a.m., will be brought back first. Extra board Operators who relieve on the road and are asked to 'check back' will be permitted to call the Station Agent to see if they are needed to perform extra work[,]" and, "In case of double covered run or errors, comparable work is work completed within two (2) hours of the original assignment. If the new assignment gets off two (2) hours past original assignment, the Operator may reject the additional assignment without penalty. If Operator is used for report, they go before pass-up Operators."

not been invited by ATU and was not on the ATU bargaining team. ATU acknowledged in its brief that it assumed "from conversations that day" that TriMet had "previously discussed" TriMet's AM/PM board proposal with Arronson. Casey testified that several days after the session, he expressed his discomfort to Arronson. However, neither Casey nor anyone else from ATU objected to TriMet. Several weeks later, on November 14, when Cordova and Laird Cusack exchanged emails about ATU's uncertainty about the specifics of the AM/PM board proposal, Cordova referred to three possible AM/PM models that TriMet could be considering: a previous model used by TriMet years earlier, a model used by Cusack's previous employer in Seattle, or the model that, as Cordova put it, "Mike Arronson suggested to you." Thus, by November 2019, at the latest, ATU understood that Arronson had provided information to TriMet about an AM/PM model for the extra board.[69] Yet ATU did not object.

Eight months later, the parties discussed the AM/PM board topic at a bargaining session on July 31, 2020. Because of social distancing required by the COVID-19 pandemic, the parties met via a video platform. TriMet manager Steve Callas attended by telephone. Arronson was working in another part of the building and, according to Casey, Callas "grabbed" Arronson and brought him into the room to sit in on the bargaining session. Arronson participated in the discussions between TriMet and ATU about how the extra board model under consideration would work. ATU's three negotiators—Cordova, Shirley Block, and Whitney Stark—were all present, but ATU did not object to Arronson's contributions, involvement, or participation. About a month later, on September 2, 2020, Cusack wrote to Cordova and Stark about the AM/PM board, and Cusack referred to "an alternative to the AM/PM board," noting that he had not "run it by" Arronson yet. Cusack also noted that he was "checking with IT about implementation issues, but it's much simpler because it uses the current system." Again, ATU did not object to TriMet relying on Arronson.

I would conclude that TriMet did not commit an unfair labor practice because ATU never objected to TriMet communicating with Arronson. Previously, the Board has dismissed *per se* bad faith bargaining claims when a labor organization failed to object to alleged unlawful direct dealing. *See Hood River Employees Local 2503-2/AFSCME Council 75/AFL-CIO v. Hood River County*, Case No. UP-92-94 at 16, 16 PECBR 433, 448 (1996), *aff'd without opinion,* 146 Or App 777, 932 P2d 1216 (1997) (no (1)(e) violation where the contacts between employer and represented employees "did not involve any attempt at substantive negotiations" and the union "had no objection to the contacts"). Here, the evidence indicates that both parties understood that Arronson was acting as the fact expert on the particular model of AM/PM board TriMet put forward for discussion. Finding an unfair labor practice when ATU knew that Arronson was consulting with TriMet, but did not object, does not advance PECBA's purpose to develop "harmonious and cooperative relationships between government and its employees[.]" ORS 243.656(1). Further, finding an unfair labor practice when a labor organization has remained silent does not promote PECBA's policy, which recognizes that "unresolved disputes in the public service are injurious to the public, the governmental agencies, and public employees[.]" ORS 243.656(2). Concluding that TriMet violated subsection (1)(e) on these facts encourages parties to remain silent and litigate later if table bargaining proves difficult, which only prolongs

[69]ATU's claim is time-barred to the extent it is based on events before May 10, 2020, ORS 243.672(6), but its acquiescence before May 10, 2020, in Arronson's involvement is relevant to both ATU's lack of objection and the actual nature of Arronson's contribution.

unresolved disputes. The better approach is to require a labor organization that believes a public employer is bargaining directly with represented employees to object promptly and clearly so that the public employer can explain why it is communicating with those represented employees.

Second, I would dismiss the claim arising from TriMet's communications with Arronson because there is insufficient evidence to conclude that TriMet did anything other than obtain facts from Arronson. ATU's own witness, union officer Fred Casey, testified that he learned on October 31, 2019, during an ATU caucus in bargaining, that Arronson had been invited to bargaining "as a subject matter expert." The most plausible explanation for why ATU did not object to Arronson's involvement for more than a year is that ATU knew Arronson was playing that limited, and permissible, role.

Further, the preponderance of the evidence does not indicate that TriMet did anything other than ask Arronson to provide information. Specifically, there was no impermissible direct dealing between TriMet and Arronson at the July 31, 2020, bargaining session itself because ATU's negotiators—Cordova, Block, and Stark—were present and engaged in the discussion at the bargaining table. With regard to TriMet's communications with Arronson *outside* that session (and within the statutory period beginning May 10, 2020), the record contains no written communications between TriMet and Arronson, no drafts of proposals, and no documents of any other kind showing that TriMet bargained with Arronson. There is, for example, no direct evidence that Arronson assisted in drafting proposals or formulating TriMet's bargaining strategy. Arronson did not testify.

The only way to conclude that TriMet bargained with Arronson outside the July 31 session is to infer from other evidence during the statutory period that TriMet's communications with Arronson were impermissible. For example, in his September 2, 2020, email to ATU representatives, Cusack referred to "an alternative to the AM/PM board," and stated that he had not "run it by" Arronson yet. It is possible that Cusack was divulging to ATU that he intended to negotiate with Arronson, but it is also possible that Cusack was telling ATU only that he intended to seek factual information from Arronson in his role as the subject matter expert—an approach both parties had accepted over the course of the negotiations. The latter conclusion is more likely. It is also the conclusion most consistent with ATU's continued acquiescence in TriMet's communications with Arronson. In sum, the weight of the evidence indicates that Arronson acted only as a subject matter expert—and this Board has never held that a public employer violates PECBA when it seeks factual information from a represented employee in that capacity. I would therefore dismiss this aspect of ATU's subsection (1)(e) claim.

In addition, I would also dismiss ATU's direct dealing claim that alleges that TriMet sought to bypass ATU and bargain directly with the MOW signals apprentices. The record as a whole indicates that the conduct of all the involved TriMet managers in fact sought to raise the matter *with ATU*, and promptly did so. Specifically, the record indicates that Casey Goldin, while a signals supervisor, became concerned about morale in his work group after he heard apprentices complain that they felt "stuck." Goldin's perception that the employees were dissatisfied was corroborated at hearing by ATU witness Jason Breedlove, an MOW signals apprentice, who acknowledged that he felt stuck for a number of reasons, including the lack of classroom training in the apprenticeship program, and had "probably" expressed that frustration to Goldin. Goldin took his concerns to his

manager, Keith Bounds. Notably, Goldin testified that he wanted the apprentices to remain in the MOW program because the work group is short-staffed.

Goldin and Bounds then took their concerns to a recurring, internal labor relations meeting with TriMet's labor relations department. The very purpose of an internal management meeting with labor relations staff is for department managers such as Goldin and Bounds to discuss with a public employer's labor relations experts how to properly address matters involving union-represented employees. TriMet Senior Labor Relations Representative Sarah Browne testified that the purpose of the recurring meeting was to discuss labor contract administration.

TriMet's labor relations staff, when presented with the matter, approached it as something that needed to be raised with ATU. Specifically, as Browne testified, and as documented in her contemporaneous notes from the meeting, Bounds understood that the apprentices' seniority forfeiture was an issue for "negotiation." Browne's email to her manager, Laird Cusack, within the hour after the meeting indicated that Bounds raised the issue as a suggestion "for proposal to ATU." There is no evidence that Browne counseled Bounds or Goldin that their understanding was incorrect or that they should somehow evade TriMet's duty to work with ATU when required. To the contrary—the evidence indicates that all the participants at the labor relations meeting considered the matter as one that would be presented to ATU.

After the meeting, Browne consulted Cusack. Cusack and Browne decided to ask Bounds to get the names of the particular employees interested in returning to their former classification. That approach was not arbitrary, baseless, or indicative of a scheme to bypass ATU. Instead, it arose directly from the language of the relevant section (Article 3, Section 15, Paragraph 8) of the parties' CBA, which provides, in relevant part:

> "Upon six (6) months' accrual in an apprentice 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*." (Emphasis added.)

In other words, TriMet perceived this not as a broad, successor bargaining issue, but as an employee morale issue that, by its very nature, had been raised by particular employees. Logically, TriMet sought to ascertain which particular employees (if any) TriMet needed to discuss with ATU.

Goldin took on that task, and talked to each apprentice individually. There is no evidence that Goldin made offers, proposals, or promises to the apprentices, or in any way sought information in order to modify TriMet's successor bargaining proposals or strategies. In fact, Goldin hoped the apprentices would stay. Goldin simply told the apprentices that if they were interested he would provide their names "to labor relations" (which, in public sector workplaces, is generally understood to indicate that a matter may require the exclusive representative's involvement). Goldin then did exactly that, and provided the names to Browne. Browne did not

counsel Goldin to return to the employees and negotiate with them. Rather, she promptly and appropriately telephoned ATU President Shirley Block. Block did not object during the phone call, and asked Browne to send an email with the information. Browne did so, quoted the WWA language that permitted an exception to seniority forfeiture "by mutual agreement" between TriMet and ATU, and noted that "[h]opefully we can reach a mutual agreement." After ATU objected two days later, TriMet dropped the matter.

This record indicates that Bounds, Goldin, Browne, and Cusack were seeking only to obtain a list of those particular employees who were interested in having TriMet and ATU discuss a possible "mutual agreement" pursuant to Article 3, Section 15, Paragraph 8 of the WWA. There is no evidence that any manager attempted to negotiate with the apprentices, or otherwise try to undercut ATU.[70] The evidence is more consistent with a conclusion that TriMet managers understood that the issue would need to be raised with ATU—which is exactly what TriMet promptly and appropriately did. This Board has previously concluded that there is no (1)(e) violation when the employer does not attempt to negotiate with represented employees and promptly notifies the union of the contacts, and we should do the same here. *See Coos Bay Firefighters Association v. City of Coos Bay and Coos Bay Fire Department*, Case No. UP-41-98 at 11, 18 PECBR 515, 525, *aff'd without opinion,* 171 Or App 523, 19 P3d 387 (2000) (no (1)(e) violation where there was "no evidence of a deliberate effort by the City to undercut the Association by dealing directly with bargaining unit members about contract proposals," and where the employer promptly notified the union of its communications with represented employees).

Given the small size of the MOW signals apprentice group, presumably TriMet could simply have produced a list of all the employees in that group and provided it to ATU, leaving to ATU the task of determining which employees, if any, might be interested in returning to their former classification. That would have been a better approach. But the fact that Bounds, Goldin, Browne, and Cusack handled the issue as they did is not sufficient for me to infer that TriMet was bypassing ATU and unlawfully bargaining with employees. Rather, viewed in context, TriMet's communications were merely the first step of several steps TriMet took in order to approach ATU to discuss a possible mutual agreement pursuant to the terms of the WWA. TriMet's conduct is not the type of conduct that rises to the level of an unfair labor practice. It did not make proposals to employees, discuss its bargaining proposals with employees, change its proposals or bargaining strategy, use the issue to stall or complicate bargaining, or take any actions to undercut ATU—in fact it promptly notified ATU and sought to negotiate with ATU. In my view, we should require more before attaching unfair labor practice liability under subsection (1)(e) to the type of communications TriMet had here. *See, e.g., Rogue Valley Transportation District*, UP-80-95 at 18, 16 PECBR at 576 ("Bypassing the exclusive representative, meeting directly with employees to discuss its contract proposal, revising its proposal in response to issues raised in the meeting,

[70]In fact, at hearing, ATU's counsel asked apprentice Robert Baker whether Goldin made him an offer to leave the apprentice program and retain his seniority. Significantly, Baker did not adopt ATU's counsel's characterization that Goldin extended an "offer." Instead, Baker testified that Goldin remarked that a return to the service worker classification without forfeiting seniority "was possible"—a remark consistent with the provision in Article 3, Section 15, Paragraph 8 that permits "mutual agreement" between ATU and TriMet.

and then submitting new proposals directly to bargaining unit members, as the District did, violates its obligation to bargain with the Union, the employees' exclusive representative, and is a *per se* violation of subsection (1)(e).").[71]

For all these reasons, I would dismiss ATU's claim that TriMet violated ORS 243.672(1)(e) by dealing directly with represented employees. Because I dissent from the conclusion that TriMet engaged in *per se* bad faith bargaining in violation of ORS 243.672(1)(e), I also dissent from that portion of the order that requires TriMet to cease and desist its violation of ORS 243.672(1)(e). I join the majority in requiring both parties to participate in at least one additional mediation session because that requirement is ordered as a remedy for ATU's violation of ORS 243.672(2)(b).

*Lisa M. Umscheid, Member

[71]I also would not interpret Goldin's conversations with the MOW signals apprentices as a survey or poll. Rather, Goldin was responding to what he perceived as a morale issue in his work group as a result of concern raised by the employees themselves. Following the lead of labor relations, he gathered names as TriMet's first step in taking the issue to ATU. Goldin provided the names to Browne, who passed them on to ATU, as previously planned, with the suggestion that ATU and TriMet discuss whether to reach an agreement as expressly envisioned in the WWA. There is no evidence that TriMet was assessing employee attitudes for the purpose of formulating proposals, responses, or strategy in successor bargaining.

Case Nos. UP-035/036-20

APPENDIX OF RELEVANT ATU FINAL OFFER PROPOSALS

**Article 3.1.2:**

"**Par. 2.** Seniority by classifications as established herein shall prevail in the performance of the work done in Paragraph 1, qualifications considered. All Journeyworkers/Technicians hired from outside the District prior to the effective date of this Agreement shall establish classification seniority behind any apprentice in the apprentice program on the date they were hired. All Journeyworkers/Technicians hired after the effective date of this Agreement shall establish classification seniority behind any Trainee in a Training program on the date they were hired. In the event of a dispute regarding seniority, ATU shall make the final determination of seniority placement."

**Article 3.1.5:**

"**Par. 5.** Service Workers may be used by the District to install and remove tire chains after Helper's classification on shift at the facility has been exhausted and under a Mechanic's supervision."

**Article 3.1.8:**

"**Par. 8.** All trading days off is a privilege granted by the Union and the District and may be canceled at any time by mutual agreement.
* * *
b. A trade can only occur between two (2) people working at the same garage, during the same hours, within the same job classification, having similar sign-up responsibilities, e.g., overhaul mechanics can only trade with overhaul mechanics, body shop mechanics can only trade with body shop mechanics. Requests for trades are subject to approval by the Supervisor. The District reserves the right to approve requests on a case-by-case basis based upon operational needs."

**Article 3.2.1:**

"**Par. 1.** When the District plans to hire for any ATU classification in the Maintenance Department a notice shall be posted on all department bulletin boards for not less than five (5) days before posting externally. If the District determines an internal candidate is equally qualified as an external candidate, the District shall hire the internal candidate."

**Article 3.2.5:**

"**Par. 5.** It is understood and agreed that in filling vacancies that are not filled by promotion within the Department, preference will be given to employees or laid off employees of the Facilities Maintenance or Stores Departments. Such vacancies will be posted on all department bulletin boards for five (5) days. If unable to fill the vacancy, it may be filled according to seniority within the District. Following selection, District employees shall receive preference for all bidding purposes over employees hired from the outside."

**Article 3.3.8:**

"**Par. 8.** Assistant Supervisor
f. Assistant Supervisors shall perform journey- level work in addition to their Assistant Supervisor duties, except when acting Supervisor."

**Article 3.3.9:**

"**Par. 9. Service Worker**
* * *
e. If the District determines an internal candidate for any Service Worker classification is equally qualified as an external candidate, the District shall hire the internal candidate. Credit shall be given to employees who have worked in a Helper/Service Worker classification for prior experience equivalent to the time worked in that position for any Service Worker classification."

**Article 3.4.1:**

"**Par. 1.** Maintenance Department seniority shall govern in laying off and reemployment of employees. Employees so laid off because of lack of work shall be returned in the inverse order in which they were laid off, as the need for their classification, or classification of work, permits.
a. If the District curtails the number of employees in any job, the employee with the least job seniority will be the first to be moved out of that job. That employee will then be entitled to exercise such job seniority s/he has on any other job in that department.
b. Only in the event of layoff, Facilities Maintenance employees shall be allowed to exercise their departmental seniority for positions in Maintenance or Stores."

**Article 3.7.1:**

"**Par. 1.** There shall be a Bus 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."

**Article 3.7.2:**

"**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."

**Article 3.7.4:**

"**Par. 4.** All Trainee programs shall meet the minimum standards for a nationally or state certified competency-based, time based hybrid model for the specific program. All Trainee programs shall provide minimum in-class hours for competency-based model for the specific program, for which TriMet shall ensure Trainees receive course credit through a local college for the classroom hours. Trainees shall receive a certificate of completion."

**Article 3.7.5:**

"**Par. 5.** 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."

**Article 3.7.8:**

**"Par. 8.** Any District employee who has successfully met all the prerequisites established by the District and is selected to enter a District apprenticeship program, shall be provided an opportunity to attend program orientation of that program prior to accepting the promotion. The orientation will include a meeting with a trainer to cover job requirements and expectations, working conditions, and an interview with a journey level worker."

**Article 3.9.3:**

"**Par. 3.** Warranty work will be done by District employees when qualified, and District mechanical employees will participate in all types of warranty work where such participation will aid in the training of District employees, ensures that employees learn the skill to avoid future work being contracted out, and is not merely repetitive in nature, and

a. Prior to commencing third party or vendor warranty work, including extended warranty work or retrofits that may include warranty work; the District will meet with the Union to explain the nature of the work and the warranty provisions covering the repairs. Documentation from this meeting in a manner and format acceptable to each party will be deemed to be a satisfactory record of the activity.

**b.** The District will provide time for mechanics to work with the vendor on warranty work that will provide District mechanics a direct training benefit. Accordingly, the location maintenance manager and the Union executive board member will meet to agree on a plan that provides the optimal training benefit and ensures that employees learn the skills involved in the mechanic work under

warranty.

**c.** For declared campaigns, vendor "policy" campaigns, and declared fleet defects where a significant portion of a fleet is affected (20% for Bus and 10% for Rail) the location maintenance manager and the Union will jointly, in good faith and with all reasonable intent, determine whether the warranty work to be performed is repetitious with little or no continuing learning value. If so determined, in writing, the continued assignment of one mechanic per shift may terminate after the initial start of the work, but not before at least one mechanic per shift has been adequately trained. The District may thereafter allow the vendor to complete the campaign work on its own. In the event the location maintenance manager and the Union executive board member cannot agree on whether a specific warranty activity is "repetitious with little or no continuing learning value," the matter will be heard by the Contracting Out Committee, whose decision shall be final."

**Article 3.11.1:**

"**Par. 1.** There shall be a Light Rail Technician Training Program. The purpose of the program is to offer qualified trainees an opportunity to advance in the field of light rail maintenance to a high level of proficiency. All light rail employees shall receive their regular rate of pay while training."

**Article 3.11.2:**

"**Par. 2.** The LRT Mechanic Training Program shall be governed by the same provisions contained in Section 7 and 21 of this Article with the following exceptions:

a. Work assignments, shift hours, and areas of instruction will be decided by the Maintenance Manager."

**Article 3.11.3:**

"**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 3.14.2:**

"**Par. 2.** Warranty work will be done by District employees when qualified, and District mechanical employees will participate in all types of warranty work where such participation will aid in the training of District employees, ensures that employees learn the skill to avoid future work being contracted out, and is not merely repetitive in nature, and

a. Prior to commencing third party or vendor warranty work, including extended warranty work or retrofits that may include warranty work; the District will meet with the Union to explain the nature of the work and the warranty

provisions covering the repairs. Documentation from this meeting in a manner and format acceptable to each party will be deemed to be a satisfactory record of the activity.

**b.** The District will provide time for mechanics to work with the vendor on warranty work that will provide District mechanics a direct training benefit. Accordingly, the location maintenance manager and the Union executive board member will meet to agree on a plan that provides the optimal training benefit and ensures that employees learn the skills involved in the mechanic work under warranty.

**c.** For declared campaigns, vendor "policy" campaigns, and declared fleet defects where a significant portion of a fleet is affected (20% for Bus and 10% for Rail) the location maintenance manager and the Union will jointly, in good faith and with all reasonable intent, determine whether the warranty work to be performed is repetitious with little or no continuing learning value. If so determined, in writing, the continued assignment of one mechanic per shift may terminate after the initial start of the work, but not before at least one mechanic per shift has been adequately trained. The District may thereafter allow the vendor to complete the campaign work on its own. In the event the location maintenance manager and the Union executive board member cannot agree on whether a specific warranty activity is "repetitious with little or no continuing learning value," the matter will be heard by the Contracting Out Committee, whose decision shall be final."

**Article 3.15.1:**

"**Par. 1.** There shall be a Light Rail Maintenance Department Training Program. The purpose of the program is to offer qualified trainees an opportunity to advance in the field of light rail maintenance to a high level of proficiency. Light Rail Maintenance Department shall have Training Programs in six (6) Journey Level Classifications:

Overhead Traction Electrification Maintainer
Traction Substation Technician Signal Maintainer
Track Maintainer
Rail Vehicle Mechanic
Field Equipment Technician"

**Article 3.15.2:**

"**Par. 2.** The District shall establish MOW Training Programs in the classifications of:

Signal Maintainer
Overhead Traction Electrification Maintainer
Traction Substation Technician
Field Equipment Technician"

**Article 3.15.3:**

"The parties acknowledge the joint committee as a source for training standards."

**Article 3.15.4:**

"**Par. 4.** The District shall fill light rail apprenticeship openings consistent with Article 21 of this section."

**Article 3.15.9:**

"**Par. 9.** In lieu of a Training program for Track Maintainer, the following provisions shall govern the filling of Track Maintainer openings.

a. Laborer/Track Trainees will be filled consistent with Article 3, Section 21. 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.

* * *

d. The Light Rail Joint Committee shall participate in and provide oversight to the training, testing and qualifying of those persons holding positions."

**Article 3.15.11:**

"**Par. 11.** Any District employee who has successfully met all the prerequisites established by the District and is selected to enter a District a training program pursuant to Article 3, Section 21 shall be provided an opportunity to attend a orientation of that program prior to accepting the promotion. The orientation will include a meeting with a trainer to cover job requirements and expectations, working conditions, and an interview with a journey level worker."

**Article 3.16.1:**

"**Par. 1.**

d. Assistant Supervisors shall perform journey-level work in addition to their Assistant Supervisor duties, except when acting supervisor."

**Article 3.17.1:**

"**Par. 1.** The function of overtime is to facilitate the continuity and completion of work under unusual or extraordinary circumstances. Overtime will be used on an exception basis and is the prerogative and responsibility of maintenance managers.

a. The criteria for making overtime assignments and paying employees at the overtime rate will be based on: classification, current signed job function with which the work would normally be associated, (i.e. body shop employees do body work, engine rebuild employees do engine rebuild, spotters do spotter work, etc.)

then seniority. Overtime will not be offered to an employee who has been off sick until that employee has returned to work for one full workday."

**Article 3.17.2: ("Carry forward" proposal)**

"**Par. 2. Callout**

a. Each supervisor shall create a list of employees on their shift by seniority, classification, and job duties. This list is to be used for offering overtime opportunities to employees on the list on their RDO

1. Employees must indicate, at the beginning of each signup, if they want to be called for overtime. However, the supervisor must make an announcement at the beginning of each signup that they are preparing the overtime list.

b. If overtime is deemed necessary, the supervisor will:

1. Offer overtime on that shift to qualified employees currently working within that classification and job function (i.e. A/C, Brakes, Engine Overhaul, Janitor, Steam Cleaner, Sign-out Clerk, etc.) by seniority."

**Article 3.21.2:**

"**Par. 2.** Any employee hired by the District between January 1, 2014 and October 9, 2020 as a Serviceworker/Helper and have not had an opportunity to enter an apprentice program, shall retain the right to be promoted into a Training program, which shall be offered on a seniority basis. Such employees who have already taken and passed the Bennett Test shall qualify for that promotional opportunity. Employees in this classification who have not yet been provided a qualifying test by the District, shall be provided at least two opportunities to pass a qualifying test established by the District, which shall determine their eligibility. Any employee eligible to be promoted into a Training Program under this provision who leaves the Training program for any reason, except a qualifying medical reason (including but not limited to leaves pursuant to OFLA, FMLA, or the ADA) or due to a military leave, may return to their Serviceworker/Helper classification and will receive a seniority date equal to the date of their return to the classification. For employees who leave a Training program for a qualifying medical reason or due to military leave, receive a seniority date in the equal to their first hire date at TriMet."

**Article 3.21.3:**

"**Par. 3.** After an opportunity for promotion has been provided to current employees in the District shall have the right to hire from the outside all Trainees annually in each Training program within the District. All newly hired Trainees, whether from within or outside the bargaining unit, shall meet the minimum qualifications established by the District. If the District determines an internal candidate is equally qualified as an external candidate, the District shall hire the internal candidate for a Trainee position. If an internal candidate is hired into a Training position but leaves for any reason, except a qualifying medical reason (including but not limited to leaves pursuant to OFLA, FMLA, or the ADA)

or due to a military leave, they may return to most recent classification worked and will receive a seniority date equal to their previous classification seniority, less time spent in the training program."

**Article 4.1.2:**

"**Par. 2.** Only those functions mutually agreed to be excluded shall be excluded. Facilities Maintenance employees retain the right to all work not specifically excluded. The District will maintain facilities, funding, staffing, and training for all functions necessary to maintain and repair buildings and grounds, owned or operated, in whole or in part, by or for the District. The District and the Union shall meet occasionally to add or delete items from the exclusion list by mutual consent."

**Article 4.2.1:**

"**Par. 1.** It is understood and agreed that in filling vacancies that are not filled by promotion within the Department, preference will be given to employees or laid off employees of the Maintenance or Stores Department. Such vacancies will be posted on all department bulletin boards for five (5) days. If unable to fill the vacancy, it may be filled according to seniority within the District."

**Article 4.5.1:**

"**Par. 1.** There shall be a Facilities Training Program. The purpose of this program is to offer qualified trainees an opportunity to advance in the field of facilities maintenance to a high level of proficiency.
After the current apprentices graduate from the program, the Facilities Training Program shall not include LME Licensure. The Facilities Training program shall be governed by the same provisions contained in Article 3, Section 7 and Section 21 of this Article unless stated otherwise in the collective bargaining agreement."

**Article 4.5.2:**

"**Par. 2.** Any District employee who has successfully met all the prerequisites established by the District and is selected to enter a District training program pursuant to Article 21, Par. 2, shall, be provided an opportunity to attend program orientation of that program prior to accepting the promotion. The orientation will include a meeting with a trainer to cover job requirements and expectations, working conditions, and an interview with a journey level worker."

**Article 9.2.1:**

"**Par. 1.** The District agreed on the following policy with reference to new jobs and classifications: In the event the District creates a job or classification within the bargaining unit but not presently covered by the Labor Agreement, openings shall first be offered to District employees and filled by these employees if they can meet

the qualifications of the job as established by the District. In the event an employee has the basic qualifications necessary, s/he will be given a reasonable training period to learn the details of the job. In making its selection among qualified employees, seniority in the District will be considered.
Reasonable rules and procedures to administer the above paragraph shall be worked out between the District and Union, as necessary."

**Grievance #6449:**

"**Settlement Agreement March 5, 2007 ("Carry forward")**
It is agreed that the Plant Maintenance Tech will not perform work of the Plant Maintenance Mechanic which involves the installation, removal, replacement, maintenance, repair, welding, assembly or disassembly of items described in a, d, and k through bb on the list on page 10 of the PMM apprentice program (see attached) including any lighting, electrical or mechanical system or equipment involving Tri-Met buildings or facilities."

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-003-21

(REPRESENTATION)

| | |
|---|---|
| OREGON STATE UNIVERSITY PUBLIC SAFETY ASSOCIATION,<br><br>Petitioner,<br><br>v.<br><br>OREGON STATE UNIVERSITY DEPARTMENT OF PUBLIC SAFETY,<br><br>Respondent. | ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE |

On February 18, 2021, Oregon State University Public Safety Association filed a petition under ORS 243.682(2), OAR 115-025-0010, and OAR 115-025-0030 to certify (without an election) a new bargaining unit of non-supervisory sworn police officers employed by Oregon State University Department of Public Safety. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards designating Oregon State University Public Safety Association as the exclusive representative of the proposed bargaining unit.

On February 19, 2021, the Board's Election Coordinator caused a notice of the petition to be posted. Pursuant to the terms of the notice posting and OAR 115-025-0060, 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 March 11, 2021). There were no objections to the petition or a request for an election.

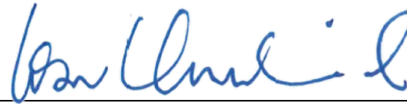
ORDER

Accordingly, it is certified that Oregon State University Public Safety Association is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

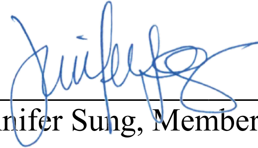
"Non-Supervisory Sworn Police Officers, employed by Oregon State University."

DATED: March 12, 2021.

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-002-19

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| PORTLAND PUBLIC SCHOOLS, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | RULINGS, |
| v. | ) | FINDINGS OF FACT, |
| | ) | CONCLUSIONS OF LAW, |
| UNITED ASSOCIATION, PLUMBERS | ) | AND ORDER |
| AND PIPEFITTERS LOCAL 290, | ) | |
| | ) | |
| Respondent. | ) | |

Daniel L. Rowan, CDR Labor Law, Portland, Oregon represented Complainant.

Daniel Hutzenbiler, McKanna Bishop & Joffe, Portland, Oregon represented Respondent.

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On February 19, 2021, 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).[1]

ORDER

1. The Union shall cease and desist from violating ORS 243.672(2)(a).

[1]This order should not be construed as precluding a union from investigating an allegation that one union member is discriminating against another, where the union's conduct of the investigation does not interfere with, restrain, or coerce, within the meaning of ORS 243.672(2)(a), employees' exercise of protected rights. Nor should this order be construed as precluding a union from disciplining a member for violating an anti-discrimination provision of a union constitution (whether by making false statements or engaging in other unprotected activity), where the union has sufficient cause and the union's actions do not interfere with, restrain, or coerce, within the meaning of ORS 243.672(2)(a), employees' exercise of protected rights.

2. The Union shall post a notice regarding its violation of ORS 243.672(2)(a) for 30 days in prominent places where the Union is permitted to post Union material.

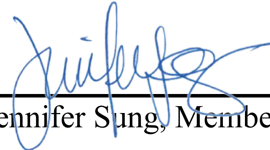
3. The Union shall rescind the discipline of M and reimburse M for penalties paid.

4. We dismiss the remainder of the Complaint.

DATED: March 24, 2021.

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-002-19

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| PORTLAND PUBLIC SCHOOLS,<br><br>Complainant,<br><br>v.<br><br>UNITED ASSOCIATION, PLUMBERS AND PIPEFITTERS LOCAL 290,<br><br>Respondent. | ) | RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER |

This case was submitted on stipulated facts before Administrative Law Judge (ALJ) B. Carlton Grew on October 23, 2020.

Daniel L. Rowan, CDR Labor Law, Portland, Oregon represented Complainant Portland Public Schools.

Daniel Hutzenbiler, McKanna Bishop & Joffe, Portland, Oregon represented Respondent United Association, Plumbers and Pipefitters Local 290.

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On January 17, 2019, Complainant Portland Public Schools (PPS or District) filed this Complaint against United Association, Plumbers and Pipefitters Local 290 (Union). On October 23, 2020, the parties submitted their post-hearing briefs, and the record closed on that date.

The issues presented for hearing are:

1. Did the Union's conduct related to the internal disciplinary proceedings against M[2] and O violate ORS 243.672(2)(a)?

[2]Single capital letters, like this one, are pseudonyms.

2. Did the Union violate ORS 243.672(2)(b) when it conducted internal disciplinary proceedings against N?

3. Did the Union violate ORS 243.672(2)(d) when it conducted internal disciplinary proceedings against N?

This Board concludes that the Union violated ORS 243.672(2)(a), but not (b) or (d).

## RULINGS

1. The ALJ correctly ruled that Joint Exhibits 38, 39, and 40, and Stipulation of Fact Nos. 42, 43, and 44 would not be received into evidence insofar as the exhibits and statements purport to be admissions by the Union regarding the strength of its legal position on the merits. ORS 40.190(1) specifically provides that evidence of settlement offers or conduct or statements made in compromise negotiations "is not admissible to prove liability for or invalidity of the claim or its amount." Exhibit 38 is the District's Settlement Proposal of March 13, 2020; Exhibit 39 is the District's Revised Settlement Proposal of June 23, 2020, and Exhibit 40 is the Union's approval of Settlement Agreement on June 25, 2020, attempts to resolve the issues raised by the Complaint. Therefore, Exhibits 38, 39, and 40 are inadmissible as evidence to prove that the Union violated the law. *See Gresham Police Officers Association v. City of Gresham*, Case No. UP-06/18-09 at 2-3, 24 PECBR 55, 56-7 (2010); *Michael Barkley and AFSCME, Local 2451 v. City of Klamath Falls*, Case No. UP-43-09, 24 PECBR 457, 458-59 (2011).

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

## FINDINGS OF FACT[3]

The Parties

1. The District is a public employer as defined in ORS 243.650(20).

2. The Union is a labor organization as defined in ORS 243.650(13).

3. The Union is one of several affiliated trade unions representing PPS employees. These unions bargain together with the District as the District Council of Unions (DCU).

4. The District and the Union are parties to a collective bargaining agreement that expired December 31, 2019. Article 18 of that agreement addresses safety:

> "1. The District shall maintain safe working conditions in accordance with established federal and state regulations. The District and employees covered under this Agreement should work to avoid or minimize hazards.
>
> "2. The parties agree to comply with Oregon OSHA regulations.

[3]These Findings of Fact are derived from the parties' Stipulation of Facts and Joint Exhibits.

"B. PHYSICAL EXAMINATIONS

"1. In the interest of safety and the wellbeing of students, employees and the public, the District and the DCU and its affiliated unions agree to the objective of a substance free workplace." (Exh. J-1, p 17.)

5. The Union represents certain District employees employed in the District Maintenance Department, including M, O, F, and C.

6. PPS employee N is a Senior Program Manager in the Maintenance Department. N is excluded from the bargaining unit as a statutory supervisor. N has been a Union member since 1994.

7. The Union and its members are subject to the Constitution of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Constitution). The Constitution includes provisions governing the conduct of Union members. It also contains a process that permits union members or local unions to bring charges against a union member who allegedly violates the Constitution. The internal Union disciplinary process involves a trial before the Local Union Executive Board. Following the trial, the Local Union Executive Board issues a finding. If the union member is found guilty, the Executive Board may assess a fine, suspend, or expel the Union member. The decision of the Executive Board is subject to appeal to the International Union's General Executive Board. The Union also maintains its own Constitution and By-laws.

8. On January 9, 2018[4], the District received a report that PPS employee F operated a PPS vehicle in an unsafe manner in the District's Benson High School parking lot.

9. M and O are F's coworkers in the Maintenance Department. They are also part of the bargaining unit represented by the Union. C is not in the Union bargaining unit.

10. The District investigated the incident and interviewed District employees M, O, and C as part of that investigation. Each of the three employees provided a written statement regarding the incident. Union Business Agent Dennis Mask interviewed C about the incident and prepared a written summary of that interview.

11. On March 26, the District sent F a letter titled, "Subject: Loudermill Notice of Proposed One Day Unpaid Suspension." The letter stated that the District was considering discipline based on three incidents, one which included the driving incident at Benson High School on January 9. (Exh. J-7.)

12. On May 9, the District issued F a written warning and one-day suspension based on the conduct described in the March 26 letter.

[4]All dates are in 2018 unless otherwise noted.

13. On May 14, F sent an email to Union Business Manager Lou Christian and Union Business Agent Dennis Mask, indicating a desire to file internal union disciplinary charges against District employees M and O.

14. On May 29, F filed charges with the Union against M and O for violating Constitutional provisions Sections 153 (the Pledge) and 197 (Discrimination against Members) by allegedly making false statements to the District..

15. On June 5, F filed charges against PPS Supervisor N for violating Constitutional provisions Sections 153 and 197.)

16. Section 153 of the Union Constitution provides:

> "Each applicant before becoming a member shall take the following pledge or oath of obligation:
>
> "I, (state name), in the presence of this Local Union, do truly promise and pledge my word of honor that I am familiar with the provisions and requirements of the Constitution and By-Laws of the United Association and that I will not perform any act in any way prejudicial to the best interest of the United Association, but will at all times endeavor to promote its prosperity and usefulness. I hereby agree to remain loyal and true to the principles and policies and to be governed by the Constitution and By-Laws and Ritual of United Association and the Local Union in any and all matters now or that may hereafter be included therein. I further pledge that I will faithfully attend all meetings of the Local Union unless prevented by sickness or other causes beyond my control. I will at all times assist members of the United Association to the extent of my ability, defend them when unjustly treated or slandered, and cultivate for each and every member the warmest friendship and brotherly love. I will assist unfortunate or distressed members to procure employment.
>
> "I do further promise and swear that I am not a member of any organization advocating the overthrow by force and violence of the Government of the United States or of Canada.
>
> "I take this obligation voluntarily, without any mental reservation, and bind myself until death under the penalty of scorn due to moral perjury and violated honor as one unworthy of trust or assistance." (Exh. J-2 at 100-1, emphasis deleted.)

17. Section 197 of the Constitution provides in part:

> "The United Association recognizes that every member is entitled to just treatment and as a matter of policy, the United Association embraces and supports the anti-discrimination laws of the United States and Canada." (Exh. J-2 at 121.)

18. On June 15, the Union held a meeting and voted to accept the charges filed against M and O. The charges were referred to the Local Executive Board and a trial was scheduled for July 11. M and O were sent notices of the trial and were ordered to attend.

19. On July 2, attorney Stephen H. Buckley provided a legal opinion to the Union President and Vice President stating that the Union could lawfully process the charge F filed against N.

20. On July 11, the Local Executive Board held a trial of M and O based on the charges filed by F.

21. The results of the trial were read at a meeting of the Executive Board on July 18, 2018. M was found guilty of violating Section 153 of the Union Constitution. O was found guilty of violating Sections 153 and 197 of the Union Constitution. M and O were each fined $250.

22. At that July 20 Union meeting, the Union also accepted the charges against N.

23. On July 26, M and O received written notice of the outcome of their trials.

24. Also on July 26, M and O met with the District Senior Manager of Employee and Labor Relations to complain about the Union charges brought against them. M and O voluntarily provided the manager with documentation related to their Union discipline. M and O also told the manager that they did not want to be involved in future District investigations.

25. On July 27, N sent an email to Union Business Manager Lou Christian requesting information about the charges filed against him.

26. Sometime after July 27, N received written notice that the charges against him had been accepted and that a trial had been scheduled for August 14.

27. On August 7, N emailed the Union and requested that the charges be dismissed. Union Business Manager Christian provided N with a copy of the legal opinion from Attorney Buckley.

28. On August 8, the Union denied N's request to dismiss the charges.

29. On August 9, N requested the trial be postponed.

30. On August 13, the Union granted an extension, rescheduling the trial for August 28.

31. On the morning of August 27, legal counsel for PPS, Daniel Rowan, contacted legal counsel for the Union, Stephen Buckley, via email to request that the Union stay disciplinary proceedings against N.

32. On August 27, Buckley replied via email and indicated that the Union would proceed with the trial of N.

33. On August 28, the Union held a trial based on F's internal Union charges against N.

34. On August 29, N emailed a representative of the International Union regarding the disciplinary charges brought against him.

35. On September 21, the Union informed N of the result of his trial. N was found not guilty.

36. On February 26, 2019, M testified at an arbitration hearing where the issue was whether the District had just cause to discipline F. O did not testify.

37. F testified at the arbitration hearing. Her testimony included the following:

> "Q. Was the basis of your Union charges against [M] and [O], that they had provided a statement to Portland Public Schools about the Benson parking lot incident?
>
> "A. That and conversations that I had with [C], yes." (Exh. J-31.)

38. On May 28, 2019, O received a letter from the International General Secretary-Treasurer, Patrick Kellett, stating that his appeal had been granted and the disciplinary charges against him were dismissed.

39. Also on May 28, 2019, M received a letter from the International General Secretary-Treasurer Patrick Kellett, stating that his fine had been reduced from $250 to $125.

40. On June 29, 2019, Arbitrator David Stiteler issued a decision regarding F's discipline. The Arbitrator concluded that F drove in an unsafe manner during the January 9, 2018 incident, but reduced the disciplinary penalty imposed.

41. On December 3, 2019, the parties agreed to submit this unfair labor practice case to this Board based on a Stipulated Record and Closing Briefs.

42. On March 13, 2020, the District provided the Union with a written settlement proposal.[5]

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[5]As noted in this Board's Rulings, we do not consider the content of these settlement discussions in this Recommended Order.

43. On March 23, 2020, counsel for the District provided an update to the ALJ regarding the due date for the Closing Brief, and of a potential settlement.

44. On May 11, 2020, counsel for the Union provided a status update to the ALJ, indicating that the District had provided a proposed settlement to the Union and the Union was considering it.

45. On June 23, 2020, the District provided a revised settlement agreement to the Union.

46. On June 25, 2020, counsel for the Union responded to the District in an email stating that a Settlement Agreement would need approval from the International Union.

47. On July 29, 2020, counsel for the Union informed the Administrative Law Judge that the parties had a tentative agreement on settlement, pending final approval from the International Union.

48. As of October 23, 2020, the date of the Parties' Stipulation, the International had not approved the Settlement Agreement and the Union has not executed the Settlement Agreement between the Parties.

## CONCLUSIONS OF LAW

The District alleges that the Union violated ORS 243.672(2)(a) by holding disciplinary proceedings, and fining, M and O because of F's charge and Union officials' conclusion that M and O made false statements in the District safety investigation. The District also alleges that the Union violated ORS 243.672(2)(b) and (d) when it conducted internal disciplinary proceedings against District manager, and Union member, N. The Union argues that its conduct was consistent with the Public employees Collective Bargaining Act (PECBA).

We turn to our analysis.

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

2. The Union violated ORS 243.672(2)(a) by engaging in disciplinary proceedings, and fining, M and O because of F's charge and Union officials' conclusion that M and O made false statements in the District safety investigation.

Standards for Decision

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 interfere 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. This section is the labor organization analogue to ORS 243.672(1)(a), which prohibits like conduct by public employers. *Jefferson County v. Oregon Public Employees Union*, Case No. UP-16-99, 18 PECBR 285 (1999). Subsection 2(a), because it addresses the conduct of labor organizations, has also 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 of a union's duty of fair representation, but by the employer in response to the Union's discipline of District employees and Union members under Union rules. As explained below, in this type of case, this Board has held that a union is free to enforce a rule against a member which: (a) reflects a legitimate union interest; (b) does not impair public policy under the labor laws; and (c) "is reasonably enforced against members who can avoid the rule by resigning their union membership." *Burkhart v. Oregon Public Employees Union Local 503*, UP-4-92, 10, 14 PECBR 150, 159 (1992).

We apply the *Burkhart* test while mindful of the standards of proof for claims under ORS 243.672(2)(a) as it mirrors ORS 243.672(1)(a).

The language of ORS 243.672(2)(a) provides two distinct prongs, one of which prohibits restraint, interference, or coercion "because of" the exercise of protected rights. The second prong of ORS 243.672(2)(a) prohibits actions that restrain, interfere with, or coerce employees "in the exercise" of their protected rights.

To determine if a union violated the "because of" prong, we ordinarily examine the union's motives or reasons for the disputed action. However, it is not necessary for a complainant to prove that the union was subjectively motivated by an intent to restrain or interfere with protected rights. *Portland Assn. 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). (Cases addressing ORS 243.672(1)(a).)

When analyzing "because of" claims, we typically examine the record as a whole to determine what motivated the union to act. *Portland Assn. Teachers*, 171 Or App at 626. We then decide whether the reasons were lawful or unlawful. *Portland Assn. Teachers*, 171 Or App at 639. Generally speaking, if all of the union'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) (addressing ORS 243.672(1)(a)). 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) (addressing ORS 243.672(1)(a)).

To determine whether a union has violated the "in the exercise" prong of ORS 243.672(1)(a), we consider the likely effects of the union's actions on employees. A union commits an "in the exercise" violation if the union'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. 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) (addressing ORS 243.672(1)(a)). Put simply, our test for this prong is: Would a reasonable person be chilled from exercising PECBA rights by the union's conduct? *Oregon Public Employees Union v. Jefferson County*, Case No. UP-5-98 at 14, 18 PECBR 109, 122 (1999), recons, 18 PECBR 199 (1999) (addressing ORS 243.672(1)(a)).

For an "in the exercise" claim, neither the union's motive nor the extent to which employees actually were coerced are controlling. Therefore, a complainant need not prove a causal connection between the union'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 a party 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 Employes 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) (cases addressing ORS 243.672(1)(a)). An example of a violation of the "in the exercise" prong is when an employer terminates an employee during the grievance process as additional 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).

Finally, 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).

Discussion

In this case, District employee and Union member F was seen by coworkers driving in an unsafe manner, a perception which was later upheld through an arbitration. A coworker notified the employer of the unsafe driving. The District investigated the incident. District officials interviewed several employee witnesses, including M and O, and directed them to provide statements. The District concluded that F had committed a safety violation and disciplined F. The Union grieved the discipline, and ultimately an arbitrator concluded that F had driven in an unsafe manner that warranted discipline.

After F was disciplined, but before the arbitration, F filed disciplinary charges with the Union against M and O. The Union held internal disciplinary proceedings (called "trials"), regarding both employees. The conduct at issue was the content of the statements M and O had provided to the District about F's driving incident, and whether that content violated Union Constitution Sections 153 (the Union's loyalty oath) and 197 (discrimination). Both employees were found guilty and were fined. Both employees appealed their fines to the International Union. While the appeal was pending, the District and Union arbitrated the grievance over the F's discipline. The District called M as a witness at the hearing and he testified. O did not testify. The International Union reduced the fine against M, and dismissed the discipline against O. The

Union's actions caused M and O to tell the District that they did not wish to be involved in future workplace investigations.

*Burkhart* was the first case in which this Board considered a Subsection 2(a) case brought by an employer based on union discipline of its employee union members. In *Burkhart*, a union suspended a bargaining unit member from union membership for 60 days because he filed a decertification petition against the union without resigning his union membership, as union bylaws required. The union member challenged the suspension as unlawful under (2)(a). This Board reviewed relevant case law under the PECBA and the federal counterpart to ORS 243.672(2)(a), Section 8(b)(l)(A)[6] of the National Labor Relations Act (NLRA).[7]

In particular, this Board discussed *Scofield v. NLRB*, 394 U.S. 423, 70 LRRM 3105 (1969). That case addressed whether a union acted lawfully in fining and suspending members who required immediate payment from the employer for piecework completed above a production ceiling, when the union believed that the members should have allowed the employer to bank the wages for payment on days that the production ceiling was not met. In reaching that decision, the *Scofield* court set out a test for evaluating such section 8(b)(l)(A) claims: A union is "free to enforce a properly adopted rule which [1] reflects a legitimate union interest, [2] impairs no policy Congress has imbedded in the labor laws, and [3] is reasonably enforced against union members who are free to leave the union and escape the rule." *Id.* at 3108.

In *Burkhart*, this board adopted the *Scofield* test as tailored to the PECBA: "We conclude that a union is free to enforce a rule which: (a) reflects a legitimate union interest (b) does not impair public policy under the labor laws, and (c) is reasonably enforced against members who can avoid the rule by resigning their union membership." *Burkhart* at 10. Applying this test to the facts in *Burkhart*, this Board first concluded that the union's rule regarding decertification addressed a legitimate union interest: "OPEU is concerned about member involvement in decertification proceedings. A member who circulates a petition may become, by virtue of that membership, privy to the union's strategy for responding to the attack. OPEU's rule clearly reflects a legitimate union interest." *Burkhart* at 10.

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[6]Section 8(b)(l)(A) states:

"It shall be an unfair labor practice for a labor organization or its agents—
"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided. That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *."

[7]Those cases included *NLRB v. Allis-Chalmers Mfg Co.*, 388 U. S. 1 75, 65 LRRM 2449 (1967) (A union did not violate section 8(b)(1)(A) by obtaining judgments on fines imposed on union members who crossed picket lines during an authorized strike); and *NLRB v. Marine & Shipbuilding Workers*1 391 U.S. 418, 68 LRRM 2257 (1968) (A union violated the statute by expelling a union member for failing to follow the union's rule requiring that a member exhaust an internal union appeal procedure before filing an unfair labor practice charge with the NLRB. The Court determined that unless "plainly internal affairs of the union are involved, "public policy requires" "unimpeded access to the Board." *Id.* at 2259. The court held that the union's internal rule was contrary to public policy.)

Second, this Board determined that OPEU's rule did not impair public policy under the labor laws. This Board reasoned that Burkhart was gathering signatures for a decertification petition, a necessary step precedent to the filing of a decertification petition. Under the PECBA, employees have a right to file a decertification petition which must be accompanied by an adequate showing of interest. ORS 243.682; OAR 115-25-010(3)(c). This Board determined that it was not necessary for Burkhart to file a petition before gaining protection under the PECBA. Rather, because an employee was required to submit an adequate showing of interest at the time of filing, the gathering of signatures is a protected activity under the PECBA. *Burkhart* at 10. This Board also determined that, while ORS 243.672(2)(a) does not contain the proviso language in Section 8(b)(l)(A),

> "[U]nions have the inherent ability to expel members. We agree that it is anomalous to require a union to maintain the membership of an individual who wants to eliminate the union's existence. The policy considerations involved in the cases discussed above are equally applicable to cases arising under the PECBA." *Burkhart* at 11.

Third, this Board determined that the rule was reasonably enforced by the union, because the rule could have been avoided by Burkhart if he had resigned from the union. "We do not find that such a forced resignation impinges on Burkhart's PECBA right to circulate a petition. There is nothing in this record which shows that [the union] took any other action against Burkhart. His suspension was based solely on his failure to resign before circulating the petition." *Burkhart* at 10.

With this precedent in mind, we apply the *Burkhart* test to the facts of this case.

Legitimate Union Interest

This case concerns workplace safety and discipline of employees for violation of workplace safety rules. Workplace safety is explicitly included in the PECBA definitions of mandatory subjects of bargaining. ORS 243.650(7)(h) provides, "For all other employee bargaining except school district bargaining and except as provided in paragraph (f) of this subsection, "employment relations" excludes staffing levels and safety issues (except those staffing levels and safety issues that have a direct and substantial effect on the on-the-job safety of public employees)." ORS 243.650(7)(f) provides, "For employee bargaining involving employees covered by ORS 243.736 and employees of the Department of Corrections who have direct contact with adults in custody, "employment relations" includes safety issues that have an impact on the on-the-job safety of the employees or staffing levels that have a significant impact on the on-the-job safety of the employees."

Employer discipline of employees is a primary interest of labor organizations as well. For example, this Board has "generally held that proposals regarding just cause standards for discipline are mandatory for bargaining." *Association Of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11, 25 PECBR 525, recons, 25 PECBR 764 (2013), citing *Multnomah County Corrections Officers' Association v. Multnomah County*, Case No. UP-21-86, 9 PECBR 9529, 9557-58 (1987). This includes not only the just cause standard itself, but also the procedures and guidelines for discipline. *Id.*; *Portland Fire Fighters*

*Association, Local 43, IAFF v. City of Portland*, Case No. UP-99-94, 16 PECBR 245, 252 (1995), AWOP, 142 Or App 206, 920 P2d 181 (1996); ORS 243.650(7)(a).

The District argues,

> "[T]he Union had no legitimate interest in impeding District investigations under the guise of enforcing its loyalty oath or nondiscrimination rule. Simply put, providing factual information to one's employer in the context of a safety investigation does not show a lack of loyalty to a union or coworkers. Any interest in trying to shield a union member from discipline through coercion or deception is not a legitimate interest. The Union was not faced with any threat as in *Burkhart,* nor was it trying to advance any legitimate bargaining interests as in *Scofield* or *Allis-Chalmers* (*NLRB v. Allis-Chalmers Mfg Co.*, 388 U. S. 175, 65 LRRM 2449 (1967))" Complainant's Post-Hearing Brief at 11-12.

This District argument focuses on the specific conduct at issue, not the subject matter or Union rule and their relationship to public policy. The key question under this element of the test is whether the Union has a legitimate interest in the subjects of employee safety and in discipline. We conclude that there is a legitimate union interest in workplace safety, and in the employer's discipline of its members by the employer regarding workplace safety issues.

Impairment of Public Policy Under the Labor Laws

We turn to whether the application of union rules regarding honesty and union loyalty impair public policy under the labor laws.[8] To determine those policies, we look to laws and regulations which concern workplace safety in Oregon.

Workplace safety is highly regulated under the Federal Occupational Safety and Health Act of 1970, 29 USC 651 *et seq*., and the Oregon Safe Employment Act, ORS 654.001 *et seq*. ORS 654.176 states that "To promote health and safety in places of employment in this state, every public or private employer shall, in accordance with rules adopted pursuant to ORS 654.182, establish and administer a safety committee or hold safety meetings." ORS 654.182(1)(a) provides that the relevant agency adopt rules that include "Prescribing the membership of the committees to ensure equal numbers of employees, who are volunteers or are elected by their peers, and employer representatives * * * ." The required agency rules are also to establish procedures for workplace safety inspections by the committee; establishing procedures for investigating all safety incidents, accidents, illnesses and deaths; evaluate accident and illness prevention programs, and prescribe guidelines for the training of safety committee members. ORS 654.182(1)(d, e). In addition, the statute releases labor organizations from liability for "the discussion or furnishing, or failure to discuss or furnish, or failure to enforce any safety or health provision to protect

[8]The *Scofield* court chose the term "labor laws" instead of naming or citing the NLRA or the Taft-Hartley Act; similarly, this Board used the term "labor laws" instead of naming or citing the PECBA. Given that workplace safety is an identified concern or subject of Oregon workplace safety law, workers' compensation law, the PECBA, and is at the heart of the dispute in this case, it is appropriate to determine the public policies relevant to this case by reviewing all the major statutory schemes governing workplace safety and discipline.

employees against work injuries, in any collective bargaining agreement or negotiations thereon." ORS 654.192.

Injuries to workers caused by unsafe working conditions and other causes are also highly regulated, under the Oregon Workers' Compensation statutes, ORS 656.001 to 656.990. As noted above, the PECBA also identifies significant safety issues as mandatory subjects of bargaining, and a public employer has the right to discipline employees who violate safety rules. Accordingly, we conclude that Oregon has significant and far-reaching public policies concerning workplace safety reflected in its labor laws.

Those policies are also reflected in the parties' collective bargaining agreement. That agreement provides:

> "1. The District shall maintain safe working conditions in accordance with established federal and state regulations. The District *and employees covered under this Agreement should work to avoid or minimize hazards*.
>
> "2. The parties agree to comply with Oregon OSHA regulations.
>
> "B. PHYSICAL EXAMINATIONS
>
> "1. In the interest of safety and the wellbeing of students, employees and the public, the District and the DCU and its affiliated unions agree to the objective of a substance free workplace." (Finding of Fact 4, emphasis added.)

M and O were District employees covered under the labor laws and the collective bargaining agreement. It is reasonable to conclude their contractual obligation to "work to avoid or minimize hazards" included reporting safety issues to the District and providing statements about safety incidents. (Finding of Fact 4.)

We turn to the relationship of union rules to these laws and the collective bargaining agreement. The Union's rationale for disciplining M and O was that it concluded, after a trial, that M and O had given false statements to the representatives of the District who were investigating a safety issue. While these employees, on this occasion, may not have contemplated F's charge or the Union's actions, the Union's discipline of M and O put any future employees giving statements about safety violations in an untenable position – they must either resign their Union position prior to making a safety report or bear the risk that Union officials may consider their statements to be untruthful.[9] Unlike the situation where an employee seeks to eliminate their bargaining unit through decertification, the option of resigning appears to be far out of proportion to the option of an employee acting in the course of their employment to describe safety-related conduct of another

[9]The question of whether the District was correct that M and O were truthful, or whether the Union was correct that they were untruthful, was resolved through the dispute resolution process of the collective bargaining agreement created for this very purpose. Here, that resolution came through an arbitration of the discipline imposed on F, and the arbitrator upheld the employer's conclusion that F's conduct warranted discipline, thus crediting M's and O's statements about the events.

employee. The more reasonable, and most likely, step an employee could take in the face of potential union discipline would be to avoid participating in safety reports and investigations. That is what M and O seek to do in the future.

Employees are subject to discipline by an employer if they provide false statements in an employer's safety investigation. They are also likely subject to discipline for refusing to report safety issues or refusal to provide information about safety issues. Such conduct would also appear to violate the collective bargaining agreement, which directs employees to "work to avoid or minimize hazards." (Finding of Fact 4.)

While, in the future, Union member employees would be aware of their option to resign from the Union prior to giving statements about the conduct of fellow employees, there is no evidence that the employees in this case had any reason to suspect that they would be disciplined by the Union if Union officials believed their statements were false. There is no evidence that these employees were aware of the Union rule, that it ever had been exercised in this workplace before, or that they would be put on trial for allegedly violating it.

Absent punishing its own members, the Union is not without recourse to challenge and correct false statements of its members that were used to discipline another member. It may file a grievance over the discipline, and pursue that grievance to arbitration, where a neutral fact-finder will determine the truthfulness of witnesses relevant to the discipline.

The only argument offered by the Union regarding the analysis above is that this Board should not adopt or follow cases on similar issues arising under the NLRA. The Union does not provide this Board with an alternative, relying on *Burkhart* instead. However, as noted above, *Burkhart* itself adopted a version of the relevant NLRA standard.

We conclude that the imposition of fines for allegedly false testimony in a disciplinary matter regarding workplace safety impairs public policy under the labor laws.[10]

Reasonably Enforced Against Union Members Free to Leave the Union and Escape the Rule

In reaching its decision in *Burkhart*, this Board discussed other cases decided under Section 8(b)(1)(A) of the NLRA. In *Allis-Chalmers*, the US Supreme Court held that a union did not violate Section 8(b)(1)(A) by obtaining judgments on fines imposed on union members who crossed picket lines during an authorized strike. This Board quoted several sections of that opinion, including the following:

> "Integral to this federal labor policy [of permitting union organizing and collective bargaining] has been the power in the chosen union to protect against erosion of its status under that policy through reasonable discipline of members who violate rules

[10]The facts in this case, including the disparate penalties imposed on M and O by the International Union, suggest that the Union's penalties for allegedly false statements could influence the content of employee reports of safety violations, and undercut the credibility of Union witnesses in disputes about such violations.

and regulations governing membership. That power is particularly vital when the members engage in strikes." *Burkhart* at 7, quoting *Allis-Chalmers* at 2450-51.)

This Board also reviewed *NLRB v. Marine & Shipbuilding Workers*, 391 US 418, 68 LRRM 2257 (1968). In that case, the Supreme Court held that a union member could not be expelled for failing to exhaust an internal union appeal procedure before filing an unfair labor practice charge with the NLRB. The Court determined that unless plainly internal affairs of the union were involved, public policy requires unimpeded access to the NLRB. Therefore, the union's internal rule was contrary to public policy, and the union violated section 8(b)(l)(A).

Applying this element of the *Burkhart* test, this Board stated in that case that the rule was reasonably enforced by the union, because the rule could have been avoided by Burkhart if he had resigned from the union. Regarding such a resignation, this Board stated,

> "We do not find that such a forced resignation impinges on Burkhart's PECBA right to circulate a petition. There is nothing in this record which shows that [the union] took any other action against Burkhart. His suspension was based solely on *his failure to resign before circulating the petition*." *Burkhart* at 10, emphasis added.

*Burkhart* and the cases it discusses all involved situations in which a union member takes an affirmative step of their own volition, outside the scope of their regular work, such as crossing a picket line; requiring an employer to pay for work exceeding a piecework ceiling on a daily basis instead of banking that surplus and using it for days where the ceiling was not met; and filing an unfair labor practice complaint against the union.

Here, however, the employees were summoned by the employer, in the course of their work, to provide evidence regarding a workplace safety issue. There is no evidence that the employees were permitted to refuse to provide statements, or that the employer did not care whether the statements were truthful or not. In the normal course of their employment, pursuant to Federal and State law, and the collective bargaining agreement, M and O's statements were given under pain of discipline. They were required to provide truthful information by their employer, and providing that information was consistent with specific language in the collective bargaining agreement that the union and its members would work to avoid or minimize safety hazards in their workplace.

The District argues, correctly, that

> "Using internal discipline against members in this way interferes with a public employer's workplace investigations or its ability to issue corrective action. The natural and probable effect of this conduct is that employees who want to be honest and forthright with their employer without fear of reprisals from the Union must resign their union membership. Employees who wish to remain in the Union may choose to avoid providing information to their employers to avoid Union discipline. The negative policy implications of employees withholding information during workplace investigations is obvious. Public employers would have a much more difficult time investigating all manner of potential workplace misconduct, including

discrimination, sexual harassment, and unsafe working conditions." District Post-Hearing Brief at 12.

For purposes of our discussion here, it does not matter whether the employees were truthful, as the employer apparently believed, and the arbitrator found, or not truthful, as the Union concluded. The relevant facts are simply that the Union concluded that the employees were untruthful in statements to the employer on a safety issue, and that as a result the Union threatened and then took punitive action against the employees.

The record does not reveal whether M and O were aware that the Union would put them on trial if their statements to the employer were suspected of being untruthful; there is no evidence regarding whether such trials had happened before, or the actions challenged in any such trials. In any event, the obvious message to their successors is to resign from the Union every time they have a duty to report, or to respond to questions, about a safety violation by a fellow Union member. Here, M and O have already stated that they will avoid giving such statements in the future, at least voluntarily. Imposing disincentives to report regarding safety issues and unsafe employee conduct is fundamentally inconsistent with the public policies contained in the statues and regulations governing safety in the workplace. It is not a consequence that one can reasonably expect an employee to ignore. Indeed, the employee's obligations to the employer are likely triggered upon merely seeing an unsafe action, not simply when the employee reports it. Under the facts of this case, it appears that the Union's system of incentives seem to favor employees involved in a safety violation not being truthful or responsibly coming forward if the person creating the unsafe situation is a fellow union member.

This Board concludes that the Union rules at issue are not reasonably enforced against union members, because those members are neither entirely free to leave the union and escape the rule, nor are those rules, as enforced here, consistent with the employees' obligations regarding safety under labor laws and the collective bargaining agreement.

We conclude that the District has proven that the imposition of fines for allegedly false testimony in a disciplinary matter regarding workplace safety impairs public policy under the labor laws, and that therefore the Union has violated ORS 243.672(2)(a). We will order the Union to cease and desist from this conduct.

3. The Union did not violate ORS 243.672(2)(b) when it conducted internal disciplinary proceedings against N.

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. It is the mirror provision to ORS 243.672(1)(e), which sets bargaining obligations on the employer.

Claims of bad faith bargaining typically arise out of traditional collective bargaining activities, where a party allegedly presents regressive or permissive proposals, or engages in surface bargaining. Other types of bad faith bargaining include an employer making a unilateral change in the status quo concerning a mandatory subject of bargaining. *See Three Rivers Ed. Assn. v. Three Rivers Sch. Dist.*, 254 Or App 570, 575, 294 P3d 547 (2013). Bad faith bargaining also

includes alleged failures to provide relevant information to the other party upon request if the information sought is of probable or potential relevance to a grievance or other contract administration issue, or if the information sought is reasonably necessary to allow meaningful bargaining on a contract proposal. *See Union-Baker ESD Association v. Union-Baker Education Service District*, Case No. UP-2-05, 21 PECBR 286 (2006). Finally, this Board has recognized certain types of actions as being so destructive of the bargaining relationship or so inconsistent with the good faith required by the statute that those actions per se violate (2)(b) or (1)(e), regardless of whether subjective bad faith is proven. *See Medford School District # 549C*, 25 PECBR at 515.

Citing no authority under the PECBA, the District urges this Board to follow NLRA precedent in this area. Section 8(b)(1)(B) of that Act provides: "It shall be an unfair labor practice for a labor organization or its agents * * * to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining *or the adjustment of grievances*" (emphasis added).

There are many cases which have determined whether particular actions taken by a union against a union member supervisor have violated Section 8(b)(1)(B). Many of those cases concern whether the union member supervisor under the union's threat of sanctions was engaged in collective bargaining or the adjustment of grievances. Supervisory work deemed to be covered by the "adjustment of grievances" clause has come to be called "Section 8(b)(1)(B) duties." *See Podewils v. NLRB*, 274 F3d 536 (DC Cir 2001); *Writers Guild of America, West, Inc. and Universal Network Television, LLC. and NBC Studios, Inc.,* NLRB 393 (2007).

The PECBA does not contain the language in 8(b)(1)(B) that vexes the courts analyzing cases under the NLRA. While the 8(b)(1)(B) term "collective bargaining" could possibly be interpreted to include the handling of grievances, cases under the NLRA have not done so. In any event, there is no evidence that N was involved in collective bargaining activity. His sole role in F's discipline was to investigate and report the circumstances, including by seeking statements from M and O, and provide notice of discipline as directed. Further, there is no evidence that the Union's contemplated punishment would impose a cognizable harm on N,[11] nor is there any evidence that the union's sanction would affect N's work for the District in the future. We conclude that the Union did not violate ORS 243.672(2)(b), and we will dismiss this claim.

4. The Union did not violate ORS 243.672(2)(d) when it conducted internal disciplinary proceedings against N.

Under ORS 243.682(2)(d), it is an unfair labor practice to violate the provisions of any written contract with respect to employment relations, where previously the parties have agreed to accept arbitration awards as final and binding upon them. It is the mirror provision to ORS 243.672(1)(g).

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[11]The record does not establish that N would suffer any personal losses due to expulsion or resignation from the Union such as loss of life insurance, health benefits, legal insurance, or ability to work in the private sector in his field.

In analyzing a violation of contract claim under either provision, we first determine whether the language is ambiguous. Unambiguous collective bargaining agreements are enforced according to their terms. A contract is ambiguous if it can reasonably be given more than one plausible interpretation. When that is the case, we ascertain the intent of the parties and construe the contract consistent with that intent. In order to do this, we examine any available extrinsic evidence of the contracting parties' intent. If after that, the ambiguity persists, we resolve it by using the appropriate maxims of contractual construction. *Jackson County School District # 9 v. Eagle Point Education Association/OEA/NEA*, Case No. UP-26-12, 25 PECBR 746 (2013).

The District contends that, in acting to determine whether to impose discipline on N, the Union violated the parties' collective bargaining agreement.

The District points to the agreement's Article 12, which provides,

> "In administering the terms and conditions of this Agreement, the parties agree to comply with applicable State and/or Federal Statutes and/or regulations regarding nondiscrimination, i.e., on the basis of age, sex, religion, race, physical handicap, marital status, political activity and association. It is the expressed intent of the [Union], in executing this Agreement, that the Board and its designees shall retain sole control and direction over the District's compliance with such laws and/or regulations and that this Article shall in no way be interpreted as affecting the application thereof. *The [Union] shall use its best efforts to direct employees complaining of such discrimination to appropriate District administrative remedies.* It is the intention of the parties that the interpretation given to this Article shall be consistent with the proper interpretation of the provision of the Oregon Fair Employment Practices Law contained in ORS 659.028 and 659.030." (Emphasis added.)

The District contends that, when F filed a discrimination charge against N with the Union, this language required the Union to refer F to the District's administrative processes, and not to conduct an internal disciplinary process. This contract provision, however, is plainly unambiguous. It refers to State and Federal statutes and regulations regarding discrimination, not discrimination regarding Union members under the Union Constitution.

The District also refers to Article 18 of the agreement, which states that "the parties agree to comply with Oregon OSHA regulations." The District refers us to Oregon OSHA ORS 654.010, which provides:

> "Every employer shall furnish employment and a place of employment which are safe and healthful for employees therein, and shall furnish and use such devices and safeguards, and shall adopt and use such practices, means, methods, operations and processes as are reasonably necessary to render such employment and place of employment safe and healthful, and shall do every other thing reasonably necessary to protect the life, safety and health of such employees."

We see no basis upon which we could determine that the Union violated this provision of the collective bargaining agreement and one of the laws it refers to. Unions routinely bring pressure

upon employers and their supervisors in disciplinary matters. They routinely file grievances, and go to arbitration, regarding discipline relevant to safety issues in the workplace. The District has provided no basis for this Board to conclude that such conduct, even as targeted as that in this case, violates the Oregon OSHA statute or regulations or any other labor law. We will dismiss this claim of the Complaint.

5. Remedy

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 (1984). In this case, a notice posting is warranted because the Union's conduct potentially affected all bargaining unit employees who are members of the Union. In addition to the traditional physical posting of the notice, this Board requires a respondent electronically notify employees of its wrongdoing when the record indicates that electronic communication is the customary and preferred method that the respondent uses to communicate with employees. *See 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). In this case, it appears that the relevant information about the trial and discipline of M and O were distributed to members with its reports of Union board meetings, by email. In that case, email is the common method of communication between the Union and its members. Accordingly, we will order the Union to post the notice and distribute it to bargaining unit employees by email.

PROPOSED ORDER

5. The Union shall cease and desist from violating ORS 243.672(2)(a).

6. The Union shall post a notice regarding its violation of ORS 243.672(2)(a) for 30 days in prominent places where the Union is permitted to post Union material.

7. The Union shall rescind the discipline of M and reimburse M for penalties paid.

8. We dismiss the remainder of the Complaint.

SIGNED AND ISSUED 19 February 2021.

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 that objections are received by the Board; "the date of service" of a recommended order means the date that the Board sends or personally serves the recommended order on the parties.) If one party has filed timely objections, but the other party has not, the party that has not objected may file cross-objections within 7 days of the service of the objections. Upon good cause shown, the Board may extend the time for filing objections and cross-objections. Objections and cross-objections must be simultaneously served on all parties of record in the case and proof of such service must be filed with this Board. Objections and cross-objections may be filed by uploading a PDF of the filing through the agency's Case Management System (preferred), which may be accessed at https://apps.oregon.gov/erb/cms/auth. Objections and cross-objections may also be filed by email by attaching the filing as a PDF and sending it to ERB.Filings@Oregon.gov. Objections and cross-objections may also be mailed, faxed, or hand-delivered to the Board. Objections and cross-objections that fail to comply with these requirements shall be deemed invalid and disregarded by the Board in making a final determination in the case. (*See* Board Rules 115-010-0010(10) and (11); 115-010-0090; 115-035-0040; and 115-070-0055.)

# 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-002-19, Portland Public Schools v. United Association, Plumbers and Pipefitters Local 290, and in order to effectuate the policies of the Public Employee Collective Bargaining Act (PECBA), we hereby notify our members that the Board found that United Association, Plumbers and Pipefitters Local 290, (Local 290) committed unfair labor practices in violation of ORS 243.672(2)(a), which prohibits a labor organization from interfering with, restraining or coercing any employee in or because of the exercise of any right guaranteed by PECBA, ORS 243.650 to 243.782.

The Board concluded that Local 290 violated (2)(a) when it engaged in disciplinary proceedings against two members for allegedly making false statements during an employer investigation of another member.

To remedy this violation, the Board ordered Local 290 to:

1. Cease and desist from violating ORS 243.672(2)(a).

2. Post this notice for 30 days in prominent places where the Union is permitted to post Union material.

3. Rescind the remaining discipline and reimburse the member for the fine imposed.

LOCAL 290

Dated: ________________, 2021 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. RC-004-21

(REPRESENTATION)

| | | |
|---|---|---|
| GOLD BEACH POLICE ASSOCIATION,<br><br>Petitioner,<br><br>v.<br><br>CITY OF GOLD BEACH,<br><br>Respondent. | ) | ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE |

On March 4, 2021, Gold Beach Police Association filed a petition under ORS 243.682(2), OAR 115-025-0010, and OAR 115-025-0030 to certify (without an election) a new bargaining unit of non-supervisory patrol officers, patrol officer sergeants, and office manager/deputy medical examiner employed by the City of Gold Beach. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards designating Gold Beach Police Association as the exclusive representative of the proposed bargaining unit.

On March 5, 2021, the Board's Election Coordinator caused a notice of the petition to be posted by March 10, 2021. Pursuant to the terms of the notice posting, OAR 115-025-0060, and OAR 115-025-0061, 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 March 24, 2021). There were no objections to the petition or a request for an election.

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## ORDER

Accordingly, it is certified that Gold Beach Police Association is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

> "Non-Supervisory Patrol Officers, Patrol Officer Sergeants, and Office Manager/Deputy Medical Examiner, employed by City of Gold Beach."

DATED: March 26, 2021.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-001-21

(REPRESENTATION)

| | |
|---|---|
| IBEW LOCAL 89, Petitioner, v. OREGON LEGISLATIVE ASSEMBLY, Respondent. | RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND INTERIM ORDER DIRECTING AN ELECTION |

Daniel Hutzenbiler, Attorney at Law, McKanna Bishop Joffe, LLP, Portland, Oregon represented Petitioner.

Tessa M. Sugahara, Attorney in Charge, and Jonathan Groux, Senior Assistant Attorney General, Oregon Department of Justice, represented Respondent.

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On January 13, 2021, Petitioner IBEW Local 89 (Petitioner or Union) filed a petition under ORS 243.682(2) and *current* OAR 115-025-0031(1)[1] to request an election for the following bargaining unit comprised of the following classifications:

> "Legislative Assistant I, Legislative Assistant II, Legislative Assistant III, and Legislative Assistant IV supporting elected officials in the Oregon Legislative Assembly, excluding supervisory, managerial, confidential, and caucus employees."

[1]Effective January 7, 2021, the Board's Division 25 rules were modified.

On February 4, 2021, Respondent Oregon Legislative Assembly (Branch or Respondent)[2] filed objections to the petition on multiple grounds. Because the petition sought to create a new bargaining unit of unrepresented employees, the matter was expedited under OAR 115-025-0065(1)(c) and assigned to Administrative Law Judge (ALJ) Jennifer Kaufman, who conducted a hearing on February 25, 2021. Pursuant to OAR 115-025-0065(7), the parties submitted post-hearing briefs on March 4, 2021. The matter was then transferred to the Board for the issuance of an order. *See* OAR 115-025-0065(2).

The issues are (1) whether the petitioned-for employees are excluded from the coverage of the Public Employee Collective Bargaining Act (PECBA); (2) whether the proposed bargaining unit is an appropriate bargaining unit; and (3) whether the petitioned-for employees are excluded on a classification-wide basis as confidential, managerial, or supervisory employees.

For the following reasons, we conclude that (1) PECBA does not exclude the petitioned-for employees from its coverage; (2) the proposed bargaining unit is an appropriate unit; and (3) the record does not establish that the petitioned-for employees are excluded on a classification-wide basis as confidential, managerial, or supervisory employees.[3] Therefore, we direct the Election Coordinator to conduct an election consistent with this order, to determine whether Petitioner should be certified as the exclusive representative of those employees.

## RULINGS

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

## FINDINGS OF FACT

### The Parties and Structure of the Legislative Branch

1. International Brotherhood of Electrical Workers, Local 89 is a labor organization within the meaning of ORS 243.650(13).

2. The Legislative Branch is a branch of the State of Oregon. The Legislative Branch is a public employer within the meaning of ORS 243.650(20).

3. The Oregon Constitution expressly divides the powers of the government of the State of Oregon into three separate branches. Article III, Section 1 provides:

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[2]In their submissions to this Board, the parties used the phrase "Legislative Assembly" and "Legislative Branch" interchangeably to refer to the employer. For readability, we use the term "Legislative Branch" or the word "Branch" to refer to the employer, and the term "Legislative Assembly" to refer to the assembly of 90 elected members.

[3]As explained further below, consistent with our rules, and in a manner consistent with this order, both parties may challenge, on an *individualized* basis, the eligibility of *specific* employees to vote, based on an individual employee being a confidential, managerial, or supervisory employee. *See* OAR 115-025-0073(2). Any challenged ballot will be impounded, and the Board will only resolve a challenge if such a resolution is necessary to certify the results of the election. *Id.*

> "The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided."

4. Article IV, Section 1 of the Oregon Constitution vests the legislative power of the state in a Legislative Assembly, which consists of a Senate and a House of Representatives. The Legislative Assembly consists of 90 elected members. The 90 elected members are comprised of 60 representatives, who serve two-year terms, and 30 senators, who serve four-year terms.

5. In addition to the 90 elected members of the Legislative Assembly, the Legislative Branch includes other offices, committees, and agencies. The Legislative Branch includes the parliamentary offices, which are the Office of the Secretary of the Senate and the Office of the Chief Clerk of the House.

6. In addition, the Legislative Branch includes the legislative agencies, which are Legislative Administration, the Legislative Counsel Office, the Legislative Fiscal Office, the Legislative Policy and Research Office, the Legislative Revenue Office, the Legislative Equity Office, and the Legislative Commission on Indian Services.

7. The Legislative Branch also includes committees referred to as statutory committees, joint interim committees, and joint interim task forces. One such statutory committee is the Legislative Administration Committee (LAC), which is established by ORS 173.710 and is a joint committee of the Legislative Assembly. The LAC consists of the Speaker of the House of Representatives, the President of the Senate, members of the House appointed by the Speaker, and members of the Senate appointed by the President. The committee is bipartisan. ORS 173.730 provides that no more than three House members of the committee shall be of the same political party and no more than three Senate members of the committee shall be of the same political party.

8. The LAC appoints a Legislative Administrator, who serves at the pleasure of the LAC and under its direction. *See* ORS 173.710. The Legislative Administrator is authorized by statute to perform administrative service functions for the Legislative Branch, including but not limited to accounting, data processing, personnel administration, printing, supply, space allocation, and property management. *See* ORS 173.720(1)(i).

9. The Legislative Administrator oversees the Legislative Administration agency, which is one of the agencies of the Legislative Branch. Legislative Administration oversees five functional areas: visitor services, information services, facility services, employee services, and financial services. Jessica Knieling is the Interim Human Resources Director and oversees Employee Services, one of the divisions of Legislative Administration. Knieling reports to the Legislative Administrator.

10. The Legislative Branch employs approximately 532 employees. The number of employees fluctuates because some employees are employed only for the duration of a legislative session. The employees employed by the Legislative Branch include the 180 petitioned-for

employees. The petitioned-for employees all work as what the Branch calls "personal staff" to one of the 90 elected members of the Legislative Assembly.

11. Each elected member is allocated an allowance provided in the Legislative Assembly budget to appoint personal staff. The Rules of the Senate for the 2021 session provide that a "member may appoint personal staff for a session or the interim or both, according to the allowance provided in the current Legislative Assembly budget." Senate Rules 15.05(1). Compensation and benefits for personal staff "shall be determined by Legislative Administration."[4] Similarly, the Rules of the Oregon House for the 2021 session provide that a "member may appoint personal staff for the session, the interim or both, according to the allowance provided[,]" and shall establish salaries payable to personal staff "in accordance with the policies and procedures as adopted by the Legislative Assembly." House Rules 15.10(1)(a) and (b).

The Legislative Branch Personnel Rules

12. Personnel administration in the Legislative Branch is governed by rules known as the Legislative Branch Personnel Rules (LBPRs). Under LBPR 1(6)(a), "[t]he authority for the personnel rules is derived from Article IV, section 11, of the Oregon Constitution, and, where otherwise not in conflict with the rules, ORS 173.005, 173.007, 240.200 and 240.245."

13. The LAC holds the authority to review, amend, and adopt the LBPRs. At the staff level, Employee Services, the Legislative Administration division overseen by Knieling, facilitates the preparation and review of new or amended LBPRs. Before the adoption, amendment, or repeal of any personnel rule by the LAC, the Legislative Administrator must provide a copy of the changes to all legislative agency heads, parliamentarians, and leadership chiefs of staff at least 30 days before the rule's effective date. The rules are subsequently considered and adopted by the LAC.[5]

14. When the LAC adopts the LBPRs, the adopted LBPRs apply only to the employees of the nonpartisan Legislative Administration agency (*i.e.*, employees in visitor services, information services, facility services, employee services, and financial services). The LBPRs apply to the remainder of the Legislative Branch only when they are subsequently adopted by a vote of both the House and the Senate.

15. Both the Senate and House have adopted the LBPRs for the current session of the Legislative Assembly. The Senate adopted Rules of the Senate for the Eighty-first Oregon Legislative Assembly (Senate Rules) on January 11, 2021. The Senate Rules govern numerous

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[4]The Senate Rules further provide that if a "member has a balance in the member's staff allowance account at adjournment *sine die* of the preceding regular session, the member may use the balance during the interim for personnel or for legislative newsletters or other informational material." Senate Rules 15.05(1)(b).

[5]In addition, the President of the Senate and the Speaker of the House of Representatives may establish an alternative procedure for considering modifications to the LBPRs, "except that no modification to a personnel rule may be made without notice and deliberation before committees of the Senate and the House or a joint committee of both houses." LBPR 1(3)(c).

aspects of the proceeding of the Senate, including convening, voting, motions, debate and decorum, committees, bill sponsorship, and other topics. The Senate Rules incorporate the LBPRs and other rules and policies as follows:

> "(1) The Legislative Branch Personnel Rules, as amended and in effect as of the last day of the Eightieth Legislative Assembly, are incorporated into the Senate Rules by this reference as rules of the proceeding of the Senate. The Respectful Workplace Policy, as adopted by the Joint Committee on Conduct on December 22, 2020, is incorporated into the Senate Rules by this reference as rules of proceeding of the Senate.
>
> "* * *
>
> "(3) The Legislative Branch Personnel Rules, the Respectful Workplace Policy, and the Legislative Branch Contracting Rules apply to the nonpartisan offices of the legislative branch when both the Senate and the House of Representatives adopt the personnel rules, Respectful Workplace Policy, and contracting rules as rules of proceeding[.]" Senate Rules 18.01.

16. The House adopted Rules of the Oregon House of Representatives for the Eighty-first Legislative Assembly (House Rules). As the Senate Rules do with regard to the Senate, the House Rules govern numerous aspects of the proceeding of the House, including convening, voting, motions, debate and decorum, committees, concurrence, conference, and other topics. The House Rules incorporate the LBPRs and other rules and policies as follows:

> "(1) The Legislative Branch Personnel Rules, as adopted by the House of Representatives on January 14, 2019, and August 10, 2020, and as adopted or revised by the Legislative Administration Committee on August 6, 2020, are incorporated into the House Rules by this reference as rules of proceeding of the House.
>
> "* * *
>
> "(3) The Legislative Branch Personnel Rules and Legislative Branch Contracting Rules apply to the nonpartisan offices of the legislative branch.
>
> "(4) The Respectful Workplace Policy as adopted by the Joint Committee on Conduct on December 22, 2020 is incorporated into the House Rules by this reference as a rule of proceeding of the House." House Rules 2.03.

17. The LBPRs provide:

> "The Legislative Branch Personnel Rules constitute rules of proceedings of the Legislative Assembly and may take precedence over conflicting provisions of state law to the extent that the rules expressly provide for such precedence. Section 4, *Mason's Manual of Legislative Procedure* (2010 ed.)." LBPR 1(5)(a).

18. The LBPRs are intended to serve as uniform procedures for the employment practices in effect throughout the Branch. The policy statement in the rules states:

> "It is the intent of the Legislative Assembly for the Legislative Branch Personnel Rules to encourage a high level of competence and professional capability by providing an orderly, efficient and equitable plan of personnel administration. In the development and application of these rules, continuing recognition must be given to the unique political and administrative requirements of the legislative process and the distinctive relationships among the various units of the Legislative Branch. The Legislative Branch Personnel Rules are intended to serve as uniform procedures that reflect current Legislative Branch employment practices." LBPR 1(2).

However, some rules in the LBPRs expressly provide that they do not apply to the personal staff of elected members, as further described below. LBPR 2(28) defines "personal staff" as "an employee working directly for a legislative member and paid from the member's services and supply budget."

19. The LBPRs provide that to "promote consistency in the interpretation of the personnel rules throughout the Legislative Branch, the appointing authority is encouraged to consult with Employee Services or with the Labor & Employment Section of the Department of Justice. Senate Rule 16.05 and House Rule 16.05 do not apply to requests for assistance made under this paragraph." LBPR 1(8).

20. The Legislative Administrator is responsible "for the administration of the Legislative Branch personnel system." LBPR 1(6)(c). At the direction of the Legislative Administrator, the Human Resources Director prepares, maintains, and administers the personnel rules, related policies, a classification system, a compensation plan, and recruitment and selection procedures. *See* LBPR 1(6)(d).[6]

21. Consistent with that rule, the Legislative Branch adopts and maintains a "branch-wide class specification plan" that groups branch positions "into broad, agency-wide classes whenever possible[,]" "reduces the total number of classes consistent with good management practices[,]" and ensures that classes of jobs are "discrete and internally consistent." LBPR 3(2). Under the rules, Employee Services allocates new positions to the appropriate class. As described in more detail below, until January 1, 2021, members' personal staff were classified in two classifications (a junior position of Legislative Assistant 2, and a senior position of Legislative Assistant 1).

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[6]For purposes of the State Personnel Relations Law (SPRL), officers and employees of the Legislative Branch are "exempt service" employees of the State of Oregon and generally are not subject to the SPRL or the rules and policies of the Oregon Department of Administrative Services or its Chief Human Resources Office. ORS 240.245; LBPR 1(4). However, ORS 240.245 provides that, for a position in the exempt service where the salary is not fixed by law, there shall be "a salary plan equitably applied to the exempt position and in reasonable conformity with the general salary structure of the state." ORS 240.245.

22. The Legislative Branch also maintains a compensation plan that applies to all employees of the branch. The purpose of the compensation plan is "to provide a uniform and equitable system for establishing and assigning salary levels and administering pay to recruit and retain a high-quality workforce." LBPR 4(1). For each class of work, a minimum and maximum pay rate, and intermediate rates as necessary, are established based on a market salary review that includes rates paid by other public and private employers for comparable work, Legislative Branch policies and financial conditions, unusual recruitment and retention circumstances, and other relevant salary and economic data. LBPR 4(2) authorizes the Senate President and the Speaker of the House of Representatives to review the compensation plan or any applicable market data and "amend, approve or deny any compensation plan changes," provided that they comply with LBPR 4 and applicable law.

23. No individual member of the Legislative Assembly has the authority to change any of the terms and conditions of employment for personal staff that are set under the LBPRs.

The 2019-2020 Classification and Compensation Study and the New Legislative Assistant Classifications

24. In summer 2019, the Branch undertook a branch-wide review of its classification structure and compensation plan, in part to ensure pay equity compliance.[7] The Branch contracted with Segal Waters Consulting (Segal) to conduct a classification, compensation, and pay equity study. The primary goals of the study were to ensure that position responsibilities were updated and well documented, job descriptions were updated to accurately reflect the work performed by employees, classification levels were clearly distinct, and compensation for jobs in the Legislative Branch was "market competitive."

25. Initially, Segal conducted a pilot project, called Phase I, in the Legislative Policy and Research Office in summer 2019. Thereafter, the study was expanded to Phase II. In Phase II, Segal analyzed all positions branch-wide, except elected and appointed officials.

26. As part of Phase II, Segal asked all Branch employees to complete a 28-page Job Description Questionnaire (JDQ) through an electronic, fillable form posted on the Branch's intranet. The questionnaire asked employees to describe their job and "actual current duties, even if they differ" from the job description, and estimate how much time they spend on those duties. Employees were also asked to answer questions on the following topics: 1) whether their job involves using discretion and independent judgment; 2) the minimum work experience and other qualifications required to do the job; 3) the type and complexity of management and supervision responsibilities; 4) the types of personal interaction with others outside direct reporting relationships (which the JDQ called "human collaboration"); 4) the freedom to act and the impact of actions taken in the job; 5) the knowledge and skill level required by the job; 6) the fiscal responsibility of the job; 7) working conditions and physical effort; and 8) the difference between the job and others in the job series.

[7]House Bill 2005, enacted in 2017, amended Oregon's equal pay law, with most changes effective on January 1, 2019. *See* Or Laws 2017, Ch 197, Section 2.

27. Employees were required to complete the JDQ by October 18, 2019. Each employee's supervisor could add comments to their own employees' JDQs. The electronic interface did not allow supervisors to change employee answers.

28. Employee Services compiled and sent Segal all completed JDQs in late October 2019. Segal analyzed the JDQs and aggregated similarities across the answers to create a recommended classification structure that accurately represents common job duties.

29. Based on the JDQs, Segal made a number of job analysis recommendations, including developing a job titling convention, recommending changes to some titles to better reflect the work performed, consolidating some job titles for jobs with similar duties and responsibilities, and updating job descriptions. Segal also conducted a job evaluation to establish internal job equity, and evaluated the following factors to assess consistency in jobs across the branch: education, experience, management/supervision, freedom to act, human collaboration, fiscal accountability, technical skills, and working conditions.

30. Segal also conducted a market evaluation, comparing jobs in the Legislative Branch to peer employers, and conducted a pay equity analysis.[8] Ultimately, Segal recommended a classification system and a pay structure for jobs across the Legislative Branch, including the Legislative Assistants who comprise the personal staff of elected members.

31. For personal staff who serve elected members, Segal recommended four new Legislative Assistant classifications—Legislative Assistant I, II, III, and IV. The Legislative Assistant I position is the junior-level position and the Legislative Assistant IV position is the senior-level position in the series. Segal also recommended a new compensation plan for the four positions.

32. According to the job descriptions, each of the four levels in the Legislative Assistant classification family is distinguished from the other levels as follows:

- Legislative Assistant I: This position is the first level in the Legislative Assistant job family. Its primary responsibility is general administrative support for the smooth and efficient day-to-day operations of the member's office.

- Legislative Assistant II: While the focus of this position is to provide day-to-day office support for the member, this position is distinguished from the Legislative Assistant I in that it is more involved in the research and analysis of issues in the review and development of legislation.

- Legislative Assistant III: This position is distinguished from the II level in that it conducts research, analysis, and advises the member on legislative strategy. The position exercises a wide range of independent discretion and independent actions when interacting with other

[8] Segal used the following peer employers: the legislative branch of California; the legislative branch of Washington; the State of Oregon executive branch; the counties of Multnomah, Marion, Lane, Clackamas, and Washington; and the cities of Beaverton, Eugene, Portland, and Salem. Segal made geographic adjustments "based on cost of labor in the market."

Legislative offices, members, and constituents. It is involved in the development of legislative strategies and advancement of the policy agenda and legislative goals of the office.

- Legislative Assistant IV: This position is the highest level in the Legislative Assistant job family. While many of the duties and responsibilities are similar to the level III position, it is distinguished from the III level in that it typically has responsibility for supervision of staff and interns. Like the Legislative Assistant III, the position supports the member in the research, analysis, and development of legislation, often involving highly complex issues. The position often represents the member in community events and legislative committees and interacts with little oversight with Legislative offices, members, the media, constituents, and the public in general.

33. The LAC adopted the classification structure recommended by Segal. The LAC also adopted a rule authorizing the presiding officers to approve the pay plan for the positions. The presiding officers approved the Segal-recommended compensation plan for the Legislative Assistants, effective January 1, 2021.

34. On December 2, 2020, Employee Services sent the elected members of the 2021 Legislative Assembly a memorandum asking each member to determine which duties the member would assign to personal staff in 2021 and inform Employee Services. Employee Services would then place the personal staff employees in the classification selected by the member, effective January 1, 2021. The memorandum stated, in part, "Enclosed are the Segal drafted descriptions for each of the four [Legislative Assistant] levels. These descriptions were developed from the dozens of JDQs submitted by [Legislative Assistants]. It is understood and expected that each office will have unique duties and expectations to serve the member and district. The structure developed captures the substantive differences in job evaluation factors."

35. In the December 2 memorandum, Employee Services responded to questions that had "been raised about the distinguishing features of the level 4." Employee Services explained:

> "There are two significant distinctions. The level 4 position is supervisory with authority to hire, discharge, assign and evaluate work and discipline or effectively recommend these actions to the appointing authority. This is distinguished from the lead work duties inherent in the level 3 of training/orienting new employees, assigning and reassigning tasks to other employees, giving direction to other employees concerning day-to-day work procedures, communicating established standards of performance to affected employees, reviewing the work of other employees to ensure conformance to established standards and providing informal assessment of employees' performance to the supervisor. Second, the level 4 regularly acts as a proxy for the member in matters of import. While all levels represent the member, the level four regularly makes independent decisions on behalf of the member on significant matters."

The Job Descriptions of the Legislative Assistant I through IV Positions

36. The job description of the Legislative Assistant I position states that the position provides "general administrative support to the Legislative Member's Office by coordinating schedules, managing correspondence, and serving as the point of contact regarding questions, and concerns[,]" and "[g]reets and responds to all visitors in the office." It describes the primary responsibility of the Legislative Assistant I as "general administrative support for the smooth and efficient day-to-day operations of the Member's office." With regard to "reporting relationships and team work," the description states that the Legislative Assistant I "[m]ay be assigned to various areas across the Assembly."

37. In addition, the job description for the Legislative Assistant I position states that the essential duties and responsibilities of the position include overseeing the day-to-day operations and functions of the Legislative Member's office; acting as the primary point of contact for the Legislative Member's office, including answering phone calls, greeting visitors, coordinating visits, assisting with requests, and responding to general inquiries; providing administrative support, such as answering phones and processing mail; maintaining the Legislative Member's calendar and scheduling appointments and arranging business travel; receiving and pricing invoices and reimbursement requests; coordinating special events; overseeing all aspects of the office, including oversight of the budget; and responding to constituent requests and questions.

38. To perform the Legislative Assistant I job, the employee must have knowledge of legislative processes and practices, existing legislation and its ramifications, historical context of policies, and current bills in process. In addition, the employee must possess skill in effective verbal and written communication, data management, researching policy issues, office management, and event organization. The employee must have the ability to pay close attention to detail, manage time effectively and stay organized, multitask and manage multiple projects simultaneously, remain calm and flexible under pressure, understand complex legislative issues, and provide excellent customer service and maintain a friendly, welcoming, and professional disposition. The minimum job requirements for the position are a bachelor's degree and one to three years of relevant experience, or an equivalent combination of education and experience.

39. The job description of the Legislative Assistant II position states that the position provides "general administrative support to the Legislative Member's Office by coordinating schedules, correspondence, events and responding to questions or requests for information[,]" and "[p]repares draft communications, speeches and legislation." It also states that the position conducts "research, policy analysis, and performs outreach and other Constituent Services[,]" and attends "Committee meetings and performs related duties as necessary." With regard to "reporting relationships and teamwork," the description states that the Legislative Assistant II may "be assigned to various areas across the Branch."

40. The job description for the Legislative Assistant II position states that the essential duties and responsibilities of the position, like the Legislative Assistant I position, include overseeing the day-to-day operations and functions of the Legislative Member's Office and acting as the primary point of contact for the Legislative Member's office and answering phone calls,

greeting visitors, coordinating visits, assisting with requests, and responding to general inquiries. In addition, the job description lists as essential duties and responsibilities developing messaging, writing floor speeches, composing letters, drafting responses to legislation, writing press releases, drafting bills, and evaluating policies; researching and writing policy analyses and analyzing proposed legislation; monitoring and tracking bills; and assisting in developing and implementing communication and outreach strategies and managing social media.

41. The knowledge, skills, and abilities listed in the job description for the Legislative Assistant II job are the same as those listed in the Legislative Assistant I job description. The minimum job requirements are higher—a bachelor's degree and three to five years of related experience or an equivalent combination of education and experience.

42. The job description for the Legislative Assistant III position states that the position "[s]upports day-to-day operations of the Legislative Member's Office in the areas of policy development, legislative strategy, and constituent services[,]" and conducts research and policy analysis. It also states that the position performs "outreach, provides constituent services and coordinates schedules and events[,]" prepares "draft communications, correspondence, speeches, and legislation[,]" and [a]ttends Committee meetings and performs related duties as necessary." With regard to "reporting relationships and teamwork," the description states that the Legislative Assistant III may "be assigned to various areas across the Assembly."

43. The essential duties and responsibilities listed for the Legislative Assistant III position include supporting the member in efforts to advance the policy agenda and legislative goals of the office and developing and implementing legislative strategies; providing counsel, guidance, and feedback on legislative and policy decisions; monitoring committee hearings and floor debates and reporting legislative action or developments; drafting letters, speeches, and testimony; researching bills, policies, current laws, and topics; working with legislative counsel to draft or amend legislation; attending and staffing work groups, task forces, meetings, tours, and other events on behalf of the office; scheduling and coordinating meetings, hearings, town halls, and other events and managing the schedule of the legislative member; contacting and arranging for speakers, presenters, and witnesses; arranging travel and lodging accommodations; managing external communications, including social media accounts, newsletters and press releases, and formulating and executing communication plans; interacting with the general public, constituents, lobbyists, business leaders, and other legislators, legislative staff, and interest groups to understand issues, draft legislation and help get legislation passed and signed into law; providing responsive constituent services, acting as a liaison to constituents, and helping to provide constituents with resources and solutions; managing the day-to-day activities of the office, including clerical tasks, record keeping, research and reports; acting as the primary contact for all visitors, and answering phones and emails.

44. The knowledge, skills, and abilities listed in the job description for the Legislative Assistant III job are the same as those listed in the Legislative Assistant I and Legislative Assistant II job descriptions. The minimum job requirements are the same as those for the Legislative Assistant II position—a bachelor's degree and three to five years of related experience or an equivalent combination of education and experience.

45. The job description for the Legislative Assistant IV position states that the position "[o]versees the day-to-day operations and administration of the Legislative Member's Office, including supervision of interns and office staff." In addition, the Legislative Assistant IV position assists "in the development of legislative strategies[,]" and conducts "extensive research and provides policy analysis and advice[,]" as well as prepares communications, correspondence, and speeches and attends committee meetings. Like the other Legislative Assistant positions in this series, the Legislative Assistant IV may "be assigned to various areas across the Branch."

46. The essential duties and responsibilities listed for the Legislative Assistant IV position include supporting the member in efforts to advance the policy agenda and legislative goals of the office, and developing and implementing legislative strategies; providing counsel, guidance, and feedback on legislative initiatives and policy decisions; monitoring committee hearings and floor debates and reporting legislative action or developments, and tracking bills; and drafting letters, speeches, talking points, and testimony; researching bills, policies, current laws and topics, and creating reports based on findings; working with legislative counsel to draft or amend legislation; attending and staffing work groups, task forces, meetings, tours, and other events on behalf of the office; scheduling and coordinating meetings, hearings, town halls, and other events and managing the schedule of the member; contacting and arranging for speakers, presenters, and witnesses; managing external communications, including social media accounts, newsletters, and press releases, and formulating and executing communication plans; interacting with the general public constituents, lobbyists, business leaders, and other legislators, legislative staff, and interest groups to understand issues, draft legislation and help get legislation passed and signed into law; providing responsive constituent services, acting as a liaison to constituents, and providing constituents with resources and solutions; managing the day-to-day activities of the office, including clerical tasks, record keeping, research, and reports, and maintain and supply all office equipment, manage the budget, and arrange travel and lodging accommodations; acting as the primary contact for all visitors, and answer phones and emails; building and sustaining relationships with elected officials, community leaders, lobbyists, and various other outside groups; and hiring, training, supervising, and mentoring other employees or interns, and delegating responsibilities and duties.

47. The knowledge and abilities listed in the job description for the Legislative Assistant IV job are the same as those listed in the job descriptions for the other jobs in the Legislative Assistant series. The required skills are also the same, with one additional skill listed: skill in management and supervision of staff, volunteers, and interns. The minimum job requirements are higher than those for the Legislative Assistant II and III positions. The Legislative Assistant IV position requires a bachelor's degree and five to seven years of related experience or an equivalent combination of education and experience.

48. Some personal staff use working titles rather than the classification assigned to their position. Common working titles for LA IVs include Legislative Director, Policy Director, and Chief of Staff. Employees or members may choose those working titles.

Roles and Responsibilities of the Legislative Assistants

49. There is no testimony in the record from any employees in the Legislative Assistant I classification. The record indicates that the employees in the Legislative Assistant I classification are primarily engaged in general office support work, such as answering phones and email. In addition, Legislative Assistant I employees coordinate or assist with scheduling events and meetings for the elected member they support. Essentially, employees in the Legislative Assistant I position act as a gateway to the member.

50. Employees in the Legislative Assistant II classification perform the same duties as Legislative Assistant I employees, and in addition perform some research and analysis for their member. Anne Marie Backstrom, Legislative Assistant II in Representative Ken Helm's office, testified that she does scheduling and manages Representative Helm's calendar. She also attends meetings on behalf of Representative Helm when he is unavailable, takes notes, and reports back to him.

51. Backstrom also answers constituents' emails and responds to their calls and voicemails. She and the other employee in the office, Legislative Assistant IV Greg Mintz, divide the constituent-related work between them. Backstrom testified that when she is responding to constituents' emails, she uses Representative Helm's email account to respond (so that the constituent receives an email from Representative Helm). Otherwise, in her other work, such as scheduling meetings, she uses her own email account.

52. Backstrom also assists with some policy-related work, such as working with Legislative Assistants in other offices to obtain testimony for bills their members are working on together.

53. Backstrom testified that the work in their office is assigned directly by Representative Helm, who holds weekly staff meetings. When there are deliverables resulting from her work, Backstrom reports those directly to Representative Helm.

54. Backstrom had a phone call with Greg Mintz before she was hired in which he went over her resume with her. She subsequently was interviewed by both Representative Helm and Mintz. Later she was told that Representative Helm made the decision to hire her, although Mintz provided input to the decision. When the operation of the office was explained to Backstrom, she was told that Representative Helm makes hiring, firing, and disciplinary decisions.

55. Backstrom and Mintz work closely together. Backstrom considers her relationship with Mintz to be a "coworker relationship."

56. At the time of hearing, an intern was working in the office 30 hours per week for academic credit. Backstrom does not assign work to the intern. Backstrom has passed on information or tasks that are within the intern's assignments, and she has observed Mintz do the same.

57. Michael Greenblatt is a Legislative Assistant II who works in Representative Zack Hudson's office. Greenblatt is the primary staff person who handles scheduling in that office. Greenblatt also responds to constituents. He also works on policy issues, and Greenblatt and Emerson Hamlin, a Legislative Assistant III and the Chief of Staff to Representative Hudson, divide the bills that Representative Hudson's office is following. Greenblatt and Hamlin each work on the strategy and tasks related to advancing their assigned bills, such as contacting other representatives or senators who would support the bills.

58. Hamlin, a Legislative Assistant III to Representative Hudson, testified at hearing. She described her duties as generally consisting of office management, policy work, and constituent support. In the area of office management, she creates a budget for the office, orders supplies, and ensures that the office has adequate supplies.

59. With regard to policy work, Hamlin conducts research, talks with stakeholders about issues of importance to them, tracks committees and bills, arranges meetings with stakeholders, and works on strategy to help advance Representative Hudson's bills. Hamlin described the role of Legislative Assistants as working to advance their member's policy positions. She cannot independently determine or implement those positions; she is always acting on behalf of her elected member.

60. In the area of constituent support, Hamlin brainstorms with the other employee in the office, Greenblatt, about responses to constituents, drafts responses, schedules meetings with constituents, and meets with constituents.

61. As personal staff to Representative Hudson, Hamlin occasionally meets with people when Representative Hudson is unable to do so, but generally, Representative Hudson prefers to meet with people himself.

62. Hamlin testified that she works independently and generally receives only higher-level direction from Representative Hudson. However, in her previous role as personal staff to Representative Mitch Greenlick, she received more detailed instructions, which she attributed to her newness to the role and his long tenure as a legislator.

63. Hamlin assigns work to one intern, a university student, who works in Representative Hudson's office for eight hours per week. Hamlin does not supervise Greenblatt, the Legislative Assistant II, nor does she assign him work. Hamlin and Greenblatt receive direction directly from Representative Hudson, and work collaboratively.

64. Nolan Plese, a Legislative Assistant IV to Representative Pamela Marsh, testified that his job duties include a little bit of scheduling, handling constituent-related work, doing policy work on bills, helping to write testimony, and helping to schedule events, such as town halls, in the district.

65. Plese testified that he responds to constituents on behalf of Representative Marsh. In doing so, he often uses Representative Marsh's email account and drafts responses over her signature. He also uses her email account for other correspondence on behalf of the office. He

sometimes signs his own name, both in correspondence to constituents and to others. He generally collaborates with Representative Marsh on managing her email account.

66. With regard to policy work on bills, Plese testified that Representative Marsh generates most of the policy ideas. Plese conducts research and analysis, such as researching Oregon law and researching the law in other states. When they are ready to work with Legislative Counsel, he shares the draft request with Representative Marsh before working with Legislative Counsel. After he submits the draft request to Legislative Counsel, if Legislative Counsel has questions, he takes those questions back to Representative Marsh so that he can respond appropriately to Legislative Counsel based on how Representative Marsh wishes to proceed. Plese described his role as carrying out the directions and desires of Representative Marsh. In other work, he testified that he does not substitute his own judgment for Representative Marsh's judgment, but there are times when he "instinctively knows" what position she would take based on their prior discussions, and if so he makes a judgment on her behalf. If not, he checks with her to get direction.

67. In his Job Description Questionnaire, Plese described his job as follows: "Supporting the Representative to achieve policy and legislative goals, remain connected with her constituents and community leaders, establish and build relationships with relevant stakeholders, all within the fast paced and high stress environment of legislative session, and while working remotely during the interim. The position ultimately must be responsive to requests of the member, whether they be complex policy research, or scheduling enough time to eat lunch."

68. Paige Prewett, a Legislative Assistant III, also works in Representative Marsh's office on a part-time basis. Plese was not involved in the hiring of Prewett. Plese does not manage Prewett, or assign work to her; she gets her work assignments directly from Representative Marsh. He has never been held accountable for any decisions or errors by Prewett, and does not believe he would be. On one occasion, at Representative Marsh's direction, Plese attempted to secure an increase in Prewett's hours, but he was informed by Employee Services that it needed to receive an email directly from Representative Marsh in order to do so.

69. When Representative Marsh's office seeks to hire, Plese is sometimes involved.[9] On those occasions, Representative Marsh and Plese both look at resumes and select applicants for interviews. Plese schedules the interviews and sits in the interviews with Representative Marsh. Plese may ask questions during the interview. Representative Marsh makes her own hiring decision, although she sometimes asks for Plese's opinion.

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[9]When Plese testified about his involvement in the hiring process, he was not asked to limit his response to his involvement in the hiring of other employees (as opposed to interns), and he did not specify whether he was referring to the hiring of employees, interns, or both.

70. In addition to witness testimony from Hamlin, Backstrom, and Plese, the record includes 52 job description questionnaires related to the petitioned-for positions.[10] The JDQs for the petitioned-for employees in the record are distributed among the four classifications as follows:

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| Legislative Assistant I: | 3 JDQs |
| Legislative Assistant II: | 3 JDQs |
| Legislative Assistant III: | 16 JDQs |
| Legislative Assistant IV: | 30 JDQs |

71. The JDQ included a section on discretion and independent judgment in which the employee was asked, "Does your job involve using discretion and independent judgment?" The JDQ also asked the employee to describe at least two examples of their use of discretion and independent judgment on the job.[11] In 43 of the JDQs in the record, the responding employee indicated that they use discretion and independent judgment in their positions. As an example, James Williams, Legislative Assistant IV to Senator Brian Boquist, gave "[d]rafting legislative bill requests for constituents and preparing testimony" and "[r]ecommending bill drafts for introduction to the legislative process" as examples of decisions or actions he takes that require discretion and independent judgment.

72. As another example, Jason Hitzert, Legislative Assistant IV to Representative (now Senator) Chris Gorsek, gave the following as examples of his use of discretion and independent judgment. "I've advised a number of Representatives on how to provide testimony on a given subject as well as providing talking points for committees and for the floor of the House." In addition, he listed researching the prevalence of public health and natural hazards, and issues with training and equipping public safety officers by the Oregon Department of Public Safety Standards and Training. He also noted that he had worked with Representative Gorsek "to create strategies to work on issues over multiple sessions." In the supervisor comments section, Representative Gorsek wrote, in part, that Hitzert "has the ability to deconstruct perspectives in order to anticipate the direction I want to go on any number of different issue areas which allows me to depend on him to use his discretion."

[10]In addition, the record includes two JDQs for positions not in the proposed unit, and several JDQs that appear to have been completed by individuals no longer employed by the Legislative Branch. The JDQs in the record comprise 1,723 pages.

[11]The JDQ referred to nine examples of actions that "may" constitute discretion and independent judgment, including "[m]aking decisions that affect the overall policies of the department or organization[,]" "[a]bility to depart from standard or division/department protocols without prior approval[,]" "[p]roviding consultation or expert advice to Oregon State Legislature senior leadership[,]" and "[c]ommitting Oregon State Legislature in matters that have a significant financial impact[.]" The JDQ also provided seven examples of actions that do not constitute discretion and independent judgment, including "[a]pplying technical knowledge to follow procedures (or to decide which procedures to follow)[,]" "[t]abulating data, conducting research or collecting facts and information[,]" and "[m]aking decisions that do not commit Oregon State Legislature in matters that have significant financial impact[.]" The JDQ did not specifically ask whether the responding employee exercises independent judgment while exercising "supervisory" authority over other employees.

73. As another example, Robert Unger, Legislative Assistant IV to Representative Paul Holvey, gave as examples of his use of discretion and independent judgment "[t]hinking on behalf of" the member when "meeting with advocates" and staff of the Legislative Branch, and considering, when scheduling meetings or events for the member, "how does this look to the public? Is this a beneficial meeting?" Later in the JDQ, when describing the consequence of an error for an employee in his position, Unger described his work as follows: "Legally we are an extension of the representative. Any direction I give to Legal Counsel, committee staff, agency requests for information/participation etc is taken as if the member has given that direction (which many times I am relaying an order from them[,] but sometimes I need to take the initiative I know they would)."

74. As another example, Linda Heimdahl, a Legislative Assistant IV to Senator Kim Thatcher, gave "[a]bility to depart from standards or office protocols without prior approval[,]" and "[f]orming recommendations regarding changes to office policies or standards" as examples of her use of discretion and independent judgment.

75. The JDQ included a section entitled "Human Collaboration," which seeks to measure "the job requirements of personal interaction with others outside direct reporting relationships as well as the impact the job has on organization, departmental or unit objectives, the output of services, or employee or customer satisfaction." The JDQ asked the employee to choose one of five ranked levels of human collaboration: Level 1 ("work requires regular interaction involving exchange and receipt of information"); Level 2 ("Work may require providing advice to others outside direct reporting relationships on specific problems or general policies."); Level 3 ("Interactions may result in decisions regarding implementation of policies."); Level 4 ("Interactions and communications may result in recommendations regarding policy development and implementation"); and Level 5 ("Communications and discussions result in decisions regarding policy development and implementation.").

76. In 43 of the JDQs in the record, the responding employee chose either Level 4 or Level 5 for "human collaboration," indicating that they view themselves as making recommendations or decisions regarding policy development and implementation, as described in the JDQ question.

77. The JDQ also included a section entitled "Management and Supervision Responsibilities," which asks the employee to identify one of five ranked levels for "nature of supervision": Level 1 (no responsibility for the direction or supervision of others); Level 2 (occasional direction of helpers, assistants, seasonal employees, interns, or temporary employees); Level 3 (providing guidance and the potential to oversee another employee); Level 4 (supervising and monitoring performance for a regular group of employees (one or more full-time employees)); Level 5 (managing and monitoring work performance by directing multiple groups of employees across more than one business function within an organization unit); Level 6 (managing and monitoring work performance of an organizational unit).[12]

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[12]The JDQ did not define any of the terms relevant to our analysis, such as the terms "supervise," "manage," "direct," "assign," or "employee." The JDQ was not intended to address the PECBA exclusions

(Continued ... )

78. In 33 of the JDQs in the record, the responding employee chose Level 4, 5, or 6 for their level of supervision responsibilities.[13] In the same section, the JDQ asked the responding individual to identify the number and type of positions over which they exercise managerial or supervisory responsibility, and then to identify those employees by job title and name. Although the JDQ used the term "employee," the JDQ did not define "employee" or direct the responding individual to limit their response to paid employees. In the section that asked for job titles and names, many of the responses include "interns" or "policy interns."

79. The record indicates that there is variation among the staffing composition and levels in the elected members' offices. There is evidence that some petitioned-for employees are in offices with more than one other paid employee (including full-time, part-time, seasonal, and temporary employees). For example, Renee Perry, Legislative Assistant IV to Representative Shelly Boshart Davis, indicated that she supervised two Legislative Assistant IIs and one intern. Devon Norden, Legislative Assistant IV to Representative Dacia Grayber, indicated that she supervised two Legislative Assistant IIs and four interns.

80. Other employees, however, identified only one other employee in their office. As examples, Evan Sorce, Legislative Assistant IV to Representative Paul Evans, indicated that he supervised only one employee—a Legislative Assistant II. Sarah Wallan, a Legislative Assistant IV to Representative Kim Wallan, indicated that she supervised only one Legislative Assistant II, as well as three interns. In other instances, the record is unclear whether an identified subordinate is a paid employee. For example, Greg Mintz, a Legislative Assistant IV to Representative Ken Helm, indicated that he supervised only one Legislative Assistant, but he also listed a worker identified as a "research fellow," as well as five interns.

81. Among the employees who selected Level 4 or higher when asked to indicate the nature of their supervisory responsibilities, some indicated that they have such responsibility over only interns. For example, Becca Byerley, Legislative Assistant IV to Representative Marshall Wilde, selected Level 4 for the nature of supervision, indicated that she supervises five "regular part-time employees," and identified those five individuals as two "policy interns" and three "interns." Similarly, Brandon Jordan, Legislative Assistant III to Representative Wilde, selected Level 4 for nature of supervision, and indicated that he supervises four "regular part-time employees," specifically, two "policy interns" and two "interns."

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for confidential, managerial, or supervisory employees, and did not incorporate the statutory definitions of PECBA, or otherwise direct the responding employees to conform their answers to those statutory definitions. The JDQ did not direct the employees to limit their responses regarding supervisory and managerial responsibilities to other paid employees, and many of the completed JDQs indicate that the employees considered "interns" when responding.

[13]Not all 33 individuals who indicated they have supervisory or managerial responsibilities are included in the list of petitioned-for employees.

82. Five of the employees who selected Level 4 or higher when asked to indicate the nature of their supervisory responsibilities also indicated in the "independent judgment" section of the JDQ that they do *not* exercise independent judgment when performing their jobs.[14]

83. When Plese completed his JDQ, he selected Level 4 for the nature of his supervision responsibilities. Plese indicated that he has such responsibility for one "part-time, seasonal, or temporary employee." In the related open comment section, he wrote, "During legislative session, provide training, hiring input, and supervision to additional staff member and occasionally interns." At hearing, Plese testified that he selected Level 4 after considering his responsibility with respect to both employees and interns. He explained that Representative Marsh directs the work of staff and interns, but some individuals, such as interns, require a little more direct supervision, in which case, he will "check in" to make sure they are "on task," and answer any questions they may have. He testified that he stated he has "hiring input" because he is involved in the process, but that he has no authority to hire. Plese has no access to confidential information regarding other employees.

Wages, Benefits, Hours, and Other Employment Conditions in the Legislative Branch

84. Employees of the Legislative Branch, including the Legislative Assistants, are employees of the State of Oregon. All Legislative Branch employees are paid through the Executive Branch Department of Administrative Services (DAS) payroll processing services, for which the Legislative Branch pays an assessment to DAS. Like all State of Oregon employees working for entities that use DAS payroll processing services, Legislative Branch employees can access and review their pay stubs on a DAS-managed web site.[15]

85. The ten-step pay plan for Legislative Assistants establishes the following pay ranges for personal staff, effective January 1, 2021. The Legislative Assistant I classification begins at $37,911 per year (Step 1) and tops out at $56,867 per year (Step 10). The Legislative Assistant II classification begins at $42,597 per year (Step 1) and tops out at $63,896 per year (Step 10). The Legislative Assistant III classification begins at $50,734 per year (Step 1) and tops out at $76,101 (Step 10). The Legislative Assistant IV classification begins at $60,425 per year (Step 1) and tops out at $90,637 (Step 10).

86. The LBPRs establish branch-wide standards for compensation and salary administration. Typically, an employee is hired for a six-month introductory period (which may be extended by the appointing authority). After completion of the introductory period, an employee

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[14]Those employees are Andrea Dominguez, Rebecca Wright, Nolan Plese, Katherine Ryan, and Evan Sorce.

[15]The Legislative Branch remits payment to the State of Oregon Workers Compensation Division for each hour worked by its employees. The Workers Compensation Division administers the Workers Compensation Law that, with some exceptions, requires application of the law to all workers employed in Oregon. *See* ORS 656.023, 656.005(27), and 656.005(28). The Workers Compensation Division is part of the Department of Consumer and Business Services, part of the Executive Branch. The Workers Compensation Division regulates disputes over Workers' Compensation benefits for the employees of the Legislative Branch, including the petitioned-for employees.

normally receives a one-step salary increase if the increase does not exceed the maximum rate in the range. LBPR 4(6)(b). Employees typically receive an annual one-step merit increase on the employee's salary eligibility date when the employee's base rate of pay is less than the maximum rate for the employee's salary range. LBPR 4(7).

87. Like other State of Oregon employees, the Legislative Assistants, as well as other Legislative Branch employees, receive health insurance benefits through the Public Employees' Benefit Board (PEBB) and retirement benefits through the Public Employees Retirement System (PERS).

88. The Legislative Assistants also earn paid vacation and sick leave, as do the other employees in the Legislative Branch. Vacation and sick leave accruals are generally transferrable when employees move to other State of Oregon employers. The LBPRs provide that Legislative Branch employees may request to be paid for up to a maximum of 120 hours of vacation leave in lieu of time off once per fiscal year provided that the employee has a balance of 40 hours of accrued vacation leave remaining after the payout. The LBPRs specifically provide, however, that personal staff are not eligible to request vacation payout in lieu of time off. LBPR 14.

89. The LBPRs provide for 10 paid holidays, plus one day of holiday special leave when granted by the presiding officers. LBPR 18(1). However, holidays during a legislative session are handled differently under the LBPRs. Specifically, an appointing authority (including each individual member, with respect to that member's personal staff) may designate a holiday as a required working day when the holiday occurs during legislative sessions, legislative days, or the period required for preparation for those periods. LBPR 18(4) provides, "When the Legislative Assembly is in session or a legislative day occurs on a holiday, employees are expected to work if asked to do so by their appointing authority."

90. All employees of the Legislative Branch, including personal staff, are covered by LBPR 15, which governs family and medical leave. Employee Services administers family and medical leave for all employees of the branch. In addition, the LBPRs require Employee Services to "assist members of the Legislative Assembly" in "complying with the requirements of FMLA and OFLA," including procedures under which employees of "member offices may request and receive FMLA and OFLA leave." LBPR 15(11)(b).

91. All employees (except temporary employees) of the Legislative Branch, including personal staff, are covered by LBPR 17, which governs leave other than vacation, sick, and family medical leave. Under the rule, an appointing authority may grant paid administrative leave to an employee ineligible to receive overtime compensation. LBPR 17(2)(a). Employees receive 24 hours of personal business leave upon completion of six months of employment in the Legislative Branch. Employees also receive jury duty and witness leave, military leave to the extent required by law, bereavement leave, and leave to address domestic violence, harassment, sexual assault, or stalking. Each appointing authority also has the discretion to grant leave without pay.

92. Elected members may hire their personal staff through direct appointment. An open competitive recruitment or limited internal recruitment process is not required. LBPR 32(1)(b). Once the member has made a hiring decision, the member is required to provide the successful

applicant's application to Employee Services for record keeping purposes. Employee Services is not, however, otherwise involved in the elected members' hiring decisions.[16] Under LBPR 32, all employees, interns, and externs appointed as personal staff "serve at the pleasure of the member[,]" and apply for employment "in the manner prescribed by the member of the Legislative Assembly."[17]

93. Elected members may hire, supervise, and evaluate family or household members as personal staff, and some do so.[18] Knieling testified that the Branch does not document which employees are related to or reside in the same household as an elected member, but she believes approximately 12 of the Legislative Assistants are family members of elected members. Otherwise, LBPR 24 governs family and personal workplace relationships, and broadly speaking, permits the employment of qualified relatives of legislative employees only if the employment does not create a conflict of interest. Under LBPR 24, an employee may not initiate or participate in an employment action involving a relative, or supervise or evaluate a relative. However, LBPR 24 applies only to the legislative agencies and parliamentary offices. It does not apply to members of the Legislative Assembly, personal staff, leadership office staff, or caucus office staff.

94. Elected members, leadership offices, and caucus offices may consider political affiliation when hiring employees. LBPR 5(1)(c). For personal staff positions, commitment to advancing the elected member's policy and legislative agenda is considered an essential job requirement. Other than positions with elected members, leadership offices, and caucus offices, all employment decisions, programs, and practices within the Legislative Branch are conducted or administered without regard to political affiliation.

95. All Legislative Branch employees, including personal staff, may be terminated without cause at the discretion of the appointing authority or designee. Employment is at will, both during and after completion of an introductory period. The "appointing authority" is the person who has "authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge or discipline an employee." LBPR 2(3). Each elected member is the appointing authority for that member's own personal staff.

96. Personal staff of elected members report to their elected member or, as contemplated by the Legislative Assistant IV job description, potentially to a Legislative Assistant IV. There is no shared supervision of personal staff above the level of the elected member. Personal

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[16]LBPR 32 also provides that, after it receives an application, Employee Services notifies the Legislative Equity Officer of the start date of the new employee, intern, extern, or volunteer, and the Legislative Equity Officer provides training, and copies of harassment and respectful workplace policies.

[17]For open competitive and limited internal recruitments elsewhere in the Branch, Employee Services is responsible for determining which applicants meet the minimum qualifications for positions in Legislative Administration, and legislative agencies and parliamentary offices determine which applicants meet the minimum qualifications for positions in those agencies and offices.

[18]ORS 244.177(2) provides, "A member of the Legislative Assembly may appoint, employ, promote, discharge, fire or demote, or advocate for the appointment, employment, promotion, discharge, firing or demotion of, a relative or member of the household to or from a position on the personal legislative staff of the member of the Legislative Assembly."

staff are not accountable to any elected member other than the legislator on whose staff they serve. On occasion, an employee in one of the Legislative Assistant classifications will work for two members and divide their time between the members, but this is not common.

97. All Legislative Branch employees, including personal staff, are subject to the same LBPR concerning corrective action. LBPR 9 provides that an appointing authority may, but is not required, to take corrective action, which may include verbal or written warnings or reprimands, nonmonetary sanctions, or monetary sanctions (such as a salary reduction, a paid or unpaid suspension, or a written work plan). Any employee who receives corrective action may submit a written response to be included in that employee's personnel record. An elected member may discipline or terminate personal staff for partisan or political reasons.

98. The work hours of personal staff are, generally speaking, the business hours of the Legislative Assembly and other hours as assigned by the elected member. The LAs' hours are variable, depending in part on whether the Legislative Assembly is in session. Individual assembly members also have discretion to require LAs to work different hours. One senator noted in an employee's JDQ that, during session, work hours may range from 7:00 a.m. to 8:30 p.m. and work days may include Saturday and Sunday. One Legislative Assistant IV wrote in his JDQ that an essential knowledge, skill, or ability to perform his job is the "[a]bility and willingness to work irregular hours (on-call 24/7)." The working hours for personal staff may also be determined by the type and amount of constituent services or community outreach assigned or expected by the member. For example, Diane Linthicum, Legislative Assistant IV to Senator Dennis Linthicum, indicated in her JDQ that her job requires extensive time, travel, and hours away from home because of the 20,000 square miles included in the senator's district.

99. When the Legislative Assembly is in session, the personal staff typically work in offices in the capitol building.[19] The record also indicates that there is a group of legislators in the Portland metropolitan area who share office space, and Legislative Assistants, including Legislative Assistant IV Nolan Plese, work in that shared office space for some portion of time. The record does not indicate how many of the Legislative Assistants employees work remotely or work at times in a member's office in the district, and if so how frequently they do so.

100. Under the LBPRs, all employees of the Legislative Branch are eligible to work remotely pursuant to a mobile work agreement. Each appointing authority has the discretion to determine whether to permit an employee to perform mobile work through a mobile work agreement. As an example, Plese works remotely during the interim between sessions. An appointing authority may terminate a mobile work agreement at any time at the appointing authority's discretion. LBPR 26.

Interchange and Promotional Ladders

101. The Legislative Assistants regularly interact with other personal staff in other members' offices, including across the different political parties. For example, Hamlin testified that she frequently works with staff in other offices, including across political party. Backstrom

[19]The work location changed during the COVID-19 pandemic, when personal staff worked remotely.

also frequently interacts with Legislative Assistants in other members' offices to schedule events and meetings. Plese testified that he interacts with Legislative Assistants "almost daily," on policy, scheduling, or when there is a shared constituent issue that members are working together on. According to the testimony of all three Legislative Assistants who testified, Hamlin, Backstrom, and Plese, LAs recognize that they are employees of the State of Oregon. The LA position requires them to put their personal policy views aside and work with people with whom they disagree. The elected officials may oppose each other on legislative matters, but LAs do not personally oppose, or conflict with, each other as a result. LAs generally understand that they are all performing a common job. LAs generally are collegial with each other, and often assist each other, for example, by sharing information about how the legislative branch operates, or sharing ideas about how to operate the office or conduct constituent events.

102. Such interactions between Legislative Assistants are also reflected in the JDQ responses. For example, Alexa Jakusovsky, a Legislative Assistant IV to Representative Lisa Reynolds, wrote in her JDQ that she interacts "regularly" with legislative offices, as well as other members and constituents.

103. The petitioned-for employees also interact regularly with other Branch employees in legislative agencies and offices across the Branch. For example, multiple employees indicated in their JDQs that they worked with employees in the Legislative Counsel's office on bill drafting. Plese indicated that he had contact with Legislative Counsel daily during session and weekly during the interim. The petitioned-for employees also work with other Legislative Branch offices as well, including the Legislative Policy and Research Office (LPRO) and the Legislative Fiscal Office. For example, MacKenzie Carroll, a Legislative Assistant IV to Representative Andrea Salinas, indicated in her JDQ that she communicates "regularly with LPRO Committee staff." Jessica Snook, Legislative Assistant IV to Representative Jami Cate, wrote in her JDQ responses that she accompanies LPRO staff to the committee or House floor "to assist in testimony or carrying of a bill." Plese indicated that he works daily during the session and weekly during the interim with the LPRO, Legislative Revenue Office, and Legislative Fiscal Office.

104. The record does not indicate the specific employment histories for all the petitioned-for employees, such as whether they have transferred between members' offices, promoted in one member's office, transferred or promoted within the Legislative Branch, or worked in another branch of the State of Oregon. The record, however, does establish that LAs move between assembly member offices, as well as between different parts of the legislative branch or across branches of the State. The administration of such employee movement is fairly simple because the state uses a single personnel system, Workday.

105. The total number of LAs typically fluctuates from approximately 90, when the legislature is not in session, to 180, when the legislature is in session.

106. The record indicates that approximately 28 percent of the petitioned-for employees have a continuous service date of 2017 or earlier, indicating that they have a continuous employment relationship with the State of Oregon of at least three years. Approximately 25 percent have a continuous service date of 2018-2019, and approximately 33 percent were hired in 2020.

107. Some personal staff have worked for multiple elected members over time.[20] LAs who are hired on a temporary basis, *e.g.*, for only one legislative session, must search for other open positions if they would like a year-round position or would like to continue working for the Branch. They are more likely to find another LA position if they search for openings in other assembly members' offices, and some LAs have secured new positions by doing so. Hamlin testified that she previously worked for Representative Mitch Greenlick before moving to Representative Hudson's office. Hamlin has also observed other Legislative Assistants work in multiple elected members' offices. Plese previously worked for Senator Diane Rosenbaum, and before that for the senate majority caucus; he presently works for Representative Pam Marsh. It is not common for personal staff to move from an office in one political party to an office in the other political party.

108. The JDQs also indicate that at least some of the LAs have worked for multiple members over time. For example, Andrea Dominguez works as a Legislative Assistant IV in Representative Mark Owens's office; previously, she worked as personal staff to Cliff Bentz.[21] Alexa Jakusovsky previously served as personal staff for Representative Akasha Lawrence Spence; she now works for Representative Lisa Reynolds.

109. There is little information in the record regarding promotion from one level of LA to another, presumably because the LA I-IV classification system was implemented only recently. However, there is some evidence in the JDQs that LAs may be promoted from one level to another. For example, Devon Norden, Legislative Assistant IV to Representative Dacia Grayber, indicated on the JDQ that there are two other LAs in the office, but commented, "Typically one LA2 and couple of interns depending on the time of year. Current office make-up is a little different as I am transitioning out of this position and my LA2 will be taking my place."[22] Additionally, Knieling testified that LA promotions occur both within the same office and across offices.

110. To transfer or promote to a different LA position, *i.e.*, to move from an LA position in one office to an LA position in another office, an LA must apply for an open position in an assembly member's office and be selected by that assembly member. When LAs transfer from one elected member's office to another, or between different positions within the legislative branch, all aspects of their compensation and benefits, including leave accruals, remain the same.

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[20]The Branch does not track the movement of LAs from one office to another. However, Hamlin testified without rebuttal that it is common for LAs to move from one office to another, and the examples provided in the record tend to corroborate that testimony.

[21]Senator Bentz resigned from the Oregon State Senate in January 2020 to campaign for Oregon's Second Congressional District; he was elected to represent the Second Congressional District on November 3, 2020. See https://bentz.house.gov/about (visited March 31, 2021).

[22]At the time that the JDQs were completed, the prior classification system with only two LA levels was still in use.

The Petition

111. On December 8, 2020, the Union filed a representation petition with this Board pursuant to ORS 243.682(2) and former OAR 115-025-0000(4) seeking certification as the exclusive representative pursuant to the card check process. That petition was assigned Case No. RC-010-20. In Case No. RC-010-20, the Union sought to represent the following bargaining unit:

> "LA1's and LA2's supporting elected officials in the Oregon Legislative Assembly, and the following titles in the Senate and House Leadership offices: Constituent Services, Office Manager/Scheduler, Legislative Assistant, Outreach Director, Community Outreach Director, Legislative Aide, Office Manager, and District Director, excluding supervisory and confidential employees."

112. On December 29, 2020, the Respondent filed objections to the petition.

113. Also in December 2020, as described above, the Legislative Branch was preparing to implement a new classification structure and compensation plan for the employees who were then classified as Legislative Assistant 1s and 2s, as the culmination of the Segal compensation, classification, and pay equity analysis. In the new classification structure, effective January 1, 2021, the petitioned-for LA1s and LA2s in Case No. RC-010-20 were allocated to four new classifications, Legislative Assistant I, Legislative Assistant II, Legislative Assistant III, and Legislative Assistant IV.

114. In December 2020, the Legislative Branch hired additional employees who would also be placed in the new classifications to prepare for the 2021 legislative session, as it typically does in the months preceding a legislative session.

115. On January 13, 2021, the Union, relying on the fact that the Legislative Assembly had hired additional employees who "would be included in the proposed unit," filed a motion to amend the petition to change the bargaining unit description to the following description:

> "Legislative Assistant I's, Legislative Assistant II's, Legislative Assistant III's, and Legislative Assistant IV's supporting elected officials in the Oregon Legislative Assembly, excluding supervisory, managerial, confidential, and caucus employees."

116. Subsequently, on January 14, 2021, in accordance with OAR 115-025-0051, the Union withdrew the petition in Case No. RC-010-20.

117. In the meantime, on January 13, 2021, the Union filed a representation petition with this Board pursuant to ORS 243.682(1) seeking certification as the exclusive representative following an election. That petition, assigned Case No. RC-001-21, is the petition at issue in this case. The Union seeks to represent the following bargaining unit:

> "Legislative Assistant I's, Legislative Assistant II's, Legislative Assistant III's, and Legislative Assistant IV's supporting elected officials in the Oregon Legislative

Assembly, excluding supervisory, managerial, confidential, and caucus employees."

118. On February 4, 2021, the Respondent filed objections to the petition in Case No. RC-001-21.

## CONCLUSIONS OF LAW

1. This Board has jurisdiction over this matter.

Under 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. To exercise that right, an employee or a labor organization may obtain voluntary recognition from the employer, ORS 243.666(1), or may file a petition with this Board to obtain certification of a labor organization as the exclusive representative of a petitioned-for group of public employees. ORS 243.682 through ORS 243.686. This Board's jurisdiction over representation matters under PECBA extends only to "public employers" and "public employees."[23] Here, the Branch concedes that it is a public employer, but asserts that it is not a "public employer" within the meaning of PECBA. To determine whether the Branch is a "public employer" as defined under PECBA, we must turn to the statutory text.

Before doing so, it is not lost on this Board that it is the legislature that, through statute, defines the scope of this Board's authority. Certainly, if the legislature had included in PECBA a provision that excludes Branch employees from the definition of "public employees" or excludes itself from the definition of a "public employer," this Board would, without hesitation, recognize and adhere to such statutory language. As set forth below, however, those statutory exclusions are absent. Using the principles of statutory construction developed by the courts, we ultimately conclude, for the reasons set forth below, that PECBA includes the Branch as a public employer and includes the petitioned-for employees as "public employees."[24]

When this Board interprets and applies statutes, our goal is to determine and give effect to the legislature's intent. ORS 174.020. In doing so, we apply the analysis supplied by *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). Our goal in interpreting a statute is to determine what meaning the legislature intended in drafting the statute. *Comcast Corp. v. Dep't of Revenue*, 356 Or 282, 295-97, 337 P3d 768 (2014) (citing *PGE*, 317 Or at 610). Because the words chosen by the legislature are the best evidence of its intent, we first review the text and context of the statute in question. *Gaines*, 346 Or at 171-72. We then review any relevant legislative history. *Id.* If we are

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[23]The Board has jurisdiction under a separate statute for certain employers who do not meet the jurisdictional standards of the National Labor Relations Board under the National Labor Relations Act. *See* ORS 663.005(3)(i), (4)(f).

[24]We address the statutory exclusions of supervisory, managerial, and confidential employees later in this order.

still unable to determine the legislature's intent, we then apply maxims of statutory construction. *Id*.

Here, ORS 243.650(20) defines "public employer" as, among others, "the State of Oregon." Relatedly, ORS 243.650(19) defines "public employee" as "an employee of a public employer," and then expressly excludes "elected officials, persons appointed to serve on boards or commissions, incarcerated persons working under Article I, section 41, of the Oregon Constitution, or persons who are confidential employees, supervisory employees or managerial employees." The Legislative Branch, including the Legislative Assembly, is part of the State of Oregon. The Branch concedes that the petitioned-for employees are not expressly excluded from the definition of "public employee," even as that statute expressly excludes the assembly members (by excluding "elected officials"). Because we can only interpret PECBA, not amend it, we cannot insert an exclusion for Branch employees that the legislature omitted. Our role is "simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted." ORS 174.010.

We also note that the legislature has expressly excluded both Legislative Assembly officers and employees from the coverage of the State Personnel Relations Law (SPRL). ORS 240.200(4) (defining "exempt service" as including "officers and employees of the Legislative Assembly"); ORS 240.245 (providing that the exempt service is not subject to SPRL, except for a requirement that salary plans be "equitably applied" to exempt positions "in reasonable conformity with the general salary structure of the state"). With respect to PECBA, however, the legislature expressly excluded only "elected officials," not employees working directly under elected officials. The fact that the legislature expressly exempted employees from SPRL—but not PECBA—also weighs in favor of the conclusion that the legislature did not intend to exclude Branch employees from the coverage of PECBA.[25] Thus, based on the words that the legislature chose in enacting PECBA, which is the best evidence of legislative intent, we conclude that the Legislative Branch is a public employer and that the petitioned-for employees are public employees (except to the extent that they may be confidential, supervisory, or managerial within the meaning of PECBA).

In arguing for a different result, the Branch asserts that we should look to the Legislative Branch Personnel Rules ("LBPRs"), rather than PECBA itself, as the initial starting point to answer whether *PECBA* excludes the Branch or its employees from *PECBA*. Specifically, the Branch argues that, because the Oregon Senate and Oregon House of Representatives enacted the LBPRs under the constitutional rulemaking authority (Article IV, Section 11), instead of the constitutional legislative authority, this case "does not involve statutory construction but the primacy of the Legislature's constitutional authority to establish rules regarding its operations."

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[25]We also note that when the legislature has sought to exclude an elected official's staff or an entire employer from the coverage of a chapter of the Oregon Revised Statutes, it has done so expressly. *See* ORS 177.050(3) ("Except as provided in subsection (4) of this section, ORS chapter 240 does not apply to the office of the Secretary of State."); ORS 178.060(3) ("Except as provided in subsection (4) of this section, ORS chapter 240 does not apply to the office of the State Treasurer."); ORS 656.753(1) ("Except as otherwise provided by law, the provisions of ORS 279.835 to 279.855 and 283.085 to 283.092 and ORS chapters 240, 276, 279A, 279B, 279C, 282, 283, 291, 292 and 293 do not apply to the State Accident Insurance Fund Corporation.").

However, the Branch does not cite any authority for the proposition that an exercise of the rulemaking authority "preempts statutory construction."

In any event, the Branch argues that the rules of statutory construction "may prove useful" in this case, and that application of those rules shows that the legislature intended to exclude the Branch and its employees from PECBA. The Branch points out that the LBPRs do not expressly state that PECBA applies to it or its employees. From that silence, the Branch contends that we should conclude that the LBPRs impliedly establish a legislative intent to exclude the Branch and its employees from PECBA.

We disagree with the premise of the Branch's assertion that we should look to the LBPRs, rather than PECBA itself, as the initial starting point to answer whether *PECBA* excludes the Branch or its employees from *PECBA*. Moreover, even if we started with the LBPRs, we would not conclude that the legislature intended to exclude Branch employees from PECBA. Rule 1, section 5, of the LBPRs addresses the "application of certain labor laws," and states that the LBPRs "constitute rules of proceedings of the Legislative Assembly and may take precedence over conflicting provisions of state law to the extent that the rules *expressly provide* for such precedence." LBPR Rule 1(5)(a) (emphasis added). Rule 1, section 4, of the LBPRs expressly provides that all legislative branch officers and employees are exempt from SPRL. LBPR Rule 1(4)(a). And, Rule 1, section 5, expressly provides that all legislative branch employees, "other than legislative librarian positions," are exempt from the Fair Labor Standards Act. LBPR Rule 1(5)(b). However, none of the LBPRs *expressly* provide that any legislative branch employees are exempt from PECBA.

In determining whether the LBPRs indicate a legislative intent to exclude Branch employees from PECBA, we find it significant that the LBPRs expressly provide that Branch employees are not covered by SPRL and the FLSA, but do not say the same regarding PECBA. That structure does not persuade us that the LBPRs' silence regarding PECBA should be construed as evidence that the legislature intended for Branch employees to be excluded from PECBA. Further, we also note that there is no inherent conflict between the adoption of personnel rules and collective bargaining. Although the Legislative Branch is a unique employer because of its constitutional authority to enact statewide legislation, we also note that many public employers have rulemaking authority, and it is commonplace for public employers to both adopt personnel rules and engage in collective bargaining. Accordingly, we decline to infer from the fact that the legislature adopted the LBPRs an intention to exclude Branch employees from PECBA.

In reaching our conclusion, we reiterate that the simplest way to clarify any confusion as to whether the Branch and its employees are subject to PECBA is for the legislature to enact such language in a statute. For this Board to insert such an exclusion into the statute, when the legislature itself has not done so, would exceed our authority and be an inappropriate function of this agency, which is to follow the statutory definitions and directives made by the legislative branch.

The Branch also argues that permitting collective bargaining would permit a "challenge to the legislatively adopted LBPRs and improperly subvert[] the Oregon Legislature's constitutional authority" under Article IV, Section 11.[26] But the Branch does not explain how collective bargaining would "subvert" its authority and, in any event, the Branch, like all public employers, would have the option to condition any collective bargaining agreement on ratification by the Assembly. Further, as explained above, the legislature retains its authority to amend PECBA to exempt some or all of its employees from PECBA, or to exempt specific subjects from mandatory collective bargaining. Accordingly, we do not agree that permitting the petitioned-for employees to engage in collective bargaining necessarily subverts the legislature's rulemaking authority in a manner that compels us to interpret PECBA as excluding the petitioned-for employees from its coverage, despite the absence of any such express exclusion.

Relatedly, the Branch also asserts that the LBPRs "do not harmonize" with PECBA. At the outset, we note that this assertion is largely based on policy arguments as to whether PECBA is an appropriate fit with the structure of how the Branch operates. It is the legislature, however, that determines statutory policy, not this Board. As an administrative agency, we administer the statute as enacted by the legislature; it is beyond our authority to create that policy in the first instance, and it would be inappropriate for us to usurp that role, which rightfully belongs to the legislature. Thus, the question of whether it is good policy for the Branch and its employees to be subject to PECBA is one for the legislature to answer, not this Board.

With that observation in mind, we turn to the Branch's arguments regarding the fit between the LBPRs and PECBA. The Branch first argues that because it is composed of 90 elected officials, its employees are hired for political reasons and may be dismissed for purely political reasons. The LBPRs, the Branch argues, "contemplate this highly personalized and politically motivated arrangement, which likewise permits the hiring and firing of family members under a carve out from the ethics laws that apply to public officials." The Branch argues that this Board's rulemaking authority "and its ability to hear appeals and overrule politically motivated personnel actions under ORS 240.560(3) cannot be reconciled with what is permitted by the 90 elected officials in regards to the subject employees."

To begin, the statute cited in this argument, ORS 240.560(3), is part of the State Personnel Relations Law, not PECBA. As noted above, the legislature has already addressed the issue regarding SPRL appeals by expressly exempting Branch employees from the coverage of SPRL. Moreover, any lack of harmony between the LBPRs and SPRL does not speak to any purported disharmony between the LBPRs and PECBA, because SPRL and PECBA are substantively distinct. Unlike SPRL, PECBA does not, in and by itself, impose any standard for the discipline or discharge of employees. PECBA only provides a process by which employees may collectively bargain with their public employer regarding their terms and conditions of employment. PECBA does not require either party to agree to any particular contractual term or type of term, and a change to the petitioned-for employees' employment terms would occur only if the Branch and the Union mutually agreed to it in the course of good faith collective bargaining. Consequently,

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[26]The Branch's objections to the petitioned-for unit do not include any contention that the application of PECBA to the legislative employees is unconstitutional. Accordingly, we understand the Branch to be arguing only that the potential effect of collective bargaining on the application of the LBPRs to represented employees is a policy consideration that should affect our statutory interpretation of PECBA.

we cannot assume that, because the legislature determined that Branch employees should not be subject to SPRL, it would make the same policy determination with respect to PECBA. Again, if the legislature agrees that, as a policy matter, the structure of the Branch or the political nature of the Legislative Assembly is an ill fit with all or some of the statutory requirements of PECBA, the legislature may enact a statute that reflects that policy determination; we, as an administrative agency, may not.

The Branch next argues that PECBA does not contain a designated bargaining representative for the legislative branch, whereas PECBA does provide for a designated bargaining representative for state agencies (ORS 243.696(1)) and the judicial branch (ORS 243.696(2)). In the absence of such a designated collective bargaining representative, the Branch argues, PECBA cannot be harmonized with the operational structure of the Branch. How the Branch might elect to conduct collective bargaining with its employees is beyond the scope of our inquiry here, and we would be overstepping our bounds to suggest what that structure might look like, or to require the Branch to designate a particular position or positions to perform that function.[27] The Branch, through its legislative authority, rulemaking authority, or some other mechanism can determine how it will be represented for purposes of collective bargaining (in the event that the petitioned-for employees vote for the Petitioner to be their exclusive representative). That such a determination has not yet been made does not persuade us that the legislature intended that the Branch is not a public employer or that its employees are not public employees within the meaning of PECBA.

Finally, the Branch asserts that it "cannot deliberate regarding management prerogatives behind closed doors and with limited representatives as other public employers routinely do," citing Article IV, Section 14, of the Oregon Constitution, and that, as a result, it "will be constitutionally prevented from negotiating with a bargaining unit in any meaningful way."[28] We do not determine whether that interpretation of the constitution is correct, because even assuming that it is, this argument sets forth only additional logistical and policy concerns about how and whether the Branch and its employees should be subject to PECBA. Those concerns may or may not be good policy reasons for excluding the Branch and its employees from PECBA. We reiterate that such a policy determination can be made only by the legislature, and it is inappropriate for this Board to make such a policy determination and then base our interpretation of PECBA on that policy instead of the statutory text.

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[27]The Branch notes that there is currently a bill before the legislature (SB 759) that would designate the Legislative Administrator as the collective bargaining representative of the Branch. Because that bill has not been enacted as a statute, it is not appropriate for us to consider it when interpreting PECBA in this matter.

[28]The Branch acknowledges that "some decisions regarding collective bargaining issues could receive input from the Legislative Administrator and [the Legislative Administration Committee (LAC)]," but argues that "neither the LAC nor the Legislative Administrator can bind the entire Oregon Legislative Assembly under a Collective Bargaining Agreement unilaterally without violating the Oregon Constitution." However, the record also shows that the legislature has a process by which it reviews and decides whether to adopt recommendations made by the Legislative Administrator or LAC regarding employees' terms and conditions of employment. Further, the Branch does not cite a constitutional provision that prohibits the Branch from honoring the terms of a collective bargaining agreement or from collectively bargaining in good faith with its employees.

In sum, we conclude that the statutory text and context do not exclude the Branch as a public employer or its employees as public employees under PECBA. We further conclude that it is beyond our authority to read the policy arguments advanced by the Branch into the statute. Therefore, we conclude that we have jurisdiction over this matter.

2. The petitioned-for bargaining unit is an appropriate bargaining unit.

We turn to the Branch's argument that the petitioned-for group of employees does not constitute an appropriate bargaining unit. PECBA defines an "appropriate bargaining unit" broadly as any "unit designated by [this] Board or voluntarily recognized by the public employer to be appropriate for collective bargaining." ORS 243.650(1). "[A] bargaining unit may consist of all of the employees of the employer, or any department, division, section or area, or any part or combination thereof, if found to be appropriate by the Board." OAR 115-025-0050(1).

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

When determining whether a unit is appropriate for collective bargaining, we must "consider such factors as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees." ORS 243.682(1)(a); *see also Douglas County*, CC-004-14 at 30-31, 26 PECBR at 387-88; *OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251 (2001).[29] Moreover, when making an appropriate unit determination, we have "discretion to decide how much weight to give each factor" in any particular case. *OPEU*, 173 Or App at 436; *see also OSEA v. Deschutes County*, 40 Or App 371, 376, 595 P2d 501 (1979). Thus, "our analysis of the propriety of a proposed unit is necessarily fact-driven, with the outcome depending on the specific facts and circumstances of the workplace and workforce at issue." *Douglas County*, CC-004-14 at 31, 26 PECBR at 388.

A threshold requirement for an appropriate unit is that the petitioned-for employees share a community of interest with each other. *See*, *e.g.*, *Oregon AFSCME Council 75 v. Washington County*, Case No. RC-30-03 at 12, 20 PECBR 745, 756 (2004); *Oregon AFSCME, Council 75 v. City of Corvallis*, Case No. RC-41-03 at 11, 20 PECBR 684, 694 (2004). Additionally, where there is a contention that the proposed bargaining unit is inappropriate because it excludes certain employees, we consider whether the petitioned-for employees share a sufficiently distinct community of interest such that the proposed unit may be deemed appropriate. *See*, *e.g.*, *Washington County*, RC-30-03 at 12, 20 PECBR at 756. A proposed unit of employees may have a sufficiently distinct community of interest to constitute an appropriate unit, even if they also share a community of interest with excluded employees. *See*, *e.g.*, *id.* at 12-13, 20 PECBR at 756-57; *City of Corvallis*, RC-41-03 at 11-16, 20 PECBR at 694-99.

[29]Those statutory factors are not exclusive, and we may also weigh other non-statutory factors, including our administrative preference for certifying the largest possible appropriate unit. *Douglas County*, CC-004-14 at 31, 26 PECBR at 388. Here, the Branch does not object on the ground that the proposed unit is too small and that a larger group of Branch employees would be an appropriate unit.

We begin by examining the community of interest, wages, hours, and working conditions of the proposed unit. "Community of interest" has long been understood to depend on factors such as similarities of duties, skills, and benefits; interchange or transfer of employees; promotional ladders; and common supervisors. *Douglas County*, CC-004-14 at 31, 26 PECBR at 388. Here, the Branch acknowledges that the employees "shar[e] the same compensation scheme, partak[e] in PERS, PEBB, other benefits," "shar[e] a common work infrastructure," and share in "the same type of work." The petitioned-for Legislative Assistants are all subject to the LBPRs, which determine their terms and conditions of employment, including compensation (including shift differentials), vacation and sick pay, and the administration of pay upon demotion or promotion. The petitioned-for employees receive similar pay and benefits and perform largely similar job duties. They also frequently interact with each other in performing those job duties. As detailed in the job descriptions, the knowledge, skills, and abilities to perform the job are identical across all four classifications, with the single exception that the job description for the LA IV position states only one additional skill not listed in the other three classifications: "management and supervision of staff, volunteers, and interns."[30] LAs sometimes transfer to different assembly members' offices, and when they do so, they retain their accrued compensation and benefits. Occasionally, although not often, two assembly members share supervision of a single LA. Additionally, LAs may be promoted from one level in the LA classification series to another, such as from an LA I to an LA II, either while remaining in the same office or when hired by one member from another member's office. Such commonalities in terms and conditions of employment weigh in favor of a conclusion that the petitioned-for LAs share a community of interest.

We recognize that each legislator has discretion to determine how to structure and manage their office, within the limits of the LBPRs and the budget set by the Legislative Assembly. Because of that discretion, there may be some variation in some of the working conditions of the petitioned-for employees. For example, pursuant to LBPR 13(1), each elected member has sole authority to assign and reassign job duties, work location, and work schedule "at any time." In addition, the LBPRs give members the sole authority to determine whether to grant paid administrative leave, authorize remote work, and use (or forego) corrective action and disciplinary measures. The record also indicates that, to some degree, the geographic size of a member's district or the amount of the member's constituent outreach may affect an LA's schedule and working hours. For example, Diane Linthicum, Legislative Assistant IV to Senator Dennis Linthicum, indicated in her JDQ that the geographic size of the senator's district required "extensive time, travel and hours away from home[.]" There is also evidence in the record that some LAs work in different office locations when the legislature is not in session, with some LAs in the Portland area working out of office space shared by multiple elected members. Further, each elected member supervises their own office, and Employee Services does not monitor elected members'

[30]As discussed below, this reference to the ability to "manage and supervise" in the LA IV job description does not establish that the LA IVs are categorically managerial or supervisory employees under PECBA.

workplaces to ensure that employees' duties, work schedules, and work assignments are handled similarly across member offices.[31]

However, even assuming that some differences in assembly members' exercise of discretion and district office locations cause some LA working conditions to vary, such differences do not necessarily mean that the petitioned-for employees do not share a community of interest.[32] When we analyze the community of interest factor, we examine the employees' *collective bargaining* interests, not more general interests. *See, e.g., State of Oregon, Mental Health Division, Fairview Training Center v. American Federation of State County and Municipal Employees, Council 75*, Case No. C-1-84 at 23, 8 PECBR 6666, 6688 (1984) (contrasting the "labor relations" community of interest with more general interest in the mission of the employer); *Revenue Hearing Officers Association v. Oregon Department of Revenue and Oregon Public Employees Union, Local 503*, Case No. C-155-83 at 6, 7 PECBR 6086, 6091 (1983) (when evaluating community of interest, we evaluate the "collective bargaining interests" of employees). The purpose of our analysis is to ensure that the resulting bargaining unit will work "for the mutual benefit of all included employees." *See United Employees of Columbia Gorge Community College v. Columbia Gorge Community College*, Case No. UC-19-01 at 7, 19 PECBR 452, 458 (2001). Unit determinations that ensure a sufficient community of interest "help effectuate policies of [PECBA] by decreasing potential sources of labor unrest and increasing equality of bargaining power." *Id.* (citing *AFSCME Council 75 v. State of Oregon and AOCE*, Case No. UC-37-97 at 8-9, 17 PECBR 767, 774-75 (1998)).

Moreover, as noted above and as acknowledged by the Branch, although each member has broad authority to manage their own office and the personal staff who work in it, the petitioned-for employees are covered by a common compensation plan and a common classification structure, and receive the same health, retirement, and paid vacation and sick leave benefits. Pay and benefits

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[31]LAs who testified explained that assembly members may have different supervisory or management styles, which one LA testified may result in "subtle differences" in how they choose to run their offices. A few employees indicated in their JDQs that every legislative office operates differently. For example, Linda Heimdahl, Legislative Assistant IV to Senator Kim Thatcher, wrote in her JDQ that "[e]very legislative office is different" and you "cannot compare one office to another." Kimberly Goddard-Kropf, Legislative Assistant I to Representative Rachel Prusak, wrote that "Every office is different, and each legislative aide has a unique relationship with their member." However, those employees did not provide specific examples of differences in the JDQs or testify at hearing, and the conclusory comments in the JDQs standing alone are insufficient to establish that there are significant differences in LAs' terms and conditions of employment across offices.

[32]Generally, when a group of employees share the same basic terms and conditions of employment (such as compensation and benefits), that is sufficient to establish that the employees have a shared community of interest, including on a classification- or state-wide basis. *See, e.g.*, *Or. AFSCME Council 75 v. State*, 304 Or App 794, 469 P3d 812, *rev den*, 367 Or 75, 472 P3d 268 (2020). In some cases, we have held that differences in supervision or location are sufficient to establish that a particular group of employees have a sufficiently distinct community of interest to justify the creation of a separate bargaining unit, even though those employees also share a community of interest with other employees excluded from the proposed unit. *See, e.g.*, *Washington County*, RC-30-03 at 12-13, 20 PECBR at 756-57; *City of Corvallis*, RC-41-03 at 11-16, 20 PECBR at694-99. However, such differences generally do not cause the larger group of employees who share basic employment terms to *lack* a shared community of interest. *Id.*

are substantial collective bargaining interests. Further, the petitioned-for employees share a common workplace (the state capitol), even though some may have other work locations, and share an overriding purpose—serving as gatekeepers for their elected members to stakeholders, constituents, and other interested parties. The LAs' duties also share sufficiently common features that the Legislative Branch created a four-position uniform classification structure, organized to reflect the common duties, that applies to all members' offices. Significantly, there is also a high degree of interchange among the petitioned-for employees. They work with each other frequently in the shared work of moving the members' legislative priorities forward, and the record contains evidence that movement of employees between members' offices is not uncommon. We conclude that these commonalities are sufficient to find that the petitioned-for employees share a community of interest.

The Branch nonetheless contends that these employees do not share a sufficient community of interest, based on its assertion that each LA is "solely loyal to" the elected official for whom the LA performs work. The Branch is correct that members expect their LAs to advance the hiring member's policy and legislative goals, and not negate those goals. That job requirement, which the Branch describes in its briefing as "loyalty," and which it characterizes as essential to the members, does not undermine a conclusion that the petitioned-for employees have sufficient community of interest to make collective bargaining on behalf of the group mutually beneficial for the employees. In fact, the legislative assistants testified that, although their job is to implement the directives of the particular assembly member who hired them, they are all employees of the State of Oregon. The LAs also consistently testified that, even when assembly members have opposing views regarding proposed legislation, the LAs do not consider themselves to be in personal conflict with each other. Any differences that arise from LAs' responsibility to loyally represent the views of their respective elected members are outweighed by the commonalities in the terms and conditions of employment that are at the core of our analysis.

Further, if we were to accept the Branch's assertion that the LAs have such divided loyalties that they cannot share a community of interest regarding their terms and conditions of employment, then each member's office must comprise its own bargaining unit, or there is no appropriate unit that can include Legislative Assistants. As to the former, such a result would be inconsistent with this Board's "well-established policy of disfavoring the fragmentation of public workplaces." *Oregon Workers Union v. State of Oregon, Department of Transportation and Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. RC-26-05 at 11, 21 PECBR 873, 883 (2007). "Our nonfragmentation policy also helps public employers[,]" because it "promotes workplace stability, and prevents the undue burden which would fall on public employers if they had to engage in bargaining sessions for the many splinter groups on a round-robin basis." *Id.* (quotation marks and citation omitted); *see also Association of State Professional Employees v. Department of Revenue and Oregon Public Employees Union*, Case No. RC-55-95 at 8, 16 PECBR 615, 622 (1996) (related administrative preference for largest possible unit is "particularly significant" in state cases).

As to any contention that LAs cannot organize and collectively bargain at all, as we explained above, the legislature has not stated in PECBA that the Branch or some or all of its employees are excluded from PECBA, and we cannot insert an exclusion into PECBA where the legislature has not included one. If the legislature determines that the issues raised by the Branch

in this matter warrant exclusion of the LAs from PECBA, it has the authority to statutorily enact such an exclusion, but, to this point, the legislature has not done so. And we, as previously stated, lack the authority to make that policy decision, which is reserved for the legislature.[33]

The Branch does not advance any other arguments as to why the petitioned-for employees lack a community of interest, and, as noted above, it acknowledges that the traditional factors that we weigh show a shared community of interest among these employees. Accordingly, we find that the petitioned-for employees share a sufficient community of interest to constitute an appropriate bargaining unit. With respect to the factor of the desires of the employees, the employees have submitted a sufficient showing of interest in representation by the Petitioner for this Board to conduct a secret-ballot election to determine that ultimate employee choice. The factor of the history of collective bargaining does not play a meaningful role here, as there is no history with respect to this employer and these employees. For these reasons, we find the petitioned-for unit to be an appropriate unit. As described below, this Board will conduct an election to determine whether the employees wish to be represented by the Petitioner.

3. The record does not establish a classification-wide supervisory, managerial, or confidential exclusion for the petitioned-for group of employees.

We turn to the final set of Branch objections, which assert that the LA Is, IIs, IIIs, and IVs are not public employees under ORS 243.650(19) because they are "supervisory," "managerial," or "confidential" employees. Representation proceedings are investigatory, not adversarial, and there is no burden of proof. OAR 115-010-0070(5)(a). "Nevertheless, in disputes concerning whether employees are 'public employees,' there must be sufficient evidence establishing that a statutory exclusion applies." *Id.*

In this case, the Branch contends that all of the petitioned-for LAs are statutory supervisors, managers, or confidential employees, on classification-wide bases. Before addressing the merits of those contentions, we address a procedural issue. Under our rules, "[q]uestions concerning public employee status" generally are not "decided in proceedings to determine the appropriate bargaining unit for a representation matter, unless the representation matter cannot be certified without the resolution of such questions." OAR 115-025-0020(4). *See also* ORS 243.682(2)(b)(E) (resolution of dispute over an appropriate unit "may occur after an election is conducted"). Here, because the Branch asserted that the proposed unit was not appropriate, as well as asserted that not one employee in the proposed bargaining unit is a "public employee" under PECBA, we scheduled an expedited hearing before conducting the election because it was not clear whether the representation matter could "be certified without the resolution of such questions" on public-

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[33]To the extent that the Branch argues that the petitioned-for employees do not share a community of interest because some of the petitioned-for employees are family members of the elected legislator who hired them, as permitted by ORS 244.177(2) (carve-out from government ethics limitations on hiring family members for "the personal legislative staff of the member of the Legislative Assembly"), we also disagree. We acknowledge that those individuals could potentially have different collective bargaining priorities than other employees (*e.g.*, job security provisions may be less important to those employees than to others in the bargaining unit). We do not conclude, however, that such differences in priorities resulting from personal relationships to elected members are sufficient to outweigh the commonalities among the petitioned-for employees.

employee status. OAR 115-025-0020(4). For the reasons described below, we conclude that the Branch has not established that, on a classification-wide basis, any of the petitioned-for classifications are confidential, managerial, or supervisory. That means that this Board will conduct an election among eligible employees in the proposed unit, which we have found appropriate. Consistent with our rules, and in a manner consistent with this order, both parties may challenge, on an *individualized* basis, the eligibility of *specific* employees to vote, based on an individual employee being a confidential, managerial, or supervisory employee. *See* OAR 115-025-0073(2). Any challenged ballot will be impounded, and the Board will only resolve a challenge if such a resolution is necessary to certify the results of the election. *Id.* If the resolution of challenged ballots is dispositive, the Board will conduct a hearing to resolve those individualized challenges. *Id.* With that framework in mind, we proceed to our analysis as to whether the record establishes that the entire classifications of LA Is, IIs, IIIs, and IVs are excluded as non-public employees under ORS 243.650(19).

Confidential Employee Exclusion

We begin with the Branch's assertion that all of the petitioned-for employees are not public employees because they are "confidential employees." Under ORS 243.650(6), a "[c]onfidential employee" means "one who assists and acts in a confidential capacity to a person who formulates, determines and effectuates management policies in the area of collective bargaining." Under 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; and (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? *Oregon Cascades*, UC-16-04 at 8, 20 PECBR at 793.

The first part of the test focuses on the individual whom the allegedly confidential employee assists, and requires a showing that the individual 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).

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*, 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.

At the outset, we note that the Branch asserts that all 180 employees are "confidential," which is a broad proposition, particularly given the narrowness of this statutory exception and the strict criteria required to satisfy this exception. Here, the Branch has not provided sufficient evidence to establish any of the three parts of the confidential employee test on a classification-wide basis.

First, the Branch must show that each employee provides assistance to an individual who actually formulates, determines, and effectuates management policies in the area of collective bargaining. The Branch, however, has not established that predicate fact. Rather, the Branch has premised much of its objections on the *lack* of any individual (or group of individuals) who do or can actually formulate, determine, and effectuate management policies in the area of collective bargaining. The Branch nevertheless asserts that all 90 elected officials in the legislature "actually formulate, determine, and effectuate management policies in the area of collective bargaining" based on the fact that elected officials must at times take policy positions on public sector collective bargaining with respect to those officials' responsibilities as *legislators*. The confidential employee exclusion, however, is concerned with an individual's authority and responsibilities as a public employer's collective bargaining representative. Here, the Branch has not effectively established that every elected official will actually formulate, determine, and effectuate management policies in the area of collective bargaining with represented Branch employees (*e.g.*, by serving as the Branch's collective bargaining representative at the bargaining table with the represented employees, or by determining the Branch's bargaining positions). Relatedly, although the petitioned-for employees undoubtedly provide assistance to their elected officials, it has not been established that such assistance relates to collective bargaining or the administration of a collective bargaining agreement between the Branch and any the petitioned-for employees. Finally, the Branch has also not established that it would be reasonably necessary for all approximately 180 employees to provide confidential assistance as it relates to collective bargaining between the Branch and those same employees. Therefore, we do not conclude that every petitioned-for classification is excluded from being a public employee based on confidential employee status. If the proposed unit is certified, this conclusion would not preclude the Branch from challenging ballots based on the confidential employee exclusion, or from filing a unit clarification petition to exclude from the bargaining unit individual employees who actually become "confidential employees," as that term is defined by PECBA.

Managerial Employee Exclusion

We turn to the Branch's contention that some of the petitioned-for employees are managerial employees.[34] Under ORS 243.650(16), a "[m]anagerial employee" means "an employee of the State of Oregon * * * who possesses authority to formulate and carry out management decisions or who represents management's interest by taking or effectively recommending discretionary actions that control or implement employer policy, and who has discretion in the performance of these management responsibilities beyond the routine discharge of duties." Additionally, a "'managerial employee' need not act in a supervisory capacity in relation to other employees." ORS 243.650(16). The managerial employee exclusion was added to PECBA by Senate Bill 750 in 1995. Unlike the supervisory and confidential exclusions, the managerial exclusion applies only to employees of the State of Oregon and the Oregon public universities listed in ORS 352.002. The exclusion is based on the judicially implied exception to the National Labor Relations Act, which grew out of the concern that "an employer is entitled to the undivided loyalty of its representatives." *NLRB v. Yeshiva University*, 444 US 672, 682 (1980). Managerial employees are those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *Id.* (quoting *NLRB v. Bell Aerospace Co.*, 416 US 267, 288 (1974)). They must "exercise discretion within, or even independently of, established employer policy and must be aligned with management." *Yeshiva University*, 444 US at 683.

This Board, in its first case construing PECBA's managerial employee exclusion, described the exclusion as follows:

> "[S]ection (16) sets up an alternative definition of 'managerial employee' as an employee of the state (l) 'who possesses authority to formulate and carry out management decisions' or (2) 'who represents management's interest by taking or effectively recommending discretionary actions that control or implement employer policy.' Both alternatives are modified by the statement that such an employee must have 'discretion in the performance of these management responsibilities beyond the routine discharge of duties.'"

*Department of Justice v. Oregon Association of Justice Attorneys*, Case No. UC-64-95 at 5, 16 PECBR 777, 782 (1996).

Here, there is no dispute that the petitioned-for employees are employees of the State of Oregon, and not the individual elected member on whose personal staff they serve. The Branch also does not appear to contend that every petitioned-for employee actually has authority to take or effectively recommend discretionary actions that control or implement the Branch's policy as an employer. Rather, the Branch appears to contend that every elected member is part of Branch management, and that because LA IIIs and IVs seek to carry out their own individual member's policy objectives, the LAs have sufficient authority to qualify as managerial employees under

[34]In its objections, the Branch objected that "some" of the petitioned-for employees are managerial employees. In its post-hearing brief, it cited as examples only LA IIIs and IVs, and consequently we limit our discussion here to LA IIIs and IVs.

PECBA. We need not decide whether every elected assembly member has sufficient authority over the Branch's polices *as an employer* to qualify as "management" for purposes of PECBA,[35] because, even assuming that they do, this record does not establish that all the LA IIIs and LA IVs, on a classification-wide basis, exercise the level of discretion required by ORS 243.650(16) to also qualify as managerial employees. For an LA to be excluded as a managerial employee, that LA would need to have the authority to take discretionary actions (or effectively recommend them), that are outside the scope of their professional duties *and* control or implement the Branch's policies *as an employer*. To the extent that LA IIIs and IVs have the authority to take or effectively recommend discretionary actions regarding proposed legislation, this record does not establish that all LA IIIs and IVs exercise that authority outside the scope of professional duties routinely performed by LA IIIs and IVs. "Although all professional employees exercise their professional judgment on behalf of their employer when carrying out their duties, *only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management*." *Oregon Association of Justice Attorneys*, UC-64-95 at 8, 16 PECBR at 784 (quotation marks and citation omitted; emphasis added). Further, the record does not establish that all LAs exercise non-routine authority regarding the Branch's *employer* policies, as opposed to other types of legislative policies. Although there may be individual LAs who actually exercise managerial authority, the record does not establish that all employees in the LA III and IV classifications should be categorically excluded as managerial employees.

Supervisory Employee Exclusion

Finally, we turn to the Branch's objection that LA IIIs and IVs are "supervisory." Under ORS 243.650(23)(a), a "[s]upervisory employee" is "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." 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. *City of Portland v. Portland Police Commanding Officers Association*, Case No. UC-017-13 at 22, 25 PECBR 996, 1017 (2014) (citing *Deschutes County Sheriff's Association v. Deschutes County*, Case No. UC-62-94 at 12, 16 PECBR 328, 339 (1996)). 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.

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[35]The record establishes that the Branch makes its employer policies through the assembly of the elected members or by statutorily delegating some authority to the Legislative Administration Committee and the Legislative Administrator. *See* ORS 173.710 ("The Legislative Administration Committee hereby is established as a joint committee of the Legislative Assembly. The committee shall select a Legislative Administrator who shall serve at the pleasure of the committee and under its direction."); ORS 173.720 (prescribing the duties of the Legislative Administrator).

The Branch asserts that LA IIIs and IVs have the authority to hire, promote, discharge, assign, or responsibly to direct, or to effectively recommend such action. For the reasons discussed below, we conclude that the record does not establish that either LA IIIs or IVs actually have any such authority on a classification-wide basis.

To begin, we note that the Branch relies on evidence that purportedly shows LAs supervise "other employees or interns." However, PECBA defines a "supervisor" as one with authority to act, or effectively recommend action, regarding only "other employees." ORS 243.650(23)(a). The term "other employees" includes only employees "who work for a wage or salary." *Laborers' International Union, Professional Law Enforcement Officers Association, Aurora, v. City of Aurora*, Case No. CC-06-10 at 11, 24 PECBR 38, 48 (2010) (authority over volunteer reserve officers does not establish supervisory status). Thus, when determining whether an employee is a statutory supervisor or manager, we "examine only their authority regarding *paid* employees." *Teamsters Local 223 v. City of Gold Hill*, Case No. UP-63-97 at 10, 17 PECBR 892, 901 (1999) (emphasis in original). *See also Laborers International Union of North America, Local 483 Law Enforcement Professional Association v. City of Gervais*, Case No. UC-16-08 at 18, 23 PECBR 143, 160 (2009). Thus, in this case, we consider the authority of LAs to supervise only other employees, not interns.

Without counting interns, the record indicates that each assembly member office typically has one, and at most two, LAs working on a regular basis throughout the year. In some offices, a second LA works year-round, and in others, a second or third LA works only when the legislature is in session. Currently, there are 180 employees in the petitioned-for unit. If, as the Branch asserts, there is one employee with supervisory authority in each of the 90 member offices, that would mean that those 90 LAs each exercise such authority over only one other employee. "[T]he provisions of the PECBA generally require that an alleged supervisor have control over multiple workers in order to be excluded from PECBA coverage." *City of Forest Grove v. City of Forest Grove Employees Local 3786*, Case No. UC-29-96 at 8, 17 PECBR 171, 178 (1997) ("ORS 243.650(23) itself speaks of supervisors as persons who have charge of other employees by directing them or adjusting their grievances, thus indicating that a true supervisor manages more than one other employee."). "While it may be appropriate in a rare case * * * to exclude an employee who supervises only one other worker," under such circumstances, the evidence concerning supervisory status must be "overwhelming." *Id.*

In this case, for evidence of supervisory status, the Branch relies exclusively on the LA job descriptions and questionnaires that were designed for the purposes of a classification, compensation, and pay equity study (not to determine the employees' supervisory status under PECBA).[36] Both the job descriptions and the JDQs (even though completed by the employees themselves) are largely conclusory and non-specific, and therefore insufficient on their own to establish supervisory status. *See Portland Police Commanding Officers Association*, UC-017-13 at 23, 25 PECBR at 1018 ("Mere inferences and conclusory statements regarding supervisory authority are insufficient to render an employee a supervisor.").

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[36]The Branch's witnesses, Knieling and Eledge, acknowledged that they lacked personal knowledge of the purported authority exercised by LAs, and that their testimony was based on the job descriptions and questionnaires.

For example, the Branch contends that LA IVs are supervisors because the list of essential duties in the LA IV job description includes: "Hires, trains, supervises, and mentors other employees or interns." This description alone does not establish supervisory status, for several reasons. Because the common understanding of the term "supervise" is much broader than the statutory definition, the mere use of that term in a job description or title is insufficient to establish supervisory status under PECBA. *See, e.g.*, *City of Union v. Laborers' International Union of North America, Local 121*, Case No. UC-9-08 at 4, 22 PECBR 872, 875 (2008) (concluding that public works superintendent was not supervisor despite job description stating that essential job functions include "[s]upervise subordinate employees including assigning and reviewing work, evaluating performance, scheduling work, recommending disciplinary actions and hiring/termination decisions"). Additionally, the LA IV job description refers to the supervision of "interns," but, as noted above, the supervision of interns is not relevant to our analysis here.[37] Similarly, "training" and "mentoring" are not one of the 12 indicia of supervisory status under PECBA. *See* ORS 243.650(23)(a); *Laborers' International Union of North America, Professional Law Enforcement Officers Association, Aurora v. City of Aurora*, Case No. CC-06-10 at 11, 24 PECBR 38, 48 (2011) (officer's role in training employees does not confer supervisory status). Although "hiring" authority is supervisory under PECBA, the record does not establish that all LA IVs actually make or effectively recommend hiring decisions for other employees. For example, one LA IV testified that he does not making hiring decisions, and that his role in the hiring process is limited to scheduling and participating in interviews and sharing his opinion about the interviewees. To the extent he shares his opinion, there is no specific evidence establishing that he has done so regarding employees (as opposed to interns), or that his input rises to the level of "effective recommendation."[38]

The Branch also contends that the questionnaires establish that LA IIIs and IVs are supervisory because some employees in those classifications indicated that they "supervise" other employees. However, the questionnaire's description of supervisory authority did not conform to PECBA's definition of "supervisor." For example, the questionnaire did not direct the employees to consider only their authority regarding other employees, and as a result, many of their responses refer to their authority over interns, which is not relevant to their status as supervisors under PECBA. For another example, the questionnaire did not direct the employees to indicate whether they use independent judgment when exercising their purported supervisory authority, which is a requirement for supervisory status under PECBA.[39] The questionnaire also did not indicate

[37]For this reason, the testimony of an LA III regarding the assignment of work to interns does not, as the Branch contends, establish that LA IIIs are statutory supervisors.

[38]We also note that the LA job descriptions indicate that the LA III classification is *not* supervisory. The LA III job description does not state that the LA III possess any supervisory authority. And, the LA IV job description states that the level IV "is distinguished from the III level in that it has responsibility for supervision of staff and interns." That is, according to the Branch's job descriptions, the LA III classification *lacks* responsibility for supervision of staff.

[39]The questionnaire, in a section separate from the supervisory authority section, asked the employees to indicate whether they exercise independent judgment when performing their job duties. Some

(Continued ... )

whether any supervisory authority was exercised in the interest of management, as opposed to the interest of the LA in the routine performance of the LA's duties. Consequently, the mere fact that some LAs indicated that they have supervisory authority in their questionnaire responses does not establish that they are "supervisors" as that term is defined under PECBA.[40]

Conclusion

In sum, we conclude that we have jurisdiction over this matter and that the petitioned-for unit is an appropriate unit. Further, none of the petitioned-for classifications are categorically supervisory, managerial, or confidential.[41] Accordingly, we will direct the Election Coordinator to conduct a secret, mail-ballot election as set forth below. Because this matter was heard on an expedited basis, the Board will grant any petition for reconsideration that is filed within 14 days of our final order. OAR 115-025-0065(2)(g). Because, however, we are only directing an election to be conducted, this order is not a final order. *Klamath Co. v. Laborers Inter. Union*, 21 Or App 281, 534 P2d 1169 (1975). *Cf. Linn-Benton-Lincoln Educ. Ass'n/OEA/NEA v. Linn-Benton-Lincoln ESD*, 152 Or App 439, 448, 954 P2d 815 (1998) (a *post-election* certification order is a "final order"). After the election is conducted, the Board will issue a final, post-election order certifying the results of the election. At that point, both parties will have 14 days to request reconsideration of that final order. OAR 115-025-0065(2)(g).

ORDER

1. An appropriate bargaining unit is:

> "Legislative Assistant I, Legislative Assistant II, Legislative Assistant III, and Legislative Assistant IV supporting elected officials in the Oregon Legislative Assembly, excluding supervisory, managerial, confidential, and caucus employees."

2. The Election Coordinator shall conduct a secret, mail-ballot election in the above-bargaining unit to allow eligible employees to express their desires for or against Petitioner IBEW Local 89 as their exclusive representative. Eligible employees are those employed in the

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(Continued ... )
of the LAs who indicated that they "supervise" indicated that they do *not* exercise independent judgment. Further, the questionnaire generally asked whether the employee exercises independent judgment when performing their job duties; it did not ask specifically whether the employee exercises independent judgment *when supervising* other employees. The exercise of independent judgment in the performance of work is common and does not make an employee a statutory supervisor. Rather, supervisory status turns on the use of independent judgment *when exercising supervisory authority* over other employees. *IAFF Local 851 v. Lane Rural Fire/Rescue*, Case No. RC-7-03 at 8, 20 PECBR 512, 519 (2003).

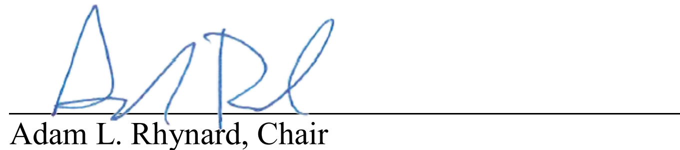
[40]The amount of variation in the questionnaire responses also weighs against a finding that all of the employees in the LA III and LA IV classifications are categorically supervisory.

[41]As noted above in this order, either party may challenge the ballot of a specific employee on an individual basis, consistent with this order.

classifications above on the date of this order and who are still employed on the date of the election. The date of the election is the date that the Election Coordinator determines mail ballots are due. The choices on the ballot shall be IBEW Local 89 or No Representation.

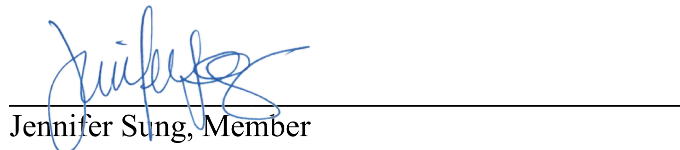
3. Within 20 days of the date of this order, the Branch shall provide the Election Coordinator with an alphabetical list of the names of eligible voters, along with their home addresses, job classifications, and, if known, personal email addresses and telephone numbers.[42] OAR 115-025-0071(2). The Board will provide IBEW Local 89 with the list. *Id.* Within 20 days of this order, the Branch shall also provide the Election Coordinator with a set of mailing labels, with the addresses of eligible voters, in alphabetical order.

DATED: April 6, 2021.



Adam L. Rhynard, Chair

Lisa M. Umscheid, Member



Jennifer Sung, Member

This is an interim order not subject to appeal under ORS 183.482.

[42]Consistent with this order, the list must include *all* employees in the petitioned-for classifications, regardless of whether the Branch believes that an individualized challenge may be warranted during the election.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-005-20

(TRIAL SERVICE REMOVAL)

| | | |
|---|---|---|
| J.B.,<br><br>Appellant,<br><br>v.<br><br>STATE OF OREGON, OREGON DEPARTMENT OF TRANSPORTATION,<br><br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | RULINGS,<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND ORDER |

J.B., Jacksonville, Oregon, appeared *pro se*.

Margaret J. Wilson, Senior Assistant Attorney General, Department of Justice, Salem, Oregon, represented the Respondent.

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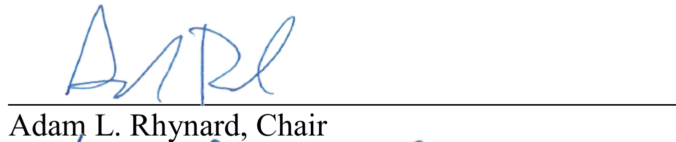
On March 26, 2021, Administrative Law Judge Martin Kehoe issued a recommended order in this matter. The parties had 14 days from the date of service of the order to file objections. OAR 115-010-0090(1). No objections were filed, which means that the Board adopts the attached recommended order as the final order in this matter. OAR 115-010-0090(4), (5).

ORDER

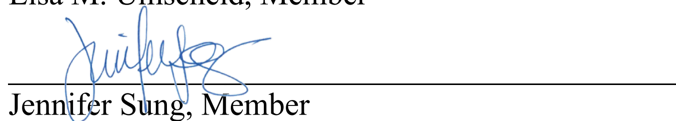
The appeal is dismissed.

DATED: April 13, 2021.



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-005-20

(TRIAL SERVICE REMOVAL)

| | | |
|---|---|---|
| JB,<br><br>Appellant,<br><br>v.<br><br>STATE OF OREGON, OREGON DEPARTMENT OF TRANSPORTATION,<br><br>Respondent. | ) | RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER |

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on November 12 and 13, 2020. The record closed on December 28, 2020, upon receipt of the parties' post-hearing briefs.

JB, Jacksonville, Oregon, appeared *pro se*.

Margaret J. Wilson, Senior Assistant Attorney General, Department of Justice, Salem, Oregon, represented the Respondent.

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On August 13, 2020, the Appellant, JB, filed an appeal with the Employment Relations Board (Board) against the Respondent, State of Oregon, Oregon Department of Transportation (ODOT). On October 9, 2020, ODOT filed a motion to dismiss. On October 12, 2020, the ALJ issued an order to show cause. On October 26, 2020, JB responded to that order. On October 28, 2020, the ALJ set the matter for hearing. The issue presented in this case is: Within the meaning of ORS 240.086(1), was JB's removal from trial service arbitrary; contrary to law, rule, or policy; or taken for political reasons? As set forth below, we conclude that it was not.

## RULINGS

1. As noted, the hearing for this case occurred on November 12 and 13, 2020. By agreement of the parties, all of ODOT's witnesses testified on November 12, 2020, and JB testified on November 13, 2020. (There were no opening statements, and JB called no additional witnesses.) The parties also agreed to start the hearing at 9:45 a.m. on November 13, 2020. All of the exhibits

that were provided in advance of the hearing were admitted without objection. (8:59 a.m. November 12, 2020.)

At around 10:19 and 10:20 a.m. on November 13, 2020, in two separate emails, JB shared 25 new exhibits with ODOT and the ALJ. The 9 exhibits included in the email received at 10:19 a.m. include evidence of a variety of communications between JB and different ODOT employees (Exhs. A-1 through A-8) and, separately, a copy of a June 22, 2020 doctor's note (Exh. A-4a). The 16 exhibits included with the email received at 10:20 a.m. included a "Medical Care Timeline" created by JB; other medical records; and updated versions of two photographs taken by JB that, unlike the originals (all of which were previously admitted, and are included as Exhs. A-Doc 13 through A-Doc 16), included "timestamps."

JB subsequently explained that these late-filed exhibits were submitted as a "rebuttal" to ODOT's Exh. R-17, which is a timeline that notes a number of unexcused absences (*i.e.*, "No Show No Calls") and was alluded to during the prior day's testimony. (10:17 a.m., 10:32 a.m. November 13, 2020.) At 11:18 a.m., ODOT stated that it did not object to the admission of the late-filed exhibits included in JB's 10:19 a.m. email (Exhs. A-1 through A-8), the two timestamped photographs, or a July 6, 2020 doctor's note included with the 10:20 a.m. email. However, ODOT also stated that it *did* object to the other late-filed exhibits included with JB's 10:20 a.m. email because, previously, those other exhibits had never been given to ODOT. At 11:21 a.m., the ALJ admitted all of the late-filed exhibits that were not objected to, and declined to admit those that ODOT did object to.

Upon review, we conclude that the ALJ's ruling was correct. During the hearing, JB explained that he provided his Medical Care Timeline and the late-filed medical records to provide "context" and to explain why he was not communicating with ODOT. (11:20 a.m. November 13, 2020.) However, as the ALJ correctly noted, because those documents were never given to ODOT during JB's employment, logically, they could not have been part of ODOT's rationale for removing JB from trial service. Indeed, some of the objected-to exhibits evidence events that occurred after JB's removal. Accordingly, those exhibits were legally irrelevant to this case. *See Williams v. State of Oregon, Department of Energy*, Case No. MA-14-04 at 3 (January 2005). We also see no compelling reason why JB had to wait until the second day of the hearing had begun to provide these particular exhibits. The exhibit that JB claims that his exhibits rebut, Exh. R-17, was provided by ODOT in advance of the hearing. In short, "good cause" has not been shown. *See* OAR-115-010-0068(3), OAR 115-010-0068(4).

2. At 11:45 a.m. on November 13, 2020, ODOT modified its earlier position and objected to the two timestamped photographs referenced above after it became clear that JB also never provided any photographs to his superiors during his employment. In response, the ALJ maintained his earlier ruling, as the timestamped photographs had already been admitted without objection, and because they merely verified one additional detail for two of the originals. (ODOT did not address this objection again in its post-hearing brief.) Upon review, we see no compelling reason to set aside that particular ruling at this time, and conclude that the ALJ acted properly within his discretion.

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

## FINDINGS OF FACT

1. ODOT is an agency of the State of Oregon (the State) that manages a statewide network of transportation systems and facilities. (Exh. R-3 at 1.)

2. On October 27, 2019, JB accepted a Compliance Specialist 2 position in ODOT's Commerce and Compliance Division (which is occasionally called CCD). (Exh. R-4 at 4.) Before an agency reorganization in November 2019, the Commerce and Compliance Division was known as the Motor Carrier Transportation Division (or MCTD).

3. The Commerce and Compliance Division operates a number of "ports of entry" where trucks that enter the state are weighed and inspected. JB's specific position was affiliated with the Ashland, Oregon port of entry.

4. After JB accepted his position with ODOT, but before his official start date, JB posted a public entry on a Google Reviews website for ODOT's Ashland port of entry. JB's post includes a positive "five star" rating, a photograph of the flags of the United States and Oregon, and states, "Come on by! I don't know half of you as well I would like, and I like less than half of you as well you deserve." (Exh. R-9.) The second sentence of the post is a misquotation of a line from the 2001 film, *The Lord of the Rings: The Fellowship of the Ring*. In addition, the post includes JB's full name. JB made this post because he wanted to boost the image of the Ashland port of entry. (11:29 a.m. November 13, 2020.) Nevertheless, ODOT does not approve of staff posting work-related information on social media sites. (3:02 p.m. November 12, 2020.)

5. On November 18, 2019, JB started working as a Compliance Specialist 2. The working titles for that position are Safety Compliance Specialist or Safety Investigator. (Exh. R-3 at 1, 9; 10:14 a.m. November 12, 2020.) The position was full time, and JB was considered "an unrepresented, non-executive, non-management employee." (9:25 a.m. November 12, 2020.) It is also considered a "classified" position. (Exh. R-3 at 1.) It was JB's first time working for the State of Oregon.

6. Also on November 18, 2019, JB signed a copy of the Compliance Specialist 2 position description. Among other things, it stated that the incumbent was expected to "[m]aintain regular and punctual attendance." (Exh. R-3 at 7-8.) On the same day, JB otherwise signed a separate document that stated, in part, "It is fully understood by me that if I refuse to work at a time or place assigned by my supervisor * * * I will be subject to disciplinary action including dismissal." (Exh. R-4 at 5.)

7. JB started his employment as a trial service employee. The standard trial service period for a new Compliance Specialist 2 is 12 months. Accordingly, JB's trial service period could have ended on November 18, 2020. However, as explained below, JB was removed from trial service on July 21, 2020. Broadly speaking, "an employee may be removed by an appointing authority at any time during trial service." (Exh. R-2 at 3.)

8. At ODOT, the purpose of a trial service period is to allow a new employee to determine whether the job is a good fit for him or her. It also allows ODOT management to determine whether the employee is a good fit for ODOT and has the necessary work habits, knowledge, capability, and skills. (9:24 a.m. November 12, 2020.) Additionally, it gives the employee time to be trained and get the necessary certifications. (3:05 p.m. November 12, 2020.) For JB's position in particular, ODOT considers whether the trial service employee has good writing skills, and can perform his or her work unsupervised, exercise good judgment, get along with his or her coworkers, treat the industry fairly, and be objective. (3:06 p.m. November 12, 2020.)

9. During JB's trial service period, JB's direct supervisor was expected to formally evaluate JB's performance once a month in nine separate categories. Those categories included (1) Safety, (2) Customer Focus & Positive Workplace, (3) Efficiency & Work Quantity, (4) Accountability & Work Quality, (5) Problem Solving, (6) Diversity, (7) Sustainability, (8) Attendance, and (9) Initiative. For each category each month, JB's supervisor wrote in a 1 for "Exceeds expectations," a 2 for "Meets expectations," a 3 for "Does not meet expectations," or an N/A when a score was not applicable. (Exh. R-2 at 3.) The document with these ratings is called the trial service performance evaluation form.

10. The two "core duties" of JB's Compliance Specialist 2 position are (1) conducting in-person "safety inspections" of trucks and their drivers, and (2) conducting "compliance reviews" (*i.e.*, investigations) of Oregon-based trucking companies (*i.e.*, "motor carriers") and generating related reports. (Exh. R-17 at 2; 10:58 a.m. November 12, 2020.) Safety inspections, which occur at a port of entry, involve checking the "mechanics" of trucks and drivers' hours of service, logbooks, and licenses. (10:17 a.m. November 12, 2020.) Compliance reviews include conducting safety audits of trucking companies and investigating those companies' records and insurance. Before the rise of COVID-19, compliance reviews were conducted at the trucking companies' places of business or at an ODOT office. Currently, compliance reviews are conducted over the telephone and through email. In addition to the foregoing, a small percentage of a Compliance Specialist 2's time is spent "speaking before the industry" and "going out on a crash."

11. JB's direct supervisor was Howard "Russ" Russell. Russell is a Safety Enforcement Manager in the Commercial Vehicle Safety Programs field unit of the Commerce and Compliance Division. (Exhs. R-2 at 2, R-12 at 2.) Russell's position has also been called Safety Compliance Field Unit Manager. (Exhs. R-1 at 3, R-3 at 9.) Russell is based out of an ODOT office in Salem. However, he supervises employees in multiple ODOT offices and ports of entry across Oregon.

12. John Truly is a Compliance Specialist 3, which is also known as a Senior Safety Compliance Specialist. Truly is the designated "lead worker" for JB's workgroup in Ashland. Truly was also primarily responsible for JB's training in Ashland, and for regularly monitoring and reviewing JB's work. Truly is currently based out of ODOT's Ashland office, but he also works remotely.

13. At all times material, Kevin Johnson was a Compliance Specialist 2 and a Safety Compliance Specialist in the Ashland office (the same position and work location as JB). (Exh.

R-3 at 9.) At some point, Johnson also acted as a trainer for JB. Johnson is now retired (and did not testify).

14. On February 6, 2020, Russell reminded JB to check in with Truly for assignments every morning that JB was scheduled to work. (Exh. R-17 at 1.)

15. On March 9, 2020, JB conducted his last truck inspection. (2:27 p.m. November 12, 2020.)

16. On March 23, 2020, Leonard "Abe" Dunivin sent an email to a group of ODOT employees. Dunivin is a "Safety Training Coordinator" for the State. (Exh. R-3 at 9, Exh. R-17 at 1.)[1] The email's subject was "Minimizing exposure during inspections." The body of the email stated, in part, "Attached is the latest Inspection alert that gives some safety practices when doing inspections to help keep your exposure down." (Exh. R-7 at 1.) These practices emanated from Commercial Vehicle Safety Alliance guidelines. The Commercial Vehicle Safety Alliance is a nationwide group that seeks to create uniformity regarding truck inspections across the states. The State of Oregon is a member of the group.

17. On March 26, 2020, at 1:44 p.m., Barry Brown sent an email with the subject of "Sick Employee" to Amy Ramsdell and Mary LaBounty. (Exh. R-8 at 1.) Brown is the Siskiyou Region Manager in the Motor Carrier Enforcement unit of the Commerce and Compliance Division. (Exh. R-8 at 1.) Ramsdell is the Division Administrator of the Commerce and Compliance Division, and works in Salem. (Exh. R-1 at 2.) LaBounty's working title is Senior Human Resource Business Partner, and she is also a Human Resource Analyst. (Exh. R-1 at 1, 3; 9:05 a.m. November 12, 2020.) Brown's email stated,

> "It was brought to my attention that [JB] from the Ashland Safety staff is sick. During the day he has been observed just walking around the TI Bay. My understanding is that anyone not feeling good should be sent home. He came down to the scale house to get a package on Tuesday and I was told he didn't look right, like he was sick. He had on a hoodie covering his head. I would hate for him to infect anyone on our crew. I've told my crew be mindful if you go into the TI Bay since his germs could be getting spread throughout the building. One of my employees just had a baby and would hate for him to catch something and take it home with him.
>
> "I heard from Kevin Johnson that [JB] didn't want to go home since he has no sick leave built up."

(Exh. R-8 at 1.)

After Brown's email was sent, Russell sent JB home for the day. (10:53 a.m. November 12, 2020.)

[1]Dunivin's position is also listed as "Technical Services Coordinator" in the Safety Services and Federal Programs unit of the Commerce and Compliance Division, and as a Compliance Specialist 3. (Exh. R-7 at 1.)

18. At 2:08 p.m. on March 26, 2020, LaBounty responded to Brown's email and the news that Russell had sent JB home. Her email stated,

> "Great! That's what we need to do, if Russ wants he can ask him for a doctors note before he returns to work. He can use MPL for the rest of the day then it is sick leave, if he ends up getting tested we need to know and his doctor may write him a note to mandate him to be home. Which changes what he may qualify for."

(Exh. R-8 at 1.)[2]

19. In late March 2020 or April 2020, Truly and/or Russell told JB that JB could start working on compliance reviews from home, and would not have to conduct truck inspections again until JB felt comfortable doing so. The same accommodation was presented to all the other truck inspectors, and it remained in effect for all truck inspectors as of the November 2020 hearing for this case. JB chose to stop conducting truck inspections. Around the same time, both Russell and Truly told JB that, whether or not JB worked onsite, JB needed to communicate with Truly every day that JB was scheduled to work about whether JB was going to work and what JB was working on. (10:50 a.m. November 12, 2020.)

20. At some point after JB stopped doing inspections, Russell called JB and asked him what it would take for JB to be able to inspect trucks again. JB replied that the only way that he would feel comfortable inspecting trucks again would be with an N95-level protective mask. Russell responded that, at that time, ODOT did not have access to that type of item. (10:31 a.m. November 12, 2020; 9:59 a.m. November 13, 2020.) At the time, ODOT only had wipes, hand sanitizer, and rubber gloves. Later on, in June 2020, ODOT provided cloth face masks to staff. Due to the short supply of N95 masks at the time, N95 masks were reserved for healthcare workers. (10:38 a.m. November 12, 2020.) In a subsequent telephone call, JB asked Russell if they could use N95 inserts in their cloth masks as an alternative. Russell replied that the State would not be providing those. (10:00 a.m. November 13, 2020.)

21. Russell's position does not give him the authority to change what equipment is provided to his employees. Russell can only make sure that they get what has been authorized. (10:46 a.m. November 12, 2020.) Ultimately, it was up to the Governor to decide whether N95 masks were necessary, as ODOT was operating under the Governor's orders. (11:42 a.m. November 12, 2020.)

22. On April 6, 2020, JB sent Truly a text message. In the message, JB stated that, because of a serious personal matter involving his wife, JB would need "to take some time off." Subsequently, JB was advised that he would need to contact and have a discussion with Tara Wait, who works with "payroll," in order to use leave for it. (11:01 a.m. November 12, 2020; 10:20 a.m. November 13, 2020.)[3] Later, at 8:19 a.m. on April 6, 2020, JB called Wait to inquire about the leave. (10:20 a.m. November 13, 2020; Exh. A-1.)

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[2]We presume that MPL refers to "miscellaneous paid leave."

[3]Wait's actual position or job title is not included in the record. It is also unclear who told JB to contact Wait about the personal matter. Moreover, evidence of this text was not presented as an exhibit.

23. On or around April 7, 2020, JB observed that some of his coworkers were not following COVID-19 precautions such as social distancing. He eventually told Truly about it. In response, Truly referred JB to Russell. (10:01 a.m. November 13, 2020.)

24. On April 9, 2020, Truly sent JB an email. Therein, Truly instructed JB to complete his Outlook calendar for each day that JB was not working in the office. Since that day, however, JB's Outlook calendar only had entries for April 14, May 4, and May 7, 2020. (Exh. R-17 at 1.) Truly also marked JB down as a "No Show No Call" on April 9, 2020. (Exh. R-17 at 1.) Essentially, a "No Show No Call" is an unexcused absence. (9:17 a.m. November 12, 2020.)

25. At 8:19 a.m. on April 9, 2020, JB called Wait again. (Exh. A-1.) The same day, JB also contacted "another individual in the HR Department regarding [his] condition and status." (10:02 a.m. November 12, 2020.)

26. On April 10, 2020, Truly marked JB down as a "No Show No Call." (Exh. R-17 at 1.)

27. On April 13, 2020, Truly marked JB down as a "No Show No Call." (Exh. R-17 at 1.)

28. For the month of April 2020, Russell gave JB two 3s, signaling "Does not meet expectations," in the Efficiency & Work Quantity and the Accountability & Work Quality categories of his trial service performance evaluation. That was because, at the time, "there was almost no work being produced." (10:25 a.m. November 12, 2020.) JB received 2s, signaling "Meets expectations," in all other categories that month. (Exh. R-2 at 3.)

29. On May 12, 2020, Dunivin (again, a Safety Training Coordinator for the State) sent information out to a group of ODOT employees "about inspecting trucks safely under the current COVID-19 conditions." (Exh. R-17 at 1.)

30. At 12:26 p.m. on May 12, 2020, Dunivin called JB on the telephone. (10:03 a.m. November 13, 2020.) During the call, JB "expressed he did not agree with the information Abe [Dunivin] sent out," and suggested that ODOT use N95 inserts in the cloth masks. (Exh. R-17 at 1.) In the same call, Dunivin asked JB why he was not doing inspections, and Dunivin later explained that ODOT could not get N95 masks. JB responded that inspections could not be conducted safely without N95 masks. (Exh. A-Doc 3.) Dunivin called JB because, previously, Russell had asked Dunivin to have a discussion with JB and other inspectors to make them feel more comfortable with ODOT's safety standards, and to share Dunivin's recent positive experience with conducting inspections. (10:35 a.m., 1:56 p.m. November 12, 2020.)[4]

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From this record, it is unclear exactly how much time off was actually requested or approved, if any. (10:20 a.m. November 13, 2020.) Exh. R-6 at 10 appears to be a timesheet for April 2020, and does not show leave being used on April 6, 2020.

[4]JB's handwritten notes regarding this May 12, 2020 call are included in the record as Exhs. A-Doc 1 through A-Doc 5. JB also testified about the call at 10:02 a.m. on November 13, 2020, and Dunivin testified about it at 1:56 p.m. on November 12, 2020.

31. JB felt "extremely disturbed" by the May 12, 2020 call with Dunivin, and believed that Dunivin had "pressured" him to do inspections without sufficient protection. (10:04 a.m., 10:06 a.m. November 13, 2021.) Nevertheless, Dunivin (a Compliance Specialist 3) is not a "management service employee," and had no supervisory authority over JB (a Compliance Specialist 2) or his job duties. (10:34 a.m., 1:52 p.m. November 12, 2020.)

32. Immediately after the May 12, 2020 telephone call with Dunivin, JB called Russell and, among other things, told Russell that the call with Dunivin had not gone well, and asked Russell how he could join the "Safety Committee." After that call, Russell started scheduling meetings in which JB could share his views about employee safety. (10:07 a.m. November 13, 2021.) When Dunivin spoke with Russell about the telephone call with JB, Dunivin told Russell that JB had been combative and unreceptive. (10:35 a.m., 1:57 p.m. November 12, 2020.)

33. On May 18, 2020, Russell called JB "and instructed him to contact John [Truly] every morning to report his progress on work assignments." (Exh. R-17 at 1.)

34. On May 26, 2020, Truly marked JB down as a "No Show No Call." (Exh. R-17 at 1.) However, at 5:43 a.m. that day, JB actually sent an email to Russell stating, "My little guy and B*** have ear doctor appointments today and I've got to take at least one of them if not both so I'll be in tomorrow." At 8:03 a.m., Russel responded, "Thanks for the heads-up. Shoot me a TAMS tomorrow." (Exh. A-2.) "TAMS" is an automated timekeeping system.[5]

35. At 8:20 a.m. on June 3, 2020, Russell sent an email to a group of ODOT employees that included JB. The subject of the email was "PPE - Masks." (Exh. R-10 at 2.) The body of the email stated,

> "Each of you will receive a cloth mask shortly. Please be sure to read the attached guidance above.
>
> "With the delivery of these masks, you will have all of your ODOT PPE gear. Let your manager know when you are getting low on gloves, sanitizer, etc. and we will work to get you more. As for masks, take care of those and be sure to keep them clean. I do not know at this time whether or when we'll have access to more."

(Exhs. A-Doc 6, R-10 at 2.)

36. At 9:07 a.m. on June 3, 2020, a Compliance Specialist 2 from LaGrande sent an email responding to Russell's email. The author included the entire email group in his response. The email stated, "Can we get the ODOT flying T emblem and our names monogrammed (I prefer cursive), on them, prior to receiving them….asking for a friend?" (Exh. A-Doc 7.)

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[5]We presume that TAMS is an acronym for Time and Attendance Management System. It is unclear whether a TAMS was submitted for May 26, 2020. However, JB's timesheet indicates that "CV-COVID-19 Leave" was used for that day. (Exh. R-6 at 12.)

37. At 9:48 a.m. on June 3, 2020, JB sent his own email responding to Russell's earlier email. JB's email was also sent to everyone who received Russell's email. The body of JB's email stated,

> "Good morning,
>
> "I am concerned that we are being asked to wear a 'cloth face covering' in place of what the attached document clearly distinguishes from PPE.
>
> "The statement made in the email: 'With the delivery of these masks, you will have all your ODOT PPE gear.'
>
> "P.P.E. is Personal Protective Equipment
>
> "**'How cloth face coverings are different from other types of masks'**
>
> "'Cloth face coverings are NOT the same as the medical facemasks, surgical masks, or respirators (such as N95 respirators) worn by healthcare personnel, first responders, and workers in other industries. These masks and respirators are personal protective equipment (PPE). Medical PPE should be used by healthcare personnel and first responders for their protection. Healthcare personnel and first responders should not wear cloth face coverings instead of PPE when respirators or facemasks are indicated.'
>
> "The kind of equipment REQUIRED, by OSHA, to be worn by mill workers when dealing with working around fine particles of wood dust, the exposure to that hazard having the result of a chronic lung condition, let alone needing to protect against a virus level hazard where the result could be acute death for you or members of your family or community…
>
> "The attached document states:
>
> "**'This is because of [evidence that] people with COVID-19 can spread the disease, even when they don't have any symptoms.'**
>
> "With there being no requirement that anyone we interact with wear any sort of protection and the hazard exposure result is acute and lethal, what are we talking about?
>
> "Providing a false sense of protection to employees that deserve to have the equipment that will keep them protected while serving the state of Oregon?
>
> "Why is there such a rush to send ANYONE out to work without the proper PPE, n95 respirator, to keep them safe?

> "I have been in safety for over a decade and I have never seen such a push from above to accept a downgraded piece of protective equipment designed to keep them safe from a known hazard while at work…
>
> "When are we going to talk about getting REAL respiratory protection?"

(Exh. R-10 at 1-2, emphasis in original.)[6]

38. At 11:05 a.m. on June 3, 2020, Russell wrote back to the entire email group. His email stated,

> "I misspoke when I used the PPE abbreviation. Such items as masks are not PPE. As noted below, let us know when you're running short of the supplies you've been issued.
>
> "Sorry for any confusion."

(Exh. A-Doc 10.)

39. At 12:07 p.m. on June 3, 2020, a Compliance Specialist 2 from Bend wrote another email response to the whole email group. His email asked, "Any chance we can get some stylish head gear…," and included a humorous photograph of a bearded man pushing a shopping cart while wearing a hat made of "pool noodles." (Exh. A-Doc 8; 11:51 a.m. November 12, 2020.)

40. At 2:06 p.m. on June 3, 2020, Russell sent an email to JB that did not include the rest of the earlier emails' recipients. The email stated,

> "In future, send such emails direct to me and we will discuss. Using the term PPE was an inadvertent error which I was happy to correct.
>
> "ODOT has now provided all supplies authorized for Oregon agencies statewide. N-95 masks are only authorized for health care and emergency workers. We do not qualify as such and will not be getting them.
>
> "These supplies combined with the CVSA's inspection techniques are all aimed at protecting inspectors. Inspectors do not have to be closer to drivers than 6'. Often, even more room can be maintained between driver and inspector. CCD staff all over Oregon have been developing methods of minimizing or completely avoiding contact with others in order to carry out the ODOT mission.
>
> "I have not pushed you to inspect. In fact, I've had no discussions with you regarding inspections for well over a month when you advised me you were uncomfortable inspecting without [an] N-95 mask. No safety staff have to inspect.

---

[6]JB's actual June 3, 2020 email contains markings, formatting, and images that have not been reproduced here. Copies of the email are included in the record as Exhs. R-10 and A-Doc 9.

CCD has simply issued supplies to those choosing to conduct the inspections that are one of the core functions that we perform to protect the public."

(Exh. R-11.)

41. Around the time that JB sent his June 3, 2020 email to the group, Russell also called JB. During that discussion, Russell stated that, in the future, JB could tell Russell directly when Russell made a mistake. JB also reiterated his concerns to Russell. As a result, Russell decided to give JB "access to the highest levels in ODOT Safety" in order to let JB give his concerns "to the people who had the most power in ODOT to make changes." (10:41 a.m. November 12, 2020.)

42. Russell did not contact, discipline, or terminate the Compliance Specialist 2s from Bend and LaGrande because of their June 3, 2020 group emails. (11:50 a.m. November 12, 2020.) In Russell's view, those two employees were simply "letting off steam" and "laughing in the face of adversity" in their emails. (12:08 p.m. November 12, 2020.) Similarly, JB was not disciplined or terminated because of his June 3, 2020 email. In Russell's view, JB's email did not contain anything that was incorrect or unprofessional. (11:52 a.m. November 12, 2020.) Russell only contacted JB about his email because it was clear to Russell that JB had "valid," "serious concerns." (12:08 p.m. and 12:15 p.m. November 12, 2020.)

43. On June 5, 2020, Truly marked JB as a "No Show No Call." (Exh. R-17 at 1.) However, at 6:06 a.m. that day, JB actually emailed Russel, writing, "I just woke up with a splitting headache and a sore throat…not sure what that's about!? Taking the day." At 7:01 a.m., Russell responded, "Thanks for letting me know." (Exh. A-3.)

44. On June 9, 2020, Russell, JB, Scott Seater, and Jess Brown had a meeting. Seater is a Division Safety Manager in ODOT Employee Safety. (Exh. R-14 at 1.)[7] He functions as a liaison between the Commerce and Compliance Division and "the greater ODOT." (10:43 a.m. November 12, 2020.) Brown is a Safety Committee Manager Liaison, and as such, is the "managerial liaison" to Russell's safety committee. Russell coordinated this particular meeting in order to address JB's concerns and to provide JB "a forum in which he could present his inspection concerns to ODOT's top Safety people." (Exh. R-14 at 1.)

45. During the June 9, 2020 meeting, JB "presented his theory of how inspections should be conducted during the COVID-19 period and what equipment should be issued to staff conducting inspections (N-95, etc.)." (Exh. R-14 at 1.) That involved JB explaining a guide for conducting inspections during COVID-19 that JB had created for the meeting. JB was not instructed to create the guide. Instead, JB decided to do so on his own.[8] (10:54 a.m. November 12, 2020.) "At the end of the discussions, Scott [Seater] offered to bring in his manager for a follow-up meeting on the subject." (Exh. R-14 at 1.) Ultimately, the June 9, 2020 meeting did not allay any of JB's concerns. (10:45 a.m. November 12, 2020.)

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[7]Exh. R-17 at 1 indicates that Seater's job title is "Division Employee Safety Specialist," and that Brown is a "CCD Safety Committee Member."

[8]A copy of the guide that JB created can be found at Exh. R-13.

46. At 7:27 a.m. on June 10, 2020, Russell sent an email to JB with the subject of "Next Wednesday (17th)." (Exh. R-12 at 2.) The email stated,

> "Since Josiah Roldan is still new to ODOT and hasn't been to Ashland yet, he and Scott Seater plan to take this opportunity to visit the POE and meet with you on Wednesday. It'll probably be in the afternoon.
>
> "Nice presentation yesterday, by the way. I thought you did a good job making your points."

(Exh. R-12 at 2.)

47. Josiah Roldan is ODOT's Employee Safety and Risk Manager. (12:17 p.m. November 12, 2020.) His position has also been called "ODOT Manager of Office Employee Safety." (Exh. R-17 at 2.) Roldan started in his current role on May 18, 2020. He previously worked in "the safety field" for over 13 years. Seater invited Roldan to the meeting to discuss the current safety requirements and to address or listen to JB's concerns.

48. At 12:33 p.m. on June 10, 2020 (a Wednesday), Russel sent JB another email. It stated, "I just got a call and it turns out Josiah's schedule has changed so they cannot come to Ashland. A Skype meeting will be held at 9:00 Monday instead. You should see an invite too." (Exh. R-12 at 1-2.)

49. At 1:00 p.m. on June 10, 2020, JB responded to Russell's email, writing,

> "I took a look back at our correspondence and realized that the topic of this meeting on Monday hasn't been communicated.
>
> "All I could see regarding the meeting topic was this: *'Josiah Roldan & Scott Seater plan to take this opportunity to visit the POE and meet with you'*
>
> "Any clarification you could provide would be appreciated."

(Exh. R-12 at 1, emphasis in original.)

50. At 2:40 p.m. on June 10, 2020, Russell wrote back to JB, "It's a continuation of yesterday's conversation with the addition of Josiah's participation. The document you submitted will be the focus." (Exh. R-12 at 1.)

51. On June 15, 2020, Russell, JB, Roldan, Seater, and Brown had their meeting as scheduled. During the meeting, Roldan discussed ODOT's policies regarding face coverings. Among other things, Roldan emphasized that N95-level masks were only required for those with a high risk of exposure including those in the medical and dental fields, where there is a risk of aerosolized COVID-19. In addition, Roldan explained that the Oregon Health Authority set the requirements, not ODOT. The group also listened to JB's concerns about COVID-19 transmission and his continuing belief that ODOT's policies were insufficient. JB otherwise told Roldan that

some of JB's coworkers were not even adhering to ODOT's basic safety requirements.[9] (12:20-12:32 p.m. November 12, 2020; 10:10 a.m. November 13, 2020.) One result of the meeting was that "ODOT Employee Safety adjusted Inspection Alert to include the wearing of <u>cloth</u> masks and bolded in red a couple 'do nots' that were already in the alert." (Exh. R-14 at 1, emphasis in original.)

52. On June 18, 2020, JB "did not show up for work but contacted co-worker, Johnson, and said he would not be in." JB "was allowed to use his Personal Business leave for the day." (Exh. R-17 at 2.) Around this time, JB started experiencing serious back pain.

53. On June 19, 2020, at 6:08 a.m., JB sent an email to Russell stating,

> "My back started flaring up so bad that I had to go to the doctor yesterday and has started on some medication and has said i cannot drive for a few days.
>
> "I have a couple phone calls to make with John [Truly] to close out a CR we were working on… if its okay with you id like to at complete that with him today from home.
>
> "* * *
>
> "I can provide a note if needed."

(Exh. A-4 at 1-2.)

54. At 7:00 a.m. on June 19, 2020, Russell wrote back to JB,

> "Sorry to hear about your back. I know how debilitating that can be. Hopefully, the meds will spin their magic quickly.
>
> "I'm fine with you working at home today for those calls to get that closed out."

(Exh. A-4 at 1.)

Later that same day, Russell told JB that he was allowed to use his personal business leave for the day. (Exh. R-17 at 2.)

55. On June 22, 2020, Truly marked JB as a "No Show No Call." Russell and Truly tried to call JB's cellphone that day, but did not receive an answer, and JB's voicemail was full. Truly also sent JB a text instructing JB to contact Russell. (Exh. R-17 at 2.)

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[9]According to Roldan's testimony, Roldan responded to JB's comment about his coworkers by telling JB that JB should be communicating any concerns that he had about them to JB's supervisors. (12:33 p.m., 12:37 p.m., and 12:45 p.m. November 12, 2020.) According to JB's testimony, Roldan asked JB to let him know about JB's coworkers' safety infractions. (12:33 p.m. November 12, 2020; 10:09 a.m. November 13, 2020.) In any event, JB never contacted Roldan after their June 15, 2020 meeting.

56. JB also visited a doctor on June 22, 2020. In a section regarding work limitations, the doctor's note from that visit stated,

> "Patient off work from today's date for 5 days. Upon return to work no heavy lifting standing or sitting except for extended periods of time patient resigned to a sedentary work job. Patient to be seen back in the office in follow-up in 10 days for reevaluation."

(Exh. A-4a.)[10]

57. On June 24, 2020, JB photographed some (unnamed) "weighmasters" violating ODOT's basic COVID-19 safety standards. (12:40 p.m. November 12, 2020; 11:45 a.m. November 13, 2020.) Afterward, JB showed these photographs to Johnson, who, as noted, was also a Compliance Specialist 2 and not a manager. They were not shared with Russell, Truly, or Roldan. (11:42 a.m. November 13, 2020.)

58. On June 25, 2020, Russell and Truly held a telephone conference with JB as part of a monthly trial service review meeting. In the call, Russell made it clear to JB that JB needed to check in with Truly every morning that JB was scheduled to work and to keep Truly up to date on the assignments that JB was working on. The group also discussed a telephone call interview JB was supposed to have the next day, June 26, 2020, at 3:00 p.m., with Truly and a trucking company as part of a compliance review. JB did not come into work until 10:25 a.m. on June 25, 2020. He also did not call in to say that he would be late that day. (Exh. R-17 at 2.)

59. On June 26, 2020, at 2:00 p.m., Truly sent JB a text message asking JB where he was. (Exh. R-17 at 2.) At 2:20 p.m., JB responded to Truly, writing,

> "Good afternoon John, I am home with very little ability to move around and in some excruciating pain.
>
> "If you can text me Joe's number I can call him to reschedule… or we can keep the appointment as long as you're ok with me being home during the call."

(Exh. A-5.)

Truly later cancelled and rescheduled the interview with the trucking company. Before JB's 2:20 p.m. text message, neither Russell nor Truly had been aware that JB was taking the day off, and the absence "was not preapproved." (Exh. R-17 at 2.)

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[10] JB asserts that this note contradicts ODOT's assertion in Exh. R-17 at 2 that he was a "No Show No Call" on June 22 and July 2, 2020. (10:25 a.m. November 13, 2020.) However, "5 days" after June 22, 2020 (the timeline noted in the doctor's note) is June 27, 2020 (a Saturday). (Exh. A-4a.) It is also not entirely clear, on this record, when JB shared this June 22, 2020 doctor's note with ODOT. Two of JB's exhibits ("Dr. Grunwald Notes - 200701 - JB.pdf" and "Medical Care Timeline.docx") indicate that JB went on to visit a doctor's office on July 1, 2020. However, those exhibits were *unadmitted*, and it does not appear that JB ever shared a note from that visit during the course of his employment.

60. On June 30, 2020 (a Tuesday), at 11:56 a.m., JB sent an email to Russell. The email stated,

> "I tried to drive into the office today but my back just wouldn't stop after [I] got there and there's no way I could sit in that chair all day.
>
> "I headed home and I grabbed my computer just in case.
>
> "I had to load up on muscle relaxers when I got home and passed out. I just woke up and I'm in no shape to work as I'm kind of out of it.
>
> "If you are ok with me working from home at least for the rest of the week, after today, that would go long way to not getting my back going south before I get my day started.
>
> "I hope you understand."

(Exh. A-6.)

61. For June 2020, Russell gave JB a 1, signaling "Exceeds expectations" in the Safety category of his trial service performance evaluation. Russell gave that score because of JB's COVID-19-related efforts. (10:28 a.m. November 12, 2020.) JB received 2s, signaling "Meets expectations," in all other categories that month. (Exh. R-2 at 3.)

62. On July 2, 2020 (a Thursday), Truly marked JB down as a "No Show No Call." Truly had asked JB to call in that day, but JB did not do so. (Exh. R-17 at 2.)

63. On July 6, 2020, Jessica Segal, an "FMLA/OFLA Consultant" in ODOT Human Resources, sent JB an email. (Exh. R-15 at 1.) FMLA refers to the federal Family and Medical Leave Act, while OFLA refers to the Oregon Family Medical Leave Act. Segal's email states, in part,

> "Attached is a pending approval notice for OFLA use. We do need additional documentation to approve the use of FMLA/OFLA protected leave. Please let me know if you have questions after reading this letter.
>
> "The documents attached to this email will need to be returned to our office prior to the start of your leave, if possible. Please return the completed forms to us by ***7/23/20.***"
>
> "These forms can also be found on our intranet site at the following link: http://transnet.odot.state.or.us/cs/ODOTHR/SitePages/fmlaofla.aspx
>
> "FMLA and/or OFLA are not scheduled through the normal 'My Requested Time-Off' in TAMS. Your FMLA/OFLA time will be entered by HR FMLA/OFLA

Consultants or your manager based on the leave request submitted and may currently be used through ***7/23/20.***

"At this time, we have set the TAMS system to use your leave according to our standard leave cascade of sick leave, personal business, vacation, and LWOP. We will be happy to update your leave choice(s) upon receipt of your leave request form.

"A copy of this notice will also be mailed to your home address."

(Exh. R-15 at 1, emphasis in original.)

The end of the letter that was attached to Segal's email states, "If you have any questions, please contact me at 503-979-5948." (Exh. R-15 at 4.)

64. Before Segal's email went out, Russell asked ODOT Human Resources to send JB FMLA/OFLA paperwork. (9:19 a.m. November 12, 2020.) Additionally, at some point, Russell also spoke with JB about filing for FMLA/OFLA leave, and "suggested" that JB contact Amy Jacobs (whose job title at ODOT is not included in the record) for assistance. (9:19 a.m., 10:22 a.m. November 12, 2020; 11:25 a.m., 11:28 a.m. November 13, 2020.) Ultimately, JB never sent in any completed FMLA or OFLA paperwork, or called Segal for assistance as directed in her July 6, 2020 letter. (9:19 a.m. November 12, 2020; 11:25 a.m. November 13, 2020.)

65. Also on July 6, 2020, an (unnamed) ODOT employee from the Ashland port of entry discovered JB's Google Reviews post. After that, the posting was brought to the attention of Russell, LaBounty (the Senior Human Resource Business Partner), and Ramsdell (the Division Administrator of the Commerce and Compliance Division). (Exh. R-1 at 2.) Russell was "a great deal" concerned about the posting, and believed that the post was "pretty inflammatory" toward the trucking industry. (11:07 a.m. November 12, 2020.) Ramsdell believed that the posting "showed poor judgment," was "very, very concerning" on its own and "very offensive" to the trucking industry, and could be grounds for ending JB's trial service on its own. (9:22 a.m., 3:01 p.m., 3:22 p.m. November 12, 2020.) Around this time, LaBounty wanted to talk to JB about the post, but was told that JB was ill and out of the office. (Exh. R-17 at 2; 9:14 a.m. November 12, 2020.)

66. On July 7, 2020 (a Tuesday), JB presented a doctor's note, dated July 6, 2020, to Russell. (10:02 a.m. November 12, 2020; Exh. R-17 at 2.) The note specifically provided that JB could return to work on July 6, 2020, but also noted that JB had unspecified "Work limitations" from June 29, 2020 through July 5, 2020.[11] This was the last doctor's note that ODOT received from JB. (9:47 a.m., 10:02 a.m. November 12, 2020; 11:22 a.m. November 13, 2020.)

[11]A copy of this doctor's note is included in the record as a late-filed but admitted exhibit named "Doctors note from Greg Grunwald – 200705.jpg."

67. On July 8, 2020, JB contacted Truly and stated that he thought that he could do some work from home. Truly then assigned JB some work. (Exh. R-17 at 3.) At 11:41 a.m. on July 8, 2020, JB called Jacobs. (Exh. A-8.)

68. On July 9, 2020 (a Thursday), JB sent Russell a text message stating that he was in pain and unable to work. (Exh. R-17 at 3.)

69. Later, at 3:20 p.m. on July 9, 2020, Russell sent JB an email. It stated,

> "I'm sorry to hear that you're going through so much pain. Nothing's worse than not being able to sleep because of pain. I know it well.
>
> "It's clear that you are in no shape to return to work because of this ongoing severe pain. The small amount of work you were able to get through yesterday and your not being able to keep in touch with John [Truly] make it apparent that working, even from home, is not reasonable at this time until you are substantially healed and free of pain. You can use any accrued leave you have and leave without pay until you're better. I believe you have 3 new days of PB available as of July 1st. After that, it'll be LWOP.[12]
>
> "Since your doctor gave you an unconditional work release beginning this past Monday, it's important that you contact the doctor again and get a new note reflecting that you cannot work and detailing the dates you'll be out including today. This will allow you to use standard leave without pay rather than 'unauthorized leave without pay' which is an unfortunate situation that can lead to discipline.
>
> "You can also explore any other leave possibilities that you may be eligible for with the FMLA/OFLA group (Amy Jacobs).
>
> "Finally, we will pick up your training again when you can return to the office again. You'll need to be at the office to begin working with Richard to start the next carrier. Until that time, just get better. John is wrapping up the first carrier, so you don't need to worry about that.
>
> "Moving forward, if you are too incapacitated to call in/text/email, please have someone else do it for you. On the other hand, if your doctor excepts you from working for a block of time, you won't need to call in daily during that period. Please just be sure to give us advance heads-up of when you are returning to the office so Richard can schedule his trip.

[12] We understand PB to mean "personal business leave," and LWOP to mean "leave without pay." (Exh. R-17 at 2.)

> "I have contacted the FMLA/OFLA unit and asked that they send you the paperwork you need. You may have already done that, but just wanted to be sure."

(Exh. A-7 at 1.)

70. After Russell sent his July 9, 2020 email, Russell also called and spoke with JB in order "to stress the importance of checking in." (11:10 a.m. November 12, 2020.)

71. As indicated above, JB did not submit any additional doctor's notes after he received Russell's July 9, 2020 email. One reason for that was because the "first available appointment" that JB could secure with his preferred doctor was on July 20, 2020. (11:33-11:39 a.m. November 13, 2020.) JB did not tell Russell about that issue.

72. On July 10, 2020, at 2:49 p.m., JB called Jacobs again. (Exhs. A-7 at 2, A-8.)

73. On July 13, 2020 (a Monday), JB sent Truly a text message stating that he could not come in. (R-17 at 3.) The message stated,

> "Today is no different, at least no worse. I have been unable to connect with Amy [Jacobs] in HR as of yet. And I am going to be reaching out to HR this morning about getting the FMLA and other admin stuff taken care of this morning. I will text you when I have completed this."

(12:10 p.m. November 12, 2020; 11:39 a.m. November 13, 2020.)[13]

74. Before JB's July 13, 2020 text message, the last time that either Russell or Truly had heard from JB was on July 9, 2020. (Exh. R-17 at 3.) Subsequently, Russell left JB a voicemail message explaining that JB needed to call Russell daily and provide Russell with an updated doctor's note if JB needed to be off work due to a serious health condition. (Exh. R-17 at 3.) However, JB did not contact either Russell or Truly again after July 13, 2020. (11:12 a.m., 12:12 p.m., 2:18 p.m. November 12, 2020; 11:27 a.m., 11:31 a.m. November 13, 2020.)

75. At 10:31, 10:45, and 10:46 a.m. on July 13, 2020, JB called Jacobs again. (Exh. A-8.) At 10:50 a.m., JB called "a general HR line" at 503-986-3700 to connect with Jacobs. In the end, JB was never able to speak with Jacobs. JB also never let his manager, Russell, know that he was having trouble contacting her.[14] (11:29 a.m. November 13, 2020.)

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[13]The language of this text message comes from JB reading it into the record during each day of the hearing (with minor, inconsequential differences in each day's iteration). It does not appear that a copy of this particular message was included as an exhibit. (12:10 p.m. November 12, 2020; 11:39 a.m. November 13, 2020.)

[14]During his trial service period, JB called Jacobs (who did not testify) on multiple occasions and left a number of voicemail messages for her. Nevertheless, he was never able to actually speak with her. When asked about this issue during cross-examination, JB could not recall whether Jacobs' voicemail message included an alternative cellphone number for Jacobs. (11:26 a.m. November 13, 2020.)

76. At some point on July 13, 2020, JB also "contacted" Standard Insurance "to connect with them about filing [a] short-term disability claim." As of the November 2020 hearing for this case, JB was "still in process with that claim." (11:32 a.m. November 13, 2020.) Standard Insurance is a private insurance company that the State uses for disability claims. (11:33 a.m. November 13, 2020.) Russell and Ramsdell were not made aware of this contact with Standard Insurance, or of any FMLA-related paperwork being filed. (11:43 a.m., 3:23 p.m. November 12, 2020.)[15]

77. On July 15, 2020, Russell tried to contact JB to complete his timesheet through email and other messages, but Russell was unable to reach him. (Exh. R-17 at 3.)

78. Russell's employees are expected to fill in their own timesheets and make a record of when they use leave through TAMS. At the end of each month, Russell has to review and approve his employees' timesheets and TAMS submissions. (10:59 a.m. November 12, 2020.) In June and July 2020, there were multiple days when JB was absent without permission or explanation. Those days could have been categorized as "leave without pay" days by default. However, in an effort to help JB avoid that result, Russell categorized those days as whatever kind of paid leave JB had available (*e.g.*, vacation or sick leave) whenever Russell could do so. (9:17 a.m., 11:01 a.m. November 12, 2020.) JB only earned 8 hours of sick leave per month at ODOT. (Exh. R-4 at 2.) In addition, JB had to work "a minimum of 32 hours per month to earn vacation leave." (Exh R-4 at 2.)

79. At 7:56 a.m. on July 16, 2020, Truly sent Russell an email with the subject of "JB: Contact Record." (Exh. R-5 at 1.) The email included a multipage spreadsheet as an attachment. It also states, in part, "I didn't start a daily diary until 5/18/20. So I have few entries before that date on the attached spreadsheet." (Exh. R-5 at 1.) The spreadsheet tracked whether JB contacted Truly each day, and by what method JB did so, if any. It also included a variety of comments about JB, and covered a time period of April 9, 2020 through July 15, 2020.

80. At 8:13 a.m. on July 16, 2020, Russell forwarded Truly's email and its attachment to LaBounty (again, the Senior Human Resources Business Partner). Russell's email states, "Here are John [Truly]'s excellent records. The highlighted dates are ones you can bank on." (Exh. R-5 at 1.) LaBounty then reviewed the records. At some point that same day, LaBounty contacted ODOT's FMLA/OFLA staff to see if they had received paperwork from JB. They responded that they had not. (Exh. R-17 at 3.) Around this time, LaBounty also had discussions with management officials including Russell and began the removal from trial service process. (Exh. R-17 at 3.)

81. For the month of July 2020, JB's trial service performance evaluation form was marked as "N/A" in all but two categories because JB only worked several days that month. (9:24

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[15]During the first day of the hearing, JB twice claimed that he "filed" for FMLA and short-term disability on July 13, 2020. (11:43 a.m., 3:23 p.m. November 12, 2020.) However, that particular claim was not made while JB was formally under oath. More importantly, the claim also conflicts with the July 24, 2020 letter from Segal (Exh. R-15 at 5) and other testimony. While JB may have "filed" for FMLA to some extent, in reality, JB was never able to "turn in" or "complete" the required FMLA paperwork. (3:23 p.m. November 12, 2020; 10:31 a.m., 11:24 a.m. November 13, 2020.) As indicated, JB's short-term disability claim has also not been completed. (11:32 a.m. November 13, 2020.)

a.m. November 12, 2020.) For those two categories, which were (1) Customer Focus & Positive Workplace and (2) Initiative, JB received 3s, signaling "Does not meet expectations." (Exh. R-2 at 3.)

82. On July 20, 2020, LaBounty emailed JB a trial service removal letter to JB's personal email address. JB also received a physical copy in the mail. The letter, which was dated July 20, 2020, stated that JB was being removed from trial service effective July 21, 2020. It also stated, in part:

> "This action is being taken pursuant to ORS 240.410 and Department of Administrative Services (DAS) State HR Policy, 40.065.01 Trial Service Period. This policy states in the judgment of the Appointing Authority, 'may remove a trial service employee during a trial service period if, in the opinion of the appointing authority: the employee is unable or unwilling to perform duties of the position satisfactorily, or the habits and dependability of the employee do not merit continuance in state service'.
>
> "Trial service is an extension of the hiring process and provides the employer, through the Appointing Authority, the opportunity to determine the employee's competence and/or fitness for the position. Your trial service removal is warranted for one or more of these reasons, which has been discussed with you by your supervisor over the past several months."

(Exh. R-1 at 2.)

83. The end of the trial service removal letter was signed by Ramsdell, who is the designated "appointing authority" for the Commerce and Compliance Division. She also made the final decision remove to JB from trial service. Ramsdell never met JB. (2:58 p.m. November 12, 2020.) However, before Ramsdell decided to remove JB from trial service, she did communicate with Russell and LaBounty about JB's performance. Among other things, Ramsdell was advised that JB had not communicated with Russell or Truly during the week prior to his removal. (3:24 p.m. November 12, 2020.) Ramsdell also reviewed JB's trial service performance evaluation and his Google Reviews post.

84. Ramsdell primarily removed JB from trial service because of JB's performance issues, including his inability to keep in touch with Russell and Truly. However, Ramsdell also removed JB because of his Google Reviews post. (10:20 a.m., 3:01 p.m., 3:27 p.m. November 12, 2020.)

85. When considering whether to remove or retain a trial service employee, Ramsdell does not use "a weighting system." She does look at the scores that the employee's manager gave in a trial service performance evaluation. However, she also considers what an employee's manager actually says to her, which may not be accounted for in the evaluation. She particularly listens to what the manager says about the employee's behavior. Ramsdell also listens to other managers who did not fill out the performance evaluation, as well as her Human Resources Business Partner, LaBounty. (3:17-3:19 p.m., 3:30 p.m. November 12, 2020.)

86. Neither Russell nor Truly made the final decision to remove JB from trial service. Nonetheless, both of them developed significant concerns about JB's work performance and were involved with his removal. For his part, Russell was ultimately most concerned about JB's "lack of work production." (11:14 a.m. November 12, 2020.) Further, in Russell's view, JB's June 3, 2020 email regarding Russell's mistaken usage of the term PPE had nothing to do with JB's removal from trial service. (12:15 p.m. November 12, 2020.)

87. JB also went to a doctor and was scanned on July 20, 2020. (11:35 a.m. November 12, 2020.)

88. On July 22, 2020, JB was sent his final paycheck. (Exh. R-17 at 4.)

89. On July 24, 2020, Segal (the FMLA/OFLA Consultant) sent Russell and JB an email, using their State of Oregon email address. The email stated, in part, "On 07/06/20, you were sent a pending approval notice for FMLA/OFLA. The medical certification supporting your need for protected leave has not been received and is now past due." (Exh. R-15 at 5.) Russell responded to FMLA/OFLA staff that JB had been removed from trial service. (Exh. R-17 at 4.)

90. On July 28, 2020, Russell sent an email to LaBounty titled "JB - Eval." (Exh. R-2 at 1.) The email includes, as an attachment, a copy of JB's trial service evaluation. In the evaluation form, JB initialed under his evaluations for the first seven months of his trial service period, while Russell initialed under all eight months.

91. Russell's July 28, 2020 email to LaBounty states:

> "The July evaluation reflects mostly 'N/A' entries. This is because [JB] was absent from work for the entire period except for 2 days. He was also unavailable for review.
>
> "The low score recorded for 'Customer Focus & Positive Workplace' was the result of a posting recently discovered by CCD staff on Google Reviews. The locations [sic] being reviewed was the Ashland Port of Entry where worked. He posted an entry that appears to be extremely inflammatory toward the trucking industry. Although it was posted 7 months previously, it only came to CCD's attention recently.
>
> "The low score recorded for 'Initiative' is due to' repeated failure to check in with his Lead or Man[a]ger. He stopped coming to work at the end of June, reportedly because of serious back issues. He received a return-to-duty clearance from his doctor stating he could return to full duty on July 5. He never returned and rarely checked in. Despite an email with clear instructions to either get a doctor's note excusing him from work or to call his manager daily, did neither. After not hearing from him for 5 working days, his trial service was cancelled on advice of Human Resources."

(Exh. R-2 at 1-2.)

92. On August 13, 2020, JB filed this appeal with the Board.

93. By April 2020, nearly all of Russell's truck inspectors stopped conducting in-person inspections. As of October or November 2020, all of them have returned to conducting truck inspections "on their own accord" and "on their own time." (10:30 a.m. November 12, 2020.) Russell has never insisted that anyone return to conducting in-person inspections. (10:31 a.m. November 12, 2020.) Relatedly, once JB was allowed to abstain from conducting in-person inspections due to COVID-19, Truly also never told JB that he needed to start doing inspections again. (2:27 p.m. November 12, 2020.)

94. As of the end of the November 2020 hearing for this case, JB remained in extreme pain, but had not yet received a clear medical diagnosis. (10:38 a.m., 11:33 a.m. November 13, 2020.)

## CONCLUSIONS OF LAW

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

2. Within the meaning of ORS 240.086(1), JB's removal from trial service was not arbitrary; contrary to law, rule, or policy; or taken for political reasons.

### Legal Standards

JB's initial appeal letter did not explicitly state why his removal from trial service was unlawful, and it did not reference a specific statute. However, in JB's response to the ALJ's order to show cause, JB specifically concluded that his actions involving his safety concerns "led to Russ making a political decision to discontinue my trial service." When the ALJ asked JB about that at the end of the hearing (at 11:58 a.m. November 13, 2020), JB reiterated his allegation that there was a political motivation, and also argued that the decision to terminate him was arbitrary. In his post-hearing brief, JB contends that removing him from trial service "was arbitrary, contrary to law, rule or policy," but does not specifically allege a political motivation or bias.

ORS 240.086(1) empowers this Board to

> "[r]eview any personnel action affecting an employee, who is not in a certified or recognized appropriate collective bargaining unit, that is alleged to be arbitrary or contrary to law or rule, or taken for political reason, and set aside such action if it finds these allegations to be correct."

Relatedly, OAR 115-045-0020(1) provides,

> "Pursuant to ORS 240.086, a classified employee not in a bargaining unit may appeal any personnel action affecting the person (including trial service removals) that is alleged to be arbitrary or contrary to law, rule or policy, or taken for political reasons."

In ORS 240.086(1) cases, an action is considered arbitrary if it is taken without cause, unsupported by substantial evidence, or "nonrational." Substantial evidence is more than a mere scintilla, and is also defined as the type of evidence a reasonable mind might accept as adequate to support a conclusion. *Hays v. State of Oregon, Department of Administrative Services*, Case No. MA-11-06 at 11 (December 2007) (citing *Paul v. Personnel Div.*, 28 OR App 603, 608, 560 P2d 293 (1977); *Rodriguez, et al. v. Secretary of State, Division of Audits*, Case Nos. MA-24/25/34-94 at 15 (September 1995)).

ORS 240.410 otherwise provides,

> "At any time during the trial service period, the appointing authority may remove an employee if, in the opinion of the appointing authority, the trial service indicates that such employee is unable or unwilling to perform the duties satisfactorily or that the habits and dependability of the employee do not merit continuance in the service."

This Board has historically construed ORS 240.410 to mean that, if we find *any* rational basis to support a good faith decision of the employer, we cannot set the trial service removal aside. *Williams*, MA-14-04 at 12 (citing *Profit v. Department of Fish and Wildlife*, Case No. MA-11-90 at 3 (November 1991); *Jorgensen v. Oregon Public Utility Commissioner*, Case No. MA-9086 (October 1986); *Sierra v. Department of Commerce, Corporation Division*, Case No. 1455 (November 1984)). Normally, a public employer is subject to much less scrutiny and is held to a lower standard in the review of a removal from trial service than for the termination of a "regular" employee (*i.e.*, an employee who has completed the trial service period). "Just cause" standards are inapplicable. *Federation of Parole and Probation Officers v. Corrections Division, State of Oregon*, Case No. UP-117-85, 9 PECBR 9110, 9117 n 7 (1986) (citing *Schlichting v. Bergstrom*, 13 Or App 562, 511 P2d 846 (1973)); *see Moll v. State of Oregon, Parks and Recreation Department*, Case No. MA-009-13 at 3 (October 2013), *recons* (December 2013) (defining "regular status").

In an October 8, 2020 letter to the parties providing notice of the hearing, the ALJ initially proposed that the issue of this case was whether ODOT violated ORS 240.570 by terminating JB's employment. On November 9, 2020, ODOT correctly argued that the issue should actually be whether ODOT's action was arbitrary; contrary to law, rule, or policy; or taken for political reasons. ORS 240.570 generally addresses "management service employees," and is therefore inapplicable here and should not have been included in the ALJ's letter. The record presented establishes that JB's Compliance Specialist 2 position was unrepresented (*i.e.*, not in a bargaining unit), classified, and non-managerial. Moreover, ODOT's framing of the issue effectively parallels what JB has argued since he filed his response to the order to show cause.

Regarding the burden of proof in this case, as stated in the October 8, 2020 hearing notice and in OAR 115-010-0070(5)(c),

> "In a hearing on an appeal from discipline under ORS 240.555 or 240.570(3), the respondent shall have the burden of proof and the burden of going forward with the evidence. The appellant shall have the burden of proving affirmative defenses. In

> all other ORS ch 240 cases, the appellant shall have the burden of proof and the burden of going forward with the evidence, and the respondent shall have the burden of proving affirmative defenses."

ORS 240.555 addresses the State's ability to "suspend, reduce, demote or dismiss an employee." ORS 240.570(3) addresses "management service employees" subject to a trial service period. As indicated above, JB was not suspended, reduced, demoted, or dismissed. He was removed from trial service. And again, JB was also never a management service employee. Therefore, JB has the burden of proof. *Hays*, Case No. MA-11-06 at 13; *Williams*, MA-14-04 at 12-13 ("The burden of proof to set aside a removal from trial service is on the terminated employee.").

As indicated above, the ALJ permitted ODOT to call its witnesses first. As a practical matter, an ALJ will often ask the respondent to go forward with its case first, because the respondent controls most of the information about the disputed action and having it proceed first tends to save time and resources. This method is especially valuable where, as here, the appellant appears *pro se*. That being said, the ALJ's decision to let ODOT present first does not shift the burden of proof. *Williams*, MA-14-04 at 2-3, 12-13 (citing *Wang v. State of Oregon, Department of Geology and Mineral Industries*, Case No. MA-12-02 at 16 (May 2003)).

## DISCUSSION

In his post-hearing brief, JB initially contends that ODOT's evidence presented at the hearing confirmed that his performance during his trial service period "met or exceeded the standards established by ODOT." In his initial appeal letter, JB also claimed that he "received uniformly positive evaluations during my probationary period." We conclude that those claims are unsupported by the evidence provided. We also conclude that the record provides an adequate and reasonable basis for ODOT to conclude that JB was "unable or unwilling to perform duties of the position satisfactorily."

We do recognize that JB's performance was not altogether unsatisfactory. For example, as noted, for the month of June 2020, JB received a 1, signaling "Exceeds expectations" in the Safety category of his trial service evaluation. He also received 2s, signaling "Meets expectations," in all other categories that month. However, a performance evaluation form is only one factor that ODOT considers. We also cannot overlook the multiple 3s, signaling "Does not meet expectations," elsewhere in the evaluation form. (Exh. R-2 at 3.) Other evidence further demonstrates that JB routinely failed to check in each day as instructed by his manager and lead worker on multiple occasions. JB's contention that *all* of his "No Show No Calls" were shown to be excused absences is unsupported by the record. The record likewise suggests that JB was often difficult to reach and unresponsive. Significantly, during the week before JB's removal from trial service, JB failed to communicate with either his manager or lead worker *at all*. And at an earlier point in JB's trial service period, "there was almost no work being produced." (10:25 a.m. November 12, 2020.) Finally, ODOT does not approve of posting work-related information on social media websites, which JB certainly did in late 2019.

Elsewhere in JB's post-hearing brief, JB argues that he complied with all FMLA requirements. He also asks whether his removal "could have been a preemptive strike to eliminate the risk of an expensive medical/long term disability or FMLA claim." As we see it, the preponderance of the evidence (including JB's own sworn testimony) demonstrates that JB never actually turned in completed FMLA or OFLA paperwork. (Exh. R-15 at 5; 3:23 p.m. November 12, 2020; 10:31 a.m., 11:24 a.m. November 13, 2020.) We do note Jacobs' apparent unresponsiveness. However, the rest of the evidence presented indicates that ODOT supported JB's aims. Upon Russell's request, Segal sent JB FMLA/OFLA paperwork and offered her assistance. (Exh. R-15 at 1.) Russell also repeatedly spoke with JB about such leave, recommended an individual who might assist JB, and even sent a letter to Russell "to be sure" that JB sent in the required paperwork. (Exh. A-7 at 1.) We recognize that ODOT ended JB's employment before his July 23, 2020 FMLA paperwork deadline. But the last doctor's note that JB gave ODOT indicated that JB could return to work on July 6, 2020 without limitations. Further, there is no indication that Segal was unresponsive. (We separately note that JB never alleged disability-related or FMLA-related retaliation in his initial appeal letter or in his response to the ALJ's order to show cause.)

JB's post-hearing brief otherwise asks whether his removal was due to his insistence that ODOT provide adequate PPE during the COVID-19 pandemic. Further, during the hearing, JB asserted that he received "extreme pushback from management" and "harassing" telephone calls" after he shared his views. (11:58 a.m. November 13, 2020.) In our view, however, all of the evidence presented indicates that ODOT took JB's safety concerns seriously, and that those concerns were not a reason why JB was removed from trial service. There is also no indication that Russell, Truly, or anyone else told JB that he had to start conducting in-person inspections again or harassed him about it.

Before JB expressed his views, ODOT had already communicated practices for minimizing exposure to COVID-19, sent JB home when he appeared sick, and let employees opt out of performing in-person truck inspections (an accommodation that remained in place long after JB's removal). Subsequently, Russell scheduled meetings in which JB could share his views about employee safety. After one of those meetings, Russell wrote in an email that JB gave a "[n]ice presentation" and "did a good job" making his points in the meeting. (Exh. R-12 at 2.) As noted, for the month of June 2020, Russell specifically gave JB an "Exceeds expectations" rating in the Safety category of JB's performance evaluation because of JB's COVID-19-related efforts. (10:28 a.m. November 12, 2020.) During the hearing, Russell also credibly testified that JB's concerns were "valid" and "serious," and showed no indication of a bias. (12:08 p.m., 12:15 p.m. November 12, 2020.) On top of that, ODOT modified an "Inspection Alert" based on JB's efforts. (Exh. R-14 at 1.)

ODOT's rejection of JB's safety recommendations does not evidence hostility or an improper motive on its own. While it may seem logical that an employer would want to follow the highest safety standards possible, State resources limit what an agency is able to do. An agency has the authority to establish standards based on the resources available. *See Williams*, MA-14-04 at 14 n 9. Furthermore, this Board has held that the statutory term "political reason" refers only to partisan politics. *Rodriguez, et al.*, MA-24/25/34-94 at 17 (citing *Foster v. Executive Department,*

*Emergency Management Division*, Case No. MA-15-87 (September 1988). Here, JB has failed to demonstrate any relationship between party politics and his removal from trial service.

Conclusion

JB's removal from trial service was not arbitrary; contrary to law, rule, or policy; or taken for political reasons. Moreover, we find no other basis to set the removal aside.

PROPOSED ORDER

The appeal is dismissed.

SIGNED AND ISSUED on March 26, 2021.

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 that objections are received by the Board; "the date of service" of a recommended order means the date that the Board sends or personally serves the recommended order on the parties.) If one party has filed timely objections, but the other party has not, the party that has not objected may file cross-objections within 7 days of the service of the objections. Upon good cause shown, the Board may extend the time for filing objections and cross-objections. Objections and cross-objections must be simultaneously served on all parties of record in the case and proof of such service must be filed with this Board. Objections and cross-objections may be filed by uploading a PDF of the filing through the agency's Case Management System (preferred), which may be accessed at https://apps.oregon.gov/erb/cms/auth. Objections and cross-objections may also be filed by email by attaching the filing as a PDF and sending it to ERB.Filings@Oregon.gov. Objections and cross-objections may also be mailed, faxed, or hand-delivered to the Board. Objections and cross-objections that fail to comply with these requirements shall be deemed invalid and disregarded by the Board in making a final determination in the case. (*See* Board Rules 115-010-0010(10) and (11); 115-010-0090; 115-035-0040; and 115-070-0055.)

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-010-19

(REPRESENTATION)

| | |
|---|---|
| SALEM POLICE EMPLOYEES UNION,<br><br>Petitioner,<br><br>v.<br><br>CITY OF SALEM,<br><br>Respondent. | RULINGS,<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND ORDER |

Mark J. Makler, Attorney at Law, Code 3 Law LLP, Portland, Oregon, represented Petitioner.

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

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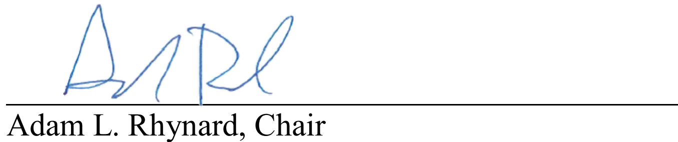
On March 30, 2021, Administrative Law Judge B. Carlton Grew issued a recommended order in this matter. The parties had 14 days from the date of service of the order to file objections. OAR 115-010-0090(1). No objections were filed, which means that the Board adopts the attached recommended order as the final order in this matter. OAR 115-010-0090(4), (5).

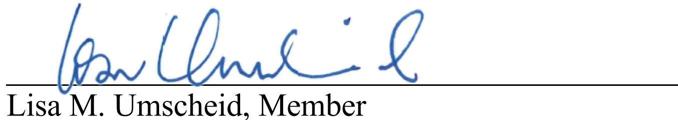
ORDER

The petition is dismissed.

DATED: April 15, 2021.



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-010-19

(REPRESENTATION)

| | | |
|---|---|---|
| SALEM POLICE EMPLOYEES UNION,<br><br>Petitioner,<br><br>v.<br><br>CITY OF SALEM,<br><br>Respondent. | ) | RECOMMENDED RULINGS,<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND PROPOSED ORDER |

A hearing in this case was held before Administrative Law Judge (ALJ) B. Carlton Grew on August 19, 20, and 27, and September 28 and 29, 2020, by Zoom teleconference hosted in Portland, Oregon. The record closed on December 1, 2020, following the submission of the parties' post-hearing briefs on November 25, and Respondent's motion to strike or dismiss a portion of Petitioner's post-hearing brief on December 1.

Mark J. Makler, Attorney at Law, Code 3 Law LLP, Portland, Oregon, represented Petitioner.

Jeffrey P. Chicoine, P.C., Attorney at Law, Portland, Oregon represented Respondent.

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On October 24, 2019, Petitioner Salem Police Employees Union (Union) filed this representation petition with the Employment Relations Board (ERB or this Board). The petition seeks to create a new bargaining unit of "All employees of the City of Salem, Oregon, Salem Police Department in the classification of Police Sergeant." On November 13, 2019, the City of Salem Police Department (Department) filed timely objections to the Petition, stating that (1) the proposed unit employees are "supervisory employees" under ORS 243.650(23)(a) of the Public Employees Collective Bargaining Act (PECBA), and, as a result, cannot be included in a new bargaining unit, and (2) the proposed unit would unduly fragment the Department's workforce.

The issues presented for hearing[1] are:

1. Are the petitioned-for Police Sergeants supervisors under ORS 243.650(23)?

2. Does the proposed unit unduly fragment the Police Department, making it an inappropriate unit for bargaining?[2]

This Board concludes that the Department's sergeants are "supervisory employees" under the PECBA and therefore excluded from bargaining, and therefore dismiss the Petition.

RULINGS

On November 19, 2019, this Board issued a Notice of Hearing including a statement of the issues for hearing listed as above. On August 19, 2020, the ALJ repeated that issue statement at the start of the hearing in this matter. On November 25, 2020, the parties submitted their post-hearing briefs. In its post-hearing brief, Petitioner asserted, for the first time in this litigation, that ORS 243.650(23)(a), which defines the statutory term "supervisor," violates the First Amendment to the US Constitution as interpreted by *Janus v. AFSCME, Council 31*, 138 S Ct 2448, 201 L Ed 2d 924 (2018).[3] Petitioner's *Janus* argument occupied 10 pages of an 29 page brief, appearing as the first argument. On December 1, 2020, Respondent Department objected to this newly raised issue, noting that the issue was not raised by the Union prior to the filing of its post-hearing brief, was not listed in the issue statement for the hearing issued by the ALJ, and was not raised before the evidentiary record was closed. The ALJ properly sustained Respondent's objection to the introduction of the Federal Constitutional challenge, for the reasons given in the Respondent's December 1 objections, and because Petitioner never sought leave to raise this issue at any time prior to doing so in its post-hearing brief. *Cf. Tri-County Metropolitan Transportation District Of Oregon v. Amalgamated Transit Union, Division 757; Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District Of Oregon*, Case No. UP-001-13,

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[1]In its post-hearing brief, Petitioner Union argues in response to the fragmentation issue that, in the alternative to a separate unit, the petitioned-for employees should be accreted to the police officer bargaining unit. Accretion of these employees to the officer bargaining unit has not been previously raised as an issue in this case, and no evidence addressed to that issue has been received, and therefore we would not consider it here. Moreover, because of our disposition of this case, the accretion issue is moot.

[2]Because we dismiss the Petition based on the supervisor issue, we do not reach the unit fragmentation issue.

[3]Briefly, the Union's arguments are that ORS 243.650(23)(a), the PECBA's definition of the term "supervisor," violates the First Amendment to the US Constitution as interpreted by *Janus*, because it interferes with the sergeants' rights to associate with each other, and that *Janus* requires that a public employer must collectively bargain with any group of employees who have chosen to associate for the purpose of collective bargaining. This is not the first challenge under *Janus* to a provision of the PECBA. *See Salem Police Employees' Union v. City Of Salem, and Oregon AFSCME Council 75, Local 2067*, Case No. UC-010-18, __ PECBR __ (November 2, 2018) (seeking to challenge this Board's rules concerning the contract bar and the open period based on *Janus*). While we do not reach the merits of Petitioner's argument, we note that ORS 243.650(23)(a) is merely the statutory definition of supervisor. That provision does not bar supervisors from becoming members of a bargaining unit.

n 16 at 22, 26 PECBR 322, 343 (2014), *aff'd without opinion*, 279 Or App 811, 381 P3d 1096 (2016). ("We agree with ATU that this issue is not before us, as the issue was not pleaded, agreed to in the issues statement, or briefed by the parties in their post-hearing briefs. Consequently, we decline to address it.").

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

## FINDINGS OF FACT

### The Parties

1. The Department is a division of the City of Salem, a public employer within the meaning of ORS 243.650(20).

2. The Union is a labor organization as defined in ORS 243.650(13), and is seeking to become the exclusive representative of the approximately 24 Department sergeants.

### Structure of the Department

3. The Department has a hierarchical command structure for sworn police officers.[4] In order of descending rank, the positions are chief, deputy chief, lieutenant, sergeant, corporal, and patrol officer or detective. The chief reports to the city manager.

4. The Department is organized into four divisions, three of which (Support, Investigations, and Patrol) employ sworn police officers and are headed by a Deputy Chief with the title division commander. The fourth division is the Communications Division, headed by a non-sworn Operations Manager.

5. The Support Division performs the Department's administrative functions and has sergeants assigned to supervise and manage the Internal Affairs Unit, Administrative Unit, and Personnel and Training Unit.

6. The Investigations Division is divided into two sections, criminal investigations and special operations, each headed by a lieutenant.

7. The Criminal Investigations Section (CIS) is made up of two units, property crimes and persons' crimes. Each unit is overseen by a sergeant and staffed by detectives. This section is headed by the Criminal Investigations lieutenant.

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[4]Sworn law enforcement personnel in this case are individuals who are certified by the Oregon Department of Public Safety Standards & Training (DPSST) and work for a law enforcement entity pursuant to an oath of office to uphold the law. *See Taylor v. Multnomah County Deputy Sheriff's Retirement Board*, 265 Or 445, 510 P2d 339 (1973).

8. The Special Operations section consists of three special units, the Drug Enforcement Unit, Street Crimes Unit, and Youth Services Unit (YSU). Each of these three units is overseen by a sergeant and staffed by detectives. Those sergeants report to the Special Operations lieutenant.

9. The Patrol Division contains the Patrol Operations section, which employs most of the Department's sworn personnel as patrol officers, and where new officers are first placed and undergo field training. There are 12 patrol sergeants in Patrol Operations, approximately half of the total number of sergeants.

10. The Patrol Division also includes four special units, each of which is staffed by patrol officers. These units are the Behavioral Health Team (BHT), Downtown Enforcement Team (DET), Problem Oriented Policing (POP) Unit, and the Traffic Control Unit (TCU). Each special unit is overseen by a sergeant, and that oversight is each sergeant's primary assignment. The four sergeants report to the Community Response lieutenant. There are also nonsworn employees in the Patrol Division in a bargaining unit represented by a local of the American Federation of State, County, and Municipal Employees (AFSCME).

11. The Communications Division is the regional dispatch center for the City and some nearby jurisdictions. It is overseen, and staffed by, nonsworn employees. The division director reports directly to the chief. A bargaining unit of Communications Division employees is represented by the Professional Communications Employees Association.

12. The primary assignment of the sergeant positions identified above is to work with the identified Department subdivision. Most sergeants also have a secondary assignment leading a special team or cadre. The special teams include the Special Weapons and Tactics Team (SWAT), Hazardous Device Team (HDT or Bomb Team), Mobile Response Team (MRT), Tactical Negotiation Team, and K-9 Team. The officers who serve on these teams do so as their secondary assignments.

13. The cadres on which sergeants may serve as cadre leaders include Emergency Vehicle Operations Certification (EVOC), Defensive Tactics (DT), Confrontation-Simulation (Con-sim), Emergency Trauma (ET), Domestic Violence (DV), and Firearms Training. Not all cadre leaders are sergeants.

Bargaining Unit of Department Police Officers

14. In addition to the petitioned-for sergeants, the Union represents a separate bargaining unit of Department employees, including all sworn officers below the rank of sergeant (corporals, patrol officers and detectives), nonsworn crime laboratory technicians, and sworn retired officers employed to transport criminals and as background investigators (officer's bargaining unit). At the time of hearing, the Union and City Department were parties to a collective bargaining agreement (Agreement) for the term of fiscal years 2020 to 2024.

15. The Agreement's recognition clause states:

> "The City recognizes the Union as the sole and exclusive bargaining agent under ORS 243.650 et seq., for all career employees (INCLUDING PROBATIONARY EMPLOYEES), in these classifications: Police Officer, Corporal, Police Laboratory Technician, Community Service Officer, and Part Time non-career employees in the classifications: Community Service Officer, Custody Officer, and Special Investigator. The parties agree that the above constitutes an appropriate bargaining unit. Any seasonal, casual, or temporary employees in the listed classifications are excluded from representation." (Exh. P-13 at 1.)

16. The Agreement also states that a supervisor's approval is required for officer bargaining unit members seeking after-hours training, changing Youth Services school assignments, and requests for non-bidded vacations made with less than 24 hours' notice. The relevant supervisors are sergeants.

17. The Agreement includes a dispute resolution process ending in arbitration. The first step in the process is to file a grievance with the bargaining unit members' "immediate supervisor." (Exh. P-13 at 36.) Sergeants are the first step grievance filing immediate supervisor for patrol officers and detectives.

Sergeants' Class Specification (Job Description)

18. The Department calls its job description for sergeants a "class specification." (Exh. P-1 at 1.) The specification for sergeants states, in its "Job Summary" section, that "[t]he Police Sergeant role is to supervise, train, and participate in the work of a patrol squad or supervise the activities of a specialized unit or sub-unit." (Exh. P-1 at 1.)

19. The specification's "essential job functions" for sergeants include:

> "• Supervise the activity of a specialized unit or sub-unit.
>
> "• Plan, review, and direct the work of subordinate uniform and civilian personnel assigned to units such as: community services, personnel and training, traffic control, youth services unit, criminal investigations section, internal affairs, and other specialized units.
>
> "• Supervise major incidents, briefings and de-briefings.
>
> "• * * * Monitor and respond to calls for service to determine the needs of subordinates, community members, and the department.
>
> "• Review incident and activity reports submitted by subordinates. Prepare written reports and provide oral reports on emergency and non-emergency situations, employee performance, and other squad activities.

"• Prepare and conduct employee performance appraisals * * *.

* * *

"• Investigate internal affairs complaints and make effective recommendations on disciplinary matters involving employees.

* * *

"• Maintain, approve, monitor, and schedule caseloads, attendance, and leave requests for assigned staff." (Exh. P-1 at 1.)

20. Most of these same responsibilities and duties are also listed in a job bulletin used for recruiting and hiring for sergeant vacancies.

Sergeants' General Authority and Responsibilities

21. Sergeants evaluate each of their subordinates. Any merit or step increases for their subordinates are contingent on these annual evaluations, which must include an explicit recommendation for a one-step merit increase, two-step merit increase, or no merit increase. If a sergeant recommends no merit increase, and the recommendation is approved, then the employee must be put on a performance improvement plan. Recommendations for no-merit increases are unusual, but have been made. Sergeants' evaluations and recommendations regarding merit increases are routinely approved, although sometimes minor adjustments in the individual ratings are made by lieutenants.

22. Sergeants also evaluate subordinates when these employees apply for a special assignment, such as to a detective position or to a position on a specialty unit or team, whether the special assignment is a primary or ancillary assignment. Appointment to special assignments are handled in accordance with City Directives, and are managed and overseen by the sergeant in charge of each specialty assignment, team or unit. Evaluations count as 30 percent of an applicant's score.

23. Step one grievances are submitted to the sergeants and the sergeants are responsible for providing a timely response. Sergeants generally respond to first step grievances after providing them to their supervisor and being given directions for a response. In theory, sergeants could independently respond to grievances, but do not do so in practice.

24. Sergeants have authority to send an officer home for personal or health reasons. Supervising sergeants are authorized by City Directives to put an employee on temporary administrative leave with after-the-fact notice to superiors. For example, one sergeant sent a patrol officer home on light duty in the office after the officer accidentally fired a gun while at a desk. The sergeant sent the officer home immediately and then notified the sergeant's superiors, and later there was a decision made to reprimand the officer.

25. Sergeants as supervisors have authority to issue an oral reprimand and have done so. Examples of such reprimand are found in Exhibits R-43, 44, 46, 47, and 48. A Patrol Lieutenant issued an oral reprimand and written reprimand as a sergeant with approval from his supervisor on his recommendation. Currently, written reprimands and above require a due process hearing. Supervising sergeants may be tasked with investigating a matter with an officer or detective on their team or squad through the internal affairs process, as discussed below.

Sergeants' Accountability for the Work of Their Unit, Squad or Team

26. Sergeants are viewed as supervisors by their superiors, and are held accountable for their supervisory work and the work of their subordinates. That accountability includes counseling, reassignment, and their supervisor's specific sections of their annual performance evaluation forms. Sergeants' special assignments are generally for multiple years, but can be shortened, ended, or lengthened depending on the operational needs of the Department and performance of individual departments.

27. The forms used to evaluate the work of sergeants have specific sections devoted to the sergeants' work in the areas of "leadership", "supervisor", and the performance of their specialty team or unit.

Sergeants' Duties Regarding Regular Patrol Operations

28. Patrol sergeants lead a squad, which is generally comprised of six patrol officers and a corporal, assigned to a patrol district. There are 11 patrol districts within the Department. There are four squads on each shift. The shifts are day, swing, and graveyard.

29. Sergeants are responsible for making sure that the squad's work gets done, gets done correctly, and that patrol officers have what they need to do their work in terms of equipment and support.

30. Sergeants assign Patrol officers to Districts, a fact that is one of 12 items in the Patrol Shift Bidding Guidelines. There are several factors a sergeant may consider in assigning patrol officers to a patrol district, including: officer preference; continuing an ongoing project; the need for a particular officer's skill and experience in a district; the need to give an officer experience with different issues arising in different districts; and giving an officer experience with a busier workload.

31. Sergeants can and do hold patrol officers over into the next scheduled shift if there is inadequate staffing due to unexpected absences or a sergeant determines that there is a need, based on their judgment, for additional staffing. Sergeants may consult with their lieutenants about holding staff over, but are not required to, and it may not be possible to do so. There are only four patrol lieutenants, not every shift is staffed with a lieutenant, and there are other times when lieutenants are not on duty or available. Most of the shifts Friday through Sunday have no lieutenants assigned. There are additional shifts without lieutenants when a lieutenant is absent, such as on vacation or other leave.

32. Sergeants can and do recommend to lieutenants that a particular patrol shift run below the defined minimal staffing level, or decide to run short when no lieutenant is on duty based on the sergeants own assessment of the needs and risks. These situations typically arise during graveyard shifts on quiet nights.

33. During a shift, patrol sergeants routinely direct the work of squad members as a result of monitoring the dispatch traffic. A sergeant may override a dispatcher and redirect a call to another officer for a variety of reasons, including: the officer in question is already engaged or overloaded; an officer with special training is more appropriate (often for a behavioral health or a domestic violence call); or after deciding to require a second officer for backup. Also, dispatchers often decide not to assign particular calls, usually those involving non-criminal calls such as a welfare check or to provide support in the reclaiming of property. Sergeants' review these unassigned calls and decide whether and how to respond, and who should respond.

34. Sergeants are usually the first supervisor to arrive at a crime scene. When that happens, the sergeant will take charge of the crime scene, directing patrol officers in their efforts to control the crime scene. Sergeants remain in charge of the crime scene unless a lieutenant arrives and assumes supervision.

35. Patrol sergeants also supervise, monitor and correct patrol officers' work by reviewing the large number of incident reports filed by patrol officers. Sergeants review incident reports to insure that all necessary investigative steps were taken and documented and that the reports are adequate for the district attorney's use. Although reviewing these reports may be delegated to corporals, the delegating sergeants remain responsible for such reviews. These reviews and related comments take up a substantial amount of patrol sergeants' work time.

36. When sergeants reject reports, they write comments which require that the report author provide additional details or do other follow-up work. The sergeants' direction must be followed, and the sergeants' supervisors consider the rejection comments to be an exercise of the sergeants' judgment based on their skills and experience.

Sergeants' Duties in Patrol Division Special Units or Teams

37. Like regular patrol sergeants, the supervising sergeants for special units or teams monitor calls from dispatch and decide which ones to respond to. The sergeant also schedules the work, authorizes overtime, calls in officers early or holds staff over, and makes sure that there is adequate coverage when granting time off. The sergeants are responsible for monitoring and correcting the work of officers by reviewing and approving or rejecting incident or investigation reports.

38. The Traffic Control Unit is a primary assignment for a sergeant. This sergeant oversees one corporal and six officers. (At the time of hearing, one officer position was vacant.) This unit's main task is motorcycle-based traffic enforcement. The unit also handles major crash investigations and crash reconstruction; operates drones; and runs special grant-funded projects regarding pedestrian safety and speed control. The sergeant is responsible for assigning duties among these responsibilities and overseeing the work. The sergeant handles all scheduling and

time off requests. There is no defined staffing minimum for this unit, but the sergeant is required to ensure that there is adequate coverage to accomplish the unit's current work. The sergeant also develops operation plans (either directly drafting or delegating such work) for parades, races, festivals, demonstrations, and other public events, and oversees the implementation of those plans. Those plans generally include selection of the number of personnel, and their assignments to planned tasks, and provisions for assistance from outside the unit if needed.

39. The Downtown Enforcement Team (DET) sergeant leads a corporal and five officers. The team focuses on downtown Salem, adjacent park areas, and mass transit. It is funded, in part, by a contract with the Salem Area Mass Transit District, which requires police staff from Monday to Friday, 12:00 p.m. to 9:00 p.m. Team personnel also work closely with Salem parks, downtown businesses, and at-risk youth programs. The sergeant assigns duties and posting, including serving as liaisons with transit, parks, businesses, and the youth program. Officers may be held over on overtime authorized by the sergeant to handle special events. The sergeant also schedules the work, authorizes overtime, calls in officers early or holds over staff, and makes sure that there is adequate coverage when granting time off. The sergeants are responsible for monitoring and correcting the work of officers by reviewing and approving incident or investigation reports.

40. The Problem Oriented Policing Unit sergeant leads two officers working on long-term problems that cannot be effectively dealt with by patrol officers. These problems arise from businesses, residences, or individual repeat offenders that require ongoing attention and more focused police work. The sergeant decides which projects to pursue, assigns officers to those projects, and decides on and directs officers in the tactics utilized in addressing such problems. The sergeant also schedules the work, authorizes overtime, calls in officers early or holdover staff, and makes sure that there is adequate coverage when granting time off. The sergeants are responsible for monitoring and correcting the work of officers by reviewing and approving incident or investigation reports.

41. The Behavioral Health Unit sergeant leads three officers. Two officers work with Marion County nonsworn personnel. The third officer is stationed in Polk County to work with that County's nonsworn health department personnel. The officers in this unit assist, support, and accompany county nonsworn personnel in calls related to behavioral health problems. Such calls are usually routed to these officers. The sergeant monitors those calls and may redirect, prioritize, or choose that officers not respond. The sergeant also schedules the work, authorizes overtime, calls in officers early or holdover staff, and makes sure that there is adequate coverage when granting time off. The sergeants monitor and correct the work of officers through their review and approval of incident or investigation reports.

Sergeants' Duties in Investigations Division: Criminal Investigations Section (CIS)

42. The CIS includes most Department detectives, who are selected for that position through a process highly regulated by the Agreement. The section is divided into a persons' crime unit and a property crimes unit, each supervised by a CIS sergeant. The CIS sergeants review incident reports that the Patrol officers have provided them for investigation, and other reports of crime. The CIS sergeants decide whether to investigate and assign the matter to a detective for

investigation. However, there are a number of specialized detectives who are routinely assigned cases in their specialty, such as auto theft, fraud, and homicides.

43. Some crimes are more complicated, and the sergeants may decide to assign the case to a detective with more experience. Some crimes involve more than one specialty, and then the sergeant must decide which specialized investigator should handle the case.

44. Initially, a CIS sergeant must decide whether a case is worthy of investigating, and then triage or prioritize the assignment of those cases. The Department does not have the resources to investigate all cases that are initially determined to justify an investigation. In 2019 approximately 1,500 cases were determined to not meet the criteria for starting an investigation, while 500 did meet the criteria and were assigned to detectives.

45. The criteria used by the property crimes sergeant in selecting cases to be investigated are not fixed, but are guidelines that the sergeant can choose not to follow. For example, while there is generally a baseline amount of damages below which a fraud investigation will not take place, in special circumstances a sergeant may direct an investigation where the amount is below the baseline. All such guidelines are subject to change by sergeants due to environmental and staffing issues, such as those presented by the COVID-19 pandemic, mass protests, and wildfires.

46. Once a case is assigned, the CIS sergeant supervises the investigation to ensure that the assigned detective has an appropriate plan for the investigation and that the investigation progresses to a conclusion. The supervising CIS sergeant may reassign cases for a variety of reasons, including redistributing caseload, releasing a detective to handle other cases, or to add resources to an investigation.

47. Child abuse reports come to the Department on “307” forms. The Department does not have the resources to investigate every such report of child abuse. A sergeant in the persons’ crime unit has delegated the review of “307” reports to a detective to determine which cases should be investigated.

48. Criminal investigation sergeants review detectives’ investigation reports to ensure that the investigations are adequate and that enough detail is concluded to aid a prosecution.

49. CIS detectives’ regular hours of work are between Monday and Friday. CIS sergeants are responsible for authorizing time off and schedule adjustments and requests for time off by detectives, and can deny such requests based on Department needs. Sergeants are responsible for deciding whether and who to call in from off duty to address pressing investigatory needs and to ensure that detectives who are called in report to duty.[5]

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[5]The Department requires Detectives to carry phones and answer calls when off duty, and provides them premium pay for doing so.

Sergeants' Duties Regarding Investigation Division Special Units/Teams

50. The Street Crimes Unit is comprised of a sergeant, a corporal, six detectives, and one administrative assistant. The sergeant does not have a caseload and is not lead investigator for any cases. The sergeant determines whether an investigation is appropriate for the unit, and whether it is substantial enough to refer to the Drug Enforcement Unit. The sergeant oversees what tactics will be used, ensures that detectives are making progress with their investigations, and ensures that the detectives have a planned conclusion to the investigation and a route to that conclusion planned out.

51. Cases assigned to individual detectives in the unit are usually self-generated by the detective, but may also be assigned as arising from public reports or complaints, or from information provided by patrol officers. An example of the latter is the identification of possible drug houses that warrant special attention. Regarding non-self-generated cases, the sergeant decides which personnel should work on that case and what tactics should be utilized, such as surveillance, or stopping and questioning visitors. Generally, Street Crimes staff works 10:00 a.m. to 6:00 p.m., Monday through Friday, but schedules are often adjusted to address specific needs of particular investigations. Detectives submit these adjustments to the sergeant and are subject to his approval. Overtime needs or other scheduling requests are authorized by the sergeant.

52. The Drug Enforcement Unit (DEU) consists of a sergeant and two detectives, and is assigned to work with federal agents. This unit is housed in the local offices of the Federal Drug Enforcement Agency. The sergeant reports to the Special Operations lieutenant, but is generally directed by the Federal DEA agent in charge. The sergeant does not handle a caseload and is not lead investigator on any cases. The unit's detectives carry a caseload and are lead investigators on cases. However, the Drug Enforcement sergeant approves overtime and authorizes time off; can call in detectives and authorize their overtime work; oversees and directs the work of detectives in the unit and ensures compliance with Department directives and collective bargaining obligations. The sergeant also reviews the reports of his detectives and approves them and orders corrections needed, and writes the annual evaluations, which can be used for promotions or special assignments.

53. The Youth Services Unit consists of a sergeant, one corporal, and seven officers. The officers in this unit are assigned to at least two schools in the Salem-Keizer School District. The Unit's work is funded by a contract with the school district, which requires that an officer be physically present in each school during each school day. The Youth Services sergeant decides on overtime authorizations, time off requests, and training for the unit's officers without involving the Special Operations lieutenant.

54. Youth Services Officers generally remain in the same assigned schools, benefitting from their long-term relationships with faculty, staff and students at individual schools. However, there have been reassignments, and the Special Operations lieutenant has sought and accepted the Youth Services sergeant's judgment and recommendation. The sergeant assigns himself or officers to temporary assignments to fill in for officers' absences to insure that the assigned schools are covered. The sergeant may cover the school themselves or add the assignment that of another officer. The sergeant's decisions on such reassignment or temporary assignment depend on "fit"

between the officer and the school. Officers' duties include making threat assessments of students, investigating crime within the school, and investigating child abuse. The sergeant may reassign cases to other officers depending on skill or an officer's absence.

Sergeants' Duties Regarding Other Specialty Units, Teams and Cadres

55. In addition to their primary assignments, some sergeants, officers, and detectives are given secondary assignments on some specialized teams. Regardless of the unit, team, or cadre, sergeants must authorize cadre work to be performed either outside of regular hours, which entails approving overtime, or during regular hours which entails temporarily removing the cadre member from their principal assignment.

56. The Hazardous Device Team is currently supervised by a sergeant who reports to a patrol operations lieutenant. The Team is a secondary assignment for both the sergeant and lower ranking team members. Hazard Device calls to the Department go directly to a sergeant and their assistant team leader. The Hazardous Device sergeant or their assistant then decide whether the Team will respond, how many staff will respond, and who the responders will be. The Hazardous Device sergeant informs their superiors about the plans, informing lieutenants or other higher ranking officers up the chain of command. The relevant Patrol lieutenant defers to the Hazardous sergeant regarding these decisions. The sergeant has expertise regarding hazardous devices and is familiar with the individual capabilities and expertise of his team members. However, the sergeant is not a bomb technician, so the sergeant in turn defers to other team members on technical issues. For example, the sergeant defers to his assistant team leader for technical judgments, which in this field can include judgments about how many and which team members to call in. However, in his own capacity as supervisor, the sergeant is responsible for making sure that calls were properly staffed.

57. The Tactical Negotiations Team is overseen by two sergeants (a team leader and an assistant team leader) who report to a Patrol Operations lieutenant. It is generally called out when SWAT is activated, but decisions such as whether to deploy the entire team or not and, if not, which team members are deployed, are left to the team's sergeants.

58. The K-9 team is overseen by a sergeant, and includes six officer-dog teams. The sergeant reviews requests for K-9 units at special events or demonstrations, and decides which to respond to and assign an officer-dog team to attend. The K-9 sergeant is also responsible for assigning teams to training academy or on-duty training, and to handle requests from other agencies (which could be approved by any sergeant but goes to the K-9 sergeant when on-duty). The K-9 sergeant is responsible for reviewing all incident reports involving dog bites to ensure that K-9 staff followed appropriate practices, including documenting noteworthy events within the report for future liability concerns.

59. The Peer Support cadre is led by a sergeant, with another sergeant functioning as the assistant team leader. The cadre uses trained Department members to provide support to sworn and nonsworn Department staff in dealing with on-the-job or personal problems that may impair their work performance. The sergeants in peer support can assign a team member to assist or permit the officer to select someone from a list.

60. The Taser cadre is led by a sergeant who oversees a team of eight instructors. The sergeant is responsible for assigning instructors to training or other tasks such as purchasing, budgeting, and maintaining and inspecting equipment, depending on individual experience and skill. The sergeant also assigns instructors to quarterly training events, new officer training, and a citizens' police academy that the sergeant would assign instructors.

Department Special Teams, Operational Plans and Special Events

61. Operations plans regarding specific parades or other civic events are generally created in the Traffic Control Unit. Plans regarding demonstrations or protests, or for special operations such as executing a search warrant by the SWAT team, are created in the Mobile Response Team. The sergeants on those teams are responsible for the preparation, creation, and presentation of such plans, although the sergeant may delegate the writing to a subordinate. Operations plans prepared by these sergeants are subject to approval by a Patrol lieutenant or higher level officials.

62. The SWAT Team supervising sergeant provides a Patrol lieutenant with operation recommendations that the lieutenant routinely approves with minor revisions.

63. Operations plans are tailored for a specific incident or event. The relevant sergeant is generally in charge of having a team execute a plan by his or her team and directing what occurs on the ground. In the SWAT Team, one sergeant is responsible for deploying and directing the sniper or perimeter team, and another sergeant for directing the entry team, executing that portion of the plan, as well as in overall charge of the deployment of personnel and equipment at the scene. Some tactics, such as using gas or dynamic entry (door breaching) require specific authority from a Patrol Operations lieutenant. When the SWAT Team is called out on short notice, plans are created through discussions directed by the relevant sergeants.

64. Search warrants are also executed by detectives in the criminal investigation units (persons' crimes and property crimes) and the Street Crimes Unit. The sergeant supervising street crimes developed plans, submitted them to superiors for review and approval, and supervised the execution of such plans. The supervising sergeant may have a subordinate draft all or part of the plan, but it is the sergeant who is responsible for the plan. Operational plans generated by the Street Crimes Unit may advocate for the involvement of additional personnel, frequently SWAT team members or former members of the Street Crimes Unit because they have the skill and experience necessary for executing search warrants. The Department requires that there be a sergeant on scene to oversee the personnel executing search warrants.

Sergeant Duties in the Department Support Division: Sergeant Duties in Internal Affairs

65. Internal Affairs procedures are contained in a Department Directive. The internal affairs sergeant manages complaints and other inquiries about Department staff. Not all inquiries rise to the level of a complaint, but the Internal Affairs sergeant or his designee logs, responds to, and tracks all of them. The sergeant reviews each inquiry and determines whether the inquiry meets the level of a formal complaint, should be handled through a disciplinary process, or whether it

appears that it can be resolved informally. Informal resolutions of inquiries may be through a direct response from the employee, sergeant, or their supervisor.

66. For each inquiry that the sergeant determines should be handled as a complaint, the sergeant consults with the division commander of the relevant employee who is the subject of the complaint to determine if the investigation will be conducted by the internal affairs sergeant or the employee's supervisor, who is generally another sergeant.

67. Internal Affairs investigations are formal. They result in a report containing a finding of unfounded, exonerated, not sustained, or sustained. A finding of unfounded, exonerated, or not sustained is also a determination that the employee will not be disciplined. While sergeant's findings are sometimes challenged by a division commander or the chief, nearly all are routinely accepted. However, if the investigating sergeant determines that the allegations are sustained, the sergeant does not recommend, determine, or issue the discipline.

Support Division: Sergeant Role in Hiring and Training Recruits

68. The Personnel and Training ("P&T") sergeant oversees Department recruitment and hiring. During the hiring process, the P&T sergeant decides whether to advance or disqualify candidates after the integrity interview, the background investigation, and the psychological examination. At the conclusion of the process, the P&T sergeant makes recommendations as to who should be hired, and those recommendations are generally followed.

69. The P&T sergeant initiates the recruitment and hiring process using a web-based workforce recruitment and testing platform. Applicants complete and submit an online application and the results of their test from the National Testing Network. They also take the Oregon Physical Abilities Test (ORPAT) physical fitness examination. Applicants who meet the Department's minimum qualifications and scoring cutoff move to the next step in the hiring process.

70. The P&T sergeant then decides on the number of applicants to interview and organizes a structured, scored, oral interview with a three-member board. The board includes Department and outside members. In recent entry level recruitments, a board interviewed the top 64 applicants.

71. Applicants who receive a passing score in the oral interview are immediately given an "integrity interview" by a background investigator made up of 120 standard questions. The questions are based on the criteria for mandatory and permissive disqualification for police certification found in the Oregon Administrative Rules and City Directives. Applicants whose answers do not include mandatory or permissive qualification issues move to the next level in the hiring process. Applicants whose answers trigger mandatory disqualification are rejected.

72. The P&T sergeant evaluates applicants whose answers trigger permissive disqualification. The sergeant weighs this information in making a hiring recommendation to the lieutenant.

73. Applicants who pass the oral interview, integrity interview, and qualification standards are given a conditional offer of employment. A background investigator then conducts a full background investigation.

74. Applicants who pass the background investigation are then given a psychological evaluation. The evaluating psychologist will sometimes issue a marginal pass or otherwise report issues revealed during the evaluation. Under those circumstances, the P&T sergeant confers with the evaluating psychologist and weighs this information in making a hiring recommendation to the lieutenant.

75. After the steps above, the P&T sergeant submits a list of the hires they recommend to the administrative lieutenant. These recommendations are routinely accepted by the lieutenant and passed on to the chief and deputy chiefs, who also generally accept the recommendations. There is no additional "hiring board" process involving the chief and deputy chiefs.

76. The P&T sergeant is the City-designated supervisor of police recruits after they are hired, as the recruits take an eight-week officer training course, ride in squad cars, or attend the state police academy (the Oregon Department of Public Safety Standards and Training (DPSST)). The sergeant assigns and schedules the recruits for coursework, sets classroom and training sessions, and oversees the training coordinator, who directs the recruits when and where to report.

77. P & T sergeant also oversees a human resources coordinator who manages payroll, pay increases, certification and training requirements, and other human resource functions.

Support Division: Administrative Sergeant

78. At the time of hearing, the administrative sergeant was also the SWAT leader; supervises four units of both sworn and nonsworn personnel; and oversees the Department's crime analysis, public relations, transport, and fleet and accreditation functions. The administrative sergeant ensures that this work is accomplished in a satisfactory manner that satisfies the Department's needs by routine oversight, prepares annual evaluations, reviews timecards, authorizes or denies overtime and time off, and insures adequate staffing.

79. The transport unit transports prisoners from jail to court, and is staffed by part-time, retired officers. The administrative sergeant monitors this unit and has intervened when court personnel report behavioral or performance concerns.

80. The Fleet and Accreditation Unit is comprised of one full-time officer and a half-time nonsworn, administrative staffer. It manages the Department fleet and coordinates the Department's ongoing accreditation efforts. The sergeant reviews major financial decisions involving repair or replacement of damaged vehicles. The sergeant also decides when special events may require more than the usual number of fleet cars be available. This requires the sergeant to ensure that enough vehicles are not in maintenance status. The fleet sergeant also oversees work done by staff to maintain the Department's accreditation.

81. The Crime Analysis Unit consists of one sworn and one nonsworn employee. Work routinely comes from various sources in the Department. However, the sergeant assigns and directs work on major projects, most recently a video analysis project.

82. For several months prior to hearing, the Administrative sergeant's primary duty was to supervise and direct the implementation of new software for the Department's record management system, a very large and complex task.

## CONCLUSIONS OF LAW

The Union filed a representation petition seeking to create a bargaining unit of approximately 24 sergeants. The City objected, contending that the sergeants are supervisory employees within the meaning of ORS 243.650(23). Supervisory status under the statute depends on whether the sergeants assign, responsibly direct, discipline, adjust grievances, or hire other employees, as those job functions are defined under the Public Employee Collective Bargaining Act (PECBA). We conclude that the sergeants are supervisory employees because they assign work to other employees, use independent judgment in doing so, and hold that authority in the interests of City management.

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

2. The petitioned-for sergeants are supervisory employees within the meaning of ORS 243.650(23) and are not appropriately included in the Union's bargaining unit.

### Standards of Decision[6]

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. Supervisory employees, however, are not "public employees" and cannot appropriately be 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).

This matter is investigatory, and neither party bears the burden of proof. 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 of ORS 243.650(23) applies.[7] *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

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[6]This summary of the analysis of a claim under ORS 243.672(1)(a) tracks this Board's 2019 decision in *Keizer Police Association v. City of Keizer*, Case No. UC-004-18, May 28, 2019.

[7]This standard is now part of OAR 115-010-0070(5)(a). ERB 1-2021, effective 1-7-21.

supervisory employee. *SEIU Local 503, OPEU v. Portland State University*, Case No. UC-002-17 at 13, 27 PECBR 222, 234 (2018).

ORS 243.650(23) 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).

When we apply this definition, we consider three questions[8], "each of which must be answered in the affirmative for an employee to be deemed a supervisory employee: (1) does the employee have the authority to take action (or to effectively recommend action be taken) in any of the 12 listed activities; (2) does the exercise of that authority require 'the use of independent judgment'; and (3) does the employee hold the authority in the interest of management?" *Portland Police Commanding Officers Association*, UC-017-13 at 22, 25 PECBR at 1017 (citing *Deschutes County Sheriff's Association v. Deschutes County*, Case No. UC-62-94 at 12, 16 PECBR 328, 339 (1996)). Significantly, 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).

In determining whether an employee exercises independent judgment, this 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) (internal citations omitted). The exercise of authority must be not of a "merely routine or clerical nature." ORS 243.650(23)(a).

Here, we analyze only one of the statutory factors--whether the petitioned-for sergeants have the authority to assign other employees – because that factor resolves this case. This Board has defined the statutory term "assign" to mean "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or

[8]More simply, there are three criteria for a supervisor under the PECBA: (1) the employee has the authority to take action (or to effectively recommend action be taken) in any of the 12 listed activities; (2) the exercise of that authority requires the use of independent judgment; and (3) the employee holds the authority in the interest of management.

overtime period), or giving significant overall duties, *i.e.*, tasks, to an employee." *City of Portland*, 25 PECBR at 1021 (quoting *Oakwood Healthcare, Inc., and International Union, United Automobile Aerospace and Agriculture Implement Workers of America, AFL-CIO, 348 NLRB* 686, 689 (2006)). Assignment of an employee to a certain department, to a certain shift, or to certain overall tasks all "generally qualify as 'assign' within our construction." *Id.* Setting or adjusting the schedule and deciding staffing issues on a routine basis are examples of assignment of duties. *See Hillsboro Sergeant's Association v. City Of Hillsboro, Oregon*, Case No. CC-009-14, at 5, 26 PECBR 491, 495 (2015); *Teamsters Local 206 v. City of Reedsport*, No. UC-46-98, at 8, 18 PECBR at 189, 197 (1999) (as an indicator of supervisory responsibility, the Board found that sergeants "may independently authorize overtime on a given shift").

Here, the record shows that sergeants have the authority to: (1) decide, on a daily basis, which tasks should be assigned to their officers; (2) decide how many officers are necessary for assignments and the combination of skills, specialization, and experience necessary to complete those tasks; (3) call in, retain, or send home officers for a shift depending on their assessment of the work facing that shift; and (4), in connection with the previous areas of decision, assign officers overtime and approve or deny officers' overtime requests.

Assigning Tasks

The sergeants at issue overseeing the various subdivisions of the Department routinely make a variety of assignments. Most of the sergeants are in the Patrol Operations division. Those sergeants assign patrol officers by designating the district each officer will patrol on a routine basis. They make these assignments while considering factors ranging from an officer's personal preference, training needs, or the officer's particular experience and skills regarding a district. They monitor dispatch traffic and can overrule particular dispatches and assign other officers, as well as evaluate and decide whether and how to act on unassigned calls, and who should take those calls. They send home, hold over, or call in officers, and these decisions are not dictated by staffing minimums, but by sergeants' evaluation of Department needs under the circumstances of a particular shift.

Patrol sergeants in particular make adjustments to assignments and staffing in response to unplanned vacancies. The sergeants must exercise their judgment in deciding whether to fill the shift vacancy and, if so, how to do it. The sergeant can then decide whether to call in a replacement, call another officer to report early, or hold over an officer at the end of his or her shift. Factors considered are time of day, activity level, whether significant events are scheduled, and length of vacancy. For example, patrol sergeants may authorize time off below minimum staffing standards on low-activity nights or denied time off above minimums during special events. Sergeants often inform their lieutenant of these adjustments, but there is no evidence that lieutenants have overruled sergeants' judgments regarding those adjustments. In fact, there is no relevant lieutenant on duty for several shifts each week.

Other sergeants have the authority to use their judgment regarding whether to call in officers and who to call in. The Traffic Control sergeant decides if they need to call in an officer for a crash investigation and who that will be. The sergeant makes these judgments by evaluating the situation, mindful of facts such as the apparent complexity of the crash and the experience of

the officers on the scene. Criminal Investigation sergeants may direct a detective to stay over to support the execution of a search warrant. The Youth Services sergeant assigns officers to cover schools outside their regular assignment when a relevant officer is absent. The Problem-Oriented Policing sergeant decides which problems to devote Department resources to, and assigns officers to work those problems. The Downtown Enforcement sergeant assigns officers to serve as liaisons to transit, parks, businesses, and the youth program, also choosing which officers get which posting. The Hazardous Device sergeant decides which officers to call in to deal with a potential device if no one is on duty. The K-9 sergeant decides which events a dog and handler will attend and which officers will go to that particular event. A sergeant serving as a cadre leader decides what and when training will occur and assigns a team member to undertake such training.

These staffing adjustments often require employees to work overtime or change their schedules, both of which can be approved by sergeants. Sergeants throughout the Department are also responsible for authorizing or granting requests for overtime or schedule adjustments, and authorizing time off requests outside the normal vacation schedule.

We conclude that the sergeants assign work as that term is used under the PECBA.

Independent Judgment in the Interests of Management

We turn to whether the sergeants exercise independent judgment through their authority to assign. The record here establishes that daily workload assignments require the use of independent judgment by the sergeants, including an individualized assessment of the availability, experience, preferences, seniority, skills, specializations, and workload of each subordinate officer as well as independent judgment regarding the difficulty of the work required by each assignment.

The Union argues that the sergeants are micromanaged and that their decisions are regularly overturned by lieutenants and other command staff. Viewing the record as a whole, however, the record does not establish that the sergeants' superiors micromanage or regularly overturn sergeants' assignments of work.

Finally, this Board concludes that the sergeants hold the authority to assign in the interest of management. Sergeants directly oversee and are in charge of their subordinate officers, and it is in this role that they hold the authority to assign in the interest of the Department's functions. The sergeants are supervisory representatives of the Department regarding the officers, and not part of a peer-to-peer relationship.

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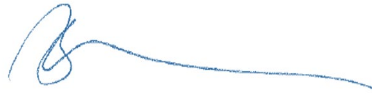
Having concluded that the sergeants have the authority to assign within the meaning of ORS 243.650(23), we hold that the sergeants are therefore "supervisory employees" under the PECBA and therefore the proposed Union bargaining unit is inappropriate. We will dismiss the petition.

PROPOSED ORDER

The Petition is dismissed.

SIGNED AND ISSUED 30 March 2021.



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 that objections are received by the Board; "the date of service" of a recommended order means the date that the Board sends or personally serves the recommended order on the parties.) If one party has filed timely objections, but the other party has not, the party that has not objected may file cross-objections within 7 days of the service of the objections. Upon good cause shown, the Board may extend the time for filing objections and cross-objections. Objections and cross-objections must be simultaneously served on all parties of record in the case and proof of such service must be filed with this Board. Objections and cross-objections may be filed by uploading a PDF of the filing through the agency's Case Management System (preferred), which may be accessed at https://apps.oregon.gov/erb/cms/auth. Objections and cross-objections may also be filed by email by attaching the filing as a PDF and sending it to ERB.Filings@Oregon.gov. Objections and cross-objections may also be mailed, faxed, or hand-delivered to the Board. Objections and cross-objections that fail to comply with these requirements shall be deemed invalid and disregarded by the Board in making a final determination in the case. (*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-048-20

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| OREGON MILITARY DEPARTMENT, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | RULINGS, |
| v. | ) | FINDINGS OF FACT, |
| | ) | CONCLUSIONS OF LAW, |
| IAFF, LOCAL 1660, | ) | AND ORDER |
| | ) | |
| Respondent. | ) | |
| | ) | |

Neil Taylor, Senior Assistant Attorney General, Department of Justice, Salem, Oregon, represented Complainant.

Julie Reading and Mike Tedesco, Attorneys at Law, Tedesco Law Group, Portland, Oregon, represented Respondent.

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On December 21, 2020, the Oregon Military Department (OMD), an executive branch agency of the State of Oregon, filed an unfair labor practice complaint against the International Association of Firefighters, Local 1660 (IAFF PANG or Union), the labor organization that represents the bargaining unit of firefighters located at the Portland Air National Guard Military Base (Portland Airbase). The complaint alleges that IAFF PANG violated ORS 243.672(2)(b) by submitting to interest arbitration a last best offer that includes a prohibited subject of bargaining. Initially, OMD did not request expedited consideration of this matter, however, on February 16, 2021, the parties jointly requested that this Board expedite the complaint under OAR 115-035-0060. The Board granted that request by letter ruling issued on February 19, 2021. The parties agreed to present the case on stipulated facts and exhibits, without a hearing. The parties submitted the stipulated facts, exhibits, and briefs on April 9, 2021, at which point, the record closed.

The issue in this case is whether IAFF PANG's retirement benefit proposal is a prohibited subject of bargaining, such that IAFF PANG violated ORS 243.672(2)(b) by including that proposal in its last best offer. Specifically, OMD contends that IAFF PANG's retirement benefit proposal is prohibited by the Oregon Pay Equity Act, because the proposal would create a compensation difference between firefighters employed by OMD at the Portland Air National Guard Military Base and firefighters employed by OMD at a different location, Kingsley Field Air Force Base. For the reasons discussed below, we conclude that IAFF PANG's retirement benefit proposal is not a prohibited subject of bargaining, and therefore, IAFF PANG did not violate section (2)(b).

## RULINGS

The parties initially agreed to set April 2, 2021, as the due date for stipulations, exhibits, and briefs. On April 1, 2021, the Board issued a letter ruling granting OMD's unopposed request for an extension of the due date to April 5, 2021. On April 5, 2021, OMD requested a second extension of the due date to April 9, 2021, however, the Union agreed to an extension only to April 7. The Board issued a letter ruling on April 5, 2021, finding sufficient good cause to extend the deadline to April 9, 2021. IAFF PANG did not pursue an objection to that ruling in its brief.

## FINDINGS OF FACT

1. The State of Oregon, Oregon Military Department, is a public employer under ORS 243.650(20). OMD employs firefighters at two airbases, the Portland Air National Guard Military Base, which is located in Portland, and the Kingsley Field Air Force Base (Kingsley Field), which is located in Klamath Falls.

2. IAFF PANG is a labor organization as defined in ORS 243.650(13) and is the exclusive representative of a bargaining unit of firefighters who are employed by OMD and work at the Portland Airbase.

3. A different labor organization, the Klamath Falls Firefighters Association, Local 3340 (IAFF KFFA), is the exclusive representative of a different bargaining unit of firefighters who are employed by OMD and work at Kingsley Field.

4. The IAFF PANG and IAFF KFFA bargaining units perform comparable work utilizing the same firefighter classifications. All represented bargaining unit employees are male. The record does not contain any other information regarding any employee's protected class status under the Oregon Pay Equity Act.[1]

5. The firefighters at the Portland Airbase and Kingsley Field assume regular fire suppression and prevention duties at their respective airbases, along with military aircraft crash rescue functions due to their attachment to military bases. The firefighters receive extensive

[1]The Oregon Pay Equity Act defines a protected class as "a group of persons distinguished by race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age." ORS 652.210(5).

training in military operations and procedures, military aircraft, and specialized equipment used in crash rescues.

6. OMD and IAFF PANG were parties to a collective bargaining agreement, the term of which was July 1, 2015 to June 30, 2019.

7. OMD and IAFF KFFA are parties to a different collective bargaining agreement, the term of which is July 31, 2019 to June 30, 2021. When OMD and IAFF KFFA were negotiating that agreement, they were anticipating the passage of Senate Bill 1049 (SB 1049) and subsequent legal challenges to it. Therefore, IAFF KFFA reached an agreement with OMD including a "ditto" or "me too" clause. Negotiated and signed in 2019, the "me too" provision states:

> "Section 2. The Parties agree that if the IAFF-PANG negotiated agreement includes additional provisions pertaining to Article 11 – Retirement, SB 1049 or other PERS related compensation, then such provisions shall be extended to the IAFF-KFFA unit with the same effective dates."

8. SB 1049 is a comprehensive piece of legislation intended by the Oregon Legislature to address the increasing cost of funding the Oregon Public Employee Retirement System (PERS) by providing relief to public employers for escalating PERS contribution rate increases. Beginning July 1, 2020, SB 1049 requires that PERS members earning more than $2,500 per month have a portion of their six-percent Individual Account Program (IAP) contributions redirected to a new Employee Pension Stability Account (EPSA) for each member. Funds from the EPSA are used to pay for part of the employee's pension benefits at retirement. Contributions to the ESPAs are required when the PERS system is less than 90-percent funded.

9. On or around January 18, 2019, OMD began negotiations with IAFF PANG to bargain the 2019–2023 successor agreement. The parties bargained in good faith for more than 150 days, as prescribed by the Public Employee Collective Bargaining Act (PECBA).

10. On February 11, 2020, IAFF PANG declared impasse. The parties had been unable to reach agreement on hours of work, retirement, and safety equipment and uniforms.

11. OMD and IAFF PANG selected an arbitrator in March 2020. The parties then engaged in mediation and informal discussions in June of 2020. The parties were ultimately able to come to an agreement on the remaining proposals except for IAFF PANG's proposal on retirement.

12. IAFF PANG's last best offer (LBO) retirement proposal would modify the existing CBA as follows:

> "Retirement Contributions.
> "**A**. ~~On behalf of employees, the State will continue to 'pick up' the six percent (6%) employee contribution payable pursuant to law. Effective February 1, 2019, compensation plan salary rates for PERS participating members shall be increased by six and nine five one hundredths percent (6.95%) to be paid in addition to the cost of living adjustment described in Article 10~~. ~~At that time~~, bargaining unit

employees will ~~begin to~~ make their own six percent (6%) contributions to their PERS account or the Individual Account Program as applicable. Employees' contributions shall be treated as 'pre tax' contributions pursuant to Internal Revenue Code Section 414(h)(2).

"**B. Pursuant to SB 1049 (2019), PERS will divert some of the six (6%) percent employee contributions referenced in paragraph A from the bargaining unit members' employee accounts in the PERS Individual Account Program (IAP). SB 1049 (2019) will divert 2.5 percent from the IAP account of PERS Tier 1 and Tier 2 members and 0.75 percent from the IAP account of OPSRP members.**

"**To maintain Tier 1, Tier 2, and OPSRP bargaining unit members' retirement security in their IAP accounts, pursuant to ORS 238A.340, the Employer will make a three (3%) employer contributions to the employer account in the IAP for each employee who is a PERS Tier 1, Tier 2, or OPSRP members on January 1, 2021.**

"**C. The Employer may deduct from an employee's salary 0.5% to help offset the cost of the 3% employer contribution referenced in paragraph B.**

***"Example: If 2.5% of the 6% employee contribution is being diverted from an employee's individual employee account in the IAP, then the Employer will contribute 3% as employer contributions to the IAP under ORS 238A.340 and may deduct 0.5% (3% minus 2.5%) from the employee's salary.***

"**D. If for any reason, including but not limited to legislative action, order of any court of competent jurisdiction or ballot measure (initiative or referral), the Employer contributions to the IAP pursuant to ORS 238A.340 are prohibited or the full six (6%) employee contribution to the employee account in the IAP is returned and/or reinstated, the parties agree to bargain the impact of those changes pursuant to the fast track process in ORS 243.698.**

"~~Contributions to Individual Account Programs. Effective February 1, 2019, compensation plan salary rates for PERS OPSRP participating members shall be increased by six and ninety five one hundredths percent (6.95%) At that time, bargaining unit employees will begin to make their own six percent (6%) contributions to their PERS account or the Individual Account Program as applicable. Employees' contributions shall be treated as 'pre tax' contributions pursuant to Internal Revenue Code Section 414(h)(2).~~" (Emphases in Original.)

13. The 2019-2021 CBA between OMD and IAFF KFFA that covers the bargaining unit of firefighters who work at Kingsley Field does not include a retirement contribution provision like the one proposed by IAFF PANG.

14. In 2017, the Oregon legislature enacted the Oregon Pay Equity Act (also commonly referred to as the Oregon Equal Pay Act). In 2019, the legislature amended the pay equity law, including by adding a provision that expressly refers to collective bargaining agreements.

15. In early December 2020, the parties agreed to ask this Board to resolve the issue of whether IAFF PANG's LBO retirement proposal was a mandatory subject or prohibited because of Oregon's pay equity act.

## CONCLUSIONS OF LAW

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

2. IAFF PANG's retirement benefit proposal is not a prohibited subject of bargaining, and therefore, IAFF PANG did not violate ORS 243.672(2)(b) by including that proposal in its last best offer.

Under PECBA, 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. ORS 243.672(2)(b). Section (2)(b) mirrors ORS 243.672(1)(e), which makes it an unfair labor practice for a public employer to refuse to bargain in good faith with an exclusive representative of its employees. A party violates (1)(e) or (2)(b) if it insists on bargaining over a proposal that is a prohibited subject of bargaining, and it does so over the other party's objection. *International Association of Fire Fighters, Local 1159, v. City of Lake Oswego*, Case No. UP-015-18 at 14 (2018). A proposal is considered a prohibited subject of bargaining if it is "specifically contrary to statute or would require a party to act contrary to statute." *Clackamas County Employees' Association v. Clackamas County and Clackamas County Housing Authority*, Case No. UP-032-15 at 6, 26 PECBR 798, 803 (2016), *aff'd without opinion*, 288 Or App 167, 403 P3d 821 (2017), *rev den*, 362 Or 665, 415 P3d 578 (2018).

In this case, OMD contends that IAFF PANG violated section (2)(b) by insisting on bargaining over its retirement benefits proposal, which OMD contends is a prohibited subject of bargaining. IAFF PANG does not dispute that it insisted on bargaining over the proposal by including it in the last best offer that it submitted pursuant to the interest arbitration process set forth in ORS 243.746.[2] Nor does IAFF PANG contend that OMD failed to object to the retirement benefit proposal at issue. The parties dispute only whether the retirement benefit proposal is a prohibited subject of bargaining.[3]

OMD contends that IAFF PANG's retirement benefit proposal would create a compensation difference between firefighters who work at the Portland Airbase and firefighters who work at Kingsley Field, and that the compensation difference would violate Oregon's Pay Equity Act. The material facts underlying OMD's contention are undisputed. IAFF PANG's proposal would increase the amount that OMD contributes to the PERS Individual Account Program (IAP), in order to mitigate the impact of SB 1049, which redirects a portion of employees' IAP contributions to the Employee Pension Stability Account when the PERS system is less than

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[2]At the end of the collective bargaining process for strike-prohibited employee bargaining units, including the IAFF PANG bargaining unit, PECBA provides for disputes to be resolved through interest arbitration. ORS 243.742-243.762. Under PECBA's interest arbitration procedure, each party must "submit to the other party a written last best offer package on all unresolved mandatory subjects" before the interest arbitration hearing. ORS 243.746(3). Here, the parties stipulated that if the Board determines that the retirement proposal is not a prohibited subject of bargaining, then the parties will proceed to interest arbitration on IAFF PANG's retirement provision alone.

[3]There is also no dispute that the subject of IAFF PANG's retirement proposal is otherwise mandatory for bargaining.

90-percent funded. In essence, IAFF PANG's proposal would require OMD to increase the employer contributions to affected employees' IAP accounts, to make up for the reduction of funds in those accounts caused by SB 1049. The collective bargaining agreement between IAFF PANG and OMD covers only those OMD firefighters who work at the Portland Airbase. OMD firefighters who work at Kingsley Field, which is located in Klamath Falls, are in a separate bargaining unit that is represented by a different union, IAFF KFFA, and covered by a different collective bargaining agreement—an agreement between OMD and IAFF KFFA. The OMD-IAFF KFFA agreement does not include a provision equivalent to IAFF PANG's retirement proposal. Consequently, if IAFF PANG's retirement proposal is incorporated into the OMD-IAFF PANG agreement, it potentially could cause OMD to compensate firefighters who work at the Portland Airbase more than it compensates firefighters who work at Kingsley Field.[4] The firefighters at both locations are in the same classifications and perform work of comparable character. OMD does not allege that the potential compensation difference between the Portland Airbase and Kingsley Field firefighters would be based on a protected class, and there is no evidence to that effect.[5]

OMD does not specifically identify which provision of the Pay Equity Act that it would violate if it provided the proposed retirement benefit to the Portland Airbase firefighters but not the Kingsley Field firefighters. Rather, OMD broadly argues that compensating the Portland Airbase firefighters differently "compared to a different firefighting bargaining unit in the same classification performing work of comparable character as defined by the Pay Equity Act, stationed at Kingsley Field," would "violate[] the strict pay equity requirements under the Act." As noted above, OMD does not allege, and the evidence does not show, that the potential compensation difference would be based on a protected class. Rather, OMD interprets the Pay Equity Act as broadly prohibiting any compensation difference between employees performing work of comparable character, regardless of whether the difference is based on a protected class. OMD also asserts that the compensation difference would not be based on any of the "bona fide factors" expressly authorized by the Pay Equity Act, ORS 652.220(2). IAFF PANG contends that its proposal would not cause OMD to violate the Pay Equity Act because 1) it would not create a compensation difference that is based on a protected class, and 2) any compensation difference caused by its retirement proposal would be based on the bona fide factor, "workplace locations." ORS 652.220(2)(a)(D).

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[4]IAFF PANG contends that its retirement benefits proposal would not result in any compensation difference between the Portland Airbase and Kingsley Field firefighters, because the IAFF KFFA collective bargaining agreement includes a "me too" provision that requires OMD to extend any retirement benefit provision in the IAFF PANG agreement to the IAFF KFFA bargaining unit. OMD disputes IAFF PANG's interpretation of the "me too" provision in the IAFF KFFA agreement; specifically, OMD contends that the "me too" provision would not apply if the retirement provision is added to the IAFF PANG agreement through interest arbitration. Because we conclude that IAFF PANG's proposal would not cause a compensation difference that violates the Pay Equity Act, we need not resolve this contract interpretation dispute (which involves IAFF KFFA, which is not a party to this case).

[5]OMD does not allege, and there is no evidence, that IAFF PANG's retirement benefit proposal is based on a protected class. Nor is there any allegation or evidence that OMD employs more employees from protected classes in one bargaining unit than the other.

For the reasons explained below, we conclude that the potential compensation difference between the Portland Airbase firefighters and the Kingsley Field firefighters would be based on the bona fide factor, "workplace locations." Consequently, we need not decide whether that compensation difference would violate the Pay Equity Act even though it is not based on a protected class, and we decline to do so.

In order to resolve the parties' dispute, we must interpret and apply the Pay Equity Act. When this Board interprets and applies statutes, our goal is to determine and give effect to the legislature's intent. ORS 174.020. In doing so, we apply the analysis supplied by *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). Our goal in interpreting a statute is to determine what meaning the legislature intended in drafting the statute. *Comcast Corp. v. Dep't of Revenue*, 356 Or 282, 295-297, 337 P3d 768 (2014) (citing *PGE*, 317 Or at 610). Because the words chosen by the legislature are the best evidence of its intent, we first review the text and context of the statute in question. *Gaines*, 346 Or at 171-172. 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*.

As noted above, IAFF PANG contends that the potential compensation difference would be based on workplace location, and therefore, would fall within the express exception provided for in ORS 652.220(2)(a)(D). We begin by examining the text of that provision in context. ORS 652.220 provides, in relevant part:

> "(1) It is an unlawful employment practice under ORS chapter 659A for an employer to:
>
> "(a) In any manner discriminate between employees on the basis of a protected class in the payment of wages or other compensation for work of comparable character.
>
> "(b) Pay wages or other compensation to any employee at a rate greater than that at which the employer pays wages or other compensation to employees of a protected class for work of comparable character.
>
> "(c) Screen job applicants based on current or past compensation.
>
> "(d) Determine compensation for a position based on current or past compensation of a prospective employee. This paragraph is not intended to prevent an employer from considering the compensation of a current employee of the employer during a transfer, move or hire of the employee to a new position with the same employer.
>
> "(2) Notwithstanding subsection (1) of this section:
>
> "(a) An employer may pay employees for work of comparable character at different compensation levels if all of the difference in compensation levels is based on a bona fide factor that is related to the position in question and is based on:
>
> "(A) A seniority system;
>
> "(B) A merit system;
>
> "(C) A system that measures earnings by quantity or quality of production, including piece-rate work;
>
> "(D) Workplace locations;

"(E) Travel, if travel is necessary and regular for the employee;
"(F) Education;
"(G) Training;
"(H) Experience; or
"(I) Any combination of the factors described in this paragraph, if the combination of factors accounts for the entire compensation differential.

"(b) An employer may pay employees for work of comparable character at different compensation levels on the basis of one or more of the factors listed in paragraph (a) of this subsection that are contained in a collective bargaining agreement."

In this case, all of the potential difference in compensation (*i.e.*, the difference in retirement contributions) between the Portland Airbase firefighters and the Kingsley Field firefighters would be based on the firefighters' workplace locations. Specifically, the OMD firefighters are in different bargaining units, and covered by different collective bargaining agreements, solely based on their workplace locations. The Portland Airbase firefighters are in the IAFF PANG bargaining unit, and covered by the IAFF PANG agreement, because they are employed at the Portland Airbase location. The Kingsley Field firefighters are in the IAFF KFFA bargaining unit, and covered by the IAFF KFFA agreement, because they are employed at the Kingsley Field location. Under PECBA, IAFF PANG may bargain the terms and conditions of employment only for the firefighters who work at the Portland Airbase, and IAFF KFFA may bargain the terms and conditions of employment only for the firefighters who work at Kingsley Field. And, under PECBA, each bargaining unit is entitled to bargain for different terms and conditions of employment. Thus, IAFF PANG may negotiate compensation for the firefighters who are employed at the Portland Airbase that differs from the compensation negotiated by IAFF KFFA for the firefighters who are employed at Kingsley Field. Because the Portland Airbase and Kingsley Field firefighters are in different bargaining units *based on* their different workplace locations, any resulting difference in their bargained-for compensation is based on the difference in their workplace locations, which is a bona fide basis for a compensation difference under ORS 652.220(2)(a)(D).

OMD argues that the collective bargaining exemption provided for under ORS 652.220(2)(b) does not apply because the applicable bona fide factor (here, workplace location) is not "listed" and "identified" in the collective bargaining agreement. We disagree with the premise of OMD's argument. Because the OMD-IAFF PANG agreement applies only to the firefighters at the Portland Airbase, the disputed compensation provision is, in fact, a workplace-location-based factor that is "contained in" the parties' collective bargaining agreement. *See* ORS 652.220(2)(b). To the extent that OMD is arguing that IAFF PANG's proposal does not fall within the exception provided for under ORS 652.220(2)(b) because the proposal is actually based on SB 1049, and not on workplace location or any of the other factors enumerated in ORS 652.220(2)(a), we also disagree. Even assuming that SB 1049 motivated the proposed compensation increase, if OMD compensates the firefighters who work at the Portland Airbase differently from the firefighters who work at Kingsley Field only because IAFF PANG's proposal causes their location-based collective bargaining agreements to differ, "the *difference* in compensation levels" would be "based on workplace locations," as expressly authorized by ORS 652.220(2)(a)(D)

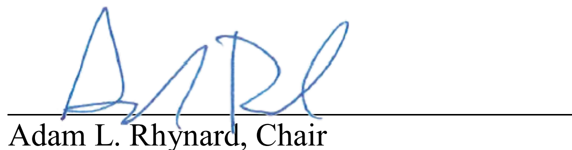
(emphasis added).[6] OMD does not identify any text, context, legislative history, or maxims of statutory construction that indicate that the legislature did not intend for ORS 652.220(2)(a)(D) to apply under the circumstances presented here, and we have found none.

In sum, OMD employs firefighters at two different workplace locations: Portland Airbase and Kingsley Field. Because the firefighters at each workplace location are in separate, location-based bargaining units, they may negotiate different employment terms in their respective, location-based collective bargaining agreements.[7] Even assuming that IAFF PANG's retirement benefit proposal would create a compensation difference between firefighters who work at Portland Airbase and firefighters who work at Kingsley Field, on the record in this case, the difference would be based solely on their workplace locations, which is a bona fide basis for a compensation difference under ORS 652.220(2)(a)(D).[8] Because IAFF PANG's retirement benefit proposal would not require OMD to act contrary to the Pay Equity Act, it is not a prohibited subject of bargaining. Therefore, IAFF PANG did not violate the duty to bargain under ORS 243.672(2)(b) by including its retirement benefit proposal in its LBO over OMD's objection. Accordingly, we will dismiss OMD's claim.

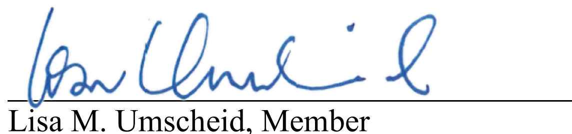
ORDER

The complaint is dismissed.

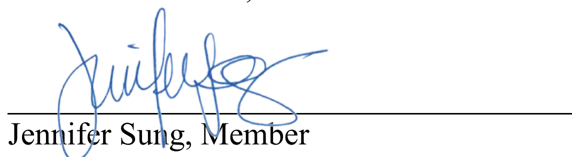
DATED: April 27, 2021.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

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[6]In other words, even if IAFF PANG's retirement benefit proposal is based on SB 1049, the *compensation difference* between the Portland Airbase and Kingsley Field firefighters would be based on workplace location.

[7]We also see no basis for concluding that the Oregon Pay Equity Act mandates a presumption that, when a labor organization and employer are negotiating location-based employment terms that would apply to some, but not all, of the employees who perform comparable work, the *higher or more advantageous* of those terms would be unlawful, as opposed to the *lower or less advantageous* of those terms.

[8]As noted above, OMD does not allege, and there is no evidence, that IAFF PANG's retirement benefit proposal is based on a protected class.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. DC-001-21

(DECERTIFICATION)

CERTAIN EMPLOYEES OF SILVERTON FIRE DISTRICT,

Petitioner,

v.

IAFF, LOCAL 1159,

Respondent.

ORDER DISMISSING PETITION AND REVOKING CERTIFICATION

On April 9, 2021, certain employees of Silverton Fire District (District) filed a petition under ORS 243.682(1)(b)(D) and OAR 115-025-0045 to decertify IAFF, Local 1159 (Association) as their exclusive representative. On April 12, 2021, 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 115-025-0045(2). After determining that the petition was sufficiently supported, the Election Coordinator caused a notice of the petition to be posted by April 21, 2021. *See* OAR 115-025-0060(1).

On April 26, 2021, the Association disclaimed interest in further representing the employees. When an exclusive representative disclaims interest in further representing employees in these circumstances, we do not proceed with a decertification election, but rather dismiss the petition and revoke the representative's certification. *See*, *e.g.*, *Coon and Employees of the City of Halfway v. Carpenters Industrial Council Local Union No. 1017*, Case No. DC-21-09 at 2-3, 23 PECBR 310, 311-12 (2009); *Clark and Employees of Curry General Hospital v. Oregon Nurses Association*, Case No. DC-57-07, 17 PECBR 491 (1998).

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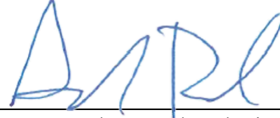
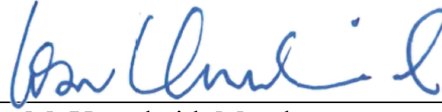
ORDER

The petition is dismissed, and the Association's certification as exclusive representative of District employees is revoked.

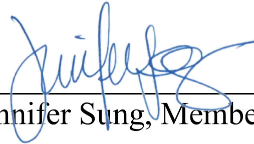
DATED: April 28, 2021.



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-005-20

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| AFSCME COUNCIL 75, LOCAL 2503,<br><br>Complainant,<br><br>v.<br><br>HOOD RIVER COUNTY (PUBLIC WORKS),<br><br>Respondent. | ) | RULING ON MOTION TO STAY |

In an order dated February 11, 2021, this Board concluded that Hood River County (Public Works) (County) violated ORS 243.672(1)(g) when it terminated CV without just cause in violation of the parties' collective bargaining agreement. This Board ordered the County to (1) cease and desist from violating ORS 243.672(1)(g); (2) rescind CV's termination and remove any mention of the termination from CV's personnel file and other employment records; and (3) make CV whole for losses that he suffered as a result of the improper termination.

On March 2, 2021, the County filed a petition for judicial review. On April 26, 2021, the County filed a motion and supporting affidavit to stay the order pending appeal. On May 10, 2021, AFSCME Council 75, Local 2503, filed an opposition to the motion to stay. For the following reasons, we deny the County's motion.

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, the County argues that paying the make-whole remedy to CV constitutes an irreparable injury.[1] In addition, the County contends that two pending legal proceedings related to CV further support its claim that the make-whole remedy constitutes an irreparable injury given the unusual facts in this case. First, the County points to a pending appeal of the dismissal of criminal charges against CV. The County terminated CV when he was indicted for allegedly stealing funds from County parks. Hood River County Circuit Court eventually dismissed those charges with prejudice, and the State of Oregon has appealed that dismissal. The County contends that it will be irreparably injured if it is required to pay CV the make-whole remedy because, if the court of appeals reverses the dismissal of the criminal charges, a guilty verdict or settlement may ultimately result. If that were to occur, the County posits that it would not be able to obtain restitution of the make-whole amount because "CV most likely would have spent it all before a Court of Appeals decision would have ordered a criminal trial." Second, the County relies on a civil action it has filed against CV seeking repayment of the funds allegedly stolen by CV. The County argues that if the Board's order is not stayed pending appeal, the County will lose the opportunity to attach the make-whole funds, and that loss is an irreparable injury.

We first consider the County's core argument that it will suffer irreparable injury because it will probably not be able to recover the estimated $218,000 in back pay, benefits, and contributions to the Public Employees Retirement System if the appeal results in a reversal of this Board's order. We have consistently rejected this argument in prior cases, holding that paying "make-whole" relief pending an appeal does not constitute irreparable injury within the meaning of ORS 183.482(3)(a)(A). *See, e.g.*, *State Teachers Education Association/OEA/NEA and Andrews, et al. v. Willamette Education Service District and State of Oregon, Department of*

[1]The County complied with the order to rescind CV's termination. The County reinstated CV, effective February 22, 2021, and he resigned, effective February 23, 2021.

*Education*, Case No. UP-14-99 at 3, 19 PECBR 339, 341 (2001) (Ruling on Motion to Stay Order); *Oregon AFSCME Council 75, Local 1329 v. Crook County Road Department*, Case No. UP-045-10 at 3, 25 PECBR 435, 437 (2013) (Ruling on Motion to Stay). We explained our reasoning for this conclusion is an unpublished, but often cited, ruling in *Payne v. Department of Commerce, Building Codes Division*, Case No. 1294 (1982) (unpublished ruling). There, we stated:

> "We are not convinced that the payment of back wages under the circumstances of this case constitutes an 'irreparable injury.' If Respondents ultimately prevail in this case it may or may not be necessary to expend time and money in an effort to recover the back pay. Balanced against the possibility that Appellant would be wrongfully deprived of a significant amount of back pay during a lengthy appeal process, we do not view Respondent's speculation about possible difficulties in recovering the funds to be a sufficient showing of irreparable injury."

That reasoning applies equally here. The County's affidavit in support of its motion does not demonstrate any facts indicating that the County would be unable to receive reasonable or complete redress in a court of law if it prevails on appeal. Its contention that it will probably be unable to collect the funds is purely speculative. *See Bergerson*, 185 Or App at 665 (no irreparable injury where the "record does not show that it is probable that the district would be unable to enforce a judgment for restitution" of payments made to the terminated employee). Moreover, the mere fact that the County would be without use of the make-whole funds during the pendency of the appeal is also insufficient to demonstrate irreparable harm. *See id.* (no irreparable injury where, even though employer would be "without the use of those funds during the pendency of review, there is no evidence that a judgment of restitution, together with prejudgment interest, would not adequately compensate the [employer] for that loss").

The County argues that our cases holding that a make-whole remedy does not constitute irreparable injury are distinguishable because, here, there are "unresolved charges of theft and secreting County funds." We are not persuaded. We understand the County to be arguing that it would be unfair to the taxpayers to require the County to pay a substantial back pay amount to an employee who engaged in wrongdoing. There is, however, no proof in this case of that alleged wrongdoing. At hearing, the County established *only* that it terminated CV because he was charged, indicted, and incarcerated for allegedly stealing funds from County-owned camping sites. The County stipulated that it did not conduct an investigation into whether CV actually stole any funds, and it offered no evidence that he did so. We see no reason why our well-established precedent should not apply here. If we stay the order and if the court of appeals affirms the order, CV will have been wrongfully deprived of a significant amount of back pay during the pendency of the appeal.[2]

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[2]The County also argues that the amount of the make-whole remedy, considered in the context of the amount of the allegedly missing funds (according to the County, "together potentially totaling more than a half million dollars"), constitutes an irreparable injury. We acknowledge that amount is substantial, particularly for a local government. The law is clear, however, that whether an injury is irreparable does not depend on the magnitude of the injury, but "upon the completeness of the remedy in law[,]" *Arlington Educ. Ass'n*, 184 Or App at 102, and there is no showing here that the County does not have a remedy in law.

We are also unpersuaded by the County's argument that other pending legal proceedings involving CV—which arise from the allegedly missing camping receipts—transform the make-whole remedy into an irreparable injury. The County first argues that it will sustain an irreparable injury because the State of Oregon has appealed the dismissal with prejudice of certain criminal charges against CV. In particular, the County argues that a guilty verdict or settlement "would undoubtedly trigger an attempt by the County" to recover funds from CV and, if the County is required to pay CV the make-whole amount pending appeal, CV will "most likely" have spent those funds, making them unavailable as a source of repayment to the County. The problem with the County's argument is that it is based on speculation. Whether the court of appeals will order a criminal trial and whether such a trial will result in a guilty verdict or settlement is speculative. It is also possible that the court of appeals will not reverse the dismissal of the criminal charges or, if it does, that those charges will not result in a trial, a guilty verdict, or a settlement. Mere speculation is insufficient to demonstrate irreparable injury. *Arlington Educ. Ass'n*, 184 Or App at 102 (motion to stay "must at least demonstrate that irreparable injury *probably* would result if a stay is denied") (emphasis added).

The County also argues that it will sustain irreparable injury because it has filed a pending civil action against CV to recover park funds that it believes (but has not yet established) were stolen from the County. The County asserts that it will suffer that irreparable injury because the County would lose the opportunity to "attach CV's 'stay put' amount as partial satisfaction of a future civil judgment against CV." This argument, like the argument about the pending appeal of the criminal charges, is based on speculation. Whether the County will obtain a civil judgment against CV is uncertain; it asserts only that it has filed a complaint in circuit court. Moreover, the County does not explain what provisional process will allow it to attach the funds that it contends CV owes, and it does not demonstrate that such process will *probably* result in the County's entitlement to retain the make-whole funds. Stated differently, the ostensible right to attach the make-whole funds is, on this record, speculative and inadequate to demonstrate irreparable injury.

Finally, the County points to *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 22 PECBR 292 (2008) (Ruling on Motion to Stay), and argues that the Board's decision there supports a stay in this case. In that case, the Board had concluded that Josephine County violated ORS 243.672(1)(a) and (b) when it contracted out mental health services. The Board ordered the county to cease and desist the unlawful contracting out, reinstate the contracted-out employees, and pay those employees back pay and benefits.[3] The county filed an appeal and sought a stay of the Board's order pending appeal. The Board granted a stay of the portions of the order that ordered the county to cease and desist contracting out and to reinstate the contracted-out employees. The Board explained that, when the county contracted out the services, it had eliminated the office space, equipment, computers, furniture, vehicles, and records used in those services. If the Board order were not stayed, the county would need to rebuild that infrastructure, but, if the court were ultimately to permit the county to contract out (reversing the Board's order), there was no entity that would be liable to reimburse the county for those expenses, leaving the county without an adequate remedy. In addition, if the county took back the services during the pendency of the appeal (if the stay were not granted), the contractor would probably violate the terms of its grants and third-party agreements and be unable to pay for its infrastructure,

[3]The Board also ordered the county to reimburse AFSCME for all lost dues and fair share payments, pay a civil penalty, and post a notice.

making it unable to accept the contract back from the county. "In other words, absent a stay, the County would probably be unable to contract out mental health services to [the contractor] even if the Court were to approve it." *Josephine County*, UP-26-06 at 4, 22 PECBR at 295.

There is no such irreparable injury in this case. In *Josephine County*, if the order were not stayed, the county would not have had any legal recourse to seek reimbursement for the cost of rebuilding its infrastructure if the court ultimately permitted the county to contract out the services. In addition, because of the legal and financial consequences of the contractor handing the services back to the county, the contractor would probably not have been able to perform the contract even if the court of appeals later permitted it to do so. Here, in contrast, the County expressly acknowledges that it has a legal remedy against CV; in fact, it has filed a civil action against CV to obtain that very remedy—recovering County funds it contends it is owed. There is no showing that the County could not also seek to recover the make-whole payment, if necessary. Further, there is no evidence in the record that CV, like the contractor in *Josephine County*, will be unable to satisfy any legal obligations to the County that may ultimately result from the pending legal actions. *Josephine County*, therefore, does not aid the County here.[4]

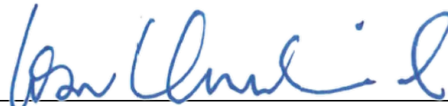
For the reasons explained above, we conclude that the County has not shown that it will sustain irreparable injury in the absence of a stay of our order. There, we deny the motion to stay.

ORDER

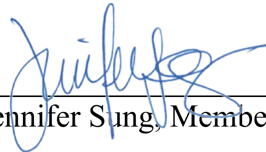
The County's motion to stay is denied.

DATED: May 24, 2021.

Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

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[4]As noted above, in *Josephine County*, the Board granted a stay of only a portion of the order. It did not grant a stay of that portion of the order that required a make-whole remedy for the contracted-out employees.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-022-20

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| ALEXANDER,<br><br>Complainant,<br><br>v.<br><br>AMALGAMATED TRANSIT UNION, DIVISION 757,<br><br>Respondent. | ) | RULINGS,<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND ORDER |

Bruce Hansen, an individual, Hillsboro, Oregon, represented the Complainant.

Whitney Stark, Attorney at Law, Albies & Stark, LLC, Portland, Oregon, represented the Respondent.

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On April 15, 2021, Administrative Law Judge Jennifer 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). Under this Board's rules, "[d]ocuments received after 5 p.m. shall be deemed filed with the Board the next business day." OAR 115-010-0033(1)(d). *See also* OAR 115-010-0010(10) ("'Date of Filing' means the date received by the Board. A document received after 5 p.m. is considered to be filed on the following business day."). This means that, in order to be timely filed, any objections needed to be received by this Board by 5 p.m. on April 29, 2021.

Complainant submitted written objections through this Board's electronic case management system (CMS) after 7 p.m. on April 29, 2021.[1] Because this Board received Complainant's objections after 5 p.m., those objections were deemed filed with the Board on April 30, 2021. OAR 115-010-0033(1)(d). Consequently, those objections were untimely. *See AFSCME Council 75, Local 2503, v. Hood River County (Public Works)*, Case No. UP-005-20 (2021) (objections filed after 5 p.m. on last date of 14-day objection period were untimely).

[1]The CMS record indicates that Complainant's objections were electronically filed at 7:59 p.m. on April 29, 2021.

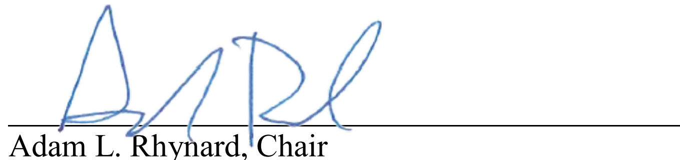
Complainant did not request an extension of time in advance of filing objections. Nor did Complainant file a motion requesting leave to file objections after the deadline had passed. Because Complainant's objections were untimely, they will not be considered by this Board. *Id.* Additionally, when a party files objections to a recommended order, they also must serve the objections on other parties and include a proof of service with the filing. OAR 115-010-0033(2). Here, Complainant did not file a proof of service with the objections, which is another reason that those objections cannot be considered by this Board.

Because Complainant's objections were untimely, and Respondent did not file objections, we treat this matter as if no objections were filed. *Id.* at 5. When no objections are filed, the Board adopts the attached recommended order as the final order in the matter. OAR 115-010-0090(4).

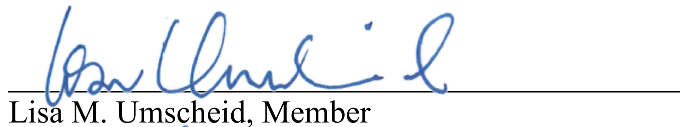
<u>ORDER</u>

The First Amended Complaint is dismissed.

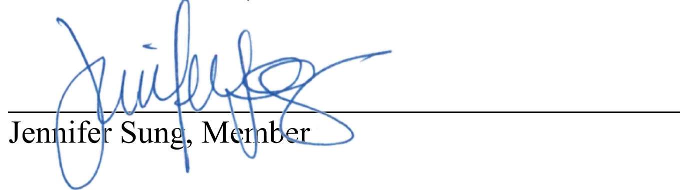
DATED: May 24, 2021.



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-022-20

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| ALEXANDER,<br><br>Complainant,<br><br>v.<br><br>AMALGAMATED TRANSIT UNION, DIVISION 757,<br><br>Respondent. | ) | RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER |

A hearing was held before Administrative Law Judge (ALJ) Jennifer Kaufman on November 24, 2020, by Zoom teleconference hosted in Salem, Oregon. The record closed on January 15, 2021, following submission of the parties' post-hearing briefs.

Bruce Hansen, an individual, Hillsboro, Oregon, represented the Complainant.

Whitney Stark, Attorney at Law, Albies & Stark, LLC, Portland, Oregon, represented the Respondent.

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On August 5, 2020, Khris Alexander (Complainant) filed an unfair labor practice complaint against the Respondent, Amalgamated Transit Union, Division 757 (ATU or Union). On September 30, 2020, Complainant filed a first amended complaint. The issues are (1) Did ATU breach its duty of fair representation to Complainant, in violation of ORS 243.672(2)(a), by removing Complainant from his Executive Board position; (2) did ATU require dues deduction authorization as a condition of membership, thereby failing or refusing to comply with ORS 243.806(4)(b), in violation of ORS 243.672(2)(c); (3) by granting Complainant's email request to revoke his dues deduction authorization, did ATU fail or refuse to comply with ORS 243.806(6), in violation of ORS 243.672(2)(c); and (4) should ATU be required to pay a civil penalty, pursuant

to ORS 243.676(4) and OAR 115-035-0075? For the reasons set forth below, we dismiss the claims against ATU.

## 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. Tri-County Metropolitan Transportation District of Oregon (TriMet) is a public employer within the meaning of ORS 243.650(20).

3. Complainant, an ATU member, works as a bus operator for TriMet. Complainant first became a member of ATU in around 2001.

4. Shirley Block is the president of ATU. Block has been the president of ATU for about six years.

Complainant's History with ATU

5. In June 2018, Complainant was elected to serve a three-year term as an Executive Board officer for ATU, representing employees who work at TriMet's Powell Transportation location. The general duties of Executive Board officers are to handle grievances and complaints, attend union meetings, communicate with members regarding union matters, and attend new member orientations.

6. In early 2020,[2] a disagreement arose between Complainant and President Block involving Complainant's seniority status in a road supervisor training program. Complainant believed that he should have bumping rights over two other members in the program based on his overall years of service with TriMet, although the other individuals had greater seniority within the training program. In April, Complainant requested ATU to file a grievance over the issue. ATU declined because Block had entered into a Memorandum of Agreement with TriMet that contradicted Complainant's position regarding the appropriate order of seniority in the program.

7. Because Complainant was unhappy with President Block's decision regarding his seniority status, he posted critical comments about ATU on Facebook. He also circulated a petition for ATU members to sign stating that they would opt out of their union membership if Block did not change his seniority status.

[2] All dates are in 2020 unless stated otherwise.

8. On the morning of May 18, Complainant's disagreement with President Block was discussed during an Executive Board meeting at which Complainant was present. Complainant asked the Executive Board to override Block's decision. A motion was made to suspend Complainant as an officer and conduct an investigation regarding the actions he had taken against ATU, but the motion did not pass. Another motion was made to conduct an investigation into Complainant's allegation that his seniority rights had been violated. The motion passed unanimously. A committee of three ATU representatives was selected to conduct the investigation.

9. After the Executive Board meeting, at 10:08 a.m. on May 18, Complainant sent an email to the Executive Board stating, "I Khris [A]lexander am resigning as Powell executive board officer as of May 31st, 2020. Per The Boards, Motion To Investigate Me Over My Actions Over A Petition." (Exh. R-5.) At 12:12 p.m., Complainant sent another email stating:

> "I Have Been Asked By A Few Atu757 Executive Board Officers During This Zoom Meeting Today To Pull Back My Resignation. I Was Asked To Let The Seniority Investigation Go Through And I Have Decided To Stay In My Executive Board Position For Now Pending The Outcome Of The Seniority Investigation. I'm Known For Rash Decisions When I Get Worked Up And This Was One Of Those.
>
> "I Have Asked My Friend To Pull Down The Petition And He Did As A Courtesy For Now Per My Request."

(Exh. R-5.)

10. At 2:23 p.m. on May 18, ATU Treasurer Mary Longoria responded, "Got it." Complainant remained in his position as an officer of the Executive Board.

11. ATU distributes a monthly newsletter, the "Labor Press," to all of its members. President Block authored a column in the June 5 issue of the Labor Press in which she spoke out against using "dues as a weapon." Block called such actions "deplorable" and stated that she would not be intimidated by such tactics. Block urged members to educate themselves and not to "let someone lead you down their own rabbit hole for their gain." Block further stated that ATU and its members are better than "stirring the pot on social media" and "threatening the livelihood of us all for the benefit of a few." (Exh. C-13 at 1.) The article did not mention Complainant by name, but he believed that Block's comments were directed at him.

12. On June 15, during an Executive Board meeting at which Complainant was present, the results of ATU's investigation into Complainant's seniority issue were presented. The investigation committee concluded that there was no basis for Complainant to file a grievance. A motion to accept the investigation committee's determination was passed.

<u>Opt-Out Request and Replacement on the Executive Board</u>

13. ATU Administrative Secretary Danielle Bower handles new member applications and members' requests to opt out of union membership and dues payments (opt-out requests). Bower maintains membership records in a software database known as "MUMS," in which she

documents status changes including retirements, changes of address, payment statuses, and opt-outs. Bower uses the MUMS database to generate a membership status report for Amalgamated Transit Workers International Union (the International Union) at the end of each month. Bower also prepares a monthly dues deduction authorization report that TriMet's payroll department relies on to process payroll deductions. Membership dues are withheld from the second pay period each month and applied as payment for the following month's membership dues. Bower must submit her dues deduction authorization report to TriMet no later than one week before the second payroll date of each month.

14. Administrative Secretary Bower's routine procedure for handling opt-out requests is to notify her contact at the TriMet payroll office to suspend further payroll deductions, code the employee as a "nonmember" in the MUMS database, and notify the Executive Board of the member's decision to opt out. Opt-out requests are generally made through a telephone call, personal visit, or letter. Before the events underlying the hearing in this matter, Bower could only recall receiving one opt-out request via email, which she received on December 12, 2019. Bower notified TriMet's payroll office to suspend that member's dues six minutes after she received that email.

15. At one time ATU had a disclaimer appearing at the bottom of its email correspondence stating that it did not accept emails as official communications, but that disclaimer no longer appears in ATU's emails. It is no longer ATU's practice to refuse acceptance of electronic documents. Particularly since the start of the COVID-19 pandemic, ATU regularly conducts business utilizing electronic forms of communication including email and Zoom.

16. On June 15 at 12:20 p.m., Complainant sent an email to Administrative Secretary Bower titled "opting out notice." The email states:

> "I Khris Alexander Wish To Stop Paying Union Dues Starting July 1st,2020.
>
> "I Do Not Give Up My Union Spot Until My Term Is Up In June 2020[3] Or Until The Members Vote Me Out Since The Bylaws And Constitution Doesn't Mention Or Reference Stopping Due's Paying While In Office Only If Running For Office.
>
> "I Do Not Authorize Any Due's To Be Taken Out After July 1, 2020."

(Exhs. C-2, R-8 at 2-3).

17. Upon receipt of Complainant's June 15 email, Bower immediately notified TriMet's payroll department of the change and coded Complainant as a nonmember in MUMS. At the time of Complainant's email, the next payroll deduction was scheduled to take place on June 22 and applied as payment for July membership dues. Bower believed that she was complying with Complainant's request to stop paying dues after July 1.

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[3]The reference to 2020 appears to be a typo. Complainant's term was scheduled to end in June 2021.

18. At 1:07 p.m. on June 15, Bower responded to Complainant's email, stating, "Done. Effective immediately." (Exhs. C-3 at 1, R-8 at 2.) Bower copied President Block and various ATU officers and staff on the email. Bower did not otherwise communicate with Block or the Executive Board before processing Complainant's opt-out request.

19. At 2:21 p.m. on June 15, President Block responded, "Well done Danielle. Now he will no longer be an officer." (Exhs. C-3 at 1, R-8 at 1.)

20. At 2:23 p.m. on June 15, Complainant responded, "Show me proof where it says that in our bylaws or constitution? Its doesn't it only says run for office at election time !" (Exhs. C-3 at 1, R-8 at 1.)

21. At 2:26 p.m. on June 15, Block responded, "Khris, you have the right to opt out. No one can force you to be in the union. Janus decision says public transit have that right. I want you to be happy with your decision." (Exhs. C-3 at 2, R-8 at 1.)

22. At 2:27 p.m. on June 15, ATU Labor Relations Coordinator Krista Cordova, an attorney, responded to the email thread, setting off an extensive email correspondence between Cordova and Complainant. Cordova stated that a member must have been a member in good standing for two years as a condition of holding office, and Complainant responded that by the time his term expired it would only be one year. Cordova responded that the bylaws and the constitution only apply to members, and stated, "If you aren't a member you don't get the benefits of being a member of the union. You get the benefits of being in the bargaining unit. If you are not a member you can't hold office." (Exhs. C-3 at 2-3, R-9 at 3.)

23. At 3:30 p.m. on June 15, Complainant responded that until he saw proof he would continue to perform his officer duties, and stated "I'm at least finishing out this month like stated the union is saying today but that's not my request." (Exhs. C-3 at 4, R-9 at 3.)

24. At 3:50 p.m. on June 15, Cordova replied that the bylaws don't apply to non-members. At 4:02 p.m., Complainant responded, "but yet you still haven't shown I cant hold my current spot until my term is up but at the least I'm finishing out this month per my email so you can do what you want after July 1,2020." Complainant went on to list the contractual benefits that he was still entitled to starting July 1, and stated:

> "The only things i lose are 'union-only' benefits/perks. Most common examples are:
>
> "Voting for union officers
>
> "Voting on the union contracts
>
> "Attending union meetings
>
> "Receiving the union newsletter

> "Discounts/deals on additional insurance, scholarships, etc. (if offered by the union.)"

(Exhs. C-3 at 5, R-9 at 2-3.)

25. At 4:06 p.m. on June 15, Cordova responded,

> "You are correct: you do not lose any benefits accorded to members of the collective bargaining unit as you are still a member of the collective bargaining unit.
>
> "You DO lose benefits that are only accorded to members of the union. You can't be the officer of something you are not a member of."

(Exhs. C-3 at 6, R-9 at 2.)

26. At 4:10 p.m. on June 15, Complainant responded, "whatever but I'm still an officer until July 1, 2020, like my email said so have fun with taking my duties before that I have a lot of support and backers that will fight that if the Shirley [Block] and Krista [Cordova] show try and take my position before that." (Exhs. C-3 at 6, R-9 at 1.)

27. At 4:14 p.m. on June 15, Cordova responded, "No one is making you give up your officer spot but you Khris." (Exhs. C-3 at 6, R-9 at 1.)

28. At 4:17 p.m. on June 15, Complainant responded, "yep on july 1, if that's what you say I cant hold office anymore (still cant reference any wording or where its posted) since that is the day i said I'm done after 19 years but the union said today which i will fight until July 1." (Exhs. C-3 at 6, R-9 at 1.)

29. At 4:22 p.m. on June 15, Cordova responded, "I'm only speaking to the bylaws/constitution. You and the top three/eboard need to figure out the rest." (Exh. C-3 at 7.)

30. Section 3 of ATU's bylaws states that Executive Board officers shall be "elected from and by the active members in good standing." (Exh. R-1 at 3.) Section 13 of ATU's bylaws states, "No member is eligible to hold office in the Division who has not been a member in good standing for at least two (2) years as of the date of the month in which the nomination meeting is held." (Exh. R-1 at 7.)

31. The next communication between the parties took place on June 22, when Complainant sent an email to Administrative Secretary Bower titled "Major mistake I made." Complainant's email to Bower states, "I made a rash decision last week being made at [S]hirley [Block] and i have had time to think about what i did in the moment." Complainant asked, "So what do i need to do to stay in do i need to sign up again and in the last week if anyone opted out let me know i will contact them and ask then to stand with me and stay in." Bower responded the next morning, stating, "You will need to contact one of the top three officers to proceed." (Exh. C-4 at 1.)

32. On June 23 at 8:46 a.m., Complainant sent a nearly identical email message to President Block, Vice President Jon Hunt, and Treasurer Longoria, which stated:

> "I made a rash decision last week being made at [S]hirley [Block] and i have had time to think about what i did in the moment.
>
> "So with that being said I want to retract my deicison to bail out on the union and give up on the members.
>
> "I admit I made a bad decision and regret it now looking back at it.
>
> "So what do i need to do to stay in do i need to sign up again?"

(Exh. C-4 at 2.) Complainant did not receive a response to his June 23 email.

33. In the July 3 issue of the Labor Press, President Block authored a column in which she addressed "a current situation with a TriMet Executive Board Officer" who was not named. Block stated that she had been accused of making "back door deals" that harmed the officer's seniority, that a committee of the officer's peers had conducted an investigation, and that the "Executive Board adopted the Committee Report and voted not to file a grievance on the matter." Block went on to state:

> "While I sympathize with the Officer and the other members whose seniority was in question, I take issue with the insinuation that I entered into any deal without the Union and its members' best interest at heart. I take much more issue with the Officer using that misinformation as a weapon to get people out of the Union."

(Exh. C-13 at 2.)

34. ATU interpreted Complainant's June 15 opt-out request as a resignation from his membership, effective July 1. ATU believed that the bylaws allowed for the appointment of an interim replacement to fill Complainant's position on the Executive Board because there was less than one year left in Complainant's term.

35. Section 12 of ATU's bylaws states, "when an office is vacated with more than one year remaining in the term, a nomination meeting will be announced and held on a date that will allow the counting of the ballots to be completed within 120 days from the time the office was vacated." (Exh. R-1 at 8.)

36. During the first week of July, President Block asked ATU member Mark Harris to take over the Executive Board position that had been held by Complainant, on an interim basis. Harris notified Block that he would accept the interim position on July 6.

37. Complainant's pay detail records reflect that he continued to conduct paid union business through July 8.

38. President Block was unaware that Complainant conducted union business after July 1.

39. On July 8, ATU's top Executive Board officers held a Zoom meeting with Complainant. The meeting was attended by President Block, Vice President Hunt, Treasurer Longoria, and Complainant. Complainant was told that he was in arrears on his union dues and that he had been replaced as an Executive Board officer. Complainant said that he thought the Union had tricked him and that he wanted to get back into the Union. Block asked Complainant to turn over his keys and his notes, and Complainant refused to do so. Complainant said that he would deliver a payment to ATU the next morning.

40. On July 9, Complainant delivered a membership application, a check for one month's dues, and a letter through the mail slot at ATU's office.[4] At 5:35 a.m., Complainant sent an email to President Block, Vice President Hunt, and Treasurer Longoria, among others, titled "June dues and application." The email states:

> "I just dropped off a check for my june dues and application to be in good standing since I was made aware I wasn't last night via zoom meeting.
>
> "My june 23rd email was ignored or I would of paid and did application back in june.
>
> "I'm staying in my spot until the members vote me put or I resign or unless my check and application is mailed back to me. its business as usual like it has been for last 2 years and me taking care of my members who are on the frontline during covid 19."

(Exh. C-5).

41. At 9:04 a.m. on July 9, Treasurer Longoria responded:

> "It was not us that said they were opting out of the union. We have a legal obligation to Not collect dues from a person that requests to opt out. Your June 23rd email was to late to change your opting out request. Processing dues deductions happen when [T]rimet processes them which is by the 15th of each month. Danielle [Bower] and I have to get the information to the employer as soon as we can so we are not out of compliance with the law. I am sorry that this has become such an issue but this is about the law not about an individual person."

(Exh. C-5 at 2.)

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[4]The original letter that Complainant delivered is not in the record. It is unclear who received the letter.

42. At 9:13 a.m. on July 9, Complainant responded:

> "A simple reply back then would have been great but it shows the union intentionally waited until yesterday to reply or info me and I acted on that.
>
> "So im still the rep unless you refuse to accept my check and application because telling me via zoom weeks after my emails isn't an official notice so you got what you wanted so I will keep business as usual since I'm squared up with the union to satisfy them and i cant wait for next months labor press article about me again. . . .the members love the professionalism at their expense in a monthly paper.
>
> "Cheers !"

(Exh. C-5 at 3.)

43. At some point on July 9, Labor Relations Coordinator Cordova telephoned Complainant after learning that he had delivered a membership application, a check, and a letter[5] to ATU's office. Complainant told Cordova that pursuant to the letter he had delivered with his application and check, if ATU cashed his check then ATU was acknowledging that he would continue to be an officer. Cordova told Complainant that he could not add terms to the membership contract, and that if ATU processed his membership application and dues payment it would only restore his member status; it would not restore his position on the Executive Board. Cordova asked whether Complainant still wanted the check deposited, and he said that he did.[6]

44. On July 10, Administrative Secretary Bower received a copy of Complainant's new membership application via email. Bower was also notified that Complainant had submitted a check for his July membership dues. Bower immediately notified the TriMet payroll department to reauthorize Complainant's dues deductions with the next payroll cycle, and changed Complainant's status to "member" in the MUMS database.

45. On the afternoon of July 10, Complainant and Labor Relations Coordinator Cordova engaged in a lengthy email exchange, on which Bower and Longoria were copied. Complainant asked for "proof with [his] signature" that he had authorized ATU to stop taking dues out of his paycheck effective June 15, and stated that he did not authorize his dues to stop at any time based on his June 23 email rescinding his June 15 request. Cordova responded that ATU had a legal obligation to comply with Complainant's request to suspend his dues, that ATU had to notify TriMet of any changes to dues deductions no later than June 18, and that Complainant's June 23 email was received after ATU had informed TriMet of the change. Complainant responded

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[5]As stated above, the original letter was not presented into evidence. Complainant attached what he purports to be a copy of the letter in subsequent email correspondence, discussed below.

[6]Complainant's recollection of this telephone conversation differs in that he recalled that Cordova called him to make sure that he had not given ATU a bad check. We credit Cordova's more detailed recollection of the conversation, which is corroborated by subsequent email correspondence between Complainant and Cordova.

that he intended for no dues to be taken out after July 1, that ATU had stopped them immediately, contrary to his request, and that if ATU had not ignored his June 23 email about rejoining then he could have paid his dues on June 24. Complainant also responded that his replacement as an officer violated ATU's constitution and bylaws, and contended that according to his letter, if ATU "cashes my check and accepts my union application they agree im current on dues and still the rep." Cordova responded that ATU had suspended Complainant's dues based on "its reasonable interpretation of your request and its desire to fulfill its legal obligations." Cordova also stated, "I made very clear to you on the phone that the union depositing your check would only result in reinstating your membership and not your position as an officer." Complainant denied that Cordova had told him he could no longer be an officer, and said that she had only called "to see if depositing the check was ok." Complainant stated that by processing his check and his application, ATU agreed to the terms of his letter, a copy of which he attached to the email.[7] (Exh. C-6 at 2-6.)

46. On July 12, Complainant sent a letter to the Executive Board appealing President Block's decision to replace him as an officer. Complainant contended that Block had violated ATU's bylaws and constitution, as well as the Labor-Management Reporting and Disclosure Act (a federal law). Complainant stated that if he was not allowed to perform his officer duties, he might seek a court injunction and file charges against Block and members of the Executive Board, and that "[t]his notice is to give you the opportunity to avoid such actions taking place." (Exh. C-9.)

47. On July 20, the Executive Board voted to uphold President Block's interim appointment of Harris to the Executive Board officer position. The Executive Board also voted to appeal to the International Union for a ruling on whether it was appropriate for ATU to replace Complainant on the Executive Board.

48. On July 26, Complainant appealed to the International Union regarding ATU's decision to replace him on the Executive Board.

49. On August 21, the International Union issued a decision finding insufficient grounds to overturn ATU's decision. The International Union concluded that Complainant had resigned from his union membership effective June 15, the date of his opt-out request, and that Complainant forfeited his Executive Board position that same day because only members of the Union may be officers. The International Union also concluded that ATU's actions did not amount to union discipline because Complainant had resigned from his position.

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[7]The letter states, among other things, "By Processing This Union Application Dated July 9,2020 And Cashing [this check] For Owed Union Dues To Be A Member In Good Standing Khris Alexander Will Continue To Be The Atu Local 757 Powell Executive Board Rep Unless The Check And Application Are Mailed Back To Me With A Written Statement Of Why The Application Was Denied And Check Not Cashed." (Exh. C-6 at 6.)

50. Section 11 of ATU's bylaws states:

> "Officers desiring to resign shall first submit their resignations to the Executive Board of the Division. If the Board finds that the reasons for resignation are justifiable, they shall recommend to the membership the acceptance of the resignation; but no resignation shall be accepted so long as all of their accountable responsibilities are not properly adjusted with the Division."

(Exh. R-1 at 8.)

ATU's Handling of Subsequent Membership Applications and Opt-Out Requests

51. On July 20 and 29, ATU Administrative Secretary Bower received two opt-out requests from members via email.[8] Bower instructed both members to submit their opt-out requests in writing. Bower began asking members to put their opt-out requests in writing because she had heard that Complainant had been complaining about the way his opt-out request had been handled, and that some members had concerns about Complainant's situation. Bower otherwise handled the opt-out requests consistent with her past practice, by changing their membership status in MUMS and promptly notifying the payroll office and the Executive Board of the change.

52. On July 21, TriMet employee and former ATU member Christopher Day sent a letter to ATU Treasurer Longoria, via fax and email, stating that he wanted to determine whether he had been "Blackballed" from ATU and that he wanted to reinstate his ATU membership. (Exh. C-15 at 1-2.)

53. On the morning of July 28, Day sent Treasurer Longoria a second email stating that it had been a week since he had contacted her about joining ATU and stating, "I wish to pay my dues and any other fees or fines directly (I do not want payroll deduction)." (Exh. C-15 at 4.) Day also stated, "I will give this one more week and then I will forward my concerns to NLRB [National Labor Relations Board] about the difficulty I am having to join ATU757." (Exh. C-15 at 4.)

54. At 11:58 a.m. on July 28, Administrative Secretary Bower emailed Day a membership application. Bower thanked Day for his interest in rejoining ATU and stated, "Once your signed application is received we will work with payroll to restart your deductions accordingly." (Exh. C-15 at 5.) The application form that Bower sent to Day includes a section for dues deduction authorization and does not reference any other method of payment.

55. At 12:48 p.m. on July 28, Day responded that he did not want dues deducted from his paychecks, and stated, "The current application only allows for paycheck payments and does not allow for any other option. Does ATU757 only accept members who accept payroll deduction?" (Exh. C-15 at 8.)

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[8]Bower estimated that she received about five to seven opt-out requests from members during this general timeframe. Neither party presented evidence regarding the other opt-out requests from that time period.

56. At 1:07 p.m. on July 28, ATU Treasurer Longoria, who was copied on the email chain, responded:

> "Section 21.3 of the Constitution and General Laws state that any eligible employee working within the jurisdiction of the ATU who desired to become a member of a Local Union must fill out the regular application. ATU 757's application process is not negotiable and has been approved by the ATU International Union.
>
> "Should you still wish to sign up with the union, please complete the application and return to our office by fax, email, or interoffice mail."

(Exh. C-15 at 9.)

57. At some point thereafter, Day contacted The Freedom Foundation to request assistance. The Freedom Foundation sent a letter to ATU Labor Relations Coordinator Cordova asking for clarification of ATU's position and how Day could become a member without payroll deduction authorization. In around late August, ATU responded to the inquiry from the Freedom Foundation with an application that did not require payroll deduction authorization.[9]

58. On October 3, Day submitted a completed copy of the new membership application to ATU with a confirmation number of an automatic payment that was made to ATU through his bank. Bower processed the payment and application and reinstated Day's membership status in MUMS. In November, Day paid his membership dues with a personal check. Both payments were processed by ATU.

59. As of the date of the hearing, Day had not received a union card[10] or a Labor Press newsletter. It is not unusual, however, for it to take a couple of months before new members begin receiving ATU publications because ATU has to provide its distributors with updated address lists. Bower estimated that Day would receive his first Labor Press newsletter by December 2020.

## CONCLUSIONS OF LAW

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

2. ATU did not violate ORS 243.672(2)(a) or ORS 243.672(2)(c) as alleged.

## DISCUSSION

### Duty of Fair Representation

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

[9]The correspondence between Day, The Freedom Foundation, and ATU are not in the record.

[10]No evidence was presented that ATU has a practice of giving union cards to its new members.

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. 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-02-09 at 24, 24 PECBR 1, 24 (2010). At the same time, "this Board has long held that 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 US 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." *Id.*

A union's action is arbitrary if it lacks a rational basis or is so perfunctory that a reasoned decision is not 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 union'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] union'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, Complainant contends that a breach of the duty of fair representation is demonstrated because (1) ATU did not follow its bylaws when it replaced Complainant on the Executive Board; (2) ATU treated Complainant's May 18 and June 15 resignation emails differently; and (3) ATU has applied inconsistent procedural requirements for opting out of the Union.

In support of his argument that ATU violated its bylaws, Complainant points out that although ATU concluded his resignation was effective July 1, the International Union concluded that his resignation was effective June 15. In Complainant's view this is an important distinction because, if the term to be filled was longer than one year, then an election was required. Whatever conclusion the International Union reached regarding the effective date of Complainant's resignation, the June 15 email exchange between Complainant and Cordova reflects that Complainant intended to be a member until July 1. Block also believed that Complainant became a non-member on July 1, and ATU's local leadership took no action to the contrary. By the time Block sought to fill the officer position with another member, there was less than one year left in the term. Consequently, Complainant has not established that ATU violated its bylaws when it appointed an interim replacement for his Executive Board position.

Although Complainant plainly contended, on June 15, that ATU's bylaws do not require membership as a condition of holding office, Complainant does not make that specific argument in his brief. To the extent that Complainant is still contending that he was entitled to maintain his

officer position as a non-member under ATU's bylaws, we disagree. ATU's bylaws address membership requirements that must be satisfied in order to *become* an officer, but they do not address the peculiar situation presented by the facts of this case, in which an officer requested to opt out of his union membership yet retain his position on the Executive Board. To the extent the bylaws discuss membership as a requirement of holding office, they do so only in the affirmative. Accordingly, ATU had a rational basis to conclude that Complainant was not entitled to hold office as a non-member. The bylaws offer no support for Complainant's position that he could remain on the Executive Board as a non-member.

In any event, even if ATU had violated its 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 [bylaws or] constitution." *Ordway v. SEIU Local 503 and State of Oregon, Department of Human Services and Home Care Commission*, Case No. FR-004-20 at 2 (2020) (internal citation omitted). Rather, the complainant must allege, and ultimately prove, additional facts that are sufficient to support a determination that (1) the union's failure to follow its constitution was arbitrary, discriminatory, or made in bad faith, and (2) the failure to follow its constitution harmed the complainant. *Id.*

Turning to the evidence in this case, Complainant did not prove that ATU's actions were arbitrary, discriminatory, or in bad faith. The record establishes that Complainant and ATU had some negative history, and the Executive Board even considered a motion to suspend Complainant. Furthermore, the email correspondence between Complainant, President Block, the Executive Board, and Cordova reflects that tensions were high and that ATU leadership had grown frustrated with Complainant. Indeed, President Block may have even welcomed Complainant's announcement that he was opting out of the Union. That Complainant's decision to opt out of his union membership was not necessarily unwelcome, however, does not establish that ATU's decision to process that request and replace him on the Executive Board was unlawful. On the contrary, for the reasons discussed below, we conclude that ATU's actions were reasonable.

First, we consider whether ATU acted arbitrarily, discriminatorily, or in bad faith when it processed Complainant's opt-out request. As of the date of Complainant's request, Bower had only received one previous opt-out request via email. Bower processed that previous request immediately, and processed Complainant's request in the same manner. Therefore, Complainant has not established that ATU deviated from its past practice in processing his opt-out request. Furthermore, ATU has a legitimate interest in promptly honoring members' opt-out requests in order to comply with its legal obligations.[11] Consequently, Complainant did not establish that ATU acted "for an improper reason" or took action that was "unrelated to legitimate union objectives" when it promptly processed his opt-out request. *Howard, Jr.*, UP-80/93-90 at 27, 13 PECBR at 354; *Block*, FR-001-15 at 4, 26 PECBR at 489. Furthermore, Complainant did not establish that ATU acted arbitrarily in processing his opt-out request. As stated above, Bower processed

[11]As discussed below, ORS 243.806 requires that dues are not withheld from public employees without their authorization.

Complainant's opt-out request in conformity with her past practice. Although Bower has since started asking members who submit their opt-out requests via email to put those requests in writing, that was not her practice as of June 15.

Next, we consider whether ATU breached its duty of fair representation by replacing Complainant on the Executive Board. As an initial matter, Complainant has provided no authority establishing that holding union office is a PECBA-protected right. Furthermore, by the time ATU replaced him on the Executive Board, in early July, Complainant was a non-member of ATU. Assuming, *arguendo*, that ATU had an obligation to treat Complainant fairly in connection with replacing him on the Executive Board, Complainant has not established that ATU breached that duty, for the following reasons.

By the end of the June 15 email exchange between Complainant and Cordova, Complainant understood it was ATU's position that opting out of his union membership would also mean the end of his role as an officer of ATU. Indeed, Complainant plainly stated, "at the least I'm finishing out this month per my email so you can do what you want after July 1,2020." This was not a situation where ATU improperly seized an opportunity to oust Complainant from the Executive Board against his will. On the contrary, Complainant confirmed his understanding of the situation by listing all of the benefits that he would be entitled to as a non-member after July 1. Furthermore, ATU has an interest in staffing its leadership positions with individuals who support ATU and want to be members of the organization. Therefore, Complainant did not establish that the ATU's actions in replacing him on the Executive Board were done for an "improper reason" or were "unrelated to legitimate union objectives."

Complainant also did not establish that ATU handled his resignation in an arbitrary manner. Although on May 18 Complainant was able to give notice of his resignation from his officer position and then retract that notice without incident, that situation is readily distinguishable from the facts underlying this case. On May 18, Complainant retracted his resignation merely hours after sending his email, before ATU had acted on his request. Moreover, on May 18, Complainant did not resign from his ATU membership. In early July, however, ATU had every reason to seek a replacement for Complainant, who was no longer a union member. Although Complainant did not receive a response from ATU leadership regarding his June 22 email seeking to renew his union membership, Complainant's membership was reinstated when he submitted a check and an application on July 8. We therefore do not conclude that ATU handled the June 15 resignation in a rash or perfunctory manner.

For the foregoing reasons, we conclude that Complainant has not established that ATU breached its duty of fair representation by processing his opt-out request and replacing him as a member of the Executive Board. We therefore dismiss the allegation that ATU violated ORS 243.672(2)(a).

Validity of Revocation of Dues Deduction Authorization

PECBA prescribes rules related to public employee dues deduction authorization agreements under ORS 243.806. ORS 243.806(6) states:

> "A public employee's authorization for a public employer to make a deduction under subsections (1) to (4) of this section shall remain in effect until the public employee revokes the authorization in the manner provided by the terms of the agreement. If the terms of the agreement do not specify the manner in which a public employee may revoke the authorized deduction, a public employee may revoke authorization for the deduction by delivering an original signed, written statement of revocation to the headquarters of the labor organization."

Pursuant to ORS 243.806(10)(a), "If a dispute arises between the public employee and the labor organization regarding the existence, validity or revocation of an authorization for the deductions and payment described under subsections (1) and (2) of this section, the dispute shall be resolved through an unfair labor practice proceeding under ORS 243.672."[12] Pursuant to ORS 243.806(10)(b), "A public employer that makes unauthorized deductions or a labor organization that receives payments in violation of the requirements of this section is liable to the public employee for actual damages in an amount not to exceed the amount of the unauthorized deductions."

In this case, there is no dispute that Complainant's original dues deduction authorization agreement did not specify the manner in which the agreement could be revoked. Complainant consequently alleges that in order for his June 15 email to be a valid revocation, it must be an "original signed, written statement" within the meaning of ORS 243.806(6), and that his email does not qualify as such. Respondent contends that ORS 243.806 is inapplicable to this dispute because it was not intended to limit the type of dues deduction revocations that public employers and unions are permitted to recognize. Respondent also argues that Complainant's email qualifies as an original signed, written statement. For the reasons discussed below, we agree with Respondent's position that Complainant's dispute with ATU does not fall within the scope of ORS 243.806.

When this Board interprets and applies statutes, our goal is to determine and give effect to the legislature's intent. ORS 174.020. In doing so, we apply the analysis supplied by *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). Our goal in interpreting a statute is to determine what meaning the legislature intended in drafting the statute. *Comcast Corp. v. Dep't of Revenue*, 356 Or 282, 295-97, 337 P3d 768 (2014) (citing *PGE*, 317 Or at 610). Because the words chosen by the legislature are the best evidence of its intent, we first review the text and context of the statute in question. *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*.

As indicated above, ORS 243.806(10)(b) establishes that as a remedy for unauthorized deductions, a public employer or a labor organization may be "liable to the public employee in an amount not to exceed the amount of the unauthorized deduction." Based on the text of the statute,

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[12]This Board has previously held that "[a] represented employee's right to seek relief against a union is limited to claims under ORS 243.672(2)(a)." *Teeter and Keepers v. Service Employees International Union, Local 503 and State of Oregon, Oregon Health Licensing Agency*, Case No. FR-04-09, 23 PECBR 831, 851 (2010). The enactment of ORS 243.806 appears to have modified that precedent.

which is the best evidence of legislative intent, the purpose of the statute is to safeguard public employees against unauthorized deductions. The statute does not provide a remedy for a situation in which an employee contends that their opt-out request should not have been honored. Therefore, the plain language of the statute shows that the intent of ORS 243.806 was to protect employees from having union dues withheld without their consent, not to prescribe limitations on employees' ability to opt-out of paying union dues.

The legislative history of ORS 243.806 also supports a conclusion that the intent of the statute was to prevent unauthorized dues deductions from public employees, not to restrict public employees' ability to opt out of paying dues. ORS 243.806 was enacted in 2019, in the wake of the Supreme Court's decision *Janus v. AFSCME*, 138 S Ct 2448 (2018), which held that it was unconstitutional to withhold union agency fees from nonconsenting public-sector employees. Staff measure summaries for House Bill (HB) 2016 reflect that the purpose of the bill's provisions related to dues deduction authorization agreements was to respond to the *Janus* decision and ensure that public employees did not have dues withheld from their paychecks without their consent.[13]

For the reasons stated above, we conclude that the text of ORS 243.806 and the legislative history both establish that the purpose of the statute is to ensure that union dues are not withheld from public employees without their consent. Yet Complainant would have us conclude that ATU was obligated to continue withholding dues from his paychecks, contrary to his request, or violate ORS 243.672(2)(c). We reject that result, which would not effectuate the purpose of the statute, and conclude that ATU did not run afoul of ORS 243.806 by honoring Complainant's request to terminate his dues deductions.[14] We therefore dismiss this allegation.

<u>Dues Deduction Authorization as a Condition of Union Membership</u>

ORS 243.806(4)(b) provides that a public employee's authorization for payroll dues deductions "is independent of the employee's membership status in the labor organization to which payment is remitted and irrespective of whether a collective bargaining agreement authorizes the deduction." Complainant contends that ATU required payroll dues deductions as a condition of membership, thereby violating ORS 243.672(2)(c).

Specifically, Complainant argues that the trouble Day encountered in becoming a member without authorizing payroll deductions establishes that ATU makes it extremely difficult for employees to do so. We are not persuaded, however, that the evidence of Day's difficulty is

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[13]*See* HB 2016 A, Staff Measure Summary, House Committee On Business and Labor ("From the *Janus v. AFSCME* ruling by the U.S. Supreme Court, public sector unions may no longer extract agency fees from non-consenting employees; employees must clearly and affirmatively consent before any money is taken from them.")
https://olis.oregonlegislature.gov/liz/2019R1/Downloads/MeasureAnalysisDocument/46055 (visited April 8, 2021).

[14]Given our conclusion that Complainant's dispute with ATU does not fall within the scope of ORS 243.806, we do not address Complainant's argument that his email did not qualify as an "original signed, written statement."

sufficient to establish that ATU has a practice of requiring dues deduction authorization as a condition of membership. At most, Day's experience establishes that there was some initial confusion or misinformation about allowing Day to renew his union membership without executing a dues deduction authorization agreement, which is not a common request received by ATU.

Although it may have been frustrating for Day to have to make multiple inquiries about renewing his membership without authorizing payroll deductions, he was ultimately able to do so. In October, Day made his initial dues payment with an electronic funds transfer from his bank account, and in November, Day made his second dues payment ~~to~~ with a personal check. There is no dispute that both of those payments were processed.[15] Furthermore, there is no evidence that any other individual has had difficulty becoming a member of ATU without authorizing payroll dues deductions. Consequently, we are not persuaded that this single instance of an employee having difficulty renewing his membership without authorizing payroll deductions establishes that ATU requires payroll dues deduction as a condition of membership.

Complainant also argues that because Bower has a practice of changing members' statuses to non-member in the MUMS database as soon as she receives their opt-out requests, ATU does not view payroll deduction authorization as independent of membership status. We disagree. As an initial matter, there is no evidence that any of the opt-out requests processed by Bower involved anything other than an intent to opt out of union membership (as opposed to a desire to utilize another method of payment). Furthermore, although Bower immediately changes members' statuses in the MUMS database for record-keeping purposes, no evidence was presented that any member who has opted out (including Complainant) has suffered any premature loss of union benefits as a result of their status change in MUMS.

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[15]Although Day had not yet received an issue of the Labor Press as of the November hearing date, that does not establish that his membership was not renewed. Bower credibly explained that it takes time to provide the distributor with updated member addresses, and that Day would likely receive his first newsletter in December.

In sum, we conclude that there is insufficient evidence to find that ATU requires payroll deduction authorization as a condition of membership. We therefore dismiss this allegation.

PROPOSED ORDER

The First Amended Complaint is dismissed.

SIGNED AND ISSUED on April 15, 2021.

Jennifer 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 that objections are received by the Board; "the date of service" of a recommended order means the date that the Board sends or personally serves the recommended order on the parties.) If one party has filed timely objections, but the other party has not, the party that has not objected may file cross-objections within 7 days of the service of the objections. Upon good cause shown, the Board may extend the time for filing objections and cross-objections. Objections and cross-objections must be simultaneously served on all parties of record in the case and proof of such service must be filed with this Board. Objections and cross-objections may be filed by uploading a PDF of the filing through the agency's Case Management System (preferred), which may be accessed at https://apps.oregon.gov/erb/cms/auth. Objections and cross-objections may also be filed by email by attaching the filing as a PDF and sending it to ERB.Filings@Oregon.gov. Objections and cross-objections may also be mailed, faxed, or hand-delivered to the Board. Objections and cross-objections that fail to comply with these requirements shall be deemed invalid and disregarded by the Board in making a final determination in the case. (*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-002-19

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| PORTLAND PUBLIC SCHOOLS,<br><br>Complainant,<br><br>v.<br><br>UNITED ASSOCIATION, PLUMBERS AND PIPEFITTERS LOCAL 290,<br><br>Respondent. | ) | FINDINGS AND ORDER FOR REPRESENTATION COSTS |

On March 24, 2021, this Board issued an order holding that United Association, Plumbers and Pipefitters Local 290 (Union) violated ORS 243.672(2)(a) as alleged by Portland Public Schools (District). The appeal period under ORS 183.482 has run without either party filing an appeal. Consequently, this Board now issues this order for representation costs. OAR 115-035-0055(2)(a). Pursuant to ORS 243.676(2)(d) and OAR 115-035-0055, this Board finds that:

1. The 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 was presented solely on stipulated facts, without an evidentiary hearing.

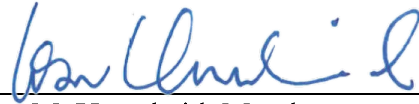
3. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). The representation costs award for a case presented solely on stipulated facts is $1,000. OAR 115-035-0055(1)(b)(B).

## ORDER

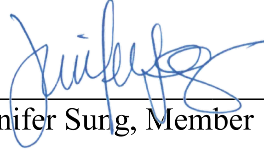
The Union shall remit $1,000 to the District within 30 days of the date of this Order.

DATED: May 26, 2021.

Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-001-21

(REPRESENTATION)

| | | |
|---|---|---|
| IBEW LOCAL 89, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | ORDER CERTIFYING |
| | ) | EXCLUSIVE REPRESENTATIVE |
| OREGON LEGISLATIVE ASSEMBLY, | ) | (ELECTION RESULTS) |
| | ) | |
| Respondent. | ) | |
| | ) | |

On January 13, 2021, Petitioner IBEW Local 89 filed a petition under ORS 243.682(2) and *current* OAR 115-025-0031(1)[1] to request an election for a bargaining unit comprised of the following classifications:

> "Legislative Assistant I, Legislative Assistant II, Legislative Assistant III, and Legislative Assistant IV supporting elected officials in the Oregon Legislative Assembly, excluding supervisory, managerial, confidential, and caucus employees."

On February 4, 2021, Respondent Oregon Legislative Assembly filed objections to the petition on multiple grounds. A hearing was conducted by Administrative Law Judge Jennifer Kaufman, and the matter was transferred to the Board. On April 6, 2021, the Board determined that Respondent's objections were not valid and issued an Interim Order Directing an Election. That interim order is incorporated into and appended to this final order.

On May 6, 2021, the Board's Election Coordinator sent ballots to eligible voters. One hundred and thirty-six valid ballots were returned by the deadline of May 27, 2021, which constitutes the date of the election.[2] OAR 115-025-0072(1)(b)(A). A tally of ballots was held on May 28, 2021. Before the tally, Respondent challenged 30 ballots on the basis that the employees

[1]Effective January 7, 2021, the Board's Division 25 rules were modified.

[2]Two ballots were deemed invalid and voided because they lacked the required signature on the ballot envelope.

who cast those ballots are supervisory employees under ORS 243.650(23)(a) or managerial employees under ORS 243.650(16), or both, and therefore were ineligible to vote. Pursuant to OAR 115-025-0073(2)(b), those ballots were impounded. The remaining 106 ballots were counted, with 75 ballots cast for IBEW Local 89 and 31 ballots cast for no representation. Because "the number of challenges will not affect the outcome of the election," the Respondent's challenges "will not be resolved," pursuant to OAR 115-025-0073(2)(c).

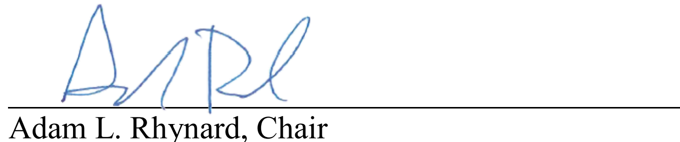
On the same date as the ballot tally (May 28, 2021), the Election Coordinator provided the parties with the tally of ballots. OAR 115-025-0073(1). Objections to the conduct of the election (or conduct affecting the results of the election) were due within ten days of furnishing the ballot tally to the parties (*i.e.*, by June 7, 2021). OAR 115-025-0075(1)(a). No objections were filed. Accordingly, it is certified that

IBEW LOCAL 89

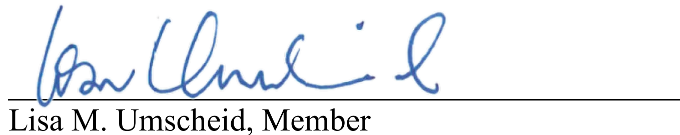
is the exclusive representative of a bargaining unit comprised of the following classifications:

> "Legislative Assistant I, Legislative Assistant II, Legislative Assistant III, and Legislative Assistant IV supporting elected officials in the Oregon Legislative Assembly, excluding supervisory, managerial, confidential, and caucus employees."

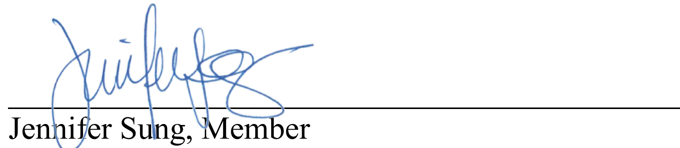
DATED: June 8, 2021.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-001-21

(REPRESENTATION)

| | | |
|---|---|---|
| IBEW LOCAL 89, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | RULINGS, |
| v. | ) | FINDINGS OF FACT, |
| | ) | CONCLUSIONS OF LAW, |
| OREGON LEGISLATIVE ASSEMBLY, | ) | AND INTERIM ORDER |
| | ) | DIRECTING AN ELECTION |
| Respondent. | ) | |
| | ) | |

Daniel Hutzenbiler, Attorney at Law, McKanna Bishop Joffe, LLP, Portland, Oregon represented Petitioner.

Tessa M. Sugahara, Attorney in Charge, and Jonathan Groux, Senior Assistant Attorney General, Oregon Department of Justice, represented Respondent.

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On January 13, 2021, Petitioner IBEW Local 89 (Petitioner or Union) filed a petition under ORS 243.682(2) and *current* OAR 115-025-0031(1)[3] to request an election for the following bargaining unit comprised of the following classifications:

> "Legislative Assistant I, Legislative Assistant II, Legislative Assistant III, and Legislative Assistant IV supporting elected officials in the Oregon Legislative Assembly, excluding supervisory, managerial, confidential, and caucus employees."

[3]Effective January 7, 2021, the Board's Division 25 rules were modified.

On February 4, 2021, Respondent Oregon Legislative Assembly (Branch or Respondent)[4] filed objections to the petition on multiple grounds. Because the petition sought to create a new bargaining unit of unrepresented employees, the matter was expedited under OAR 115-025-0065(1)(c) and assigned to Administrative Law Judge (ALJ) Jennifer Kaufman, who conducted a hearing on February 25, 2021. Pursuant to OAR 115-025-0065(7), the parties submitted post-hearing briefs on March 4, 2021. The matter was then transferred to the Board for the issuance of an order. *See* OAR 115-025-0065(2).

The issues are (1) whether the petitioned-for employees are excluded from the coverage of the Public Employee Collective Bargaining Act (PECBA); (2) whether the proposed bargaining unit is an appropriate bargaining unit; and (3) whether the petitioned-for employees are excluded on a classification-wide basis as confidential, managerial, or supervisory employees.

For the following reasons, we conclude that (1) PECBA does not exclude the petitioned-for employees from its coverage; (2) the proposed bargaining unit is an appropriate unit; and (3) the record does not establish that the petitioned-for employees are excluded on a classification-wide basis as confidential, managerial, or supervisory employees.[5] Therefore, we direct the Election Coordinator to conduct an election consistent with this order, to determine whether Petitioner should be certified as the exclusive representative of those employees.

## RULINGS

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

## FINDINGS OF FACT

### The Parties and Structure of the Legislative Branch

1. International Brotherhood of Electrical Workers, Local 89 is a labor organization within the meaning of ORS 243.650(13).

2. The Legislative Branch is a branch of the State of Oregon. The Legislative Branch is a public employer within the meaning of ORS 243.650(20).

3. The Oregon Constitution expressly divides the powers of the government of the State of Oregon into three separate branches. Article III, Section 1 provides:

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[4]In their submissions to this Board, the parties used the phrase "Legislative Assembly" and "Legislative Branch" interchangeably to refer to the employer. For readability, we use the term "Legislative Branch" or the word "Branch" to refer to the employer, and the term "Legislative Assembly" to refer to the assembly of 90 elected members.

[5]As explained further below, consistent with our rules, and in a manner consistent with this order, both parties may challenge, on an *individualized* basis, the eligibility of *specific* employees to vote, based on an individual employee being a confidential, managerial, or supervisory employee. *See* OAR 115-025-0073(2). Any challenged ballot will be impounded, and the Board will only resolve a challenge if such a resolution is necessary to certify the results of the election. *Id.*

> "The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided."

4. Article IV, Section 1 of the Oregon Constitution vests the legislative power of the state in a Legislative Assembly, which consists of a Senate and a House of Representatives. The Legislative Assembly consists of 90 elected members. The 90 elected members are comprised of 60 representatives, who serve two-year terms, and 30 senators, who serve four-year terms.

5. In addition to the 90 elected members of the Legislative Assembly, the Legislative Branch includes other offices, committees, and agencies. The Legislative Branch includes the parliamentary offices, which are the Office of the Secretary of the Senate and the Office of the Chief Clerk of the House.

6. In addition, the Legislative Branch includes the legislative agencies, which are Legislative Administration, the Legislative Counsel Office, the Legislative Fiscal Office, the Legislative Policy and Research Office, the Legislative Revenue Office, the Legislative Equity Office, and the Legislative Commission on Indian Services.

7. The Legislative Branch also includes committees referred to as statutory committees, joint interim committees, and joint interim task forces. One such statutory committee is the Legislative Administration Committee (LAC), which is established by ORS 173.710 and is a joint committee of the Legislative Assembly. The LAC consists of the Speaker of the House of Representatives, the President of the Senate, members of the House appointed by the Speaker, and members of the Senate appointed by the President. The committee is bipartisan. ORS 173.730 provides that no more than three House members of the committee shall be of the same political party and no more than three Senate members of the committee shall be of the same political party.

8. The LAC appoints a Legislative Administrator, who serves at the pleasure of the LAC and under its direction. *See* ORS 173.710. The Legislative Administrator is authorized by statute to perform administrative service functions for the Legislative Branch, including but not limited to accounting, data processing, personnel administration, printing, supply, space allocation, and property management. *See* ORS 173.720(1)(i).

9. The Legislative Administrator oversees the Legislative Administration agency, which is one of the agencies of the Legislative Branch. Legislative Administration oversees five functional areas: visitor services, information services, facility services, employee services, and financial services. Jessica Knieling is the Interim Human Resources Director and oversees Employee Services, one of the divisions of Legislative Administration. Knieling reports to the Legislative Administrator.

10. The Legislative Branch employs approximately 532 employees. The number of employees fluctuates because some employees are employed only for the duration of a legislative session. The employees employed by the Legislative Branch include the 180 petitioned-for

employees. The petitioned-for employees all work as what the Branch calls "personal staff" to one of the 90 elected members of the Legislative Assembly.

11. Each elected member is allocated an allowance provided in the Legislative Assembly budget to appoint personal staff. The Rules of the Senate for the 2021 session provide that a "member may appoint personal staff for a session or the interim or both, according to the allowance provided in the current Legislative Assembly budget." Senate Rules 15.05(1). Compensation and benefits for personal staff "shall be determined by Legislative Administration."[6] Similarly, the Rules of the Oregon House for the 2021 session provide that a "member may appoint personal staff for the session, the interim or both, according to the allowance provided[,]" and shall establish salaries payable to personal staff "in accordance with the policies and procedures as adopted by the Legislative Assembly." House Rules 15.10(1)(a) and (b).

The Legislative Branch Personnel Rules

12. Personnel administration in the Legislative Branch is governed by rules known as the Legislative Branch Personnel Rules (LBPRs). Under LBPR 1(6)(a), "[t]he authority for the personnel rules is derived from Article IV, section 11, of the Oregon Constitution, and, where otherwise not in conflict with the rules, ORS 173.005, 173.007, 240.200 and 240.245."

13. The LAC holds the authority to review, amend, and adopt the LBPRs. At the staff level, Employee Services, the Legislative Administration division overseen by Knieling, facilitates the preparation and review of new or amended LBPRs. Before the adoption, amendment, or repeal of any personnel rule by the LAC, the Legislative Administrator must provide a copy of the changes to all legislative agency heads, parliamentarians, and leadership chiefs of staff at least 30 days before the rule's effective date. The rules are subsequently considered and adopted by the LAC.[7]

14. When the LAC adopts the LBPRs, the adopted LBPRs apply only to the employees of the nonpartisan Legislative Administration agency (*i.e.*, employees in visitor services, information services, facility services, employee services, and financial services). The LBPRs apply to the remainder of the Legislative Branch only when they are subsequently adopted by a vote of both the House and the Senate.

15. Both the Senate and House have adopted the LBPRs for the current session of the Legislative Assembly. The Senate adopted Rules of the Senate for the Eighty-first Oregon Legislative Assembly (Senate Rules) on January 11, 2021. The Senate Rules govern numerous

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[6]The Senate Rules further provide that if a "member has a balance in the member's staff allowance account at adjournment *sine die* of the preceding regular session, the member may use the balance during the interim for personnel or for legislative newsletters or other informational material." Senate Rules 15.05(1)(b).

[7]In addition, the President of the Senate and the Speaker of the House of Representatives may establish an alternative procedure for considering modifications to the LBPRs, "except that no modification to a personnel rule may be made without notice and deliberation before committees of the Senate and the House or a joint committee of both houses." LBPR 1(3)(c).

aspects of the proceeding of the Senate, including convening, voting, motions, debate and decorum, committees, bill sponsorship, and other topics. The Senate Rules incorporate the LBPRs and other rules and policies as follows:

> "(1) The Legislative Branch Personnel Rules, as amended and in effect as of the last day of the Eightieth Legislative Assembly, are incorporated into the Senate Rules by this reference as rules of the proceeding of the Senate. The Respectful Workplace Policy, as adopted by the Joint Committee on Conduct on December 22, 2020, is incorporated into the Senate Rules by this reference as rules of proceeding of the Senate.
>
> "* * *
>
> "(3) The Legislative Branch Personnel Rules, the Respectful Workplace Policy, and the Legislative Branch Contracting Rules apply to the nonpartisan offices of the legislative branch when both the Senate and the House of Representatives adopt the personnel rules, Respectful Workplace Policy, and contracting rules as rules of proceeding[.]" Senate Rules 18.01.

16. The House adopted Rules of the Oregon House of Representatives for the Eighty-first Legislative Assembly (House Rules). As the Senate Rules do with regard to the Senate, the House Rules govern numerous aspects of the proceeding of the House, including convening, voting, motions, debate and decorum, committees, concurrence, conference, and other topics. The House Rules incorporate the LBPRs and other rules and policies as follows:

> "(1) The Legislative Branch Personnel Rules, as adopted by the House of Representatives on January 14, 2019, and August 10, 2020, and as adopted or revised by the Legislative Administration Committee on August 6, 2020, are incorporated into the House Rules by this reference as rules of proceeding of the House.
>
> "* * *
>
> "(3) The Legislative Branch Personnel Rules and Legislative Branch Contracting Rules apply to the nonpartisan offices of the legislative branch.
>
> "(4) The Respectful Workplace Policy as adopted by the Joint Committee on Conduct on December 22, 2020 is incorporated into the House Rules by this reference as a rule of proceeding of the House." House Rules 2.03.

17. The LBPRs provide:

> "The Legislative Branch Personnel Rules constitute rules of proceedings of the Legislative Assembly and may take precedence over conflicting provisions of state law to the extent that the rules expressly provide for such precedence. Section 4, *Mason's Manual of Legislative Procedure* (2010 ed.)." LBPR 1(5)(a).

18. The LBPRs are intended to serve as uniform procedures for the employment practices in effect throughout the Branch. The policy statement in the rules states:

> "It is the intent of the Legislative Assembly for the Legislative Branch Personnel Rules to encourage a high level of competence and professional capability by providing an orderly, efficient and equitable plan of personnel administration. In the development and application of these rules, continuing recognition must be given to the unique political and administrative requirements of the legislative process and the distinctive relationships among the various units of the Legislative Branch. The Legislative Branch Personnel Rules are intended to serve as uniform procedures that reflect current Legislative Branch employment practices." LBPR 1(2).

However, some rules in the LBPRs expressly provide that they do not apply to the personal staff of elected members, as further described below. LBPR 2(28) defines "personal staff" as "an employee working directly for a legislative member and paid from the member's services and supply budget."

19. The LBPRs provide that to "promote consistency in the interpretation of the personnel rules throughout the Legislative Branch, the appointing authority is encouraged to consult with Employee Services or with the Labor & Employment Section of the Department of Justice. Senate Rule 16.05 and House Rule 16.05 do not apply to requests for assistance made under this paragraph." LBPR 1(8).

20. The Legislative Administrator is responsible "for the administration of the Legislative Branch personnel system." LBPR 1(6)(c). At the direction of the Legislative Administrator, the Human Resources Director prepares, maintains, and administers the personnel rules, related policies, a classification system, a compensation plan, and recruitment and selection procedures. *See* LBPR 1(6)(d).[8]

21. Consistent with that rule, the Legislative Branch adopts and maintains a "branch-wide class specification plan" that groups branch positions "into broad, agency-wide classes whenever possible[,]" "reduces the total number of classes consistent with good management practices[,]" and ensures that classes of jobs are "discrete and internally consistent." LBPR 3(2). Under the rules, Employee Services allocates new positions to the appropriate class. As described in more detail below, until January 1, 2021, members' personal staff were classified in two classifications (a junior position of Legislative Assistant 2, and a senior position of Legislative Assistant 1).

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[8]For purposes of the State Personnel Relations Law (SPRL), officers and employees of the Legislative Branch are "exempt service" employees of the State of Oregon and generally are not subject to the SPRL or the rules and policies of the Oregon Department of Administrative Services or its Chief Human Resources Office. ORS 240.245; LBPR 1(4). However, ORS 240.245 provides that, for a position in the exempt service where the salary is not fixed by law, there shall be "a salary plan equitably applied to the exempt position and in reasonable conformity with the general salary structure of the state." ORS 240.245.

22. The Legislative Branch also maintains a compensation plan that applies to all employees of the branch. The purpose of the compensation plan is "to provide a uniform and equitable system for establishing and assigning salary levels and administering pay to recruit and retain a high-quality workforce." LBPR 4(1). For each class of work, a minimum and maximum pay rate, and intermediate rates as necessary, are established based on a market salary review that includes rates paid by other public and private employers for comparable work, Legislative Branch policies and financial conditions, unusual recruitment and retention circumstances, and other relevant salary and economic data. LBPR 4(2) authorizes the Senate President and the Speaker of the House of Representatives to review the compensation plan or any applicable market data and "amend, approve or deny any compensation plan changes," provided that they comply with LBPR 4 and applicable law.

23. No individual member of the Legislative Assembly has the authority to change any of the terms and conditions of employment for personal staff that are set under the LBPRs.

<u>The 2019-2020 Classification and Compensation Study and the New Legislative Assistant Classifications</u>

24. In summer 2019, the Branch undertook a branch-wide review of its classification structure and compensation plan, in part to ensure pay equity compliance.[9] The Branch contracted with Segal Waters Consulting (Segal) to conduct a classification, compensation, and pay equity study. The primary goals of the study were to ensure that position responsibilities were updated and well documented, job descriptions were updated to accurately reflect the work performed by employees, classification levels were clearly distinct, and compensation for jobs in the Legislative Branch was "market competitive."

25. Initially, Segal conducted a pilot project, called Phase I, in the Legislative Policy and Research Office in summer 2019. Thereafter, the study was expanded to Phase II. In Phase II, Segal analyzed all positions branch-wide, except elected and appointed officials.

26. As part of Phase II, Segal asked all Branch employees to complete a 28-page Job Description Questionnaire (JDQ) through an electronic, fillable form posted on the Branch's intranet. The questionnaire asked employees to describe their job and "actual current duties, even if they differ" from the job description, and estimate how much time they spend on those duties. Employees were also asked to answer questions on the following topics: 1) whether their job involves using discretion and independent judgment; 2) the minimum work experience and other qualifications required to do the job; 3) the type and complexity of management and supervision responsibilities; 4) the types of personal interaction with others outside direct reporting relationships (which the JDQ called "human collaboration"); 4) the freedom to act and the impact of actions taken in the job; 5) the knowledge and skill level required by the job; 6) the fiscal responsibility of the job; 7) working conditions and physical effort; and 8) the difference between the job and others in the job series.

[9]House Bill 2005, enacted in 2017, amended Oregon's equal pay law, with most changes effective on January 1, 2019. *See* Or Laws 2017, Ch 197, Section 2.

27. Employees were required to complete the JDQ by October 18, 2019. Each employee's supervisor could add comments to their own employees' JDQs. The electronic interface did not allow supervisors to change employee answers.

28. Employee Services compiled and sent Segal all completed JDQs in late October 2019. Segal analyzed the JDQs and aggregated similarities across the answers to create a recommended classification structure that accurately represents common job duties.

29. Based on the JDQs, Segal made a number of job analysis recommendations, including developing a job titling convention, recommending changes to some titles to better reflect the work performed, consolidating some job titles for jobs with similar duties and responsibilities, and updating job descriptions. Segal also conducted a job evaluation to establish internal job equity, and evaluated the following factors to assess consistency in jobs across the branch: education, experience, management/supervision, freedom to act, human collaboration, fiscal accountability, technical skills, and working conditions.

30. Segal also conducted a market evaluation, comparing jobs in the Legislative Branch to peer employers, and conducted a pay equity analysis.[10] Ultimately, Segal recommended a classification system and a pay structure for jobs across the Legislative Branch, including the Legislative Assistants who comprise the personal staff of elected members.

31. For personal staff who serve elected members, Segal recommended four new Legislative Assistant classifications—Legislative Assistant I, II, III, and IV. The Legislative Assistant I position is the junior-level position and the Legislative Assistant IV position is the senior-level position in the series. Segal also recommended a new compensation plan for the four positions.

32. According to the job descriptions, each of the four levels in the Legislative Assistant classification family is distinguished from the other levels as follows:

- Legislative Assistant I: This position is the first level in the Legislative Assistant job family. Its primary responsibility is general administrative support for the smooth and efficient day-to-day operations of the member's office.

- Legislative Assistant II: While the focus of this position is to provide day-to-day office support for the member, this position is distinguished from the Legislative Assistant I in that it is more involved in the research and analysis of issues in the review and development of legislation.

- Legislative Assistant III: This position is distinguished from the II level in that it conducts research, analysis, and advises the member on legislative strategy. The position exercises a wide range of independent discretion and independent actions when interacting with other

[10]Segal used the following peer employers: the legislative branch of California; the legislative branch of Washington; the State of Oregon executive branch; the counties of Multnomah, Marion, Lane, Clackamas, and Washington; and the cities of Beaverton, Eugene, Portland, and Salem. Segal made geographic adjustments "based on cost of labor in the market."

Legislative offices, members, and constituents. It is involved in the development of legislative strategies and advancement of the policy agenda and legislative goals of the office.

- Legislative Assistant IV: This position is the highest level in the Legislative Assistant job family. While many of the duties and responsibilities are similar to the level III position, it is distinguished from the III level in that it typically has responsibility for supervision of staff and interns. Like the Legislative Assistant III, the position supports the member in the research, analysis, and development of legislation, often involving highly complex issues. The position often represents the member in community events and legislative committees and interacts with little oversight with Legislative offices, members, the media, constituents, and the public in general.

33. The LAC adopted the classification structure recommended by Segal. The LAC also adopted a rule authorizing the presiding officers to approve the pay plan for the positions. The presiding officers approved the Segal-recommended compensation plan for the Legislative Assistants, effective January 1, 2021.

34. On December 2, 2020, Employee Services sent the elected members of the 2021 Legislative Assembly a memorandum asking each member to determine which duties the member would assign to personal staff in 2021 and inform Employee Services. Employee Services would then place the personal staff employees in the classification selected by the member, effective January 1, 2021. The memorandum stated, in part, "Enclosed are the Segal drafted descriptions for each of the four [Legislative Assistant] levels. These descriptions were developed from the dozens of JDQs submitted by [Legislative Assistants]. It is understood and expected that each office will have unique duties and expectations to serve the member and district. The structure developed captures the substantive differences in job evaluation factors."

35. In the December 2 memorandum, Employee Services responded to questions that had "been raised about the distinguishing features of the level 4." Employee Services explained:

> "There are two significant distinctions. The level 4 position is supervisory with authority to hire, discharge, assign and evaluate work and discipline or effectively recommend these actions to the appointing authority. This is distinguished from the lead work duties inherent in the level 3 of training/orienting new employees, assigning and reassigning tasks to other employees, giving direction to other employees concerning day-to-day work procedures, communicating established standards of performance to affected employees, reviewing the work of other employees to ensure conformance to established standards and providing informal assessment of employees' performance to the supervisor. Second, the level 4 regularly acts as a proxy for the member in matters of import. While all levels represent the member, the level four regularly makes independent decisions on behalf of the member on significant matters."

The Job Descriptions of the Legislative Assistant I through IV Positions

36. The job description of the Legislative Assistant I position states that the position provides "general administrative support to the Legislative Member's Office by coordinating schedules, managing correspondence, and serving as the point of contact regarding questions, and concerns[,]" and "[g]reets and responds to all visitors in the office." It describes the primary responsibility of the Legislative Assistant I as "general administrative support for the smooth and efficient day-to-day operations of the Member's office." With regard to "reporting relationships and team work," the description states that the Legislative Assistant I "[m]ay be assigned to various areas across the Assembly."

37. In addition, the job description for the Legislative Assistant I position states that the essential duties and responsibilities of the position include overseeing the day-to-day operations and functions of the Legislative Member's office; acting as the primary point of contact for the Legislative Member's office, including answering phone calls, greeting visitors, coordinating visits, assisting with requests, and responding to general inquiries; providing administrative support, such as answering phones and processing mail; maintaining the Legislative Member's calendar and scheduling appointments and arranging business travel; receiving and pricing invoices and reimbursement requests; coordinating special events; overseeing all aspects of the office, including oversight of the budget; and responding to constituent requests and questions.

38. To perform the Legislative Assistant I job, the employee must have knowledge of legislative processes and practices, existing legislation and its ramifications, historical context of policies, and current bills in process. In addition, the employee must possess skill in effective verbal and written communication, data management, researching policy issues, office management, and event organization. The employee must have the ability to pay close attention to detail, manage time effectively and stay organized, multitask and manage multiple projects simultaneously, remain calm and flexible under pressure, understand complex legislative issues, and provide excellent customer service and maintain a friendly, welcoming, and professional disposition. The minimum job requirements for the position are a bachelor's degree and one to three years of relevant experience, or an equivalent combination of education and experience.

39. The job description of the Legislative Assistant II position states that the position provides "general administrative support to the Legislative Member's Office by coordinating schedules, correspondence, events and responding to questions or requests for information[,]" and "[p]repares draft communications, speeches and legislation." It also states that the position conducts "research, policy analysis, and performs outreach and other Constituent Services[,]" and attends "Committee meetings and performs related duties as necessary." With regard to "reporting relationships and teamwork," the description states that the Legislative Assistant II may "be assigned to various areas across the Branch."

40. The job description for the Legislative Assistant II position states that the essential duties and responsibilities of the position, like the Legislative Assistant I position, include overseeing the day-to-day operations and functions of the Legislative Member's Office and acting as the primary point of contact for the Legislative Member's office and answering phone calls,

greeting visitors, coordinating visits, assisting with requests, and responding to general inquiries. In addition, the job description lists as essential duties and responsibilities developing messaging, writing floor speeches, composing letters, drafting responses to legislation, writing press releases, drafting bills, and evaluating policies; researching and writing policy analyses and analyzing proposed legislation; monitoring and tracking bills; and assisting in developing and implementing communication and outreach strategies and managing social media.

41. The knowledge, skills, and abilities listed in the job description for the Legislative Assistant II job are the same as those listed in the Legislative Assistant I job description. The minimum job requirements are higher—a bachelor's degree and three to five years of related experience or an equivalent combination of education and experience.

42. The job description for the Legislative Assistant III position states that the position "[s]upports day-to-day operations of the Legislative Member's Office in the areas of policy development, legislative strategy, and constituent services[,]" and conducts research and policy analysis. It also states that the position performs "outreach, provides constituent services and coordinates schedules and events[,]" prepares "draft communications, correspondence, speeches, and legislation[,]" and [a]ttends Committee meetings and performs related duties as necessary." With regard to "reporting relationships and teamwork," the description states that the Legislative Assistant III may "be assigned to various areas across the Assembly."

43. The essential duties and responsibilities listed for the Legislative Assistant III position include supporting the member in efforts to advance the policy agenda and legislative goals of the office and developing and implementing legislative strategies; providing counsel, guidance, and feedback on legislative and policy decisions; monitoring committee hearings and floor debates and reporting legislative action or developments; drafting letters, speeches, and testimony; researching bills, policies, current laws, and topics; working with legislative counsel to draft or amend legislation; attending and staffing work groups, task forces, meetings, tours, and other events on behalf of the office; scheduling and coordinating meetings, hearings, town halls, and other events and managing the schedule of the legislative member; contacting and arranging for speakers, presenters, and witnesses; arranging travel and lodging accommodations; managing external communications, including social media accounts, newsletters and press releases, and formulating and executing communication plans; interacting with the general public, constituents, lobbyists, business leaders, and other legislators, legislative staff, and interest groups to understand issues, draft legislation and help get legislation passed and signed into law; providing responsive constituent services, acting as a liaison to constituents, and helping to provide constituents with resources and solutions; managing the day-to-day activities of the office, including clerical tasks, record keeping, research and reports; acting as the primary contact for all visitors, and answering phones and emails.

44. The knowledge, skills, and abilities listed in the job description for the Legislative Assistant III job are the same as those listed in the Legislative Assistant I and Legislative Assistant II job descriptions. The minimum job requirements are the same as those for the Legislative Assistant II position—a bachelor's degree and three to five years of related experience or an equivalent combination of education and experience.

45. The job description for the Legislative Assistant IV position states that the position "[o]versees the day-to-day operations and administration of the Legislative Member's Office, including supervision of interns and office staff." In addition, the Legislative Assistant IV position assists "in the development of legislative strategies[,]" and conducts "extensive research and provides policy analysis and advice[,]" as well as prepares communications, correspondence, and speeches and attends committee meetings. Like the other Legislative Assistant positions in this series, the Legislative Assistant IV may "be assigned to various areas across the Branch."

46. The essential duties and responsibilities listed for the Legislative Assistant IV position include supporting the member in efforts to advance the policy agenda and legislative goals of the office, and developing and implementing legislative strategies; providing counsel, guidance, and feedback on legislative initiatives and policy decisions; monitoring committee hearings and floor debates and reporting legislative action or developments, and tracking bills; and drafting letters, speeches, talking points, and testimony; researching bills, policies, current laws and topics, and creating reports based on findings; working with legislative counsel to draft or amend legislation; attending and staffing work groups, task forces, meetings, tours, and other events on behalf of the office; scheduling and coordinating meetings, hearings, town halls, and other events and managing the schedule of the member; contacting and arranging for speakers, presenters, and witnesses; managing external communications, including social media accounts, newsletters, and press releases, and formulating and executing communication plans; interacting with the general public constituents, lobbyists, business leaders, and other legislators, legislative staff, and interest groups to understand issues, draft legislation and help get legislation passed and signed into law; providing responsive constituent services, acting as a liaison to constituents, and providing constituents with resources and solutions; managing the day-to-day activities of the office, including clerical tasks, record keeping, research, and reports, and maintain and supply all office equipment, manage the budget, and arrange travel and lodging accommodations; acting as the primary contact for all visitors, and answer phones and emails; building and sustaining relationships with elected officials, community leaders, lobbyists, and various other outside groups; and hiring, training, supervising, and mentoring other employees or interns, and delegating responsibilities and duties.

47. The knowledge and abilities listed in the job description for the Legislative Assistant IV job are the same as those listed in the job descriptions for the other jobs in the Legislative Assistant series. The required skills are also the same, with one additional skill listed: skill in management and supervision of staff, volunteers, and interns. The minimum job requirements are higher than those for the Legislative Assistant II and III positions. The Legislative Assistant IV position requires a bachelor's degree and five to seven years of related experience or an equivalent combination of education and experience.

48. Some personal staff use working titles rather than the classification assigned to their position. Common working titles for LA IVs include Legislative Director, Policy Director, and Chief of Staff. Employees or members may choose those working titles.

Roles and Responsibilities of the Legislative Assistants

49. There is no testimony in the record from any employees in the Legislative Assistant I classification. The record indicates that the employees in the Legislative Assistant I classification are primarily engaged in general office support work, such as answering phones and email. In addition, Legislative Assistant I employees coordinate or assist with scheduling events and meetings for the elected member they support. Essentially, employees in the Legislative Assistant I position act as a gateway to the member.

50. Employees in the Legislative Assistant II classification perform the same duties as Legislative Assistant I employees, and in addition perform some research and analysis for their member. Anne Marie Backstrom, Legislative Assistant II in Representative Ken Helm's office, testified that she does scheduling and manages Representative Helm's calendar. She also attends meetings on behalf of Representative Helm when he is unavailable, takes notes, and reports back to him.

51. Backstrom also answers constituents' emails and responds to their calls and voicemails. She and the other employee in the office, Legislative Assistant IV Greg Mintz, divide the constituent-related work between them. Backstrom testified that when she is responding to constituents' emails, she uses Representative Helm's email account to respond (so that the constituent receives an email from Representative Helm). Otherwise, in her other work, such as scheduling meetings, she uses her own email account.

52. Backstrom also assists with some policy-related work, such as working with Legislative Assistants in other offices to obtain testimony for bills their members are working on together.

53. Backstrom testified that the work in their office is assigned directly by Representative Helm, who holds weekly staff meetings. When there are deliverables resulting from her work, Backstrom reports those directly to Representative Helm.

54. Backstrom had a phone call with Greg Mintz before she was hired in which he went over her resume with her. She subsequently was interviewed by both Representative Helm and Mintz. Later she was told that Representative Helm made the decision to hire her, although Mintz provided input to the decision. When the operation of the office was explained to Backstrom, she was told that Representative Helm makes hiring, firing, and disciplinary decisions.

55. Backstrom and Mintz work closely together. Backstrom considers her relationship with Mintz to be a "coworker relationship."

56. At the time of hearing, an intern was working in the office 30 hours per week for academic credit. Backstrom does not assign work to the intern. Backstrom has passed on information or tasks that are within the intern's assignments, and she has observed Mintz do the same.

57. Michael Greenblatt is a Legislative Assistant II who works in Representative Zack Hudson's office. Greenblatt is the primary staff person who handles scheduling in that office. Greenblatt also responds to constituents. He also works on policy issues, and Greenblatt and Emerson Hamlin, a Legislative Assistant III and the Chief of Staff to Representative Hudson, divide the bills that Representative Hudson's office is following. Greenblatt and Hamlin each work on the strategy and tasks related to advancing their assigned bills, such as contacting other representatives or senators who would support the bills.

58. Hamlin, a Legislative Assistant III to Representative Hudson, testified at hearing. She described her duties as generally consisting of office management, policy work, and constituent support. In the area of office management, she creates a budget for the office, orders supplies, and ensures that the office has adequate supplies.

59. With regard to policy work, Hamlin conducts research, talks with stakeholders about issues of importance to them, tracks committees and bills, arranges meetings with stakeholders, and works on strategy to help advance Representative Hudson's bills. Hamlin described the role of Legislative Assistants as working to advance their member's policy positions. She cannot independently determine or implement those positions; she is always acting on behalf of her elected member.

60. In the area of constituent support, Hamlin brainstorms with the other employee in the office, Greenblatt, about responses to constituents, drafts responses, schedules meetings with constituents, and meets with constituents.

61. As personal staff to Representative Hudson, Hamlin occasionally meets with people when Representative Hudson is unable to do so, but generally, Representative Hudson prefers to meet with people himself.

62. Hamlin testified that she works independently and generally receives only higher-level direction from Representative Hudson. However, in her previous role as personal staff to Representative Mitch Greenlick, she received more detailed instructions, which she attributed to her newness to the role and his long tenure as a legislator.

63. Hamlin assigns work to one intern, a university student, who works in Representative Hudson's office for eight hours per week. Hamlin does not supervise Greenblatt, the Legislative Assistant II, nor does she assign him work. Hamlin and Greenblatt receive direction directly from Representative Hudson, and work collaboratively.

64. Nolan Plese, a Legislative Assistant IV to Representative Pamela Marsh, testified that his job duties include a little bit of scheduling, handling constituent-related work, doing policy work on bills, helping to write testimony, and helping to schedule events, such as town halls, in the district.

65. Plese testified that he responds to constituents on behalf of Representative Marsh. In doing so, he often uses Representative Marsh's email account and drafts responses over her signature. He also uses her email account for other correspondence on behalf of the office. He

sometimes signs his own name, both in correspondence to constituents and to others. He generally collaborates with Representative Marsh on managing her email account.

66. With regard to policy work on bills, Plese testified that Representative Marsh generates most of the policy ideas. Plese conducts research and analysis, such as researching Oregon law and researching the law in other states. When they are ready to work with Legislative Counsel, he shares the draft request with Representative Marsh before working with Legislative Counsel. After he submits the draft request to Legislative Counsel, if Legislative Counsel has questions, he takes those questions back to Representative Marsh so that he can respond appropriately to Legislative Counsel based on how Representative Marsh wishes to proceed. Plese described his role as carrying out the directions and desires of Representative Marsh. In other work, he testified that he does not substitute his own judgment for Representative Marsh's judgment, but there are times when he "instinctively knows" what position she would take based on their prior discussions, and if so he makes a judgment on her behalf. If not, he checks with her to get direction.

67. In his Job Description Questionnaire, Plese described his job as follows: "Supporting the Representative to achieve policy and legislative goals, remain connected with her constituents and community leaders, establish and build relationships with relevant stakeholders, all within the fast paced and high stress environment of legislative session, and while working remotely during the interim. The position ultimately must be responsive to requests of the member, whether they be complex policy research, or scheduling enough time to eat lunch."

68. Paige Prewett, a Legislative Assistant III, also works in Representative Marsh's office on a part-time basis. Plese was not involved in the hiring of Prewett. Plese does not manage Prewett, or assign work to her; she gets her work assignments directly from Representative Marsh. He has never been held accountable for any decisions or errors by Prewett, and does not believe he would be. On one occasion, at Representative Marsh's direction, Plese attempted to secure an increase in Prewett's hours, but he was informed by Employee Services that it needed to receive an email directly from Representative Marsh in order to do so.

69. When Representative Marsh's office seeks to hire, Plese is sometimes involved.[11] On those occasions, Representative Marsh and Plese both look at resumes and select applicants for interviews. Plese schedules the interviews and sits in the interviews with Representative Marsh. Plese may ask questions during the interview. Representative Marsh makes her own hiring decision, although she sometimes asks for Plese's opinion.

[11]When Plese testified about his involvement in the hiring process, he was not asked to limit his response to his involvement in the hiring of other employees (as opposed to interns), and he did not specify whether he was referring to the hiring of employees, interns, or both.

70. In addition to witness testimony from Hamlin, Backstrom, and Plese, the record includes 52 job description questionnaires related to the petitioned-for positions.[12] The JDQs for the petitioned-for employees in the record are distributed among the four classifications as follows:

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| Legislative Assistant I: | 3 JDQs |
| Legislative Assistant II: | 3 JDQs |
| Legislative Assistant III: | 16 JDQs |
| Legislative Assistant IV: | 30 JDQs |

71. The JDQ included a section on discretion and independent judgment in which the employee was asked, "Does your job involve using discretion and independent judgment?" The JDQ also asked the employee to describe at least two examples of their use of discretion and independent judgment on the job.[13] In 43 of the JDQs in the record, the responding employee indicated that they use discretion and independent judgment in their positions. As an example, James Williams, Legislative Assistant IV to Senator Brian Boquist, gave "[d]rafting legislative bill requests for constituents and preparing testimony" and "[r]ecommending bill drafts for introduction to the legislative process" as examples of decisions or actions he takes that require discretion and independent judgment.

72. As another example, Jason Hitzert, Legislative Assistant IV to Representative (now Senator) Chris Gorsek, gave the following as examples of his use of discretion and independent judgment. "I've advised a number of Representatives on how to provide testimony on a given subject as well as providing talking points for committees and for the floor of the House." In addition, he listed researching the prevalence of public health and natural hazards, and issues with training and equipping public safety officers by the Oregon Department of Public Safety Standards and Training. He also noted that he had worked with Representative Gorsek "to create strategies to work on issues over multiple sessions." In the supervisor comments section, Representative Gorsek wrote, in part, that Hitzert "has the ability to deconstruct perspectives in order to anticipate the direction I want to go on any number of different issue areas which allows me to depend on him to use his discretion."

[12]In addition, the record includes two JDQs for positions not in the proposed unit, and several JDQs that appear to have been completed by individuals no longer employed by the Legislative Branch. The JDQs in the record comprise 1,723 pages.

[13]The JDQ referred to nine examples of actions that "may" constitute discretion and independent judgment, including "[m]aking decisions that affect the overall policies of the department or organization[,]" "[a]bility to depart from standard or division/department protocols without prior approval[,]" "[p]roviding consultation or expert advice to Oregon State Legislature senior leadership[,]" and "[c]ommitting Oregon State Legislature in matters that have a significant financial impact[.]" The JDQ also provided seven examples of actions that do not constitute discretion and independent judgment, including "[a]pplying technical knowledge to follow procedures (or to decide which procedures to follow)[,]" "[t]abulating data, conducting research or collecting facts and information[,]" and "[m]aking decisions that do not commit Oregon State Legislature in matters that have significant financial impact[.]" The JDQ did not specifically ask whether the responding employee exercises independent judgment while exercising "supervisory" authority over other employees.

73. As another example, Robert Unger, Legislative Assistant IV to Representative Paul Holvey, gave as examples of his use of discretion and independent judgment "[t]hinking on behalf of" the member when "meeting with advocates" and staff of the Legislative Branch, and considering, when scheduling meetings or events for the member, "how does this look to the public? Is this a beneficial meeting?" Later in the JDQ, when describing the consequence of an error for an employee in his position, Unger described his work as follows: "Legally we are an extension of the representative. Any direction I give to Legal Counsel, committee staff, agency requests for information/participation etc is taken as if the member has given that direction (which many times I am relaying an order from them[,] but sometimes I need to take the initiative I know they would)."

74. As another example, Linda Heimdahl, a Legislative Assistant IV to Senator Kim Thatcher, gave "[a]bility to depart from standards or office protocols without prior approval[,]" and "[f]orming recommendations regarding changes to office policies or standards" as examples of her use of discretion and independent judgment.

75. The JDQ included a section entitled "Human Collaboration," which seeks to measure "the job requirements of personal interaction with others outside direct reporting relationships as well as the impact the job has on organization, departmental or unit objectives, the output of services, or employee or customer satisfaction." The JDQ asked the employee to choose one of five ranked levels of human collaboration: Level 1 ("work requires regular interaction involving exchange and receipt of information"); Level 2 ("Work may require providing advice to others outside direct reporting relationships on specific problems or general policies."); Level 3 ("Interactions may result in decisions regarding implementation of policies."); Level 4 ("Interactions and communications may result in recommendations regarding policy development and implementation"); and Level 5 ("Communications and discussions result in decisions regarding policy development and implementation.").

76. In 43 of the JDQs in the record, the responding employee chose either Level 4 or Level 5 for "human collaboration," indicating that they view themselves as making recommendations or decisions regarding policy development and implementation, as described in the JDQ question.

77. The JDQ also included a section entitled "Management and Supervision Responsibilities," which asks the employee to identify one of five ranked levels for "nature of supervision": Level 1 (no responsibility for the direction or supervision of others); Level 2 (occasional direction of helpers, assistants, seasonal employees, interns, or temporary employees); Level 3 (providing guidance and the potential to oversee another employee); Level 4 (supervising and monitoring performance for a regular group of employees (one or more full-time employees)); Level 5 (managing and monitoring work performance by directing multiple groups of employees across more than one business function within an organization unit); Level 6 (managing and monitoring work performance of an organizational unit).[14]

[14]The JDQ did not define any of the terms relevant to our analysis, such as the terms "supervise," "manage," "direct," "assign," or "employee." The JDQ was not intended to address the PECBA exclusions

(Continued ... )

78. In 33 of the JDQs in the record, the responding employee chose Level 4, 5, or 6 for their level of supervision responsibilities.[15] In the same section, the JDQ asked the responding individual to identify the number and type of positions over which they exercise managerial or supervisory responsibility, and then to identify those employees by job title and name. Although the JDQ used the term "employee," the JDQ did not define "employee" or direct the responding individual to limit their response to paid employees. In the section that asked for job titles and names, many of the responses include "interns" or "policy interns."

79. The record indicates that there is variation among the staffing composition and levels in the elected members' offices. There is evidence that some petitioned-for employees are in offices with more than one other paid employee (including full-time, part-time, seasonal, and temporary employees). For example, Renee Perry, Legislative Assistant IV to Representative Shelly Boshart Davis, indicated that she supervised two Legislative Assistant IIs and one intern. Devon Norden, Legislative Assistant IV to Representative Dacia Grayber, indicated that she supervised two Legislative Assistant IIs and four interns.

80. Other employees, however, identified only one other employee in their office. As examples, Evan Sorce, Legislative Assistant IV to Representative Paul Evans, indicated that he supervised only one employee—a Legislative Assistant II. Sarah Wallan, a Legislative Assistant IV to Representative Kim Wallan, indicated that she supervised only one Legislative Assistant II, as well as three interns. In other instances, the record is unclear whether an identified subordinate is a paid employee. For example, Greg Mintz, a Legislative Assistant IV to Representative Ken Helm, indicated that he supervised only one Legislative Assistant, but he also listed a worker identified as a "research fellow," as well as five interns.

81. Among the employees who selected Level 4 or higher when asked to indicate the nature of their supervisory responsibilities, some indicated that they have such responsibility over only interns. For example, Becca Byerley, Legislative Assistant IV to Representative Marshall Wilde, selected Level 4 for the nature of supervision, indicated that she supervises five "regular part-time employees," and identified those five individuals as two "policy interns" and three "interns." Similarly, Brandon Jordan, Legislative Assistant III to Representative Wilde, selected Level 4 for nature of supervision, and indicated that he supervises four "regular part-time employees," specifically, two "policy interns" and two "interns."

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(Continued ... )
for confidential, managerial, or supervisory employees, and did not incorporate the statutory definitions of PECBA, or otherwise direct the responding employees to conform their answers to those statutory definitions. The JDQ did not direct the employees to limit their responses regarding supervisory and managerial responsibilities to other paid employees, and many of the completed JDQs indicate that the employees considered "interns" when responding.

[15]Not all 33 individuals who indicated they have supervisory or managerial responsibilities are included in the list of petitioned-for employees.

82. Five of the employees who selected Level 4 or higher when asked to indicate the nature of their supervisory responsibilities also indicated in the "independent judgment" section of the JDQ that they do *not* exercise independent judgment when performing their jobs.[16]

83. When Plese completed his JDQ, he selected Level 4 for the nature of his supervision responsibilities. Plese indicated that he has such responsibility for one "part-time, seasonal, or temporary employee." In the related open comment section, he wrote, "During legislative session, provide training, hiring input, and supervision to additional staff member and occasionally interns." At hearing, Plese testified that he selected Level 4 after considering his responsibility with respect to both employees and interns. He explained that Representative Marsh directs the work of staff and interns, but some individuals, such as interns, require a little more direct supervision, in which case, he will "check in" to make sure they are "on task," and answer any questions they may have. He testified that he stated he has "hiring input" because he is involved in the process, but that he has no authority to hire. Plese has no access to confidential information regarding other employees.

Wages, Benefits, Hours, and Other Employment Conditions in the Legislative Branch

84. Employees of the Legislative Branch, including the Legislative Assistants, are employees of the State of Oregon. All Legislative Branch employees are paid through the Executive Branch Department of Administrative Services (DAS) payroll processing services, for which the Legislative Branch pays an assessment to DAS. Like all State of Oregon employees working for entities that use DAS payroll processing services, Legislative Branch employees can access and review their pay stubs on a DAS-managed web site.[17]

85. The ten-step pay plan for Legislative Assistants establishes the following pay ranges for personal staff, effective January 1, 2021. The Legislative Assistant I classification begins at $37,911 per year (Step 1) and tops out at $56,867 per year (Step 10). The Legislative Assistant II classification begins at $42,597 per year (Step 1) and tops out at $63,896 per year (Step 10). The Legislative Assistant III classification begins at $50,734 per year (Step 1) and tops out at $76,101 (Step 10). The Legislative Assistant IV classification begins at $60,425 per year (Step 1) and tops out at $90,637 (Step 10).

86. The LBPRs establish branch-wide standards for compensation and salary administration. Typically, an employee is hired for a six-month introductory period (which may be extended by the appointing authority). After completion of the introductory period, an employee

[16]Those employees are Andrea Dominguez, Rebecca Wright, Nolan Plese, Katherine Ryan, and Evan Sorce.

[17]The Legislative Branch remits payment to the State of Oregon Workers Compensation Division for each hour worked by its employees. The Workers Compensation Division administers the Workers Compensation Law that, with some exceptions, requires application of the law to all workers employed in Oregon. *See* ORS 656.023, 656.005(27), and 656.005(28). The Workers Compensation Division is part of the Department of Consumer and Business Services, part of the Executive Branch. The Workers Compensation Division regulates disputes over Workers' Compensation benefits for the employees of the Legislative Branch, including the petitioned-for employees.

normally receives a one-step salary increase if the increase does not exceed the maximum rate in the range. LBPR 4(6)(b). Employees typically receive an annual one-step merit increase on the employee's salary eligibility date when the employee's base rate of pay is less than the maximum rate for the employee's salary range. LBPR 4(7).

87. Like other State of Oregon employees, the Legislative Assistants, as well as other Legislative Branch employees, receive health insurance benefits through the Public Employees' Benefit Board (PEBB) and retirement benefits through the Public Employees Retirement System (PERS).

88. The Legislative Assistants also earn paid vacation and sick leave, as do the other employees in the Legislative Branch. Vacation and sick leave accruals are generally transferrable when employees move to other State of Oregon employers. The LBPRs provide that Legislative Branch employees may request to be paid for up to a maximum of 120 hours of vacation leave in lieu of time off once per fiscal year provided that the employee has a balance of 40 hours of accrued vacation leave remaining after the payout. The LBPRs specifically provide, however, that personal staff are not eligible to request vacation payout in lieu of time off. LBPR 14.

89. The LBPRs provide for 10 paid holidays, plus one day of holiday special leave when granted by the presiding officers. LBPR 18(1). However, holidays during a legislative session are handled differently under the LBPRs. Specifically, an appointing authority (including each individual member, with respect to that member's personal staff) may designate a holiday as a required working day when the holiday occurs during legislative sessions, legislative days, or the period required for preparation for those periods. LBPR 18(4) provides, "When the Legislative Assembly is in session or a legislative day occurs on a holiday, employees are expected to work if asked to do so by their appointing authority."

90. All employees of the Legislative Branch, including personal staff, are covered by LBPR 15, which governs family and medical leave. Employee Services administers family and medical leave for all employees of the branch. In addition, the LBPRs require Employee Services to "assist members of the Legislative Assembly" in "complying with the requirements of FMLA and OFLA," including procedures under which employees of "member offices may request and receive FMLA and OFLA leave." LBPR 15(11)(b).

91. All employees (except temporary employees) of the Legislative Branch, including personal staff, are covered by LBPR 17, which governs leave other than vacation, sick, and family medical leave. Under the rule, an appointing authority may grant paid administrative leave to an employee ineligible to receive overtime compensation. LBPR 17(2)(a). Employees receive 24 hours of personal business leave upon completion of six months of employment in the Legislative Branch. Employees also receive jury duty and witness leave, military leave to the extent required by law, bereavement leave, and leave to address domestic violence, harassment, sexual assault, or stalking. Each appointing authority also has the discretion to grant leave without pay.

92. Elected members may hire their personal staff through direct appointment. An open competitive recruitment or limited internal recruitment process is not required. LBPR 32(1)(b). Once the member has made a hiring decision, the member is required to provide the successful

applicant's application to Employee Services for record keeping purposes. Employee Services is not, however, otherwise involved in the elected members' hiring decisions.[18] Under LBPR 32, all employees, interns, and externs appointed as personal staff "serve at the pleasure of the member[,]" and apply for employment "in the manner prescribed by the member of the Legislative Assembly."[19]

93. Elected members may hire, supervise, and evaluate family or household members as personal staff, and some do so.[20] Knieling testified that the Branch does not document which employees are related to or reside in the same household as an elected member, but she believes approximately 12 of the Legislative Assistants are family members of elected members. Otherwise, LBPR 24 governs family and personal workplace relationships, and broadly speaking, permits the employment of qualified relatives of legislative employees only if the employment does not create a conflict of interest. Under LBPR 24, an employee may not initiate or participate in an employment action involving a relative, or supervise or evaluate a relative. However, LBPR 24 applies only to the legislative agencies and parliamentary offices. It does not apply to members of the Legislative Assembly, personal staff, leadership office staff, or caucus office staff.

94. Elected members, leadership offices, and caucus offices may consider political affiliation when hiring employees. LBPR 5(1)(c). For personal staff positions, commitment to advancing the elected member's policy and legislative agenda is considered an essential job requirement. Other than positions with elected members, leadership offices, and caucus offices, all employment decisions, programs, and practices within the Legislative Branch are conducted or administered without regard to political affiliation.

95. All Legislative Branch employees, including personal staff, may be terminated without cause at the discretion of the appointing authority or designee. Employment is at will, both during and after completion of an introductory period. The "appointing authority" is the person who has "authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge or discipline an employee." LBPR 2(3). Each elected member is the appointing authority for that member's own personal staff.

96. Personal staff of elected members report to their elected member or, as contemplated by the Legislative Assistant IV job description, potentially to a Legislative Assistant IV. There is no shared supervision of personal staff above the level of the elected member. Personal

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[18]LBPR 32 also provides that, after it receives an application, Employee Services notifies the Legislative Equity Officer of the start date of the new employee, intern, extern, or volunteer, and the Legislative Equity Officer provides training, and copies of harassment and respectful workplace policies.

[19]For open competitive and limited internal recruitments elsewhere in the Branch, Employee Services is responsible for determining which applicants meet the minimum qualifications for positions in Legislative Administration, and legislative agencies and parliamentary offices determine which applicants meet the minimum qualifications for positions in those agencies and offices.

[20]ORS 244.177(2) provides, "A member of the Legislative Assembly may appoint, employ, promote, discharge, fire or demote, or advocate for the appointment, employment, promotion, discharge, firing or demotion of, a relative or member of the household to or from a position on the personal legislative staff of the member of the Legislative Assembly."

staff are not accountable to any elected member other than the legislator on whose staff they serve. On occasion, an employee in one of the Legislative Assistant classifications will work for two members and divide their time between the members, but this is not common.

97. All Legislative Branch employees, including personal staff, are subject to the same LBPR concerning corrective action. LBPR 9 provides that an appointing authority may, but is not required, to take corrective action, which may include verbal or written warnings or reprimands, nonmonetary sanctions, or monetary sanctions (such as a salary reduction, a paid or unpaid suspension, or a written work plan). Any employee who receives corrective action may submit a written response to be included in that employee's personnel record. An elected member may discipline or terminate personal staff for partisan or political reasons.

98. The work hours of personal staff are, generally speaking, the business hours of the Legislative Assembly and other hours as assigned by the elected member. The LAs' hours are variable, depending in part on whether the Legislative Assembly is in session. Individual assembly members also have discretion to require LAs to work different hours. One senator noted in an employee's JDQ that, during session, work hours may range from 7:00 a.m. to 8:30 p.m. and work days may include Saturday and Sunday. One Legislative Assistant IV wrote in his JDQ that an essential knowledge, skill, or ability to perform his job is the "[a]bility and willingness to work irregular hours (on-call 24/7)." The working hours for personal staff may also be determined by the type and amount of constituent services or community outreach assigned or expected by the member. For example, Diane Linthicum, Legislative Assistant IV to Senator Dennis Linthicum, indicated in her JDQ that her job requires extensive time, travel, and hours away from home because of the 20,000 square miles included in the senator's district.

99. When the Legislative Assembly is in session, the personal staff typically work in offices in the capitol building.[21] The record also indicates that there is a group of legislators in the Portland metropolitan area who share office space, and Legislative Assistants, including Legislative Assistant IV Nolan Plese, work in that shared office space for some portion of time. The record does not indicate how many of the Legislative Assistants employees work remotely or work at times in a member's office in the district, and if so how frequently they do so.

100. Under the LBPRs, all employees of the Legislative Branch are eligible to work remotely pursuant to a mobile work agreement. Each appointing authority has the discretion to determine whether to permit an employee to perform mobile work through a mobile work agreement. As an example, Plese works remotely during the interim between sessions. An appointing authority may terminate a mobile work agreement at any time at the appointing authority's discretion. LBPR 26.

Interchange and Promotional Ladders

101. The Legislative Assistants regularly interact with other personal staff in other members' offices, including across the different political parties. For example, Hamlin testified that she frequently works with staff in other offices, including across political party. Backstrom

[21]The work location changed during the COVID-19 pandemic, when personal staff worked remotely.

also frequently interacts with Legislative Assistants in other members' offices to schedule events and meetings. Plese testified that he interacts with Legislative Assistants "almost daily," on policy, scheduling, or when there is a shared constituent issue that members are working together on. According to the testimony of all three Legislative Assistants who testified, Hamlin, Backstrom, and Plese, LAs recognize that they are employees of the State of Oregon. The LA position requires them to put their personal policy views aside and work with people with whom they disagree. The elected officials may oppose each other on legislative matters, but LAs do not personally oppose, or conflict with, each other as a result. LAs generally understand that they are all performing a common job. LAs generally are collegial with each other, and often assist each other, for example, by sharing information about how the legislative branch operates, or sharing ideas about how to operate the office or conduct constituent events.

102. Such interactions between Legislative Assistants are also reflected in the JDQ responses. For example, Alexa Jakusovsky, a Legislative Assistant IV to Representative Lisa Reynolds, wrote in her JDQ that she interacts "regularly" with legislative offices, as well as other members and constituents.

103. The petitioned-for employees also interact regularly with other Branch employees in legislative agencies and offices across the Branch. For example, multiple employees indicated in their JDQs that they worked with employees in the Legislative Counsel's office on bill drafting. Plese indicated that he had contact with Legislative Counsel daily during session and weekly during the interim. The petitioned-for employees also work with other Legislative Branch offices as well, including the Legislative Policy and Research Office (LPRO) and the Legislative Fiscal Office. For example, MacKenzie Carroll, a Legislative Assistant IV to Representative Andrea Salinas, indicated in her JDQ that she communicates "regularly with LPRO Committee staff." Jessica Snook, Legislative Assistant IV to Representative Jami Cate, wrote in her JDQ responses that she accompanies LPRO staff to the committee or House floor "to assist in testimony or carrying of a bill." Plese indicated that he works daily during the session and weekly during the interim with the LPRO, Legislative Revenue Office, and Legislative Fiscal Office.

104. The record does not indicate the specific employment histories for all the petitioned-for employees, such as whether they have transferred between members' offices, promoted in one member's office, transferred or promoted within the Legislative Branch, or worked in another branch of the State of Oregon. The record, however, does establish that LAs move between assembly member offices, as well as between different parts of the legislative branch or across branches of the State. The administration of such employee movement is fairly simple because the state uses a single personnel system, Workday.

105. The total number of LAs typically fluctuates from approximately 90, when the legislature is not in session, to 180, when the legislature is in session.

106. The record indicates that approximately 28 percent of the petitioned-for employees have a continuous service date of 2017 or earlier, indicating that they have a continuous employment relationship with the State of Oregon of at least three years. Approximately 25 percent have a continuous service date of 2018-2019, and approximately 33 percent were hired in 2020.

107. Some personal staff have worked for multiple elected members over time.[22] LAs who are hired on a temporary basis, *e.g.*, for only one legislative session, must search for other open positions if they would like a year-round position or would like to continue working for the Branch. They are more likely to find another LA position if they search for openings in other assembly members' offices, and some LAs have secured new positions by doing so. Hamlin testified that she previously worked for Representative Mitch Greenlick before moving to Representative Hudson's office. Hamlin has also observed other Legislative Assistants work in multiple elected members' offices. Plese previously worked for Senator Diane Rosenbaum, and before that for the senate majority caucus; he presently works for Representative Pam Marsh. It is not common for personal staff to move from an office in one political party to an office in the other political party.

108. The JDQs also indicate that at least some of the LAs have worked for multiple members over time. For example, Andrea Dominguez works as a Legislative Assistant IV in Representative Mark Owens's office; previously, she worked as personal staff to Cliff Bentz.[23] Alexa Jakusovsky previously served as personal staff for Representative Akasha Lawrence Spence; she now works for Representative Lisa Reynolds.

109. There is little information in the record regarding promotion from one level of LA to another, presumably because the LA I-IV classification system was implemented only recently. However, there is some evidence in the JDQs that LAs may be promoted from one level to another. For example, Devon Norden, Legislative Assistant IV to Representative Dacia Grayber, indicated on the JDQ that there are two other LAs in the office, but commented, "Typically one LA2 and couple of interns depending on the time of year. Current office make-up is a little different as I am transitioning out of this position and my LA2 will be taking my place."[24] Additionally, Knieling testified that LA promotions occur both within the same office and across offices.

110. To transfer or promote to a different LA position, *i.e.*, to move from an LA position in one office to an LA position in another office, an LA must apply for an open position in an assembly member's office and be selected by that assembly member. When LAs transfer from one elected member's office to another, or between different positions within the legislative branch, all aspects of their compensation and benefits, including leave accruals, remain the same.

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[22]The Branch does not track the movement of LAs from one office to another. However, Hamlin testified without rebuttal that it is common for LAs to move from one office to another, and the examples provided in the record tend to corroborate that testimony.

[23]Senator Bentz resigned from the Oregon State Senate in January 2020 to campaign for Oregon's Second Congressional District; he was elected to represent the Second Congressional District on November 3, 2020. See https://bentz.house.gov/about (visited March 31, 2021).

[24]At the time that the JDQs were completed, the prior classification system with only two LA levels was still in use.

The Petition

111. On December 8, 2020, the Union filed a representation petition with this Board pursuant to ORS 243.682(2) and former OAR 115-025-0000(4) seeking certification as the exclusive representative pursuant to the card check process. That petition was assigned Case No. RC-010-20. In Case No. RC-010-20, the Union sought to represent the following bargaining unit:

> "LA1's and LA2's supporting elected officials in the Oregon Legislative Assembly, and the following titles in the Senate and House Leadership offices: Constituent Services, Office Manager/Scheduler, Legislative Assistant, Outreach Director, Community Outreach Director, Legislative Aide, Office Manager, and District Director, excluding supervisory and confidential employees."

112. On December 29, 2020, the Respondent filed objections to the petition.

113. Also in December 2020, as described above, the Legislative Branch was preparing to implement a new classification structure and compensation plan for the employees who were then classified as Legislative Assistant 1s and 2s, as the culmination of the Segal compensation, classification, and pay equity analysis. In the new classification structure, effective January 1, 2021, the petitioned-for LA1s and LA2s in Case No. RC-010-20 were allocated to four new classifications, Legislative Assistant I, Legislative Assistant II, Legislative Assistant III, and Legislative Assistant IV.

114. In December 2020, the Legislative Branch hired additional employees who would also be placed in the new classifications to prepare for the 2021 legislative session, as it typically does in the months preceding a legislative session.

115. On January 13, 2021, the Union, relying on the fact that the Legislative Assembly had hired additional employees who "would be included in the proposed unit," filed a motion to amend the petition to change the bargaining unit description to the following description:

> "Legislative Assistant I's, Legislative Assistant II's, Legislative Assistant III's, and Legislative Assistant IV's supporting elected officials in the Oregon Legislative Assembly, excluding supervisory, managerial, confidential, and caucus employees."

116. Subsequently, on January 14, 2021, in accordance with OAR 115-025-0051, the Union withdrew the petition in Case No. RC-010-20.

117. In the meantime, on January 13, 2021, the Union filed a representation petition with this Board pursuant to ORS 243.682(1) seeking certification as the exclusive representative following an election. That petition, assigned Case No. RC-001-21, is the petition at issue in this case. The Union seeks to represent the following bargaining unit:

> "Legislative Assistant I's, Legislative Assistant II's, Legislative Assistant III's, and Legislative Assistant IV's supporting elected officials in the Oregon Legislative

Assembly, excluding supervisory, managerial, confidential, and caucus employees."

118. On February 4, 2021, the Respondent filed objections to the petition in Case No. RC-001-21.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over this matter.

Under 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. To exercise that right, an employee or a labor organization may obtain voluntary recognition from the employer, ORS 243.666(1), or may file a petition with this Board to obtain certification of a labor organization as the exclusive representative of a petitioned-for group of public employees. ORS 243.682 through ORS 243.686. This Board's jurisdiction over representation matters under PECBA extends only to "public employers" and "public employees."[25] Here, the Branch concedes that it is a public employer, but asserts that it is not a "public employer" within the meaning of PECBA. To determine whether the Branch is a "public employer" as defined under PECBA, we must turn to the statutory text.

Before doing so, it is not lost on this Board that it is the legislature that, through statute, defines the scope of this Board's authority. Certainly, if the legislature had included in PECBA a provision that excludes Branch employees from the definition of "public employees" or excludes itself from the definition of a "public employer," this Board would, without hesitation, recognize and adhere to such statutory language. As set forth below, however, those statutory exclusions are absent. Using the principles of statutory construction developed by the courts, we ultimately conclude, for the reasons set forth below, that PECBA includes the Branch as a public employer and includes the petitioned-for employees as "public employees."[26]

When this Board interprets and applies statutes, our goal is to determine and give effect to the legislature's intent. ORS 174.020. In doing so, we apply the analysis supplied by *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). Our goal in interpreting a statute is to determine what meaning the legislature intended in drafting the statute. *Comcast Corp. v. Dep't of Revenue*, 356 Or 282, 295-97, 337 P3d 768 (2014) (citing *PGE*, 317 Or at 610). Because the words chosen by the legislature are the best evidence of its intent, we first review the text and context of the statute in question. *Gaines*, 346 Or at 171-72. We then review any relevant legislative history. *Id.* If we are

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[25]The Board has jurisdiction under a separate statute for certain employers who do not meet the jurisdictional standards of the National Labor Relations Board under the National Labor Relations Act. *See* ORS 663.005(3)(i), (4)(f).

[26]We address the statutory exclusions of supervisory, managerial, and confidential employees later in this order.

still unable to determine the legislature's intent, we then apply maxims of statutory construction. *Id*.

Here, ORS 243.650(20) defines "public employer" as, among others, "the State of Oregon." Relatedly, ORS 243.650(19) defines "public employee" as "an employee of a public employer," and then expressly excludes "elected officials, persons appointed to serve on boards or commissions, incarcerated persons working under Article I, section 41, of the Oregon Constitution, or persons who are confidential employees, supervisory employees or managerial employees." The Legislative Branch, including the Legislative Assembly, is part of the State of Oregon. The Branch concedes that the petitioned-for employees are not expressly excluded from the definition of "public employee," even as that statute expressly excludes the assembly members (by excluding "elected officials"). Because we can only interpret PECBA, not amend it, we cannot insert an exclusion for Branch employees that the legislature omitted. Our role is "simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted." ORS 174.010.

We also note that the legislature has expressly excluded both Legislative Assembly officers and employees from the coverage of the State Personnel Relations Law (SPRL). ORS 240.200(4) (defining "exempt service" as including "officers and employees of the Legislative Assembly"); ORS 240.245 (providing that the exempt service is not subject to SPRL, except for a requirement that salary plans be "equitably applied" to exempt positions "in reasonable conformity with the general salary structure of the state"). With respect to PECBA, however, the legislature expressly excluded only "elected officials," not employees working directly under elected officials. The fact that the legislature expressly exempted employees from SPRL—but not PECBA—also weighs in favor of the conclusion that the legislature did not intend to exclude Branch employees from the coverage of PECBA.[27] Thus, based on the words that the legislature chose in enacting PECBA, which is the best evidence of legislative intent, we conclude that the Legislative Branch is a public employer and that the petitioned-for employees are public employees (except to the extent that they may be confidential, supervisory, or managerial within the meaning of PECBA).

In arguing for a different result, the Branch asserts that we should look to the Legislative Branch Personnel Rules ("LBPRs"), rather than PECBA itself, as the initial starting point to answer whether *PECBA* excludes the Branch or its employees from *PECBA*. Specifically, the Branch argues that, because the Oregon Senate and Oregon House of Representatives enacted the LBPRs under the constitutional rulemaking authority (Article IV, Section 11), instead of the constitutional legislative authority, this case "does not involve statutory construction but the primacy of the Legislature's constitutional authority to establish rules regarding its operations."

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[27]We also note that when the legislature has sought to exclude an elected official's staff or an entire employer from the coverage of a chapter of the Oregon Revised Statutes, it has done so expressly. *See* ORS 177.050(3) ("Except as provided in subsection (4) of this section, ORS chapter 240 does not apply to the office of the Secretary of State."); ORS 178.060(3) ("Except as provided in subsection (4) of this section, ORS chapter 240 does not apply to the office of the State Treasurer."); ORS 656.753(1) ("Except as otherwise provided by law, the provisions of ORS 279.835 to 279.855 and 283.085 to 283.092 and ORS chapters 240, 276, 279A, 279B, 279C, 282, 283, 291, 292 and 293 do not apply to the State Accident Insurance Fund Corporation.").

However, the Branch does not cite any authority for the proposition that an exercise of the rulemaking authority "preempts statutory construction."

In any event, the Branch argues that the rules of statutory construction "may prove useful" in this case, and that application of those rules shows that the legislature intended to exclude the Branch and its employees from PECBA. The Branch points out that the LBPRs do not expressly state that PECBA applies to it or its employees. From that silence, the Branch contends that we should conclude that the LBPRs impliedly establish a legislative intent to exclude the Branch and its employees from PECBA.

We disagree with the premise of the Branch's assertion that we should look to the LBPRs, rather than PECBA itself, as the initial starting point to answer whether *PECBA* excludes the Branch or its employees from *PECBA*. Moreover, even if we started with the LBPRs, we would not conclude that the legislature intended to exclude Branch employees from PECBA. Rule 1, section 5, of the LBPRs addresses the "application of certain labor laws," and states that the LBPRs "constitute rules of proceedings of the Legislative Assembly and may take precedence over conflicting provisions of state law to the extent that the rules *expressly provide* for such precedence." LBPR Rule 1(5)(a) (emphasis added). Rule 1, section 4, of the LBPRs expressly provides that all legislative branch officers and employees are exempt from SPRL. LBPR Rule 1(4)(a). And, Rule 1, section 5, expressly provides that all legislative branch employees, "other than legislative librarian positions," are exempt from the Fair Labor Standards Act. LBPR Rule 1(5)(b). However, none of the LBPRs *expressly* provide that any legislative branch employees are exempt from PECBA.

In determining whether the LBPRs indicate a legislative intent to exclude Branch employees from PECBA, we find it significant that the LBPRs expressly provide that Branch employees are not covered by SPRL and the FLSA, but do not say the same regarding PECBA. That structure does not persuade us that the LBPRs' silence regarding PECBA should be construed as evidence that the legislature intended for Branch employees to be excluded from PECBA. Further, we also note that there is no inherent conflict between the adoption of personnel rules and collective bargaining. Although the Legislative Branch is a unique employer because of its constitutional authority to enact statewide legislation, we also note that many public employers have rulemaking authority, and it is commonplace for public employers to both adopt personnel rules and engage in collective bargaining. Accordingly, we decline to infer from the fact that the legislature adopted the LBPRs an intention to exclude Branch employees from PECBA.

In reaching our conclusion, we reiterate that the simplest way to clarify any confusion as to whether the Branch and its employees are subject to PECBA is for the legislature to enact such language in a statute. For this Board to insert such an exclusion into the statute, when the legislature itself has not done so, would exceed our authority and be an inappropriate function of this agency, which is to follow the statutory definitions and directives made by the legislative branch.

The Branch also argues that permitting collective bargaining would permit a "challenge to the legislatively adopted LBPRs and improperly subvert[] the Oregon Legislature's constitutional authority" under Article IV, Section 11.[28] But the Branch does not explain how collective bargaining would "subvert" its authority and, in any event, the Branch, like all public employers, would have the option to condition any collective bargaining agreement on ratification by the Assembly. Further, as explained above, the legislature retains its authority to amend PECBA to exempt some or all of its employees from PECBA, or to exempt specific subjects from mandatory collective bargaining. Accordingly, we do not agree that permitting the petitioned-for employees to engage in collective bargaining necessarily subverts the legislature's rulemaking authority in a manner that compels us to interpret PECBA as excluding the petitioned-for employees from its coverage, despite the absence of any such express exclusion.

Relatedly, the Branch also asserts that the LBPRs "do not harmonize" with PECBA. At the outset, we note that this assertion is largely based on policy arguments as to whether PECBA is an appropriate fit with the structure of how the Branch operates. It is the legislature, however, that determines statutory policy, not this Board. As an administrative agency, we administer the statute as enacted by the legislature; it is beyond our authority to create that policy in the first instance, and it would be inappropriate for us to usurp that role, which rightfully belongs to the legislature. Thus, the question of whether it is good policy for the Branch and its employees to be subject to PECBA is one for the legislature to answer, not this Board.

With that observation in mind, we turn to the Branch's arguments regarding the fit between the LBPRs and PECBA. The Branch first argues that because it is composed of 90 elected officials, its employees are hired for political reasons and may be dismissed for purely political reasons. The LBPRs, the Branch argues, "contemplate this highly personalized and politically motivated arrangement, which likewise permits the hiring and firing of family members under a carve out from the ethics laws that apply to public officials." The Branch argues that this Board's rulemaking authority "and its ability to hear appeals and overrule politically motivated personnel actions under ORS 240.560(3) cannot be reconciled with what is permitted by the 90 elected officials in regards to the subject employees."

To begin, the statute cited in this argument, ORS 240.560(3), is part of the State Personnel Relations Law, not PECBA. As noted above, the legislature has already addressed the issue regarding SPRL appeals by expressly exempting Branch employees from the coverage of SPRL. Moreover, any lack of harmony between the LBPRs and SPRL does not speak to any purported disharmony between the LBPRs and PECBA, because SPRL and PECBA are substantively distinct. Unlike SPRL, PECBA does not, in and by itself, impose any standard for the discipline or discharge of employees. PECBA only provides a process by which employees may collectively bargain with their public employer regarding their terms and conditions of employment. PECBA does not require either party to agree to any particular contractual term or type of term, and a change to the petitioned-for employees' employment terms would occur only if the Branch and the Union mutually agreed to it in the course of good faith collective bargaining. Consequently,

[28]The Branch's objections to the petitioned-for unit do not include any contention that the application of PECBA to the legislative employees is unconstitutional. Accordingly, we understand the Branch to be arguing only that the potential effect of collective bargaining on the application of the LBPRs to represented employees is a policy consideration that should affect our statutory interpretation of PECBA.

we cannot assume that, because the legislature determined that Branch employees should not be subject to SPRL, it would make the same policy determination with respect to PECBA. Again, if the legislature agrees that, as a policy matter, the structure of the Branch or the political nature of the Legislative Assembly is an ill fit with all or some of the statutory requirements of PECBA, the legislature may enact a statute that reflects that policy determination; we, as an administrative agency, may not.

The Branch next argues that PECBA does not contain a designated bargaining representative for the legislative branch, whereas PECBA does provide for a designated bargaining representative for state agencies (ORS 243.696(1)) and the judicial branch (ORS 243.696(2)). In the absence of such a designated collective bargaining representative, the Branch argues, PECBA cannot be harmonized with the operational structure of the Branch. How the Branch might elect to conduct collective bargaining with its employees is beyond the scope of our inquiry here, and we would be overstepping our bounds to suggest what that structure might look like, or to require the Branch to designate a particular position or positions to perform that function.[29] The Branch, through its legislative authority, rulemaking authority, or some other mechanism can determine how it will be represented for purposes of collective bargaining (in the event that the petitioned-for employees vote for the Petitioner to be their exclusive representative). That such a determination has not yet been made does not persuade us that the legislature intended that the Branch is not a public employer or that its employees are not public employees within the meaning of PECBA.

Finally, the Branch asserts that it "cannot deliberate regarding management prerogatives behind closed doors and with limited representatives as other public employers routinely do," citing Article IV, Section 14, of the Oregon Constitution, and that, as a result, it "will be constitutionally prevented from negotiating with a bargaining unit in any meaningful way."[30] We do not determine whether that interpretation of the constitution is correct, because even assuming that it is, this argument sets forth only additional logistical and policy concerns about how and whether the Branch and its employees should be subject to PECBA. Those concerns may or may not be good policy reasons for excluding the Branch and its employees from PECBA. We reiterate that such a policy determination can be made only by the legislature, and it is inappropriate for this Board to make such a policy determination and then base our interpretation of PECBA on that policy instead of the statutory text.

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[29]The Branch notes that there is currently a bill before the legislature (SB 759) that would designate the Legislative Administrator as the collective bargaining representative of the Branch. Because that bill has not been enacted as a statute, it is not appropriate for us to consider it when interpreting PECBA in this matter.

[30]The Branch acknowledges that "some decisions regarding collective bargaining issues could receive input from the Legislative Administrator and [the Legislative Administration Committee (LAC)]," but argues that "neither the LAC nor the Legislative Administrator can bind the entire Oregon Legislative Assembly under a Collective Bargaining Agreement unilaterally without violating the Oregon Constitution." However, the record also shows that the legislature has a process by which it reviews and decides whether to adopt recommendations made by the Legislative Administrator or LAC regarding employees' terms and conditions of employment. Further, the Branch does not cite a constitutional provision that prohibits the Branch from honoring the terms of a collective bargaining agreement or from collectively bargaining in good faith with its employees.

In sum, we conclude that the statutory text and context do not exclude the Branch as a public employer or its employees as public employees under PECBA. We further conclude that it is beyond our authority to read the policy arguments advanced by the Branch into the statute. Therefore, we conclude that we have jurisdiction over this matter.

2. The petitioned-for bargaining unit is an appropriate bargaining unit.

We turn to the Branch's argument that the petitioned-for group of employees does not constitute an appropriate bargaining unit. PECBA defines an "appropriate bargaining unit" broadly as any "unit designated by [this] Board or voluntarily recognized by the public employer to be appropriate for collective bargaining." ORS 243.650(1). "[A] bargaining unit may consist of all of the employees of the employer, or any department, division, section or area, or any part or combination thereof, if found to be appropriate by the Board." OAR 115-025-0050(1).

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

When determining whether a unit is appropriate for collective bargaining, we must "consider such factors as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees." ORS 243.682(1)(a); *see also Douglas County*, CC-004-14 at 30-31, 26 PECBR at 387-88; *OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251 (2001).[31] Moreover, when making an appropriate unit determination, we have "discretion to decide how much weight to give each factor" in any particular case. *OPEU*, 173 Or App at 436; *see also OSEA v. Deschutes County*, 40 Or App 371, 376, 595 P2d 501 (1979). Thus, "our analysis of the propriety of a proposed unit is necessarily fact-driven, with the outcome depending on the specific facts and circumstances of the workplace and workforce at issue." *Douglas County*, CC-004-14 at 31, 26 PECBR at 388.

A threshold requirement for an appropriate unit is that the petitioned-for employees share a community of interest with each other. *See*, *e.g.*, *Oregon AFSCME Council 75 v. Washington County*, Case No. RC-30-03 at 12, 20 PECBR 745, 756 (2004); *Oregon AFSCME, Council 75 v. City of Corvallis*, Case No. RC-41-03 at 11, 20 PECBR 684, 694 (2004). Additionally, where there is a contention that the proposed bargaining unit is inappropriate because it excludes certain employees, we consider whether the petitioned-for employees share a sufficiently distinct community of interest such that the proposed unit may be deemed appropriate. *See*, *e.g.*, *Washington County*, RC-30-03 at 12, 20 PECBR at 756. A proposed unit of employees may have a sufficiently distinct community of interest to constitute an appropriate unit, even if they also share a community of interest with excluded employees. *See*, *e.g.*, *id.* at 12-13, 20 PECBR at 756-57; *City of Corvallis*, RC-41-03 at 11-16, 20 PECBR at 694-99.

[31]Those statutory factors are not exclusive, and we may also weigh other non-statutory factors, including our administrative preference for certifying the largest possible appropriate unit. *Douglas County*, CC-004-14 at 31, 26 PECBR at 388. Here, the Branch does not object on the ground that the proposed unit is too small and that a larger group of Branch employees would be an appropriate unit.

We begin by examining the community of interest, wages, hours, and working conditions of the proposed unit. "Community of interest" has long been understood to depend on factors such as similarities of duties, skills, and benefits; interchange or transfer of employees; promotional ladders; and common supervisors. *Douglas County*, CC-004-14 at 31, 26 PECBR at 388. Here, the Branch acknowledges that the employees "shar[e] the same compensation scheme, partak[e] in PERS, PEBB, other benefits," "shar[e] a common work infrastructure," and share in "the same type of work." The petitioned-for Legislative Assistants are all subject to the LBPRs, which determine their terms and conditions of employment, including compensation (including shift differentials), vacation and sick pay, and the administration of pay upon demotion or promotion. The petitioned-for employees receive similar pay and benefits and perform largely similar job duties. They also frequently interact with each other in performing those job duties. As detailed in the job descriptions, the knowledge, skills, and abilities to perform the job are identical across all four classifications, with the single exception that the job description for the LA IV position states only one additional skill not listed in the other three classifications: "management and supervision of staff, volunteers, and interns."[32] LAs sometimes transfer to different assembly members' offices, and when they do so, they retain their accrued compensation and benefits. Occasionally, although not often, two assembly members share supervision of a single LA. Additionally, LAs may be promoted from one level in the LA classification series to another, such as from an LA I to an LA II, either while remaining in the same office or when hired by one member from another member's office. Such commonalities in terms and conditions of employment weigh in favor of a conclusion that the petitioned-for LAs share a community of interest.

We recognize that each legislator has discretion to determine how to structure and manage their office, within the limits of the LBPRs and the budget set by the Legislative Assembly. Because of that discretion, there may be some variation in some of the working conditions of the petitioned-for employees. For example, pursuant to LBPR 13(1), each elected member has sole authority to assign and reassign job duties, work location, and work schedule "at any time." In addition, the LBPRs give members the sole authority to determine whether to grant paid administrative leave, authorize remote work, and use (or forego) corrective action and disciplinary measures. The record also indicates that, to some degree, the geographic size of a member's district or the amount of the member's constituent outreach may affect an LA's schedule and working hours. For example, Diane Linthicum, Legislative Assistant IV to Senator Dennis Linthicum, indicated in her JDQ that the geographic size of the senator's district required "extensive time, travel and hours away from home[.]" There is also evidence in the record that some LAs work in different office locations when the legislature is not in session, with some LAs in the Portland area working out of office space shared by multiple elected members. Further, each elected member supervises their own office, and Employee Services does not monitor elected members'

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[32]As discussed below, this reference to the ability to "manage and supervise" in the LA IV job description does not establish that the LA IVs are categorically managerial or supervisory employees under PECBA.

workplaces to ensure that employees' duties, work schedules, and work assignments are handled similarly across member offices.[33]

However, even assuming that some differences in assembly members' exercise of discretion and district office locations cause some LA working conditions to vary, such differences do not necessarily mean that the petitioned-for employees do not share a community of interest.[34] When we analyze the community of interest factor, we examine the employees' *collective bargaining* interests, not more general interests. *See, e.g., State of Oregon, Mental Health Division, Fairview Training Center v. American Federation of State County and Municipal Employees, Council 75*, Case No. C-1-84 at 23, 8 PECBR 6666, 6688 (1984) (contrasting the "labor relations" community of interest with more general interest in the mission of the employer); *Revenue Hearing Officers Association v. Oregon Department of Revenue and Oregon Public Employees Union, Local 503*, Case No. C-155-83 at 6, 7 PECBR 6086, 6091 (1983) (when evaluating community of interest, we evaluate the "collective bargaining interests" of employees). The purpose of our analysis is to ensure that the resulting bargaining unit will work "for the mutual benefit of all included employees." *See United Employees of Columbia Gorge Community College v. Columbia Gorge Community College*, Case No. UC-19-01 at 7, 19 PECBR 452, 458 (2001). Unit determinations that ensure a sufficient community of interest "help effectuate policies of [PECBA] by decreasing potential sources of labor unrest and increasing equality of bargaining power." *Id.* (citing *AFSCME Council 75 v. State of Oregon and AOCE*, Case No. UC-37-97 at 8-9, 17 PECBR 767, 774-75 (1998)).

Moreover, as noted above and as acknowledged by the Branch, although each member has broad authority to manage their own office and the personal staff who work in it, the petitioned-for employees are covered by a common compensation plan and a common classification structure, and receive the same health, retirement, and paid vacation and sick leave benefits. Pay and benefits

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[33]LAs who testified explained that assembly members may have different supervisory or management styles, which one LA testified may result in "subtle differences" in how they choose to run their offices. A few employees indicated in their JDQs that every legislative office operates differently. For example, Linda Heimdahl, Legislative Assistant IV to Senator Kim Thatcher, wrote in her JDQ that "[e]very legislative office is different" and you "cannot compare one office to another." Kimberly Goddard-Kropf, Legislative Assistant I to Representative Rachel Prusak, wrote that "Every office is different, and each legislative aide has a unique relationship with their member." However, those employees did not provide specific examples of differences in the JDQs or testify at hearing, and the conclusory comments in the JDQs standing alone are insufficient to establish that there are significant differences in LAs' terms and conditions of employment across offices.

[34]Generally, when a group of employees share the same basic terms and conditions of employment (such as compensation and benefits), that is sufficient to establish that the employees have a shared community of interest, including on a classification- or state-wide basis. *See, e.g.*, *Or. AFSCME Council 75 v. State*, 304 Or App 794, 469 P3d 812, *rev den*, 367 Or 75, 472 P3d 268 (2020). In some cases, we have held that differences in supervision or location are sufficient to establish that a particular group of employees have a sufficiently distinct community of interest to justify the creation of a separate bargaining unit, even though those employees also share a community of interest with other employees excluded from the proposed unit. *See, e.g.*, *Washington County*, RC-30-03 at 12-13, 20 PECBR at 756-57; *City of Corvallis*, RC-41-03 at 11-16, 20 PECBR at694-99. However, such differences generally do not cause the larger group of employees who share basic employment terms to *lack* a shared community of interest. *Id.*

are substantial collective bargaining interests. Further, the petitioned-for employees share a common workplace (the state capitol), even though some may have other work locations, and share an overriding purpose—serving as gatekeepers for their elected members to stakeholders, constituents, and other interested parties. The LAs' duties also share sufficiently common features that the Legislative Branch created a four-position uniform classification structure, organized to reflect the common duties, that applies to all members' offices. Significantly, there is also a high degree of interchange among the petitioned-for employees. They work with each other frequently in the shared work of moving the members' legislative priorities forward, and the record contains evidence that movement of employees between members' offices is not uncommon. We conclude that these commonalities are sufficient to find that the petitioned-for employees share a community of interest.

The Branch nonetheless contends that these employees do not share a sufficient community of interest, based on its assertion that each LA is "solely loyal to" the elected official for whom the LA performs work. The Branch is correct that members expect their LAs to advance the hiring member's policy and legislative goals, and not negate those goals. That job requirement, which the Branch describes in its briefing as "loyalty," and which it characterizes as essential to the members, does not undermine a conclusion that the petitioned-for employees have sufficient community of interest to make collective bargaining on behalf of the group mutually beneficial for the employees. In fact, the legislative assistants testified that, although their job is to implement the directives of the particular assembly member who hired them, they are all employees of the State of Oregon. The LAs also consistently testified that, even when assembly members have opposing views regarding proposed legislation, the LAs do not consider themselves to be in personal conflict with each other. Any differences that arise from LAs' responsibility to loyally represent the views of their respective elected members are outweighed by the commonalities in the terms and conditions of employment that are at the core of our analysis.

Further, if we were to accept the Branch's assertion that the LAs have such divided loyalties that they cannot share a community of interest regarding their terms and conditions of employment, then each member's office must comprise its own bargaining unit, or there is no appropriate unit that can include Legislative Assistants. As to the former, such a result would be inconsistent with this Board's "well-established policy of disfavoring the fragmentation of public workplaces." *Oregon Workers Union v. State of Oregon, Department of Transportation and Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. RC-26-05 at 11, 21 PECBR 873, 883 (2007). "Our nonfragmentation policy also helps public employers[,]" because it "promotes workplace stability, and prevents the undue burden which would fall on public employers if they had to engage in bargaining sessions for the many splinter groups on a round-robin basis." *Id.* (quotation marks and citation omitted); *see also Association of State Professional Employees v. Department of Revenue and Oregon Public Employees Union*, Case No. RC-55-95 at 8, 16 PECBR 615, 622 (1996) (related administrative preference for largest possible unit is "particularly significant" in state cases).

As to any contention that LAs cannot organize and collectively bargain at all, as we explained above, the legislature has not stated in PECBA that the Branch or some or all of its employees are excluded from PECBA, and we cannot insert an exclusion into PECBA where the legislature has not included one. If the legislature determines that the issues raised by the Branch

in this matter warrant exclusion of the LAs from PECBA, it has the authority to statutorily enact such an exclusion, but, to this point, the legislature has not done so. And we, as previously stated, lack the authority to make that policy decision, which is reserved for the legislature.[35]

The Branch does not advance any other arguments as to why the petitioned-for employees lack a community of interest, and, as noted above, it acknowledges that the traditional factors that we weigh show a shared community of interest among these employees. Accordingly, we find that the petitioned-for employees share a sufficient community of interest to constitute an appropriate bargaining unit. With respect to the factor of the desires of the employees, the employees have submitted a sufficient showing of interest in representation by the Petitioner for this Board to conduct a secret-ballot election to determine that ultimate employee choice. The factor of the history of collective bargaining does not play a meaningful role here, as there is no history with respect to this employer and these employees. For these reasons, we find the petitioned-for unit to be an appropriate unit. As described below, this Board will conduct an election to determine whether the employees wish to be represented by the Petitioner.

3. The record does not establish a classification-wide supervisory, managerial, or confidential exclusion for the petitioned-for group of employees.

We turn to the final set of Branch objections, which assert that the LA Is, IIs, IIIs, and IVs are not public employees under ORS 243.650(19) because they are "supervisory," "managerial," or "confidential" employees. Representation proceedings are investigatory, not adversarial, and there is no burden of proof. OAR 115-010-0070(5)(a). "Nevertheless, in disputes concerning whether employees are 'public employees,' there must be sufficient evidence establishing that a statutory exclusion applies." *Id.*

In this case, the Branch contends that all of the petitioned-for LAs are statutory supervisors, managers, or confidential employees, on classification-wide bases. Before addressing the merits of those contentions, we address a procedural issue. Under our rules, "[q]uestions concerning public employee status" generally are not "decided in proceedings to determine the appropriate bargaining unit for a representation matter, unless the representation matter cannot be certified without the resolution of such questions." OAR 115-025-0020(4). *See also* ORS 243.682(2)(b)(E) (resolution of dispute over an appropriate unit "may occur after an election is conducted"). Here, because the Branch asserted that the proposed unit was not appropriate, as well as asserted that not one employee in the proposed bargaining unit is a "public employee" under PECBA, we scheduled an expedited hearing before conducting the election because it was not clear whether the representation matter could "be certified without the resolution of such questions" on public-

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[35]To the extent that the Branch argues that the petitioned-for employees do not share a community of interest because some of the petitioned-for employees are family members of the elected legislator who hired them, as permitted by ORS 244.177(2) (carve-out from government ethics limitations on hiring family members for "the personal legislative staff of the member of the Legislative Assembly"), we also disagree. We acknowledge that those individuals could potentially have different collective bargaining priorities than other employees (*e.g.*, job security provisions may be less important to those employees than to others in the bargaining unit). We do not conclude, however, that such differences in priorities resulting from personal relationships to elected members are sufficient to outweigh the commonalities among the petitioned-for employees.

employee status. OAR 115-025-0020(4). For the reasons described below, we conclude that the Branch has not established that, on a classification-wide basis, any of the petitioned-for classifications are confidential, managerial, or supervisory. That means that this Board will conduct an election among eligible employees in the proposed unit, which we have found appropriate. Consistent with our rules, and in a manner consistent with this order, both parties may challenge, on an *individualized* basis, the eligibility of *specific* employees to vote, based on an individual employee being a confidential, managerial, or supervisory employee. *See* OAR 115-025-0073(2). Any challenged ballot will be impounded, and the Board will only resolve a challenge if such a resolution is necessary to certify the results of the election. *Id.* If the resolution of challenged ballots is dispositive, the Board will conduct a hearing to resolve those individualized challenges. *Id.* With that framework in mind, we proceed to our analysis as to whether the record establishes that the entire classifications of LA Is, IIs, IIIs, and IVs are excluded as non-public employees under ORS 243.650(19).

Confidential Employee Exclusion

We begin with the Branch's assertion that all of the petitioned-for employees are not public employees because they are "confidential employees." Under ORS 243.650(6), a "[c]onfidential employee" means "one who assists and acts in a confidential capacity to a person who formulates, determines and effectuates management policies in the area of collective bargaining." Under 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; and (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? *Oregon Cascades*, UC-16-04 at 8, 20 PECBR at 793.

The first part of the test focuses on the individual whom the allegedly confidential employee assists, and requires a showing that the individual 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).

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*, 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.

At the outset, we note that the Branch asserts that all 180 employees are "confidential," which is a broad proposition, particularly given the narrowness of this statutory exception and the strict criteria required to satisfy this exception. Here, the Branch has not provided sufficient evidence to establish any of the three parts of the confidential employee test on a classification-wide basis.

First, the Branch must show that each employee provides assistance to an individual who actually formulates, determines, and effectuates management policies in the area of collective bargaining. The Branch, however, has not established that predicate fact. Rather, the Branch has premised much of its objections on the *lack* of any individual (or group of individuals) who do or can actually formulate, determine, and effectuate management policies in the area of collective bargaining. The Branch nevertheless asserts that all 90 elected officials in the legislature "actually formulate, determine, and effectuate management policies in the area of collective bargaining" based on the fact that elected officials must at times take policy positions on public sector collective bargaining with respect to those officials' responsibilities as *legislators*. The confidential employee exclusion, however, is concerned with an individual's authority and responsibilities as a public employer's collective bargaining representative. Here, the Branch has not effectively established that every elected official will actually formulate, determine, and effectuate management policies in the area of collective bargaining with represented Branch employees (*e.g.*, by serving as the Branch's collective bargaining representative at the bargaining table with the represented employees, or by determining the Branch's bargaining positions). Relatedly, although the petitioned-for employees undoubtedly provide assistance to their elected officials, it has not been established that such assistance relates to collective bargaining or the administration of a collective bargaining agreement between the Branch and any the petitioned-for employees. Finally, the Branch has also not established that it would be reasonably necessary for all approximately 180 employees to provide confidential assistance as it relates to collective bargaining between the Branch and those same employees. Therefore, we do not conclude that every petitioned-for classification is excluded from being a public employee based on confidential employee status. If the proposed unit is certified, this conclusion would not preclude the Branch from challenging ballots based on the confidential employee exclusion, or from filing a unit clarification petition to exclude from the bargaining unit individual employees who actually become "confidential employees," as that term is defined by PECBA.

Managerial Employee Exclusion

We turn to the Branch's contention that some of the petitioned-for employees are managerial employees.[36] Under ORS 243.650(16), a "[m]anagerial employee" means "an employee of the State of Oregon * * * who possesses authority to formulate and carry out management decisions or who represents management's interest by taking or effectively recommending discretionary actions that control or implement employer policy, and who has discretion in the performance of these management responsibilities beyond the routine discharge of duties." Additionally, a "'managerial employee' need not act in a supervisory capacity in relation to other employees." ORS 243.650(16). The managerial employee exclusion was added to PECBA by Senate Bill 750 in 1995. Unlike the supervisory and confidential exclusions, the managerial exclusion applies only to employees of the State of Oregon and the Oregon public universities listed in ORS 352.002. The exclusion is based on the judicially implied exception to the National Labor Relations Act, which grew out of the concern that "an employer is entitled to the undivided loyalty of its representatives." *NLRB v. Yeshiva University*, 444 US 672, 682 (1980). Managerial employees are those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *Id.* (quoting *NLRB v. Bell Aerospace Co.*, 416 US 267, 288 (1974)). They must "exercise discretion within, or even independently of, established employer policy and must be aligned with management." *Yeshiva University*, 444 US at 683.

This Board, in its first case construing PECBA's managerial employee exclusion, described the exclusion as follows:

> "[S]ection (16) sets up an alternative definition of 'managerial employee' as an employee of the state (l) 'who possesses authority to formulate and carry out management decisions' or (2) 'who represents management's interest by taking or effectively recommending discretionary actions that control or implement employer policy.' Both alternatives are modified by the statement that such an employee must have 'discretion in the performance of these management responsibilities beyond the routine discharge of duties.'"

*Department of Justice v. Oregon Association of Justice Attorneys*, Case No. UC-64-95 at 5, 16 PECBR 777, 782 (1996).

Here, there is no dispute that the petitioned-for employees are employees of the State of Oregon, and not the individual elected member on whose personal staff they serve. The Branch also does not appear to contend that every petitioned-for employee actually has authority to take or effectively recommend discretionary actions that control or implement the Branch's policy as an employer. Rather, the Branch appears to contend that every elected member is part of Branch management, and that because LA IIIs and IVs seek to carry out their own individual member's policy objectives, the LAs have sufficient authority to qualify as managerial employees under

[36]In its objections, the Branch objected that "some" of the petitioned-for employees are managerial employees. In its post-hearing brief, it cited as examples only LA IIIs and IVs, and consequently we limit our discussion here to LA IIIs and IVs.

PECBA. We need not decide whether every elected assembly member has sufficient authority over the Branch's polices *as an employer* to qualify as "management" for purposes of PECBA,[37] because, even assuming that they do, this record does not establish that all the LA IIIs and LA IVs, on a classification-wide basis, exercise the level of discretion required by ORS 243.650(16) to also qualify as managerial employees. For an LA to be excluded as a managerial employee, that LA would need to have the authority to take discretionary actions (or effectively recommend them), that are outside the scope of their professional duties *and* control or implement the Branch's policies *as an employer*. To the extent that LA IIIs and IVs have the authority to take or effectively recommend discretionary actions regarding proposed legislation, this record does not establish that all LA IIIs and IVs exercise that authority outside the scope of professional duties routinely performed by LA IIIs and IVs. "Although all professional employees exercise their professional judgment on behalf of their employer when carrying out their duties, *only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management*." *Oregon Association of Justice Attorneys*, UC-64-95 at 8, 16 PECBR at 784 (quotation marks and citation omitted; emphasis added). Further, the record does not establish that all LAs exercise non-routine authority regarding the Branch's *employer* policies, as opposed to other types of legislative policies. Although there may be individual LAs who actually exercise managerial authority, the record does not establish that all employees in the LA III and IV classifications should be categorically excluded as managerial employees.

<u>Supervisory Employee Exclusion</u>

Finally, we turn to the Branch's objection that LA IIIs and IVs are "supervisory." Under ORS 243.650(23)(a), a "[s]upervisory employee" is "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." 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. *City of Portland v. Portland Police Commanding Officers Association*, Case No. UC-017-13 at 22, 25 PECBR 996, 1017 (2014) (citing *Deschutes County Sheriff's Association v. Deschutes County*, Case No. UC-62-94 at 12, 16 PECBR 328, 339 (1996)). 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.

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[37]The record establishes that the Branch makes its employer policies through the assembly of the elected members or by statutorily delegating some authority to the Legislative Administration Committee and the Legislative Administrator. *See* ORS 173.710 ("The Legislative Administration Committee hereby is established as a joint committee of the Legislative Assembly. The committee shall select a Legislative Administrator who shall serve at the pleasure of the committee and under its direction."); ORS 173.720 (prescribing the duties of the Legislative Administrator).

The Branch asserts that LA IIIs and IVs have the authority to hire, promote, discharge, assign, or responsibly to direct, or to effectively recommend such action. For the reasons discussed below, we conclude that the record does not establish that either LA IIIs or IVs actually have any such authority on a classification-wide basis.

To begin, we note that the Branch relies on evidence that purportedly shows LAs supervise "other employees or interns." However, PECBA defines a "supervisor" as one with authority to act, or effectively recommend action, regarding only "other employees." ORS 243.650(23)(a). The term "other employees" includes only employees "who work for a wage or salary." *Laborers' International Union, Professional Law Enforcement Officers Association, Aurora, v. City of Aurora*, Case No. CC-06-10 at 11, 24 PECBR 38, 48 (2010) (authority over volunteer reserve officers does not establish supervisory status). Thus, when determining whether an employee is a statutory supervisor or manager, we "examine only their authority regarding *paid* employees." *Teamsters Local 223 v. City of Gold Hill*, Case No. UP-63-97 at 10, 17 PECBR 892, 901 (1999) (emphasis in original). *See also Laborers International Union of North America, Local 483 Law Enforcement Professional Association v. City of Gervais*, Case No. UC-16-08 at 18, 23 PECBR 143, 160 (2009). Thus, in this case, we consider the authority of LAs to supervise only other employees, not interns.

Without counting interns, the record indicates that each assembly member office typically has one, and at most two, LAs working on a regular basis throughout the year. In some offices, a second LA works year-round, and in others, a second or third LA works only when the legislature is in session. Currently, there are 180 employees in the petitioned-for unit. If, as the Branch asserts, there is one employee with supervisory authority in each of the 90 member offices, that would mean that those 90 LAs each exercise such authority over only one other employee. "[T]he provisions of the PECBA generally require that an alleged supervisor have control over multiple workers in order to be excluded from PECBA coverage." *City of Forest Grove v. City of Forest Grove Employees Local 3786*, Case No. UC-29-96 at 8, 17 PECBR 171, 178 (1997) ("ORS 243.650(23) itself speaks of supervisors as persons who have charge of other employees by directing them or adjusting their grievances, thus indicating that a true supervisor manages more than one other employee."). "While it may be appropriate in a rare case * * * to exclude an employee who supervises only one other worker," under such circumstances, the evidence concerning supervisory status must be "overwhelming." *Id.*

In this case, for evidence of supervisory status, the Branch relies exclusively on the LA job descriptions and questionnaires that were designed for the purposes of a classification, compensation, and pay equity study (not to determine the employees' supervisory status under PECBA).[38] Both the job descriptions and the JDQs (even though completed by the employees themselves) are largely conclusory and non-specific, and therefore insufficient on their own to establish supervisory status. *See Portland Police Commanding Officers Association*, UC-017-13 at 23, 25 PECBR at 1018 ("Mere inferences and conclusory statements regarding supervisory authority are insufficient to render an employee a supervisor.").

[38]The Branch's witnesses, Knieling and Eledge, acknowledged that they lacked personal knowledge of the purported authority exercised by LAs, and that their testimony was based on the job descriptions and questionnaires.

For example, the Branch contends that LA IVs are supervisors because the list of essential duties in the LA IV job description includes: "Hires, trains, supervises, and mentors other employees or interns." This description alone does not establish supervisory status, for several reasons. Because the common understanding of the term "supervise" is much broader than the statutory definition, the mere use of that term in a job description or title is insufficient to establish supervisory status under PECBA. *See, e.g.*, *City of Union v. Laborers' International Union of North America, Local 121*, Case No. UC-9-08 at 4, 22 PECBR 872, 875 (2008) (concluding that public works superintendent was not supervisor despite job description stating that essential job functions include "[s]upervise subordinate employees including assigning and reviewing work, evaluating performance, scheduling work, recommending disciplinary actions and hiring/termination decisions"). Additionally, the LA IV job description refers to the supervision of "interns," but, as noted above, the supervision of interns is not relevant to our analysis here.[39] Similarly, "training" and "mentoring" are not one of the 12 indicia of supervisory status under PECBA. *See* ORS 243.650(23)(a); *Laborers' International Union of North America, Professional Law Enforcement Officers Association, Aurora v. City of Aurora*, Case No. CC-06-10 at 11, 24 PECBR 38, 48 (2011) (officer's role in training employees does not confer supervisory status). Although "hiring" authority is supervisory under PECBA, the record does not establish that all LA IVs actually make or effectively recommend hiring decisions for other employees. For example, one LA IV testified that he does not making hiring decisions, and that his role in the hiring process is limited to scheduling and participating in interviews and sharing his opinion about the interviewees. To the extent he shares his opinion, there is no specific evidence establishing that he has done so regarding employees (as opposed to interns), or that his input rises to the level of "effective recommendation."[40]

The Branch also contends that the questionnaires establish that LA IIIs and IVs are supervisory because some employees in those classifications indicated that they "supervise" other employees. However, the questionnaire's description of supervisory authority did not conform to PECBA's definition of "supervisor." For example, the questionnaire did not direct the employees to consider only their authority regarding other employees, and as a result, many of their responses refer to their authority over interns, which is not relevant to their status as supervisors under PECBA. For another example, the questionnaire did not direct the employees to indicate whether they use independent judgment when exercising their purported supervisory authority, which is a requirement for supervisory status under PECBA.[41] The questionnaire also did not indicate

[39]For this reason, the testimony of an LA III regarding the assignment of work to interns does not, as the Branch contends, establish that LA IIIs are statutory supervisors.

[40]We also note that the LA job descriptions indicate that the LA III classification is *not* supervisory. The LA III job description does not state that the LA III possess any supervisory authority. And, the LA IV job description states that the level IV "is distinguished from the III level in that it has responsibility for supervision of staff and interns." That is, according to the Branch's job descriptions, the LA III classification *lacks* responsibility for supervision of staff.

[41]The questionnaire, in a section separate from the supervisory authority section, asked the employees to indicate whether they exercise independent judgment when performing their job duties. Some

(Continued ... )

whether any supervisory authority was exercised in the interest of management, as opposed to the interest of the LA in the routine performance of the LA's duties. Consequently, the mere fact that some LAs indicated that they have supervisory authority in their questionnaire responses does not establish that they are "supervisors" as that term is defined under PECBA.[42]

Conclusion

In sum, we conclude that we have jurisdiction over this matter and that the petitioned-for unit is an appropriate unit. Further, none of the petitioned-for classifications are categorically supervisory, managerial, or confidential.[43] Accordingly, we will direct the Election Coordinator to conduct a secret, mail-ballot election as set forth below. Because this matter was heard on an expedited basis, the Board will grant any petition for reconsideration that is filed within 14 days of our final order. OAR 115-025-0065(2)(g). Because, however, we are only directing an election to be conducted, this order is not a final order. *Klamath Co. v. Laborers Inter. Union*, 21 Or App 281, 534 P2d 1169 (1975). *Cf. Linn-Benton-Lincoln Educ. Ass'n/OEA/NEA v. Linn-Benton-Lincoln ESD*, 152 Or App 439, 448, 954 P2d 815 (1998) (a *post-election* certification order is a "final order"). After the election is conducted, the Board will issue a final, post-election order certifying the results of the election. At that point, both parties will have 14 days to request reconsideration of that final order. OAR 115-025-0065(2)(g).

ORDER

1. An appropriate bargaining unit is:

> "Legislative Assistant I, Legislative Assistant II, Legislative Assistant III, and Legislative Assistant IV supporting elected officials in the Oregon Legislative Assembly, excluding supervisory, managerial, confidential, and caucus employees."

2. The Election Coordinator shall conduct a secret, mail-ballot election in the above-bargaining unit to allow eligible employees to express their desires for or against Petitioner IBEW Local 89 as their exclusive representative. Eligible employees are those employed in the

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(Continued ... )
of the LAs who indicated that they "supervise" indicated that they do *not* exercise independent judgment. Further, the questionnaire generally asked whether the employee exercises independent judgment when performing their job duties; it did not ask specifically whether the employee exercises independent judgment *when supervising* other employees. The exercise of independent judgment in the performance of work is common and does not make an employee a statutory supervisor. Rather, supervisory status turns on the use of independent judgment *when exercising supervisory authority* over other employees. *IAFF Local 851 v. Lane Rural Fire/Rescue*, Case No. RC-7-03 at 8, 20 PECBR 512, 519 (2003).

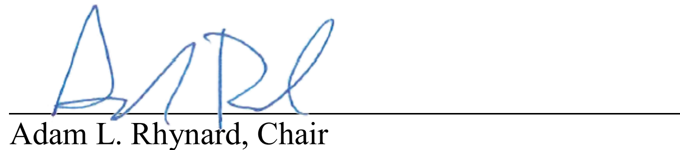
[42]The amount of variation in the questionnaire responses also weighs against a finding that all of the employees in the LA III and LA IV classifications are categorically supervisory.

[43]As noted above in this order, either party may challenge the ballot of a specific employee on an individual basis, consistent with this order.

classifications above on the date of this order and who are still employed on the date of the election. The date of the election is the date that the Election Coordinator determines mail ballots are due. The choices on the ballot shall be IBEW Local 89 or No Representation.

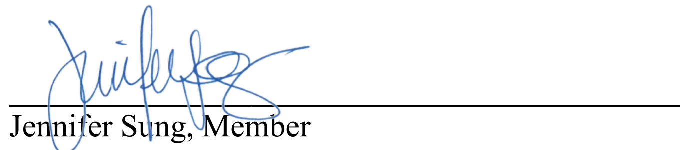
3. Within 20 days of the date of this order, the Branch shall provide the Election Coordinator with an alphabetical list of the names of eligible voters, along with their home addresses, job classifications, and, if known, personal email addresses and telephone numbers.[42] OAR 115-025-0071(2). The Board will provide IBEW Local 89 with the list. *Id.* Within 20 days of this order, the Branch shall also provide the Election Coordinator with a set of mailing labels, with the addresses of eligible voters, in alphabetical order.

DATED: April 6, 2021.



Adam L. Rhynard, Chair

Lisa M. Umscheid, Member



Jennifer Sung, Member

This is an interim order not subject to appeal under ORS 183.482.

[42]Consistent with this order, the list must include *all* employees in the petitioned-for classifications, regardless of whether the Branch believes that an individualized challenge may be warranted during the election.

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.

OREGON INSTITUTE OF TECHNOLOGY,

Respondent.

FINDINGS AND ORDER FOR REPRESENTATION COSTS

On October 28, 2020, this Board issued an order holding that Oregon Institute of Technology (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. On December 24, 2020, Oregon Tech filed a petition for judicial review. Thereafter, Oregon Tech moved to dismiss the appeal, and the court granted the motion and dismissed the appeal, with the appellate judgment effective on June 10, 2021. Having received the appellate judgment, this Board now issues its order for representation costs. OAR 115-035-0055(2)(a).

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

1. The Oregon Tech American Association of University Professors (Association) is the prevailing party. Only a prevailing party in an unfair labor practice proceeding 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).

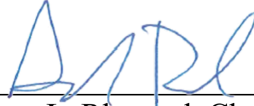
2. This case required three days of hearing.

3. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). The representation costs award for a case that required more than one day of hearing is $5,000. OAR 115-035-0055(1)(b)(D).

## ORDER

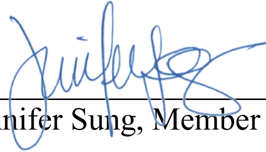
Oregon Tech shall remit $5,000 to the Association within 30 days of this Order.

DATED: July 8, 2021.



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-048-20

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| OREGON MILITARY DEPARTMENT,<br><br>Complainant,<br><br>v.<br><br>IAFF, LOCAL 1660,<br><br>Respondent. | ) ) ) ) ) ) ) ) ) ) | FINDINGS AND ORDER FOR REPRESENTATION COSTS |

On April 27, 2021, this Board issued an order holding that the last best offer submitted by the International Association of Firefighters, Local 1660 (IAFF PANG) did not include a prohibited subject of bargaining, and therefore, that IAFF PANG did not violate ORS 243.672(2)(b) as alleged in the complaint filed by the Oregon Military Department (OMD). 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. IAFF PANG 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.

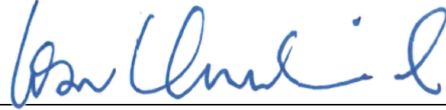
3. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). The representation costs award for a case presented solely on stipulated facts is $1,000. OAR 115-035-0055(1)(b)(B).

<u>ORDER</u>

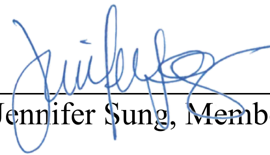
OMD shall remit $1,000 to IAFF PANG within 30 days of the date of this order.

DATED: July 9, 2021.

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-010-18

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| CLACKAMAS COUNTY EMPLOYEES' ASSOCIATION,<br><br>Complainant,<br><br>v.<br><br>CLACKAMAS COUNTY,<br><br>Respondent. | ) | ORDER ON REMAND |

This matter is before the Board on remand from the Court of Appeals. *Clackamas County Employees' Association v. Clackamas County*, 308 Or App 146, 480 P3d 993 (2020). The court affirmed the Board's conclusion that Clackamas County (County) did not violate the "because of" prong of ORS 243.672(1)(a) when it issued a written reprimand to a member and officer of the Clackamas County Employees' Association (Association), Felipe Morales, for calling a County manager "Looney Dooley" in an email. The court affirmed the Board's finding that Morales was not engaged in protected activity when he sent the email. However, the court reversed and remanded that portion of the Board's order dismissing the claim that the County violated the "in" prong of ORS 243.672(1)(a). *See Clackamas County Employees' Association v. Clackamas County*, Case No. UP-010-18 at 8 (January 15, 2019), *reconsideration order* (March 14, 2019). Both parties submitted briefs after remand. For the following reasons, after reconsidering the County's discipline of Morales under the totality of the circumstances, as directed by the court, we conclude that the County's conduct would not have the natural and probable effect of chilling Morales or bargaining unit employees in the exercise of protected activity.

Procedural Background

On April 20, 2018, the Association filed a complaint alleging that the County violated ORS 243.672(1)(a) by issuing a written reprimand to Morales for sending a February 26, 2018, email calling County manager Leann Dooley "Looney Dooley." The complaint alleged that the County violated both the "in" and "because of" prongs of ORS 243.672(1)(a). The County filed a timely answer.

In a periodic reassignment of cases in order to process contested cases as expeditiously as possible, the Board, rather than an administrative law judge, conducted a hearing on

November 27, 2018. On January 15, 2019, the Board issued an order concluding that because Morales was not engaged in protected activity when he sent the February 26 email, the County did not violate the "because of" prong of ORS 243.672(1)(a) when it disciplined him for sending an email that was inconsistent with the County's expectations of its employees. The Board also concluded that, in light of the finding that Morales "was not engaged in protected activity when sending the insult to Dooley," "the written reprimand would not have the natural and probable effect of deterring employees from engaging in protected activity." *Clackamas County*, UP-010-18 at 8. In reaching that conclusion, we acknowledged that "establishing engagement in protected activity is not always an element of an 'in' claim." *Id.* at 8 n 10. We explained, however, that "the Association does not allege, and there is no evidence establishing, that the County engaged in other conduct, such as discussing Morales's discipline with other County employees, that would naturally and probably deter employees from engaging in protected activity." *Id*. Consequently, we dismissed both the "because of" and "in" claims.

The Association timely filed a petition for reconsideration.[1] On March 14, 2019, the Board issued an order on reconsideration, adhering to the dismissal of the complaint.

On appeal, the court affirmed those portions of our order concluding that Morales was not engaged in protected activity when he sent the February 26 email, and that the County did not violate the "because of" prong of ORS 243.672(1)(a) when it disciplined Morales for sending that email. *Clackamas County*, 308 Or App at 151. However, the court held that our dismissal of the "in" claim was not supported by substantial reason. The court remanded with the instruction that we explain whether, taking into account all the particular circumstances, "the discipline imposed would have the natural and probable effect of deterring Morales or other employees in the exercise of protected activity[,]" and instructed that the question "is not one that can be answered solely by reference to the text of the email." *Id*., 308 Or App at 154. The court instructed us to consider "the action that the employer took *under the particular circumstances*," *id*. (quoting *Portland Assn. Teachers v. Mult. Sch. Dist No. 1*, 171 Or App 616, 624, 16 P3d 1189 (2000) (emphasis in *Clackamas County*)), and assess the particular circumstances in which the email was sent, "including the following: (1) Morales was, as he had been doing for weeks, engaging in advocacy that involved repeated challenges to Dooley's role in the investigations in which he was serving as a union representative; (2) those communications were heated and contentious; (3) a few weeks before Morales sent this email, he sent several other emails harshly criticizing Dooley's actions in the investigation and suggesting that those actions impaired the Association's ability to effectively represent its membership; and (4) at the time he sent this email, he was waiting for what he believed was an inordinately long time for the result of a disciplinary investigation involving Dooley." *Id.*

<u>Opinion on Remand</u>

On remand, having reassessed our conclusion in light of all the circumstances, including those enumerated by the court, we conclude that the County's reprimand of Morales for sending the email would not have the natural and probable effect of deterring Morales or other employees in the exercise of protected rights. We reason as follows.

[1]Pursuant to OAR 115-010-0100(3)(b), when the Board issues a final order without a recommended order, the Board will grant any timely submitted request for reconsideration.

The Public Employee Collective Bargaining Act (PECBA) guarantees public employees the "right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." ORS 243.662. In order to protect and enforce these rights, PECBA provides that a public employer may not "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." ORS 243.672(1)(a).

ORS 243.672(1)(a) includes "two distinct prohibitions: (1) restraint, interference, or coercion 'because of' the exercise of protected rights; and (2) restraint, interference, or coercion 'in' the exercise of protected rights." *Portland Assn. Teachers*, 171 Or App at 623; *see also International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-049-12 at 17-18, 25 PECBR 871, 887-88 (2013). To determine if an employer violated the "because of" prong of paragraph (1)(a), we examine the employer's reasons for the disputed action. *Portland Assn. Teachers*, 171 Or App at 623; *Klamath County Fire District #1*, UP-049-12 at 18, 25 PECBR at 888. To prove a violation of the "because of" prong of paragraph (1)(a), a complainant need only show that the employer took the disputed action because an employee exercised a protected right. *Id*. It is not necessary for a complainant to demonstrate that an employer acted with hostility or anti-union animus, or prove that the employer was subjectively motivated by an intent to restrain or interfere with protected rights. *Id*.

When we analyze whether an employer's actions interfered with, restrained, or coerced employees "in" the exercise of their protected rights, "the employer's motive is irrelevant." *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-39-10 at 15, 25 PECBR 325, 339 (2012). "We focus only on the effects of the employer's actions on the employees. If the employer's conduct, when viewed objectively, has the natural and probable effect of deterring employees from engaging in PECBA-protected activity," the employer violates the "in" prong of paragraph (1)(a). *Id*. Because this standard is objective, "neither [the employer's] motive nor the extent to which employees actually were coerced is controlling." *Portland Assn. Teachers*, 171 Or App at 624.[2]

Here, to identify the issue presented on remand, we summarize the matters no longer in dispute. Specifically, the court affirmed our conclusion that the County did not reprimand Morales because he engaged in protected activity. That conclusion is based on the fact that Morales was not engaged in protected activity when he sent the February 26 email for which he was disciplined,

[2]An "in" violation may be derivative or independent. An employer "who commits a 'because of' violation generally also commits a derivative 'in' violation because an action taken in response to employees' exercise of protected rights has the natural and probable effect of chilling the exercise of those rights." *Treasure Valley Education Association v. Treasure Valley Community College*, Case No. UP-012-18 at 16 (2019) (citing *Tri-County Metropolitan Transportation District of Oregon*, UP-39-10 at 15-16, 25 PECBR at 339-40). An independent violation is typically "based on an employer's threat or implied threat of interference with employees' exercise of protected rights." *Tigard Police Officers' Association v. City of Tigard*, Case No. UP-59-10 at 11, 24 PECBR 927, 937 (2012); *Klamath County Fire District #1*, UP-049-12 at 18, 25 PECBR at 888 (independent violations typically occur "when the employer makes threats that are directed at protected activity"). Here, because we found, and the court affirmed, that the County did not commit a "because of" violation, the only issue before us is whether the County committed an independent "in" violation.

and that the County disciplined him for legitimate reasons. In addition, the Court affirmed our conclusion that the County did not use Morales's February 26 email as pretext to discipline him for protected activity. In other words, there is no dispute that the County disciplined Morales *for lawful reasons*: because his email violated County policy.

In general, an employer's lawful act, objectively taken, is not inherently threatening. *Spray Education Association and Short v. Spray School District No. 1*, Case No. UP-91-87 at 18, 11 PECBR 201, 218 (1989). That is so because, in most circumstances, an "employer's lawful conduct, when viewed objectively, does not have the natural and probable effect of chilling employees in their exercise of protected rights." *Eugene Charter School Professionals, AFT, AFL-CIO v. Ridgeline Montessori Public Charter School*, Case No. UP-34-08 at 16, 23 PECBR 316, 331 (2009).[3] There are circumstances, however, when an employer action that might otherwise be lawful can nevertheless violate the "in" clause "depending on the timing and circumstances." *Crook County Firefighters Association, IAFF Local 5115 v. Crook County Fire and Rescue*, Case No. UP-011-18 at 29 (2019) (citing *Portland State University Chapter American Association of University Professors v. Portland State University*, UP-013-14 at 13, 26 PECBR 438, 450 (2015)). "Specifically, an employer could violate the 'in' clause by 'present[ing] an entirely lawful act in such a way that reasonably leads others to believe it was unlawfully based on protected activity.' *Ridgeline Montessori Public Charter School*, UP-34-08 at 16 n 13, 23 PECBR at 331 n 13 (2009)." *Clackamas County*, 308 Or App at 152. However, a merely "possible" effect of the employer's actions is insufficient to establish an "in" violation of ORS 243.672(1)(a). *See AFSCME Local 88 v. Multnomah County*, Case No. UP-44-98 at 8, 18 PECBR 430, 437 (2000). Rather, the chilling effect must be both natural and probable. *Treasure Valley Education Association v. Treasure Valley Community College*, Case No.UP-012-18 at 16 (2019).

Thus, on remand, there is a single, narrow issue before us: whether the County's otherwise lawful discipline of Morales, when viewed objectively and in the context of all the "particular circumstances," *Clackamas County*, 308 Or App at 154, would have the natural and probable effect of deterring Morales or other bargaining unit employees in the exercise of their PECBA-protected rights.

The circumstances include those identified by the court: specifically, at the time that Morales sent the email, (1) he had been engaging in other advocacy as a union representative that involved repeated challenges to Dooley's role in investigations; (2) those communications were heated and contentious; (3) a few weeks before Morales sent this email, he sent several other emails harshly criticizing Dooley's actions in the investigation and suggesting that those actions impaired the Association's ability to effectively represent its membership; and (4) at the time that he sent this email, he was waiting for what he believed was an inordinately long time for the result of a disciplinary investigation involving Dooley. *Id.* The Association contends that,

[3]For example, a workplace reorganization that is implemented for lawful reasons does not, in the absence of other circumstances, violate ORS 243.672(1)(a). A lawful reorganization does not violate the "in" prong even if it results in depriving some employees of contract rights because no reasonable employee would be "naturally and probably chilled in the exercise of protected rights by a reorganization that was not implemented because of protected activity." *Teamsters Local 223 v. Tillamook County Emergency Communications District*, Case No. UP-46-95 at 9, 16 PECBR 397, 405 (1996).

because the discipline "occurred in the context of Morales's continuing and sustained representation of employee EZ in a disciplinary investigation," the "natural and probable effect was to discourage Morales or other [Association] representatives from engaging in vigorous representation of employees under disciplinary investigation."

We understand the Association to be arguing that, because Morales routinely uses harsh language as a tactic when, as an Association representative, he engages in vigorous representation of employees, the discipline for using harsh language while he is *not* engaged in protected activity nonetheless would have a chilling effect on the vigorous representation of employees.[4] Before we consider that contention in light of the particular circumstances of this case, we note that the use of harsh language is merely a tactic, and that tactic is not, in and of itself, protected activity. This Board has long given both employers and employees wide latitude to use harsh or demeaning language when engaging in collective bargaining and related activity. *See, e.g.*, *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757,* Case No. UP-035/036-20 at 60 (2021) (citing *Lane Unified Bargaining Council v. McKenzie School District #68,* Case No. UP-14-85 at 39, 8 PECBR 8160, 8198 (1985)); *see also Clackamas County Employees' Assn. v. Clackamas County,* 243 Or App 34, 42, 259 P3d 932 (2011) (distinguishing between employer threats "that are directed at protected activity and generic expressions of anger that may be made in the heat of a collective bargaining dispute," and explaining that "harsh language alone does not constitute an unfair labor practice"). In cases where an employer has disciplined an employee for using inappropriate language or engaging in misconduct while the employee was engaged in protected activity, the question of whether the employee's activities were protected by PECBA is distinct from the separate question of whether the *manner* in which the employee engaged in the PECBA-protected activity was so threatening or outrageous that the employee forfeited the protection of the Act. *See, e.g.*, *Wy'East Education Association v. Oregon Trail School District No. 46*, Case No. UP-16-06 at 32-34, 22 PECBR 668, 699-701 (2008), *rev'd in part on other grounds*, 244 Or App 194, 260 P3d 626 (2011), *order on remand*, 24 PECBR 786 (2012) (describing when employees' actions or statements during protected activity are so threatening that they lose the protection of PECBA).[5] In this case, because Morales was not engaged in protected activity when he sent the February 26 email for which he

[4]To the extent that the Association argues that the County's discipline was naturally and probably chilling merely because Morales *holds* an Association office, we disagree. The fact that Morales holds an Association office does not mean that he is immune from lawful discipline for conduct that is not a protected activity. *See, e.g., Lane County Public Works Association, Local 626 and Bushek v. Lane County*, Case No. UP-36-90 at 14-15, 13 PECBR 187, 200-01 (1991), *aff'd*, 118 Or App 46, 846 P2d 414 (1993) (no violation of paragraph (1)(a) where union officer's conduct involved a "personal matter outside of the framework of the collective bargaining or grievance resolution process").

[5]*See also Central Education Association and Vilches v. Central School District 13J*, Case No. UP-74-95 at 17, 17 PECBR 54, 70 (1996), *aff'd*, 155 Or App 92, 962 P2d 763 (1998) (the protected "conduct was not so outrageous as to remove his protected activity from the protection of the PECBA"); *International Association of Firefighters, Local 1395 v. City of Springfield*, Case No. UP-48-93 at 11, 15 PECBR 39, 49 (1994) (employer violated the "because of" prong of paragraph (1)(a) when it gave employee a low performance rating because of the employee's demeanor when speaking as a union officer about working conditions at two meetings with managers; lawful union activities of union representatives cannot "be made the subject of adverse employer action simply because they do not conform to the employer's expectations of proper decorum and diplomacy").

was disciplined, the question of whether Morales's conduct was so outrageous that he forfeited the protection of PECBA is *not* before us. Rather, the question presented is whether, under the particular circumstances of this case, the County's otherwise lawful discipline of Morales for violating County policy while he was *not* engaged in protected activity, or the County's conduct or statements when issuing that discipline, could naturally and probably deter employees from engaging in protected activity.

Viewing all of the particular circumstances of this case objectively, we conclude that the discipline issued, and the manner and context in which the County issued the discipline, would not naturally and probably have such a chilling effect. Significantly, it is undisputed that, at the time of the discipline, Morales had engaged in vigorous representation of employees for many years; that he had frequently used comparably harsh (or even harsher) language against managers and supervisors when engaged in such activity; and that the County never disciplined Morales for using harsh language when he was engaged in protected activity—even when the targets of the language complained. For example, approximately one month before the email at issue, Morales called Dooley "unprofessional" and "incompetent" when she emailed a County employee a suspension notice that described the length and date of the suspension incorrectly. Although Dooley complained to Senior Labor Analyst Sherryl Childers and Assistant Human Resources Director Eric Sarha about Morales's email, the County did not take any action to discipline Morales.

Additionally, we note that the County disciplined Morales for the email at issue only after conducting an investigation and concluding that Morales was *not* engaged in protected activity at the time that he sent it—a conclusion that was sustained by this Board and affirmed by the court.[6] Although the context surrounding that discipline includes Morales's protected activity, the context also includes the County's long and consistent track record of *not* disciplining Morales for using comparably harsh and unprofessional language when he was engaged in protected activity, even after County managers had expressed to County human resources their frustration with Morales for his zealous approach in representing bargaining unit employees. In light of that track record, it would not be objectively reasonable for an employee to infer that they would be disciplined for using harsh language *when engaged in vigorous representation*, and we find it unlikely that an employee would naturally and probably be deterred from continuing to engage in vigorous representation or other protected activity.

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[6]This Board found, and the court affirmed, that Morales was not engaged in protected activity when he sent the email at issue, notwithstanding the Association's broad assertion that Morales was engaged in protected activity. We note that the County took multiple steps in an effort to determine whether Morales was engaged in protected activity when he sent the email, including consulting with county legal counsel, checking Morales's time card to determine whether Morales used union business leave on the day he sent the email, and giving Morales two opportunities to provide further explanation of the basis for his assertion that he was engaged in protected activity. Additionally, County witnesses testified that if they had determined that Morales was engaged in protected activity when he sent the email, they would not have disciplined him for the language in the email. Although the Association asserted a representational privilege in response to the County's questioning of Morales, and this Board did not decide the issue of whether the privilege applied under those circumstances, we note that the record indicates that the County was attempting to *avoid* disciplining Morales for protected activity. Under the circumstances of this case, the County's efforts to *avoid* disciplining an employee for protected activity could be viewed as another particular circumstance that weighs against finding that the County's conduct, objectively taken, would naturally and probably have an impermissible chilling effect on protected activity.

Further, as we previously concluded, and the court affirmed, the County did not discipline Morales for the email as a pretext for disciplining him for protected activity. The County's discipline of Morales was also proportionate and consistent with its treatment of other employees for similar policy violations. Likewise, there is no evidence that the County was singling Morales out because of his status as an Association representative, or otherwise creating the impression that he was being singled out for that reason.

The County also did not publicize or otherwise broadcast its discipline of Morales, which is an action that could, depending on the circumstances, have a natural and probable chilling effect. *See Ridgeline Montessori Public Charter School*, UP-34-08 at 16 n 13, 23 PECBR at 331 n 13. *Cf. Multnomah County*, UP-44-98 at 9, 18 PECBR at 438 (the full context of allegedly threatening letter, including the facts that the county sent the letter only to the union representative and not any county employees, made it more likely that the letter was an ordinary, lawful communication between the director and the union representative).

The County took no action that tied or connected the discipline of Morales to his protected activities. Thus, this case is materially different from *Crook County Fire and Rescue*, UP-011-18, where we concluded that the employer violated ORS 243.672(1)(a) because it portrayed its actions, which were otherwise lawful, as connected to protected activity. In that case, the employer, shortly after employees unionized, began using an outside investigator to review some employee conduct. In addition, soon after the parties concluded contentious first-contract bargaining, the employer began using supervisory notes to document employee conduct, a departure from its previous, informal approach. Using an outside investigator and using supervisory notes are lawful actions. The Board nonetheless concluded that the employer violated paragraph (1)(a) because the employer repeatedly attributed its actions to the employees unionizing. The Board reasoned that the employer's statements, "viewed objectively under all the circumstances, conveyed a message to employees connecting the District's actions (which communicated a heightened scrutiny of employee performance and conduct) to protected activity (forming a union)." *Crook County Fire and Rescue*, UP-011-18 at 33. Moreover, the particular way in which the employer used the outside investigator and supervisory notes, objectively viewed, "created the impression that the chiefs were treating Association officers and known supporters differently from employees who were perceived as less supportive of the Association." *Id*.

In this case, the County took no actions that conveyed to Morales, the bargaining unit, or Association officials a message connecting the discipline to any protected activity. There is also nothing in the County's actions that created the impression that the County was treating Morales differently from other County employees. Rather, the record indicates that the County followed the routine pre-disciplinary process, including holding an investigatory meeting, notifying Morales of the proposed discipline, and holding a mitigation meeting before discipline was actually imposed. And, when the discipline was ultimately imposed, it was proportionate to the discipline other employees had received for communications that violated County ordinances. These facts distinguish the present case from *Crook County Fire and Rescue*, UP-011-18.

Similarly, the totality of the circumstances, including timing, do not indicate that the County's discipline of Morales, objectively taken, would naturally and probably be taken as a

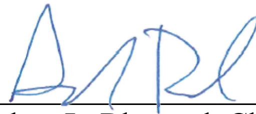
threat of reprisal for protected activity. An employer's statement that it intends to take a lawful action can, depending on timing and other circumstances, have the "quality of a reprisal" against bargaining unit employees when those employees intend to exercise their protected rights. *See Portland State University*, UP-013-14 at 14, 26 PECBR at 451 (university's otherwise lawful announcement that it would disable faculty access to email and electronic accounts two days before a PECBA-protected strike vote had the quality of a reprisal and violated the "in" prong of ORS 243.672(1)(a)); *Klamath County Education Association v. Klamath County School District*, Case No. C-28-78 at 10, 5 PECBR 2991, 3000 (1980) (principal's directive to teachers, on the day of a strike vote, to turn in two weeks of lesson plans the following day had the quality of a reprisal because the timing coincided with the strike vote). Here, there is no evidence that the County connected the investigation of the February 26 email or the resulting discipline to any planned or intended protected activities by Morales—in fact, it sought to insulate the investigatory and disciplinary process from Morales's protected activities by having managers in Morales's own department, who had no knowledge of his particular Association-related representation that preceded the email or other dealings with Dooley, handle the matter. Considering all these circumstances, we do not conclude that the County's discipline has the quality of a reprisal. And, given the County's long track record of *not* disciplining Morales for using comparably harsh language when engaged in vigorous representation, the mere fact that the timing of the discipline was proximate to his protected activity is not, in itself, sufficient to support a conclusion that the discipline would naturally and probably have the prohibited chilling effect.

In sum, considering all of the particular circumstances of this case, we are not persuaded that the otherwise lawful action of the County would naturally and probably chill Morales or a bargaining unit employee in the exercise of protected rights. Accordingly, after reconsidering our analysis as directed by the court, we conclude that the County did not violate ORS 243.672(1)(a) and dismiss the complaint.

ORDER

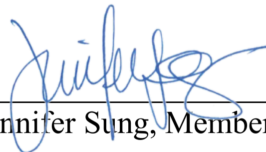
The complaint is dismissed.

DATED: July 14, 2021.



Adam L. Rhynard, Chair

Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-024-20

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1660 and HANES, | ) | |
| Complainants, | ) | RULINGS, |
| v. | ) | FINDINGS OF FACT, |
| | ) | CONCLUSIONS OF LAW, |
| TUALATIN VALLEY FIRE AND RESCUE, | ) | AND ORDER |
| Respondent. | ) | |

Noah Scott Warman, Tedesco Law Group, Portland, Oregon, represented Complainants.

Dan Rowan, CDR Labor Law, LLC, Portland, Oregon, represented Respondent.

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On July 9, 2021, 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).

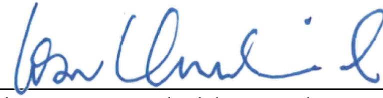
In these circumstances, OAR 115-010-0090(5) allows the Board to limit the precedential value of the final order. The Board does so in this case. Accordingly, the order is binding on, and has precedential value for, only the named parties in this case.

ORDER

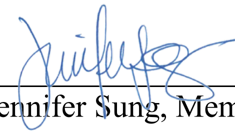
The complaint is dismissed.

DATED: August 4, 2021.

Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-024-20

(UNFAIR LABOR PRACTICE)

| | |
|---|---|
| INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL 1660 and ROCKY HANES,<br><br>Complainants,<br><br>v.<br><br>TUALATIN VALLEY FIRE AND RESCUE,<br><br>Respondent. | RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER |

A hearing was held before Administrative Law Judge (ALJ) B. Carlton Grew on January 15, 2021 via teleconference hosted from Portland, Oregon. The record closed with submission of the parties' post-hearing briefs on March 12, 2021.

Noah Scott Warman, Tedesco Law Group, Portland, Oregon represented Complainants International Association of Firefighters Local 1660 and Rocky Hanes.

Dan Rowan, CDR Labor Law, LLC, Portland, Oregon represented Respondent Tualatin Valley Fire and Rescue.

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On January 17, 2019, Complainants International Association of Firefighters Local 1660 (Association) and Rocky Hanes (Hanes) filed this Complaint against Tualatin Valley Fire and Rescue (District or TVFR) alleging violations of the Public Employees Collective Bargaining Act (PECBA). The District filed a timely answer. On March 12, 2021, the parties submitted their post-hearing briefs.

The issues presented for hearing are:

1. With respect to ORS 243.672(1)(a), did the District discipline Hanes on April 16, 2020 because of his PECBA-protected activities as president of the Association?

2. With respect to ORS 243.672(1)(c), did the District discriminate against Hanes regarding his tenure and terms and conditions of employment, by means of the April 16, 2020 discipline, for the purpose of discouraging membership in the Association?

3. If Respondent prevails, should the Association be ordered to pay the District a civil penalty?

This Board concludes that the District did not violate ORS 243.672(1)(a) and (c) by disciplining Hanes because of his PECBA-protected activities as president of the Association, and declines to impose a civil penalty on the Association.

## RULINGS

1. At the close of Complainants' evidence at hearing, Respondent moved that the case be dismissed. The ALJ correctly denied this motion. Such a motion has rarely, if ever, been granted by an ALJ. It would be a rare case in which paucity of the evidence was so apparent as to justify the risk of time and expense of rescheduling the hearing in the event of this Board's reversal of the ALJ. *See also Public Employees Union v. Jefferson County*, Case No. UP-19-99, 18 PECBR 245, 250 (1999) (requiring complainant, in cases where respondent fails to file an answer, to present a prima facie case); ORS 183.415(10). In this case, Complainants' testimony and exhibits were sufficient to entertain a conclusion that Respondent had violated ORS 243.672(1)(a) and (c).

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

## FINDINGS OF FACT

### The Parties

1. The District is a public employer, as defined in ORS 243.650(20). The District has 27 fire stations and more than 500 employees.

2. The Association is a labor organization as defined by ORS 243.650(13) and exclusive representative of a bargaining unit of approximately 450 fire suppression and prevention personnel employed by the District. The Association has represented the District firefighting employees since the District was first created.

3. The District was created in 1989 by merging the Tualatin Rural Fire Protection District and the Washington County Fire District 1. It is the largest fire district in Oregon, covering portions of four counties, nearly a dozen cities, and more than half a million residents.

4. Hanes is a District Fire Captain stationed at Fire Station 57 in West Linn. Hanes is a bargaining unit member and has been the president of the Association since 2000.

5. The Association and District have had an uneventful relationship for many years. The most recent bargaining over a collective bargaining agreement was unremarkable, and no grievances or unfair labor practice complaints had been filed in twenty years. However, there had been some relatively recent changes in District management. Division Chief Greg Ladrow had been in that position six years (after 19 years of prior service with the District); Assistant Chief of Operations Kenny Frentress, also a long-term District employee, became Assistant Chief a few years ago; and Fire Chief Deric Weiss was not yet chief in 2018 (his predecessor signed the 2018-2022 collective bargaining agreement).

6. In October 2019, the parties entered a Memorandum of Understanding regarding scheduling (scheduling agreement or MOU). Hanes was one of the Union officers who negotiated the agreement. Assistant Chief Frentress, who had been a member of the Association bargaining unit and continues to pay part-time fair share payer dues to the Association, was the District's lead spokesperson in those negotiations.

7. In November 2019, the parties had several meetings regarding the implementation of the scheduling agreement. Hanes and Frentress and other representatives of the District and Association attended these meetings.

8. The parties failed to agree on the interpretation and implementation of the scheduling agreement. On December 27, 2019, Hanes filed a grievance and demand for arbitration on behalf of the Association regarding the agreement.

9. On January 28, 2020[1], Hanes, Frentress and other representatives of the parties participated in a mediation session regarding the scheduling MOU grievance. The mediation session did not resolve the grievance.

10. Association Vice President Gary Burton (VP Burton) believed that the relationship between the Association and the District had become strained as a result of the District leadership changes. However, in communications over the scheduling agreement and in all of the following meetings relevant to Hanes' discipline, District managers did not engage in threats, anger, or accusations of intransigence, bad faith, or dishonesty, and there was no suggestion that retaliation from the District was in the offing. The behavior of the parties' representatives during these meetings was professional and polite.

District and Station organization

11. The District is headed by Fire Chief Weiss. His direct subordinate is Assistant Chief Frentress. The next step down in the hierarchy is Division Chief Ladrow, who supervises Battalion Chiefs. The Battalion Chiefs supervise the Captains, Lieutenants, and line staff.

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[1]The following dates are in 2020 unless noted otherwise.

12. The District is divided into three geographical areas, each with a Battalion Chief as the immediate supervisor for all stations and their companies in each particular geographic area.

13. On March 5, Hanes was the Captain on duty at Station 57. As Captain, Hanes was the ranking officer at the station[2] and in command of the Station 57 fire engine and the three other members of the crew assigned to it. This group is called an engine company or company. The officer in charge of a company, like this one, is called the Company Officer. The Battalion Chief for the area which included Station 57 was Battalion Chief Dan Griffin, who was therefore Hanes' supervisor.

14. The District Activities Schedule (DAS) is a shared electronic document used by District managers and other personnel. The document lists scheduled activities that will require a company[3] to move from its home station. The entry for each activity shows the name of the activity, the location, and which units will attend. All Company Officers are required to review the District Activities Schedule during their shift. Oversight for the DAS is provided by a Battalion Chief.

15. The District has other means besides DAS to determine the location of its fire companies at a particular time. Company Officers call the Battalion Chief and report their location; the District can track the location of its vehicles by GIS (a GPS-type system); a District dispatcher can locate vehicles through its Automatic Vehicle Location system; and District employees can call the Company Officer's cell phone. Upon receiving an emergency call, dispatchers use preprogrammed alarm assignments and the tracked location of vehicles to choose companies to respond.

16. Battalion Chiefs are responsible for coordinating all resources within the District, and therefore must be aware of the location of the fire equipment and personnel in their assigned geographical area. Company Officers are required to keep their Battalion Chief generally advised of the location and status of their company.

The March 25 Peer Support Meeting

17. In March 2020, the District, in conjunction with the Association, created a Peer Support Team to help employees of the District cope with the death of a highly esteemed coworker. District Lieutenant Jeff Campbell was in charge of coordinating these Peer Support Team meetings.

18. On March 5, a Peer Support Team meeting was held from 1:00 p.m. to 3:00 p.m. at District Fire Station 59 in West Linn. The DAS for March 5 stated that Hanes' Station 57 company would be at Station 59 from 1:00 p.m. to 3:00 p.m. to attend the Peer Support meeting.

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[2]On some occasions, the ranking officer at a station may be a Lieutenant, who would then be the Company Officer.

[3]The record refers to the fire vehicle and its associated staff by various terms such as unit, company, or crew. For consistency, we use the term company.

19. The company normally stationed at Station 59 was headed by Company Officer Robin Peters. The DAS for March 5 stated that Peters' company would be stationed there as usual, but attending the Peer Support meeting.

20. Hanes was aware that his company was scheduled to be at Station 59 for the Peer Support meeting. Hanes and his three Company members decided not to attend the March 5 meeting and remain at Station 57.

21. On March 5, Hanes spoke by telephone with the Peer Support Team's coordinator, Lieutenant Campbell, and Lieutenant Todd Raeburn, the lieutenant on duty at Station 59, to inform them that Hanes and his crew would not be attending the meeting. Hanes did not, however, call his own supervisor, Battalion Chief Griffin. Hanes later acknowledged to Griffin, during the investigation, that he did not make the call, and that he should have, and apologized for not doing so.

District Investigation and Discipline of Hanes

22. Under the Collective Bargaining Agreement, the levels of discipline are a (documented) oral warning; written warning; denial of special privileges; suspension; demotion; and dismissal. Thus, an oral warning is the lowest level of District discipline. The agreement also provides that oral warnings are not subject to the just cause provisions of the agreement and, while they may be taken up by a grievance, such a grievance may not be taken to arbitration.

23. Under the District's system of managing employee conduct and progressive discipline, District management has the option of providing an employee with "coaching and counseling," which is essentially a communication to the employee that they failed to act appropriately in a situation. Coaching and counseling is not discipline under the collective bargaining agreement.[4]

24. On the evening of March 5, Division Chief Ladrow informed Assistant Chief Frentress that Hanes' Station 57 Company did not go to Station 59 for the Peer Support meeting. Frentress decided to do some preliminary factfinding. Frentress also telephoned Fire Chief Weiss, Director of Organizational Health Lucy Shipley (DOH Shipley), and District counsel, Dan Rowan, to inform them of the situation.

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[4]Despite the non-disciplinary status of coaching and counseling, Association officials, Association counsel, and Battalion Chief Griffin repeatedly asserted that coaching and counseling was the lowest level of discipline that the District could impose on Hanes. Claiming that a coaching and counseling is disciplinary, when it is not, implies that the District policy of imposing the lowest level of discipline for an offense would include coaching and counseling, which it does not. Framing the issue as if coaching and counseling is discipline also exaggerates the weight of an oral warning. However, the parties have agreed that an oral warning is minimal discipline; under the parties' agreement such discipline is not subject to just cause and is not subject to arbitration.

25. Frentress began his investigation by asking Battalion Chief Griffin[5] whether he had authorized Hanes to remain at Station 57. Griffin told Frentress that he had not spoken to Hanes that day and had not authorized Hanes to keep his company at Station 57. Griffin stated that he was not aware of Hanes' decision not to take his unit to Station 59. The two did not discuss anything related to Hanes' role as the Union President or any PECBA-protected activities.

26. On March 6, Frentress spoke with Lieutenants Campbell and Raeburn, who confirmed that the company from Station 57 had not attended the March 5 meeting, and that Hanes had called them to tell them this.

27. Later on March 6, Frentress telephoned Hanes, with VP Burton and DOH Shipley listening in on Frentress' conference phone. Frentress asked Hanes whether he knew his Company was scheduled to attend the Peer Support Team meeting. Hanes said yes. Frentress asked whether Hanes attended the meeting. Hanes said no. Frentress asked whether Hanes or a member of his crew requested permission from the Battalion Chief to miss the meeting. Hanes said no. Frentress then informed Hanes that the District would conduct a formal investigation. Hanes sought to discuss the situation further, but Frentress told him that he would have an opportunity to discuss his concerns during the formal investigatory interview.

28. After the call ended, Burton told Frentress that it was unlike Hanes not to be where he was supposed to be. Frentress told Burton that it was not the first time the issue had arisen.

29. On March 11, Frentress informed VP Burton that Battalion Chief Griffin would conduct the formal investigation. Once Griffin returned from vacation, Frentress and Ladrow, with Burton present, met with Griffin to assign him the investigation. Frentress and Griffin did not communicate further about the matter until Griffin completed the investigation and issued discipline.

30. On March 20, Griffin provided Hanes with a Notice of Potential Disciplinary Action. The notice stated, in part:

> "'I. Daily resource management and all movement within the District will be coordinated by the on-duty Battalion Chiefs at C5, C6 and C7. Companies will contact their Battalion Chief to coordinate movement and training requests.'
>
> "Failure to follow District policies is just cause for disciplinary action.
>
> "Pursuant to SOG 8.7.10.1 you are hereby notified that disciplinary action may be taken as a result of such violation(s), and that such action shall be in addition to any reprimand provided to you thus far for this/these incident(s). Such disciplinary action may include, but not limited to; oral warning, written reprimand, loss of special privileges, suspension without pay, demotion, any other potential

[5]Griffin had retired from the District and was working for the District on a generally automatically renewing contract of less than one year. As such, he was not subject to just cause for termination. The record does not reveal the terms of employment for other Battalion Chiefs or whether they were subject to just cause.

disciplinary action that may be considered for this situation, up to and including termination of employment. This is in according to section 16.1 of the current collective bargaining agreement.

"If you wish to present any information to me that may have a bearing on the decision regarding this situation, including any explanation in response to these allegations, persons you believe we should talk to in connection with this matter, and/or any mitigating circumstances regarding the discipline being considered, you may meet with me in-person or present such information in writing no later than March 31.

"The final decision regarding disciplinary action for the allegations will be made in a timely manner.

"c.c. Local 1660
Human Resources
Assistant Chief Frentress
Division Chief Greg Ladrow"

(Exh. J-6.)

31. Also on March 20, Griffin met with Hanes and VP Burton to discuss the events of March 5. The parties stood several feet apart, wearing masks; Griffin found it somewhat hard to hear the others. At the meeting, Hanes confirmed that he was aware of the Peer Support Team meeting at Station 59, did not attend the meeting himself or take his company there, as a matter of his and his company's preference, and did not contact Griffin before or after making that decision. Hanes told Griffin that he believed that the District had better emergency response coverage because his company did not go to Station 59, but did not assert that this was the reason for his decision. Hanes apologized for not contacting Griffin, and stated he wouldn't fail to call in the future. Burton repeatedly suggested that coaching and counseling was the appropriate District response. Griffin stated that the District always imposed the lowest level of discipline necessary to affect change, but did not commit to a specific level of discipline.[6]

32. Later that day, Griffin spoke with Division Chief Ladrow about the matter. Griffin told Ladrow he would be comfortable with imposing coaching and counseling. Griffin stated that he thought Hanes was apologetic, and would not repeat the omission. Griffin also stated that he viewed the potential discipline through its effect on District staff in light of the ongoing struggles District personnel had with their colleague's recent death and the Covid-19 pandemic. Ladrow

[6]The parties dispute the exact language Griffin used about the discipline he planned to, was likely to, or had the option to impose in this meeting. We find that Griffin did not agree to impose a specific level of discipline or other action with Association officials. We also find that Griffin was contemplating imposing only coaching and counseling until his later conversation with Ladrow. In that conversation, Ladlow could reasonably be perceived as signaling strong support for an oral warning, and Griffin responded to that signal.

responded by suggesting that Griffin de-emphasize emotional factors and consider other issues, including how Hanes' conduct could be perceived by the other Company Officers[7], and referring to instances when Hanes had repeatedly attempted to jawbone the DAS Battalion Chief into changing his company's assignment on Fridays.[8] Ladrow asked how it would look if the District let the Association president get away with an inappropriate action.[9]

33. Ladrow did not know of any prior discipline or counseling and coaching issued to Hanes. Ladrow told Griffin that Griffin was to make the final decision on whether Hanes would receive discipline or counseling and coaching.

34. On April 2, Ladrow asked Griffin for a "final recommendation and closure document" regarding Hanes. On April 4, Griffin informed Ladrow that he would issue Hanes an Oral Warning. Due to the work schedules of Hanes and Griffin the earliest the two could meet was after April 13.

35. On April 16, Griffin met with Hanes and VP Burton and issued the Oral Warning. Griffin wrote down his account of the meeting later that day. His description stated, in part:

> "I handed them the 'Oral Warning Letter' and gave them a chance to read it. I think Gary said something like 'how did we end up here?' I said the Fire District needs assurances that this kind of thing won't happen again." I then started going down my list of quotes from the letter and said something like you were aware the Peer Support session was on the DAS right? Rocky [Hanes] said yes. You were not on an emergency call right? Rock[y] said no. I said you did not call me and ask to miss the peer support session, right? Rocky said no. Then I asked Rocky, did you miss the session and he said Yes.
>
> "Gary [Association VP Burton] said something about he had recently met with Kenny [Assistant Chief Frentress] and Kenny said that this decision was going to be entirely up to you. And I said it was up to me. Gary said something to the effect

[7]Griffin recalled that one part of the concerns regarding the perceptions of other company officers were how it would look to other company officers if the Association president were seen to be "getting away with something." (Griffin Testimony.)

[8]Aside from pressuring the DAS Battalion Chief, the record contains no evidence of additional questionable actions by Hanes, as an employee, relevant to this discipline. Specifically, there is no evidence of other instances of Hanes and his company intentionally not being where they were supposed to be. Indeed, aside from the employee disciplined for using the fire apparatus for a personal errand, there is no evidence of any Company Officer unilaterally and intentionally deviating from the DAS with or without Battalion Chief approval. There were examples in the record of Company Officers inadvertently being in the wrong place because of circumstances such as not being aware of a relevant change in the DAS.

[9]The answer to this question, presumably, is that it would reflect poorly on District management if it failed to discipline an employee because that employee was also the Association president. We do not construe this statement urging that the Association president *should not* be treated differently than other employees as a statement implying that the Association president *should* be treated differently than other employees.

that he was afraid that union members might retaliate against me or blame me for Rocky getting written up. I said yes, I am concerned about that as well. Then I said something like, it goes with the job unfortunately. Gary said something to the effect of this whole thing smells like [retaliation] against Rocky over a grievance filed by the union. I said it's not, The Fire District needs assurances that this type of behavior stops here and does not spread.

"Gary went on to tell me that they are concerned that Robin Peters did not get disciplined for missing a peer session at Station 59. I said it's my understanding is that situation was different because Robin was at the station but chose not to participate. I said, that's different than not showing up at all. Robin was where he was supposed to be. They both expressed that it is the same to them. Gary then brought up the fact that a Medic 20 officer did not get disciplined for missing a football game standby in Newberg that was on the DAS. I said that's true, but the difference is that the Medic 20 officer did not know about the football game standby in advance. I told them that missing the football was also not good, but not the same as missing something on purpose.[[10]

"I told Gary and Rocky that the Fire District was very concerned that someone else on your crew may have wanted to attend, but they were afraid to speak up against the station captain. Rocky said do you really think those (3) guys in there would stay quiet about anything? I said, the district was trying to make sure everyone had a chance to attend. I said the Fire District spent a lot of time and energy putting this together. I said to Rocky something like you should have called me and this all would have turned out differently. I would have made you go."[11]

(Exh. R-3 at 4 (paragraph breaks added for readability)).

36. Griffin also told Burton and Hanes that the discipline was intended to "send a message" to other Company Officers not to do what Hanes did.[12]

37. After the meeting, Ladrow asked Griffin how it went. Based on Griffin's oral description, Ladrow directed Griffin to write a summary of the meeting. Griffin wrote that summary (quoted above) later on April 16.

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[10]In another incident, a Company Officer had taken a fire vehicle, without his company, to run significant personal errands without notifying his Battalion Chief. This employee received a higher level of discipline than Hanes.

[11]At hearing, VP Burton expressed vague disagreement with some of Griffin's summary, stating that it did not reflect how VP Burton "does business." (Burton Testimony.) That disagreement does not appear to raise an issue relevant to our disposition of this case. We find the same-day summary by Griffin to be the most accurate testimony about the meeting.

[12]While Complainants' post-hearing brief suggests that the use of the term "send a message" was to interfere with PECBA rights, it is apparent from the testimony of all parties (including VP Burton) that the purpose of the "message" was to deter other company officers from repeating Hanes' actions.

Grievance over Hanes' discipline

38. On April 28, VP Burton, on behalf of Hanes and the Association, filed a grievance over the oral warning issued to Hanes. The grievance stated, in part,

> "Prior to the issuance of the discipline VP Burton had conversations with upper management and BC Griffin at which time agreed *[sic]* that coaching and counseling would achieve the desired effect. * * * The union and management have always agreed that the lowest level of discipline to effect change is all that is necessary."

(Exh. J-8 at 2.)

39. The Grievance sought the following remedy:

> "The existing oral reprimand should be changed to coaching and counseling *unless any similar incident occurs in the next months then the discipline would turn into an oral reprimand.* This was recommended to BC Griffin prior to the grievance process and he was unwilling due to intended or unintended pressures placed upon him from others."

(Exh. J-8 at 2, emphasis added.)

40. It was customary for the parties meet to discuss grievances; Burton and Hanes expected that to happen here. Ladrow, however, did not meet with Burton, and, on May 4, denied the grievance in writing. Ladrow stated that an oral warning is the lowest level of discipline in the parties' collective bargaining agreement, and that he supported Griffin's decision to impose an oral warning.

41. On May 15, Burton advanced the grievance to Step 3. The Step 3 grievance contained the same statement of facts and remedy as before, simply adding that the grievance had been denied at Step 2.

42. Chief Weiss did not meet with Burton to address the grievance, and denied the grievance on May 20. This unfair labor practice complaint followed.

## CONCLUSIONS OF LAW

The Association alleges that the District violated ORS 243.672(1)(a) and (c) by imposing an Oral Warning on Hanes, instead of the contractually non-disciplinary coaching and counseling, because of Hanes' PECBA-protected Association activity.

We turn to our analysis.

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

2. The District did not violate ORS 243.672(1)(a) by imposing an oral warning on Hanes instead of coaching and counseling.

Standards for Decision

ORS 243.672(1)(a) makes it an unfair labor practice for a public employer or its designated representative to interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed by the PECBA, ORS 243.650 to 243.806, 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.

The language of ORS 243.672(1)(a) provides two distinct prongs, 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. 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. Teachers*, 171 Or App at 626. We then decide whether the reasons were lawful or unlawful. *Portland Assn. 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 (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 employers 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. 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 a party 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 Employes 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 additional 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).

Finally, the burden of proof is on Complainants to prove their claims by a preponderance of the evidence. ORS 183.450(2); OAR 115-010-0070(5)(b).

Discussion

At various times during the District investigation, both parties acknowledged that it was inappropriate for Hanes to keep his company at Fire Station 57, instead of moving it to Station 59 for the Peer Support Team meeting, without informing his Battalion Chief. The issue here is whether the District disciplined Hanes with a documented oral warning (instead of not disciplining him and providing coaching and counseling) in or because of Hanes' Association-related activity. Notably, in its grievance, the Association itself stated that "[t]he existing oral reprimand should be changed to coaching and counseling unless any similar incident occurs in the next months then the discipline would turn into an oral reprimand." Finding of Fact 39.

The Association acknowledges that there is no direct evidence of retaliation in this case. The Association asks this Board to infer from District officials' actions and statements that the District imposed an oral warning instead of coaching and counseling in retaliation for Hanes' Association activity. In support of its argument, the Association points to several background and foreground facts, which we address in turn.

The parties' labor relations history

The Association and District have had an uneventful relationship for many years. Bargaining was unremarkable, albeit with Fire Chief Weiss' predecessor, and the Association had not filed demands for arbitration or unfair labor practice complaints for more than twenty years.

In October 2019, Hanes and Frentress led the parties in negotiating a Memorandum of Understanding regarding scheduling (scheduling agreement). In November 2019, the parties had multiple meetings regarding the implementation of that agreement. Unusually, in the experience of the parties, the Association and District did not agree on the interpretation and implementation of their agreement. On December 27, 2019, Hanes filed a grievance and demand for arbitration on behalf of the Union. On January 28, 2020, Hanes and Frentress led the parties in an unsuccessful

attempt to resolve the grievance through mediation, and the Association did not withdraw its demand for arbitration, which remained pending as of May 20, 2020.

While this level of contention was unprecedented in the parties' recent history, there is no evidence that this dispute was noteworthy relative to other public employer/public employee bargaining relationships subject to the PECBA. Despite several meetings to bargain, and then interpret, the scheduling agreement, there is no evidence that the parties' interactions included threats, anger, or accusations of intransigence, bad faith, or dishonesty, and no suggestion that retaliation from the District, or the Association, was in the offing. Nor is there any evidence in the record which connects the decision to impose discipline to the parties' bargaining relationship. Aside from the fact that there was a dispute at all, the record contains no evidence of any actual conduct by any participant that suggests the conflict had spilled over into the District's relationship with the Association in general or Hanes in particular.

Timing

The Association points to the fact that the discipline of Hanes took place four months after the date Hanes filed for arbitration on behalf of the Association, and argues that this length of time was short enough to permit an inference that the level of discipline was retaliation for that filing.[13] To make that time appear shorter, the Association urges that this Board take into account the District firefighter work schedule of one shift every three days; the vacations and preplanned absences of Griffin and Hanes, and the time-consuming onset of the COVID-19 pandemic. We reject this contention. Four months is a significant amount of time, and, in the context of the facts of this case, too long to support an inference of bad faith on its own. *See Treasure Valley Education Association v. Treasure Valley Community College,* Case No. UP-012-18 at 21, n. 12, __ PECBR __, n. 12, (2019) (Although employer actions occurred close in time to the protected activity, and "[a]lthough * * * in some cases timing can be evidence of causation, in this case, the timing has an independent explanation: [the parties' collective bargaining agreement] deadlines required the [employer] to act when it did. After considering the timing under the totality of the circumstances, we decline to draw an inference of animus." *Treasure Valley Community College* at 21, n. 12, __ PECBR at __.)

In addition, the timing of the discipline was in part controlled by Hanes; it was Hanes who chose to keep his company at Station 57 without informing his supervisor. Both parties have acknowledged that this action by Hanes was inappropriate. This is plainly not a case where an employer created a false pretext for discipline shortly after a precipitating conflict between a labor organization and an employer.

Ladrow's appropriate role in Griffin's decision

The Association suggests that it was independently wrongful for Ladrow to make his strong suggestion, or signal, that Griffin consider actual discipline after Griffin indicated his support for coaching and counseling. The Association emphasizes that Griffin moved towards discipline in

[13]Extending the timeline further, the first obvious breakdown in the parties' harmonious relationship was not when Hanes filed for arbitration; the parties were unable to resolve this significant disagreement well before that, despite extensive negotiations.

response to these remarks by Ladrow. The Association argues that, as the first line supervisor who Hanes failed to call, Griffin's initial view of the appropriate level of discipline, if any, should be given more weight than Ladrow's view. However, there is nothing inherently suspicious about an upper-level supervisor suggesting a higher (or lower) level of discipline than that suggested by a first line supervisor. Even if Griffin had initially agreed to impose only coaching and counseling, as the Association suggests, that agreement could have been overturned by District management without mandating a conclusion that the District action was retaliatory.

Comparable discipline

The Association argues that the discipline imposed on Hanes was not comparable with previous discipline for similar matters. The District points to a case in which an employee used a fire truck, without his company, for significant personal errands without advising his supervisor. This conduct was more objectionable than that of Hanes, and received a higher level of discipline. Hanes did not make any personal use of the equipment, did not move it away from the station, and he and his company were available to respond to emergencies at all times. The differences between the two examples suggests that Hanes should have received less discipline than the other employee, a result actually reflected in the level of discipline it placed on Hanes.

During discussions over the discipline, Association officials mentioned the lack of discipline for an individual "Medic 20" who failed to report to a location listed in the DAS because he was unaware of the assignment. As Griffin pointed out, this mistake was not comparable to Hanes' decision not to move his company knowing he was scheduled to do so and knowing that he should have reported the decision to Griffin.

Finally, the Association points to the lack of discipline imposed on Station 59 Company Officer Peters, who did not attend the March 5 Peer Support Team meeting and did not inform the Battalion Chief of that decision. The Association contends that Peters "did exactly the same things Hanes did." Association post-hearing brief at 1. The Association is incorrect. Peters' company was always at the location where the DAS stated that it would be, and where Battalion Chief expected it to be. In other words, Peters' company and vehicle were in the same place they would have been had they attended the Peer Support meeting. Hanes, and his company, were not. Hanes was disciplined in part for failing to call his Battalion Chief to inform him that his company was not moving as planned; Peters, on the other hand, had no reason to call his Battalion Chief to tell him that his company would remain where it was supposed to be. In addition, Peters' individual company members were present at the Peer Support event location, and could easily have attended, while Hanes' company members were not. The last factor is of minimal weight, however, because there is no evidence that any of Hanes' company members actually wanted to attend.

District assertions regarding past conduct by Hanes in his capacity as an employee

Ladrow told Griffin, and Griffin told Association VP Burton, that Hanes should be given a higher level of discipline because of his conduct in the past. The example of past conduct offered was that Hanes had repeatedly urged the DAS Battalion Chief to change his company's assignment on Fridays, which could be viewed as persistently challenging employer decisions regarding the placement of District resources for personal reasons.

The District officials' early statements, and the text of the documented oral warning, hint that District managers believed Hanes' failure to bring him and his company to the Peer Support meeting location was itself wrongful, despite the fact that participation in these meetings was voluntary. At the debriefing after the March 5 Peer Support meetings, Chief Weiss and HR Shipley heard some staff state that they found it upsetting that the Association's president chose not to participate. The next day, Assistant Chief Frentress told Burton that the Peer Support Team was not happy that the Union's president did not attend the team meeting.

These facts, combined with the text of the documented oral warning, could suggest that District management believed that Hanes' non-participation was inconsistent with his leadership role in the District because of his leadership role in the Union, including by possibly discouraging attendance by employees who would benefit from peer support resources, and that this conduct supported Hanes' discipline. The record is clear that participation at such meetings was voluntary. However, District officials understood that attendance, on the other hand, was mandatory. (Regardless of the Peer Support rules, the presence of Hanes and his company was mandatory under the DAS absent Battalion Chief Griffin's approval.) The lack of similar employer action regarding Peters and his company's presence at the station but non-attendance at the event could support the view that this aspect of the discipline was based on Hanes' leadership role in the Association. However, Hanes also had a leadership role in the District because of his longevity and his status as Company Officer.

However, the Association leadership rationale is ultimately speculative. The Association itself asserts only that the retaliation was based on the negative turn in the parties' bargaining relationship. Further, the evidence in the record is sufficient to conclude that the District imposed the discipline because of Hanes' unusual and inappropriate action, and not because of his Association status and activities.

Looking at this evidence in total, we cannot conclude that, but for Hanes' Association activity, he would have received coaching and counseling instead of an oral warning, and that this discipline was not imposed because of his Association activity. Given the rather brazen and unusual nature of his offense, we also cannot conclude the District's conduct, when viewed objectively under the totality of the circumstances, had the natural and probable effect of deterring employees in engaging in activity protected by the PECBA. We will dismiss the claim under ORS 243.672(1)(a).

3. The District did not violate ORS 243.672(1)(c) by discriminating against Hanes on the basis of his protected activity.

ORS 243.672(1)(c) makes it an unfair labor practice for a public employer to "[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization." The elements of a subsection (1)(c) violation and a subsection (1)(a) "because of" prong violation are similar. A complainant proves a violation of subsection (1)(c) by showing protected activity, employer action, and a causal connection between the two. *Treasure Valley Community College*; *International Longshore and Warehouse Union, Local 28 v. Port of Portland*, Case No. UP-35-10 at 14-15, 25 PECBR 285, 298-299 (2012).

We concluded above, based on the record as a whole, that there was not a causal connection between Hanes' protected activity and his discipline. For the same reasons, we also conclude that the District did not violate ORS 243.672(1)(c), and we dismiss this claim.

4. A civil penalty should not be awarded against the Association.

243.676 (4) provides in part:

"(a) The board may award a civil penalty to any person as a result of an unfair labor practice complaint hearing, in the aggregate amount of up to $1,000 per case, without regard to attorney fees, if:
"* * *

"(B) The complaint has been dismissed pursuant to subsection (3) of this section, and that the complaint was frivolously filed, or filed with the intent to harass the other person, or both."

A Complaint is frivolous if every argument is one that (1) a reasonable lawyer would know is not well grounded in fact, or that (2) a reasonable lawyer would know is not warranted either by existing law or by a reasonable argument for the extension, modification, or reversal of existing law. *SEIU Local 503, OPEU v. State of Oregon, Department of Transportation*, Case No. UP-11-09 at 22, 23 PECBR 939, 960 (2010); *AFSCME Council No. 75 v. Cly of Forest Grove*, Case Nos. UP-5/25-93 at 2, 14 PECBR 796, 797 (1993) (Rep. Costs Order); *Westfall v. Rust International*, 314 Or 553, 559, 840 P2d 700 (1992)).

Looking at the record as a whole, it is apparent that the original impetus for this unfair labor practice complaint was (1) Hanes' discipline was unusual in his career; (2) the parties' bargaining relationship had become strained with the changes in District managers; and, (3) Association officials concluded that Griffin had changed his mind about Hanes' discipline because of his discussion with Ladrow. We have found all of these to be true. However, Association officials appear to have believed that because Ladrow indicated support for discipline, Ladrow's input was based on an unlawful motive, namely Frentress' experiences in recent bargaining with the Association (which Ladrow was not a part of). On the one hand, we have determined that the Association position was ultimately unconvincing, and Association officials appear to have made only retaliatory inferences from every fact available to them. On the other hand, District officials did not use the grievance process to respond to the Association's protests and supply additional facts about the disciplinary decision. We conclude that the allegations were grounded in fact, and were arguably warranted either by existing law or by a reasonable argument for the extension, modification, or reversal of existing law.

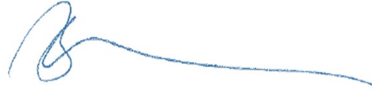
An intent to harass is an intent to torment the other party by subjecting it to constant interference or intimidation. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-37-08 at 27, 23 PECBR 895, 921 (2010). The District offered no evidence that the Association filed this complaint to intimidate the District or punish it for taking a disciplinary action the Association found unacceptable.

Accordingly, while we will dismiss the Complaint, we will not order the Association to pay a civil penalty to the District.

PROPOSED ORDER

The Complaint is dismissed.

SIGNED AND ISSUED 9 July 2021.



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 that objections are received by the Board; "the date of service" of a recommended order means the date that the Board sends or personally serves the recommended order on the parties.) If one party has filed timely objections, but the other party has not, the party that has not objected may file cross-objections within 7 days of the service of the objections. Upon good cause shown, the Board may extend the time for filing objections and cross-objections. Objections and cross-objections must be simultaneously served on all parties of record in the case and proof of such service must be filed with this Board. Objections and cross-objections may be filed by uploading a PDF of the filing through the agency's Case Management System (preferred), which may be accessed at https://apps.oregon.gov/erb/cms/auth. Objections and cross-objections may also be filed by email by attaching the filing as a PDF and sending it to ERB.Filings@Oregon.gov. Objections and cross-objections may also be mailed, faxed, or hand-delivered to the Board. Objections and cross-objections that fail to comply with these requirements shall be deemed invalid and disregarded by the Board in making a final determination in the case. (*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-010-18

(UNFAIR LABOR PRACTICE)

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| CLACKAMAS COUNTY EMPLOYEES' ASSOCIATION,<br><br>Complainant,<br>v.<br><br>CLACKAMAS COUNTY,<br><br>Respondent. | ) | RULING ON RECONSIDERATION OF ORDER ON REMAND |

On July 26, 2021, the Clackamas County Employees' Association (Association) requested reconsideration of this Board's July 14, 2021, order on remand, which dismissed the Association's complaint alleging that Clackamas County (County) violated ORS 243.672(1)(a) by issuing a written reprimand to an Association officer, Felipe Morales. We granted the Association's request and allowed the County an opportunity to respond. The County declined to file a response. After considering the Association's request, we adhere to the conclusions and reasoning of our July 14 order, as supplemented by this order.

It is undisputed that Morales, in an email that he sent to an employee and a manager, insulted the manager using language that violated the County's workplace professionalism policy, and that the County disciplined Morales because of that policy violation. As an Association officer, Morales frequently engaged in protected activity, including by representing the employee to whom he sent the email at issue. However, after considering the content and context of the insulting email, this Board determined that Morales was not engaged in protected activity when he sent it. *See Clackamas County Employees' Association v. Clackamas County*, Case No. UP-010-18 (January 15, 2019, Final Order at 7 *and* March 14, 2019, Reconsideration Order at 1). We also concluded that the County did not discipline Morales because of protected activity, or interfere with employees in the exercise of protected rights. The Association appealed. The court affirmed our determination that Morales was not engaged in protected activity when he emailed the insult, and affirmed our conclusion that the County did not discipline Morales because of protected activity. The court reversed our conclusion that the County did not interfere with employees in the exercise of protected rights and remanded the matter to us to address that conclusion in light of the court's instructions. *Clackamas Cty. Emps.' Ass'n v. Clackamas Cty.*, 308 Or App 146, 480 P3d 993 (2020). On remand, we reconsidered the Association's "in" claim, applying the standard set forth by the court, and we concluded that, taking into account all the particular

circumstances, the discipline imposed would not have the natural and probable effect of deterring Morales or other employees in the exercise of protected activity.

The Association, in its request for reconsideration, contends that we erred on remand by considering, as one of the relevant circumstances, that Morales was not engaged in protected activity when he emailed the insult at issue. The Association's argument is based on a footnote in the court's opinion. As background, the court found that substantial evidence supported our determination that the "insult was not factually connected to Morales's work as a union representative." *Id*. at 151. In a footnote, however, the court stated, "the facts here are close enough that had ERB determined that the email did amount to protected activity, we would conclude that substantial evidence supported that decision as well." *Id.* at 151 n 4. The Association reads that footnote as a directive to this Board to treat the email as having an "indeterminate" protected status when conducting our analysis of the Association's "in" claim on remand.

Reading the court's footnote in the context of the opinion as a whole, we do not agree that the court directed us to treat the insulting email's protected status as "indeterminate," as the Association contends. The court's "in" claim analysis proceeded from its affirmation of our conclusion that the email was not protected activity. *See id.* at 151-52. The court faulted our original "in" claim analysis as treating the fact that the email was not protected activity as dispositive of the "in" claim. *Id.* at 152. The court explained that, even if the email was not protected activity, an "in" violation was still possible, and the court directed this Board to reconsider the "in" claim analysis accordingly. *Id.* ("As both parties acknowledge, contrary to ERB's apparent rationale, however, an 'in' claim does not require the existence of a protected activity."). Thus, the court did not direct us to revisit the protected status of the email when conducting the "in" claim analysis, or even to give the email an "indeterminate" protected status when conducting that analysis. Rather, the court directed us to consider what the natural and probable effect of disciplining Morales for emailing the insult would be on employees' willingness to engage in the exercise of protected rights, notwithstanding our determination that emailing the insult was not protected activity. *Id.* at 153.

We also disagree with the Association's contention that treating the protected status of the email as "indeterminate" would change the outcome of the "in" claim analysis. The Association asserts that the issuance of a written reprimand to Morales for an email with an "indeterminate" protected status will cause Morales and other employees "[t]o avoid any chance of discipline" by "striv[ing] to stay well south of the line separating protected from unprotected activity when engaging in speech and representing employees." This assertion misunderstands both what constitutes protected activity and what issue is presented by this case. If an employee is "engaging in speech and representing employees," then the employee *is* engaged in protected activity—whether or not the employee subjectively believes that they are engaged in protected activity. In other words, an employee who is participating in a labor organization's representation of other employees is *by definition* crossing the line separating protected from unprotected activity—to the protected side. *See* ORS 243.662. Because such representational activity *is* protected activity, an employee who is representing other employees cannot, as a matter of law, "stay south of the line separating protected from unprotected activity."

The only line that an employee who is representing other employees could choose to "stay south of" is the line separating inappropriate from "outrageous" conduct—because an employee may be lawfully disciplined for "outrageous" conduct even if they engaged in that conduct in the context of protected activity.[1] Because of that longstanding rule, an employee who is engaged in representational activity very well may "strive to stay well south of" the "outrageous" conduct line to avoid discipline—but a deterrent effect on *inappropriate conduct* is not prohibited by the Public Employee Collective Bargaining Act (PECBA).[2] PECBA does not protect inappropriate conduct; it protects only the underlying activity of representing employees.[3] Further, the question of whether Morales crossed the line to "outrageous" conduct is not at issue in this case, because this Board determined that Morales was *not* engaged in representational or other protected activity when he emailed the insult for which he was disciplined.[4] The only issue on remand is whether the otherwise lawful discipline of Morales for violating the County's professionalism policy, when viewed objectively and in the context of all the "particular circumstances," *Clackamas County*, 308 Or App at 154, would have the natural and probable effect of deterring Morales or other bargaining unit employees in the exercise of their PECBA-protected rights.[5] This "analysis is laser-focused on the natural and probable effect of the employer's actions on employees' willingness to engage in protected activity, not on whether the employee engaged in protected activity." *Id.* at 152-53.

The Association asserts that employees will conclude that, in order to avoid future discipline, they must refrain from engaging in protected activity. However, as we explained in our prior remand order, the particular circumstances of this case also include the fact that the County had a track record of *not* disciplining Morales for insulting a manager when he was clearly engaged in protected activity. Considering all of the circumstances, it is more likely that a reasonable employee would conclude that, to avoid future discipline, they must refrain from using insulting

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[1]*See*, *e.g.*, *Wy'East Educ. Ass'n v. Or. Trail Sch. Dist. No. 46*, Case No. UP-16-06 at 32-34, 22 PECBR 668, 699-701 (2008), *rev'd in part on other grounds*, 244 Or App 194, 260 P3d 626 (2011), *order on remand*, 24 PECBR 786 (2012); *Cent. Sch. Dist. 13J v. Cent. Educ. Ass'n*, Case No. UP-74-95 at 17, 17 PECBR 54, 70 (1996), *aff'd*, 155 Or App 92, 962 P2d 763 (1998); *International Association of Firefighters, Local 1395 v. City of Springfield*, Case No. UP-48-93 at 11, 15 PECBR 39, 49 (1994).

[2]This rule may also have a deterrent effect on the conduct of public employers: to avoid unfair labor practice liability, a public employer may choose to refrain from issuing discipline against an employee who violated employer policy while engaged in protected activity unless the employee clearly crossed the line from inappropriate to outrageous conduct.

[3]As this Board has repeatedly noted, both employers and employees are afforded wide latitude when engaged in activities related to collective bargaining. However, this latitude for inappropriate conduct is merely incidental to PECBA's protections; PECBA does not give either employers or employees a statutory right to engage in inappropriate conduct.

[4]If Morales had been engaged in protected activity when he sent the email, then the issue presented would be "whether the insult that Morales included in the email was so 'outrageous' that he may be disciplined for it even though he was engaged in protected activity at the time."

[5]Because this is an objective standard, Morales's subjective responses are not relevant. *Clackamas Cty. Employees' Ass'n v. Clackamas Cty.*, 243 Or App 34, 43, 259 P3d 932 (2011) ("[T]he issue is whether the [employer's action] would chill a reasonable employee.").

language when they are not engaged in protected activity. Because using insulting language is not, in and by itself, a protected activity, such a deterrent effect on the use of insults does not give rise to a PECBA "in" violation.

The Association also appears to assert that employees would conclude that they must refrain from using insulting language even when they are engaged in protected activity. As we have explained, PECBA does not protect the use of insulting language. However, even assuming that PECBA protects not only the underlying activity of representation but also the tactic of using insulting language when engaged in representation, there is no "in" violation unless a chilling effect on protected activity is, under the particular circumstances of this case, the natural and probable effect of the County's action. To determine the "natural and probable" effect of the County's action on the conduct of reasonable employees, we must consider all of the particular circumstances of this case, as directed by the court.

The circumstances include the following: Morales frequently engaged in protected activity, including communications with a manager, Dooley, that were "heated and contentious." *Clackamas County*, 308 Or App at 154. Morales had previously used harsh language criticizing Dooley while engaged in activity that was more self-evidently protected, representational activity. Although Dooley complained about Morales's harsh statements, the County did not discipline Morales (or even initiate a disciplinary investigation). When Morales insulted Dooley in the email at issue, "he was waiting for what he believed was an inordinately long time for the result of a disciplinary investigation involving Dooley." *Id.* However, a connection between the insulting email and protected activity was neither self-evident nor expressed by Morales. The County attempted to resolve the "indeterminate" status of that email by giving Morales two opportunities to establish how the email was connected to protected activity *before* the County issued the written warning. The County disciplined Morales only after he declined to explain the connection between the insulting email and his protected activity, and the County determined, based on the limited information that it had at the time, that the emailed insult was *not* protected activity.[6] The level of discipline issued was not discriminatory in any way. In light of these particular circumstances, a reasonable County employee would likely conclude that, if they want to use insulting language as a tactic when engaged in activity that is not self-evidently protected, they can avoid discipline by more expressly communicating that they are engaged in protected activity at the time of the activity, or by explaining the connection to protected activity after the fact (such as during a pre-discipline investigation).

In sum, the record establishes that Morales and other employees would have viable options for avoiding future discipline other than refraining from engaging in protected activity. Employees could refrain from insulting other people in violation of the County's workplace professionalism policy. Or, if they wish to use insulting language when engaging in protected activity that is not self-evidently protected, they could identify the connection to protected activity either contemporaneously or during a pre-disciplinary investigation (if one occurs).[7] Accordingly, we

[6]Neither Morales nor the Association explained how the insulting email was, in Morales's subjective view, connected to protected activity until the unfair labor practice hearing in this matter, *i.e.*, after the County disciplined Morales for sending the email.

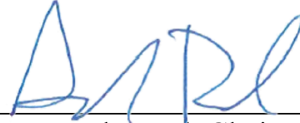
[7]Typically, protected activities, such as representing an employee in an investigatory meeting or participating in a bargaining session, are self-evidently protected.

conclude that the County's action, when viewed objectively under the all of the particular circumstances of this case, would not have the natural and probable effect of causing employees to refrain from engaging in protected activity.

ORDER

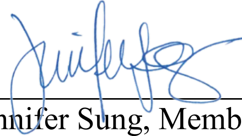
We adhere to our July 14, 2021, order on remand, as supplemented by this order. The complaint is dismissed.

DATED: August 18, 2021.



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 join the Board's reasoning and decision to adhere to our order on remand. I write separately to explain an additional reason why I adhere to our decision to dismiss the Association's complaint in its entirety.

According to the Association, on remand we failed to evaluate the "indeterminacy under which Morales acted." Specifically, the Association contends that Morales "would not have been able to know" whether his insulting email was protected activity within the scope of ORS 243.662. That statute protects the right of public employees "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. Because Morales could not, according to the Association, be certain about whether he was participating in an activity of the Association, he would naturally and probably be chilled by receiving a reprimand for sending the email. To lend weight to its argument, the Association suggests that the court "stated the email *might* have amounted to protected activity" under ORS 243.662.

I construe the Association's argument as grounded in a fundamental misunderstanding of the court's opinion. The Association claims that the court "stated" that Morales's insulting email "might" have constituted protected activity. The Association acknowledges, as it must, that the court affirmed our conclusion that Morales's insulting email "was not factually connected to Morales's work as a union representative." *Clackamas Cty. Emps.' Ass'n v. Clackamas Cty.*, 308 Or App 146, 151, 480 P3d 993 (2020). In a footnote, the court also observed that, if we had reached a different decision—that is, if we had decided that there was, in fact, a connection between Morales's insulting email and his participation in the Association's representation of bargaining unit employees—the court would have concluded "that substantial evidence supported that decision as well." *Id*. at 151 n 4. The Association bases its entire argument in its petition for reconsideration on that single statement by the court in that single footnote.

The court did not, however, actually state that Morales's email "might" have constituted protected activity under ORS 243.662, as the Association claims. Rather, the court made an observation grounded in the nature of substantial evidence review of the Board's factual findings. In particular, here, the court reviewed our finding that there was no factual connection between Morales's February 26 email and his participation in the Association's representation of bargaining unit employees. The court reviews the Board's factual findings for substantial evidence. *AFSCME Council 75, Local 3694 v. Josephine Cty.*, 234 Or App 553, 560, 228 P3d 673 (2010). Substantial evidence "exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding." ORS 183.482(8)(c). When the court conducts such a "whole record" review, it considers "whatever evidence the record may contain that would detract from, as well as support, the agency's order." *Cole v. DMV*, 336 Or 565, 584, 87 P3d 1120 (2004). But the court "does not weigh the evidence anew or otherwise judicially interfere with how ERB evaluates, weighs, and balances competing criteria to reach a decision." *Or. AFSCME Council 75 v. State*, 304 Or App 794, 818, 469 P3d 812, *rev den*, 367 Or 75, 472 P3d 268 (2020); *see also* ORS 183.482(7) (reviewing court shall not substitute its judgment for that of the agency on any issue of fact).

The court conducted that "whole record" review in this case. *Clackamas County*, 308 Or App at 149. After doing so, it concluded that substantial evidence in the record supported our finding that Morales's insult was not "factually connected" to his participation in any Association activity related to employee representation or collective bargaining. *Id*. at 151. Our decision was straightforward: When Morales sent the insulting email on February 26, he was not "participat[ing] in the activities" of the Association "for the purpose of representation and collective bargaining * * * on matters concerning employment relations." *See* ORS 243.662. Rather, Morales was acting as an individual employee, communicating a personal insult to a manager he apparently did not like. That conclusion was based on the fact that there was nothing that tied the email to any Association activity. Consequently, the County's discipline of Morales was lawful. Under long-standing PECBA precedent, lawful discipline does not generally violate the "in" prong of ORS 243.672(1)(a), and this lawful discipline did not violate that statute.[8]

The court's observation in footnote 4 does not compel a different result in this straightforward, lawful discipline case. The court's footnote means only that if the Board had reached a different conclusion—for example, if the Board had drawn different inferences from the testimony or exhibits, assessed the credibility of witnesses differently, or weighed the evidence differently, and in doing so found a factual connection between the email and the Association's representational activities—such a result would also have been supported by substantial evidence, given this record. The footnote is not a statement, as the Association claims, that Morales was acting under "indeterminacy" about whether he was participating in the Association's activities.

As the Board's order on remand and this ruling on the Association's petition for reconsideration explain, the only uncertainty (if any) facing Morales on February 26 was whether his insult would, *if* it had been uttered or emailed in the course of Association activities, lose the protection of PECBA. But here, Morales did not send the email as part of his participation in the Association's representational activities. Rather, he acted only as an individual employee, like any other. Thus, the email was not protected under ORS 243.662 in the first instance, and there was no protection to lose. The Association's argument otherwise obscures the real issue on remand—which is simply, and only, whether the County's lawful discipline of Morales, given all the particular circumstances, would naturally and probably chill Morales or bargaining unit employees generally from exercising their PECBA-protected rights. For the all the reasons we have explained, it would not.

*Lisa M. Umscheid, Member

[8] *See Spray Education Association and Short v. Spray School District No. 1*, Case No. UP-91-87 at 18, 11 PECBR 201, 218 (1989); *Eugene Charter School Professionals, AFT, AFL-CIO v. Ridgeline Montessori Public Charter School*, Case No. UP-34-08 at 16, 23 PECBR 316, 331 (2009) (an employer's lawful conduct, when viewed objectively, "does not have the natural and probable effect of chilling employees in their exercise of protected rights"). The principle that lawful discipline is not generally chilling (and therefore does not, without other employer action, violate ORS 243.672(1)(a)) is subject to exceptions in rare cases, such as where an employer portrays otherwise lawful discipline as retaliatory. But this is not such a rare case. Acting only as an individual employee, Morales sent an offensive insult—one containing a sexist connotation or a demeaning reference to mental health, or possibly both—to a female manager. The County is not required by PECBA to ignore such conduct.

**STATE OF OREGON**

**EMPLOYMENT RELATIONS BOARD**

(UNFAIR LABOR PRACTICE)

| OREGON AFSCME COUNCIL 75,<br>LOCAL 974,<br><br>Complainant,<br><br>*v.*<br><br>STATE OF OREGON, ACTING THROUGH ITS DEPARTMENT OF ADMINISTRATIVE SERVICES AND DEPARTMENT OF CORRECTIONS,<br><br>Respondent. | **Case No. UP-033-17**<br><br>**CONSENT ORDER** |
|---|---|

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

Margaret Wilson, Senior Assistant Attorney General, Oregon Department of Justice, Salem, Oregon, represented the Respondent.

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On November 29, 2017, Complainant Oregon AFSCME Council 75, Local 974 filed an unfair labor practice complaint against the State of Oregon, Acting Through its Department of Administrative Services ("DAS") and Department of Corrections ("DOC," collectively the "State") alleging violations of ORS 243.672(1)(e). The case was placed in abeyance by the parties but was then set for a hearing on July 6, 2021, before Administrative Law Judge Martin Kehoe. However, parties have agreed to settle this matter by entry of this Consent Order and waive further proceedings and review by the Board.

## STIPULATED FACTS

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

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

3. Oregon AFSCME Council 75 is the exclusive representative of a statewide strike prohibited bargaining unit of DOC employees in the classification of Correctional Officer, Corporal, and Sergeant in the DOC's Transport unit and at the following individual prisons

operated by DOC: Coffee Creek Correctional Facility, Columbia River Correctional Institution, Deer Ridge Correctional Institution, Eastern Oregon Correctional Institution, Powder River Correctional Facility, Santiam Correctional Institution, Shutter Creek Correctional Institution, Snake River Correctional Institution, Two Rivers Correctional Institution ("TRCI"), and Warner Creek Correctional Facility.

4. Each AFSCME-represented prison has a separate security local union established within AFSCME. AFSCME Local 974 (the "Union") represents the security employees at TRCI in Umatilla, Oregon.

5. At the times relevant to this matter, the parties were operating under a collective bargaining agreement that was in effect from 2015-2017 (the "Contract").

6. The security employees at DOC facilities supervise inmates around the clock, requiring adequate staff to be on duty 24 hours per day, 7 days a week. When most security employees are absent from the workplace, their post must be covered by coworkers.

7. To ensure proper coverage, Union-represented employees bid their shifts and days off by seniority within their classification every six months. The Contract provides detailed bidding procedures for each prison in Article 25. To the extent allowed under the Contract, management at each prison establishes the list of positions for shift and day off bidding.

8. Before the bidding begins, DOC management distributes bid sheets listing all the positions available for bid along with the shift, days off, and often times the location or job to be performed by the employee who successfully bids the position. For example, at TRCI, the most senior Sergeant would review the list of shifts and days available to Sergeants and select from those available choices. That selection determines whether the employee works day, swing, or graveyard shift, and also determines the specific start and stop times for the shift, and which days they regularly have scheduled off. In many situations, selection of the shift by the employee also determines what duties the employee performs and where within the prison the employee works. Different positions involve different potential safety risks. This selection also impacts compensation, as some positions require DOC to pay the employee working that shift additional incentive pays (e.g., night shift differential of $.75 per hour and employees working as flex staff receive an additional five percent differential under Article 16 of the Contract).

9. In 2017, TRCI conducted its bi-annual bid process in April and October. During the October bid, TRCI made significant changes to the positions and shifts available for employees to bid. These changes included reducing the number of Corporal positions available to bid, reducing the number of Correctional Officer positions to bid, changing the days off for many positions, eliminating or changing the number of positions that are eligible for incentive pays, and possible work-out-of-classification opportunities for staff.

10. The State decided to make these changes without bargaining with the Union, and subsequently announced its decision to implement the changes several weeks after the bid information was distributed to the Union. This change was announced to employees prior to the actual October 2017 bid process. DOC did not provide formal notice of the change to the Union before deciding to make the changes and announcing the implementation of those changes.

11. The Union objected to these changes and attempted to convince DOC to reinstate the status quo. The Union had previously raised similar objections when the State had attempted

to unilaterally implement similar changes. The State refused to reverse the changes and comply with its bargaining obligation before pursuing any allowable changes.

## STIPULATED CONCLUSIONS OF LAW

1. The Board has jurisdiction over these parties and subject matter.

2. The State's unilateral reduction of the number of Corporal and Correctional Officer spots available for staff to bid, along with the changes in days off, start and stop times, and modification of positions that were eligible for incentive pays impacted various mandatory subjects of bargaining, including but not limited to workload, indirect compensation, hours of work, and safety.

3. The State violated ORS 243.672(1)(e) by changing these mandatory subjects of bargaining without bargaining to completion with the Union.

## STIPULATED ORDER

1. The State violated ORS 243.672(1)(e) as stipulated above.

2. The State will cease and desist from committing the unfair labor practice above.

3. DOC will restore the status quo in effect prior to the change for the next bid cycle. It will reinstate the same number of corporal and correctional officer positions for that bid and bargain with the Union to address remaining changes to days off and start and stop times.

4. DOC shall email the attached notice to represented security staff at TRCI and will also post the notice on its intranet system for employees to access.

5. The State will pay the Union representation costs in the amount of $500.00.

6. The State and the Union will bargain in good faith over a make whole remedy for the employees affected by this unilateral change. The parties will utilize the expedited bargaining procedures under ORS 243.698.

DATED this 18th day of August 2021.

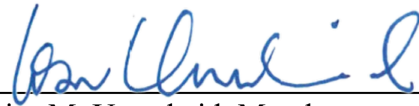
/s/ Margaret Wilson
MARGARET WILSON
On Behalf of the Respondent

[signature]
JASON WEYAND
On Behalf of the Complainant

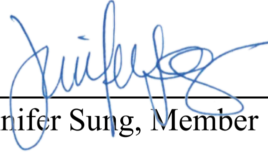
This Consent Order is approved and adopted by the Board.

DATED this 18 day of August 2021.

Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

# NOTICE TO EMPLOYEES

## POSTED BY ORDER OF THE STATE OF OREGON EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board (Board) in Case No. UP-033-17, OREGON AFSCME COUNCIL 75, LOCAL 974, Complainant, v. STATE OF OREGON, ACTING THROUGH ITS DEPARTMENT OF ADMINISTRATIVE SERVICES AND DEPARTMENT OF CORRECTIONS, Respondent, and in order to effectuate the policies of the Public Employee Collective Bargaining Act (PECBA), we hereby notify our employees that the State and the Union have entered into a Consent Order that was approved and adopted by the Board.

**The Board concluded that:**

1. The State's unilateral reduction of the number of Corporal and Correctional Officer spots available for staff to bid at Two Rivers Correctional Institution (TRCI), along with the changes in days off, start and stop times, and modification of positions that were eligible for incentive pays impacted various mandatory subjects of bargaining, including but not limited to workload, indirect compensation, hours of work, and safety.

2. The State violated ORS 243.672(1)(e) by changing these mandatory subjects of bargaining without bargaining to completion with the Union.

**To remedy these violations, the Board has ordered as follows:**

1. The State will cease and desist from committing the unfair labor practice above.

2. The State will restore the status quo in effect at TRCI prior to the change for the next bid cycle, and reinstate the same number of corporal and correctional officer positions for that bid and bargain with the Union to address remaining changes to days off and start and stop times.

3. The State will email the attached notice to represented security staff at TRCI and post the notice on its intranet system for employees to access.

4. The State will pay the Union representation costs in the amount of $500.00.

5. The State and the Union will bargain in good faith over a make whole remedy for the employees affected by this unilateral change. The parties will utilize the expedited bargaining procedures under ORS 243.698.

EMPLOYER

Dated August 17, 2021

By: */s/ David M. Guzman*

Title: State Labor Relations Manager

**********

**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. RC-009-21

(REPRESENTATION)

| | | |
|---|---|---|
| WEST VALLEY PROFESSIONAL FIREFIGHTERS, IAFF LOCAL 4861,<br><br>Petitioner,<br><br>v.<br><br>SOUTHWEST POLK FIRE DISTRICT,<br><br>Respondent. | ) | ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE |

On August 2, 2021, West Valley Professional Firefighters, IAFF Local 4861, filed a petition under ORS 243.682(2) and OAR 115-025-0030 to certify (without an election) a new bargaining unit of all full-time Firefighter/EMTs and Firefighter/Paramedics employed by Southwest Polk Fire District. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards designating West Valley Professional Firefighters, IAFF Local 4861, as the exclusive representative of the proposed bargaining unit.

On August 3, 2021, the Board's Election Coordinator caused a notice of the petition to be posted. Pursuant to the terms of the notice posting and OAR 115-025-0060, objections to the proposed bargaining unit or a request for an election were due within 14 days of the date of the notice posting (*i.e.*, by August 20, 2021). Upon notification that the employer did not post the notice until August 12, 2021, the Election Coordinator directed that the affected employees be notified that the updated date for objections to the proposed bargaining unit or a request for an election was August 26, 2021. The employer notified the affected employees by email. There were no objections to the petition or a request for an election.

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ORDER

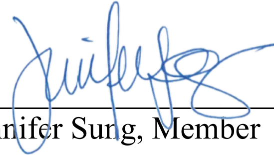
Accordingly, it is certified that West Valley Professional Firefighters, IAFF Local 4861, is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

> All full-time Firefighter/EMTs and Firefighter/Paramedics, employed by Southwest Polk Fire District.

DATED: August 27, 2021.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-009-21

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| EAGLE POINT EDUCATION ASSOCIATION, | ) | |
| Complainant, | ) | |
| v. | ) | DISMISSAL ORDER |
| EAGLE POINT SCHOOL DISTRICT, | ) | |
| Respondent. | ) | |

Caleb Mammen, Attorney at Law, McKanna Bishop Joffe LLP, Portland, Oregon, represented Complainant.

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

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On March 8, 2021, Eagle Point Education Association (Association) filed a complaint alleging that Eagle Point School District (District) violated ORS 243.672(1)(e) by unilaterally changing the status quo on (1) licensed bargaining unit members' daily work schedules and preparation time; and (2) bus drivers' daily schedules, assignments, and corresponding compensation. The complaint was assigned to Administrative Law Judge (ALJ) Jennifer Kaufman, who conducted an investigation under ORS 243.676(1)(b) and OAR 115-035-0005. During the investigative stage, the District filed a motion to dismiss the complaint on March 30, 2021, asserting that the complaint mirrored a contractual grievance arbitration filed by the Association and heard by Arbitrator Katrina Boedecker on March 11 and 12, 2021. On April 14, 2021, the Association submitted its response opposing the motion, asserting that its complaint arose solely under ORS 243.672(1)(e), and not a contractual claim under ORS 243.672(1)(g). On April 30, 2021, ALJ Kaufman, with the agreement of the parties, placed the matter in abeyance pending the outcome of the arbitration proceeding.

On June 18, 2021, Arbitrator Boedecker issued an award denying the Association's grievance. On July 19, 2021, the Association submitted a response in light of the award, asserting that the complaint should proceed because the arbitration award did not fully and clearly decide the unfair labor practice issues under ORS 243.672(1)(e), as alleged in the Association's complaint. On July 21, 2021, the District submitted a memorandum in support of its motion to dismiss in light of the arbitration award, asserting that the award concerned the same issues raised in the Association's complaint. Thereafter, ALJ Kaufman recommended dismissal of the complaint. For the following reasons, we conclude that dismissal of the complaint is warranted.

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.

In spring 2020, District teachers had worked remotely while offering virtual instruction. On August 7, 2020, the District announced that, as a result of the ongoing COVID-19 pandemic, the 2020-21 school year would begin in Comprehensive Distance Learning (CDL). The District planned to add four additional in-service days for teachers, and announced that teachers would be expected to work on site. Between August 13 and 17, 2020, the District and the Association met and discussed the District's planned changes. The Association demanded bargaining over the changes, and reiterated that demand on August 27. On August 28, the Association submitted a proposal to the District, and the District responded on September 3. On September 10, the Association acknowledged the District's response and stated that the contractual language governed, unless and until the parties bargained any changes.

Between September 18 and October 3, 2020, the parties exchanged proposals regarding scheduling changes for classified bargaining unit members (bus drivers). The parties did not reach agreement. Around the beginning of the school year, the District reduced bus driver hours and changed bus driver schedules.

The date of implementation of the COVID-related changes is the subject of disagreement between the parties. It appears that teachers first returned to work on August 31, but that due to area wildfires instruction was delayed until September 21.

On October 20, the Association filed a level two written grievance alleging numerous contract violations. The Association identified the main violations as "requiring licensed personnel to be on-site when students are not (Article 5.A.1.a.) and reducing hours and compensation for classified members (Article 21.B.1.a.)."

As noted above, on June 18, 2021, the arbitrator issued a decision denying the Association's grievance in its entirety. The arbitrator found that the allegations regarding changes to teachers daily work schedules and preparation times were untimely, and dismissed the remaining allegations on the merits. The arbitrator expressly declined to address the statutory

allegations, stating that "[a]ny allegations of unilateral changes in the status quo are for the Board to decide." Those allegations are that the District violated ORS 243.672(1)(e) by "unilaterally changing the status quo of licensed bargaining unit members daily work schedules and preparation time" and by "unilaterally changing the status quo on bus driver daily schedules, assignments, and corresponding compensation."

The Association contends that its contractual allegations and its unfair labor practice allegations are entirely distinct and that the complaint's allegations should therefore be set for hearing. The District contends that the substance of the complaint's allegations are tied to specific sections of the contract, and that the Association is essentially pursuing a 1(g) contract claim that it did not file. The District argues that the complaint does not set forth a single alleged violation of the status quo that is not addressed by the contract, and that the complaint duplicates the same claims and issues that were the basis of the grievance. The Respondent also contends that the (1)(e) allegations are untimely as to any conduct occurring before September 10, 2020.

The question presented is whether the complaint's allegations, which are characterized as unilateral changes to the status quo in violation of ORS 243.672(1)(e), are actually alleged contract violations under ORS 243.672(1)(g). We have previously explained that "[a]n assertion that the employer changed the *status quo* on benefits established by the contract is nothing more than a convoluted way of saying that the employer breached the contract. Stated differently, although [the Association's] pleadings and arguments are couched in the language of unilateral change, in their essence, they describe an alleged breach of contract." *Clackamas County Employees' Association v. Clackamas County*, Case No. UP-53-09 at 7, 23 PECBR 571, 577 (2010) (dismissal order). In such cases, a party can pursue a grievance or file a complaint under (1)(g), but not 1(e). *Id.* at 8, 23 PECBR at 578.

Here, we conclude that the complaint, although it alleges unilateral changes in violation of (1)(e), describes alleged breaches of contract under (1)(g). Specifically, the complaint expressly asserts that the complained-of changes are addressed by and subject to specific terms in the parties' contract. The complaint then spells out the specific contractual terms that address the complained-of changes. The complaint further asserts that the District had not asserted "an inability to perform the terms of the agreement, pursuant to ORS 243.702(1)," which concerns the renegotiation of invalid terms in a collective bargaining agreement. The complaint does not otherwise distinguish between the alleged unilateral changes and the alleged breaches of the terms of the parties' contract. As pleaded, therefore, we conclude that the alleged unilateral changes describe alleged breaches of contract. *See Clackamas County*, UP-53-09 at 7, 23 PECBR at 577. Accordingly, the complaint, as pleaded, is not viable under ORS 243.672(1)(e), and we dismiss it.[1]

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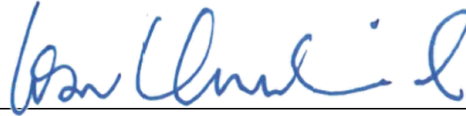
[1]In reaching this conclusion, we note that there are circumstances in which a party could allege a breach of contract and, alternatively, a unilateral change. For just one example, if an employer had asserted that the contract was silent on the issue, a (1)(e) claim could be cognizable, depending on the circumstances. Here, however, the allegations in the Association's complaint only concern a change to (and breach of) the parties' contract. Although the Association, in its response to the motion to dismiss, advances a legal argument that the contract is silent on pertinent issues, that argument is inconsistent with the pleadings. Moreover, the Association never moved to amend the complaint.

ORDER

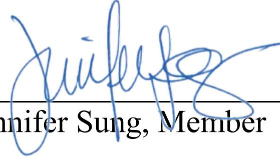
The complaint is dismissed.

DATED: August 27, 2021.

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-007-21

(UNIT CLARIFICATION PETITION)

| | | |
|---|---|---|
| MCMINNVILLE PROFESSIONAL FIREFIGHTERS, IAFF, LOCAL 3099, Petitioner, | ) | RULINGS, |
| v. | ) | FINDINGS OF FACT, |
| | ) | CONCLUSIONS OF LAW, |
| CITY OF MCMINNVILLE FIRE DEPARTMENT, Respondent. | ) | AND ORDER |

Jason Weyand, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented Petitioner.

Adam Collier, CDR Labor Law, Portland, Oregon, represented Respondent.

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On April 26, 2021, Petitioner McMinnville Professional Firefighters, IAFF, Local 3099 ("Union"), filed a petition to clarify its existing bargaining unit of employees in the Fire Department ("Department") of the City of McMinnville ("City") by adding an unrepresented employee in the classification of Support Services Technician (SST). The City objected to the proposed unit clarification, asserting that the SST does not share a community of interest with the existing bargaining unit because the SST is an administrative and strike-permitted position, while the existing bargaining unit employees perform fire suppression, fire prevention, or emergency medical services duties and are strike-prohibited. The City also asserted that the SST is more closely aligned with other administrative positions that the Union did not petition to represent. A hearing was held before Administrative Law Judge (ALJ) B. Carlton Grew on June 3, 2021, under the Board's expedited process for resolving representation petitions. OAR 115-025-0065(c). The parties agreed to submit post hearing briefs on June 18, 2021. OAR 115-025-0065(f). The record closed on that date, and the case was transferred to the Board for expedited consideration. OAR 115-025-0065(e).

The issue is whether it is appropriate to add the SST position to the existing bargaining unit. For the following reasons, we find that the petitioned-for unit is appropriate and therefore, we clarify the unit as requested.

## RULINGS

The rulings of ALJ Grew were reviewed and are correct.

## FINDINGS OF FACT

1. The Association is a labor organization within the meaning of ORS 243.650(13).

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

3. The City is organized into the following departments: Administration, Community Development, Finance/Municipal Court, Fire, Information Systems, Library, Legal, Parks and Recreation, Planning, and Police.

4. Two labor unions represent employees at the City, the Union and the McMinnville Police Association (affiliated with the Teamsters Union). As of the hearing date, there were approximately 36 employees in the Union's bargaining unit, approximately 44 employees in the Police Association, and approximately 224 unrepresented City employees (including supervisory and confidential employees who are excluded from the definition of "public employee" under ORS 243.650(19)).

5. The Union and the City are parties to a collective bargaining agreement.[1]

6. The recognition clause of the parties' collective bargaining agreement provides:

> "The City recognizes Local 3099, International Association of Firefighters, as the sole and exclusive bargaining agent for all regular employees in the classifications [of Battalion Chief, Fire Captain, Fire Engineer/Apparatus Operator, Firefighter, Part-Time Plus Firefighter, Deputy Fire Marshal, and Fire Prevention Specialist], and any new classifications created by the City that perform similar fire suppression duties, fire prevention duties, or emergency medical services as those performed by bargaining unit members (but excluding supervisory or confidential employees as those terms are defined in ORS 243.650)."

7. Rich Leipfert is the Fire Chief. The Assistant Chief/Fire Marshal (Deborah McDermott), Operations Chief, and Training Division Chief report to Chief Leipfert.

[1]At the time of hearing, the CBA was set to expire on June 30, 2021, and the parties were in successor negotiations.

8. Assistant Chief McDermott supervises the Deputy Fire Marshal (a bargaining unit position), the Support Services Technician (the petitioned-for position), the Office Manager, and the Operations Support Specialist, whom are commonly referred to as the "administrative staff."[2]

9. The Operations Chief supervises the bargaining unit employees (other than the Deputy Fire Marshal), whom are commonly referred to as "line staff."

10. The Office Manager (Donna Fleischman), Operations Support Specialist (Jenny James), and Support Services Technician (Lori Martino), are unrepresented employees.

11. In 2018, to reduce the workload of bargaining unit employees and improve operations, Fire Chief Leipfert requested that the City create an administrative support position. The City responded to Leipfert's request by creating the Support Services Technician (SST) position in early 2019. The City hired Martino for the SST position in April 2019.

12. The SST position is in its own classification and is unique to the Fire Department.

13. The SST job description generally describes the position's duties as follows:

> "Responsible for assisting with the coordination of records management, apparatus & facility maintenance, equipment & supply inventory, and equipment repair & maintenance and personal protection equipment (PPE) and uniform purchasing."

14. According to the SST job description, the position's essential duties include, but are not limited to:

- "Assist with the coordination of annual preventive maintenance of fleet and facilities.
- "Maintaining and operating computer inventory and maintenance system.
- "Maintain a complete and accurate record of scheduled and completed training assignments.
- "Maintain a complete and accurate inventory of firefighting/EMS equipment and supplies.
- "Coordinate equipment repairs by off-site vendors.
- "Scheduling annual service and repair Self Contained Breathing Apparatus (SCBA). Includes conducting annual (SCBA) and (HEPA) FIT testing.
- "Maintain complete and accurate service, repair, and test records for equipment.
- "Transport equipment, supplies, and vehicles as needed.
- "Maintain training records and coordinate with State Department of Public Safety Standards and Training (DPSST) for department certification and accreditation programs.

[2]As a collateral issue, the parties dispute whether the Office Manager is a statutory supervisor under ORS 243.650(23). However, we do not need to resolve the Office Manager's supervisory status in order to determine whether the proposed unit is appropriate, and we decline to do so.

- “Maintain recordkeeping for EMS Licensing, training and provider licensing.
- “Assist with budget preparation.
- “Coordinate the sizing, purchasing and issuing of PPE and uniforms for the Department
- “Order and maintain an adequate level of supplies and drugs.
- “Performs other job-related duties as required.
- “Operates vehicles, computers, radios, phones, fax machines, and a wide range of equipment, tools, safety gear, etc.
- “Interacts and communicates with immediate supervisor, other departmental supervisors, employees, trainees, consultants, and sales representatives.
- “Provide Assistant Fire Chiefs’ with continual and necessary information including but not limited to issues, service problems, and major and unusual problems.”

15. According to the SST job description, the required skills include “[u]sing office equipment (computers, copy machines, fax machines, and postage machines” and “[t]he ability to use hand, power, pneumatic and hydraulic tools.”

16. The SST job description lists the physical requirements as follows:

- “Must be able to operate a motor vehicle in a safe and efficient manner.
- “Must have the use of sensory skills in order to effectively communicate and interact with other employees and the public through the use of the telephone and personal contact as normally defined by the ability to see, read, talk, hear, handle or feel objects and controls.
- “Physical capability to effectively use and operate various items of office related equipment, and power tools.
- “It may be necessary for the individual to respond to emergency situations in which walking, running, climbing, reaching, bending, lifting, pushing and pulling 50 lbs. or more is required and the ability to respond quickly.
- “Must be able to work in dimly lit, smoky and/or dark conditions and during hot, cold and inclement weather.”

17. The SST job description describes the “working conditions” as follows:

> “Work is performed primarily in an office environment under regular and recurring work situations; and involves the continuous use of decision-making, interpersonal skills, teamwork, customer service, problem analysis, independent judgment, and basic math.
> “When the work schedule or special duty requires it, the employee will work on weekends, holidays, irregular hours, and in inclement weather.”

18. Martino is responsible for maintaining the Department’s inventory of various supplies, including uniforms and personal protective equipment (PPE). This responsibility includes tracking inventory; helping to develop and adhere to a budget for supplies; ordering

supplies; cleaning, repairing, and testing equipment; ensuring that equipment complies with applicable standards; determining whether equipment can be repaired in-house or must be taken to a specialty vendor; and taking items to vendors for repair or maintenance.

19. The SST is responsible for maintaining and repairing the Department's supply of self-contained breathing apparatuses (SCBAs), a form of required personal protective equipment for firefighters. An SCBA has a regulator and a mask. The Department has approximately 48 SCBA packs.

20. Firefighters are not permitted to enter a scene with significant smoke or chemical exposure risk without wearing a SCBA. A defective or ill-fitting SCBA is a significant health and safety hazard.

21. Martino is the only employee certified to maintain the SCBA regulators and masks. The City paid for Martino to take a two-day course to become certified to perform maintenance on SCBA regulators and masks. An individual must be recertified for SCBA maintenance every two years.[3]

22. The SCBA has many mechanisms that must be maintained and put together correctly for the SCBA to work properly. When maintaining an SCBA, Martino may, for example, take apart the SCBA regulator, clean the parts, apply sealant to particular parts, and put the SCBA back together. Martino must know, for example, which types of cleaning agents can be used, which parts require sealant, and which parts cannot have sealant applied to them. Martino also must know how to use various tools, including tools specifically designed to maintain the SCBAs.

23. Martino must also frequently maintain or repair the SCBA masks. Each mask has a communication device, including a microphone and speaker. Each mask also has a heads-up display that tells the firefighter how much air they have left. Parts, like the speakers, are frequently broken.

24. SCBA pack maintenance is a significant, regular job duty for the SST. Typically, after every fire event, she must repair at least one SCBA pack, and one or more masks.

25. Martino also schedules and coordinates mandatory annual testing of the SCBAs by a contractor.

26. The SST also coordinates and performs the SCBA mask "fit testing" for all firefighter employees and volunteers of the City and the City of Amity (pursuant to a mutual aid agreement between the cities). An SCBA mask must form a proper seal to protect the wearer. Martino is certified to conduct the fit tests using a special machine that detects whether there is a proper seal. Martino has substantial experience conducting fit tests. All employees or volunteers must be fit tested when hired, and annually thereafter. Masks must be fit tested routinely because

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[3]After the Union filed the unit clarification petition at issue, the City informed Martino that it would cease paying for training or certifications that were not required for her position. The City will continue to pay for Martino's SCBA-related training and certifications, because SCBA maintenance and fit testing are required SST job duties.

faces often change shape. An individual also may request additional fit testing when their mask is uncomfortable. Each individual is issued two masks.

27. A "turnout" is another form of firefighter PPE, and includes a helmet, gloves, boots, pants, and jacket. In addition to maintaining the Department's turnout supply, Martino "sizes" volunteers and employees for turnouts; assists with cleaning and repair of turnouts; finds replacement gear when repairs are needed; and monitors the expiration of equipment (turnouts typically expire 10 years from the date of manufacture). To perform this duty, Martino must be familiar with National Fire Protection Association (NFPA) standards for gear, which vary depending on the type of scene that the gear is used for. For example, older gear does not meet the NFPA standard for wildland fires; older gear must be combined with other gear to meet the standard. Newer gear meets the NFPA standard on its own. Turnouts also must be maintained and cleaned according to NFPA standards, which are specific to the type of gear. Martino recently helped the Department switch to turnouts that are more protective against carcinogens.

28. The Department recently responded to a large dairy fire, which caused the SCBAs and turnouts to require special cleaning. Martino figured out those requirements and implemented them. For example, the fire caused butter to be caked into some of the SCBA regulators. To ensure that the firefighters had enough working SCBAs, Martino promptly replaced the clogged regulators with spare, clean ones. Then, Martino took apart the clogged regulators and cleaned out the butter, a task that required technical skills and knowledge.

29. The Department does not require Martino to wear a uniform, but upon her request, the Department supplied her with a uniform, including boots. Martino determined that she needed a uniform because she has to handle, clean, and maintain the turnouts, SCBAs, and other equipment, which can be dirty or contaminated.

30. The Department tasked Martino and a bargaining unit firefighter with stocking a county-wide conflagration trailer. This involved determining what supplies were needed, ordering the supplies, constructing a wall in the trailer, and organizing the supplies in the trailer. The supplies included items like compasses, canteens, and whistles, as well as forms or "paperwork" needed when such incidents occur. The Deputy Fire Marshal assisted Martino with construction of the trailer wall.

31. Martino is required to drive fire apparatuses and ambulance rigs to mechanics for maintenance, repair, and testing. Ladders and hoses on the fire apparatuses must be tested every year.

32. Driving fire apparatuses requires special knowledge and skill. The Department tested Martino to ensure that she can operate the apparatuses safely.

33. Martino maintains and updates the line staff's certification and license records. This duty primarily involves data entry, checking compliance with requirements, and communication with the line staff.

34. Martino works with the training chief to track training records, input reports, and ensure that training task books, which are required for certification by the DPSST, are completed properly.

35. Martino communicates on a regular, daily basis with line staff. For example, line staff contact her about supply needs, and she contacts line staff to remind them to turn in certification information to her.

36. The SST job duties include reviewing fire inspection reports submitted by vendors. Vendors conduct fire inspections and submit reports to the Department. The vendor indicates whether various requirements were complied with, and what, if any, deficiencies were found. There is no standard report form. Martino receives the reports, inputs report data into the computer, and flags reports that identify deficiencies for further action by the Deputy Fire Marshal. Because of Martino's knowledge and experience regarding fire safety, Martino can distinguish between significant deficiencies that may require immediate attention and relatively minor deficiencies that can be addressed in a more routine manner, and she has done so on various occasions. The Deputy Fire Marshal, Candela, considers this to be a valuable skill. Before the SST position was created, Candela received and input the inspection reports himself. In approximately April 2021, the City implemented furloughs due to a budget shortfall. Because Martino was furloughed, she and Candela began sharing the duty of receiving and inputting inspection reports.

37. To perform the job duties of the SST, it is very helpful, and potentially necessary, for Martino to understand well the applicable DPSST requirements and any NFPA guidelines that the Department has adopted or elects to follow. Chief Leipfert and Assistant Chief McDermott agree that "prior fire experience should be required or highly desired" for the SST position. Martino understands DPSST requirements and NFPA standards well, because of her extensive experience as a volunteer firefighter and fire investigator.

38. The SST does not perform fire suppression or emergency medical services duties. The SST is not required to perform fire prevention or investigation duties, other than the duties related to fire inspection reports.[4]

39. The Office Manager (OM), according to its job description, "provides a variety of complex administrative support, involving sensitive and confidential information for the Fire Chief, Officers, and the Department. This position also provides information and assistance to the public regarding Fire Department policies and procedures. This position provides fiscal

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[4]Martino has extensive volunteer experience as a fire investigator, and serves on the County's volunteer Fire Investigation Team. When she started working for the City as an SST, she expressed interest in assisting with fire investigations for the City. The City agreed that Martino could assist the Fire Marshal and Deputy Fire Marshal with fire investigations during regular work hours, and Martino did so on multiple occasions. The City contends that Martino's fire investigation work was permitted but not required, and consequently, should not be considered when determining whether it is appropriate to add the SST position to the Union's bargaining unit. The Union disputes the City's factual and legal contentions regarding that work. For the reasons discussed below, we conclude that it is appropriate to add the SST position to the Union's bargaining unit without considering Martino's fire investigation work. Accordingly, we do not resolve the parties' factual disputes regarding such work, and we do not decide the issue of whether work that is permitted but not required may be considered when determining a position's community of interest.

management of Department expenditures, payroll, budget preparation and tracking and supervises front office staff."

40. The Operations Support Specialist (OSS), according to its job description, "performs a variety of advanced administrative support duties of considerable complexity required in support of the Fire Department and requires a thorough knowledge of division operations, services, and policies and procedures. The Operations Support Specialist provides administrative and programmatic support to the department's administrative staff; these tasks include managing complex patient chart reviews, the FireMed program, event and street permitting, providing information to the public and staff; assisting in a wide variety of assignments related to the administration of budgets, contracts, research projects and programs; provides office support; and performs related work as required."

41. The OM and OSS job descriptions do not include any of the following requirements: skills and physical ability to use hand, power, pneumatic and hydraulic tools; physical ability to operate a motor vehicle in a safe and efficient manner; physical ability to push or pull weights of 50 pounds or more; or physical ability to work in dimly lit, smoky and/or dark conditions and during hot, cold and inclement weather.

42. The OM and OSS do not perform any mechanical or technical duties related to the SCBAs, turnouts, or other personal protective equipment, and are not required to have any knowledge of such equipment.

43. The OM and OSS positions do not require or especially benefit from knowledge of NFPA standards and DPSST requirements, or experience in firefighting or fire investigation.

44. The OM and OSS positions do not require certifications in SCBA maintenance or fit testing.

45. The OM and OSS positions do not require the ability to operate fire apparatuses.

46. The OM and OSS generally do not have any physical contact with equipment that has been used in incident scenes.

47. The OM and OSS are not expected to bring supplies to incident scenes.

48. The Deputy Fire Marshal, the Support Services Technician, the Office Manager, and the Operations Support Specialist have adjoining cubicles outside the offices of the chiefs.

49. There is an SCBA room at the station where Martino stores her tools, and where she works on the SCBA regulators and masks. There is a work bench on one side, and SCBA fit-testing equipment on the other. There are storage cabinets for SCBA parts and tools, as well as other supplies, such as sealants and specialized cleaning products. SCBAs cannot be cleaned with certain products, such as bleach. Martino estimates that she spends eight to fifteen hours per week in the SCBA workroom, depending on whether there was a fire or how many SCBA packs need repair.

50. The starting (Step A) semi-monthly salary for the relevant Department classifications are: SST ($1,769), OSS ($1,953), OM ($2,052), and Firefighter ($2,486).

51. The vacation accrual rate, sick leave rate, and holiday schedule for unrepresented employees and the Deputy Fire Marshal are the same.

52. All City employees (except for those covered by the Police Association CBA) receive health insurance through the same service. Insurance premiums are split "90/10" for both employees in the Union bargaining unit and unrepresented general service employees. Both groups have the same dental and vision options, with generally comparable co-pay plans. Both groups are eligible to participate in a voluntary employee benefit association (VEBA); for each participating employee, the City provides funds equivalent to their deductible, which can be used to offset health care costs. Both groups are eligible for a flexible spending account. Both groups receive life insurance.

53. The standard schedule for the Support Services Technician, Operations Support Specialist, and Office Manager is Monday through Friday, eight hours per day, *i.e.*, 40 hours per week. For some time, those staff were permitted to work a "9/80 schedule." Under that schedule, they worked 80 hours in nine days, so that once every two weeks, they had a day off during the work week. During that period, the OSS and SST worked on the same days. The Office Manager and OSS covered for each other on their work-week day off.

54. Due to a budget shortfall, the City implemented furloughs across nearly all departments in April 2021. At the time of hearing, the City expected the furloughs to continue through the end of August 2021. In the Fire Department, the unrepresented employees were required to return to an eight-hour day, five-day week schedule, but take every Friday off as a furlough day (working a total of 32 hours per week). The Union and City agreed that the bargaining unit employees would not be required to take furlough days.

55. The Operations Support Specialist and Office Manager start work at 8 a.m. Martino requested that she be allowed to start work at 7 a.m. so that line staff who need something from her could speak to her in person at the end of their shift (*e.g.*, to request supplies or update a certification record). Assistant Chief agreed that the schedule adjustment would facilitate that communication and approved the request.

56. The Deputy Fire Marshal is the only bargaining unit employee who works a 40-hour, eight hours per day/five days per week schedule. Most of the bargaining unit employees work 24-hour shifts.

57. The SST job description indicates that the position involves "irregular work hours" because the Department expects the SST to be available to respond to major incidents. If a large fire occurs, it is an "all hands on deck situation," and the SST may be needed to support operations. Martino has provided support to line staff during such situations, for example, by delivering water and food to the scene. She worked some evenings to complete SCBA fit testing for volunteers. She worked some overtime hours when she agreed to work the airshow. Martino has never been mandated to work overtime.

58. The City has personnel rules that apply to all unrepresented employees, and generally apply to represented employees, unless inconsistent with their respective CBA.

59. The Department has a code of conduct that supplements, and may overlap with, the City personnel rules. The code of conduct is applicable to all Department employees, and only Department employees. As explained by Chief Leipfert, the Department has its own code of conduct because it operates differently from the rest of the city; Fire Department staff are held to a high standard; and the code of conduct helps everyone to "stay consistent with [the Department's] values."

60. All, or nearly all, of the SST job duties were formerly performed by bargaining unit employees. Some SST duties are, or potentially could be, shared with bargaining unit employees. For example, before the SST position was created, the Deputy Fire Marshal was responsible for reviewing and inputting fire inspection reports submitted by vendors. That job duty was transferred to the SST, and Martino has performed that duty since she was hired. At some point after the furloughs started in April 2021, the Deputy Fire Marshal started sharing that duty.

61. The primary job duties of bargaining unit line staff (other than the Deputy Fire Marshal) are fire suppression and emergency medical services. Line staff have historically performed some administrative duties and continue to do so, even after some of those duties were shifted to the SST. For example, line staff remain responsible for filling out medical charts and reviewing the charts for the purpose of quality assurance.

62. Formerly, some bargaining unit line staff were certified to perform SCBA maintenance. Because of the Covid-19 pandemic, the Department has had difficulty arranging for line staff to complete SCBA-maintenance training. As a result, at the time of hearing, Martino was the only employee certified to perform SCBA maintenance. The Department's goal is for some bargaining unit employees to also become certified in SCBA maintenance, so that they will share that job duty with the SST.[5]

[5]Unlike the dissent, we find that the record as a whole conclusively establishes that the SCBA maintenance and repair is a required job duty of the SST. The substantial evidence includes, but is not limited to, the following: The classification is titled "Technician." The 2019 job posting stated that the "Support Services Technician is responsible for assisting with the coordination of records management, apparatus and facility maintenance, equipment and supply inventory, *equipment repair and maintenance*, and personal protection equipment and uniform purchasing." (Emphasis added.) The SST job description also states that the SST is responsible for assisting with "equipment repair and maintenance." Both the SST job posting and job description include as a job duty, "Scheduling annual service and repair Self Contained Breathing Apparatus (SCBA)," and require the SST to have "[t]he ability to use hand, power, pneumatic and hydraulic tools." The City paid for Martino to attend a two-day, in-person training by a third-party to be certified to repair and maintain the SCBAs. Both Chief Leipfert and Martino testified that the SST is responsible for SCBA maintenance and repair. Unlike the fire investigation work that Martino performed, the City has never alleged that it does not require the SST to perform the SCBA maintenance and repair duties or that it assigned those duties to Martino only upon her request, and there is no evidence to that effect. Further, there is no allegation or evidence that the City barred Martino from performing those duties when it barred her from performing fire investigation work, or that the City intends to do so.

63. Both the chiefs (unrepresented employees) and line staff (bargaining unit employees) perform fire suppression duties. Both the Assistant Chief/Fire Marshal (an unrepresented employee) and the Deputy Fire Marshal (a bargaining unit employees) perform fire investigations and fire prevention work.[6] Before the SST position was created, both the Training Division Chief (an unrepresented employee) and line staff (bargaining unit employees) performed the training certification administrative work that is now primarily performed by the SST.

64. Generally, the OSS and OM cover each other's absences, and coordinate their schedules accordingly. Together with the Assistant Chief/Fire Marshal, the OM directs the work of the OSS and approves the OSS's time off requests.

65. The OSS job duties include review of medical charts and ambulance billing. Martino is trained to perform those duties, as back up for the OSS. Martino estimates that she spends less than five percent of her time performing those duties. Martino does not perform any of the other OSS or OM job duties.[7]

66. Martino has never been assigned to work in any other City department. Martino has very little interaction with City employees outside of the Department. She occasionally interacts with other City employees as one of the Department employees who serve on the City's health and safety committee.

67. The SST classification has no levels, and the position has no promotional path. To obtain a promotion in the City, Martino would need to apply for an open position like any other candidate.

68. The City is considering creating a fire district, in which case, all of the Department employees, including the bargaining unit employees, SST, OSS, and OM, would become employees of the fire district.

69. In 1983, this Board certified a bargaining unit of strike-permitted and strike–prohibited employees in the City's Police Department. *See Teamster Food Processors, Drivers, Warehouseman and Helpers, Local Union No. 670, v. City of McMinnville*, Case No. C-28-83, 7 PECBR 5924 (1983).

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[6]As established by the testimony of Assistant Chief/Fire Marshal McDermott, when Martino requested that the City allow her to perform fire investigation duties, McDermott was concerned that allowing Martino to perform some of the same fire investigation work as a bargaining unit employee, the Deputy Fire Marshal, could cause the Union to file a grievance. However, McDermott also considered the fact that she, as Fire Marshal, also performs some of the same fire investigation work as the Deputy Fire Marshal, and that this sharing of duties between an unrepresented employee and a bargaining unit employee has not caused any problems. Consequently, McDermott decided to allow Martino to perform fire investigation work, so long as doing so did not cause any "problems." McDermott's and Leipfert's testimony further establishes that Martino's performance of fire investigation work did not cause any problems with her job performance, or cause the Union to make any complaint or file any grievance, and that the City decided to cease allowing Martino to perform the fire investigation work solely because the Union petitioned to add Martino's position to the bargaining unit.

[7]Any Department employee, including a chief or bargaining unit employee, may "pitch in" by answering the phone or the front door when both the OSS and OM are absent.

70. The McMinnville Police Association's collective bargaining agreement provides that it is the representative of a unit that includes employees in the following classifications: Sergeant, Corporal, Police Officer, Evidence and Property Technician, Records Specialist, and Parking Enforcement Specialist.

71. The Evidence and Property Technician, Records Specialist, and Parking Enforcement Specialist positions are non-sworn positions.

72. The Police Department also employs or has employed unrepresented administrative employees in the classifications of Office Support Specialist I, Office Support Specialist II, and Support Services Manager.[8] The Support Services Manager supervises both the Records Specialists (who are represented by the Police Association), and the Office Support Specialists (who are unrepresented). According to the City's Human Resources Manager, the Police Department's Support Services Manager's role is similar to that of the Fire Department's Office Manager. The starting (Step A) semi-monthly salary for relevant Police Department classifications are: Office Support Specialist I ($1,453), Records Specialist ($1,856), Evidence and Property Technician ($1,995), and Police Officer ($2,506).

Todd Godfrey is a firefighter/paramedic, acting captain, and acting apparatus operator in the Union's bargaining unit. Godfrey currently serves as the Union's president. At the time of hearing, Godfrey had worked for the Department for approximately 13 years.

In early 2021, Martino and Godfrey discussed her interest in joining the Union. The Union is affiliated with the IAFF, which has a self-imposed standard for the types of employee positions it will represent. Generally, the IAFF represents employees in positions that are directly related to fire suppression or prevention in the fire service. Some IAFF affiliates in Oregon represent individuals who do not directly perform fire suppression or prevention duties but play related roles, such as mechanics and fire prevention program staff. Godfrey consulted with IAFF state representatives, and they agreed that Martino's position met the IAFF's standard for representation.

Firefighter Godfrey and Deputy Fire Marshal Candela believe that Martino, as the SST, supports the line staff in a manner that is materially different from the OSS and OM. Chief Leipfert and Assistant Chief McDermott believe that the SST is "more administrative than operational" and has more in common with the OSS and OM than bargaining unit employees.

The Union asked the City to voluntarily agree to add the SST classification to the Union bargaining unit, and the City declined. The Union then filed the unit clarification petition at issue.

## CONCLUSIONS OF LAW

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

2. The petitioned-for accretion to the Union's existing bargaining unit is appropriate. When determining whether it is appropriate to add unrepresented employees to an existing

[8]At the time of hearing, one of the Office Support Specialist positions in the Police Department was unfilled, because the employee had recently been promoted to Records Specialist.

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). In accretion cases, we also 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 * * *)." *OPEU v. Executive Department*, Case No. UC-59-87, 10 PECBR 456 (1988). 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).

Community of Interest

We begin by addressing whether the petitioned-for employee, the Support Services Technician, shares a community of interest with the existing 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. For the reasons discussed below, we find that the record establishes that the SST and bargaining unit employees share a community of interest.

The SST and bargaining unit employees are all employed by the City to work in the Fire Department, subject to the Department code of conduct, and supervised by the Fire Chief. Additionally, the Deputy Fire Marshal, a bargaining unit employee, and the SST, are both directly supervised by the Assistant Chief/Fire Marshal.

The SST and bargaining unit employees work in the same location, the main fire station. The SST's and Deputy Fire Marshal's cubicles are next to each other. The SST and bargaining unit employees frequently and regularly interact for work-related purposes, for example, when the SST is communicating with firefighters regarding their equipment needs and certification records, sizing them for uniforms and turnouts, and conducting fit testing for the self-contained breathing apparatuses (SCBAs).

The benefits, such as health insurance, for the SST and bargaining unit employees are largely the same. Vacation and sick leave accrual rates for the SST and the Deputy Fire Marshal are the same.

The SST's job duties are closely related to the duties of bargaining unit employees. Fire suppression is a primary duty of bargaining unit firefighters, and the SST is responsible for ensuring that the firefighters have the supplies that they need to perform their work. In particular, the SST ensures that the firefighters' personal protective equipment, including SCBAs and turnouts, is in good working order for use by the firefighters in the field. For example, the SST is responsible for testing equipment to verify that it meets safety standards and determine whether it needs to be repaired or replaced. The SST also sizes turnouts and performs mandatory SCBA fit tests to ensure that the equipment fits the individual firefighter properly. Additionally, the SST

helps to ensure that the firefighters complete all of the trainings and maintain all of the certifications that are required for their jobs.

Nearly all of the SST's job duties were previously performed by bargaining unit employees. Some of the SST's job duties may continue to be shared with bargaining unit employees; for example, the Deputy Fire Marshal and SST currently share responsibility for receiving fire inspection reports. Under this Board's definition of "bargaining unit work," the SST is performing bargaining unit work. *See Tigard Police Officers Association v. City of Tigard*, Case No. UC-32-88 at 8, 10 PECBR 1014, 1021 (1988). And, under that precedent, the fact that the primary work of the SST was previously performed by bargaining unit employees means that the SST shares an especially strong community of interest with the bargaining unit employees, and should weigh heavily in favor of finding the proposed accretion appropriate. *See id.* In *Tigard*, the association petitioned to add a "crime prevention specialist" position to its existing bargaining unit. The city had created the specialist position to perform duties that were previously performed by bargaining unit police officers as "a secondary part of their law enforcement duties." The Board found that the crime prevention specialist's work was, under these circumstances, "bargaining unit work" and concluded, "without difficulty, that the specialist share[d] a community of interest with bargaining unit employees." *Id.*

Based on all of the foregoing factors, including the fact that the SST performs bargaining unit work, we too find, without difficulty, that the SST and bargaining unit employees share a community of interest.

The City argues that the SST lacks a community of interest with the bargaining unit employees because the SST "shares a greater community of interest with other unrepresented City employees than the IAFF bargaining unit members." However, even assuming that the SST shares a "greater" community of interest with other unrepresented employees, that does not mean that the SST does not *also* share a community of interest with the bargaining unit employees, or that the proposed unit clarification is inappropriate. Employees can, and typically do, share a community of interest with more than one group of employees, and Public Employee Collective Bargaining Act (PECBA) expressly contemplates that there will be more than one way to divide a workforce into appropriate units. *See* ORS 243.682(1)(a) (authorizing this Board to find a unit is appropriate "even though some other unit might also be appropriate"). Further, PECBA does not require a petition to set forth the most appropriate unit, only *an* appropriate unit. *Id.*; *see also Douglas County*, CC-004-14 at 31, 26 PECBR at 388.

The City also argues that the SST lacks a community of interest with the existing bargaining unit because the SST's job duties do not include fire suppression, fire investigation, and emergency medical services, which are the primary job duties performed by the bargaining unit employees. This Board rejected that argument in a closely analogous case, *Oregon State Police Officers Association v. Oregon State Police Department and Executive Department, Labor Relations and Personnel Division*, Case No. UC-99-87, 10 PECBR 678 (1988) ("*OSPD*"). In *OSPD*, the association proposed adding five employees in the Communications Specialists III and IV classifications to its bargaining unit, which was composed mainly of sworn, strike-prohibited police officers. *Id*. The Board disagreed with the State's contention that the Communication Specialists did not share a community of interest with the existing bargaining unit because they did "not perform the traditional law enforcement functions" performed by bargaining unit

employees. 10 PECBR at 682. The Board found that it was appropriate to add the petitioned-for employees because they "perform a critical role for the daily functioning of the OSP in that they assure that the Department's communication and other electronic equipment is in working order for daily use by Troopers in the field. Troopers rely on the Communication Specialists to maintain and repair the Department's equipment, which is critical to the troopers' work and safety. The Communication Specialists perform work which is unique to the Department and is integral to and directly supportive of the Department's function." *Id.* at 683. Here, as in *OSPD*, the SST performs a critical role for the daily functioning of the Department, in that the bargaining unit firefighters rely on the SST to supply, maintain, and repair the Department's personal protective equipment, which is critical to the firefighters' work and safety. Moreover, much of the work performed by the SST is historically bargaining unit work.

The City also argues that differences in salary levels and benefits preclude a finding that the SST shares a community of interest with the existing bargaining unit. When asserting that those differences are great, the City compares the SST only with those bargaining unit employees who work 24-hour shifts, and ignores the similarities between the SST and the Deputy Fire Marshal, who works a standard 40-hour workweek. Further, even considering the differences that the City focuses on, we find that the relationship between the SST's and bargaining unit employees' job functions, coupled with the commonalities discussed above, are more than sufficient to establish a shared community of interest. *See, e.g.*, *Tigard*, UC-32-88 at 8, 10 PECBR at 1021 (finding community of interest even though benefits and wages differed). This Board has found a shared community of interest between employees with far greater differences in duties, compensation, and other working conditions. *See, e.g.*, *Executive Department*, 10 PECBR at 469-70 (finding accounting division employees share community of interest with existing bargaining unit employees despite diversity in job duties, compensation, and other specific working conditions). The differences in compensation and other working conditions at issue are the "types of distinctions" that "can be dealt with as a part of the collective bargaining process." *Executive Department*, 10 PECBR at 470.[9] Indeed, in larger units (and as units expand), it is common for wage differences to be present.[10]

<u>History of Collective Bargaining and Desires of Employees</u>

The record establishes that the SST desires to be represented by the Union for the purposes of collective bargaining, and to be included in the existing bargaining unit of Department employees. The SST is a recently created position, and there has been no prior attempt to organize

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[9]Notably, the salary differential between the SST and firefighter classifications is comparable to the salary differential between different classifications included in the McMinnville Police Association bargaining unit.

[10]In *Executive Department*, the Board recognized that diversity in job duties and working conditions among bargaining unit employees is the expected result of this Board's administrative preference for larger units. 10 PECBR at 470 ("The diversity between the duties and responsibilities of the Accounting Division employees and employees in the current OPEU unit, however, is not a reason for finding the inclusion of the Accounting Division employees to be inappropriate in this case. Such diversity is a typical result under our policy encouraging wall-to-wall units * * *."). It would be wholly inconsistent for this Board to simultaneously maintain the administrative preference for larger units and find that employees with diverse duties and working conditions cannot be included in the same bargaining unit.

the SST, or the other residual Department employees.[11] However, as noted above, nearly all of the SST's job duties were formerly performed by bargaining unit employees.

Scope of Proposed Addition

As noted above, under this Board's precedent, in accretion cases, we also consider whether the scope of the proposed addition is "logically defined." The City contends that it is inappropriate to add only the SST position, and not the other residual positions in the Department, namely, the OSS and OM.

The SST is a unique position in the City, and the Department. The SST performs both administrative and technical duties, including the maintenance and repair of the firefighters' personal protective equipment and the fit-testing of their SCBAs. The SST must be certified to perform the technical duties. To perform SCBA maintenance and repair, the SST also must have mechanical aptitude, as well as the knowledge, skill, and physical ability to use power tools and other specialized tools. Department management also agrees that the SST position at least greatly benefits from, and potentially should require, prior fire service experience. The other residual employees do not perform any comparable technical duties; their positions do not require any technical certifications or mechanical aptitude; and their job duties do not require or substantially benefit from prior fire service experience. Under these circumstances, the proposed inclusion of the SST, but not the OSS and OM, is logical.

The City asserts that there is "nothing unique" about the SST position, and that the position's duties are "entirely administrative." In making this assertion, however, the City does not sufficiently account for the record evidence regarding the SST's significant technical duties. The City's argument also fails to meaningfully consider that the core functions of the SST position have long been bargaining unit work. That factor alone is worth particular weight in determining whether it is appropriate to add the newly created position to the existing unit. That factor also distinguishes the SST from the OSS and OM positions—there is no evidence that those two other positions are performing work that has historically been bargaining unit work.

The City also argues that the proposed addition would cause undue fragmentation of the City's workforce. The fragmentation objection is misplaced, because the Union is not petitioning to create a new, separate bargaining unit. Rather, the Union simply seeks to add a classification to an existing bargaining unit. Such "accretions" of employees "allow those persons who desire representation to become represented without further fragmentation" of the workforce. *Executive Department*, UC-59-87 at 16, 10 PECBR at 471. As this Board explained in *Executive Department*, "the major purpose of this Board's nonfragmentation policy is to assist employers by giving them fewer bargaining units to deal with and therefore save the employers time and money and to some extent protect them from the 'whipsaw' effect caused by unions competing against each other for

[11]The parties, to an extent, dispute why the Union did not petition to represent the other residual employees, *i.e.*, the OSS and OM. The Union's President testified that the IAFF would not agree to represent those types of positions. The City introduced hearsay evidence that those employees do not desire representation. The Union also asserts that the OM is a statutory supervisor, and the City acknowledged at hearing that there is a legitimate question regarding the supervisory status of that position. We do not need to resolve these disputes to determine whether the proposed unit clarification is appropriate, and we decline to do so.

ever-higher benefits." UC-59-87 at 13-14, 10 PECBR at 468-69 (internal quotation marks and citation omitted). However, "fragmentation of the employer's work force is not an issue" where the petitioner "does not seek to separate a small group" of employees into a new bargaining unit, but rather "seeks to add a group of unrepresented" employees to an already existing bargaining unit. *Id.* Here, as in *Executive Department*, clarifying the SST into the existing Fire Department unit "would not increase the number of bargaining units" the City "must deal with." *Id.* "It would merely increase the number" of employees represented by the Union. *Id.* "The reasons behind our nonfragmentation policy do not apply in this kind of clarification case." *Id.*

Moreover, when a petitioner seeks to add unrepresented employees to an existing unit, nothing in PECBA, our rules, or our case law "require[s] that the petitioner seek to clarify all residual employees of the employer or all residual employees within a department of the employer." *Id.*, UC-59-87 at 4-5, 10 PECBR at 459-60. To the contrary, our rules expressly authorize units that consist of only "part" of a department. 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."). Further, the unit clarification process for adding unrepresented employees "was created for the specific purpose of providing a vehicle for unions to petition to bring groups of residual employees * * * into already-existing bargaining units," even when the petitioned-for employees "would not constitute appropriate bargaining units in themselves." *Executive Department*, UC-59-87 at 4-5, 10 PECBR at 459-60.

In *Executive Department*, this Board concluded that it was appropriate to add employees from one division of the State's Executive Department (which had multiple divisions) to the union's "collector" bargaining unit. *Id.* The *OSPD* case, discussed above, is even more closely analogous to the instant case, because the petitioner proposed adding some, but not all, of the residual classifications in the state police department to the existing departmental bargaining unit. UC-99-87, 10 PECBR 678. Specifically, the association in *OSPD* proposed adding five employees in the classifications of "Communications Specialists III and IV" to its bargaining unit, which was composed mainly of sworn, strike-prohibited police officers. *Id.* The association did not petition to represent all of the department's unrepresented employees, which included clerical, bookkeeping, auto service worker, dispatcher, and personnel office employees. *Id.* at 680. The State objected, contending that the only appropriate unit would include all of the department's unrepresented employees. *Id.*, 10 PECBR at 683. The Board disagreed, explaining that "the asserted appropriateness" of the State's preferred bargaining unit was "not so clear as to preclude our authorizing the clarification of the Communication Specialists into the OSPOA unit." *Id.* Similarly, in a subsequent case involving the same bargaining unit, we found it appropriate to add only the classifications of Communication Systems Analyst I & II and Trades Maintenance Worker II to the OSPOA unit. *Oregon State Police Officers Association v. Oregon Department of State Police*, Case No. UC-13-96 at 7, 16 PECBR 825, 831 (1996). In that case, we explained that the addition of eleven employees to the Association bargaining unit "would not unduly fragment the potential bargaining unit of 330 residual department employees."[12]

[12]The City does not assert, much less substantiate in the record, that any significant problems would be caused by adding the SST to the bargaining unit, without also adding the OSS and OM. To the contrary, the record establishes that there is a comparable split in the police department, where some employees who perform administrative duties are included in the bargaining unit and some are not, and there is no allegation or evidence that this split has caused the City any problems.

Requiring the Union to petition for all of the residual employees in the Department would impose a new requirement that this Board expressly rejected long ago. We see no meaningful distinction between the instant case and prior cases where the Board has approved accretions of some, but not all, of the residual employees in a department. Those precedents make clear that the "logically defined" standard is relatively low. For the reasons discussed above, we find that standard was met here.

We turn to addressing the dissent, who argues that the scope of the petitioned-for addition is not logically defined. Specifically, the dissent asserts that the proposed addition fails to follow any "line" drawn by the employer. We disagree. The proposed addition follows a classification line drawn by the employer. Moreover, the petition merely proposes to add a classification that is unique to the Fire Department to an existing, Department- and classification-based bargaining unit. We are not aware of any case in which this Board has deemed such an accretion inappropriate.

The cases relied on by the dissent are inapposite. The dissent cites *City of Portland Planning and Engineering Employees Association v. City of Portland*, Case No. UC-38/70-95, 16 PECBR 602, 614 (1996). In that case, the association (which the Board considered to be a quasi-craft unit) petitioned to represent only parts of various classification series; for example, the association petitioned to represent the "Senior Programmer Analyst," but not the "Programmer Analyst" or the "Programmer." The instant case is materially different in several ways, including because the Union's petition seeks to add to a unit that includes only Department-specific classifications an entire Department-specific classification, and there are no other classifications in the same series. The dissent also cites *Service Employees International Union Local 503, Oregon Public Employees Union v. Marion County*, Case No. UC-11-10 at 35-36, 24 PECBR 521, 555-56 (2011). In that case, the City employed temporary employees in 35 classifications represented in the existing bargaining unit, but the union petitioned to add temporary employees in only 25 of those 35 classifications, and because the union "offered *no* reason" for the distinction, the Board concluded that the distinction was "arbitrary." *Id*. (emphasis added). In this case, the Union has identified multiple, legitimate bases for petitioning to add the SST but not the OSS and OM, including the facts that only the SST performs bargaining unit work; only the SST performs technical duties; and only the SST provides support to the bargaining unit employees that is critical to their health and safety.

Relatedly, the dissent argues that the petition disregards a line drawn by the employer around the positions of the OSS, OM, and SST. In the dissent's view, those three employees constitute a "three-person team" or a "single work unit" that have "highly similar jobs that perform a single body of work." We are not aware of any record evidence that refers to the SST, OSS, and OM as a "three-person team" or a "single work unit."[13] But even if the Department had assigned such a label to those three positions, it would not be dispositive, because the record establishes that the SST performs bargaining unit work and continues to share duties with bargaining unit employees. That is, there is no bright line that separates the SST's actual work from the work of the bargaining unit employees.

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[13]Assistant Chief/Fire Marshal McDermott testified that she supervises all of "the administrative staff," which includes the Deputy Fire Marshal, a bargaining unit employee.

Further, the evidence does not establish that the SST, OSS, and OM have "highly similar jobs that perform a single body of work."[14] Rather, the record establishes that the OSS, SST, and OM share only one job duty (chart review for ambulance billing), which the SST performs only occasionally as a "back up" to the OSS. Neither the OSS nor OM have the skills, knowledge, training, or certification to perform any of the SST's technical duties. And even assuming that the OSS and OM could perform the SST's administrative duties, there is no evidence that the Department has trained them to do so and that they serve as "back up" to the SST. Indeed, when the SST needed help with the administrative duty of reviewing fire inspection reports (because of furloughs), the Department assigned that duty back to the Deputy Fire Marshal (a bargaining unit employee)—*not* the OSS or OM.

The dissent also argues that we should deny the petition because adding the SST to the Union's bargaining unit would not "best effectuate" PECBA's policies, quoting *Association of Public Employees v. Oregon State System of Higher Education and Oregon Public Employees Union, Local 503, SEIU*, Case No. RC-113-87 at 6, 10 PECBR 883, 888 (1988) (*OSSHE*). We disagree, for several reasons. First, we disagree with the dissent's view of this Board's standard for determining whether a proposed unit is appropriate. When explaining why this Board adopted an administrative preference for larger units as a factor to consider (in addition to the statutory factors) in *OSSHE*, the Board stated that we must "apply the statutory criteria for an appropriate unit in a manner that best effectuates the purposes and policies of PECBA." *Id.* However, this Board has *never* held that *only* the bargaining unit that "*best* effectuates" the statute's policy goals is appropriate, and that we should deny petitions for other bargaining units because they are not "the best." To the contrary, as this Board has stated time and time again, PECBA *expressly* provides that there may be more than one appropriate unit, and it does not require the Board to designate the "most appropriate" unit, only "an" appropriate unit.

Second, as explained above, the petitioned-for accretion is entirely consistent with this Board's administrative preference for larger units, and therefore, under the Board's reasoning in *OSSHE*, that accretion *does* "best effectuate" PECBA's policies. *Id.* Indeed, as the Board explained in *OSSHE*, "The natural consequence of our application of the [preference for larger units] is that we ordinarily will add unrepresented employees to appropriate units but will refuse to carve out a splinter unit of employees from such units." *Id.*

Third, the dissent's policy arguments are based on speculation about "the potential adverse effects" of adding the SST to the unit—and that speculation is controverted by the evidence in the record.[15] Specifically, the dissent contends that "[d]ividing a single small team of employees with highly similar jobs that performs a single body of work and reports to the same supervisor can also

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[14]In the City's Police Department, there is a group of employees who all perform similar administrative work in support of law enforcement and who are supervised by a single supervisor (the Support Services Manager)—and some of them are unrepresented (the Office Support Specialists), and some of them are represented by the Police Association (the Records Specialists). The City does not claim that this "division" has caused any of the adverse effects that the dissent speculates will be caused if we grant the petition in this case, and there is no evidence of any such effects.

[15]None of the dissent's assertions about the "potential adverse effects" of adding only the SST position to the bargaining unit were raised by the City.

invite disputes or impair efficiency by making it more difficult for the employer to maintain similar terms and conditions of employment for similar positions, with potential adverse effects on productivity, employee satisfaction, and employee recruitment and retention." As discussed above, the starting premise of that contention—that the petition would "divide a single small team of employees with highly similar jobs that performs a single body of work"—is not supported by the evidence.

Further, we disagree with the dissent's assertion that the proposed accretion will "invite disputes over bargaining unit work." This argument assumes that assigning a particular type of work (in this case, the very broad category of administrative support work) to both bargaining unit and unrepresented employees will lead to bargaining unit work disputes. Putting aside the question of whether that assumption is correct, we note that the Department has, for many years, assigned the same work to both bargaining unit and unrepresented employees—and that state of affairs will continue even if we deny the petition. For example, both the bargaining unit firefighters and the unrepresented chiefs perform fire suppression duties. And, both the bargaining unit Deputy Fire Marshal and the unrepresented Fire Marshal perform fire investigation duties.[16] Moreover, both the unrepresented SST and the bargaining unit Deputy Fire Marshal perform review of fire inspection reports. And, according to the Chief, the Department intends to assign SCBA maintenance work to both the unrepresented SST and some bargaining unit line staff. Under these circumstances, adding the SST to the bargaining unit would *eliminate* some bases for disputes over bargaining unit work.[17] Moreover, contrary to the dissent's underlying assumption, there is no evidence that these overlaps between the job duties of represented and unrepresented employees have caused disputes between the Union and the City. Indeed, Assistant Chief McDermott testified that she feared allowing Martino to perform fire investigation work would give rise to a bargaining unit work dispute, but that when she did so, it caused no such dispute.

Relatedly, the dissent argues that the petition should be denied because "the bargaining power of the Support Services Technician and the employer would not tend to be equalized" unless the OSS and OM are also added to the unit. Greater equalization of bargaining power is the justification for this Board's preference for larger bargaining units, and as explained above, the proposed accretion of an unrepresented employee to the existing bargaining unit furthers that preference. As an unrepresented individual employee, the SST has little, if any, bargaining power. PECBA represents the legislature's policy determination that inclusion of the SST in a bargaining unit with other employees would "tend to equalize the bargaining power" of the SST with that of the employer, because all of the unit employees would share the *collective* bargaining power of the unit as a whole. *See* ORS 243.656. Certainly, that collective bargaining power might be nominally greater if the OSS and OM were also added to the existing bargaining unit. But, as we explained above, nothing in PECBA, our rules, or our precedent require an existing union to

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[16]Chief Leipfert testified that before the SST position was created, both represented line staff and the unrepresented Training Division Chief performed the administrative work related to training records, and that it's difficult to draw lines because "we all pitch in."

[17]At worst, the proposed accretion will exchange some of the existing bases for bargaining unit work disputes (the duties shared between the SST and the existing bargaining unit employees) for a new one (the duty shared between the SST and the remaining residual employees).

*maximize* its bargaining power by proposing to add *all* residual employees.[18] Moreover, when this Board references the concept of equalizing bargaining power, this Board compares only the bargaining power of a union to that of an employer when assessing different bargaining units.[19] Generally, the Board assumes that the larger the bargaining unit, the greater the equality of power between the union and the employer. This Board does not use that concept to compare the bargaining power of an individual employee against those of her represented counterparts.

At the same time that the dissent argues that the petition should be denied because it does not propose a large enough bargaining unit, the dissent also argues that the petition should be denied because it proposes a unit that is too large. Specifically, the dissent asserts that the SST will be ignored as a "minority of one" in a bargaining unit dominated by firefighters. That assertion is also speculative, as there is no evidence that the firefighters will choose to ignore the SST's interests in bargaining. To the contrary, in the existing bargaining unit, there is already a minority of one, the Deputy Fire Marshal. The Deputy Fire Marshal is the only bargaining unit employee who works a 40-hour workweek, the only one who is supervised by the Fire Marshal, and the only one whose primary job duties are fire prevention and investigations. The other 35 unit employees work 24-hour shifts, are supervised by the Operations Chief, and primarily perform fire suppression and emergency medical services. There is no evidence that the Union has failed to represent the Deputy Fire Marshal's interests because of his minority status. *See also OSSHE*, RC-113-87 at 8-9, 10 PECBR at 890-91 (denying petition to sever small group from statewide unit and noting record established that the small group's interests had been "well served" since joining the statewide unit). Even if we assume, despite this evidence, that there is a great risk that the SST's interests would be disregarded as one administrative employee in a unit with 35 firefighters, we do not see how adding one or two more administrative employees would change the intra-unit power dynamics in any meaningful way.[20] And, in any event, denying the petition for this reason would contradict this Board's longstanding preference for larger units. The Board has repeatedly adhered to the larger unit preference, and denied petitions to create smaller units of employees,

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[18]The dissent appears to be arguing that the Union will not have any ability to negotiate better employment terms for the SST so long as the OSS and OM remain unrepresented, because all three perform similar administrative duties. We decline to address whether we agree with that assessment, because PECBA does not authorize us to grant or deny representation petitions based on our assessment of what the employees may or may not achieve through the collective bargaining process. PECBA grants public employees only the right to engage in the collective bargaining *process*–without any guarantee that the process will produce any of the employees' desired results. We also note that many mandatory subjects of bargaining concern non-economic employment terms, such as the right to a union representative and the right to be disciplined only for cause.

[19]Thus, for example, in a case where a union proposes to create a relatively small unit, and there is an objection that the unit would unduly fragment the workplace, this Board may compare the bargaining power of the small unit to a potential larger, appropriate unit, and consider the relative bargaining power of the two units as one factor in its multi-factor analysis.

[20]The dissent agrees that a unit including the Department's 35 firefighters, one deputy fire marshal, one SST, one OSS, and one OM, would be appropriate.

even when the employees argued that their interests would be lost in the larger unit preferred by this Board.[21] *See, e.g.*, *id* at 7-8, 10 PECBR at 889-90 (and cases cited therein).

At the same time that the dissent argues the SST's interests will not be advanced by adding that position to the bargaining unit, the dissent argues that adding the SST to the unit will "mak[e] it more difficult for the employer to maintain similar terms and conditions of employment for similar positions, with potential adverse effects on productivity, employee satisfaction, and employee recruitment and retention." Both cannot be true at the same time: if Union representation will not help the SST improve her employment terms, how will Union representation cause those terms to be so different from those of the OSS and OM that their employment satisfaction will be negatively impacted?[22] In any event, the record establishes that there are many similarities in employment terms for bargaining unit and unrepresented employees, including fringe benefits and leave accrual rates—which at least suggests that when the City has found it necessary or helpful to maintain similar terms for both Union and unrepresented employees, the collective bargaining process has enabled the City to do so.

Designation of a Mixed Unit

The City also contends that it is inappropriate to add the SST to the existing bargaining unit because the former is strike-permitted, and the existing unit employees are strike-prohibited under ORS 243.736. This Board has the authority to designate mixed units of strike-prohibited and strike-permitted employees. *City of Canby v. Canby Police Association*, Case Nos. C-218-82 and C-235-82, 7 PECBR 5873 (1983), *aff'd*, 68 Or App 317, *rev den*, 297 Or 546 (1984). This Board has designated mixed units in numerous cases, including a mixed unit of police department employees in the City. *Teamster Food Processors, Drivers, Warehouseman and Helpers, Local Union No. 670, v. City of McMinnville*, Case No. C-28-83 at 11-12, 7 PECBR 5924, 5930-31 (1983).[23]

This Board has "found it appropriate to add strike-permitted employees to an existing unit of strike-prohibited [employees] where 1) the positions are unique to the [department] and directly supportive of its particular function and 2) inclusion of the positions will not significantly change the unit's ratio of strike-permitted and strike-prohibited employees." *Tigard*, UC-32-88 at 9, 10 PECBR at 1022. Here, the SST is unique to the Fire Department and directly supportive of its fire service function. Additionally, including the SST (one employee) will not significantly change the

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[21]There is also no evidence, or even legal basis for assuming, that the SST can better further her interests by bargaining with the City as an individual, unrepresented employee. Under PECBA, that assessment is a determination for the individual employee to make.

[22]Of course, if unrepresented employees become dissatisfied because union representation results in better employment terms for represented employees, PECBA gives the unrepresented employees the right to petition for representation.

[23]In *McMinnville,* the Board noted that *barring* the four strike-permitted police department employees from being added to the strike-prohibited bargaining unit covering the rest of the police department "would lead to fragmentation and a possible proliferation of small units, a situation which, historically, we have not favored." C-28-83 at 12, 7 PECBR at 5931.

unit's ratio of strike-permitted and strike-prohibited employees. Accordingly, we find it appropriate to designate a mixed unit in this case.

In sum, we find that the statutory and administrative factors that this Board considers when determining whether a proposed accretion is appropriate weigh in favor of granting the petition. Specifically, the statutory factors of community of interest, bargaining history, and desires of the employees, weigh heavily in favor of finding the proposed unit clarification appropriate. Additionally, the proposed unit is consistent with our administrative preference for larger units, because the accretion of a Department-specific classification will increase the size of the existing departmental and classification unit and is logically defined. The proposed unit clarification also satisfies our standard for designating a mixed unit of strike-permitted and strike-prohibited employees. Accordingly, we find it appropriate to add the SST to the Union's bargaining unit, and we clarify the unit as requested.

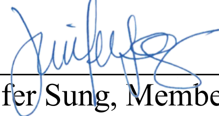
## ORDER

The Support Services Technician (SST) classification is added to the bargaining unit currently represented by the McMinnville Professional Firefighters, IAFF, Local 3099.

DATED: September 10, 2021.

Adam L. Rhynard, Chair

*Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

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*Member Umscheid, dissenting.

This case presents the question of whether the Board should add to an existing firefighter bargaining unit only one of three unrepresented positions in a functionally distinct administrative support team for the fire department. Only one position in that administrative support team is not a logical group or class, as required by Board precedent. Moreover, carving out only one position from the administrative support team, and leaving the remaining two positions unrepresented, does not best effectuate the purposes and policies of PECBA. Therefore, I dissent.

The Board has granted unit clarification petitions to add unrepresented employees to an existing bargaining unit when (1) the petitioned-for employees do not have "a community of interest distinct" from that of the represented employees, and (2) the petition seeks to add "a logically defined group or class of employees (as opposed to interested individuals or fragments of a group)." *Oregon Public Employees Union, SEIU, Local 503 v. Executive Department, State*

*of Oregon*, Case No. UC-59-87 at 16, 10 PECBR 456, 471 (1988). The Board has assessed whether petitioned-for employees are a "logically defined group or class" (as opposed to interested individuals or fragments of a larger group) in local government employment, as well as in state employment. *See City of Portland Planning and Engineering Employees Association v. City of Portland*, Case No. UC-38/70-95 at 13, 16 PECBR 602, 614 (1996) (dismissing petition to add 55 out of 118 information technology classifications because the petitioned-for positions were "not a functionally distinct group, but rather a fragment of a larger group of information systems personnel"); *Service Employees International Union Local 503, Oregon Public Employees Union v. Marion County*, Case No. UC-11-10 at 35-36, 24 PECBR 521, 555-56 (2011) (dismissing petition to add temporary employees working in only 25 of the 35 classifications filled by temporary employees because the petition did "not propose the addition of a logically defined group of employees"), *nunc pro tunc* order, 24 PECBR 557 (2011).

I do not disagree that the petitioned-for Support Services Technician position shares a sufficient community of interest with the fire fighters and Deputy Fire Marshal in the existing bargaining unit. The Support Services Technician and the represented employees work in the same building, where no City employees other than fire department employees work. The Support Services Technician and represented employees interact with each other regularly, receive generally similar benefits, and share the same supervisor at the highest level (the Fire Chief). All fire department employees are engaged in either providing or supporting the department's fire suppression and fire prevention services provided for residents of McMinnville. And, significantly, all fire department employees are subject to the McMinnville Fire Department Code of Conduct. *See Oregon AFSCME Council 75 v. Douglas County*, Case No. CC-004-14 at 33, 26 PECBR 358, 390 (2015) (giving "particularly great weight," in the certification of a departmental unit, to department rules that heavily regulated department employees' conduct). There are some notable differences in the hours and working conditions of the Support Services Technician and the represented employees; for example, the fire fighters work 24-hour shifts and respond to fire and medical calls in the community, whereas the Support Services Technician works during typical business hours and predominantly in an office setting. However, the differences are outweighed by sufficient similarities, and, notably, the City itself has purposefully consolidated in the department the administrative functions related to running the department. Under these circumstances, the petitioned-for position has sufficiently aligned collective bargaining interests with represented employees such that the petitioned-for position shares a community of interest with the represented employees.

This petition, however, turns on a different question: whether a three-person administrative support team of administrative and clerical employees should be divided into two groups—an unrepresented group (of two employees) and a single position that will be added to the bargaining unit. For the reasons described below, the Support Services Technician, on its own, is not a logical class or group (as opposed to merely an interested individual).

To begin, the City purposefully consolidated the administrative support functions needed to support the City's fire services into one small, functionally distinct administrative support team housed in the department. Specifically, over time, the City created this administrative support team by shifting administrative support work from other parts of the City and from the represented fire fighters to an office-based work unit located in the fire department. As a result of that consolidation, the department's administrative support functions are now provided by an Office

Manager position, an Operations Support Specialist position, and the petitioned-for Support Services Technician position (currently filled by Lori Martino). In particular, at some point in time, the City moved the ambulance billing duties from other City employees to the Operations Support Specialist position, which performs those duties as its major responsibility. That position also provides the primary front desk coverage in the office, including answering the phone, and performs the administrative work related to street permitting and street closures. The Office Manager prepares the work schedule to ensure shift coverage, receives goods, prepares and tracks purchase orders, and coordinates and supports the department's officer meetings.

The third administrative support position—the petitioned-for Support Services Technician—joined the team in early 2019. In a 2018 memo to the City Manager proposing the new position, the Fire Chief explained that the fire fighters "have a large administrative work load that must be accomplished," and that their performance of those duties, typically after 6:00 p.m., resulted in "late night administrative work" that "compounds the sleep deprivation issues the organization struggles with due to the large call volume." The Fire Chief advocated for creating an "administrative specialist position." The Chief predicted that funding a "non-uniform employee in an administrative support role would reduce the work load on the emergency responders, and gain efficiencies in ordering and inventory control that are currently weak."

The City conducted a hiring process for the new position in early 2019. The job announcement described the work as "performed primarily in an office environment under regular and recurring work situations" and the required education and experience as "a high school education or GED and five years of experience in administrative, clerical, or office work." Familiarity with firefighting or experience in a fire department was not required. The City's human resources manager, who sat on the hiring panel, described Martino as an impressive candidate with superior administrative skills. Before joining the City of McMinnville, Martino had worked for many years at a nearby city, Lafayette, as a building permit technician. (She also has experience as a volunteer fire fighter.) The Fire Chief testified that her "prior governmental experience" made her the most qualified candidate and acknowledged at hearing that her experience as a volunteer fire fighter was "helpful." Her offer letter recognized her "18 years of prior municipal service" as the reason she was granted vacation accrual upon hire at the rate of a nine-year employee. The offer letter welcomed her as "a member of our Administrative team." That "Administrative team," according to the Fire Chief's testimony, consists of the Administrative Chiefs and the unrepresented administrative support staff.

As the Support Services Technician, Martino performs predominantly office-based administrative support work.[24] Of the 17 duties listed in the position description, all but two (coordinating annual FIT testing of self-contained breathing apparatus (SCBA), and transporting equipment, supplies, and vehicles) are office-based, administrative support duties. Martino testified that the list of essential job duties she prepared in August 2019 was generally accurate, as modified by some additional duties she listed at hearing. Her administrative or office-based duties consist of maintaining and tracking uniform and personal protective equipment (PPE) inventory, including keeping inventory data on a spreadsheet; ordering uniforms, PPE, and SCBA parts, and

[24]I also dissent from the Board majority's factual findings that state or suggest that the technical and mechanical duties of the Support Services Technician comprise the majority or most important parts of the position's duties.

assembling those materials and parts; ordering building and fleet maintenance supplies and parts, scheduling maintenance, and the record keeping related to those tasks; entering training records and assigning training to employees; entering apparatus and personnel information in ESO; scanning information into personnel records; ordering and outfitting uniforms and PPE for employees; scheduling fleet maintenance and the record keeping related to fleet maintenance; reviewing medical charts and performing back-up ambulance billing; applying for DPSST certifications; importing calls on ESO; entering volunteer calls on ESO; tabulating inspection records; managing the Verizon 911 account; and participating on the safety committee. According to Martino's testimony and the position description questionnaire (as modified by her testimony), those duties require approximately 75 to 80 percent of her work time.

Unlike the Office Manager and the Operations Support Specialist positions, the Support Services Technician position is also responsible for some technical and mechanical work. Martino's testimony and the position description questionnaire indicate that she spends approximately 20 to 25 percent of her time on technical or mechanical work. Specifically, when questioned in detail about her estimates on her position description questionnaire, Martino testified that she spends about 15 to 20 percent of her time doing work related to SCBA maintenance and FIT testing. Notably, neither the job announcement nor the job description for the Support Services Technician position list as a duty of the job the ongoing maintenance and repair of SCBAs (as opposed to scheduling annual service of the SCBAs and conducting FIT testing annually and for new hires and new volunteers). The record is unclear about how much work Martino will perform after the COVID-19 pandemic related to the on-site, ongoing maintenance and repair of SCBAs.[25] The position description questionnaire also indicates that the essential duties of the position include programming Kenwood radios, and "shuffling" apparatus for maintenance, for the balance of the Support Services Technician's work time.[26] Even including the recurring SCBA maintenance and

[25]Specifically, the job announcement for the position—the document used to attract applicants for the job—does not list on-site, ongoing maintenance of SCBAs as a job duty. Rather, the detailed list of duties and responsibilities includes "[c]oordinating equipment repairs by off-site vendors" and "[s]cheduling annual service and repair" of SCBAs, including "conducting annual (SCBA) and (HEPA) FIT testing." The position description, similarly, does not list as an essential duty and responsibility on-site, ongoing SCBA repairs and maintenance. Rather, the position description includes as duties "[c]oordinat[ing] equipment repairs by off-site vendors," "[s]cheduling annual service and repair" of SCBAs, and "conducting annual (SCBA) and (HEPA) FIT testing."

The Fire Chief testified that the SCBA-related job duty of the Support Services Technician "currently and as hired" is to coordinate with the City's vendor who does annual testing of the SCBAs. The Fire Chief also testified that "due to COVID," Martino had "taken on" the primary role of doing the on-site, ongoing SCBA maintenance and repair work, and the department intended to get some of that work "pushed back" to the fire fighter staff. It is unclear to me on this record whether the City expects the Support Services Technician to do actual ongoing SCBA maintenance and repair herself (as opposed to coordinating with vendors or potentially doing sporadic work) after the pandemic subsides.

[26]The position description questionnaire asks employees to list only essential duties—*i.e.*, "those duties that make up at least 5% of your time." The record indicates that Martino performs some other non-office-based work, such as taking supplies to a fire scene, which the Fire Chief testified occurred on "very limited" occasions, assisting in a project related to preparing and stocking the county-wide conflagration trailer, and working on other nonrecurring special projects.

repair work that Martino testified that she performs, she spends approximately 20 to 25 percent of her work time on mechanical or technical tasks.

This record demonstrates that the Support Services Technician job is primarily an administrative support, office-based position, with approximately 20 to 25 percent of the job consisting of duties that are technical or mechanical. Martino's testimony about her position description questionnaire and the time she spends on particular tasks is consistent with Fire Marshal Deborah McDermott's testimony that Martino spends approximately 75 to 80 percent of her work time at her desk. The job announcement, the position description, the position description questionnaire, and the testimony of both Fire Chief Leipfert and Fire Marshal McDermott all also indicate that the Support Services Technician position is more administrative than operational.

Further, the Support Services Technician position is an integral part of the department's functionally distinct three-position administrative team. All three employees report to the same supervisor. They work similar work schedules. Until furloughs began in April 2020, the unrepresented employees in the department were working on a schedule in which they worked 9-hour days with every other Friday off. Their off Fridays were staggered, with Martino and the Operations Support Specialist off on the same Friday, and the Office Manager off on the other Friday. At least one member of the administrative team is therefore present each day of the week. Their duties are also similar, and to some degree, overlapping. The Operations Support Specialist is primarily responsible for answering the phone, with the Office Manager acting as primary back-up. The Support Services Technician provides administrative support for the ambulance billing work performed by the Operations Support Specialist. According to Martino's answers on the position description questionnaire, the Support Services Technician and the Operations Support Specialist interact on a daily basis related to the ambulance billing work. The Support Services Technician also interacts daily with the Office Manager related to purchase orders. Further, the three positions are paid similarly; their salary ranges fall within a five-range band. Finally, their working conditions are similar, with the exception of the work location for that portion of time that the Support Services Technician spends working on the SCBAs or transporting apparatus for maintenance.[27]

This feature of this public employer's workplace—the purposeful creation of a small, functionally distinct administrative support team for the department—should weigh heavily in determining whether only the Support Services Technician is a logical addition to the bargaining unit. Certainly, the Support Services Technician performs some technical and mechanical duties. Those duties are both important to the department and, the record indicates, appreciated by the department's management and represented employees. The existence of the position's

[27]The similarity of the required education and experience for the three positions also indicates that the three positions comprise a functionally distinct administrative support team. The Support Services Technician and Operations Support Specialist position require a high school diploma; one position requires five years of administrative, clerical or office experience, and the other requires at least three years of experience in an office/clerical position with substantial public contact. The Office Manager position requires a combination of education and experience, such as college coursework or vocational training in business administration or a related field, and a minimum of two years of increasingly responsible experience in office administration, accounting, procurement, budget, computer applications, and public contact.

technical and mechanical duties, however, should not detract from the larger point: the majority of the Support Services Technician position's duties are administrative, office-based duties that are similar to and regularly overlap with the administrative duties performed by the other two administrative support employees. The City has, in other words, purposefully created a small administrative support team that is a "functionally distinct group." *See City of Portland*, UC-38/70-95 at 11, 16 PECBR at 612.[28] Whatever label (if any) is used to describe that three-person administrative support unit, the factors such as shared working conditions, hours, and supervision, as well as the amount of interchange among employees on the team, indicate that this particular group of administrative support employees is a functionally distinct group. [29]

The Support Services Technician position, on its own, is not such a functionally distinct group. To be sure, the fact that the Support Services Technician has technical and mechanical duties distinguishes the position, to some degree, from the other two administrative support positions. But that distinguishing feature, on its own, is not sufficient to make only the Support Services Technician position a logical addition to the bargaining unit. As a result of the position's

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[28]The majority argues that *City of Portland*, UC-38/70-95, 16 PECBR 602, is inapposite because the petitioner in *City of Portland* sought to add only some classifications in a series of classifications, and, here, the petitioner seeks to add a fire department-specific classification to a unit consisting of other department-specific classifications. That is an accurate description of the two petitions, but it focuses on a factual distinction that is not material to our analysis here. The correct inquiry in this case is whether, by adding only a single classification (Support Services Technician), the petition omits sufficiently similar classifications (Operations Support Specialist and Office Manager) so that the single classification to be added is not a logical group or class. Just as in *City of Portland*, the petition here seeks to add to a bargaining unit only a subset of the logical group or class. The fact that the City of McMinnville, because of the relatively small size of its fire department's administrative office, has three single-position classifications (rather than classifications in a series), does not mean that only one classification is therefore logical. It means that the fire department's administrative office is not large enough to require classifications in a series.

[29]In *Oregon AFSCME Council 75 v. Washington County Department of Public Safety (Sheriff's Office) and Washington County*, Case No. UC-127-87 at 10-11, 11 PECBR 230, 239-40 (1989), the Board explained, in dicta, that the clerical employees in the county's department of public safety were not a "logically defined" group or class because, if they were, it would follow that the clerical employees in each of the county's 14 other departments would also constitute a "logically defined" group. But the City of McMinnville's fire department presents a different situation. Here, the fire department's administrative support employees are not, "in function and employment conditions" "essentially interchangeable" with other City administrative employees. *See Washington County*, UC-127-87 at 10, 11 PECBR at 239. Rather, the administrative support team performs some work that is unique to the fire department, such as reviewing medical charts for ambulance billing, and is subject to a department-only Code of Conduct. Concluding that all three administrative support employees are a logically defined, functionally distinct group is also consistent with the fire department's workplace culture in which the department's employees perceive that they share a unique culture and language related to fire fighting. That a fire department is unusually self-contained (as compared to other typical city departments) is also reflected by the fact that, in Oregon, fire-related services are not uncommonly provided by stand-alone fire protection districts. *See, e.g.*, ORS Chapter 478 (relating to the formation, powers, and duties of rural fire protection districts); ORS Chapter 198 (relating to special districts generally). In fact, the City is planning for the possible formation of a fire district. If such a district is eventually formed, all three employees on the administrative support team will transfer to the new district.

mechanical and technical duties, the employee in the Support Services Technician position may certainly have some collective bargaining priorities that differ from the priorities of the other two administrative support positions. For example, the Support Services Technician position currently needs SCBA-related certification and uses hand tools in addition to office equipment, and there may be collective bargaining objectives related to that certification and those tools. On balance, however, any such bargaining priorities unique to the Support Services Technician position are substantially outweighed by the similar collective bargaining interests that the three administrative support positions would likely share because their pay, hours, working conditions, and many of their duties are similar.[30] Further, the fact that some of the Support Services Technician's duties (both administrative and technical) were previously performed by fire fighters is relevant to the question of whether the Support Services Technician shares a sufficient community of interest with fire fighters. *See Tigard Police Officers Association v. City of Tigard*, Case No. UC-32-88 at 8, 10 PECBR 1014, 1021 (1988) (Crime Prevention/Public Information Specialist position shares community of interest with police officers in bargaining unit where 75 percent of the petitioned-for employee's work was crime prevention work previously performed by police officers, which the city had decided "was too important to law enforcement to be done only part-time by police officers").[31] That fact is not, however, dispositive of the separate question of whether a relatively new position that is primarily administrative, such as the Support Services Technician, is on its own a logical class or group when other administrative positions in the work unit are not included in the petition.

Dividing the administrative support team into two groups also disregards the lines of the employer's chosen structure, another reason this petition does not propose a logical addition to the bargaining unit (as opposed to merely an interested individual). *See Douglas County*, CC-004-14 at 34, 26 PECBR at 391 (giving the administrative preference for the largest possible unit less weight where the departmental unit sought is consistent with the employer's chosen structure). Here, over time, this public employer moved administrative support functions away from other City employees, who did the ambulance billing work, and from the fire fighters, who did a wide range of administrative support work and technical work, and consolidated those functions in a departmental administrative support team. With regard to the duties now performed by the Support Services Technician, the City believed that doing so would result in efficiencies in ordering and inventory control to the benefit of the City (and, presumably, the public it serves). By granting a petition that does not follow the lines chosen by the employer without a reason for doing so (other than the desire of the incumbent employee for union representation), the Board reaches a decision that could impair those efficiencies or the orderly operation of government services without a sufficiently compelling reason.

Further, this Board's precedent does not require granting this petition. In particular, the Board's unit clarification decisions involving the Oregon State Police do not provide helpful guidance in this case. *Oregon State Police Officers Association v. Oregon State Police Department*

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[30]The Union contends that the Officer Manager is a supervisory employee ineligible to collectively bargain. The City contends that the Officer Manager is a lead position. If the Union is correct, carving out the Support Services Technician position from a two-person team of nonsupervisory administrative support workers is equally as illogical as carving out the position from a three-person team.

[31]In *City of Tigard*, the city did not object to the petition on the basis that the petitioned-for position was not a logical class or group because other, similar positions were excluded.

*and Executive Department, Labor Relations and Personnel Division*, Case No. UC-99-87, 10 PECBR 678 (1988) ("*OSP*"), does not address the issue presented in this case. In *OSP*, the association petitioned to add the Communication Specialist III and IV classifications to the existing sworn officer bargaining unit. That bargaining unit already included the Communication Specialist I and II classifications (although there were no employees working in those classifications). *OSP*, UC-99-87 at 1 n 1, 10 PECBR at 678 n 1. The state did not object to the petition on the basis that adding the Communication Specialist III and IV classifications would illogically divide a functionally distinct communications work group. The Board granted the petition, but its decision contains no findings or analysis related to whether the Communication Specialists III and IV worked with other employees with similar duties and working conditions and who reported to the same supervisor but were omitted from the petition.[32]

Similarly, *Oregon State Police Officers Association v. Oregon Department of State Police*, Case No. UC-13-96, 16 PECBR 825 (1996) ("*OSP II*"), does not consider whether the petitioned-for employees were a carve-out from a larger, functionally distinct team. There, the association petitioned to add the Communication Systems Analyst I and II and Trades Maintenance Worker II classifications to the bargaining unit (which already included the Communication Systems Analyst III classification). Six of the petitioned-for employees worked closely together in the Communication and Engineering Services section. The Communication Systems Analysts worked on electronic systems and the Trades Maintenance Worker IIs worked on the facilities that house those systems. *OSP II*, UC-13-96 at 4, 16 PECBR at 828. Six Trade Maintenance Worker IIs worked in Central Installation, and were responsible for installing and repairing all police equipment in vehicles. The state did not object on the basis that the petition did not seek to add employees who performed highly similar jobs as part of a functionally distinct team. In short, neither *OSP* nor *OSP II* require the petition here to be granted.

Finally, the purposes and policies of PECBA are not best effectuated by granting this petition. As the Board has frequently observed, in unit determination cases, the Board may make unit determination decisions from among a range of possible appropriate units. *See* ORS 243.682(1)(a) (the Board may "determine a unit to be the appropriate unit in a particular case even though some other unit might also be appropriate"). But that does not mean that *any* proposed unit is appropriate, or that the sincere desires of an employee for union representation should be a determinative factor. Rather, the Board is required to "apply the statutory criteria in a way that 'best effectuates the purposes and policies of PECBA.'" *Oregon AFSCME Council 75 v. State of Oregon, Oregon Judicial Department*, 304 Or App 794, 813, 469 P3d 812, *review denied*, 367 Or 75, 472 P3d 268 (2020), quoting *Association of Public Employees v. Oregon State System of Higher Education and Oregon Public Employees Union, Local 503, SEIU*, Case No. RC-113-87 at 6, 10 PECBR 883, 888 (1988). Those purposes and policies include protection of the interests of the public, which pays for and uses government services, and the interests of public employers. Specifically, the statutorily enumerated purposes and policies of PECBA include "the development of harmonious and cooperative relationships between government and its employees[,]" alleviating strife and unrest and avoiding "unresolved disputes," "establishing greater equality of bargaining power between public employers and public employees," and

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[32]In addition, employees in the Communication Specialist III and IV classifications "primarily perform technical duties," unlike the Support Specialist Technician, who performs both administrative, office-based support work and some technical and mechanical work. *See OSP*, UC-99-87 at 5, 10 PECBR at 682.

"attempting to assure the orderly and uninterrupted operations and functions of government[.]" ORS 243.656. Determining that the Support Services Technician position, on its own, is a logical class to add to the bargaining unit does not best effectuate these policies, for the reasons explained below.

Here, granting the petition results in the majority of employees with whom the Support Services Technician is likely to share the most similar collective bargaining interests remaining unrepresented. As a result, the bargaining power of the Support Services Technician and the employer will not tend to be equalized. Rather, the employer will maintain greater bargaining power with respect to the terms and conditions of employment of the administrative support employees because the workplace reality is that the Support Services Technician is part of a three-person team, and the majority of that team will remain unrepresented. *See Oregon Workers Union v. State of Oregon, Department of Transportation and Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. RC-26-05 at 11, 21 PECBR 873, 883 (2007) ("[l]arger units tend to better equalize bargaining power" and are most fully consistent with PECBA's policy objectives of efficient bargaining, stable labor relations, and uninterrupted public services). Further, adding only the Support Services Technician position to the bargaining unit essentially leaves the petitioned-for employee as the only employee in the bargaining unit with collective bargaining interests arising from primarily office-based, administrative work.[33] Because the hours, wages, and working conditions of the Support Services Technician are in many respects different from those of the employees in the bargaining unit, and the Support Services Technician will be added without the other members of the administrative support team, the Support Services Technician position will be, in effect, a minority of one in the bargaining unit. Finally, the absence of equalized bargaining power is exacerbated by including a single strike-permitted employee in a bargaining unit of 36 strike-prohibited employees.

In addition, granting the petition also results in a single body of work—administrative support of the fire department—being performed in part by a represented employee and in part by unrepresented employees. That type of division of a single work unit, without a sufficiently compelling reason for doing so, can invite disputes over bargaining unit work. Such a result would be inconsistent with an important purpose of PECBA—minimizing the possibility of unresolved disputes, which the statute recognizes as injurious not just to public employers, but also to the public and to public employees themselves. *See* ORS 243.656(2). Dividing a single small team of employees who have highly similar jobs, perform a single body of administrative support work, and report to the same supervisor can also invite disputes or impair efficiency by making it more difficult for the employer to maintain similar terms and conditions of employment for similar positions, with potential adverse effects on productivity, employee satisfaction, and employee

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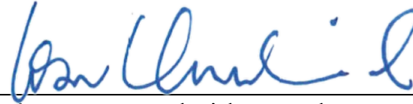
[33]The Deputy Fire Marshal is in the bargaining unit and, like the three administrative support employees, works out of the office and is supervised by the Fire Marshal. The Deputy Fire Marshal, however, is included in the bargaining unit as a part of what the collective bargaining agreement calls the "Fire Prevention Unit," not as an administrative employee. Moreover, the Deputy Fire Marshal investigates complaints, performs fire cause investigations, and conducts inspections to ensure compliance with fire and buildings codes, along with similar duties related to fire and life safety inspections—and thus has duties and working conditions different from those performed by the three administrative support employees.

recruitment and retention.[34] Considering such potential effects is not a speculative inquiry, but a necessary component of assessing how a newly configured bargaining unit may affect public employees, public employers, and the public—a part of applying the statutory criteria in a way that best effectuates the purposes and policies of PECBA. *See State of Oregon, Oregon Judicial Department*, 304 Or App at 813.

For all these reasons, I would dismiss the petition. There is not a sufficiently logical reason to divide this functionally distinct administrative support team into two groups—one represented, and one unrepresented. Further, doing so does not best effectuate the policies and purposes of PECBA.



*Lisa M. Umscheid, Member

[34]I am not suggesting that public employee organizing or collective bargaining create these risks—only that dividing into two groups, without a sufficiently compelling reason, a small team of employees with similar jobs who report to the same supervisor may do so.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-002-21

(REPRESENTATION)

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| WASHINGTON COUNTY POLICE OFFICERS ASSOCIATION,<br><br>Petitioner,<br><br>v.<br><br>WASHINGTON COUNTY SHERIFF'S OFFICE,<br><br>Respondent. | ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE |

On January 19, 2021, Petitioner Washington County Police Officers Association filed a petition to certify a new bargaining unit by card check, under ORS 243.682(2) and current OAR 115-025-0030.[1] The petition proposed a unit that would include all employees employed by Respondent Washington County Sheriff's Office, in the classifications of Criminal Records Specialist I, Criminal Records Specialist II, and Senior Criminal Records Specialist. On February 15, 2021, Respondent timely filed objections to the petition, contending that (1) a separate unit of Criminal Records Specialists ("CRS") is inappropriate because it did not include all of the remaining unrepresented employees in the Sheriff's Office (or the County), and (2) the Senior CRS are statutory supervisors.

Because the petition seeks to create a new bargaining unit of unrepresented employees, the matter was expedited under OAR 115-025-0065(1)(c) and assigned to Administrative Law Judge (ALJ) Martin Kehoe. A hearing was scheduled for March 9, 2021. Subsequently, the parties mutually agreed to postpone the hearing to August 16 and 17, 2021.

In the interim, on May 25, 2021, Respondent amended its objections to add a contention that an appropriate unit must include, at a minimum, employees working as Jail Service Technicians (JST). On July 16, 2021, Petitioner amended its petition to propose a bargaining unit that would include employees in the classifications of CRS I, CRS II, Senior CRS, JST, and

[1]Effective January 7, 2021, the Board's Division 25 rules were modified.

Investigative Service Specialist (ISS). On July 26, 2021, Respondent informed the ALJ that the amended petition made Respondent's objection to the appropriateness of the unit moot. On July 29, 2021, after conferring with Respondent, Petitioner clarified that the amended petition was intended to include the classifications of JST I, JST II, and JST III. Respondent filed an objection to the amended petition, contending only that the Senior CRS are statutory supervisors.

On July 30, 2021, ALJ Kehoe informed the parties that he had determined that the amended petition was supported by a sufficient showing of interest, even without any authorization cards that were submitted by objected-to employees. Because the inclusion or exclusion of the objected-to employees could not affect the result of the showing of interest determination, ALJ Kehoe concluded that the proposed bargaining unit should be certified without a hearing. ALJ Kehoe also indicated that, after the unit certification, Respondent could file a unit clarification petition to determine the supervisory status of the Senior CRS, as set forth in OAR 115-025-0050(6) (Unit Clarification Petition to Determine Public Employee Status). He then afforded Respondent an opportunity to respond by August 13, 2021, and show cause why the petitioned-for bargaining unit should not be certified. Respondent did not file a response.

On August 25, 2021, ALJ Kehoe sent a letter to the parties stating that because of the significant number of employees added in the amended petition, it was necessary for Respondent to post a new notice of the modified proposed bargaining unit to provide the requisite 14-day period for the affected employees to request an election under OAR 115-025-0061. That posting identified the proposed bargaining unit as Criminal Records Specialist I, Criminal Records Specialist II, Senior Criminal Records Specialist, Jail Services Technician I, Jail Services Technician II, Jail Services Technician III, Investigative Support Specialist, and Investigative Support Specialist - Senior.[2] Under the terms of that notice, a request for an election was required to be received by September 9, 2021. No request for an election was filed.

A majority of eligible employees in the proposed bargaining unit signed valid authorization cards designating the Washington County Police Officers Association as the exclusive representative of the proposed bargaining unit. Because the Association petitioned for certification of the unit by card check, we treat Respondent's objection to the inclusion of the Senior CRS classification in the proposed bargaining unit as challenges to the inclusion of those employees on the list of eligible employees that is used to determine whether the showing of interest for the representation petition is sufficient. See OAR 115-025-0051(2), (3). Because the number of challenges is "insufficient to potentially affect the result" of the showing of interest determination, the challenges are dismissed. OAR 115-025-0051(3)(b). *See also* IBEW Local 89 v. Oregon Legislative Assembly, Case No. RC-001-21 (2021) (certifying results of certification election without resolving challenges to certain employees' public employee status when the number of challenges could not affect the outcome).

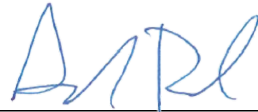
[2]The County identified the Investigative Support Specialist – Senior classification as supervisory. As with the Senior CRS Classification, we do not determine the supervisory status of the Investigative Support Specialist—Senior classification in this proceeding.

## ORDER

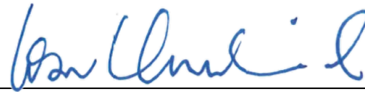
Accordingly, it is certified that the Washington County Police Officers Association is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

> Employees in the classifications of Criminal Records Specialist I, Criminal Records Specialist II, Senior Criminal Records Specialist, Jail Services Technician I, Jail Services Technician II, Jail Services Technician III, and Investigative Support Specialist, employed in the Washington County Sheriff's Office.

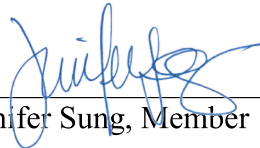
DATED: September 17, 2021.



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-013-21

(AMENDMENT OF RECOGNITION)

| | | |
|---|---|---|
| HUBBARD POLICE OFFICERS ASSOCIATION / OREGON FRATERNAL ORDER OF POLICE- LABOR COUNCIL, Petitioners, | ) | |
| v. | ) | ORDER AMENDING CERTIFICATION/RECOGNITION OF EXCLUSIVE BARGAINING REPRESENTATIVE |
| CITY OF HUBBARD, Respondent. | ) | |

On May 28, 2015, this Board certified the Fraternal Order of Police as the exclusive representative of sworn regular full-time municipal police officers that conduct regular patrol duties within the City of Hubbard (excluding all temporary, confidential, casual, seasonal, and supervisory employees).[1] On August 16, 2021, the Hubbard Police Officers Association, as affiliated with Oregon Fraternal Order of Police-Labor Council, filed an amended petition under OAR 115-025-0050(11) to amend the certification/recognition to reflect the name/affiliation change. The petition and supplementary materials demonstrated that the originally certified exclusive representative was Lodge 7 of the Fraternal Order of Police. Represented members unanimously voted on June 13, 2021, to create the Hubbard Police Officers Association, and to contract with Oregon Fraternal Order of Police-Labor Council for representation services, and to no longer contract with the national Fraternal Order of Police for those services.

On August 24, 2021, the Board's Election Coordinator provided the City of Hubbard with the petition and caused a notice of petition for amendment of certification to be posted. That posting provided that the proposed amended certification would reflect that the Hubbard Police Officers Association, as affiliated with the Oregon Fraternal Order of Police-Labor Council, would be certified as the exclusive bargaining representative for sworn regular full-time municipal police officers that conduct regular patrol duties within the City of Hubbard.

[1]The certification in *Fraternal Order of Police v. City of Hubbard, Oregon*, Case No. CC-006-15, specifically identified the Chief of Police and Sergeant positions as supervisory.

Pursuant to the terms of the notice posting, objections to the petition were initially due by September 9, 2021. Because the initial notice was not timely posted, a revised notice was posted with a new objection period ending September 21, 2021. No objections were filed.

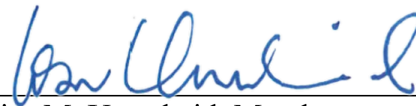
We conclude that the name change and affiliation vote was conducted in compliance with at least minimal due process requirements and that a majority of bargaining unit members voted to identify the exclusive representative as the Hubbard Police Officers Association, affiliated with Oregon Fraternal Order of Police-Labor Council. *See* OAR 115-025-0050(11).

ORDER

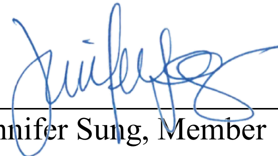
The petition is granted and the Fraternal Order of Police's certification/recognition is amended to reflect the exclusive representative as Hubbard Police Officers Association, affiliated with Oregon Fraternal Order of Police-Labor Council.

DATED: September 22, 2021.

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-010-21

(REPRESENTATION)

| | | |
|---|---|---|
| OREGON AFSCME COUNCIL 75,<br><br>Petitioner,<br><br>v.<br><br>OFFICE OF PUBLIC DEFENSE SERVICES,<br><br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE |

On September 16, 2021, Oregon AFSCME Council 75 filed an amended petition under ORS 243.682(2) and OAR 115-025-0030 to certify (without an election) a new bargaining unit of all full-time and part-time employees within the Administrative Services Division, the Compliance, Audit and Performance Division, and the Executive Division employed by the Office of Public Defense Services. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards designating Oregon AFSCME Council 75 as the exclusive representative of the proposed bargaining unit.

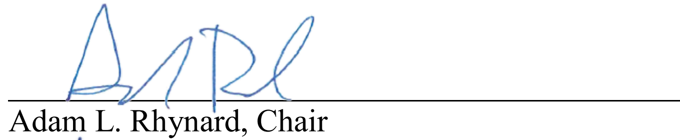
On September 16, 2021, the Board's Election Coordinator caused a notice of the petition to be posted. Pursuant to the terms of the notice posting and OAR 115-025-0060, objections to the proposed bargaining unit or a request for an election were due within 14 days of the date of the notice posting (*i.e.*, by September 30, 2021). There were no objections to the petition or a request for an election.

ORDER

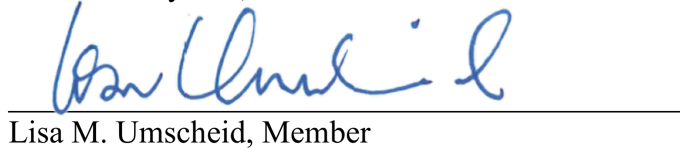
Accordingly, it is certified that Oregon AFSCME Council 75 is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

> "All full-time and part-time employees within the Administrative Services Division, the Compliance, Audit and Performance Division, and the Executive Division, of the Office of Public Defense Services excluding temporary employees, supervisory employees, managerial employees and elected officials."

DATED: October 1, 2021.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member

Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-014-21

(UNIT CLARIFICATION)

| | | |
|---|---|---|
| PROTEC17, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | ORDER ADDING |
| | ) | UNREPRESENTED EMPLOYEES |
| CITY OF PORTLAND, | ) | TO EXISTING UNIT |
| | ) | |
| Respondent. | ) | |
| | ) | |

On September 17, 2021, PROTEC17 filed a unit clarification petition under ORS 243.682(2)(a) and OAR 115-025-0050(4) to add the Capital Project Manager II classification to its current bargaining unit at the City of Portland. A majority of eligible employees specified in the petition signed valid authorization cards designating PROTEC17 as the exclusive bargaining representative.

On September 21, 2021, the Board's Election Coordinator caused a notice of the petition to be posted. Pursuant to the terms of the notice posting and OAR 115-025-0060, 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 October 7, 2021). Upon notification that the employer did not post the notice timely, the Election Coordinator directed that the notice be posted on September 27, 2021 with an updated date for objections to the proposed bargaining unit or a request for an election of October 11, 2021. The employer emailed the affected employees as directed. There were no objections to the petition.

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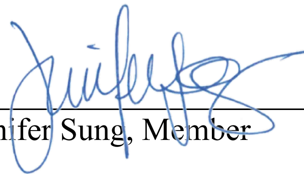
## ORDER

Accordingly, it is certified that all regular, probationary, and temporary employees whose job classification is Capital Project Manager II (CPM II) are added to the existing bargaining unit represented by PROTEC17.

DATED: October 12, 2021.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-001-20

(DUTY OF FAIR REPRESENTATION)

| | |
|---|---|
| WILLIAMS,<br><br>Complainant,<br><br>v.<br><br>AMALGAMATED TRANSIT UNION, DIVISION 757,<br><br>and<br><br>TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON,<br><br>Respondents. | RULINGS,<br>FINDINGS OF FACT<br>CONCLUSIONS OF LAW,<br>AND ORDER |

On September 30, 2021, this Board heard oral argument on Complainant's objections to an April 14, 2021, recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe, after a hearing on November 19, 2020. The record closed on January 11, 2021, upon receipt of the parties' post-hearing briefs.

Dianna Dee Williams, Portland, Oregon, appeared *pro se*.

Krista Cordova, Attorney at Law, Portland, Oregon, represented Respondent, Amalgamated Transit Union, Division 757.

Ankur Doshi, Attorney at Law, Portland, Oregon, represented Respondent, Tri-County Metropolitan Transportation District of Oregon.

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On March 12, 2020, the Complainant, Dianna Dee Williams, filed an unfair labor practice complaint against the Respondents, the Amalgamated Transit Union, Division 757 (ATU) and the Tri-County Metropolitan District of Oregon (TriMet or District). In this phase of the case, the issue

is whether ATU violated ORS 243.672(2)(a) and its duty to fairly represent Williams when it withdrew Williams's grievance, Grievance #9805. As set forth below, we conclude that it did not. Accordingly, we dismiss the complaint against both Respondents.

RULINGS

1. Here, as is the standard practice for duty of fair representation cases like this one, the ALJ correctly bifurcated the hearing and ruled that Williams must first prevail against her labor organization, ATU, before proceeding against her employer, TriMet. *See Ralphs v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO and State of Oregon, Executive Department*, Case Nos. UP-68/69-91 at 2, 14 PECBR 409, 410 (1993); *Mengucci v. Fairview Training Center and Teamsters Local 223*, Case Nos. C-187/188-83 at 13, 8 PECBR 6722, 6734 (1984). In her objections and at oral argument, Williams contends that these cases are distinguishable because they involved terminations from employment, whereas her (1)(g) claim against TriMet involves an alleged contract breach that concerns layoffs. The rule requiring that an employee prevail against a labor organization in a duty of fair representation claim before proceeding with a contractual claim against an employer, however, is not limited to just termination cases, and applies in other alleged contractual breaches. *See, e.g., Morgan-Tran v. AFSCME Local 88 and Multnomah County*, Case No. UP-67-03, 20 PECBR 948 (2005) (applying rule in a contractual dispute concerning layoff and bumping rights). Accordingly, the November 19, 2020, hearing correctly addressed only Williams's ORS 243.672(2)(a) claim against ATU. The ALJ also correctly allowed TriMet's attorney to be present during the hearing and participate in it. *Randolph v. International Alliance of Theatrical Stage Employees, Local B-20, and Metropolitan Exposition Recreation Commission*, Case Nos. UP-15/16-92 at 3-4, 15 PECBR 85, 87-88 (1994), *affirmed without opinion*, 134 Or App 414, 894 P2d 1267 (1995).

2. During the hearing, the ALJ admitted all of the exhibits presented except for Exhs. C-28 and C-29, which generally concern Williams's post-traumatic stress disorder (PTSD). After an objection from ATU and a discussion, Exhs. C-28 and C-29 were deemed legally irrelevant to the central issue of this case. Upon further review, Exh. C-29 does appear to indicate that ATU representative Anthony Forrester (who was not called to testify) was at least aware of Williams's PTSD as of February 10, 2016. As detailed below, one of Williams's central arguments in this case is that Forrester treated Williams differently than other ATU members and withdrew Grievance #9805 because of an alleged dislike of Williams's personality, which Williams contends is linked with her PTSD. We acknowledge and understand Williams's perception, but conclude that the ALJ's ruling was correct, given Williams's ambiguous responses to ATU's objection and the ALJ's subsequent questioning. Additionally, Forrester's knowledge of Williams's PTSD is not particularly relevant here because Forrester did not decide to withdraw Grievance #9805, and there is no evidence that Forrester played a meaningful role in ATU's decision-making process.

3. At oral argument, the parties agreed to the admission of Joint Exhibit 19.

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

## FINDINGS OF FACT

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). It represents roughly 6,000 employees[1] in total, and 28 different bargaining units. The bargaining unit most involved with this case is a group of approximately 2,635 TriMet employees with a wide range of positions. ATU also represents employees who work for 27 other employers (*i.e.*, "properties") besides TriMet.

3. At all times material, ATU and TriMet have been parties to a collective bargaining agreement known as the "Working and Wage Agreement" (WWA). Among other things, the WWA includes a grievance and arbitration procedure with three formal "Steps." If ATU and TriMet cannot resolve a grievance at one of the initial Steps, known as Step 1 and Step 2, ATU can refer the grievance to the final Step, which is arbitration. ATU can also withdraw (*i.e.*, "close") a grievance at any stage.

4. Williams is a "public employee" within the meaning of ORS 243.650(19). She has been a TriMet employee since July 24, 1995. At all times material, Williams has also been a member of ATU's TriMet bargaining unit.

5. In 2007, Williams became a Schedule Writer I, after applying, testing, and interviewing for the position. It was a promotion over her previous position at TriMet. Schedule Writer I was an ATU-represented position.

6. In 2008, a Schedule Writer II position became available. However, Williams did not apply for that position at the time. Schedule Writer IIs are also represented by ATU.

7. Schedule Writer I and Schedule Writer II are separate positions/classifications with their own duties and responsibilities. Broadly speaking, the Schedule Writer I position prepared simple schedules under the direction of a Schedule Writer II. Schedule Writer IIs were paid over $2 an hour more than Schedule Writer Is. Schedule Writer Is more commonly went "into the field" and rode buses than Schedule Writer IIs, and Schedule Writer IIs provided more "technical input" than Schedule Writer Is. That said, both positions have involved some "schedule writing" and "field work," and shared certain minimum qualifications.[2]

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[1]Williams objects that the record includes conflicting evidence on the precise number of ATU-represented employees; however, we need not resolve that dispute as it is not pertinent to our analysis.

[2]Copies of the Schedule Writer I job description are included in the record as "Onequestionasked.pdf" at 9-11 and Exh. J-14. Copies of the Schedule Writer II job description are included in the record as "Onequestionasked.pdf" at 12-13 and Exh. J-15. "Class Specification Bulletins" for the Schedule Writer I and II positions are provided in Exhs. C-2 and C-3, respectively. The Schedule Writer II position is also described in Exh. R-2, which is a notice for an October 19, 2020, Schedule Writer II position opening for rail.

8. Williams has never been a Schedule Writer II. Moreover, becoming a Schedule Writer II would be a promotion over Williams's current position and her old Schedule Writer I position.

9. On June 21, 2010, TriMet sent Williams a letter. It explained that the Schedule Writer I position was being eliminated in TriMet's 2010-2011 budget due to a "recession and revenue shortfall." The letter also noted that Williams was being returned to her "previous seniority class of Streetcar Operator" effective August 22, 2010. It then explained that an employee's return to the workgroup that he or she was being "bumped from" is governed by Article 1, Section 14, Paragraph 1 of the WWA. Subsequently, all three Schedule Writer Is were "laid off" from their Schedule Writer I positions.

10. Article 1, Section 14 of the WWA concerns layoffs. It provides,

> "**Par. 1.** Employees' department seniority shall govern in laying off and reemployment of employees. Employees laid off because of lack of work shall be returned in the inverse order in which they were laid off, as the need for their classification, or classification of work, permits.
>
> "**Par. 2.** If the District curtails the number of employees in any job, the employee with the least job seniority will be the first moved out of the job. That employee will then be entitled to exercise such job seniority s/he has on any other job in that department.
>
> "**Par 3.** An employee subject to layoff who has no seniority in any other department will have preference over outside hires for any jobs that become available and for which the employee is qualified or can be trained within a reasonable period of time."

(Emphasis in original.)

11. Although the Schedule Writer I position was eliminated on August 22, 2010, and it remains so to date, the position is still referenced in the WWA.

12. When Williams was laid off, ATU's elected president was Jonathan J. Hunt. Later, Hunt was succeeded by Bruce Hansen.

13. Williams and ATU did not file a grievance for her August 22, 2010 layoff, based on the advice of Williams's union representative. However, on or around June 5, 2011, ATU filed Grievance #8098 on Williams's behalf. In short, Grievance #8098 alleged that Schedule Writer I work was being performed by "planning personnel" and "lower seniority" Schedule Writer IIs. It was regularly described as a "work out of classification" grievance.

14. On July 21, 2011, ATU and TriMet held a "prefiling conference" for Grievance #8098. On July 27, 2011, ATU sent TriMet a letter requesting a Step 2 hearing for the same. On October 13, 2011, ATU and TriMet held that Step 2 hearing.

15. On October 17, 2011, TriMet sent ATU and Williams a letter denying Grievance #8098. In essence, TriMet's letter asserted that Grievance #8098 was untimely and that there was no violation of the WWA.

16. On October 20, 2011, ATU sent TriMet a letter requesting a Step 3 grievance committee hearing regarding Grievance #8098.

17. In April 2014, a majority of ATU's membership voted against taking Grievance #8098 to arbitration, after ATU's executive board recommended the same following a vote.

18. On June 4, 2014, ATU withdrew Grievance #8098 "without prejudice." Whenever ATU withdraws a grievance using the words "without prejudice," it does so to allow ATU and its members to file new grievances involving similar situations in the future.

19. At some point "several years prior" to ATU's September 16, 2019 withdrawal of Williams's Grievance #9805 (which is addressed below), Williams started a "Union Brothers and Sisters" Facebook page. Williams did so in order to (as she puts it) "be a watchdog over the union." Williams is also currently an administrator for the Facebook page. It currently has over 900 members.

20. "Almost six years" before the November 19, 2020 hearing for this case, Shirley Block was elected ATU's president, taking over the role from Hansen.

21. At some point before the hearing for this case, Block's staff told Block about the Union Brothers and Sisters Facebook page. Block has a "personal" Facebook page. However, Block does not use Facebook "at all," and has "never" looked at the Union Brothers and Sisters Facebook page.[3]

22. In 2017, Williams was "separated" from her position with Portland Streetcar for alleged "gross insubordination." Afterward, Williams filed a related grievance.

23. In December 2018, TriMet posted an opening for a Schedule Writer II position.

24. On January 3, 2019, at 5:29 a.m., an ATU member and union representative named Jean Strickland sent an email to Block.[4] In her email, Strickland asked Block whether Williams could take over the new Schedule Writer position.

25. On January 3, 2019, at 1:09 p.m., Block responded to Strickland's email. In relevant part, Block wrote,

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[3]Williams objects that these findings (and others in the order) are based only on Block's testimony, which Williams asserts is not "evidence." Testimony, however, is evidence, and is typically the primary form of evidence adduced at hearing.

[4]Strickland was retired as of the Board's November 19, 2020 hearing.

> "Look at the position and see if the schedule writer job is posted as a 1 or 2 position. I don't know how many years Dee Williams [has] or which schedule writer she was. Any one can apply for the job that meets the qualifications."

26. On January 3, 2019, at 1:50 p.m., TriMet Senior Labor Relations Representative Cynthia Kandle (who did not testify) sent Block an email with the subject of "Schedule Writer 2 Position." The email stated,

> "Just wanted to follow up on our discussion this morning about the Schedule Writer 2 job posting. It is currently posted and closes tomorrow (01/04/19) at 5 p.m.
>
> "You had asked about Dee Williams' prior experience as a Schedule Writer. It looks like she was a Schedule Writer 1 from 09/24/07 to 08/21/10. She does not appear to have held the Schedule Writer 2 position at any time.
>
> "Let me know if there is anything else needed."

27. On January 4, 2019, at 9:22 a.m., Strickland sent an email to Krista Cordova (ATU's attorney) and Block. In that email, Strickland wrote,

> "Dee [Williams] was a laid off and person with less seniority took her position. She put in an application for the recent posting and got reply that they have enough qualified applicants. She shouldn't have to apply because she had been laid off and should be first to be considered. Is there something you can do."

28. On January 4, 2019, at 9:41 a.m., Cordova responded to Strickland's email, writing,

> "I had labor relations pull her work history and they said she only held a position as Schedule Writer I, and not Schedule Writer II. Do you know if this is accurate?"

At 11:20 a.m. the same day, Strickland wrote back, "Yes, that is correct."

29. At some point after the December 2018 posting, Williams applied for a Schedule Writer II position. TriMet later hired two Schedule Writer IIs. Williams was not selected.

30. On February 5, 2019, ATU timely filed Grievance #9805 (the grievance directly at issue in this case) on Williams's behalf, and Block sent a letter to TriMet's Director of Labor & Employee Relations Laird Cusack requesting a Step 1 hearing for the same.[5] Block's letter also indicated that Terrance Howard would be representing ATU during that Step 1 hearing.

31. In sum, in Grievance #9805, Williams asserted that a Schedule Writer II position should have been offered to a TriMet employee named Arelina Russell first, and that if Russell declines that offer, then a Schedule Writer II position should be offered to Williams next.

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[5]Williams initially submitted the grievance to ATU on or around January 30, 2019, and ATU received it on January 31, 2019.

Grievance #9805 specifically references Article 1, Section 14, Paragraph 1 (the text of which is provided above); Article 7, Section 1, Paragraph 3 of the WWA; and an ATU/TriMet memorandum of understanding known as "MOA A.35."[6]

32. Article 7, Section 1, Paragraph 3 of the WWA provides, "The District will provide training on all existing or new equipment pertaining to an employee's assigned job function." Meanwhile, MOA A.35, which was agreed to by Block (representing ATU) and TriMet in November 2018, generally involved a "Streetcar Restructure" and resolved eight specific grievances. MA A.35 does not specifically address Schedule Worker Is or IIs, and naturally does not list Grievance #9805, which was filed after MOA A.35 was agreed to.

33. Block gave "the go-ahead" for ATU to file Grievance #9805. However, when Block first saw that grievance, Block believed that ATU "would lose it" to TriMet because, previously, Williams had been a Schedule Writer I rather than a Schedule Writer II. Block allowed the grievance to be filed anyway because Block wanted to give herself the opportunity to ask TriMet to allow Williams to be put into a Schedule Writer II position.

34. When Grievance #9805 was filed, Block already had some "personal knowledge" of the Schedule Writer I and II positions. Previously, Block was a Field Operations Coordinator, and worked closely with the Schedule Writer IIs. Block was also previously the union representative for Schedule Writer Is and IIs. In addition, before Block became ATU's president, Block worked for TriMet for close to 39 years, was a shop steward for 12 years, and was an ATU executive board officer for 9 years. During her time with ATU, Block negotiated a number of WWAs for ATU.

35. On May 6, 2019, at 9:20 a.m., Kandle (TriMet's Senior Labor Relations Representative) sent an email about Grievance #9805 to Cusack (TriMet's Director of Labor & Employee Relations) and others. The email was sent in response to separate emails from Williams and Cusack asking about the status of the aforementioned grievance. Kandle's email stated,

> "Shirley [Block] had indicated that ATU would be withdrawing the grievance. I will check with her. She and Krista [Cordova] indicated they would not pursue this issue because they do not believe Ms. Williams has any entitlement to the position. However, the fact they haven't sent the withdrawal is problematic. I will ask Krista if the union rep can communicate with Dee [Williams]."

36. On May 6, 2019, at 9:35 a.m., Kandle sent Block and Cordova (again, ATU's attorney) an email regarding Grievance #9805. It stated,

> "I recall that in a meeting we had when the Schedule Writer position was posted you had indicated that the grievance would be withdrawn. Dee Williams is contacting Laird [Cusack] about it, asking if it can be scheduled. She said that ATU had sent a letter to expedite the grievance, which we did not receive. You had said

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[6] In Williams's post-hearing brief (at page 6), she contends that TriMet also "possibly breached" Article 7, Section 1, Paragraph 4 of the WWA. That particular contract language was not specifically referenced in Grievance #9805.

> not to worry about this issue or scheduling. Can you please advise about the withdrawal notice?"

37. On May 15, 2019, Kandle sent another email to Cusack. Its subject was "RE: Grievance # 9805- 2nd request for response." It stated,

> "Shirley [Block] replied to my follow up email/phone call and said we need to talk in person. Since they aren't withdrawing as indicated, I think we just hear it at Step 1. I will ask Jenn to have the appropriate department schedule the hearing. You probably don't want to respond to this email. We will just get it scheduled."

38. After Kandle's May 15, 2019 email, Block and Cordova met in person with Kandle. (The precise date of this meeting is unknown.) During the meeting, Block asked Kandle to consider giving Williams "special privileges" and moving Williams into a Schedule Writer II position, as Williams already had some of the training required to be a Schedule Writer II. However, after Kandle checked in with Cusack about it, Kandle denied Block's request because Williams was never a Schedule Writer II. Kandle also told Block and Cordova that Williams could apply for a Schedule Writer II vacancy, and indicated that TriMet was unwilling to negotiate this matter. Subsequently, Block told ATU representative Anthony Forrester about the meeting's outcome.

39. On May 17, 2019, at 3:07 p.m., TriMet Labor Relations Analyst Jennifer Goodrich sent an email with the subject of "Schedule Writer 2 recruitment" to Chartisha Roberts of TriMet and others. Goodrich's email stated, "We have a grievance regarding the Schedule Writer 2 recruitment from earlier this year. Can you let me know if Diana (Dee) Williams #1609 submitted an application for that recruitment?" At 3:23 p.m. that day, Roberts responded, writing,

> "We had 58 applications and we only had 2 openings. The hiring manager only looked at people who scored 7 or higher on their work record reviews. (8 is the highest you can score)[.] 26 of the applicants scored 7 or higher and she scored a 6."

40. On May 22, 2019, TriMet sent Block a letter stating that a Step 1 hearing for Grievance #9805 was scheduled for June 25, 2019. On June 25, 2019, the Step 1 hearing was held as scheduled, with Williams and ATU representative Forrester in attendance (rather than Howard).

41. On July 17, 2019, TriMet sent Block and Williams a letter denying Grievance #9805. In the letter, TriMet denied that the WWA had been violated, and noted that Schedule Writer Is and IIs are different job classifications and do not share the same type of work, and that Williams was not a Schedule Writer II when she was laid off.

42. On July 23, 2019, Block sent Cusack a letter requesting a Step 2 hearing for Grievance #9805. The letter also stated that Forrester would represent ATU during that hearing. A copy of the letter was also sent to Williams.

43. On July 24, 2019, Goodrich (the TriMet Labor Relations Analyst) sent an email about Grievance #9805 to Block and Cordova. The email stated,

"I received the request for a Step 2 hearing on this grievance yesterday and was surprised. My understanding was that we would schedule the Step 1 hearing so Ms. Williams could be heard, but that the grievance would not be pursued after that.

"Please let me know if the ATU intends to withdraw the grievance."

44. On August 2, 2019, Goodrich sent another email to Block and Cordova. That email stated, "I hope you have had a chance to review this grievance. Please let me know if the ATU intends on withdrawing this grievance."

45. On September 10, 2019, Forrester sent an email with the subject of "Williams" to Block and others at ATU. The email stated,

"This is an FYI…

"Dee Williams had, was supposed to have, her grievance hearing yesterday. It was a step 2 for the suspension she had for her outburst to Todd Hurley during the CMS testing. She asked if Jean [Strickland] could represent her in the meeting, and I didn't have a problem with it.

"Dee told Kathryn [Wittman] (director of bus transportation), that she was going to record the meeting and Kathryn told her that she wasn't comfortable with proceeding with the hearing if Dee was going to record it. So the meeting was canceled.

"Just wanted you to know in case you get an email from TM regarding taping of grievance hearings.

"I have been clear in the past that ATU does not support, nor will agree to tape meetings. After I heard what happened, I again stated my position to Dee about taping meetings, and that it has not changed."[7]

46. On September 16, 2019, Block sent Cusack and Williams a letter stating that ATU was withdrawing Grievance #9805 (the grievance and withdrawal at issue in this case) "without prejudice." Williams did not receive the withdrawal letter until September 19, 2019.

47. Also on September 16, 2019, Williams attended a meeting about arbitrations with Cordova, Forrester, and Strickland at the union hall. During that meeting, nobody told Williams that Grievance #9805 was being withdrawn. Williams also did not ask Cordova for an update about Grievance #9805. After the meeting, Williams asked Forrester why he did not tell her about the withdrawal of Grievance #9805 during the September 16, 2019 meeting. Forrester responded that

[7]Williams's post-hearing brief (at 27) suggests that the grievance hearing described in this email was for Williams's Grievance #9887 (not Grievance #9805). That is likely the grievance that Williams filed in 2017. "TM" refers to TriMet.

he was not the decision-maker for that withdrawal and thus was not responsible for telling Williams about it.

48. Before ATU withdrew the grievance, Williams did not ask Block, Hunt, Cordova, or any of ATU's other office staff for an update about Grievance #9805. Moreover, before the hearing, Williams did not contact Block to ask her why Grievance #9805 was withdrawn. Instead, Williams exclusively communicated with her lower level union representatives and TriMet's Cusack about the grievance.

49. Block made the decision to withdraw Grievance #9805. Forrester did not. Moreover, before Block made that decision, Block considered the differences between the Schedule Writer I and II positions and reviewed their respective job descriptions. During the same investigation, Block also reviewed and considered related grievances that ATU previously filed but "lost" to TriMet (*i.e.*, "comparables"). One of those grievances was Williams's grievance from 2011, Grievance #8098. In addition to the foregoing, Block had "several discussions" about Grievance #9805 with ATU representatives including Cordova, Forrester, and Terry Howard (none of whom testified) before deciding to withdraw it.

50. On September 25, 2019, Cusack sent an email with the subject of "Recording of grievance hearings" to Block and others. Cusack's email stated that Williams had "insisted on recording a step 2 grievance hearing," and that TriMet was opposed to doing so. The email also included National Labor Relations Board cases related to that issue. At 3:28 p.m. on September 25, 2019, Block responded to Cusack, writing,

"Laird, as much as this pains me to agree with a CBB, I know we can't record the meetings. With that said Anthony [Forrester] will have the message as well and you don't have to continue sending me NLRB. I have better things to do."

51. On October 1, 2019, at 8:22 p.m., Forrester sent the following text message to Williams:

> "How I represent a person is no reflection on how I feel about them or what the meeting is about.
>
> "Who you have representing you has been under discussion after your antics from the last hearing."
>
> "If you ask Shirley [Block], from my conversations with her, she will probably tell you it is going to be me.
>
> "For me, I need to have a conversation with you and Jean [Strickland] prior to me making a decision."

Williams subsequently replied to Forrester via text message, writing, "What antics???" After that, Forrester sent Williams the following text message:

"Your push to have the meeting recorded when you have been clear from years ago about recording.

"I'm heading to bed. We can talk later."

Williams then responded with the following text message:

"I have no issue with being recorded…. you people are the ones who have issues with being recorded. I'm a truthful person ….because you guys are liars you don't want to be recorded.

"You will not represent me in any shape or form."

52. On October 1, 2019, Williams sent Block an email. Therein, Williams wrote,

"I am requesting a different Union rep for my step two grievance meeting scheduled for Friday Oct 11, 2019.

"Anthony Forrester has proven to be biased and ill prepared to represent me.

"I know that you have let others have other reps, due to Anthony's biased and prejudice against them. He is also prejudiced against me.

"He stated because of my 'antics' in the last meeting, he has to be there. By 'antics' he meant me wanting the meeting recorded. He knew prior to that meeting that I wanted it recorded, because of lies mgt is saying. All he said 'You know how I feel about recording. That's why I take notes.'

"I have been recorded before, and when I wasn't….that was on the advice of Anthony….and I got an 'unjust separation' because of it. Four YEARS later….that grievance is still not resolved.

"If all are honest….there should be no issues, in recording meetings.

"Anyway, I would like Jean [Strickland] and/or Terry Howard to be my representative. If you want an actual Eboard officer….Fred Casey or Khris Alexander could help. Or if Jon [Hunt] is up to it….he wouldn't tolerate this BS like Anthony [Forrester] does.

"I do not want Anthony in the room at all. When he was in the room with Krista [Cordova], Jean [Strickland] and I….he overtook the meeting, and I did not learn what I needed to….after Krista took the time to meet with us."

53. On October 9, 2019, Strickland had a meeting with Block and Forrester in Block's office. Strickland organized the meeting because Strickland wanted to have Williams and Block talk to each other. (12:27 p.m.) Strickland testified that, after she asked Block about whether that

could occur, Block said something to the effect of, "Why should we talk to her when she is so… when she says such… um… inflammatory things about us?"[8]

54. At 12:33 p.m. on October 9, 2019, after the above-referenced meeting, Block responded to Williams's email, writing, "Dee, I just had a conversation with both Jean and Anthony. I am leaving this up to my Eboard officer."

55. Strickland has spoken with Block and Forrester about Grievance #9805 more than five times. However, neither Block nor Forrester said anything about Grievance #9805 being withdrawn during the October 9, 2019, meeting. Outside of that particular meeting, Block and Strickland have also had conversations about Williams "getting emotional," being "high strung," and needing "a little bit more attention" and "love."

56. On July 19, 2020, Strickland sent an email to Forrester, Williams, and Block regarding the meeting referred to in Forrester's September 10, 2019 email. The email stated,

> "Anthony, again I was at that meeting. And again, like I told you and Shirley [Block], Dee [Williams] ASKED if she could record the meeting. ASKED. Not said she would. It was a simply, polite question. [Kathryn Wittman] said it was fine with her as it was a common practice in her former position with heavy rail. But she needed to ask her boss. That's it. Period. We continued to chat informally. It was all very pleasant.
>
> "Using the word outburst is inflammatory. You were not there to pass your own personal take on her reaction to being confronted and reprimanded in front of passengers by someone she did not know. That entire incident was handled poorly by Todd Hurley and you and Shirley should be standing next to Dee and supporting her instead of using words that an ill trained manager uses. If a manager talks to an operator during their shift, comes into the train no less, up to the cab, you would have been outraged. But Dee? No, you blame her for her 'outburst'. The manager should have been instructed by Shirley how and where is appropriate for this type of conversation."

57. At some time after ATU withdrew Grievance #9805, Williams asked ATU for information about her grievance history. On February 11, 2020, ATU responded to that request by providing Williams with a list of all of her grievances and their statuses including Grievance #9805. That document states that Grievance #9805 was closed and provides an explanation for that action: "Lay off provisions not applicable because new posting was not same job that grievant

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[8]This particular quote comes directly from Strickland's testimony. Strickland subsequently testified that Block asked Williams something more akin to "Why should I talk to Dee when she says things that aren't very kind about me?" In a June 13, 2020, affidavit (which is included in the record as Exh. C-26), Strickland claimed that Block asked her something else, specifically, "[W]hy should I help [Williams], when she is so negative towards me on FB?" During the hearing, however, Strickland never testified that Block ever said anything about not helping Williams or about "FB," which we assume refers to Facebook. Further, during the same hearing, when Block was asked if she had made a statement like what Strickland had attributed to her, Block unequivocally denied doing so.

[Williams] had been laid off from." When sending that information, Cordova invited Williams to notify her if the information provided did not fulfill her request, or if she had any additional questions or concerns.

58. Williams filed the unfair labor practice complaint in this case on March 12, 2020.

## CONCLUSIONS OF LAW

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

2. ATU did not violate ORS 243.672(2)(a) and its duty to fairly represent Williams when it withdrew Grievance #9805.

### Standards of Decision

The complaint alleges that ATU violated ORS 243.672(2)(a), which provides that "[i]t is 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 in ORS 243.650 to 243.806." Among other things, ORS 243.672(2)(a) requires a labor organization to fairly represent all employees in a bargaining unit for which it is the exclusive representative, a duty commonly known as a labor organization's "duty of fair representation." *Chan v. Leach and Stubblefield, Clackamas Community College; and McKeever and Brown, Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-05 at 12, 21 PECBR 563, 574 (2006), *recons den*, 21 PECBR 597 (2007). In short, a labor organization breaches its duty of fair representation where its actions are arbitrary, discriminatory, or performed in bad faith. *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) (which involved an allegation that the union negligently failed to understand the effect of complainant's PTSD upon his ability to assist in his representation); *Putvinskas v. Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO, and Southwestern Oregon Community College*, Case No. UP-71-99 at 13-14, 18 PECBR 882, 894-95 (2000).

A union's action is "arbitrary" if it lacks a rational basis, or the processing of a grievance is so perfunctory that a reasoned decision is not made. An action is "discriminatory" if there is substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. That discrimination refers to treatment different from that afforded to others who are similarly situated. A union's decision is made in "bad faith" if the union intentionally acts against a member's interest, and does so for an improper reason. *Chan*, UP-13-05 at 12-13, 21 PECBR at 574-75 (internal citations omitted); *Putvinskas*, UP-71-99 at 13-14, 18 PECBR at 894-95 n 19 and 20 (citing *Howard 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)).

The Board has held that a labor organization's decisions about whether to file or how far to pursue a grievance is entitled to "substantial discretion" and "substantial deference." *Conger v. Jackson County and Oregon Public Employees Union*, Case No. UP-22-98 at 10, 18 PECBR 79, 88 (1999) (citing *Bjornsen, et al. v. Jackson County Sheriff's Officers Association and*

*Jackson County*, Case Nos. C-130/131/132/133/134/135-83, 8 PECBR 6783 (1985)); *Randolph*, UP-15/16-92 at 20-22, 15 PECBR at 104-106 (citing *Stein v. OSPOA and Department of State Police*, Case No. UP-41-92, 14 PECBR 73 (1992); *Byrne v. Oregon Public Employees Union, and Taub and Woodard and Department of Human Resources, Adult and Family Services*, Case Nos. UP-28/36-91, 13 PECBR 448 (1992)). We give such deference to a union's decision-making to permit it to be free to act in what it perceives to be the best interests of its members, without undue fear of lawsuits from individual members. *Putvinskas*, UP-71-99 at 13, 18 PECBR at 894 (citing *Ralphs*, UP-68/69-91 at 14, 14 PECBR at 422).

The Board generally does not substitute its own judgment for that of a union that rationally decided not to process a grievance. The Board's role is not to decide whether a grievance has merit. Instead, the Board primarily determines whether the union conducted a proper investigation and used a rational method of decision-making in reaching its conclusion. *Slayter v. Service Employees International Union Local 503 and State of Oregon, Department of Fish and Wildlife*, Case No. FR-01-12 at 11, 25 PECBR 494, 504 (2013); *Putvinskas*, UP-71-99 at 14, 18 PECBR at 895. An employee does not have an absolute right to have a grievance taken to arbitration. A union's good-faith decision not to pursue a potentially meritorious grievance, even if mistaken, is not a breach of its duty of fair representation. *Chan*, UP-13-05 at 13-14, 21 PECBR at 575-76 (citing *Vaca v. Sipes*, 386 US 171, 191 (1967)). Stated differently, differences of opinion over the processing of a grievance do not, without more, support a conclusion of a duty of fair representation breach. *Randolph*, UP-15/16-92 at 20-21, 15 PECBR 104-105.

As in any unfair labor practice case, the burden of proof is on the complainant to prove the alleged claims by a preponderance of the evidence. ORS 183.450(2); OAR 115-010-0070(5)(b); *Chan*, UP-13-05 at 13, 21 PECBR at 575.

Discussion

Williams broadly contends that ATU's withdrawal of Grievance #9805 was arbitrary, discriminatory, and/or done in bad faith. Primarily, in her objections before the Board and at oral argument, Williams asserts that ATU (1) failed to sufficiently investigate the merits of her grievance; (2) did not adequately explain to her why it was withdrawing her grievance; and (3) treated her differently than similarly situated employees. We address each of those assertions, in turn.

In determining whether a complainant has proved that a union breached its duty of fair representation, we extend substantial discretion to how the union investigates a potential grievance, when at least some reasonable, good-faith investigation is undertaken. *Thomas v. Metro/ERC and International Alliance of Theatrical Stage Employees, Local B-20*, Case Nos. UP-24/25-96, at 17 PECBR 40, 47–49 (1996); *Randolph*, UP-15/16-92 at 22, 15 PECBR at 106. In conducting an investigation, the union is not required do so "in the same manner as an attorney represents a client." *Putvinskas*, UP-71-99 at 17, 18 PECBR at 898. Thus, a union's failure to take witness statements or to allow the union member to rebut aspects of the union's investigation does not breach the duty of fair representation. *Id.*

In this case, Williams contends that Block made only one inquiry into the merits of the grievance, which consisted of a question to determine whether Williams was a Schedule Writer I or a Schedule Writer II. According to Williams, Block decided to withdraw the grievance (which claimed that Williams was entitled to be recalled from layoff into a Schedule Writer II position) when she determined that Williams was laid off from a Schedule Writer I position, not a Schedule Writer II position. Williams contends that Block's investigation should have been more thorough, a contention that is in part based on Williams's interpretation of the WWA, which is different from ATU's interpretation of the WWA.

To begin, we note that there is no rule requiring a union to ask more than one question during a grievance investigation, and there are many circumstances under which asking one question could be sufficient. In any event, in this case, the record establishes that ATU's investigation consisted of more than Block asking one question. Specifically, Block looked into whether Williams could fill a Schedule Writer II vacancy *before* Williams filed Grievance #9805. Additionally, before deciding to withdraw Grievance #9805, Block personally inquired about Williams's opportunities with representatives from both ATU and TriMet, asked Kandle if TriMet would move Williams into a Schedule Writer II position, considered the differences between the two Schedule Writer positions, reviewed their job descriptions, considered her personal knowledge about the two classifications, and reviewed and considered related grievances, including Williams's failed 2011 grievance, Grievance #8098. Through Forrester, ATU also represented Williams during Grievance #9805's Step 1 hearing with TriMet. Moreover, although we do not assess the merits of the grievance in assessing whether the union breached its duty of fair representation, we note that it was more than rational for Block to ask whether Williams had ever been a Schedule Writer II, as that information was highly relevant to the merits of the grievance. When it was relayed to Block that Williams had not held a Schedule Writer II position, it was not wholly irrational for Block to make the determination that she did, particularly given Block's prior involvement, history, and knowledge of the Schedule Writer classifications.

We next address Williams's assertion that ATU violated the duty of fair representation by failing to explain to her the reasons why it withdrew the grievance. We note that the record shows that ATU communicated with Williams about the grievance, including by timely informing Williams that ATU withdrew the grievance. The record also shows that when Williams asked for a summary of her grievance history, ATU explained its reason for withdrawing the grievance at issue. There is no allegation or evidence that Williams previously requested an explanation and ATU refused to provide one. Thus, Williams is essentially contending that ATU violated its duty of fair representation by not explaining the reasons for withdrawing her grievance at the time the grievance was withdrawn, even in the absence of a request for an explanation. The recommended order explained that under our precedent, the duty of fair representation does not require a union to explain its decision not to pursue a grievance to the grievant. *Putvinskas*, UP-71-99 at 17, 18 PECBR at 898 ("While a union may choose to explain its decision not to pursue a grievance, the duty of fair representation does not *require* a union to offer that explanation." (Emphasis in original.)). That is so because, when an employee claims that a union's decision not to pursue a grievance violated the duty of fair representation, the question is whether the union made the grievance-processing *decision* arbitrarily, in bad faith, or in a discriminatory manner. *Id.* The mere fact that a union did not explain the reasons for the decision to the grievant in the withdrawal notice does not mean that the union's action was arbitrary, discriminatory, or done in bad faith.

In arguing for a different result, Williams relies on an October 24, 2018, National Labor Relations Board General Counsel Memorandum by then-General Counsel Peter B. Robb (GC 19-01). In that memorandum, GC Robb stated:

> "[A] union's failure to communicate decisions related to a grievance or to respond to inquiries for information or documents by the charging party, in the General Counsel's view, constitutes more than mere negligence and, instead, rises to the level of arbitrary conduct unless there is a reasonable excuse or meaningful explanation. This is so irrespective of whether the decisions, alone, would violate the duty of fair representation. In addition, where a union ultimately communicates with the charging party in a Section 8(b)(1)(A) duty of fair representation case only after he/she filed the ULP charge, such post-hoc communications should not furnish the basis for dismissal on grounds that the union's conduct was mere negligence, nor should it be found to cure earlier violations resulting from a failure to communicate."

GC 19-01. The memorandum went on to say "[t]he General Counsel is aware that the above-described approaches may be inconsistent with the way Regional Directors may have been historically interpreting duty of fair representation law." *Id.*

This NLRB General Counsel memorandum does not direct our analysis in this case, for several reasons. To begin, we note that GC 19-01 did not actually argue that a union should be required to *explain the reasons* for a grievance-processing decision in every instance, or that a failure to provide such an explanation would automatically constitute a breach of the duty of fair representation. Rather, GC 19-01 merely states the former NLRB General Counsel's view that a failure to communicate grievance decisions or respond to requests for information could violate the duty of fair representation, under some circumstances. Moreover, a General Counsel memorandum from the NLRB is not precedent for either the NLRB itself or for this Board. As noted above, the legal argument made by the NLRB General Counsel in that memorandum is inconsistent with this Board's longstanding precedent. Additionally, GC 19-01 was *rescinded* on February 21, 2021, by a new memorandum, GC 21-02, and therefore GC 19-01 is no longer operational at the NLRB. Accordingly, we do not accord any weight to GC 19-01, which, as set forth above, is contrary to this Board's longstanding precedent.

In any event, as noted above, the record in this case establishes that ATU timely processed the grievance, communicated with Williams about the grievance (including by notifying Williams of grievance meetings and the decision to withdraw), and responded to her request for information about the grievance. Further, Williams's assertions that ATU did not explain to her the reason why it was withdrawing the grievance, or that it did so only *after* she filed this complaint are at odds with the record. Specifically, on February 11, 2020, ATU provided Williams with a list of all of her grievances and their statuses—including the grievance at issue here (#9805). That document states that the grievance was closed and provides an explanation for the action (that the layoff provision relied on in the grievance was inapplicable because the "new posting was not [the] same job that [Williams] had been laid off from"). The complaint was filed on March 12, 2020,

approximately one month after ATU explained to Williams why the grievance had been withdrawn.

We now address Williams's assertion that ATU acted in a discriminatory manner by treating her differently from similarly situated employees. Specifically, Williams contends that ATU-represented employees in different positions and in different layoff scenarios were placed by TriMet into higher-classification positions without being required to apply for those positions. However, the examples provided by Williams involve very different circumstances. None of the examples involved a Schedule Writer I being recalled into a Schedule Writer II position. Nor did any of the examples involve an employee being recalled from layoff into a higher classification with differences comparable to the differences between the Schedule Writer I and II classifications.

Williams asserts that Block made no effort to negotiate with TriMet on her behalf as Block did for other employees in the examples Williams relied on. But the record establishes that Block did, in fact, attempt to persuade TriMet to place Williams into a Schedule Writer II position. It was TriMet, not ATU, that declined to pursue that option of placing Williams into a Schedule Writer II position. The fact that TriMet agreed to an ATU proposal in one situation but not another does not constitute discrimination *by ATU*. Additionally, in the examples identified by Williams, Block was President of ATU at the time that TriMet was eliminating or reorganizing classifications at issue and thus in a position to bargain over what would happen to the affected employees; in contrast, Block was not President of ATU when TriMet eliminated the Schedule Writer I classification and laid off Williams. Therefore, we do not conclude that Williams has proved that ATU represented her in a discriminatory manner in breach of its duty of fair representation.

Williams also suggests that ATU unlawfully withdrew Grievance #9805 because Block and Forrester do not like Williams and/or Williams's "personality," which Williams specifically links with her PTSD. In addition, Williams argues that Block unlawfully withdrew Grievance #9805 in retaliation for Williams's activities involving the Union Brothers and Sisters Facebook page. After careful review, we see no compelling evidence for any of those arguments.

Regarding the alleged bias of Forrester, Williams testified that, on September 16, 2019, the same day that Grievance #9805 was withdrawn, she attended a meeting with Forrester and others, and that, during that meeting, Forrester did not tell Williams that her grievance was being withdrawn. Williams also pointed to Forrester's September 10, 2019, email to Block and others from ATU in which Forrester indicated that Williams had had an "outburst," and further noted that Forrester was not at the meeting that he described in that email. Beyond that, Williams highlighted the text messages that she received from Forrester in October 2019. She also testified, without further explanation, that she has "battled with Shirley [Block] and Anthony [Forrester] in a union meeting." Those details, and the rest of the facts presented that concern Forrester, do not establish that ATU withdrew Grievance #9805 because of personal bias.

Significantly, the record indicates that Forrester did not decide to withdraw Grievance #9805; rather, that decision was made by Block. There is likewise no evidence that Forrester played a meaningful role in that decision or the related investigation, and no evidence regarding Forrester's knowledge of the Facebook page or how Forrester has treated other ATU members. Regarding the September 16 meeting, the record indicates that the topic of the meeting was

unrelated to Grievance #9805, and there is no evidence that the subject of Grievance #9805 was raised by anyone. Further, Forrester's text messages to Williams were sent after Grievance #9805 was withdrawn, and included the neutral statement, "How I represent a person is no reflection on how I feel about them or what the meeting is about."

Regarding Block's alleged bias, Williams testified that she and Block have discussed Williams's PTSD at union meetings, and that ATU does not understand the anger that that PTSD brings. Williams also testified, without elaboration, that she and Block "have gotten in many arguments," that she and Block "got in a huge fight at a union meeting" in which Williams called Block "a coward," and that she and Block had "a lot of conflicts" while Block was still working in Field Operations. Williams also highlighted Block's October 9, 2019, email in which she responded to Williams's request for a new union representative (for a grievance other than Grievance #9805) by indicating that she discussed the request with Forrester and her team and that she would leave the decision up to the Union's Executive Board officer. Williams also points to the testimony of Jean Strickland, an ATU member and representative, regarding a conversation between Strickland and Block in October 2019, after Block had already decided to withdraw Grievance #9805. As we explain below, after considering the record as a whole, we do not find that it establishes that Block decided to withdraw Grievance #9805 because of personal bias against Williams.

Block credibly testified that her decision to withdraw Grievance #9805 had nothing to do with the individual who initially filed that grievance. Rather, Block credibly testified that she withdrew the grievance because she did not believe that there was a sufficient likelihood that ATU would prevail if it pursued the grievance to arbitration. Her testimony on that issue was credible because she explained in detail how she made that assessment of the grievance. The record evidence, including both documents and testimony, also establishes that Block and other ATU representatives looked into whether Williams could be recalled into the Schedule Writer II position even before Williams filed a grievance. Block also credibly testified that she attempted to negotiate on Williams's behalf by personally asking TriMet to agree to place Williams in a Schedule Writer II position. That act by Block, which she voluntarily took without having been asked by Williams to do so, undermines the allegation that Block refused to assist Williams because of a personal bias against her. Block also explained that, if TriMet ever brings the Schedule Writer I position back, she would immediately demand that TriMet directly offer Williams the position without requiring Williams to apply for it. In addition, Block credibly testified that she does not use Facebook "at all" anymore and has "never" looked at Williams's Facebook page. Moreover, the record does not establish that Block had a clear understanding of Williams's role or activities regarding the page. The record shows only that Block understood that the page involved "a bunch of fighting back and forth."

We turn to addressing Strickland's testimony. To begin, we note that Strickland's testimony was materially inconsistent with her pre-hearing affidavit. Strickland testified that in October 2019 (after Grievance #9805 was withdrawn), she asked Block to meet in person with Williams in an effort to improve their relationship, and that Block responded to that request by stating something to the effect of, "Why should we talk to her when she is so… when she says such… um… inflammatory things about us?" Strickland also testified that she could not recall Block's exact words. In a pre-hearing affidavit, Strickland asserted that Block asked, "[W]hy

should I help [Williams], when she is so negative towards me on FB?" A statement suggesting that Block may have been reluctant to "talk" with Williams in person on one occasion (which is what Strickland's testimony establishes) is vastly different from a statement signaling an unwillingness to represent Williams fairly, particularly when that statement was made after Grievance #9805 was already withdrawn. Because Strickland's testimony was inconsistent with her affidavit, we give more weight to her testimony than to the affidavit. Hearing testimony is generally considered more reliable than an affidavit. The evidentiary value of the affidavit is also greatly limited by the general lack of detail presented for this issue, and Strickland's admission that she cannot recall Block's exact words.[9]

Finally, we address Williams's request that ATU assign someone besides Forrester to represent her, and Block's response, both of which occurred after the withdrawal of Grievance #9805 and related to a different grievance. Notably, the Public Employee Collective Bargaining Act does not require a union to afford a grievant with the grievant's choice of representative. *Randolph*, UP-15/16-92 at 20, 15 PECBR at 104. Nor do we agree that the substance of Block's response to the request shows any personal bias against Williams. Rather, Block neutrally indicated that she discussed the request with her "team" and that she would defer to her Executive Board officer (presumably referring to Forrester). Further, Williams herself testified that Block and Forrester have let Williams choose to have Strickland represent her on one or two other occasions.

In sum, ATU's withdrawal of Grievance #9805 was not arbitrary, discriminatory, or done in bad faith. Therefore, ATU did not violate ORS 243.672(2)(a) and its duty to fairly represent Williams.

3. Williams cannot pursue her charges against TriMet.

As a rule, where no violation is found against the labor organization in a duty of fair representation case, the related complaint against the public employer will automatically be dismissed.[10] *Hadley, Hadley, Cordes, Burton, and McMenamy v. Multnomah County Deputy Sheriff's Association and Multnomah County*, Case No. FR-1-08 at 6, 22 PECBR 416, 421 (2008) (citing *Tancredi v. Jackson County Sheriff's Employee Association and Jackson County Sheriff's Office*, Case No. UP-31-04 at 9, 20 PECBR 967, 975 (2005)); *Putvinskas*, UP-71-99 at 18, 18 PECBR at 899 (citing *Bjornsen, et al.*, 8 PECBR at 6783; *Mengucci*, C-187/188-83 at 10, 8 PECBR

[9]Williams asserts that Strickland's testimony about Block's alleged statement was inconsistent with her affidavit because Strickland was nervous at the hearing. We note that when Williams was questioning Strickland at the hearing, Williams used the wording that Strickland had used in her affidavit, but even after such potential reminders, Strickland never confirmed that Block had used that wording. In any event, it is undisputed that Block was responding to a request by Strickland for an in-person meeting, not a question about Block's general willingness to represent Williams or Block's specific decision to withdraw Grievance #9805. Further, any statement made by Block would need to be considered together with all of the evidence in the record, which, for the reasons explained above, establishes both that Block did try to help Williams and that she had rational, non-discriminatory reasons for withdrawing Grievance #9805.

[10]As noted above in the Rulings section of this order, this rule is not limited to contractual claims that an employer violated a "just cause" provision of a contract.

at 6730). We have rejected Williams's underlying charges against ATU. Therefore, we must dismiss her charges against TriMet as well, and do so without an additional hearing.

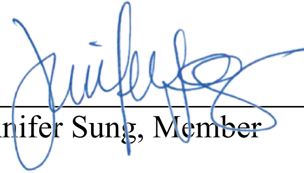
ORDER

The complaint is dismissed.

DATED: October 15, 2021.

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

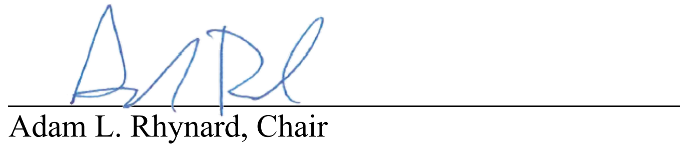
Case No. RC-002-21

(REPRESENTATION)

| | | |
|---|---|---|
| WASHINGTON COUNTY POLICE OFFICERS ASSOCIATION,<br><br>Petitioner,<br><br>v.<br><br>WASHINGTON COUNTY SHERIFF'S OFFICE,<br><br>Respondent. | ) | NUNC PRO TUNC ORDER |

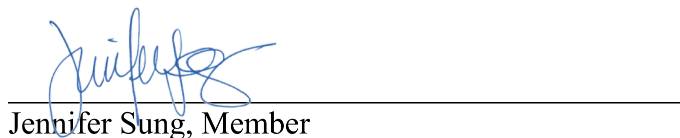
On September 17, 2021, this Board issued an order certifying the Washington County Police Officers Association (Association) as the exclusive representative of a petitioned-for group of employees of the Washington County Sheriff's Office (County). In that order, we described that group of employees as including the classification of Investigative Support Specialist – Senior, while noting that we were not resolving at that time the County's assertion that employees in that classification (as well as another) were statutory supervisors. In the Order section of our September 17 order, however, when describing the bargaining unit, we inadvertently neglected to include the Investigative Support Specialist – Senior classification as presumptively part of the bargaining unit (subject to a potential subsequent unit clarification petition and order excluding that classification as supervisory). Our September 17, 2021, order is amended, *nunc pro tunc*, to correct that omission. In all other respects, our order remains unchanged.

DATED: October 19, 2021.



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-038-21

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| OREGON STATE POLICE OFFICERS ASSOCIATION,<br><br>Complainant,<br><br>v.<br><br>STATE OF OREGON, DEPARTMENT OF STATE POLICE,<br><br>Respondent. | ) | RULINGS,<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND ORDER |

Daryl Garrettson, Attorney at Law, Lafayette, Oregon, represented Complainant.

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

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On September 10, 2021, the Oregon State Police Officers Association (Association) filed an unfair labor practice complaint against the State of Oregon, Department of State Police (State). The complaint alleges that the State violated the duty to bargain under ORS 243.672(1)(e) by refusing to bargain in good faith over the changes in employment terms and conditions required by Executive Order 21-29 (EO 21-29), or by failing to bargain to completion over the impacts of those changes on mandatory subjects of bargaining before implementing EO 21-29. The Association requested expedited consideration of this matter under OAR 115-035-0060. The State opposed that request. On September 20, 2021, after considering the parties' submissions, the Board issued a letter ruling granting the request for expedited consideration. The Board assigned the matter to Administrative Law Judge (ALJ) Martin Kehoe, who conducted a hearing on October 6, 2021. Per mutual agreement, the parties submitted post-hearing briefs on October 13, 2021, at which point, the record closed. The matter was then transferred to the Board for the issuance of an order.

For the reasons explained below, the Board concludes that the State did not violate ORS 243.672(1)(e) by refusing to bargain in good faith over the changes in employment terms and conditions required by EO 21-29, or by failing to bargain to completion over the impacts of those changes on mandatory subjects of bargaining before implementing EO 21-29. Consequently, we dismiss the complaint.[1]

## RULINGS

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

## FINDINGS OF FACT

1. The Association is a labor organization within the meaning of ORS 243.650(13) and the exclusive representative of a mixed bargaining unit of strike-permitted and strike-prohibited employees of the Oregon State Police, a department of the State.

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

3. Consistent with ORS 243.696, the Department of Administrative Services (DAS) represents the State in collective bargaining.

4. The Association and the State are parties to a collective bargaining agreement, effective July 1, 2019 to June 30, 2023.

5. On March 8, 2020, Governor Kate Brown issued Executive Order 20-03, declaring a state of emergency in response to the COVID-19 pandemic, pursuant to ORS 401.165. During all times relevant to this matter, that state of emergency was ongoing.

6. By mid-2021, vaccines against COVID-19 were readily available and free of cost to any Oregonian above the age of 12.

7. On June 25, 2021, Governor Brown issued Executive Order 21-15, rescinding many of the prior executive orders that had imposed various public health measures, effective June 30, 2021.

8. In or about July and August 2021, there was a large surge in the number of patients hospitalized because of COVID-19, largely due to the spread of the coronavirus Delta variant. The vast majority of hospitalized individuals with COVID-19 were unvaccinated.

9. On or about August 11, 2021, Governor Brown made a public announcement signaling her intent to issue an executive order that would require Executive Branch employees to be vaccinated against COVID-19.

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[1]In light of the October 18, 2021, deadline set forth in EO 21-29, on October 14, 2021, this Board issued a letter to the parties to provide initial notice that the Board would dismiss the complaint and issue a final appealable order explaining our reasons as expeditiously as possible.

10. On August 11, 2021, in response to the Governor's announcement, the Association's counsel, Daryl Garrettson, emailed DAS and demanded to bargain over the vaccination requirement "before the implementation" of the requirement.

11. On August 13, 2021, Governor Brown issued EO 21-29, pursuant to her "authorities under Article V, section 1, of the Oregon Constitution, the emergency invoked in Executive Order 20-03, and ORS 401.168."

12. EO 21-29 requires Executive Branch employees (and certain contract workers) to be fully vaccinated against COVID-19 by October 18, 2021. The order defines "fully vaccinated" as "having received both doses of a two-dose COVID-19 vaccine or one dose of a single-dose COVID-19 vaccine and at least 14 days have passed since the individual's final dose of COVID-19 vaccine." The order allows for exceptions "for individuals unable to be vaccinated due to disability, qualifying medical condition, or a sincerely held religious belief." The order specifically prohibits any employee "from engaging in work for the Executive Branch after October 18, 2021," if the employee has not been fully vaccinated. The order also specifically prohibits the Executive Branch from permitting any employee to engage in work for the Executive Branch after October 18, 2021, if the employee has not been fully vaccinated and provided proof thereof, as required by the order. The order requires affected employees to provide their employer with either proof of vaccination, or a written request for one of the specified exceptions, by October 18, 2021. The order also provides, "Employees who fail to comply with this directive will face personnel consequences up to and including separation from employment. * * * Timelines in this Executive Order may be extended at the Governor's discretion." The order further states, "Pursuant to ORS 401.192(1), the directives set forth in this Executive Order shall have the full force and effect of law, and any existing laws, ordinances, rules and orders shall be inoperative to the extent they are inconsistent with the directives set forth in this Order."

13. Nettie Pye, Statewide Labor Relations Manager for DAS, was assigned to represent the State in all bargaining related to the implementation of EO 21-29 for Executive Branch employees.

14. On August 25, 2021, Pye emailed representatives of multiple unions that represent Executive Branch employees, including the Association. Pye notified the unions that the State would be emailing all Executive Branch employees later that day to let them know that "the processes to give proof of vaccination or request exceptions to vaccination requirements" were open in Workday, the State's electronic personnel information system. Pye also attached to the email the State's COVID-19 Vaccination Requirement Policy, the vaccination exception request questionnaire, the religious belief accommodation process overview, the Americans with Disabilities Act (ADA) medical exemption provider form, and the procedure for requesting a vaccination exemption. Finally, Pye stated, "If you are included in this email, we have received your Demand to Bargain," and indicated that she either had already or would soon reach out to schedule impact bargaining.

15. The COVID-19 Vaccination Requirement Policy attached to Pye's August 25 email restates the vaccination requirements and related provisions set forth in EO 21-29.

16. On August 27, 2021, another DAS labor relations manager contacted Garrettson about scheduling bargaining.

17. On August 30, 2021, Pye emailed the Association and stated, in relevant part:

> "The State's position is that the vaccine mandate, the date designated to be fully vaccinated by and the exception processes are prohibited subjects of bargaining as the Governor's Executive Order carries the force of law. The Executive Order is based on an emergency as identified in a separate Executive Order and on the Governor's statutory and constitutional powers.
>
> "The State remains willing to bargain the impacts of the Executive Order."

18. On August 31, 2021, Garrettson responded to Pye and explained that the Association disagreed with the State's position regarding the legal effect of EO 21-29 and the State's bargaining obligations.

19. On September 1, 2021, Garrettson emailed Pye to inquire further about the State's position. Specifically, Garrettson stated that he understood Pye's August 30 email to be indicating that the State was refusing to bargain over the decision to require vaccinations, but willing to bargain over the impacts of that decision. Garrettson asked whether the State was willing to bargain over three specific topics: 1) the implementation date of the requirement, *i.e.*, the October 18, 2021, deadline; 2) the consequences for a bargaining unit employee who fails to meet the deadline, *i.e.*, "whether termination of employment is the appropriate consequence"; and 3) the reasons or basis for exemptions.

20. On September 7, 2021, Pye responded to Garrettson and stated, "You are correct, DAS is negotiating the impact" of EO 21-29, but that the "state will not bargain the decision, believing the [EO] carries the force of law and the state is continuing to move forward with the October implementation deadline and the two exceptions listed in the EO. That being said, DAS remains steadfast in its intent to meet with the Association and negotiate the impact of the [EO] to the extent it can prior to and after the deadlines required under the [EO]." Pye also indicated that the State had received and was in the process of discussing proposals "on a variety of topics" from unions across the state.

21. On September 10, 2021, the Association filed the unfair labor practice complaint in this matter.

22. As of the date of the hearing in this matter, the State and the Association had met twice to bargain over the impacts of the vaccine requirement.

23. Another union that represents a different bargaining unit of Executive Branch employees, SEIU Local 503, submitted a proposal to the State to create a grace period for employees who started the vaccination process before the October 18, 2021. Under the proposal, such employees would be permitted to remain employed with the State past the October 18 deadline. Until fully vaccinated, those employees would either work remotely or be on leave (and be permitted to use paid leave, if available). Pye determined that the Governor approved of the

proposed grace period. The State and SEIU Local 503 entered into a letter of agreement that provided for that grace period. Subsequently, the State entered into a similar letter of agreement that covers another bargaining unit that is represented by AFSCME. The State would agree to the same grace period for employees in other bargaining units, including the unit represented by the Association.

## CONCLUSIONS OF LAW

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

2. The State did not violate ORS 243.672(1)(e) by refusing to bargain in good faith over the changes in employment terms and conditions required by EO 21-29, or by failing to bargain to completion over the impacts of those changes on mandatory subjects of bargaining before implementing EO 21-29.

As a general rule, a public employer commits a per se violation of ORS 243.672(1)(e) if it unilaterally changes the status quo concerning a mandatory subject of bargaining without first completing its bargaining obligation under the Public Employee Collective Bargaining Act (PECBA). *See Ass'n of Or. Corr. Emples. v. State*, 353 Or 170, 177, 295 P3d 38 (2013); *Portland Fire Fighters' Ass'n, Local 43 v. City of Portland*, 245 Or App 255, 264-65, 263 P3d 1040 (2011). The Association contends that the State violated (1)(e) when it implemented the vaccination requirement and other provisions of EO 21-29, without bargaining over those terms. Additionally, the Association contends that the State violated (1)(e) when it implemented EO 21-29 before the parties completed bargaining over the impacts of the vaccination requirement on mandatory subjects.

The State concedes that it did not bargain over the vaccination requirement or other terms mandated by EO 21-29, and that it implemented those terms before the parties completed impact bargaining. The State, however, maintains that this conduct did not violate PECBA. Specifically, the State contends that because EO 21-29 has the "full force and effect of law," ORS 401.192(1), the State was legally required to comply with EO 21-29, including by implementing its provisions by its specified deadline (October 18, 2021). Further, the State contends that any proposal that is contrary to EO 21-29, or that would require the State to act contrary to EO 21-29, is a prohibited subject of bargaining. A proposal is a prohibited subject of bargaining, regardless of whether it might otherwise be described as "mandatory" or "permissive," if it is specifically contrary to a statute, or would require a party to act contrary to a statute. *SEIU Local 503 v. Dept. of Admin. Servs.*, 183 Or App 594, 598, 54 P3d 1043 (2002); *Clackamas Cty. Employees' Ass'n v. Clackamas Cty.*, Case No. UP-032-15 at 6, 26 PECBR 798, 803 (2016), *aff'd without opinion*, 288 Or App 167, 403 P3d 821 (2017), *rev den*, 362 Or 665, 415 P3d 578 (2018).

In response, the Association contends that the Governor, even when acting under the emergency powers authorized in ORS 401.165 through 401.236, did not have the power to modify the State's bargaining obligations under PECBA. Further, the Association questions whether a proposal to modify the terms of EO 21-29 qualifies as a "prohibited" subject under PECBA, in light of the fact that the State entered into letters of agreement with other unions that effectively modify the executive order's vaccination deadline by creating a grace period for employees who had initiated the vaccination process by October 18. The State contends that the grace period was

not a prohibited subject because the Governor granted an exception, as EO 21-29 expressly authorizes her to do. EO 21-29 at 5 ("Timelines in this Executive Order may be extended at the Governor's discretion. * * * Any decision made by the Governor pursuant to this Executive Order is made at her sole discretion.").

The parties' contentions make clear that this case does not turn on the application of PECBA. Rather, this case turns on the scope of the Governor's emergency powers under ORS 401.165 through 401.236. As set forth below, after reviewing the text of the emergency powers statutes and relevant precedents, including *Elkhorn Baptist Church v. Brown*, 366 Or 506, 466 P3d 30 (2020), we conclude that the Governor's emergency powers preclude a finding that the State violated ORS 243.672(1)(e), as alleged in the complaint.

Governor Brown issued EO 21-29 pursuant to her "authorities under Article V, section 1, of the Oregon Constitution, the emergency invoked in Executive Order 20-03, and ORS 401.168." Under ORS 401.168(1), "[d]uring a state of emergency, the Governor has complete authority over all executive agencies of state government and the right to exercise, within the area designated in the proclamation, all police powers vested in the state by the Oregon Constitution in order to effectuate the purposes of this chapter." The state's "police power" refers to "the whole sum of inherent sovereign power which the state possesses, and, within constitutional limitations, may exercise for the promotion of the order, safety, health, morals, and general welfare of the public." *Elkhorn Baptist Church*, 366 Or at 524 (quoting *Union Fishermen's Co. v. Shoemaker*, 98 Or 659, 674, 193 P 476 (1920)). Through the exercise of that police power, "a community can 'protect itself against an epidemic of disease which threatens the safety of its members.'" *Elkhorn Baptist Church*, 366 Or at 525 (quoting *Jacobson v. Massachusetts*, 197 US 11, 27, 25 S Ct 358 (1905)). When issuing EO 21-29, the Governor exercised the state's police power to "protect state workers, their coworkers, and the public that relies on state services" from COVID-19 and its many impacts. EO 21-29 at 2.

ORS 401.192(1) expressly and unequivocally provides: "All rules and orders issued under authority conferred by ORS 401.165 to 401.236 shall have the full force and effect of law both during and after the declaration of a state of emergency." Thus, EO 21-29 is a state law, and like any other state law, its express terms are enforceable and must be complied with by the covered agencies and employees.

Further, ORS 401.192(1) expressly and unequivocally provides: "*All existing laws*, ordinances, rules and orders *inconsistent with ORS 401.165 to 401.236 shall be inoperative during the period of time and to the extent such inconsistencies exist*." (Emphases added.) As explained by Senior Judge Landau in a letter opinion rejecting a motion for emergency relief from the vaccination requirement set forth in EO 21-29, "The legislature * * * may grant the authority to suspend the laws," and "[t]hat is what the legislature did in ORS 401.192(1) when it granted the governor significant powers during a declared emergency and then provided that '[a]ll existing laws, ordinances, rules and orders inconsistent with' the authority exercised by the governor 'shall be inoperative.' Thus, if any laws are suspended under EO 21-29, it is because the governor's order does so 'by the Authority of the Legislative Assembly.'" Letter Opinion at 3, entered October 7, 2021, *Oregon Fraternal Order of Police, et al v. Katherine Brown, State of Oregon* (21CV35125) (quoting Or Const, Art 1, § 22). Because EO 21-29 supersedes all existing laws that are inconsistent with the exercise of the governor's authority under ORS 401.168, we conclude

that the covered agencies and employees must comply with the express terms of EO 21-29 regardless of the parties' bargaining obligations under PECBA (unless the Governor agrees to an exception or modification, as authorized by the order).

That conclusion is confirmed by ORS 401.168(2), which expressly provides that "the Governor has authority to suspend provisions of any order or rule of any state agency, if the Governor determines and declares that strict compliance with the provisions of the order or rule would in any way prevent, hinder or delay mitigation of the effects of the emergency." We understand ORS 401.168(2) to mean that, even if this Board ordered the State to delay implementation of EO 21-29 pending bargaining with the Association, the Governor would have the authority to suspend that order if she determined and declared that compliance with that order would in any way prevent, hinder or delay mitigation of the effects of the COVID-19 health emergency.

In sum, considering the text and context of ORS 401.168, we conclude that when the Governor issues a valid executive order under the authority granted by that statute, that order may effectively define the State's bargaining obligations under PECBA. Thus, in this case, even if there is a conflict between the State's obligations under EO 21-29 and PECBA, then EO 21-29 controls, and the State does not violate (1)(e) by complying with EO 21-29. *Elkhorn Baptist Church*, 366 Or at 527 ("The legislature has also expressly addressed how any conflict between the statutes in chapter 401 and any other laws, ordinances, rules, or orders should be resolved: the statutes in chapter 401 control." (Citing ORS 401.192(1)); Letter Opinion at 3, *Oregon Fraternal Order of Police.*

The Association does not suggest that the plain text of ORS 401.168, ORS 401.192, and EO 21-29 can be interpreted differently. Nor does the Association identify any statutory or constitutional provision that limits the effect that a Governor's executive order issued pursuant to ORS 401.168 can have on the State's bargaining obligations under PECBA. Rather, the Association argues that EO 21-29 violates statutory and constitutional limits on the exercise of the Governor's emergency powers.

We begin with the Association's statutory arguments. The Governor's "emergency powers * * * are required to be exercised in a manner consistent with the reason for which they are granted; that is, they must be exercised to address the declared emergency." *Elkhorn Baptist Church*, 366 Or at 525 (citing ORS 401.168(1)). The Association contends that the limited scope of EO 21-29, which applies only to Executive Branch employees (as opposed to all State employees, or all Oregon employees), demonstrates that the Governor did not issue the order to address the declared emergency, but to act "as an employer." However, the Association does not dispute that EO 21-29 mitigates the spread and impacts of COVID-19 by increasing the number of vaccinated individuals. Further, the Association does not identify any provision that prohibits the Governor from considering her responsibilities as the "leader of the Executive Branch" or acting as an employer when deciding how to address the COVID-19 emergency. EO 21-29 at 2. To the contrary, ORS 401.168(1) expressly grants the Governor "complete authority over all executive agencies of state government" during a state of emergency.

The Association also argues that EO 21-29, by requiring employees to disclose their vaccination status to their employer, violates the Americans with Disabilities Act. However, the Equal Employment Opportunity Commission (EEOC), in guidance published in December 2020 and updated in May 2021, has stated that the ADA does not prevent employers from requiring employees to provide documentation or other confirmation of vaccination, which is what EO 21-29 requires.[2]

We turn to the Association's constitutional arguments. The Association appears to question whether the statutory delegation of emergency powers to the Governor under ORS 401.165 through 401.236 violates the constitutional prohibition against the separation of powers. For the reasons stated by Senior Judge Landau in *Oregon Fraternal Order of Police*, we conclude that the delegation of emergency powers is constitutional. Letter Opinion at 3-4, *Oregon Fraternal Order of Police*.

Finally, the Association contends that EO 21-29 impairs the collective bargaining agreement between the Association and the State, in violation of the state Contract Clause, Article I, § 21, of the Oregon Constitution, and the federal Contract Clause, Article I, § 10, of the United States Constitution. For both the federal and state Contract Clauses, the Association must, at a minimum, establish that EO 21-29 actually impairs the parties' contract. *See Hughes v. State*, 314 Or 1, 14, 838 P2d 1018 (1992) ("First, it must be determined whether a contract exists to which the person asserting an impairment is a party; and, second, it must be determined whether a law of this state has impaired an obligation of that contract."); *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 US 400, 411, 103 S Ct 697, 704 (1983) ("The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." (Quotation marks and citation omitted.)).

The Association contends that EO 21-29 impairs Article 3, Section 2.2 of the CBA, which the Association characterizes as "specifically reserv[ing] to the Association the right to negotiate over changes in the conditions of employment." However, as the Association acknowledges, Section 2.2 must be read with Section 2.1, which expressly provides: "The Employer is not limited, confined, or restricted by past practice, rule, custom, or regulation in making changes in policies, procedures, rules, and regulations to carry out the mission of the Department." Further, while Section 2.2 reserves the Association's right to bargain, the scope of that right is expressly defined by reference to state law: "this article shall not be interpreted to restrict the Association's right to bargain the impact of mandatory subjects of bargaining or the impact of permissive subjects of bargaining where the Employer is compelled to negotiate over the matter by state law or by law, bargain the decision." As explained above, the emergency power statutes expressly authorize the Governor to issue executive orders; such orders may supersede the requirements of other state statutes; and such orders have the full force and effect of state law. The CBA does not contractually bar the legislature, or the governor acting under authority delegated by the legislature, from modifying the statutory duty to bargain.

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[2]*See* EEOC, "What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and the Other EEO Laws," at K.4 and K.9, available at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last accessed October 18, 2021).

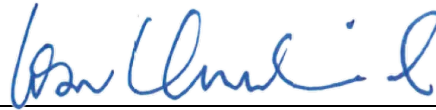
Consequently, we conclude that the State did not violate PECBA by declining to bargain with the Association over the requirements of EO 21-29. Further, because EO 21-29 set a deadline of October 18, 2021, the State did not violate PECBA by implementing EO 21-29 by that deadline, without first completing impact bargaining.

ORDER

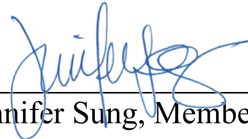
The complaint is dismissed.

DATED: October 22, 2021.

Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-024-20

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1660 and HANES,<br><br>Complainants,<br><br>v.<br><br>TUALATIN VALLEY FIRE AND RESCUE,<br><br>Respondent. | ) | FINDINGS AND ORDER FOR REPRESENTATION COSTS |

On August 4, 2021, this Board issued an order holding that Tualatin Valley Fire and Rescue (TVFR) did not violate ORS 243.672(1)(a) and (c), as alleged in the complaint filed by the International Association of Firefighters, Local 1660, (Association) and its president (Hanes). 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. TVFR is the prevailing party. Only a prevailing party in an unfair labor practice case is entitled to representation costs. ORS 243.676(2)(d), (3)(b); OAR 115-035-0055(1)(a). The prevailing party is "the party in whose favor a Board Order is issued." OAR 115-035-0055(1)(d).

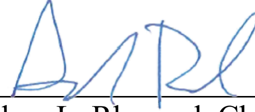
2. This case required one day of hearing.

3. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). The representation costs award for a case that required one day of hearing is $3,000. OAR 115-035-0055(1)(b)(C).

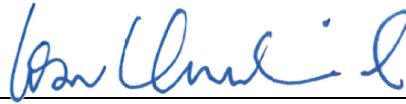
ORDER

The Association shall remit $3,000 to TVFR within 30 days of the date of this order.

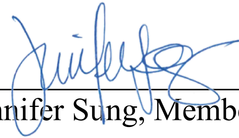
DATED: October 26, 2021.



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-016-21

(UNIT CLARIFICATION)

| | |
|---|---|
| NEWBERG-DUNDEE PUBLIC SAFETY ASSOCIATION,<br>Petitioner,<br>v.<br>CITY OF NEWBERG,<br>Respondent. | ORDER ADDING UNREPRESENTED EMPLOYEES TO EXISTING UNIT |

The Newberg-Dundee Public Safety Association (Association) is recognized as the exclusive bargaining representative for the following employees of the City of Newberg (City): "all police officers, corporals, communication officers, records & evidence technician, and regular part-time employees, excluding limited duration employees (employees hired to work a period not to exceed 90 days), Captains, Sergeants, Support Services Manager, Chief of Police, Administrative Assistant (or otherwise titled individual), and any other confidential or supervisory employees." On September 30, 2021, the Association filed a unit clarification petition under ORS 243.682(2) and OAR 115-025-0050(6) to clarify the public employee status of the Administrative Assistant position, asserting that the position was no longer a confidential employee. In the same petition, the Association sought to add, under OAR 115-025-0050(4), a new job position (Public Safety Tech Manager) to its existing bargaining unit by way of card check. That position was created after the execution of parties' current collective bargaining agreement, which runs from July 1, 2017 through June 30, 2022. The petition included a sufficient showing of interest.

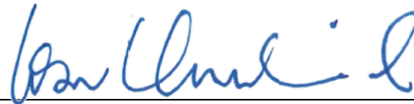
On October 1, 2021, the Board's Election Coordinator caused a notice of the petition to be posted at the City by October 6, 2021. Pursuant to the terms of the notice posting, objections to the petition or a request for an election were due within 14 days of the date of the notice posting (*i.e.*, by October 20, 2021). There were no objections to the petition or a request for an election.

## ORDER

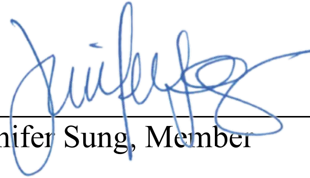
Accordingly, it is certified that the Public Safety Tech Manager and Administrative Assistant at the City of Newberg are added to the bargaining unit currently represented by Newberg-Dundee Public Safety Association.

DATED: October 27, 2021.

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-036-17

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| PORTLAND FIRE FIGHTERS' ASSOCIATION, LOCAL 43, IAFF, | ) | |
| Complainant, | ) | RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |
| v. | ) | |
| CITY OF PORTLAND, | ) | |
| Respondent. | ) | |

Elizabeth A. Joffe, Attorney at Law, Mckanna Bishop Joffe, LLP, Portland, Oregon, represented Complainant.

Heidi K. Brown, Chief Deputy City Attorney, and Fallon Niedrist, Deputy City Attorney, Portland, Oregon, represented Respondent.

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On August 26, 2021, Administrative Law Judge (ALJ) B. Carlton Grew issued a recommended order in this matter. Following questions from the parties about the remedy ordered, the ALJ issued an amended recommended order on September 27, 2021. The parties had 14 days from the date of service of the amended 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).

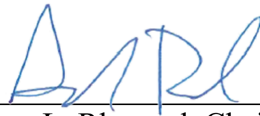
ORDER

1. The City shall cease and desist from violating ORS 243.672(1)(e).

2. The parties shall return to bargaining and shall bargain in good faith toward the goal of reaching agreement regarding the mandatory impacts of the City decision to eliminate the Dive Team through a 90-day expedited bargaining process, with any economic damages to cease

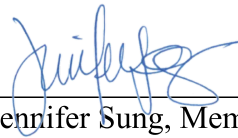
on the date when the parties jointly agreed to place this case in abeyance, unless the parties have come to a different agreement.

DATED: October 27, 2021.



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-036-17

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| PORTLAND FIRE FIGHTERS' ASSOCIATION, LOCAL 43, IAFF, | ) | |
| Complainant, | ) | *AMENDED* RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER |
| v. | ) | |
| CITY OF PORTLAND, | ) | |
| Respondent. | ) | |

A hearing was held before Administrative Law Judge (ALJ) B. Carlton Grew and the Oregon Employment Relations Board (ERB or this Board) via videoconference hosted in Portland, Oregon on April 15, 2021. The record closed on May 20, 2021, following receipt of the parties' post-hearing briefs.

Elizabeth A. Joffe, Attorney at Law, Mckanna Bishop Joffe, LLP, Portland, Oregon, represented Complainant.

Heidi K. Brown, Chief Deputy City Attorney, and Fallon Niedrist, Deputy City Attorney, Portland, Oregon, represented Respondent.

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**A Recommended Order was issued on August 26, 2021. Following questions from the parties about the remedy ordered, the ALJ issued this Amended Recommended Order on September 27, 2021.**

On December 11, 2017, Complainant Portland Fire Fighters' Association, Local 43, IAFF (Association, PFFA, or Union), filed a Complaint for unfair labor practices against the City of Portland (City, PF&R, or Bureau) regarding its elimination of the firefighter Dive Team, under the Public Employees Bargaining Act (PECBA). The case was held in abeyance pending the resolution of the related case, No. UP-59-13, *Portland Fire Fighters' Association, IAFF Local 43 v. City of Portland*, 302 Or App 395, decided by the Oregon Court of Appeals on February 26, 2020. On November 16, 2020, the ALJ informed the parties that the Board Chair directed that the matter be scheduled for hearing. On March 29, 2021, the City filed its Answer admitting and denying

allegations in the Complaint and raising some affirmative defenses. On April 15, 2021, the Association filed an Amended Complaint, and, on April 21, the City filed its Amended Answer.

The issues in this case are:

1. Did the City violate ORS 243.672(1)(e) by eliminating the Dive Team in June 2017, while the parties were in dispute resolution processes under PECBA for a successor agreement?

2. If the Association prevails, should the City be ordered to pay the Association a civil penalty?

This Board concludes that the City violated its duty to bargain in good faith under subsection (1)(e) by refusing to bargain over the impacts of its elimination of the Dive Team on its members.

RULINGS

The City argues that the Association's eve of hearing proposal, and day of hearing motion, to amend its Complaint should be denied in significant part. It also argues that the Association's original Complaint was untimely, and therefore should be dismissed.

Association Amended Complaint

In the Association's original Complaint, filed in December 2017, the only economic damages alleged, and relief sought, regarding the members of the Dive Team was premium pay:

> "On or about June 8, 2017, the City voted to eliminate the Dive Team for 2016-2017. This resulted in reduction of premium pay under the status quo created by the expired union contract and past practice, defined as the practice from prior to 2013 and from 2015-2017.
>
> "* * *
>
> "WHEREFORE, the PFFA prays for an order from the Board as follows:
>
> "* * *
>
> "4. Awarding economic relief to Dive team members deprived of premium pay, plus interest at the statutory rate;"

Complaint at 2-3.

On April 14, 2021, the day before the hearing in this case, the Association notified the ALJ and City that it would move to amend its Complaint at hearing to include allegations that the elimination of the Dive Team had an impact as a safety risk, and that the impacts of elimination

also included loss of overtime and retirement funds. The Amended Complaint also fixed an error and harmonized the allegations with the parties' Joint Stipulated Facts, Exh. Jt-16 at 089. The City opposed the Association's motion as to the new allegations regarding safety, overtime, and retirement. At hearing, the ALJ allowed the motion and granted the City time to file its own Amended Answer and Affirmative Defenses to the Amended Complaint.

At hearing, the ALJ received evidence regarding the safety issue and impacts of overtime and retirement compensation for Dive Team members. However, in his Recommended Order, the ALJ addressed the motion in detail and properly exercised his discretion to strike the portion of the Amended Complaint concerning safety.

OAR 115-035-0010(2) provides,

> "Complainant may amend the complaint at any time before service of the complaint. Thereafter, an amendment to the complaint may be made only if good cause is shown. If the Board or Board Agent allows the amendment, respondent shall be given a reasonable period of time to amend its answer."

The criteria an ALJ should consider in deciding whether to approve a late amendment to a complaint include the nature of the amendment (whether it proposes a new legal theory or new factual allegations), whether the respondent has objected, whether any surprise or prejudice to the respondent can be cured by additional days of hearing or allowing the respondent to amend its answer, whether the purpose of the amendment is a litigation tactic, and the impact of the amendment on the orderly presentation of evidence or other practical concerns. This Board "usually upholds an ALJ's decision on motions to amend a complaint after a respondent has filed its answer. We grant the presiding ALJ a great deal of discretion in deciding whether to grant or deny such motions." *Eagle Point Education Association/OEA/NEA v. Jackson County School District No. 9*, Case No. UP-61-09 at 2-3, 24 PECBR 943, 944-5 (2012), citing *Wy'East Education Association/East County Bargaining Council/Oregon Education Association, Et Al. v. Oregon Trail School District No. 46*, Case No. UP-16-06, 22 PECBR 668, 669-72 (2008), *rev'd and remanded*, 244 Or App 194, 260 P3d 626 (2011) (citation omitted).

The original December 2017 Complaint in this case was filed by an attorney who is now retired. The Association's present counsel first appeared in this case prior to December, 2020, more than four months before the April 2021 hearing. While the three additional allegations required additional evidence in the case, and required an Amended Answer, the hearing was nevertheless concluded in one day. The allegations regarding lost overtime and retirement benefits are subject to the same legal analysis as the previous alleged lost premium pay.

The most troublesome addition in the Amended Complaint is the claim that the City's decision affected the safety of members of the bargaining unit who were not on the Dive Team, namely other, conventional firefighters working near bodies of water. This claim is not similar to the other allegations because it is not an economic issue, and because it addresses issues relevant to bargaining unit employees who are not Dive Team members. The evidence on the issue was not extensive, did not interfere with the orderly presentation of evidence, and the City was also able to present and argue evidence on the issue. While the timing of the amendments would raise a

strong suspicion that the eve of hearing notice of filing was a litigation tactic, and to harass the respondent, the amendments were not frivolous, or made solely for the purpose of delaying the proceeding. Given the eve of hearing notice of the proposed amendments, and, in particular, the late notice of the safety issue, the amendment did present a hardship on the City.

Respondent argues,

> "Additionally, the amendment included, for the first time, notice to the City about the Union's theory on impacts to firefighter overtime and retirement, rather than simply the resulting loss of specialty pay. The City was afforded almost no time to prepare additional witnesses or testimony in response to these new theories. Particularly regarding the issue of firefighter safety, the nature of this amendment—that the elimination of the Dive Team was a safety issue—was a *predominant* theory of their case rather than ancillary, and yet, PFFA failed to notify the City of this new theory of the case until the day before the hearing was scheduled. While both counsel for the PFFA and the City were not involved with the matter at the filing of the unfair labor practice complaint, counsel for PFFA came on the case in late October 2020. PFFA's counsel had months of preparation time, including the exchange of exhibits, stipulation of facts, and preparation of witnesses for hearing, to amend the complaint, and it was prejudicial to the City to allow such a significant deviation from the complaint in the eleventh hour. Accordingly, the late amendment prejudiced the City in its presentation of the case and should not have been granted."

City Post-hearing brief at 10.

While the ALJ may have acted within his discretion had he denied all of the amendments, viewing the case from the perspective of a completed hearing, we conclude that the ALJ acted within his discretion when he struck only the safety claim.[1]

Timeliness of original Complaint

ORS 243.672(3) provides that unfair labor practice complaints must be filed within 180 days "following the occurrence of an unfair labor practice." The City argues that the original Complaint is untimely because the Union filed it 187 days after the City Council adoption of the 2017-2018 "adopted budget," which the City argues is the date the Association knew or reasonably

[1]Even if we permitted this amendment, the Association's success on this claim would not be assured. While "safety issues that have an impact on the on-the-job safety of the employees" are mandatory subjects of bargaining. ORS 243.650(7)(f), the connection between an employer's actions and safety must be clear: [W]e agree with the board's conclusion that it must be apparent from the face of a proposal itself—that is, "directly" and without reference to extrinsic evidence—that the proposal involves a "safety issue." . . . [W]e conclude that the subject of a proposal is a "safety issue" for purposes of ORS 243.650(7)(f) if it would reasonably be understood, on its face, to directly address a matter related to the on-the-job safety of strike-prohibited employees." *Multnomah County Correctional Deputy Ass'n v. Multnomah County*, 257 Or App 713, 716–17 (2013). The safety of firefighters working over water is arguably not directly identified in the contractual language at issue.

should have known that the Dive Team assignments would be eliminated. *See Roseburg Police Employees Association v. City of Roseburg*, Case No. UP-44-09, 24 PECBR 697 (2012) (describing the PECBA limitations period and the discovery rule, under which a party must file within 180 days after it knows or reasonably should know that an unfair labor practice has occurred.) The parties agree that the actual elimination of the Dive Team took place July 1, 2017, and that the complaint was filed on December 11, 2017, 163 days later.

In *Oregon State Police Officers' Association v. State of Oregon, Oregon State Police*, Case No. UP-30-07 at 4, 22 PECBR 970, 973 (2009), *aff'd*, 240 Or App 419 (2011), this Board noted that,

> "Historically, we have applied both the occurrence rule and the discovery rule to determine the 180-day limitation period for filing an unfair labor practice complaint. The 'occurrence rule' requires that a complaint be filed within 180 days of the date on which the change happened. In *Oregon AFSCME Council 75 v. Morrow County*, Case No. UP-38-96, 17 PECBR 17, 19 (1996), *recons,* 17 PECBR 75 (1997) we applied an occurrence rule and found a complaint untimely when it was filed more than 180 days from the date on which the employer made allegedly unlawful changes in employees' pay. In *Association of Professors of Southern Oregon State College v Oregon State System of Higher Education and Southern Oregon State College*, Case No UP-13/118-93, 15 PECBR 347, 357 (1994), we applied a discovery rule and held a complaint timely when it was filed within 180 days of the date on which the union learned about an allegedly unlawful unilateral change."

The purpose of the discovery rule is to mitigate harm to complainants when they neither know, nor reasonably should have known, of the occurrence that violated their legal rights until a later date. The discovery rule lengthens the period of time in which a claim may be filed. This Board has never used the discovery rule to shorten the limitations period below that provided under the occurrence rule. Put another way, this Board has never held that the limitations period begins to run before the occurrence that violated the PECBA actually took place. Doing so would violate the statute, which explicitly provides 180 days to file a Complaint "following the occurrence of an unfair labor practice." ORS 243.672(3). *See Riddle Association of Classified Employees v. Riddle School District #70*, Case No. UP-114-91, 13 PECBR 654 (1992) (despite prior announcement that an employer was cancelling a clothing allowance, the unfair labor practice did not occur, nor did the limitations period begin to run, until the employer first denied a claim for reimbursement).

In *Oregon AFSCME Council 75, Local #3997 v. Deschutes County*, Case No. UP-32-09, 24 PECBR 290, 291(2009), this Board stated,

> "This Board has long held that 'an unfair labor practice generally occurs when the alleged act becomes final, not when the employer gives notice of intent.' *Washington County Police Officers' Association v. Washington County*, Case No. UP-15-08, 23 PECBR 449, 476 (2009); *Oregon State Police Officers' Association v. State of Oregon, Oregon State Police*, Case No. UP-30-07, 22 PECBR 970 (2009). Our rationale is that the 'occurrence' is not the respondent's announcement

but rather the effective date of the action, because until the announced action takes effect, the respondent could change its decision or be persuaded not to take the action. *AFSCME Council 75, Local 3327, and Lahr, M.D. v. State of Oregon, Department of Human Resources, Mental Health and Developmental Disability Division*, Case No. UP-64-97, 18 PECBR 257, 264 (1999)."

Accordingly, as Complainant notes, this Board has longstanding precedent that the limitations period begins to run from the effective date of a newly adopted budget, not from the date the governing body adopted the budget. *McMinnville Education Association v. McMinnville School District No. 40*, Case No. C-118-77, 3 PECBR 1876 (1978); *West Linn Education Association v. West Linn School District 3JT*, Case No. C-151-77, 3 PECBR 1864 (1978). We conclude that the original Complaint was timely.

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

## FINDINGS OF FACT

### Parties

1. The City is a public employer as defined by ORS 243.650(20). It provides certain services to the public through the Portland Fire and Rescue Bureau.

2. The Association is a labor organization as defined by ORS 243.650(13) and is the exclusive representative of fire and rescue personnel employed by the City in the Portland Fire and Rescue Bureau.

3. The Association and the City have been parties to a series of collective bargaining agreements defining the terms and conditions of employment for the represented employees. The terms of the relevant agreements were July 1, 2007 through June 30, 2010, and July 1, 2012 through June 30, 2016.

### Dive Team creation and evolution

4. The City's Dive Team was created in 1984 after three railroad employees drowned in the Willamette River when their train went off a bridge.

5. The Team was initially formed using firefighters with previous diving experience who volunteered. The Team was formalized over the years with the adoption of certification, training and fitness requirements, and operational guidelines. The City provided funding, emergency response equipment, and a vehicle.

6. The Dive Team's function evolved to provide 24-hour emergency water rescue and recovery services. It responded to calls for service in the Willamette River from Elk Rock Island (near Milwaukie) north to Kelly Point Park at the Columbia River and in the Columbia River from its confluence with the Willamette River east to Chinook Landing in Fairview. The Team also responded to calls in the Sandy River, Blue Lake, Sauvie Island, and in Portland area reservoirs.

The Team worked with three divers from Gresham Fire when responding to incidents on Gresham waterways, such as the Sandy River.

7. The Team responded to flooding incidents, bridge jumpers, boating accidents, car crashes, and other water-related incidents.

8. The Team has assisted local and federal law enforcement with underwater evidence recovery and searches around waterfront structures and moored vessels.

Dive Team training, rescue and recovery activity

9. The Dive Team worked in two primary modes, (1) rescue and (2) recovery. Rescue mode is urgent action to reduce loss of life and injury. Recovery mode is to recover (quickly if possible) the bodies of drowned people. A Dive Team response typically began in rescue mode, with divers entering the water within 15-30 minutes after the call. It switched to recovery mode 30-60 minutes after the person was last seen on the water's surface, depending on conditions and the victim's age. Rescue mode might last longer if there was a possibility that the person underwater had access to an air pocket.

10. A rescue was considered successful if the victims were recovered while they still had a pulse. The Dive Team engaged in a significant number of successful rescues. Tragically, none of those successful rescues resulted in the victim ultimately surviving or even regaining consciousness. Some of those victims did survive until family members were present.[2]

11. Dive Team members were motivated in part by the importance of prompt body recovery for victims' families and friends, and to show family members and the public that all rescue and recovery measures had been taken as quickly as possible. They also understood that it was important to recover dead bodies before they succumbed to decomposition and predation.

12. Multnomah County waterways are also patrolled by the Multnomah County Sheriff's Office ("MCSO"), which also provides recovery services, but has a longer response time than the Dive Team. The County divers' response time was at least one hour, and sometimes up to several hours due to having fewer divers on duty.

13. Members of the Dive Team performed difficult, dangerous tasks requiring a great deal of training (typically military) and experience. Heroic efforts of Dive Team members have been recognized by public officials and the press. National recognition was given to a Dive Team member who rescued a person who drove a car off a bridge into the river; the Fire Chief awarded a Bronze Medal of Valor to a Dive Team member who, acting without dive gear, rescued a woman as she entered the deep water where her son had just drowned.

14. A dive operation requires four divers, operating in rotation in different roles: (1) one diver in the water by themselves; (2) a rapid intervention diver 100 percent ready to swim

[2]Since elimination of the Dive Team, there have been several incidents in which there was no ability to attempt a rescue once the person went below the surface even though witnesses could identify their location. However, there is no evidence that any rescue attempts, even if successful, would have ultimately saved the lives of the victims.

down and rescue diver #1 if diver #1 becomes entangled, trapped, or has a problem with air supply; (3) a 75 percent ready diver who is ready to step into the rapid intervention position, and (4) a diver who is running the dive operation or resting. When diver #1 comes up, the remaining divers bump into the next spot, and diver #1 who was in the water goes to the fourth role, running the dive and resting. The cycle repeats until the dive operation ends. (The City of Gresham had only three divers, requiring another jurisdiction's dive team to assist in any dive.).

15. At its largest, the Dive Team had 25 members: eight on each 24-hour Emergency Operations shift, plus one Kelly relief shift position. The Team responded to an average of 80 incidents per year. Team members were stationed throughout the City, while the dive van, with the diving gear and equipment, was housed at Fire Station 1. When calls for service came, four Team members would be dispatched from their stations to arrive on scene.

16. Each Dive Team member was required to hold a certification as an open water, rescue, public safety, or military scuba diver. Team members were required to participate in monthly training drills, including in-water simulations and dry drills. Team members were required to complete at least eight monthly training drills per year, but were encouraged to do all twelve. The drills typically took four to six hours.

17. Dive Team members were permitted to perform drills either during or outside their regularly scheduled hours. Dive Team members received overtime pay if they performed training drills outside their regularly scheduled hours. In fiscal year 2012-13, nearly half of the Dive Team's budget was spent on overtime costs associated with off duty training. Between July 1, 2016 and March 31, 2017, Dive Team training overtime costs were $12, 648, or nearly $1,000 per Team member.

18. During rescue or recovery, the Dive Team usually worked with Portland Fire's Marine Program, whose members are trained and equipped to perform water surface rescues and marine firefighting. Marine Program members perform body recovery operations using visual sighting for floating bodies, and sonar and dragging operations for submerged bodies. The Marine Program does not have rescue divers.

19. In a typical water rescue incident, Portland Fire would activate the Dive Team and the Marine Program. If the response moved into recovery mode, the Dive Team was often joined by MCSO watercraft. The Dive Team would sometimes leave the scene once the MCSO staff were in place.

Dive Team specialty pay and overtime compensation

20. When the Dive Team began, firefighter dive volunteers did not receive any additional compensation. In 2006, the Dive Team Coordinator proposed that Dive Team members receive hazard pay based on their expertise, high-risk work, and training, comparable to other specialty rescue teams such as the Hazardous Materials and Technical Rescue Teams.

21. In 2007, during contract bargaining, the Association proposed a six percent "Specialty Pay" category for the Dive Team, to pay them an additional six percent of their regular

firefighter wage. This would be the first time the Dive Team was recognized in a collective bargaining agreement. Although the City was interested in providing specialty pay, it rejected this proposal. The City then offered a proposal which included the specialty pay but also included language providing, in the City's view, that the City would retain a similar level of control over the contractually recognized Dive Team as it had over the volunteer Team.

22. The parties agreed that the July 1, 2007 to June 30, 2010 collective bargaining agreement would contain the following provision:

> "**Dive Rescue Team**. Effective July 1, 2009, those employees certified for and assigned to the Dive Rescue Team shall receive additional pay of six percent (6%) of the top step Fire Fighter base hourly rate. Assignment to the Dive Rescue Team *shall be limited to thirteen (13) members or such other number as the Bureau, in its sole discretion, may establish*, and may be restricted to employees assigned to a designated Dive Rescue Team station(s).
>
> "*Assignment and required certifications shall be at the sole discretion of the Bureau.* Additionally, the Bureau may require that incumbents on the Dive Rescue Team successfully pass an annual evaluation based on criteria established by the Bureau."

Joint Stipulated Facts ¶¶4, 5; Exh. Jt-1 at 9 (emphasis added).

23. Similarly, the parties' July 1, 2012 to June 30, 2016 CBA contained the following language:

> "Those employees certified for and assigned to the Dive Rescue Team shall receive additional pay of six percent (6%) of the top step Fire Fighter base hourly rate. *Assignment to the Dive Rescue Team shall be limited to twenty five (25) members or such other number as the Bureau, in its sole discretion, may establish*, and may be restricted to employees assigned to a designated Dive Rescue Team station(s).
>
> *"Assignment and required certifications shall be at the sole discretion of the Bureau.* Additionally, the Bureau may require that incumbents on the Dive Rescue Team successfully pass an annual evaluation based on criteria established by the Bureau."

Exh. Jt-5 at 8 (emphasis added).

First elimination of the Dive Team: City 2013 budget

24. During 2013, the City eliminated the Dive Team, for the first time, due to budget reductions in fiscal year 2013–14.[3]

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[3]The City's fiscal year is from July 1 through June 30 of the following year.

25. On December 26, 2013, the Association filed an unfair labor practice complaint with this Board, Case No. UP-059-13. The Association alleged, among other things, that the City's elimination of the Dive Team was an unlawful unilateral change in violation of ORS 243.672(1)(e). An ALJ heard the case over seven days in July and August 2015, and issued a Recommended Order on April 6, 2015.

26. On December 2, 2015, after objections to the ALJ decision, this Board held[4] that *either* (1) the Union and the City bargained to completion over the budget reductions when City officials and the Union President engaged in informal discussions that constituted "collective bargaining," *or* (2) the Union's failure to demand to bargain the City's changes constituted a waiver of the claim. Therefore, this Board held, the City had not violated ORS 243.672(1)(e). This Board did not reach the issue of whether eliminating the Dive Team was subject to bargaining. The Board held, however, that the City violated ORS 243.672(1)(e) with respect to changes to the process for selecting candidates for promotion. *Portland Fire Fighters' Association, IAFF Local 43 v. City of Portland*, Case No. UP-059-13 at 14, 26 PECBR 548, 561 (2015).

27. The City and Association appealed the Board's decision in Case No. UP-059-13 to the Oregon Court of Appeals. On February 26, 2020, that court held that the informal discussions between City officials and the Union President did not constitute "collective bargaining," and that the City had also failed to plead the affirmative defense of waiver by inaction upon which this Board had relied. Accordingly, the court reversed this Board, and remanded the waiver by inaction portion of the Board's order for further consideration. *Portland Fire Fighters' Association v. City of Portland*, 302 Or App 395 (2020).

28. On September 24, 2020, this Board issued its decision on remand in Case No. UP-059-13, holding that the Union's complaint was properly dismissed because the Union's actions during the budget discussions constituted a waiver by action. *Portland Fire Fighter's Association v. City of Portland, order on remand* (2020) (Member Sung dissenting).

29. On November 9, 2020, the Union appealed this Board's decision on remand in Case No. UP-059-13. That appeal is still pending before the Court of Appeals.[5]

Restoration of the Dive Team: City 2015 budget

30. During fiscal year 2015–16, the City restored funding for 13 Dive Team members (not the 25 it had funded previously). Pursuant to the July 1, 2012 through June 30, 2016 agreement, the City paid these 13 bargaining unit employees 6 percent specialty pay, and overtime pay for time spent in training outside of their regular scheduled hours of work as provided in the collective bargaining agreement. The City funded the Dive Team at the 13 member level through fiscal year 2016-17.

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[4]The summary of Case No. UP-059-13 in this and the following two paragraphs are placed here to aid the reader; they are not actual Findings of Fact.

[5]At the time this Recommended Order was being finalized, the case was in briefing status with no oral argument date set.

Bargaining in 2016-17

31. On March 4, 2016, parties began bargaining for a successor agreement. They held 28 bargaining sessions until December 20, 2016, 3 mediation sessions with the last on February 12, 2017, exchanged final offers on March 24, 2017, and filed their last best offers by August 30, 2017.

32. In September and October 2017, the parties engaged in twelve days of interest arbitration to determine whether the Union's last offer (to create a Union-sponsored health care trust for firefighters) versus the City's last offer (to maintain the existing health care benefits structure with additional features aimed at firefighter health) best met the criteria set out in the PECBA. The City's last offer included the same Dive Team language as in the 2012-16 agreement. The City never presented any proposal that would eliminate the Dive Team.

33. On December 29, 2017, Arbitrator Michael Cavanaugh issued his Opinion and Award, determining that the City's last offer was more closely aligned with the PECBA criteria. The Arbitrator's Award, combined with the parties' prior tentative agreements, became the parties' July 1, 2016 to June 30, 2019 collective bargaining agreement.

City budget process

34. The City's budget process usually starts in November. The mayor and City Council provide City bureaus with guidance on proposed budgets. The bureaus then develop a proposed budget, often using a Budgetary Advisory Committee ("BAC"), which they usually submit to the City Budget Office (CBO) in January or February. The CBO reviews the proposed budgets for several weeks, then submits them to the City Council. The Council then holds budgetary sessions with the bureaus and community forums, to obtain input that may influence the Mayor's Proposed Budget ("MPB").

35. The issuance of the MPB is the first formal step in the budget process and usually takes place in May. The City then hosts additional public forums. The City Council reviews the MPB, makes its changes, and, usually by end of May, issues an Approved Budget. The Approved Budget is submitted to the City Tax Supervising and Conservation Commission ("TSCC"), for compliance review, after which it is returned to the City Council for any recommended changes. The City then issues the Final Approved Budget ("FAB"), usually in June.

36. Despite its name, the City may make changes to the FAB. There is a regularly scheduled Budget Monitoring Process ("BMP" or "bump") in the fall and spring of each year. In addition, budgets are sometimes modified at different times to incorporate changes required by collective bargaining agreements.

Second elimination of the Dive Team: City 2017 budget

37. For fiscal year 2017–18, Mayor Ted Wheeler provided budget guidance to City public safety and housing bureaus to find a two percent budget reduction.

38. The consensus among the Fire Bureau BAC members was that they did not support any cuts to Bureau funding because they believed that any further cuts jeopardized safety. Accordingly, the BAC's first recommendation was to increase funding for premium and overtime pay for the Dive Team so it could be restored to its full 25-member capacity. In the event that this additional funding could not be provided, the BAC recommended eliminating the 13 Dive Team assignments as well as converting the Bureau's four 24/7 Rapid Response Vehicle units to 40 hour per week units to attain the two percent reduction.[6]

39. On February 2, 2017, the Fire Chief issued a memorandum criticizing the proposed budget's reductions, stating that they would have a negative impact on emergency response times and response reliability throughout the city, as well as on firefighter safety. The Chief stated that he would be working with the relevant City Commissioner to prevent any cuts to the Fire Bureau's funding.

40. On March 6, 2017, the CBO released an analysis of PF&R's proposed budget recommending the elimination of Dive Team premium pay.

41. On June 8, the City Council adopted the City's budget for the 2017 – 18 fiscal year. The budget eliminated the 13 Dive Team positions. The elimination and resulting economic losses to Dive Team members was effective July 1, 2017.

42. On July 13, 2017, Association President Alan Ferschweiler emailed City Labor Relation Manager Jerrell Gaddis regarding the elimination of the Dive Team. Ferschweiler demanded that the City maintain the current compensation to Dive Team members pending the completion of the ongoing contract negotiations. Ferschweiler also stated that the Association would file an unfair labor practice complaint if the City did not maintain the current compensation.

43. On August 7, 2017, Gaddis replied that the City had no duty to bargain with the Union over the elimination of the Dive Team because, "[d]espite the impact on compensation, removing employees from premium pay assignments is a permissive subject of bargaining" and that the City had no duty to bargain because the City had prevailed in the prior unfair labor practice action, Case No. UP-059-13. Joint Stipulated Facts ¶35; Exh. Jt-15.

44. Since the elimination of the Dive Team, the City has not assigned their former work to any other City employees or to any outside contractor. MCSO continues to provide the same recovery services as before.

45. On December 11, 2017, the Union filed its Complaint in this case. The parties requested that the ALJ place the case in abeyance pending the decision of the Oregon Court of Appeals in the related case between the parties, Case No. UP-59-13, and the ALJ did so.

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[6]There is no evidence that the decision to eliminate the Dive Team was anything besides an economic one to meet budget reduction goals.

2019-2020 Bargaining

46. On January 4, 2019, the parties began bargaining for a successor to the 2016–19 collective bargaining agreement. On April 6, 2020, the parties reached an initial tentative agreement, and reached a revised tentative agreement on May 14, 2020. The parties' 2019–23 CBA was signed on December 3, 2020. The Dive Team specialty pay language in the 2012–16 CBA remained unchanged in the following 2016–19 and 2019–23 agreements.

Dive Team member retirement benefits

47. Association bargaining unit members are covered by the Fire and Police Disability, Retirement and Death Benefit Plan. Defined pension benefits under that plan are calculated according to a three tiered formula based on participants' date of hire. Most of the Dive Team members working in 2017 were Tier II, because they were hired between 1990 and the end of 2006. Tier II benefits are based on years of service and final pay, which is based on a three-year look-back period from the date of their retirement and takes the highest 12-month period. That 12-month period is usually based on the most recent 12 months prior to retirement because it typically includes cost-of-living and longevity increases and promotions.

48. Retiring Association unit members also receive a payment into their voluntary employees' beneficiary association (VEBA) plan, a type of tax-exempt trust used by its members and eligible dependents to pay for eligible medical expenses. The VEBA plan calculates the full value of an employee's accrued vacation and a percentage of their accrued sick leave, which are paid out at the employees' rate of pay at the time of retirement.

49. Fire Lieutenant Robert Scruggs, who served on the Dive Team his entire career, planned for a year to retire and did retire on September 15, 2017, two and a half months after the Dive Team was eliminated. Had his final pay included the additional 4.27 pay periods of Dive Team Specialty pay between July 1, 2017 and his retirement date, his base monthly pension would have been approximately $55.00 higher. His VEBA payment was $3,567 less than it would have been with the six percent specialty pay.[7]

50. Other current, longtime Dive Team members will have lower pension benefits because their lookback window will not include any weeks with the six percent premium pay. One 15-year member of the Dive Team chose to delay his planned retirement and continue working for an additional couple of years to make up for the lost six percent premium pay's impact on his retirement benefits.

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[7]Regarding Scruggs, after hearing the parties additionally stipulated that "When Mr. Scruggs retired, he was a lieutenant receiving lieutenant pay per Schedule A of the parties' CBA, plus he received the following premiums: trainer (6% of lieutenant rate); paramedic (11% of top step firefighter rate); longevity for 22 years of service (5% of top step firefighter rate); and apparatus operator (3% of top step firefighter rate)." Email from Fallon Niedrist to ALJ Grew, 5/3/21 at 2:58 pm.

## CONCLUSIONS OF LAW

The Association alleges that the City violated ORS 243.672(1)(e). We conclude that the Association met its burden to establish that the City violated its statutory obligations under the PECBA by refusing to bargain over the impacts of its elimination of the Dive Team.

We turn to our analysis.

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

2. The City did not violate ORS 243.672(1)(e) by eliminating the Dive Team in June 2017, while the parties were in dispute resolution processes under PECBA for a successor agreement.

### Standards for Decision

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).

In analyzing unilateral change allegations, this Board considers four factors: (1) whether an employer changed the status quo; (2) whether the change concerned a mandatory subject of bargaining; (3) whether the employer exhausted its duty to bargain; and (4) any affirmative defenses raised by the employer. *Association of Engineering Employees of Oregon,* UP-043-11 at 10. We do not apply this analysis in a mechanical manner and may proceed to any factor if it will be dispositive of the issue. *Association of Engineering Employees of Oregon,* UP-043-11 at 10.

### City authority to eliminate the Dive Team under the collective bargaining agreement

Here, the City asserts as an affirmative defense that the relevant status quo was determined by the parties' collective bargaining agreement, and that the "the contract language permits the [City] to take the specific action it did" to eliminate the Dive Team, citing *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06 at 44, 22 PECBR 323, 366 (2008). In considering this defense, this Board "must interpret the contract language to determine whether the contract does in fact authorize the action." *Lebanon Education Association/OEA,* UP-4-06 at 42. In other words, "if the [collective bargaining agreement] authorizes an employer to act unilaterally with respect to certain conditions of employment, then changing those conditions is not a change in the status quo, and a failure to bargain before changing them cannot be an unfair labor practice." *Ass'n of Oregon Corrections Employees v. Dep't of Corrections*, 209 Or App 761, 769 (2006).

Accordingly, we turn to the standards for contract interpretation. When we interpret contracts, our goal is to discern the parties' intent. To do so, we apply the three-part analysis described in *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04 at 10, 21 PECBR 20, 29 (2005) (*citing Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997)). We first examine (1) the text of the disputed contract language in the context of the contract as a whole, and if the language is clear, the analysis ends. Unambiguous contracts are enforced according to their terms. *Portland Fire Fighters' Assn. v. City of Portland*, 181 Or App 85, 91, 45 P3d 162 (2001), *rev den*, 334 Or 491, 52 P3d 1056 (2002). Contract language is ambiguous if it reasonably can be given more than one plausible interpretation. 181 Or App at 91. If the provision is ambiguous, we examine (2) extrinsic evidence of the parties' intent, to the extent it is available. If the provision remains ambiguous after considering the extrinsic evidence, we apply (3) appropriate maxims of contract construction. *Yogman*, 325 Or at 364.

The last agreement in effect prior to the elimination of the Dive Team at issue here, 2012-2016 stated,

> "Assignment to the Dive Rescue Team shall be limited to thirteen (13) *members or such other number as the Bureau, in its sole discretion, may establish,* and may be restricted to employees assigned to a designated Dive Rescue Team station(s). *Assignment and required certifications shall be at the sole discretion of the Bureau*."

Finding of Fact 22.

The City argues that this language "unambiguously authorizes PF&R to eliminate the Dive Team without bargaining: the provision plainly states that PF&R has the 'sole discretion' to establish a Dive Team of 25 members or 'such other number' as PF&R chooses. 'Such other number' unambiguously includes no Dive Team members, as 'zero' is a number." City Post-hearing brief at 13.

The Association argues that the contractual phrase "such other number," "must be a higher number than 25 in order for the clause to make sense because the prior clause says the Team shall be 'limited to' 25 members, and 'limited to' means 'no more than.'" Association post-hearing brief at 25. The Association does not dispute that only the City could raise the number of Dive Team members beyond 25. It does, however, dispute that this language "clearly and unmistakably authorizes the City to eliminate the Team altogether and assign no members to it. At the very minimum, that language is ambiguous, which falls short of supporting the City's contractual waiver argument." Association Post-hearing brief at 25.

Reviewing the text of the disputed provision in the context of the contract as a whole, the City appears to be correct. Taken as a whole, the statement, "shall be limited to [[25]] thirteen (13) *members or such other number as the Bureau, in its sole discretion, may establish,*" does not limit the City from changing the number of people on the dive Team from more, or less, than 25. Even if we were to conclude that it is possible that this language did not include "zero" as a number, it would certainly include "one," and a distinction between one and zero members of the Dive Team

is neither practical nor reasonable – the evidence in this record suggests that the Dive Team could not operate safely, if at all, with three or less members participating in a dive operation.

The history of the parties' conduct and bargaining over this and predecessor language support this conclusion. The City considered eliminating the Dive Team in 2008, while the specialty pay language was new, and the Association did not argue that the specialty pay provision prevented the City from doing so. The City decided to expand the Team to 25 despite an identified contractual number of 13. The City eliminated the Dive Team in 2013, under essentially the same contractual language. The parties engaged in contract negotiations after that elimination, with no evidence of an attempt by the Association to secure language specifically protecting the existence of the Dive Team (such as ordering layoffs of other bargaining unit members first in the event of budget cuts). In the 2015–16 fiscal year, the City unilaterally reconstituted the Dive Team. At that time, the same contract language that the number of Team members shall be limited to 25, and the Team had had 25 members ever since it was formalized. However, the City limited the Team to 13 members in 2015, without objection from the Association.

The City argues:

> "The facts demonstrate that the parties' status quo with regard to the Dive Team assignments has been one of change at the discretion of management. PF&R has had Dive Team assignments for only six years out of the nearly 12 years that the parties have had the Dive Team specialty pay in their CBA. Excluding the second elimination of the Dive Team in 2017, PF&R only had Dive Team assignments for six of the eight years between 2009 and 2017. Further, management exercised its discretion over the number of members assigned to the Dive Team from the very beginning, in increasing the number from 13 to 25, and continued to exercise that discretion in 2015 when it moved back to a 13-member Dive Team. Thus, there has been no consistent practice of a Dive Team at all, let alone a specific number of members, after specialty pay was negotiated for the Dive Team. PF&R's elimination of the Dive Team in 2017 was consistent with the contract language and borne out by the parties' flexible, changing status quo around the Dive Team and thus was not a unilateral change."

City Post-hearing brief at 18.

The City also argues,

> "First, the parties' bargaining history demonstrates that PF&R retained full control and authority over the Dive Team in exchange for providing specialty pay. When PFFA first introduced the specialty pay proposal in 2007, it contained no language around PF&R's authority as to assignment and required certifications. (Stipulated Facts, ¶ 5). The City's counterproposal contained the 'sole discretion' parameters. The purpose of the 'sole discretion' language was to memorialize PF&R's *existing authority at the time* over the Dive Team, which was a completely voluntary function. (Herron Testimony). That status quo of complete control over the Dive Team included the number of assignments, if any—the language contained only a

maximum number of Dive Team assignments, but not a minimum. Likewise, the status quo included what, if any, training requirements and overtime would be approved by PF&R. This quid pro quo of retaining control over the Dive Team as though it continued as a voluntary function in exchange for the specialty pay was discussed at the table, with no questions as to its meaning, and adopted by the parties into the 2007–2010 CBA. (*Id*.)."

City post-hearing brief at 15.

While we need not accept the City's version of the status quo, its arguments are relevant to determining the parties' intent in selecting the language at issue for their collective bargaining agreement. Aside from challenging the 2013 elimination of the Team altogether, the Association has not disputed the City's effectuated interpretation of the agreement.

The Association's contrary interpretation is not tenable. Nothing in the contractual language imposes a duty on the City to retain the Dive Team. The relevant paragraph contains no directive terms such as "must" or "cannot"; instead, it contains terms which give the broadest possible power to the City: "its sole discretion." Indeed, the agreement's grant of authority to the City to "*such other number as the Bureau, in its sole discretion, may establish"* is, especially in the context of the history of the Dive Team, a clear and unmistakable waiver of the Association's rights to bargain over the number of members of the Dive Team, and therefore whether there are any members at all.

We conclude that the collective bargaining agreement, negotiated between the City and Association, did not bar the City from eliminating the staff of the Dive Team.[8]

City duty to bargain over the impacts of City elimination of the Dive Team

The City argues that the contractual power to eliminate the Dive Team necessarily includes the power to refuse to bargain of the impacts of that decision.[9] The Association argues that even if the City had no duty to bargain over the decision to eliminate the Dive Team, "it had a duty to bargain over the impacts of that decision on mandatory bargaining subjects and to fulfill that duty before it implemented the decision." Association Post-hearing brief at 16. Among other cases, the Association cites *City of Vale*, 20 PECBR at 358. In that case, this Board held that a city was

[8]Because of our resolution of this issue, we need not address the City's arguments that the decision to eliminate the Dive Team was a permissive subject of bargaining; that the Association waived any right to bargain over the issue; and, that the Association demand to bargain and this action were untimely, and therefore not a refusal to bargain under subsection (1)(e).

[9]The City argues that when an employer simply "goes out of the business" of providing a particular service, that decision need not be bargained, citing *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337, *on reconsideration*, 20 PECBR 388 (2003) (A city was not required to bargain the decision to eliminate its police department); *Oregon State Employes Association v. Department of Human Resources, Adult and Family Services Division, Keith Putman, Administrator,* Case No. C-194-80, 6 PECBR 4658 (1981) (the employer was not required to bargain decision to stop providing certain review functions which were then taken over by an independent agency). However, in both of these cases, this Board held that these employers were required to bargain the impacts of those changes.

required to bargain over impact of closing its police department prior to implementation of that closure.

The City argues,

"However, having to bargain such impacts contradicts the plain language of the CBA. First, PF&R has *'sole discretion'* over assignment to the Dive Team, which includes specialty pay if a member is so assigned. If PF&R had to bargain a member's loss of specialty pay and impacts on retirement once removed from the Dive Team, PF&R would not, in fact, have 'sole discretion' over assignments, because PFFA would have some say as to those assignments in the impact bargaining process. Thus, the CBA language does not support PFFA's position that PF&R had to bargain loss of specialty pay and impacts on retirement when it no longer assigned members to the Dive Team.

"Second, PF&R also has 'sole discretion' over 'required certifications' to be on the Dive Team. It is undisputed that overtime opportunities for the Dive Team arose from training to maintain certification. (Picard Testimony; Goforth Testimony). Had PF&R simply decided to no longer require Dive Team certifications, which PF&R had the 'sole discretion' to decide, those overtime opportunities would have been likewise eliminated. Here, PF&R's decision to eliminate the Dive Team is the functional equivalent of eliminating certification requirements—it no longer had need for certified divers, eliminated required certifications, and thus, no longer paid for overtime to obtain and maintain those certifications. As with the specialty pay and retirement, had PF&R been required to bargain the impacts on overtime by eliminating training requirements, PF&R would not, in fact, have 'sole discretion' over that decision; PFFA would once again have some say by virtue of the bargaining process. Thus, requiring impact bargaining contradicts the plain language of the CBA, which grants 'sole discretion' to PF&R in the decision over required certifications. The CBA is clear that PF&R had the 'sole discretion' to make that decision, without bargaining.

"* * * *.

"[T]he parties' actions after the Dive Team specialty pay was added further indicate their mutual understanding that PF&R retained full control over the Dive Team. As explained more fully in Section V.B of this Brief, the parties' status quo after bargaining the specialty pay was varied, based on management needs and interests. For example, in 2008, PF&R considered eliminating the Dive Team entirely before the specialty pay come into effect, and neither management nor PFFA leadership considered the CBA language as conflicting with that decision. (Goforth Testimony). Likewise, when PF&R reconstituted the Dive Team in 2015 with only 13 members, rather than the 25 members permitted under the CBA, PFFA did not file a ULP over that decision for failure to bargain, either the decision or the impacts on those firefighters who were not re-assigned to the smaller Dive Team. (Ferschweiler Testimony). Accordingly, the parties' conduct indicates that the

> CBA authorized PF&R to make changes to the Dive Team, including elimination, without having to bargain the decision or impacts."

City Post-hearing brief at 14, 15.

If the City were correct that an employer's power to take an action affecting the terms and conditions of employment of its workers also implied no duty to bargain over the impact of that action, there would be no such thing as impact bargaining. Beyond this argument, the City does not refer us to any contractual language that would credibly constitute a waiver of impact bargaining in this case.

We conclude that the City had a duty to bargain over the impacts of zeroing out the Dive Team on mandatory bargaining subjects and to fulfill that duty before it implemented the decision.

The Association identifies several impacts of the elimination of the Dive Team that concern mandatory conditions of employment: the six percent pay reduction; lost overtime opportunities (City overtime costs for off-duty Dive Team training made up nearly half of the Dive Team's budget); the effect of lost specialty pay on Dive Team members' retirement benefits (affecting calculation of pension benefits and VEBA contributions); It is undisputed that the City did not engage in impact bargaining, and it does not argue that any of these impacts, presented with supporting evidence at hearing, do not constitute mandatory subjects of bargaining.

The City argues that these economic impacts on Dive Team members were *de minimis* and therefore need not be bargained, citing *Multnomah County Corrections Deputy Association*, 2019 WL 6877510, at 13, fn. 5, and *Federation of Oregon Parole and Probations Officers v. Corrections Division, Field Services Section, Robert J. Watson, Administrator, & Executive Department, State of Oregon,* Case No. C-57-82, 7 PECBR 5649, 5655 (1983) (if "the impact on employment conditions of management's decision is not significant or is merely peripheral," then there is no bargaining obligation.)

The City's argues that the *de minimis* nature of the impacts to both of these subjects is illustrated by the facts that (1) the overtime that resulted from Dive Team training was "only $12,648, or 0.1 percent of PF&R's overtime budget of over $9.2 million dollars during the first three quarters of the 2016–17 fiscal year" (City Post-hearing brief at 24); (2) the City could have required all Dive Team training on-duty only, reducing overtime opportunities to zero; and (3) call shifts for regular firefighting work were available nearly every day, and bargaining unit members who wanted to pick up call shift overtime could do so. We note that the purpose of eliminating the Dive Team was to save the City money; that the nature of the impacts on the affected bargaining unit members is the issue, not the impact on the City; and that if it were realistic for the City to require Dive Team members to train on-duty only, it is odd that the City chose to spend funds on overtime that it did not have to. It is not clear on this record whether call shift overtime for regular firefighting work was comparable to the overtime regularly accrued by the Dive Team, but that issue can be addressed through the calculation of lost overtime to the individual employees.

As far as specialty pay is concerned, the City contends that it was permitted to remove individuals from the Dive Team, and thus end their specialty pay, under the terms of the parties' collective bargaining agreement and status quo without bargaining. However, removing individuals from the Dive Team would not end specialty pay to a person who replaced them. If all the individuals were removed, eliminating the Dive Team in that fashion, we are again confronted with the fact that if such impacts need not be bargained, then in effect, no impact bargaining exists.

Turning to retirement benefits, the City argues that the one Association witness who testified discussed the impacts the elimination of the Dive Team had on his retirement still received 99.4 percent of the benefit he would have otherwise received. We conclude that the testimony regarding benefits couched in terms of lost benefits per month presented an economic impact which was not *de minimis*. In addition, there was testimony that a bargaining unit member decided to defer retirement until he obtained additional funds, illustrating a meaningful financial impact on that member.

3. The City should not be ordered to pay the Association a civil penalty.

The Association requests that this Board order the City to pay a civil penalty. ORS 243.676(4) authorizes us to consider awarding 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." The Association argues that "the City's actions in eliminating the Dive Team for the second time without bargaining constitutes both a repetitive and egregious violation." Association Post-hearing brief at 30. This Board, however, has not held that the City's previous elimination of the Dive Team without bargaining was unlawful. We decline to order a civil penalty because the record does not establish that the City knowingly, repetitively, and unlawfully sought to eliminate the Dive Team, or that its conduct was egregious.

Remedies

The remedies sought by the Association include an order requiring the City to post a notice; restore the Dive Team to the *status quo ante* unless and until it completes its bargaining obligation with the Union; and make all Dive Team members whole for their lost specialty pay, overtime compensation, and reduced retirement benefits, with interest at the statutory rate.

Posting a notice

The Association requests that we order the City to post a notice of its unfair labor practice. We generally order a notice posting if we determine a party's violation of PECBA was: (1) calculated or flagrant, (2) part of a continuing course of illegal conduct, (3) committed by a significant number of the respondent's personnel, (4) affected a significant number of bargaining unit employees, (5) significantly (or potentially) impacted the designated bargaining representative's functioning, or (6) involved a strike, lockout, or discharge. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82 at 12, 6 PECBR 5590, 5601, *aff'd without opinion*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536, 678 P2d 738 (1984). Not all of these criteria need be satisfied to warrant posting a notice.

*Laborers' Local 483 v. City of Portland*, Case No. UP-15-05 at 17-18, 21 PECBR 891, 907-908 (2007); and *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02 at 2, 19 PECBR 684, 685 (2002). However, we typically require the presence of multiple factors before requiring a posted notice. *See Wy'East Education Association/East County Bargaining Council/Oregon Education Association, Et Al. v. Oregon Trail School District No. 46,* Case No. UP-16-06 at 47, 22 PECBR 668, 714 (2008). In this case, we conclude that the Association has not established that any of the requisite factors are met. Therefore, we decline to order the City to post a notice.

Bargaining obligation

In addition to issuing a cease-and-desist order, this Board has "broad authority to fashion an appropriate remedy under the circumstances of each particular case to effectuate the purposes of the Public Employee Collective Bargaining Act (PECBA)." *Oregon School Employees Association v. Parkrose School District*, Case No. UP-030-12 at 2, 25 PECBR 845, 846 (2013) (Recons Order).

Here, we must remedy the City's violation of section (1)(e) by refusing to bargain the impacts of its elimination of the Dive Team. This Board has stated, "The duty to bargain in good faith is not fulfilled when an employer is found guilty of a (l)(e) violation committed during the course of negotiations. This is so regardless of the employer's subjective good faith or bad faith. Commission of a per se (1)(e) violation taints the bargaining process and a remedy must be provided. ORS 243.676(2)(b) and (c)." *Lane Unified Bargaining Council v. McKenzie School District #68,* UP-14-85 at 43-44, 8 PECBR at 8202-03. Generally, we order the parties to resume bargaining at the step where the earliest violation occurred. *Lane Unified Bargaining Council,* UP-14-85 at 44, 8 PECBR at 8203; *Blue Mountain Faculty Association/Oregon Education Association/NEA and John Lamiman v. Blue Mountain Community College*, UP-22-05 at 97, 21 PECBR at 769. However, we also consider the extent to which ordering the parties to return to another point in the bargaining process is warranted and helpful to the parties under the circumstances of the case. *Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections*, Case Nos. UP-006/016-10 at 24, 24 PECBR 864, 886 (2012).

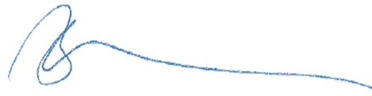
In this case, the refusal to bargain occurred on August 7, 2017. At this late date, it does not appear that simply returning the parties to impact bargaining would further the purposes of PECBA, and it is not the most appropriate remedy here. Under these circumstances, we order the parties to participate in a 90-day expedited bargaining process over the impacts of the end of the Dive Team on the Dive Team members, with any economic damages to cease on the date when the parties jointly agreed to place this case in abeyance, unless the parties have agreed otherwise. In the event the negotiations are unsuccessful, the parties may return to this Board for calculation of economic damages, limited as noted above.

PROPOSED ORDER

1. The City shall cease and desist from violating ORS 243.672(1)(e).

2. The parties shall return to bargaining and shall bargain in good faith toward the goal of reaching agreement regarding the mandatory impacts of the City decision to eliminate the Dive Team through a 90-day expedited bargaining process, with any economic damages to cease on the date when the parties jointly agreed to place this case in abeyance, unless the parties have come to a different agreement.[10]

SIGNED AND ISSUED 27 September 2021.



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 that objections are received by the Board; "the date of service" of a recommended order means the date that the Board sends or personally serves the recommended order on the parties.) If one party has filed timely objections, but the other party has not, the party that has not objected may file cross-objections within 7 days of the service of the objections. Upon good cause shown, the Board may extend the time for filing objections and cross-objections. Objections and cross-objections must be simultaneously served on all parties of record in the case and proof of such service must be filed with this Board. Objections and cross-objections may be filed by uploading a PDF of the filing through the agency's Case Management System (preferred), which may be accessed at https://apps.oregon.gov/erb/cms/auth. Objections and cross-objections may also be filed by email by attaching the filing as a PDF and sending it to ERB.Filings@Oregon.gov. Objections and cross-objections may also be mailed, faxed, or hand-delivered to the Board. Objections and cross-objections that fail to comply with these requirements shall be deemed invalid and disregarded by the Board in making a final determination in the case. (*See* Board Rules 115-010-0010(10) and (11); 115-010-0090; 115-035-0040; and 115-070-0055.)

[10]The purpose of this Amended Recommended Order is to add the relevant abeyance and damages language (appearing in the final paragraph of the conclusions of law in the original order) to the Proposed Order section.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-037-21

(UNFAIR LABOR PRACTICE)

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|---|---|
| SEIU LOCAL 503, OPEU,<br><br>Complainant,<br><br>v.<br><br>MARION COUNTY,<br><br>Respondent. | RULINGS,<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND ORDER |

Jared Franz, Staff Attorney, SEIU Local 503, OPEU, Salem, Oregon, represented Complainant.

Brian Kernan, Senior Assistant Legal Counsel, Marion County, Salem, Oregon, represented Respondent.

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On September 3, 2021, SEIU Local 503, OPEU (Union) filed an unfair labor practice complaint against Marion County (County). The complaint alleges that Marion County violated ORS 243.672(1)(e) by failing to bargain in good faith with the Union over the County's change in July 2021 to the temporary telework policy it adopted at the outset of the COVID-19 pandemic. The Union requested that this Board expedite the complaint under OAR 115-035-0060. The County opposed that request. On September 13, 2021, the Board issued a letter ruling expediting the case.

On September 14, 2021, we issued a notice of expedited hearing and prehearing order setting the hearing for October 11 and 12, 2021. The County filed a timely answer to the complaint on September 24, 2021. The parties filed prehearing briefs on October 5, 2021.

This Board conducted a hearing on October 11 and 12, 2021, by video conference. The parties made oral closing arguments on October 12, at which point the record closed.

As stated by the Board in the notice of expedited hearing and prehearing order, the issue presented in this case is: Did Respondent Marion County violate ORS 243.672(1)(e) by refusing to bargain in good faith with Complainant SEIU Local 503, OPEU regarding a change in telecommuting for SEIU-represented employees?

For the following reasons, we conclude that the County violated ORS 243.672(1)(e) when it unilaterally revoked the Temporary Telework Policy in July 2021.

## RULINGS

Neither party pursued any objections to the Board's rulings.

## FINDINGS OF FACT

### The Parties

1. Complainant SEIU Local 503, OPEU (Union) is a labor organization within the meaning of ORS 243.650(13). The Marion County Employees Association Local 294 (MCEA) is an administrative subdivision of the Union that represents approximately 1,000 regular and temporary employees of Marion County.

2. Respondent Marion County (County) is a public emp1oyer within the meaning of ORS 243.650(20). The County employs approximately 1,740 regular and temporary employees.

3. Latricia Straw is the President of MCEA. Shawna Schaeffer is employed by the Union as a Public Services Field Coordinator. Schaeffer provides representation services to employees in the MCEA bargaining unit.

4. The Board of Commissioners (BOC) consists of three elected commissioners who establish policy for Marion County generally. The BOC also establishes employment-related policy for employees of the County, including the terms of the personnel rules that apply to County employees. During the relevant period, Jan Fritz was the Chief Administrative Officer for the County, Colleen Coons-Chaffins was the Business Services Director, Bruce Armstrong was the County Counsel, and Michelle Shelton was the Chief Human Resources Officer.

### The Parties' Initial Collective Bargaining Related to the 2020-2022 Collective Bargaining Agreement

5. The Union and the County have been parties to a series of collective bargaining agreements over several decades. The current collective bargaining agreement between the parties is effective from July 1, 2020 to June 30, 2022 (CBA).

6. The parties began negotiations regarding the CBA in December 2019. The parties held bargaining sessions on December 18, 2019, February 13, 2020, and February 25, 2020. Neither party made proposals directly related to pandemic safety, telecommuting, or remote work options during these first three bargaining sessions.

### The Emergence of the COVID-19 Pandemic and the County's Response

7. On March 8, 2020, Governor Kate Brown declared a State of Emergency pursuant to her authority under ORS 401.165 in response to the pandemic arising from the 2019 novel coronavirus, which causes a disease now known as COVID-19.

8. On March 12, 2020, the parties held a fourth bargaining session. In the March 12, 2020, bargaining session, the Union proposed that the parties enter a letter of agreement related to COVID-19. The Union gave the County a draft letter of agreement, which states that the purpose of the agreement was "to address work restrictions and pay provisions for employees who have been or may have been exposed to the novel coronavirus." The agreement included proposed terms related to safety equipment, a waiver of limits on vacation accrual and vacation cash-out, a temporary moratorium of discipline for sick time or leave without pay, paid administrative leave, access to leave banks, and required notice to the Union in the event an employee was exposed to the novel coronavirus. In addition, the agreement included the following proposed provision related to teleworking:

> "For the period March 1, 2020 through at least June 30, 2020 or a date mutually determined, employee telework requests will be presumed to be acceptable unless denied within seventy-two hours of the request. For this period, the only criteria an employer may use as basis to deny a telework or telecommute request will be whether the position is suitable for telecommuting or telework. Denied requests can be appealed to the Chief Human Resources Officer."

9. After March 12, 2020, the parties conducted bargaining by virtual means because of concerns related to the rise of COVID-19 cases throughout Oregon.

10. County Chief Administrative Officer Jan Fritz signed a "Board Session Agenda Review Form" regarding a possible amendment to the Marion County personnel rules. The form lists an agenda planning date of March 12, 2020. The form states, in part, "Marion County seeks to maintain essential services in order to meet its critical business needs while also maintaining a focus on the health and safety of its employees."

11. On March 16, 2020, at a special meeting, the BOC declared a State of Emergency under ORS 401.309 in response to COVID-19.[1]

12. On March 16, 2020 at 5:05 p.m., Keith Quick, the Union's Bargaining Coordinator, followed up via email with two of the County's bargaining representatives, Colleen Coons-Chaffins and County Counsel Bruce Armstrong, about the Union's proposed COVID-19 letter of agreement. Quick attached to the email a letter of agreement entered by the State of Oregon and SEIU Local 503 related to COVID-19. Quick wrote, "The state has agreed to the attached LOA. We gave you a proposal last week. We need to address this ASAP. Every day the news gets more dire and Marion County workers can't wait any longer. Can we expect a response from you in the next 24 hours?"

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[1]ORS 401.309 provides that the governing body of a city or county may declare, by ordinance or resolution, "that a state of emergency exists within the city or county." ORS 401.309(1). That ordinance or resolution may "establish procedures to prepare for and carry out any activity to prevent, minimize, respond to or recover from any emergency[,]" ORS 401.309(2), designate the emergency management agency charged with carrying out emergency duties or functions, ORS 401.309(3), and order mandatory evacuations, ORS 401.309(4). The statute also provides that nothing in ORS 401.309 "shall be construed to affect or diminish the powers of the Governor during a state of emergency declared under ORS 401.165. The provisions of ORS 401.165 to 401.236 supersede the provisions of an ordinance or resolution authorized by this section when the Governor declares a state of emergency within any area in which such an ordinance or resolution applies." ORS 401.309(5).

13. On March 18, 2020, the BOC approved an ordinance amending the Marion County Personnel Rules by adopting a temporary policy regarding telecommuting (Temporary Telework Policy). The ordinance recognized that "the health, safety and well being of Marion County employees is essential to the County continuing to carry out its essential functions[,]" and "some county work may be performed through telecommuting[.]" The Temporary Telework Policy acknowledged that County "employees are at the forefront" of the County's concern as it worked "to adapt quickly to this emerging public health threat and navigate new business practices in order to continue to serve our community to the best of our abilities." The policy outlines the prerequisites for and conditions relating to teleworking and includes a provision that an employee's supervisor or department head may discontinue the employee's teleworking arrangement with 24 hours' notice.

14. The Temporary Telework Policy concludes as follows:

> "REVIEW: This temporary policy shall be attached as an addendum to the Marion County Personnel Rules and reviewed by human resources and the chief administrative officer at least every 14 days and updated or revoked as necessary. This temporary policy allowing telework is only in effect during the time period covered by the COVID-19 Emergency Declaration issued by the Board of Commissioners."

15. The policy includes a COVID-19 telecommuting agreement, which an eligible, approved employee was required to sign. That agreement included the following agreement: "I agree to comply with the conditions [in the agreement] and understand this agreement is temporary due to the COVID-19 pandemic and may be rescinded at any time."

16. On March 18, 2020, County Counsel Bruce Armstrong sent an email to Keith Quick transmitting a copy of the Temporary Telework Policy that the BOC had approved that day. The County did not provide a copy of the policy to the Union before its adoption.

17. On March 19, 2020, Quick responded to Armstrong's email. Quick wrote that although the Union appreciated the County's temporary telecommuting policy, "our team doesn't think the new policy covers all the issues we raised in our proposed LOA." Quick attached a counterproposal. Quick also described why the County's operations were, in the Union's view, like the services provided by the State of Oregon (which had already agreed to a COVID-19-related letter of agreement with the Union), and asked Armstrong for a response from the County to the Union's proposal by March 20. Quick also relayed concerns that County employees had about working in person during the pandemic and asked whether the County had a plan to limit public access to Marion County worksites.

18. On March 20, 2020, Armstrong replied to Quick's email. Armstrong explained that he had reviewed the letter of agreement the Union proposed the day before and found "that the vast majority of approaches and employee options proposed in that LOA are currently achievable under the Marion County policies now in effect." Armstrong noted that "[w]hile we need to ensure that certain county functions and services are carried out for our community, we want to do what we can to keep our employees safe, and to slow the progress of the COVID-19 virus."

19. On March 21, 2020, the BOC adopted an order closing County offices to the public and directing non-essential employees to stay home.

20. On March 23, 2020, Governor Brown issued Executive Order No. 20-12, which strongly encouraged local governments to facilitate telework and work-at-home by employees.

21. On March 24, 2020, Quick replied to Armstrong's March 20 email. Quick wrote that he interpreted Armstrong's response as communicating that the County was "not interested in an LOA right now." Quick suggested than an alternative to a letter of agreement would be a "side agreement like an LOA that will help provide more clarity and protections for County workers and the public." Quick also forwarded to Armstrong an email MCEA President Latricia Straw had sent to Fritz, emphasizing the Union's desire to cooperate with the County during the COVID-19 pandemic and asking numerous questions about the effect of the pandemic on leave, training, personal protective equipment, discipline, and similar topics.

22. On March 25, 2020, the BOC approved COVID-19 Social Distancing Polices in response to COVID-19.

23. On March 25, 2020, the BOC adopted an order directing County department heads to direct their employees to work in one of the following ways: telework, including work-from-home, alternative schedules, or on site in a manner consistent with County COVID-19 Social Distancing Polices.

24. The same day, March 25, 2020, Armstrong replied to Quick's March 24 email. Armstrong outlined multiple steps the County was taking to adhere to the Governor's executive orders and the guidance from the Oregon Health Authority and the Centers for Disease Control and Prevention (CDC). Armstrong noted that "[t]hese steps also achieve the vast majority of approaches proposed in the LOA." Armstrong also forwarded answers to the questions posed by Straw to Fritz.

25. Also on March 25, 2020, in a separate email thread, Quick wrote to Armstrong and noted that the two of them had talked during the previous week about limiting the scope of bargaining and "trying to reach a settlement as quickly as possible." Quick informed Armstrong that the Union wanted to focus "on three areas for limited scope negotiations"—cost of living adjustments, health care, and the COVID-19 letter of agreement.

26. On March 26, 2020, Armstrong replied that he would respond to the substance of Quick's email at a later time and asked whether the Union would agree to cancel the bargaining session scheduled for March 31. On March 27, Quick replied that the Union would agree to cancel "as long as the County is intending to move things forward with a response to my email by 3/31 at the latest."

27. On April 1, 2020, Armstrong responded to Quick's email. Armstrong conveyed a one-time package proposal and communicated the condition that if the parties could not "resolve this quickly, we will return to bargaining through the normal process" and "at the parties' prior positions." Armstrong offered, on behalf of the County, a two percent cost of living adjustment for each year of the two-year contract term and increases of $50 to health insurance premiums (for a monthly contribution of $1,546 for calendar year 2021 and $1,596 for calendar year 2022). Armstrong also responded to various language changes that the Union had proposed. With respect to the Union's desire for a COVID-19 letter of agreement, Armstrong wrote:

> "Finally, management and MCEA have shared a fair amount of communication with regard to MCEA's desire for letters of agreement relating to the current pandemic situation. However, it is important to note that for purposes of this discussion, we are negotiating an MCEA collective bargaining agreement that will take effect on July 1, 2020. It is safe to say that no person can reliably anticipate the circumstances that our community, county or state will be facing three months from now. Management seeks to resolve CBA negotiations promptly and this package is made with that goal in mind. We will not be including discussions of letters of agreement relating to the COVID-19 pandemic as part of the quick resolution of this matter."

28. On April 3, 2020, the County implemented the Temporary Telework Policy by adding the addendum to the Marion County Personnel Rules.

29. Eligible County employees could telecommute, and did so, pursuant to the Temporary Telework Policy beginning on April 3, 2020. Some County employees worked in-person at County facilities throughout the pandemic, including, for example, some employees in the Board of Commissioners' office, the County Counsel's office, the sheriff's office, and the health department.

30. On April 10, 2020, after the Union surveyed bargaining unit members, Quick responded to the County's April 1 package proposal. Quick explained that "given the current crisis" the Union accepted the County's package proposal.

31. On April 14, 2020, both parties initialed their tentative agreement to a redlined collective bargaining agreement incorporating the terms of the County's package proposal. The CBA agreed to by the parties does not contain language related to telecommuting.

32. On June 24, 2020, the Oregon Health Authority (OHA) issued administrative rules requiring masking in response to COVID-19. That day, the County issued FAQs to all County employees regarding the mask mandate.

33. On November 18, 2020, the BOC adopted a COVID-19 Physical Distancing and Infection Notification Policy and Procedure.

34. The County held COVID-19 vaccination clinics for eligible County employees in January, February, March, April, and May 2021.

35. On March 17, 2021, the County adopted a COVID-19 Infection Control Plan, in compliance with Oregon OSHA's temporary rule for COVID-19 (OAR 437-001-0744).

36. Since the beginning of the COVID-19 pandemic, the County has implemented a variety of safety measures in its facilities at various times. Those safety measures include supplying employees with equipment and materials (such as respirators, masks, hand sanitizer, and bottled water); installing plexiglass barriers; manufacturing and installing hand sanitizer stands; implementing measures to attempt to improve ventilation (such as changing filters more frequently and increasing outside air flow); using electrostatic sanitizer sprayers to sanitize buildings and vehicles; and wiping down high-touch points.

The County's Rescission of the Temporary Telework Policy

37. At some time before June 10, 2021, the BOC learned that Governor Brown intended to lift the remaining restrictions imposed by the Governor's executive orders on June 30, 2021.

38. On June 10, 2021, the BOC sent an email to all County employees indicating that the County intended to rescind the Temporary Telework Policy and that County employees would be expected to return to on-site work by July 19, 2021. The BOC's email explained that each department was evaluating how best to manage the transition, and that employees "will hear more from your department head or manager about how this transition will take place in your department. We are committed to safety, health, and wellness and will continue enhanced cleaning, ventilation optimization and other COVID-19 protocols for the time being." The BOC also noted that if there was sufficient interest among employees, additional employee COVID-19 vaccine clinics would be scheduled.

39. The County did not notify the Union before the BOC sent the emailed announcement to all employees on June 10, 2021, and no bargaining occurred before June 10, 2021, about the cessation of teleworking and the return of County employees to in-person work.

40. On June 10, 2021, Chief Human Resources Officer Michelle Shelton sent an email to all County employees attaching FAQs regarding the County's rescission of the Temporary Telework Policy. Those FAQs included the following:

> **"Why are we calling all employees back to in-office work as of July 19th?**
> "As vaccinations rates continue to rise, we anticipate the Oregon state of emergency will conclude in the coming weeks.
>
> "* * * * *
>
> **"What if I am currently dealing with a serious medical condition and I need to work from home?**
> "Working from home will no longer be an option as of July 19th. Please contact your HR Business Partner and/or Leave Administrator to discuss leave options."
>
> "* * * * *
>
> **"If I am quarantined due to COVID exposure, or a positive COVID Test, can I work from home?**
> "No. You should follow normal department call-in procedures and take appropriate leave available to you in accordance with county Personnel Rules and labor agreements."

41. The Union received notice of the County's intended rescission of the Temporary Telework Policy when it received these June 10 emails.

42. As of June 10, 2021, the CDC still classified the risk of community transmission of COVID-19 in Marion County as "substantial."

43. On June 23, 2021, Shawna Schaeffer, the Union's Public Services Field Coordinator, emailed Shelton a demand that the County bargain with the Union, pursuant to ORS 243.698, over the decision and the impact of requiring workers to return to the physical workplace from telecommuting. Schaeffer requested dates that the County was available to bargain, and wrote, "The Union was notified on June 10, 2021 and for the purposes of the expedited bargaining process we'd like to use this date for our ninety day timeline for negotiations."

44. On June 25, 2021, Governor Kate Brown issued Executive Order No. 21-15, rescinding all remaining COVID-19 restrictions, effective June 30, 2021, or when the state crossed the threshold of 70 percent first-dose vaccinations for those 18 or older, whichever was earlier. The Executive Order states that, as of June 25, 2021, 2,760 Oregonians had died due to COVID-19 related illnesses. The Executive Order states:

> "Although we should all take pride in our collective efforts, we must remember that Covid-19 is still a worldwide threat, as communities, states, and nations with low vaccination rates continue to see outbreaks. We must remain vigilant. Covid-19 remains a significant threat in Oregon, especially to those who are unvaccinated. New, more contagious variants continue to spread, both around the world and here at home. As of this week, approximately 33% of eligible Oregonians age 12+ have not received any vaccination. When you look at the entire population in Oregon, approximately 42% of all Oregonians—including children who are not yet eligible for vaccination—remain unvaccinated. While widespread vaccination among the eligible population has dramatically reduced the spread of Covid-19 and provided protection to some of our most vulnerable Oregonians, Covid-19 is likely to be present in our lives for months to come."

45. On June 30, 2021, the BOC adopted an order ending the County's COVID-19 State of Emergency and rescinding all County policies and temporary rules adopted as part of the County's COVID-19 response. On June 30, 2021, 59.3 percent of Marion County residents at least 18 years old had been fully vaccinated, and 61.7 percent of that population had received one dose.

46. By June 30, 2021, the CDC had reduced the risk of community transmission of COVID-19 in Marion County from "substantial" to "moderate."

47. On July 2, 2021, Shelton replied to Schaeffer's June 23, 2021, email. Shelton explained that the BOC enacted the temporary telework policy in response to the COVID-19 pandemic and, "on June 30, 2021, the commissioners officially rescinded the temporary policy. As such, we do not consider this policy, that was implemented in April of 2020, a mandatory subject of bargaining."

48. On July 7, 2021, Union President Straw sent an email to the BOC requesting a listening session via videoconference regarding the process for returning to in-person work. The email requested a response by July 13, 2021. In the email, Straw outlined concerns raised by employees related to the required return to in-person work.

49. On July 9, 2021, Schaeffer emailed Shelton. Schaeffer wrote that the Union disagreed that the cessation of telecommuting was not a mandatory subject of bargaining. Schaeffer explained that employees returning to in-person work "under the current circumstances impacts health and safety, which is a mandatory subject matter." Schaeffer asked the County to provide dates that it was available to begin bargaining with the Union and stated that the Union would file an unfair labor practice complaint if the County refused to bargain.

50. On July 13, 2021, Shelton responded by email. Shelton wrote that employee health, safety, and wellness was a top priority of the County. Shelton wrote that the County was willing to "learn more about and discuss any specific health and safety concerns the union has," and offered three possible meeting times.

51. On July 15, 2021, Schaeffer responded to Shelton by email agreeing to meet on July 22. Schaeffer wrote that, although the Union was aware that things were returning to "the new normal," the Union's view was that impact bargaining was required because of the cessation of telecommuting.

52. On July 19, 2021, the County employees who had been teleworking returned to on-site work, except for those employees granted telework as a reasonable accommodation for a disabling condition and those who continued teleworking due to work or space constraints.

53. On July 19, 2021, the day that employees returned to in-person work, only 63 percent of Marion County residents 18 or older had received at least one dose of a COVID-19 vaccine, and only 60.5 percent of that population had completed the vaccine series.

54. On July 20, 2021, the CDC upgraded the risk of community transmission of COVID-19 in Marion County from "moderate" to "substantial."

55. On July 22, 2021, the parties met to discuss the return to in-person work. At that meeting, the Union conveyed the concerns of bargaining unit members, including the safety concerns of immunocompromised employees and parents of children too young to be vaccinated. Schaeffer stated at the meeting that the Union had submitted a demand to bargain and the Union wanted the parties to be cognizant of the bargaining deadline.

56. On July 25, 2021, Schaeffer emailed County Human Resources Specialist Angelique Voltin requesting additional dates that the County's representatives were available to meet.

57. On July 28, 2021, Voltin responded to Schaeffer via email with proposed dates. The Union selected August 9, 2021, to meet again with the County's representatives.

58. On August 1, 2021, the CDC upgraded the risk of community transmission of COVID-19 in Marion County from "substantial" to "high."

59. Union President Straw testified that she believed that she contracted COVID-19 in early August 2021 from being in close contact in the workplace with a County employee who subsequently reported testing positive for COVID-19. Straw obtained a COVID-19 test after contact with that employee, but because she was tested quickly, the result was inconclusive. Later, a County employee from epidemiology contacted Straw and told Straw that she was presumptively positive for

COVID-19. The employee told Straw that she was required to quarantine for two weeks and could not return to work until she had been without a fever for three days. (Because of the nature of her work, Straw did not telecommute.) Straw experienced what she believed were COVID-19 symptoms for three to four days. Ultimately, she returned to work on August 23, 2021. Straw testified that she had been vaccinated since May 2021, wore a face covering while at work, and took every other precaution. Straw believes that she experienced milder COVID-19 symptoms than she would have if she had not been vaccinated.

60. Representatives for both parties met again on August 9, 2021. At that meeting, Shelton stated that the County was there to listen. Toby Green, an organizer, stated that the Union was there to bargain. Diana Downs, a bargaining unit member and the Secretary-Treasurer of the Union, explained that she was quarantining at home, on doctor's orders, after being exposed to COVID-19 at work. Downs noted that she was able to work during quarantine, but was using her sick leave because she was not permitted to telecommute.

61. At the conclusion of the August 9, 2021, meeting, Schaeffer, who was attending the meeting virtually, shared her video screen and read a letter of agreement the Union presented. Shelton thanked the Union representatives for their time and said that the County would respond by email.

62. Also on August 9, after the parties' meeting, Schaeffer transmitted the Union's proposed letter of agreement by email to Shelton and Voltin.

63. On August 13, 2021, Governor Brown reintroduced an indoor mask mandate.

64. On August 13, 2021, Voltin emailed Schaeffer and advised that the County was proceeding with the transition from telework to in-office operations, as announced on June 10, 2021. Voltin wrote, "We appreciate our partnership with the union, but at this time, we do not feel the need to meet to discuss this further."

65. On August 13, 2021, Schaeffer replied to Voltin's email. Schaeffer wrote, "Just for clarity, the County is rejecting our proposal and refusing to bargain further on this topic?"

66. On August 16, 2021, Voltin replied to Schaeffer's email. Voltin affirmed that "the county is declining your proposal at this time." Voltin also wrote:

> "In addition, after meeting with you on two separate occasions, we have both listened to your concerns and reviewed the materials you provided regarding the time, place, and manner of work, and we do not feel that there is any more to discuss at this time. The health, safety, and wellness of our employees and the community members we serve, remain our top priority. We continue to have COVID-19 protocols in place to keep our workplace safe, to include the temporary administrative order to require masks to be worn in indoor spaces."

COVID-19 in Marion County

67. Marion County recorded 1,236 cases of COVID-19 in July 2021, up 95 percent from the previous month (when there were 633 cases of COVID-19 in Marion County). The number of

COVID-19 cases in Marion County increased to 5,001 in August 2021 and to 4,517 in September 2021. The rates of hospitalizations and deaths caused by COVID-19 also increased from June 2021 in the three following months. There were 57 people hospitalized with COVID-19 in Marion County in July 2021 (a 46 percent increase over June), 215 people hospitalized in August 2021, and 133 hospitalized in September 2021.

68. In July 2021 through September 2021, deaths from COVID-19 in Marion County also increased. In July 2021, 12 people died in Marion County from COVID-19, a 140 percent increase from June. In August 2021, 48 people died from COVID-19 in Marion County. In September 2021, 20 people died from COVID-19 in Marion County.

69. From June 10, 2021 through October 4, 2021, 67 Marion County employees contracted COVID-19. Of those cases, 9 were in the district attorney's office (although one employee was a temporary employee who was not physically in the office during this period), 16 were in the sheriff's office, 6 were in the juvenile department, 10 were in the public works department, 19 were in the health and human services department, and 3 were in the business services department. During the same June 10 through October 4 period, there were 139 COVID-19 exposures among Marion County employees.

70. From June 10, 2021 through October 1, 2021, there were 10 COVID-19 outbreaks investigated by Marion County Health and Human Services at eight Marion County worksites.[2] Outbreaks were investigated at Public Works on Silverton Road NE, Marion County Jail on Aumsville Highway SE, Health and Human Services on Center Street, Health and Human Services on Silverton Road, the District Attorney's Office on Court Street NE, the Sheriff's Transition Center on Aumsville Highway SE, and the Stepping Stones Transitional Facility. Those outbreaks involved 25 COVID-19 cases among Marion County employees. For this purpose, a case is any COVID-19 case (confirmed or presumptive) that is associated with a facility that has been identified as having ongoing COVID-19 transmission, which may include staff, clients, residents, or other individuals.

71. From June 10, 2021 through October 1, 2021, there were 21 employees in the Marion County Health and Human Services Department exposed to COVID-19 at work.

72. As of October 4, 2021, the CDC's assessment of the risk of community transmission of COVID-19 in Marion County remained "high."

73. As of October 5, 2021, 58.4 percent of people of all ages in Marion County had received at least one COVID-19 vaccine. On October 5, 2021, 64.5 percent of all Oregonians had received at least one COVID-19 vaccine. On October 5, 2021, Marion County had a lower percentage of vaccinated residents than Lincoln County (70.2%), Benton County (69.6%), Multnomah County (69.5%), Washington County (68.2%), Hood River County (68.1%), Lane County (65.4%), Deschutes County (65.1%), Clatsop County (63.6%), Clackamas County (63.6%), Tillamook County (63.5%), and Polk County (61.6%).

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[2]Marion County Health and Human Services tracks outbreaks at all places of employment in Marion County. The County offered evidence at hearing of outbreaks tracked at its own facilities. Health and Human Services categorizes places of employment as "workplace settings" and congregate settings. A workplace setting is any place of employment that is not a congregate setting (which, for this purpose, is a residential setting). Health and Human Services tracks COVID-19 outbreaks in workplace settings when there are two COVID-19 cases and outbreaks in congregate settings when there is one COVID-19 case.

## CONCLUSIONS OF LAW

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

2. The County violated ORS 243.672(1)(e) when it unilaterally revoked the Temporary Telework Policy in July 2021.

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." A public employer may violate its duty to bargain in good faith under ORS 243.672(1)(e) if it does not complete its bargaining obligation before making a change in the status quo concerning a subject that is mandatory for bargaining. *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 183, 295 P3d 38 (2013) (*AOCE II*) (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"). When reviewing an allegation of an unlawful unilateral change, we consider (1) whether an employer made a change to the status quo; (2) whether the change concerned a mandatory subject of bargaining; and (3) whether the employer exhausted its duty to bargain. *Id*. at 177 (citing *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03 at 8, 20 PECBR 890, 897 (2005), *rev'd on other grounds*, 209 Or App 761, 149 P3d 319 (2006) (*AOCE I*)). Further, it is well-established that the Public Employee Collective Bargaining Act (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). When asserted, we also consider an employer's affirmative defense of waiver: namely, a party may waive its right to bargain by (1) "clear and unmistakable" contract language, (2) a bargaining history that a party consciously yielded its right to bargain, or (3) the party's action or inaction. *AOCE II*, 353 Or at 177.

We begin by considering whether there was a unilateral change to the status quo. The parties agree that the County's revocation in July 2021 of the Temporary Telework Policy constituted a change. The County contends, however, that the revocation was not a change to the status quo. Rather, the County contends that the status quo was "no telework." Consequently, according to the County, the return of employees in July 2021 to on-site work was only a return to the status quo, not a departure from it.

A working condition can become the status quo "by terms of an expired contract, past practice, work rule, or policy." *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-53-00 at 9-10, 19 PECBR 656, 664-65 (2002); *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-06 at 7, 22 PECBR 159, 165 (2007). Here, the Union contends, and we agree, that the status quo is determined by the employer's policy—in this case, the Temporary Telework Policy. The County decided to permit teleworking for certain employees at the outset of the COVID-19 pandemic, and that policy remained in effect throughout 15 months of the pandemic (until revoked by the County, in the action at issue in

this case). That policy permitting teleworking for eligible employees during the pandemic was the only teleworking policy in existence during the pandemic. It was a policy that affected almost every aspect of remote employees' working lives—including the location of their work, the means of receiving assignments, the methods of communicating with other employees and the public, the means of performing work, and similar aspects of work. That employer policy determined the status quo during the pandemic.

We understand the County to argue that we should determine the status quo based on a past practice, not employer policy. In making that argument, the County relies on a practice that preceded the COVID-19 pandemic—namely, the County's practice of not generally permitting telework. The problem with the County's argument is that the "no telework" past practice was supplanted and replaced by the County's policy permitting teleworking during the pandemic. It is that policy adopted by the County, not the preceding past practice, that establishes the status quo here. *See 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 (1995) (recognizing that a status quo resulting from a policy is distinct from a status quo resulting from practices in the workplace); *Department of Corrections*, UP-33-06 at 8, 22 PECBR at 166 (distinguishing a status quo established by an employer policy from a status quo established by past practice).

Moreover, even if we were to rely on a practice rather than a policy to determine the status quo in this case, the record contradicts the County's assertion that, when it revoked the Temporary Telework Policy in July 2021, it merely returned employees to the status quo. That is so because the practice relied on by the County—no teleworking—existed only *before* the pandemic. However, when the County returned employees to in-person work in July 2021, those employees returned to in-person work during an ongoing pandemic and just as the COVID-19 Delta variant was causing a surge in cases, hospitalizations, and deaths. In fact, that Delta surge occurred while the Union and the County were meeting about the end of the temporary policy. The parties' representatives met on July 22, 2021, and August 9, 2021. Between those meetings, on August 1, 2021, the CDC upgraded the risk of community transmission of COVID-19 in Marion County from "substantial" to "high." The record is abundantly clear that COVID-19 cases and hospitalizations in Marion County began surging in July 2021 and remained elevated in August and September 2021. These facts contradict the County's assertion that it merely returned employees to a status quo of "no teleworking"—because that ostensible status quo existed only *before* the COVID-19 pandemic. In other words, the County did not have a practice of "no teleworking" *during* a pandemic caused by the global spread of a dangerous virus.

The County also argues that the Temporary Telework Policy cannot establish the status quo because the policy was temporary and expressly stated that the County could revoke it at any time. The Board has previously concluded that an employer policy that can be changed at any time can nonetheless determine the status quo. *See 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). We adhere to that precedent in this case. Although the employer policy in this case was, by its terms, temporary, we conclude that it nonetheless established the status quo. It was in place *for 15 months* during an emergency. Telecommuting touched almost every aspect of remote employees' daily working lives. Whatever else may be said about whether an expressly temporary policy can establish a status quo in other, more routine situations, here, the policy dramatically affected remote employees' working lives for 15 months. Although there is no bright line

on when a temporary emergency-related change becomes the status quo, 15 months is more than sufficient to establish that the Temporary Telework Policy here became the status quo, such that the County was required to bargain a change to that policy.

Next, we turn to whether the change concerns a mandatory subject of bargaining. The Union contends that the subject of the change concerns a safety issue that has a direct and substantial effect on the on-the-job safety of public employees and is therefore a mandatory subject pursuant to ORS 243.650(7)(h). The County responds that the revocation of the Temporary Telework Policy concerned only workplace location, not safety. The County also argues that, even if the revocation of the policy did involve safety, the Union raises only "generalized concerns" about COVID-19, not a safety issue that has a direct and substantial effect on employees' on-the-job safety. For the following reasons, we agree with the Union.

To begin, we must determine the subject of the disputed change. The County contends that the actual subject of the Temporary Telework Policy was not a safety issue, but workplace location. When a proposal or change includes multiple bargaining subjects, we determine the "core feature" of the proposal or change that "defines and ultimately shapes the scope of" the proposal. *See Jackson County v. Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. UP-002-20 at 6 (2020); *Oregon Tech American Association of University Professors v. Oregon Institute of Technology*, No. UP-023-20 at 28 (2020). Further, the subject of a proposal or change is a "safety issue" "if it would reasonably be understood, on its face, to directly address a matter related to the on-the-job safety of employees." *Multnomah County Corrections v. Multnomah County*, 257 Or App 713, 734, 308 P3d 230 (2013).

Here, the Temporary Telework Policy is reasonably understood, on its face, to directly address a matter related to on-the-job safety of employees—namely, COVID-19 exposure and transmission in the workplace.[3] The Temporary Telework Policy expressly states, "The purpose of this temporary policy is to recognize that the novel coronavirus, also known as COVID-19, has impacted Marion County locally," and County "employees are at the forefront of [the County's] concern as we work to adapt quickly to this emerging public health threat." Further, the policy states, "Marion County is adhering to the recommendations of the Centers for Disease Control and the Oregon Health Authority regarding preventative measures, including social distancing, quarantines, and curtailment of non-essential county functions. * * * Marion County's priority is to maintain essential services and critical business needs * * * while allowing for work location flexibility when work can be performed remotely." The policy provides, "Employees who wish to work at some place other than the primary workplace on specified days shall complete the COVID-19 Telecommuting Agreement." Thus, we

[3]By the phrase "COVID-19 exposure and transmission in the workplace," we are referring to those risks attendant to employees working in-person in County facilities during the COVID-19 pandemic, including the risk of employees contracting COVID-19 at work and the risk of employees transmitting COVID-19 to other employees at work. For ease of readability, we refer to this subject throughout the remainder of this order as "COVID-19 exposure." We note that the County may have had other reasons, including public health-related reasons, for adopting the Temporary Telework Policy. Those reasons may have included minimizing the spread of the COVID-19 virus generally and reducing the risk that members of the public would be exposed to COVID-19 in County facilities. Those subjects, however, are not subjects within the scope of PECBA's required bargaining between public employers and labor organizations, and the core feature of the policy is addressing COVID-19 exposure.

conclude that the subject of the Temporary Telework Policy (and its revocation) is the safety issue of COVID-19 exposure.[4]

With respect to the decision to end the policy, we acknowledge that the BOC's June 10, 2021, email to all County employees refers to the cessation of telecommuting as part of the County's plan to "fully resume in-office services for our residents." Certainly, after July 19, Marion County residents were once again able to obtain in-person service from County employees. We do not second-guess any judgment by the BOC that providing in-person services to residents was preferable to providing services by teleworking employees. However, the record establishes that just as the County enacted the Temporary Telework Policy because it believed that it was necessary for employee safety, it revoked that policy when it believed that the COVID-19 concerns had diminished such that employees could safely work in Marion County facilities (with other safety measures). That revocation was a change concerning the safety issue of COVID-19 exposure. There is no evidence that the County stopped its employees from telecommuting for other reasons, such as complaints about service delivery or service quality caused by employees working remotely. On balance, on this record, we conclude that the core feature of the Temporary Telework Policy (and its revocation) was COVID-19 exposure.[5]

We next consider whether this subject was mandatory for bargaining. Pursuant to ORS 243.650(7)(h), "employment relations" for the employees at issue here expressly excludes safety issues except those "safety issues that have a direct and substantial effect on the on-the-job safety of public employees[,]" which are mandatory subjects of bargaining. Having determined that the subject of the unilateral change is the safety issue of exposure to COVID-19, we next determine whether that safety issue has "a direct and substantial effect on the on-the-job safety of public employees." *See Multnomah County Corrections*, 257 Or App at 734-35 (describing two-part inquiry to determine whether the subject of a proposal is a safety issue that is mandatory for bargaining). In this case, the Union has established, and there is no real dispute, that exposure to COVID-19 has a direct and substantial effect on the on-the-job safety of public employees. The County disputes which measures should be taken to prevent employees' exposure to COVID-19 in the workplace, but the County does not dispute that preventing workplace exposure to COVID-19 is necessary to protect employees' health and safety. Because the safety issue of exposure to COVID-19 has a direct and substantial effect on employees' on-the-job safety, it is a mandatory subject for bargaining.

The County contends that the change (elimination of employees' teleworking option) did not involve a safety issue that had a "direct and substantial" effect on employees' on-the-job safety because the County implemented other safety measures to mitigate employees' exposure to COVID-19 when

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[4]PECBA requires this Board to analyze scope of bargaining issues using a subject-based approach. *See Springfield Police Association v. City of Springfield*, Case No. UP-28-96 at 7-10, 16 PECBR 712, 718-21 (1996). Under a subject-based approach, the adoption and revocation of the Temporary Telework Policy, and any modifications to that policy, are all possible proposals or changes that concern the same subject: the safety issue of COVID-19 exposure.

[5]The County also suggests that the subject of the change was the duration of the state of emergency declared by the Board of Commissioners, and that subject is prohibited for bargaining. Specifically, the County argues that only the Board of Commissioners could declare an emergency pursuant to ORS 401.309, and that the duration of such a declared emergency "is not subject to negotiation." In advancing that argument, however, the County mischaracterizes the change in dispute. The disputed change is the change to the safety issue of COVID-19 exposure, not a change to the duration of the state of emergency declared by the BOC pursuant to ORS 401.309.

working in-person. Those measures included increasing the cleaning of "high touchpoints" such as door handles in County facilities, increasing air flow in County facilities, changing air filters more frequently, providing masks and hand sanitizer, installing plexiglass in public spaces, requiring social distancing and capacity limits, and holding vaccination clinics for employees. The County contends that these enhanced safety measures—combined with the 63 percent vaccination rate in Marion County on July 19, 2021—mean that employees returning to in-person work in July 2021 did not, in fact, encounter direct and substantial risks to their on-the-job safety. The County's argument conflates the safety issue (exposure to COVID-19), with the various possible measures that can be taken to address that safety issue (*e.g.*, telecommuting, cleaning, personal protective equipment). When bargaining over the safety issue of COVID-19 exposure, the parties are free to make (or reject) proposals about how to address that issue, including but not limited to proposals about specific safety measures. PECBA does not dictate the content of such proposals, or the ultimate outcome of bargaining. PECBA requires only that the County bargain in good faith with the Union about the safety issue, rather than decide unilaterally how to address it.[6]

The County also relies on *SEIU Local 503 v. State of Oregon, Oregon State Hospital*, Case No. UP-13-02, 20 PECBR 189 (2003). In that case, the state psychiatric hospital unilaterally discontinued the use of steel handcuffs as a means of restraining patients in order to "reduce the risk of injury to patients." *Id.*, UP-13-02 at 3, 20 PECBR at 191. The Board, without first deciding whether that change involved an employee safety issue, concluded that there was insufficient evidence to demonstrate that "the discontinuation of the use of steel handcuffs increases the risk of employee injury so as to demonstrate a direct and substantial effect on employee safety that requires bargaining." *Id.*, UP-13-02 at 9, 20 PECBR at 197.[7] Here, as set forth above, we have already concluded that the change at issue did involve a safety issue—exposure to COVID-19. That exposure to COVID-19 has a direct and substantial effect on employee safety is self-evident and not disputed by the County. Moreover, the County's decisions to implement and revoke the teleworking policy both were premised on its assessment of whether teleworking was a necessary or preferred measure for protecting employees from COVID-19 exposure. That assessment of a particular safety measure (permitting teleworking)

[6]The fact that the County implemented enhanced safety measures does not excuse it from its bargaining obligations under PECBA. The purpose of collective bargaining under PECBA is to give employees a voice in determining their terms and conditions of employment. *See* ORS 243.656(3) (one purpose of PECBA is to establish "greater equality of bargaining power between public employers and public employees"). PECBA recognizes that the workplace can be improved when public employees exercise that voice. As we have often said, "pushing complicated issues through the crucible of collective bargaining often results in creative, agreeable solutions," even in difficult circumstances. *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). A unilateral change by an employer is not unlawful merely because a disputed change is undesirable to employees; it is unlawful because a unilateral change "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." *Oregon Tech American Association of University Professors (Oregon Tech AAUP) v. Oregon Institute of Technology*, Case No. UP-023-20 at 30-31 (2020) (citing *NLRB v. Katz*, 369 US 736, 743-44, 82 S Ct 1107 (1962)).

[7]As the court explained in *Multnomah County Corrections*, "In *SEIU*, the board did not expressly address the initial question, *viz*., whether the proposal involved a safety issue," because, "given its ultimate conclusion, it was not necessary for it to do so." 257 Or App at 727 n 15.

does not determine whether the safety issue itself (exposure to COVID-19) has a direct and substantial effect on employee on-the-job safety. *Oregon State Hospital*, therefore, does not aid the County here.[8]

In sum, the Temporary Telework Policy concerns a mandatory subject of bargaining: the safety issue of exposure to COVID-19. The County changed the status quo concerning that subject by revoking the Temporary Telework Policy and requiring employees to return to in-person work during the ongoing COVID-19 pandemic. The record establishes that the County decided to make that change and implemented it without bargaining in good faith with the Union: In its answer, the County admitted that it relayed its decision to revoke the Temporary Telework Policy (and require nearly all employees to resume working in-person) by sending the June 10, 2021, communication to all County employees, and that it did so without prior notice to or discussion with the Union. Further, although the County met with the Union on July 22, 2021, and August 9, 2021, it repeatedly asserted that it was merely listening to the Union's concerns and was not bargaining.[9] We conclude, therefore, that the County unilaterally changed a mandatory subject of bargaining when it decided to revoke the Temporary Telework Policy effective July 19, 2021, without bargaining with the Union, and when it implemented that decision before it bargained over the impacts of that decision on mandatory subjects that were more than de minimis. Such conduct is a per se violation of the duty to bargain under (1)(e).[10]

Next, we turn to the County's affirmative defense of waiver. A party may waive its right to bargain by (1) "clear and unmistakable" contract language, (2) a bargaining history that shows the party consciously yielded its right to bargain, or (3) the party's action or inaction. *AOCE II*, 353 Or at 177. The County contends that the Union, through its bargaining conduct in March and April 2020, consciously yielded its right to bargain about the revocation of the Temporary Telework Policy. We also understand the County to argue that the Union waived its right to bargain through clear and unmistakable language in the management rights clause of the CBA. For the reasons explained below, we do not find that the Union waived its right to bargain on either basis.

For its first affirmative defense, the County contends that the Union consciously yielded its right to bargain about the rescission of the Temporary Telework Policy through its bargaining conduct in March and April 2020. To prevail on this affirmative defense, the County must prove that the parties' bargaining history establishes that the Union consciously yielded its right to bargain over the cessation

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[8]Although we do not require a labor organization to wait and prove actual harm before a safety issue must be bargained, we also note that the evidence in this case establishes that in-person work during the COVID-19 Delta variant surge has, in fact, resulted in workplace exposure to COVID-19 and increased risk to the on-the-job safety of County employees. For example, the record indicates that 67 County employees contracted COVID-19 at work from June 10, 2021 through October 4, 2021. There were 10 workplace outbreaks of COVID-19 at Marion County workplaces from June 10, 2021 through October 1, 2021. And, the Union president contracted COVID-19 from a close contact with a coworker at work during that time period.

[9]We also construe the County's answer as admitting that the County did not intend to and did not bargain with the Union at the July 22 and August 9 meetings. *See* Answer, paragraph 9(c) (County admits "that it stated in the [July 22] meeting that its objective in holding the meeting was to listen to the Union's concerns related to in-person work, and not to bargain over the rescission of the Temporary Telework Policy"); paragraph 12(a) (the County "never agreed that either the July 22, 2021 or the August 9, 2021 meeting[s] were bargaining sessions").

[10]We do not understand the County to dispute that the revocation of the Temporary Telework Policy had impacts on mandatory subjects, including, at a minimum, paid leave.

of the Temporary Telework Policy. *See Oregon School Employees Association v. Bandon School District #54*, Case Nos. UP-26/44-00 at 16, 19 PECBR 609, 624 (2002); *AFSCME, Council 75, Local #1393 v. Umatilla County Board of Commissioners, Vanelsberg, Roadmaster*, Case No. C-183-82 at 4 n 2, 8 PECBR 6767, 6770 n 2 (1985) (Order on Reconsideration). "[A] party waives bargaining over a proposal, through negotiating over it without reaching agreement, only when the party has 'consciously yielded' its position and the issue has been 'fully discussed' and 'consciously explored.' *Central Linn Education Association v. Central Linn School District,* Case No. UP-7-96 at 8, 17 PECBR 194, 201 (1997)." *Eugene Police Employees' Association v. City of Eugene*, Case No. UP-9-00 at 8, 19 PECBR 463, 470 (2001).

Here, the record shows that, although the Union repeatedly requested to bargain over COVID-19 issues, including employee safety, and made various proposals, the County never bargained with the Union over those issues; rather, the County adopted the Temporary Telework Policy unilaterally. The County argues that the Union's acceptance of the County's package proposal in April 2020, which did not include the Union's proposed letter of agreement addressing COVID-19 issues, shows that the Union consciously yielded the right to bargain over the revocation of the Temporary Telework Policy, including because the Temporary Telework Policy was, by its express terms, temporary. However, the record shows that the County expressly declined to bargain over COVID-19 issues in the context of successor bargaining and did not engage in any bargaining over the Union's proposed letter of agreement. Because the County did not actually bargain over the issue (much less bargain extensively, such that the issue was fully discussed and consciously explored), the standard for waiver by conscious yielding of the right to bargain cannot be met. *See Central Linn*, UP-7-96 at 8-9, 17 PECBR at 201-02; *Eugene*, UP-9-00 at 8-9, 19 PECBR at 470-71; *cf. Oregon State Police Officers Association v. State of Oregon Department of State Police*, Case No. UP-109-85 at 15, 9 PECBR 8794, 8808 (1986) (finding association consciously yielded right to bargain over termination of disability insurance when, in successor bargaining, state proposed to terminate practice of employer paid disability insurance, parties "bargained extensively" over the issue, and the union did not pursue its proposal in arbitration, and thereby "objectively manifested a decision to drop its proposal and acceded to the State's position").

The County also argues that the Union waived its right to bargain about the revocation of the Temporary Telework Policy by not demanding to bargain about that policy when the County first adopted it. That argument fails for several reasons. First, a failure to demand to bargain in response to proper notice of a potential change is a "waiver by inaction," which is an affirmative defense that the County did not plead with specificity, and therefore, cannot be considered. *Portland Fire Fighters' Ass'n, IAFF Local 43 v. City of Portland*, 302 Or App 395, 403, 461 P3d 1001 (2020). Second, the record shows that the Union did attempt to bargain about the Temporary Telework Policy by explaining to the County that the policy did not address all of the Union's concerns and making a counterproposal, but the County declined to bargain. Third, this Board has long held that there "is no requirement that a union demand to bargain—to avoid a waiver—when the employer has already made a unilateral change" or presented it as a *fait accompli*. *Teamsters Union Local No. 57 v. City of Brookings*, Case No. UP-141-93 at 8, 16 PECBR 267, 274 (1995) (citing *International Association of Fire Fighters, Local 1489 v. City of Roseburg*, Case No. UP-9-87, 10 PECBR 504 (1988)). That is precisely what occurred here. The BOC adopted the Temporary Telework Policy as an addendum to the County's personnel rules on March 18, 2020, without first notifying the Union that it proposed to do so. Fourth, the Union's acceptance of one change—the adoption of the policy—does not constitute a waiver of its right to bargain over future changes regarding the same subject of bargaining, including revocation of

the policy. *See, e.g.*, *AOCE I*, UP-33-03 at 11, 20 PECBR at 900 (a union's failure to demand to bargain over past changes "does not operate as a waiver of future bargaining rights").[11]

For its second affirmative defense, the County argues that the management rights clause in the CBA constitutes a "clear and unmistakable" waiver of the Union's right to bargain about the revocation of the Temporary Telework Policy. The County relies on Article 2(D) of the CBA, which provides:

> "Except as may be specifically modified by the terms of this agreement, the county retains all rights of management in the direction of its work force. It is recognized that the responsibilities and authority of management are exclusively functions to be exercised by the county.
>
> "These rights of management shall include, but not be limited to, the following:
>
> "* * * * *
>
> "D. The management and direction of the work force including the right to determine the methods, processes and manner of performing work; the establishment of new positions and the determination of the duties and qualifications to be assigned or required; the right to hire, promote, demote, terminate, reassign, appoint and retain employees; the right to lay off for lack of work or funds; the right to abolish positions or reorganize the departments or division; the right to determine shifts, assignments and schedules of work; the right to purchase, dispose and assign equipment or supplies."

The County argues that when the BOC revoked the Temporary Telework Policy, it merely exercised the rights set forth in Article 2(D), and that the Union, by agreeing to Article 2(D), waived its right to bargain about that revocation.

We conclude that this management rights clause does not clearly and unmistakably waive the Union's right to bargain about the return of employees to in-person work during the pandemic, for the following reasons. To begin, the Board has long held that "[g]enerally worded management rights clauses * * * will ordinarily not be construed as waivers of statutory bargaining rights." *Eugene Police Employees' Association v. City of Eugene*, Case No. UP-011-17 at 8 (2018) (quoting *Oregon School Employees Association v. South Coast Education Service District*, Case No. UP-027-16 at 19, 27 PECBR 48, 67 (2007) (internal citations omitted)). In interpreting a generally worded management rights clause, this Board has long interpreted phrases such as "inherent rights of management" or "customary functions of management" as "term[s] of art in in labor-management relations. * * * Use of [such phrases] indicates that the parties intended the management rights clause to apply only to permissive subjects for bargaining." *City of Eugene*, UP-011-17 at 9 (quoting *AOCE II*, 353 Or at 186-87 (quoting *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03 at 16, *order on remand*, 23 PECBR 222, 237 (2009))). The management rights clause in these parties' CBA includes such generic phrases. The County does not explain why we should depart from this principle in this case, and we see no reason to do so.

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[11]To hold that a union's acceptance of a change constitutes a waiver of future bargaining rights would create a perverse incentive for unions to demand bargaining and file unfair labor practice charges over all changes, rather than encourage the informal resolution of disputes.

In addition, the management rights clause in the CBA expressly provides that the County "retains all rights of management" in the direction of its workforce. As the Board explained in *City of Eugene*, the use of the word "retain" in a management rights clause bolsters the conclusion that the clause is limited to permissive subjects of bargaining because a "party cannot retain * * * something that it never had in the first place." *City of Eugene*, UP-011-17 at 9 (quoting *AOCE II*, 353 Or at 187). Applying *City of Eugene* here, we conclude that Article 2(D) can be read as limited to management retaining rights concerning permissive subjects of bargaining, and because the County's change in this case concerns a mandatory subject of bargaining, Article 2(D) does not constitute a clear and unmistakable waiver by the Association regarding the revocation of the Temporary Telework Policy.

For all these reasons, the County did not meet its burden to prove that the Union waived its right to bargain about the decision to revoke the Temporary Telework Policy or its impacts on mandatory subjects of bargaining. In its answer, the County acknowledged that it did not bargain with the Union. Consequently, we conclude that the County violated ORS 243.672(1)(e).

Having found that the County 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. However, in this instance, the record shows that the vast majority of employees have already returned to working in-person, and a wholesale and immediate return to the status quo of teleworking may be unnecessarily disruptive for both the employer and employees. Additionally, as explained above, the COVID-19 pandemic is an unprecedented public health emergency that is unpredictable and rapidly changing. Under these circumstances, we find it appropriate and consistent with the purposes of PECBA to order the parties to bargain for a 30-day period regarding a remedy, including a make-whole remedy. If the parties are unable to agree on a remedy within that 30-day bargaining period, each party shall submit its proposed remedy to this Board within 35 days of the date of this order, and the Board shall order a remedy.

The Union 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 the County'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 the County and Union-represented employees. Accordingly, we will order the County to post the notice and distribute it to bargaining unit employees by email.

Finally, the Union requests that we award a civil penalty because the County disregarded the law and the health and safety of its workers, which constitutes egregious conduct. We may award a

civil penalty when the action constituting an unfair labor practice was egregious or the party committing an unfair labor practice did so knowingly and repetitively. ORS 243.676(4)(a)(A); OAR 115-035-0075. Actions are egregious only if they were "taken in knowing disregard of the law." *Association of Professors of Southern Oregon State College v. Oregon State System of Higher Education and Southern Oregon State College*, Case Nos. UP-13/118-93 at 16, 15 PECBR 347, 362 (1994); *Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon*, Case No. UP-014-17 at 22 (2018). Here, although it is a close question, the record does not establish that the County's revocation of the Temporary Telework Policy was taken in knowing disregard of the law, and the County did not commit an unfair labor practice knowingly and repetitively. In reaching that conclusion, we consider the fact that the COVID-19 pandemic has presented novel and emergency circumstances, and that public employers have been required to act rapidly in response to quickly changing public health data, recommendations, and directives. Under all these circumstances, we conclude that a civil penalty is not warranted.

## ORDER

1. Marion County shall cease and desist from violating ORS 243.672(1)(e).

2. The parties shall bargain for a 30-day period regarding a remedy, including a make-whole remedy. If the parties are unable to agree on a remedy within that 30-day bargaining period, each party shall submit its proposed remedy to this Board within 35 days of the date of this order, and the Board shall order a remedy.

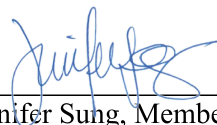
3. Marion County shall post the attached notice for 30 days in prominent places where Union-represented employees are employed.

4. Marion County shall distribute the attached notice by email to all Union-represented employees within 10 days of the date of this order.

DATED: October 29, 2021.

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-037-21, *SEIU Local 503, OPEU v. Marion County*, 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 Marion County (County) committed an unfair labor practice 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 the County violated the duty to bargain in good faith when it unilaterally revoked the Temporary Telework Policy without first bargaining in good faith with SEIU Local 503, OPEU.

To remedy this violation, the Board ordered the County to:

1. Cease and desist from violating ORS 243.672(1)(e).

2. Bargain with SEIU Local 503, OPEU for a 30-day period regarding a remedy for the violation, including a make-whole remedy. (If the parties are unable to agree on a remedy within that 30-day bargaining period, each party must submit its proposed remedy to the Board within 35 days of the date of the order, and the Board will order a remedy.)

3. Post this notice for 30 days in prominent places where SEIU Local 503, OPEU-represented employees are employed.

4. Distribute this notice by email to all SEIU Local 503, OPEU-represented employees within 10 days of the date of the order.

EMPLOYER

Dated________________________, 2021 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. RC-008-20

(REPRESENTATION)

<table>
<tr><td>AMALGAMATED TRANSIT UNION,<br>DIVISION 757,<br><br>Petitioner,<br><br>v.<br><br>LANE TRANSIT DISTRICT,<br><br>Respondent.</td><td>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)</td><td><br><br><br>RULINGS,<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND ORDER</td></tr>
</table>

On October 25, 2021, the Board heard oral argument on Respondent's motion for leave to file objections and on Respondent's objections to a recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe on June 16, 2021, after a hearing held before ALJ B. Carlton Grew on February 16, 2021, via videoconference. The record closed on March 26, 2021, upon receipt of the parties' post-hearing briefs.

Krista Cordova, Labor Relations Coordinator, Amalgamated Transit Union, Division 757, Portland, Oregon, represented the Petitioner.

Sarah M. Rain, Attorney at Law, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Indianapolis, Indiana, represented the Respondent at hearing. Jacqueline M. Damm, Attorney at Law, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Portland, Oregon, represented the Respondent after hearing and at oral argument.

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On November 2, 2020, Petitioner Amalgamated Transit Union, Division 757 (ATU or Union), filed a petition seeking to certify a bargaining unit without an election, under ORS 243.682(2) and *former* OAR 115-025-0000(4).[1] The petition proposed the formation of a new bargaining unit comprised of the job classifications of Applications Administrator, IT Systems Administrator, Data Warehouse Manager, IT Network Engineer, and IT Help Desk Technician.

[1]Effective January 7, 2021, the Board's Division 25 rules were modified. We apply the rules in effect when the petition was filed.

On November 20, 2020, Lane Transit District (District) filed timely objections to the petition. The District asserted that the proposed unit was not an appropriate unit because the employees in the petitioned-for unit have a community of interest with the unrepresented nonsupervisory employees who are excluded from the petition. The District also asserted that the proposed unit would result in fragmentation and would be inconsistent with the Board's preference for the largest possible unit.

On June 16, 2021, ALJ Kehoe issued a recommended order granting the petition. Objections to that recommended order were required to be filed on June 30, 2021. On June 30, 2021, at 5:01:05 p.m., the District filed objections to the recommended order. Pursuant to OAR 115-010-0010(10), the date of filing "means the date received by the Board. A document received after 5 p.m. is considered to be filed on the following business day." On July 13, 2021, the Board directed the District to file a submission as to why the objections were not untimely filed. On July 20, 2021, the District filed a motion asking the Board to accept its objections as timely filed. On July 29, 2021, the Union filed an opposition to that motion.

On August 3, 2021, the Board notified the parties that the Board would defer a ruling on the District's motion and would set both the motion and the District's objections for oral argument. At oral argument, the parties offered argument on both the motion and the objections.

The issues are:

1. Whether the District's objections were timely filed and, if not, whether there is good cause to extend the time for filing the objections;

2. Whether the petition proposes an appropriate bargaining unit under ORS 243.682(2) and *former* OAR 115-025-0050.

We conclude that the petition proposes an appropriate unit, modified by this Board to include the Intelligent Transportation Systems Manager classification in the IT department. Consequently, it is not necessary to determine whether the District's objections were timely filed or whether good cause exists to extend the time for filing objections, and we do not reach those questions.

## RULINGS

All rulings 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). It operates a public transit system in the Eugene and Springfield, Oregon metropolitan area. It primarily provides bus service. The District currently has about 300 employees.

2. The District is organized into nine departments, including (1) Human Resources & Risk Management, (2) Finance, (3) IT, (4) Business Services, (5) Customer & Specialized Services, (6) Planning & Development, (7) Facilities Management, (8) Transit Operations, and (9) Maintenance. The Finance department includes a Payroll subgroup. The Customer & Specialized Services department includes a Marketing and Communication subgroup. The Transit Operations department includes a Public Safety subgroup.

3. All of the District's departments report to the District's Executive Office, which in turn reports to the District's Board of Directors. The Executive Office includes the District's General Manager, Assistant General Manager, and Clerk of the Board. Nearly every department has its own Director who reports to the Assistant General Manager, who in turn reports to the General Manager. However, the Director of Planning & Development reports directly to the General Manager.

4. ATU is a labor organization within the meaning of ORS 243.650(13). It currently represents 29 separate bargaining units at multiple employers. Two of those units are at the District. The remainder involve employees of other employers. The petitioned-for unit would be ATU's third unit of District employees. ATU's current President-Business Representative is Shirley Block.

5. At least one of ATU's non-District bargaining units includes IT workers. Further, in addition to ATU's two existing units of District employees, ATU represents other multiple bargaining units at a single employer, including multiple bargaining units at C-Tran and at Valley Transit, both of which are in Washington.

6. ATU's larger existing bargaining unit of District employees includes a variety of job classifications in Transit Operations (including Bus Operator), Fleet Services (including Lead Journeyman, Journeyman Mechanic, Journeyman Tire Specialist, General Service Worker, Lead Detailer, Equipment Detail Technician, Lead Inventory Technician, and Inventory Technician), Customer Services (including Lead Customer Service Representative and Customer Service Representative), and Facilities Services (including Station Cleaner).

7. ATU's other existing bargaining unit of District employees, which was formed in February 2019, presently includes only the Public Safety Officer job classification. The unit currently includes eight Public Safety Officers.[2] All of the Public Safety Officers are part of the Public Safety subgroup of the Transit Operations department. All the other represented employees in Transit Operations are part of the larger ATU unit.

[2]Our description of ATU's smaller unit of District employees is based on the evidence presented in this case and reflects both parties' assertions. We also take notice of the Board's February 20, 2019, order in *Amalgamated Transit Union Division 757 v. Lane Transit District*, Case No. RC-002-19 (2019), in which we certified ATU as the exclusive representative of "All Lane Transit District (LTD) Fare Inspectors and Public Safety Officers not excluded by law as supervisory employees of LTD as defined in ORS 243.650(23)(a)."

8. The District and ATU are parties to two collective bargaining agreements (CBAs), with one CBA for each of ATU's existing bargaining units of District employees. Each unit's CBA is bargained separately. The District and ATU's Public Safety Officer unit completed the negotiations for their first CBA near the end of 2020. The CBA for the larger bargaining unit had a term of July 1, 2017 through June 30, 2021, which the parties extended through June 20, 2022. The CBA for the Public Safety Officer unit is effective through June 30, 2024.

9. All the District's unrepresented employees (including those in the IT department) are often referred to collectively as "administrative staff," "administrative support," or "administrative employees." Those terms, and the related terms used for the same group, do not describe those employees' job duties. The unrepresented employees work in virtually all the District's departments. Many employees who are currently unrepresented were part of an organizing drive in 2018 and/or 2019, but they have not yet been part of a representation petition or bargaining unit.

10. All unrepresented District employees are governed by an Administrative Employee Handbook containing all the District's policies, including those concerning outside employment, nepotism, complaints, job postings, holidays, consolidated annual leave benefits, and the use of office for financial gain, for example. Portions of the Handbook also apply to the District's represented employees.

11. Currently, all of the District's represented employees are hourly, considered nonexempt under the Fair Labor Standards Act (FLSA), and eligible for overtime pay. The majority of the unrepresented employees are salaried and considered FLSA exempt and do not receive overtime pay. However, two employees in Finance, one employee in Human Resources & Risk Management, two employees in Business Services, two employees in Marketing, and one employee in IT (the IT Help Desk Technician classification) are unrepresented, hourly, and FLSA nonexempt.

12. The payroll of represented and unrepresented employees is administered by the same Payroll subgroup. All District employees are paid every other Friday (*i.e.*, bi-weekly).

13. The District operates out of multiple buildings in a single square block in the Glenwood community of Lane County. Those include (1) the Administration building (the District's "primary" office/facility), (2) the Maintenance building, (3) a bus wash building, (4) a fueling station, (5) a storage building, and (6) the Facilities Management building. In addition, a small number of District employees work at the District's Eugene Station in downtown Eugene.

14. A number of Transit Operations, Human Resources & Risk Management, Executive Office, Finance (*e.g.*, Payroll), Marketing and Communication, IT, Planning & Development, and Business Services employees work in the Administration building. That group includes both represented and unrepresented employees. However, certain areas of the Administration building are only accessible by unrepresented employees between 5:30 p.m. and 7:00 a.m. each day. 174 represented Bus Operators use the Administration building to get their daily route assignments and to sign in and out of work. Additionally, certain Bus Operators regularly work in the Administration building in the Transit Planning subgroup. The Administration building's boardroom, conference rooms, courtyard, lunchrooms, and lobby can

be used by any District employee (represented or not). Further, represented and unrepresented employee trainings regularly occur in the Administration building. The Union office is also in the Administration building, right between the building's lunchroom and wellness center.

15. Unrepresented employees receive paid leave that combines paid sick leave and vacation leave in one leave bank known as consolidated annual leave (CAL). Represented employees receive separate vacation and sick leave banks. The leave accrual rates for unrepresented employees are different than the accrual rates for represented employees. Unrepresented employees also receive an "extended illness bank" of three to five days off for illnesses lasting more than three days in addition to their regular consolidated annual leave (as outlined in Policy 307 of the Administrative Employee Handbook). Represented employees do not receive an "extended illness bank."

16. Each of ATU's two bargaining units of District employees has its own unique holiday schedule, but employees from both have ten total holidays. The larger unit has seven specific calendar holidays (as listed in Article 19 of its CBA) and three floating holidays. The Public Safety unit has eight specific calendar holidays (as listed in Article 13 of the Public Safety unit's CBA) and two floating holidays. Meanwhile, all unrepresented District employees (including those in the IT department) have nine specific holidays, which are listed in the Administrative Employee Handbook.

17. All the District's unrepresented employees (including those of the IT department) have the same employment benefits, and choose one of the same four health insurance options outlined in the District's "Admin [E]mployees Benefits Resource Guide." Most of the District's represented employees have the same employment benefits as the unrepresented employees, including the same health, dental, and accidental death and dismemberment insurance options. As a retirement benefit, unrepresented employees may elect to participate in a deferred compensation plan. A defined benefit pension is available to represented employees through the LTD/ATU Pension Trust. Unrepresented employees uniquely have a long-term disability benefit, while represented employees uniquely have a short-term disability benefit. All employees receive three days of bereavement leave, but represented employees have slightly different bereavement leave rules (as outlined in their CBAs) than unrepresented employees (as outlined in Policy 309 of the Administrative Employee Handbook).

18. Currently, due to the COVID-19 pandemic, many of the District's unrepresented employees (including the IT department's Applications Administrator, for example) are working remotely. However, some unrepresented employees are still working in their offices.

19. All the District's unrepresented employees (again, including those in the IT department) have a flexible, business casual dress code (*e.g.*, khakis and either polo or button-down shirts). In contrast, nearly all the District's represented employees are given uniforms. Represented Maintenance department employees wear coveralls.

<u>IT Department</u>

20. The IT department is responsible for a wide range of enterprise information technology matters including, but not limited to, the District's hardware (*e.g.*, computers and

monitors), software, printers, communications from site to site, signs on the roads, and bus scheduling. The IT department supports all the District's departments and subgroups (*e.g.*, Human Resources & Risk Management, Finance, Maintenance, Transit Operations, Planning & Development, and Payroll) remotely and in person, though Transit Operations is the IT department's main priority. That support involves working directly with represented and unrepresented District employees and helping them complete their work. In addition, the IT department also supports several outside contractors that employ non-District employees, including Mobility on Demand.

21. The IT department has seven job classifications in total, and all of them are unrepresented. There is one employee in each classification, although the IT Help Desk Technician position was vacant at the time of hearing. The five petitioned-for classifications are (1) Applications Administrator, (2) IT Systems Administrator, (3) Data Warehouse Manager, (4) IT Network Engineer, and (5) IT Help Desk Technician. Two other classifications, (6) Director of IT and Strategic Innovation, and (7) Intelligent Transportation Systems Manager, are also part of the IT department, but were not part of ATU's proposed third unit. There are no IT employees in any of the District's other departments.

22. All IT department employees report directly to Director of IT and Strategic Innovation Robin Mayall. No other District employees report to her. As noted above, the Director of IT and Strategic Innovation reports directly to the Assistant General Manager.

23. At least one employee has promoted within the IT department. Meanwhile, it is very unlikely that any District employee who does not work in the IT department will transfer into that department. There is also no way for employees from another department to cover the work of an IT employee if IT employees are out sick or on vacation. However, IT employees can cover for or help another group (*e.g.*, Finance) if that group is short employees. In fact, IT department employees have picked up other groups' duties from time to time, especially when there is turnover at the District.

24. All IT employees except for the IT Help Desk Technician classification receive a salary and are considered FLSA exempt. The IT Help Desk Technician classification is paid hourly and is considered FLSA nonexempt. Unlike the other IT employees, the IT Help Desk Technician classification is a part-time position; the employee works "25-28 hours per week and is not eligible for full company benefits."

25. In general, the petitioned-for IT employees are paid more than the average District employee and other subgroups. In the District's pay schedule, the highest pay grade is a 22 and the lowest is a 4. The Data Warehouse Manager has a pay grade of 18. Both the IT Systems Administrator and IT Network Engineer have a pay grade of 17. The Applications Administrator has a pay grade of 15. The IT Help Desk Technician classification has a pay grade of 11. Both the Director of IT and Strategic Innovation and the ITS Manager have a pay grade of 19.[3]

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[3]The IT Help Desk Technician classification's pay grade is not shown on the District's salary schedule for unrepresented employees because that classification was unfilled when the exhibit was generated.

26. Like the District's other unrepresented employees, IT department employees generally work Monday through Friday during traditional business hours, with somewhat flexible start and end times (*e.g.*, 7:00 a.m. to 4:00 p.m., 8:00 a.m. to 5:00 p.m., or 8:30 a.m. to 5:30 p.m.). However, IT department employees also frequently work additional hours (including nights, weekends, and holidays) depending on business needs.

27. IT employees often respond to system needs or implement system upgrades outside traditional business hours. Applications Administrator Neil Blickfeldt testified, for example, that several IT employees had performed work after-hours on February 14, 2021, and on President's Day 2021. The position descriptions and job announcements for the IT classifications reflect that after-hours work is expected for these positions. For example, the position description for the IT Help Desk Technician II position states that the position shares "responsibility for off-hours coverage" and is "required to carry a cell phone for off-site accessibility."[4] The job description for the Applications Administrator requires that employee to be "available for after hours support," and the job descriptions for the Systems Administrator and Network Engineer both state that those employees' duties "often include[] evening, weekend, and 24-hour on-call duties." Other unrepresented employees outside the IT department occasionally work outside the traditional business hours. For example, some Finance, Planning & Development, Human Resources & Risk Management, and Marketing and Communication employees attend meetings and/or events outside of regular business hours. The job description for the Transit Development Planner indicates that the position's work schedule is a standard 8:00 a.m. to 5:00 p.m. business day "with occasional events and meetings outside of business hours." Similarly, the job description for the Controller describes that position's work schedule as "generally Monday through Friday, with additional hours and flexibility needed occasionally depending on business needs."

28. The entire IT department is generally always "on call." Blickfeldt testified that he considers the IT employees to be "on call, 24/7." The job descriptions for the Applications Administrator, IT Systems Administrator, and IT Network Engineer all describe required on-call duties. The job description for the Applications Administrator positions lists as an "associated" job function "[r]eceive a cell phone stipend to be available for after-hours support." The only other unrepresented employees who are always on call are supervisors and one Facilities Management employee at a time.

29. IT department employees do not "compete" with other unrepresented employees for vacation slots. Instead, IT employees decide among themselves who can go on vacation and when that can happen, generally without coordinating with the Director of IT and Strategic Innovation. The IT department intentionally schedules outages, deployments, and upgrades to occur outside of regular business hours and during regular holidays in order to minimize disruption and inconvenience for other District employees.

30. The IT department generally operates out of five dedicated offices in a row in the same area in the northwest corner of the Administration building. None of the petitioned-for IT

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[4]The job descriptions presented for the IT Help Desk Technician job classification specifically identify the classification as "IT Help Desk Technician II." The petition and the parties make no distinction between different types of IT Help Desk classifications. We use IT Help Desk Technician to refer to the position.

classifications share an office with any employees from other departments. However, IT's five offices are close to many other offices and areas of the same building, including the Marketing and Communication and Planning subgroups' areas in particular. The Intelligent Transportation Systems Manager regularly works in the Maintenance building, which is located next to the Administration building where the other IT employees work.

31. IT department employees regularly work at other District facilities besides the Administration building and do some of their work remotely or outdoors. The only other group of District employees that is as "mobile" as the IT department is the Facilities Management department's construction workers.

32. At the time of hearing, only two of the petitioned-for IT department employees were regularly coming into the office to work, and they were doing so one at a time, for a total of five days a week. The Director of IT and Strategic Innovation, the Applications Administrator, and the Data Warehouse Manager were almost exclusively working remotely at the time of hearing.

33. When the IT department has a meeting, it typically meets in one of the three conference rooms in the southwest corner of the Administration building. Those particular conference rooms are primarily used by unrepresented employees, but they can be used by any District employees (*e.g.*, Transit Operations staff). The IT department also uses the main board room and some small Finance department rooms of the Administration building as conference rooms. In addition, there are conference rooms in the Maintenance building and the Facilities Management building that any District employees can use.

34. For breaks, the IT department uses the "Administrative lunchroom" in the Administration building, which can be used by anyone, but is primarily used by unrepresented District employees. The IT department also uses the office lounge in the same building for breaks.

35. No other unrepresented employees use the same specialized physical and software tools that IT department employees use. Those tools can include cable testers, fiber splicers, remote access tools, and networking analysis tools.

36. The minimum qualifications for an IT department job classification are different for each classification (as detailed in the job descriptions in the record). A bachelor's degree in computer science, some relevant certifications, and good written and verbal communication skills are preferred. No other unrepresented District employees are expected to have a degree in computer science in particular. Additionally, all IT department employees must generally have had some computer science or information technology experience working somewhere other than the District before becoming part of the IT department.

37. IT department employees and employees from the District's other business units sometimes sit on hiring panels together. Individual hiring panel members do not unilaterally decide whether a candidate is hired.

Data Warehouse Manager

38. The Data Warehouse Manager leads and manages the data management systems for the District. Among other things, the Data Warehouse Manager evaluates current databases, builds new databases using the latest current technology, and creates systems that will assist the end users in using data to better manage the organization. More specifically, the Database Warehouse Manager is expected to bring all the District's systems and databases together and give information and reports to executives and directors so that they can make decisions. The Data Warehouse Manager does not manage people and has no subordinates.

IT Systems Administrator

39. The IT Systems Administrator installs, configures, and supports the District's computer servers and technology infrastructure systems. The IT Systems Administrator also monitors all critical servers to ensure system availability to all users and may perform necessary maintenance to support system availability. The employee in this position may assist in network modeling, analysis, planning, and coordination between network and data communications hardware and software.

Applications Administrator

40. The Applications Administrator is responsible for the installation, upgrade, procurement, and proper operation of business unit software. That includes monitoring, problem resolution, configuration, product installations/upgrades, and software documentation. Some days, the Applications Administrator also works on hardware or networks. No other District employee performs the kind of work that the Applications Administrator performs. For the past six years, the Applications Administrator has been Neil Blickfeldt.

41. Normally, the Applications Administrator spends the majority of the workday in the Application Administrator's own office in IT's designated corner of the Administration building. Sometimes, the Applications Administrator will spend the majority of the workday at a different jobsite, which could be a construction site or any of the District's other buildings. Because of the COVID-19 pandemic, between March 2020 and the February 16, 2021, hearing for this case, the current Applications Administrator had used the office only about three times.

IT Network Engineer

42. The IT Network Engineer manages the District's IT infrastructure. The job classification's responsibilities include analyzing log and data files to evaluate performance as compared to desired performance metrics, creating plans and executing programs for building and maintaining the infrastructure, auditing network activity and security log files, and tuning equipment and system configurations to maximize resource utilization and service efficiency. The IT Network Engineer is generally responsible for communications between the District's various computers.

43. The employee who most recently held the IT Network Engineer classification submitted a resignation letter a week before the February 16, 2021, hearing. The District will post for the IT Network Engineer classification once, or even before, that employee departs.

IT Help Desk Technician

44. The IT Help Desk Technician job classification is responsible for providing desktop support to internal clients and providing support for IT staff. That includes, but is not limited to, desktop workstations, laptops, cellphones, and related peripherals. The IT Help Desk Technician classification may also assist a colleague with network administrative tasks, such as maintaining network equipment, server patching, and telecommunications and radio equipment support. The IT Help Desk Technician classification otherwise handles all the IT department's day-to-day frontline responsibilities such as resetting passwords and helping other employees with individual computers. In addition to its technical responsibilities, this classification is also responsible for maintaining documentation, replenishing spare parts and consumable supplies, processing warranty repairs to equipment vendors and manufacturers, tracking IT systems fixed assets, and maintaining IT areas in an orderly fashion.

45. The IT Help Desk Technician job classification is considered the entry-level position in the IT department. Accordingly, the IT Help Desk Technician classification requires less experience than the other IT classifications. Nevertheless, before being hired for the IT Help Desk Technician classification, a candidate still needs two to three years of experience outside of the District. Moreover, the IT Help Desk Technician classification uses the same electronic testing equipment and hand tools as the other petitioned-for IT classifications.

46. The IT Help Desk Technician classification is currently unfilled/vacant. As of the February 16, 2021, hearing, the District was preparing to advertise and/or post for the open IT Help Desk Technician classification.

Intelligent Transportation Systems Manager

47. The Intelligent Transportation Systems Manager plans, develops, implements, operates, and manages the GPS and communications systems on the District's buses and the real-time sign display systems at the District's stations. The Intelligent Transportation Systems Manager also manages various technical projects as assigned, and provides "team lead" in troubleshooting, analysis, and research. The Intelligent Transportation Systems Manager's required experience level is generally comparable to that of the rest of the IT department.

48. ATU did not include the Intelligent Transportation Systems Manager job classification in this petition because the classification functioned as a supervisor with one direct report as recently as 2019. ATU also understood that the Intelligent Transportation Systems Manager has a seat on the District's "leadership council," which can influence organizational decisions. Nevertheless, the Intelligent Transportation Systems Manager has not had any

subordinates since the classification that most recently reported to the Intelligent Transportation Systems Manager became vacant.[5]

49. Previously, the current employee in the Intelligent Transportation Systems Manager classification functioned as the Director of the IT department. At another point, the Intelligent Transportation Systems Manager reported to the Maintenance Director. Currently, the Intelligent Transportation Systems Manager reports to the Director of IT and Strategic Innovation.

CONCLUSIONS OF LAW

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

2. A bargaining unit comprised of the classifications of Applications Administrator, IT Systems Administrator, Data Warehouse Manager, IT Network Engineer, IT Help Desk Technician, and Intelligent Transportation Systems Manager in the District's IT department is an appropriate unit.

The Union petitioned to represent a new bargaining unit comprised of five of the six nonsupervisory classifications in the District's IT department. We may determine that it is appropriate to include positions that were not part of the original petition, if the showing of interest submitted is sufficient for the larger unit. *Oregon AFSCME Council 75 v. City of Ontario*, Case No. RC-1-07 at 17, 22 PECBR 260, 276 (2008). Although the petition excluded the Intelligent Transportation Systems Manager classification, the parties now agree that the classification is nonsupervisory and appropriately included in the proposed unit. Accordingly, we modify the proposed unit to include all six nonsupervisory classifications in the IT department. With that issue resolved, the ultimate issue in this case is whether the proposed unit, as modified, is an appropriate unit under ORS 243.682(2) and *former* OAR 115-025-0050.

The Union, which already represents two bargaining units at the District, contends that the statutory factors in the Public Employee Collective Bargaining Act (PECBA) warrant a finding that a unit comprised only of nonsupervisory employees in the District's IT department is appropriate. The District contends that a unit comprised only of nonsupervisory employees in the IT department is inappropriate because those employees share a community of interest with the other unrepresented employees excluded from the petition and the petitioned-for employees do not have a sufficiently distinct community of interest to warrant a separate bargaining unit. The District also argues that this Board's administrative preference for the largest possible unit and policy against fragmentation preclude a finding that a bargaining unit comprised only of IT employees is appropriate.

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[5]The District objected to the exclusion of the Intelligent Transportation Systems Manager from the proposed departmental unit. The Union had excluded the Intelligent Transportation Systems Manager because it believed that the position was supervisory, as defined under PECBA. At oral argument, the District affirmatively represented that the Intelligent Transportation Systems Manager classification, which was not included in the petition, is nonsupervisory and can appropriately be included in the proposed unit, and based on the District's representation, the Union agreed to including that position as part of this petition.

Standards for Decision

Under PECBA, an "appropriate bargaining unit" is any "unit designated by [this] Board or voluntarily recognized by the public employer to be appropriate for collective bargaining." ORS 243.650(1). PECBA also expressly provides that the Board 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). In other words, PECBA does not require that a petition describe the most appropriate unit, only *an* appropriate unit. *See Oregon AFSCME Council 75 v. Douglas County*, Case No. CC-004-14 at 31, 26 PECBR 358, 388 (2015). Consistent with these principles, our rules provide that 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." *Former* OAR 115-025-0050(1).

When determining whether a unit is appropriate for collective bargaining, we must "consider such factors as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees." ORS 243.682(1)(a); *see also Douglas County*, CC-004-14 at 30-31, 26 PECBR at 387-88; *OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251 (2001). Those statutory factors are not exclusive; we may also weigh other non-statutory factors, including our administrative preference for certifying the largest possible appropriate unit. *Douglas County*, CC-004-14 at 31, 26 PECBR at 388. We also consider each of the factors in relation to each other. *See International Union of Operating Engineers, Local 701 v. Deschutes County Public Works*, Case No. RC-4-88 at 12, 10 PECBR 906, 917 (1988). When making an appropriate unit determination, we have "discretion to decide how much weight to give each factor" in any particular case. *OPEU*, 173 Or App at 436; *see also OSEA v. Deschutes County*, 40 Or App 371, 376, 595 P2d 501 (1979). Thus, "our analysis of the propriety of a proposed unit is necessarily fact-driven, with the outcome depending on the specific facts and circumstances of the workplace and workforce at issue." *Douglas County*, CC-004-14 at 31, 26 PECBR at 388. We consider all the facts and "apply the statutory criteria in a way that 'best effectuates the purposes and policies of PECBA.'" *Oregon AFSCME Council 75 v. Oregon Judicial Department*, 304 Or App 794, 813, 469 P3d 812 (2020) (quoting *Assoc. of Public Employees v. OSSHE and OPEU*, Case No. RC-113-87 at 5, 10 PECBR 883, 888 (1988)).

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

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

As a condition of an appropriate unit, the petitioned-for employees must share a community of interest with one another. *See, e.g., Oregon AFSCME Council 75 v. Washington County*, Case No. RC-30-03 at 12, 20 PECBR 745, 756 (2004); *Oregon AFSCME, Council 75 v. City of Corvallis*, Case No. RC-41-03 at 11, 20 PECBR 684, 694 (2004). In addition, when "a proposed bargaining unit consists of a subset of a larger workforce, the appropriate unit determination requires a finding that the petitioning employees share a community of interest 'sufficiently

distinct' from the interests of the excluded employees to warrant the proposed separate bargaining unit." *Oregon Judicial Department*, 304 Or App at 833 (citing *Washington County*, RC-30-03 at 12, 20 PECBR at 756). Because we consider all the factors in relation to each other, the degree of distinction that is sufficient depends on the circumstances of the case. *See Deschutes County Public Works*, RC-4-88 at 12, 10 PECBR at 917. A proposed unit of employees may have a sufficiently distinct community of interest to constitute an appropriate unit, even if they share a community of interest with excluded employees. *Washington County*, RC-30-03 at 12-13, 20 PECBR at 756-57; *City of Corvallis*, RC-41-03 at 11-16, 20 PECBR at 694-99.

In this case, there is no meaningful dispute that the IT employees share a community of interest with one another. Before the COVID pandemic (when remote work became typical), all the IT employees except the Intelligent Transportation Systems Manager worked in the same part of the Administration office.[6] Before the pandemic, the IT employees also often worked remotely and, when working onsite, often worked in various areas of the District's facilities, making them a "mobile" workgroup within the District's larger workforce. All the IT employees report to the same manager, Director of IT and Strategic Innovation Robin Mayall.

All the IT employees perform technical duties related to the information technology systems of the District. That work consists of specialized information technology work, primarily related to enterprise information and technology. The IT employees also support the District's contractors that provide transit on demand (referred to as "paratransit" during the hearing). The District generally prefers that the IT employees have specialized knowledge of and pre-employment experience in computer science, including certifications from information technology vendors and suppliers and preferably an undergraduate degree in computer science. The IT employees often work together, and they use many of the same tools, such as fiber splicing and cable testing tools, in performing their jobs. Because their work requires specialized skill and training, the IT employees do not receive support from other administrative employees in doing their jobs (although IT employees have picked up the duties of other administrative employees from time to time). Other administrative employees do not transfer or promote into the IT department.

The IT positions, except the IT Help Desk Technician position, also have similar hours. Except for the IT Help Desk Technician, the IT employees work full-time during general business hours with the flexibility to set their own start and stop times. The IT Help Desk Technician position is a part-time position. Significantly, all the IT positions, even the IT Help Desk Technician position, are also expected to be generally available to perform work outside the standard business day. The IT employees respond to outages or problems and perform repairs and upgrades outside standard business hours in order to minimize disruption to District services or inconvenience to other District employees.

The IT employees also have generally similar compensation. Specifically, with the exception of the entry-level IT Help Desk Technician position, which is paid on an hourly basis, the remaining IT positions are exempt and are all clustered in the upper portion of the District's salary scale (in salary ranges 15, 17, 18, and 19 in a salary range structure that begins at

[6]Before the COVID-19 pandemic, the Intelligent Transportation Systems Manager typically worked in the Maintenance building.

range 4 and ends at range 22). All the IT positions, except the IT Help Desk Technician, are benefits-eligible and receive the same benefits. The IT employees receive the same holidays and consolidated annual leave. All these commonalities are sufficient to demonstrate that the IT employees share a community of interest.

The IT employees also share a community of interest with the District's unrepresented employees, whom the District refers to as the "administrative" or "administrative support" employees. The administrative support employees, including the IT employees, generally work in the same Administration building, share the same supervisor at the highest level, receive the same benefits and leave entitlements, perform office-based work in support of the District's transit programs, and are covered by the same policies. The question here is whether the IT department employees have a community of interest sufficiently distinct from the other administrative employees to warrant certifying a bargaining unit comprised only of the employees in the IT department.

For the following reasons, we conclude that the nonsupervisory IT employees share a community of interest that is sufficiently distinct from the interests of the other unrepresented administrative support employees. To begin, unlike the other administrative support employees, the IT employees are routinely expected to be available outside typical office hours. After-hours work is required because of system upgrades and responses to outages or other unplanned situations. Notably, the IT employees are expected to be available outside traditional business at times in order to minimize the inconvenience to other employees or disruption to services. The IT employees' required after-hours availability is generally a routine, rather than an occasional, feature of the work (as opposed to the work of planners and other administrative employees, who occasionally attend after-hours events when specific events require them to do so). The IT employees are expected to be available by phone after hours.

In addition, the IT employees' work is specialized and, consequently, IT employees are expected to have pre-employment experience and technical training, typically an undergraduate degree in computer science and potentially certifications from information technology vendors and suppliers. The record does not indicate that other administrative support employees are expected to have similar types of specific pre-employment experience or training and certification. The IT employees use some of the same tools, such as fiber splicing tools and cable testing tools. Those tools are not used by other administrative employees. The record does not indicate that employees other than the IT employees provide support to the District's Mobility on Demand contractors.

Further, unlike other administrative support employees, the IT employees worked remotely from time to time even before the COVID-19 pandemic. The IT employees are also the only employees who regularly work in multiple areas of the District's facilities; the record indicates that the only other District employees who are as "mobile" as the IT employees are the Facilities Management Department's construction workers. In sum, taking all these factors together, we conclude that the IT employees have substantial collective bargaining interests that are unique to their work group and distinct from the interests of the other administrative support employees.

In arguing that the IT employees' community of interest is not sufficiently distinct, the District asserts that that the distinctive aspects of the petitioned-for employees' community of interest are merely those that are "inherent in a professional setting where employees have specific

areas of expertise for which they are responsible." We disagree. The distinctive features of the IT employees' community of interest do not arise solely from their area of professional expertise. For one example, before the COVID-19 pandemic, the IT employees, alone among administrative support employees, were permitted to work remotely. Although the nature of the IT employees' work may have made remote working particularly practicable, the fact that they worked remotely is not "inherent" to their area of professional expertise any more than it would be for employees working in payroll or finance, for example. Further, the record does not demonstrate that any other administrative support employees are expected to provide the same degree of routine after-hours availability to support the District's operations.

In sum, despite the common interests shared by the administrative support and IT employees, on balance, we conclude that the IT employees' skills, duties, hours, and working conditions result in interests that are sufficiently distinct from the interests of the remaining administrative employees.[7] In reaching that conclusion, we give substantial weight to the fact that the distinctive aspects of the IT employees' interests—including their skills, duties, hours, and "mobile" work—are central to their work and give rise to collective bargaining interests that are significant. Further, in many instances, the similarities between the administrative support employees and IT employees' working conditions and benefits are primarily a result of the fact that both groups are unrepresented and therefore both groups are subject to the District's workplace-wide policies. The fact that both IT employees and other administrative support employees are currently unrepresented, however, does not in and of itself defeat the divergent and significant collective bargaining interests of the IT employees that arise from the nature of the IT employees' work, rather than from the District's policies.

<u>Desires of Employees</u>

ATU has submitted a sufficient showing of interest to establish that a majority of the nonsupervisory employees in the IT department wish to form a bargaining unit.

In addition, significantly, the petitioned-for employees' desire for union representation has been markedly more persistent than the desire of the other unrepresented administrative support employees. Specifically, after the Union organized the smaller bargaining unit (currently comprised of public safety employees) in 2019, some unrepresented employees in the

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[7]The District also contends that *Laborers' International Union of North America, Local 320 v. City of Keizer*, Case No. RC-37-99, 18 PECBR 476 (2000), compels a conclusion that the petitioned-for unit is inappropriate. There, the Board certified a bargaining unit of eight utility workers, in part because the petitioned-for employees worked outside performing manual labor, while other city employees performed clerical work in an office environment. *Id.* at 10, 18 PECBR at 485. The District argues that such a distinction is missing here because the "IT department employees perform work and eat lunch in the same building as other unrepresented Administrative employees and operate their department together with the other Administrative departments." *City of Keizer*, however, does not require that distinction to be present to find a smaller unit appropriate. Rather, the Board has previously rejected the argument that *City of Keizer* rigidly controls the outcome of a later case involving a different employer. "[B]ecause representation matters are fact specific and call on this Board to exercise its discretion in weighing factors on a case-by-case basis, it is unlikely that a prior case involving a different employer will conclusively resolve a future case." *Oregon AFSCME Council 75 v. Douglas County*, Case No. C-004-14 at 34, 26 PECBR 358, 391 (2015).

administrative support departments informed the Union that they also desired to be represented. The Union attempted to organize the unrepresented administrative support employees. Although a substantial number, and possibly even a slim majority, of unrepresented administrative support employees indicated an interest in forming a bargaining unit, the Union ultimately decided that there was insufficient support to file a representation petition. The IT employees, however, continued to want union representation. They persisted in that interest and remained in contact with the Union. The Union ultimately obtained a sufficient showing of interest from the IT employees and filed the petition at issue in this case. The IT employees' markedly persistent desire for union representation gives this factor particular weight. *See Deschutes County Public Works*, RC-4-88 at 12-13, 10 PECBR at 917-18 (noting that petitioned-for employees' desire for union representation was stronger than the desires of other employees); *International Union of Operating Engineers, Local 701 v. Grant County Road Department*, Case No. C-254-83 at 8, 8 PECBR 6735, 6742 (1984) (certifying departmental unit where the petitioned-for employees' desires "not only for their own bargaining unit, but for any union representation, also appear to be in marked contrast with the desires of other County workers").

History of Collective Bargaining

The history of collective bargaining at the District includes the fact that the Union presently represents two bargaining units of District employees. The larger bargaining unit is comprised of maintenance and operations employees. That unit includes the customer service classifications of Lead Customer Service Representative and Customer Service Representative. Notably, those classifications are not in the Transit Operations, Maintenance, or Facilities Management departments, but in the Customer and Specialized Services Department (which also includes unrepresented administrative support classifications).

The smaller unit was certified in 2019. Specifically, on January 30, 2019, the Union filed a petition under ORS 243.682(2) to certify, without an election, a bargaining unit of fare inspectors and public safety officers. There were no requests for an election filed, and the District did not object to the petition. On February 20, 2019, this Board certified the Union as the exclusive representative for that new bargaining unit consisting of public safety officers and fare inspectors. *See Amalgamated Transit Union, Division 757 v. Lane Transit District*, Case No. RC-002-19 (2019). That unit currently includes only public safety officers.

After the Union organized that second unit, as described above, the Union attempted to organize a wall-to-wall unit of administrative support employees. There was insufficient interest at that time to proceed with a petition. The IT employees, however, persisted in their wish to be represented, and approached the Union with their desire for union representation. That resulted in the present petition.

Finally, the unrebutted testimony of the Union President indicates that the existence of multiple bargaining units at the District, all represented by the Union, has not caused problems in the parties' collective bargaining or contract administration.

Administrative Preferences

Next, we consider the Board's administrative preferences. The most prominent "is our preference, in most situations, for establishing the largest possible appropriate unit." *Laborers' International Union of North America, Local 320 v. City of Keizer*, Case No. RC-37-99 at 5, 18 PECBR 476, 480 (2000). That preference seeks to avoid breaking the workforce into excessive bargaining units, because such a result is contrary to many of the policies underlying PECBA. *See* ORS 243.656(2)-(4). The policy considerations the Board has articulated in favor of larger units "include stable labor relations; promoting greater equality in bargaining power; 'undue hardship' on employers through fragmentation of the workforce by magnifying the time and resources expended in bargaining with multiple units; and avoiding the possibility of 'whipsawing' an employer as numerous bargaining units compete for better settlements." *Washington County*, RC-30-03 at 6, 20 PECBR at 750.

The Board also follows a corollary policy "of disfavoring the fragmentation of public workplaces." *See Oregon Workers Union v. State of Oregon, Department of Transportation and Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. RC-26-05 at 11, 21 PECBR 873, 883 (2007). Fragmentation can "water[] down the bargaining power of affected employees" and pose an "undue burden" "on public employers if they [have] to engage in bargaining sessions for the many splinter groups on a round-robin basis." *Oregon Judicial Department*, 304 Or App at 816. The Board generally gives the policy against fragmentation more weight in cases in which a petition seeks to remove employees from an existing unit. *Deschutes County Public Works*, RC-4-88 at 14, 10 PECBR at 919.

Application of our larger-unit preference and nonfragmentation policy, however, "should not unreasonably take precedence over the representation rights of employees." *Deschutes County Public Works*, RC-4-88 at 14, 10 PECBR at 919. The Board's administrative preferences "are not 'rules' that must be strictly adhered to in all cases." *Grant County*, C-254-83 at 8, 8 PECBR at 6742. Thus, we do not "blindly apply" the preferences but rather weigh them, along with the statutory factors, to determine the appropriateness of a particular unit under the circumstances of the case. *See Douglas County*, CC-004-14 at 34, 26 PECBR at 391.

In determining what weight to give to the administrative factors in this case, we consider the specific features of the District as a workplace. In particular, this workplace already includes multiple units represented by the Union. There is no evidence that the existence of those units has caused competition between units that has unfairly "whipsawed" the District. There also is no evidence that the multiple units have caused problems, diluted employee bargaining power, or complicated the parties' labor-management relationship. We therefore do not see a reason to conclude that one additional unit comprised of a largely separate, self-integrated work group performing relatively specialized work will create such problems. On this record, we do not conclude that the Board's administrative preferences should outweigh the statutory factors. Further, weighing the administrative preferences more heavily than the statutory factors would, in this case, frustrate the IT employees' PECBA right to self-determination and union representation, without furthering the policies on which the preferences are based. *See Deschutes County Public Works*, RC-4-88 at 14, 10 PECBR at 919 (application of the Board's administrative preferences "should not unreasonably take precedence over the representation rights" of employees).

The District contends that a unit comprised of only nonsupervisory IT employees is not appropriate because it would "open the floodgates to an infinite fragmented workforce of many small units." We disagree. We have weighed the policy against fragmentation along with all the other criteria. Although a larger unit of all unrepresented administrative support employees might be appropriate and would generally be preferred, we do not conclude that the policy against fragmentation makes the smaller unit of IT employees inappropriate. As a general matter, we give our policy against fragmentation less weight in cases that do not involve a petition seeking to remove employees from an existing unit. *See id*. Moreover, given all the circumstances of this case, including the particular history of collective bargaining and the IT employees' hours, skills, duties, and working conditions, we assess the risk of future numerous fragmentary units in this workplace as quite low.[8] And any such risk is ameliorated by the fact that this Union already represents two bargaining units in this workplace without adverse effect on labor stability and the parties' labor-management relationship. In our view, weighing the policy against fragmentation more heavily in this case would frustrate these employees' particular and persistent desire for representation without advancing the purposes of PECBA.

In sum, after weighing together all the unit determination factors, including our administrative preferences, we conclude that a unit of the six nonsupervisory classifications in the IT department is an appropriate unit. The IT employees have a community of interest sufficiently distinct from the collective bargaining interests of the other administrative employees. We also give significant weight to their persistent desire to be represented even after the Union's attempt to organize all the unrepresented administrative support employees was unsuccessful, and to the history of collective bargaining in this workplace. *See, e.g., Douglas County*, CC-004-14 at 34, 26 PECBR at 391 (recognizing that the balance of factors weighed in favor of employee free choice); *City of Keizer*, RC-37-99 at 10, 18 PECBR at 485 ("Even though a wall-to-wall unit might be appropriate (and would generally be preferred), if that unit is rejected, application of the statutory factors may lead us to conclude that some smaller bargaining unit is also appropriate.").

For all the reasons explained above, a bargaining unit comprised of the petitioned-for classifications and the classification of Intelligent Transportation Systems Manager in the IT department is an appropriate unit.

ORDER

1. An appropriate bargaining unit is: Employees in the IT department in the following classifications: (1) Applications Administrator, (2) IT Systems Administrator, (3) Data Warehouse Manager, (4) IT Network Engineer, (5) IT Help Desk Technician, and (6) Intelligent Transportation Systems Manager.

2. A majority of eligible employees in the appropriate bargaining unit signed valid authorization cards requesting that ATU represent the unit. Accordingly, it is certified that

[8]Our conclusion in this case that a bargaining unit of nonsupervisory IT employees in the IT department is an appropriate unit does not necessarily mean that other departmental units would be appropriate.

AMALGAMATED TRANSIT UNION, DIVISION 757

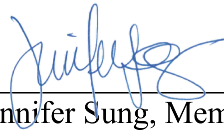
is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

> Employees in the IT department in the following classifications: (1) Applications Administrator, (2) IT Systems Administrator, (3) Data Warehouse Manager, (4) IT Network Engineer, (5) IT Help Desk Technician, and (6) Intelligent Transportation Systems Manager.

DATED: November 19, 2021.

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-014-17

(UNFAIR LABOR PRACTICE)

| | | |
|---|---|---|
| SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, OREGON PUBLIC EMPLOYEES UNION, | ) | |
| Complainant, | ) | |
| v. | ) | ORDER ON REMAND |
| UNIVERSITY OF OREGON, | ) | |
| Respondent. | ) | |

This matter is before the Board on remand from the Court of Appeals. *SEIU Local 503 v. Univ. of Or.*, 312 Or App 377, 494 P3d 993 (2021) (*SEIU Local 503*). The Service Employees International Union Local 503 (Union) claimed that the University of Oregon (University) violated the duty to bargain under ORS 243.672(1)(e) by declining to produce an unredacted version of a report without certain conditions. In an order issued December 4, 2018, this Board concluded that the University violated (1)(e), and the University appealed. The court concluded that the Board erred in its analysis and remanded the case for reconsideration. For the reasons explained below, after reconsidering this matter as directed by the court, we conclude that the University violated (1)(e).

Procedural and Factual Background

On April 28, 2017, the Union filed a complaint alleging that the University violated ORS 243.672(1)(e) by refusing to produce an unredacted version of a document titled "Resource Sharing Staff Interview Report" (Report). The findings of fact in our original order are undisputed, and we summarize them here only for ease of review. A Union steward received complaints by Union-represented employees about their treatment by a particular supervisor, and he discussed those concerns with a Human Resources (HR) manager. In response, the HR manager interviewed the Union-represented employees about their workplace, and he documented those interviews in the Report. The steward requested a copy of the Report. Eventually, the University produced a highly redacted version of the Report. The Union objected to the redactions. The University asserted a confidentiality interest, contending that the Report is a confidential "personal record" under the University's Faculty Records Policy. The University asked the supervisor whether he

would voluntarily consent to full disclosure of the Report to the Union, but the supervisor declined to consent without conditions, namely, a nondisclosure agreement (NDA) with a provision barring the Union steward from seeing the Report (but permitting substitution of a different steward). The parties attempted to negotiate an NDA, but the Union objected to provisions insisted on by the University, including the steward restriction and a liquidated damages provision, and the parties were unable to reach an agreement.

In response to the Union's unfair labor practice complaint, the University contended that it did not have a duty under the Public Employee Collective Bargaining Act (PECBA) to produce the Report because its content was not potentially or probably relevant to a contract administration matter. Further, the University contended that, even if the Report met the relevance standard, the University's response to the information request did not, under the totality of the circumstances, violate (1)(e). Because the University asserted that the redactions were justified by its confidentiality interest, the University bore the burden of establishing that its confidentiality interest was legitimate and substantial, and that it pursued a good-faith accommodation to reconcile the conflict.

The Board concluded that the Union met its burden to establish that the Report is potentially or probably relevant to a contract administration matter. *Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon*, Case No. UP-014-17 at 15 (2018) (*Original Order*). The University did not dispute that conclusion on appeal. *SEIU Local 503*, 312 Or App at 382. Consequently, we will not revisit that issue on remand.

The Board also concluded that, under the totality of the circumstances, the University's response to the information request violated (1)(e). *Original Order*, UP-014-17 at 21. When assessing the totality of circumstances, the Board was "guided by the four factors identified in [*Oregon School Employees Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81 at 5, 6 PECBR 5027, 5031 (1982)]: (1) the reason given for the request, (2) the ease or difficulty with which information could have been produced, (3) the type of information requested, and (4) the history of the parties' labor-management relations." *Original Order*, UP-014-17 at 15. When discussing the third *Colton* factor, the Board concluded that, because the University had a duty to produce the Report under PECBA, it fell within an exception under the Faculty Records Policy that permitted the University to disclose personal records when required to do so by law. Consequently, the Board concluded that the University had not established a legitimate and substantial confidentiality interest under the Faculty Records Policy, and that the University's conduct, under the totality of the circumstances, violated (1)(e). On appeal, the University contended that the Board's analysis of the University's confidentiality interest was erroneously circular, and the court agreed. *SEIU Local 503*, 312 Or App at 384-85. The court directed this Board, on remand, to "assess the third *Colton* factor in its own right—including determining whether [the University] established a legitimate and substantial confidentiality interest in the redacted information—without reference to [an] ultimate conclusion that the totality of the circumstances weighs in favor of disclosure under PECBA." *Id.* at 385.

On appeal, the University also contended that the Board improperly conflated the first *Colton* factor, "the reason given for the request," with the threshold test for relevance. Although the court agreed that *Colton* "requires" us to consider "the reason given for the request," the court clarified that this factor "includes but is not necessarily limited to the requesting party's explanation of the information's relevance." *Id.* at 385.

In our original order, we had also concluded that, "even if the University had established a legitimate and substantial confidentiality interest, the University's proposed accommodations do not represent the common-sense approach we have urged parties to use in resolving (1)(e) information request disputes." *Original Order*, UP-014-17 at 20 n 10. The court addressed this conclusion as an "alternative ruling," and directed us to reconsider it "with an accurate understanding of the University's confidentiality interest." *SEIU Local 503*, 312 Or App at 386.

While the University's appeal was pending, the University was obligated to comply with this Board's original order. To resolve the parties' remedy dispute, the University submitted an unredacted copy of the Report to an administrative law judge (ALJ) for *in camera* review. *See Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon*, Case No. UP-014-17 (2019) (*Order on In Camera Review*).

Opinion on Remand

With the court's instructions in mind, we reconsider whether the University's response to the Union's information request, under the totality of the circumstances, violated (1)(e).

It is well-settled that a public employer's obligation to collectively bargain in good faith under ORS 243.672(1)(e) includes the duty to provide an exclusive representative with requested information that has "some probable or potential relevance to a grievance or other contractual matter." *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98 at 7, 18 PECBR 64, 70 (1999). When analyzing (1)(e) claims, we "begin with the premise of full disclosure." *Id.* It is the requesting party's burden to establish that the requested information meets the relevance standard. As noted above, this Board previously concluded that the Union established that the redacted information in the Report has some probable or potential relevance to a grievance or other contractual matter, and the University no longer disputes that conclusion.

We turn to the question of whether the University's conduct—*i.e.*, the way in which the University responded to its duty to provide the Report to the Union—violated (1)(e). Even when there is a request for information of probable or potential relevance, the "extent to which a party must supply the information requested and the length of time a party may take to do so are dependent upon the totality of circumstances present in the case; just as good or bad faith bargaining at the negotiations table must be determined by consideration of all circumstances." *Colton*, C-124-81 at 5, 6 PECBR at 5031. We assess the totality of circumstances, guided by the four factors identified in *Colton*: (1) the reason given for the request, (2) the ease or difficulty with which information could have been produced, (3) the type of information requested, and (4) the history of the parties' labor-management relations. *Id*.

Additionally, when a party withholds information on the basis of confidentiality or conflicting legal obligations, "the withholding party must prove both a legitimate and substantial confidentiality interest, and that it pursued a good-faith accommodation to reconcile the conflict." *Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon*, Case No. UP-009-15 at 8, 26 PECBR 724, 731 (2016), *aff'd*, 291 Or App 109, 419 P3d 779, *rev den*, 363 Or 599 (2018). The Board "'balances a labor organization's need for information against any legitimate and substantial confidentiality interest established by the employer.' The party asserting confidentiality has the burden of proof." *Ashland Police Association v. City of Ashland*, Case No. UP-50-05 at 9, 21 PECBR 512, 520 (2006) (quoting *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98 at 8, 18 PECBR 64, 71 (1999)).

In this case, the University provided a heavily redacted copy of the Report, and when the Union objected, the University declined to produce an unredacted version. We consider whether the scope of the redaction was justified under the totality of the circumstances, guided by the *Colton* factors. The second and fourth *Colton* factors are not in dispute: the University could easily produce an unredacted copy of the Report, and the history of the parties' labor-management relations did not indicate improper "fishing expeditions," a pattern of numerous requests, or other factors that would weigh against the University's obligation to provide a response to the Union's request. *See Colton*, C-124-81 at 6, 6 PECBR at 5032.

The first *Colton* factor—the reason given for the information request—includes, but is not limited to, the Union's explanation of the Report's relevance. In this case, the Union steward first requested the Report in a meeting with the HR manager who wrote the Report, and the reason for the request was evident from the context of the request itself. Before that meeting, the steward had informed the HR manager that several employees alleged mistreatment and poor management by a specific supervisor. To assess those complaints and the workplace environment, the HR manager interviewed multiple employees and summarized their responses in the Report.[1] When the HR manager and steward met again, the HR manager described the Report, and noted that it identified problems with the supervisor's managerial style. In response, the steward asked the HR manager for a copy of the Report. The HR manager did not ask the steward why he was requesting a copy. The reason for the request was self-evident from its context: the Report is directly related to the steward's investigation of the employee complaints that prompted the Report. Moreover, when the University later asked the Union to explain why it requested the Report, the Union explained that it was investigating a possible violation of Article 19 of the parties' collective bargaining agreement, which relates to unlawful discrimination.

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[1]When the HR manager notified employees that he would be speaking with them, he sent them each an email that stated, in part, "I would like to meet with you to formally discuss the climate in Resource Sharing [RS]. I would like to hear from you, personally, about your perception of RS (challenges, stresses, opportunities, etc.). The information provided to me in this meeting will be aggregated with the feedback I receive from your peers and shared with Adriene and Mark. You will not be singled out or asked for a follow-up meeting with management based on feedback given to me in this meeting. This is a concerted effort by Library Administration to address growing concerns in Resource Sharing over issues of communication and interaction (whether by yourself or others) with management. I hope you will take me up on this offer because I see it as the first, important step towards improving the overall climate in RS." *Original Order*, UP-014-17 at 4.

The third *Colton* factor concerns the "type of information requested." In the Report, the HR manager formally summarized bargaining unit employees' responses to questions regarding "the climate" in their department and "growing concerns * * * over issues of communication and interaction" with their supervisor. The HR manager also made some recommendations about how to address what he learned from the interviews. The University gave a copy of the Report to the Union that redacted all bargaining unit employees' statements regarding the supervisor, but left unredacted their statements regarding bargaining unit employees. When the Union asked the University to describe the redacted information, the University represented that it is purely subjective, evaluative material about the supervisor, or recommendations for his professional development. However, the University admitted, for the first time at oral argument before this Board, that a portion of the redacted material is actually objective, factual information. Further, the record establishes that the majority of redacted material consists of summaries of bargaining unit employees' statements regarding their workplace complaints.[2]

The University contends that the redacted information is a confidential "personal record" under its Faculty Records Policy. The policy defines "personal record" as "all" "records containing information concerning an academic staff member," with only three exceptions: directory information, records of academic achievement, and salary information. The policy further provides that "personal records may not be released to any other person or agency without the faculty member's consent, unless upon receipt of a valid subpoena or other court order or process or as required by state or federal laws, rules, regulations, or orders."[3]

Because the Faculty Record Policy's definition of "personal record" is so broad—including *all* records that contain "information concerning an academic staff member," with only three, narrow exceptions—we agree that the Report qualifies as a confidential "personal record" under that policy, such that the University's confidentiality interest is legitimate with respect to that policy. However, the breadth of the definition of "personal record" means that the University's policy treats nearly *all* information concerning an academic staff member as "confidential,"

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[2]As the Board noted in the original order, it was difficult to determine the nature of the redacted information because the University did not submit an unredacted copy of the Report for *in camera* review during the evidentiary hearing. Although the University repeatedly asserted that the redacted information is purely subjective, evaluative information, testimony regarding the content of the Report and the Report's unredacted portions indicated that much of the redacted material consists of bargaining unit employees' statements about the supervisor. Additionally, as noted above, the University admitted at oral argument that a portion of the redacted material consists of objective, factual information. We also note that, when the University submitted the Report for *in camera* review during the remedy phase, the ALJ determined that most of the redacted material consists of "bargaining unit employees' statements expressing workplace complaints," and only a small portion consists of "confidential evaluative information made by the University or recommendations for the [supervisor's] professional development." *Order on In Camera Review*, UP-014-17 at 2.

[3]The University promulgated the Faculty Records Policy pursuant to ORS 352.226, which authorizes the University to adopt standards governing access to "personnel records," and provides that such standards "shall require that personnel records be subjected to restrictions on access unless upon a finding by the president of the public university that the public interest in maintaining individual rights to privacy in an adequate educational environment would not suffer by disclosure of such records."

regardless of how sensitive or private the information actually is.[4] Because the policy's definition of "personal record" is so broad, the fact that the Report qualifies as a "personal record" does not necessarily establish that the University's confidentiality interest in the Report is *substantial*.

To determine whether the University's confidentiality interest is substantial, we must consider the nature of the redacted information. The record indicates that the redacted material may be divided into two categories: 1) the HR manager's purely subjective, evaluative opinions and recommendations based on what he heard from employees, and 2) the summaries of the bargaining unit employees' statements about the workplace issues under investigation, and any other objective, factual information.

Generally, a party either has no duty to produce purely subjective, evaluative information, or is ultimately excused from producing it. *See, e.g.*, *Colton*, C-124-81 at 6-7, 6 PECBR at 5032-33. That is so for two reasons. Typically, a party's purely subjective, evaluative information has no potential or probable relevance to a contractual or bargaining matter, and there is no duty to produce information that does not meet that threshold. And, even when such information is relevant, we recognize that each party has a substantial and legitimate confidentiality interest in their own subjective "reasoning." *Id.* (recognizing there is a confidentiality interest in "an explanation of a party's reasoning," "versus a description of the action the party took and the reason expressed for the action"). Typically, a party's confidentiality interest in such internal, subjective information outweighs the other party's interest in disclosure. Such internal, subjective information includes an employer's purely subjective, evaluative statements about its own supervisor (and the union equivalent, such as a union's subjective, evaluative statements about a union steward). Accordingly, we agree that the University has a legitimate and substantial confidentiality interest in the HR manager's purely subjective, evaluative statements about the supervisor (including his recommendations for professional development).

However, we question whether the University has established that it has a substantial confidentiality interest in the summaries of the bargaining unit employees' statements about the workplace issues under investigation, or other objective, factual information. Generally, there is a duty to produce objective, factual information that meets the threshold relevance standard. *Id.* The University admitted that at least some of the redacted information consists of objective, factual information. And, the Report primarily summarizes bargaining unit employees' responses to an HR manager's questions during interviews conducted to assess workplace issues and employee concerns that were brought to the University's attention *by the Union*. Even if the employees expressed subjective opinions about their workplace during these interviews, the Report's summary of their statements is objective or factual information about what they expressed. Further, the employer's confidentiality interest in subjective statements made by bargaining unit employees is not akin to the employer's confidentiality interest in subjective, evaluative statements made by *the employer.*

The University contends that its confidentiality interest is substantial because it adopted the Faculty Records Policy pursuant to ORS 352.226, which directs public universities to adopt standards governing access to personnel records. The University asserts that ORS 352.226

[4]Further, the University imposes the same restriction on disclosure, regardless of how sensitive the information is.

implicitly establishes a faculty privacy right, and that the University has a substantial interest in protecting that right and "upholding the integrity" of the Faculty Records Policy. Although we recognize that the University has an interest in protecting faculty privacy and upholding the Faculty Records Policy, the University has defined as "confidential" nearly all information about a faculty member, without regard to whether the information is actually private or sensitive. Further, the University provides the same, high level of protection to all information about faculty, regardless of how private or sensitive the information actually is.[5]

The University contends that the extensive redactions of the Report were justified because the supervisor felt that some of the employees' statements about him are unflattering and lack proper context. Although we sympathize with the supervisor's desire to avoid disclosure of subordinates' negative or critical statements about his conduct in the workplace, a supervisor's conduct in the workplace is not a private matter. Rather, a supervisor's conduct in the workplace could violate a contract or other legal obligation, and therefore, is subject to examination. That is true under the circumstances of this case, where the supervisor conduct at issue is treatment of subordinate employees, and the party seeking to examine the supervisor's conduct is the employees' exclusive representative.

Nonetheless, for the purposes of this analysis, we assume that the University has met its burden to establish that its confidentiality interest is both legitimate and substantial. That, however, does not end our analysis. As the court noted, even if the University's confidentiality interest is legitimate and substantial, we must still consider "the totality of circumstances to determine whether the union's need for particular information outweighs the employer's confidentiality interest in the information, such that the employer must disclose, notwithstanding its confidentiality interest." *SEIU Local 503*, 312 Or App at 384.

We begin with the purely subjective, evaluative statements.[6] Because disclosure of the HR manager's purely subjective, evaluative statements would not serve the purpose of the Union's request (to investigate potential contract violations), on balance, we find that the University's legitimate and substantial confidentiality interest outweighs the Union's interest in disclosure.

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[5]We note that the University introduced no evidence at the evidentiary hearing in this matter to prove that the Report's redacted content is actually sensitive or private in nature, even though the University bore the burden of proving that its confidentiality interest was both legitimate and substantial. The University could have, for example, submitted an unredacted copy of the Report in the record for *in camera* review, in order to prove the factual basis for its defense, but it chose not to. The University did not submit an unredacted copy of the Report for *in camera* review until doing so was necessary to comply with this Board's order during the remedy phase. As noted above, that *in camera* review resulted in a finding contrary to the University's assertion—namely, the ALJ determined that most of the redacted material consists of "bargaining unit employees' statements expressing workplace complaints," and only a small portion consists of "confidential evaluative information made by the University or recommendations for the [supervisor's] professional development." *Order on In Camera Review*, UP-014-17 at 2.

[6]Because a party's purely subjective, evaluative statements typically do not meet the threshold relevance standard, we typically do not reach the question of whether the requesting party's interest in disclosure of such statements outweighs the withholding party's confidentiality interest. In this case, however, the Union established that the Report has probable or potential relevance to a contract administration matter, and the Report happens to include both subjective, evaluative statements and objective or factual information. Consequently, we must balance the parties' interests.

Although the other circumstances weigh in favor of disclosure, we conclude that the University's redaction of the purely subjective, evaluative statements was consistent with the duty to bargain in good faith.

However, the Union's interest in the summaries of the bargaining unit employees' statements, and any other objective, factual information in the Report, is much stronger. This Board has repeatedly held that witness statements and investigation reports must be disclosed when potentially relevant to a contractual matter, notwithstanding the employer's confidentiality interest. *See, e.g.*, *Portland State University Chapter of the American Association of University Professors v. Portland State University*, Case No. UP-36-05 at 18-19, 22 PECBR 302, 319-21 (2008) (report on investigation of bargaining unit employee's affirmative action complaint); *Beaverton Police Association v. City of Beaverton*, Case No. UP-60-03, 20 PECBR 924 (2005) (internal affairs investigation). Here, the disclosure of the bargaining unit employees' statements and the other factual information would serve the purpose of the Union's request—to investigate a potential grievance. A union files a grievance to enforce its contractual rights. Additionally, a union has a statutory duty of fair representation, which includes a duty to investigate potential grievances. *See, e.g.*, *Williams v. Amalgamated Transit Union, Division 757 and Tri-County Metropolitan Transportation District of Oregon*, Case No. FR-001-20 at 14 (2021).

The University contends that the Union's interest in the redacted information is weak because the redacted information is not *actually* related to age discrimination (which is only one of the potential grievances that the Union was investigating). The question of whether the redacted information actually relates to the Union's investigation is irrelevant to our analysis. When assessing the strength of the requesting party's interest in information, we must consider the information's *potential* relevance to a grievance or contract administration matter, *not* its *actual* relevance, because that is what a requesting party must do when deciding whether to pursue an information request. For example, in this case, based on the information that was available to the Union (*i.e.*, the complaints that prompted the HR manager to interview the employees and the HR manager's description of the Report), the Union reasonably concluded that the Report's content is potentially relevant to its investigation of a potential grievance. But, the Union could not assess whether the Report's content is *actually* relevant to its investigation unless and until the University provided the Union with an unredacted copy of the Report. Although the University asserts that the redacted information is irrelevant to the Union's investigation, under PECBA, the Union is entitled to review the information and make its own assessment. *Portland State University*, UP-36-05 at 18, 22 PECBR at 319; *Laborers' Local 483 v. City of Portland*, Case No. UP-15-05 at 14, 21 PECBR 891, 904 (2007).

Further, even assuming that the redacted information is not actually relevant to any potential grievance, that would not mean that the Union's interest in the redacted information is weak. A union is entitled to potentially relevant information whether that information would tend to show that a potential grievance has merit, or the opposite. Indeed, a union has a strong interest in timely receiving information that shows there has *not* been a contractual violation, so that the union does not waste resources investigating or pursuing meritless claims. It is common for a union to decide, based on information provided by the employer, that it should not pursue a potential grievance—and both public employers and unions benefit from the efficient resolution of potential disputes. In this case, if the Report showed that the employees, when asked to provide information about their workplace complaints, provided no information that is relevant to a potential grievance

(as the University asserts), then the Report could provide the Union with an objective basis for deciding that it need not investigate the grievance further. However, we reiterate that, under PECBA, the Union is entitled under to make its own assessment of the Report's content.

We also find that the Union has an especially strong interest in the Report under the particular circumstances of this case. The University conducted the employee interviews summarized in the Report in response to employee complaints that were reported *by the Union*. Considering the Union's role in prompting the Report, the University's interest in withholding the Report *from the Union* is relatively weak.

The University bears the burden of proving that its confidentiality interest in the redacted information outweighs the Union's interests under the circumstances. The University did not meet that burden here with respect to the employee statement summaries and any other objective, factual information in the Report. Because the Union's interest in that redacted information outweighs the University's confidentiality interest, the University was required by PECBA to disclose those portions of the Report to the Union. Consequently, the University's overbroad redaction of the Report violated (1)(e).

We turn to the alternative basis for our conclusion that the University violated (1)(e). As noted above, when a party withholds information on the basis of confidentiality or conflicting legal obligations, the withholding party must prove both a legitimate and substantial confidentiality interest, and that it pursued a good-faith accommodation to reconcile the conflict. For the reasons discussed below, we find that the University did not pursue a good-faith accommodation to reconcile the conflict between the parties' interests.

First, the University misrepresented the nature of the redacted information when communicating with the Union. Specifically, when the Union asked the University to describe the redacted content, the University represented that it is "[e]valuative information related to [the supervisor's] communication style/skills, work habits and abilities, and actions as a supervisor" and "[r]ecommendations for [the supervisor's] professional development." And, when the Union questioned whether the redacted information also included a summary of interviews with Union-represented employees and "factual information," the University did not acknowledge that it redacted factual information, and instead maintained that it redacted only purely subjective, evaluative material regarding the supervisor. However, the University acknowledged for the first time at oral argument that it had redacted objective, factual information. Further, the ALJ confirmed, after conducting an *in camera* review of the Report, that the majority of redacted material consists of summaries of the interviews with Union-represented employees. Only a small portion of the redacted material consists of the HR manager's purely subjective, evaluative statements and professional development recommendations. The University does not dispute any of these facts, which establish that the University's description of the redactions—at best—lacked the accuracy and transparency that is necessary for parties to fulfill their PECBA bargaining obligations. That conduct was inconsistent with the University's duty to bargain in good faith, and is, in itself, a sufficient basis for finding that the University failed to pursue a good-faith accommodation.

Second, the University's proposed accommodations do not represent the common-sense approach we have urged parties to use in resolving (1)(e) information request disputes. For example, the University initially proposed a nondisclosure agreement that required the Union to pay $10,000 in liquidated damages upon a breach, plus attorney fees and costs. The University also initially proposed that only the Union's attorney be permitted to access the Report, and only by an in-person review at the University's offices in Eugene. The University offers no specific explanation as to how the Report's contents warranted such draconian conditions, even as a starting proposal. The University relies solely on its interest in maintaining the confidentiality of faculty records generally, which does not, under the circumstances presented, justify its treatment of the Report as if it involved private health information, private personal information, valuable research information, or other comparably sensitive information.

Although the University later reduced its proposed liquidated damages amount, it continued to insist that the Union either agree to a liquidated damages provision, or a provision stating that a breach of the NDA is an unfair labor practice and will cause the University "irreparable harm," and authorizing this Board to "fashion a remedy" and "award representation costs." The University's insistence on such conditions was not reasonable under the circumstances. In particular, the University's proposals failed to account for the fact that the Union is the exclusive representative of its employees, and that the University and Union have a longstanding contractual relationship that is regulated by PECBA.[7] Rather, the University made NDA proposals as if it were engaged in complex civil litigation against a party who has no ongoing relationship with the University.

Additionally, the University insisted on prohibiting the Union steward—a University employee who represented the employees at issue and had requested the Report—from viewing the Report. Under PECBA, public employees have a statutory right to act as a steward, and a public employer may not interfere with an employee's exercise of protected rights. *Clackamas Cty. Employees' Ass'n v. Clackamas Cty.*, 243 Or App 34, 40, 259 P3d 932 (2011).[8]

The University asserts that its NDA proposals merely reflected the conditions that the supervisor required for his consent to the Report's disclosure and, as such, were reasonable. That argument fails, for several reasons. First, the University's belief that the supervisor could dictate the conditions placed on disclosure arose from the University's erroneous conclusion that the Faculty Records Policy conclusively prohibited disclosure of the Report without his consent. Because the University was required by PECBA to disclose most of the Report to the Union, the

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[7]As the Union correctly noted, PECBA expressly provides that it is an unfair labor practice for a labor organization to "[v]iolate the provisions of any written contract with respect to employment relations." ORS 243.672(2)(d). PECBA also authorizes this Board to "[t]ake such affirmative action * * * as necessary to effectuate the purposes [of PECBA]," ORS 243.676(2)(c), and award representation costs to the prevailing party, ORS 243.676(2)(d).

[8]Additionally, unions have the sole prerogative to determine which employees will participate in bargaining or other representational activities. *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union. Division 757 and Amalgamated Transit Union. Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case Nos. UP-035/036-20 at 62 n 32 (2021). And, as a general rule, an employer may not deny employees the union representative of their choice. *See, e.g.*, *Oregon Public Employees Union v. Jefferson County*, Case No. UP-20-99, 18 PECBR 310 (1999).

University was permitted to disclose most of the Report to the Union without the supervisor's consent pursuant to Section (E)(3) of the Faculty Records Policy. Second, even assuming the University needed the supervisor's consent, there is no evidence that the supervisor insisted that the NDA include provisions that would make the Union liable for liquidated damages and attorney fees. Third, even if the University needed the supervisor's consent and the supervisor had requested all of the conditions at issue, that would not make it lawful for the University to insist on conditions that would interfere with the steward's exercise of protected rights or be inconsistent with the University's statutory duty to bargain in good faith with the Union.

The University also argues that it was excused from providing the Report to the Union in response to its information request because the Union could have obtained the Report through a subpoena instead. This Board has previously rejected that argument. *Klamath Falls Education Association/OEA/NEA v. Klamath Falls City Schools*, Case No. UP-27-07 at 26, 23 PECBR 257, 282 (2009). As we explained in *Klamath Falls*,

> "The right of a labor organization or employer to enforce an information request before this Board is separate and distinct from the right of parties in a pending unfair labor practice proceeding to seek and enforce a discovery request. The duty of the parties to share information allows bargaining and contract administration to proceed in an efficient and timely manner. These goals would be undermined if a party had to file an unfair labor practice complaint and obtain a subpoena whenever it needed information."

*Id.* (citing *Oregon School Employees Association v. Salem-Keizer School District 24J*, Case No. UP-40-86 at 7-8, 11 PECBR 659, 665-66 (1989)).

In sum, considering the totality of the circumstances, the University violated (1)(e) by redacting, and thereby withholding from the Union, objective, factual information, including statements by bargaining unit employees concerning workplace complaints. Additionally, the University failed to establish that it pursued a good-faith accommodation to reconcile the conflict between the parties' interests. The University's communications with the Union regarding the nature of the redacted material were inconsistent with its duty to bargain in good faith. And, the University's proposals and approach when bargaining over the NDA were not aimed at a reasonable balance between the Union's need for the information and the University's interest in preserving the confidentiality of the Report, or faculty records generally. For each of these reasons, we conclude that the University's response to the Union's information request violated ORS 243.672(1)(e). Consequently, we order the University to cease and desist from that unlawful conduct. Because the University complied with our original order pending appeal, we see no other remedies that are required to effectuate the purposes of PECBA.

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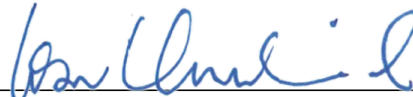
ORDER

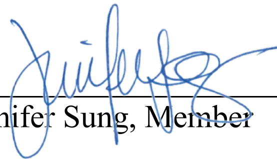
The University shall cease and desist from violating ORS 243.672(1)(e) in responding to information requests from the Union.

DATED: November 23, 2021.

Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-034-20

(UNFAIR LABOR PRACTICE)

| MW,<br><br>Complainant,<br><br>v.<br><br>AMALGAMATED TRANSIT UNION,<br>DIVISION 757,<br>Respondent. | RULINGS,<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND ORDER |
|---|---|

On November 12, 2021, this Board heard oral argument on Complainant's objections to a July 22, 2021, recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew, after a January 21, 2021, hearing that was held via videoconference. The record closed on March 5, 2021, following receipt of the parties' post-hearing briefs.

Rebekah Millard of the Freedom Foundation, Salem, Oregon, represented Complainant.

Krista Cordova, Attorney at Law, Amalgamated Transit Union, Division 757, Portland, Oregon, represented Respondent.

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On October 27, 2020, Complainant MW filed an unfair labor practice complaint against the Amalgamated Transit Union, Division 757 (ATU or Union) regarding alleged retaliation against her for cancelling her ATU membership. The complaint alleged that Union officials unlawfully targeted, harassed, and discriminated against MW because of her decision to resign her union membership by denying her access to certain ATU group text messages; calling her a "freeloader"; and agreeing to temporarily modify shift sign-up procedures in a manner that negatively impacted her. On January 5, 2021, ATU filed a timely answer.

The issue is whether Complainant has established that ATU engaged in the alleged conduct and, if so, whether that conduct violated ORS 243.672(2)(a) and (c).

For the reasons set forth below, we conclude that ATU officials did not unlawfully target, harass and discriminate against Complainant MW because of her decision to resign her union membership and did not violate ORS 243.672(2)(a) and (c).

## RULINGS

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

## FINDINGS OF FACT

Parties

1. MW is a public employee as defined by ORS 243.650(19). She is employed by the Tri-County Metropolitan Transportation District of Oregon (TriMet).

2. ATU is a labor organization as defined in ORS 243.650(13). It represents approximately 5,000 transportation workers in Oregon and Washington. ATU is the exclusive representative of a bargaining unit of certain TriMet employees, including MW.

3. ATU and TriMet are parties to a collective bargaining agreement defining the terms and conditions of employment for the represented employees.

4. MW began employment with TriMet in 2011. She became a rail operator in 2014 and held that position through the time of hearing. TriMet rail operators exclusively operate TriMet's light rail trains.

5. MW was a regular dues-paying member of ATU until March of 2020.

Shift sign-ups

6. A "sign-up" is a process during which TriMet employees in a particular job classification, such as rail operator, sign up in order of seniority for particular shifts to work.[1] Lower seniority generally results in less desirable shifts to choose from. Sign-ups are usually done for a term of 12 to 13 weeks. However, circumstances sometimes require sign-ups to be held for shorter periods of time. The "Sign-up Team," made up of one TriMet manager and several union officials, makes decisions about the details of sign-ups and calls the employees for their turn to actually sign up for the available shifts the employees choose. During the relevant time period, the sign-up team included Anthony Forrester, the Union Representative for TriMet rail operators and the ATU Executive Board Officer for Rail Transportation, and Mike Arronson, TriMet's Chief Station Agent at Powell Garage and Chief Sign-up Agent.

7. One type of shift is called "Vacation Relief." These are shifts available for a short term because the employees normally working them are scheduled to be on a period of leave. Because some of the employees taking leave are high-seniority employees, their vacations tend to make some of the most desirable shifts in the classification available for Vacation Relief.

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[1]The operators who testified describe a sign-up as the process by which they pick or bid for "work," and "work" refers to a combination of schedule and route for a particular time period. We use the term "shifts" instead of "work" when discussing sign-ups, to avoid confusion with other uses of the term "work" in this order.

8. MW, as a seven-year TriMet rail operator, was not in the top tier of rail operators with regard to seniority, and the regular shifts she was able to select were less desirable. She frequently signed up for Vacation Relief shifts because she liked the variation in the work and the more desirable shifts.

MW's withdrawal from ATU

9. In March of 2020, Complainant withdrew her membership from ATU.

10. Forrester's duties include grievance handling, representing union members in investigatory meetings, and participating in scheduling work through sign-ups as a member of the sign-up team.

11. After receiving notice of MW's withdrawal from ATU, Union staff informed Forrester, because he was MW's Union representative. Forrester approached MW and asked why she left the Union. She told him that she was unhappy with the Union's representation, and the two did not speak about it again.

MW removed from ATU text message discussion

12. As part of the sign-up team, Forrester participated in assigning Vacation Relief to various employees, including MW.

13. In early May of 2020, amid disruption caused by the COVID-19 pandemic, there were delays in the previously scheduled sign-up affecting TriMet rail operators. The alert that the sign-up was postponed was distributed through an official Operator Notice on April 28, 2020. ATU member NC sent Forrester a group text inquiring about these delays. Four additional people were included in the group text. Forrester did not recognize two of the group text's phone numbers and asked who the numbers belonged to. ATU member AC responded that the numbers belonged to MW and another individual, and offered to remove the individuals from the text exchange. Forrester requested that MW be removed. Forrester credibly testified that he wanted MW removed because he intended the text conversation to follow to address an internal union matter, namely, how the union wanted to address the delay, including a potential disagreement among union officials–not generally pertinent information about the delay.

14. The relevant portion of the text conversation stated,

> "AC: . . . I just know we're all on the same page as far as not wanting to go to the board as of 5-31.
>
> "Forrester: Nope. That is fine. I have another number for [MW]. She is a non member (a free loader). I would like her removed from this conversation.
>
> "AC: Ok.

"Forrester: The other [person on the group chat] is fine if she is a member."

15. The group text was not a sign-up, and did not include all employees who were also affected by the sign-up delay, including some union-member rail operators. There is no evidence that any participant in the group text received any advantage in the sign-up process as a result of their inclusion in the group text.

16. After the group text conversation, Forrester received additional information regarding the delayed sign-up. On May 6, 2020, Forrester sent that information to MW at the most recent phone number he had for her, and asked AC to ensure that MW received the information.

MW referred to as freeloader

17. As quoted above, during the early May 2020 group text exchange regarding the sign-up delay, Forrester referred to MW as a "free loader."

18. MW learned of this characterization of her status shortly thereafter. She was offended. She also believes the term was inappropriately used regarding her situation, because she had been a dues-paying member of ATU for many years before she ended her ATU membership in March of 2020.

19. Later in the text exchange, another Union member criticized Forrester's use of the term "free loader" to refer to MW. In response, Forrester stated,

> "For the record. I do represent [MW] equally as I am required to by law. It is not because of her race, it is because she decided to be a non-member. She is resting on the backs of all of us who are paying members. She is resting on the backs of all of us who serve all, no matter what race, sex, sexual orientation, religion. She is the one who made the decision to be a non-member. Should she decide to do the right thing and rejoin, my tone would change."

20. In a subsequent text exchange between Forrester and a Union member, Forrester asked the Union member to relay information to MW. The Union member asked whether Forrester preferred to deal with MW directly or "to go through me," and wrote, "I know everyone is not on the best terms right now." In response, Forrester wrote, "I'm not sure when it went south with her. Well when I called her a freeloader. But I don't know before that."

Steel Bridge closure Vacation Relief and sign up

21. In June of 2020, TriMet rail runs were to be disrupted by a construction project on the Steel Bridge, which carries TriMet light rail tracks. The construction project was divided into four phases. Phases 3 and 4 were to take place during the last week of the project, during which the bridge would be closed to light rail traffic. The bridge closure required TriMet to make temporary changes to every light rail route, and by extension, the operators' shifts. TriMet held a special sign-up for the one-week bridge closure, so that operators could select from the shifts, as

modified to accommodate the construction. The sign-up team was responsible for determining how to conduct the sign-up to accommodate the bridge construction.

22. The Sign-up Team's solution for this one-week closure was a simple one: put all the rail operators already scheduled to be on vacation during the week of the bridge closure into Vacation Relief status. Putting the vacationing operators into Vacation-Relief status would effectively free up more shifts for the non-vacationing operators to select during the special sign-up, in order of seniority. Under the Sign-up Team's plan for the one-week bridge closure (putting all of the vacationing operators on Vacation Relief status), all of the non-vacationing operators would pick from all of the available shifts in order of seniority. This Sign-up Team considered this plan to be more efficient, because the vacationing operators would not have to go through the motions of picking shifts that would occur during their vacations, and the Sign-up Team would not have to conduct a separate Vacation Relief sign-up to find operators to cover the vacationing operators' shifts. Although MW was not a high-seniority rail operator, MW was typically one of the most senior employees picking shifts during the Vacation Relief sign-up, and therefore usually had the opportunity to pick the most desirable Vacation Relief shifts. Because the bridge-closure plan effectively eliminated the Vacation Relief sign-up, and any operators with more seniority than MW would have the opportunity to pick shifts before MW during the special sign-up, the plan potentially affected MW's ability to pick her preferred shift.[2] The effective elimination of the Vacation Relief sign-up for the week impacted all lower-seniority employees who typically select Vacation Relief shifts in the same manner.[3]

23. Arronson, the Chief Sign-Up Agent, was the one who suggested this plan. Arronson had no knowledge of any employees' union membership status. Likewise, the sign-up team did not discuss MW or anyone's membership status when deciding to conduct the sign-up in this

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[2] If the Sign-up Team had not placed the vacationing operators on Vacation Relief status during the one-week bridge closure, the vacationing operators would have been required to sign up for shifts that they did not actually intend to work, and then those shifts would have been available for operators who chose Vacation Relief status to pick during the Vacation Relief sign-up. In that scenario, however, the vacationing operators could have picked shifts that MW would have considered undesirable. Or, any of the more senior, non-vacationing operators could have chosen to be on Vacation Relief status during the one-week bridge closure, and then, during the Vacation Relief sign-up, those more senior operators could have picked the more desirable Vacation Relief shifts before MW.

[3] MW argues that the testimony of the shift team members was confusing and somewhat contradictory, and that they were therefore hiding inappropriate conduct. Looking at their testimony as a whole, we conclude that the shift-team members' memories were reasonably affected by the situation they faced at the time of their decision: the disruptions cause by COVID-19, multiple construction closures, and the fact that decisions regarding a one-week bridge closure were not considered important enough to merit the attention and documentation, and even the memory, that other matters and longer closures did. In our view, the lapses in memory did not reflect an attempt to conceal their decisions or the course of events. Finally, we do not see a basis for inferring that the shift team intended to disadvantage MW, because the shift team's decision affected other employees in a manner similar to MW, without actually harming MW at all.

manner. Complainant subsequently chose to sign for Vacation Relief or its equivalent for that week.[4]

24. MW and Forrester ("Man 1") had an exchange over the TriMet radio about the situation,[5] as follows:

> "MAN 1: [MW], is that you on the radio? Did you hear me, [MW]?
> MW: Well, I heard part of it, but maybe I'll just do vacation relief and grieve that.
> MAN 1: There's nothing to grieve, [MW]. It's -- so (indiscernible) vacation relief, both the first phases one and two as well as phases three and four.
> MW: No, but I heard people picking their work and you told them, oh, I'll put you on vacation relief, since you're on vacation then you won't have to pick any work, which messed it up for us to (indiscernible) vacation relief because now we don't have anything to pick. So I don't understand now how if I pick vacation relief, I have no choices at all, when there were pay slots.
> MAN 1: Negative. So, you're choosing vacation relief for the first phases one and two. There's going to be plenty to choose from. For phases three and four, which is only one week, you'll -- there's going to be -- most of the people on that took vacation are doing vacation relief because they're not taking work. So you can choose where you're willing to work for that week. (indiscernible) vacation relief, there's for those three weeks, there's actually some good choices left because for those first three weeks, in Mike's opinion and my opinion.
> MW: Okay. So you went dead for a long period of time, so I don't really know what you said, but I was thinking if I take Friday, Saturday off, what would my choices be?
> MAN 1: Friday, Saturday off, but really you would be looking at a split for the weekday, and there's actually some good work to choose from on Sunday.
> MW: I'm just gonna do vacation relief on both.
> MAN 1: Okay. So if you sign vac – so I can get you on vacation relief for the first half of the project, for those first three weeks. For the second, for the phases three

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[4]MW, like any other operator, had the option to pick from all of the available shifts during the special sign-up, in seniority order. MW opted, however, to put herself in Vacation Relief status. Although the Sign-up Team's plan (putting the vacationing operators on Vacation Relief status for the one-week bridge closure), in theory, could have completely eliminated the need for Vacation Relief operators to pick Vacation Relief shifts, at least two shifts ended up being available as Vacation Relief shifts. As a result, operators who chose to be on Vacation Relief status but were *not* actually on vacation, including MW, were able to pick from those Vacation Relief shifts. Those Vacation Relief shifts included the shift that the most senior rail operator, RW, had picked (RW had picked his shift before the Sign-up Team was able to implement their plan). MW objected to the placement of vacationing operators on Vacation Relief status during the one-week bridge closure because that technically caused her place on the Vacation Relief seniority list to move down. However, the Sign-up Team did not expect any of the vacationing operators to actually pick any Vacation Relief shifts during the sign-up, and none of them did so. As a result, even though MW was seventh on the Vacation Relief seniority list for the week of the bridge closure, she was actually the first operator on Vacation Relief status to pick Vacation Relief shifts for that week.

[5]Conversations over the TriMet radio are recorded.

and four, you'll be falling to [RW]'s work. Other than that, there's like, no work to choose from.
MW: I would fall under whose work? Why? How many people are on vacation relief?
MAN 1: So for the last week of the project, except for [RW] who put in a choice, we put -- if you're on vacation, we put them on vacation relief. We didn't do that with him.
MW: So that was a choice you guys made, was to put them on vacation relief. Because I didn't hear anyone say they wanted vacation relief. So that's a choice you guys made, is to put them on vacation relief?
MAN 1: People on vacation during that single week, which is that phases three and four, so they were put on vacation relief. So you can either choose vacation relief, but I'm telling you, it's going to be [RW]'s work or --"

## CONCLUSIONS OF LAW

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

2. Union officials did not unlawfully target, harass and discriminate against MW because of her decision to resign her union membership and did not violate ORS 243.672(2)(a) and (c). ATU's actions also did not interfere with, restrain, or coerce MW in the exercise of any right protected by the Public Employee Collective Bargaining Act (PECBA).[6]

### Standards for Decision

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 interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed by PECBA, ORS 243.650 to 243.806, 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. This section is the labor organization analogue to ORS 243.672(1)(a), which prohibits like conduct by public employers. *Jefferson County v. Oregon Public Employees Union*, Case No. UP-16-99, 18 PECBR 285 (1999).

Typically, cases alleging a subsection 2(a) violation involve related claims against the labor organization and the public employer: in such cases, the public employee alleges that the public employer violated the collective bargaining agreement, but that the contract violation was not addressed because the labor organization breached its duty of fair representation. If the complainant prevails on the duty of fair representation claim, then they may pursue their claim against the public employer for breach of the collective bargaining agreement. *See*, *e.g.*, *Chan v. Leach and Stubblefield, Clackamas Community College, McKeever and Brown,*

[6]ORS 243.672(2)(c) makes it an unfair labor practice for a public employee union to "[r]efuse or fail to comply with any provision of" the PECBA. Complainant does not allege that the Union violated any other section of the PECBA except subsection 2(a); therefore her claims under subsection 2(c) add nothing to her Complaint, and we dismiss this claim as redundant.

*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, does not allege that ATU breached the duty of fair representation (or that TriMet violated the collective bargaining agreement). Rather, MW alleges that an ATU officer targeted, harassed, and discriminated against her because she chose to end her ATU membership, and that such conduct restrained, interfered with, or coerced MW's exercise of her right to not associate with ATU in violation of (2)(a).

Because this Board has decided very few (2)(a) cases that do not involve duty of fair representation claims, we begin by looking at cases involving ORS 243.672(1)(a), the public employer analogue to ORS 243.672(2)(a). The statutory text of both (1)(a) and (2)(a) has two distinct prongs. The first prong prohibits restraint, interference, or coercion "because of" a public employee's exercise of protected rights. The second prong prohibits actions that restrain, interfere with, or coerce a public employee "in the exercise" of their protected rights. In (1)(a) cases, we have explained that the "because of" prong is directed at the employer's motives or reasons for the disputed action. To establish a "because of" violation, 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. 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). Rather, "a complainant "need only show that the employer was motivated *by the protected right* to take the disputed action." *Id.* (emphasis in original, quotation marks and citation omitted).

When analyzing "because of" claims under ORS 243.672(1)(a), we typically examine the record as a whole to determine what motivated the employer to act. *Portland Assn. Teachers*, 171 Or App at 626. We then decide whether the reasons were lawful or unlawful. *Portland Assn. Teachers*, 171 Or App at 639. Generally speaking, if all of the employer's reasons are lawful, the alleged "because of" claim is dismissed. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03 at 9, 20 PECBR 733, 741 (2004) (addressing ORS 243.672(1)(a)). 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 (2007), *aff'd,* 234 Or App 553 (2010) (addressing ORS 243.672(1)(a)).

To determine whether a public employer has violated the "in" 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 its 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. 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) (addressing ORS 243.672(1)(a)). Put simply, our test for this prong is whether a reasonable person would be chilled from exercising PECBA rights in light of 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) (addressing ORS 243.672(1)(a)).

For an "in" claim under ORS 243.672(1)(a), neither 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. Although it generally has no impact on the resolution of a particular case, we have also recognized that a derivative "in" violation naturally occurs when a party 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 Employes 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) (cases addressing ORS 243.672(1)(a)).

As a general matter, we agree that the framework for analyzing non-duty-of-fair-representation claims against a labor organization under ORS 243.672(2)(a) is analogous to the framework for claims against a public employer under ORS 243.672(1)(a). Specifically, the statute proscribes two actions by a labor organization: (1) restraint, interference, or coercion "because of" the exercise of protected rights; and (2) restrain, interference, or coercion "in" the exercise of protected rights.

Similarly, we agree that, for a "because of" claim, we examine the record as a whole to determine what motivated the union to act. *Portland Assn. Teachers*, 171 Or App at 626. We then decide whether the reasons were lawful or unlawful. *Portland Assn. Teachers*, 171 Or App at 639. Generally speaking, if all the union's actions are lawful, we dismiss the alleged "because of" claim. *Umatilla County*, UP-18-03 at 20 PECBR at 741. Likewise, for an "in" claim under ORS 243.672(2)(a), we look to whether the union's actions, when viewed objectively under the totality of the circumstances, have the natural and probable effect of deterring employees from engaging in activity protected by the PECBA. *Portland Assn. Teachers*, 171 Or App at 623.

However, for both prongs, we note that a labor organization is not directly analogous to a public employer in several respects. To begin, a labor organization does not directly control a public employee's terms and conditions of employment, but rather is the exclusive representative of employees in negotiating those terms and conditions of employment. Additionally, a labor organization cannot compel a public employee to be a member of the union, and, after *Janus v. AFSCME, Council 31*, __ US _ , 138 S Ct 2448 (2018), a labor organization cannot compel a public employee to pay their fair share of representation costs unless the employee affirmatively consents. Given that, a labor organization, under PECBA, has a legitimate interest in advocating for and attempting to persuade employees to become union members. As part of that interest, a labor organization may lawfully identify legitimate consequences and downsides to an employee exercising their right not to join the union as a member. Additionally, under the *Janus* decision, a labor organization may lawfully take into account an employee's union membership status when making certain decisions, such as requiring a non-member to pay for arbitrations or other services. *Id.* at 2468-69 ("Individual nonmembers could be required to pay for [grievance representation] service or could be denied union representation altogether."). *See also id.* at 2469 n 6 ("Some States have laws providing that, if an employee with a religious objection to paying an agency fee requests the union to use the grievance procedure or arbitration procedure on the employee's behalf, the union is authorized to charge the employee for the reasonable cost of using such procedure." (Quotation marks and citations omitted.)).

We further note that ORS 243.672(2)(a) proscribes conduct by both a labor organization and a public employee. Both labor organizations and public employees are entitled to protections under the First Amendment of the Constitution of the United States. *See id.* at 2470-76. Therefore, any finding that statements made by public employees or officials of a labor organization violate PECBA must be mindful of the First Amendment protections enjoyed by both public employees and labor organizations.

With that constitutional limitation in mind, we turn to determining whether complainant has met the burden of proving that ATU's actions violated ORS 243.672(2)(a).

<u>Analysis</u>

MW contends that Forrester violated subsection (2)(a) by taking the following actions: (1) excluding MW from a group text exchange; (2) responding to the shifts affected by a one-week closure of the Steel Bridge in a manner that potentially interfered with MW's shift preferences; and, (3) referring to her as a "freeloader" in a group text exchange with some union members. MW characterizes these actions as reprisals against MW for choosing to no longer be a member of ATU.

<u>Exclusion from group text exchange</u>

The record is clear that an ATU officer, Forrester, excluded MW from a group text conversation because MW was no longer a member of ATU. MW argues that exclusion from this conversation was particularly damaging to her because the subject of the conversation related to a delay in a previously scheduled sign-up regarding TriMet rail operators.

Although the conversation *related* to the sign-up delay, Forrester's credible testimony establishes that the text conversation concerned an internal union matter, namely, how the union wanted to address the delay, including a potential disagreement among union officials–not generally pertinent information about the delay. Because the conversation concerned *internal* union decision-making and strategy, Forrester explained that he was uncomfortable with a non-member such as MW participating in the conversation. MW does not dispute that labor organizations may *lawfully* exclude non-members from participating in internal union matters, including, for example, membership meetings, officer elections, and contract ratification votes. Thus, although Forrester excluded MW from an internal union discussion *because* she was a non-member, that exclusion did not unlawfully restrain, coerce, or interfere with MW's PECBA-protected right not to be an ATU member. Rather, that exclusion reflects the legal reality that non-members are not entitled to the same level of access, involvement, and benefits available to public employees who choose to be union members. Simply put, excluding a non-member from internal union deliberations is not a violation of ORS 243.672(2)(a), and we do not understand MW to argue otherwise.

MW concedes that, as a non-member, she was not entitled to participate in an internal union conversation about how ATU intended to respond to the delayed sign-up. MW asserts, however, that because the conversation concerned sign-ups, which affected her as an employee, she was

entitled to participate in the conversation as a represented employee. We disagree. MW does not identify any circumstance that distinguishes the group text from any other internal union discussion, such as a contract ratification vote, that relates to employees' working conditions. Additionally, MW does not allege, and the record does not show, that she suffered any employment consequences as a result of being excluded from the group text. To the contrary, the record establishes that MW had access to the pertinent information about the sign-up by other means. Specifically, the pertinent information about the sign-up delay had been distributed to all operators at least a week before the group text discussion.[7] Moreover, when Forrester received additional information about the delayed sign-up, he relayed that information to MW directly by text and through another Union official. Because Forrester was exercising ATU's legal right to exclude non-members from internal union matters when he excluded MW from the group text, that act did not violate the "because of" prong of ORS 243.672(2)(a).

We turn to the question of whether Forrester's exclusion of MW from the group text objectively interfered with employees "in" the exercise of protected rights. As discussed above, there is no evidence that Forrester did anything other than exercise ATU's legal right to exclude non-members from an internal union discussion. Given that labor organizations have the legal right to exclude non-members from internal union discussions, any effect that such exclusion, in and by itself, has on a public employee's exercise of the right to decline or withdraw from union membership is *lawful*. In other words, to the extent that the exclusion of non-members from internal union discussions creates an incentive for employees to become union members (or creates a disincentive for employees to withdraw from union membership), that effect is lawful—not a basis for a (2)(a) claim. Thus, the question in this case is whether there are particular circumstances that would cause Forrester's otherwise lawful exclusion of MW from the group text to naturally and probably have a chilling effect that is apart from, or beyond, the lawful effect. Viewing Forrester's conduct objectively under the totality of the circumstances, we see no basis for concluding that it would have any *unlawful* chilling effect on a reasonable employee. Indeed, the record establishes that Forrester affirmatively ensured that MW received pertinent work information by other means—that conduct shows that Forrester sought to ensure that employees had pertinent information without regard to membership status, and mitigates any chilling effect caused by his decision to exclude nonmembers from the internal union discussion. Accordingly, we conclude that MW has not established that her exclusion from an internal union text conversation violated either prong of ORS 243.672(2)(a).

<u>Response to Steel Bridge closure</u>

As described in the Findings of Fact, a one-week closure of the Steel Bridge and its light rail tracks required TriMet to temporarily modify routes and schedules, which in turn, changed the shifts that rail operators normally worked. When it became apparent that this bridge closure would occur, the Sign-up Team (composed of both TriMet and Union officials, including Forrester) had to conduct a highly unusual, one-week sign-up in order to allow rail operators to pick from the modified shifts. The solution that the Sign-up Team arrived at was a simple one: put all the rail operators who were scheduled to be on vacation during the week of the bridge closure

[7] We also note that the group text excluded some union-member rail operators, which weighs against an inference of unlawful discrimination on the basis of union membership status.

into Vacation Relief status which would essentially leave all of the shifts available for all of the non-vacationing operators to pick from during the special sign-up, and largely eliminate the need to conduct a separate Vacation Relief sign-up. During the special sign-up, the non-vacationing rail operators would pick shifts in order of seniority, just like Vacation Relief.

We begin with MW's claim that, by this action, ATU violated the "because of" prong of (2)(a). MW essentially alleges that TriMet and ATU schemed to create this bridge closure plan to disadvantage her because she resigned ATU membership. In order to establish this claim, MW must prove there is a casual connection between her decision to resign ATU membership and the Sign-up Team's decision to adopt the one-week bridge closure plan described above. MW, however, points to no evidence that establishes any such causal connection, and the record includes no such evidence. Rather, the extensive evidence introduced at hearing establishes that the Sign-up Team made a neutral, business-based decision based on a unique, one-week closure of a bridge.

MW contends that Forrester's use of the term "freeloader" to refer to MW shows that he harbored some animus towards MW because of her non-member status. MW further contends that Forrester's involvement in the Sign-up Team, and the bridge-closure plan's potentially negative impact on MW, are sufficient to establish that the Sign-up Team adopted that plan to retaliate against MW for withdrawing from ATU. We conclude that these facts do not establish MW's claim, for several reasons. Even assuming that Forrester harbored animus against MW as alleged, his involvement in the Sign-up Team does not establish that the Sign-up Team adopted the bridge-closure plan because of that animus. To the contrary, the record establishes that the Sign-up Team adopted the bridge-closure plan for neutral reasons that are not pretextual. Significantly, Mike Arronson, TriMet's chief station agent, was central to the formation and implementation of the plan, and he had no knowledge of MW's membership status with ATU. Further, the record establishes that the plan affected all similarly situated operators in the same way, and there is no evidence that the plan had a disparate, negative impact on MW in particular, or non-members generally. We recognize that the bridge-closure plan might have had a negative impact on MW's shift options, because MW was one of the most senior employees who routinely bid on Vacation-Relief shifts, and the plan effectively reduced the number of Vacation Relief shifts during the bridge-closure week. However, the plan had the same potential impact on any other operator who typically sought Vacation Relief shifts and had less seniority than other construction-affected rail operators, regardless of their union-membership status. Consequently, the potential impact on MW does not support an inference that the Sign-up Team chose the plan to retaliate against MW.

Additionally, MW did not identify an alternative method of handling the Steel Bridge closure that MW believed was appropriate and would have less potentially negative impact on her. Rather, she simply asserts that the chosen method disadvantaged her, and that the "usual procedure" of shift-bidding would have worked for her. However, even if the Sign-up Team had followed the usual procedure, any operators with more seniority than MW would have had the opportunity to select Vacation Relief shifts before MW. Further, the record establishes that the Sign-up Team determined that it did not make sense to follow the usual procedure due to the short-time frame of the bridge closure. This fact illustrates a central problem with MW's argument–any other method of handling the one-week bridge closure would likely have been more complicated and would likely have disadvantaged someone, if not MW. It is worth noting that

ATU officials had a duty to the bargaining unit as a whole, not just disparate individual bargaining unit employees. ATU had no duty to honor MW's preferences exclusively, whether she was a member or not. In any event, it does not appear that the change actually disadvantaged MW, and she did in fact work a Vacation Relief shift, or its equivalent, during the Steel Bridge closure.

In sum, we conclude that MW has not established that ATU, through Forrester's participation on the Sign-up Team, agreed to adopt a bridge-closure plan that would potentially disadvantage MW *because* she resigned her union membership. The Steel Bridge closure meant that the affected operators had to bid for construction-modified shifts during a special sign-up, and the short time frame made it impractical to engage in the traditional shift bidding process. Eliminating Vacation Relief status for one week was a simple solution to a potentially complicated problem, easing the ripple effect of accommodating rail operators whose runs were temporarily modified due to construction.

We turn to addressing whether the Sign-up Team's adoption of the bridge-closure plan, when objectively viewed under the totality of the circumstances, would tend to chill employees in the exercise of protected rights. MW does not identify any statements, acts, or other circumstances that would cause a reasonable employee to believe that the Sign-up Team adopted the bridge closure plan to retaliate against MW for withdrawing from ATU, and we see none. For example, there is no evidence that the bridge closure plan had a significant disparate impact on MW, or non-members generally. MW, therefore, has not established that the bridge closure plan interfered with, restrained, or coerced her in the exercise of her right to resign from ATU membership within the meaning of ORS 243.672(2)(a).

<u>Use of the term "freeloader"</u>

Forrester referred to MW as a "freeloader" twice. The first time, Forrester used the term when explaining why he wanted MW removed from the same group text that we discussed above. Specifically, Forrester wrote, "[MW] is a non member (a free loader). I would like her removed from this conversation." Forrester credibly testified that he used the term to explain that it was inappropriate to have MW as part of a group text regarding an internal union matter. Forrester used the term for the second time in a subsequent text with a different ATU member, in the context of explaining that he believed his relationship with MW "went south" when he called her a "freeloader." MW argues that use of the term was inappropriate because it was derogatory, and that the term was wrongly applied to her because she had paid dues to ATU for several years in the past. MW argues that Forrester's use of the term is sufficient to establish that ATU violated the "in" prong of ORS 243.672(2)(a). For the following reasons, we disagree.

Forrester explained that he used the term "freeloader" because, in his opinion, it accurately reflects MW's status as an individual who is enjoying the benefits of union membership without paying for those benefits. ATU equates the term "freeloader" with "free rider," which is a term that has long been used to describe employees who benefit from being represented by a union without paying union dues. "Free rider" is defined as "a worker who enjoys the benefits derived from a union contract and activities without becoming a member of the union." *Webster's Third New Int'l Dictionary* 907 (unabridged ed 2002). ATU notes that "free rider" is commonly used in legal opinions, including the Supreme Court's opinion in *Janus*. *See, e.g.*, *Janus,* 138 S Ct at 2466;

*Abood v. Detroit Bd. of Educ*., 431 US 209, 224, 97 S Ct 1782, 1794 (1977). Forrester testified to recalling seeing the term used in legal opinions. Merriam-Webster identifies the terms "freeloader" and "free rider" as synonyms.[8]

We do not understand MW to argue that ORS 243.672(2)(a) prohibits public employees or union officials from using the term "free rider" to describe an employee, such as herself, "who enjoys the benefits derived from a union contract and activities without becoming a member of the union." *Webster's Third New Int'l Dictionary 907* (unabridged ed 2002). Rather, MW argues that "freeloader" has more negative connotations and is meaningfully distinct from "free rider." We find that the terms are similar in kind. The terms are closely related and, in the context of labor relations and how Forrester used the term "freeloader," it is sufficiently clear that Forrester was intending to convey that MW was receiving the benefits of unionization while not paying for them. MW objected to the use of the term because she had paid dues for almost all of her time as a TriMet employee in the ATU bargaining unit. However, at the time that Forrester used the term, MW had opted out of paying dues. Therefore, Forrester's comment accurately described MW's current status as an individual who was not paying for the benefits provided by ATU, the exclusive representative of ATU employees. Generally speaking, such comments are not inherently coercive and do not interfere with or restrain employees because of or in the exercise of protected activities.[9] Moreover, as noted above, ORS 243.672(2)(a) must be interpreted in a manner that does not infringe on either ATU's or Forrester's First Amendment rights. A ruling that the utterance of "free rider," "freeloader," or similar term in the labor relations context, is per se unlawful would not be consistent with those rights.

There may be some circumstances where a union official's use of the term "freeloader" to refer to a represented employee is part of a course of speech or conduct that is not protected by the First Amendment and amounts to interfering, restraining, or coercing employees in violation of ORS 243.672(2)(a). This, however, is far from such a case. Forrester used the term only twice, in the context of text messages. In the first instance, Forrester used the term to explain why he wanted to exclude MW, as a non-union member, from participating in an internal union discussion. As noted above, there is nothing inherently unlawful in that exclusion. In the second instance, MW was not involved in the text exchange, and Forrester used the term only to explain that he believed his relationship with MW "went south" because he had used the term to describe her. These incidents do not rise to the level of harassment or other impermissible conduct. For all of these reasons, we conclude that Forrester's use of the term did not violate ORS 243.672(2)(a).

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[8]*See* "Free rider," Merriam-Webster.com Thesaurus, Merriam-Webster, at https://www.merriam-webster.com/thesaurus/free%20rider. Accessed Dec. 13, 2021.

[9] As ATU notes, courts have held that, under the National Labor Relations Act (NLRA) and Federal Labor Relations Act (FLRA), far more loaded terms are protected. *See Letter Carriers Local 496 v. Austin*, 418 US 264 (1974), and *Linn v United Plant Guard Workers of America, Local 114,* 383 US 53, 60-61 (1966) (term "scab" protected under the NLRA). *See also Professional Airway Systems Specialists, Chapter 258 College Park, Georgia*, Case No. AT-CO-03-0306, 2003 BL 34779 (2003) (terms "bootlicker," "scab," "parasite," and "freeloader" protected under the FLRA).

MW also argues that Forrester's use of the term "freeloader" shows that ATU acted in bad faith or that ATU sought to punish MW for resigning as an ATU member. We understand MW to be contending that the use of the term "freeloader" is essentially evidence of Forrester's subjective intent to take actions "because of" MW's exercise of protected rights. Again, there may be some circumstances where a union official's usage of "freeloader" could establish the intent element of a (2)(a) claim. In this case, however, the two instances are not sufficient to establish that Forrester sought to retaliate against MW, much less that any other ATU officer sought to do so. MW has not established any other evidence of animus or unlawful intent on the part of ATU. Accordingly, we decline to infer that Forrester's use of the term "freeloader" in this case establishes some bad faith motive on the part of ATU. Further, as discussed above, even assuming that Forrester's use of the term was indicative of animus on his part, the record as a whole establishes that the other actions at issue in this case (*i.e.*, the exclusion of MW from the group text and adoption of the bridge-closure plan) were taken for lawful reasons.

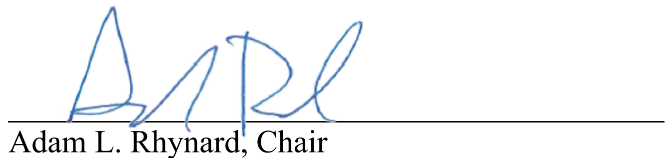
ATU's conduct as a whole

For the reasons explained above, we conclude, under the facts of this case, that Forrester's actions—(1) excluding MW from participating in a group text exchange regarding an internal union matter; (2) participating in the Sign-up Team's development and implementation of a plan in response to a one-week closure of the Steel Bridge; and, (3) referring to her as a "freeloader" in text exchanges—did not independently violate either prong of subsection (2)(a). We also conclude that the totality of these actions also does not constitute a course of retaliatory conduct against MW for choosing to no longer be a member of ATU, as alleged in this complaint. Each allegedly retaliatory act was shown, to the contrary, to be a lawful act taken for legitimate reasons. Additionally, MW has not established that any of the neutral or lawful bases for the actions were a mere pretext for unlawful action. MW also has not identified any other facts that persuade us that the entire course of conduct, viewed as a whole, interfered with, restrained, or coerced her because of or in the exercise of protected rights. Therefore, we dismiss the complaint.

ORDER

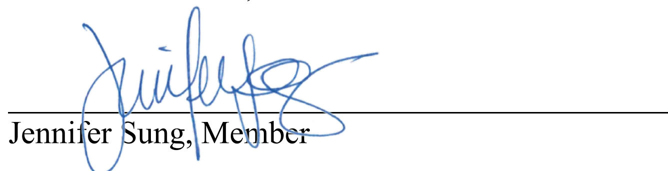
The complaint is dismissed.

DATED: December 16, 2021.



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-037-21

(UNFAIR LABOR PRACTICE)

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|---|---|---|
| SEIU LOCAL 503, OPEU, Complainant, | ) | |
| v. | ) | RULING ON RECONSIDERATION |
| MARION COUNTY, Respondent. | ) | |

Jared Franz, Staff Attorney, SEIU Local 503, OPEU, Salem, Oregon, represented Complainant.

Brian Kernan, Senior Assistant Legal Counsel, Marion County, Salem, Oregon, represented Respondent.

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On October 29, 2021, this Board issued a final order in which we concluded that Marion County (County) violated ORS 243.672(1)(e) when it unilaterally revoked the County's Temporary Telework Policy in July 2021 without completing its bargaining obligations. On November 5, 2021, the County filed a petition for reconsideration of that order. Because we had expedited the complaint and issued a final order without a recommended order, we granted the County's request and scheduled oral argument. *See* OAR 115-010-0100(3)(b).

On November 23, 2021, SEIU Local 503, OPEU (Union) submitted a memorandum in aid of oral argument. On November 29, 2021, by email, the County sought leave to file a supplemental legal memorandum. On November 29, 2021, the Board denied the County's request. On December 2, 2021, the Board heard oral argument from both parties. Having considered the parties' arguments, we adhere to our prior order, as supplemented by this order.

Summary of Key Findings and Conclusion in the Final Order

Before turning to our analysis on reconsideration, we summarize the key factual findings and the conclusion in our October 29, 2021, order (*Original Order*). The County does not seek reconsideration of the facts we found in the Original Order.

On March 16, 2020, at a special meeting, the County Board of Commissioners declared a State of Emergency under ORS 401.309 in response to the emergence of the COVID-19 public health crisis. ORS 401.309 provides that a city or county governing body may declare, by ordinance or resolution, that a state of emergency exists within the governing body's jurisdiction. That state of emergency permits the governing body to take multiple actions to protect residents, including, for example, designating an emergency management agency and ordering mandatory evacuations.

In a separate meeting two days later, on March 18, 2020, the Board of Commissioners adopted an ordinance that amended the Marion County Personnel Rules to include a temporary policy permitting County workers to telework (Temporary Telework Policy). The Temporary Telework Policy allowed County employees to telework "during the time period covered by the COVID-19 Emergency Declaration issued by the Board of Commissioners." *Original Order* at 4. Before the COVID-19 pandemic, County employees were not generally permitted to telework. The Temporary Telework Policy recognized that "the health, safety and well being of Marion County employees is essential to the County continuing to carry out its essential functions[,]" and "some county work may be performed through telecommuting[.]" The policy outlined the prerequisites for and conditions relating to teleworking by County employees, and included a provision that an employee's supervisor or department head could discontinue the employee's teleworking arrangement with 24 hours' notice. Participating employees were required to sign an agreement affirming their understanding that the "agreement is temporary due to the COVID-19 pandemic and may be rescinded at any time." The County adopted the Temporary Telework Policy without providing prior notice to or bargaining with the Union.[1]

On March 21, 2020, the Board of Commissioners adopted an order closing County offices to the public and directing non-essential employees to stay home. On April 3, 2020, the County implemented the Temporary Telework Policy by adding the policy as an addendum to the Marion County Personnel Rules. Eligible employees began telecommuting pursuant to the Temporary Telework Policy on April 3, 2020.

Fifteen months after initially adopting the ordinance approving the Temporary Telework Policy, on June 10, 2021, the Board of Commissioners emailed all County employees informing them that the County intended to rescind the Temporary Telework Policy and that County workers would be expected to return to on-site work by July 19, 2021. The same day, June 10, the County's Chief Human Resources Officer sent an email to all County employees that answered questions

[1]The parties were engaged in collective bargaining for their successor collective bargaining agreement from December 2019 through April 14, 2020, and thus were engaged in table bargaining when the COVID-19 pandemic began. During those successor negotiations, on March 12, 2020, the Union proposed that the parties enter a letter of agreement related to COVID-19. The Union gave the County a draft letter of agreement that, among other provisions, would generally permit County employees to telework from "March 1, 2020 through at least June 30, 2020 or a date mutually determined[.]" The County declined to bargain with the Union about a COVID-19 letter of agreement or the Union's proposal that County employees be permitted to telecommute through at least June 30, 2020. Ultimately, citing "the current crisis" of COVID-19, the Union agreed to conclude bargaining by accepting a two percent cost of living adjustment for both years of the successor contract and an increase of $50 in County contribution to health insurance premiums.

about the July 19 return to in-person work. The County decided to rescind the Temporary Telework Policy without providing prior notice to or bargaining with the Union.

On June 23, 2021, pursuant to ORS 243.698, the Union demanded to bargain regarding the County's decision and the impact of requiring County workers to discontinue telecommuting and return to in-person work. On July 2, 2021, the County's Chief Human Resources Officer informed the Union that the County did not consider the Temporary Telework Policy to be a mandatory subject of bargaining.

On July 19, 2021, as directed, County employees returned to in-person work at County facilities.[2] On July 20, 2021, the Centers for Disease Control and Prevention upgraded the risk of community transmission of COVID-19 in Marion County from "moderate" to "substantial." On August 1, 2021, the CDC upgraded the risk of community transmission of COVID-19 in Marion County from "substantial" to "high."

On July 22 and August 9, 2021, representatives of the Union and the County met to discuss the return to in-person work. The County maintained throughout those meetings and thereafter that those meetings were "listening sessions" and that the County was not bargaining.

We concluded that the County unilaterally changed a mandatory subject of bargaining when it decided to revoke the Temporary Telework Policy effective July 19, 2021, without bargaining with the Union, and when it implemented that decision before it bargained over the impacts of that decision on mandatory subjects that were more than de minimis. We applied the well-settled unilateral change framework and considered (1) whether the County made a change to the status quo; (2) whether the change concerned a mandatory subject of bargaining; and (3) whether the County exhausted its duty to bargain. *See, e.g., Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177, 295 P3d 38 (2013) (*AOCE II*) (citing *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03 at 8, 20 PECBR 890, 897 (2005), *rev'd on other grounds*, 209 Or App 761, 149 P3d 319 (2006) (*AOCE I*)). Because the County also asserted that the Union waived its right to bargain, we also considered whether the County met its burden to prove waiver. A party may waive its right to bargain by (1) "clear and unmistakable" contract language, (2) a bargaining history that a party consciously yielded its right to bargain, or (3) the party's action or inaction. *AOCE II*, 353 Or at 177.

Applying that framework in this case, we concluded that the County's policy (the Temporary Telework Policy), rather than a workplace practice (the practice of "no teleworking" before the pandemic) established the status quo during the relevant period—*e.g.*, as of June and July 2021, when the County made and then implemented its decision to discontinue teleworking. In reaching that conclusion, relying in part on *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 (1995), we considered and rejected the County's argument that the Temporary Telework Policy could not establish a status quo because the policy expressly allowed the County to rescind it. The parties agreed that the County made a change when it revoked the policy.

[2]Employees granted telework as a reasonable accommodation for a disabling condition and those precluded from returning to in-person work because of work or space constraints continued teleworking.

We also concluded that the change concerned a subject that is mandatory for bargaining. We began, as we must, by identifying the subject of the change.[3] The Union contended that the subject of the change was a safety issue that has a direct and substantial effect on the on-the-job safety of employees and is therefore mandatory pursuant to ORS 243.650(7)(h). The County asserted that the subject was workplace location, not safety. We determined that the "core feature" of the Temporary Telework Policy was COVID-19 exposure and transmission in the workplace. *See Jackson County v. Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. UP-002-20 at 6 (2020) (when a proposal or change includes multiple bargaining subjects, we determine the "core feature" of the proposal or change that "defines and ultimately shapes" its scope). Both the initial adoption of the Temporary Telework Policy and its revocation were predicated on the Board of Commissioners' judgment that it was initially necessary and subsequently unnecessary to permit teleworking to limit COVID-19 exposure and transmission in the workplace.

We determined that the subject—COVID-19 exposure and transmission in the workplace—concerned workplace safety. In making that determination, we applied *Multnomah County Corrections v. Multnomah County*, 257 Or App 713, 308 P3d 230 (2013), in which the court explained that the subject of a proposal or change is a safety issue "if it would reasonably be understood, on its face, to directly address a matter related to the on-the-job safety of employees." *Id*. at 734. In this case, on its face the Temporary Telework Policy stated that the purpose of the policy was to enable the County to adapt quickly to the "emerging public health threat" of COVID-19, and that County employees were at the "forefront" of the County's concern, and therefore it directly addressed on-the-job safety of County employees. Further, we concluded that the safety issue (COVID-19 exposure and transmission in the workplace) is mandatory for bargaining for strike-permitted employees because it is a safety issue that has "a direct and substantial effect on the on-the-job safety of public employees." ORS 243.650(7)(h). The parties did not dispute that COVID-19 exposure and transmission has a direct and substantial effect on public employee safety in the workplace. The County also did not dispute that the revocation of the policy had impacts on mandatory subjects, including paid leave.

The County admitted that it did not engage in bargaining before it made its decision on June 10, 2021, to revoke the Temporary Telework Policy or before it implemented that decision on July 19, 2021. Consequently, the County violated ORS 243.672(1)(e) by making a unilateral change concerning a subject that is mandatory for bargaining and doing so before completing its bargaining obligations. It also failed to bargain before implementing the decision.

[3]As we explained in the Original Order, we are required to analyze bargaining issues by determining the subject (here, COVID-19 exposure and transmission), as opposed to the specific proposal or change concerning that subject (here, the revocation of permission to telework, as set forth in the Temporary Telework Policy). *See Springfield Police Association v. City of Springfield*, Case No. UP-28-96 at 9, 16 PECBR 712, 720 (1996), *aff'd without opinion*, 147 Or App 729, 939 P2d 172, 173 (1997) (based on the 1995 amendments to PECBA enacted by Senate Bill 750, *see* 1995 Or Laws Ch 286, it "is clear, based on the text and context of ORS 243.650(7), that the legislature mandated that we employ a subject-based mode of analysis in deciding scope-of-bargaining cases.").

Finally, we rejected the County's two affirmative defenses of waiver. The County alleged that the Union consciously yielded its right to bargain through its conduct at the bargaining table during successor negotiations, which occurred just as the pandemic was beginning. The County also alleged that the management rights clause in the collective bargaining agreement constituted a "clear and unmistakable" waiver of the Union's right to bargain. The County, however, did not meet its burden to prove either defense.[4] Consequently, we concluded that the County committed a per se violation of ORS 243.672(1)(e).

ORDER ON RECONSIDERATION

The County's petition requests reconsideration on two grounds. First, the County argues that we erred by not addressing *Coos Bay Police Officers' Association v. City of Coos Bay and Coos Bay Police Department*, Case No. UP-61-92, 14 PECBR 229 (1993). Further, the County argues that by not doing so we also failed to give proper significance to the language in the Temporary Telework Policy. Specifically, the County contends that the determination of the status quo in this case must account for the language in the Temporary Telework Policy that explicitly linked the duration of the policy to the declared state of emergency and therefore retained the County's right to unilaterally rescind the policy. Second, the County argues that we erred by ordering the County to post and electronically distribute a notice because the prerequisites for that remedy are not present in this case.

Before proceeding with our reconsideration of the issues raised by the County, we note those aspects of our prior order that the County does *not* challenge. The County does not contest (a) that it made a change when it rescinded the Temporary Telework Policy, (b) that the change concerned the subject of COVID-19 exposure and transmission in the workplace, (c) that the subject of COVID-19 exposure and transmission in the workplace is a safety issue that has a direct and substantial effect on the on-the-job safety of public employees and is mandatory for bargaining pursuant to ORS 243.650(7)(h), (d) that it did not bargain with the Union before deciding to rescind the policy or before implementing that decision, and (e) that it did not meet its burden to prove its affirmative defenses that the Union waived its right to bargain. Consequently, we do not revisit those aspects of our conclusion.

We begin by considering the import of *City of Coos Bay*, UP-61-92, 14 PECBR 229, to this case, as the County requests. In *City of Coos Bay*, the union alleged that the city violated (1)(e) by unilaterally changing its promotional process. The city, like the County in this case, defended on the basis that its policies expressly allowed it to make the disputed change. Specifically, the police department maintained a series of General Orders, defined as "a written directive issued by the Chief of Police which establishes policy, procedures and regulations that affect the entire Department." *Id*. at 3, 14 PECBR at 231. One such General Order provided that General Orders "remain in effect until superseded, cancelled or amended by a subsequent General Order or until the Chief of Police withdraws the General Order." *Id*. The General Order related to promotion of employees provided that the Chief of Police was required to annually review the promotional process "to determine if elements have become obsolete due to changes in technology, passage of time, or changes in the applicant pool." *Id*. Under the city's written policy before the change, all

[4]Because "waiver of the right to bargain is an affirmative defense, it is the employer's obligation to plead and prove it." *Portland Fire Fighters' Ass'n, IAFF Local 43 v. City of Portland*, 302 Or App 395, 403, 461 P3d 1001 (2020).

applicants for a sergeant position went through the three phases of the process, which included a grade based on past performance evaluations, a written exam, and an oral interview. *Id*.

The city had not promoted any employees in the police department since January 1981. *Id*. at 2, 14 PECBR at 230. In March 1992, a new policy chief changed the promotional process by changing the last step of the three-step process from an oral interview to an assessment center, and by deciding that not all applicants would progress through all three steps. *Id*. at 3, 14 PECBR at 231. After the police department published the change to the process, the union demanded to bargain. The city refused.

The Board concluded that the city did not violate (1)(e). The Board began by emphasizing that because the city unilaterally changed the General Order pertaining to promotions, the city declined to bargain upon demand, and the parties' contract contained no express waiver of the union's right to bargain, the union "ordinarily would prevail." *Id*. at 5, 14 PECBR at 233. The Board explained, however, that the "rather uncommon circumstance" of the discretion reserved to the city in the policy "requires the opposite result." *Id*. The Board concluded that because the General Orders by their terms were "issued, amended and rescinded at the discretion" of the police chief, it "is as if the employer's established practice, where no written rules existed, was to change promotional procedures at its whim, without bargaining with the union." *Id.* at 5-6, 14 PECBR at 233-34. In other words, the city's policy "allowed the employer to unilaterally change the promotion criteria, and that right was the status quo." *Beaverton Police Association v. City of Beaverton*, Case No. UP-10-01 at 9 n 7, 19 PECBR 925, 933 n 7 (2002). The Board concluded that because the City of Coos Bay police chief acted in a manner "contemplated by and consistent with" the procedures (and therefore maintained, not changed, the status quo), the city did not violate (1)(e).

The County argues that *City of Coos Bay* requires the same result in this case—namely, that because the Temporary Telework Policy expressly provides that the policy "is only in effect during the time period covered by the COVID-19 Emergency Declaration issued by the Board of Commissioners[,]" and because only the Board of Commissioners could end the declared emergency, the County did not violate (1)(e) when it revoked the Temporary Telework Policy. For the reasons explained below, the County's reading of *City of Coos Bay* is difficult to reconcile with the waiver-based unilateral change analysis consistently used by this Board beginning in 2002 and endorsed by the Oregon Supreme Court in *AOCE II*, 353 Or 170, and does not provide a defense to the County here.

To understand why *City of Coos Bay* does not provide the type of defense the County relies on in this case, it is useful to review the development of the Board's analysis of unilateral change claims. Specifically, until 2002, the Board used two distinct approaches in unilateral change cases. It sometimes permitted a public employer to defend a unilateral change claim by demonstrating that "specifically relevant" language authorized the employer to make the disputed change. *See, e.g., Oregon School Employees Association v. Astoria School District 1*, Case No. UP-52-91 at 7-8, 13 PECBR 474, 480-81 (1992) (the Board "generally will conclude that an employer has exhausted its bargaining duty" concerning a disputed unilateral change "when an extant written agreement includes a provision that is specifically relevant to the issue in dispute.") *Id.* at 7, 13 PECBR at 480. In other cases, the Board assessed whether the employer could lawfully make a change to a mandatory subject by focusing on whether the labor organization had waived

its right to bargain. *See, e.g., Service Employees International Union, Local #49 v. Pacific Communities Hospital*, Case No. UP-92-91 at 15, 13 PECBR 753, 767 (1992) (public hospital did not make an unlawful unilateral change by adopting new personnel policies because, "in its contract negotiations with the Union, the Hospital obtained the right to unilaterally adopt work rules covering mandatory subjects of bargaining[,]" and the contractual waiver language was "specific, supported by bargaining history, and consistent with the employer's customary practices.").

In 2002, the Board expressly disavowed the "specifically relevant" defense to unilateral change cases and stated that it would "no longer apply" that defense. *Oregon School Employees Association v. Bandon School District #54*, Case Nos. UP-26/44-00 at 16, 19 PECBR 609, 624 (2002). Instead, the Board explained that when a public employer seeks to defend against a unilateral change claim on the grounds that "there is express contract language, and/or that bargaining has been completed, the proper defense is waiver." *Id*. at 16, 19 PECBR at 624. The Board explained:

> "Our use of the 'specifically relevant' test arose out of the conviction that the purposes of the PECBA are best served by encouraging parties to resolve their purely contractual disputes through collectively-bargained processes rather than by filing refusal to bargain complaints with this Board. We adhere to this belief, but we are not convinced that the 'specifically relevant' test is either necessary, or the appropriate approach, for accomplishing this purpose. The amount of language that is required to satisfy the 'specifically relevant' standard is a recurring problem. How much language is enough is a subjective determination.
>
> "We conclude that a waiver analysis is a more appropriate analytical framework. Waiver is a defense historically recognized by this Board and the private sector in deciding whether a party has a continuing duty to bargain. First, a party may waive its right to bargain by express contract language that constitutes a 'clear and unmistakable waiver.' Second, waiver may be proved by bargaining history that shows that a party 'consciously yielded' its right to bargain over a mandatory subject. Third, a waiver may be established by the action or inaction of a party. In some cases, a waiver defense may be based solely on contract language; in others, it may be claimed by a combination of contract language and extrinsic evidence of bargaining history and/or past practice.
>
> "The waiver approach could have been applied in [cases in which the Board used the 'specifically relevant' test]. There is no need to analyze contract language to determine if it is 'specifically relevant.' Instead, contract language may be analyzed to determine if there is a 'clear and unmistakable' waiver of the right to bargain. If the language is ambiguous, a party may still demonstrate waiver by submitting extrinsic evidence of negotiation history and/or practice."

*Bandon School District #54*, UP-26/44-00 at 15-16, 19 PECBR at 623-24 (internal citations omitted). The Board reasoned that there were advantages to using a waiver approach rather than the "specifically relevant" test, including that a waiver approach provides a "consistent analytical framework" that can be applied "when appropriate, across unilateral change contexts." *Id*. at 16,

19 PECBR at 624. Further, because "waiver principles are well-established, there is a large body of case law available for guidance in deciding such cases." *Id*.

In *AOCE II*, the Oregon Supreme Court affirmed the Board's use of that waiver approach. In that case, the union asserted that the Department of Corrections violated ORS 243.672(1)(e) when it made changes to its employees' scheduled days off and shift stop and start times without first bargaining with the union. The Department of Corrections contended that the terms of the parties' collective bargaining agreement permitted its unilateral action, and therefore it did not violate (1)(e). The Board used a waiver analysis in evaluating that defense. The Department argued that a waiver approach was erroneous and that the Board was instead *first* required to determine whether the collective bargaining agreement permitted the employer to take the action that it did.

The court agreed with the Board. The court explained that a waiver framework—the framework adopted by the Board as the appropriate framework in *Bandon School District #54* in 2002—is consistent with the Oregon legislature's intent. The court reasoned that the Oregon legislature "intended that defenses to unfair labor practice charges under ORS 243.672(1)(e) be analyzed under" the same waiver rubric used in cases under the National Labor Relations Act. *AOCE II*, 353 Or at 181. A waiver rubric in unilateral change cases was well-established under the NLRA by 1973 when the Oregon legislature enacted the Public Employee Collective Bargaining Act (PECBA), which it modeled on the NLRA. Because PECBA is modeled after the NLRA, Oregon courts look to cases decided under the NLRA, particularly those decided before 1973, the year PECBA was enacted. *See, e.g., AFSCME Council 75 v. City of Lebanon*, 360 Or 809, 817, 825, 388 P3d 1028 (2017) (PECBA is modeled after the NLRA in many respects, and federal cases interpreting the NLRA can provide guidance in interpreting parallel provisions of PECBA); *Portland Assn. of Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 631 n 6, 16 P3d 1189 (2000).

The court in *AOCE II* further observed 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." *AOCE II*, 353 Or at 185.[5]

With that history in mind, we turn to considering the effect of *City of Coos Bay* in this case. Here, we understand the County to argue that, based on *City of Coos Bay*, it had no duty to bargain with the Union because the Temporary Telework Policy gave the County the right to rescind that policy at its own discretion, and that discretion was itself the status quo. Because there is no longer a dispute that the Temporary Telework Policy concerned a mandatory subject and the Union has the right to bargain about mandatory subjects, we interpret the County to argue essentially that its bargaining obligation was somehow completed. But there is no evidence that the County ever bargained about the Temporary Telework Policy; in fact, the County acknowledges that it repeatedly refused to do so. Consequently, in order to demonstrate that it was not required to bargain, the County was required by *AOCE II* to prove that the Union waived its right to bargain. In our prior order, consistent with *AOCE II*, we applied the required waiver analysis. *See Original Order* at 12 (relying on *AOCE II*, 353 Or at 177). We concluded that the County did not meet its

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[5]The court recognized the split in the federal circuit courts, with some courts endorsing a waiver analysis and some using a "contract coverage" defense. *AOCE II*, 353 Or at 180 n 10.

burden to prove that the Union waived its right to bargain, and the County does not challenge that conclusion.

Our conclusion is not affected by the fact that the County relies on policy language, rather than contract language, as was at issue in *AOCE II*. At its core, the County's argument asserts either that the Union has no right to bargain with respect to the revocation of the Temporary Telework Policy at all or (given that there is no waiver) that bargaining has been completed. As to the former, the County has not challenged our conclusion that the Temporary Telework Policy concerns a mandatory subject. The Union therefore has a right to bargain with respect to changes to that policy, including the revocation of the policy. As to the latter—the premise that bargaining has been completed—the County admitted in its answer and at hearing that it did not bargain over the Temporary Telework Policy before it was adopted in March 2020 or before it was rescinded in July 2021. Thus, the County's argument essentially reduces to a contention that the Union had no continuing right to bargain about the policy. But *that* argument is incompatible with a foundational principle of PECBA: A union has a continuing right to bargain about mandatory subjects. *See AOCE II*, 353 Or at 185; *see also* ORS 243.650(4) (collective bargaining means "the performance of the mutual obligation" of the public employer and union "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").

For these reasons, we disagree with the County that *City of Coos Bay* requires, as a matter of law, dismissal of the complaint.

Moreover, even assuming, as the County contends, that *City of Coos Bay* remains valid law after *AOCE II*, *City of Coos Bay* is inapposite here. As the court pointed out in *AOCE II*, in *City of Coos Bay,* to determine the status quo, the Board considered whether "the parties" had "defined their rights and responsibilities regarding a given employment condition." *AOCE II*, 353 Or at 184 (quoting *City of Coos Bay*, UP-61-92 at 5, 14 PECBR at 233). But here, there is no argument and there is no evidence that "the parties" defined their rights and responsibilities regarding the Temporary Telework Policy when the County initially adopted the policy. To the contrary, the Union attempted to initiate negotiations with the County in March 2020, at the outset of the pandemic, about teleworking for County employees. The County declined to bargain with the Union, and instead imposed its own unilaterally prepared policy as a fait accompli without prior notice to or input from the Union. Stated differently, even applying *City of Coos Bay* to this case, it does not stand for the proposition that a public employer can reject a union's request to bargain over the adoption of a policy concerning a mandatory subject, unilaterally embed in that policy its own "right" to rescind that policy at its own whim, and then, when it unilaterally rescinds the policy, defend against a unilateral change claim on the basis that "the parties" defined the status quo as permitting the employer to act unilaterally. And that is exactly what happened here: The County, acting alone, created an ostensible right to rescind the policy, but because the policy concerned a mandatory subject, its later exercise of that "right" without bargaining violated (1)(e) unless the Union waived its right to bargain. And that did not happen here.[6]

[6]Relatedly, the County contends that we misapplied *Teamsters Local Union No. 223 v. City of Shady Cove*, Case No. UP-3-94, 15 PECBR 589 (1995). In that case, the Board held that an (Continued. . . .)

Further, the fact that the policy at issue in this case states that it is "only in effect during the time period covered by the COVID-19 Emergency Declaration" does not change this conclusion. The Temporary Telework Policy was not a policy limited to County operations, such as, for example, a decision to close County offices to the public, nor was it limited to non-employment, emergency-related issues involving Marion County's operations or residents. Instead, by its own terms, the Temporary Telework Policy directly regulated the working conditions of County employees, and cannot be viewed as a permissive subject with impacts on only permissive subjects. *See, e.g., Federation of Oregon Parole and Probation Officers v. State Corrections Division*, Case No. C-57-82, 7 PECBR 5649, 5654 (1983) (bargaining issues can be categorized as (1) permissive decision and impact (that is, general operational management decisions); (2) permissive decision and mandatory impact (employment relations affected by a management decision); and (3) mandatory decision and impact (an employment relations subject)). For the reasons we explained in the Original Order, and which the County no longer challenges, the policy concerned a mandatory subject. The mere fact that the Temporary Telework Policy was adopted by the Board of Commissioners in connection with the COVID-19 public health emergency does not, in and of itself, eliminate the County's PECBA bargaining obligations. [7]

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(Continued . . . .)

employer-promulgated personnel manual that provided that the employer could change the manual nonetheless established the status quo. The Board reasoned that although the manual "may not have the force of contract, it is undisputed that it was in effect" at the relevant time and concerned "a matter of employment relations." *Id*. at 11-12, 15 PECBR at 599-60. The County argues that *City of Shady Cove* is inapplicable here because that case involved first contract bargaining. However, in the Original Order, we relied on *City of Shady Cove* solely for the proposition that an employer policy that concerns a mandatory subject can establish the status quo *even if* the employer can change that policy. The fact that the parties in this case have a long-standing labor-management relationship does not make *City of Shady Cove* inapplicable. Just as in *City of Shady Cove*, the Temporary Telework Policy was in effect at the relevant time and concerned a mandatory subject of bargaining; consequently, considering all the facts in this case, it established the status quo.

[7]The County did not allege or attempt to prove that the undeniable public health emergency caused by COVID-19 modified its bargaining duty. When bargaining is required, "the extent of the duty to bargain <u>before</u> implementation or decision may be modified if the employer is faced with a legitimate emergency or business necessity." *Federation of Oregon Parole and Probation Officers v. State Corrections Division*, Case No. C-57-82 at 7, 7 PECBR 5649, 5655 (1983) (emphasis in original). Emergency or business necessity is an affirmative defense. Because implementation of a change "may substantially upset the balance of bargaining power, an employer must clearly show that an emergency exists before its bargaining duty will be modified." *Id*. at 12 n 6, 7 PECBR at 5660 n 6. The record indicates that multiple senior managers at the County began discussing, planning for, and working on the potential revocation of the Temporary Telework Policy at some point in May 2021, approximately one month before the County announced its decision on June 10, 2021, and approximately two months before it implemented that decision on July 19, 2021. Although the Board of Commissioners declared a state of emergency in response to the COVID-19 public health crisis, that emergency did not modify the County's bargaining duty related to the revocation of the Temporary Telework Policy, an action that County managers discussed and deliberated over for approximately one month.

We turn next to the second basis for the County's request for reconsideration. The County argues that we erred in ordering the County to post a notice of its violation of PECBA. 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). We ordered the County to post a notice because its conduct affected a significant number of bargaining unit employees. The County contends that we erred in doing so because we generally require multiple factors before ordering a notice posting and, in any event, the record does not indicate that a significant number of bargaining unit employees were affected in this case. We disagree with the County for the reasons explained below.

To begin, the Board has broad authority to "fashion an appropriate remedy under the circumstances of each particular case to effectuate the purposes of the Public Employee Collective Bargaining Act (PECBA)." *Oregon School Employees Association v. Parkrose School District*, Case No. UP-030-12, *recons*, 25 PECBR 845, 846 (2013). *See also Elvin v. OPEU*, 102 Or App 159, 164, 793 P2d 338 (1990), *aff'd*, 313 Or 165, 832 P2d 36 (1992); ORS 243.676(2)(c). The Board has repeatedly ordered a notice posting based on the sole factor that the employer's conduct affected a significant number of bargaining unit employees. *See, e.g., Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-003-16 at 79 (2018); *Crook County Firefighters Association, IAFF Local 5115 v. Crook County Fire and Rescue*, Case No. UP-011-18 at 36 (2019). We have also determined, as the County notes, that a notice posting is not warranted where an "insufficient number of these criteria were met." *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 47, 22 PECBR 668, 714 (2008), *rev'd and remanded*, 244 Or App 194, 260 P3d 626 (2011).

In this case, we exercised our broad remedial authority to conclude, given all the circumstances in this case, that it was appropriate to order a notice posting. We adhere to that conclusion. To the extent that evidence pertaining to an additional factor is required, the record supports a conclusion that a significant number of management personnel were involved in the unilateral change. Ryan Matthews, a manager, testified that the management decision makers involved in the revocation planning and decision included managers from the Juvenile Department, the Human Resources Department, the Business Services Department, the Finance Department, and the Health and Human Services Department. The decision itself was made and communicated to employees by the three-person Board of Commissioners itself. This record is sufficient to demonstrate that the decision to return to in-person work involved a significant number of the County's personnel.

We also disagree with the County that the record includes insufficient evidence that a significant number of bargaining unit employees were affected by the County's conduct. We do not require that a particular percentage or number of employees be affected by unlawful conduct before ordering a notice posting. Rather, we determine, based on the record as whole, whether the public employer's conduct affected a significant number of employees. That standard is easily satisfied here.

To begin, until its petition for reconsideration, the County did not contest the fact that its decision to require in-person work affected the 1,000-person bargaining unit as a whole. The parties submitted this case in part on stipulated facts, and those stipulated facts indicate that on June 10, 2021, the Board of Commissioners' office sent an email to "all County employees" notifying them of the County's intent to rescind the Temporary Telework Policy, and the same day, the County's Chief Human Resources Manager sent an email to "all County employees" attaching answers to frequently asked questions (FAQs) about the return to in-person work. Those FAQs included the following introductory sentence: "The county is requiring *all employees* telecommuting to return to regular in-office work fulltime as of July 19, 2021." (Emphasis added.) The FAQs explained that there were no exceptions to the return-to-work requirement, including for those employees who were not vaccinated or who had childcare or medical issues. On July 7, 2021, Union President Latricia Straw sent an email to the Commissioners informing them that the Union had heard concerns from bargaining unit employees "about the 'No Exception' rule for transitioning back into the office[,]" and that the Union had surveyed its members and received approximately 100 responses within 24 hours. The parties stipulated that on July 19, 2021, "the County's employees did return to on-site work" with only limited exceptions. At hearing, Straw testified that there were only "a few" exceptions to the return-to-work requirement and cited as examples a few people in her own work group, some managers, and employees who worked in epidemiology and children's behavioral health. This record is sufficient to warrant a notice posting on the basis that the County's conduct affected a significant number of bargaining unit employees.

For all the reasons explained above, we adhere to our original order, as supplemented by this order.

## ORDER

1. We adhere to our October 29, 2021, order, as supplemented by this order.

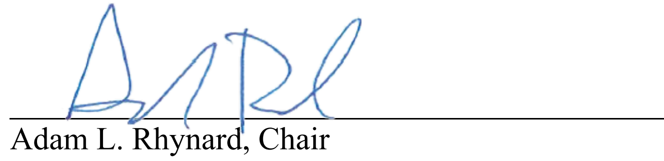
2. Marion County shall cease and desist from violating ORS 243.672(1)(e).

3. The parties shall bargain for a 30-day period regarding a remedy, including a make-whole remedy. If the parties are unable to agree on a remedy within that 30-day bargaining period, each party shall submit its proposed remedy to this Board within 35 days of the date of this order, and the Board shall order a remedy.

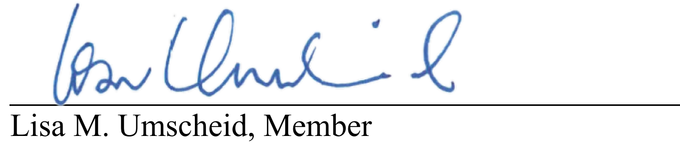
4. Marion County shall post the attached notice for 30 days in prominent places where Union-represented employees are employed.

5. Marion County shall distribute the attached notice by email to all Union-represented employees within 10 days of the date of this order.

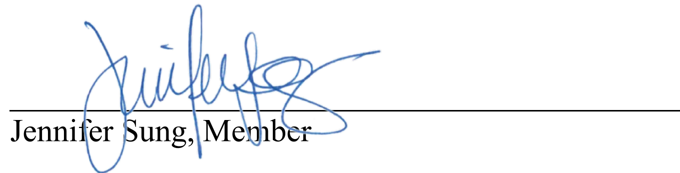
DATED: December 16, 2021.



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-037-21, *SEIU Local 503, OPEU v. Marion County*, 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 Marion County (County) committed an unfair labor practice 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 the County violated the duty to bargain in good faith when it unilaterally revoked the Temporary Telework Policy without first bargaining in good faith with SEIU Local 503, OPEU.

To remedy this violation, the Board ordered the County to:

1. Cease and desist from violating ORS 243.672(1)(e).

2. Bargain with SEIU Local 503, OPEU for a 30-day period regarding a remedy for the violation, including a make-whole remedy. (If the parties are unable to agree on a remedy within that 30-day bargaining period, each party must submit its proposed remedy to the Board within 35 days of the date of the order, and the Board will order a remedy.)

3. Post this notice for 30 days in prominent places where SEIU Local 503, OPEU-represented employees are employed.

4. Distribute this notice by email to all SEIU Local 503, OPEU-represented employees within 10 days of the date of the order.

EMPLOYER

Dated________________________, 2021 By: ____________________________________

Title:____________________________________

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**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. UC-006-21

(UNIT CLARIFICATION PETITION)

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| UNIVERSITY OF OREGON POLICE ASSOCIATION,<br><br>Petitioner,<br><br>v.<br><br>UNIVERSITY OF OREGON,<br><br>and<br><br>SERVICE EMPLOYEES INTERNATIONAL UNION,<br><br>Respondents. | ) | RULINGS<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND ORDER |

Daniel E. Thenell, Attorney at Law, Thenell Law Group, P.C., Portland, Oregon, represented the Petitioner.

Jeslyn Everitt, Associate General Counsel, University of Oregon, Eugene, Oregon, represented Respondent University of Oregon.

Jared Franz, Staff Attorney, SEIU Local 503, OPEU, Salem, Oregon, represented Respondent Service Employees International Union.

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On November 29, 2021, Administrative Law Judge Martin Kehoe issued a recommended order in this matter. On December 14, 2021, the Board granted Respondent University of Oregon's motion to extend to December 20, 2021, the time to file objections to the recommended order. *See* 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, this order is binding on, and has precedential value for, only the named parties in this case.

ORDER

The petition is granted, and the University of Oregon Police Association's bargaining unit is clarified to include the University of Oregon Police Department's Community Service Officers.

DATED: December 27, 2021.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-006-21

(UNIT CLARIFICATION PETITION)

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| UNIVERSITY OF OREGON POLICE ASSOCIATION,<br><br>Petitioner,<br><br>v.<br><br>UNIVERSITY OF OREGON<br><br>and<br><br>SERVICE EMPLOYEES INTERNATIONAL UNION,<br><br>Respondents. | RECOMMENDED RULINGS FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER |

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on July 19, 2021. The record closed on August 19, 2021, upon receipt of the parties' post-hearing briefs.

Daniel E. Thenell, Attorney at Law, Thenell Law Group, P.C., Portland, Oregon, represented the University of Oregon Police Association.

Jeslyn Everitt, Associate General Counsel, University of Oregon, Eugene, Oregon, represented the University of Oregon.

Jared Franz, Staff Attorney, SEIU Local 503, OPEU, Salem, Oregon, represented the Service Employees International Union.

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On April 16, 2021, the Petitioner, the University of Oregon Police Association (UOPA), filed a unit clarification petition with the Employment Relations Board (Board). The petition seeks to transfer the University of Oregon Police Department's (UOPD's) strike-permitted Community Service Officers (CSOs) to the UOPA's existing strike-prohibited bargaining unit of UOPD Police

Officers. The UOPA contends that its unit is more appropriate for the CSOs than the CSOs' current unit that is represented by the Service Employees International Union (SEIU). The petition was supported by a sufficient showing of interest. *See* OAR 115-025-0050(8). The Respondents, the University of Oregon (University) and SEIU, filed timely objections.

The issues in this case are: (1) Does the petition inappropriately seek to transfer strike-permitted employees into a strike-prohibited bargaining unit? (2) Do the UOPD's CSOs share a sufficient community of interest with the UOPD's Police Officers? As set forth below, we conclude: (1) the petition does not inappropriately seek to transfer strike-permitted employees into a strike-prohibited unit, and (2) the CSOs have a sufficient community of interest with the Police Officers and are more appropriately included in the UOPA unit than the SEIU unit.

## RULINGS

All rulings by the ALJ were reviewed and are correct.

## FINDINGS OF FACT

### Background

1. The University is a "public employer" within the meaning of ORS 243.650(20). The UOPD is an agency of the University.

2. In 2011 or 2012, the University officially formed the UOPD. Previously, the same agency was called the Department of Public Safety. In 2012 or 2013, the UOPD's Police Officers first became armed. (11:54-11:55 a.m., 12:14-12:15 p.m., 3:27-3:28 p.m., Exh. 9 at 2-3.)

3. The University's main campus is in Eugene, Oregon. The University also has a smaller campus in Portland, Oregon in the White Stag Building and in the Naito Building. The UOPD maintains a presence at both campuses. (9:09 a.m., 1:40-1:42 p.m., 1:52 p.m., 1:55 p.m.) The UOPD also "operates 24 hours a day, year-round." (Exh. 12 at 1.)

4. The UOPD employs both "sworn" employees and "non-sworn" (or "unsworn") employees. In essence, sworn employees are legally authorized to carry a firearm, while non-sworn employees are not.

5. The UOPA and SEIU are "labor organizations" within the meaning of ORS 243.650(13). Each represents a separate bargaining unit with different classifications of University employees.

6. The University has separate collective bargaining agreements (CBAs) with UOPA and SEIU.

UOPD Organizational Structure

7. The head of the UOPD is its Chief of Police, Matthew Carmichael. The Chief of Police oversees the UOPD's four main Divisions: (1) Security/Support, (2) Operations, (3) Portland, and (4) Administration. The head of each Division reports directly to the Chief. (9:04 a.m., 9:07 a.m., Exh. 8.)

8. The Security/Support Division is led by the Director of Security/Support, Benjamin McNulty. In turn, Director McNulty directly supervises Assistant Director of Security/Support Scott Geeting (and others). (10:10 a.m.) Assistant Director Geeting directly supervises the petitioned-for CSOs who work at the Eugene campus (as well as an Alarm Specialist position that is currently vacant). Currently, the Eugene campus only has two CSOs. One of those CSOs, Rebekah Galick, works full time, while the other Eugene-based CSO, Nathan Diamond, works part time (one day a week). All CSOs are non-sworn. (2:51-2:52 p.m., 5:41-5:42 p.m., Exh. 6, Exh. 8, and Exh. 20.)[1]

9. Geeting is serving as the Assistant Director of Security/Support in an interim capacity until the position is permanently filled. The Assistant Director of Security/Support is intended to be a "non-sworn, non-police position." However, Geeting's permanent position is Police Sergeant, which is a sworn position. The position of Assistant Director of Security/Support was also created just a few months before the hearing, after the petition was filed. (9:08-9:11 a.m., 2:29-2:31 p.m., 5:16-5:19 p.m.)

10. As of the July 19, 2021 hearing, the Portland Division is led by Sergeant Raymond Holguin, a sworn employee, who currently works part time and does so remotely from his residence in California. Currently, Sergeant Holguin supervises just one CSO, Jonathan Koble. Sergeant Holguin and CSO Koble are the only UOPD employees on the Portland campus. Moreover, for several months before the hearing, Koble was the only UOPD employee physically present at that location. No Police Officers are assigned to the Portland campus. (9:09-9:10 a.m., 2:00 p.m., 2:02-2:03 p.m., 2:06 p.m., Exh. 6, Exh. 8.)

11. Sergeant Holguin was expected to retire two to three months after the July 19, 2021 hearing. Upon Holguin's retirement, direct supervision of the Portland-based CSO(s) will transfer to the Associate Director of Security/Support. (5:16-5:19 p.m.)

12. The Operations Division is led by Operations Captain Don Morris. It also has Investigations Team and four Patrol Teams. The Investigations Team is led by an Investigations Sergeant, and each Patrol Team is led by a Patrol Sergeant. Each Patrol Team has at least two Police Officers. The Investigations Team has a Detective assigned to it. (Exh. 6, Exh. 8.)

[1]The record occasionally refers to the CSO classification (which has the contractual "class number" of #5522 or D5522) as Public Safety Officer. Previously, the CSO classification was called Campus Patrol Officer (#5520) and Program Representative I (#0816). In all the classification's iterations, CSOs have always been represented by SEIU. (11:47-11:50 a.m., 11:54-11:55 a.m., 12:05 p.m., 1:29 p.m., 3:31-3:33 p.m., 4:06-4:4:08 p.m., 5:48-5:51 p.m., Exh. 16 at 38 and 127, Exh. 21 at 113, Exh. 22 at 1.)

13. The Administration Division is led by Administration Captain Jason Wade. An Administrative Sergeant position (who would report to Captain Wade) is assigned to the Administration Division, but that position is currently vacant. The Division also includes a Records Specialist, an Evidence Technician, and a Crime Analyst, all of whom are non-sworn and currently report directly to Captain Wade. (9:10 a.m., 4:43-4:44 p.m., Exh. 8.)

14. Outside of the UOPD's organizational structure, nearly any University employee who works with University students and might be alerted of a crime may be considered or designated as a Campus Security Authority (CSA). The CSA designation is a result of the federal Jeanne Clery Act. Being a CSA is not a true classification or position. (5:03-5:07, 5:47 p.m.)

UOPA's Bargaining Unit

15. The UOPA is the exclusive representative of a bargaining unit that includes the UOPD's Police Officers and Campus Dispatchers. Both of those classifications are strike-prohibited by state statute. The UOPA unit is the University's only statutorily strike-prohibited unit. (12:14-12:16 p.m., 12:22 p.m., 4:20-4:21 p.m., Exh. 15 at 4 and 7, Exh. 33.)

16. The UOPA was formed in or around 2017. Initially, the UOPA bargaining unit only included Police Officers. Later, the Campus Dispatchers joined the same unit. (11:50-11:51 a.m., 12:14-12:15 p.m., 3:29 p.m., 4:01-4:04 p.m.)

17. When the UOPD was established, and before the UOPA bargaining unit was formed, the Police Officers and Campus Dispatchers were part of SEIU's unit. SEIU did not object to the Police Officers or the Dispatchers leaving SEIU's unit. (11:26-11:32 a.m., 11:55-11:56 a.m., 12:14-12:15 p.m., 3:30-3:31 p.m., 3:34-3:36 p.m.) The original motivation for leaving SEIU and forming the UOPA was a desire for a representative that was specifically suited for those performing law enforcement work and the risks associated with it. (4:07-4:08 p.m.)

18. As of the July 19, 2021 hearing for this case, the UOPD employed 10 Police Officers, and an additional Police Officer was in the process of being hired via a lateral transfer. (12:12-12:13 p.m., 12:27 p.m., 3:58 p.m., 4:22 p.m., 5:20 p.m.).

19. The UOPD currently employs no Campus Dispatchers. Accordingly, the UOPA only represents Police Officers at this time. Presently, the UOPD's Dispatch services are primarily provided by the Junction City Police Department via a contract with the University. (9:59 a.m., 11:57 a.m., 5:20 p.m.) The UOPA has filed a demand to bargain and/or a grievance regarding these changes, and the dispute remains unresolved. (4:20-4:21 p.m., 4:25 p.m.)

20. When the UOPA was formed, there were four or five Campus Dispatchers. (11:55-11:57 a.m., 12:23 p.m.) When the UOPD was fully staffed, it had nine Campus Dispatchers. (4:20-4:21 p.m.)

UOPA and the Fraternal Order of Police

21. The UOPA currently has a contract with the Oregon Fraternal Order of Police (FOP) Labor Council (which is a different legal entity than the FOP's national organization and the UOPA). Through that contract, the FOP provides the UOPA's members a number of services and benefits including the FOP's national legal defense fund and an FOP membership. The legal defense fund provides UOPA members personal legal representation for employment-related administrative, civil, and criminal matters. The UOPA pays the FOP for these services through the UOPA's standard member dues. Previously, the UOPA was represented by a group of attorneys unaffiliated with the FOP, and used a different legal defense fund. Currently, the FOP Labor Council also assists with the UOPA's labor bargaining. (12:59-1:00 p.m., 1:03-1:06 p.m., 1:11-1:14 p.m., 3:46-3:47 p.m., 3:50-3:51 p.m., 4:01-4:05 p.m., 4:18 p.m.)

22. If the UOPA ends its contract with FOP, the UOPA's members would no longer have access to FOP's legal defense fund via UOPA membership. However, it is possible for an otherwise eligible individual to independently pay for coverage by the FOP legal defense fund and be an FOP member even if that individual is not a member of the UOPA. Furthermore, if the UOPA ends its contractual relationship with the FOP legal defense fund, the UOPA would immediately join a different legal defense fund. If that occurred, UOPA members could either join the new fund (using their UOPA member dues) or choose to pay for and remain part of the FOP fund on their own. Membership in the FOP is not compulsory. (1:09-1:10 p.m., 4:18 p.m., 4:23-4:25 a.m., 4:27 p.m., 5:38-5:40 p.m.)

23. The FOP has two primary types of memberships: (1) sworn, active members and (2) non-sworn, non-active, associate members. Associate members can be anyone who is sufficiently associated with law enforcement or is a non-sworn employee of a law enforcement agency. That group includes the UOPD's petitioned-for CSOs. The majority of FOP members are sworn police officers. Retired sworn police officers can also be active members. (1:00-1:00 p.m., 1:13-1:14 p.m., 3:50-3:51 p.m.)

24. Both types of FOP memberships permit the member to join the FOP legal defense fund, and both cost the same amount of money. However, only sworn members can vote on internal FOP matters or hold an FOP board position. (1:13-1:14 p.m.)

SEIU's Bargaining Unit

25. SEIU's bargaining unit includes a "wide range" of classifications. In total, the unit includes between 1,400 and 1,600 University employees. Some of SEIU's classifications work for the UOPD, including the CSOs, Evidence Technician, Records Specialist, Crime Analyst, and Office Specialist. SEIU's unit also includes a "large number" of classifications that work for the University but are not part of the UOPD, such as the University's custodians and landscapers.[2] (11:43-11:44 a.m., 12:13-12:15 p.m., 12:25-12:26 p.m., 1:40-1:42 p.m., Exh. 8.)

[2]According to SEIU's brief (at 2), a full list of the classifications currently represented by SEIU can be found in Appendix A of SEIU's 2019-2021 CBA. (Exh. 16 at 127.) Purportedly, that list includes employees in every department and division of the University. SEIU also contends that the organization has represented University employees since 1973, and has represented CSOs since 1999 or earlier.

26. When SEIU negotiates its CBAs, it negotiates collectively alongside other unions opposite all seven of Oregon's public universities at the same time. (11:16-11:19 a.m.)

27. As of the July 19, 2021 hearing for this case, and when the petition was filed, the UOPD employed 2.5 CSO positions. Specifically, that includes CSO Galick (who works full time in Eugene), CSO Diamond (who works one day a week in Eugene), and CSO Koble (who works full time in Portland). (9:11-9:17 a.m., 11:52 a.m., 12:25-12:26 p.m., 1:42 p.m., 3:59-4:01 p.m.)

28. The UOPD is currently in the process of recruiting and hiring a number of additional CSOs and "eliminating seven sworn officer positions." Theoretically, by the end of this reorganization, the UPOD will employ around 14.5 CSO positions in total, with 12.5 positions at the Eugene campus and 2 positions at the Portland campus. (9:11-9:17 a.m., 11:40-11:43 a.m., 1:34 p.m., 1:39 p.m., 2:58 p.m., 3:59-4:01 p.m., 4:22 p.m., 5:20 p.m., 5:45-5:46 p.m., Exh. 10, Exh. 11.) Through this reorganization, the UOPD will "shift several armed officer positions into unarmed [CSO] positions." (Exh. 10 at 1 and 2, Exh. 14 at 2.)

29. As indicated, SEIU's entire bargaining unit is statutorily strike-permitted. (11:52 a.m., 12:14 p.m.) Nevertheless, Article 8 of the latest SEIU CBA states, "Neither the Union nor any bargaining unit employee shall cause, engage in or sanction any strike, slowdown, or walkout or commit any other acts of work stoppage during the term of this Agreement." (Exh. 16 at 9.) Article 5 of the CBA states, "If, after bargaining, the parties do not reach agreement, the Union may exercise its right to utilize the dispute resolution procedures under ORS 243.712-ORS 243.726, including the right to strike (notwithstanding Article 8 – No Strike or Lockout of this Agreement)." (Exh. 16 at 8.)

30. In theory, any University department has the option of creating its own CSO position(s) that would be included in that department's own organizational structure. However, currently, all of the University's CSOs work for the UOPD. (12:18-12:19 p.m.)

31. SEIU represents CSOs at each of Oregon's public universities. In total, SEIU represents 30 to 40 CSOs statewide, with about 4 to 7 CSOs at each university. (11:37 a.m.)

32. SEIU has taken a position that it does not want to represent sworn officers. (12:03-12:04 p.m.)

Duties, Skills

33. The UOPD's Police Officers are sworn employees, while its CSOs, Evidence Technician, Records Specialist, Crime Analyst, and Office Specialist are non-sworn. (9:08-9:11 a.m., Exh. 20 at 1-2.)

34. CSOs and Police Officers both respond to "calls for service" from Dispatch. The Evidence Technician, Records Specialist, Crime Analyst, and Office Specialist do not.

35. Police Officers uniquely respond to calls for service involving crimes in progress, "persons in crisis," thefts, and assaults (including sexual assaults), among other things. (9:17-9:20

a.m., 9:32-9:34 a.m., 10:45 a.m., 2:59-3:01 p.m.) Those calls could involve Police Officers collecting evidence, investigating crimes, interviewing witnesses and victims, and documenting the crime scene. (9:44-9:46 a.m.) In contrast, CSOs generally respond to non-emergency, "non-person" calls for service. Those calls could include lockouts, for example. (9:43 a.m.) In general, more dangerous calls for service go to Police Officers, and less dangerous calls go to CSOs. (5:21-5:23 p.m.)[3]

36. Both Police Officers and CSOs take calls for service involving accessing buildings (including lockouts), alarms, disabled vehicles/jumpstarts, and elevator entrapments. (12:06-12:07 p.m., 1:21-1:23, 2:35-2:36 p.m.) For certain kinds of calls, CSOs are specifically designated as the primary response while Police Officers are designated as the secondary response – *e.g.*, calls involving disabled vehicles, a dog at large, a barking dog, and non-emergency elevator issues. For other kinds of calls, a Police Officer is designated as the primary while a CSO is designated as the secondary – *e.g.*, littering, towed vehicle, and transporting a student home after a medical issue. "[A] sign down typically does not have a police officer involved, but if [CSOs] and campus Facilities Services personnel are initially unavailable, a police officer might need to respond and secure the sign until other units could fill their usual roles." (Exh. 18 at 2, 3, and 5, Exh. 19 at 3.)

37. CSOs also directly assist and support Police Officers during the Police Officers' calls for service, and sometimes the two classifications go on calls together. That could involve CSOs transporting items (*e.g.*, prisoner property) back to the UOPD building via a CSO's pickup truck, helping with "crime scene integrity," or logging or limiting people coming in and out of a crime scene, for example. Additionally, a CSO could take a Police Officer's patrol car to the mechanic, pick up food for a Police Officer during an event, or provide other logistical support. (9:11-9:16 a.m., 9:44-9:46 a.m., 9:56-9:57 a.m., 1:23 p.m., 1:25-1:26 p.m., Exh. 22 at 4.)

38. In general, if a CSO becomes aware of a crime or other emergency (*e.g.*, an alarm or gas smell) occurring, the CSO is supposed to contact a Police Officer or Dispatch (which will in turn contact a Police Officer) for assistance using the CSO's police radio. The CSO is not supposed to directly respond to the crime or emergency (as a Police Officer would). Stated differently, if a CSO sees a crime or emergency, the CSO is generally expected to "observe and report." After that, a Police Officer may intervene, and/or the shift's Watch Commander may give the CSO direction. (1:21-1:23 p.m., 1:31-1:32 p.m., 9:11-9:16 a.m., 9:56-9:59 a.m., 2:47-2:48 p.m., 4:57-4:58 p.m.) However, CSOs "may act as first responders to medical emergencies." (Exh. 1 at 5, Exh. 20 at 2.)

39. Like CSOs, University employees designated as *CSAs* are expected to call the UOPD and report crimes. That said, CSAs do not go on patrol or carry police radios, while the UOPD's Police Officers and CSOs do. (5:03-5:07, 5:47 p.m.)

40. The person designated as a shift's Watch Commander is always a sworn employee (*e.g.*, a Sergeant, a Corporal, or Administration Captain Wade). In essence, the Watch Commander gives direction to sworn and non-sworn UOPD employees who are working in the field (*i.e.*, not in the UOPD office/building) in Eugene. A Watch Commander regularly monitors Eugene-based

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[3]Exh. 18 (which was admitted) is a "Calls for Service Matrix" that details precisely which classification is supposed to receive a particular type of call for service. (5:21-23 p.m., 5:43-5:44 p.m.)

CSOs' work, and gives those CSOs direction and assignments when a CSO's direct supervisor is off duty, and whenever Eugene CSOs are working in the field. (1:23-1:24 p.m., 1:35-1:36 p.m., 2:28-2:29 p.m., 2:43-2:45 p.m., 3:40-3:42 p.m., 5:07 p.m.)

41. CSOs serve as "campus ambassadors" to University students and staff, and function as "the face" of the UOPD. (9:23-9:24 a.m., 12:06-12:07 p.m., 1:21-1:23 p.m., Exh. 22 at 2.)

42. Police Officers can stop, detain, and arrest people, and can use force on others. CSOs cannot. (9:19-9:20 a.m., 9:32-9:34 a.m., 1:32 p.m., 2:48 p.m., 4:14-4:15 p.m., 4:58-5:01 p.m.) That said, on occasion, a CSO may need to support a Police Officer who is using physical force on someone (*i.e.*, going "hands on"). (1:26-1:28 p.m., 1:34 p.m.) Further, "most situations involving UOPD do not escalate or result in use of force," and Police Officers "rarely find themselves in incidents when use of force is necessary." (Exh. 19 at 2.)

43. Police Officers regularly investigate crimes and write police reports. As of the July 19, 2021 hearing, CSOs did not yet investigate any crimes or write police reports. (5:01 p.m.) However, in the near future, CSOs will be responsible for responding to calls and writing initial police reports for property-related (non-person) misdemeanors without suspect information (cold cases), and for performing limited investigations related to those cases (which may include contacting victims). Those cases could involve something being stolen, damaged, or graffitied, for example. CSOs will not be making any arrests in connections with their police reports. (9:32-9:34 a.m., 10:02-10:03 a.m., 10:43 a.m., 2:35-2:37 p.m., 2:48-2:49 p.m.) Relatedly, Police Officers and CSOs both write "incident reports." (9:11-9:16 a.m., 9:43-9:44 a.m., 10:03 a.m., Exh. 1 at 9, Exh. 22 at 4.)

44. Police Officers can issue criminal citations and "letters of trespass," and can take people to court. Police Officers can also enforce the Eugene City Code and issue related citations through a memorandum of understanding. CSOs cannot do those things. (4:58-5:00 p.m., 5:19 p.m.) However, CSOs can "issue parking citations." (Exh. 20 at 1.) Further, although CSOs do not take trespass calls from Dispatch or issue written trespass notices or citations, while on patrol, a CSO may tell a person that he or she is trespassing on campus and/or notify Dispatch of the trespass. (2:59-3:01 p.m.)

45. Both CSOs and Police Officers patrol on and off campus by vehicle, by bicycle, or on foot. The two classifications also conduct traffic enforcement. (9:17-9:20 a.m., 9:32-9:34 a.m., Exh. 1 at 4, Exh. 2 at 2, Exh. 23 at 5.) The Evidence Technician, Records Specialist, Crime Analyst, and Office Specialist do not patrol.

46. Sometimes, CSOs and Police Officers patrol together. When that occurs, the CSOs "provide support" to the Police Officers. During some patrols, a CSO will join a Police Officer in the Police Officer's car. But a Police Officer will not go on patrol with a CSO driving the vehicle. (5:19 p.m., Exh. 1 at 5.)

47. Portland-based CSO Koble primarily handles building security. (2:07-2:08 p.m.) However, before the COVID-19 pandemic, when Sergeant Holguin still worked in person at the Portland campus, CSO Koble did foot patrols of the campus with Holguin five to eight times a

day. Occasionally, the Portland CSO also performs surveillance, which can include watching security video footage. (2:02 p.m., 2:04 p.m.)

48. CSOs may be assigned to a fixed post, such as the University's Knight Library or the Erb Memorial Union. Once the UOPD finishes hiring its new group of CSOs, CSOs will have more fixed posts. In addition, after more CSOs are hired, the CSO assigned to the Erb Memorial Union will be responsible for providing security there and engaging with a number of student organizations. Other CSOs will be responsible for working with student athletes and a comfort dog. (10:38-10:43 a.m.)

49. CSOs and Police Officers both provide security and traffic control for on-campus events. (2:26 p.m., 5:14-5:16 p.m., Exh. 20 at 1 and 2.)

50. The UOPD has a single policy manual that applies to all its employees. However, some of the policies only apply to a particular classification. For example, the UOPD's use of force policy directly applies to the Police Officers, and generally does not apply to the CSOs. (10:15-10:16 a.m., 10:53-10:54 a.m., 3:16 p.m., 5:19 p.m.)

51. All UOPD employees must be able to respond to subpoenas and render credible testimony in a court of law. Under *Brady v. Maryland*, 373 US 83, 83 S Ct 1194 (1963), police departments have a duty to provide exculpatory information regarding the credibility of police department employees to the district attorney once the department becomes aware of it. As a result, if any UOPD employee is dishonest, he or she could be terminated and may be decertified. (10:16-10:18 a.m., 3:39-3:40 p.m., Exh. 1 at 9, Exh. 2 at 2, Exh. 23 at 3.)

52. CSO Galick has never testified in court. (2:49 p.m.) However, CSO Diamond has been called to testify to a grand jury (though he did not end up testifying). (1:32 p.m., 5:01-5:02 p.m.) CSO Koble also testified to a grand jury after he recognized a homicide suspect while he was watching security video footage. (1:58-2:00 p.m., 2:07-2:08 p.m.)

53. CSOs occasionally transfer crime scene evidence, and thus become part of the chain of custody, which can lead to being called as a witness. (9:57-9:59 a.m.) Once CSOs start writing police reports, it will increase the likelihood that a CSO will have to testify in court, which increases the CSO's liability. (10:02-10:03 a.m., 5:45-5:46 p.m.)

54. CSOs and Police Officers have the same level of access to the Criminal Justice Information Services (CJIS) and Law Enforcement Data System (LEDS) databases. However, in practice, CSOs will inevitably have far fewer reasons to use those databases, given their relatively limited responsibilities. (1:32-1:33 p.m., 5:44-5:45 p.m.) A CSO is unlikely to make a criminal history request or check for a warrant like a Police Officer would, for example. Nevertheless, a CSO may check on a vehicle's registration or look someone up. (10:47-10:48 a.m., 2:32-2:34 p.m., 5:08-5:09 p.m.)

55. The Crime Analyst generally ensures that the University complies with the Jeanne Clery Act and associated regulations, and "applies statistical and quantitative analysis to crime data," among other related tasks. (Exh. 20 at 4.)

56. The Evidence Technician centrally "is responsible for maintaining the chain of custody and integrity of evidence and property collected by the police department." (10:35-10:37 a.m., Exh. 20 at 4-5.)

57. The Office Specialist is assigned to the UOPD's "front office," and generally greets and assists visitors and cleans and maintains UOPD-owned vehicles. (Exh. 20 at 3.)

58. The Records Specialist performs a variety of "clerical and administrative work" including "maintaining law enforcement records, criminal information, reports and documents." (Exh. 20 at 3.)

Benefits

59. The SEIU CBA gives CSOs some right to another SEIU position if they are laid off. Police Officers do not have a similar right. (12:21 p.m.)

60. CSOs and Police Officers have different retirement benefits and life insurance options. (9:48-9:50 a.m.) However, CSOs and Police Officers are both eligible to receive Oregon Public Employees Retirement System benefits. (Exh. 15 at 29.)

Interchange or Transfer of Employees, Promotional Ladders and Opportunities

61. If a Police Officer is absent, a CSO generally cannot temporarily fill in for the Police Officer or respond to a Police Officer's calls for service. But a Police Officer can temporarily perform the role of a CSO. (9:19-9:20 a.m., 9:50 a.m.)

62. CSOs may be able to promote to a lead CSO role. CSOs can also apply to become the Assistant Director or Director of the Security/Support Division. CSOs cannot promote or transfer directly into a Police Officer position. However, a CSO can apply and test for a Police Officer vacancy, but will have to go through the same hiring process that anyone else would. (9:51-9:53 a.m.) To date, at least three CSOs have become Police Officers. (9:51 a.m., 10:00 a.m., 10:37 a.m.)

Supervision and Worksites

63. As indicated above, the Eugene-based CSOs are currently directly supervised by Assistant Director of Security/Support Geeting, who in turn reports to Director of Security/Support McNulty. Assistant Director Geeting primarily handles the Eugene-based CSOs' leave requests (*e.g.*, sick leave), scheduling matters, and performance evaluations. Outside of that, the designated Watch Commander regularly gives Eugene-based CSOs direction and assignments regarding work in the field, and reviews CSOs' work (including their "daily reports"). A Eugene CSO might also seek out the Watch Commander for approval or direction before taking an action. (1:37 p.m., 2:28-2:29 p.m., 2:51-2:53 p.m., 3:43 p.m., Exh. 22 at 2.)

64. Again, Portland-based CSO Koble is currently supervised by Sergeant Holguin, who works part time and remotely. If Koble cannot reach Hoguin and needs assistance, Koble will call either Administration Captain Wade or Chief Carmichael. Koble also has weekly meetings with Holguin and Chief Carmichael via telephone. Koble separately reports to Building Manager John Wolfe and Provost Jane Gordon, neither of whom works for the UOPD. (2:00 p.m., 2:92 p.m., 2:06 p.m.)

65. The UOPD's main building is located next to the Eugene campus, at 2141 East 15th Avenue. That off-campus building has its own secured parking lot. In that lot, there is an area (known as "The Barn") where the UOPD has locker rooms, restrooms, vehicle bays, and an area for storing equipment. (10:03-10:06 a.m.)

66. In Eugene, CSOs and Police Officers similarly report to the UOPD's main building for work. Some CSOs also attend some briefings with Police Officers. In addition, in Eugene, CSOs and Police Officers (like all Eugene campus UOPD employees) use the same locker rooms, restrooms, breakrooms, report writing room, and parking lot area. The two classifications also use the same computers (which are in the report writing room) in Eugene. Neither CSOs nor Police Officers have access to the UOPD's evidence room, which can only be accessed by the Evidence Technician. (10:03-10:07 a.m., 10:46 a.m., 2:27 p.m., 2:31-2:32 p.m., 5:32-5:33 p.m.)

67. On the Portland campus, the UOPD has a single office. CSO Koble used to share that office with Sergeant Holguin. However, as noted, Holguin is currently working remotely. (2:04-2:05 p.m.)

<u>Wages</u>

68. The budgeted starting salary for a full-time Police Officer is $76,189 a year. The minimum wage for a Police Officer is $27.98 an hour and the maximum wage is $36.63 an hour. Police Officers can also receive "incentive pay" by obtaining certain certificates, or by performing special assignments such as K9 Officer of Corporal. (9:38 a.m., Exh. 2 at 1, Exh. 15 at 74, Exh. 23 at 2 and 6.)

69. The budgeted starting salary for a full-time CSO is $44,511 a year. The minimum wage for a CSO is $19.51 an hour and the maximum wage is $29.71 an hour. (Exh. 1 at 6, Exh. 16, Exh. 22 at 1, 2.)

70. CSOs are paid an extra dollar an hour for night and weekend hours (*i.e.*, a "shift differential"), while Police Officers are not. Additionally, CSOs are paid a 2.5% "longevity pay premium" once they have been at the top step of their salary range for 12 months, while Police Officers are not. (12:20-12:21 p.m.)

71. CSOs and Police Officers are both eligible for overtime pay. CSOs are paid overtime when they work more than 10 hours in a shift in a 40-hour workweek. Meanwhile, Police Officers are paid overtime when they work more than 80 hours in a 14-day work period. (12:21 p.m., Exh. 15 at 35, Exh. 16 at 47-48.)

72. CSOs and Police Officers both receive paid lunch time. (2:03 p.m.)

Hours

73. Police Officers bid for their schedules, which last for six months, by seniority twice a year in accordance with the UOPA CBA and the UOPD's policy manual. Police officers generally work 12-hour shifts, and work either from 7 a.m. to 7 p.m. or from 7 p.m. to 7 a.m. Moreover, Police Officers can either work a 3-day workweek or a 4-day workweek. The K9 Police Officer works 10-hour shifts on weekdays. As a rule, at least two Police Officers are on duty at all times. The Patrol Commander (*i.e.*, Operations Captain Morris) determines what hours need Police Officers and what shifts are available to them. (12:20 p.m., 5:25-5:31 p.m., Exh. 15 at 58.)

74. Unlike Police Officers, CSOs cannot bid for their shifts and do not have set schedules. Instead, CSO schedules are flexible and "will vary depending on department needs." (Exh. 1 at 2.) CSOs generally work 8-hour shifts, but they can work 8-, 10-, or 12-hour shifts. Further, the UOPD does not require that a particular number of CSOs are working at any given time, and frequently no CSO is on duty. However, sometimes, the UOPD may have a contract requiring a CSO be on duty. One such contract mandates that, during finals week, a CSO is assigned to the University's Knight Library. When that happens, a CSO works at the Knight Library's door, providing security and making sure that people who do not belong there are escorted out of the building. Additionally, the UOPD plans to post CSOs around campus "24/7" in the future. Director of Security/Support McNulty is ultimately responsible for CSOs' schedules, but that responsibility is shared by the Assistant Director of Security/Support. (5:25-5:31 p.m., 5:41 p.m., Exh. 10 at 2, Exh. 11 at 1.)

75. CSO Galick, who works full time in Eugene, currently works 10-hour shifts. CSO Diamond, who works part time in Eugene, currently works one day a week, predominantly on Saturdays. He usually works on the weekends. As noted, CSO Koble works full time in Portland. (1:20 p.m., 1:23 p.m., 1:29 p.m., 5:26-5:31 p.m., 5:41 p.m.)

Equipment and Uniforms

76. CSOs and Police Officers similarly wear black boots and black pants. Moreover, both classifications wear the same black utility/duty belts with the same set of keys, glove pouch, flashlight, and multitool. Both CSOs and Police Officers have the option of wearing a baseball-style hat with "UOPD" insignia. Additionally, CSOs and Police Officers carry and use the same police radios and the same police channel, and regularly use that channel to share information. CSOs and Police Officers also use the same quartermaster to order equipment. (9:53-9:54 a.m., 9:57 a.m., 9:59 a.m., 2:24-2:25 p.m., Exh. 20 at 1 and 2.)

77. CSOs and Police officers both wear uniform polo shirts, but each classification's uniform shirt is a different color and has slightly different language on it. Likewise, both classifications wear armored vests, but Police Officers are expected to wear their vests on the outside of their shirts, while CSOs are generally expected wear them under their shirts. Further, each classification's vest is a different color. (9:53-9:55 a.m., 1:55-1:58 p.m., 2:23-2:34 p.m., 3:15-3:16 p.m., 5:10-5:12 p.m., Exh. 20 at 1 and 2, Exh. 24.)

78. CSOs regularly carry pepper spray on their belts. That pepper spray is intended for self-defense only. As a rule, CSOs do not carry "use of force tools" such as a firearm or a taser, or carry handcuffs. In contrast, Police Officers regularly carry a firearm, a holster, ammunition, a taser, and handcuffs (all of which CSOs cannot use). (10:23 a.m., 1:32 p.m., 1:55-1:58 p.m., 2:07 p.m., 2:24-2:25 p.m., 3:20 p.m., 9:53-9:55 a.m., 2:24 p.m., 2:46 p.m., 2:48 p.m., 5:10-5:12 p.m.)

79. In April 2021, after the petition was filed, the UOPD made a number of slight changes to CSOs' uniforms. However, the new uniform policy has not been applied to CSO Koble in Portland yet (though the policy will be applied to him in the future). In general, those changes further distinguish the CSOs from the Police Officers. Among other things, the UOPD made the CSOs start wearing their vests under their shirts, and removed the word "Police" from the CSOs' unforms. Under the new policy, CSO uniforms will only use the acronym "UOPD." CSOs will also no longer wear police badges. After the additional CSOs are hired, the UOPD may further reduce the number of items on the CSOs' belts. (9:53-9:55 a.m., 2:08-2:09 p.m., 2:25 p.m., 2:49-2:51 p.m., 5:10-5:12 p.m.)

80. Currently, CSO vehicles (which are pickup trucks) and Police Officer vehicles (which are SUVs) have the same overall design and white color, and both have the word "Police" on them. Further, both types of vehicles are stored in the same secured parking area. However, CSO vehicles specifically say "Community Service Officer" on them, while Police Officer vehicles do not. The UOPD is also currently in the process of making the two types of vehicles more distinct from one another. In part, that will include removing the word "Police" and police badges from the CSO vehicles. (1:25 p.m., 2:34-2:35 p.m., 5:09-5:10 p.m., Exh. 20 at 1 and 2.)

81. Neither the Records Specialist nor the Crime Analyst wears a uniform. The Office Specialist normally does not wear a uniform, "but may wear UOPD polo shirts at some functions." (Exh. 20 at 3, 4.)

Certifications and Training

82. Oregon's Department of Public Safety Standards and Training (DPSST) operates a police academy and provides a variety of other related training. According to state law, UOPD's Police Officers must either complete DPSST's police academy or have completed another state's comparable police academy. (9:20-9:21 a.m., 10:52-10:53 a.m., 4:47 p.m.)

83. Among other things, DPSST's police academy includes training regarding responding to calls for service, responding to domestic violence, criminal investigations, traffic enforcement, the use of firearms, the use of force, defensive tactics, physical fitness, and testifying in court. In total, DPSST's police academy requires around 600 to 700 hours of training. At the end of the police academy, Police Officers take an oath to follow DPSST's Criminal Justice Code of Ethics (which CSOs are not required to do). (9:20-9:22 a.m., 9:46-9:47 a.m., 10:56-10:57 a.m., 3:21-3:24 p.m., 4:47 p.m., Exh. 25.)

84. Under a state law, after earning the basic DPSST police academy certification, each Police Officer must continue to maintain that certification year after year through annual "maintenance training." That annual training specifically involves 8 hours of use of force or

firearms training, and 1 hour of ethics training. In addition, every 3 years, Police Officers must complete a total 84 hours of training that includes at least 3 hours of mental health or crisis intervention training. Beyond that, Police Officers must maintain first aid/CPR certification at all times. There are no comparable state laws regulating CSOs. (4:46-4:51 p.m.)[4]

85. As of the hearing for this case, the UOPD did not require its CSOs to have a DPSST certification, complete police academy, or be firearm certified. However, the UOPD recently decided that all CSOs will need to attain a DPSST "private security" certification. That particular certification, which is intended for unarmed security professionals, is not required by law (and is distinct from the DPSST's police academy certification). DPSST's private security certification requires 14 hours of training. DPSST does not have a CSO or Public Safety Officer certification option. (1:29-1:31 p.m., 9:23-9:24 a.m., 9:30-9:31 a.m., 9:40-9:41 a.m., 10:10-10:14 a.m., 10:51-10:53 a.m., 10:56 a.m., 2:46 p.m., 4:48-4:49 p.m.)

86. The UOPD uses daily PoliceOne Academy training bulletins, which are presented in the form of courses and tests, to keep UOPD employees up to date on UOPD's policies.[5] Both CSOs and Police Officers take these courses, but the courses given are tailored to each classification. However, both classifications take some of the same courses, including trainings regarding diversity, equity, inclusion, customer service, and communication. All of these courses are taken individually. (9:48-9:50 a.m., 10:07-10:08 p.m., 10:18-10:21 a.m., 2:27 p.m., 3:16 p.m.)

87. CSOs and Police Officers receive the same first aid, CPR, AED, bloodborne pathogen, and implicit bias training. Further, both CSOs and Police Officers receive defensive tactics and leadership training. That said, the defensive tactics and leadership training that each classification receives is tailored to each classification's duties, with some overlap. Police Officers also receive much more defensive tactics training. (10:21-10:22 a.m., 10:25 a.m., 10:49-10:51 a.m., 1:33 p.m., 3:24-3:25, Exh. 5.) Similarly, both CSOs and Police Officer receive pepper spray training. However, CSOs are only taught how to use pepper spray in self-defense, while Police Officers are also trained how to use pepper spray when making an arrest or taking someone into custody. Likewise, Police Officers receive EVOC training, while CSOs receive safe driver training. (10:23 a.m.)[6] Currently, the two classifications receive different racial bias training. (10:26 a.m., 3:25 p.m.)

88. CSOs occasionally train alongside Police Officers. For example, CSO Koble took CPR, AED, pepper spray, and first aid training alongside Police Officers. CSO Galick trained with Police Officers as part of a "bicycle patrol instructor certification program," and for "trauma training" and "CAHOOTS" training.[7] CSO Galick is also the UOPD's primary first aid, CPR, and

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[4]*See* OAR 259-008-0065.

[5]PoliceOne is a product of Lexipol, a nationwide standardized law enforcement policy system.

[6]CPR refers to cardiopulmonary resuscitation, and AED refers to automated external defibrillator. (Exh. 2 at 3, Exh. 19 at 3.) We presume that EVOC refers to Emergency Vehicle Operations Course (or Certification).

[7]CAHOOTS appears to be a community "mobile crisis intervention program." (Exh. 19 at 1.)

AED instructor, which requires her to train Police Officers. Galick otherwise instructed Police Officers about matters related to the Olympic trials that were hosted at the University's Eugene campus. Once, a CSO and some Police Officers were sent to the same training in San Francisco, California that focused on empathy, service, and leadership. Separately, Police Officers have used the CSOs' trucks for active shooter and other trainings. (10:19-10:22 a.m., 10:27 a.m., 2:03 p.m., 2:22-2:23 p.m., 2:27 p.m.)

89. CSOs do not receive firearm safety, traffic stop, emergency vehicle operation, or child abuse training, while Police Officers do receive such training. (10:23 a.m., 10:25 a.m., 2:46-2:47 p.m.)

90. The Evidence Technician receives first aid, CPR, and bloodborne pathogens training. The Office Specialist receives CPR training. (10:49-10:51 a.m.)

Discipline

91. A state law known as the "Police Officer Bill of Rights" regulates how police officers can be interviewed, when they can be interviewed, and how many investigators can be present. Similar regulations are included in the UOPA CBA and the UOPD's policy manual. (5:34-5:35 p.m.)[8]

92. The UOPA always assigns an attorney to its members at the very beginning of any investigation, and that representation continues until after discipline is issued. As noted, an attorney is personally assigned to members for all administrative, criminal, and civil proceedings. That coverage includes all use of force disputes, "Brady" testimony/credibility issues, and DPSST decertification proceedings. (3:36-3:39 p.m.)

93. The discipline and investigation of CSOs is regulated by the SEIU CBA. There is state law regulating the investigation of CSOs that resembles the law regulating the investigation of the Police Officers. (5:34-5:35 p.m., Exh. 27.) If a CSO is investigated or disciplined, SEIU may choose to utilize either a law firm or its own attorneys, or choose to not use an attorney. (12:05 p.m.)

94. Once a Police Officer or CSO successfully completes his or her probationary period, he or she can only be disciplined for "just cause." (5:36 p.m.)

Hiring Requirements

95. Police Officer applicants and CSO applicants are both interviewed by interview panels. However, Police Officer applicants are uniquely interviewed by a "community-based" interview panel comprised of University faculty, students, and staff. CSO applicants are interviewed by administrators of the UOPD's Security/Support Division. Further, each classification's interview panel asks different kinds of questions. In general, the questions that CSO applicants are asked are less stressful than those that Police Officers are asked. The main

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[8]*See* ORS 236.360.

aims of a CSO interview panel are to determine the applicant's ability to communicate, work with the community, and hold a conversation, and to determine whether the applicant has any experience with customer service. (9:24-9:25 p.m., 10:00 a.m., 3:14-3:15 p.m.)

96. Police Officer applicants and CSO applicants go through a similar background check that includes checking an applicant's references, credit, educational records, and criminal history. (9:24-9:25 a.m., 9:26-9:29 a.m., 10:00 a.m.)

97. Both Police Officers and CSOs need a valid Oregon driver's license throughout their employment. (9:23-9:24 a.m., 9:40-9:41 a.m., Exh. 1 at 2, Exh. 2 at 2, Exh. 22 at 2.)

98. At a minimum, both Police Officers and CSOs need a "High School Diploma or GED/equivalent," but a Police Officer also needs "45 quarter credit hours or 30 semester credit hours from an accredited college or university." (Exh. 1 at 2, Exh. 2 at 2, Exh. 22 at 2.)

99. CSO and Police Officer applicants take "very similar" pre-employment physical and psychological examinations. For either classification, the doctors' office is given a position description. Subsequently, a doctor interviews the applicant to see whether, in the doctor's view, the applicant is suitable for the applied-for classification and its corresponding functions and stressors. In general, Police Officers are expected to have to experience additional and more significant stressors CSOs are unlikely to experience (*e.g.*, carrying a firearm, being involved in a "deadly force encounter," or responding to a domestic violence dispute). As a result, the pre-employment physical and psychological examinations for a Police Officer are generally more extensive. Police Officers and CSOs both take heart, hearing, and vision tests, but a CSO medical examination more closely resembles the general examination given to other University employees who work outside of the UOPD. (9:20 a.m., 9:26-9:29 a.m., 3:14 p.m., 3:18-3:20 p.m., 4:52-4:56 p.m.)

100. Newly-hired Police Officers must pass the Oregon Physical Abilities Test (ORPAT) in order to maintain employment. Among other things, the ORPAT includes a timed running test. (9:20 a.m., 9:26-9:27 a.m., 3:13-3:14 p.m., 4:50-4:54 p.m.) (9:40-9:41 a.m.) CSOs are not required to take or pass the ORPAT. (4:53-4:54 p.m.)

101. Newly-hired CSOs and Police Officers have different probationary periods. CSOs have either a 6-month or 12-month probationary period in accordance with the SEIU CBA (which is the same for all SEU-represented University employees). In contrast, Police Officers have an 18-month probationary period that allows time for the classification's mandatory police academy and field training. If a CSO is hired as a Police Officer, that individual starts a new probationary period and his or her seniority resets as well. (5:33-5:34 p.m.) Moreover, a CSO who applies to become a Police Officer still has to go through the full Police Officer application process that any other applicant would, including the same background check and medical and psychological examinations. (3:18 p.m.)

Desires of Employees

102. In this case, every one of the three CSOs currently employed by the UOPD signed a valid showing of interest card supporting transferring the CSO classification from SEIU's bargaining unit to the UOPA's unit. (Exh. 13.) During the hearing, the same CSOs also expressed a desire to join the UOPA because it is especially tailored to representing law enforcement and the risks associated with it. (1:20-1:21 p.m., 2:00-2:02 p.m., 2:15-2:16 p.m., 2:21 p.m.)

CONCLUSIONS OF LAW

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

2. The petition does not inappropriately seek to transfer strike-permitted employees into a strike-prohibited unit, and the CSOs have a sufficient community of interest with the Police Officers and are more appropriately included in the UOPA unit than the SEIU unit.

Standards of Decision

Standard Unit Appropriateness Factors

In determining whether a proposed bargaining unit is appropriate for collective bargaining, ORS 243.682(1)(a) requires this Board to "consider such factors as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees." Historically, the term "community of interest" has included such factors as similarity of duties, skills, and benefits; interchange or transfer of employees; promotional ladders and opportunities; and common supervision and worksites. OAR 115-025-0020(3); *Klamath Community College Faculty Association, OEA/NEA v. Klamath Community College*, Case No. CC-03-09 at 13-14, 23 PECBR 484, 496-97 (2010); *Oregon School Employees Association v. South Coast ESD, Region #7*, Case No. RC-10-00 at 6, 19 PECBR 58, 63 (2001).

Notably, the list of factors above is nonexclusive, and this Board has adopted and applied other factors in determining appropriate bargaining units. The most prominent of those factors is our well-established administrative preference, in most situations, for establishing the largest possible appropriate unit. A "wall-to-wall" unit is one that includes all possible employees on an employer, and thus fully carries out the Board's preference. *Oregon AFSCME Council 75 v. Oregon Judicial Department - Yamhill County*, 304 Or App 794, 817, 469 P3d 812, 817 (2020); *Oregon Public Employees Union v. State of Oregon*, 173 Or App 432, 436, 22 P3d 251, 253 (2001); *Laborers' International Union of North America, Local 320 v. City of Keizer*, Case No. RC-37-99 at 5-8, 18 PECBR 476, 480-83 (2000). We are similarly concerned about undue fragmentation of an employer's workforce by creation of too many bargaining units. *Laborers' International Union of North America Local 483 v. City of Portland*, Case No. RC-22-02 at 7, 20 PECBR 208, 214 (2003). In general, the Board will certify a smaller unit as a fragment of the employer's workforce only if the employees' community of interest in the proposed unit is clearly distinct from that of other employees, or there are other compelling reasons to create a smaller unit. *Klamath Community College*, CC-03-09 at 14, 23 PECBR at 497 (citing *Oregon Workers Union v. State of Oregon, Department of Transportation and Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. RC-26-05 at 13, 21 PECBR 873, 885 (2007)).

This Board has been delegated broad discretion to decide how much weight to give each relevant factor in any particular case. *State of Oregon*, 173 Or App at 436 (citing *Welches School District No. 13 v. Welches Education Association/OEA/NEA*, 116 Or App 564, 569, 842 P2d 437, 439 (1992)); *Association of Public Employees v. Oregon State System of Higher Education and Oregon Public Employees Union, Local 503*, SEIU, Case No. RC-113-87 at 6, 10 PECBR 883, 888 (1988) (citing *International Union of Operating Engineers, Local No. 701 v. Grant County Road Department*, Case No. C-254-83 at 7, 8 PECBR 6735, 6741 (1984)). ORS 243.682(1)(a) specifically empowers us to find a bargaining unit appropriate "even though some other unit might be appropriate." Accordingly, the statute 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). As stated in OAR 115-025-0020(2), "a bargaining unit may consist of all of the employees of the employer, or any department, division, section or area, or any part of combination thereof, if found to be appropriate by the Board." In the end, each unit determination case is governed by its own peculiar facts. *South Coast ESD, Region #7*, RC-10-00 at 8, 19 PECBR at 65; *Mid-Valley Bargaining Council (OEA/NEA) v. Greater Albany Public School District 8-J*, Case No. C-17-81 at 17, 6 PECBR 4766, 4782 n 4 (1981).

Additional Mixed Bargaining Unit Factors

The Public Employee Collective Bargaining Act grants most public employees the right to strike. However, ORS 243.736(1)(c) and (1)(h) make it unlawful for police officers and emergency communications workers to strike. As a result, UOPA's entire bargaining unit, which exclusively includes Police Officers and Campus Dispatchers, is statutorily strike-prohibited. If the instant petition is granted and the CSOs join the UOPA's unit, that unit will become a "mixed unit" and the CSOs will also be statutorily prohibited from exercising their right to strike. *See Gresham Police Officers' Association v. City of Gresham and Teamsters Local 223*, Case No. UC-006-12 at 17, 25 PECBR 303, 319 (2012); *Klamath County Peace Officers Association v. Klamath County and Laborers' International Union of North America, Local 915*, Case No. RC-12-86 at 12-13, 9 PECBR 8944, 8955-56 (1986).

When addressing a petition to transfer strike-permitted employees from a strike-permitted bargaining unit into a strike-prohibited unit, our task is to evaluate the two units to determine which is more appropriate for the position(s) at issue. In such a case, our overriding goal is to group those employees who share the greatest community of interest in the same unit. *City of Gresham*, UC-006-12 at 16-17, 25 PECBR at 318-19 (citing *Oregon State Police Officers' Association v. State of Oregon, Department of State Police and Oregon AFSCME Council 75*, Case No. UC-6-00 at 6, 18 PECBR 930, 935 (2000); *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections and AFSCME, Council 75*, Case No. UC-24-99 at 7, 18 PECBR 441, 447 (2000)).

This Board has expressed a strong preference for separate bargaining units for strike-permitted and strike-prohibited employees, primarily due to the difference in the potential dispute processes available to the two categories of employees. *Ashland Police Association v. City of Ashland and International Brotherhood of Electrical Workers, Local 659*, Case No. UC-22-06 at 9, 22 PECBR 1, 9 (2007) (citing *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections and AFSCME, Council 75*, Case No. UC-25-99 at 12-13, 18 PECBR

576, 587-588 (2000)); *Washington County Police Officers Association v. Washington County*, Case No. UC-36-00 at 8, 19 PECBR 641, 648 (2002) (citing *Douglas County Law Enforcement Association v. Douglas County Sheriff's Department*, Case No. UC-18-94 at 10, 15 PECBR 496, 505 (1994)). However, an employee's strike-permitted or strike-prohibited status is not controlling on our determination (just as the desires of the employees are not controlling), and the Board has the authority to designate mixed units. *Josephine County v. Josephine County Sheriff's Association*, Case No. UC-01-12 at 16, 25 PECBR 189, 204 (2012); *Tigard Police Officers Association v. City of Tigard*, Case No. UC-32-88 at 9, 10 PECBR 1014, 1022 (1988) (citing *City of Canby v. Canby Police Association*, Case Nos. C-218-82 and C-235-82, 7 PECBR 5873 (1983), *aff'd* 68 Or App 317 (1984), *rev den* 297 Or 546 (1984). Ultimately, for the Board to convert statutorily strike-permitted employees to strike-prohibited status, there must be compelling reasons for that result based upon other community of interest factors. *State of Oregon, Department of Correctios*, UC-24-99 at 12-13, 18 PECBR at 587-88.

When a petition proposes adding strike-permitted employees to a strike-prohibited bargaining unit, in addition to the standard unit appropriateness factors noted above, we have considered: (1) the percentage of strike-prohibited employees in the proposed unit, (2) the relationship of the employees' duties to a law enforcement employer's mission, (3) the uniqueness of the employees' positions, (4) the extent to which other employees with similar duties are or could be organized, (5) the pattern of organization in the workforce, and (6) the history and stability of labor relations. *Beaverton Police Association v. City of Beaverton and Service Employees International Union Local5 503, Oregon Public Employees Union*, Case No. UC-13-09 at 17, 23 PECBR 803, 819 (2010) (citing *Multnomah County Deputy Sheriff's Association v. Multnomah County and AFSCME Local 88*, Case No. UC-14-01 at 16, 19 PECBR 733, 748 (2002)); *Washington County Police Officers Association v. Washington County*, Case No. UC-36-00 at 8-9, 19 PECBR 641, at 648-49 (2002) (citing *State of Oregon, Department of Corrections*, UC-24-99 at 7, 18 PECBR at 447).

Burden of Proof

In a representation case such as this one, there is no burden of proof an any party. OAR 115-010-0070(5)(a).

Discussion

Similarity of Duties, Skills, and Benefits; Uniqueness of Employees' Positions; Other Employees with Similar Duties

CSOs, like all the employees in SEIU's bargaining unit, are non-sworn employees. Similarly, CSOs do not have arrest powers and do not carry firearms, tasers, or handcuffs as the UOPA's sworn Police Officers do. We also recognize that CSOs and Police Officers often respond to different *types* of calls for service or emergencies, and may perform different tasks while doing so. However, crucially, only CSOs and Police Officers regularly respond to calls for service and emergencies, and the two classifications frequently respond to calls together. Further, only CSOs and Police Officers regularly patrol campus by vehicle, by bicycle, and on foot (often doing so together) and provide security and conduct traffic enforcement. CSOs are not expected to respond

to more dangerous calls for service or use force. But CSOs may nonetheless be required to directly assist Police Officers using physical force on someone. Moreover, as noted, "most situations involving UOPD do not escalate or result in use of force," and even Police Officers "rarely find themselves in incidents when use of force is necessary." (Exh. 19 at 2.) CSOs generally respond to non-emergency calls for service, but "may act as first responder to medical emergencies." (Exh. 1 at 5, Exh. 20 at 2.) Additionally, soon, both CSOs and Police Officers will be writing police reports and conducting related investigations (though CSOs' reports will be limited to property-related misdemeanors with no suspects, and this particular responsibility did not exist when the petition was filed). Both CSOs and Police Officers already write incident reports and can issue parking citations.

By comparison, the duties and skills of a CSO have very little in common with that of the Records Specialist, Evidence Technician, Crime Analyst, or Office Specialist. The duties and skills of SEIU's various non-UOPD classifications (which notably were not explored in detail by the parties) are likely to have even less in common with them. The CSOs' work is neither clerical nor administrative in nature. To some extent, CSAs report crimes like CSOs do. However, that particular duty is unlikely to be one of a CSA's regular or core duties. A CSA could also be part of a non-SEIU bargaining unit. The DPSST police academy certification required of a Police Officer is appreciably different than the DPSST private security certification required of a CSO, and the police academy certification requires far more hours of training. Yet no other University employees appear to need *any type* of DPSST certification.

As indicated above, CSOs and Police Officers largely have different employment benefits. However, we are unconvinced that those differences are considerable enough to significantly affect our analysis, given the foregoing and the rest of our analysis below. On balance, these initial factors weigh heavily in favor of the proposed bargaining unit. They also provide a compelling reason for transferring the CSOs into a mixed unit.

Interchange or Transfer of Employees, Promotional Ladders and Opportunities

There is no distinct promotional path for CSOs to become Police Officers. Again, if a CSO wants to become a Police Officer, the CSO must apply and interview for the position just like any other applicant would. We also recognize that a CSO cannot temporarily replace a Police Officer. However, at least three CSOs have already become Police Officers. On top of that, a Police Officer can cover for a CSO, and the UOPD plans to "shift several armed officer positions into unarmed community service officer positions." (Exh. 10 at 1 and 2, Exh. 14 at 2.) Further, the record does not demonstrate that CSOs can readily or naturally promote within SEIU's bargaining unit or cover for any other classifications in that unit, either. These factors ultimately weigh in favor of the proposed unit as well.

Common Supervision

As detailed above, the Eugene-based CSOs report directly to Assistant Director of Security/Support Geeting (who in turn reports directly to Director of Security/Support McNulty), and the Portland-based CSO reports directly to Sergeant Holguin. Meanwhile, all the Police Officers report directly to a Sergeant and then to Operations Captain Morris above that. To that

extent, CSOs and Police Officers have different direct supervisors. However, CSOs also do not share a direct supervisor (or a Division) with SEIU's Records Specialist, Evidence, Technician, or Crime Analyst, or with any of the dozens of SEIU-represented classifications that work for the University's other departments. Further, all the CSOs and the Police Officers ultimately report to the Chief of Police, the head of the agency (though all SEIU-represented UOPD employees do as well). The Portland-based CSO also has weekly meetings with Chief Carmichael, and goes directly to Administration Captain Wade or Chief Carmichael for assistance when necessary. On top of that, the Watch Commander regularly directs and monitors the work of both Police Officers and the Eugene-based CSOs. Finally, we highlight that all the CSOs currently report directly to sworn employees, just as the Police Officers do, and that the Watch Commander is always sworn. We acknowledge that Geeting's Assistant Director role will eventually be filled by a non-sworn employee, but also note that that classification was created after the petition was filed. On balance, this factor also weighs in favor of the proposed bargaining unit.

Common Worksites

The Eugene-based CSOs share a worksite with SEIU's Records Specialist, Evidence Technician, Crime Analyst, and Office Specialist. That shared worksite includes common locker rooms, restrooms, and breakrooms, as well as a common report writing room and secured parking lot. Also, there are no Police Officers assigned to the Portland campus. Nevertheless, the Eugene-based CSOs share the same worksite with all the Police Officers. Beyond that, unlike other UOPD classifications, who appear to work almost exclusively in the main UOPD building, the Eugene-based CSOs and the Police Officers similarly work all over on the Eugene campus, or are assigned to a fixed post at some other area of University. On occasion, CSOs and Police Officer even share the same vehicles. Meanwhile, SEIU's numerous non-UOPD classifications are unlikely to regularly work at the UOPD's building or in its single Portland office. The Portland-based CSO used to exclusively share the single Portland office with Sergeant Holguin, but now works alone. Similarly, only the Evidence Technician has access to the evidence room. On balance, this factor similarly weighs in favor of the proposed bargaining unit.

Wages, Hours

As detailed above, CSOs and Police Officers have quite different budgeted starting salaries ($44,511 and $76,189 a year, respectively) and minimum and maximum hourly rates ($19.51 to $29.71 and $27.98 to $36.63, respectively). However, it also generally appears that a CSO's wages are just as distinct from a number of other SEIU-represented classifications. (Exh. 16 at 127 to 142.) CSOs and Police Officers are both eligible for overtime pay, but it is given under different circumstances (as detailed above). Both classifications receive paid lunch time, but in our view, that fact is relatively insignificant here. As for hours, CSOs and Police Officers work very different schedules and get their schedules in different ways. In short, CSOs' schedules are far more flexible, and CSOs do not bid for their shifts like Police Officers do. Nonetheless, it is unclear whether other SEIU-represented classifications have similarly flexible schedules. When the petition was filed, there were no minimum manning requirements for the CSOs, while at least two Police Officers were always on duty (though that is expected to change in future). Considered together, these factors weigh slightly against the proposed bargaining unit.

Equipment and Uniforms

CSOs and Police Officers must wear black boots, black pants, a black utility/duty belt, an armored vest, and a UOPD polo shirt, and similarly have the option of wearing a UOPD baseball hat. In our view, the fact that the two classifications' shirts and vests are different colors and may have slightly different language on them is not especially noteworthy, given that there is no indication that other SEIU-represented classifications have any comparable uniform requirements. The same is true of the fact that CSOs must wear their vests on the inside of their shirts while the Police Officers wear them on the outside. Otherwise, both CSOs and Police Officers also must carry the same set of keys, a glove pouch, a flashlight, a multitool, and a police radio. Employees in SEIU's bargaining unit do not use comparable equipment. Similarly, just CSOs and Police Officers use vehicles that are specific to their classification, and only the two classifications patrol campus by bicycle. Likewise, a CSO may ride with Police Officer in a patrol car, or drive a Police Officer's car to the mechanic, and Police Officers have used CSOs' trucks during a training. The fact that each classification's vehicles differ slightly in appearance is not particularly significant, when no remotely similar SEIU-represented classifications have their own vehicles (at least as far as this record shows). CSOs and Police Officers also use the same computers and have the same access to electronic databases (though the two classifications have different reasons to use those databases). Certainly, it is significant that CSOs do not carry use of force tools such as a firearm or a taser while Police Officers do. In fact, it is a fundamental distinction between the two classifications. However, that distinction is ultimately outweighed by all the other similarities detailed above. Therefore, these factors weigh in favor of the proposed unit.

Certifications and Training

In order to become either a CSO or a Police Officer, an applicant needs to pass a background check and comparable medical and psychological examinations. Further, going forward, both CSOs and Police Officers will need a specific DPSST certification and a valid driver's license. At the same time, Police Officers must have far more training than CSOs do. Indeed, DPSST's police academy requires hundreds more hours of than DPSST's private security certification does. Along with that, most of that training is tailored to Police Officers' unique responsibilities. However, even without considering the new private security certification requirement (which was implemented after the petition was filed), CSOs already receive a meaningful amount of training, and take some of the same training as the Police Officers. Among other things, that includes the PoliceOne Academy training bulletins. In addition, CSOs and Police Officers often train together, and are occasionally trained on similar subjects (including the use of pepper spray, for example). Notably, CSO Galick also trains Police Officers. Like CSOs and Police Officers, the Evidence Technician and the Office Technician take CPR training, but other than that, there is little overlap in the record on the subject of training that supports keeping the CSOs in their current unit. Accordingly, these factors weigh in favor of the proposed bargaining unit.

Discipline

Police Officers, like all SEIU-represented employees, can only be disciplined for just cause. However, that fact is not especially compelling under the circumstances. Further, a state law regulates how Police Officers can be interviewed, and no comparable law exists for the other

classifications at issue. Moreover, currently, Police Officers are always assigned an attorney whenever they are involved in an administrative, criminal, or civil investigation or legal dispute. SEIU-represented employees do not receive a similar benefit. As a result, this factor weighs against the proposed bargaining unit.

Hiring Requirements

As outlined above, CSO applicant and Police Officer candidates are both interviewed by interview panels. CSOs and Police Officers also go through a similar background check, take similar medical and psychological examinations, and must have a valid Oregon driver's license. We do recognize that the interview panels for either classification consist of different kinds of interviewers, that each panel asks different kinds of questions, and that the doctors administering the medical and psychological examinations hold each type of applicant to a different standard. However, given that the record contains little if any evidence regarding how other SEIU-represented employees are interviewed and examined, or what their job requirements are, such distinctions are of limited value here. CSOs and Police Officers also have very different probationary periods. Nevertheless, in light of the rest of the evidence presented for this issue, that particular fact is not dispositive. On balance, this factor weighs in favor of the proposed bargaining unit.

History and Stability of of Collective Bargaining, Pattern of Organization in the Workforce

Both bargaining units at issue here have existed for a significant amount of time, and there is no evidence of significant instability in labor-management relations (beyond the dispute regarding the Campus Dispatchers noted above). At the same time, there no evidence that the CSOs have ever sought representation by any other labor organization. Separately, because the petition seeks to transfer the CSOs from one existing bargaining unit to another, the petition raises no initial concerns regarding unit fragmentation. Put differently, granting this petition would not require the University to participate in additional successor contract negotiations. We also note that SEIU's bargaining unit is not a true "wall-to-wall" unit, given the existence of UOPA's unit and other labor organizations that represent University employees. *See Chemetka Community College Education Association v. Chemetka Community College and Chemetka Community College Classified Employees Association*, Case No. UC-9-99 at 16-17, 18 PECBR 493, 507-08 (2000). In the end, these factors do not meaningfully weigh for or against the proposed bargaining unit.

Desires of Employees

In this case, all the petitioned-for employees signed authorization cards. In addition, all those CSOs testified that they wanted to join UPA's bargaining unit and explained that preference. The CSOs plainly share the original motivation behind the creation of the UOPA unit, which was a preference for representation that is specifically tailored to law enforcement and the risks associated with it. Accordingly, this factor weighs heavily in favor of the proposed unit. Notably, the same details also help to override our concern that the CSOs will be deprived of their statutory right to strike. *See State of Oregon, Oregon State Penitentiary v. American Federation of State, County, and Municipal Employees*, and *State of Oregon, Oregon Women's Correctional Center v.*

*American Federation of State, County, and Municipal Employees,* Case Nos. UC-19/20-87 at 12, 10 PECBR 144, 155 (1987). Relatedly, we note that the latest SEIU CBA, which currently governs the CSOs, states, "Neither the Union nor any bargaining unit employee shall cause, engage in or sanction any strike, slowdown, or walkout or commit any other acts of work stoppage during the term of this Agreement." (Exh. 16 at 9.) However, such language is quite common in CBAs and not especially relevant or significant here.

Percentage of Strike-Prohibited Employees in the Proposed Unit

The UOPD is in the process of greatly increasing the number of CSOs and reducing the number of sworn officers, which includes at least some Police Officers. Those reorganization plans are not insignificant and do not go unrecognized here. We also note that other University departments could create additional CSO position in the future. However, as a matter of due process and procedural fairness, our emphasis must be on the circumstances present at the time of the petition, rather than an unknown or hypothetical future. (There also is no clear evidence of non-UOPD CSOs ever existing.) For similar reasons, we also will not consider any Campus Dispatchers in this portion of our analysis. We recognize that SEIU represents CSOs at other public universities in the state, but our focus here is on SEIU's bargaining unit of University employees in particular.

When the petition was filed, and as of the July 19, 2021 hearing, the UOPD only employed 3 CSOS along with 10 Police Officers. Using those numbers, if the CSO's joined the UOPA bargaining unit, the otherwise strike-permitted CSOs would make up approximately 23% of the proposed mixed unit, leaving 77% of the unit statutorily strike-prohibited (where the unit was previously 100% strike prohibited). That is plainly a significant increase in the percentage of strike-permitted employees. Nevertheless, given the other circumstances of this case, that increase is ultimately not controlling. We also note that one of the three existing CSOs only works one day a week, which arguably reduces the percentage of strike-permitted employees to 22%. *See City of Gresham*, UC-006-12 at 21, 25 PECBR at 323 (involving a 22% increase). In short, on this record, this factor weighs neither for nor against the proposed unit.

Relationship to Law Enforcement Employer's mission

Upon review, we also conclude that the work of the CSOs is sufficiently closely aligned with the mission and image of the UOPD. Indeed, the petitioned-for CSOs are viewed as "the face" of the agency. (Exh. 22 at 2.) After the reorganization, the CSOs will play an even more significant role in the agency. Beyond that, CSOs uniquely, directly, and closely support the UOPD's Police Officers in the field. Furthermore, when the petition was filed, no other University department employed any CSOs. There is also no clear evidence of other University employees who primarily respond to calls for service and patrol and serve a comparable ambassador function. *See City of Beaverton*, UC-13-09 at 17, 23 PECBR at 819. Accordingly, this factor weighs in favor of the proposed bargaining unit.

Conclusion

Taking the entirety of the record and all the relevant factors into account, we conclude that the petition does not inappropriately seek to transfer strike-permitted employees into a strike-prohibited bargaining unit, that the CSOs have a sufficient community of interest with the Police Officers, and that the CSOs are more appropriately included in the UOPA's unit than SEIU's unit.

PROPOSED ORDER

The petition is granted, and the UOPA's bargaining unit is clarified to include the UOPD's CSOs.

SIGNED AND ISSUED on November 29, 2021.

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 that objections are received by the Board; "the date of service" of a recommended order means the date that the Board sends or personally serves the recommended order on the parties.) If one party has filed timely objections, but the other party has not, the party that has not objected may file cross-objections within 7 days of the service of the objections. Upon good cause shown, the Board may extend the time for filing objections and cross-objections. Objections and cross-objections must be simultaneously served on all parties of record in the case and proof of such service must be filed with this Board. Objections and cross-objections may be filed by uploading a PDF of the filing through the agency's Case Management System (preferred), which may be accessed at https://apps.oregon.gov/erb/cms/auth. Objections and cross-objections may also be filed by email by attaching the filing as a PDF and sending it to ERB.Filings@Oregon.gov. Objections and cross-objections may also be mailed, faxed, or hand-delivered to the Board. Objections and cross-objections that fail to comply with these requirements shall be deemed invalid and disregarded by the Board in making a final determination in the case. (*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. FR-001-20

(DUTY OF FAIR REPRESENTATION)

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| WILLIAMS,<br><br>Complainant,<br><br>v.<br><br>AMALGAMATED TRANSIT UNION, DIVISION 757,<br><br>and<br><br>TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON,<br><br>Respondents. | FINDINGS AND ORDER FOR REPRESENTATION COSTS |

On October 15, 2021, this Board issued an order dismissing the complaint filed by Dianna Dee Williams (Complainant) against Respondents Amalgamated Transit Union, Division 757 (ATU) and Tri-County Metropolitan Transportation District of Oregon (TriMet). In doing so, we held that ATU did not violate ORS 243.672(2)(a) and its duty to fairly represent Complainant when it withdrew Grievance #9805. Because Complainant did not prevail against ATU, we also dismissed Complainant's claims against TriMet. The appeal period under ORS 183.482 has run without the filing of an appeal. Consequently, this Board now issues this order for representation costs. OAR 115-035-0055(2)(a).

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

1. ATU is the prevailing party. Only a prevailing party in an unfair labor practice case is entitled to representation costs. ORS 243.676(3)(b); OAR 115-035-0055(1)(a).[1] The prevailing party is "the party in whose favor a Board Order is issued." OAR 115-035-0055(1)(d).

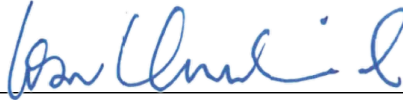
2. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). Here, as an individual, Complainant had to rely on personal financial resources to litigate the matter. In those circumstances, we award $500 to the prevailing party, unless we determine that a lesser award is more appropriate. OAR 115-035-0055(1)(b)(F). As the record does not establish any mitigating factors, we order our standard award of $500.

## ORDER

Complainant shall remit $500 to ATU within 60 days of the date of this Order.

DATED: December 28, 2021.

Adam L. Rhynard, Chair



Lisa M. Umscheid, Member

This Order may be appealed pursuant to ORS 183.482.

[1]Under ORS 243.676(3)(b), we only issue representation costs to a respondent after "find[ing] that the person named in the complaint has not engaged in or is not engaging in an unfair labor practice * * *." Here, we reached such a conclusion only with respect to ATU, and did not make any such finding on the dismissed claims against TriMet. Accordingly, we issue representation costs only to ATU.